The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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Ontario
Law Reform
Commission

The Honourable Charles Harnick
Attorney General for Ontario

Dear Attorney:

I have the honour to submit the Ontario Law Reform Commission's Report on the Law of Charities.

December, 1996

John D. McCamus
Chair
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* Copies of these appendices are not reproduced here, but have been placed on file with the Great Library of the Law Society of Upper Canada at Osgoode Hall in Toronto, and the libraries of the six Ontario university law faculties—the Faculties of Law of the Universities of Ottawa, Toronto, Western Ontario, and Windsor, the Faculty of Law of Queen's University, and Osgoode Hall Law School of York University.
This comprehensive Report on the Law of Charities responds to a reference on this topic to the Commission by the Attorney General. The terms of the reference are set out as Appendix A to this Report.

The publication of this Report brings to completion a lengthy and arduous process. At a relatively early stage in the Commission's work on this reference, the Commission decided that the importance of the subject required a thorough examination of the available evidence concerning the functioning of the charities sector, a careful examination of the history of the public and private law regimes regulating the sector, a survey of research and reform activity in other jurisdictions and the preparation of a comprehensive and detailed set of proposals for modernization of the law in this field.

So ambitious a plan could not have been fashioned or attempted without the involvement of a highly expert and dedicated researcher to act as Project Director. The Commission was most fortunate to attract the talents and energies of Professor David Stevens of the Faculty of Law of McGill University to serve in this capacity. Professor Stevens devoted an extraordinary amount of time and effort to this project. He assisted the Commission in developing its project plan. He carried the major burden of the actual research. He prepared a Director's Report for consideration by the Commission and played a principal role in the making of necessary revisions to incorporate decisions of the Commission and editorial changes necessary for publication of the Commission's final Report. The Commission is extremely grateful to Professor Stevens for his indispensable contribution to this project.

The Commission's research plan required the preparation of a series of background research papers. These were prepared by Professor Bruce Chapman of the Faculty of Law of the University of Toronto, Eugene Meehan, then a member of the Faculty of Law of the University of Ottawa and now a member of the Ontario Bar, and Professor Stevens himself. The Commission profited from the endeavours of these scholars and we wish to express our appreciation to them. We also profited from the advice of the twenty-four members of an advisory panel whose involvement was very helpful, especially in the early stages of this work, in strengthening our resolve to conduct an extensive and thorough examination of this subject. The members of the Project Advisory Group, to whom we are very grateful, are listed in Appendix C-2. We also benefitted from and much appreciate the encouragement and advice of the members of the consultative groups listed in Appendix C-3 and the members of the Special Committee on Charities of the Canadian Bar Association–Ontario listed in Appendix C-4.

Much had been accomplished on this project by the time of the decision by the Government of Ontario, in the late spring of this year, to close down the operations of the Commission. Nonetheless, much work remained to be done if the project was to achieve
completion before the projected date for sunsetting the Commission on December 31st, 1996. This Herculean task simply could not have been accomplished without the extensive involvement of Professor Stevens. Importantly, however, the Commission staff, in what the reader will appreciate was not the easiest of circumstances, devoted themselves conscientiously to the task of completing this project as well as a number of other Commission works in progress. In particular, Commission Counsel, Donald Bur, assumed principal responsibility for Commission input into the preparation of the final version of this report. Another of our Commission Counsel, Barbara Hendrickson, assumed this responsibility with respect to the series of chapters dealing with the treatment of the charities sector by Revenue Canada and the federal income tax legislation. We are also indebted to my Osgoode Hall Law School colleague, Professor Neil Brooks, who reviewed and commented on these chapters.

As well, we wish to express our appreciation to those who provided editorial and secretarial assistance. Editorial and proofreading responsibilities were assumed by Doreen Potter, who has now proved herself invaluable in this respect in a long list of Commission projects, and by Sarah Pearce, a recent graduate of Osgoode Hall Law School of York University. Secretarial assistance was provided very effectively by Tina Afonso, secretary to the Commission Chair, and by Helène Lajeunesse, a member of the secretarial staff of the Faculty of Law of McGill University. Finally, Cora Calixterio discharged with her usual finesse the task of transforming a very lengthy manuscript into publishable form. The Commission is very grateful to all of these individuals.

A lengthy and complex report on as difficult a subject as that addressed in these pages poses, of course, a considerable challenge for the reader. The Report contains literally hundreds of recommendations on topics of some complexity. In order to make the substance of the Report's recommendations more readily accessible, Professor Stevens kindly assisted in the preparation of a Summary of Recommendations. This Summary does not, however, literally repeat word for word the detailed recommendations set out on the various topics covered in the report. Rather, the Summary attempts to synthesize and describe the general thrust of the recommendations made in each chapter of the report.

Accordingly, this Summary of Recommendations, which is set out at the end of the Report beginning at page 625 will serve, we hope, as a form of executive summary of the Report for the reader in haste. Readers who wish to peruse in full detail the various aspects of the proposals fashioned by the Commission may then turn to the relevant chapter where the detailed proposals and the justifications for them are set out at length.

December, 1996

John D. McCamus

Chair
ART I: INTRODUCTION AND BACKGROUND

CHAPTER 1

INTRODUCTION AND BACKGROUND

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CHAPTER 1 INTRODUCTION AND BACKGROUND

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1. INTRODUCTION
This report results from a reference to the Ontario Law Reform Commission in June 1989, by the Attorney General, pursuant to section 2 of the Commission’s constituting statute. The Attorney General asked the Commission to study the law governing charitable organizations and to make recommendations respecting "the appropriate laws to govern charities in modern times". In particular, the terms of reference asked the Commission to examine the status, the legal form, the sources, and the uses of revenue of charitable organizations, as well as the form of government supervision appropriate to the charitable sector as a whole. Among the specific issues identified were the following:

(1) What type of activity should benefit from the advantages accorded to charities?
(2) Should organizations aimed at accomplishing political purposes be considered charitable?
(3) Is it appropriate that charities be created by means of different legal forms, that is, trusts, corporations, and unincorporated associations?
(4) Should the investment powers of charities be subject to restriction, and if so, in what way?
(5) Should charities be entitled to own for-profit organizations or to carry on business directly?
(6) Should charitable fund raising activities be controlled?
(7) Who should be responsible for regulating charities and by what means?

There are many federal and provincial statutes that affect the activities of charitable organizations. The federal government, however, plays the dominant regulatory role in the sector through its administration of sections 110, 118.1, 149 and 149.1 of the Income
These statutory provisions govern the tax-exempt status of nonprofit and charitable organizations, in addition to the tax credits and to tax deductions available to individuals and corporations, respectively, for donations to charitable organizations. The federal government also plays a significant role in the sector through its incorporating power and, to a lesser degree, its spending power.

The provincial government’s involvement in the sector has been grounded in the traditional parens patriae jurisdiction of the Crown over charity and the jurisdiction of courts of equity over charitable purpose trusts and charitable purpose corporations. This traditional provincial focus is now manifested in two statutes of central importance to this study, the Charities Accounting Act and the Charitable Gifts Act.. The law governing charity and charitable organizations in Ontario, however, has many other facets. In addition to the law of charitable purpose trusts and charitable purpose corporations, some of the most important laws are: (1) the law governing unincorporated associations; (2) the general nonprofit corporations law; (3) the law of mortmain and charitable uses; (4) the provincial income, property, and sales tax laws; (5) the laws governing the licensing of gambling events; and (6) the many laws establishing supervisory and discretionary grant powers in numerous government ministries and agencies, especially the Ministry of Community and Social Services and the Ministry of Citizenship, Culture and Recreation.

The Commission’s task—to suggest the design of appropriate contemporary laws to govern modern charities—is made difficult by a unique set of factors. Primary among these is the fact that relatively little attention—academic, political, legislative, or otherwise—has been paid to the charitable sector in recent years. In the estimation of most informed observers, the charity sector constitutes a "third order" of organization in society, on a par, theoretically, with the private or market sector and with the public or government sector. Like these, it is implicated in the allocation of resources, the distribution and redistribution of wealth, and the control of economic and social power. Also, like these it is, in principle, founded on a very distinctive logic of human relations: its culture of altruism stands in contrast to the market sector’s culture of contract and the public sector’s culture of law and the public interest. Despite this position of theoretical pre-eminence, however, the charity sector in Canada has attracted comparatively little academic, political, or legislative interest. As a consequence, there is a noticeable lack of informed public debate on the role of the sector in Canadian society.

This lack of interest is evidenced in Ontario by a relative quiescence on the legislative and administrative fronts in recent decades. Although Ontario’s laws governing charitable organizations are among the most well-developed in Canada, and although the province’s Office of the Public Trustee is one of Canada’s most active public administrations in this domain, these laws are seriously out of date. Many of their provisions are internally incoherent, and the financial and human resources devoted to their administration are meagre given the size of the sector and the ostensible ambition of the legislation. Among other things, this neglect means that there is at present relatively
limited administrative expertise in this domain in Ontario and very limited information about the operations of Ontario’s charitable organizations.

Another sort of difficulty arises from the fact that much of the provincial law governing charitable organizations, deriving as it does from the English law of trusts and the historical parens patriae jurisdiction of the Crown, is at odds with the current organization and modern identity of the sector. The language of the law and the logic of the current (provincial) administrative models are derived from traditional trust law, but the current problems of this sector are of more modern origin. This is not to say that the central preoccupations of this body of law—policing the fiduciary duties of those in charge of charitable organizations and supervising changes in the objects of charitable organizations—do not continue to be important. Rather, it suggests that such matters as the regulation of fundraising, the supervision of tax expenditures, the delivery of government-funded social and cultural services through the instrumentality of charitable and nonprofit organizations, and the relative efficiency of charitable and other types of nonprofit organizations are, all things considered, more pressing in the modern context.

One significant corollary of this point is that the scope of many of the laws considered in our study is, or ought to be, the nonprofit sector in general and not just specifically charitable organizations. An example will illustrate the difficulty. Historically, the English law of trusts has been preoccupied with defining "charity" in order to determine the validity of purpose trusts. This definitional quest, more than anything else, has given charity law its distinctive shape. The current preference for the corporate as opposed to the trust form of organization, however, has made this quest much less important than it once was; corporate status is now granted to all nonprofit organizations almost without distinction and almost as a matter of right. As a consequence, most charitable organizations have as much in common with other nonprofit organizations (that is, corporate form, nonprofit purpose, and reliance on donations for capital) as they do with each other. Thus, if the relevant issue is the regulation of fundraising, or if it is the effective delivery of government-funded social and cultural services through the efforts of a non-governmental agency, then, whether the fundraiser or non-governmental agency is technically a "charity" in the view of the traditional law of charitable purpose trusts is entirely beside the point.

Finally, our task is made difficult by the very strong claims to jurisdiction, in most of the relevant areas of regulation, of both the federal and provincial governments. Almost any conceivable regulation of the nonprofit or charitable sector could be justified as both valid federal and valid provincial legislation: federally, as legislation in relation to income tax; and, provincially, as legislation in relation to charity, the latter pursuant to section 92(7) of the Constitution Act, 1867, which establishes provincial legislative jurisdiction in respect of "the establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions ...". At the same time it is critical to recognize that the sector itself has a very limited capacity, in terms of both economic and human resources, to respond to a sophisticated regulatory regime at even one level of government—let alone two. This is especially clear where the governing regimes diverge in important respects, as they do presently in many cases.
The Commission has attempted to respond to these challenges in several ways. The lack of public debate on the role of the charitable and nonprofit sector in Canadian society encouraged us to devote considerable space to the discussion of theories and explanations of the sector and of the unique problems it presents for regulation. The lack of recent legislative activity and the relative lack of current administrative experience have encouraged us to make recommendations for reform that are slightly more modest than the ideal. We devote considerable space to developing a statistical profile of the sector and a history of state/charity relations in order to escape the narrow focus imposed on the law of charity by the English law of trusts. And when it is relevant to do so, we make recommendations for the reform of the laws governing nonprofit organizations as well as those governing charitable organizations. Finally, we discuss more fully than is our custom the federal laws governing charitable organizations so that our recommendations as a whole might result in integrated and complementary regimes of regulation. Where leaving the jurisdiction is a viable option for a regulated organization, which is the case, for the most part, with private foundations, we generally recommend that the regulation be adopted federally. Conversely, where community or local standards seem paramount—such as in door-to-door and other types of local fundraising—we recommend local regulation.

In this introductory chapter we provide a sketch of the background of the study in section 2, and we briefly introduce the principal motives of the government and the sector for regulation in section 3.

2. BACKGROUND
(a) GENESIS OF THE PROJECT

Throughout the 1970s and 1980s there was evident dissatisfaction with the state of Ontario’s provincial law governing charitable organizations among members of the judiciary and interested members of the province’s legal and accounting professions. This dissatisfaction was expressed on many occasions, but was perhaps loudest when the sector demonstrated its particular vulnerability to fraud. In one such case, In the Matter of the application of the Canadian Foundation for Youth Action for the passing of its accounts, His Honour Judge Cornish remarked:

[T]he Charities Accounting Act, as it now stands, is a cumbersome, confusing statute which is completely ineffective for the curbing of such operations as CFYA.... This Act should either be drastically revised or the provision for control of charitable organizations transferred to some other statute such as the Public Trustee Act.

The Court then made specific recommendations for the improvement of the law
governing charitable organizations, that have been echoed by others knowledgeable in the law of charities. For example, the author of the leading treatise on the law of trusts in Canada, Professor Donovan Waters, has stated:

> [W]hile Ontario has made certain useful advances in this area [that is, the public regulation of charitable organization], there appears to be much force in the contention that the whole subject is in need of revision and modernization.

Moreover, the Commission itself, in two previous reports, also strongly recommended reform in this area of the law.

A series of more recent events, however, has conspired to raise the public profile of the sector and draw attention to the seriousness of the problems affecting it and the deficiencies of the legal regime governing it. We note three such factors or events in particular.

1. In recent years the Office of the Public of Trustee has been exercising its statutory mandate more aggressively than had been its custom previously. The Public Trustee has instigated or has been involved in several high profile court cases involving, in several instances, prominent charitable organizations. Some of these cases concerned straightforward issues of mismanagement and misappropriation, but most involved difficult cutting-edge questions in which the traditional law was in apparent conflict with current practice. This latter litigation dealt with such matters as the propriety of charitable organizations remunerating their directors; the legality of charitable foundations making grants to amateur athletic associations; the propriety of a charitable organization becoming involved in political activities; the legality of public hospitals (or their related foundations) owning interests in large medical arts office complexes; and the legality of a church corporation leasing its land under a ninety-nine-year lease.

   In addition to its involvement in these highly publicized and controversial cases, the Office of the Public Trustee conducted its own extensive internal review of the law of charitable organizations.

   Although this interest in the exercise of the Office of the Public Trustee’s statutory mandate has, on several occasions, attracted the severe and even hostile criticisms of various segments of the sector, it has also served usefully to point up many of the deficiencies in the current law.

2. Among the many cases in which the Office of the Public Trustee has been involved, the Centenary Hospital case was perhaps the most influential in demonstrating the fundamental incoherence of important parts of the law governing charitable organizations. This case dealt with the plans of the Centenary Hospital Association, a public hospital under the Public Hospitals Act, to construct a medical arts building to generate revenues on an ongoing basis to help finance its activities. Although these plans had been approved by the Ministry of Health, the Office of the Public Trustee objected to them on three basic grounds. First, it argued that the construction of a medical arts...
building would violate section 6b of the Charities Accounting Act\textsuperscript{29}. This provision prohibits the ownership of land by a charity if the charity does not actually use the land in the execution of its charitable purpose. Secondly, the Public Trustee argued that proceeding with the medical arts building project would constitute a breach of trust since it would entail risking charitable assets in a business. Thirdly, it argued that the project would violate the Charitable Gifts Act\textsuperscript{30}, which prohibits a charitable organization’s ownership of more than ten percent interest in a profit-making enterprise. If the Court had accepted any one of these arguments, the hospital would have been prohibited from doing something which the Ministry of Health had not only permitted, but had, under its Business Oriented New Development program\textsuperscript{31}, even encouraged.

In the result, Mr. Justice Osler held that public hospitals were not subject to the supervisory jurisdiction of the Office of the Public Trustee, to section 6b of the Charities Accounting Act, nor to the relevant provisions of the Charitable Gifts Act. Thus, each of the Public Trustee’s three arguments failed. Mr. Justice Osler found, instead, that public hospitals were subject to the exclusive jurisdiction of the Ministry of Health under the Public Hospitals Act.

Although this result was perfectly reasonable, it was not apparent to anyone prior to this decision that the position of the Office of the Public Trustee was obviously wrong\textsuperscript{32}. Moreover, much of the force of Mr. Justice Osler’s reasoning derives from the fact that there is, in the case of public hospitals, a separate comprehensive regulatory regime under the Public Hospitals Act. It is unclear, therefore, whether some of the arguments made by the Office of the Public Trustee might not prevail another day, even if it appears that some of the force of the reasons supporting the decision of Mr. Justice Osler derived from the over-restrictiveness and incongruence of the general regime governing charities.

What the case demonstrated to everyone involved was that clarifying the law of charities can be a very expensive and time-consuming process.

(3) The third event leading up to the reference to the Commission was what may be called, for present purposes, the "Patricia Starr affair". We will look at this matter in a little more detail here since there is no easily accessible public record of it\textsuperscript{33} and since it also involved several issues of concern central to this study. These issues include: (i) whether Revenue Canada is effective in detecting violations of the provisions of the Income Tax Act, specifically the provisions prohibiting partisan political activity on the part of registered charities; (ii) whether the current government of Ontario practices for ensuring the proper expenditure of government grants to nonprofit organizations are adequate; and (iii) whether there is adequate provincial or federal supervision and enforcement of the trust obligations of those individuals responsible for running charitable organizations\textsuperscript{34}.

The affair involved three types of legal wrongs and, ultimately, Patricia Starr was convicted of three types of criminal or quasi-criminal violations. She was convicted on eight counts under the Election Finances Act\textsuperscript{35}, all involving excessive donations to certain political campaigns or failures to reveal the identity of the contributor; she was
convicted of a criminal breach of trust relating to her stewardship of funds belonging to the charity for which she worked, the National Council of Jewish Women ("NCJW"); and, she was convicted of criminal fraud relating to a fraudulent grant application to the Ministry of Citizenship, signed by her and made on behalf of the NCJW.

The Patricia Starr affair first surfaced as an incident involving improper contributions by a charity to the political campaigns of several Liberal and Progressive Conservative politicians. The journalists who uncovered the improper contributions may have initially been attracted to the activities of Patricia Starr by her high profile connections to important members of the Ontario Liberal Party, including members of the DelZotto family, principals in the Tridel Corporation, and others. These reporters used records available under the Election Finances Act to uncover the improper campaign contributions. These, it was later discovered, had all been made from a "capital" fund belonging to the NCJW, but controlled by Patricia Starr. Subsequently, a number of private and public investigations were conducted which uncovered the following facts concerning the sources of the fund from which the illegal contributions had been made:

– $251,000 of the fund came from a sales tax rebate issued by the Ontario Ministry of Revenue. The rebate was in respect of sales taxes paid during the course of the construction of a nonprofit housing project that the NCJW had constructed in partnership with the Tridel Corporation. According to the Ministry, the rebate money was supposed to have been used to reduce the rents of tenants in the project.
– $33,000 was alleged to have come from the Ministry of Community and Social Services as part of a $380,000 grant intended for disabled persons under the ministry’s Attendant Care Program.
– At least $30,000 of the fund came from the Tridel Corporation in the form of what Patricia Starr maintained were "consulting fees" on account of the charity’s work in the construction of the nonprofit housing project.

Other alleged improprieties were also uncovered:

– The NCJW had received over $350,000 from the Ministry of Citizenship for renovations to a NCJW building under a matching grant program. As it turned out, the cost estimate given to the Ministry by the NCJW was double the true value.
– $113,000 of a grant obtained from the Ministry of Community and Social Services was spent without authorization on a bus for disabled residents of the housing project.
– The NCJW failed to report the $215,000 sales tax rebate to the Canada Mortgage and Housing Corporation, which provided some of the financing for the NCJW’s housing project.
– The Public Trustee found that "a total of 126 separate, prohibited payments were made to various beneficiaries, amounting to $160,053.84. These funds were paid out over a four-year period commencing in 1985 and went to political candidates at all levels of
government. While payments went to candidates from all three major parties the overwhelming majority of recipients were Liberal.

What is perhaps most disturbing about the Patricia Starr affair is, first, that her wrongdoings were, it appears, initially discovered by the press and, secondly, that the first clues of her wrongdoing were found in the reports required under the Election Finances Act. This trail eventually led to the discovery of the more serious matters involving the criminal charges. Thus, none of the various administrative controls on the activities of the NCJW, it seems, had revealed any of the improprieties. One major reason for this failure, of course, was Ms. Starr’s own fraud. For example, the spaces provided for the disclosure of financial information relating to political activities on the NCJW’s T3010 returns were left blank.

Incidents like the Patricia Starr affair occur with a frequency sufficient to undermine the public’s confidence in the sector. The public reasons that if one charity can do what Patricia Starr’s did and escape detection, how many others can do the same? As the law and administrative practice now stand, we have no way of providing a definitive answer. Even if this ignorance does not argue conclusively for a more rigorous administration within this sector, it at least raises a serious question.

(b) HISTORY AND METHODOLOGY OF THE PROJECT

Work on the project commenced in January 1990. A research team was appointed, and a Project Advisory Committee of twenty-four people was formed. Notices which announced the project and solicited submissions on the issues of interest to the project were placed in several Ontario newspapers and in the Ontario Gazette in early 1990. The Commission also directly solicited submissions from over 800 charitable organizations in all parts of Ontario in March 1990; over one hundred submissions resulted from these efforts. In June 1990 the project director held day-long consultations with representatives of over twenty foundations and representatives of over one hundred charitable organizations. Later, in September 1990, members of the Project Advisory Committee were consulted. The Commission also held meetings with the members of nine consultative groups from various representative charitable sectors in Ontario in February 1991. Finally, in February 1993 the Commission met with members of the Canadian Bar Association–Ontario, Special Committee on Charities. The final draft of the full report was submitted to the Commission in January 1995.

3. WHY REGULATE CHARITY?
(a) GOVERNMENT’S PERSPECTIVE

There are five main reasons why governments have regulated charitable activity and charitable organizations. These reasons, which are specific to charity, are reviewed in this introductory chapter to orient the discussion that follows.
The first and, from the point of view of provincial governments, historically most important reason arises out of the regard society has for the charitable intentions of donors. This regard is reflected in the law in two basic ways. First, the law facilitates charitable activity by providing appropriate legal forms, such as the charitable purpose trust, the nonprofit corporation, and the unincorporated association. Second, the law acts to protect charity from its particular vulnerability to fraud and waste.

These objectives (to facilitate and protect charitable activity) and their underlying motive (the high value placed by society on those activities) can be seen in a wide variety of current policies and concerns. They are most evident in the law of charitable trusts where the existence and precise content of the donor’s charitable intention are the focus of most of the important doctrines. They also lie behind recent calls for closer government supervision of professional fundraisers: many people fear that professional fundraisers employed by charitable organizations skim or waste money intended for charity; others are concerned that donors are deceived if the involvement of professionals in a fundraising campaign is not made explicit at the time of solicitation. These objectives also provide some support for the restrictive approach governments have traditionally taken towards charitable investments: by restricting the investment opportunities of capital devoted to a charitable purpose, governments have sought to preserve that capital from undue risk and ensure that charitable trustees do not become unduly preoccupied with the instrumental goals of capital growth and income generation, but focus instead on financing charitable activity over the long term. Finally, on the basis of this rationale, the law, and especially the law of trusts, imposes substantial burdens on administrators of assets devoted to charitable purposes, and exacts from them a very high standard of care and duty of integrity. In all these instances, the principal reason for the state’s intervention is the concern society has for the charitable intentions of donors.

A second reason governments regulate charitable activity is to ensure the legitimacy and authenticity of the recipients of several extraordinary state-conferred privileges. For example, charitable organizations are permitted to issue receipts for donations which entitle donors to deduct from their income tax a certain percentage of the donation. This tax credit is of significant benefit to charitable organizations at a substantial cost to governments. So too is the tax-exempt status of charitable organizations and their favourable treatment under sales tax and property tax laws. Consequently, there arises the need to ensure that the organizations which receive the favourable treatment are what they purport to be.

These two objectives are commonly, but not necessarily, associated with two quite different theoretical perspectives on the charity sector and on the role government should play in it. A common interpretation of the first objective—that it is the charitable intentions of donors that are significant—maintains that “charity” is a real concept. As a consequence, people who approach issues relating to the role of the state in the charity sector with the first sort of objective in mind usually look to the true meaning of “charity” for guidance on when and how charities should be regulated. A common interpretation of the second objective, by contrast, regards the concessional tax treatment as a kind of
government expenditure—a "tax expenditure"—and, therefore, tends to regard charity and charitable organizations as, in some way, instrumental to other more central objectives of the state.

Often, the policy recommendations of these two perspectives converge, but frequently, as will be seen, they diverge\(^5\). Our recommendations will be drawn from the arguments developed from both perspectives.

There are two further regulatory concerns of the state—\(\text{one that has motivated the regulation of charity in the past and one that is increasingly important today. First, at certain times in Anglo-Canadian legal history, the dominant regulatory concern has been the fear that charitable organizations would grow to the point where they would begin to usurp the functions of the state or the commercial economy or, relatedly, the fear that charitable organizations would be used to shelter economic activity from the taxing and regulatory powers of the state}^{58}\). Historically, this concern applied almost wholly to religious institutions. It manifested itself in regulations restricting the power of landowners to devise their land to charitable purposes, in requirements that charitable trusts (and corporations, generally) obtain licences from the state in order to hold land, and in legislation limiting the power of such organizations to own land at all. There is some existing law that was initially motivated by concerns of this sort. For example, subject to certain exceptions and prescribed modalities, the Charities Accounting Act\(^59\) in Ontario still prohibits charitable organizations from owning land that is not used for their charitable purposes.

This traditional concern is important to keep in mind for two reasons. First, in some instances, it is still valid. In the mid-1970s, for instance, federal authorities became concerned that family foundations were being used, inappropriately, as a way of avoiding the capital gains tax that would otherwise arise on an intergenerational transfer of wealth. Controlling shareholders, it was claimed, were donating their controlling interests in the family business to foundations controlled by other members of the family. The capital gains tax was thus avoided, but family control of the business was nonetheless maintained\(^60\). Similarly, the Ontario government enacted the Charitable Gifts Act\(^61\) in 1950, in part, to foreclose the use of family foundations to avoid succession duties.

The second reason to keep the traditional concern in mind is that we should be alert to its presence in the current law and be prepared to ask whether, in fact, its current applications are still valid. We suspect that to the extent society continues to be concerned that charitable organizations not become "too large", society’s real concern is that the charitable organizations which are too large are, in fact, no longer truly charitable. When the issue is reformulated in this new way, this third objective sounds very much like the second objective, since the true problem will be whether the relevant
organization should continue to be entitled to the privileges that the state confers on charitable organizations.

The newer concern arises out of the increasing need of governments to deliver some goods and services through the instrumentality of non-government agencies. Modern governments are, thus, substantial donors. As such, they need responsible and effective charitable organizations that deliver on their promises and a charitable sector of sufficient variety and vibrancy to satisfy their diverse needs. In this respect, governments are similar to large public and private foundations. However, as well as voluntarily accepted accountability reporting, governments also have the legislative power to impose general performance standards on charitable organizations. Charitable organizations are reluctant to accept this increased regulation, in part, because they perceive an already high degree of accountability to government through government grant-reporting mechanisms. Conversely, some of the impetus for greater centralized accountability is coming from the government agencies that use the sector to deliver government-financed services.

All four of these government concerns share two common regulatory objectives. Given the decisions to facilitate charity through the provision of the required legal forms, to treat charities favourably under the tax system, and to effect government purposes through the instrumentality of nonprofit organizations, then the ultimate objectives of most government regulation are to ensure both a certain loyalty to purpose on the part of charitable fiduciaries, and a certain level of effectiveness on the part of charitable organizations and their administrators. Much of this report, therefore, discusses the formulation of and the modes for enforcing the relevant standards of loyalty and diligence and competence in this area, while another considerable portion is devoted to the issue of the appropriate design of provincial public administration of the charitable sector.

It would be a mistake, however, for government to lose sight of the core values which have motivated much of its activity in this domain historically by adopting a posture which is exclusively interest driven or exclusively instrumentalist. We stated at the beginning of this section that one of the chief influences on government involvement in the sector has been the high value society has placed on charitable activity. This value lies not only, or even chiefly, in the fact that the beneficiaries of charity benefit from it, but also in the facts that, first, the donors and volunteers benefit from giving their support and, second, society profits because the virtues of good citizenship are valued and practised widely. The valorization and promotion of good citizenship, hence, constitutes a fifth objective of government involvement in the sector. It suggests a role for government that is complementary and cooperative; it also suggests a regulatory approach that relies less on command and sanction and more on mutual respect and persuasion.

(b) CHARITABLE SECTOR’S PERSPECTIVE

Charitable organizations themselves might like the state to regulate their activities for several groups of reasons. The most important of these relates to their shared interest in
the integrity of the sector as a whole. Effective government regulation might inhibit fraudulent and dishonest actors from infiltrating the sector and staining the name of charity to the detriment of all. Government regulation of standards might also promote professionalism and efficiency in the sector, thereby enhancing its reputation in the eyes of the public. Private agencies, such as better business bureaus or charity watch groups, might contribute to the achievement of these goals. These private agencies, however, could not be as effective or forceful as the government in excluding fraudulent actors, nor possibly, would they have the resources to be as accurate or as comprehensive in their assessments of performance. Further, this sort of regulation may specifically require a taxing power to finance it, since it is difficult to see how the information gathering and dissemination required could be made profitable. Finally, the endorsement and legitimacy that government "certification" gives to any particular charity may be of considerable advantage to the charity when it comes time to raise money through public donations, big or small.

Another group of reasons has to do with the benefits to the sector as a whole from having better information about itself. Armed with better general information, the sector would be in a better position to police itself and to advance its interests politically in the same way that Chambers of Commerce or the Business Council on National Issues do for the business sector.

Finally, there are, perhaps less legitimate concerns that there may be too many actors in the sector and, thus, too much competition for scarce charitable dollars. Older, more traditional charities might advocate strict rules on admission to the status and privileges of charity in order to reduce the competition, from newer charities, for scarce donor funds. Local charities might seek to exclude outsiders for similar reasons. Thus, it is quite common in the various provincial regulatory schemes dealing with the licensing of gaming events to require that the proceeds of the event be spent in the province where the event takes place. Historically, international charities have encountered significant problems in the English law of charitable trusts.

All of these various objectives of the charity sector argue conclusively in favour of some form of regulation. The most substantial problem from the point of view of the sector itself is balancing the achievement of these objectives with the fact that the sector has a very limited capacity to respond to complex regimes of regulation. Thus, this report is based on the premise that the question is not whether to regulate charities, but how.

Endnotes:

2. Unless the context suggests otherwise, "charity" is used in this report in its traditional common law sense. The definition formulated by Lord Macnaghten in Commissioners for Special Purposes of the Income Tax Act v. Pemsel, [1891] A.C. 531 at 583, [1891-1894] All E.R. Rep. 28 at 55 (H.L.), is its most concise expression: ‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to
the community, not falling under any of the preceding heads. The term "nonprofit" will be used to identify the larger set of organizations whose purposes are other than the pursuit of profit. A more extensive effort at definition and classification is presented infra, chs. 6, 7, and 8.

3. These are fully set out infra, Appendix A.


5. See Canada Corporations Act, R.S.C. 1970, c. C-32. There are over 3,000 federally incorporated nonprofit corporations. Many of these have been incorporated by special Acts. See, for example, An Act to incorporate the Governing Council of the Salvation Army in Canada, 1909, 8–9 Edw. 7, c. 132 (Can.), as am. by S.C. 1916, c. 63 and c. 64; S.C. 1957, c. 55; and S.C. 1962, c. 40. Other federal statutes of interest are listed infra, Appendix B-1 (public statutes) and Appendix B-2 (recent private Acts).


9. The most notable being the Charitable Institutions Act, R.S.O. 1990, c. C. 9. Provincial laws affecting charity and charitable organizations are listed infra, Appendix B-3 (public statutes) and Appendix B-4 (private Acts).

10. This is changing, however. The main current works on the law of charity are: D.J. Bourgeois, The Law of Charitable and Nonprofit Organizations, 2d ed. (Markham, Ont.: Butterworths, 1995); R.I. Burke-Robertson, Non-share Capital Corporations (Scarborough, Ont.: Carswell, 1992); Canadian Centre for Philanthropy, Law, Tax and Councils of the Salvation Army in Canada, 1909–1991, c. 132 (Can.), as am. by S.C. 1916, c. 63 and c. 64; S.C. 1957, c. 55; and S.C. 1962, c. 40. Other federal statutes of interest are listed infra, Appendix B-1 (public statutes) and Appendix B-2 (recent private Acts).


12. There are over 40,000 charitable organizations in Ontario receiving over $1 billion dollars in donations each year. The inherent opportunities for abuse and fraud are manifold.


15. Concern over the inadequacy of the provincial regimes has been one of the principal motivating factors in recent years in the establishment of a number of associations founded to promote the cause of charity in Canada. See M.C. Cullity, Case Comment (1977), 2 Philanthrop. (No. 1) 41. Particular examples include the Canadian Centre for Philanthropy, and the Wills and Trusts Section of the Canadian Bar Association. See, further, infra, ch. 3.

Supervising Charities" (1972), 1 Philanthrop. (No. 2) 22.


The Commission is of the opinion that a review of the administration, regulation and monitoring of charities by an appropriate body would be timely and in the public interest....A consolidation of The Charitable Gifts Act, The Charities Accounting Act, and any retained sections related to charitable uses of The Mortmain and Charitable Uses Act is desirable.


18. The Office of the Public Trustee has recently been reconstituted (as a corporation sole) under the name "Public Guardian and Trustee". See Public Guardian and Trustee Act, R.S.O. 1990, c. P. 51, as am. by S.O. 1992, c. 32, s. 25. For the sake of convenience we refer to the office under its former name throughout this report.

19. See, for example, Canadian Foundation for Youth Action, supra, note 14, and In the matter of Etobicoke Olympic Facilities Fund, unreported (April 27, 1977, Ont. Surr. Ct.). See D.L. Campbell, Case Comment: "Remuneration of Directors" (1990), 9 Philanthrop. (No. 1) 36.


22. Re Centenary Hospital Association and Public Trustee (1989), 69 O.R. (2d) 1 and 447, 59 D.L.R. (4th) 449 (H.C.J.). See D. Waters, Case Comment: "Re Centenary Hospital Association" (1990), 9 Philanthrop. (No. 1) 3 (hereinafter referred to as "Waters, Case Comment").


24. Ontario, Office of the Public Trustee, Charities Division, McComiskey Report (1986) (Chair: J. McComiskey, Q.C.) [unpublished]. The Committee’s mandate was as follows (at 33-36):

I. To review existing common law and statute enactments governing charities, and, if found necessary, to recommend legislative enactments on any or all issues and all aspects of the law and practice related to charitable organizations operated in Ontario, including:

1. The definition of charity;
2. The method of formation of a charity by incorporation or otherwise, and the jurisdiction to supervise this initial procedure;
3. The control or review of the actions of charities, by whom such reviews should be performed, and through which forum;
4. The rights of charitable organizations to carry on business to earn funds to support their charitable objects;
5. The penalties to be imposed by fine, imprisonment, cancellation of charters or cancellation of the right to operate in Ontario following a failure to comply with legislative enactments;
6. The obligations and responsibilities of officers and directors of charitable organizations and the rights of members;
7. The rights of charitable organizations with respect to the holding, financing, leasing or conveying property, real or personal;
8. Surrender and revival of charitable corporations;
9. The question of disclaimer by charitable organizations;
10. The modification and termination of charitable trusts including corporations, the Variation of Trusts Act, the Accumulations Act, the Perpetuities Act and the Rule in Saunders v. Vautier;
11. The application of the doctrine of extra-territoriality;
12. Funding by government grant as compared with contributions or gifts from the public.

II. To submit a report on the committee’s findings and recommendations.

III. To review draft legislation and to implement recommendations made by the Committee.

25. See, for example, Canadian Bar Association, Taxation, Wills and Trusts Section, submission to the
Ministry of the Attorney General (Ontario) (July 23, 1990) [unpublished], at 1:
[T]he Canadian Bar Association¾Ontario earnestly submits to the Attorney-General that recent administrative actions of the office of the Public Trustee have created uncertainty and confusion among public charities in Ontario. It is the purpose of this Submission that you take urgent action to clarify the situation for all concerned.

The complaints against the activities of the Office of the Public Trustee continue. In criticizing the Public Trustee’s declared intention to seek a judicial winding-up of a charitable organization which had made donations to another charity of a portion of its surplus funds, purportedly contrary to its objects’ clause in its letter patent, Canadian Taxpayer (January 29, 1991) 24 stated:

We don’t know what is in the mind of the Public Trustee and have no idea what will be developing. But the proposition that the trustee appears to embrace seems both a danger to existing charities and wrong-headed in a policy sense. But then, many of the positions taken by the Public Trustee in the past few years have struck us the same way.

In an earlier edition of the Canadian Taxpayer (July 17, 1990), at 100, it was opined:

The point we wish to make is that there appears to be no end to the chutzpah of Ontario. If you even contemplate operating…in Ontario…you’d best be aware that big brother is watching you.

27. Re Centenary Hospital Association and Public Trustee, supra, note 23. See, also, Waters, Case Comment, supra, note 23.


29. R.S.O. 1980, c. 65, s. 6b, as en. by S.O. 1982, c. 11, s. 1. See, now, Charities Accounting Act, supra, note 7, s. 8.


32. Indeed, on the question of the Public Trustee’s authority over the hospital, few thought the claim to jurisdiction was even questionable.


34. The Patricia Starr affair also provoked federal concern and interest in reform of the law and its administration. The Revenue Minister of the time, Otto Jelinek was reported in the media (Financial Post, November 21, 1990, at 3, [Toronto] Globe and Mail, November 21, 1990, at A4) as having said:

A few bad examples which had received a great deal of attention cast a bad light on the entire sector. I’m proposing to allow for even greater openness …. The Patti Star Affair confirmed to me that we had to make changes sooner, rather than later.

At the same time, perhaps coincidentally, Revenue Canada expressed an interest in reviewing the law and administration of nonprofit organizations; see, Canadian Taxpayer (October 16, 1990) 159. As a consequence of that review, s. 149(12) as am. by 1994, c. 7, Sch. VIII (1993, c. 24), s. 88(4), was added to the Act in 1993 and was made applicable for 1993 and later. It requires, for the first time, that nonprofit organizations with investment income of over $10,000 or assets equal to $200,000 or more, complete an annual information return. Previously, nonprofits organized as corporations were required to file only a corporate tax return. Now see Form T1044.


36. [Toronto] Globe and Mail, June 29, 1991, at A5. It is worth noting that at her sentencing Mr. Justice Ted Wren of the Ontario Court of Justice, General Division, noted that Starr’s contribution to the well-being of society was remarkable. He said: "She has dedicated herself with an uncommon zeal toward the betterment of life in the community": ibid. It is also worth noting that it does not appear from the public record that Starr gained personally from any of her dealings.

37. Ibid.

38. A number of [Toronto] Globe and Mail articles suggested that the connections between Starr, the Tridel Corporation, the DelZotto family, and the government were too obvious. As Michael Valpy put it in the [Toronto] Globe and Mail, June 24, 1989, at A8: "[Starr] told anyone who would listen of her close friendship with the DelZotto family. Her constant escort to political gatherings was Mario Giampretti, Tridel’s vice-president of corporate development."
Linda McQuaig of the [Toronto] Globe and Mail, June 24, 1989, at A2 wrote: "[A Liberal source] said that he and several other Liberals who saw [Starr] at the Tridel offices warned her that she was very foolish to be running a political fund-raiser for the housing minister out of the office of one of the province’s largest developers."

39. Separate investigations were completed by the police, by the Office of the Public Trustee, by the law firm Goodman and Goodman (at the behest of the NCJW), by several provincial government ministries, including the Ministry of Community and Social Services, the Ministry of Citizenship, the Ministry of Culture and Communications, and the Ministry of Revenue, by several government agencies, including the Canada Mortgage and Housing Corporation, and by Revenue Canada.


48. We do not know to what extent the defrauded Ontario government ministries were aware of her activities prior to the revelations in the press.

49. Supra, note 35.

50. Similar or more serious incidents have occurred recently in other jurisdictions. The former president of the United Way of America was sentenced for defrauding the organization of $1.2 million in 1995. For a fuller account, see R.E. Herzlinger, "Can Public Trust in Nonprofits and Governments Be Restored?" (1996), 74 Harv. Bus. Rev. (No. 2) 97. In England, C. Baxter, "Trustees’ Personal Liability and the Role of Liability Insurance", [1996] Conv. 12 cites the example of Rosemary Aberdour who "was allowed to relieve the National Hospital for Neurology and Neurosurgery of 2.4 million pounds". See, also, [1992] Ch. Comm. Rep. 24. Unlike the Starr case, supra, note 33, these foreign examples appear to have involved an element of personal benefit.

51. See, infra, Appendices C-1 and C-2.

52. See, infra, Appendices D-2, D-3, and D-4.

53. See, infra, Appendices C-3 and C-4.

54. Similarly, it has been suggested that businesses which advertise that a portion of their sales revenues goes to charity improperly exploit the charitable intentions of their customers.

55. Some regard this tax credit as a state subsidy, others as merely a more equitable way of defining the tax base. This issue is taken up more fully, infra, ch. 9.

56. A detailed statistical profile is provided infra, ch. 5. For a recent review of the federal government’s performance in supervising chairities, see J. Bryden, M.P. for Hamilton-Wentworth, M.P.’s Report: Canada’s Charities: A Need for Reform (October 1996).

57. We introduce this division in the theories at this juncture, but develop their respective policy implications in greater depth in chs. 6 and 9, infra.

58. Mortmain legislation was motivated by other considerations as well, including the desire to protect the dying from undue exploitation by the church; skepticism as to the value of religion generally; a desire to protect subsequent generations from being disinherited; and a desire to enhance the alienability of land. For a further discussion, see, infra, ch. 18.

59. Supra, note 7.

60. See, further, L. McQuaig, Behind Closed Doors (Markham, Ont.: Penguin Books, 1987) ch. 2, for a fuller account.

61. Supra, note 8.


63. A similar sentiment was expressed in the U.K. Report of the Committee on the Law and Practice
Relating to Charitable Trusts (Cmd. 8710, 1952) (hereinafter referred to as the "Nathan Report"), at 12, para. 53:
The democratic state as we know it could hardly function effectively or teach the exercise of democracy to its members without such channels for and demands on voluntary service. Not only does voluntary service act as a nursery school of democracy but also as the field in which good neighbourliness may be exercised. ... Some of the most valuable activities of voluntary societies consist, however, in the fact that they are able to stand aside from and criticize state action, or inaction, in the interests of the inarticulate man in the street. On the virtue of good citizenship, see A. Etzioni, The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda (New York: Crown Publishers, 1993). In general, see R.D. Putnam, Making Democracy Work: Civic Traditions in Modern Italy (Princeton, N.J.: Princeton University Press, 1993), and J.F. Helliwell and R. Putnam, "Social Capital and Economic Growth in Italy" (1995), 21 Eastern Economic J. (No. 3).


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CHAPTER 2

PREVIOUS STUDIES

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1. INTRODUCTION
In section 2 of this chapter we survey the recent studies conducted by various governments in Canada on the laws affecting charity and charitable organizations. The objective of section 2 is to assess the level and quality of recent government interest in the sector in order to gauge the timeliness and appropriateness of any possible reform. Our conclusion is that recent government interest—at least at the provincial level—in the viability, effectiveness, and honesty of the sector has been weak. We therefore think that any reform of the laws governing charitable organizations that might result from this study should proceed with caution and only after substantial further consultation with the sector.

Section 3 is a survey of the main public studies of the charity sector that have been carried out in the United Kingdom, the United States, and Australia in recent years. The objective of section 3 is to provide a basis for understanding the relevance of the legislative and administrative experience of these jurisdictions in this area of the law to the current situation in Ontario. Our preliminary conclusion, based on the limited evidence presented in section 3, is that the government of Ontario should be wary of adopting legislative and administrative models developed in these jurisdictions, because the social, historical, and legal contexts in which these models were developed are markedly different from the social, historical, and legal context in which the law of charity has developed in Ontario. Specifically, for these reasons, we do not think that the law, practice, and institutions of the United Kingdom are of any determinative relevance to the current situation in Ontario.

2. GOVERNMENT STUDIES (CANADA)
(a) INTRODUCTION
There has never been a comprehensive study of the law of charity in Canada, nor have Canadian governments displayed much official curiosity regarding their role in the charity sector. Canadian governments have looked at discrete questions of interest to the sector, sometimes as the need has arisen, more frequently long after. But even in the various discrete domains that have been examined, there has rarely been a great deal of thought devoted to the appropriate design of the law, and there has been little resultant legislative activity.

Before going on to the main task of this section, which is to describe the government studies that have been completed to date, it is important to speculate why this neglect has occurred and to ask whether, on balance, it has been benign.
On the positive side, there have been at least three factors:

- Perhaps of first importance has been the recognition on the part of Canadian governments that the raison d’être of the charity sector is to be "apart" from government, and therefore that too much government influence in the sector would be simply counter-productive.
- The lack of government interest reflects, as well, the tendency of contemporary Canadian society to place much less emphasis on the role of charity in the provision of social welfare assistance, education, and health care than, to pick two obvious and relevant examples, American society and Canadian society in earlier times. This has meant that Canadian governments have not had to rely on the sector to deliver basic social services to the extent that governments in more "interventionist" jurisdictions have; therefore there has been less reason, from a public policy point of view, for Canadian governments to be interested in the integrity and effectiveness of the sector. Interestingly, Canadian governments, in a sense, have thus been among the most interven-tionist, since they have merely taken over proportionately more of the sector’s traditional work in establishing the Canadian version of the welfare state.
- Last, on the positive side, the lack of government interest reflects the recognition of Canadian governments that even the facilitative role of the state is of relatively modest value in a sector whose actors are motivated principally by altruism. This factor, in particular, helps explain the fact that government interest has been incidental and fragmentary: charity has been a subject of interest only when the tax privileges available to charities have been thought subject to abuse or when charities have been the object of exploitation by non-altruistic elements in society, such as in the case of commercial bingo operations, other gambling operations, and professional fundraisers.

There are, as well, two negative factors that have contributed to the neglect. First, the sector has always had a relatively weak share of voice in the halls of government, due largely to its lack of organization and to the dominance that economic and social issues have had on legislative agendas. Second, Canadians in general do not seem to regard the health of the sector as a matter of pressing public interest. This may be due to a pervasive feeling that the sector is basically honest, but recent trends in donating and volunteering behaviour also suggest a general decline in interest in charity on the part of vast numbers of Canadians.

Assessing whether this neglect has been benign or not, is, in the light of these factors, not an easy task. Certainly the lack of activity to date is cause for caution against moving too quickly or going too far in the present reform. With these points in mind, we turn to a description of the government level studies that have preceded the present one.
(b) ONTARIO GOVERNMENT STUDIES
(i) Ontario Ministry of Consumer and Commercial Relations, Entertainment Standards Branch

The Ministry of Consumer and Commercial Relations, Entertainment Standards Branch, issued a press release and consultation paper in February 1990, to commence a process of public review of the legislation, regulation, and administrative practice governing commercial bingo halls and other forms of charitable gaming in Ontario. This effort was undertaken in response to "the unprecedented growth of charitable gaming" and "the strain" which that growth had caused to "the regulatory frame-work". It followed the imposition, in August 1989, of a temporary moratorium on the licensing of charitable gaming events in new commercial bingo facilities. The consultation and review led to the introduction of Bill 237, An Act to provide for the Regulation of Gaming Services, on June 27, 1990. The Bill died on the order paper when the provincial Legislature was dissolved in the summer of 1990. A statute regulating gaming services was finally enacted in 1992. This statute, called the Gaming Service Act, 1992, was amended in 1993 and in its present form is entitled the Gaming Control Act, 1992.

As the title of the consultation paper suggested—Charitable gaming: putting the charities back in the driver's seat/Jeux de bienfaisance: redonner le contrôle aux organismes—the government’s main concern was the adequacy of the level of returns to charitable organizations from licensed gaming events. Charitable gaming in Ontario had grown from a $80 million business in 1975 to a $600 million business in 1990. The discussion paper suggested that this unprecedented growth had entailed greater and greater sophistication on the part of the operators of commercial bingo halls with more and more exploitation of charitable organizations as a consequence. The government’s objective in enacting legislation was to ensure that the primary purpose of charitable gaming—fundraising for charity—was not unduly subordinated to the interests of commercial operators. We will present our own views on this issue in chapter 18.

(ii) Ontario, Ministry of Community and Social Services, Provincial-Municipal Social Services Review

The Ministry of Community and Social Service appointed the Provincial-Municipal Social Services Review (PMSSR) Committee in May 1987. The Committee was comprised of four members from the Ministry of Community and Social Services, four members representing the Association of Municipalities of Ontario, and three from the Ontario Municipal Social Services Association.

The Committee was established to review the existing relationships between the province and the municipalities with respect to "the delivery and funding of social services" and to propose "options for a more rational framework of responsibilities for service delivery and cost sharing". The Ministry published the Committee’s report in February 1990. The report dealt extensively with the allocation of responsibility for policy development, service management, service delivery, and funding of social services in the province. Although its main preoccupation was the provision of social welfare
assistance in Ontario by governments, it did make reference to and recommendations with respect to the "voluntary sector". In particular, it recommended that "the role of the voluntary sector be preserved and encouraged"\(^8\), that the responsibility for the delivery for social welfare assistance continue to be shared between "municipal and non-government service providers"\(^9\), and that the development of social service plans at the community level include participation from the voluntary sector. Overall, the Committee conceived of the role of the voluntary sector as complementary to that of the government in the provision of social welfare assistance and as adding a necessary dimension of diversity in the face of "constantly changing" public needs.

(iii) Ontario Ministry of Community and Social Services, Social Assistance Review Committee

In April 1988, the Ministry of Community and Social Services published Transitions, the report of its Social Assistance Review Committee\(^10\). The Social Assistance Review Committee was established in July 1986, as an "independent committee charged with undertaking a public review of the province’s social assistance system"\(^11\). The Committee was comprised of twelve members, all of whom had extensive experience in the field of social assistance provision. It was assisted in its deliberations by seven advisory groups. The mandate of the Committee was to answer the following four questions\(^12\):

What should be the guiding principles and objectives of social assistance and related programs?
To what extent is the present system meeting those objectives?
What overall strategies or change should the province adopt?
What parameters should the province accept as it moves to change its legislation?

Although the bulk of the Committee’s report dealt with the overall design of provincial social assistance programs, and although the report focused almost exclusively on government administration and government funding of social assistance programs, it did make a number of observations and recommendations on the role of the voluntary sector in social assistance delivery. In a revealing statement of its conception of the role of the voluntary sector in the provision of social assistance, the Committee made the following observation in its summary of the report\(^13\):

The emergence of a secondary welfare system, represented by food banks and emergency food and shelter programs, highlights the need for a clarification of the relationship between government and the voluntary sector. We strongly recommend that the government reaffirm the importance of the ongoing and supportive role of the voluntary sector, while also asserting its own responsibility to meet basic human needs for food, shelter, and clothing by providing adequate benefits. Adequate social assistance is the primary method of ensuring the natural demise of the secondary welfare system, thereby freeing the voluntary sector to perform
its vitally important role of personal care and support. The answer is not to provide formalized funding for food banks.

The Committee concluded with the following four recommendations concerning the voluntary sector:

265. The government should reaffirm the traditional and ongoing role of the voluntary sector, while also asserting its own responsibility to provide adequate social assistance to those in need.
266. Measures should be taken to promote greater collaboration between government and the voluntary sector in the planning and coordination of services.
267. The voluntary sector should be looked upon as a possible provider of opportunity planning within the new social assistance system, with full government funding.
268. The Ontario government should not provide formalized funding to food banks.

(iv) Submissions to Federal/Provincial/Territorial Working Group

The Ontario Ministry of Consumer and Commercial Relations, in early 1988, produced two short working papers dealing with issues relating to fundraising. These papers were presented to a February 1988 meeting of ministers responsible for consumer affairs in Canada.

The first paper, Charitable Solicitations, dealt with issues relating to third-party fundraisers, with fraudulent fund-raising scheme, and with fundraising schemes of questionable integrity. The paper canvassed the issues and surveyed the existing legislative schemes in Canada, but recommended only that a process of ongoing exchange of information among the various levels of government in Canada be continued.

The second paper, Computerized Gaming Technology, dealt with the more peripheral issue of the problems for regulation presented by gaming machines. The paper examined the existing regulatory and administrative practice affecting computerized gaming events in all Canadian jurisdictions, and looked at proposals for the reform of the Criminal Code provisions that authorize provincial governments to issue licences for gaming events.


The Ontario Law Reform Commission’s Report on the Law of Trusts contained one chapter on the law of charitable trusts and non-charitable purpose trusts. The Commission concluded that the major reform of the law of trusts recommended by the report as a whole should not affect the law of charitable trusts until the law of charitable trusts has been "examined in toto". The Commission expressed the view at the time that the law of charitable trusts and non-charitable purpose trusts was governed by "a unique
body of case law and diverse statutory provisions\textsuperscript{21} such that it required separate detailed consideration.

However, the Commission did make three sets of interim recommendations, the first relating to imperfect trust provisions (that is, provisions containing mixed charitable and non-charitable purposes), the second relating to the variation and reorganization of charitable trusts, and the third relating to the disposition of the unexpended funds of a public appeal.

\textbf{a. Recommendations Relating to Imperfect Trust Provisions}

The first set of recommendations in the report dealt with the common law rule that, to be valid, a charitable purpose trust must be for exclusively charitable purposes. This rule has resulted in the invalidity of many trusts provisions, and the thwarting of many charitable intentions. For example, a gift to "such charitable or benevolent purposes that my trustees shall select" runs afoul of this rule because benevolent purposes are not charitable purposes. In its report, the Commission reviewed the case law and the various legislative ameliorations of this harsh doctrine then existing in other jurisdictions, and concluded by recommending the abolition of the doctrine, using the following statutory language\textsuperscript{22}:

\begin{verbatim}
81.—(1) In this section, ‘imperfect trust provision’ means a trust under which a non-charitable as well as a charitable purpose or purposes is or are included or could be construed as being included in the object or objects of the trust to or for which an application of the trust property or any part thereof is by the trust directed or allowed.
(2) A trust for both non-charitable and charitable purposes shall not be held to be invalid for the reason only that it is an imperfect trust provision.
(3) Every imperfect trust provision shall be construed and given effect to as if no application of the trust property or any part thereof to or for any non-charitable purpose had been or could be construed to have been authorized.
\end{verbatim}

In the formulation of its recommendation, the Commission took account of the provisions of section 16 of the Perpetuities Act. Section 16 (1) of the Perpetuities Act\textsuperscript{23} validates all specific non-charitable purpose trusts as powers to appoint, exercisable by the trustees for a period of twenty-one years. Under section 16 (2), any property remaining after the expiry of the twenty-one year period reverts to the settlor or testator. In its report on the law of trusts, the Commission recommended that where such specific non-charitable purposes are combined with charitable purposes, the remainder revert to the charitable purposes, not to the settlor or to testator. The Commission recommended the adoption of the following statutory language\textsuperscript{24}:

\begin{verbatim}
81.—(4) Where under an imperfect trust provision property is held on trust which is valid by virtue of subsection 16 (1) of the Perpetuities Act, subsection (2) of that section does not apply to the trust, and subsection (3)
\end{verbatim}
of this section applies but in those circumstances and to that property only in or to which that subsection 16 (2) would otherwise have applied.

The Commission also recommended that the relieving provisions of section 81 not apply to trust property which the trustees are expressly or impliedly directed to apply to a non-charitable purpose. This proposal is formulated in section 81(5) of the Commission’s draft statute:

81.—(5) Where under the terms of an imperfect trust provision the trustees are expressly or impliedly directed to apply a part of the trust property to or for any non-charitable purpose, subsections (2), (3) and (4) do not apply to the trust property which is to be so applied.

b. Recommendations Relating to the Variation and Reorganization of Charitable Trusts

The Commission also took up the problem of the reorganization and variation of charitable trusts. The Commission observed that changes in the manner of administration of charitable trusts are often necessary or desirable and that the purposes of such trusts often become outdated. The common-law cyprès doctrine is designed to deal with these problems, but in its report the Commission argued that the common-law cyprès doctrine is inadequate to current needs. The Commission argued that the situation in Ontario was considerably different from the situation in the United Kingdom where the "hand of history lies heavy, stretching back over four centuries to the Tudor period, and beyond that in the case of many trusts, including those associated with colleges, cathedrals and churches, to origins in the twelfth century." Ontario’s "smaller population", "more recent origin", and different social structure had produced "a smaller and less varied scene of charitable activity." This circumstance had resulted in a less technical and less finely developed doctrine of cyprès. The Commission recommended, nevertheless, the adoption of a provision to give courts a good deal more freedom to vary the terms of charitable trusts by, first, broadening the grounds for the variation of the terms of charitable trusts to include not only "impossibility" and "impracticability", but also any "other difficulty" hindering or preventing the carrying out of the intention of the terms of the trust, or in circumstances where the variation of the terms of the trust "would facilitate the carrying out" of the intention of "the terms of the trust". Second, the Commission recommended that variations effected by courts not be constrained by the two requirements of the cyprès doctrine, the first to the effect that the donor should have a "general charitable intent", and the second to the effect that, in selecting new objects, the court should select objects that are as "close as possible" to the objects of the original gift. The Commission was of the view that these common-law constraints on the freedom of courts to vary had resulted in lengthy, expensive, and unnecessary litigation to discover the intention of the donor. The Commission recommended that the first requirement be abolished outright, except in the circumstance where there is a gift over or a reversion to the donor, and that the second be modified "by permitting the court to approve or select substituted objects that are as close as is practicable or reasonable to the
objects being varied. The Commission recommended the adoption of the following statutory language to implement these recommendations:

76.—(1) If the Court upon application by the trustees of a charitable trust, or, in the absence of such trustees, by the personal representatives of a testamentary donor, finds,

(a) that an impracticability, impossibility or other difficulty has arisen, whenever it arose, that hinders or prevents the carrying out of the intention of the terms of the trust; or
(b) that a variation of the terms of the trust or an enlargement of the powers of the trustees would facilitate the carrying out of that intent,

the Court may amend, replace, delete or otherwise vary any term of the trust or may enlarge the powers of the trustees to administer the trust.

(2) For the purposes of variation under subsection (1),

(a) it is irrelevant whether the donor had a particular or a general charitable intent, except that where an instrument of gift expressly provides for a gift over or a reversion in the event of a lapse or other failure of a charitable object, the gift over or reversion, if otherwise valid, may take effect despite this clause; and
(b) the Court shall approve or select one or more purposes as close as is practicable or reasonable to the original or previously varied purpose or purposes.

c. Disposition of the Unexpended Funds of Public Appeals

Finally, the Commission’s report dealt with the problem of the disposition of the unexpended funds of public appeals. This problem has always created difficulty for the common law since it is often the case that donors to a public appeal do not have a general charitable intention, and therefore that the cyprès doctrine could not be deployed to dispose of the unexpended portion of the funds raised on a public appeal. The Commission recommended that this problem be solved by the application of its new cyprès doctrine, except in the circumstance where the donor had specified in writing, at the time of his or her donation, that the funds were to revert to him or her if they were not required for the purposes of a public appeal.
No legislation implementing any of these recommendations has been proposed or enacted in Ontario to date.


The Ontario Law Reform Commission conducted a study on the utility and effectiveness of two statutes affecting charitable organizations, The Mortmain and Charitable Uses Act and The Religious Institutions Act, and presented its Report on Mortmain, Charitable Uses and Religious Institutions to the Attorney General, the Hon. R. Roy McMurtry, Q.C., in 1976. The Commission recommended the repeal of The Mortmain and Charitable Uses Act on the basis that the policy of this statute was anachronistic. The Commission argued that, to the extent that there may have been valid policy reasons for restricting the power of charitable organizations to invest in land (such as, the fear that "great concentrations of economic wealth consisting of land, a scarce resource, will be controlled in perpetuity by a few wealthy individuals through ‘private’ charitable trusts or foundations" or the need to monitor the activities of charitable organizations), these could be implemented more effectively and coherently in other statutes. The recommendation was expressed as follows:

3. If as a matter of government policy it is thought desirable to continue to restrict direct investment in land by charities, the charitable uses provisions of the Act should be repealed and replaced with new and simpler legislation to achieve that purpose.

The Commission’s report went on to recommend detailed changes to The Mortmain and Charitable Uses Act, in order to make the expression of its policy more coherent, in the event that the Legislature did not choose to follow its first recommendation.

The Commission also looked at The Religious Institutions Act and concluded that its policy—which was to facilitate the holding of lands in perpetuity by unincorporated religious societies—was sound and that the Act should, as a consequence, be continued. The Commission made detailed recommendations for its improvement and in an annex to its report provided a draft replacement Act.

In 1982, the Legislature responded by repealing The Mortmain and Charitable Uses Act and enacting an amendment to the Charities Accounting Act, which incorporated most of the Commission’s recommendations for improvements to the charitable uses provisions of the Mortmain and Charitable Uses Act. A few years earlier, The Religious Institutions Act had been repealed and the Religious Organizations’ Lands Act enacted, the latter incorporating most of the Commission’s recommendations with respect to the improvement of the former.

(c) GOVERNMENT STUDIES ELSEWHERE IN CANADA
(i) Alberta, Institute of Law Research and Reform
There has been some effort in recent years to reform non-profit corporations law in several Canadian jurisdictions. Success has been achieved in Saskatchewan. Alberta has recently studied the question and reviewed the issues with a view to enacting new legislation to replace its Societies Act and Companies Act. As one of the first steps in this effort, the Institute of Law Research and Reform published a report, in March 1987. That report contained a proposed statute and a discussion of the issues affecting its design. The statute proposed in the report constituted a major renovation of the province’s nonprofit corporation law, equal in scope to that which occurred in the domain of business corporations law across Canada in the early 1980s.

The Institute’s report was followed up by the introduction in the Legislature of Bill 54, Volunteer Incorporations Act, in 1987, by the Minister of Consumer and Corporate Affairs. In July 1988, the then Minister of Consumer and Corporate Affairs, the Honourable Elaine McCoy, appointed a task force (the Volunteer Incorporations Act Task Force) to review Bill 54. That task force presented its report in January 1990. The task force consulted widely over a period of eighteen months in the nonprofit sector. Its report recommended the adoption of Bill 54, with minor changes.

Bill 54 is principally an enabling statute, but it does contain provisions that regulate those nonprofit corporations which use "public money", that is, money solicited from the public and money obtained through grants from the government. The principal regulatory devices are the requirement that annual financial statements be audited and the requirement that annual financial statements be filed with the registrar under the Act. The Bill makes provision for regulations prescribing the form of the financial statements.

Bill 54 has not been enacted to date.

(ii) Law Reform Commission of British Columbia

The Law Reform Commission of British Columbia reviewed in a series of reports several of the most difficult legal issues confronting the non profit sector. In its report on informal public appeals, the Commission examined the legal status of public appeals and the question of the disposition of the unexpended funds of public appeals. The Commission recommended a legislative solution to the various problems. In its report and working paper on conflicts of interest, the Commission examined issues relating to self-dealing transactions between non profits and their fiduciaries. It recommended the enactment of a new statute, the "Standards of Conduct Act", to prohibit such transactions, subject to a number of restrictive exceptions. Finally, in its report on non-charitable purpose trusts, the Commission recommended the adopt of legislation that would validate and facilitate the creation of non-charitable purpose trusts. We examine the proposals made by the Commission in these reports in appropriate chapters below. To date, none of the recommended statutes has been enacted.

(iii) Manitoba Law Reform Commission
In its 1992 report\textsuperscript{49}, the Manitoba Law Reform Commission recommended the adoption of legislation to validate and facilitate non-charitable purpose trusts. The proposals of the Manitoba Law Reform Commission are discussed in more detail below in chapter 14. The recommended legislation has not been enacted.

(iv) Canada, Department of Consumer and Corporate Affairs

The federal government published a study of nonprofit corporations law in 1974\textsuperscript{50}. The study was written by Professor Peter A. Cumming of Osgoode Hall Law School. It contains a lengthy discussion of the issues and the provisions of a proposed not-for-profit corporations statute. There was some effort to enact legislation federally in 1980 which ultimately failed. It died on the order paper in November 1983 when the 31st Parliament was prorogued. The proposed statute was, however, enacted in Saskatchewan in 1979\textsuperscript{51}.


There has been federal legislation governing charitable organizations since the first Income Tax Act in 1917\textsuperscript{52}. The federal scheme of regulation developed considerable sophistication in 1967 when a centralized registration and reporting system was put into place. Since 1967, there have been three major reforms of the federal tax regime. We review these reforms briefly here and in greater detail in chapters 10 and 11 of this report.

In 1975, the Department of Finance published a green paper\textsuperscript{53} which proposed a major reconsideration of the federal tax regime applicable to charities. The green paper itself was eight to ten pages long, did not contain much in the way of empirical analysis, and was not accompanied by specific legislative provisions. Its principal recommendation was to suggest that there was a need for greater public accountability of charitable organizations and that the best way to meet this need was to implement a public system of information disclosure. Legislation implementing this recommendation was enacted in 1977\textsuperscript{54}.

In 1983, the Department of Finance published a discussion paper, Charities and the Canadian Tax System\textsuperscript{55}. This was a twenty-page document, accompanied by detailed legislative provisions. It recommended the adoption of several complex rules designed to tighten up the disbursement regime applicable to charities. There was a very substantial background paper\textsuperscript{56} written prior to this report. That background paper dealt with issues relating to the definition of charity, the political activities of charities, the possibility of extending tax exempt status to "citizen interest groups", and the federal registration procedures applicable to charitable organizations. Legislation dealing with these and other matters was enacted in 1984\textsuperscript{57}.

Finally, the federal government in the late 1980s conducted a major review of the charities tax regime. On this occasion it was the Charities Division of Revenue Canada, not the Department of Finance, which investigated ways of improving the federal tax administration and procedures, and increasing the public accountability of charitable organizations. This process of review resulted in the publication in 1990 of a discussion
paper, A Better Tax Administration in Support of Charities. This discussion paper formed the basis of a public consultation which was completed in March 1991. The discussion paper deals with the following issues: the definition of "related business"; disclosure concerning fundraising costs; the foreign activities of charitable organizations; the political activities of charitable organizations; public disclosure of information relating to the operations required of charitable organizations; and the administration of the annual filing requirement. Unlike the previous two studies, one of the main concerns of this study is to find ways to enhance the credibility and reputation of the sector in Canada. Many of the issues addressed in the discussion paper are still under review. The Charities Division is now in the final stages of revising the annual information return and public information return (Form T3010), and we understand that the revised form will be implemented in 1997.

(d) CONCLUDING OBSERVATIONS

Two concluding observations are in order. First, it is note-worthy that although there have been a number of recent studies touching on issues of concern to the charity sector in Ontario, the government of Ontario has introduced legislation in only two cases, the first in response to the recommendations of the Commission in 1976 on the law of mortmain, charitable uses and religious institutions, and the second in respect of the regulation of gaming services. Second, none of the Ontario government studies summarized above dealt with the sector or any of the major problems of the sector directly. Rather, issues affecting the sector have arisen incidentally in the investigation of other more preoccupying matters, such as charitable gambling, the efficient delivery and just distribution of social welfare services, or the law of trusts. Thus none of the studies purported to treat charity or the charity sector directly and in its own right.

These observations reiterate the points made at the beginning of this section that there has been very little consideration and very little action at the provincial level for decades.

3. STUDIES IN OTHER JURISDICTIONS
(a) THE UNITED KINGDOM
(i) Introduction

The law of the United Kingdom has for several centuries exhibited an abiding interest in the supervision of charitable trusts. This interest exists against a background of a very long and rich social tradition of charity in the United Kingdom that has had a profound impact on the current law of charities there, and has contributed in a significant way to the very high public profile that the law of charity has had and continues to have in the United Kingdom. It is important to keep these distinctive features in mind as we review the recent experience in the United Kingdom. We look at the following studies: the Nathan Report; the Goodman Report; the Woodfield Report; and the 1989 White Paper.

(ii) The Nathan Report
The modern law of the public regulation of charity in the United Kingdom begins in 1952 with the publication of the Report of the Committee on the Law and Practice Relating to Charitable Trusts (the Nathan Report). That report was the result of the investigations of a Committee whose mandate was:

- to consider and report on changes in the law and practice (except as regards taxation) relating to charitable trusts in England and Wales which would be necessary to enable the maximum benefit to the community to be derived from them.

Since the Nathan Report forms the foundation of the current regulatory regime in England and Wales, and since it dealt with many of the same issues and concerns with which we deal in this report, we examine it in some detail, under the following headings: genesis; methodology; main recommendations; and reception.

**a. Genesis**

By most accounts three factors led to the need for a major study of the law of charity in the United Kingdom in the early 1950s. The first was the development in the 1930s and 1940s, on a massive scale, of the welfare state. This development, it was thought, required a complete rethinking of the role of the voluntary sector in the provision of social welfare assistance in the United Kingdom. This point was expressed in the following way by Lord Beverage in his influential book published in 1948:

> It is needless to emphasize the importance of the subject whose study is attempted [in this book]. In a totalitarian society, all action outside the citizen’s home ... is directed and controlled by the state. By contrast, vigour and abundance of voluntary action outside one’s home individually and in association with other citizens for bettering one’s own life and that of one’s fellows are the distinguishing marks of a free society. They have been outstanding features of British life ... . Room, opportunity and encouragement must be kept for voluntary action in seeking new ways of social advance. There is need for political invention to find new ways of fruitful cooperation between public authorities and voluntary agencies.

One aspect of the problem posed by the development of the welfare state in the United Kingdom was the increasing redundancy of a vast number of the longstanding charitable trusts. Another was the fear that voluntary action in general had been made superfluous. Speaking to this second aspect, one commentator observed that there were many people who were "wondering whether voluntary action ... is really needed, and whether their own sacrifices are really wanted in the Britain of the present day".

A second factor militating in favour of a major reconsideration of the role of the sector in British society was the "gradual drying up of the sources from which financial support for charities, including charitable trusts", was to come. The origins of this problem lay in the transformations of English society which had occurred since the end of the nineteenth
century, and in the consequent marked decline in both the social importance attached
to charitable giving and in the economic capacity of donors to give. David Owen attributed
the diminishing financial resources of charitable organizations to the "drain that the
welfare state had on the resources [of donors]". "Was it reason-able", he continued, "that
donors already harried by staggering taxes should continue to support voluntary effort?"74

The Nathan Report itself summed up these first two motive forces of the pressure for an
inquiry, and, at the same time, intimated the connection between them, as follows:75

[F]irstly ... the importance, particularly in the circumstances of today, of
putting to the best possible use the country’s voluntary agencies, including
charitable trusts as a typical and numerous example of them; and secondly
... the importance of providing for voluntary action ... additional finance
from private as opposed to public, funds, by the reallocation of the
endowments of charitable trusts which were thought to be ‘moribund’ or
‘dormant’.

Thus, to simplify this matter for the purposes of comparison with the present situation in
Ontario, the first problem—the redundancy of the traditional charities—was to be
remedied by redirecting their endowments, if possible, to solve the second problem—the
lack of sources of funding for the more modern charities.

These peculiar circumstances of Lord Nathan’s study contrast starkly with the current
situation in Ontario, as evidenced in part by the concerns expressed by the Attorney
General in his letter of reference to the Law Reform Commission: there is no statement in
the Attorney General’s reference to the Commission concerning the redundancy of a
significant number of charitable trusts in Ontario. We have not discovered such
redundances, nor have such redundancies been reported by other studies. Nor does the
Attorney General make any reference to any significant social transformation that has
caused a radical shift in the sources of financing of the charity sector in Ontario.76 In
short, as one might expect, the social, historical, and legal context of our report is
consider-ably different from that of the Nathan Report.

A third impetus for Lord Nathan’s study was the call by the legal profession in England
for a review of the law of charity which, in the view of many, had become too complex
and too overburdened with unnecessary technicality.77 In one notorious decision,78 a gift
of over £250,000 "for such charitable or benevolent object or objects" as the testator’s
trustees should select, was held to be an invalid charitable trust, on the basis that
"benevolent purposes" were different from and wider than "charitable" purposes and only
the latter could form the objects of a valid charitable trust in equity. The end result of the
decision was that the testator’s residual estate of over £250,000 went to the testator’s
next-of-kin, not to charity as he had intended.

b. Methodology
Lord Nathan was appointed chair of the Committee. He was a lawyer and politician who had been a member of Parliament, first as a Liberal in the 1930s, then as a member of the Labour Party. The Committee membership was comprised of another eleven people, all of whom had considerable knowledge of social welfare law and the law of charity.

The Committee worked from January 1950 to December 1952. They received written evidence from over eighty-five individuals and organizations, met thirty-one times, and heard oral evidence from over ninety witnesses. The Committee heard from all sectors of British society with an interest in charity: religious groups, social service agencies, education trusts, members from the legal and accounting professions, voluntary associations, and boards of trade. The Committee did not undertake any empirical studies, such as comprehensive surveys of existing charities, because of their desire to complete the work "in the shortest time compatible with its scope and complexity". However, the Committee did produce a sample of charitable trusts established in the United Kingdom between June and October 1951, to give what they considered to be a flavour of the level of activity in the United Kingdom.

c. Main Recommendations

After affirming the value of voluntary action and its complementary relationship with government-provided social services, and after noting that the quality of the information on the 110,000-odd charitable trusts in England and Wales was exceedingly poor, the Nathan Committee went on to make numerous recommendations all of which, in essence, sought merely to revamp the existing legislative apparatus, as embodied in the Charitable Trusts Acts of 1853, 1855, and 1860 and the Endowed Schools Acts of 1869, 1873, and 1874. This body of legislation had two primary objectives: to ensure the "due administration of charitable funds"; and to permit changes in the purposes of obsolete charitable trusts. Pursuant to these nineteenth century statutes, a public administration, the Charity Commissioners, had already been established. The Charity Commissioners exercised advisory, administrative, supervisory, and quasi-judicial authority over the charity sector. The recommendations of the Nathan Committee were directed at merely enhancing the powers of the Charity Commissioners and rationalizing the legislative framework under which the Commissioners operated. They also recommended the establishment of a central registry for charities in England and Wales, and the adoption of a statutory basis for cooperation between social welfare charities and state welfare agencies.

A notable feature of the recommendations contained in the Nathan Report for present purposes is that they were all very context specific. One particularly important feature of the context was the fact that the vast majority of charitable organizations in England and Wales at the time of the Nathan Report were organized in the form of trusts, not corporations. This fact had a marked effect on the preoccupations of the Nathan Committee and can be seen as an important factor in many of its recommendations, such as those dealing with the renovation of the Official Trustee of Charity Lands and the Official Trustees of Charitable Funds.
A second important relevant feature of the Nathan Committee’s recommendations relates to the Committee’s critical evaluation of the role of the Charity Commissioners, and to its recommendations for the reform of that institution. A good deal of the Committee’s public hearing time was spent listening to the complaints made by charitable organizations and local authorities about the practices of the Commissioners. According to David Owen, these complaints were of two main types:

In the first place, there was the complaint, by no means novel, of intolerable delay in the office of the Commissioners. One agency stressed its reluctance to submit cases which required a decision ‘within a reasonable time’ [memorandum from the Methodist Board of Trustees for chapel affairs]. The Royal Maternity Charity, founded in the mid-eighteenth century to provide mid-wives for poor, married women, submitted over 100 documents... bearing on its request to turn over its work and assets to the Central Council of District Nursing. An examination of the correspondence, which covered two years of negotiations, suggest that although some of the epithets applied to the Commission may have been excessive—‘unimaginative departmentalism’, ‘coercion difficult to distinguish from tyranny’—they were not entirely unmerited. ...

A second criticism was perhaps more fundamental. This had to do with the Commissioners’ conception of their function. On the whole, they tended to exaggerate the quasijudicial side of the work at the expense of the administrative end... to be excessively legalistic and literal in their decisions. ... [T]hey had long ceased to be actively concerned with the broader questions of charitable endowments and how to improve their social utility. ... The inquisitorial function, which originally formed an important part of the commissioner’s mandate, was rarely exercised, and then only for a suspected breach of trust or other serious legal offence. Their major obligation, as they saw it, was to answer inquiries, decide questions referred to them, and frame schemes in accordance with sound law. ... [T]o visit the Ryder Street office was to find oneself in a sleepy bureaucratic backwater wholly cut off from the main currents. The isolation was not only spiritual but constitutional, for the Commission was affiliated with no government department. This was in sober fact an orphan agency. Its spokesmen in the House continued to be, as for decades, an unpaid parliamentary commissioner, whose influence was necessarily limited as back bench status.

The Nathan Committee sought to address these rather severe criticisms by proposing that the Charity Commissioners be re-invigorated. To this end, the Committee recommended that the body be enlarged (to between five and nine members), that it be represented by a Minister in Parliament, and that it be less dominated by lawyers.

The interesting feature of these latter proposals, from the perspective of Ontario, is the very limited extent to which they apply to the Charities Division of the Office of the
Public Trustee since that agency has always had a much more restricted role in the charity sector. The more interesting question for Ontario is whether quasi-judicial powers, such as those exercised by the Charity Commissioners, should be granted to an administrative agency in Ontario. The Nathan Report is quite unhelpful on this point, however, since it basically assumes that the policy underlying the creation of the Charity Commissioners in the mid-nineteenth century was, in all essential respects, correct.

d. Reception

The public reaction to the Nathan Report is also of some interest\(^8\)\(^5\). We rely on David Owen’s characteristically vivid appraisal\(^8\)\(^6\):

Broadly speaking, the cleavage [in the public’s reaction] was between those who conceived of charity as a personal and voluntary act and those who were more concerned with maximizing the utility (to recall the Benthamite formula) of the nation’s charity resources. These positions, both of which stopped short of rigid dogmatism, were ably enunciated [in The Lord’s in July of 1953] by the Arch-bishop of Canterbury (Jeffrey Fisher) and Lord Samuel. The former, while joining in the praise of the Report, was doubtful about too much tidying up of the charity household. Husband and wife, he reflected, sometimes have different ideas, and ‘when, as here, the relation is between the robust forceful partner of statutory action and the frail and delicate but gracious partner of voluntary charity, one must be more than ever careful’. It was the old fear echoed by several noble lords, of rigidity over centralization, indifference to local interests and the wishes of benefactors and thus, in the words of The Times, ‘loss of the grace and spontaneity without which charity, in the Christian sense, is no longer itself’.

Owen cites Lord Nathan’s "incisive" reply in the House of Lords to the two criticisms\(^8\)\(^7\):

On the one hand, the myriad of trusts could be thought of as assets with some £200 billion, together with vast amounts of land, ‘to be disposed of, reformed and diverted like so many military formations in the battle against want and wretchedness. Alternatively, they can be considered, as they have for centuries past been considered, as so many benefactions, each whose peculiar characteristics must as far as possible be reverently protected against the ravages of time and the buffettings of economic change. The first is an argument for efficiency—efficiency for the sake of the beneficiaries. The second is an argument for piety, for respect for the wishes of the founders.’

He concludes with a statement summarizing the overall feel of the Nathan Report\(^8\)\(^8\):
What had been attempted and what in the opinion of most competent critics had been accomplished with tolerable success was to strike a balance between the demands of efficiency and piety.

The official response of the government to the Nathan Report came several years later in a white paper, Government Policy on Charitable Trusts in England and Wales. The 1956 White Paper’s response to the recommendations of the Nathan Committee could be characterized as lukewarm. According to Owen, this unsympathetic response was due to the fact that the government had changed from Labour to Conservative and the new Conservative government "was reluctant to disturb the existing charity structure, even to the extent contemplated by the Nathan Report.

Legislation effecting a reform was not enacted until 1960. This legislation, studied in more detail below in chapter 17, in essence reflects the more moderate views of the 1956 White Paper.

(iii) Subsequent Studies

There have been several reviews of the law and the public administration of charities in the United Kingdom since the enactment of the Charities Act, 1960. We will look at each of these briefly in turn.

a. The Goodman Report

In February 1974, the National Council of Social Service (NCSS) organized a national conference of voluntary organizations in the United Kingdom in response to "repeated calls" for a review of the law of charity and its effect on the voluntary sector. Following this 1974 national conference, the executive committee of the NCSS established in September 1974 a "committee of enquiry" with the following terms of reference:

In view of the present-day role of voluntary organisations within the field of social welfare,
(a) to examine the effects of the existing legislation regarding charitable organisations in England and Wales; and
(b) to suggest improvements which will benefit the work and development of voluntary organisations.

The Committee was chaired by Lord Goodman. There were fifteen Committee members who were selected, for the most part, from the executives of national charitable organizations. The Committee received written submissions from several hundred organizations and individuals, and heard oral testimony from over twenty-five individuals and organizations. The Committee conducted research into three areas: the definition of charity; the financial privileges of charity; and the public administration of charity. Much of the investigative work of the Committee was comparative. This fact is reflected in its
report which contains descriptions of the law relating to charity and charitable organizations from different European and North American countries.

By far the main preoccupation of the Goodman Committee was the definition of "charity". The Committee made recommendations supporting the distinction between charitable purposes and nonprofit purposes generally. It also sought to define the words "benefit" and "community" as used in the Pemsel test. The Committee supported the rule prohibiting charitable organizations from carrying on political activities.

The Committee also investigated the justifiability of the existing tax privileges (rate reliefs and favourable income tax treatment of donations) and the need for an exemption in favour of charitable organizations from the new value-added tax. Finally, the Committee made recommendations with respect to improvements to the registration system, the rationalization of local charities, the regulation of fund raising, and the public accountability of charitable organizations.

b. The Woodfield Report

A review of the law of charity was taken up at the government level, in February 1987, by a committee of four persons commissioned by the Home Secretary and the Economic Secretary, under terms of reference which required it to assume that "no change in the law relating to the definition of charitable status" was to occur, and with a mandate to make recommendations which "could be introduced within the existing legislative framework, as opposed to those which would have to await legislation to alter that framework". Within these very limiting constraints, the Woodfield Committee was to provide a critique of the law and practice relating to charitable organizations in the United Kingdom.

The Committee reported within a year, recommending substantial changes to the Charities Act, 1960, the majority of which could be characterized as "deregulatory" in orientation. In particular, the Committee recommended that the monitoring and investigatory powers of the Charity Commissioners be enhanced, but that their supervisory jurisdiction with respect to investments and land transactions be reduced. The Committee also made recommendations in favour of a further relaxation of the cyprès doctrine, and for improvements to the central registration and annual reporting system. Lastly, the Woodfield Committee made recommendations relating to malpractice in fundraising, in recognition of the "growing importance of modern fundraising charities as compared with the older traditional charity based on an endowment".

c. The 1989 White Paper

The renewed interest of government in the charity sector as evidenced in the Woodfield Report and in two contemporaneous reports (one by the Public Accounts Committee and the other by the National Audit Office) was expressed more formally again by a government white paper entitled Charities: A Framework for the Future (the 1989 White Paper). The object of the 1989 White Paper was to set out detailed proposals for
legislation that would implement the recommendations of the Woodfield Report. Besides the predictable preoccupation with the functioning of the Charity Commissioners, the White Paper focused on two new issues of concern. The first of these was the level of government funding of the sector—in the order of £2 billion per year—and the need for ensuring that "[government] funds are being effectively and efficiently deployed in a way which is of practical help and achieves the benefits intended". The 1989 White Paper expressed the view that an appropriate balance between the public’s need for accountability, on the one hand, and the sector’s need for freedom to allow "innovation and enterprise", on the other, was best captured in the idea of "partnership". The second new preoccupation concerned the "modernization" of the charity sector in the United Kingdom, especially in the area of innovative financing techniques, such as running associated businesses, organizing as corporations as opposed to trusts, and using modern fundraising techniques, such as television advertising.

The 1989 White Paper also expressed views on the definition of "charity", arguing in favour of a categorical distinction between political activity and charitable activity, and in favour of the maintenance of the advancement of religion as a charitable purpose. Although the issue of the appropriateness of the statutory regime governing charity organized in the form of a corporation was raised, the 1989 White Paper did not present any recommendations on the reform of nonprofit corporations law in any detail.

The bulk of the 1989 White Paper’s recommendations, however, dealt with improvements to the organization and functioning of the Charity Commissioners and the problem of altering outmoded trust objects. In particular, the 1989 White Paper agreed with the Woodfield Committee that the investment function of the Official Custodian for Charities should be abolished, and that charities should no longer be required to obtain the consent of the Commission for land transactions. Most of the recommendations of the 1989 White Paper were implemented by legislation enacted in 1992 and 1993. The current regime in England and Wales is discussed in more detail below in chapter 17.

(iv) Concluding Observations on the Relevance of the U.K. Studies

Several features of the more recent studies conducted in the United Kingdom are noteworthy. The first is the new interest in these studies in issues of more direct relevance to the situation in Ontario. Thus, the Goodman Report takes up directly the issue of what privileges should be extended to charitable organizations, and the Woodfield Report and the 1989 White Paper place more emphasis on fundraising issues and, to a lesser extent, issues relating to the inappropriateness of existing nonprofit corporations statutes. Nonetheless, and secondly, it is still the case that the main preoccupation of all these studies is the functioning of the Charity Commissioners. As suggested above, it may well be that an institution like the Charity Commissioners is required in Ontario at the present time, but the fact is that its necessity in the United Kingdom remains more or less unquestioned in these three reports. On that issue, it is also worth emphasizing that the position of the Thatcher government, as expressed in the 1989 White Paper, was in favour of a Board of Charity Commissioners with fewer powers of intervention into the affairs of charitable organizations. The third noteworthy feature of the situation in the
United Kingdom for present purposes is the level and quality of the interest of
government and other public organizations in the sector. Each of the studies mentioned is
detailed and extensive in its consideration of the issues. This level of government and
public interest contrasts starkly with the situation in Ontario, as described in section 2(b)
of this chapter.

(b) THE UNITED STATES
(i) Introduction

Our review of the public studies conducted in the United States in recent decades must
be, due to the complexity of the matter, quite superficial in scope. As will become evident
as we review each of the areas of policy concern in Part IV of this report, the level of
legislative and administrative activity in the United States has been enormous. This
activity, as one might expect, has been accompanied by a vast number of government and
other public studies of various areas, as well as academic interest by economists and
academic lawyers. We propose therefore to look briefly at two major public studies
conducted in the early 1970s in the United States that were very influential in
encouraging debate on the appropriate role of government in the charity sector. These
two studies were prepared by the Commission on Foundations and Private Philanthropy
(the Peterson Commission)\textsuperscript{104} and the Commission on Private Philanthropy and Public
Needs (the Filer Commission)\textsuperscript{105}.

(ii) The Peterson Commission

The Peterson Commission was founded in February 1969 when John D. Rockerfeller III
invited Peter G. Peterson, chairman of the Board of Bell & Howell Limited, to provide
"an independent appraisal of American philanthropy\textsuperscript{106}.
The Commission was founded
in response to the very difficult situation that private philanthropy found itself in at that
time in America. There had been many severe criticisms of American foundations
alleging, in general terms, that they were simply tax dodges for the wealthy. The Peterson
Commission, in the first chapter of its report, summarized the climate aptly as follows\textsuperscript{107}:

American philanthropy generally and the foundations specifically have
come under heavy siege in recent years. Their inner life, their external
effects, have been investigated by four congressional committees,
analyzed and then studied by the Treasury Department and frontally
attacked by individual critics respected for their professional competence
in law or finance. Able men have also come to the defense of
philanthropy. Yet even when the best of the defenders have directly joined
the issue with the best of the critics, the result has not always been a gain
in public understanding. More often than not, the selfcentred advocacy of
each side has served only to cloud the public’s view of the dynamics of
American philanthropy.
At another point in the first chapter of its report, the Commission described the predicament of private philanthropy as follows:

Among other things, it was charged 1) that many or most of the foundations were nothing but tax dodges for millionaires; 2) that many foundations represented great concentrations of money and power controlled by self-appointed, self-perpetuating "ivy league" establishment; 3) that foundations were heavily involved in politics, not charity; 4) that foundations often used their money to further extreme ideologies, whether of the right or of the left; 5) that the foundations squandered on high salaries and lavished expense accounts the money that ought to go to charity; 6) that foundations hoarded money as though it were their own when in fact the money belongs to the public and should be spent on charity.

One result of this negative sentiment was the enactment of the Tax Reform Act of 1969 which established a stricter regulatory regime for charitable organizations, including a strict regime of disbursement quotas for foundations.

The Commission set itself terms of reference comprising five basic questions. First, the Commission wanted to investigate the role of philanthropy in American society. The objective was to determine what "private" charity could do that would supplement the educational, scientific, and social endeavours that had recently been taken up by government. Was private philanthropy, in short, complementary or merely redundant? Second, the Commission wanted to investigate how charitable organizations would be able to finance their activities in the years to come. In particular, the Commission was concerned with the role that private foundations would and should play in the financing of charitable activities. Third, the Commission sought to investigate the appropriateness of tax incentives for private philanthropy, and in particular, the fairness and efficiency of the then existing regime of tax incentives. Fourth, the Commission sought to investigate the nature of the abuses committed by private philanthropy and the appropriateness of the proposed government responses. Fifth and finally, the Commission sought to determine whether or not foundations served a useful social purpose.

The Commission had a very distinguished membership of over fifteen people chosen from the private sector. Among them, in addition to Peter G. Peterson, the chairman, were the chairman-president and chief executive officer of Coca-Cola, J. Paul Austin; the president of the University of Chicago and former law professor and Dean of Law, Edward H. Levi; law professor, Paul A. Freund; and Harvard sociology professor, Daniel Bell.

Overall, the Commission’s report argued in favour of a very healthy and vigorous charity sector, for the maintenance of a system of tax incentives in favour of charitable donations, and a regime of regulation of foundations that would require increased public accountability and disclosure, as well as significant annual disbursement requirements. The significance of the Commission’s report was that it marked the beginning of two
decades of sustained policy and academic interest in the sector in the United States and the creation of an academic literature that is enormous.

(iii) The Filer Commission

The Filer Commission was established in November 1973. Like the Peterson Commission, it was privately initiated and privately funded. Its mandate was to investigate the role of philanthropic giving and the role of the voluntary or "third" sector in American society, and to make recommendations "concerning ways in which the sector and the practice of private giving can be strengthened and made more effective"111. In part, like the Peterson Commission, it was established in response to the very negative criticism of the sector generated during the congressional hearings leading up to the enactment of the Tax Reform Act of 1969. The membership of the Filer Commission came from a cross-section of American life and included religious and labour leaders, foundation executives, corporate executives, and former government officials.

The most remarkable thing about the work of the Commission was its sponsorship of over eighty studies on all aspects of the charity and nonprofit sector. Those studies were published separately from the Commission’s report, in six lengthy volumes. The studies included: (1) histories of the sector and its relationship with government; (2) studies of matters of interest to the particular fields of philanthropy (education, science, health, welfare, arts and culture, environment, voluntarism, social action, and public and international affairs); (3) economic studies of philanthropic behaviour; (4) studies of government funding; (5) studies dealing with the tax treatment of charity; and (6) studies dealing with the public regulation of the charity sector. Many of the studies were comparative in nature, dealing with the laws and practice of other jurisdictions including Canada, the United Kingdom, and France. This research effort of the Commission constitutes an outstanding legacy both for its breadth and for the fact that it generated a very deep academic and policy interest in the sector in the United States, which has been sustained to this day.

The Filer Commission made detailed recommendations on the law and policy affecting philanthropy and the nonprofit sector in the United States112. All of these recommendations, it is fair to say, sought to enhance the activity of the sector. In part, like the Peterson Commission, the Filer Commission can be seen as an effort to rehabilitate the standing of the sector in the face of the severe criticism it suffered at the end of the 1960s.

(iv) Concluding Observations on the Relevance of the U.S. Studies

To simplify matters for the purposes of comparison, the debate on the sector in the United States has always been polarized between those suspicious of the philanthropic motives of wealthy private benefactors and those who regard the sector as a vitally important segment of democratic society. This polarization has surfaced frequently in the Canadian debate on the sector to an extent, we would suggest, not justified by the facts nor grounded in our indigenous political culture. This is because we have tended to accept,
without sufficient critical distance, many of the presuppositions of the vast American
literature that has arisen out of these two reports. Our suggestion here is that we remain
cognizant of this danger when it comes time to assess the policies and the administrative
initiatives which have been adopted as a consequence of this writing.

Finally, we note, as with the case of the United Kingdom, the level of public interest in
the sector in the United States, as evidenced by these two vast public studies, is nowhere
near equalled in Canada.

(c) AUSTRALIA

In December 1993, the Australian government referred to the Australian Industry
Commission a project to examine and report on (1) the size, scope, efficiency, and
effectiveness of the services provided by charitable organizations in Australia; (2) the
size and scope of and funding arrangements for the services provided by Australian
charitable organizations overseas; and (3) the administrative efficiency of charitable
organizations. As part of that study, the Industry Commission was to look at, in
particular, the appropriateness of the legislation governing charitable organizations and
the appropriateness of the tax incentives provided to charitable organizations. The study
excluded from the scope of its review organizations in the health and education sector,
and religious organizations. Its specific focus was on what the Industry Commission
termed "community social welfare organizations" (CSWOs) and non-government
development organizations (NGDOs), the latter referring to organizations involved in
international development.

The final report presents a detailed statistical profile of the segment of the Australian
charity sector studied. One interesting finding was that over half, $2.7 billion out of
$4.8 billion in 1993-94, of the sector’s financing came from government and only $580
million of the sector’s financing came from individual donations. The final report found
that the sector employs over 100,000 people.

The report made recommendations with respect to the development and application of
standards governing the quality of the services provided by the sector; the standardization
and streamlining of government procedures for the selection of service providers and for
the valuation of their work; the standardization of funding procedures across all
governments; the removal of the distortions caused to the sector by the dividend
imputation; the reform of fundraising legislation so that it would be brought up to date
and made uniform, and so that it would pay special attention to issues such as the public
disclosure of contract fundraisers, public nuisance, and donor privacy; the provision of
funding to the Australian Accounting Standards Board and the Public Sector Accounting
Standards Board to develop suitable accounting standards for the sector; better auditing
of organizations receiving preferential tax treatment; and the development of a
framework for the collection of statistics on the sector by the Australian Bureau of
Statistics.
There is some overlap between the scope of our study and the scope of the Australian study. Of particular interest is the Australian study’s preoccupation with the matter of government involvement in the sector, a topic we examine in chapter 19. One very significant different is the exclusion from the study of organizations in the education and health sector, and in the religious sector—the former because they are in large measure already the public sector institutions; the latter because, presumably, it is a case apart.

Endnotes:


5. *Ibid.*, title am. by S.O. 1993, c. 25, s. 25. This Act imposes a registration requirement on suppliers of gaming services and provides for the prescription by regulation of the rules of play, trust accounts for moneys due to charities, financial statement reporting requirements, and investigative and enforcement powers.


R.S.C. 1985, c. C-46, s. 207.


R.S.O. 1990, c. P.9. Section 16 provides as follows:

16.(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor, within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or the person or person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital.


34. R.S.O. 1970, c. 411.


36. Ibid., at 24.

37. Ibid., at 60. The draft Act is contained in Appendix A of the report at 63.

38. R.S.O. 1980, c. 297, as repealed by S.O. 1982, c. 12, s. 1.

39. R.S.O. 1980, c. 65, ss. 6a-6d, as en. by S.O. 1982, c. 11, s. 1.

40. Supra, note 34, as repealed by S.O. 1979, c. 45, s. 28.


46. Bill 54, Volunteer Incorporations Act, Alta. 1987 (21st Leg., 2d Sess.).


50. Canada, Department of Consumer and Corporate Affairs, Proposals for a New Not-for-profit Corporations Law for Canada (Ottawa: Information Canada, 1974).

51. The Non-Profit Corporations Act, supra, note 42.

52. Income War Tax Act, 1917, 7-8 Geo. 5, c. 28 (Can.).


Canada, Department of Finance, Charities and the Canadian Tax System A Discussion Paper (Ottawa: May 1983).

See N. Brooks, Charities: The Legal Framework (Ottawa: Secretary of State, 1983) [unpublished].


Indeed two of them suggested that a comprehensive study of the sector was needed. See Report on Mortmain, Charitable Uses and Religious Institutions, supra, note 32, at and 24, and Report on the Law of Trusts, supra, note 18, at 429.


66. Appointed by Prime Minister Attley in January 1950.


70. The contours of the post-war crisis are sketched in more detail in Owen, supra, note 60, ch. entitled "Junior Partner in the Welfare Firm". The classic example of agencies made redundant by the growth of the welfare state were those charitable trusts established to provide for "surgical appliances" (crutches, braces, and trusses), all of which were now to be provided for under the National Health Service Act, 1946, 9 & 10 Geo. 6, c. (U.K.). Other examples of redundancy were the various trusts established to provide scholarships and exhibitions for university education. University exhibitions and scholarships became redundant with the Education Act, 1944, 7 & 8 Geo. 6, c. (U.K.), and with the state's provision of universal access to university-level education.

71. Owen, supra, note 60, states at 573: "[T]he expansion of the public social services in the 1920s and 30s raised questions about without dramatically altering the status of private philanthropy. But the impact of the legislation of the 40s was of a different order of magnitude. Plainly, charitable enterprise would have to take stock of its position and perhaps lay out a new course."


73. Owen, supra, note 60, at 533.

74. Ibid.

75. Nathan Report, supra, note 62, at 3 (emphasis added).

76. This is not to say, of course, that we will not be concerned with making recommendations for revision of the cy-près doctrine, or for the government role in the encouragement of charitable giving and volunteering.

77. See, for example, Owen, supra, note 60, ch. 21.


80. 1853, 16 & 17 Vict., c. 137 (U.K.); 1855, 18 & 19 Vict., c. 124 (U.K.); and 1860, 23 & 24 Vict., c. 136 (U.K.) respectively.

81. 1869, 32 & 33 Vict., c. 56 (U.K.); 1873, 36 & 37 Vict., c. 87 (U.K.); and 1874, 37 & 38 Vict., c. 87 (U.K.) respectively.

82. The Nathan Report, supra, note 62, made the following specific recommendations:
That provision be made for the establishment of a central registry of charitable trusts so that "would-be beneficiaries and voluntary workers" and members of the general public would have access to information on the existence, financing, and granting policies of all charitable trusts in England and Wales;

(2) that a re-active, as opposed to pro-active public administration be supported. Thus, the Charity Commissioners were to continue to have wide powers to inquire into breaches of trust and fraudulent administration, but they were only encouraged to facilitate the adoption by charitable trustees of the "best administrative techniques";

(3) that more effective enforcement of the already existing obligation of charitable trustees to file annual accounts. It recommended, as well, that there be an obligation to have those accounts audited prior to filing;

(4) that all land owned by charitable trusts and all securities and other investments owned by charitable trusts be vested in two corporations sole, namely, the Official Custodian of Charity Land and the Official Custodian Charitable Funds, respectively. This recommendation was justified on the basis that the assets of charitable trusts could more easily be transferred and new trustees could more easily be appointed by avoiding the cumbersome formalities associated with the transfer of assets from a trust. This was not a new idea, however. It was based on already existing institutions, the Official Trustees of Charity Lands and the Official Trustees of Charitable Funds, both of which had been exercising a similar but more restricted jurisdiction;

(5) that the powers granted in the several Charitable Trusts Acts to the Charity Commissioners to permit transactions in land not otherwise permitted in the trust instrument and to restrict certain transactions in land whether permitted or not in the trust instrument be continued and clarified;

(6) that the law of mortmain as it applied to charitable corporations be abolished;

(7) that the range of permissible investments for charitable trusts (whose trust instrument did not explicitly mention a range of permissible investments) be extended to include, at 173-74: "with certain safeguards...the stocks and shares, including equity (i.e. ordinary) stocks and shares of financial, industrial and commercial companies";

(8) that the definition of charity be reworded in a way that would allow greater flexibility of interpretation and be more in accordance with Lord Macnaghten's rather general definition in Commissioners for Special Purposes of the Income Tax v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28 (H.L.);

(9) that the cy-près doctrine be "relaxed" so that trust instruments could be modified even though their objects had not become, strictly speaking, impracticable or impossible. The report recommended that the Commissioners' and the Court's power to make schemes be subject to several limiting considerations such as, at 174, "the spirit of the intention of the founders", the "interest of the locality", and "the possibility of effecting administrative economy by merging endowments". The scheme-making authority would also be obliged to consult with the trustees of the trust, and alterations to the trust within 35 years of its establishment would not be permitted except with the consent of the trustees and the founder(s);

(10) that the Charity Commission be reconstituted so that

(i) there would be a Minister in Parliament responsible for its administration (under the previous law, although one of the commissioners was also an M.P., lack of ministerial accountability and ministerial representation in Parliament meant that charities issues were usually unsuccessful in getting and keeping the attention of Parliament); and
(ii) their numbers would be increased; and,

(11) that the existing exemptions from the jurisdiction of the Charity Commissioners be continued with minor modifications, for the most part aimed at redressing anomalies.

83 In some instances, however, this basic feature of the context of the Nathan Report, supra, note 62, makes only the verbal formulation of the recommendations inapplicable to the situation in Ontario. For example, the report's focus on the cy-près doctrine, although formulated almost entirely in the language of the law of trusts, applies with equal force to the law of non-profit corporations, where there is also a need for some vehicle for modifying outmoded charitable objects.

84 Owen, supra, note 60, at 584-86.

85 For a review of the Nathan Report, see D.W. Logan, "Report of the [Nathan] Committee" (1953), 16 Mod. L. Rev. 348.

86 Owen, supra, note 60, at 589-90 (footnotes omitted).

87 Ibid., at (footnotes omitted).

88 Ibid.

89 The government responded almost immediately to one of the proposals contained in the Nathan Report (hereinafter referred to as the "1956 White Paper"). That proposal dealt with the problem posed by bequests to mixed charitable and non-charitable purpose trusts. The statute is the Charitable Trusts (Validation) Act, 1954, 2 & 3 Eliz. 2, c. 58 (U.K.).

90 In particular, the 1956 White Paper, supra, note 89, made the following recommendations:

(1) that the actual content of the definition of "charity" should not change in substance, and consequently that the definition should not change in form either since any change in form might be interpreted by a court as a change in substance;
(2) that a central registration system should be established, but that the penalty for failure to comply with the requirements of the central registration system be committal for contempt of court and not a penalty on each of the responsible trustees, as had been recommended by the Nathan Report;
(3) that consistent with the Nathan Report's recommendation, the existing powers of inquiry of the Charity Commissioners not be expanded and that the Charity Commissioners be given no more responsibility than simply to stimulate and encourage the efficient administration of charitable trusts;
(4) that contrary to the Nathan Report's recommendation, all annual accounts of all charities subject to the Charity Commissioners' jurisdiction need not be audited since this would impose too large a burden on smaller charities. In addition, the 1956 White Paper recommended that the Commissioners be given the power to permit some charities to submit accounts less frequently than on an annual basis;
(5) that the recommendation of the Nathan Report, that all land and all investments of charitable trusts be vested by statute in an official custodian, not be adopted. Instead it was recommended that the institution of the Official Custodian of Charitable Property be maintained, but be made available to all charitable trusts at their option;
(6) that consistent with the *Nathan Report*, certain restrictions on dealings in charity land be continued;

(7) that consistent with the *Nathan Report*, the law of mortmain, as it applied to charitable corporations, be abolished;

(8) that consistent with the *Nathan Report*, a power to increase the powers of investment of charitable trustees be vested in the Charity Commissioners, but that this new power of the Charity Commissioners be made subject to certain statutory safeguards and conditions;

(9) that consistent with the *Nathan Report*, the *cy-près* doctrine should be relaxed although it should not be relaxed to the extent recommended by the Nathan Committee. The *1956 White Paper* agreed that the antecedent conditions for the application of the doctrine and the criteria for the acceptability of modifications needed to be refined. The 1956 White Paper however recommended that the power to initiate modifications in the objects of charitable trusts should rest almost exclusively with the trustees of the charitable trusts and only in "very exceptional cases" should the Charity Commissioners have the power to initiate changes;

(10) that consistent with the recommendation of the *Nathan Report*, the Charity Commissioners be given a Minister (the Home Secretary) and that the office of Parliamentary Commissioner be abolished;

(11) that contrary to the *Nathan Report's* suggestions on the recomposition of the Charity Commission, the *1956 White Paper* conceived of the role of the Commission as primarily a body whose task "was to deal with proposals initiated by trustees". Thus the 1956 White Paper's recommendation on the composition of the Commission was that the Parliamentary Commissioner be abolished and that eligibility for the position of two legal commissioners be extended to solicitors.

91 Owen, *supra*, note 60, at 591.

92 8 & 9 Eliz. 2, c. 58 (U.K.).


94 Ibid.

95 See *Commissioners for Special Purposes of the Income Tax v. Pemsel*, *supra*, note 82.

96 *Woodfield Report*, *supra*, note 64, at 55.

97 Ibid., at 56.

98 *Supra*, note 92.


101 Supra, note 65.
102. Ibid., at 2.


107. Ibid., at 2.

108. Ibid., at 4.


110. See, further, infra, ch. 11.

111. Filer Commission Report, supra, note 105, at 1. John D. Rockefeller III was also instrumental in the establishment of the Filer Commission.

112. The most relevant and interesting recommendations for our purposes are as follows (Filer Commission Report, supra, note 105):

Chapter VI: "Broadening the Base of Philanthropy":

2. That an additional inducement to charitable giving should be provided to low- and middle-income taxpayers. Toward this end, the Commission proposes that a 'double deduction' be instituted for families with incomes of less than $15,000 a year; they would be allowed to deduct twice what they give in computing their income taxes. For those families with incomes between $15,000 and $30,000, the Commission proposes a deduction of 150 per cent of their giving.

Chapter VII: "Improving the Philanthropic Process: Accessibility":

1. That the duplication of legal responsibility for proper expenditure of foundation grants, now imposed on both foundations and recipients, be eliminated and that recipient organizations be made primarily responsible for their expenditures.

2. That tax-exempt organizations, particularly funding organizations, recognize an obligation to be responsive to changing viewpoints and emerging needs and that they take steps such as broadening their boards and staffs to insure that they are responsive.

3. That a new category of 'independent' foundation be established by law. Such organizations would enjoy the tax benefits of public charities in return for diminished influence on the foundation's board by the foundation's benefactor or by his or her family or business associates.

Chapter VII: "Improving the Philanthropic Process: Minimizing Personal or Institutional Self-Benefitting":

1. That all tax-exempt organizations be required by law to maintain 'arms-length' business relationships with profit-making organizations or activities in which any member of the organization's staff, any board member or any major contributor has a substantial financial interest, either directly or through his or her family.

2. That to discourage unnecessary accumulation of income, a flat payout rate of 5 per cent of principal be fixed by Congress for private foundations and a lower rate for other endowed tax-exempt organizations.

3. That a system of federal regulation be established for interstate charitable solicitations and that intrastate solicitations be more effectively regulated by state governments.

4. That as a federal enforcement tool against abuses by tax-exempt organizations, and to protect these organizations themselves, sanctions appropriate to the abuses should be enacted as well as forms of administrative or judicial review of the principal existing sanction -- revocation of an organization's exempt status.

Chapter VII: "Improving the Philanthropic Process: Influencing Legislation":

That nonprofit organizations, other than foundations, be allowed the same freedoms to attempt to influence legislation as are business corporations and trade associations, that toward this end Congress remove the current limitation on such activity by charitable groups eligible to receive tax-deductible gifts.


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CHAPTER 3

SOURCES OF INSTITUTIONAL SUPPORT AND PROSPECTS FOR SELF-GOVERNANCE

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   (iii) Better Business Bureau
3. PUBLIC AGENCIES
   (a) Voluntary Action Program, Department of Canadian Heritage, Canada
   (b) Ministry of Consumer and Commercial Relations / Office of the Public Trustee, Ontario
4. CONCLUDING OBSERVATIONS AND RECOMMENDATIONS

1. INTRODUCTION

In section 2 of this chapter, the Commission reviews the objectives and describes the activities of the private organizations, while in section 3 we review the public agencies that provide support to the charity sector in Ontario, both through the provision of financial and organizational resources, as well as through the collection and dissemination of information. We conclude in section 4 with several general
recommendations on how governments might better support the efforts of these organizations and agencies.

2. PRIVATE ORGANIZATIONS

A number of private organizations have developed in Canada in recent years to promote the cause of charity and to encourage charitable giving. Some of these organizations act as advocates of the interests of charitable organizations as a whole, some are involved in the promotion or coordination of charitable giving, and some are concerned with developing the capacity of the sector to manage itself effectively. We describe the main organizations of this kind in this section

(a) Canadian Centre for Philanthropy

(i) Mission

The Canadian Centre for Philanthropy was founded in the early 1980s by a small group of people interested in promoting charity and charitable giving in Canada. Today, the Centre carries out a range of activities in fulfilment of its formal objects, which are "strengthening the relationship between the charitable sector and Canadian society...helping charities adjust to the demands of a radically changing social and economic environment...[and] promoting greater understanding and constructive support for the sector among the Canadian public, opinion leaders and policy-makers".

These objects are pursued through the following four main program areas: public affairs; research; awareness; and professional development and information.

a. Public Affairs

The Centre provides information and tools, in the form of "Issue Alerts" and discussion papers, to help organizations understand the public policy issues that most affect them. The public affairs program also holds round-table discussions and consultations with charitable organizations, makes presentations to government on issues affecting the sector, and undertakes media relations activities.

b. Research

The Centre aims to build a base of knowledge about the sector and the environment in which it functions. The research department has produced several studies and it also issues regular "Research Bulletins" on a variety of topics relating to the charitable sector.

c. Awareness

Imagine is a national, bilingual program, launched in 1988, to promote giving and volunteering in the corporate sector and among individuals. Over 400 corporations have become Imagine "Caring Companies" by pledging to donate one percent of pre-tax
profits (averaged over three years) and to encourage giving and volunteering among their employees. The thrust of Imagine's Phase II program, which began in 1994, is to promote partnership between the private and charitable sectors so that innovative ways are found to meet the needs of Canadians. This is summed up in Imagine's Phase II theme: "A New Spirit of Community".

**d. Professional Development and Information**

The Centre provides resources to help charities with their fundraising and management efforts. Publications include *The Canadian Directory to Foundations*, 5 *The Grant Report*, 6 and *Building Foundation Partnership*. 7 The Centre holds seminars on topics such as "effective foundation fundraising" and "corporate giving". An annual national symposium, launched in 1995, brings together representatives from government, corporations, foundations, and the charitable sector to discuss current issues. The Centre launched two national certificate programs in 1990—one in voluntary and nonprofit management 8 and the other in fundraising management 9 and continues to participate in the supervision of both programs. Course enrolment totals approximately 1,300 each year, and is made up of people in senior staff positions with Canadian charities. A resource centre, open to the public, is maintained in Toronto.

(ii) Funding and Administration

The Centre receives most of its funding from annual membership fees, product sales, charitable gifts, and grants from foundations and corporations. The Centre has a board of directors comprised of eleven members. Over 600 charitable organizations, foundations, and corporations, of which nearly 400 come from Ontario, are affiliates of the Centre. The Centre is run by one full-time president and chief executive officer, and nine full-time staff. More detailed information on the Centre is set out in the following table, derived from the Centre's audited financial statements from 1992 to 1995.

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Grants and donations</td>
<td>1,769,989</td>
<td>1,178,218</td>
<td>484,847</td>
<td>552,345</td>
</tr>
<tr>
<td>Affiliate fees</td>
<td>403,833</td>
<td>446,580</td>
<td>421,056</td>
<td>289,677</td>
</tr>
<tr>
<td>Publications</td>
<td>215,100</td>
<td>253,499</td>
<td>322,056</td>
<td>404,631</td>
</tr>
<tr>
<td>Conferences and seminars</td>
<td>292,340</td>
<td>241,154</td>
<td>192,031</td>
<td>108,042</td>
</tr>
<tr>
<td>Management certificates</td>
<td>27,653</td>
<td>30,755</td>
<td>34,333</td>
<td>38,185</td>
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<tr>
<td>Computer searches</td>
<td>20,078</td>
<td>25,614</td>
<td>25,614</td>
<td>32,353</td>
</tr>
<tr>
<td>Investment income</td>
<td>138,458</td>
<td>95,633</td>
<td>61,269</td>
<td>27,473</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>2,863,501</strong></td>
<td><strong>2,265,512</strong></td>
<td><strong>1,544,277</strong></td>
<td><strong>1,573,398</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Expenditures</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total expenditures</td>
<td>3,382,240</td>
<td>2,052,966</td>
<td>1,890,762</td>
<td>1,609,642</td>
</tr>
<tr>
<td>Salaries, benefits, and contract staff*</td>
<td>1,304,315</td>
<td>965,504</td>
<td>901,661</td>
<td>820,352</td>
</tr>
<tr>
<td><strong>Total Assets</strong></td>
<td><strong>1,274,138</strong></td>
<td><strong>1,843,840</strong></td>
<td><strong>1,948,913</strong></td>
<td><strong>2,162,581</strong></td>
</tr>
</tbody>
</table>
* This amount is included in the total expenditures.

(b) Voluntary Sector Management Program, York University

The Seymour Schulich Business School at York University, under the directorship of Dr. Brenda Zimmerman, runs a Nonprofit and Leadership Management Program. There are two levels of courses:

The certificate course is aimed at providing a basic introduction for practitioners to the management of third-sector organizations. This course has two formats: regular, which involves one half-day a week for one academic year; and summer, which involves two intensive weeks in June for two years.\(^\text{10}\)

The M.B.A. concentration course is aimed at providing a more intensive, comprehensive understanding of the management of the third sector. This course can be taken either full time or part time in the evenings.

The program also sponsors workshops, seminars, conferences, and a summer institute. As well, it publishes and distributes research papers and other publications.\(^\text{11}\)

(c) Canadian Centre for Business in the Community/Institute for Donations and Public Affairs Research

The Canadian Centre for Business in the Community (CCBC), formerly the Institute for Donations and Public Affairs Research (IDPAR), is a nonprofit research organization, affiliated (as of 1991) with the Conference Board of Canada. The primary source of funding for CCBC comes from its members, who are, for the most part, the few larger Canadian corporations that make a practice of donating to nonprofit organizations. IDPAR was founded in 1972 and incorporated federally in 1976. Its primary purpose is to provide research information to its membership.

CCBC publishes two publications that are important sources of information on the sector. The first, *Corporate Community Investment in Canada*,\(^\text{12}\) is an annual publication which provides a compilation and analysis of information on corporate donating practices in Canada. It contains information obtained through CCBC's annual poll of its members. The second publication, *Campaigns Outlook*, is published twice yearly (formerly under the title *Fund Programs Planned*).\(^\text{13}\) It provides a near-comprehensive listing of major campaigns ($50,000 or more) taking place in Canada, up to the date of publication. In addition to these two publications, CCBC provides a number of other information services to its corporate clientele. It also occasionally sponsors conferences.

(d) Coalition of National Voluntary Organizations

In 1977, *People in Action*, the report of the National Advisory Council on Voluntary Action (NACOVA), recommended the establishment of a Coalition of National
Voluntary Organizations (NVO). It was to be an umbrella organization and the main link between voluntary organizations (at the national level) and the federal government on all issues of concern to the voluntary sector. The NVO has received a large portion of its operating support from the Voluntary Action Program ever since.

The NVO was one of the first organizations developed by Canadian voluntary organizations to represent their interests to government. The Coalition is still in existence and, in addition to its lobbying efforts, acts as a forum for the exchange of information and ideas among its members, mostly through its annual conference. To give some examples of its lobbying efforts, the Coalition was instrumental in persuading the federal government to repeal the standard $100 deduction in 1984, and it was instrumental in the design of the current tax credit treatment of charitable deductions, which was put into place in 1988.

(e) The Philanthropist

The Philanthropist is a quarterly journal published by the Agora Foundation. It was founded in the late 1960s by a small group of Toronto lawyers who, styled as the Charities Committee of the Wills and Trust Section of the Canadian Bar Association-Ontario, responded to the need in Canada for legal scholarship on charity issues. The first editor of the journal was Bertha Wilson. She was succeeded by Marie-Louise Dickson in 1976, who was followed by Lynn Bevan in 1981, then John Gregory in 1987. Initially, the Philanthropist was published annually and dealt exclusively with legal issues. Today, it deals with matters ranging from management and accounting issues to public policy and black-letter law. Its current vocation is to act as a forum for the discussion of all issues of concern to the charity sector. Its editorial content, although not scholarly or speculative, is well-informed and critical.

(f) Charities Committee of the Wills and Trusts Section, Canadian Bar Association-Ontario

Besides being the original sponsors of the Philanthropist, the Charities Committee of the Wills and Trusts Section of the Canadian Bar Association-Ontario, has played an important role in sponsoring conferences on charity issues and in taking up the brief of the sector when the occasion has required. Recently, the Committee has written a critical evaluation of the activities of the Charities Division of the Office of the Public Trustee.

(g) Federated Appeals

Federated appeals have been in existence in Canada since 1917. The first federated appeals were developed by Jewish charities in Toronto and in Montreal. They were followed quickly by other sectarian and non-sectarian federations in Montreal, Toronto, and Winnipeg. By 1939, there were federated appeals in nine Canadian cities; by 1952, there were fifty-six appeals in Canada serving 5.5 million people or thirty-eight percent of the population; by 1972, there were over one hundred campaigns serving 14 million
people or nearly two-thirds of the population of Canada; and by 1981, there were ninety-three campaigns. The 1990 Canadian United Way campaigns raised over $209 million for the benefit of over 3,600 charitable organizations. Of this, over $100 million was raised in Ontario (over fifty percent of the Canadian total), as follows:

<table>
<thead>
<tr>
<th>ONTARIO UNITED WAY/CENTRAIDE 1990 Campaigns</th>
<th>Population Served</th>
<th>Amount Raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ajax-Pickering</td>
<td>110,000</td>
<td>$925,000</td>
</tr>
<tr>
<td>Barrie/South Simcoe</td>
<td>105,000</td>
<td>725,080</td>
</tr>
<tr>
<td>Belleville and District</td>
<td>40,000</td>
<td>374,000</td>
</tr>
<tr>
<td>Brant</td>
<td>118,373</td>
<td>845,600</td>
</tr>
<tr>
<td>Leeds and Grenville</td>
<td>83,166</td>
<td>410,000</td>
</tr>
<tr>
<td>Cambridge and North Dumfries</td>
<td>95,000</td>
<td>1,151,163</td>
</tr>
<tr>
<td>Chatham-Kent</td>
<td>103,777</td>
<td>1,050,000</td>
</tr>
<tr>
<td>Northumberland</td>
<td>23,000</td>
<td>303,000</td>
</tr>
<tr>
<td>Collingwood and District</td>
<td>23,700</td>
<td>62,500</td>
</tr>
<tr>
<td>Cornwall and District</td>
<td>55,000</td>
<td>461,178</td>
</tr>
<tr>
<td>Deep River District</td>
<td>7,800</td>
<td>104,000</td>
</tr>
<tr>
<td>Fergus and District</td>
<td>8,000</td>
<td>43,700</td>
</tr>
<tr>
<td>Greater Fort Erie</td>
<td>23,453</td>
<td>282,063</td>
</tr>
<tr>
<td>Guelph</td>
<td>80,136</td>
<td>900,505</td>
</tr>
<tr>
<td>Halton Hills</td>
<td>34,189</td>
<td>150,000</td>
</tr>
<tr>
<td>Burlington, Hamilton-Wentworth</td>
<td>535,000</td>
<td>6,750,000</td>
</tr>
<tr>
<td>Kingston, Frontenac, Lennox and Addington</td>
<td>145,000</td>
<td>1,309,000</td>
</tr>
<tr>
<td>Kirkland and District</td>
<td>13,000</td>
<td>42,000</td>
</tr>
<tr>
<td>Kitchener-Waterloo</td>
<td>237,000</td>
<td>2,890,000</td>
</tr>
<tr>
<td>Lanark County</td>
<td>50,000</td>
<td>121,000</td>
</tr>
<tr>
<td>Victoria County</td>
<td>51,000</td>
<td>232,000</td>
</tr>
<tr>
<td>Greater London</td>
<td>300,000</td>
<td>240,863</td>
</tr>
<tr>
<td>Milton</td>
<td>33,500</td>
<td>200,000</td>
</tr>
<tr>
<td>Niagara Falls</td>
<td>72,100</td>
<td>708,000</td>
</tr>
<tr>
<td>Oakville</td>
<td>104,000</td>
<td>1,127,000</td>
</tr>
<tr>
<td>Oshawa-Whitby-Newcastle</td>
<td>225,000</td>
<td>2,895,623</td>
</tr>
<tr>
<td>Ottawa-Carleton</td>
<td>643,300</td>
<td>11,600,000</td>
</tr>
<tr>
<td>Peel</td>
<td>690,000</td>
<td>5,600,000</td>
</tr>
<tr>
<td>Upper Ottawa Valley</td>
<td>40,000</td>
<td>241,000</td>
</tr>
<tr>
<td>Peterborough and District</td>
<td>105,493</td>
<td>1,793,342</td>
</tr>
<tr>
<td>Sarnia-Lambton</td>
<td>82,000</td>
<td>1,750,000</td>
</tr>
<tr>
<td>Sault Ste. Marie</td>
<td>80,000</td>
<td>1,189,025</td>
</tr>
<tr>
<td>Haldimand-Norfolk</td>
<td>89,000</td>
<td>331,517</td>
</tr>
<tr>
<td>St. Catharines and District</td>
<td>150,000</td>
<td>2,360,176</td>
</tr>
<tr>
<td>Elgin-St. Thomas</td>
<td>70,000</td>
<td>660,017</td>
</tr>
<tr>
<td>Stratford-Perth</td>
<td>31,600</td>
<td>376,792</td>
</tr>
<tr>
<td>Sudbury and District</td>
<td>152,000</td>
<td>1,055,294</td>
</tr>
<tr>
<td>Thunder Bay</td>
<td>125,000</td>
<td>812,745</td>
</tr>
<tr>
<td>Population Served</td>
<td>Amount Raised</td>
<td></td>
</tr>
<tr>
<td>-------------------</td>
<td>---------------</td>
<td></td>
</tr>
<tr>
<td>Porcupine</td>
<td>373,000</td>
<td></td>
</tr>
<tr>
<td>Greater Toronto</td>
<td>44,255,000</td>
<td></td>
</tr>
<tr>
<td>South Niagara</td>
<td>776,000</td>
<td></td>
</tr>
<tr>
<td>Windsor-Essex County</td>
<td>7,058,000</td>
<td></td>
</tr>
<tr>
<td>Woodstock and District</td>
<td>470,000</td>
<td></td>
</tr>
<tr>
<td>York Region</td>
<td>2,227,000</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>105,751,340</td>
<td></td>
</tr>
</tbody>
</table>

Although there are a number of sectarian federated campaigns still in operation in various centres around Ontario, the largest fundraiser of this type remains the United Way. The United Way is organized at the national level under an umbrella organization, United Way/Centraide Canada. In what follows, we provide a brief description of the operation of the United Way of Greater Toronto in order to present a more precise picture of how United Way organizations function in general and, in particular, to examine the extent to which member organizations are held accountable for their use of donated dollars.

(i) The United Way of Greater Toronto

a. Goals and Organizational Structure

The United Way of Greater Toronto seeks to "meet urgent human needs and improve social conditions by mobilizing the community's volunteer and financial resources in a common cause of caring". The ways in which the organization attempts to accomplish this objective are further specified in its mission statement to include, among other things:

"raising funds to meet vital community needs through a federated campaign";

"insuring that donor dollars are spent...as efficiently and effectively as possible";

"promoting the development of needed community services ...";

"strengthening the voluntary sector by providing...support services to voluntary organizations...";

"managing United Way operations efficiently and effectively...".

The affairs of the United Way are managed by a board of trustees, most of whom are elected by the members of the United Way of Greater Toronto, and a few of whom are directors ex officio, including the president of the Labour Council of Metropolitan Toronto and senior representatives of government, business, labour, and other community organizations. The membership of the organization includes all persons, individual or corporate, who have made a receipted donation of at least $1 to the United Way. The bylaws of the United Way of Greater Toronto provide for a chairperson and three vice-
chairpersons (one of whom is chief financial officer of the corporation), and a president or "senior professional officer". They also provide for the creation of an executive committee to which is delegated the powers of the board between the meetings of the board.

As befits an organization of its size and complexity, the United Way of Greater Toronto conducts much of its business through the standing committees of its board of trustees. There are several such committees, the most important of which are Allocations and Agency Services, and Community Outreach. Other committees, such as the Campaign Cabinet, are responsible for the fundraising endeavours of the corporation.

b. Fundraising Activities

The United Way of Greater Toronto's annual campaign runs from early September to late November year. It is conducted according to several basic principles, namely:

(1) the United Way endeavours to canvass all individuals in the Metropolitan Toronto area;

(2) no "undue pressure to give" is placed on prospective contributors and the United Way "does not condone any technique used to obtain contributions based on motivations other than the desire to help others"; and

(3) the United Way does not "lend its support to any project publicity event or other event that would cause an unfavourable reaction" among its supporters and volunteers.

The Campaign Cabinet, under the direction of the general campaign chairman, manages the annual campaign. The annual campaign goal is recommended by the Campaign Cabinet to the board of trustees.

c. Allocation of Funds

Two committees of the Board play a role in the allocation of funds. The Allocations and Agency Services Committee makes recommendations to the board of trustees on the allocation of funds to the United Way of Greater Toronto member agencies through the evaluation process of citizen review a panel of volunteers who evaluate each agency's performance in relation to both membership and allocation criteria.

To be eligible for funding by the United Way, an agency must:

(1) be private and nonprofit, and not connected to any political or religious group;

(2) be incorporated and registered as a charitable organization under the federal Income Tax Act;
(3) provide programs and services which are of a social, health, community, or related nature;

(4) meet a vital community need;

(5) be able to demonstrate that it has the support of the community;

(6) be operated by a volunteer board of directors which reflects the community it services, and which is responsible for the development, delivery, and evaluation of services, as well as the efficient and effective management of the agency's programs and budgets;

(7) effectively use volunteers in the delivery of services; and

(8) be supportive of the United Way, its operating policies, and campaign efforts.

Member agencies are required to submit an application which includes detailed financial, operational, and organizational information, along with comparative audited financial statements, including a statement of operations, a balance sheet, and capital accounts, all with appropriate notes. Member agencies are thus held to a very rigorous standard of accountability.

(ii) Association of Canadian Foundations

The Association of Canadian Foundations has over forty members, representing all types of foundations public, private, community and a wide range of sizes. It acts as a vehicle for discussion of issues of importance to foundations as well as, on occasion, the voice of foundations to government.

(iii) Better Business Bureaus

The Better Business Bureau of Metropolitan Toronto (BBB), through its Charities Review Board, provides a rating service of charitable organizations operating in the Metropolitan Toronto area. Financial and operating information is solicited from charitable organizations. This information includes annual reports, copies of T3010 filings, and responses to the Bureau's own questionnaires. Organizations are ranked as follows: A(i), a registered charity "whose status the BBB has no reason to doubt"; A(ii), a "genuine charity that occasionally uses a professional fundraiser whose costs show up in the financial statements"; A(iii), a "genuine charity that occasionally uses a promoter on commission whose expenses are not reflected in the financial statements"; B(i), "an organization whose information is incomplete"; B(ii), "an organization [that] has refused to provide the BBB with information"; and C, a for-profit enterprise that "may be confused with a charitable organization". One informed commentator doubts the capacity of the Bureau's present service to detect fraud systematically, or to yet the quality and efficiency of the many varied types of charitable organizations.
3. PUBLIC AGENCIES

(a) Voluntary Action Program, Department of Canadian Heritage, Canada

Arguably, the most supportive government agency in the sector is the Canadian Identity Directorate's Voluntary Action Program in the federal Department of Canadian Heritage. The Program originated in the social development movement of the late 1950s and early 1960s and was originally called "Assistance to Community Groups".

The Program's current mandate is to maintain close links with the voluntary sector, to monitor the voluntary sector's evolution, to facilitate access of voluntary organizations to government decisionmakers, and to promote the concept of voluntary action, both within government and to the public. The two primary objectives of the Voluntary Action Program are:

1. to support the growth and diversity of the voluntary sector through advocacy and the promotion of volunteerism; and

2. to strengthen the independence of the voluntary sector by facilitating access to financial assistance and technical expertise, and by developing innovative financing techniques.

The Program fulfils this mandate through three program components: the granting program, the production unit for a series of technical resource publications for use by the voluntary sector, and the policy and research arm of the Directorate.

The Voluntary Action Program operates with an annual budget of $95,000 and a complement of almost six person-years. Although the granting program in recent years was typically able to disperse $805,000 to some sixty-five to seventy-five groups, because of budget restrictions this aspect of the Program has been substantially reduced in recent years. In 1995-96 its grants budget was reduced to $65,000, and in 1996-97 there will be a further reduction to $27,000.

The Program maintains in its inventory some twenty titles of technical resource publications for use by the voluntary sector, in both English and French, and dispenses copies without charge to voluntary organizations and individuals on request. Among the most noteworthy publications are two statistical studies on donation behaviour in Canada. In addition, the Program is looking into the establishment of an Internet link.

With the major decrease in the grants budget, the Program's emphasis has recently shifted to policy and research. The major activities are research on the information needs of the voluntary sector, research on the effects of the current taxation infrastructure on the financing of the charitable sector, and monitoring current trends in volunteerism.

(b) Ministry of Consumer and Commercial Relations / Office of the Public Trustee, Ontario
The Ontario Ministry of Consumer and Commercial Relations and the Office of the Public Trustee jointly published a handbook in 1989, entitled *Not-for-profit Incorporator's Handbook*. This handbook is designed for the use of laypersons and professionals involved in the formation of nonprofit corporations. It contains much useful information on procedures, sample object clauses, and an examination of the governing regulatory regime. It is a very helpful publication even if, in places, it tends to present some matters of opinion as statements of law.

4. CONCLUDING OBSERVATIONS AND RECOMMENDATIONS

Four observations flow from this description of the public and private support organizations.

First, almost all of the presently existing private organizations are of recent origin. Although they are few in number and exist on limited resources, their high level of achievement in recent years demonstrates a significant capacity in the charity sector to organize itself and coordinate its activities. This capacity is also exhibited at the community level in smaller organizations such as social planning councils, as well as at the provincial and national levels in umbrella organizations such as United Way/Centraide Canada and the Canadian Council of 4-H Clubs. Although this feature of the sector, by itself, is not a sufficient demonstration of a full capacity for self-governance, it does suggest that there is no need for any legislative action to organize the sector.

Second, none of the organizations, except perhaps and to a limited extent only the NVO and the Canadian Association of Foundations, acts in an official capacity as the voice of the sector or a segment of the sector to government. Although many of these organizations have been consulted by governments in the past, and many have taken the initiative to make their views known to the government, none is a full-time interest group. Moreover, the most obvious candidate for that job, the Canadian Centre for Philanthropy, in fact represents two groups - foundations and active charities whose interests are significantly different and often diverge. We mention this to highlight the point made in the previous chapter that the sector's share of influence in the halls of government has historically been relatively weak.

Third, however, there may be a role for government in coordinating and financing some of the activities of some of the private organizations described, perhaps along the lines of the model presented by the Voluntary Action Program. It is true that, at least in recent years, the sector has demonstrated a capability for financing its activities through membership fees and fees for service. But, it is also true that both the Canadian Centre for Philanthropy and the Voluntary Sector Management Program at York University, for example, provide public or quasi-public goods information, training, and education whose provision might be enhanced by government involvement through subsidies and/or increased cooperation. As an example only, better cooperation between the Canadian Centre and Ontario government agencies that published the handbook could have resulted in a better publication. CCBC, perhaps, provides an interesting and informative
counter-example of consumers of information coordinating their efforts and defraying the entire cost of producing the information that they require. Yet the information published by CCBC is of use to many donors, large and small, not just the few hundred corporate members of CCBC. The provision and dissemination of its information could be made more efficient and more effective were a less exclusive agency such as government involved.28 These observations are merely to suggest that there may be a problem in producing sufficient information about, and adequate programs of education for, the charity sector. This in turn may indicate a need for a public sector contribution in the form of subsidies or in the form of institutions like the Voluntary Action Directorate. The only recommendation of the Commission in this regard, at this point, is the quite general one that whichever Ontario government agency (or agencies) retains responsibilities in the sector, its approach should be flexible, imaginative, and open to the possibility of cooperative efforts with the sector's own institutions.

Fourth, there is no organization in Canada with the resources sufficient to produce the quantity and quality of scholarly writing on the third sector equivalent to those which exist in several major educational institutions in the United States.29 It would be enormously helpful to the viability of the sector if there were greater scholarly interest and greater public support for scholarly research into the issues affecting the sector. Public support could be developed in a number of ways, ranging from the creation of a small centre along the lines of the Ontario Centre for International Business, to financial support for the research efforts of already existing programs or institutions such as the Canadian Centre for Philanthropy and the York Management Program. The level and type of support would of course be subject to general budgetary constraints. However, it is the Commission's view that, all things considered, public money is as well spent on fostering scholarly research into the sector as it is on increasing the resources available to the public agencies responsible for policing and regulating the sector.

Endnotes:

1

Among them, members of the Advisory Committee of the Ontario Law Reform CommissionAllan Arlett, Ian Morrison, and Arthur Bond.

2

In March 1980, a similar association, the Independent Sector, was established in the United States. The Independent Sector's current membership is composed of national voluntary organizations (52%) and grant-making groups (48%) for a total membership of more than 700 nonprofit organizations. The Independent Sector has a large board of directors of over fifty members, including twelve officers. It has a full-time staff of more than thirty and an operating budget of over $4 million.

The objectives and activities of the Independent Sector parallel those of the Canadian Centre for Philanthropy. In the late 1980s, the Independent Sector ran a national campaign "The Give Five Campaign" which was designed to encourage volunteering by Americans. The Independent Sector also publishes a substantial
number of books and pamphlets on the nonprofit sector and is the sponsor of many conferences, including a widely attended annual workshop.

3

This statement is taken from the Canadian Centre for Philanthropy mission statement. The information that follows was obtained through conversations with representatives of the Centre and from the Centre's promotional literature.

4


5


6

Rose van Rotterdam (ed.), *The Grant Report* (Toronto: Canadian Centre for Philanthropy, 1995).

7

Ingrid van Rotterdam, *Building Foundation Partnership* (Toronto: Canadian Centre for Philanthropy, 1995).

8

The certificate program in voluntary and nonprofit sector management is made up of eight courses:

- Strategic and Operational Planning in the Non-Profit Sector
- Board, Community and Government Relations in the Non-Profit Sector
- Financial Management in the Non-Profit Sector
- Management Leadership and Decision Making in the Non-Profit Sector
- Human Resource Management in the Non-profit Sector
- Marketing for the Non-Profit Sector
- Fund-Raising and Resource Development for the Non-Profit Sector
- Program Planning and Evaluation in the Non-Profit Sector
The courses offered are:

- Overview to Non-Profit Management
- Overview to Fund-Raising Management
- Developing Fund-Raising Volunteers
- Information and Financial Management for Fund-Raisers
- Strategic Management for Fund-Raising Campaigns
- Applied Marketing for Fund-Raisers
- Fund-Raising Approaches I
- Fund-Raising Approaches II

10

See York University, Voluntary Sector Management Program, Faculty of Administrative Studies, *Overview of Mission, Achievements and Future Needs*.

11

See, for example, M.S. Moyer, "How Voluntary Sector Managers Might Use Consumer Research to Market Their Organizations to Volunteers" (1984), 4 Philanthrop. (No. 3) 15.

12


13

See *infra*, ch. &nbsp4, sec. 2(b).

14

See *infra*, this ch., sec. 3(a).

15

At the outset, the journal was published independently by the Agora Foundation. During the early 1980s, the Canadian Centre for Philanthropy took over publication. Responsibility was returned to the Agora Foundation in 1987.

16

Canadian Bar Association-Ontario, Charities Committee, *Jurisdiction of the Public Trustee* (July 17, 1990) [unpublished draft].


United Way/Centraide Canada was founded in 1939. Its current membership numbers 122 United Way and Centraide branches across Canada. Its function is to provide administrative support to its member agencies across Canada. Over half of its revenues (57%) are composed of membership dues. Sales of supplies and services constitute the bulk of the remainder of its revenues (32.5%).

United Way of Greater Toronto, mission statement.

J. Gregory, "Evaluating Charities: The Better Business Bureau" (1991), 10 Philanthrop. (No. 3) 25, at 26. At the national level, the Canadian Council of Better-Business Bureaus provides information on national charities through its Philanthropic Advisory Service. In the United States, the National Charities Information Bureau (NCIB) reviews the activities of charities. There is also the Council of Better Business Bureaus (CBBB) and the recently established American Institute of Philanthropy (AIP).

Ibid., at 28.

27

Not-for-profit Incorporator's Handbook, *ibid.*

28

There are serious problems with the quality of this information as well. See, *infra,* ch. 4.,

29

There are research and educational programs at Yale University, New York University School of Law, University of San Francisco, and Case Western Reserve University, among others.

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CHAPTER 4

SOURCES OF EMPIRICAL INFORMATION ON THE CHARITY SECTOR IN CANADA:
AN OPPORTUNITY FOR GOVERNMENT

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      (vii) CANADIAN CENTRE FOR BUSINESS IN THE COMMUNITY (CCBC), FORMERLY INSTITUTE OF DONATIONS AND PUBLIC AFFAIRS RESEARCH (IDPAR) POLICY AND ATTITUDE STUDIES
      (viii) A. ARLETT, P. BELL, AND R.W. THOMPSON, CANADA GIVES
      (ix) CANADIAN CENTRE FOR PHILANTHROPY, LAW, TAX AND CHARITIES
      (x) JOSEPHINE REKART, VOLUNTARY SECTOR SOCIAL SERVICES IN THE 1980S
      (xi) SAMUEL MARTIN, FINANCING OF HUMANISTIC SERVICES AND AN ESSENTIAL GRACE
3. CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

It is generally acknowledged that the quality and quantity of information available on the charity sector in Canada is considerably weaker than desirable.¹ In this chapter the existing sources of information are surveyed.² In section 3 of this chapter, the Commission concludes with recommendations on what Canadian governments can do to improve the quality and quantity of information on the sector.

2. SURVEY OF SOURCES OF EMPIRICAL INFORMATION
(a) Four Main Sources of Empirical Information

There are four principal sources of empirical information on the charity sector in Canada: the publicly available tax information filed by charitable organizations; the publicly available aggregate tax data derived from the confidential tax filings of individuals and corporations; the Statistics Canada family expenditure surveys; and the confidential tax filings of individuals, corporations, and charitable organizations themselves. We assess each of these sources of primary data in turn.

First, the public portions of Form T3010 (Registered Charity Information Return and Public Information Return) and Form T2050 (Canadian Charities Application for Registration) tax filings of Canadian charitable organization are available from Revenue Canada upon request. Revenue Canada has also made this information available in aggregate form to various users, usually at cost. Ideally, the information on these forms, when aggregated, should provide a reliable and detailed description of Canadian charitable organizations in regard to such matters as their administrative structure, their sources of financing, their methods of operation, and their beneficiaries. In fact, however, this source of information is generally thought to be somewhat less than reliable and, as a consequence, was bypassed by many of the studies that were interested in these sorts of questions because of its deficiencies.

There are a number of reasons for the deficiencies. Historically, large numbers of registered charities have consistently failed to file their annual information return on time or at all. This has meant that the aggregate information from this source is always incomplete. Further, the aggregate information provided for any particular taxation year, in fact, always covers more than twelve calendar months since the taxation years of charities do not uniformly correspond to the calendar year. This has meant that it is not possible to draw accurate statistical conclusions on the operations of Canadian charitable organizations based on the data from this source for any given period time. Finally, a number of other factors, such as the design of the forms, the varying levels of qualifications of the people who complete them, and the deficiencies in the applicable accounting standards, have contributed to the poor quality of information on the T3010 and T2050 forms.

A second major source of empirical information on the sector is the compilation of taxation statistics taken from stratified random samples of individual and corporate tax returns. These statistics provide aggregate information on the donating behaviour of individual Canadians, according to several demographic variables (age, sex, occupation, province of origin, etc.), and of Canadian corporations. For corporations, these aggregate statistics have been available since 1965. For individuals, they have been available since 1946.

The standard $100 deduction, implemented in 1957 and repealed in 1984, diminishes considerably the value of this source for these years since it is very difficult to determine with any assurance of accuracy what the actual level of donations was in those years. Since all claims for charitable deductions or tax credits must, since 1984, be supported by
receipts, the aggregate information provided from this source might be a reasonably reliable indicator of the level of individual donations for taxation years after 1983. The hesitation is due to the fact that many donations to charities are unreceipted and many individuals (and corporations) who are issued receipts do not use them to claim credits.10

The corporate taxation statistics are also not entirely accurate since many corporate donations are accounted for as business expenses, not deductible charitable donations.

A third main source of empirical information is the family expenditure survey published periodically by Statistics Canada. These surveys have been conducted by the federal government since 1937,11 on a more or less decennial basis, until the late 1970s, when there were two, 1976 and 1979. In the 1980s, there were three: 1982, 1984, and 1986; and since then, one, in 1992.12 These surveys test the spending habits of Canadian families by tracking the actual spending of a representative sample of families over the course of a year. They are generally thought to provide reasonably reliable information on the donation behaviour of Canadian families, although they are methodologically deficient in at least two respects: they do not impose a rigorous definition of "charity" on respondents, and they rely on respondents' ability to recall donations, as opposed to requiring respondents to record donations as they are made. As a consequence, there are often very marked differences between information from this source and the statistical conclusions drawn from data available from other sources. For example, the family expenditure survey estimates of individual donations generally are much higher than that available from taxation statistics. Some of the discrepancy is accounted for by the fact that not all donations are receipted; some, no doubt, is due to errors inherent to the methodology.

A fourth main source of empirical information on the sector are the confidential tax filings of individuals and corporations (the annual tax returns) and of charitable organizations (the financial statements that charitable organizations are obliged to file with their annual information returns and the private portion of those returns). A number of federal government studies have used information taken from one or more of these sources to develop profiles of the sector, of organizations, and of individual donating habits. One excellent source, for example, published by Statistics Canada in 1982 and entitled Selected Financial Statistics of Charitable Organizations 1980,13 is a survey of the confidential financial statements of charitable organizations. Using the Revenue Canada six-part classification of charitable organizations, this study provides aggregate information on the number of different types of charitable organization in Canada, their sources of funds, and the destination of their funds.14 Another two studies, published by the Voluntary Action Directorate and the Department of the Secretary of State and entitled Donations to Registered Charities: Revenue Canada Taxation Data for 198615 and Donations to Registered Charities: Revenue Canada Taxation Data for 1987,16 used a sample17 of personal T1 income tax returns to obtain more accurate information on the destination of donations according to the type of charity and according to certain demographic variables of donors.

(b) Other Sources of Current Data
Other empirical information of lesser importance is available from numerous surveys of
the sector conducted over the past decade. These are listed below.

(i) Canadian Centre for Philanthropy D. Sharpe, *A Portrait of Canada's Charities*

The Centre sent a four-page, twenty-five-question survey to all 67,731 registered
charities in August 1993. The effective response rate was 6.05 percent. The information
obtained from the survey was used in D. Sharpe, *A Portrait of Canada's Charities: The
Size, Scope and Financing of Registered Charities*.18

(ii) Voluntary Sector Management Program, York University

Together with the Canadian Centre for Philanthropy, the Voluntary Sector Management
Program conducted a joint survey in late 1993 on the effectiveness of not-for-profit
organization boards. A questionnaire of sixty-eight questions was sent to the membership
of the Canadian Centre for Philanthropy. Results of the survey were published in 1992.19

(iii) Longwoods Research Group General Public Research

In August 1990 the Longwoods Research Group Limited conducted a research study for
Revenue Canada Taxation, to test for "attitudes and perceptions on current policy" and
"perceptions of Revenue Canada Taxation concerning its mandate and role in
administering policy" among informed members of the general public.20 This was
qualitative, as opposed to quantitative, research. Eight focus groups were formed, two in
each of Halifax, Montreal (French), Toronto, and Vancouver. These groups were asked to
express their opinions on current issues of public policy relating to the tax treatment of
charities, such as the definition of charity, the business activities of charities, fundraising
and receipting, the political activities of charities, and foreign charities. They were also
asked to express their opinions on the role of Revenue Canada Taxation in the charity
sector. The study was commissioned as part of Revenue Canada's recent reappraisal of its
charities regime.

(iv) Longwoods Research Group CEOs of Canadian Charities

A second research study, commissioned as part of Revenue Canada's recent reappraisal
and completed by the Longwoods Research Group, was also qualitative in nature.21 The
methodology was to canvass the opinions of the CEOs and treasurers of charities in eight
focus groups. Sessions were conducted in Toronto, Winnipeg, and Montreal. Opinions
were canvassed on the following issues: problems that arise in dealing with Revenue
Canada; perceptions of the performance of Revenue Canada Taxation; and certain
proposals for reform.

(v) Doreen Duchesne, *Giving Freely: Volunteers in Canada*
This research study was based on the returns from two questionnaires used in a survey of some 70,000 people, conducted by Statistics Canada in October 1987 and January 1988 and sponsored by the Secretary of State of Canada. The objective of the survey was to obtain information on the volunteering habits of Canadians and the profiles of volunteers in Canada. The results of the survey were published in the general report, *Giving Freely: Volunteers in Canada*, which was complemented by the publication of numerous specific reports dealing with volunteering in different sectors of charitable activity, different geographic regions of Canada, and selected demographic groups. The Coalition of National Voluntary Organizations also published a short summary of the findings of the study prepared by David T. Ross and E. Shillington.

(vi) Canadian Centre for Business in the Community (CCBC), formerly Institute of Donations and Public Affairs Research (IDPAR) Semi-annual Reports

The Institute of Donations and Public Affairs Research (IDPAR), now (since 1991) the Canadian Centre for Business in the Community (CCBC), has published since the early 1970s semi-annual reports on major nondenominational campaigns, across Canada, seeking funds from the private sector (individuals, corporations, and foundations). Typically, only campaigns of $50,000 or more are listed. The information is collected by canvassing "a myriad of agencies and institutions, large and small across Canada, both in English and in French for financial campaigning information". It also obtains information in cooperation with the Canadian Hospital Association, the Association of Community Colleges of Canada, the Sports Marketing Council, the Canadian Association of Educational Development Officers, and the YMCA National Council. CCBC also uses government sources. The publication is circulated among the members of the Conference Board of Canada to provide them with the information they need in making their donation decisions.

(vii) Canadian Centre for Business in the Community (CCBC), formerly Institute of Donations and Public Affairs Research (IDPAR) Policy and Attitude Studies

These reports, now in their twenty-fifth consecutive annual edition, are a series of annual policy and attitude studies conducted by IDPAR/CCBC. Typically, these studies result from 200-odd valid responses returned from a poll of over 3,500 Conference Board of Canada members' firms. In the past, two types of questionnaires, "industrial" and "non-industrial", were sent to member and non-member corporations of IDPAR/CCBC. The questionnaires asked the respondent corporations about the level of their donations, their allocations of funds according to type of charity, and about the nature and size of their firms. The publications resulting from these polls provide a detailed, but somewhat unreliable, picture of corporate donation practices in Canada for the year.

(viii) A. Arlett, P. Bell, and R.W. Thompson, *Canada Gives*

Two public opinion surveys were conducted in the fall of 1987 by Decima Research at the behest of the Canadian Centre for Philanthropy. The first survey was designed to determine the attitudes of individual Canadians towards charitable giving. Interviews
with a random sample of 1,000 adults across Canada and an additional 1,149 residents of Vancouver, Calgary, Winnipeg, Toronto, Montreal, and Halifax were undertaken between October 15 and October 30, 1987. Highlights and analysis of the survey are set out in chapter of the Canada Gives publication. It examines the following issues: Canadians' attitudes toward charities; the profile the charitable sector has among Canadians; the level of giving to non-religious organizations; the level of giving to religious organizations; volunteerism; the reputation of charitable organizations; and the potential for Canadians to give more.

The second survey was of senior executives in 134 of Canada's largest corporations and 228 smaller companies (defined as having revenues between $1 million and $40 million and at least twenty employees) to test for corporate attitudes towards donations. The published study, chapter of Canada Gives, contains information on: corporate attitudes towards donations; corporate donation practices; corporate donations in relation to attitudes and practice; corporate donations go; event sponsorship; payroll deductions; and employee volunteerism.

(ix) Canadian Centre for Philanthropy, Law, Tax and Charities

This study was a follow-up to the Canadian Centre for Philanthropy's survey of attitudes towards charitable giving in Canada conducted in 1987. This study was commissioned by the Imagine program of the Canadian Centre for Philanthropy in late 1989. It examined general attitudes towards charitable donations and volunteering; effect of factors such as the tax deductibility of donations and the economic climate on attitudes towards giving; public's assessment of the social environment in Canada and the level of need for social services; and attitudes towards giving.

(x) Josephine Rekart, Voluntary Sector Social Services in the 1980s

This study examines the impact of changes in government policy and government expenditure on fifty-eight voluntary agencies which provided family and children services and which received at least some of their funding, either in the form of contracts for services or grants, from the British Columbia Ministry of Social Services and Housing for the period 1981 to 1986.

(xi) Samuel Martin, Financing of Humanistic Services and An Essential Grace

Professor Martin's purpose in each of these books was to analyze the delivery, by both the charity sector and government, of the "humanistic services". The first book is a qualitative and quantitative study of the sources of financing for the humanistic services in Canada for the quarter century following World War II, with special emphasis on the early 1970s. Martin's research team relied heavily on the standard sources of information (described above), as well as a number of original surveys investigating patterns of giving among individuals and corporations. The second book is more philosophical and historical in orientation, with a greater focus on the role of the charity sector in the delivery of humanistic services. Martin's main preoccupation in writing the second book
was to assess the motivations and social philosophies that lie behind the various patterns of giving in Canadian society. This study also relied on the traditional sources of information, as well as a number of original surveys.

These books stand virtually unequalled in the Canadian scholarly writing on philanthropy for the extent of original empirical work.

3. CONCLUSIONS AND RECOMMENDATIONS

It is apparent from the discussion in this chapter that our information on the sector is quite poor. This occurs for two basic reasons. First, most of the detailed information and the bulk of the studies on the charity sector deal with the donation and volunteering behaviour of individuals and, to a much lesser extent, the donation behaviour of corporations. These sources, besides being preoccupied with only one of many issues, tend to have a very strong advocacy flavour. The second general observation is that much of the raw data available, both from public and third-sector sources, is conceptually and/or methodologically weak.

These two fundamental features of the existing sources of data make definite and precise empirical conclusions very difficult. For this reason, we recommend that Statistics Canada undertake a review of its statistical operation in the third sector, with a view to generating a better framework for the collection and publication of information on the sector. We also make the following specific suggestions for the improvement of the basic data.

(1) The information on corporate giving in Canada could be improved if, besides donations, it attempted to measure corporate support for charity in the form of sponsorships, business expenses, and gifts in kind. One of the regulatory issues addressed in this study is the legitimacy of business enterprises co-opting charities in their marketing campaigns. At present, it is very difficult to measure the extent of this phenomena. As well, the information could be presented in ways that reveal more about corporate donation behaviour. For example, it would be helpful to be able to analyze corporate donation behaviour according to the type of corporations, such as close versus public type of industry, and size of corporation.

(2) The information provided on corporate giving in the IDPAR/CCBC annual survey of corporations is deficient in a number of respects. There are, for example, a number of problems relating to the size, validity, stratification, and year-to-year comparability of the sample. This survey would be a much better source of information were these methodological questions addressed more rigorously. Our suggestion is that there is a need here for the professional and financial assistance that some government agency, such as Statistics Canada, might provide.

(3) Our information on the patterns of individual giving and on some aspects of the profiles of charitable organizations (for example, their sources of donation
(4) Information on the profiles of charitable organizations could be improved enormously if the T3010 form were improved and if all or most of the information provided on it and with it were publicly available. Additionally, better enforcement of the obligation to file the T3010 form would make this source of information more reliable.38

(5) Some method should be devised for updating the category of registration for charitable organizations under the Revenue Canada system. There does not appear to be, at the present time, a method for reclassifying a charity whose classification may have changed. A notorious example is the YMCA, which is currently classified as a religious charity. Perhaps the best system would be to have charities respond to a classification question on each annual return. A change in classification might result in a new registration number.

(6) The CCBC’s efforts resulted in the only publication available in Canada providing information on the levels of fundraising in Canada.39 Although this publication is quite extensive, it is difficult to gauge its accuracy. The information it provides, however, is enormously useful for grantors foundations, corporations, individuals, and governments alike in planning their annual donation. It would be useful if the data from which this type of publication is drawn were more comprehensive. Accordingly, this is one argument in favour of a registration requirement for fundraising campaigns. We return to this suggestion below in chapter 18.

(7) The resources and donation patterns of Canadian foundations is information that should be widely available; it is, at present, due to the efforts of the Canadian Centre for Philanthropy. Their Canadian Directory to Foundations is an excellent source of information, which the government should continue to facilitate through information-sharing and, resources permitting, financial assistance.

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Endnotes:

1
See, for example, B.R. Levens, *Some Problems and Gaps in the Reporting of Charitable Giving By Corporations and Individuals*, prepared for Canadian Centre for Philanthropy (Vancouver, May 1991) [unpublished].

2


3


4

Surprisingly, given the potential value of this source of information, aggregate information derived from these forms has only been available from Revenue Canada since the mid-1980s.

5

See, for example, Statistics Canada, *Selected Financial Statistics of Charitable Organizations* (Catalogue 61-212) (November 1975) for 1971 and (February 1976) for 1972 and 1973; Statistics Canada, *Selected Financial Statistics of Charitable Organizations: 1980* (December 1982) (Catalogue 61-519); Statistics Canada, *Selected Financial Statistics of Religious Organizations* (Catalogue 61-211) (September 1975) for 1971, (February 1976) for 1972 and 1973, and (July 1977) for 1974 and 1975. All of these studies used the financial statements submitted by charitable organizations with their T3010 returns, not the financial information contained on the T3010 return itself. The aggregate data from the T3010 return, however, was, in some of these studies, used for validation purposes.

6


7

Sharpe, *supra*, note 3, outlines the difficulties he had with the aggregate T3010 in an appendix: (1) the actual T3010 forms were reviewed, it was discovered some registered charities in fact reported their financial information in the thousands of dollars (dropping three zeros from their T3010 financial data) but that the data was inputted without the three zeros; (2) the T3010 aggregate data for universities were compared with other available sources of information (such as information from the Association of Universities and Colleges of Canada), only 15 out of 51 of the aggregate revenue figures matched, with the remainder downwardly biased; and (3) similar discrepancy was discovered for hospitals. Because of these errors, the T3010 financial data used for the Sharpe study were multiplied by an adjustment factor of 1.5 on the assumption that other reporters would be as likely to exhibit the same errors as hospitals and
universities. A small portion of this adjustment factor was to compensate for inflation between 1991, the date of the data, and 1993, the date of the study.

8

Statistics Canada, Corporation Taxation Statistics (annual publication).

9


10

Sharpe, supra, note 3, estimates $6.6 billion receipted donations for individuals and $1 billion receipted donations for corporations, and an additional $2 billion in unreceipted donations, in 1993. Individuals, according to the Sharpe study, claimed only $3.5 billion in credits. Corporations similarly claimed only $500 million.

11

The first one was published in 1937 by the Dominion Bureau of Statistics.

12


13

Supra, note 5.

14

The 6-part Revenue Canada classification system divides charitable organizations into the following categories: Welfare, Health, Education, Religion, Community, and Miscellaneous. The previous Statistics Canada surveys used the 1970 Standard Industrial Classification which established 9 categories: Charitable Trusts and Funds; Miscellaneous Health Services; Voluntary Welfare Services; Miscellaneous Charitable Organizations; Education and Related Services; Theatrical and Other Stage and Entertainment Services; Miscellaneous Amusement and Recreation Services; Camping Grounds and Trailer Parks; and Religious Organizations. Unfortunately, the lack of correspondence between the two classification systems used in the various Statistics Canada Studies means there is no possibility of direct comparison between the early ones and the 1982 study.

15

Supra, note 3.

The 1986 survey sampled 366,034 individual tax returns using the coded charitable receipts to determine the destination of donations by Revenue Canada's classification. The accuracy of the survey thus depends a great deal on the classification of charitable organizations established when they were first registered, since while organizations change in orientation over time, they seldom change their initial registration classification. On this particularly problematic feature of the survey, however, the authors of the study remark that "verification by Revenue Canada Taxation indicates that the error rate is very small and need not be considered significant overall" (at 2). We rely heavily on the information provided in these studies in ch. 5, infra.

Supra, note 3.


Charities Tax Measure; Survey of CEOs of Canadian Charities (Ottawa: September 1990) [unpublished].

(Ottawa: Statistics Canada, 1989).

N. St-Amand and I. Gunn, Volunteers in New Brunswick (Profile #27) (Ottawa: Secretary of State, 1989); J.W. Catano, Volunteers in Nova Scotia (Profile #28) (Ottawa: Secretary of State, 1989); J.E. Green, The Special Character of Volunteer Activity (Profile #29) (Ottawa: Secretary of State, 1989); S. Murphy and K. Anonsen, Volunteers in Newfoundland (Profile #30) (Ottawa: Secretary of State, 1989); F. MacLeod, Volunteers in British Columbia (Profile #21) (Ottawa: Secretary of State, 1989); P.T. Faid, Albertans As Canada's Leading Volunteers (Profile #22) (Ottawa: Secretary of State, 1989); D. Pearce, Volunteers in Saskatchewan (Profile #23) (Ottawa: Secretary of State, 1989); H. Stevens, Volunteers in Manitoba (Profile #24) (Ottawa: Secretary of State, 1989); J. Gagné, Volunteers in Quebec (Profile #26) (Ottawa: Secretary of State, 1989); A. Cumyn, Youth As Volunteers (Profile #1) (Ottawa: Secretary of State, 1989); L. Graff,
Voluntary Activity in Ontario: How Much Is 4.5 Billion Dollars Worth? (Profile #25) (Ottawa: Secretary of State, 1989); J.W. Catano, Women As Volunteers (Profile #3) (Ottawa: Secretary of State, 1989); L. Stewart, Volunteers Who Work With Children and Youth (Profile #32) (Ottawa: Secretary of State, 1989); A. Harvey, Informal Volunteers: Doing It On Their Own (Profile #33) (Ottawa: Secretary of State, 1989); J. Guay, Self-Help Groups in Canada (Profile #34) (Ottawa: Secretary of State, 1989); M. Prince, Volunteers in the Community: Society and Public Benefit Organizations (Profile #16) (Ottawa: Secretary of State, 1989); B. Brennan, Volunteers in Religious Organizations (Profile #14) (Ottawa: Secretary of State, 1989); M. Emo, Volunteers in Multi-Domain Organizations (Profile #17) (Ottawa: Secretary of State, 1989); J. Benoît, Fire Service Volunteers: Image and Reality (Profile #18) (Ottawa: Secretary of State, 1989); K. Thompson, Volunteering in the International Sector (Profile #19) (Ottawa: Secretary of State, 1989); L. Graff, Voluntary Organizations and Volunteering: Size Doesn’t Matter (Profile #20) (Ottawa: Secretary of State, 1989); J. Kent, Volunteers in Leisure, Recreation and Sports Organizations (Profile #15) (Ottawa: Secretary of State, 1989); A. Lang, Volunteers in the Arts and Culture (Profile #13) (Ottawa: Secretary of State, 1989); K.D. Hart, Volunteers in Organizations Focusing on Employment and Economic Interests (Profile #12) (Ottawa: Secretary of State, 1989); S. Kalef, Volunteers in Law and Justice Organizations (Profile #11) (Ottawa: Secretary of State, 1989); J. Maynard, Volunteers in Education and Youth Development (Profile #10) (Ottawa: Secretary of State, 1989); J. Kent, Volunteers in Health Organizations (Profile #9) (Ottawa: Secretary of State, 1989); M.J. Prince, Volunteers in Social Service Organizations (Profile #8) (Ottawa: Secretary of State, 1989); J. Zenchuk, We, the Volunteers: From the Volunteers’ Perspective (Profile #31) (Ottawa: Secretary of State, 1989); F. MacLeod, Volunteers in Major Metropolitan Centres (Profile #7) (Ottawa: Secretary of State, 1989); B. Brennan, Seniors As Volunteers (Profile #2) (Ottawa: Secretary of State, 1989); P.T. Faid, Urban and Rural Volunteers (Profile #6) (Ottawa: Secretary of State, 1989); S. Kalef, Education and Volunteering (Profile #5) (Ottawa: Secretary of State, 1989); and K.D. Hart, Employment and Volunteering (Profile #4) (Ottawa: Secretary of State, 1989).

24


25

Campaigns Outlook (formerly Fund Programs Planned).

26

IDPAR, Fund Programs Planned, 1990, at iv.

27

For example, the City of Montreal maintains a collection of financial campaigns in the Montreal area, "Campagnes et collectes".
Corporate Giving in Canada, Policies and Practices and Corporate Giving in Canada (Ottawa: CCBC/IDPAR), Tables and Commentary; and J. Rostami, Corporate Community Investment in Canada (Ottawa: CCBC/IDPAR).

29

A. Arlett, P. Bell, and R. W. Thompson, Canada Gives: Trends and Attitudes Towards Charitable Giving and Volunteers (Toronto: Canadian Centre for Philanthropy, 1988) (hereinafter referred to as "Canada Gives"), ch. 2 "Individual Philanthropy".

30

Ibid., ch. 3 "Corporate Philanthropy".

31


32

Canada Gives, supra, note 29, and related text.

33


34


35

Martin, Financing of Humanistic Services, supra, note 34, at 19, stated that the purpose of the book was to examine all organizations "whose common mode of operation was `not-for-profit' and whose common objective was the betterment of the community or society through the offering of health services, educational instruction, welfare services or aid to, or the understanding and development of, the habits, skills, art, instruments, and institution of the Canadian people".

36

See, also, Levens, supra note 1. Most informed observers argue that more statistical and other sorts of information generally is required on the civic economy, of which charities and nonprofits form only a part. In the view of these observers, formal knowledge bases for the civic sector should be developed to parallel those which are available for the market, personal and public sectors. For a recent study of the civic economy, see J. Quarter, Canada's Social Economy: Co-operatives, Non-profits and Other Community Enterprise (Toronto: James Lorimer & Co., 1992).

We do not include this recommendation in the body of our report since it goes well beyond our mandate.
See supra, note 16.

The Auditor General’s Annual Report, 1990, supra, note 6, reported that over 31% of the 63,000 plus registered charities had not filed their annual returns on time. The same study indicated that 17% of the random sample of files examined had annual reports missing for the years 1982 to 1987.

Campaigns Outlook, supra, note 25. In Alberta, information filings under the Public Contributions Act, R.S.A. 1980, c. P-26, used to provide information on Alberta campaigns. That statute was repealed in 1995 by S.A. 1994, c. C-4.5, s. 57, and replaced by the Charitable Fund-raising Act, S.A. 1995, c. C-4.5. The reports are no longer available.

The Canadian Directory to Foundations (Toronto: Canadian Centre for Philanthropy).
CHAPTER 5

OVERVIEW OF THE CHARITY SECTOR IN ONTARIO

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5. Levels of Ontario Government Support for The Charity Sector

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1. INTRODUCTION

This chapter provides a detailed description of the charity sector in Ontario, relying on the best available sources of information. The description is divided into four sections, as follows: Patterns of Giving (Individual and Corporate); Profiles of Charitable Organizations; Foundations; and Levels of Government Support for the Charity Sector.

2. PATTERNS OF GIVING (INDIVIDUAL AND CORPORATE)
   (a) Introduction

Throughout this section of this chapter, we provide descriptions of both individual and corporate donating behaviour by examining that behaviour with respect to three aspects: magnitude (how much is given), generosity (how much is given relative to the donor's
capacity to give), and destination or direction (who are the beneficiaries of donations). For the purposes of this report, the utility of this exercise lies in the light it sheds on the need for a more or less aggressive regulatory or policing regime whose principal function is to protect donors. Such facts as the relative sophistication of donors (indicated, in part, by the demographics of individual giving), the principal destination of donations, and the relative economic importance of donations should, we believe, have a significant influence on the design and size of any public agency established to regulate or police the charity sector.

In this section we also examine patterns of individual volunteering behaviour. This examination is relevant to the extent that it provides information on the qualifications of the people who run charitable organizations, and therefore on the sector's own administrative and self-regulatory capabilities and on its capacity to respond to a regulatory regime of greater or lesser complexity.

Two words of caution are worth emphasizing at the outset. First, as discussed in chapter 4, the reliability of the various sources of data varies considerably. Therefore, the weight attached to any empirical claim made in this chapter, or in any other study, ought to be adjusted accordingly. This word of caution applies especially to the quantification of donations. One recent study of donation behaviour, for example, found it necessary to multiply the donation data from the aggregate T3010 data by a factor of 1.5 to account for what the author of the study perceived to be reporting inaccuracies. Second, we have not restricted ourselves to a single source of data, and therefore the facts and figures provided throughout this chapter vary from table to table. Readers are therefore cautioned to look at the provisos stated in the notes to the tables and to recall the inherent limitations of the sources used. Given these two aspects of the data that follow, our conclusions must remain more imprecise and tentative than desirable.

We start, by way of introduction, with Table 1 and Figure 1.1. These provide an indication of the historical pattern of donation support for charitable organizations in Canada. By far the largest source has been individual donations, which comprise between eighty-three and eighty-eight percent of total donations for the period 1969-1985. Individual donations during this period also show a somewhat stable pattern of both absolute and relative growth. Corporate giving, by contrast, appears to fluctuate with the fortunes of the economy.

Figure 1.1

Distribution of Donations by Source: Individuals, Corporations and Foundations,

Canada, 1969-1985
<table>
<thead>
<tr>
<th>Year</th>
<th>Individuals</th>
<th>Corps.</th>
<th>Found.</th>
<th>Total</th>
<th>Amount of Donations (all dollar figures in millions)</th>
<th>Percentage Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1969</td>
<td>$667</td>
<td>$69</td>
<td>$38</td>
<td>$774</td>
<td>86.2%</td>
<td>8.9%</td>
</tr>
<tr>
<td>1970</td>
<td>663</td>
<td>60</td>
<td>40</td>
<td>763</td>
<td>86.9%</td>
<td>7.9%</td>
</tr>
<tr>
<td>1971</td>
<td>670</td>
<td>61</td>
<td>45</td>
<td>776</td>
<td>86.3%</td>
<td>7.9%</td>
</tr>
<tr>
<td>1972</td>
<td>733</td>
<td>81</td>
<td>50</td>
<td>864</td>
<td>84.8%</td>
<td>9.4%</td>
</tr>
<tr>
<td>1973</td>
<td>808</td>
<td>93</td>
<td>55</td>
<td>956</td>
<td>84.5%</td>
<td>9.7%</td>
</tr>
<tr>
<td>1974</td>
<td>910</td>
<td>122</td>
<td>60</td>
<td>1,092</td>
<td>83.3%</td>
<td>11.2%</td>
</tr>
<tr>
<td>1975</td>
<td>1,043</td>
<td>96</td>
<td>65</td>
<td>1,204</td>
<td>86.6%</td>
<td>8.0%</td>
</tr>
<tr>
<td>1976</td>
<td>1,196</td>
<td>118</td>
<td>70</td>
<td>1,384</td>
<td>86.4%</td>
<td>8.5%</td>
</tr>
<tr>
<td>1977</td>
<td>1,265</td>
<td>134</td>
<td>75</td>
<td>1,474</td>
<td>85.8%</td>
<td>9.1%</td>
</tr>
<tr>
<td>1978</td>
<td>1,406</td>
<td>144</td>
<td>85</td>
<td>1,635</td>
<td>86.0%</td>
<td>8.8%</td>
</tr>
<tr>
<td>1979</td>
<td>1,564</td>
<td>171</td>
<td>95</td>
<td>1,830</td>
<td>85.5%</td>
<td>9.3%</td>
</tr>
<tr>
<td>1980</td>
<td>1,770</td>
<td>195</td>
<td>110</td>
<td>2,075</td>
<td>85.3%</td>
<td>9.4%</td>
</tr>
<tr>
<td>1981</td>
<td>2,025</td>
<td>228</td>
<td>125</td>
<td>2,378</td>
<td>85.2%</td>
<td>9.6%</td>
</tr>
<tr>
<td>Year</td>
<td>Individual Donations</td>
<td>Organizational Donations</td>
<td>Total Donations</td>
<td>Percentage of Total</td>
<td>Corporate Donations</td>
<td>Foundation Donations</td>
</tr>
<tr>
<td>------</td>
<td>----------------------</td>
<td>--------------------------</td>
<td>-----------------</td>
<td>--------------------</td>
<td>--------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>1982</td>
<td>2,248</td>
<td>164</td>
<td>135</td>
<td>2,547</td>
<td>88.3%</td>
<td>6.4%</td>
</tr>
<tr>
<td>1983</td>
<td>2,470</td>
<td>256</td>
<td>145</td>
<td>2,871</td>
<td>86.0%</td>
<td>8.9%</td>
</tr>
<tr>
<td>1984</td>
<td>2,800</td>
<td>250</td>
<td>155</td>
<td>3,205</td>
<td>87.4%</td>
<td>7.8%</td>
</tr>
<tr>
<td>1985</td>
<td>3,050</td>
<td>251</td>
<td>166</td>
<td>3,467</td>
<td>88.0%</td>
<td>7.2%</td>
</tr>
</tbody>
</table>

Source: *Canada Gives*, c. 1, Appendix, Table II-I

Original Sources: Individual donations were estimated by *Canada Gives* from Revenue Canada *Taxation Statistics* and Canada Expenditure Surveys. Corporate donations were taken from Statistics Canada *Corporation Taxation Statistics*. Foundation donations for the years 1983-1985 were taken from the Canadian Centre for Philanthropy and, for earlier years, were estimated by *Canada Gives*.

(b) **Individuals: Donations and Volunteering**

(i) **Historical Patterns of Individual Donations, 1946-1980**

(a) **Magnitude**

As one would expect, over the years, the burden of donation support for the sector has shifted from the lower income ranges to the middle and upper income ranges (with over forty percent of donations in 1980 coming from persons in the $10,000-$25,000 income range, compared to under ten percent from the same group in 1946) (Figures 2.1 and 2.2). This pattern is explained almost entirely by inflation.

**Figure 2.1**

*Percentage of Total Donations by Income Class, Canada, 1946*
One interesting feature of the pattern of individual donations in the 1946-80 period, illustrated graphically in Figure 2.3, is the marked decline in total donations from 1961 to 1970. A significant portion of this decline was probably due to the introduction of the more rigorous system of regulation of charitable organizations under the federal *Income Tax Act*, introduced in January 1967. The new central registration system, together with the reform of receipting practices that preceded it in the early 1960s, appears to have been effective in eliminating questionable and fraudulent receipting practices.
Figure 3.1 shows that the real value of donations per capita increased minimally over the decade of the 1970s and increased only slightly in the early 1980s. This pattern suggests that the capacity of charitable organizations to meet the demands placed on them by Canadian society, as determined or affected by real donation dollars available to spend per Canadian, remained roughly the same during this period. This is of some interest to the present study since it indicates that the protection of donor dollars was economically of not much greater importance at the beginning of the period than it was at the end.
Figure 4.1 makes evident three further facts relating to the historical pattern of individual giving in Canada. It shows, as one might expect, that the amount of annual donations per donor, by income class, rises substantially as one moves from lower to higher income classes, in every year sampled in the period 1961 to 1980. In 1980, for example, donors with income of over $50,000 gave, on average, $1,768, compared to $581 for donors earning $10,000 to $24,999. More remarkable is the decline, from 1961 to 1970, in annual donations per donor in all income groups, but especially in the two upper income groups. There are a number of possible explanations for this decline, in addition to the one suggested above that the early-1960s federal reforms eliminated questionable receipting practices: increased propensity on the part of Canadians to consume or to save; the increasing burden of taxes; and the fact that, because of inflation, all income ranges had fewer dollars to spend on charity. Finally of interest from Figure 4.1 is the modest increase in annual donations per donor in the middle and lower income classes and the levelling off or modest decline in donations for the two upper income groups, for the period 1970-80. Three possible explanations for the former are: a greater number of transfers, in the lower and middle income groups, of charitable donation deductions between spouses to reduce one spouse’s income to the level required to allow the other to claim him/her as a dependent; the increased use of receipts by donors in the lower and middle income groups; and, most probably, the fact that the average incomes of the lower and middle groups were rising as fast as or faster than those of the upper groups.
One last relevant fact is illustrated in Figure 5.1: the relative number of taxpayers claiming tax deductions declined in every class in virtually every year sampled.

Figure 5.1

% of Tax Filers Claiming Charitable Deductions, by Income Class, Selected Years, Canada 1961-1980
Taken together with the claim that the real value of total donations per Canadian remained about the same from 1970 to 1985 (Figure 3.1), Figures 4.1, and 5.1 suggest that the culture of giving in Canada during the decade of the 1970s (and perhaps well before) may have been stagnating. Although the sector's real donation income per Canadian remained about the same, relatively fewer and fewer people in all income groups were supporting it, and in the upper income levels, they were supporting it with modestly smaller donations. It is true, however, that, according to several absolute measurements, such as total individual donations, total individual donations adjusted for inflation, and total number of donors, the sector's donation support was growing.

(b) *Generosity*

The claim alleging a stagnating culture of giving is reinforced by some of the data available to measure the generosity of Canadians over the 1946-80 period. As Figures 6.1 and 7.1 illustrate, donations measured both as percentage of income and of disposable income declined during the 1946-70 period, and levelled off in the late 1970s at a historic
low of .5 of income.\textsuperscript{10} The decline in generosity, measured thus, is a phenomenon witnessed in every income class almost without exception.

Figure 6.1

\textbf{Total Donations as \% of Total Income, Selected Years, Canada, 1946-1980}

Figure 7.1

\textbf{Total Donations as \% of Total Disposable Income, Selected Years, Canada, 1946-1980}

Figure 8.1 indicates which of the two possible factors had the greater influence. It suggests that stagnation in the culture of giving was accountable only in small measure by the people who do give, giving less, since the average donation as a percentage of
average income in all but the lower income ranges stays roughly the same throughout the period. Rather, the stagnation was due more to the decline in the proportion of the population who gave. Taking the analysis one step further, it seems implausible to attribute much of this latter development to a lack of confidence on the part of prospective donors in the efficiency, effectiveness, or honesty of the sector, since not only does the available information suggest that the credibility of the sector is not a problem in the eyes of the general public, but even if it were, all prospective donors can readily see that there are a multitude of charitable organizations to which one could give without any worry that the donation would end up advancing the cause of charity. This line of reasoning tends to suggest that there is very little a regulatory or policing agency could have contributed to affect these developments in the culture of giving.

Figure 8.1

Annual Donations per Donor as % of Average Income, by Income Class, Selected Years, Canada 1961-1980

c. Direction

By far the consistently preferred destination of individual donation dollars during the decade of the 1970s and early 1980s was religion. Thus, for example, of the over $3 billion in estimated individual donations in 1985, over $2.2 billion of them went to religious organizations. This fact is also of some importance to this study since one could reasonably argue that charitable donors donating to religions require little in the way of
state-fostered protection. We shall see, however, that the current patterns of giving show a marked increase in relative support for other segments of the sector.

Figure 9.1

Donations to Non-Religious Charities as % of Total Individual Donations, Canada, 1969-1985

(ii) Donations: Current Patterns of Individual Donations

a. Introduction

The following tables depict the recent and current situation in Ontario and Canada. We use three sources of information throughout: Taxation Statistics for 1985, 1986, and 1987 ("TS"), VAD; and the Sharpe study. The reason we use three sources over several years is to increase the strength of the limited empirical claims we make. While readers are again reminded of the inherent limitations of each of these three sources, two further notes of caution are required.

(1) The figures from the Taxation Statistics are taken from the line item "charitable deductions" and therefore do not include donations included in "other deductions", such as gifts to the Crown. The figures available from the VAD study include all donations to the following types of recipients:

1. Welfare Institutions
2. Health Institutions
3. Education Institutions
4. Religious Institutions
5. Benefits to Community
6. Other
7. Registered Canadian Athletic Associations
8. Colleges and Universities
9. Foreign Charitable Institutions

10. Gifts to Federal, Provincial and Municipal Governments

Note that only the first six classifications from the VAD study match the Revenue Canada categorization (that is, Welfare, Health, Education, Religions, Benefits to the Community, and Other). This is because the VAD study disaggregated colleges and universities and foreign charitable institutions, and added athletic associations and gifts to government to the list. Due to the manner in which the VAD statistics are presented, it was not always possible to include items 7, 8, and 9 in the compilations that follow. As a matter of course, we excluded item 10. Otherwise, for the reasons stated in chapter 4, one would expect the VAD statistics to be more accurate. Readers should recognize that the figures cited in both the Taxation Statistics and the VAD statistics are for receipted donations as declared by tax filers. Estimates of donations from other sources are often higher because they attempt to measure all donations, receipted and unreceipted, and/or because they include receipted donations that are, for whatever reason, not declared by tax filers.

(2) We use the Sharpe study to provide more current information. It purports to be accurate as of 1993. However, the Sharpe study relied on T3010 data, not individual or corporate taxation statistics. This source consistently reports higher donation income since it includes all donations declared and undeclared, receipted and unreceipted. Further, the Sharpe study manipulated the data in two ways. First the data was reorganized into slightly different classifications, as follows:

1. Places of Worship
2. Hospitals
3. Teaching Institutions
4. Other Charitable Organizations
5. Public Foundations
6. Private Foundations

This reorganization makes it more difficult to compare the Sharpe study data with the VAD data. Second, the Sharpe study multiplied the T3010 data by a factor of 1.5 to adjust for what it regarded as downwardly biased reporting errors and, since it uses 1991 T3010 data, inflation. For the most part, we refer to the Sharpe study only in notes, to provide additional commentary on our own conclusions. However, to give the reader a sense of the magnitude of the divergence in absolute values, the Sharpe study estimates total 1993 individual donations to be $8.2 billion. The VAD study estimated total 1986 individual donations to be only $2.2 billion. The 1991 raw T3010 data adjusted by the Sharpe study, however, states that total individual donations were $4.7 billion (1986 dollars) of which $3.9 billion (1986 dollars) were receipted and $.8 billion (1986 dollars) were unreceipted.\textsuperscript{15} It is hard to know where in this range the truth lies. Obviously, our estimates are much too low, but it is also not clear whether the Sharpe estimates are too high. The important point is that any conclusions to be drawn from any of this data must be appropriately qualified. We rely on the taxation statistics and not on the T3010 data since our objective is to analyze the demographic patterns of individual and corporate giving. Very few of our conclusions are affected by the discrepancies in the quantification of donations.

b. \textit{Ontario in General}

(1) \textit{Magnitude}

Tables 10 and 12 and Figure 11.1 indicate several important facts concerning the magnitude of current charitable donations in Ontario. First, the total amount of donations in the relevant years is approximately $1 billion. Second, Ontario's total donations, as a proportion of the Canadian total, is approximately forty-six percent, exceeding the Ontario proportion of the Canadian population by about ten percentage points. What this indicates that Ontarians donate more \textit{per capita} than Canadians in general is confirmed in the higher total donations per tax filer and per donor (Figure 12.1), and the higher proportion of tax filers reporting donations (Table 13). Third, the average amount donated in Ontario is roughly $500 per donor per year, or $135 per tax filer per year. These amounts (admittedly low estimates) are helpful in assessing the required level of government involvement, in purely economic terms.

<table>
<thead>
<tr>
<th>Total Charitable Donations, Ontario and Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ Thousands</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Ontario</strong></td>
</tr>
<tr>
<td>1985 (TS) $905,604</td>
</tr>
<tr>
<td>1986 (TS) $999,585</td>
</tr>
<tr>
<td>1987 (TS) $1,144,038</td>
</tr>
<tr>
<td>1986 (VAD) $1,030,876</td>
</tr>
<tr>
<td><strong>Canada</strong></td>
</tr>
<tr>
<td>1985 (TS) $1,994,046</td>
</tr>
<tr>
<td>1986 (TS) $2,172,933</td>
</tr>
<tr>
<td>1987 (TS) $2,441,136</td>
</tr>
<tr>
<td>1986 (VAD) $2,216,303</td>
</tr>
</tbody>
</table>
Ontario as % of Canadian total  
45.4%  46.0%  46.9%  46.5%  
Ont. pop. as % of Can. pop.  
35.8%  35.9%  36.2%  35.9%  

Figure 11.1
Charitable Donations per Donor and per Tax Filer, Ontario and Canada, 1985-1987

<table>
<thead>
<tr>
<th>Number and Percentage of Tax Filers Reporting Donations, 1986 (VAD)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Number of Tax Filers Reporting Donations</strong></td>
</tr>
<tr>
<td>Ontario</td>
</tr>
<tr>
<td>Canada</td>
</tr>
</tbody>
</table>

Note: 1986 VAD data excludes items 7, 8, and 9.ss

(2) Generosity

Ontarians as a group give a larger percentage of their total income and a larger percentage of their disposable income than do Canadians in general, as a group (Figure 13.1) but, interestingly, Ontarians are slightly less generous than Canadians in general if generosity is measured by the average size of annual donations per donor as a percentage of average income (Figure 14.1). This means that there are proportionately more donors
in Ontario than in Canada in general confirming Table 12 but that Ontario donors give a slightly smaller percentage of their income.

Figure 13.1

Total Charitable Donations as % of Total Income & Total Donations as % of Total Disposable Income, Ontario and Canada, 1985-1987

Figure 14.1

Average Size of Total Individual Donations as % of Average Income, Ontario and Canada, 1985-1987

(3) Direction
Figure 15.1 shows two things. First, although the bulk of donation dollars in Ontario go to Religion (60.51 percent), the proportion is noticeably less than the proportion of donations to Religion in the rest of Canada (69.35 percent). Ontario's culture of giving is, then, slightly more secular in orientation. Second, the four preferred secular charities Welfare (10.37 percent), Health and Education (7.6 percent each), and Arts and Culture (1.75 percent) are disproportionately larger destinations in Ontario compared to the rest of the country.

(4) Conclusion

The figures provided thus far make possible a rudimentary analysis of how much of a need there is for government supervision of the sector aimed at protecting donor dollars. That need, we would argue, should be assessed, in part, on the basis of the amount of donation dollars at risk. On the assumption that dollars donated to Religion ($685 million) and the United Way ($100 million) require little supervision, that would leave roughly $250 million worth of annual donations in Ontario possibly open to the need for further government scrutiny. A large portion of these donation dollars, however, are donated to major public institutions such as hospitals and universities and to obviously credible organizations such as health research organizations, social planning councils, the Red Cross, and private schools. What remains when Health, Education and Universities
are taken out might be $100 million, or less, a significant sum but considerably less than the $1 billion we started with.  

\[16\]

c. **Donations as a Function of Province of Donor**

(1) **Magnitude**

Figure 16.1 gives some indication of the size of the charity sector in Ontario compared to its size in other provinces. One implication of Ontario's dominance as a source of individual donations is that any regulatory initiatives in Ontario would very likely affect the sector Canada wide. For example, national charities headquartered in Ontario that rely on Ontario donations for, say, fifty percent of their revenues could very well respond to an intrusive and burdensome regulatory regime by simply nationalizing the Ontario standards, especially if the standards conformed to valid sector norms. Of course, national charities might just choose to move their headquarters to another province, but to the extent that the aim of the unattractive regime was to protect individual donations, it is unlikely that this exit option would be a completely successful strategy, since the regime would still no doubt regulate the use of funds collected in Ontario and it would undoubtedly continue to regulate solicitations in Ontario, regardless of the headquarters of the soliciting charity. The exit option would, however, be a viable strategy for foundations, private and public, new and old, which do not rely on ongoing donations as a source of funds.

\[\text{Figure 16.1} \]

**Percentage Distribution of Total Donations by Province, 1986**
The observation that total individual donations in Ontario are disproportionately large must be balanced by various relative measurements which show that the culture of giving is as strong or stronger in other provinces, and therefore as much in need if at all of government protection. Thus, when compared with Ontario, annual donations, per donor, are higher in four other provinces (Figure 17.1); per tax filer, higher in two other provinces (Figure 18.1); and the percentage of tax filers claiming deductions is higher or roughly equivalent in four other provinces (Figure 19.1).

Figure 17.1

Annual Donations per Donor, by Province, 1986

Figure 18.1

Annual Donations per Tax Filer, by Province, 1986
(2) Generosity

Our three measures of generosity confirm these points. Ontario falls to fifth and sixth places when giving is measured as a proportion of total income (Figure 20.1) and as a proportion of disposable income (Figure 21.1), respectively; Ontario falls all the way to ninth place when average annual donations are expressed as a percentage of average income (Figure 22.1). These facts confirm the point made above that a higher proportion of Ontarians make donations than Canadians in most other provinces, but that the level of giving expressed relative to various measures of capacity to give is lower.

Figure 20.1

Total Donations as % of Total Income, by Province, 1986
Figure 21.1

Total Donations as % of Total Disposable Income, by Province, 1986

Figure 22.1

Annual Donations per Donor as % of Average Income, by Province, 1986
(3) Direction

For various reasons of history, Quebec's pattern of giving is markedly different from that prevailing in the rest of the country. The point made above regarding the slightly more secular orientation of Ontario giving is highlighted again in Figure 23.1. Indeed, the reason the Canadian average for donations to religious charities is as low as 69.35 percent is due to the patterns of religious giving in Ontario and Quebec.

Figure 23.1

Destination of Donations as % of Provincial Total, 1986, Selected Provinces
(4) Conclusion

Three points are worth emphasizing. First, any regime in Ontario is going to affect national charities in a significant way. However, second, it is inconceivable that Ontario's position as the major source of funds will change, even if the regime in Ontario is perceived to be hostile or overly aggressive by many. This is not to say, however, that some charities, especially private foundations, would not leave. Third, it is clear that several other provinces have as much or more interest in protecting donor dollars as Ontario.

d. Donations as a Function of Income

(1) Magnitude

Expressing giving patterns as a function of income provides some help in determining the need for further public regulation of the charity sector aimed at protecting donor dollars. To what extent are donors themselves capable of assessing the efficiency, effectiveness, and honesty of the organizations to which they give? One may begin to address this question by looking at the demographics of giving. Thus, we look at income, age, and occupation.

Just over thirty-five percent of total Canadian donations (over $775 million) come from individuals earning between $10,000 and $30,000 per annum and over twenty-three percent (over $520 million) from earners in the $60,000 plus per annum range (Figure 24.1). The size of annual donations per donor increases with income, from approximately $330 for individuals in the $10,000 to $20,000 annual income range to nearly $1,000 for
individuals in the $60,000 to $100,000 range, and over $3,000 for people who earn over $100,000 annually (Figure 25.1).

The proportion of donors in each income class increases as one moves from the lower to the higher income ranges. (Figure 27.1). That proportion increases from 26.17 percent in the $10,000 to $20,000 range to 70.25 percent in the $60,000 to $100,000 range, and over seventy-five percent in the over-$100,000 income range. To some extent, these figures are distorted by the fact that they are measurements of receipted and declared donations. One could quite legitimately surmise that informal unreceipted and undeclared giving could well increase the proportion of donors in all classes.
(2) Generosity

The picture of this particular demographic variable is completed in Figures 28.1 and 29.1. These tell us that although the high income earners as a group donate a higher percentage of their income than the lower income earners the range is from .17 percent to 1.91 percent (Figure 28.1) the personal cost of giving to the actual donors is much higher in the three lowest income ranges (Figure 29.1).
(3) Direction

The figures available which indicate the direction of giving according to income show a preponderance of donors in the lower ranges favouring religion, and a significantly larger proportion of people in the $60,000 plus ranges preferring welfare, health, and education (Table 30.1). From the point of view of the beneficiaries, the pattern is the same: a comparatively larger proportion of the donations to religion come from people in the lower income ranges and a comparatively larger proportion of the donations to welfare, health, and education charities comes from people in the higher income ranges (Table 31.1).
(4) Conclusion

We draw two tentative conclusions. First, assuming for the moment that higher income earners have a greater capacity for vetting charitable organizations than do lower income earners, the fact that the bulk of donations in the less than $5,000 to $39,999 per year income ranges go to religion (between seven and fourteen percentage points more than the national rate of 69.35 percent) tends to indicate less of a need for a government agency to supervise the sector for the benefit of donors with the (assumed) lower capacity to screen charitable organizations for themselves. One could turn this observation on its head, of course, and argue that the donation pattern is skewed towards religion in these income ranges just because of the lack of capacity to screen charitable organizations. If this were true, one would expect to hear more from charitable organizations in favour of greater government supervision. Second, it is noteworthy that by at least one measure of donor sophistication the usage of tax receipts sophistication increases with wealth. The rate of tax receipt usage, taken together with the fact that the higher income ranges have a greater propensity to support secular charities, suggests that there are in fact two cultures
of giving in Canada: wealthy and secular, on the one hand, and not-so-wealthy and religious, on the other.

c. Donations as a Function of Age

(1) Magnitude

The largest supporters of the charity sector measured by total annual donations are individuals in the forty to fifty and fifty to sixty age ranges, followed closely by the thirty to thirty-nine, sixty to sixty-nine, and seventy and over age groups (Figure 32.1).

Figure 32.1

Source of Total Donations, by Age Group, Canada, 1986

However, the picture changes considerably when one looks at the average size of annual donations by age group. The average annual donations of people in the seventy-plus group are the largest, at $755; the amount of average annual donations declines substantially with each drop in age grouping (Figures 33.1 and 34.1).

Figure 33.1

Annual Donations per Donor, by Age Group, Canada, 1986
The level of giving of the various age groups is confirmed by Figure 35.1, which tracks receipted and declared donations, ranging from over forty-two percent for the over-seventy age group to just over seventeen percent for the twenty to twenty-nine age group.
(2) Generosity

From Figure 37.1, it is readily apparent that there is also a marked correlation between age and generosity, with relatively more people in higher age groups donating significantly higher proportions of their income.

Figure 37.1

Total Donations as % of Annual Income, by Age, Canada, 1986
(3) Direction

Figure 38.1 permits several interesting observations. First, religion as a destination is (roughly) equally supported by all age groups over thirty (as is welfare and community). Second, "others" as a destination receives markedly more support from people in age groups under forty than over forty. This pattern may be indicative of a preference in younger donors for less well-established categories of charitable giving, such as environmental organizations and sports organizations. Third, education is most strongly supported by people in the forty to fifty age range (perhaps because they have school-age children). Fourth, health is most strongly supported by donors in seventy-plus range, followed closely by the sixty to seventy, then the fifty to sixty, age ranges. This latter pattern, interestingly, tends to confirm a point made by some economic theorists of the sector who regard donations as a form of voluntary price discrimination, with the older age groups showing a willingness to pay more for health as they move closer to the end of their life. On this and related points, see further, chapter 9.
(4) Conclusion

The four points made under section 2(b)(ii)e(3) "Direction" are the most relevant and interesting with respect to "age" as an explanatory factor.

f. Donations as a Function of Occupation

Employees, as a category, are the largest single source of donations with over fifty percent of total donations (Figure 39.1). Yet their annual donation per donor $379.80 is among the lowest (Figure 39.2). Although a high proportion of employee donations go to religion, a good deal go to secular organizations, thus indicating a very important need in the sector to canvass for funds widely among "ordinary" working people. The donations of farmers, fishermen, pensioners, and salesmen are very heavily skewed to religion; those of self-employed professionals and investors, relatively speaking, are skewed to
more secular organizations (Figure 39.3). The latter group also tends to be in the highest annual donation per donor groups. If one assumes that donors in this group are more sophisticated and in less need of protection, then the fact that more of their giving is skewed away from religion is fortuitous, since whatever screening that needs to be done can be done by them, not the state. Conversely, if one assumes that of all the categories, religion requires the least supervision and if one assumed that fishermen, farmers, and pensioners have a lower capacity for screening, then the donating preferences of the latter are also a fortuitous match.

Figure 39.1

Source of Donations, by Occupation, Canada, 1986

Figure 39.2

Average Annual Donation per Donor, by Occupation, Canada, 1986
Figure 39.3

Destination of Donations, by Occupation, Canada, 1986
(iii) **Volunteering: Current Patterns**

In this subsection we look briefly at the demographics of volunteering. Volunteer work is as much a source of support for the sector, and as much a part of the tradition of charity, as giving in the form of gifts; indeed, in many ways, it is more central to notions of charity than is donating money. While this is true, volunteering does not present any serious problems that are in any way central to the present study. The present utility of the following information is that it provides a profile of the people working in the organizations which accept and deploy donations. This information may be helpful in determining the extent to which the sector can run on trust, since, one might surmise, what motivates volunteers to volunteer would also motivate them to be effective and honest with donated money. This information will also help determine how capable the sector is of responding to a more or less complex regulatory regime. All of the information in what follows is taken from *Giving Freely* and from the Sharpe study.

The Sharpe study, relying on its own survey of Canadian charities, estimated that Canadian charities rely on a volunteer base of 4.5 million volunteers per year, equivalent
to sixteen percent of the Canadian population. This does not mean that 4.5 million individuals volunteered; only that charities rely on a volunteer base of this size.

Figure 40.1 illustrates one fact of relevance to our study. Ontario’s proportion of volunteers in Canada is roughly equal to its proportion of the country’s population: Ontario has thirty-five percent of the country’s volunteers and 36.8 percent of its population. This contrasts sharply with what was observed for donations above. The level of volunteering is much higher in British Columbia, Saskatchewan, and Manitoba; these are three provinces, it will be recalled, where the measures of generosity were also higher than the national average.

Another general observation is that there is a noticeable gap between rates of volunteering for men versus women. In some provinces, the gap is very wide (seventeen percentage points in Prince Edward Island), and in other provinces, it is non-existent (Quebec), or noticeable but small (five percent in Ontario). Interestingly, the gap is smallest in the country’s two largest provinces. One could reasonably speculate that these patterns reflect the different stages of deterioration of traditional male/female social roles, and the consequent transformation of social organizations.

The patterns of the participation rates for men and women across various age groups is interesting. The highest rates of volunteers, for both sexes, are in the thirty-five to fifty-five age range.

Figure 40.1

Volunteers, by Province, as % of National Total, 1987
Interestingly, volunteer rates are also positively correlated to levels of education and household income (Figures 42.1 and 43.1).
Finally, Table 44 provides an indication of the motives of volunteers. Altruism, the desire to work, and the advancement of family are the major influences.
### Table 44

**Reasons for Volunteering, Canada, 1987**

<table>
<thead>
<tr>
<th>Reason</th>
<th>TOTAL VOLUNTEERS</th>
<th>VERY IMPORTANT</th>
<th>SOMEWHAT IMPORTANT</th>
<th>NOT TOO IMPORTANT</th>
<th>NOT AT ALL IMPORTANT</th>
<th>NOT STATED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meeting people, companionship</td>
<td>100%</td>
<td>35%</td>
<td>39%</td>
<td>14%</td>
<td>6%</td>
<td>6%</td>
</tr>
<tr>
<td>Fulfilling religious obligations or beliefs</td>
<td>100%</td>
<td>23%</td>
<td>21%</td>
<td>18%</td>
<td>32%</td>
<td>7%</td>
</tr>
<tr>
<td>Learning new skills</td>
<td>100%</td>
<td>29%</td>
<td>36%</td>
<td>16%</td>
<td>11%</td>
<td>8%</td>
</tr>
<tr>
<td>Helping others</td>
<td>100%</td>
<td>63%</td>
<td>29%</td>
<td>2%</td>
<td>0%</td>
<td>5%</td>
</tr>
<tr>
<td>Helping a cause one believes in</td>
<td>100%</td>
<td>60%</td>
<td>28%</td>
<td>4%</td>
<td>2%</td>
<td>6%</td>
</tr>
<tr>
<td>Feeling that one has accomplished something</td>
<td>100%</td>
<td>54%</td>
<td>32%</td>
<td>6%</td>
<td>2%</td>
<td>6%</td>
</tr>
<tr>
<td>Doing something one likes to do</td>
<td>100%</td>
<td>55%</td>
<td>31%</td>
<td>7%</td>
<td>2%</td>
<td>6%</td>
</tr>
<tr>
<td>Helping to maintain and promote one's own heritage or language</td>
<td>100%</td>
<td>15%</td>
<td>22%</td>
<td>23%</td>
<td>33%</td>
<td>7%</td>
</tr>
<tr>
<td>Having influence in community affairs</td>
<td>100%</td>
<td>11%</td>
<td>28%</td>
<td>27%</td>
<td>27%</td>
<td>7%</td>
</tr>
<tr>
<td>Improving one's job opportunities</td>
<td>100%</td>
<td>19%</td>
<td>20%</td>
<td>19%</td>
<td>34%</td>
<td>8%</td>
</tr>
<tr>
<td>Feeling an obligation to help other volunteers</td>
<td>100%</td>
<td>17%</td>
<td>39%</td>
<td>21%</td>
<td>15%</td>
<td>7%</td>
</tr>
<tr>
<td>Using one's own skills and experience</td>
<td>100%</td>
<td>36%</td>
<td>42%</td>
<td>11%</td>
<td>5%</td>
<td>7%</td>
</tr>
<tr>
<td>Doing work that benefits one's own children, family, or self</td>
<td>100%</td>
<td>43%</td>
<td>26%</td>
<td>11%</td>
<td>13%</td>
<td>7%</td>
</tr>
<tr>
<td>Feeling one owes something to one's community</td>
<td>100%</td>
<td>21%</td>
<td>40%</td>
<td>19%</td>
<td>13%</td>
<td>6%</td>
</tr>
<tr>
<td>Doing something with one's spare time</td>
<td>100%</td>
<td>20%</td>
<td>31%</td>
<td>21%</td>
<td>22%</td>
<td>6%</td>
</tr>
</tbody>
</table>

*Source: Giving Freely.*

Direction of volunteering is indicated in Figure 45.1. Once again, religion leads, followed closely by sports, education, health, and social services, but interestingly the relative importance of religion as a destination for volunteers is nowhere near what it is for donations. Men predominate in sports and recreation organizations, environment and
wildlife organizations, and employment and public benefit organizations; women predominate in the remaining organizations (the majority), but especially in health.

Figure 45.1

Volunteer Jobs, by Type or Organization and Sex, Canada, 1987

Figure 46.1 indicates that the vast majority of volunteers are involved in fundraising and administrative work. (On a generous interpretation of these two terms, one would include, from Figure 46.1, the terms "fundraising, canvassing for funds", "providing information", "organizing events", "sitting as a board member", "recruiting volunteers", and "office work".)

Figure 46.1

The Top Ten Activities of Volunteers, Canada, 1987
(iv) Corporate Giving

One might expect that donations from the business sector would require little in the way of state protection: corporate donors normally should have the wherewithal to vet charitable organizations for their effectiveness and bona fides. Still, one service government might usefully perform for corporate (and individual) donors would be to provide information on funds sought by charitable organizations. Here, we review briefly some of the salient features of corporate giving.

a. Magnitude

Corporate donations measured in real dollars varied between a low of $200 million and a high of $359 million between 1969 and 1987. The per capita value of donations varied between $8.30 and $14. As observed previously, there is a marked correlation between corporate giving and the fortunes of the economy (Figure 47.1).  

Figure 47.1

Purchasing Power of Corporate Donations, Canada, 1969-1987
The largest sources of corporate donations are the financial industries sector and the manufacturing sector (Figure 48.1).

Figure 48.1

Percentage and Distribution of Donations by Major Industrial Group, Canada, 1985
b. Generosity

A convenient measure of the generosity of corporations is to express donations as a function of pre-tax corporate profits. Figure 49.1 shows some variability but an overall trend of decline, paralleling that noticed in the case of individual donations.

Figure 49.1

Corporate Donations as % of Corporate Profits, Canada, 1969-1987

There is also a great deal of variation between sectors, with two of the poorer performers in total dollars donated the retail sector and the agricultural sector performing at the upper end of this measurement (Figures 50.1 and 51.1).

Figure 50.1

Donations as % of Profits by Major Industrial Group, Canada, 1985
Figure 51.1

Donations as % of Profits by Major Industrial Group, Canada, 1987

c. Direction
By far the largest recipient of corporate donations in both 1979 and 1989 was health and welfare, followed closely by education, then culture (Figures 52.1 and 53.1).

Figure 52.1

Destination of Corporate Donations, 1979

Figure 53.1

Destination of Corporate Donations, 1989
3. PROFILES OF CHARITABLE ORGANIZATIONS

(a) Registration Statistics

All of the statistics in this subsection are taken from the Revenue Canada registration statistics for the years indicated.

Figures 54.1 and 55.1 indicate that Ontario's share of registered charities declined between 1980 and 1990, from over thirty-nine percent to just under thirty-five percent. The largest increases in the relative number of registered charities occurred in Quebec and Newfoundland, perhaps an indication of the transformation of charities in these provinces from church organizations to secular organizations.

Figure 54.1

Percentage Distribution of Registered Charities by Province, 1980
Figures 56.1 and 56.2 indicate a noticeable movement away from religious charities to secular charities in the decade of the 1980s. This shift is also evident in some of the donation statistics examined above in section 1. Figure 9.1 showed a very slight decline in donations to religious organizations during the first five years of the decade, with donations to religious organizations hovering at around seventy-five percent of total donations, and Table 15 indicated a more severe drop in religious donations as of 1986 to just under seventy percent of total donations. If these statistics are indicative of a
continuing trend towards the secularization of the sector in Canada, then the case for the public regulation of the sector may need to be addressed again when this transformation reaches the point where the influence of religious organizations in the sector is no longer sufficient to assure or contribute significantly to its integrity.

Figure 56.1

Registered Charities by Category, 1980

Figure 56.2

Registered Charities by Category, 1990
Tables 57 and 58 indicates the makeup of the charity sector by category and by province in 1990. As can be seen, some categories are disproportionately high or low in some provinces compared to those provinces' share of total registrations. For example, "religion" is high in Prince Edward Island and Newfoundland, "welfare" and "other" charities are high in Quebec. Ontario's percentages for each category are more or less equal to its proportion of total registrations, except for "community", which is proportionately low.

Taken together, these two tables indicate a marked difference between the sector in Quebec, on the one hand, and the sector in the rest of Canada, on the other. The variations in patterns across the provinces in English-speaking Canada, although often significant, are much less severe. Roughly speaking, the pattern in English Canada is that nearly fifty percent of the total registrations are religious charities; and nearly forty-five of the registrations are welfare, education, and community charities combined, each with roughly fifteen percent of the registrations. Quebec's registrations are significantly higher in "welfare" and "other" categories, and substantially lower in "religion".

### Table 57

**Number of Registered Charities by Category, by Province, 1990**

<table>
<thead>
<tr>
<th>Province</th>
<th>Welfare</th>
<th>Health</th>
<th>Education</th>
<th>Religion</th>
<th>Community</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland</td>
<td>0.82%</td>
<td>1.53%</td>
<td>0.92%</td>
<td>2.19%</td>
<td>0.87%</td>
<td>0.17%</td>
<td>1.53%</td>
</tr>
<tr>
<td>P.E.I.</td>
<td>0.48%</td>
<td>1.10%</td>
<td>0.73%</td>
<td>7.82%</td>
<td>1.19%</td>
<td>0.26%</td>
<td>0.80%</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>3.51%</td>
<td>5.30%</td>
<td>4.28%</td>
<td>4.71%</td>
<td>8.26%</td>
<td>1.99%</td>
<td>4.96%</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>3.36%</td>
<td>3.41%</td>
<td>2.59%</td>
<td>4.15%</td>
<td>3.92%</td>
<td>1.56%</td>
<td>3.37%</td>
</tr>
<tr>
<td>Quebec</td>
<td>27.12%</td>
<td>15.74%</td>
<td>18.60%</td>
<td>14.58%</td>
<td>14.17%</td>
<td>48.13%</td>
<td>17.68%</td>
</tr>
</tbody>
</table>
Table 58

Number of Registered Charities by Category, by Province, 1990

<table>
<thead>
<tr>
<th>Province</th>
<th>Welfare</th>
<th>Health</th>
<th>Education</th>
<th>Religion</th>
<th>Community</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland</td>
<td>7.83%</td>
<td>6.75%</td>
<td>9.25%</td>
<td>67.79%</td>
<td>8.16%</td>
<td>0.22%</td>
<td>100.00%</td>
</tr>
<tr>
<td>P.E.I.</td>
<td>8.77%</td>
<td>8.56%</td>
<td>14.20%</td>
<td>46.35%</td>
<td>21.50%</td>
<td>0.63%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>10.30%</td>
<td>7.16%</td>
<td>13.24%</td>
<td>44.68%</td>
<td>23.85%</td>
<td>0.77%</td>
<td>100.00%</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>13.35%</td>
<td>6.25%</td>
<td>10.86%</td>
<td>53.37%</td>
<td>15.35%</td>
<td>0.81%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Quebec</td>
<td>22.32%</td>
<td>5.97%</td>
<td>16.16%</td>
<td>38.84%</td>
<td>11.49%</td>
<td>5.21%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Ontario</td>
<td>13.11%</td>
<td>6.73%</td>
<td>16.40%</td>
<td>49.79%</td>
<td>11.98%</td>
<td>1.98%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Manitoba</td>
<td>15.17%</td>
<td>6.81%</td>
<td>14.69%</td>
<td>46.11%</td>
<td>16.39%</td>
<td>0.82%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>14.56%</td>
<td>7.20%</td>
<td>10.90%</td>
<td>50.83%</td>
<td>16.19%</td>
<td>0.33%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Alberta</td>
<td>10.58%</td>
<td>6.35%</td>
<td>13.81%</td>
<td>51.68%</td>
<td>17.03%</td>
<td>0.54%</td>
<td>100.00%</td>
</tr>
<tr>
<td>British Columbia</td>
<td>14.08%</td>
<td>7.47%</td>
<td>18.50%</td>
<td>42.60%</td>
<td>16.60%</td>
<td>0.75%</td>
<td>100.00%</td>
</tr>
<tr>
<td>N.W.T.</td>
<td>8.33%</td>
<td>9.09%</td>
<td>18.94%</td>
<td>43.94%</td>
<td>19.70%</td>
<td>0.00%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Yukon</td>
<td>12.84%</td>
<td>5.50%</td>
<td>14.68%</td>
<td>41.28%</td>
<td>25.69%</td>
<td>0.00%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Canada</td>
<td>14.56%</td>
<td>6.71%</td>
<td>15.37%</td>
<td>47.12%</td>
<td>14.34%</td>
<td>1.91%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

Source: Revenue Canada, Registration Division

Tables 59 and 60 show the distribution of registrations by classification and by province in 1990. One important fact is starkly evident: Ontario has a disproportionately high number of private foundation registrations, with just over ten percentage points more private foundation registrations than its share of total registrations, for a total of nearly fifty percent of the registrations of Canadian private foundations. Quebec shows a substantially higher relative share of registrations of public foundations.

Table 59

Proportions of Charities by Classification, per Province, 1990
<table>
<thead>
<tr>
<th>Province</th>
<th>Charitable Organizations</th>
<th>Public Foundations</th>
<th>Private Foundations</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland</td>
<td>1.53%</td>
<td>0.85%</td>
<td>0.27%</td>
<td>1.44%</td>
</tr>
<tr>
<td>P.E.I.</td>
<td>0.80%</td>
<td>0.41%</td>
<td>0.30%</td>
<td>0.75%</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>4.96%</td>
<td>4.32%</td>
<td>3.21%</td>
<td>4.85%</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>3.37%</td>
<td>3.50%</td>
<td>2.27%</td>
<td>3.60%</td>
</tr>
<tr>
<td>Quebec</td>
<td>17.68%</td>
<td>26.47%</td>
<td>22.14%</td>
<td>18.30%</td>
</tr>
<tr>
<td>Ontario</td>
<td>34.87%</td>
<td>33.50%</td>
<td>47.94%</td>
<td>35.39%</td>
</tr>
<tr>
<td>Manitoba</td>
<td>5.85%</td>
<td>6.15%</td>
<td>5.04%</td>
<td>5.83%</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>7.13%</td>
<td>7.26%</td>
<td>5.14%</td>
<td>6.95%</td>
</tr>
<tr>
<td>Alberta</td>
<td>10.71%</td>
<td>7.38%</td>
<td>6.42%</td>
<td>10.36%</td>
</tr>
<tr>
<td>British Columbia</td>
<td>12.39%</td>
<td>10.00%</td>
<td>8.96%</td>
<td>12.12%</td>
</tr>
<tr>
<td>N.W.T.</td>
<td>0.22%</td>
<td>0.03%</td>
<td>0.14%</td>
<td>0.21%</td>
</tr>
<tr>
<td>Yukon</td>
<td>0.18%</td>
<td>0.13%</td>
<td>0.14%</td>
<td>0.18%</td>
</tr>
<tr>
<td>Canada</td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

Table 60

Proportions of Charities by Classification, in each Province, 1990

<table>
<thead>
<tr>
<th>Province</th>
<th>Charitable Organizations</th>
<th>Public Foundations</th>
<th>Private Foundations</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland</td>
<td>96.33%</td>
<td>2.83%</td>
<td>0.84%</td>
<td>100.00%</td>
</tr>
<tr>
<td>P.E.I.</td>
<td>95.61%</td>
<td>2.59%</td>
<td>1.80%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>92.80%</td>
<td>4.25%</td>
<td>2.95%</td>
<td>100.00%</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>92.54%</td>
<td>4.65%</td>
<td>2.81%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Quebec</td>
<td>87.70%</td>
<td>6.91%</td>
<td>5.39%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Ontario</td>
<td>89.44%</td>
<td>4.52%</td>
<td>6.04%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Manitoba</td>
<td>91.11%</td>
<td>5.04%</td>
<td>3.85%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>93.00%</td>
<td>4.98%</td>
<td>2.01%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Alberta</td>
<td>93.83%</td>
<td>3.40%</td>
<td>2.76%</td>
<td>100.00%</td>
</tr>
<tr>
<td>British Columbia</td>
<td>92.77%</td>
<td>3.94%</td>
<td>3.29%</td>
<td>100.00%</td>
</tr>
<tr>
<td>N.W.T.</td>
<td>96.35%</td>
<td>0.73%</td>
<td>2.92%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Yukon</td>
<td>93.16%</td>
<td>3.42%</td>
<td>3.42%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Canada</td>
<td>90.77%</td>
<td>4.78%</td>
<td>4.46%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

Source: Revenue Canada, Registration Division
(b) Sources of Revenue of Canadian Charities

The best contemporary study of the sources of revenue is the Sharpe study. We set out some of the findings of that study in Tables 61, 62, 63, and 64.

Table 61

<table>
<thead>
<tr>
<th>Sources of Revenue</th>
<th>Amount ($ millions)</th>
<th>Percentage of Total Revenues</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Government</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal</td>
<td>5,331</td>
<td>6.2</td>
</tr>
<tr>
<td>Provincial</td>
<td>41,205</td>
<td>47.6</td>
</tr>
<tr>
<td>Local</td>
<td>2,325</td>
<td>2.7</td>
</tr>
<tr>
<td><strong>Sub-Total</strong></td>
<td><strong>48,861</strong></td>
<td><strong>56.5</strong></td>
</tr>
<tr>
<td><strong>Receipted Donations</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individuals</td>
<td>6,612</td>
<td>7.6</td>
</tr>
<tr>
<td>Corporations</td>
<td>1,000</td>
<td>1.2</td>
</tr>
<tr>
<td>Others</td>
<td>794</td>
<td>0.9</td>
</tr>
<tr>
<td><strong>Sub-Total</strong></td>
<td><strong>8,406</strong></td>
<td><strong>9.7</strong></td>
</tr>
<tr>
<td>Unreceipted Donations</td>
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</tr>
<tr>
<td>Gifts from Other Charities</td>
<td>2078</td>
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</tr>
<tr>
<td>Gifts in Kind**</td>
<td>540</td>
<td>0.6</td>
</tr>
<tr>
<td>Investment Income</td>
<td>3015</td>
<td>3.5</td>
</tr>
<tr>
<td>Net Capital Gains</td>
<td>3</td>
<td>0.0</td>
</tr>
<tr>
<td>Net Related Business Income</td>
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<td>0.7</td>
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<tr>
<td>Fees***</td>
<td>4376</td>
<td>5.1</td>
</tr>
<tr>
<td>Other Income****</td>
<td>16543</td>
<td>19.1</td>
</tr>
<tr>
<td><strong>Total Revenues</strong></td>
<td><strong>86,512</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Notes: Amounts may not add due to rounding.

* Receipted donations are amounts given to registered charities for which official donation receipts were issued.

** Estimated on the basis of information collected in survey of registered charities.
*** Includes memberships and subscriptions.

**** Does not include Gifts in Kind.

Source: Sharpe study, Table 8

Table 62

Sources of Revenue According to Charity Type

<table>
<thead>
<tr>
<th>Charity Type ($ millions)</th>
<th>Places of Worship</th>
<th>Hospitals</th>
<th>Teaching Institutions</th>
<th>Other C.O.</th>
<th>Public Foundations</th>
<th>Private Foundations</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Government</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal</td>
<td>30</td>
<td>822</td>
<td>1,833</td>
<td>2,545</td>
<td>75</td>
<td>26</td>
<td>5,331</td>
</tr>
<tr>
<td>Provincial</td>
<td>30</td>
<td>16,285</td>
<td>14,347</td>
<td>8,611</td>
<td>1,750</td>
<td>182</td>
<td>41,205</td>
</tr>
<tr>
<td>Local</td>
<td>24</td>
<td>144</td>
<td>372</td>
<td>1,409</td>
<td>365</td>
<td>11</td>
<td>2,325</td>
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<tr>
<td><strong>Sub-Total</strong></td>
<td><strong>84</strong></td>
<td><strong>17,251</strong></td>
<td><strong>16,552</strong></td>
<td><strong>12,564</strong></td>
<td><strong>2,190</strong></td>
<td><strong>220</strong></td>
<td><strong>48,861</strong></td>
</tr>
<tr>
<td><strong>Receipted Donations</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individuals</td>
<td>2,964</td>
<td>109</td>
<td>304</td>
<td>2,147</td>
<td>822</td>
<td>266</td>
<td>6,612</td>
</tr>
<tr>
<td>Corporations</td>
<td>18</td>
<td>36</td>
<td>159</td>
<td>361</td>
<td>294</td>
<td>131</td>
<td>1,000</td>
</tr>
<tr>
<td>Others</td>
<td>189</td>
<td>18</td>
<td>101</td>
<td>380</td>
<td>76</td>
<td>29</td>
<td>794</td>
</tr>
<tr>
<td><strong>Sub-Total</strong></td>
<td><strong>3,171</strong></td>
<td><strong>163</strong></td>
<td><strong>565</strong></td>
<td><strong>2,888</strong></td>
<td><strong>1,192</strong></td>
<td><strong>426</strong></td>
<td><strong>8,406</strong></td>
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<tr>
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<td>555</td>
<td>71</td>
<td>295</td>
<td>896</td>
<td>197</td>
<td>33</td>
<td>2,046</td>
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<td>176</td>
<td>40</td>
<td>2,078</td>
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<td>17</td>
<td>84</td>
<td>402</td>
<td>15</td>
<td>0</td>
<td>540</td>
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<td>616</td>
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<td>274</td>
<td>3,015</td>
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<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Net Related Business Income</td>
<td>21</td>
<td>137</td>
<td>77</td>
<td>372</td>
<td>22</td>
<td>14</td>
<td>644</td>
</tr>
<tr>
<td>Fees***</td>
<td>73</td>
<td>41</td>
<td>2,557</td>
<td>1,534</td>
<td>150</td>
<td>21</td>
<td>4,376</td>
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<td>8,050</td>
<td>2,880</td>
<td>4,695</td>
<td>418</td>
<td>59</td>
<td>16,543</td>
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<td><strong>Total Revenues</strong></td>
<td><strong>5,128</strong></td>
<td><strong>26,314</strong></td>
<td><strong>23,763</strong></td>
<td><strong>25,488</strong></td>
<td><strong>4,730</strong></td>
<td><strong>1,088</strong></td>
<td><strong>86,512</strong></td>
</tr>
<tr>
<td><strong>Number of Charities</strong></td>
<td><strong>25,177</strong></td>
<td><strong>1,071</strong></td>
<td><strong>2,516</strong></td>
<td><strong>34,285</strong></td>
<td><strong>3,148</strong></td>
<td><strong>3,033</strong></td>
<td><strong>69,230</strong></td>
</tr>
</tbody>
</table>

Notes: C.O. = Charitable Organizations

Percentages may not add up to 100 due to rounding.

* Receipted donations are amounts given to registered charities for which official donation receipts were issued.
** Estimated on the basis of information collected in survey of registered charities.

*** Includes memberships and subscriptions.

**** Does not include Gifts in Kind.

Source: Sharpe study, Table 9

### Table 63

**Percentage of Each Source of Revenue Received by Each Charity Type**

<table>
<thead>
<tr>
<th>Source of Revenue</th>
<th>Charity Type (Percentages)</th>
<th>Places of Worship</th>
<th>Hospitals</th>
<th>Teaching Institutions</th>
<th>Other C.O.</th>
<th>Public Foundations</th>
<th>Private Foundations</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Government</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal</td>
<td></td>
<td>0.6</td>
<td>15.4</td>
<td>34.4</td>
<td>47.7</td>
<td>1.4</td>
<td>0.5</td>
<td>100</td>
</tr>
<tr>
<td>Provincial</td>
<td></td>
<td>0.1</td>
<td>39.5</td>
<td>34.8</td>
<td>20.9</td>
<td>4.2</td>
<td>0.4</td>
<td>100</td>
</tr>
<tr>
<td>Local</td>
<td></td>
<td>1.0</td>
<td>6.2</td>
<td>16.0</td>
<td>60.6</td>
<td>15.7</td>
<td>0.5</td>
<td>100</td>
</tr>
<tr>
<td><strong>Sub-Total</strong></td>
<td></td>
<td>0.2</td>
<td>35.3</td>
<td>33.9</td>
<td>25.7</td>
<td>4.5</td>
<td>0.4</td>
<td>100</td>
</tr>
<tr>
<td><strong>Receipted Donations</strong>*</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individuals</td>
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<td>44.8</td>
<td>1.6</td>
<td>4.6</td>
<td>32.5</td>
<td>12.4</td>
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</tr>
<tr>
<td>Corporations</td>
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<td>1.8</td>
<td>3.6</td>
<td>15.9</td>
<td>36.1</td>
<td>29.4</td>
<td>13.1</td>
<td>100</td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td>23.9</td>
<td>2.3</td>
<td>12.8</td>
<td>47.9</td>
<td>9.6</td>
<td>3.6</td>
<td>100</td>
</tr>
<tr>
<td><strong>Sub-Total</strong></td>
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<td>37.7</td>
<td>1.9</td>
<td>6.7</td>
<td>34.4</td>
<td>14.2</td>
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<td>Unreceipted Donations</td>
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<td>9.6</td>
<td>1.6</td>
<td>100</td>
</tr>
<tr>
<td>Gifts from Other Charities</td>
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<td>11.5</td>
<td>6.5</td>
<td>51.4</td>
<td>8.5</td>
<td>1.9</td>
<td>100</td>
</tr>
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<td>Gifts in Kind****</td>
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<td>3.1</td>
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<td>11.4</td>
<td>20.4</td>
<td>35.4</td>
<td>12.3</td>
<td>9.1</td>
<td>100</td>
</tr>
<tr>
<td>Net Capital Gains</td>
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<td>5.8</td>
<td>39.5</td>
<td>26.7</td>
<td>12.4</td>
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<td>100</td>
</tr>
<tr>
<td>Net Related Business Income</td>
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<td>57.8</td>
<td>3.5</td>
<td>2.2</td>
<td>100</td>
</tr>
<tr>
<td>Fees***</td>
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<td>35.1</td>
<td>3.4</td>
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</tr>
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<td>48.7</td>
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<td>2.5</td>
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<td><strong>Total Revenues</strong></td>
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<td><strong>30.4</strong></td>
<td><strong>27.5</strong></td>
<td><strong>29.5</strong></td>
<td><strong>5.5</strong></td>
<td><strong>1.3</strong></td>
<td><strong>100</strong></td>
</tr>
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<td><strong>Percentage of all Charities</strong></td>
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<td><strong>49.5</strong></td>
<td><strong>4.5</strong></td>
<td><strong>4.4</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>
Notes: C.O. = Charitable Organizations

Percentages may not add up to 100 due to rounding.

* Receipted donations are amounts given to registered charities for which official donation receipts were issued.

** Estimated on the basis of information collected in survey of registered charities.

*** Includes memberships and subscriptions.

**** Does not include Gifts in Kind.

Source: Sharpe study, Table 10

Table 64

<table>
<thead>
<tr>
<th>Source of Revenue</th>
<th>Charity Type (Percentages)</th>
<th>Places of Worship</th>
<th>Hospitals</th>
<th>Teaching Institutions</th>
<th>Other C.O.</th>
<th>Public Foundations</th>
<th>Private Foundations</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Government</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal</td>
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<td>0.6</td>
<td>3.1</td>
<td>7.7</td>
<td>10.0</td>
<td>1.6</td>
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<td>6.2</td>
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<td>60.4</td>
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<td>37.0</td>
<td>16.8</td>
<td>47.6</td>
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<td>0.5</td>
<td>1.6</td>
<td>5.5</td>
<td>7.7</td>
<td>1.0</td>
<td>2.7</td>
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<td><strong>65.6</strong></td>
<td><strong>69.7</strong></td>
<td><strong>49.3</strong></td>
<td><strong>46.3</strong></td>
<td><strong>20.2</strong></td>
<td><strong>56.5</strong></td>
</tr>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individuals</td>
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<td>0.4</td>
<td>1.3</td>
<td>8.4</td>
<td>17.4</td>
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<td>0.1</td>
<td>0.7</td>
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<td>6.2</td>
<td>12.1</td>
<td>1.2</td>
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<td>1.5</td>
<td>1.6</td>
<td>2.7</td>
<td>0.9</td>
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<td><strong>Sub-Total</strong></td>
<td></td>
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<td><strong>0.6</strong></td>
<td><strong>2.4</strong></td>
<td><strong>11.3</strong></td>
<td><strong>25.2</strong></td>
<td><strong>39.2</strong></td>
<td><strong>9.7</strong></td>
</tr>
<tr>
<td>Unreceipted Donations</td>
<td></td>
<td>10.8</td>
<td>0.3</td>
<td>1.2</td>
<td>3.5</td>
<td>4.2</td>
<td>3.0</td>
<td>2.4</td>
</tr>
<tr>
<td>Gifts from Other Charities</td>
<td></td>
<td>8.2</td>
<td>0.9</td>
<td>0.6</td>
<td>4.2</td>
<td>3.7</td>
<td>3.7</td>
<td>2.4</td>
</tr>
<tr>
<td>Gifts in Kind**</td>
<td></td>
<td>0.4</td>
<td>0.1</td>
<td>0.4</td>
<td>1.6</td>
<td>0.3</td>
<td>0.0</td>
<td>0.6</td>
</tr>
<tr>
<td>Investment Income</td>
<td></td>
<td>6.7</td>
<td>1.3</td>
<td>2.6</td>
<td>4.2</td>
<td>7.8</td>
<td>25.2</td>
<td>3.5</td>
</tr>
<tr>
<td>Net Capital Gains</td>
<td></td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Net Related Business Income</td>
<td></td>
<td>0.4</td>
<td>0.5</td>
<td>0.3</td>
<td>1.5</td>
<td>0.5</td>
<td>1.3</td>
<td>0.7</td>
</tr>
<tr>
<td>Fees***</td>
<td></td>
<td>1.4</td>
<td>0.2</td>
<td>10.8</td>
<td>6.0</td>
<td>3.2</td>
<td>1.9</td>
<td>5.1</td>
</tr>
</tbody>
</table>
In summary, the conclusions to be drawn from this information that are important to the present study are as follows:

(1) Government funding currently constitutes over half the revenues of the sector while donations account for just over twelve percent of revenues, with the bulk of these (9.5 percent when receipted and unreceipted donations are added together) from individuals. Thus, to the extent that the efficiency of this sector is a concern to governments, it ought be so, more because of the substantial amount of direct government funding involved than because of the donation dollars at risk.

(2) The bulk of government funding (approximately seventy percent) is directed to teaching institutions and hospitals, with roughly twenty-five percent going to charities in the other categories. Very little government funding is directed to public foundations (approximately 4.5 percent), private foundations (.4 percent), and places of worship (.2 percent). On the assumption that the current accountability regimes governing hospitals and teaching institutions are adequate, the amount of government funding that might be subject to a new regime of regulation would be approximately $15 billion Canada-wide. Total donations to the sector were approximately $11 billion. No figures are available for Ontario alone.

(3) The largest government supporter is the provincial government, providing roughly eighty-four percent of the government funding. Forty percent of this went to hospitals, thirty-five percent to teaching institutions, and twenty-one percent to other charitable organizations.
(4) Individual donations go to places of worship (forty-five percent), other charitable organizations (thirty-three percent), and public foundations (twelve percent).

(c) Expenditures, Assets, and Liabilities

We complete the profile of charitable organizations by presenting information on expenditures and assets, again relying on the data provided by the Sharpe study on the assets of charities.23

Table 65

Allocation of Expenditures by Each Charity Type

<table>
<thead>
<tr>
<th>Charity Type ($ Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenditure</td>
</tr>
<tr>
<td>--------------------------</td>
</tr>
<tr>
<td>Fundraising Costs</td>
</tr>
<tr>
<td>Fees to Consultants</td>
</tr>
<tr>
<td>Administration</td>
</tr>
<tr>
<td>Political Expenditures</td>
</tr>
<tr>
<td>Gifts to Qualified Donees</td>
</tr>
<tr>
<td>Programs</td>
</tr>
<tr>
<td>Accumulated with Permission</td>
</tr>
<tr>
<td>Other Expenditures</td>
</tr>
<tr>
<td>Total Expenditures</td>
</tr>
<tr>
<td>Total Number of Charities</td>
</tr>
</tbody>
</table>

Notes: C.O. = Charitable Organizations

Salaries and benefits are included in these figures.

Figures may not add up due to rounding.

Source: Sharpe study, Table 14
Table 66

Percentage of Expenditures Incurred by Each Charity Type

<table>
<thead>
<tr>
<th>Expenditure</th>
<th>Places of Worship</th>
<th>Hospitals</th>
<th>Teaching Institutions</th>
<th>Other C.O.</th>
<th>Public Foundations</th>
<th>Private Foundations</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fundraising Costs</td>
<td>10.0</td>
<td>6.9</td>
<td>7.8</td>
<td>60.1</td>
<td>14.5</td>
<td>0.7</td>
<td>100</td>
</tr>
<tr>
<td>Fees to Consultants</td>
<td>8.4</td>
<td>1.7</td>
<td>9.0</td>
<td>65.8</td>
<td>14.3</td>
<td>0.9</td>
<td>100</td>
</tr>
<tr>
<td>Administration</td>
<td>5.8</td>
<td>26.2</td>
<td>29.8</td>
<td>32.7</td>
<td>4.8</td>
<td>0.7</td>
<td>100</td>
</tr>
<tr>
<td>Political Expenditures</td>
<td>11.3</td>
<td>0.0</td>
<td>0.2</td>
<td>50.6</td>
<td>6.2</td>
<td>31.7</td>
<td>100</td>
</tr>
<tr>
<td>Gifts to Qualified Donees</td>
<td>21.9</td>
<td>9.3</td>
<td>2.8</td>
<td>26.1</td>
<td>30.7</td>
<td>9.2</td>
<td>100</td>
</tr>
<tr>
<td>Programs</td>
<td>5.3</td>
<td>33.6</td>
<td>27.2</td>
<td>29.3</td>
<td>4.2</td>
<td>0.4</td>
<td>100</td>
</tr>
<tr>
<td>Accumulated with Permission</td>
<td>9.2</td>
<td>7.5</td>
<td>1.2</td>
<td>42.6</td>
<td>36.7</td>
<td>2.8</td>
<td>100</td>
</tr>
<tr>
<td>Other Expenditures</td>
<td>3.3</td>
<td>38.1</td>
<td>35.6</td>
<td>21.6</td>
<td>1.2</td>
<td>0.2</td>
<td>100</td>
</tr>
<tr>
<td>Total Expenditures</td>
<td>5.9</td>
<td>31.5</td>
<td>27.3</td>
<td>29.2</td>
<td>5.3</td>
<td>0.8</td>
<td>100</td>
</tr>
<tr>
<td>Total Number of Charities</td>
<td><strong>36.4</strong></td>
<td><strong>1.5</strong></td>
<td><strong>3.6</strong></td>
<td><strong>49.5</strong></td>
<td><strong>4.5</strong></td>
<td><strong>4.5</strong></td>
<td>100</td>
</tr>
</tbody>
</table>

Notes: C.O. = Charitable Organizations
Percentages may not add up to 100 due to rounding.
Source: Sharpe study, Table 15

Table 67

Expenditures as Share of Each Charity's Total Expenditure

<table>
<thead>
<tr>
<th>Expenditure</th>
<th>Places of Worship</th>
<th>Hospitals</th>
<th>Teaching Institutions</th>
<th>Other C.O.</th>
<th>Public Foundations</th>
<th>Private Foundations</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fundraising Costs</td>
<td>10.0</td>
<td>6.9</td>
<td>7.8</td>
<td>60.1</td>
<td>14.5</td>
<td>0.7</td>
<td>100</td>
</tr>
<tr>
<td>Fees to Consultants</td>
<td>8.4</td>
<td>1.7</td>
<td>9.0</td>
<td>65.8</td>
<td>14.3</td>
<td>0.9</td>
<td>100</td>
</tr>
<tr>
<td>Administration</td>
<td>5.8</td>
<td>26.2</td>
<td>29.8</td>
<td>32.7</td>
<td>4.8</td>
<td>0.7</td>
<td>100</td>
</tr>
<tr>
<td>Political Expenditures</td>
<td>11.3</td>
<td>0.0</td>
<td>0.2</td>
<td>50.6</td>
<td>6.2</td>
<td>31.7</td>
<td>100</td>
</tr>
<tr>
<td>Gifts to Qualified Donees</td>
<td>21.9</td>
<td>9.3</td>
<td>2.8</td>
<td>26.1</td>
<td>30.7</td>
<td>9.2</td>
<td>100</td>
</tr>
<tr>
<td>Programs</td>
<td>5.3</td>
<td>33.6</td>
<td>27.2</td>
<td>29.3</td>
<td>4.2</td>
<td>0.4</td>
<td>100</td>
</tr>
<tr>
<td>Accumulated with Permission</td>
<td>9.2</td>
<td>7.5</td>
<td>1.2</td>
<td>42.6</td>
<td>36.7</td>
<td>2.8</td>
<td>100</td>
</tr>
<tr>
<td>Other Expenditures</td>
<td>3.3</td>
<td>38.1</td>
<td>35.6</td>
<td>21.6</td>
<td>1.2</td>
<td>0.2</td>
<td>100</td>
</tr>
<tr>
<td>Total Expenditures</td>
<td>5.9</td>
<td>31.5</td>
<td>27.3</td>
<td>29.2</td>
<td>5.3</td>
<td>0.8</td>
<td>100</td>
</tr>
<tr>
<td>Total Number of Charities</td>
<td><strong>36.4</strong></td>
<td><strong>1.5</strong></td>
<td><strong>3.6</strong></td>
<td><strong>49.5</strong></td>
<td><strong>4.5</strong></td>
<td><strong>4.5</strong></td>
<td>100</td>
</tr>
<tr>
<td>Fundraising Costs</td>
<td>2.3</td>
<td>0.3</td>
<td>0.4</td>
<td>2.8</td>
<td>3.7</td>
<td>1.1</td>
<td>1.4</td>
</tr>
<tr>
<td>-------------------</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
</tr>
<tr>
<td>Fees to Consultants</td>
<td>0.1</td>
<td>0.0</td>
<td>0.0</td>
<td>0.1</td>
<td>0.1</td>
<td>0.1</td>
<td>0.1</td>
</tr>
<tr>
<td>Administration</td>
<td>15.3</td>
<td>12.9</td>
<td>16.9</td>
<td>17.4</td>
<td>13.9</td>
<td>13.4</td>
<td>15.5</td>
</tr>
<tr>
<td>Political Expenditures</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.9</td>
<td>0.0</td>
</tr>
<tr>
<td>Gifts to Qualified Donees</td>
<td>16.1</td>
<td>1.3</td>
<td>0.5</td>
<td>3.9</td>
<td>25.1</td>
<td>48.4</td>
<td>4.3</td>
</tr>
<tr>
<td>Programs</td>
<td>57.8</td>
<td>68.9</td>
<td>64.4</td>
<td>65.0</td>
<td>50.9</td>
<td>31.0</td>
<td>64.6</td>
</tr>
<tr>
<td>Accumulated with Permission</td>
<td>0.7</td>
<td>0.1</td>
<td>0.0</td>
<td>0.6</td>
<td>3.1</td>
<td>1.5</td>
<td>0.4</td>
</tr>
<tr>
<td>Other Expenditures</td>
<td>7.6</td>
<td>16.5</td>
<td>17.9</td>
<td>10.1</td>
<td>3.1</td>
<td>3.5</td>
<td>13.7</td>
</tr>
<tr>
<td>Total Expenditures</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Notes: C.O. = Charitable Organizations

Percentages may not add up due to rounding.

Source: Sharpe study, Table 16

Table 68

<table>
<thead>
<tr>
<th>Charity Type</th>
<th>Assets</th>
<th></th>
<th>Liabilities</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$ millions</td>
<td>% Percent</td>
<td>$ millions</td>
<td>% Percent</td>
</tr>
<tr>
<td>Places of Worship</td>
<td>$17,542</td>
<td>16.2%</td>
<td>$3,248</td>
<td>9.9%</td>
</tr>
<tr>
<td>Hospitals</td>
<td>20,740</td>
<td>19.1%</td>
<td>6,951</td>
<td>21.2%</td>
</tr>
<tr>
<td>Teaching Institutions</td>
<td>32,768</td>
<td>30.2%</td>
<td>8,886</td>
<td>27.1%</td>
</tr>
<tr>
<td>Other Charitable Organizations</td>
<td>27,402</td>
<td>25.2%</td>
<td>11,584</td>
<td>35.3%</td>
</tr>
<tr>
<td>Public Foundations</td>
<td>6,825</td>
<td>6.3%</td>
<td>1,662</td>
<td>5.1%</td>
</tr>
<tr>
<td>Private Foundations</td>
<td>3,289</td>
<td>3.0%</td>
<td>476</td>
<td>1.5%</td>
</tr>
<tr>
<td>All Charities</td>
<td>$108,566</td>
<td>100.0%</td>
<td>$32,807</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Source: Sharpe study, Table 25

4. FOUNDATIONS

(a) Introduction

(i) General Profile
According to the Canadian Centre for Philanthropy's two recent studies of Canadian foundations, there are between three and four thousand foundations in Canada. Of these, however, the Centre's second study identified only 944 as "active", that is, as generally open to outside applications and granting at least $10,000 per year.

The development of foundations in Canada is a fairly recent phenomenon. Only two percent of the foundations that exist today were established prior to the 1950s; thirty-six percent were established during the 1950s and 1960s, forty-two percent in the 1970s, and twenty-one percent in the 1980s.

In addition to the Canadian-based foundations, there are more than sixty American foundations that award grants in Canada on a regular basis. These include the Alcoa Foundation, Carnegie Corporation of New York, The Ford Foundation, The Kresge Foundation, and The Procter & Gamble Fund.

(ii) Geographic Distribution of Foundations, 1994

Close to sixty percent of the Centre's 944 "active" Canadian foundations were based in Ontario in 1994. These foundations accounted for 41.8 percent ($1.66 billion) of assets of listed foundations and 44.2 percent ($153 million) of listed grants (Table 69). Ontario's population in 1988 was, by comparison, only thirty-six percent of the Canadian total.

<table>
<thead>
<tr>
<th>Province</th>
<th>Total # of Foundations</th>
<th>% of Total in Directory</th>
<th>Assets</th>
<th>Number Reporting</th>
<th>% of Total Assets in Directory</th>
<th>Grants</th>
<th>Number Reporting</th>
<th>% of Total Grants in Directory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Canada</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B.C.</td>
<td>82</td>
<td>8.6%</td>
<td>$ 505,224,699</td>
<td>82</td>
<td>12.7%</td>
<td>$ 42,953,311</td>
<td>82</td>
<td>12.4%</td>
</tr>
<tr>
<td>Alta</td>
<td>53</td>
<td>5.6%</td>
<td>303,219,037</td>
<td>52</td>
<td>7.6%</td>
<td>51,923,677</td>
<td>52</td>
<td>15.0%</td>
</tr>
<tr>
<td>Sask.</td>
<td>17</td>
<td>1.8%</td>
<td>13,624,179</td>
<td>17</td>
<td>0.3%</td>
<td>1,491,061</td>
<td>17</td>
<td>0.4%</td>
</tr>
<tr>
<td>Man.</td>
<td>43</td>
<td>4.5%</td>
<td>192,477,398</td>
<td>43</td>
<td>4.8%</td>
<td>13,970,763</td>
<td>43</td>
<td>4.0%</td>
</tr>
<tr>
<td>Total</td>
<td>195</td>
<td>20.5%</td>
<td>1,014,545,313</td>
<td>194</td>
<td>25.4%</td>
<td>110,338,812</td>
<td>194</td>
<td>31.8%</td>
</tr>
<tr>
<td>Central Canada</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ont</td>
<td>558</td>
<td>59.1%</td>
<td>1,663,269,520</td>
<td>554</td>
<td>41.8%</td>
<td>153,237,963</td>
<td>553</td>
<td>44.2%</td>
</tr>
<tr>
<td>Que.</td>
<td>161</td>
<td>17.0%</td>
<td>1,222,914,661</td>
<td>161</td>
<td>30.7%</td>
<td>79,148,688</td>
<td>161</td>
<td>22.8%</td>
</tr>
<tr>
<td>Total</td>
<td>719</td>
<td>76.1%</td>
<td>2,886,184,181</td>
<td>715</td>
<td>72.8%</td>
<td>232,386,651</td>
<td>714</td>
<td>67.0%</td>
</tr>
</tbody>
</table>
Charitable organizations in Ontario received over fifty percent of foundation grants in 1988, and over forty percent of total funds granted (Table 70). No figures are available for 1994.

### Table 70

<table>
<thead>
<tr>
<th>Province</th>
<th>% of Population</th>
<th>% of Grant Money</th>
<th>% of Number of Grants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario</td>
<td>36%</td>
<td>42%</td>
<td>52%</td>
</tr>
<tr>
<td>Western Canada</td>
<td>29%</td>
<td>28%</td>
<td>29%</td>
</tr>
<tr>
<td>Quebec</td>
<td>26%</td>
<td>26%</td>
<td>16%</td>
</tr>
<tr>
<td>Atlantic Canada</td>
<td>8.8%</td>
<td>4%</td>
<td>3%</td>
</tr>
<tr>
<td>Northern Canada</td>
<td>0.2%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Source: *Directory* (9th ed.), Table 2.s

Charitable organizations in the social service sector received the highest level of support from foundations in 1988 with twenty-three percent of total grants, and an average grant of $34,149. Health and education each received eighteen percent of foundation grants with average grants of $35,302 and $41,363 respectively. Sports and recreation, and international charity organizations seem relatively neglected by foundations: their grants accounted for a mere two and one percent respectively, of all foundation grants. This may
be due in part to the questionable status of these types of organizations, especially the former, under the traditional law of charities. Religious organizations have traditionally been funded by individual donations, as previously presented statistics show. It is worth noting, therefore, that fifteen percent of 1988 foundation grants were awarded to religious organizations, at an average of $28,807 per grant. Charitable organizations in the arts and culture sector received twelve percent of foundation grant money at an average of $35,393 per grant. The science and technology sector received larger than average grants at $53,404 per grant, but these grants account for only ten percent of all foundation grants.

(v) **Top Fifty and Top Ten**

a. **By Assets**

The fifty largest foundations in Canada in 1994, based on assets, had combined assets of over $2.69 billion. This represented over sixty-seven percent of the assets of the foundations listed in the Centre's directory. These fifty foundations awarded over $174 million in 1994, accounting for over fifty percent of all grants made by the Centre's active foundations in that year. The three largest foundations based on assets are the J.W. McConnell Family Foundation, Vancouver Foundation, and The Chastell Foundation. Of the fifty largest foundations, half are located in Ontario.

Table 71

**Top Fifty Foundations Assets, 1994**

<table>
<thead>
<tr>
<th>No.</th>
<th>Foundation Name</th>
<th>Year Est'd</th>
<th>City</th>
<th>Assets</th>
<th>Grants</th>
<th># of Grants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>McConnell Family Foundation; The J.W. (1993)</td>
<td>1937</td>
<td>Montreal</td>
<td>$371,000,000</td>
<td>$16,072,800</td>
<td>63</td>
</tr>
<tr>
<td>2</td>
<td>Vancouver Foundation (1993)</td>
<td>1943</td>
<td>Vancouver</td>
<td>355,602,470</td>
<td>22,001,209</td>
<td>779</td>
</tr>
<tr>
<td>4</td>
<td>Hospital for Sick Children Foundation; The (1993)</td>
<td>1972</td>
<td>Toronto</td>
<td>109,179,000</td>
<td>15,233,000</td>
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<td>11</td>
<td>Coutu: La Fondation Marcelle et Jean (1993)</td>
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<td>1,956,769</td>
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<tr>
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<td>Foundation Name</td>
<td>Year</td>
<td>City</td>
<td>Income 1</td>
<td>Income 2</td>
<td>Yearly Growth</td>
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<tr>
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<td>Montreal</td>
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<td>1,144,750</td>
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<td>18</td>
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<td>29</td>
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<td>Edmonton</td>
<td>32,391,501</td>
<td>1,327,308</td>
<td>174</td>
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<tr>
<td>30</td>
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<td>Toronto</td>
<td>31,173,249</td>
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<td>484,235</td>
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<td>Sill Foundation Inc.; Thomas (1993)</td>
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<td>1,020,953</td>
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<td>1973</td>
<td>Toronto</td>
<td>26,004,506</td>
<td>8,100,870</td>
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<tr>
<td>36</td>
<td>Lunenfeld Charitable Foundation; The Samuel (1993)</td>
<td>1954</td>
<td>Toronto</td>
<td>24,500,000</td>
<td>1,957,878</td>
<td>28</td>
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<td>37</td>
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<td>Toronto</td>
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<td>1,114,500</td>
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<td>38</td>
<td>Law Foundation of British Columbia; The (1993)</td>
<td>1969</td>
<td>Vancouver</td>
<td>23,626,759</td>
<td>12,294,061</td>
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<td>39</td>
<td>McLean Foundation; The (1993)</td>
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<td>Toronto</td>
<td>22,907,113</td>
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<td>Calgary Foundation; The</td>
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<td>Calgary</td>
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<td>42</td>
<td>Bombardier; Fondation J. Armand (1993)</td>
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<td>Valcourt</td>
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<td>No.</td>
<td>Foundation Name</td>
<td>Year Est'd</td>
<td>City</td>
<td>Assets</td>
<td>Grants</td>
<td># of Grants</td>
</tr>
<tr>
<td>-----</td>
<td>----------------------------------------------------</td>
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<td>----------</td>
<td>------------</td>
<td>------------</td>
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<td>1</td>
<td>Vancouver Foundation (1993)</td>
<td>1943</td>
<td>Vancouver</td>
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<td>$22,001,209</td>
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<td>2</td>
<td>Alberta Foundation for the Arts (1993)</td>
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<td>Edmonton</td>
<td>12,172,584</td>
<td>16,513,066</td>
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<td>Montreal</td>
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<td>16,072,800</td>
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<td>Trillium Foundation (1994)</td>
<td>1982</td>
<td>Toronto</td>
<td>0</td>
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<td>Hospital for Sick Children Foundation; The (1993)</td>
<td>1972</td>
<td>Toronto</td>
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<td>15,233,000</td>
<td>87</td>
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<td>Law Foundation of British Columbia; The (1993)</td>
<td>1969</td>
<td>Vancouver</td>
<td>23,626,759</td>
<td>12,294,061</td>
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</table>

Source: Directory (11th ed.), Table 2, at vi.

b. By Grants

The fifty largest Canadian foundations, based on grants, awarded a total of $236.5 million in 1994. This represented over sixty-eight percent of total foundation grants. These fifty foundations had assets totalling $2,372 billion, or sixty percent of the assets of all the foundations. The three largest foundations by grants were the J.W. McConnell Family Foundation, the Vancouver Foundation, and the Alberta Foundation for the Arts.

Table 72

Top Fifty Foundations Grants, 1994
<table>
<thead>
<tr>
<th>No.</th>
<th>Foundation Name</th>
<th>Year</th>
<th>City</th>
<th>Initials</th>
<th>Endowment</th>
<th>Fund</th>
<th>ID</th>
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<td>Toronto</td>
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<td>Toronto</td>
<td>26,004,506</td>
<td>8,100,870</td>
<td>64</td>
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<td>Edmonton</td>
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<td>4,647,750</td>
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<td>15</td>
<td>Bronfman Family Foundation; The Samuel and Saidye (1992)</td>
<td>1952</td>
<td>Montreal</td>
<td>58,109,655</td>
<td>4,084,383</td>
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<tr>
<td>16</td>
<td>Kahanoff Foundation; The (1992)</td>
<td>1979</td>
<td>Calgary</td>
<td>74,068,598</td>
<td>4,037,305</td>
<td>45</td>
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<tr>
<td>17</td>
<td>Winnipeg Foundation; The (1993)</td>
<td>1921</td>
<td>Winnipeg</td>
<td>81,104,662</td>
<td>4,022,471</td>
<td>175</td>
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<tr>
<td>20</td>
<td>Bickell Foundation; J.P. (1993)</td>
<td>1951</td>
<td>Toronto</td>
<td>55,600,000</td>
<td>3,251,310</td>
<td>182</td>
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<td>EJLB Foundation; The (1993)</td>
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<td>58,600,861</td>
<td>2,409,702</td>
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<td>28</td>
<td>Morrow Foundation; F.K. (1993)</td>
<td>1944</td>
<td>Toronto</td>
<td>38,263,663</td>
<td>2,199,700</td>
<td>45</td>
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<tr>
<td>29</td>
<td>Counselling Foundation of Canada (1993)</td>
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<td>Toronto</td>
<td>31,173,249</td>
<td>2,166,742</td>
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<td>Lunenfeld Charitable Foundation; The Samuel (1993)</td>
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<td>Toronto</td>
<td>24,500,000</td>
<td>1,957,878</td>
<td>28</td>
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<td>32</td>
<td>Coutu; La Fondation Marcelle et Jean (1993)</td>
<td>n/a</td>
<td>Montreal</td>
<td>58,600,861</td>
<td>1,956,769</td>
<td>114</td>
<td></td>
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<tr>
<td>33</td>
<td>Laidlaw Foundation (1993)</td>
<td>1949</td>
<td>Toronto</td>
<td>40,562,903</td>
<td>1,925,694</td>
<td>201</td>
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<td>34</td>
<td>Burns Memorial Fund (1993)</td>
<td>1939</td>
<td>Calgary</td>
<td>33,450,551</td>
<td>1,854,885</td>
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<tr>
<td>35</td>
<td>Lawson Foundation; The (1993)</td>
<td>1956</td>
<td>London</td>
<td>34,687,531</td>
<td>1,740,828</td>
<td>104</td>
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<tr>
<td>36</td>
<td>Bell Foundation; Max (1993)</td>
<td>1965</td>
<td>Toronto</td>
<td>40,167,000</td>
<td>1,706,000</td>
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<td>Eaton Foundation; The (1993)</td>
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<td>Toronto</td>
<td>16,528,231</td>
<td>1,694,887</td>
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<td>Manitoba Law Foundation; The (1993)</td>
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<td>Winnipeg</td>
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<td>1,579,557</td>
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<tr>
<td>40</td>
<td>Kinneear Foundation; The Henry White (1993)</td>
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<td>34,257,273</td>
<td>1,577,851</td>
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<td>42</td>
<td>Calgary Foundation; The (1993)</td>
<td>1955</td>
<td>Calgary</td>
<td>21,543,766</td>
<td>1,548,211</td>
<td>135</td>
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<td>1,450,446</td>
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<td>Gordon Charitable Foundation; Walter and Duncan (1993)</td>
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<td>38,133,941</td>
<td>1,412,287</td>
<td>88</td>
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<td>45</td>
<td>Edmonton Community Foundation; The (1993)</td>
<td>1989</td>
<td>Edmonton</td>
<td>32,391,501</td>
<td>1,327,308</td>
<td>174</td>
<td></td>
</tr>
</tbody>
</table>
(b) Classification of Foundations

(i) Family Foundations

Family foundations are the most common type of foundation in Canada, accounting in 1990 for ninety percent of all foundations in Canada. Some are very large: forty-three of the fifty largest foundations based on assets are family foundations. Most, however, tend to be small, and tend to grant smaller sums to a greater variety of charities.

The largest foundation in Canada is the Montreal-based J.W. McConnell Family Foundation. On its own, in 1994 it accounted for 14.6 percent of the total assets of all active Canadian foundations, and its grants accounted for 9.3 percent of all grants awarded in Canada. Like the McConnell Family Foundation, most of the larger family foundations in Canada are based in Montreal (the CRB, Macdonald Stewart, Samuel & Saidye Bronfman Family, Molson Family, De Seve, RHW, and Eldee foundations). Toronto has the second largest concentration of major family foundations (the Donner Canadian, R. Samuel McLaughlin, F.K. Morrow, Bickell, and Joseph Tanenbaum foundations). The Kahanoff Foundation is based in Calgary. Most of the major family foundations were established in the 1950s and 1960s.

(ii) Community Foundations

There are, at last count, twenty-nine active community foundations in Canada. The Vancouver Foundation is the largest with $355.6 million assets. The Winnipeg Foundation, established in 1921, is the oldest active foundation in Canada. It is also the second largest community foundation with assets of $81.1 million and grants of $4.02 million in 1994.

Over half of the ten largest community foundations were established before the 1960s, namely in Winnipeg (1921), Victoria (1936), Vancouver (1943), Peterborough (1953), Fredericton (1967), Calgary (1967), Thunder Bay (1971), and Saint John (1977). The Metropolitan Toronto Community Foundation was established in 1981, making it the youngest of the major community foundations.
(iii) Corporate Foundations

Corporate foundations are legally independent entities, but generally remain very closely tied to the corporation with which they are associated through interlocking board memberships. The main function of corporate foundations is to permit better planning of corporate giving. Corporate foundations are often not endowed, but operate simply as intermediaries in the distribution of the "parent" corporation profits.

In the United States, Japan, and several European countries, corporate foundations have been operating effectively since the mid-1960s. Many of the largest Canadian corporate foundations were established shortly thereafter, in the late 1960s and in the 1970s. There are, at last count, only twenty-one active corporate foundations in Canada today.

As of 1988, six of the largest corporate foundations, based on assets, were located in Ontario. The J. Armand Bombardier Foundation and the Dominion Textiles Foundation were the only two major corporate foundations in Quebec. Alberta is the home to the Nelson Lumber Foundation and the Carthy Foundation. The Richardson Century Fund is the only major corporate foundation in Manitoba.

The J. Armand Bombardier Foundation was the largest corporate foundation in 1988 with $9,372 million in assets. The Noranda Foundation was the most generous corporate foundation, with grants of $2,908 million in 1988. It is interesting to note that many of the corporate foundations with the largest assets are not the most generous. This may be explained by the different methods of running a corporate foundation: the most generous foundations may not have a significant amount of assets, but are run as pass-through foundations, whereas the foundations with the most assets are building an asset pool for donations in the future.

The ten largest corporate foundations based on assets, had combined assets of $23,204 million in 1988, which accounted for a mere 0.8 percent of assets of all foundations. Grants given by corporate foundations totalled $3.397 million in 1988, or 1.3 percent of grants of all foundations.

The ten largest corporate foundations based on grants, had assets of $16,507 million in 1988, accounting for 0.6 percent of all foundation assets. They granted a total of $7,821 million, which represented 2.9 percent of all foundation grants.

(iv) Special Interest Foundations

There are a good number of special interest foundations in Canada, especially in the areas of health and law. Many are based in Toronto (Associated Medical Services Inc., Hospital for Sick Children Foundation, Law Foundation of Ontario, and Physician's Services Incorporated). Others are based in the western provinces the (Alberta Law Foundation, Law Foundation of B.C., M.S.I. Foundation (Alberta), Manitoba Law Foundation, and Manitoba Medical Service Foundation).
Seven of the ten largest special interest foundations were established in the 1970s; the Law Foundation of B.C. was founded in 1969, the Ottawa-based Law for the Future Fund in 1984, and the Manitoba Law Foundation in 1986.

The ten largest special interest foundations had total assets of $244,689 million in 1988, accounting for 8.9 percent of the assets of all foundations. These foundations granted $35,898 million, or 13.3 percent of the total foundation grants made in 1988.35

(v) Government Foundations

The following are some of the government foundations listed in the Canadian Directory to Foundations: Trillium Foundation (Ontario); Wild Rose Foundation (Alberta); Alberta Foundation for the Literary Arts; and Recreation, Parks and Wildlife Foundation (Alberta). Three quarters of these are in Alberta. Government foundations are a recent phenomenon, all except the Recreation, Parks and Wildlife Foundation (1976) were established in the 1980s.

Government foundations awarded a total of $21,359 million in 1988, which accounted for eight percent of grants of all foundations.36 These foundations generally have very few assets. The Trillium Foundation, for example, has no assets at all, but awarded almost $15 million in 1988. These foundations are largely funded with lottery profits, which are usually directly and completely awarded to charitable organizations without further investment.

5. LEVELS OF ONTARIO GOVERNMENT SUPPORT FOR THE CHARITY SECTOR

In this, the last section of empirical studies, we present the data available from the provincial government public accounts on provincial government grants and payments to the charity sector for three fiscal years, 1989-90, 1988-89, and 1987-88. We look at the three most significant granting ministries: Citizenship; Culture and Communications; and Community and Social Services. One note of caution is in order. The manner in which the public accounts are presented does not distinguish between nonprofit and charitable organizations. However, they do help to present some idea of the magnitude of grants and relative significance of the sector to the various ministries' activities.

<table>
<thead>
<tr>
<th>Ministry</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citizenship</td>
<td>$ 6,293,915</td>
<td>$ 0</td>
<td>$ 46,577,469</td>
<td>$20,976,509,333</td>
<td>135127887</td>
</tr>
<tr>
<td>Ministry</td>
<td>A</td>
<td>B</td>
<td>C</td>
<td>D</td>
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<tr>
<td>--------------------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
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<td>------------------</td>
</tr>
<tr>
<td>Citizenship</td>
<td>22,526,849</td>
<td>40,188</td>
<td>45,914,585</td>
<td>27,929,285,807</td>
<td>.490625124</td>
</tr>
<tr>
<td>Culture and Communications</td>
<td>144,018,535</td>
<td>7,087,884</td>
<td>236,324,623</td>
<td>27,929,285,807</td>
<td>.561859931</td>
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<tr>
<td>Community and Social Services</td>
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<td>982,219,147</td>
<td>4,311,701,136</td>
<td>27,929,285,807</td>
<td>.83180674</td>
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</tbody>
</table>

### Table 75

<table>
<thead>
<tr>
<th>Ministry</th>
<th>A</th>
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<th>C</th>
<th>D</th>
<th>E</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citizenship</td>
<td>25,517,334</td>
<td>290,217</td>
<td>38,510,448</td>
<td>35,463,213,771</td>
<td>.662608079</td>
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<tr>
<td>Culture and Communications</td>
<td>168,759,454</td>
<td>16,688,749</td>
<td>227,457,872</td>
<td>35,463,213,771</td>
<td>.741937188</td>
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<tr>
<td>Community and Social Services</td>
<td>2,400,158,999</td>
<td>912,129,965</td>
<td>3,774,757,425</td>
<td>35,463,213,771</td>
<td>.635844566</td>
</tr>
</tbody>
</table>

### 6. CONCLUSIONS AND RECOMMENDATIONS

We draw a number of tentative conclusions from the empirical analysis in this chapter.

(1) Our analysis suggests that the culture of giving in Canada is going through a period of stagnation or decline. The available information on the credibility of the sector together with the existence of well-established, obviously efficient, and obviously honest institutions suggests that there is very little that a regulatory regime which targeted credibility generally could do to reverse the decline.
However, regulation targeting credibility in specific areas of charitable activity, such as international charity, for example, might well be justified. This general conclusion does not, however, suggest that there may not be other good reasons for the government to increase its regulation of the sector. These other reasons include policing the tax expenditure, protecting charitable purpose organizations from fraud, enhancing the public profile of the sector, and emphasizing the importance of practising in the sector with regard to good citizenship.

(2) The empirical information suggests a classification of the sector for possible regulatory purposes in at least one respect. It is clear that religion is a case apart. Religion is by far the most favoured destination of donor dollars, although there appears to be a recent trend of secularization in the sector as a whole. The demographic information is also quite distinctive: a very large proportion of donations from donors in the lower income brackets go to religion, and there is proportionately equal support for religion in all age groups.

(3) The empirical information also suggests a division among types of foundations along the lines presently used in the Income Tax Act. Private foundations or family foundations are by far the most significant foundations in terms of asset size and total number of grants awarded. The other foundations—public, corporate, special interest, and government—are much fewer in number and much smaller in size.

(4) The information on the revenues of the sector indicates an evolution towards greater support overall by government grants compared to donations. However, these statistics may be misleading since large numbers of charitable organizations do not receive any government grants at all.

(5) The information on registrations substantiates the claim that the sector is in a process of evolution towards greater secularization.

(6) The information on expenditures indicates that surprisingly few organizations use the services of professional fund raisers. It also shows that the vast majority of organizations are able to comply with the twenty percent limit that Revenue Canada places on administrative expenditures.

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**Endnotes:**

Sharpe, *A Portrait of Canada's Charities: The Size, Scope and Financing of Registered Charities* (Toronto: Canadian Centre for Philanthropy, 1994) (hereinafter referred to as "Sharpe study"); and K.M. Day and R.A. Devlin, *The Canadian Nonprofit Sector* (Ottawa: Canadian Policy Research Network and Kahanoff Foundation, 1996) [forthcoming]. The empirical work for the Commission's study was completed in the summer of 1991. However, some of the data from these more recent studies has been used to update our profile of the charity sector in this chapter.

As part of the background work for this chapter, the Commission completed a study paper which provides a survey of the results of the empirical work in existence as of August 1991, updated by a more extensive bibliography. See Ontario Law Reform Commission, *Study Paper 3: Conclusions From Existing Empirical Studies of the Charity and Nonprofit Sector* (1991) [unpublished].

2

See Sharpe study, supra, note 1. On the methodology of this study, see, further, infra, text accompanying note 15.

3


4

See, now, R.S.C. 1985, c. 1 (5th Supp.).

5

For the history of the registration system, see, infra, ch. 10.

6

In sec. 3, infra, we shall see that the largest portion of revenues to the sector in the order of 56.5% in 1993 according to the Sharpe study, supra, note 1 came from government sources.

7


Martín (1975), *ibid.*, and Deeg, *ibid.*

The Sharpe study, *supra*, note 1, after adjustments, estimated a 2% donation rate in 1993. The reason for the divergence between that estimate and ours is the different sources and different methodology used. Our figure is undoubtedly low since it uses only receipted donations actually declared. The Sharpe study estimated that nearly half of receipted donations are not declared and that a large portion of individual donations $1.6 billion out of $8.2 billion are not receipted. The Sharpe study used adjusted T3010 data. We used unadjusted taxation statistics. Despite the discrepancies in process and outcome, the point regarding stagnation stands.


*Supra*, note 3.

*Supra*, note 3.

*Supra*, note 1.

Our source for these figures is the Day and Devlin study, *supra*, note 1.

The Sharpe study, *supra*, note 1, estimates the following percentages for Canada for individual donations: Places of Worship (45%); Others (33%); Hospitals and Teaching Institutions (6%); and Public Foundations (12%). Since the study estimates $8.2 billion in individual donations, 33% of that $2.7 billion by the same logic in the text, is "at risk" nationwide. Ontario's share, approximately 45%, totals $1.2 billion. However, as in the text, that figure should be adjusted downward further since it includes many obviously trustworthy charities. This is perhaps one conclusion which may be affected by the discrepancy in quantification. The public agency that we recommend be established in Part infra, might devote some effort to establishing up-to-date and accurate statistical profiles of the sector.
Supra, note 3

18

Supra, note 1

19

See, also, Figure 41.1, infra.

20

The Sharpe study, supra, note 1, estimated total corporate giving in 1993 to be $1.24 billion, $1 billion of which was receipted.

21

Revenue Canada, Taxation, in A Better Tax Administration in Support of Charities, Discussion Paper (Ottawa: November 1990), at 8, states that only 26% of the approximately 5,000 new registrations every year are religious organizations. According to the same source, welfare, education, and benefit to the community groups constitute two-thirds of the new registrants. Documenting the same transition, the Report of the Auditor General of Canada to the House of Commons: Main Points (Ottawa: Department of National Revenue, Taxation and Finance, 1991), at 254, provides the following data.

<table>
<thead>
<tr>
<th>Number of Registered Charities</th>
<th>Percentage Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Welfare</td>
<td>3,481</td>
</tr>
<tr>
<td>Health</td>
<td>2,283</td>
</tr>
<tr>
<td>Education</td>
<td>3,033</td>
</tr>
<tr>
<td>Religious</td>
<td>22,343</td>
</tr>
<tr>
<td>Benefit to Community</td>
<td>3,973</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>35,113</td>
</tr>
</tbody>
</table>

22

Supra, note 1.

23

A recent study published by the Canadian Centre for Philanthropy provides an in-depth analysis of fundraising in Canada. See M.H. Hall, Charitable Fundraising in Canada (Toronto: Canadian Centre for Philanthropy, 1996).

24


The *Directory* (9th ed.), *supra*, note 4, cites the following definition of foundation, at iv: "A foundation (is) a non-governmental, non-profit organization with funds (usually from a single source, either an individual, a family or a corporation) and program managed by its own trustees or directors, established to maintain or aid social, educational, charitable, religious, or other activities serving the common welfare, primarily through the making of grants."

*Directory* (9th ed.), *ibid.*, Table 15, at xv.


The Canadian Centre for Philanthropy's study relied on the T3010 forms which do not oblige reporting charities to indicate what method of asset valuation was used. Hence much precision in the information is lost. See *Directory* (11th ed.), *supra*, note 4.

*Directory* (11th ed.), *ibid.*, Table 2, at vi. Asset figures may be lower than they are in reality, because some foundations indicate the book value as opposed to the market value of their assets.

On community foundations in Canada, see M. Sharpe, "The Community Foundation" (1991), 10 Philanthrop. (No. 1) 26. The Canadian Centre for Philanthropy defines community foundations as follows: "Community foundations normally share the five following characteristics: funds are derived from the contribution of many donors, usually through bequests; grant programs are designed to benefit the particular city or region served; activities are regularly reported to the public; the governing body represents broad segments of the community; and the use of funds may be altered if purposes designated by donors become impracticable."

Quebec and Ontario Paper, Dominion Securities, Allstate, Royal LePage, Mitsui Canada, and Molson Companies.

*Directory* (9th ed.), *supra*, note 4, Table 11, at xiii.
There has been significant growth in the number of hospital foundations in recent years. See M. Wright, "Why Are so Many Charities Establishing Their Own Foundation? The Hospital Experience", in _Legal and Tax Issues Affecting Charities_ (Toronto: Canadian Centre for Philanthropy, 1985), who notes that the number of hospital foundations had increased from 21 to over 100 from 1982 to 1984.
PART II: PUBLIC POLICY AND THE CHARITY SECTOR

CHAPTER 6

A WORKING DEFINITION OF CHARITY

1. INTRODUCTION

There are a number of serious difficulties with the current common law definition of "charity". These are examined in detail in the two next chapters. In this chapter, the Commission sets out the rudiments of a real definition section 2, then identifies the main policy implications of that definition section 3. The discussion in this chapter provides the basis for an evaluation of the current difficulties in the law and the basis for our proposed reforms. We suggest, however, that reform is better effected through further case law development than through statutory enactment. As a consequence, our discussion in this chapter and the next two is intended more for lawyers, government officials, and the judiciary, than for the legislature.

2. DEFINITION OF CHARITY

(a) The Connotations of "Charity", "Philanthropy", and "Altruism"

One approach to the problem of defining "charity" is to begin by noticing various differences in the meaning of two related terms, "charity" and "philanthropy".¹ "Charity", in its main connotation, signifies acts of kindness and consideration that demonstrate concern for the poor and needy; "philanthropy" signifies acts of generosity that demonstrate regard for the achievements of human kind in general.² The first conception emphasizes feelings of empathy for people in emotional, economic, or physical distress; the latter is moved by respect for the higher endeavours of humanity, such as the sciences, philosophy, the arts, and sports. The abstraction uniting these two terms is that they are both concerned with (1)good (2)others. The structure and content of "charity" and "philanthropy" in these senses are, at this level of abstraction, the same. The differences lie at a deeper level: in the identification of the beneficiaries or the clientele of each (the disadvantaged versus the National Ballet, for example); in the types of human well-being pursued (economic and social capacity versus aesthetic and intellectual...
capacity, for example); and in the emotions associated with each (concern for the poor versus respect for the achievements of science, for example).

There are pejorative connotations of both terms that "altruism", a general term that comprehends both, avoids. "Charity" is sometimes taken to connote pity or disdain for its beneficiaries; by "philanthropy" some people understand aesthetic conceit, or plutocratic and aristocratic arrogance. Perhaps to avoid aspects of the first connotation, "caritas" in Corinthians 1:13 is invariably translated as "love" not "charity". "Charity" also evokes a religious connection, and in Judeo-Christian religious traditions, among others, in its highest form it is the love of God. "Philanthropy" is more secular. It is commonly associated, for example, with the benefactions of the great robber-baron philanthropists of the United States in the late nineteenth and early twentieth centuries. In the Aristotelian/Thomist tradition, charity is the principal element of the virtue of friendship; philanthropy or "liberality" is an aspect of the virtue of temperance and, in particular, identifies how wealthy persons should spend their money.

Despite these clear differences in both positive and pejorative connotations, "charity" is used by the law to express both meanings. "Altruism" is almost as useful a term in this same context, and it will be used for the purposes of this chapter only in the quest for a real definition. "Charity" and "philanthropy", in this chapter only, are used in the narrower senses.

Interestingly, the law also marks a distinction between "charity" and "philanthropy" for certain purposes. That distinction is also manifest in many of the opinions expressed in submissions to the Commission. Some of the submissions from organizations that do charitable work argued that philanthropic work is "different" and somewhat less worthy of favourable consideration. For many on the philanthropy side of the divide, the feeling was mutual, at least to the extent that these organizations accepted the fact that a substantive divide exists. Among the submissions from philanthropically oriented organizations, there were also differences of opinion as to whether, for instance, sports is as worthy as medical research. Finally, there was a body of opinion that religion is a case apart altogether, perhaps a third category.

Despite these differences of opinion, we take the structural and substantive identity of the two aspects of altruism, (1)good (2)others, as the starting point of a real definition. The present difficulty is to identify first meaning of "doing good", and second meaning of "others".

(b) The Meaning of "Doing Good"

To answer the first question, we must look beyond the purely material aspects of the particular thing or service donated, since wealth in almost any form can be used altruistically. The important issues are the designated purpose and/or the actual use of the donated wealth. The first question, then, is: What purposes or what uses are altruistic?
On the whole, the law does a tolerably good job answering this question. Instead of offering a definition, however, the law merely lists three general purposes, and a fourth catch-all purpose:

(1) the relief of poverty; (2) advancement of religion; (3) advancement of education; and (4) advancement of "other causes beneficial to the community."

This is helpful as far as it goes, but a list is not a definition. We need to know what unites the items on the list. This question is usually avoided by judges and textbook writers alike, even if the fourth category has always implicitly suggested a possible answer.

The philosopher John Finnis, writing in the natural law tradition, contributes helpfully in responding to this question. Finnis identifies a range of human goods almost identical in scope and meaning to the common-law list. Their unifying factor in his view is that they are "basic forms of human flourishing to be pursued and realized" in all practical activity. The basic human goods on Finnis' more complete list are our ultimate purposes; they are the ones that give all our right-thinking actions their point, making them intelligible to ourselves and others. Finnis argues that there are a limited number of such goods. Life is one of them and, using life as an example, he argues that we understand the life-saving or life-sustaining actions of a doctor because we know without doubt that life is to be pursued. Nobody asks, "Why does the doctor want to save the patient's life?" That question is unanswerable except to say, "That life is to be pursued is self-evident: any sane person is capable of seeing that life as such is worth having". Finnis lists life, knowledge, play, aesthetic experience, friendship, religion, and practical reasonableness as goods per se nota. We would add work to this list. In moral theory, these basic goods form the first principles of practical reason in making choices. What is helpful in the theory for present purposes are the similarities with some modification between Finnis' categories and the common-law classification of charitable purposes, and, more important, Finnis' isolation of what it is that unites the things on the list, that is, that they are self-evident and underived human goods.

By "life", Finnis means "every aspect of vitality which puts a human being in good shape for self-determination". Hospitals, medical schools, the work of surgeons and nurses, famine relief, soup kitchens, road safety laws, etc., all participate in the good of life. By "knowledge", Finnis means, simply, the good we achieve when we get "to the truth of the matter", or the good we identify when we speak of "knowledge for its own sake", or what we mean when we say, "It would be good to find out". Thus, for example, we consider the well-informed person, to that extent, to be well off, and not only for the profitable use he can make of his knowledge. Truth, in short, is self-evidently worth pursuing. By "play", Finnis means "performances which have no point beyond the performance itself, enjoyed for its own sake". The performance may be "solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or ad hoc". It is sufficient to explain the behaviour of people involved in a game to say, "They enjoy playing". The good of "aesthetic experience" points to the self-evident
goodness, "the to-be-pursuedness" of beauty. The good of sociability or "friendship" can range from a minimum of peace and harmony among persons, to acting for the sake of one's friend. By "religion", Finnis means the "establishing and maintenance of a proper relationship between oneself and the divine", the arrangement of all orders in an ultimate order of things. Secular humanism has brought with it scepticism over whether religion is a basic human good. Finnis argues that the sceptic must admit, at the very least, that whether in fact God exists or not, the question of God's existence is crucially important for everyone. Finally, there is "practical reasonableness" or reasonableness, the basic good of being able "to bring one's own intelligence to bear effectively...on the problems of choosing one's actions and life-style and shaping one's own character...[T]his involves that one has a measure of effective freedom;...it [also] involves that one seeks to bring an intelligent and reasonable order into one's own action and habits and practical attitudes."13

Altruism, then, is the provision of the material, social, or emotional means to pursue these basic human goods these common or universal goods to others so that they may flourish. When we help the poor, our object is to provide them with the material advantages of shelter and sustenance (life), as well as the means to pursue the other goods (knowledge, play, religion). Material or financial support for a primary school provides the means for others to pursue not only the good of knowledge, but, especially among children, the good of practical reasonableness, that is, the ability to live a balanced, well-ordered life. Donations to hospital foundations go exclusively to the purposes hospitals pursue, such as care of the sick or health research, the point of which is to contribute to health of others.

There are as many ways to assist others in the pursuit of these goods as there are people with the resources to do so. In fact there are many more: the variety in specificity of these goods is as rich as the human imagination; they are certainly richer than the hundreds of cases cited in the always lengthy definition chapters of charity law texts. There is a logic about the connection between the goods and any particular instantiation which Finnis attempts to capture in the concept of "determination" or "implementation". A community, through its laws, provides the conditions for the coordination of the pursuit by its members of these human goods, and therefore a law, in the natural law tradition, is a determination or implementation of these goods. Similarly, altruistic projects, that is, projects formally intended to help and which actually do help others to pursue these goods, are also, according to the definition being advanced, determinations or implementations of the goods. In both cases, practical intelligence is engaged to design and implement a project (of law or charity) that actually instantiates or is a determination of the good.

One aspect of the divide, noted previously, between "charity" and "philanthropy" may now be more easily explained. The divide is based not on a ranking of these goods, but, in part, on the degrees of deprivation of the means of flourishing in the beneficiaries. The economically destitute are bereft of any means; the young dancer's chances of perfecting his art are merely diminished by his lack of resources. True, we can easily imagine cases in which our sympathy and, therefore, even our altruism is directed more strongly
towards the promising dancer who lacks means, than it is towards the derelict who will not change his ways. Nonetheless, there are degrees of need and degrees of deprivation of the means to live a fulfilling life. "Charity" in the narrow sense identifies the most wanting end of the continuum, "philanthropy", the least. The critical observation is that what seemed to be a difference in kind is now seen as only a difference in degree. Perhaps this explains the law's wisdom in its more inclusive use of "charity".

(c) The Meaning of "Others"

The second half of our working definition of altruism required that whatever was determined to be good had to be done "for others". Benefits to oneself, one's family, one's relatives, or one's friends are more a matter of obligation (moral or legal) or affection than altruism, even though it is often said that charity begins at home. Indeed, the obligational aspect is recognized by the income tax system in its treatment of the family as, in part, the taxable unit. "Altruism" connotes dispositions towards individuals that are more remote in our affections or to whom we are not otherwise obligated. "Strangers" is perhaps too strong a word to express the distance required, but it is helpful because it does emphasize that some such distance is mandatory.

The requirement of emotional and obligational distance seems easy to accept. Interestingly, it raises a more difficult question regarding the general relevance of the motives of a donor, because, in part, it is the motives of the donor that we are focusing on in requiring an emotional and obligational distance. To be purely altruistic, we seem to be saying, an act has to have as its motive, as well as its form and actual effect, the doing of good for strangers. True altruism, like true liberality or true justice, in this view, is a disposition of the will before it is anything else. Clearly, the case of helping the economically destitute will usually fit this difficult criterion, since any act of aid to the destitute almost certainly has to have as its principal motive helping a stranger. Just as clearly, however, much philanthropic work is motivated by considerations other than or in addition to simply doing good by others, for example, self-aggrandizement, social status, or personal gratification. In this way, an inquiry into motives may help to understand the distinction between charity and philanthropy: these classifications identify two poles on a second continuum, a continuum expressing the purity of the motives of people who help strangers. Charity is at one end, since an act of this nature is invariably quite close to the ideal of pure altruism; philanthropy is at the other, since an act of this nature is probably less purely altruistic in motive.

The legal, if not the moral, practice, however, is very reticent about engaging in any overt consideration of a donor's true motives. For obvious reasons, the law generally focuses only on the donor's formal purpose and the actual effect. Consequently, the law does not recognize any general distinction between charity and philanthropy on this ground either. Nonetheless, the distinction is an important one which ought to be borne in mind in any discussion of the law of charity aimed at its reform.

The observation that charity and philanthropy can be understood as situated on two continuums (first, the degrees of deprivation of the means of living a fulfilling life and,
second, the purity of the donor's motives) is evidenced in an interesting and provocative way in the good of religion. The secular humanist argues as follows: "Religion is mere superstition, not really a good, and therefore its absence can in fact cause no real or permanent (only temporary and psychological) deprivation. Moreover, the good if it is goods is generally consumed by the members of the faith. Their donations, therefore, go to themselves. In sum, there is no good, and even if there is, it is not for others." Yet, contrary to the sceptic's conclusions about what the law should be, the law treats religion perhaps as the most favoured basic human good of all. This degree of difference of opinion makes for an interesting debate. The sceptic's reading of religion is based on his explicit denial of the self-evident proposition that religion is good. A more positive view maintains that donations for the support of religious institutions are not, as it were, one half of an exchange transaction in which the institution offers psychological comfort in return for membership dues.

3. POLICY IMPLICATIONS OF THE REAL DEFINITION

There is obviously a great deal more to be said before these arguments for a real definition of charity we revert to that term are acceptable philosophically. The immediate objective in identifying the elements of a real definition is, thus, more limited. The present purpose is to develop a definition that provides the basis for a critique of the common-law definition and the basis for reform proposals. To summarize what has been said about a definition so far: the truly charitable act is the act whose form, actual effect, and motive are the provision of the means of pursuing a common or universal good to persons who are remote in affection and to whom no moral or legal obligation is owed. In applying this definition to evaluate a project, we might proceed, first, by identifying the goods or intended goods; second, by asking whether the particular project is (really) a determination of one or more of the goods; third, by asking whether the project benefits only strangers; and fourth, rarely, by questioning whether the project is also motivated by the desire to be charitable. There are several policy implications of this conception of charity.

First, this idea provides considerable help in understanding the law's categorical distinction between charity and politics. In a liberal democracy, politics is the process of a society's collaborative effort to make law, to come to some agreement or understanding on a particular determination of the good. By definition, then, a political opinion is not a determination of the good itself. To take a side in a political debate, to support a cause in the political arena, is to argue about in what the good consists, under the circumstances, and to encourage the government to legislate or spend accordingly. In a liberal democracy, only the institutions established for the purpose of making law may say which parties have hit upon the best balance or the best formulation, under the circumstances. The liberal-democratic process of law-making itself assumes that any reasonable opinion as to what the law should be, might be right, and concomitantly, each side in the debate must from the outset be prepared to accept that it might be wrong. These are some of the presuppositions of political discourse in a liberal society. A just law, by contrast, represents not only a society's settled convictions as to what purposes, acts, or provisions, if any, are determinations of the good, but is by definition (if it is a
Just like law) a determination of the good. Likewise, and this is the point, a charitable act is also a determination of the good. Thus, in this way, the distinction between politics and charity parallels the distinction between politics and law: the debate about the content of the good and a determination of the good itself are two different things.20

Second, the distinction between politics and charity, just described, is largely formal. It relies primarily on the logic of the acts described, and not on the motives underlying them, to make the required distinction. Thus, the formal description of the charitable act (doing good for others) and the formal description of the political act (agitating to affect public awareness or to change the law or policy) are different, even if the motives underlying these activities to help others are often identical. Similarly, practicing politics and practicing law (interpreting and applying law) are formally distinct activities, even if each is properly motivated by the desire to see justice done. Interpreting and applying the law or pursuing its application, although motivated by the desire to help others or to see justice done, is likewise formally distinct from charity. The recognition of these formal distinctions is important to the integrity of each of the activities identified. People who argue that there is no distinction between politics and charity generally make the mistake of failing to distinguish the activities at the level of their form. This mistake is as harmful to the activity of politics as it is to charity: it fails to differentiate between what is being done and why it is being done.

Third, acts do not present themselves in the world with labels identifying their true form. To understand what kind of act is performed in a particular case requires an evaluation that makes use of all the available evidence, including evidence relating to motive and intention. This evaluation or judgment will be more or less valid for cases on the margin, but easily justified for core instances. Neither the open-textured quality of this exercise nor its perennial difficulty detract from the validity of the formal distinctions just established.

Fourth, some acts which appear political or commercial or otherwise non-charitable may, in fact, be formally charitable. Acts which appear political, but which are ancillary and incidental to an act of charity, or are necessary or purely instrumental to it, are essentially charitable. Thus, to pick a mundane example, the donor’s writing of the donation cheque and placing it in the envelope are instrumental to the donor’s act of giving and therefore a part of his charitable act. Or, more importantly, an organization which is legally required to be exclusively charitable (and therefore do only charitable acts) does not jeopardize that status by engaging in apparently political activities which are, in fact, merely ancillary and incidental to its charitable activities. Similarly, in another important example, when such an organization runs its annual bazaar or charity golf tournament, or invests its savings to generate income, or engages in fund raising, these activities are best described as formally charitable as fund raising or investing for charity not businesses, since these activities are purely instrumental to the altruistic purposes and activities of the organization, and are therefore, in essence, charitable.

Fifth, this definition allows one to see that the assessment of whether an act is charitable is a very context-specific question. It helps in coming to an understanding of how certain
specific projects come to be included or excluded in the common-law case law on charities. Ideally, the decision-making process ought to engage the community's collective wisdom about the content of the good, under the circumstances, and whether the particular project chosen by the donor in fact tends to its achievement or whether it is plainly impractical. That the motivation is charitable in the sense described is often sufficient for a positive answer. But this is not always so. A project may seem properly motivated, but still not be charitable because it is badly designed or misconceived. For example, there are a number of instances where judges have decided that the donor's project, although charitably motivated, was not practically useful. An interesting example of this is *Re Shaw.*21 This case dealt with a bequest by the author G.B. Shaw to fund research into the practicability of implementing a forty-letter alphabet. Harman J. held that the trust was not charitable because, among other reasons, the objective once achieved would be of insufficient "utility".22 Understandably, however, courts are also reluctant to question explicitly the intelligence of charitably motivated persons, so often this issue of the practical usefulness of a project is handled with subtlety and care. Frequently, it is dealt with using a proxy rule, but this merely masks the true reason for the decision and often leads to considerable doctrinal confusion.23

Sixth, this context specificity of proper determinations of the good indicates that very little is to be gained by the law in attempting to define charity in any but the most general terms. Although it does not preclude searching for something more definitive than the *Pemsel* definition, it does suggest that significantly more specificity may well be impossible and, in any event, probably would be unhelpful in achieving any greater clarity in the law.

Seventh, we can also understand some of the confusion in the case law if we look at the historical practice of the courts in light of this definition. We can see how inconsistent the practice really was or is, and in this process try to understand why, for example, such things as sports, recreation societies, or the Jewish and Catholic religions were improperly excluded from the list.24 The judicial policy on sports and recreation societies is partially explained by the pretension to seriousness of Victorian judges and their consequent scepticism about the good of play. The position on certain religions is simply a reflection of the chauvinism, or even bigotry, of English society at that time. In these examples we see the community, through its judges, struggling to articulate its best determinations of the good, sometimes failing due to its own, obvious (in retrospect) limitations. This approach now provides a basis for arguing why some associations concerned with the preservation of the natural environment, for example, might be charitable: a heightened awareness of the implications of pollution on the quality of life generally leads to a recognition that the preservation of the natural environment requires a concerted communal effort, and that the ultimate object of such an effort is the preservation of life.25

4. CONCLUSION
This attempt at a real definition of charity, however tentative, does suggest several broad parameters regarding the legal definition of "charity" and the advisability of adopting a statutory definition. We reiterate these broad conclusions in here.

(1) Two broad distinctions emerge from the discussion:

(a) One distinction is that there is a noticeable difference between two types of charitable activity: one designating acts motivated by a desire to help the poor; the other designating acts motivated by a desire to advance human achievement or quality of life. It may or may not be advisable, for reasons of social policy, for instance, to favour the former over the latter (with a larger tax subsidy or a less severe restriction on political activity, for example). The possibility of drawing a distinction suggests that doing so in a statute is at least feasible. The nature of the distinction, however, which we characterize more as a matter of degree than as a matter of kind, also suggests that utilizing it in a statutory definition may be fraught with difficulties in application. Moreover, because this was an attempt at a real definition that is, a definition which people would be inclined to accept after reflection on the true meaning of charity there undoubtedly would also be considerable political difficulty in drawing lines that appear to rank charitable activities.

(b) The other distinction is between charity and politics. Our argument defined this as a difference in kind. As such, any statutory or other legal definition must respect it or fall into serious confusion. It is a separate question, however, whether a charitable organization should be permitted to undertake political activities, and if so, to what extent. The line suggested in the discussions so far is that political activity be permitted only to the extent that it is purely instrumental to a charitable purpose and, therefore, essentially charitable. Thus, for example, the expression used to designate permissible political activities in the Income Tax Act—those that are "ancillary and incidental to its charitable activities"—is, in the Commission's view, basically correct. Beyond that, an organization ceases to be exclusively charitable in purpose. Whether this is desirable will depend on why the legislator may want organizations to remain exclusively charitable.

(2) Religion emerged as a possible third category. By its own interpretation in our view, the only proper interpretation where matters of legislative policy are in issue religion does not involve charity in the sense of (1) doing good (2) for others, as clearly as does, for example, relief of poverty. Yet, in addition to being a traditional well-spring of such charitable activity, practising a religion is good. Although not other-regarding in the same sense as other types of charity, religion is nonetheless other-regarding in its worship of God, obeying His law, and constructing and maintaining a sanctuary for His worship.
(3) The argument for a real definition also suggests that any statutory definition, first, be broadly inclusive it ought to include the good of play and aesthetic experience, for example and, second, be general, since whether an act is a determination of a good can be determined only in light of all the circumstances. The fact remains that the common-law test as laid down in Pemsel is already quite general. Moreover, Canadian courts, if not elements of the public administration, have already shown themselves quite open to further sensible developments.29

(4) The attempt at a real definition is, by nature, conceptually oriented. Nothing yet has been said about function or social policy. Thus, any particular statutory definition, besides complying with the constraints suggested here, may also have to answer to its function in the relevant statute and the social policies underlying that statute.

(5) The motive of the donor and the practicality of his or her project as well as the donor's formal purpose are considerations that influence our evaluation of the donor's act as charitable. The legal practice, for obvious reasons, generally avoids overt consideration of the first two elements. They are, nonetheless, indispensable in understanding that practice.

(6) Acts which are instrumental to, or are ancillary or incidental to, charitable acts are essentially charitable. This level and type of apparently political activity, of apparently commercial or business activity, of fund raising activity, and of investment activity are best understood as essentially charitable.

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End notes:


2 See D.H. McMullen, S.G. Maurie, and D.B. Parker, Tudor on Charities, 6th ed. (London: Sweet & Maxwell, 1967), at 1, citing Morice v. Bishop of Durham (1804), 9 Ves J. 399 (S.C.); 32 E.R. 656, aff'd (1805), 10 Ves J. 522, 32 E.R. 947 (L.C.); "In its widest sense 'charity' denotes all the good affections that men ought to bear towards each other. In its most restricted sense it denotes relief of the poor." See, also,

3

For the latter perspective, see, for example, L. McQuaig, Behind Closed Doors (Markham, Ont.: Penguin Books, 1987), at 57: "[O]ne is struck by how much of the money seems to go to the very established cultural and educational institutions and how little to anything directly helping the poor"; T. Odendahl, Charity Begins at Home: Generosity and Self-Interest Among the Philanthropic Elite (New York: Basic Books, 1989); and L.M. Salomon, J.C. Musselwhite Jr., and C.J. DeVita, Partners in the Public Service: Government and the Non-Profit Sector in the Welfare State (Washington: Independent Sector and the United Way Institute, 1989).

4

For charities established for the relief of poverty, the public benefit requirement is less stringent. For a discussion of the rule, see Re Scarisbrick; Cockshatt v. Public Trustee, [1951] 1 Ch. 622, [1951] 1 All E.R. 822 (C.A.). See the "poor-relations" cases discussed infra, ch. 8.

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Different versions of the theory have formulated the self-evident goods in different ways.

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Finnis, supra, note 7, at 86.
Perhaps this maxim explains the anomalous "poor relations" cases mentioned. For further discussion, see infra, ch. 8.

There is a provocative suggestion in economic literature that an act of charity is just another consumption preference of the donor. L.A. Blum, *Friendship, Altruism and Morality*, paperback ed. (London: Routledge & Kegan Paul, 1982), at 5 characterizes a related view in the Kantian tradition this way:

To act from altruistic feeling or emotion is to act out of an inclination or desire. Though the inclination is towards the good of another, action thus prompted is fundamentally egoistic in its motivation. For the agent acts beneficently only because he happens to have a particular inclination to promote the others' good.

That purity of will as the foundational element is affirmed in St. Paul, Corinthians I, 1:13.

Consider also Maimonedes, "Eight Degrees of Charity":

The first and lowest degree is to give, but with reluctance or regret. This is the gift of the hand, but not of the heart.

The Second is to give cheerfully, but not proportionately to the distress of the sufferer.

The Third is to give cheerfully, and proportionately but not until solicited.

The Fourth is to give cheerfully, proportionately, and even unsolicited, but to put it in the poor man's hand, thereby exciting in him the painful emotion of shame.

The Fifth is to give charity in such a way that the distressed may receive the bounty, and know their benefactor, without their being known to him...

The Sixth which rises still higher, is to know the objects of our bounty but remain unknown to them...
The Seventh is still more meritorious, namely, to bestow charity in such a way that the benefactor may not know the relieved persons, nor they the names of their benefactors...

The Eighth and the most meritorious of all, is to anticipate charity by preventing poverty; namely, to assist the reduced fellowman, either by a considerable gift, or a sum of money, or by teaching him a trade, or by putting him in the way of business, so that he may earn an honest livelihood, and not be forced to the dreadful alternative of holding out his hand for charity.

But compare this statement from Re Campden Charities (1881), 18 Ch. D. 310, at 327, 50 L.J. Ch. 646 (C.A.): "We know that the extension of doles is simply the extension of mischief."

In Attorney-General v. Tyndall (1764), Amb. 614, (Ch. D.), Lord Healey stated that "it is indifferent to the donors in what species they give their money: not service to the poor but vanity is their motive".

See American Law Institute, Restatement (Second) of Trusts (Washington, D.C.: 1957) §368:

If the purposes to which the property is by the terms of the trust to be devoted are charitable purposes, the motive of the settlor in creating the trust is immaterial....Even if the motive of the testator in disposing of his property is to spite his heirs, the trust is none the less a charitable trust if the purposes are charitable.

The motives of the donor, as an object of inquiry in the determination of whether a gift is charitable, is rejected categorically at the outset of the chapter on charitable trusts in A.W. Scott, The Law of Trusts, 3d ed. (Boston: Little, Brown & Co., 1967). Professor Scott noted that lawyers tend to become somewhat "lyrical" when they attempt to define what is a charitable trust. He cited the case of Vidal v. Girard's Executors, 2 How. 127, 11 Towel. ed. 205 (1844), in which the lawyer arguing in favour of upholding a trust created by Mr. Girard to found a secular school for orphan children argued:

[W]hatever if given for the love of God, or for the love of your neighbour, in the catholic and universal sense given from these motives and to these ends free from the stain or taint of every consideration that is personal, private or selfish.

Professor Scott remarked that, although this "striking statement may appeal to the ear, it is wholly unsound as a definition of a charitable trust". Scott continued, at 2767:

From the legal point of view, perhaps no definition could be worse than this. It makes the matter depend upon the motive of the donor rather than the purpose to which the property is to be applied. It is well settled that the motive of the donor is immaterial. A trust is nonetheless charitable although the donor was actuated by a desire to glorifying himself or by a desire to spite his relatives....St. Paul, it is true, in his tribute to the virtue of charity, was speaking of the motive rather than the purpose; but St. was not attempting to define charitable trusts or to deal with the question of their validity under the Anglo-American system of jurisprudence.

Despite these very strong statements, however, the existing law occasionally does have recourse to the motives of the donor as a relevant determining consideration. The Income Tax Act, R.S.C. 1985, c.(5th Supp.), is implicitly sceptical regarding the motives of "philanthropy" in imposing a much more stringent disbursement regime on foundations than on operating charities. In addition, in some circumstances courts are forced to look beyond the apparent charitable form of a transaction to discern its true motive and,
thereby, its true nature. Thus, in *R. v. Burns*, [1988] 1 C.T.C. 201, 19 F.T.R. 275 (sub nom Burns v. Minister of National Revenue) (F.T.D.); aff'd [1990] 1 C.T.C. 350, 35 F.T.R. 121n (C.A.), it was held that the taxpayer's donation to the Canadian Ski Association was made in response to the Association's expectations that the gift would be made in exchange for ski instructions for the taxpayer's daughter. See, also, *Homa v. Minister of National Revenue*, [1969] Tax A.B.C. 961, where an ostensible gift to an institution providing education to the son of the taxpayer was held not to be a charitable donation.

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Only in the circumstance where the political effort is aimed at overturning an unjust law, such as Amnesty International working against legalized torture in Chile, or where that effort can be said to be purely instrumental to a charitable purpose, is it essentially altruistic.

21


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This latter test is formulated in the *Restatement (Second) of Trusts, supra*, note 19, §368, as follows: a purpose is charitable only if “its accomplishment is of such social interest to the community as to justify the property to be devoted to the purpose in perpetuity”.

23

In *Re Shaw, supra*, note 21, for example, Harman J. held that the objects were also invalid because the pursuit of knowledge, without a teaching element, was not a charitable purpose. This holding is now agreed to have been mistaken.

24

Some of these impediments were removed and charitable trusts in favour of Jewish, Roman Catholic, and Protestant Dissenters were permitted in a series of statutory reforms in the early to mid-nineteenth century. See *Roman Catholic Relief Act, 1813*, 53 Geo. 3, c.(U.K.); *Roman Catholic Charities Act, 1832*, 2 & 3 Will. 4, c. 115 (U.K.); *Religious Disabilities Act, 1846*, 9 & 10 Vict., c. 59 (U.K.); *Nonconformists' Chapels Act, 1844*, 7 & 8 Vict., c. 45 (U.K.); *Places of Worship Registration Act, 1855*, 18 & 19 Vict., c. 81 (U.K.); and *Roman Catholic Charities Act, 1860*, 23 & 24 Vict., c. 134 (U.K.).

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Compare *Hobson v. Minister of National Revenue* (1959), 59 D.T.C. 211, 21 Tax A.B.C. 433, in which it was held that the Audubon Society, whose main purpose was to stimulate an interest in the need for conservation, was not charitable.

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See, for example, D. Baker, "ViewpointRethinking Charity: What Do We Owe Each Other" (1991), 10 Philanthrop. (No. 1) 33. Baker argues that equal subsidization by the tax system distorts charitable giving since those with the resources to give, give to philanthropy rather than charity. Thus he states, at 35, that "[a]t the same time as we allow these elite interests to drive the public agenda, fueled by the tax subsidy..., much harsher treatment is accorded to the 'political' activities of charities, particularly those that seek to advance the interests of members of disadvantaged groups in society". In a similar vein, see I. Morrison,

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Supra, note 19.

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In any event, there are very substantial constitutional protections which must be considered.

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See, for example, Re Laidlaw Foundation (1984), 48 O.R. (2d) 549, 13 D.L.R. (4th) 491 (Div. Ct.).

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CHAPTER 7

THE LEGAL DEFINITION OF CHARITY:
THE CURRENT APPROACH AND PROPOSALS FOR REFORM

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1. INTRODUCTION

Over the years, the legal definition of "charity" has been influenced substantially by the policies underlying the particular areas of law in which the term has been used. Part of the importance of the discussion in chapter 6 lies in the effort to see beyond these distorting influences. The real definition illuminates the broader conceptual limits by which any particular statutory definition must abide. In this chapter, however, the Commission argues for a more substantive role for the real definition than this. In section 2 of this chapter, we contend that the legal definition of charity should be identical for all policy domains, and therefore that policy function ought not to play any formally explicit role in the development or formulation of that definition. We also recommend against the adoption of a statutory definition of charity. In section 3, we set out the basic elements of the common-law definition and recommend improvements based on or derived from the real definition. We reiterate the point made at the beginning of chapter 6 that these improvements should be implemented by courts and administrators, not by legislators. We conclude in section with a summary of our main observations concerning the reform of the basic elements of the legal definition of charity. In the following chapter, we take up particular problems in the case law on the definition of charity.
An historical example illustrates the point about the influence of policy on the development of the legal definition of charity. The example concerns the Mortmain Act, 1736, a statute that was enacted in the United Kingdom in an age of anti-clericalism. Its principal provisions, in effect, prohibited devises of land to charity. Parliament feared that clerics administering the sacrament of last rights would play on the conscience of dying persons by encouraging them to devise their lands to the church in order to save their souls, thereby depriving the "rightful heirs" of their inheritance. The policy of this statute—a suspicious attitude towards the value of religious charity—was best implemented by adopting a broad definition of charity. A famous case on the meaning of "religion", Thornton v. Howe, illustrates the result of this thinking. In this case, land was left in trust for the printing, publishing, and propagation of the sacred writings of the late Joanna Southcote, who had claimed that she was with child of the Holy Ghost and that of her the second Messiah was to be born. The court held the trust was charitable for a religious purpose, and therefore invalid because of the statute. The decision is sometimes cited as an example of the toleration of the law, but as one author notes, that toleration was the "kiss of death".

Long after the decline in influence of the policy concerns which motivated the Mortmain Act, 1736, the heritage of case law it spawned survives to influence the "legal" meaning of "charity". Most observers, for example, readily acknowledge that it has contributed to the acceptance of a much wider definition of what counts as a religious purpose than might otherwise have been the case. Some texts, remarkably, do not even mention the fact that the wide definition of religion was employed, in that case, in the way described above.

Historically, however, the main function of the definition of charity has not been its role in mortmain legislation. Rather, its main function has been, and one of its two main functions continues to be, its role in the law of charitable purpose trusts. Under the law of trusts, and subject to a few minor exceptions, only charitable purpose trusts are valid and enforceable. Property devoted in trust to any other nonprofit purpose, therefore, automatically reverts under trust law to the settlor or testator, since, exceptions aside, such a trust is void. With this result, imposed under trust law, comes the significant benefit of state enforcement of the trust through the exercise of the parens patriae jurisdiction of the Crown, which in Ontario (and other common law jurisdictions) has been, in part, developed and transformed by statute.

The importance of this role of "charity" is diminished considerably today by the fact that the vast majority of Canadian charities are organized as corporations, not as charitable purpose trusts; whether a nonprofit corporation is charitable is entirely irrelevant to the question of its viability or legal status. Thus, the other main function of "charity"—to determine the eligibility of certain organizations for state-financed subsidies and other state-sponsored privileges—is by far the more important one today.
The most significant area of law in this regard is Canadian income tax law. "Charity" is used in this context to determine the eligibility of certain organizations and certain trusts for the taxation advantages of charitable status, that is, the tax credit and tax deduction for donations to charity, and the tax-exempt status of charitable organizations and charitable trusts under federal and provincial income tax laws. But charitable status entails other state-conferred privileges as well: eligibility for gaming licences pursuant to the provisions of the *Criminal Code*,13 exemptions (for some) from property tax and retail sales tax under, respectively, the *Assessment Act*14 and the *Retail Sales Tax Act*;15 preferential treatment under the Goods and Services Tax Part of the *Excise Tax Act*;16 and eligibility for discretionary government grants under several provincial statutes, including the *Charitable Institutions Act*.17

In one respect the state interest in the two main modern contexts is, broadly construed, the same. In both cases the state is concerned with bestowing a benefit-viability and enforcement in the case of the law of trusts, and the direct or indirect financial (or other) subsidy in the case of the various privileges on a desired or meritorious social activity. This identity in state interests might seem to entail an identity in function, and, therefore, constitute a strong justification for a single legal definition of "charity". Thus, perhaps in line with this thinking, all the areas of modern statutory law identified so far use only the uncodified common-law definition of "charity", as developed in the trust law context.18

Beneath this unity, however, many commentators see significant tensions.19 They discern important differences between the two main bodies of law, and they argue that these differences place undue stress on the common definition. For example, although viability entails the enforcement subsidy, that subsidy is nowhere near as costly as the tax subsidy. Consequently, many charity law observers note a tendency towards a liberal interpretation when viability is the sole issue, since the effect of a negative answer in that context is usually to upset the evident intentions of a testator; and a tendency towards a strict interpretation in the tax area, since the effect of a positive answer in that context is a further widening of the fiscal breach. Alternatively, some observers have maintained that the substantial cost and overwhelming importance of the tax subsidy argues in favour of a narrower definition altogether.20

In addition to the two main areas of law mentioned, there are laws restricting the powers of "charitable" organizations to own land (a hold-over from the mortmain laws)21 and businesses;22 there have been and continue to be laws creating a jurisdiction in a public agency to supervise and regulate "charitable" organizations.23 As well as viability and enforcement, there are also other benefits at common law extended to charitable purpose trusts, such as exemptions from the rule against inalienability24 and the rule against remoteness of vesting. Finally, there are many areas of statutory law which use the classification "charitable" or "charity" for some specific purpose.25 Interestingly, given the relative insignificance, from a social and fiscal policy point of view, of the restrictions on land ownership, the only statute containing a definition of charity is the one which restricts the land-owning powers of charitable organizations.26
It could be argued that these other areas of law also contribute to the need for more than one definition of charity. For example, one might expect that any statutory scheme containing a jurisdiction to regulate or supervise fundraising for a charitable purpose might stipulate a wider definition, because its policy objective would apply with equal force to non-charitable nonprofit purpose fundraising as well.

Despite the force of these arguments, it is the recommendation of the Commission, on balance, that something like the status quo on the question of definition be maintained. Subject to the criticisms set out in the remaining sections of this chapter, the Commission, therefore, endorses the common-law definition and the common-law methodology. We do not think that more than one definition of charity is required or advisable, and we do not believe that it is necessary or advisable to adopt a definition or definitions by statute. We think, despite the cogency of the foregoing remarks about function, that it would be a serious error to explicitly modify the definition of "charity" according to the statutory context, with the effect that an organization's classification as a charity would depend on the definition in the particular statutory regime at issue. This is not to say, however, that there cannot be or should not be differentiation in treatment among charities of different kinds. We only suggest that the general category "charity" have uniformity in meaning across all the relevant domains of law.

We make this recommendation for three reasons. The first is the need for regulatory simplicity. Several definitions and it should be emphasized that the adoption of even a single statutory definition for all provincial laws still results in at least two different definitions, one at the federal level and one at the provincial level would, in our view, cause far more harm (from confusion) than any benefit derived from differentiation in meaning according to context. The second is realism. As the attempt at a real definition illustrates, "charity" is an intelligible concept. In our view, its legal meaning should not, therefore, diverge from its real meaning if the only gain to be had is better targeting of certain statutory regimes. More precise targeting can be achieved, if desired, by differentiation among types of charity. The third reason is that a statutory definition or definitions 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.

If, however, the Legislature believes that for reasons of clarity in the law or for some other reasons, a statutory codification of the common-law definition is required, then we recommend that statutory definition to be a mere codification of the Pemsel test or, better yet, a modestly improved version of it. We say this for two reasons: first, this type of approach will minimize confusion between the federal and provincial regimes, and second, a general definition, such as the one in Pemsel, will give courts sufficient scope to make sound decisions on a case-by-case basis.

What follows in the remainder of this chapter, therefore, is as much a vindication of the common-law definition, as a critique, although many criticisms are offered. To the extent that we criticize the common law, however, the thrust of our remarks does not, lead to any recommendation for statutory reform.
3. THE COMMON-LAW DEFINITION

(a) Introduction

The common-law definition is similar in structure to the real definition. It evaluates projects by examining whether they propose to do charity. It thus asks whether the project aims at charity (what good or goods are proposed?) and whether the proposed project will result in a benefit (is the project effective or practically useful?) to the public (does it benefit strangers?). Our discussion, in this section, is divided as follows. In subsection (b) we examine the general tests applied by the law to determine what purposes count as charitable, and in subsection (c) we examine problems relating to the notion of "public benefit". In the following chapter, we examine particular problems relating to each of the possible categories of charity recognized or not recognized under the tests set out in subsection (b).

As will be seen, there is a good deal of confusion in much of the common law analysis on the topic of the meaning of "charity". This is only to be expected from a methodology that is nearly 200 years old and that has served many purposes in many different jurisdictions. One major source of confusion is, however, worth flagging at the outset. The common law equivocates in a harmful and confusing way in its use of the terms "public" and "benefit". These two terms are used to identify each of the required elements in the three principal aspects of the test, that is: whether the purpose pursued is charitable (of "public benefit"); whether the project chosen is of sufficient practical utility (of "public benefit"); and whether someone other than the donor or those related to him/her are benefitting (of "benefit to the public").

(b) What Purposes Are Charitable?

(i) Introduction

We examine three existing approaches that attempt to answer this question. The second and third of these are the most influential, but all three approaches are basically related, so it would be a mistake to think of any of them as discrete.

(ii) Statute of Elizabeth Test

One source for the legal definition of "charitable purposes", especially dominant until the 1950s and still used by some courts today, is the preamble to the Statute of Charitable Uses, more commonly known as the Statute of Elizabeth. The preamble is a non-exhaustive list of projects classified by the law, at the time of its enactment, as "charitable":

Whereas lands...goods...chattels...and money, have been...given...by Sundry...well-disposed persons...for...The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners; the maintenance of schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief,
As is well known, the preamble of the Statute of Elizabeth was never intended to provide a comprehensive definition of "charity". The statutory preamble was intended only to define the jurisdiction of a commission established under the statute to investigate and enforce "all and singular such gifts, allocations, assignments for any of the charitable and godly purposes before [in the Preamble] rehearsed". The formal title of the statute described its purpose as: "An Act to redress misemployment of Lands, Goods, and Stock of Money heretofore given to certain Charitable Uses". The charitable trusts that were the target of the statute were twofold: charitable trusts in favour of the poor and charitable trusts to support public works. These trusts were singled out for legislative action because they had become the object of much "squandering and defalcation" by reason of frauds, breaches of trust and negligence in those that should...employ the same", at a time when government was interested in acting to help alleviate the social consequences of poverty and to improve the public infrastructure. There was, thus, much that was thought at the time of the statute's enactment to have been charitable- most importantly religion- that was intentionally left off the list. In cases unrelated to the statute, English courts continued to use a more general and inclusive common law definition that had been developed by the Court of Chancery. That definition included the advancement of religion as a charitable object and equated "charity" with a broadly inclusive notion of "public benefit".

Generally, the approach of the modern courts, which rely on the statute as their starting point, has been to ask whether an activity falls within the spirit and intendment of this statutory preamble, or, failing that, whether it is analogous to one of the enumerated purposes, and, in either case, whether it is beneficial to the community. Alternatively, but to the same effect, courts ask whether the purpose under consideration falls within the equity of the statute. This approach dates back to the early nineteenth century to the case of Morice v. Bishop of Durham, where, on account of the then prevailing scepticism as to the value of charitable activity coupled with a preference for the succession rights of a testator's next-of-kin, it was said that the legal definition of charity was not coterminous with the common meaning of charity. The statutory preamble was selected as establishing the more restrictive and appropriate legal meaning. At first instance in that case, the Master of the Rolls, Sir William Grant, stated: Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court Here its signification is derived chiefly from the Statute of Elizabeth (stat. 43, Eliz. c. 4). Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied.

This view was confirmed in the Chancery Court by Lord Chancellor Eldon, who stated that the law of charity was confined to "either such charitable purposes as are expressed..."
in the Statute (stat. 43 Eliz., c. 4), or to purposes having analogy to those. This view distinguished the charitable trust from the public trust.

Initially, the central cases of a valid charitable purpose under the method of the preamble were the relief of poverty through alms-giving and the relief of the indigent through the provision of medical care, employment, and education, together with a restricted class of other objects of general public utility, such as the repair of bridges and canals. Sir Samuel Romilly, counsel for one of the parties in Morice, usefully summarized the new definition by identifying four main objects, only slightly broader in scope than the two existing categories.

1st, relief of the indigent; in various ways: money: provisions: education: medical assistance; &c.; 2dly, the advancement of learning: 3dly, the advancement of religion; and, 4thly: ...the advancement of objects of general public utility.

The only major point of departure from the preamble in Romilly's classification was the addition of the advancement of religion. His fourth category, "general public utility", was meant to include only the public works mentioned in the statute.

Over time the class of objects included as being within the spirit and intendment of the list of purposes in the preamble, or analogous thereto, grew. The vague methodology of the approach left considerable scope for courts to respond to and express the prevailing sentiments of their times to the point where numerous commentators have noticed definite trends in the case law: in some eras the courts have been quite restrictive, in others quite liberal.

Throughout the ascendancy of this method, generalizations were not discouraged nor prohibited, and most textbooks published during the height of its influence attempted at least a categorization of the charitable objects recognized by law. But this approach eschewed, and still eschews, attempts to define "charity". As a result, the "legal" meaning of charity under the preamble has the reputation of being highly "technical" because it is reposed in obscure arguments, contained in a multitude of cases, about the "spirit and intendment" of the statute. Since the logic was always to distinguish the "legal" from the "common" meaning of charity, courts always had a convenient way to express negative decisions. They could always say: "To the non-lawyer, perhaps, this activity may be charitable; nevertheless at law it is not because it is not within the spirit and intendment of the statute."

An excerpt from Lord Reid's decision in Scottish Burial Reform & Cremation Society v. Glasgow Corp. provides a useful summary of the approach under the statute and its current status:

The preamble specifies a number of objects which were then recognised as charitable. But in more recent times a wide variety of other objects have come to be recognised as also being charitable. The courts appear to have proceeded first by seeking some analogy between an object mentioned in the preamble and the object with respect to which they had to reach a decision. And then they appear to have gone further and to have been satisfied if they could find an analogy between an object already held to be charitable and
the new object claimed to be charitable. And this gradual extension has proceeded so far that there are few modern reported cases where a bequest or donation was made or an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not of individuals, and yet the object was held not to be within the spirit and intendment of the Statute of Elizabeth I.

As this passage clearly intimates, the Statute of Elizabeth test has latterly developed into something of a "shibboleth", something to be said and gotten out of the way, before moving on to the Pemsel test or directly to the decision. 54 It would be a mistake, however, to dismiss it too hastily, since the case law it has spawned is still influential. Also, despite important developments over the last forty years, there remains a fundamental affinity between this test and the next two: they all purport to eschew definition, and they all attempt to make categorical distinctions between what is charitable and what is merely of "public benefit".

(iii)"Pemsel" Test

The more common strategy in the case law is to start with the test laid down by Lord Macnaghten in Pemsel.55 In his speech in that case, referred to above, Lord Macnaghten said:56

How far then, it may be asked, does the popular meaning of the word `charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

This list of four things, essentially (and legally) charitable, is, in various forms, also found in several statutes across the common law world.

In drawing up the Pemsel list, Lord Macnaghten appears to have thought that he was merely classifying the items on the much lengthier Statute of Elizabeth list. Like Sir Samuel Romilly before him, Lord Macnaghten may have intended that the fourth general category merely address those items on the statute's list which had not been captured in the first three. Many commentators thus suggest that Lord Macnaghten had no intention of changing the definition or the methodology of the common law. Thus, there is considerable authority that any purpose falling under the fourth head of Pemsel must also be within the spirit and intendment of the statute.57 Others, however, have argued that Pemsel effected, and was intended to effect, a significant liberalization of the common-law approach.58 These commentators suggest that the Pemsel test ushered in an era in which the relevant question became, or was to become, simply, whether the activity under consideration is "beneficial to the public", with this key phrase expanded to include "objects of a hedonistic nature that contribute to the quality of life" of rich and poor alike.59

In practice, the Pemsel test continued to foster a very fact-specific judicial approach, with courts arguing by analogy to other cases where organizations or purposes similar to the ones in issue had or had not been found charitable. As with the approach that used the
preamble as the starting point, the object was not to deduce what was and was not a charity from a real definition, but to use the list and the case law which developed from it as suggestive of the main types of things that were charity.

A statement from Lord Wilberforce’s speech in *Scottish Burial Reform & Cremation Society v. Corp.*[^61] provides a useful summary of the *Pemsel* approach:

> Lord Macnaghten's grouping of the heads of recognised charity in *Pemsel*'s case is one that has proved to be of value and there are many problems which it solves. But three things may be said about it, which its author would surely not have denied: first that, since it is a classification of convenience, there may well be purposes which do not fit neatly into one or the other of the headings; secondly, that the words used must not be given the force of a statute to be construed; and thirdly, that the law of charity is a moving subject which may well have evolved even since 1891.

In general, therefore, it may be said that the method under a conservative interpretation of the *Pemsel* test is to start with the *Statute of Elizabeth* and/or the *Pemsel* test, preferably the latter, then look to the rich case law for analogies and for precedents both for and against. A conservative interpretation might resist overturning old precedents such as the exclusion of sports or the pursuit of knowledge in the absence of a teaching element refusing to extend the general fourth category. But there are many variations on this theme, and the approach overall is thought to be open and liberal.

**(iv)"Purposes Beneficial to the Public" Test**

There is a tendency in some more recent cases towards a third approach which may be characterized as a near-full retreat from the position set out in *Morice v. Bishop of Durham*[^62] and a near-complete dilution of the restrictiveness of *Pemsel*'s fourth category.[^63] Whereas *Morice* posited a categorical distinction between charitable purposes and purposes merely beneficial to the public, the third approach comes very close to collapsing this distinction altogether. Lord Russell, in *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*,[^64] described this new test in the following manner:[^65]

> The Courts, in consistently saying that not all ['objects of general public utility'] are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law, but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose...which could not have been within the contemplation of the Statute.

And in the same case Sachs L.J. said:[^66]

> I do not propose to consider the instant case on the basis of analogies. The analogies or 'stepping stones' approach was rightly conceded on behalf of the Attorney-General not to be essential: its artificiality has been demonstrated in the course of the consideration of the numerous authorities put before us. On the other hand, the wider test advancement of purposes beneficial to the community or objects of general public utility has an admirable breadth and flexibility which enables it to be reasonably applied from generation to generation to meet changing circumstances.
These two formulations of the third approach use the statute or the *Pemsel* list and the case law only as a final means of invalidating the trust. What counts according to this new formulation is whether the purpose under consideration is beneficial to the public, very broadly conceived. Only the traditionally excluded objects, such as political objects and objects contrary to public policy, would be excluded for certain. By this test many well-established exclusions would be eliminated. The logical possibility, however, of refusing to acknowledge some charitable purpose trusts when the reasons are otherwise thin would still be available to courts.

(v) Conclusion

We make four points by way of conclusion.

First, in point of fact, the law does not attempt and has never attempted to define "charity". It has merely provided a method for identifying charitable purposes. The trend of the law, however, has been to develop an increasingly open interpretation of the fourth category of the *Pemsel* test, which could be taken as a definition if it were positioned as such. For example, the emerging or implicit definition might be: "charitable purposes are purposes of public benefit, including...".

Second, the Commission suggests that the real definition, set out in the previous chapter, provides the proper interpretation of what the law should accept as purposes that are beneficial to the public. We suggest that the definition provides the basis for understanding how the fourth category has been judicially expanded in recent years to include things such as publishing of law reports and sports, and also how it ought to be expanded further. We suggest that it also provides the basis for understanding what ought to be excluded.

Third, the phrase "benefit to the public" is too vague and equivocal to be used as the catch phrase for this element of the definition. As stated above, and as will be developed further below, this phrase is currently used to name the three critical elements identified in our real definition, that is, the nature of the good pursued, the practical utility of the project chosen, and the character of the beneficiary of that benefaction. For a clear development in the law these three elements must be distinguished in legal argument and in court decisions. We would, therefore, prefer that this element of the test be cast more clearly as an inquiry into whether the project at issue advances a common good. In our view, this is what, with perhaps one exception, is meant by a "charitable purpose" or by a purpose that is beneficial to the public. The remaining elements would examine whether the project advances the good in a practical or useful way, and whether it benefits strangers.

Fourth, one significant theme in the history of the fourth category ("other" purposes of charity) is whether what we labelled "philanthropy" in chapter 6 "liberality" to use Lord Romilly's word belongs in that category. The core purposes in the traditional interpretation have always been the relief of poverty, the advancement of religion, and public works (in a very narrow sense). The historic trend has been to add philanthropy, in
our sense of the word. We see no reason to object to this development, but we do regard
it as support for the proposition that, for limited purposes, the distinctions might still be
made. Our examples for this possibility at the end of chapter 6 were the relaxation of the
rules regulating the political activity of charities, or some charities, in the narrow sense of
that word, and an increase in the tax subsidy to these groups.58

(c) Is the Project of "Public Benefit"?

(i) Introduction

The common-law test also requires that there be a public, as opposed to a private, benefit.
This part of the inquiry is often put: Is the project of "public benefit" or of "benefit, to the
public" or to "a sufficient segment of the community"? The connotations of the
formulation of this part of the common-law test are that the issue is, in part, a question of
the number of people who benefit and, in part, whether the people who benefit are
members of the public, as opposed to, for example, the friends and family of the donor.
This part of the common-law test is used as well to facilitate consideration of the
practical utility the "benefit" of the project.

There is considerable confusion in the case law over the meaning and significance of this
element of the common-law test. This confusion is acknowledged by most commentators.
As long ago as 1953, Professor Fridman wrote:69

The concept of public benefit is intangible and nebulous; its effects can only be
represented as variable and unpredictable. Imprecision has resulted in illogical and
capricious decisions, sometimes impossible to reconcile.

In Dingle, Lord Cross spoke critically of this part of the test: 70

The phrase a `section of the public’ is in truth a vague phrase which may mean different
things to different people. In the law of charity judges have sought to elucidate its
meaning by contrasting it with another phrase: `a fluctuating body of private individuals.’
But I get little help from the supposed contrast for as I see it one and the same aggregate
of persons may well be describable both as a section of the public and as a fluctuating
body of private individuals.

There are several reasons for this confusion. One of them is the common law's
equivocation in the use of the terms "public" and "benefit". Another is that of the three
aspects of the test just mentioned the number of beneficiaries, the emotional and
obligational distance of the donor from the beneficiaries, and the practical utility of the
project the Commission would argue that only the latter two are strictly relevant. Based
on our real definition of a charitable act an act that (1) a common or universal good (2) a
practical or useful way (3) the benefit of stranger source suggestion is that the number of
beneficiaries is never formally relevant. It often is a useful indicum, however, on the
question of emotional and obligational distance.

We do not recommend statutory reform of this part of the test either. We think the view
of the law advanced in the following paragraphs is already to a great extent established,
either implicitly or explicitly, in many of the decisions and much of the doctrinal writing. Our objective in this part of the chapter is merely to marshall the material into an intelligible definition and, thereby, to contribute to the clarification of the law. Our discussion is consequently divided into two parts: a description of the confusion, and a restatement of the true rule. In the description we look, first, at the "section of the community" element of this part of the common-law test, then second, at its "benefit" element. A leading Australian text on the law of trusts states the common-law test in a way that succinctly and completely expresses both these elements. We, therefore, adopt that formulation as a representative statement of the current law:

There can be no charity without public benefit, that is benefit must be shown, and the benefit must be for the public or community as a whole or for an appreciable, but unascertained and indefinite, portion of it.

Our argument is that these two elements are better expressed by our distance requirement and our practical utility requirement.

(ii) Confusion Over the "Public Benefit" Test

_a. "Section of the Public"

Two English decisions of the late-1940s and early-1950s provide influential formulations of the "section of the public" element of the "benefit to the public" test. In one case, _Re Compton_, there was a bequest "for the education of Compton and Powell and Montague children to be used to fit the children...to be servants of God serving the nation". In the other case, _Oppenheim v. Tobacco Securities Trust Co._, there was a trust for the education of the children of the employees of a group of associated companies having in combination over 100,000 employees. In drawing the required distinction between a public and a private benefit, the two courts in these two cases focused on the existence of a personal relationship, by blood or by, employment, and on the size of the section of the community identified. In _Re Compton_, Lord Greene held against the validity of the trust, saying:

[A] gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim on it.

The court in _Oppenheim_, likewise, held against the validity of the trust on the basis that it did not meet the "public benefit" test. In that case Lord Simonds said:

These words `section of the community' have no special sanctity, but they conveniently indicate first, that the possible...beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual...A group of persons may be numerous but, if the nexus between them is their personal relationship to a single
propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

This test is generally referred to as the Compton or the Compton/Oppenheim test. It has two parts, both of which are problematic. One part requires that the beneficiary class not be defined by reference to a "personal relationship to a named propositus". The other requires that the size of the beneficiary class not be negligible.

(1) "Personal Relationship to a Named Propositus"

To the extent that the Compton/Oppenheim test requires an investigation of any relationship between the donor and the beneficiary class, it is roughly the same as our requirement that there be emotional and obligational distance. Understood that way, there is nothing objectionable about the test. However, as formulated by Lord Greene in the passage just quoted (a "personal relationship to a named propositus"), the test is seriously misleading. If it is literally construed and there has been a tendency to take this formulation literally then the test excludes gifts in favour of any class identified by a relationship with any named person, not just those classes identified by their relationship with the donor, as in our test. Thus, a gift for the advancement of education for the benefit of "employees of the Crown", for example, is excluded. That is the first problem.

(2) Size of the Class

The second problem is that the Compton/Oppenheim test formally requires consideration of the size of the beneficiary class. As a preliminary matter, it is unclear whether the test requires consideration of the size of the class of possible (meaning eligible) or of ultimate beneficiaries. Lord Simonds' statement emphasizes the size of the possible beneficiary class of those eligible. But his words have been interpreted by some to require an ultimate beneficiary class of a certain size. A clear statement of the view that the size of the ultimate beneficiary class is relevant is contained in the Restatement (Second) of Trusts:

A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust.

In our view, however, it does not matter which formulation is correct since both are misguided. The size of the beneficiary class, whether possible or ultimate, is not formally relevant.

This position is borne out by an examination of the actual decisions of the courts. There are many cases where a charitable trust was held valid even though the possible or the ultimate class of beneficiaries was small. An endowed professorship, for example, or a scholarship for only one student, or an endowment for a minister's stipend or retirement allowance, are all valid charitable trusts, even though the number of possible or ultimate beneficiaries in each case is small. To our knowledge no case has ever been cited and
no compelling example has ever been provided which demonstrates that the size alone of the possible or ultimate beneficiary class is formally relevant.

The root cause of the error may be, however, that the smallness in size of the beneficiary class is often a very useful indication of a lack of distance. The smaller the size of the class, the more likely the donor could actually name the beneficiaries; in a situation where the donor could name the beneficiaries there is a reasonable suspicion that the motive is affection or duty, not altruism. Certainly it is common for altruism to be aimed at specific individuals, for example, a trust fund established to pay for the medical treatment of a child with a rare disease, or a trust to help a family that has lost their home in a natural disaster. All donors to these trusts give altruistically; these are quintessentially charitable acts, yet, obtusely, they are excluded by this limb of the *Compton/Oppenheim* test. Of course, in these examples there is no need for the law of purpose trusts so no harm is thereby caused. The real issue is, however, that it is a mistake to elevate the size of the beneficiary class into a formally relevant consideration, and, although it may have led to only a few errors, this mistake has caused some confusion.

The confusion lies in the fact that courts and commentators readily assert that the "public benefit" criterion varies from category of charity to category of charity. Courts, for example, readily maintain that the "public benefit" standard has developed "empirically", not logically, that it is a question of degree, and that "][m]uch must depend on the purpose of the trust" in issue. In *Gilmour v. Coats*, decided a few years before *Oppenheim*, Lord Simonds explained the different treatment in the application of the public benefit standard for different types of charity:

> It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty.

Similarly, Lord Somervell stated in *Inland Revenue Commissioners v. Baddeley*: 89

> There might well be a valid trust for the promotion of religion benefiting a very small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity, though it is clear...that a recreation ground for the public is a charitable purpose.

Commentators likewise maintain that the criterion "public benefit" fluctuates depending on the particular head of charity under consideration. Certainly, as the law now stands, this is true in an anomalous group of cases called the "poor relations cases", where charitable trusts for the benefit of poor relations and, more recently, poor employees have been upheld as valid. We examine these anomalous cases in chapter 8. Those cases to one side, we suggest that such open acknowledgement of so much variation in the criterion is recognition that the criterion is not what it is purported to be. The error
lies, in our view, in thinking of "class size" as a formally relevant consideration in the first place.

b. "Benefit"

Complicating matters further is the existence of the third sense of "public benefit" in the common law, namely, the requirement that (in our words) the project have practical utility, or that it actually contribute to the improvement of the world. There is only limited explicit recognition in the case law and commentary that the practical utility of the project is a formally relevant consideration. This reticence of the law, if we may put it that way, can be explained by a number of factors. First and foremost, the size element of the Compton/Oppenheim test frequently acts as a screen for this question. In the Restatement (Second) of Trusts formulation of the size test, for example, the relevance of the size of the ultimate beneficiary class is due to the belief that a class of sufficient size ensures that the community has an interest in enforcing the trust. We agree that is the reason, but we do not agree with size being used as the correct indicium. Rather, in our view, the community will have an interest in enforcing any charitable purpose trust which contributes effectively to the instantiation of a common good for the benefit of strangers. Second, trusts lacking practical utility are often cured of their particular defect frequently vagueness under the "scheme-making" power of the courts or, rarely, under a very broad application of the "initial impracticability or impossibility" cy-pres doctrine. Third, for obvious reasons, courts are reluctant to say of a benevolent person that his or her project is impractical or useless, or that it will not work. Often the application of this requirement, therefore, is disguised in other considerations. Fourth, if "practical utility" is thought to include only material, economic, or social benefits, then identifying these in the case of religion is extremely problematic. Either these benefits are considered to be non-existent with respect to religion, or they are fixed on as relevant considerations and religion is valued only for its byproducts or accoutrements (for example, where stained glass windows are concentrated on instead of acts or worship). Thus these four substantial difficulties with recognizing, articulating, and applying the practical utility aspect of the benefit to the public test have contributed significantly to the confusion in this area.

Recognizing the formal relevance of the practical utility test does help solve one puzzle in this area of the law. The statements made regarding the variation in strictness of the "public benefit" test, which we previously construed as enigmatic, may now be more readily explained. We noted in chapter that the practical utility question is always context specific. It is this fact that helps explain the appearance of variation. Where the donor's gift is for the relief of poverty, it will almost always be the case that the gift contributes to the advancement of one or more of the goods for the benefit of strangers, given the beneficiaries' pre-existing state of serious deprivation. A gift that supports an accepted religion is also likely to pass the practical utility test, since invariably the avenues for giving are limited and pre-established by the recipient religion. In other words, projects in these two categories are simple to design and, therefore, almost never fail the practical utility test. Projects advancing other goods are more difficult to design, although one would expect that, given the prevalence of educational institutions in our society, projects
for the advancement of education would seldom miss the mark either. These observations affirm, rather than deny, the existence of a single standard. The appearance of variation is only an appearance. It is not the standard that varies; it is the success ratio of projects in the different categories that fluctuates.

(iii) Clarification

We agree with Professor Fridman's conclusions regarding the elements of the public benefit test, which he expressed some time ago:\(^9^7\)

(a) A charitable trust is one which benefits an identifiable group of people, however small or great in number, but with a common interest, so long as that group is not identified by some blood relationship or family or purely contractual tie.

(b) The benefit involved may be physical or spiritual, measurable or intangible, direct or indirect.

(c) But it must be recognizable, that is, capable of intellectual and definite recognition, and it must be of reasonable expectation. It must not be a putative or hoped-for benefit.

We think that the correct design of the "public benefit" test on the points in issue in this area of the law should have the features identified by Professor in the passage quoted. That is, once it has been established that the objects are charitable, that they advance a common or universal good, then the "public benefit" test should consider obligational and emotional distance, and the overall practical utility of the project. It should not ask about size except insofar as size of the beneficiary class may be an indication of the lack of distance or a factor that contributes to the project's lack of utility.\(^9^8\) Since "benefit" and "public" are equivocal, however, we suggest that courts should use these terms carefully or not at all.

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Endnotes:

1

*An Act to Restrain the Disposition of Lands, whereby the same become Unalienable, 1736, 9 Geo. 2, c. 36 (U.K.)* (hereinafter referred to as the *Mortmain Act, 1736*).

2

3

Jones, ibid.

4


5


6

See, further, H.A.J. Ford and W.A. Lee, Principles of the Law of Trusts, 2d ed. (Sydney: Law Book Co., 1990), at 826:

[Thornton v. Howe] has been approved of judicially and administratively in a number of cases so as to favour religious activities of many kinds, including those of controversial sects.... [T]he Charity Commissioners in England have ruled charitable the highly controversial church known as the Unification Church otherwise called The Moonies.


This area of the law of trusts will be taken up in more detail *infra*, chs. and 16.

For example, in England and Wales, the Charity Commissioners exercise concurrently some of the powers of the Attorney General. See, for example, *Charities Act, 1993*, c. 10 (U.K.), ss. 27, 32, and 63(2).


It is not known how many Canadian charities are incorporated or how many are organized as trusts. As suggested *supra*, in ch. 4, it would be helpful if information like this were compiled by the federal government through the annual information return that charities are required to file.

However, it should be noted that the Office of the Public Trustee currently does exercise some authority over the contents of the letters patent of incorporation. See Office of the Public Trustee and Ministry of Consumer and Commercial Relations, *Not-for-profit Incorporator's Handbook* (Toronto: Queen's Printer, 1989), at 47-48. For a further discussion see *infra*, ch. 16.

R.S.C. 1985, c. C-46. Section 207(1)(b), as rep. & sub. by R.S.C. 1985, c. 52 (1st Supp.), s. 3, s. 12(1), provides for an exception from the general prohibition against games of chance and lotteries "for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council..., to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose".

The only statute in Ontario containing a definition is the *Charities Accounting Act*, supra, note 10, s. 7. In that statute it is used as part of the new mortmain provisions only.

For example see N. Brooks, "Charities: The Legal Framework" (Ottawa: Secretary of State, 1983) [unpublished], and G. Cross, "Some Recent Developments in the Law of Charity" (1956), 72 Law Q. Rev. 187.

In *Dingle v. Turner*, [1972] A.C. 601 at 624-25, [1972] 1 All E.R. 878 at 890 (H.L.) (subsequent references are to [1972] A.C.), Lord Cross stated that he thought that the decisions in *Re Compton; Powell v. Compton*, [1945] 1 Ch. 123, [1945] 1 All E.R. 198 (C.A.) (subsequent references are to [1945] 1 Ch.), and *Oppenheim v. Tobacco Securities Trust Co.*, [1951] A.C. 297 [1951], 1 All E.R. 31 (H.L.) (subsequent reference is to [1951] A.C.) were "pretty obviously influenced by the consideration that if such trusts as were there in question were held valid they would enjoy an undeserved fiscal immunity". Three of the four judges who concurred with Lord Cross, however, expressly disagreed with this comment. In *Re Resch's Will Trusts; Le Cras v. Perpetual Trustee Co.*, [1969] 1 A.C. 514 at 540, [1967] 3 All E.R. 915 at 921 (P.C.), Lord Wilberforce stated that the test for charity was whether the object is "in modern times, accepted as a public benefit suitable to attract the privileges given to charitable institutions". It is clear that he meant the tax privileges. In *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31 at 52, [1947] 2 All E.R. 217 at 225 (H.L.) (subsequent references are to [1948] A.C.), Lord Wright also made reference to the relevance of tax privileges to the decision to confer charitable status. Also, E.B. Bromley, "Contemporary Philanthropy Is the Legal Concept of `Charity' Any Longer Adequate?", in D.W.M. Waters (ed.), *Equity, Fiduciaries and Trusts 1983* (Scarborough: Carswell, 1993) 59, at 96, argues:

Any legal concept of charity adequate for the future must come to assign some significance to the fiscal and tax benefits which attach to charitable status,...[I]t
seems that fiscal benefits must become a factor in the minds of the court because it is a factor in the minds of the man in the street and the State.

21

Supra note 18.

22


23

Charitable Accounting Act, supra, note 10.

24

See, further, infra, ch.for this and other examples of benefits of this type.

25

See federal and provincial statutes listed infra, in Appendix B. See, for example, Re Co-operative College of Canada and Saskatchewan Human Rights Commission (1975), 64 D.L.R. (3d) 531, [1976] 2 W.W.R. 84 (Sask. C.A.) (applicability of Fair Employment Practices Act, R.S.S. 1965, c. 293 to defendant college depended on whether college was entitled to exemption as charity under Act).

26

See Charities Accounting Act, supra, note 10, s. 7. This statutory provision was first enacted in 1909 as The Mortmain and Charitable Uses Act, S.O. 1909, c. 58, s. 2(2) (hereinafter referred to as the "Mortmain and Charitable Uses Act (1909)"). A previous statute had used a list of purposes taken from the Statute of Elizabeth, infra, note 33, and a concluding proviso "and any other purposes similar to those hereinbefore mentioned": The Mortmain and Charitable Uses Act, 1902, S.O. 1902, c. 2, s. 6.

27

Most studies and commentators support this position. The 1989 U.K. White Paper, supra, note 6, at 6, concluded:

The Government consider that an attempt to define charity...would be fraught with difficulty, and might put at risk the flexibility of the present law which is both its greatest strength and its most valuable feature.
See, also, B. Bittker and G.K. Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation" (1976), 85 Yale L.J. 299 at 331-32:

Despite the vagueness of the term and the divergent activities which it embraces, the unadorned reference to `charitable purposes' in s. 501(c)(3) has created only minor problems of interpretation for tax planners, administrators, and the courts...It is not likely that a detailed statutory definition would eliminate these residual problems of distinguishing between `charitable' and `non-charitable' purposes...by an unending process amending the Code to settle every boundary dispute as it arises.


The truth of the matter is that it is impossible to frame a perfect definition of charitable purposes. There is no fixed standard to determine what purposes are charitable. [A] definition...[cannot] include what should be included and exclude what should not be included. Matters of grave policy like this cannot be solved by definition.

See, also, G.W. Keeton, "Some Problems in the Reform of the Law of Charities" (1960), 13 Current Legal Probs. 22, at 23:

It is difficult to see what value could be gained from enacting the Pemsel definition. In the long run, there is probably no alternative to the work of rationalisation being undertaken by appellate courts.

By contrast, in Britain the Report of the Committee on the Law and Practice Relating to Charitable Trusts (Cmd. 8710, 1952) (hereinafter referred to as the "Nathan Report") recommended, in para. 140, that the text of Commissioners for Special Purposes of the Income Tax v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28, (H.L.) (hereinafter referred to as "Pemsel") (subsequent references are to [1891] A.C.) be codified, but that the codification provision explicitly affirm that no change in the law was thereby intended. This recommendation was not accepted in the subsequent government White Paper (Government Policy on Charitable Trusts in England and Wales), nor by Parliament in the subsequently enacted Charities Act, 1960, 8 & 9 Eliz. 2, c.(U.K.). The U.K. report, National Council of Social Services, Charity Law and Voluntary Organisations (London: Bedford Square Press, 1976) (Chair: Lord Goodman) (hereinafter referred to as the "Goodman Report"), recommended a reformulation of the list of charitable objects. See Appendix F for this list. Appendix F contains a variety of possible definitions from various sources. The Report of the Royal Commission on Income Tax (Cmd. 615, 1920) (hereinafter referred to as the Colwyn Commission) recommended the adoption of a definition in order to make clear that the legal definition included more than just the relief of poverty. A subsequent government committee recommended against the adoption of a definition since "there was no real need...as the existing provision had not given rise to any very great problems of interpretation": Income Tax Codification
Committee (Cmd. 5131, 1936). The Board of Inland Revenue, however, had recommended to the Colwyn Commission that the legal definition be restricted to relief of poverty and physical distress, principally on the basis that the tax benefit was "a concealed subsidy" which was not under state control. See Brooks, supra, note 19, at 25-26. See, also, B.E.V. Sabine, A History of Income Tax (London: Allen & Unwin, 1966). In The Royal Commission on the Taxation of Profits and Income, Final Report (Cmd. 9538, 1955), the majority of commissioners recommended in favour of a narrower definition, to limit the tax subsidy. A minority recommended an even more restricted definition on the basis that the taxation advantages were tax expenditures and therefore were justifiable only insofar as the charities relieved the state itself of some other expenditure.

28

This is so even if the broad language of the Pemsel decision, supra, note 27, is used in the provincial law (that is, even if the provincial statute is a mere codification of the common-law definition). Note that the change in the definition in the Ontario mortmain legislation in 1909 (see Mortmain and Charitable Uses Act (1909), supra, note 26) from a definition based on the Statute of Elizabeth, infra, note 33, to one based on Pemsel, led one court to conclude that there had been a liberalization in the meaning of "charity" in Ontario, even in areas of law having nothing to do with mortmain. See Re Orr (1917), 40 O.L.R. 567 at 585 (App. Div.) (rev’d on other grounds (sub nom Cameron v. Church of Christ, Scientist) (1918), 57 S.C.R. 298, 43 D.L.R. 668), where Meredith C.J.O., in a judgment concurred in by three of the other four members of the court presiding, stated (at 597):

The course of provincial legislation leads clearly, I think, to the conclusion that the Legislature of Ontario adopted this latter change in the law for the purpose of preventing the English doctrine...from being applied in Ontario.


29

See G.W. Keeton and L.A. Sheridan, The Modern Law of Charities, 2d ed. (Belfast: Northern Ireland Legal Quarterly, 1971), at 51: "It is desirable, if not essential, to preserve a single definition of charity, whether for purposes of validity, rating or taxation; but that does not mean that all charities should necessarily be treated equally for [all] purposes.

30
For a similar conclusion, see Brooks, *supra*, note 19, at 40-50.

31

This was the recommendation of the *Goodman Report, supra*, note 27, at 16.

32


33

1601, 43 Eliz. 1, c. 4 (U.K.) (hereinafter referred to as the "Statute of Elizabeth").

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This fact is well known, if frequently overlooked. In *Gilmour v. Coats*, [1949] A.C. 426 at 442, [1949] 1 All E.R. 848 at 852 (H.L.) (subsequent references are to [1949] A.C.), Lord Simmonds stated:

> It is a commonplace that that statute...was directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature.
One commentator has suggested that the statute is remarkable for the way it defines charity so that state purposes, as opposed to religious purposes, are emphasized as core to the meaning of "charity". It thus marks the "beginning of [charity] as a voluntary partnership, between the citizen and the State, to fund and achieve social objectives": Bromley, supra, note 20,64-65. On the omission of religion, see, further, F.H. Newark, "Public Benefit and Religious Trusts" (1946), 62 L.Q.R. 234, and Picarda, supra, note 6.

39

See Bromley, supra, note 20 and Jones, supra, note 2, at 57-58.

40

See Jones, ibid., at 57-58, 120.

41

Recently, Canadian courts have shown some hesitation about starting with the Statute of Elizabeth. In Re Laidlaw Foundation, supra, note 28, at 582, Southey J. stated that "it was highly artificial and of no real value in deciding whether an object is charitable...to pay lip service to the Preamble of a statute passed in the reign of Eliz. I". In Re Levy Estate, supra, note 28, at 392, the following comment was made: "[T]he preamble to the Statute of Elizabeth...no longer defines charitable trusts in this province." But Stone J., in Native Communications Society of B.C. v. Minister of National Revenue, [1986] 3 F.C. 471 at 478, [1986] 2 C.T.C. 170 at 173 (F.C.A.), stated: "A purpose, to be a good `charitable' one, must possess a charitable nature within `the spirit and intendment' of the preamble." See, also, MacGuigan J. in N.D.G. Neighbourhood Association v. Minister of National Revenue (1988), 85 N.R. 73, [1988] 2 C.T.C. 14 (F.C.A.).

42


43

See Jones, supra, note 2, at 133. Note that where personaltiy was involved, as in Morice v. Bishop of Durham, supra, note 42, and, therefore, where the matter was outside the purview of the Mortmain Act, 1736, supra, note 1, a narrower definition was more helpful in advancing the interests of the next-of-kin since any bequest on trust for some non-charitable purpose would fail and the property would go to the next-of-kin.

44

Bentwich, supra, note 32, at 522, has referred to the definition as having "that worst root of title, an ancient and obsolete Statute".
45

Morice v. Bishop of Durham, supra, note 42, at 404-05 (9 Ves.).

46

Morice v. Bishop of Durham, supra, note 42, at 541 (10 Ves.).

47

Jones, supra, note 2, at 133, wrote: "That case and its successors have bequeathed to future lawyers the thankless, often impossible, task of distinguishing the charitable gift...from the gift which is merely for the public benefit."

48

Morice v. Bishop of Durham, supra, note 42, at 532 (10 Ves.).

49

Lord Romilly argued, ibid., at 531 (10 Ves.), that the following purposes, although for the benefit of the public, were not charitable: "the establishment of a Cabinet of Natural History, Anatomical Exhibitions, Galleries of Pictures, to be open to the public: a legacy to the African Society, for acquiring information in the interior of Africa to contribute to raise the degraded state of society in that part of the world." All of these, however, would certainly be classified as charitable purposes today, which shows a significant difference between his understanding and ours.

50

The conventionality of the scope of the definition is acknowledged openly by the courts. Lord Wright's remarks in National Anti-Vivisection Society v. Inland Revenue Commissioners, supra, note 20, at 42, are illustrative:

Where a society has a religious object, it may fail to satisfy the test if it is unlawful, and the test may vary from generation to generation as the law successively grows more tolerant....Again....trusts may, as economic ideas and conditions and ideas of social service change cease to be regarded as being for the benefit of the community. And trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of a public value.

Lord Simonds, in the same case at 69-70, said:

If to-day a testator made a bequest for the relief of the poor and required that it should be carried out in one way only and the court was satisfied by evidence that
that way was injurious to the community, I should say that it was not a charitable
gift, though three hundred years ago the court might upon different evidence or in
the absence of any evidence have come to a different conclusion.

51

See, for example, Oosterhoff and Gilse, supra, note 28, at 805-09, where the authors
observe that the English cases in the 1940s and 1950s were much stricter in their
approach due, the authors speculate, to a strict constructivist legal tradition and a greater
need for tax revenues following the war. The authors also observe that a more "lenient
attitude" has been adopted recently both in England and Canada, as evidenced in the
"poor employees" cases (see Jones v. T. Eaton Co., [1973] S.C.R. 635, 35 D.L.R. (3d) 97,
and Re Laidlaw Foundation, supra, note 28, there is a broader interpretation of the fourth
limb of Pemsel test, supra, note 27. See, also, Fridman, supra, note 32, at 538.

52

"The morass of case law expands from year to year and even a novice may place side by
side decisions which can be reconciled only by an audacious straining of language":
Keeton and Sheridan, supra, note 29, at 24. "Often it may appear illogical and even
capricious. It could hardly be otherwise when its guiding principle is so vaguely stated
and is liable to be so differently interpreted in different ages": Gilmour v. Coats, supra,
note 38, at 443, (Simonds J.). Picarda, supra, note 5, at 6 says (citing National Anti-
Vivisection Society v. Inland Revenue Commissioners, supra, note 20): "The legal
meaning of the word differs from the popular meaning, and it has been said on the
highest authority that charity in the legal sense is a word of art of precise and technical
meaning."

53


54

See Bromley, supra, note 20. "Shibboleth" is Bromley's word.

55

Supra, note 27.

56

Ibid., at 583. It is widely believed that Lord Macnaghten took this definition from the
argument of Samuel Romilly, counsel for the defendant in Morice v. Bishop of Durham,
supra, note 42. The American Law Institute, Restatement (Second) of Trusts (Washington, D.C.: 1957), §368, gives a similar definition:

Charitable Purposes include (a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; (f) other purposes the accomplishment of which is beneficial to the community.

The Restatement, ibid., also identifies the fourth limb as the common element: "The common element of all charitable purposes is that they are designed to accomplish objects which are beneficial to the community."

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58

In a dissent in Pemsel, supra, note 27, at 568, Bramwell L.J. voiced the objection in this way:

I think the judgment on this should be reversed. As the majority of your Lordships think otherwise the State will be a subscriber of £17 a year to supporting, maintaining, and subsidising `the missionary establishment among heathen nations of the Protestant Episcopal Church ...'.

59

Goodman Report, supra, note 27.

60

Thus, after setting out his four heads, Macnaghten L.J. in Pemsel, supra, note 27, at 583, said:

The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

Says one commentator (Bromley, supra, note 20, at 75):

In my opinion it is a fundamental misunderstanding to talk about the `spirit and intendment' of the Preamble as being congruous with Pemsel's `beneficial to the community'. They reflect divergent if not conflicting philosophies.
The phrase in our text is taken from the *Goodman Report, supra*, note 27, and is quoted by Bromley as characteristic of the new approach ushered in by *Pemsel*. In another passage, Bromley (at 60) argues that the *Pemsel* decision represented

a significant break from the Preamble and reflect[ed] the philanthropy of late nineteenth century England rather than Elizabethan England. *Pemsel* mark[ed] a turn away from concern for the poor being the pervasive and dominating consideration of the law of charity to other purposes beneficial to the community which could incidentally benefit the rich.

The latter, argues Bromley (at 61), is what Sir Samuel Romilly set aside as "liberality": "assisting individuals, not in a state of indigence, but possessing the comforts of life, is liberality; but not charity": *Morice v. Bishop of Durham, supra*, note 42, at 532 (10 Ves.).

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61

*Supra*, note 53, at 154.

62

*Supra*, note 42.

63

As suggested in the previous section, some commentators trace this development to Lord Macnaghten's speech in *Pemsel, supra*, note 27. Consider also art. 1270 of the *Civil Code of Quebec*:

A social trust is a trust constituted for a purpose of general interest, such as cultural, educational, philanthropic, religious, or scientific purpose.

64

[1972] Ch. 73, [1971] 3 All E.R. 1029 (subsequent references are to [1972] Ch.).

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67
Public works do not fit easily into this definition. This problem is discussed infra, in ch. 8.

There is precedent for the latter in the current income tax regime which favours gifts to the Crown by permitting a credit for the full amount of the gift even if this exceeds the 20% of income limit applicable to other charitable gifts. To some extent, the classifications used in the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), also serve as a precedent for differential treatment.

Fridman, supra, note 32, at 539.


Ford and Lee, supra, note 6, at 829.

Supra, note 20.

Supra, note 20.
The problem of the validity of trusts such as those in *Oppenheim v. Tobacco Securities Trust Co.*, supra, note 20, and in *Re Compton*, supra, note 20, was alleviated by a change in the class ascertainability rules applicable to private trusts by the decision of the House of Lords in *McPhail v. Doulton*, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.). Also significant was the acceptance of a less stringent test for public benefit in the case of charitable trusts aimed at the relief of poverty in *Dingle v. Turner*, supra, note 20, and by the recognition in *Re Denley's Trust Deed*, [1969] 1 Ch. 373, [1968] 3 All E.R. 65, that a trust expressed to be for charitable purposes, but of actual benefit to an identifiable group of individuals who therefore have an interest in enforcing it may, on that account, be a valid private trust.

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Similarly, gifts to help friends in need or to family members are also not charitable: *Re Doering*, [1948] O.R. 923, [1949] 1 D.L.R. 267 (H.C.J.) (a gift "for the education of the male descendants in the male line" held to be not charitable). But the requirement of distance has sometimes been overlooked (see *Spiller v. Maude* (1864), 5 New Rep. 30, 11 L.T. 329; subsequent proceedings (1881), 32 Ch.D. 158r; *Pease v. Pattinson* (1886), 32 Ch.D. 154, [1886-90] All E.R. Rep. 507; and *Re Buck*; *Bruty v. Mackey*, [1896] 2 Ch. 727, [1895-99] All E.R. Rep. 366), and there are several notorious exceptions: the "poor relations" exception, the "poor employees" exception, and the "founder's kin" exception.

80
Contra. Re Payne Estate; Gilmer v. British Columbia (Attorney General) (1953), 11 W.W.R. 424 (B.C.S.C.), where a trust in favour of "needy ex-members of the Imperial Armed Forces" was held valid.

81

Oppenheim v. Tobacco Securities Trust Co., supra, note 20, at 306 (see quote in text accompanying note 77, supra).

82

Professor Waters, supra, note 57, at 562, argues for this interpretation:

In the case of a discretionary trust or any trust which involves a selection among a class of persons, the objects of the trusts are the persons who are eligible for selection, not those who actually receive something. It is therefore irrelevant as to whether one person or ten thousand persons are to be selected from the class. As for public benefit, this means that the class which is eligible for selection must form a sufficient section of the community. It may well be...that there is little or no actual benefit to those who ultimately receive nothing though they were eligible for selection. And when only one individual or a few individuals may be selected, the actual gain or benefit to the community or to the class may in that sense seem to be none. But the fact of eligibility is what the courts have always considered to constitute benefit, and, if the class of eligibles is large enough, there is a public benefit.

In Scott on Trusts, supra, note 27, at 2939 and 2942, a similar argument is advanced:

Where the class of persons from whom the recipients of benefits are to be selected is sufficiently large, the fact that the number of persons who are to receive the benefits is small does not prevent the trust from being charitable. This is clear enough where the income of the trust fund is to be applied for the benefit of one person or a limited number of persons for an indefinite period. In such a case the number of persons who are to receive benefits under the trust at any one time is limited, but the total number is unlimited. A trust is upheld as a charitable trust because it is of benefit to the community. It is not essential, however, that every member of the community should be a beneficiary or potential beneficiary of the trust. Even though the purposes of the trust are charitable in character, the trust is not a valid charitable trust if the benefits are limited to too small a class of persons.

83

Supra, note 56, §375. See, also, Norris J.A. in dissent in Re Wedge Estate (1968), 63 W.W.R. 397 at 399, 67 D.L.R. (2d) 433 at 435 (B.C.C.A.). It was suggested that a gift on trust "to some needy displaced family of European origin...who wishes to make a new
start in life in Canada and engage in farming" was not a charitable trust because it failed the public benefit test. In the opinion of the dissenting judge, it failed because only one person or one family was to benefit.

84

The *Goodman Report, supra*, note 27, at 22, agreed:

> Provided all requirements for charitable status are present the fact that the beneficiary class may be small should as at present be no bar to charitable status.

85

Apropos of the criticisms in the text, none of the examples cited by the *Restatement (Second) of Trusts, supra*, note 56, to support its rule actually illustrate the point about the size of the class.

86

One could argue that, in fact, the ultimate beneficiary in the first example is the university community at large. Professor Waters suggests that the possible beneficiaries in the second example are the entire class of students from which the scholarship student is chosen. See Waters, *supra*, note 57, at 562 and 567.

87

The last phrase is from Lord Cross in *Dingle v. Turner, supra*, note 20, at 624.

88

*Gilmour v. Coats, supra*, note 38, at 449.

89


90

Oosterhoff and Gillese, *supra*, note 28, at 810: "[T]here is a progression from a very limited requirement of public benefit of trusts for the relief of poverty, to a greater requirement of trusts for the advancement of religion, a still greater requirement of trusts for the advancement of education, and the most stringent requirement of trusts for other purposes beneficial to the community." See, also, *Inland Revenue Commissioners v. Baddeley, supra*, note 89, at 615, per Lord Somervell.


There are other anomalies as well. Another exception found only in the English case law is the so-called "founder's kin" rule which permits educational trusts in favour of a sufficiently large section of the community that express favouritism within the group for the grantor's relatives. This exception was considered in a 1954 English case, *Re Koettgen Westminster Bank Ltd. v. Family Welfare Association Trustees Ltd.*, [1954] Ch. 252, [1954] 1 All E.R. 581, and in a 1961 Privy Council decision, *Caffoor v. Commissioner of Income Tax (Colombo)*, [1961] A.C. 584, [1961] 2 All E.R. 436 (P.C.). In the former case the gift was "for the promotion and furtherance of commercial education" with a preference that up to 75% of the income was to be given "to any employees of John Batt & Co. (London) Ltd. or any members of the families of such employees". Lord Upjohn in that decision held that the trust was valid as a charitable trust. In the latter case, there was a gift for the education of the grantor's relatives with a giftover to others if the relatives were unable to accept the gift. The Privy Council held, at 604, in that case that the trust was invalid as a charitable trust because of the "absolute priority to the benefit of the trust income...conferred on the grantor's own family". No Canadian case has upheld a gift under which the "founder's kin" are to be preferred, and the exception in favour of such charitable trusts has been criticized both in England and in Canada. *Waters, supra*, note 57, at 569 states: "Any further extension of the exception in favour of private benefit would bring the whole law of public benefit into disrepute."

See, for example, *Re Pinion*, supra, note 6, in which the testator left his studio, its contents and his "atrociously bad" paintings to the National Museum. Harmon J., at 107, said:

I can conceive of no useful object to be served in foisting upon the public this mass of junk. It is neither public utility nor educative value.
And Russell L.J., at 111, said:

For my part, I would not admit to the favoured ranks of charity bearing the banner of education a disposition with such negligible qualifications to bear it. Where the evidence leaves me with virtual certainty on balance of probabilities that no member of the public will ever extract one iota of education from the disposition, I am prepared to march it in another direction, pressing into its hands a banner lettered *de minimus non curat lex*.

See, also, *Re Elmour*, [1968] V.R. 390, where the testator's writing, which was to be published under the purported charitable trust, was judged to be of no literary value and therefore the trust itself was held to be non-charitable. But compare *Re Shapiro* (1979), 27 O.R. (2d) 517, 107 D.L.R. (3d) 133 (H.C.J.), where a trust to assist in the publication of an unknown Canadian author was held valid.

A British Columbia case, *Re Millen* (1986), 30 D.L.R. (4th) 116, 22 E.T.R. 107 (B.C.S.C.) (subsequent references are to 30 D.L.R. (4th)), provides a good illustration of similar difficulties. There the trust was established to fund the "Millen Award" to be awarded annually for, at 117: "1. A lyric, beautiful in form and in content" and "2. A prose original, fact or fiction, which in some way portrays the beautiful." It was held non-charitable because (1) it was not educational, the only relevant category in the courts view (since "beauty" is too vague a term and since it lies in the eye of the beholder), and (2) there was no public benefit because only one person would ultimately benefit, there being no requirement or provision for the publication of the work. We would argue that the court was, in part at least, mistaken. The advancement of aesthetic experience ought to be a valid category of charitable purpose in and of itself. And the public benefit requirement ought not to be construed to require a beneficiary class of a certain size. Rather, the difficulties with this gift were the lack of realistic institutional provision for its existence in perpetuity, its vagueness with respect to the selection of the recipient of the prize, and, therefore, its lack of utility in the advancement of a laudable purpose.


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*Supra*, note 56.

96

See, further, *infra*, ch. 13. Application of the *cy-près* doctrine where there is no impossibility or impracticability, however, is prohibited. Thus, where the project can still
be accomplished, but there are obviously better, more practical ways to achieve the relevant charitable objective, there can be no *cy-près* application.

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98

The *Goodman Report, supra*, note 27, at 19, made a similar but more tentative recommendation regarding the relevance of size:

Trusts for the benefit of classes of persons with special needs have been held charitable, even though quite a small number of persons might fall within such a class. Each case requires consideration on its merits. For instance, there is no reason in principle why people suffering from a rare disease should not be beneficiaries of a charitable trust established for their benefit. Likewise in the field of education, a small group of children by reason of some special disability may require special facilities....Provided the other requirements for charitable status are present we see no reason why the fact that there may be few eligible beneficiaries (i.e. members of the public to benefit individually) should be a bar to charitable status.
CHAPTER 8

THE LEGAL DEFINITION OF CHARITY: SPECIFIC PROBLEMS WITH THE CURRENT DEFINITION AND PROPOSALS FOR REFORM

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       (I) THE NON-CHARITABLE STATUS OF ORGANIZATIONS FOUNDED TO PROMOTE GOVERNMENT POLICIES
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   A. CHARITABLE STATUS OF PUBLIC WORKS PROJECTS
1. INTRODUCTION

In this chapter, the Commission examines a number of particular problems with the common-law definition of charity. From the discussion in the previous two chapters, it should be clear that in our view courts should no longer feel unduly constrained by the list of charitable projects in the Statute of Elizabeth, by the categories generated from that list in the textbooks and commentaries, or by the categories established in Pemsel. Indeed, one of our conclusions was that there is already a tendency in much of the recent case law to use the fourth category in Pemsel as a broadly inclusive definition. All that is required for the proper development of that approach is a better understanding of what is meant by "public benefit" in the Pemsel test. We suggest that the definition of charity, as set out in chapter 6, offers the way forward on this question. In the following discussion we make use of that definition to clarify and resolve many of the problems raised. The discussion itself is organized using the traditional rubrics of the Pemsel test, since that test is the starting point of almost all the modern cases and academic commentary dealing with the definition of charity. As will become apparent, the Pemsel test is deeply flawed conceptually. Consequently almost all of the problems relating to the question of definition discussed here arise due to conceptual difficulties posed by this test. Our effort in what follows, therefore, is to suggest lines of development that will permit over time an improved legal understanding of the meaning of charity.

2. "RELIEF OF POVERTY"
There are two questions concerning this head of charity: What is its content, that is, what purposes fall under this head? and, What should be done about the "poor relations" exception to the distance requirement? The Commission looks at each question in turn.

(a) Content

Relief of poverty is one of the core purposes in the narrow conception of charity, but it is not the only one. Aiding the emotionally, physically, mentally, and spiritually distressed are other important goals. The common characteristic of all these functions is the provision of help to people in circumstances of suffering and distress caused by or contributed to by, or which may cause or contribute to, economic deprivation. In Canada, many courts have tended to include all these purposes under Pemsel's first category relief of poverty even though relief of poverty is not necessarily an apt description of the intentions of most of these projects. A few courts have regarded all these purposes, except the relief of poverty, as coming under the fourth head other purposes beneficial to the community on the understanding that the relief of poverty requires a substantial element of economic deprivation in the proposed beneficiaries, but such economic deprivation will not necessarily be present where the beneficiaries of the charity are distressed or disadvantaged emotionally, physically, mentally, or spiritually. Some courts have avoided the difficulty of classifying these purposes under the Pemsel test altogether by resorting directly to the list in the preamble to the Statute of Elizabeth. As well as specifying the poor, the preamble mentions aged and impotent people, and sick and maimed soldiers and mariners. The problem, then, is how to categorize certain activities which no one doubts are charitable, but few seem to know for certain how, or by virtue of what definitive test.

Hospitals present a useful illustration of the difficulty. The Privy Council, in Re Resch's Will Trusts, addressed the issue of classifying the activities of a private hospital in the following passage:

A gift for the purposes of a hospital is prima facie a good charitable gift. This is now clearly established both in Australia and in England, not merely because of the use of the word 'impotent' in the preamble ..., though the process of referring to the preamble is one often used for reassurance, but because the provision of medical care for the sick is, in modern times, accepted as a public benefit suitable to attract the privileges given to charitable institutions.

In this passage, hospitals are said to be prima facie charitable, they are put in the fourth category, and recourse is had to the Statute of Elizabeth. Gifts for the benefit of orphans have presented similar difficulties in classification. The relief of poverty is certainly an element in many such gifts, but so is the advancement of education and the relief of the emotional distress caused by the lack of a home and parents. Similarly, gifts for the support of the aged may often have an element of poverty relief in them, but this facet is often far less pronounced than the objective of simply providing comfort to people in their declining years.
What is the source of the difficulty? There are, we would suggest, three contributing factors. The first element lies in the social transformation of some of the institutions involved in the pursuit of the charitable purposes under consideration. To continue with the example of hospitals, historically hospitals were established for the care of the poor, not the treatment of the sick. Today they treat sick people, rich and poor alike. Second, the difficulty arises in part from the concomitant evolution in the law’s use of the word "charity". Historically hospitals were "charitable" institutions in the narrow sense, because they provided relief to the poor. Today, hospitals are "charitable" institutions in the wide sense (that is, charitable and philanthropic), because they are established to pursue the good of health (life) for both rich and poor people. The third cause of confusion, however, is the very formulation of the various common-law tests applied. To illustrate this point, it is necessary to pause briefly to develop an explanation that may, ultimately, permit a modest improvement in this area of the law.

Two different perspectives were employed in the discussion in chapter on the definition of charity: one focused on and drew insights from the distinction between charity and philanthropy, in the narrow sense of those terms; the other developed a real definition from the list of common goods. Although complementary and equally helpful in understanding the meaning of charity, these two perspectives divide up the subject-matter "charity" in different ways and thereby generate two incommensurable systems of classification. Using the first, we divided the subject-matter into charity, in the narrow sense, and philanthropy. Using the second, we divided the charity according to the common goods life, knowledge, play, etc. There is no explicit cross-referencing between the two systems of classification: the first does not explicitly acknowledge that the point of charity is human flourishing; the second does not explicitly incorporate the notion that economic deprivation in and of itself is one of the main impediments to human flourishing. The third source of confusion in the area of case law under consideration then, is, in part, that these two incommensurable systems of classification are incorporated, in congruently, directly into the Pemsel list. On the one hand, the "relief of poverty" category of Pemsel names a project, referencing the distinction between charity and philanthropy (in their narrow senses). On the other hand, religion, education,9 and much of the fourth limb of Pemsel name projects referencing, directly or indirectly, goods from the list of common goods. Besides mixing systems of classification in this way, the Pemsel list makes two further conceptual errors: it names projects at different levels of generality and, more importantly for present purposes, and as already noted, it gets the content of charity, in the narrow sense, wrong."relief of poverty" fails to describe all the purposes concerned with people in distress and suffering. More conceptual complexity follows when resort is had in the case law to the Statute of Elizabeth (as in Re Resch’s Will Trusts)10 to address this latter discrepancy. This occurs because the items on the statute’s list are not generated by either system of classification, but consist merely in a random list of specific projects that were considered charitable at the time of its enactment.

The way forward is to understand that there are at least two systems of classification at work in the Pemsel definition and to recognize that the test is modestly defective for that reason.11 Our definition, which uses only the second system of classification, provides
guidance, but since it does not call for any explicit consideration of economic deprivation, it must be carefully applied. In particular, the practical utility element of our test provides sufficient scope to exclude projects that are intended to aid, or that in fact aid, only the rich, since these projects are unlikely to contribute effectively or usefully to the advancement of any of the goods. 12 They do not contribute to human flourishing in any very effective way.

(b) The "Poor Relations" Exception to the Distance Requirement

Trusts for the relief of poverty where the persons who benefit are the donor's "poor relations" 14 or the donor's "poor employees" 14 are valid trusts, even though they do not benefit the public. These trusts are anomalous and have been accepted as such by most commentators and courts. Some observers have called for their abolition. 15 In our view, for the purposes of trust law, the abolition of these exceptions to the distance requirement is not required. For the purposes of favourable tax treatment, however, we believe that there is sufficient reason to act to abolish them now.

These exceptions are probably explained by looking at the purpose relief of poverty at stake and the centrality of that purpose to the narrow meaning of charity. 16 The question from the trust law perspective is whether there is sufficient reason for the state becoming involved in the enforcement of these trusts and whether these trusts should be afforded the other trust law advantages perpetual existence, for example extended to charitable purpose trusts. Given the centrality of the relief of poverty to the meaning of charity, and given there is involved in these types of trusts a well-identified class of people with a strong interest in seeing that these trusts are enforced, there seems to be little reason to abolish them. One could argue, to the contrary, that in many instances what a donor wants to achieve by using a charitable purpose trust can be achieved nearly as well by using a valid private trust. 17 It could also be argued that allowing one exception to the restrictive purpose-trust rule leads to others, perhaps to the point where all non-charitable purpose trusts should be recognized as valid. 18 These opposing reasons are not compelling. In our view the reasons for and against these exceptions are too evenly balanced to justify a legislative repeal, insofar as trust law is concerned. The law of inertia should, therefore, continue to apply.

There is much less reason to favour these trusts with the tax advantages, however, since the motive to help strangers is weak, the resulting social benefits are minimal, and the opportunity for tax avoidance through income splitting is strong. Therefore, the Commission recommends that the federal government enact a provision which excludes these trusts from the currently available tax privileges.

3.RELIGION

(a) Introduction

The advancement of religion has always presented difficulties for the law of charitable purpose trusts. We have looked at some of the reasons for this in our discussion of the
real definition of charity. Our present object is to contribute further to the clarification of the current law by examining two problems. The first problem concerns the definition of the good of religion. The second concerns the way in which the public benefit testin our language the distance requirement and the practical utility requirement applies in the domain of religion. We look at each in turn.

(b) Definition

As the learned authors of an Australian textbook on the law of trusts have observed, the "modern law of trusts for the advancement of religion reflects the convulsions of its history". As stated in chapter 7, the effect of mortmain legislation and the enthusiastic reception of the policy underlying it by English courts in the eighteenth and nineteenth centuries have resulted in a much more liberal policy on what counts as religion for the purposes of the law of charity than is perhaps defensible. This liberal approach also results from an understandable reluctance on the part of courts to question the truth or authenticity of the beliefs of those who profess a religious conviction:

[T]he court will normally make no distinction between one Christian sect and another or even between one religion and another, unless the religion in question is so offensive to the court that it might be regarded as inculcating doctrines adverse to the very foundation of all religion or subversive of all morality such as the spread of materialism.

Occasionally, courts will reach a negative result regarding a particular religious purpose by accepting that the purpose at issue might be religious in some general sense but not in the "technical" legal sense. However, this is rarely done as a matter of definition. Rather, the courts have used one of two related narrow lines of reasoning to reach this result. They have sometimes used the "public benefit" test to exclude particular practices of certain otherwise recognized religions, and they have sometimes held that the legal meaning of religion is not necessarily coextensive with the official actions and practices of a given (recognized) religion.

Thus, in the prevailing approach of the law, there is some reluctance to apply a rigorous definition of "religion". Instead, the law applies a minimalist definition, one which assumes that some religion is better than none but expects that no religion is, or no religion should be permitted to be, harmful to the public interest, and that not everything professed or practised as or by a religion counts as religion in law. This is not the only possible approach, but perhaps the law is wise to err initially on the side of over-inclusiveness. The wisdom is easy to appreciate: there is an extraordinary risk of chauvinism in this particular decision, and the importance of religion to individual identity makes mistaken evaluations particularly harmful.

There is another less influential line of thinking in the case law that takes a slightly more rigorous view of what should be considered as religion in the first place. This approach is also supported by academic commentary, and some general definitions have been offered. Thus, Lord Hanworth said:
The promotion of religion means the promotion of spiritual teaching in a wide sense, and
the maintenance of the doctrines on which it rests, and the observances that serve to
promote and manifest it.

Similarly, Donovan J. in *United Grand Lodge of Ancient Free & Accepted Masons of
England v. Holborn Burrough Councils*, said:

To advance religion means to promote it, to spread its message ever wider among
mankind; to take some positive steps to sustain and increase religious belief; and these
things are done in a variety of ways which may be comprehensively described as pastoral
and missionary.

In these two definitions it is recognized that the domain of religious activity is essentially,
but by no means exclusively, spiritual, and that there is a necessity for an established
doctrine and an element of doctrinal propagation, both within and sometimes outside the
membership, and a necessity for a practice or observances. Although they make valuable
contributions, these two definitions still overlook a key element identified in the
following passage from the decision of Dillon J. in *Re South Place Ethical Society;
Barralet v. Attorney-General*, in which his Lordship sought to identify the distinction
between religion and ethics:

Religion...is concerned with man's relations with God, and ethics are concerned with
man's relations with man. The two are not the same, and are not made the same by
sincere inquiry into the questions: what is God? ... It seems to me that two of the essential
attributes of religion are faith and worship; faith in a god and worship of that god.

In this passage, the worship of God is identified as core to the meaning of religion, and
the established doctrines and observances are understood as contributing to or as facets of
the knowledge and the worship of God. Similarly, the accepted definition in American
trust law requires an element of theism: "a bond uniting man to God and a virtue whose
purpose is to render God the worship due to him as the source of all being and the
principle of all government of things".

On the basis of these elements of a definition, ethical societies, polytheistic religions
and religions involving ancestor worship, the Church of Scientology, bogus
religions, and cults have been, at one time or another, and for varying purposes,
excluded by some courts from being classified as religion. The decisions in question rely
on some or all of the elements identified. The approach is to appraise critically not the
truth of the religious doctrine *per se*, but rather whether it is essentially religious in nature
and whether the organization that proffers it is authentic. This more critical approach
parallels a similar process sometimes applied in other domains of charity such as art and
education. Courts will sometimes evaluate the validity of the artistic value of works of art
donated to charity and, also, they will assess the value of the knowledge sought to be
transmitted in a purportedly educational trust.

What is the way forward? Should courts continue to avoid the direct question, given the
danger of chauvinism and the seeming indeterminacy of authenticity as a criterion, or
should legal doctrine develop a more robust definition of "religion"? In our view, the
courts, in fact, have little real choice in answering this question since the indirect approach is, as often as not, used as a covert way of applying a poorly articulated legal definition. The real choice, therefore, is whether the doctrine on definition will be developed explicitly or implicitly. Our preference is that the development be more explicit. The proper counterweight to the danger of chauvinism is tolerance, but the proper response to sham is the application of a strong definition. Although we have not offered and do not offer a definition of religion, we suggest this outline: the worship and knowledge of God, the pastoral and missionary propagation of an established theology, and observances or practices.

Of course, adopting a more explicit approach on the question of definition does not by itself preclude the other arguments if and when they apply. We would submit, however, that once a better definitional process is in place, these other arguments that a particular religious practice of an otherwise valid religion is not of benefit to the public or that the practice is not religious in the technical legal sense will in fact be applicable very rarely, if ever. With respect to the public benefit criterion as applied to religion, we argue below that the criterion will not usually be applicable at all once it is determined that the good pursued is religion. With respect to the "non-religious-in-the-technical-legal-sense" argument, there are two features of the practices and beliefs of almost all religions which will make the application of this argument problematic in the vast majority of cases. First, many of the other "non-religious-in-the-technical-legal-sense" activities of the charity purporting to be religious will often, if not always, be activities that are in the pursuit of other goods.39

Anglican nuns run hospitals, Protestant missionaries run schools, parishes and synagogues intentionally foster community and friendship, and Christians and Jews established Y.M.C.A.s and Y.M.H.A.s to foster Christian and Jewish fellowship and sportsmanship among youths. It is critical to recognize that these activities are generally pursued by these organizations as religious activities: the hospital is run by the nuns as nuns; the school is run by the missionaries as missionaries, etc. The point is that there is enormous diversity in the form and manner of the pursuit of the good of religion. Is there any sense in the law excluding some of them solely on the basis of a poorly articulated "technical" meaning of religion? Second, the actual practices and observances of all religions in many instances are likely to appear irrational unless understood from the internal point of view. How does the Catholic rosary, an Anglican sacrament, the circumcision of Jewish boys, or the Sikh kirpan appear to the unsympathetic, irreligious outsider? Making the decision that a particular practice of an otherwise authentic religion is not "religious-in-the-technical-legal-sense" is fraught with enormous difficulty. We would submit that it cannot be done unless the starting point is the internal point of view, and that once examined from the internal point of view, that should be the end of the matter in nearly every case.

Do these features of the good of religion pose insurmountable difficulties for the law? We submit that the law should recognize and accept the diversity that these features of the pursuit of the good of religion entail, and that the law must tackle the difficulties involved head on, with a definition that exposes sham religions and sham transactions involving
religions. We suggest the following as examples of properly reasoned conclusions where the good of religion is possibly involved:

(1) The religious identity of the Y.M.C.A. is now false, although it might still qualify as a charitable or nonprofit organization because of its pursuit of health for the benefit of others on a nonprofit basis.

(2) The "donation" at the gate of the Christian theme park is an entrance fee, not a tax-deductible donation. It is an exchange transaction, not a gift, even though the provision of a Christian context for play and fellowship is a valid religious pursuit.40

(3) The income from Hutterite farming is taxable although the farming work is performed in furtherance of community or of a religious conception of the nature of work since none of that aspect of the matter has any bearing on the tax status of the personal income earned.41

(4) A gift in trust for "the purposes of the United Church" is a valid charitable trust, even though the United Church spends money on activities other than worship, since all those other activities are either in pursuit of other goods or in pursuit of the good of religion.

(5) A gift in trust for the followers of Joanna Southcote, Jone's Peoples Temple, or the Church of Bacchus (a restaurant) is not valid and is not entitled to any favourable tax treatment because the recipient religion is not authentic.42

In brief, in our view, the problem with the minimalist approach to the definition of religion is that it lets in too many "religions" while it excludes too many valid activities of authentic religions. It is preferable to face the challenge of identifying authentic religions, then apply, as required, other elements of the definition of charity such as whether or not the gift benefits strangers or other arguments, to identify sham organizations and sham transactions. Indeed, Canadian courts have already shown themselves to be somewhat more willing to do just this than have their English counterparts.

(c) Public Benefit and Religion

Religion presents a problem for the public benefit test in three ways. First, charitable trusts in favour of religion will typically single out a particular religion for benefit. This feature may give gifts in favour of religion the appearance of being discriminatory and, therefore, objectionable from a public policy perspective. We deal with this particular problem below.43 Second, gifts in favour of religion will typically and naturally benefit the donor’s religion. This feature may make these gifts appear "private", as running afoul of the distance requirement. Third, depending on how one values the good of religion, few or none of the benefits of a gift for the advancement of religion will have practical utility. Thus it may appear that a gift in favour of religion can never satisfy the practical
utility element of the public benefit test. On this third difficulty, Professor Waters has said:44

This subject has proved one of the most difficult for the courts to handle in view of the fact that unlike education, poverty relief, welfare and community endeavours, there is essentially nothing in religion which can be proved objectively in court to promote the observable well-being of persons or to be for the observable benefit of the public.

Our objective now is to assess the impact of the public benefit requirement on the second and third difficulties the "private" benefit or distance problem, and the practical value problem and to conclude each discussion with proposals for improvement.

In essence, the problem is that courts often do not know what more they are required to decide once they have found that the gift in question advances the good of religion. The difficulty is illustrated in the following passage:45

'It is not all religious purposes that are charitable. Religious purposes are charitable only if, they tend directly or indirectly towards the instruction or the edification of the public', or at any rate, as was remarked in Venge v. Somerville et al., [1924] A.C. 496, at 499, 'of an appreciably important class of the community'.

This accurate description of the law is in fact enigmatic and evasive and, thus, symptomatic of the difficulty we now address.

(i) The Problem of "Private Benefit" or Lack of Distance

It may seem difficult for a gift that advances religion to comply with the distance requirement when the usual gift in favour of religion is to the donor's own religion and, more often than not, to the donor's own worshipping community. Does the "nexus of a faith",46 as Professor Waters puts it, defeat the "benefit to the public" element of such gifts in the same way that the nexus of common employment or family destroys the "benefit to the public" element of gifts to advance education or gifts in the fourth category under the Pemsel test?47 Sometimes the question is put, mistakenly as we have argued above, as a question of size, with different activities of the same religion being classified as charitable or not, depending on the number of people involved.48

One response to this difficulty is to locate the distance element in the fact that religions are generally open for all to join and that they are interested in proselytizing. Thus, because of this, any benefit from a gift to advance religion is theoretically available to a large segment of the population, not just those who belong to the donor's community at the date of the gift.49 Another response is to count heads. Neither of these suggestions, however, is adequate in our view: the first because it is entirely artificial to suggest that the Catholic or the atheist benefits from a gift to support the United Church in the way suggested,50 and the second because the number of people benefitting, as we have already argued, is irrelevant.
A better view is to analyze the gift, depending on the circumstances, as meeting the distance requirement in one of three ways:

(1) Where the gift is used to sustain the infrastructure social or material of a worshipping community, the distance requirement is met either: (a) by virtue of the fact that other members of that community benefit and they are strangers in the requisite sense; or, perhaps better, (b) by virtue of the fact that no one “benefits” in any way objectionable under the distance requirement since the infrastructure is established to support the worship of God. The gift is, therefore, from the internal point of view, a gift "to God".

(2) Where the gift is intended to support the religious lives of others, the distance requirement is met, in addition to the reason given in (1)(b) above, by virtue of the fact that strangers indeed benefit.

(3) Where the gift is to the wider purposes of the religion in question, as in "to the works of the parish" or "to the church", then the distance element is met in addition, possibly, to the reasons given in (1)(a), (1)(b), and (2) above, by virtue of the fact that members of the public benefit from the works of the religion (for example, hospitals, day care, social outreach).

(ii) The Practical Utility Problem

The Statute of Elizabeth makes minor mention of religious objects. Only the repair of churches was mentioned, and this was because at the time of its enactment the repair of churches, like the construction and maintenance of causeways, bridges, and sea banks (which are also mentioned in the statute), were parish responsibilities. The inclusion of this object in the statute’s list was, therefore, as much an indication of its secular value as its religious value. As Professor Jones remarked, the preamble

\[\text{did not attempt to mark out the limits of legal charity or condemn as non-charitable those uses which were outside its letter and equity... }\]

\[\text{[since the] object of that Act...was simply to secure the proper application of the endowments of those charitable trusts which could alleviate poverty and relieve the parish of the financial responsibility.}\]

Religious purposes were still recognized as charitable, but their enforcement fell outside the administrative apparatus for the enforcement of charitable purposes established under the statute.

The history of religious purposes under the statute is a history of growth by analogy from the religious projects on the statute’s list. The repair of churches, the gift of memorial windows, the maintenance of cemeteries, and the installation of church bells were all held to be charitable as religious purposes, as were, in time, endowments to support ministers. All of these projects have two things in common. First, all are very conventional religious gifts having a substantial tangible quality and a substantial public good (in the economist’s sense) quality to them and, therefore, all could easily satisfy any conceivable formulation of the practical utility test. On account of these features of most
gifts to advance religion, the practical utility test seldom raises any difficulty and it is generally said that the practical utility element of the gift is "assumed". Second, all of these projects merely contribute to providing the material and social infrastructure that make worship possible, and therefore they may be said to be secondary or instrumental to the more central act of worship. Yet, interestingly, the elements of religion more central to worship prayer and ritual, for example often lack the tangible qualities of these secondary elements; and unless acts of worship are themselves considered to satisfy the practical utility test, the paradox arises that the means but not the end is considered to have practical utility. Unfortunately, English law has made just this mistake.

The famous case of Gilmore v. Coats is illustrative. In that case there was a gift in favour of a Roman Catholic priory of discalced Carmelite nuns. The nuns lived their lives in prayer and contemplation, not undertaking any works outside their walls. The technical legal question was whether there was a sufficient element of "benefit to the public" to the gift in our practical utility sense given that none of the sisters' work had any obvious tangible effect outside their walls. It was, of course, accepted that Roman Catholicism was a religion recognized by the English law of charity. For the court, however, this did not entail that all its works the work of Carmelite nuns in particular were charitable, and therefore the first argument of the appellant that the court should accept the Catholic belief in the efficacy of intercessory prayer was rejected out of hand. Thus, the act of worship itself was held not to satisfy the practical utility test.

The reasoning to support this position, as one might expect from such a paradoxical conclusion, was fundamentally self-contradictory. Lord Reid reasoned as follows:

"The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it. Admittedly public benefit in the present case can only be established if the court is entitled to accept and act on the beliefs of the Roman Catholic Church. This would, in my view, now be something new."

On the contrary, we would argue that if one accepts that the advancement of religion is charitable per se, as Lord Reid in this passage seems to, then one does not value religion mainly as a means to some other good or for its by-products, such as (possibly) a more civil population. This is true even if there are good instrumental reasons to value religion, such as the historic one that it has been a well-spring of other charitable activity such as the relief of poverty and the advancement of education and health. The good of religion lies in the worship of God, and a life of relationship and obedience to Him. Yet, in the above passage, Lord Reid contradicts this implicitly by suggesting that an act of worship is judged beneficial for reasons other than its being what it is: ""a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service". But, if the service is not accepted by the law as having "spiritual efficacy", that is, as being an act of worship and to be beneficial as such then why and how can the law value it? To argue by analogy, an act to relieve the suffering of the poor must have as its effect as well as its purpose the relief of the
suffering of the poor, and a court would be mistaken not to regard both aspects of the act in determining the authenticity of the act. Similarly, the law must ask in any case involving the good of religion whether the act or acts in issue have as their purpose and effect the advancement of worship. Of course, the law need not accept or even pronounce on matters of theology, and in difficult cases there is no requirement that the law refrain from sceptical approaches to the self-interpretation of any particular religion. The law cannot avoid, however, the question of whether the act is or is not an act of worship, since this is one of the central questions regarding the good of religion. Matters that are typically accepted as advancing religion such as the repair of churches and the support of ministers are, to repeat, just the necessary infrastructure; and if these are accepted as charitable, then the act of worship itself is a fortiori charitable. Moreover, to assess whether the intercessory prayers of Carmelite nuns is an act of worship, the starting point and ending point, in the case of an authentic religion, ought to be the self-interpretation of the religion in question.

This interpretation of the Gilmour decision, as being internally incoherent, is reinforced by the second and third arguments considered by the court. The second argument considered was whether practical utility could be found in the edification of the public that would result from the example for living as set by the nuns. Lord Reid, paradoxically, thought this was a valid approach to the question and even accepted that there was such an effect on the public, but he held that the benefit was too remote. The third argument was the support of the existence of the community enabled twenty women to practise religion in a way that would not otherwise have been possible, and that these women constituted the relevant section of the public required by the test. Lord Reid held that this argument assumed a positive answer to the first question, that is, the existence of the community was of benefit to the public. He therefore concluded that the third argument was not valid.

The only real question in the case should have been whether the life of the nuns was a religious life. The court's answer to this question was simply bizarre: one of the core instances of worship considered as such by almost all extant civilizations the life devoted to religious piety was pronounced by the English court not to be religious for the purposes of the law of charity. The way forward is to ask if gifts to religion tend to advance the good of religion in a manner in which that good can be advanced. Supporting the material or social infrastructure is valid, but so, too, are other gifts that support the worshipping practices of an authentic religion in ways it considers valid. The practical utility test is satisfied when the good of religion is so advanced.

This brings us back, finally, to a point made earlier. Gifts to advance religion should rarely if ever fail the practical utility test (or the distance requirement); because all the available projects in religion come "pre-packaged", if one may put it that way, by the religious organizations in question. There is very little scope, therefore, for a donor to make any kind of error in the design of his or her gift.

4. EDUCATION
(a) Introduction

The principal good pursued for the benefit of others in the case of the advancement of education is knowledge, but education will often include play, practical reasonableness, friendship, and aesthetic experience as well. "Education", strictly speaking, is the activity in which these goods are sought for the benefit of others through teaching, training, and instruction.60

There are three problems in the current law concerning the meaning of the "advancement of education". Two of these relate to the proper scope of the term "education", and the third concerns the meaning of "knowledge". We discuss each in turn.

We do not discuss, however, the central cases of advancement of education such as a trust to fund a scholarship or prize, or an endowment in favour of founding a grade school because in our view these projects present no special difficulty.61 Also, we do not examine issues relating to the distance requirement because this requirement presents few if any problems in this category in Canada.62 In the usual case of the gift to a school or a university to fund a scholarship, the distance requirement is satisfied because the gift in question supports the educational project of a school to which the donor has no obligational tie. Often there is a tie of loyalty the donor is an alumnus but this is considered, correctly, to be too remote a connection, given that the actual people who benefit will usually not be related to the donor. In other cases, the requirement is satisfied because the gift supports a research project which will increase the body of knowledge for society at large, or a certain segment of it.

(b) The First Problem: The Narrow Scope of "Education"

The first problem arises because the activity of education does not include all the common ways in which knowledge is sought for the benefit of others. Education is merely the most obvious and the most common. Neither research nor self-study necessarily involve one person teaching another, but a gift to fund research into the causes of cancer or a trust to fund a research fellowship ought to be valid charitable gifts and, indeed, are considered to be so by current law.63 Likewise, gifts to fund a library, an adult reading room, or an adult learning society are all gifts where the good of knowledge is pursued, but these gifts do not necessarily advance education in any conventional sense of that term. These should also be, and indeed generally are considered to be, valid charitable gifts.64 The difficulty in the current law concerns the proper classification of these activities under the Pemsel test; although they are not concerned with educating in any conventional sense, education is the only category in the Pemsel test that deals with knowledge.

To examine this difficulty more closely, consider the case of the gift to fund university research into the causes of cancer. There is ample authority that such a gift is educational.65 This classification is plausible since one could argue that the point of research in a university setting is to advance the general educational mission of the university. However, this could reasonably be objected to on the basis that it casts
research activity as merely subsidiary, or at most complementary, to teaching. Many would properly argue, we submit, that it should be able to stand on its own.

To raise the question more directly, then, let us suppose that the endowment to fund cancer research is established outside the university context. Our suggestion is that so long as the results of the research are publicly available, the gift advances the good of knowledge for the benefit of the cancer research community or society at large and is, therefore, charitable. This same analysis would apply to vindicate the endowment of a research fellowship, since implicit in the fellowship element of the endowment is the requirement of some public sharing of the knowledge gained. Similarly, a community library and an adult reading room are projects that pursue the good of knowledge for the benefit of groups of people other than "students" in any less than figurative sense. There should not, in our submission, be any requirement to tie the validity of any of these gifts to the advancement of education. Instead, it is preferable to expand the role of the good of knowledge in the law of charitable purposes by recognizing that knowledge is frequently sought not only for the good of "schools" of strangers (that is, education), but for the good of society at large, or segments of society such as the cancer research community or the neighbourhood community.

(c) The Second Problem: Status of the Goods of Play, Practical Reasonableness, Friendship, and Aesthetic Experience

A second problem arises because the goods of play, practical reasonableness, friendship, and aesthetic experience are not explicitly mentioned anywhere in the Pemsel test. Consequently, in meritorious cases they have had to find a place somewhere else on the Pemsel list or no place at all. The absence of explicit recognition of these goods has resulted in confusion about their status in law and in distortions in the content of "education".

As far as "education" is concerned, there have been two harms: (i)tendency, now largely reversed, to exclude these goods from "education" when they ought to be included; and (ii)tendency, still prevalent, to include them in education when they ought to be excluded, but recognized independently.

(i) The Under inclusiveness of "Education" in Older Case Law

Many of the gifts to advance education are intended to benefit the younger generation. Consequently, they often have as their object, in addition to the intellectual development of students, the imparting of the skill, knowledge, and habits necessary to lead a fulfilling life. Thus, the development of skills of play, practical reasonableness (the virtues of prudence, justice, courage, and temperance), friendship and sociability (courtesy, respect for others), and aesthetic experience will be an integral and often explicit part of such gifts. Knowledge in the narrow sense of "intellectual development", therefore, is usually not the only good at stake in gifts in favour of education.
Two cases illustrate this point. In an Ontario case, *Societa Unita v. Graven Hurst*, the issue was whether a summer camp where children were taught about their Italian heritage and culture was entitled to tax-exempt status. In an English case, *Inland Revenue Commissioners v. McMullen*, there was a gift in trust "to organise or provide...facilities which will enable...pupils of schools and universities in...the United Kingdom to play association football or other games or sports and thereby to assist in ensuring that due attention is given to the physical education and development of such pupils". In *Societa Unita*, Lerner J. held, correctly in our view, that the camp was charitable and therefore tax exempt because the children would learn to be better citizens through a better understanding of their culture and themselves. The Court of Appeal in England held that the gift in *McMullen* was not charitable, but the House of Lords reversed, holding, again correctly in our view, that the gift was charitable on the basis that education "when applied to the young" includes "instruction, training and practice containing...spiritual, moral, mental and physical elements".

These two cases illustrate the difficulties that might be encountered when these legally orphaned goods are made the subject-matter of gifts. There was a tendency in the case law prior to *McMullen* to construe the knowledge component of education projects so narrowly that knowledge of these goods was excluded. The 1981 House of Lords decision in *McMullen*, however, made clear for the first time that the legal concept of education includes much more than the fostering of intellectual development in a narrow sense. *Societa Unita* perhaps goes a step further, since the organization in that case was not even a school in any traditional sense. These developments are appropriate, and, in our view, this broadening of the legal definition of education, so that it corresponds with its meaning in common English, is to be encouraged.

(ii) The Over inclusiveness of "Education" in Some Case Law

Gifts advancing the goods of play, practical reasonableness, friendship, and aesthetic experience for the benefit of others outside the context of education have met with even more difficulty. Lacking any independent legal recognition they do not appear on the *Pemsel* list or the *Statutes of Elizabeth* list projects advancing these goods have had to be accommodated either by expanding "education" or not at all. Below we argue that these projects should be accorded independent recognition. At this point, however, our concern is with the harm their inclusion in the category "education" has caused to the legal understanding of that term. It is clear that education as a rubric for these projects has obvious limits and, although properly accommodating in some instances, as suggested above in (i), will be completely inappropriate for others. Two cases, *Re Shapiro* and *Re Litchfield*, provide examples. In *Re Shapiro*, there was a gift to assist the publication of unknown authors. Montgomery J. held that the gift was valid because it was for the advancement of education. He quoted Mr. Justice Vaisey in *Re Shaw's Will Trusts; National Provincial Bank Ltd. v. National City Bank Ltd.*, stating that education included "the promotion or encouragement of these arts and graces of life which are, after all, perhaps the finest and best part of the human character". In *Re Litchfield*, it was said, to a similar effect, that "the encouragement of the humanities can be just as much a part of the advancement of education as the advancement of scientific research". Thus,
projects advancing aesthetic experience have been accommodated within a broadening category of "education" to the detriment of the legal understanding of both. In our submission, courts should resist the temptation to fictionalize "education" to accommodate these other goods in cases where the donor's project implicating them has no teaching that is, no educational component. Although the most frequent errors of this type are made in respect of aesthetic experience, there is no reason to expect that similar errors will not occur with respect to play, friendship, and practical reasonableness, if projects advancing these goods continue to be denied independent recognition.

(iii) Conclusion

The remedy to this confusion, then, is:

(1) explicit recognition of the inherent limits of the category of "education" and, in particular, recognition that education, like relief of poverty, names an activity or a project, not a good;

(2) independent recognition of the goods of play, practical reasonableness, friendship, and aesthetic experience, and therefore independent recognition of projects advancing these goods for the benefit of others; and

(3) recognition that education projects sometimes do implicate these goods but that, as independent goods, they do not require implication in an educational project to constitute valid charitable purposes.

(d) The Third Problem: The Uncertain Meaning of "Knowledge" and "Dissemination of Knowledge"

The third problem in the case law concerns the meaning of "knowledge" and "dissemination of knowledge", and how, in particular, these terms are to be distinguished from propaganda, propagandizing, and political campaigning. This is a problem that involves either issues relating to the content of the good of knowledge, or issues relating to the practical utility of certain projects in which it is claimed that knowledge is being advanced.

(i) The Meaning of "Knowledge"

Because the common-law test is whether the purpose is to advance "education", there has been a tendency to think that certain kinds of "lesser" knowledge should be excluded. It has been said, for example, that education projects must have as their purpose the "edification" of someone or the "leading out of ignorance" of someone. In our view, some of the mistaken case law on the meaning of education can be explained as originating in this mistaken conception of education, with its concomitant narrow definition of knowledge.
One aspect of this problem arises from the fact that there are different kinds of knowledge: theoretical and practical; speculative and technical; scientific and moral. Another related aspect is that knowledge can be sought for its own sake or as a means to an end, as illustrated, for example, in the commonly acknowledged differences between a liberal arts education and training for a trade. We suggest that these distinctions among the kinds of knowledge that can be pursued in education projects should not play any formal role in sorting out which education projects are charitable and which are not. All are valid and these distinctions are irrelevant for that purpose. The relevant question should be, simply, whether the particular project in question aims to advance knowledge, of any type, for the benefit of others.

Another dimension of the problem concerning the meaning of "knowledge" arises from the need to draw some distinction between knowledge and propaganda and, therefore, between education and propagandizing. Gifts purportedly in favour of education can sometimes be heavily affected by political motives. Where there is a political program or agenda, or an element of propagandizing for social transformation in the gift or organization of issue, the gift or organization concerned may be essentially political, not educational, and is therefore not charitable. The tendency in the cases to castigate "lesser" knowledge might better be articulated as a rejection of projects favouring the dissemination of political propaganda. This would be, in our view, a valid reason. Our suggestion at this point is that accepting this as a valid reason does not argue in favour of drawing distinctions among types of knowledge.

(ii) The Practical Utility of Projects Advancing the Good of Knowledge

None of the foregoing is to argue that the law should not be diligent in applying the practical utility test in this domain. To do this properly courts should pay attention to distinctions among kinds of knowledge so that they can make evaluations as to the practical utility of specific projects advancing, or purportedly advancing, the good of knowledge. For example, to the forty-letter alphabet proposed in Re Shaw, the proper objection might have been that the knowledge sought to be advanced and disseminated in that project was practical knowledge, and the specific project was therefore open to the objection that once information on the feasibility of a forty-letter alphabet was acquired, in terms of practicality it would have been useless.

5. PUBLIC POLICY AND PUBLIC WORKS

There are a number of ways that public policy has been thought relevant to the task of evaluating the validity of charitable projects. We examine two of these briefly before focusing on the most important problem in this domain, charitable projects that are discriminatory.

(a) Whether a Charitable Purpose Can Be Contrary to Public Policy

It is clear law that a valid charitable purpose cannot be contrary to the law or public policy. This rule is obviously correct. It can be interpreted in two distinct ways. First, it
can be interpreted as a super-added criterion addressed after the various parts of the
definition of charity have been addressed. On this view, a project could be *prima facie* charitably, but denied recognition because it violates public policy. This way of reasoning might be facilitated by a doctrinal distinction between the legal and the common meaning
of charity. Second, it can be interpreted merely as a necessary implication of the
requirement that the purpose pursued be charitable, since if the purpose pursued is
charitable, it cannot also be against public policy. On this view, a project that violates
public policy could not be even *prima facie* charitable.

While both understandings can be found in the case law, we prefer the second. It makes
clear the basic and reasonable assumption that the state does not choose against the good,
at least to the extent that the state does not promulgate public policy or law so that
otherwise valid charitable pursuits are in conflict with it or them.\(^83\)

(b) Whether All Elements of Public Policy Are Necessarily Charitable

Sometimes it is argued that if the purpose pursued is the advancement of some element of
public policy, however defined, then the purpose must also be charitable at law. On this
view, for example, an organization founded to promote compliance with the *Canadian
Charter of Rights and Freedoms*,\(^84\) or to pursue the enforcement of a particular law or of
Canadian law in general, is charitable. We suggest that this proposition is false for one of
two reasons, depending on the type of organization under consideration and the intended
scope of the proposition.

(i) The Non-charitable Status of Organizations Founded to Promote Government Policies

First, if the dominant objective of an organization is to alter the public's awareness in a
way that could be defended plausibly as simply advocating compliance with public
policy, for example, by encouraging people to do their civic duty, to meet the obligations
of patriotism, or to observe and respect human rights, then, in our submission, the
organization is political in the broadest, but still standard, sense of that term. It is aimed
ultimately at influencing opinion on what the law or public policy should be, and is
therefore not charitable. Similarly, if the dominant objective of an organization is to
pursue the enforcement of the law, in part, through the initiation of legal challenges under
the constitution, then the organization's principal activity is pursuing the enforcement of
law, not doing charity.\(^85\) Every reasonable political or legal opinion in a liberal
democracy will commend itself to the public under the guise of the good or the right.
What marks the view as political or legal is the desire of those who advance it to
persuade fellow citizens or judges to take a certain view on a certain issue.

These arguments apply regardless of the motivating spirit, and, therefore, apply even if
the motivating spirit is to benefit others through the removal of legal or social obstacles
to the full recognition of their human dignity. The reasons in both sorts of cases are
similar: reasonable people may disagree that the particular awareness aimed at is valid or
that the particular provision of law challenged is the cause of the particular injustice
identified, or that the particular project chosen is the proper one under the circumstances, given the basic motivation. These are all essentially political or legal projects.

(ii) The Intersection of Public Policy and Charitable Purposes

Second, it is sometimes suggested that any project that advances public policy, as defined broadly by the current state of the law or policy, is necessarily charitable because the fourth category of Pemsel includes, or is completely coterminous with, the declared purposes of government. Thus, the argument goes, if the government does something or is in favour of doing something, then doing it must be of "public benefit" and, therefore, charitable. There is an element of truth in this line of thinking which requires clarification, but the basic proposition, again, is misleading. There are two aspects to the problem.

a. Charitable Status of Public Works Projects

First, governments provide funding for, among other things, public goods such as bridges, highways, and monuments. These sorts of public works projects have also traditionally been classified as charitable both under the Statute of Elizabeth and, to a lesser extent, under the fourth head of the Pemsel test. These projects provide public goods in the economist's sense of goods that are non-appropriable and as cheap to produce for many as for one. Charitable trusts advancing projects of this kind were common in Elizabethan and Victorian England, but are rare in modern Canadian society. One reason for this is that the modern state, with its extensive taxation machinery, no longer looks to the generosity of citizens to fund public works. But they do exist in modern times. The House of Lords held in Incorporated Council of Law Reporting for England & Wales v. Attorney-General that the publication of judicial decisions in a system of precedent law was analogous to the sort of public works under consideration and, therefore, a valid charitable purpose. So, too, gifts for the beautification of a street or gifts to support measures taken in the interest of public safety or to support a cemetery have been held charitable.

One might legitimately ask whether gifts to fund public works are charitable in the sense of being gifts to advance a common good or, indeed, whether they are charitable in any other conventional sense. We think the answer to this question is yes: these projects advance common goods by providing the material infrastructure that makes it possible for others to pursue them more effectively. In this regard, interestingly, they are exactly like all other charitable projects. Knowledge, for example, is advanced for the good of others not by somehow giving it directly to others, but by giving someone the material means or material encouragement to pursue it. Even the best teachers do not "put" knowledge into the heads of their students. The distinction between public works projects and other more usual types of charitable projects lies at the level of the directedness and directness of the charity: the public works projects, because they are also public goods in the economist's sense, make many pursuits of many goods possible to a multitude of people.
Recognizing that public works projects are charitable in the way just described, however, does not support the broader claim that the fourth category of Pemsel is coterminous with public policy, that is, that everything government does is charitable. Much less does it prove that everything government does, because government does it, is charitable. It merely indicates that there is considerable overlap between what constitutes a valid charitable project and the projects and activities of government. This, then, is the element of truth in the general proposition that the fourth category of Pemsel includes, as it is completely coterminous with the declared purposes of government.

**b. Government Purposes as a Test for Charitable Purposes**

One way to raise the second aspect of the problem is to begin with the observation that law and charity are similar in the sense that both are concerned with instantiations or determinations of common goods; law, by the state, for the benefit of the citizenry; charity, by individuals and associations of individuals, for the benefit of strangers. Given this degree of similarity, one might ask whether it would be appropriate for a court simply to look to what the law or public policy is, or what the state does, to assess whether any particular project is charitable. Thus, this is one way of putting forward the argument that charity and public policy are coterminous: that government does it too is strong evidence or even proof that a particular project is charitable.

We think this line of reasoning, although tempting, should be resisted and courts should simply continue to ask of the project in issue whether it satisfies the test as we have formulated it. The rejected view is as dangerous and misleading as it is helpful. Its appeal lies in the fact that it seems to provide an element of certainty in the otherwise vague fourth limb of the Pemsel test. In our view, however, this certainty is illusory: government purposes, the nature and elements of public policy, and the point of any particular law are not always readily discernible, at least so as to be beyond reasonable dispute. Moreover, in this day and age, government expenditures, even if motivated to advance a clearly identifiable common good (as opposed to the private purposes of particular lawmakers), are not always practical and useful ways of doing so. That is to say, government programs fail for all the same reasons as charitable projects fail. Thus, since state action in any of its many forms cannot be applied as readily as the proposition under consideration suggests, it should not form part of the formal considerations in the vast majority of cases. Certainty in the fourth limb of the Pemsel test should come from a better understanding of the definition of charity.

**(c) Charity and Discrimination**

Charitable purpose trusts may sometimes be, or appear to be, discriminatory because they explicitly exclude certain portions of the public, or because they explicitly favour one segment of the public over others. To the extent that this feature of charitable gifts has surfaced as a problem in the law, it has been dealt with in one of two ways.

If a gift benefits a small group of people identified by, for example, race, religion, or ethnic origin, it has been held in some cases that the segment of the public so identified is
too small to satisfy the "public benefit" test. Often in these cases the gifts are in favour of the members of a particular church or of a particular religion in a particular area, and they often involve the pursuit of goods, such as friendship and play, that have been perennially suspect in the common law. The decisions usually focus on the question whether the gift is of public benefit and the gifts usually fail. It is often difficult to disentangle in the reasons the arguments based on the non-charitable nature, at law, of the good involved and the arguments based on the size and composition of the group benefited.\textsuperscript{90} If, however, these elements of the decisions are put to one side if the good involved is held valid, as it should be in our view, and the objection based on size is put aside as irrelevant, again, as it should be in our view the issue becomes whether there is any further basis upon which to object to these types of gift. This brings us to the second way this type of problem has been approached.

In some jurisdictions, such as Ontario, this type of gift can also be regarded as attracting the application of the laws and policies governing unlawful discrimination and, if the gift is in violation of these in a way that causes substantially incontestable harm to the public, it can be attacked as a contravention of public policy.\textsuperscript{91} Obviously any treatment of this kind must carefully distinguish between legitimate and illegitimate discrimination, since the law ought not to invalidate gifts that favour the members of a particular group if there are good reasons supporting the manner in which the group is identified. Gifts in favour of members of a particular religion are an obvious example of gifts that should be valid even if they are discriminatory, but there are many others. This type of discriminatory gift is accommodated to some extent under Canadian human rights legislation with provisions such as section of Ontario's \textit{Human Rights Code}.\textsuperscript{92} Section provides as follows:\textsuperscript{93}

18. The rights under Parto equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

This immunity under human rights legislation does not by its terms extend to determine a gift's or organization's charitable status at law. It only provides that the groups identified may discriminate against non-members with respect to the provision of services and facilities. It could still be argued, therefore, that a particular gift or entity is not charitable at law because, in discriminating on the grounds of, for instance, race with respect to its eligibility or membership criteria, it violates public policy. How then is legitimate discrimination with respect to eligibility or membership criteria to be distinguished from illegitimate discrimination? A recent decision of the Ontario Court of Appeal, \textit{Canada Trust Co. v. Ontario Human Rights Commission},\textsuperscript{94} has begun the task of addressing this question.

\textit{Canada Trust} dealt with a charitable purpose trust that had been established under the will of one Colonel Leonard. The purpose of the trust was to provide fellowships for students in Canada and Great Britain. The terms of the trust, however, were discriminatory. The recital of the trust deed stated:\textsuperscript{95}
Whereas the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization ...;

And Whereas the Settlor believes that, the progress of the World depends in the future...on the maintenance of the christian religion;...

....

And Whereas the Settlor believes that, so far as possible the conduct of the affairs of the British Empire should be in the guidance of christian persons of British Nationality who are not hampered or controlled by any allegiance or pledge of obedience to any...power or authority, temporal or spiritual....

In keeping with these views, the trust went on to restrict the management of the trust to non-Catholic "Christians of the White Race" and to establish eligibility criteria requiring applicant students to be "British subject[s] of the White Race and of the Christian Religion in its Protestant form", and that the scholarships be awarded in such a way that female recipients receive no more than twenty-five percent of disbursements.

The Leonard Foundation had been the subject of much criticism during its fifty-odd-year existence prior to the mid-1980s. In 1986, the Ontario Human Rights Commission filed a formal complaint against the Foundation. The trustee of the Foundation, Canada Trust Ltd., responded by making an application under section of the Trustee Act.96 The trustee asked the court whether any provisions of the trust were "void or illegal or incapable of being fully administered" by reason of being contrary to the provisions of the Ontario Human Rights Code, 1981, or any other public policy, or for uncertainty; if so, whether the trust failed in whole or in part, also who was entitled to the trust fund and whether, in particular, the cy-près doctrine might be applied to the trust funds.

The principal provision of the Human Rights Code at issue in the case was section 1, which provided that:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethinical origin, citizenship, creed, sex, age, marital status, family status or handicap.

At trial, McKeown J. held that the trust did not fall within the terms of section of the provincial Human Rights Code since it was not "a service" or "a facility" and that even if it was, section of the Code fully exempted the trust. With respect to whether there was any other basis upon which to find that the trust was in violation of public policy, McKeown J. held that, although the terms of the trust were objectionable, they did not violate any rule of public policy, in part, because the trust did not pose any substantially incontestable harm to the Ontario public. 97 He also found the terms to be sufficiently certain. He therefore upheld the trust, in toto.

In the Court of Appeal, Robins J.A. (Osler J. (ad hoc) concurring) held that the provisions were contrary to the public policy of "promoting racial equality". His decision did not touch on the issue of uncertainty. He concluded that the cy-près doctrine applied and that
the Court should "propound a scheme that will bring the trust into accord with public policy and permit the general charitable intent to advance education or leadership through education to be implemented". Tarnopolsky J.A. held, as well, that the trust provisions were in violation of the public policy against discrimination on the basis of race, religion, and sex, and that the terms of the trust were a "clear case" where there would be "substantially incontestable harm to the public". He held, as a consequence, that the trust was "void on the ground of public policy", but since there was a general charitable intent to "promote leadership through education", he held that the fund could be applied *cy-près*.

As Tarnopolsky J.A. noted, this was the first decision in the Commonwealth to strike down discriminatory provisions in a charitable purpose trust expressly because they were contrary to public policy. However, there had been precursors in related areas of the law. In *Wren*, a decision of the High Court of Justice of Ontario, a discriminatory restrictive covenant prejudiced against Jews was struck down. A later decision of the Ontario Court of Appeal, *Noble v. Alley*, held, to the contrary, that provisions in a restrictive covenant discriminating on the grounds of race were not contrary to public policy. In addition, there had been cases where offensive provisions in charitable purpose trusts were struck down by obvious proxy rules. For example, there is a group of cases where the higher standard applicable to the validity of a condition subsequent was applied where there was as much or more objection to the actual substance of the condition subsequent. Other cases have employed the *cy-près* doctrine after declaring certain discriminatory provisions impossible or impracticable, thus striking them out and applying the funds *cy-près*.

With respect, we think that the *Canada Trust* decision of the Ontario Court of Appeal is entirely correct and that, left to its own devices, the common law of charitable trusts in Ontario, with this start, could develop a sufficiently subtle doctrine against certain forms of discrimination. The difficulty will be to define the difference or point of balance between discrimination that is prohibited on the grounds of public policy and discrimination that is permitted because it advances a legitimate interest of a legitimate community. There are several lines of thinking that would support such a doctrinal development. Unfortunately, the Court of Appeal decision is not entirely helpful on this particular question. Only Tarnopolsky J.A. dealt with it to any extent. He said, merely, that not all such restrictions violate public policy and that, for example, those that favour women, aboriginal peoples, and the physically and mentally challenged are valid. Although helpful, this formulation does not identify the required distinction.

One view on this question is to regard the dedication of property to a charitable purpose, either in a trust or in a corporation, as a "public" institution and therefore as subject to greater public regulation and public scrutiny. This characterization of charitable entities is supported by the fact that charitable purpose trusts and charitable purpose corporations receive numerous tax advantages, have the ability to exist in perpetuity, and have available to them the protection of the Crown. Another, and in our view more persuasive, approach would require courts to investigate the motives behind the discriminatory provisions, and in cases where the discriminatory provisions are motivated
predominantly by antipathy or malevolence towards another group identified by race, religion, or sex, to strike them out or declare the trust void. This approach is also based on the inherently "public" nature of the charitable purpose trust and the charitable purpose corporation, but "public" in the sense of "common", not in the sense of governmental or "of the state". On this view, these trusts or entities are favoured because they are involved in making common goods available altruistically. Malevolently discriminatory provisions undermine two aspects of this formula. The donor who attaches malevolently discriminatory provisions to his or her benefaction implies that the good provided for is not necessarily and unconditionally good for all human beings regardless of race, religion, or sexit is not common. More importantly, that donor often has as a principal motive not altruism, but racism, sexism, or bigotry. Here, then, is one situation where the law might be wise to have recourse to motives in order to assess whether a gift or entity is not truly charitable.

If this approach is taken, then mere chauvinism or favouritism, in our view, should not suffice to disqualify a trust or entity. Considerably more discriminatory provisions ought to be acceptable than what would be permitted under Tarnopolsky J.A.'s rule. Some categories for example, race ought to be more suspect than others. Gifts favouring a disadvantaged race, however, will generally be valid, since these are motivated invariably by a desire to redress a disadvantage. This may have been Tarnopolsky J.'s point. All the same, a scholarship for English Canadians to learn French, a scholarship in favour of Presbyterians at a teachers' college, or a gift to support a Welsh community centre in London, although discriminatory on suspect grounds, ought to be valid since there is no malevolent motive in any of them.

6. INTERNATIONAL CHARITY

Although English case law fairly readily accepts the permissibility of charitable trusts that benefit foreigners, there is some doubt in England as to whether there must also be a local benefit and whether the general permissibility varies according to the type of charity in question. From two Ontario decisions on point, Lewis v. Doerle and Re Levy Estate, it is clear that there does not have to be a local benefit. The Restatement (Second) of Trusts likewise states:

The mere fact that a trust is created for the benefit of members of a community outside the State or the United States does not prevent a trust from being charitable. Thus, a trust for the benefit of the poor of another state, or a trust to establish a hospital in a foreign country, is charitable.

But English precedents are so authoritative that they, at least, make this a debatable question in Ontario too. On the understanding of charity advanced in this chapter and in the previous two, there would be no basis in principle to exclude a charity that benefited foreigners exclusively. There may well be, however, insurmountable practical obstacles to a court, the Public Trustee, or Revenue Canada executing its supervisory functions. In addition, there may be reasons relating to tax policy or foreign relations which would justify the imposition of restrictions on the recognition or operation of international charities. In keeping with our general recommendation that the legal definition of charity
be as close as possible to the real definition, the Commission recommends that any restriction on international charity, motivated by policy considerations of this type, be adopted in a form that does not call into question the charitable status of international charity just because it is international.

7. POLITICAL PURPOSES

The English and Canadian case law is clear that politically oriented organizations are not charitable.112 A number of reasons are traditionally advanced. The most repeated claim is that a court cannot supervise the execution of a trust for political purposes because a court cannot determine whether a proposed change in the law is necessarily for the benefit of the public.113 Although, in our view, this is a valid reason, it is often criticized as vacuous or obfuscatory.114 It may be that the state should extend its enforcement aid or tax privileges to politically oriented organizations, but the rationale for doing so is not that the practical objective sought to be achieved by the group is necessarily good, since at least in a liberal democracy, as argued in chapter 6, whether it is or is not, is open to public doubt. To this extent, political "charities" fail because the state is unwilling to lend its *imprimatur* to a quest of acknowledged debatability. This is, in essence, what we take to be the traditional argument against political "charities". The practical consequence of this is that these groups may not use the charitable purpose trust to organize their affairs, and they must apply directly to government for any sort of state subsidy.

There are some cases, however, such as McGovern v. Attorney-General,115 where the validity of the overtly political objective is of little or no doubt and, therefore, not really debatable. Releasing prisoners of conscience and ceasing to torture innocent people, the two causes at issue in McGovern, are clearly good, because imprisoning people just because of their religious or political beliefs and torturing innocent people are two moral and political choices that are clearly wrong. Thus, advocating and acting lawfully to aid and abet the release of prisoners of conscience and the cessation of torture are obviously valid determinations of the good, even if they involve trying to persuade others and are therefore also political. The feature that marks off this special case is that there truly is no debate. A late nineteenth century Ontario case, Lewis v. Doerle,116 is illustrative of the proper approach to a similar situation. In that case the Ontario Court of Appeal upheld a devise of land in trust that was to be administered "to promote, aid and protect citizens of the United States of African descent, in the enjoyment of their civil rights".117

Trusts to promote friendship or international peace have also been held invalid on the basis of the political purpose doctrine,118 as has the purpose of promoting Canadian unity.119 We think, however, that there is a valid distinction to be made between promoting fellowship locally, nationally, or internationally, on the one hand, and promoting political doctrines such as Canadian unity, however patriotic, on the other. The former should be held to be charitable on the basis that they advance the good of friendship. We will return to this argument briefly below. We think, however, that the latter is clearly political.
Where the political purposes or activities are ancillary or incidental to other valid charitable purposes or activities, recent case law has affirmed, correctly, that the entities involved are still charitable.\textsuperscript{120} The prohibition applies only when the political purposes or activities are one of the main or dominant purposes or activities.

8.\textbf{FRIENDSHIP}

Friendship as a good poses several practical difficulties in the law of charity, since it is, as a matter of practice, rare for a person to pursue this good exclusively for the benefit of strangers. Invariably, it is the donor's affection for the recipient individual or group that moves him or her to give. Most organizations which pursue friendship clubs, societies, and associations do so solely for the mutual benefit of their members, and most gifts to such organizations are moved by the donor's own friendship with that group or association, not by an altruism intended to benefit strangers.\textsuperscript{121} Thus, the distance requirement is often not satisfied where the good is friendship.

Another complicating element, often present in gifts where the good of friendship is implicated, is that the recipient group was formed to pursue the advancement of a common interest of the group, not friendship or sociability \textit{per se}, although friendship may be an important by-product of the association and perhaps even one of its main goals. Trade unions are a good example of this phenomenon. The fact that their use of the label "brotherhood" is expressly intended as much for its ideological value as anything else is a strong indication that their founding purpose is not friendship \textit{per se}, but the social and economic interests of the group. Thus, we also speak of membership in the "labour movement".\textsuperscript{122}

A third problem is distinguishing between the advancement of friendship between two or more communities, on the one hand, and politics, on the other, since the aim of projects of the former type usually contains an element of changing people's minds. The relevant distinction is that political activity aims to change people's minds about public policy, while friendship projects aim to change people's minds, simply, about other people. In our view, the trend of the law against classifying international friendship societies as charitable is therefore quite mistaken.\textsuperscript{123} The source of the error is the failure of the current tests to recognize explicitly the good of friendship. A 1980 decision of the Federal Court of Appeal, \textit{Native Communications Society of B.C. v. Minister of National Revenue},\textsuperscript{124} is a good example of a case that caused some difficulty because of the lack of explicit recognition in the traditional sources that the good of friendship can be a valid charitable purpose. In that case, one of the primary purposes of the organization applying for registration under the \textit{Income Tax Act} as a charity was to foster a sense of community among a disparate native population in British Columbia through the publication of a newspaper and radio and television broadcasts. Another means was to provide training facilities and programs to natives in these media. The Minister refused registration on the basis that this sort of activity did not fit under education, apparently the most plausible category. However, the Federal Court of Appeal upheld the Society's appeal, correctly in our submission, by finding room in the fourth \textit{Pemsel} category.
Despite these problems, it is clear that there is some latent legal recognition that gifts that providing the occasion or infrastructure for friendship, such as gifts to support community centres, social and recreational centres, parks, and the like, are charitable. This is so even though there is some older English authority against it. 125

9. SPORTS AND RECREATION

Victorian judges believed that sport, although useful to society, could not be charitable. Thus, traditional English case law going back to that era, and strictly followed since, has held that trusts in favour of sporting purposes are not charitable. 126 This type of trust has only been allowed, as suggested above, where the sport aspects of the purposes were ancillary to some other recognized purpose, such as education. Fortunately, these matters have been dealt with effectively in Ontario in the Re Laid law Foundation 127 decision of the Divisional Court of Ontario. That case involved the legality of grants made by the Laid law Foundation to certain amateur athletic and sports associations for the disabled. At first instance, Dymond Surr. Ct. J. held that the recipient organizations were charitable on the basis that the promotion of sport was for the public benefit. She relied, however, on arguments that emphasized sports' instrumental value - its promotion of fitness, health, and character as opposed to its intrinsic value. Southey J.'s decision in the Divisional Court affirmed the reasoning of Her Honour Judge Dymond and generally supported a more liberal approach to the definition of charity. We respectfully suggest that this has been a salutary development of the law.

10. AESTHETIC EXPERIENCE

The traditional tests have some difficulty accommodating projects such as museums, art galleries, literature prizes, arts councils, and wilderness and nature preserves. As suggested above, the tendency has been to include them with education, but this is clearly problematic since, in most instances, including them in that category requires corrupting the meaning of both "education" and "aesthetic experience". The category should be given independent status, as has the category of sports (play) recently in Ontario.

11. LIFE AND WORK

Projects that advance the goods of life and work for the benefit of others may play a more prominent role in the future, given the contemporary concern with the environment and current high levels of unemployment. Traditionally, projects advancing the good of life have included only such obvious things as hospitals, medical research, 128 and the protection and preservation of animals. 129 Projects advancing life may become more diverse given the inherent complexity of life, the diversity of threats to health, life's variety of non-human forms, and its necessary "ecological" situation in a biosphere. Courts and public administrators should be open to these developments.

Projects advancing work for the benefit of others should also, in appropriate cases, be entitled to recognition. Social councils, micro-development projects, and community foundations are all involved in pursuing creative and effective ways of getting people
back to work. Their efforts should not be curtailed by an overly restrictive definition of charity, and should be recognized as validly charitable even if they do not easily fit under the traditional categories of relief of poverty and/or the advancement of education.\textsuperscript{130}

12. THE "EXCLUSIVELY CHARITABLE" CONDITION

The law requires that charitable entities, to attract that designation and the privileges that accompany it, must be organized for purposes that are exclusively charitable and carry on only charitable activities. Under the federal tax law, an entity can be deregistered if it engages in non-charitable activities, and it will not be registered in the first place if any of its purposes are non-charitable. Under the law of trusts, a purpose trust is invalid unless (exceptions aside) all its purposes are charitable. Moreover, under the law of trusts and corporate law, carrying on non-charitable activities in the context of a charitable entity constitutes a breach of fiduciary duty on the part of those fiduciaries who authorize such acts.

What is the justification for this? The answer, we believe, is administrative ease. Charitable entities must be strictly charitable because imposing this condition on them is a cost-effective way of identifying the proper targets of state privileges intended for charity. It is important to be clear that administrative ease is the sole reason for this criterion for two reasons. First, there may be special instances where the condition could be modified or eliminated, while still assuring the effectiveness of the policy targeting. Second, understanding that the "exclusively charitable" principle is applied for the sake of administrative convenience helps in the design of the specific rules that implement the principle. As an example of the first point, it is obvious that there is a lot more charity in the world than is recognized by the exclusively charitable test. For example, direct gifts to distressed or impoverished individuals, a gift to a person whose whole life is devoted to doing charity, and a gift by a non-member to a mutual benefit nonprofit organization that pursues a common good but for the benefit of its membership such as a cooperative daycare are all charitable acts. It is difficult to devise ways to allow for the tax deductibility or creditability of the first gift, but it is not hard to imagine ways to permit deductibility or creditability of the second and third types of gifts. In addition, there is no reason not to designate the first gift as a charitable entity, even if the organization does not satisfy the exclusively charitable standard. As an illustration of the second point, the rules established to govern businesses carried on by charities can take many forms some of which such as the American rules permit charities to carry on unrelated businesses but tax the profits of the business. This type of regulation aims more specifically at the unfair consequences of subsidizing charitable businesses with tax subsidies by attempting to take away the subsidy.

Getting the formulation of the "exclusively charitable" principle correct is also of the utmost importance. There are two key elements to be considered the entity's purpose or purposes and its activities. Both must be exclusively charitable. A purpose is charitable if it proposes to instantiate a common or universal good. An activity is charitable if it has as its form and actual effect the instantiation of one of the goods. There is a difficulty here, however, which has led to some confusion in the law and legal writing. What ought to be
of concern are the primary or principal purposes as opposed to the ancillary and incidental purposes; with respect to activities, what we ought to be concerned about is whether they are activities intended to further, and which in fact further, the primary or principle ends.\textsuperscript{131} Making the correct assessment in the case of a particular entity is a complex factual inquiry involving investigation into these specific elements. One cannot look in isolation, for example, at such activities as letter writing, mass mailing, postage metering, and depositing cheques at the bank. Clearly, none of these activities considered in isolation is charitable. These activities must be looked at in their proper context as part of a campaign to raise funds in support of charity. It has been argued by some that since donation fundraising, considered in isolation, is not a charitable activity, a hospital foundation which does only this type of fundraising as well as granting the funds raised to the hospital does not meet the exclusively charitable test. This, in our view, is a mistaken conclusion. The error lies in the failure to see that the charitable nature of the fundraising activity is determined by the purposes that inform it as well as its actual effect. The proper approach is to look at the entity’s whole project or projects, its stated purpose(s), as well as its actual effect(s). Then one must ask whether the project(s) are practically useful instantiation(s) of a common good or goods for the benefit of others. All of the organization’s activities must contribute effectively, in the final analysis, to the achievement of its project(s). They all must be, at least, ancillary meaning subservient or subordinate to the achievement of the project or incidental meaning liable to happen to the project.

In subsequent chapters, the Commission makes further specific recommendations concerning the formulation and application of the exclusively charitable test in the various domains of the law of concern in this study. This test is easily the most important regulatory principle applied to the sector, since it is the principle that conditions the eligibility of the privileges.

13. CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

The Commission does not recommend any change in the basic definition of "charity". Our position generally has been that courts should be open and not legalistic in their interpretation and application of the common-law case law on the meaning of "charity". In our view, notwithstanding a few perhaps, a few too many judicial decisions to the contrary, there is no true divergence between the common-law definition and the real meaning of charity, and therefore there is no case to be made for a general or basic reform. To the extent that the case law requires reformation, it ought to occur through the methods of reformation inherent to the common-law tradition. We hasten to emphasize that this project is as much within the jurisdiction of public administrators as it is within that of the courts. Indeed, if there has been any serious failing in this regard in recent years, it has been at the level of public administration. Ontario courts have done an effective job in recent years of sorting through the contemporary problems in this area of the law, but, in the Commission's view, it is regrettable that the Office of the Public Trustee has seen fit to litigate, let alone appeal, such matters as the issues which are at stake in the Laid law case.
For the sake of thoroughness, Appendix F provides numerous possible codified definitions of "charity" employed or suggested in other jurisdictions. As just stated, however, we do not recommend any of them for adoption in Ontario. In addition to the substantive reasons summarized in the previous paragraph, it is our view concurred by most commentators and public studies in other jurisdictions that a legislated solution to the problems inherent in this definition is far too blunt an approach to work to effect or encourage proper development. We also think that a legislated definition is as likely to cause as much harm as good.

Our suggestion has been that "charity" is properly defined as follows: A truly charitable act or project is one that has as its form, its motive, and its effect the provision of the means of pursuing a common or universal good to another. We have analyzed that definition as being comprised of three key elements: the charitable purpose (the good pursued), the practical utility of the act or the project (the effect), and the destination of the benefit (others). We set motive aside not because it is unimportant, but because it is too difficult to consider directly. Still, it remains an important background element in the legal practice on the definition, and it surfaces occasionally to play an important role in understanding and applying legal rules.

The law's sole preoccupation with this definition has been and continues to be to identify entities that satisfy the "exclusively charitable" standard, since these are the entities entitled to state privileges. For an entity to meet this standard, it must be shown that all its project(s) have as their primary purpose(s) and actual effect(s) the instantiation of a common good for the benefit of others. We have identified a number of sources of confusion in some of the writing, judicial and otherwise, both in this chapter and in the previous two chapters, in the articulation of this standard. We reiterate the most important sources of confusion here:

1. "Charity" has two widely accepted but somewhat contradictory connotations: one narrow, that includes only acts aimed at relieving the distress or suffering of others; one wide, that includes what we have called "philanthropy". This is seen as a tension that requires no resolution but one that indicates a possibility for treating the former somewhat more favorably than the latter.

2. The policy function of "charity" has definitely affected, even distorted, its legal meaning historically and may well continue to do so into the future. This is unfortunate, perhaps unavoidable, but nonetheless it is to be avoided.

3. There are three basic tests for "charity", not quite definitions, at common law. All are related, all are slightly distinct, all are subject to many divergent interpretations, and all are conceptually imperfect. This is unfortunate but mostly innocuous.

4. The phrase "benefit to the public" is used equivocally to refer to the three elements in one definition or three actual definitions. This as a major source of
confusion, and courts should focus instead on whether the project (1) pursues a good (2) for the benefit of strangers (3) in a practically useful way.

(5) It is unfortunate that the common-law tests do not give adequate independent recognition to all the common goods. Nevertheless, we note that little serious harm has been caused by this, that courts are modifying their approach, and that the law has sufficient internal resources to continue development in the right direction.

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Statute of Charitable Uses, 1601, 43 Eliz. 1, c.(U.K.) (hereinafter referred to as the "Statute of Elizabeth").

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Although it is important to investigate and resolve these problems, to our knowledge no court has been seriously deceived by the confusion to the point of reaching an obviously mistaken conclusion.

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Re Resch’s Will Trusts, supra, note 5, at 540.

See Re Forgan Estate (1961), 34 W.W.R. 495, 29 D.L.R. (2d) 585 (Alta. S.C.), where the gift was for the establishment of "a home for the care of the children of others, orphans, wards of the province". See, also, Re St. Catherine’s House (1977), 2 A.R. 337 (C.A.) ("home or hostel for Anglican girls in the Diocese of Edmonton with particular concern for those of low earning ability who want to become teachers and clerks" held charitable on the basis of the statute and the fourth limb of Pemsel, supra, note 2), and Re Ryan Estate; Canada Permanent Trust Co. v. McFarlane, [1972] 4 W.W.R. 593, 27 D.L.R. (3d) 480 (B.C.C.A.) (gift to "Protestant homes or institutions for the care and welfare of children" held charitable because it was for the relief of poverty).


Other examples of valid trusts for the relief of people in distress include gifts in favour of retired soldiers (Verge v. Somerville, [1924] A.C. 496, 131 L.T. 107 (P.C.), and Whitmore v. Canadian Legion (Regina Branch), [1940] 3 W.W.R. 359 (Sask. K.B.); disaster relief funds (Re North Devon & West Somerset Relief Fund Trusts; Hylton v. Wright, [1953] W.L.R. 1260, [1953] 2 All E.R. 1032); and the relief and rehabilitation of prisoners, and unmarried mothers (Re Andrae; Sims v. Public Trustee (1967), 61 W.W.R. 182 (Alta. S.C.)).

Education will be examined infra, this ch., sec. 4. As will be seen there, education indirectly references the goods of knowledge, play, and practical reasonableness.

Supra, note 5.

In Scottish Burial Reform & Cremation Society v. Glasgow Corp., [1968] A.C. 138 at 154, [1967] 3 All E.R. 215 at 223 (H.L.) (subsequent references are to [1968] A.C.), Lord Wilberforce noted that the test in Pemsel, supra, note 2, "though no doubt not very satisfactory and in need of rationalisation, is tolerably clear".
We mention this problem because it appears to be the source of some anxiety in the cases and commentary. Waters, supra, note 3, at 552-57, remarks that Canadian courts have been very liberal in their interpretation of poverty, and have included in it gifts to aged men and women, widows, and neglected children. In this way, he argues, the relief of poverty, category is broadened into charity in the narrow sense. From there he reasons that it may be a short step to "well-meaning but unreasoned generosity" to the wealthy aged; once it is admitted that serious economic deprivation is no longer a necessary element in the definition, it may seem that the gift to the wealthy aged must be accepted. This is where the "practical utility" criterion, however, is relevant. Consider the example of an endowment, established by a complete stranger, to fund the purchase of a library for a community of wealthy retirees, from which the poor are excluded. Under the definition of "charity" advanced in ch. 6, supra, this endowment should fail since it is not a practically useful way to advance the good of knowledge. The donor's altruism is, under our test, misguided. (A second solution to this hypothetical, suggested in some cases, is to add a requirement that a charitable act, although it may include the rich among its beneficiaries, may not exclude the poor. See Protestant Old Ladies Home v. Provincial Treasurer (P.E.I.), [1941] 2 D.L.R. 534 (P.E.I.C.A.), Re Nottage; Jones v. Palmer, [1895] 2 Ch. 649, [1895-9] All E.R. Rep. 1203 (C.A.), provides another illustration of a situation in which the type of reasoning being advanced might have been applied. Re Nottage is the leading authority, mistaken in our view, supporting the proposition that sport is not a charitable purpose. In that case, an endowment was established to support a yachting award. Instead of holding that sport is not a charitable purpose, the court might have said the actual gift was not a practically useful way of advancing sport, given the very limited number of very rich people involved in yachting and, therefore, given the very limited effect, if any, it would have on the advancement of sport generally; there must have been many far more effective ways to advance sport in England than that chosen by the testator.

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This is the justification offered in Re Scarisbrick, supra, note 13.
Under s. 18 of the *Perpetuities Act*, R.S.O. 1990, c. P.9, employee trusts of all types are relieved from the application of perpetuities rules.

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This possibility is considered further below, but in our view, such a general recognition of validity of purpose trusts is undesirable. For a further discussion, see infra, ch. 14.

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*Supra*, ch. 6.

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For the first technique, see, for example, *Cameron v. Church of Christ Scientist* (1918), 57 S.C.R. 298, 43 D.L.R. 668, where a gift in favour of Christian Science was held invalid on the basis that "private devotion or edification" was not charitable religious activity in law because it lacked practical utility. Trusts in favour of certain religious orders have also been held not charitable on similar grounds. See *Gilmour v. Coats*, [1949] A.C. 426, [1949] 1 All E.R. 848 (H.L.) (subsequent references are to [1949] A.C.). The idea of requiring that religions satisfy a stricter public benefit test was considered and ultimately rejected by the 1989 U.K. White Paper, *Charities: A Framework for the Future* (Cmnd. 694, 1989).

One prominent example of the second technique is the historical treatment of the Catholic mass in English trust law. It still remains uncertain whether a trust for the saying of masses is charitable under English law since the leading House of Lords decision, *Bourne v. Keane*, [1919] A.C. 815, [1918-19] All E.R. Rep. 167 (H.L.), held only that outright gifts for masses are not invalid as gifts for superstitious uses. There is an early Ontario case to like effect: *Elmsley v. Madden* (1871), 18 Gr. 386. Two earlier lower court decisions in England, *Re Caus; Lindboom v. Camille*, [1934] 1 Ch. 162, [1935] All E.R. Rep. 818, and *Re Hallisy Estate*, [1932] O.R. 486, [1932] 4 D.L.R. 516 (C.A.) held in favour of the validity of trusts for masses. Recently, a third lower court decision, *Re Hetherington; Gibbs v. McDonnell*, [1990] Ch. 1, [1989] 2 All E.R. 129, held that a trust for the saying of masses in public was valid. It is unclear, however, that these decisions would be followed by higher courts. See, further, Waters, *supra*, note 3,578. There are other examples of the second technique. For example, there are cases involving gifts to a church or a church office holder in trust for the "use of the Diocese" or for "parish work" which have been held not charitable on the basis that not all the work of the parish or diocese was charitable. See *Re McCauley Estate* (1897), 28 O.R. 610 (H.C.J.), and *Farley v. Westminster Bank Ltd.*, [1939] A.C. 430, [1939] 3 All E.R. 491 (H.L.). More recent Canadian cases have been more generous on this score. See *Re Delaney Estate; Canada Trust*
Co. v. Roman Catholic Archepiscopal Corp. of Winnipeg (1957), 26 W.W.R. 69, 12 D.L.R. (2d) 23 (B.C.C.A.) (gift to the archepiscopal corporation for the benefit of a particular parish, or "otherwise", held valid as either an outright gift to the corporation or as a valid trust), and Blais v. Touchet, [1963] S.C.R. 358, 40 D.L.R. (2d) 961 (gift in trust "pour les oeuvres" of the bishop held valid on the basis that "oeuvres" was to be interpreted as charitable works). See, also, Hutterian Brethren Church of Wilson v. R., [1980] C.T.C. 1, 31 N.R. 326, where the farming activities of the church brethren were held not charitable, and the income arising therefrom, therefore, not exempt from tax.

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The approach has been described by Professor Waters, supra, note 3,579, as follows:

[B]y working outwards by a process of analogy from the repair of churches, the courts in Canada like those in England have developed an approach to religious activity which in the main has accommodated a probable response to religion of contemporary society, but, as the cases...show, they have not been able to devise a set of criteria for the assessment of religion which is entirely satisfactory.

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In a religiously homogenous society, the issue will not arise, but in a diverse society, such as Ontario, the question is ever present. The English practice, until the Toleration Act 1688, 1 Will. & Mar., c.(U.K.), in the case of Protestant dissenters and the mid-nineteenth century, in the case of the Jewish and Roman Catholic religions, was outwardly biased against religions other than the Church of England. The practice in Ontario was otherwise almost from the beginning. Thus, in England, there are very old cases where trusts in favour of the advancement of the Jewish and the Catholic religion were held invalid, either on the basis that they contravened public policy or on the basis that they were in favour of superstitious uses.

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Note, however, that the freedom to practise religion is not at stake in the decision whether the religion is authentic for the purposes of the law of charity. Only the availability of the purpose trust and the tax privileges are in issue.

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See Nikulnikoff v. Archbishop of Russian Orthodox Greek Catholic Church, 255 N.Y.S. 653 (Sup. Ct. 1932), cited in Picarda, supra, note 27, at 436.

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See Neo v. Neo (1875), L.R. 6 P.C. 381.

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See R. v. Registrar General; Ex parte Segerdal, [1970] 2 Q.B. 697, [1970] 3 All E.R. 886 (C.A.), and Missouri Church of Scientology v. Tax Commissioner, 560 S.W. 837 (1977), where the Church of Scientology was denied the property tax relief available to charities on the basis, in both cases, that it was more a philosophy with religious connotations without any element of reverence for God.

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For example, see Theriault v. Silber, 391 Fed. Supp. 578 (1975), where a prisoner in a federal penitentiary claimed to have founded a church with his fellow prisoners and complained of violations of his right to the free exercise of religion committed by prison authorities.

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See Re Pinion; Westminster Bank v. Pinion, [1965] Ch. 85 at 98, [1964] 1 All E.R. 890 (C.A.), where the gift by the testator of the testator's art collection to be maintained by the trust in its integrity as a museum was held not to be charitable because the collection was not of sufficient quality. See, also, Re Hummeltenburg; Beatty v. London Spiritualistic Alliance, [1923] 1 Ch. 237, [1923] All E.R. Rep. 49.

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After some obvious difficulty sorting through the problem of religion, the Goodman Report, supra, note 15, concluded in favour of the status quo. It did not offer a definition of religion. The report merely suggested that a court should be permitted to say that some religions that are detrimental to the community's moral welfare should be excluded. The 1989 U.K. White Paper, supra, note 23, at 8 states, similarly, that "any religious body is entitled to charitable status so long as its tenets are not morally subversive and so long as its purposes are directed to the benefit of the public". The White Paper cites with approval a statement made in the High Court of Australia that there can be "no acceptable discrimination between institutions which take their character form religions which the majority of the community recognizes as religious and institutions which take their character from religions which lack that general recognition".
This is because the genuine pursuit of the other goods is generally an integral part of the doctrines, practices, and observances of almost all religions.

See, for example, *Homa v. M.N.R.*, [1962] Tax A.B.C. 961, where the taxpayer's claim that a portion of the moneys paid to a private religious school, which his children attended, was a donation was rejected.

Under s. 110(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the income of a person who has taken a vow of poverty and who donates the income to his or her order is deductible. In this case, the work and the income earned are properly treated as essentially charitable (religious) because, in part, the entire income is given away, and therefore is tax exempt.

Some of these examples are taken from A.H. Oosterhoff and E.E. Gilse, *Text, Commentary and Cases on Trusts*, 4th ed. (Toronto: Carswell, 1992), at 825.

*Infra*, this ch., sec. 5(c).

Waters, *supra*, note 3, at 569.


See *Davies v. Perpetual Trustee Co.*, [1959] A.C. 439, [1959] 2 All E.R. 128 (P.C.), where a gift to establish a religious college in favour of the descendants of Presbyterians in New South Wales from the north of Ireland was held invalid on account of the limited number and close nexus of the people that would benefit.
For example, see Neville Estates Ltd. v. Madden, supra, note 25, where the fact that the public were not prohibited from joining a synagogue made a gift to it sufficiently "public". Also, see, Association of Franciscan Order of Friars Minor v. City of Kew, [1967] V.R. 732 (Aus.) for a similar argument. This is also the meaning given to this element in Oosterhoff and Gillese, supra, note 42, at 825.

Perhaps the suggestion is that the benefit received is in the form of a spillover by way of the more citizen-like behaviour of the members of the recipient church which results from their religious virtue. This is to value religion, mistakenly, exclusively for its by-product.

Supra, note 1.


Jones, ibid., at 57-58. See, also, A.W. Scott, The Law of Trusts, 3d ed. (Boston: Little, Brown & Co., 1967), Vol. IV, at 2880-81 (hereinafter referred to as "Scott on Trusts"), where this is explained and Sir Francis Moore, the draftsman of the statute, is quoted as explaining that religion was left off the list "lest the gifts intended to be employed upon purposes grounded upon charity, might, in change of times...be confiscate into the King's treasury".

See cases cited in Oosterhoff and Gillese, supra, note 42, at 823, and Waters, supra, note 3, at 581.

Supra, note 23. See, also, Cocks v. Manners (1871), L.R. 12 Eq. 574, 40 L.J. Ch. 640, for a similar case with a similar holding. In that case, a gift to a Dominican convent where the members led quiet lives of contemplation was held invalid because of the lack of public benefit.

Gilmour v. Coats, supra, note 23, at 459.

Ibid. [emphasis added].

In Ontario, see, for example, Re Schneckenburger (1931), 40 O.W.N. 210 (S.C.), and Re Boyd Estate (1924), 55 O.L.R. 627 (C.A.). See, also, cases cited in Waters, supra, note 3, at 571.
The Republic of Ireland's *Charities Act, 1961*, No. 17 (Ir.), s. 45(1), provides that:

> [I]n determining whether or not a gift for the purpose of the advancement of religion is a valid charitable gift it shall be conclusively presumed that the purpose includes and will occasion public benefit.

Section 45(2) provides that a valid charitable gift for the advancement of religion "shall be construed in accordance with the laws, canons, ordinances and tenets of the religion concerned".

For recent cases discussing these issues, see *Briarpatch Inc. v. R.* (1996), 96 D.T.C. 6294 (Fed. C.A.) (magazine containing articles of interest to poor not charitable), and *Vancouver Society of Immigrant & Visible Minority Women v. R.* (1996), 96 D.T.C. 6232, 195 N.R. 235 (Fed. C.A.) (networking and referral service for immigrant women not charitable activity).


The Canadian case law is clear that distance is required. See *Re Doering*, *supra*, note 21. In England there is a line of authority in favour of gifts for the advancement of education that partially favour the donor's relations. These are the so-called "founder's kin" cases. That line of authority has been extended in England to include gifts where there is a preferred class of recipients comprised of employees (and their relations) of a company. See *Re Koettgen's; Westminster Bank Ltd. v. Family Welfare Association Trustees Ltd.*, [1954] Ch. 252, [1954] 1 All E.R. 581. None of these decisions has been followed in Canada. In our view that is a good thing.


See *Re Spencer* (1928), 34 O.W.N. 29 (H.C.J.).

Waters, *supra*, note 3,653 gives the example of a donor who establishes a research fund outside a university on condition that the research results be kept completely secret. He suggests, correctly in our view, that such a gift is not charitable. In our view, however, its failure to attain charitable status has little to do with the fact that there is no teaching element to the gift. Rather, the gift is not charitable because the prohibition against publication undermines the principle that knowledge is a *common* good. Such an internally
incoherent projects somewhat like a project to save a life by taking it cannot be a practically useful way of advancing the good of knowledge.

67


68


69

Ibid., at 18.

70

There were earlier cases supporting this position, but the position was by no means established prior to the decision of the House of Lords in Inland Revenue Commissioners v. McMullen, ibid. See Re Mariette; Mariette v. Governing Body of Alderham School, [1915] 2 Ch. 284, [1914-15] All E.R. Rep. 794, for one of the earliest cases.

71

Infra, this ch., secs. 8, 9, and 10.

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Re Shapiro, supra, note 72, at 519.

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Supra, note 73.

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See Waters, supra, note 3, at 565, for a discussion of this view.

See Re Co-operative College of Canada and Saskatchewan Human Rights Commission, [1976] 2 W.W.R. 84, 64 D.L.R. (3d) 531 (Sask. C.A.) (a college teaching cooperative principles was held not to be charitable, in part, for the reason that teaching cooperative principles was an "economic" object and therefore akin to a political object), and Positive Action Against Pornography v. Minister of National Revenue, [1988] 2 F.C. 340, 49 D.L.R. (4th) 74 (Fed. C.A.) (a society founded to change social opinions about pornography was held not to be educational). For other examples, see cases cited in Waters, supra, note 3, at 566.

Supra, note 63.

See, also, Re Hummeltenberg, supra, note 37 (a college for the training of spiritual mediums), and Re Pinion, supra, note 37 (a museum to contain a "worthless" collection).

See Oosterhoff and Gillese, supra, note, 42, at 211.

Although this is not true of every state, one hopes and behaves as though it is true of one's own. For a similar argument, see J. Phillips, Case Comment, "Everywoman's Health Centre v. Minister of National Revenue" (1992), 11 Philanthrop. (No. 1) 3, at 7.


Hence, we would argue that the following objective of the Women's Legal Education and Action Fund is not charitable. The following is cited in E.B. Bromley, "Contemporary Philanthropy Is the Legal Concept of 'Charity' Any Longer Adequate?", in D.W.M. Waters (ed.), Equity, Fiduciaries and Trusts 1993 (Scarborough: Carswell, 1993) 59, at 84:

(3) [T]he promotion of human and civil rights through the sponsoring of selective litigation, and in particular, to secure the enforcement of the Constitution of Canada and the Canadian Charter of Rights and Freedoms set out therein and educating the public concerning the principles reflected in the Constitution.
The view that such activity is charitable has been criticized, rightly in our view, by Bromley, *ibid.*, at 84-85:

[It would] enable groups who support the law as it presently stands to conduct activities to maintain and enforce existing law within the ambit of allowable charitable activities but denies that opportunity to groups which want to promote changes to the law....[S]uch a proposition conflicts with the concrete reality that an activity intended to influence the legislature or Parliament to maintain the existing law on something as fundamental and divisive as abortion is just as political as an activity intended to influence it to change the existing law or enact a new law.

See, also, *Re Hopkinson: Lloyds Bank Ltd. v. Baker*, [1949] 1 All E.R. 346, at 330, 65 T.L.R. 108 (Ch. D.), where it was said, supporting the position taken here:

I venture to add as a corollary to that statement [of Lord Parker in *Bowman v. Secular Society Ltd.*, [1917] A.C. 406 to the effect political objects are not charitable] that it would be equally true to apply it to the advocating or promoting of the maintenance of the present law, because the court would have no means in that case of judging whether the absence of a change in the law would or would not be for the public benefit.

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Interestingly, however, gifts to governments in Canada are in some cases 100% deductible or creditable. This treatment of these gifts could be regarded as a remnant of the Elizabethan and Victorian policies of favouring trusts to fund public works. See E.B. Bromley, "Parallel Foundations and Crown Foundations" (1993), 11 Philanthrop. (No. 4) 37.

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Other human rights codes in Canada contain similar clauses. See, for example, the *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 20, as am. by S.Q. 1982, c. 61, s. 6:

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of a institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

See, also, the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, s. 2, as am. by S.A. 1985, c. 33, s. 2 and S.A. 1990, c. 23, ss. 2, 3:

2.(1) No person shall publish or display before the public or cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or class of persons for any purpose because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin of that person or class of persons.

(3) Subsection (1) does not apply to

(a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,

(b) the display or publication by or on behalf of an organization that

(i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and

(ii) is not operated for private profit, of a notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or

(c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2), if the notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

Similarly, the *Human Rights Act*, S.B.C. 1984, c. 22, s.provides:

19.(1) Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

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I accept that racial and religious discrimination is nowadays widely accepted as deplorable ..., but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or to exclude adherence to a particular faith is contrary to public policy. The testatrix's desire to exclude persons of the Jewish faith or of the Roman Catholic faith from those eligible for the studentship in the present case appears to me to be unamiable, and...undesirable, but it is not, I think, contrary to public policy.

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Ibid., at 349-52.

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Re Dominion Students' Hall Trust; Dominion Students' Hall v. Attorney-General, [1947] Ch. 183, [1947] L.J.R. 371 (subsequent references are to [1947] Ch.), struck down a discriminatory condition favouring male students of the British Empire of European origin as being at the time impossible to comply with since it undermined the main purpose of the trust which was to foster community of citizenship among members of the British Empire. In that case, Evershed J. held, at 186-87, as follows:

I have...to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the Hall to member of the Empire of European origin. But times have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and
goodwill it is the purpose of the charity to sustain. The case, therefore, can be said to fall within the broad description of impossibility....In these circumstances, I am happy to think that I can make the order which I have been asked to make.

Re Lysaght, supra, note 97, applied a similar line of argument to avoid a condition that was discriminatory against Jews and Catholics. There, the named trustee refused to serve unless the discriminatory provision was removed. Buckley J. held that the personality of the trustee, the Royal College of Physicians and Surgeons, was a necessary part of the gift and therefore the gift failed, but could be applied cy près by striking out the discriminatory provisions.

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This latter decision was itself repudiated by the Ontario Legislature in 1951 by The Conveyancing and Law of Property Amendment Act, 1950, S.O. 1950, c. 11. For the law at present, see the Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 22.

104

See Clavering v. Ellison (1959), 7 H.L. Cas. 707, 11 E.R. 282 (H.L.), and Clayton v. Ramsden, [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.). This area of the law is notoriously incoherent and has been the subject of judicial and doctrinal critique. The central legal principles distinguish between a condition precedent and a condition subsequent, each subject to a distinct criterion of certainty. The standard of certainty applicable to a condition precedent is low since a failure to meet this standard results in the gift being declared void. Conversely, the standard applicable to a condition subsequent is high since a failure to meet this standard results in only the condition subsequent itself being struck.

105

See cases cited supra, note 100.

106

See J. Phillips, Case Comment (1990), 9 Philanthrop. (No. 3) 3, at 25.

107


> It may be that, on very broad and general grounds, relief of poverty and distress in any part of the world, or the advancement of the Christian religion in any part of the world, would be regarded as being for the benefit of the community in the United Kingdom. I see, however, formidable difficulties where the objects of the trust were, say, the setting out of soldiers or the repair of bridges or causeways in a foreign country. To such cases the argument of public policy...might be the answer.

See, also, *McGovern v. Attorney-General*, [1982] Ch. 321, [1981] 3 All E.R. 493 (subsequent references are to [1982] Ch.), where it was held that a trust for the abolition of torture and inhumane punishment in foreign countries was void because the court would not have the means to assess whether any proposed change in the law would be to the benefit of the public in the foreign country.


There are many marginal cases where a purpose trust was held valid as charitable, even though one could reasonably argue that its objects were political: *Re Scowcraft*, supra, note 64 (a trust "for the furtherance of conservative principles and religious and mental improvement"); *Farewell v. Farewell* (1892), 22 O.R. 573 (H.C.J.) (a trust for the adoption by the Parliament of the Dominion of Canada of legislation prohibiting the sale of intoxicating liquor as a beverage and for the promotion of temperance through the education of public opinion); *Inland Revenue Commissioners v. Falkirk Temperance Café Trust*, [1927] S.C. 261, 11 Tax Cas. 353 (Scot.); *Re Hood*, supra, note 64 (temperance); and *Lewis v. Doerle*, supra, note 109 (a trust "to promote, aid and protect citizens of the United States of African descent in the enjoyment of their civil rights").

Lord Parker in *Bowman v. Secular Society Ltd.*, supra, note 33, at 442, put the argument this way:

A trust for political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

The gift in *Bowman* was to the Secular Society Ltd., whose purposes included the promotion of the repeal of Sunday observance legislation. A different formulation of the same idea is contained in Lord Simonds' speech in *National Anti-Vivisection Society v. Inland Revenue Commissioners*, supra, note 112, at 50:

The law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands.

And Slade J. summarized the reasons as follows in *McGovern v. Attorney-General*, supra, note 108, at 336-37:

From the passages from the speeches of Lord Parker, Lord Wright and Lord Simonds which I have read I extract the principle that the court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the United Kingdom for one or both of two reasons: first, the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the function of the legislature.

See, also, *Re Patriotic Acre Fund*, supra, note 112.
Another common argument is that political propaganda and distorted information is not of public benefit. See Re Hopkinson, supra, note 85.

114

Lord Parker's justification in Bowman v. Secular Society Ltd., supra, note 33, has been characterized as "implausible" by S. Gardner, An Introduction to the Law of Trusts (Oxford: Clarendon Press, 1990) at 107, and "a strain on credulity" by Sheridan, Charitable Causes, Political Causes and Involvement, supra, note 112, at 12.

115

Supra, note 108.

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Supra, note 109.

117

Ibid., at 206.

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See Re Koeppler Will Trusts; Barclay's Bank Trust Co. v. Slack, [1986] Ch. 423, [1985] 2 All E.R. 869 (C.A.). This appears to have been the position in the United States for some time: Vanderbilt v. Commissioner of Internal Revenue, 93 F. (2d) 360 (1937).

121

Social service clubs present an interesting example. Generally, they pursue friendship and sociability as well as providing services to the community that are charitable in nature. The fact that the sociability pursued is for their own benefit means that one of their main purposes is non-charitable, and therefore that they are not exclusively charitable. See Watt Estate v. Minister of National Revenue (1964), 64 D.T.C. 488, 36 Tax A.B.C. 40 (Edmonton Lions Club not exclusively charitable).

See cases cited *supra*, note 118.


See *Inland Revenue Commissioners v. Baddeley*, *supra*, note 90, which held that a trust to establish a community centre in which "social intercourse and discreet intercourse may go hand in hand with religious observance and instruction" was not charitable. See, also, *Williams' Trustees v. Inland Revenue Commissioners*, *supra*, note (a social centre for Welsh people in London), and in Australia, *Attorney-General v. Cahill*, *supra*, note 90 (a Catholic boy's club). The effect of this case law has been repealed, at least in part, by statutes in England and several Australian jurisdictions which validate "social welfare" trusts providing for "facilities for recreation or other leisure-time occupation". See, for example, *Recreational Charities Act, 1958*, 6 & 7 Eliz. 2, c.(U.K.). In our view, for the reason stated in the text, there is no need for such legislation in Ontario. *Contra*, Waters, *supra*, note 3, at 599. More recent decisions have held in favour of trusts for recreational purposes. See, for example, *Brisbane City Council v. Attorney-General for Queensland*, [1978] 3 W.L.R. 299, [1978] 3 All E.R. 30 (Aus.), (park and recreational show ground), and *Re Vernon Estate; Boyle v. Battye*, [1948] 2 W.W.R. 46 (B.C.S.C.) (a community hall).


1. INTRODUCTION

In this chapter, the Commission presents some of the explanations of charity and charity law offered in the growing (largely American) literature on charity law. That literature is both positive and normative: it seeks both to explain why the law handles certain problems in certain ways and to recommend what the law should be. There is also a large body of empirical literature, only some of which has attempted to test the hypotheses generated in the theoretical work. In some instances in the discussion that follows we use American examples, sometimes because there is no Canadian analogue, but usually because what the theories describe is American in provenance and design.
This literature is preoccupied with three basic questions. The first question, the most basic, asks why charity takes place at all. This question is generally put by asking why governments or the private sector cannot do or refrain from doing what charity the "third" sector does. Thus, somewhat perversely, the inquiry is commenced by defining and describing charity in terms of what it is not. The second basic question takes up issues relating to the privileged tax treatment of charities the deduction or tax credit and the tax exemptions. Here the problem is to understand why governments treat charities in these favourable ways and what can or should be required of charities in return. The third basic question seeks to understand the internal functioning and accountability mechanisms of organizations where self-interest founded on an ownership stake is absent. This question looks at both the inherent appropriateness of various forms of organization and the role of external agencies, chiefly government, in ensuring that the objectives of the organization are fulfilled.

A good deal of this literature asks these questions about the nonprofit sector as a whole, not just its charitable component, so as a preliminary matter it is useful to set out possible taxonomies of the nonprofit sector. We do this in section 2 of this chapter. Section concludes with the taxonomy of the sector which, in our view, best organizes it for regulatory purposes. Sections 3 and 4 address only the first and second questions, respectively.

2. FOUR TAXONOMIES OF THE NONPROFIT SECTOR

(a) First Taxonomy: Locus of Control and Sources of Financing

One taxonomy classifies nonprofit organizations along two axes: the locus of control of the organization (the people who provide the financing versus others), and the sources of revenue (donations versus commercial transactions). This classification looks as follows:

<table>
<thead>
<tr>
<th>Source of Financing</th>
<th>Direct Control by Source Financing</th>
<th>Control by Intermediary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Donative</td>
<td>(1) Political clubs, church</td>
<td>(2) CARE, Arts museums, Salvation Army</td>
</tr>
<tr>
<td>Commercial</td>
<td>(3) Cooperative daycare, Canadian Automobile Association, Consumers Union</td>
<td>(4) National Geographic</td>
</tr>
</tbody>
</table>

Although this taxonomy of organizations is used extensively in the literature, the most noteworthy feature of it for the purposes of the present study is that what the law calls "charity" is not identified as an independent classification. Charities in the "legal" sense can be found in all four boxes, but principally in boxes (1), (2), and (3). This deficiency, if deficiency it is, is due to the fact that the classification scheme does not refer explicitly to either of the two characteristics of "charity" at law, namely (1) doing good (2) by others, as we have put it, or public benefit, as the Pemsel test puts it. Rather, the
typology focuses on the nonprofit motive as the identifying characteristic of this segment of society, then looks at the two important variables of control and source of financing.

(b) Second Taxonomy: The First Taxonomy Plus Destination of Benefits

A second and more complex classification of nonprofits adds a third dimension to the classification system just described. In addition to looking at the locus of control and the source of income, this scheme looks at the destination of the benefits. In this scheme the beneficiaries can be the people who control the organization, the people who finance it, or neither, that is, strangers. In turn, control can be in three places: with the intermediaries and the financers, as before, but now also the beneficiaries. It also means that the people who provide the financing can be the beneficiaries, controllers, and third parties, through both donations and commercial transactions. This scheme results in ten different types of nonprofit organizations. Although this taxonomy does not explicitly take account of the type of good or service provided, it does take account of who the beneficiaries actually are, and it is a more useful scheme of classification for present purposes.

Table II

<table>
<thead>
<tr>
<th>Identifying Relation and Example</th>
<th>Controller (C)</th>
<th>Source of Financing (SF)</th>
<th>Beneficiary (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1. Intermediary (by definition, neither the Source of Financing nor the Beneficiary)]</td>
<td>[1. Intermediary (i.e. Board of Directors of CARE)]</td>
<td>[1. Beneficiary]</td>
<td>[1. Controller]</td>
</tr>
<tr>
<td>2. Source of Financing</td>
<td>2. Beneficiary, by Donation (i.e. public donations)</td>
<td>2. Controller</td>
<td>2. Source of Financing</td>
</tr>
<tr>
<td>3. Beneficiary]</td>
<td>3. Third Party (by definition, neither the Controller nor the Beneficiary)]</td>
<td>3. Stranger (by definition, neither the Controller nor the Source of Financing)]</td>
<td>3. Stranger (i.e. famine relief overseas)</td>
</tr>
</tbody>
</table>

(a) DONATIVES

I. C

<table>
<thead>
<tr>
<th>C</th>
<th>1. Intermediary (i.e. Board of Directors of CARE)</th>
<th>1. Third Party, by Donation (i.e. public donations)</th>
<th>1. Stranger (i.e. famine relief overseas)</th>
</tr>
</thead>
<tbody>
<tr>
<td>SF</td>
<td>1. Intermediary (i.e. Board of Directors of Public TV)</td>
<td>2. Beneficiary, by Donation (i.e. donors to Public TV)</td>
<td>3. Source of Financing (i.e. donors to Public TV)</td>
</tr>
<tr>
<td>(eg. CARE)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>III.</td>
<td>C</td>
<td>SF = B</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>(e.g., Parish church, where the congregation has control over all operations)</td>
<td>2. Source of Financing</td>
<td>2. Beneficiary by donation</td>
<td></td>
</tr>
<tr>
<td>3. Controller (i.e., congregation)</td>
<td>3. Source of Financing (i.e., congregation)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>IV.</th>
<th>C</th>
<th>SF = B</th>
</tr>
</thead>
<tbody>
<tr>
<td>(e.g., Parish-based charity not for benefit of parishioners)</td>
<td>2. Source of Financing (i.e. congregation)</td>
<td>3. Controller by Donation (i.e. congregation)</td>
</tr>
<tr>
<td>1. Stranger (i.e. famine relief verseas)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>V.</th>
<th>C</th>
<th>SF = B</th>
</tr>
</thead>
<tbody>
<tr>
<td>(e.g. Foreign missions: One parish in Canada subsidizes another overseas which is otherwise autonomous)</td>
<td>3. Beneficiary (i.e. subsidized parish)</td>
<td>1. Third Part, by Donation (i.e. donor parish)</td>
</tr>
<tr>
<td>2. Controller (i.e. subsidized parish)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(b) COMMERCIALS

<table>
<thead>
<tr>
<th>VI.</th>
<th>C</th>
<th>SF = B</th>
</tr>
</thead>
<tbody>
<tr>
<td>(e.g. Oxfam Gift Shop; UNICEF cards)</td>
<td>1. Intermediary (i.e. Board of Directors)</td>
<td>1. Third Party, by Purchase (i.e. customers)</td>
</tr>
<tr>
<td>1. Stranger (i.e. profits go to famine relief)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VII.</th>
<th>C</th>
<th>SF = B</th>
</tr>
</thead>
<tbody>
<tr>
<td>(e.g., National Geographic;</td>
<td>1. Intermediary (i.e. Board of Directors)</td>
<td>2. Beneficiary, by Purchase (i.e. customers, patients, students, etc.)</td>
</tr>
<tr>
<td>3. Source of Financing (i.e. profits poured back into business for benefit of purchasers through better service/product at lower price)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
(c) Third Taxonomy: A Further Ordering of the Second Taxonomy

These ten types of nonprofit organizations can be further ordered for explanatory purposes. One such division, in order to isolate and assess the source of income as a possible explanatory factor, is into donatives and commercials. This exercise has been done already in the table presented. Another division is to group them into factor-pair relations in order to highlight the importance of these relations in defining the identity of the nonprofit. Although the results are somewhat complex, this exercise is useful, especially in relation to donatives.

TABLE III

<table>
<thead>
<tr>
<th>Descriptive Name for Type of Organization Identified in the Relation</th>
<th>Identifying elation</th>
<th>Members of Set</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Independent/Activist (direct control by Source of Financing)</td>
<td>C = SF</td>
<td>C = B (III) Parish Church</td>
</tr>
<tr>
<td></td>
<td></td>
<td>C = B (IV) Parish-based Charity</td>
</tr>
<tr>
<td>2. Intermediated (Controllers facilitate and direct the</td>
<td></td>
<td>C = B (V) Foreign Missions</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class</td>
<td>Description</td>
<td>Example</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>---------</td>
</tr>
<tr>
<td>1. CARE</td>
<td>Purely Altruistic (Source of Financing helps only others)</td>
<td>CARE, SF = B (II) U.S. Public TV</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Mutual Benefit (Source of Financing help only themselves)</td>
<td>SF = B (I) CARE</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Purely Altruistic (Source of Financing helps only others)</td>
<td>SF = C (IV) Parish-based Charity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Self-determining (Beneficiaries run their own show)</td>
<td>B = C (III) Parish Church</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Paternalistic (Beneficiaries let others decide for them)</td>
<td>C = SF (V) Foreign Missions</td>
<td></td>
</tr>
</tbody>
</table>

Key: B = Beneficiary  
C = Controller  
SF = Source of Financing (Donor)

The first observation to be made is that these descriptive names identify polar opposites. Therefore, any particular organization may be located somewhere between the two poles. CARE, for instance, although used here as an example of a purely altruistic, paternalistic, and intermediated nonprofit, is not completely paternalistic since it consults with its beneficiaries as to their needs.

The second observation is that, at least with respect to the donatives, there is an element of altruism in all the forms of association identified, including the mutual benefits (Classes II and III). When people make a donation to public television, they do so partially out of an intention to benefit other viewers, both those who pay and those who do not, and partially out of a sense of obligation to pay their fair share on account of the benefits received. A parishioner who contributes to the collection plate usually contributes to support the church in general, so that all persons, including herself, will continue to have an opportunity to worship.

The third observation is in respect of the commercial organizations for which this last exercise was not done. The logic of these organizations and their purposes is more complex. Essentially, in all of the commercials there is a consumer-purchaser, the source of financing, who transacts with the nonprofit for largely selfish reasons: she wants the product or service the nonprofit has to offer. It is the analogue to this person in the
donatives, the donor, who had altruistic motives. These motives will be far less preponderant in the case of purchasers from commercials (which is not to say they are not present) than they were for donors, even those donors in mutual benefits (Classes II and III). Any altruistic motive there is in the case of the commercials will be in respect of the profit made or forgone by the organization and/or in the higher price paid by the purchaser. The profit made or forgone could go to (1)purchasers in the form of a rebate or reduced price (Class VII, National Geographic, and Class VIII, cooperative day care), (2)controllers in the form of profit (Classes VIII, cooperative day care, and Class X, church bookstore), or (3)third party by virtue of a subsequent donation of profits (Class VI, Oxfam Gift Shop and IX, church bazaar). We will look briefly at each in turn.

(1) In the first case, Classes VII and VIII, since the profit generally goes to the purchasers in the form of reduced prices, there is little if any altruism in the purchasers. In the case of Class VII the altruism is in the person or institutions the "owners" who or which forgo the profit. In Class VIII, altruism is, arguably, totally absent.

(2) Where the beneficiary is the controller, and not also the income source, that is, Class X, the presence or absence of and location of the altruism depends on whether the purchase price exceeds the amount the purchaser would otherwise be willing to pay, and also on the ultimate destination of the benefit. If the first amount is greater than zero, there is altruism in the purchaser, otherwise the purchaser is getting fair value and donating nothing. A paradigm of Class X, the church bookstore, is also the classic example of a charity running a related business. In this paradigm the ultimate destination of the benefit is church operations a charity.

(3) Where the beneficiary is a stranger, Classes VI and IX, the altruism is possibly shared by the purchaser and the controller. However, it is usually a great deal more predominant in the motives of the controller on account of the fact that the whole profit is donated to the benefit of strangers. Notice that these are the classic cases of charities running unrelated businesses.

(d)Fourth Taxonomy: The Particular Nonprofit Purpose as the Primary Consideration

Although the taxonomies discussed to this point are useful, the Commission thinks that they do not provide an adequate classification of the nonprofit sector. We agree that the source of financing, locus of control, and destination of benefits are three important variables. What is missing, however, is a sufficiently explicit recognition of the sector's own self-understanding. An appropriate classification should take account of the purposes for which people organize nonprofits, and these purposes should play a dominant role in any scheme of classification. The defect with the schemes of classification just discussed is that they collapse all purposes into one the nonprofit purpose then use variables of lesser importance to generate a classification. Only in the last exercise do we see some of these purposes beginning to emerge.
We think that the law should be based primarily on a classification scheme that identifies at least four, perhaps five, principal nonprofit purposes: religion, charity, politics, mutual benefit, and perhaps a catch-all "other". Notice that this classification separates religion from charity in the legal sense. Charity might be broken down further into social welfare and philanthropy, as suggested above in chapter 6.

The classification scheme should also look at the destination of benefits and the sources of donative financing, as do the others, but not at sources of commercial financing. Although commercial financing raises important regulatory issues, in particular, those pertaining to the related and unrelated businesses of charities, it need not figure in a scheme of classification of entities in the sector, since it does not identify any independent accountability issues.

Finally, the scheme should take account of the array of possible accountability mechanisms. "Accountability mechanisms" in our proposed scheme functions in a way similar to the "locus of control" criterion used in the above schemes, but, in our view, it is much more precise in identifying what is truly of concern to the sector, its financiers, and the government, namely, the apparent lack of management accountability in the sector. The original point of focusing on the nonprofit element of nonprofit entities in the sector was to distinguish this sector from the profit-purpose sector where the profit motive of shareholders and other owners constitutes a very strong incentive for such owners to ensure that the managers of their enterprises maximize their profits. By contrast, in a nonprofit organization, there is no one with a self-interest strong enough to induce them to establish accountability mechanisms as effective as these. This deficiency is one of the traditional justifications for the parens patriae jurisdiction of the Crown. People who identify control as a criterion, we believe, are really concerned about accountability mechanisms: to whom and how is management of a nonprofit entity accountable, and how effective are the accountability techniques in controlling for disloyalty and inefficiency.10

There are two main types of accountability mechanisms. One type focuses on the different kinds of donative financing, the other on the sort of work or service performed by the nonprofit entity. In the first, accountability arises out of the fact that some entities rely heavily on donors for financial support and therefore may have to behave responsibly in order to maintain that support. In the other, some accountability arises out of the responses of consumers, donors, and others to the quality of the service offered by the nonprofit entity. This sort of accountability will obviously be more apparent in the case of operating entities, than in the case of funding agencies. Hence, the relevance of a distinction between operating charities and foundations.

Our proposed scheme, then, identifies three main sets of variables: the particular nonprofit purpose; the destination of the benefits; and accountability mechanisms, that is, the sources of donative financing and the type of work performed (operational or non-operational).

TABLE IV
### NONPROFIT PURPOSE ORGANIZATIONS

<table>
<thead>
<tr>
<th>Purposes</th>
<th>Religion (To Worship God)</th>
<th>Charitable (To Do Good For Others)</th>
<th>Political (To Effect Political Change)</th>
<th>Mutual Benefit (To Help Members)</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Social Welfare</td>
<td>Philanthropic</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Destination of material benefits</td>
<td>members (?)</td>
<td>strangers</td>
<td>strangers</td>
<td>none directly produced</td>
<td>members</td>
</tr>
<tr>
<td></td>
<td>God (?)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(none directly produced (?))</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2)</td>
<td>Constituencies to which accountable</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I: by sources of financing as the relevant constituency</td>
<td>a,b, perhaps c</td>
<td>a,b,c,d,e</td>
<td>a,b,c,d,e</td>
<td>a,b,c,d,e</td>
<td>a,b</td>
</tr>
<tr>
<td>II: by service orientation or lack thereof</td>
<td>x,y</td>
<td>x,y</td>
<td>x,y</td>
<td>x,y</td>
<td>x,y</td>
</tr>
</tbody>
</table>

**KEY:**

(1) The destination of material benefits can be: strangers, members, or none (no material benefits produced).

(2) The constituencies to which the organization is accountable can be:

(I) by sources of financing as the relevant constituency:

- Ongoing gifts/grants from (A) a small, private membership; (B) a large, public, membership; (C) the public at large; (D) the government; and

- One-time gifts/grants from (E) any source.

(II) by service orientation or lack thereof:

(X) operational,

(Y) non-operational (funding).

The Commission does not propose that this scheme of classification be fully reflected in any new law. Our intention at this juncture is merely to provide the best possible taxonomy, one which allows for a classification of organizations in the sector that uses all
the important elements. In our view, a proper taxonomy must begin by looking at the particular nonprofit purpose of the organization. Then it should consider the destination of benefits and modes of accountability.

It is not the case that all entities in the sector fit neatly into any one of the classifications identified in this scheme. Many do, but many organizations have mixed purposes. Some established for religious worship will also have a strong social welfare orientation (the Salvation Army, for example). Some mutual benefits might also be charitable when considered from the point of view of a non-member benefactor (a cooperative daycare, for example). Many organizations will have an operational as well as a funding mission, and some will be exclusively one or the other. There will be many entities that fall on the margins of each of the possible classification systems one could develop using these criteria. Nonetheless the broad categories are descriptive in an enlightening way, and they can be (and have been) used for understanding normative issues and generating policy. From these categories one can generate quite easily the current classifications used under the Income Tax Act\textsuperscript{11} private foundations, public foundations, and charitable organizations a scheme which the Commission believes is very sound and which ought to be used in provincial law as well.

Our study, since it is concerned with the law governing charitable organizations, focuses on religious and charitable-type organizations. In the following tables, we therefore provide an indication of the various types of organizations in these classes. One can readily see that accountability, the most important issue, varies in significance according to the type of organization under consideration.

<table>
<thead>
<tr>
<th>TYPE</th>
<th>NAME</th>
<th>EXAMPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>AX</td>
<td>congregational religion</td>
<td>small Protestant temple</td>
</tr>
<tr>
<td>BX</td>
<td>ecclesiastical religion</td>
<td>Anglican Church of Canada</td>
</tr>
<tr>
<td>CX</td>
<td>shrine</td>
<td>St. Joseph's Oratory, Montreal</td>
</tr>
<tr>
<td>DX</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>EX</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>AY</td>
<td>private religious foundation</td>
<td>a parish trust</td>
</tr>
<tr>
<td>BY</td>
<td>public religious foundation</td>
<td>Catholic Charities of the Archdiocese of Toronto (in part only)</td>
</tr>
<tr>
<td>CY</td>
<td>public religious foundation</td>
<td>? perhaps Ø</td>
</tr>
<tr>
<td>DY</td>
<td>Ø</td>
<td>Ø</td>
</tr>
<tr>
<td>EY</td>
<td>Ø</td>
<td>Ø</td>
</tr>
</tbody>
</table>

Table VI
CHARITABLE SOCIAL WELFARE
<table>
<thead>
<tr>
<th>TYPE</th>
<th>NAME</th>
<th>EXAMPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>AX</td>
<td>private charity</td>
<td>the poor and distress relief activities of a parish</td>
</tr>
<tr>
<td>BX</td>
<td>public charity</td>
<td>the poor and distress relief activities of a diocese</td>
</tr>
<tr>
<td>CX</td>
<td>public charity</td>
<td>the poor and distress relief activities of an organization sponsored by donations from the general public, such as the Salvation Army</td>
</tr>
<tr>
<td>DX</td>
<td>government-sponsored charity</td>
<td>the poor and distress relief activities of an organization sponsored by government grants, such as a children's aid society</td>
</tr>
<tr>
<td>EX</td>
<td>traditional charitable purpose trust</td>
<td>a trust established to run a shelter for the poor</td>
</tr>
<tr>
<td>AY</td>
<td>private charitable foundation</td>
<td>family establishing a trust for benefit of poor</td>
</tr>
<tr>
<td>BY</td>
<td>public charitable foundation</td>
<td>United Way, in part</td>
</tr>
<tr>
<td>CY</td>
<td>public charitable foundation</td>
<td>a community foundation, in part</td>
</tr>
<tr>
<td>DY</td>
<td>government charitable foundation</td>
<td>Trillium Foundation, in part</td>
</tr>
<tr>
<td>EY</td>
<td>traditional charitable purpose trust</td>
<td>a trust established to make grants to poor relief organizations</td>
</tr>
</tbody>
</table>

Table VII
CHARITABLE PHILANTHROPIC

<table>
<thead>
<tr>
<th>TYPE</th>
<th>NAME</th>
<th>EXAMPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>AX</td>
<td>private philanthropy</td>
<td>alumni association of a private school</td>
</tr>
<tr>
<td>BX</td>
<td>public philanthropy</td>
<td>a museum with a large membership</td>
</tr>
<tr>
<td>CX</td>
<td>public philanthropy</td>
<td>public research institute</td>
</tr>
<tr>
<td>DX</td>
<td>government sponsored philanthropy</td>
<td>a museum</td>
</tr>
<tr>
<td>EX</td>
<td>traditional philanthropic purpose trust</td>
<td>endowment to run a private museum</td>
</tr>
<tr>
<td>AY</td>
<td>private philanthropic foundation</td>
<td>corporate foundation that funds art galleries</td>
</tr>
<tr>
<td>BY</td>
<td>public philanthropic foundation</td>
<td>Canadian Conference on the Arts, in part</td>
</tr>
<tr>
<td>CY</td>
<td>public philanthropic foundation</td>
<td>a community foundation, in part</td>
</tr>
<tr>
<td>DY</td>
<td>government-sponsored philanthropic foundation</td>
<td>Ontario Arts Council</td>
</tr>
<tr>
<td>EY</td>
<td>traditional philanthropic purpose trust</td>
<td>a trust to establish a university scholarship</td>
</tr>
</tbody>
</table>

3. THEORIES EXPLAINING THE EXISTENCE OF THE THIRD SECTOR
(a) Introduction

There are two main schools of thought as to why nonprofits exist at all. The first is economic in orientation. It suggests that nonprofits are either a response to problems of "market failure" or a response to the inadequacy of government solutions to the problems of supplying "public goods" or goods with high "positive externalities". The second approach attempts to understand the nonprofit sector as a response to certain political problems commonly faced by liberal-democratic polities.

The economic approach has been developed extensively since at least the early 1970s when the Filer Commission commenced its massive study of the charity sector, and the literature, as a consequence, is large and sophisticated. It is partly as a reaction to the domination of the subject by economists that more politically oriented theories were developed in the mid-1980s. The latter, although possibly of greater intuitive appeal, are quite unable to match the economic theories in precision and conceptual complexity. We present only a brief account of each, in order to draw out for our purposes what is plausible or helpful for the purposes of this study.

(b) Economic Theories

Market failure theories are theories about why the free-play of market forces does not, in all circumstances, result in the most efficient allocation of social resources and, therefore, why institutions other than the market, like charity, might be required to achieve this goal. The perspective is one which generally expects the market to be the best mechanism for maximizing the collective welfare of a community, as defined by the free choices people would like to make. There are a number of very standard instances of market failure that have been developed since the concept of market failure was first invented in the 1940s, only three of which are relevant for present purposes: "positive externalities" and "public goods", both of which will be treated below in (i), and "market imperfections", which will be treated below in (ii), (iii), and (iv).

(i) The "Public Good" Argument

A public good is a good, like national defence (the classic public good) or a public park, that displays two features: (1) it is provided for one person, there is no simple or cost-effective way to exclude another from consuming it (the "non-excludability" condition); and (2) costs no more to produce for many persons than it does for one (the "non-rivalry" condition). Public goods are generally not provided by a market system of production and distribution, since the rationally self-interested person has no incentive to pay for that which, without his paying, will either be provided to him anyway, or, if it is not provided to him, will not be provided to anyone, and its having failed to be provided will not be the direct result of his not paying.

"Positive externality" is a concept close in meaning to "public good". The distinction is that a commodity that has positive externalities, in addition to showing some non-excludability and non-rivalry conditions, will also have properties that make it
"appropriable". An example might be education: education is certainly of private benefit to its recipient, and thus appropriable, but it is also a benefit to society at large to have educated citizens. Like public goods, goods with high positive externalities may not be provided in efficient quantities in a society of rational utility maximizers, since although persons want them, none has sufficient incentive to pay as much as is needed to provide the services in the collectively desired quantity.

One way to solve the market failure problem posed by the public good and positive externalities issues is to have government provide the relevant good and use its taxing power to eliminate the problem of "free riders" (the persons who will not pay their fair share). Another might be charity. Some of the goods and services provided by charities are public goods or goods with high positive externalities. This fact has led some economists to suggest that the existence of charities might somehow be a solution to the free rider problems, at least in some settings. It has been suggested, for example, that religion, public broadcasting, health care, and the fruits of scientific and medical research are examples of public goods. Coincidentally it is noticed that they are also provided in large quantities by charitable organizations. No theorist, however, has attempted to show that charities are better situated than the market to solve the free rider problem; most theorists would concede that particular problem remains unsolved. Generally, rather, the theories go on to explain how charities are better able than governments to provide some public goods, or, alternatively, they go on to use the public good argument as part of a theory that explains the tax deduction or the tax credit. We treat the latter below in section 4 of this chapter. As to the former, the leading theory argues that charity is a response to a residual unsatisfied demand of some voters (the donors) in society who cannot get the government to provide as much or as high a quality of certain public goods as they would like. Charities, on this theory, supplement the government's provision of public goods, perhaps also offering certain cost advantages over government, such as being less bureaucratized, more flexible, or more imaginative.

There are two significant drawbacks to this particular application of the market failure explanation. First, to the extent that it is successful, it is only partially so. Although it is true that some charities are involved in the provision of public goods or goods with high positive externalities, a large number, perhaps the vast majority, are involved in the provision of purely private goods. Interestingly, the initial plausibility of these theories may arise from an equivocation in the use of the word "public". The word "public" in the economist's meaning and the charity lawyer's meaning has two distinct referents. In the first, it refers to the notions of non-excludability and non-rivalry; in the second, it is usually taken to refer to the requirement that a benefit be provided to a stranger. The second problem, perhaps related, is that this application of the market failure theory appears to miss the point that all charity, even philanthropy, but especially eleemosynary charity, has more to do with the redistribution of wealth, than the allocation of resources.

Still, there is an element of truth in the explanation.

(ii)The "Contract Failure" and "Agency Cost" Arguments
Contract failure theories also aim to explain why nonprofit organizations exist. They focus on the fact that the type of organization under consideration is prohibited by definition from distributing any profit it might make to any person analogous to an owner. Contract failure theories rely on a different form of market failure referred to as "market imperfections". "Market imperfections" are real-world deviations from the ideal of the perfect market. The "market ideal", in the words of the leading proponent of this type of theory, as it relates to nonprofits, suggests that under the right conditions, "profit maximizing firms will supply goods and services at the quantity and price that represent the maximum social efficiency". He goes on to describe three of the necessary conditions, as follows:

Among the most important of these conditions is that consumers can, without undue cost or effort, (a) a reasonably accurate comparison of the products and prices of different firms before any purchase is made, (b) a clear agreement with the chosen firm concerning the goods or services that the firm is to provide and the price to be paid and (c) subsequently whether the firm complied with the resulting agreement and obtain redress if it did not.

The fact that these conditions do not always exist is utilized in this theory to explain why nonprofit organizations might come into existence in a market economy and supplement the work of for-profit enterprises. It is a "contract failure" theory, therefore, because it is the failure of the possibility of contracting with a for-profit entity that drives the consumer to the nonprofit.

The general argument works as follows. Certain products or services present consumers with considerable difficulties in appraising their worth. A for-profit firm producing such a product or service has both an incentive and an opportunity to skimp on quality or quantity. A nonprofit firm, by contrast, is prohibited by definition from reaping any gain due to this kind of skimming, since any profit it might derive from cheating is necessarily ploughed back into the entity, and must ultimately end up in its product or service. Therefore, there generally is no incentive to skimp in nonprofits. By the same token, however, there is also a reduced incentive in the nonprofit to operate efficiently since there is no owner to reap the benefits of an efficient operation. The contract failure theory suggests, as a general proposition, that nonprofits would be favoured when benefits due to the lack of an incentive or opportunity to skimp outweigh the costs due to the lack of incentive to operate efficiently.

This general idea, it has been suggested, has three applications. First, it is thought to apply to the case of donative nonprofits, the best example, perhaps, being Class I, CARE. The theory suggests that it makes sense to think of the donor to CARE as a consumer of, for instance, famine-relief-for-strangers-overseas. A for-profit firm providing this product has a strong incentive and perfect opportunity to skimp, since the purchaser has no way of checking the quality or quantity of famine relief purchased. This first instance of the theory's application is characterized by the separation of the purchaser from the recipients of the benefit.
The second application arises where the product or service provided is a public good or a good with high positive externalities, such as public television in the United States. Public television relies on donors to support it. If it were operated by a for-profit firm, donors would be concerned that some of their dollars go into the pockets of the owners, and not to support additional broadcasting. With the same service offered by a nonprofit, donors would have better assurance that each dollar contributed actually increases the quantity or quality of the broadcasting provided. What characterizes this application is the public good quality of the thing purchased, together with the difficulty of discerning whether the contributions of donors actually produce an increment of equal magnitude in the product or service purchased.

A third application arises in the case of complex goods, such as the health care provided by a hospital. This example could be Class or Class VII, either a donor contributing to a charity hospital or patients themselves purchasing health care at a nonprofit hospital. Other examples are education and day-care services. What characterizes these examples is the fact that the product or service provided is such that the donor or purchaser cannot, at a reasonable cost, monitor its quality effectively. To take the education example, parents might feel more comfortable sending their children to nonprofit private schools because they have better assurance that the quality of education provided will not suffer on account of the profit motive of the school's owners.

The contract failure theory, in all three of its applications, deals with the problems of trusts in settings where market competition would not necessarily work well to constrain the profit motive of the people who provide the good or service. There are a number of obvious difficulties with this theory, however. Insofar as it applies to charity, the main problem is that it seems to misunderstand the nature of charity. It takes the relevant identifying characteristic of charity to be its nonprofit nature as opposed to its altruistic nature and seeks to understand why some goods are better provided by nonprofit organizations. In so doing, it appears to misunderstand all charitable giving as just another type of consumption preference. It thus collapses altruism into self-interest. To take the example of CARE, it may be just wrong to think of the donor to CARE as a purchaser of a commodity, since a donation to CARE is an altruistic act. The problem with the theory lies perhaps in its initial assumption that all non-market behaviour needs to be explained exclusively in terms of market failure. It is just as well to ask why all market behaviour is not altruistic.

Another problem with this theory is that, even on its own terms, it does not explain very much since, even when there is a non-distribution constraint, all the decision-makers in the institutions and in the examples could skimp just as easily by taking higher salaries or otherwise inflating the costs of administration. Although this point is initially acknowledged by the theory, it is hard to see how it is overcome in any of the examples.

(iii) The "Donor Control" Argument

Donor control theories are a variation on the contract failure theory. They aim to understand why donors might organize themselves such that they directly control the
distribution of their generosity to the beneficiaries. This sort of theory explains why the cooperative day-care centre, for example, arises: parents who belong to a cooperative day-care have better control over the quality of care provided to their children than they might have had from a privately operated day-care. However, cooperative day-cares are commercial enterprises (the parents pay for a service), and the question here is why control might be a feature that is also attractive to donors. The explanations focus on a number of situations, the only relevant ones for our purposes being the cases of contract failure, mentioned above separation, poor monitoring, and complex goods. This theory uses these contract failure situations to explain why donors might want to take charge.

The theory has some plausibility, but there are often more obvious reasons why donors would want to take charge besides the fact that they do not feel they can trust their agents. In some cases (private foundations, for example) it is not the actual delivery or quality of the altruistic service provided that causes donors concern; they simply want the power to choose the specific beneficiary of their altruism. In other cases, donors take charge because they want to give more of themselves their time, energy, and spirit than just their money.

(iv) The "Donative Financing" Argument

The last set of explanatory theories asks why we have organizations to which people donate their wealth. The economists have pointed to several economic phenomena plausibly present in the act of donating. Some of the more informative examples include the following:

1. Donations by the wealthy to the arts could be explained as a form of voluntary price discrimination, in which the rich single themselves out to pay more for a product, that would not be provided at all if they were not willing to pay.

2. These donations, alternatively, might also be understood as purchases of status.

3. Those who have done well financially in life might feel generous towards their alma mater. They might regard their donations to it as repayment of an implicit loan received from it when they were students and paid less in tuition than their education (as events in their lives confirm) was worth.

4. The wealthy might contribute to the capital funding of a hospital, to guarantee that there are enough hospital services available when they require them in the future.

(c) Political Theories

Political theories explaining the existence of charity attempt to show why what is done by charity is not done by government. There is some affinity between these theories and the public good theories, since the problems are more or less the same, except that the
political theories will not have to rely exclusively on a "public goods" type of argument, since they are not, by definition or inclination, market failure theories. Yet there is almost as much confusion at the conceptual level in asking the "why not the government" question as there is in asking the "why not the market" question. The reason can be succinctly stated. Charity generally considered (not the specific benefits provided by charitable acts) is a public good which cannot by definition be provided by government. If the freerider wanted a high level of charity in his society, but did not want to pay for it by giving to charity, he could not be excluded from "consuming" whatever level of charity was provided by others, and his enjoyment of that level of charity would not affect the enjoyment of others. Yet if the freerider were forced to contribute by government, that is, if he were taxed, his contribution would not be charity. Nevertheless, it does make sense to ask how the provision of goods and services by charity supplements the provision of goods and services provided by government in a liberal democracy, since both agencies are engaged in essentially redistributive acts.

There are a number of arguments worth canvassing. These are all mainly based on the fact that government should not and cannot be the sole agency of the maximization of social welfare in a liberal democracy. A political system of liberal property rights guarantees, at least, the logical possibility of property owners donating their property to charitable causes. However, the argument goes beyond proving the logical possibility of charity in a liberal democracy. Governments are constrained by norms of universality and equality to act categorically. In large societies the delivery of social welfare benefits or subsidies for the arts, education, or health care and the like, requires the bureaucratization of decision-making so that all discretionary distributions are in compliance with these fundamental norms. These constraints mean that governments cannot be creative, flexible, or particularistic in the provision of social welfare. In a society with a heterogenous population with widely varying values, the government's performance in the provision of social welfare would be decidedly lackluster from the point of view of the vast majority of its citizens. The voluntary provision of the goods would permit more pluralism (less dictatorship) in the determination of public values, and the ways in which publicly valued things, like education, are provided. Moreover, this alternative method of provision would permit more daring innovations or experimentations than governments might be willing to engage in, since widespread disagreement about the provision of some things may be based only on whether it is worthwhile subsidizing it out of the consolidated revenue fund, as opposed to whether the thing itself is of public benefit.

(d)Conclusion

Although there is an element of truth in each of the economic theories canvassed so far about the concept of "charity" from the point of view of a realist, the perspective of all of them is fundamentally distorted by the initial assumption that the existence of the sector has to be explained as a case of market failure. More importantly, the relative failure of these theories to explain the existence of the sector, considered even on their own terms, serves only to enhance the realist's position. Be that as it may, nothing in the economic theories discussed so far suggests a radical departure from the current regulatory objectives.
The political theories offer a better understanding of the sector. Their insight as to the overall value of the sector in a liberal-democratic polity is instructive and valid, and, at a very general level, should serve to inform the sector's public regulation. It suggests a regime of regulation which is non-confrontational and as inobtrusive as possible.

4.THEORIES EXPLAINING TAX PRIVILEGES

(a) The Tax Exemption

Charities share the tax-exempt status with all nonprofits. Therefore most of the theories explaining the tax-exempt status do so for nonprofits as a group. There are at least four possible classes of income received by charities, any one of which or all of which might be made subject to income tax. The first is gift income, the second is passive investment income, the third is related business income, and the fourth is unrelated business income. It is the exemption of at least the first three types of income that needs explanation. Most theorists concede that the fourth should be taxed.

One theory of the tax exemption, based largely on the assumption that gift income is the predominant kind of income, is either that it is inappropriate to treat this kind of income in the same way as, for example, the sales revenue of a commercial enterprise, or that even if we did treat it the same way, in an exclusively charitable organization that income would always be offset by the "costs" due to expenditures on charitable work, since in an exclusively charitable organization all the resources are devoted, in the end, to charity. A complementary argument suggests that even if this income definition problem could be solved and a net income identified for tax purposes, it would be difficult to establish the proper rate of taxation, given that different charities benefit different classes of taxpayers, and many of them benefit only the poor. If the rate is a function of the benefit received from the income, that benefit would vary greatly from charity to charity, depending on who the beneficiaries of the charity were.

A second theory of the exemption regards it as a subsidy by the state to nonprofits. This theory assumes, more realistically, a wider variety of income types in the nonprofits, and suggests that the state withdraws from taxing nonprofits in order to subsidize their capitalization. This subsidy is required because without it the most efficient institutional answer to the contract failure problems or the public goods problem would otherwise be underfinanced, and we would end up not having as many of them as we would like. The reason for this, in turn, is that nonprofits, by definition, are precluded from raising their financing in capital markets. Thus, the state, by not taxing the income of nonprofits, allows them to pour their profits back into their enterprises, thereby financing themselves.

A third theory also regards the exemption as a subsidy, but one justifiable on the basis of the sort of benefits provided to society by charities. On this view, the state chooses to treat favourably perhaps for the reasons suggested above in the section on political theories of the nonprofits certain kinds of enterprises by not taxing their net income. The tax savings is the subsidy. The difficulty with this theory is that it argues in favour of a
similar subsidy to the for-profit suppliers of the same public benefits, and it offers no reason why the subsidy is tied to a percentage of net income.

A fourth and final theory is based on the premise that an income tax is designed to be a tax on the capacity of the taxable unit to provide or consume for itself. Therefore any taxable unit which provided exclusively for the benefit of others a charity would be completely tax exempt no matter what its source of income. Also, any partial provision for the benefit of others would be deductible from income. The tax exemption and tax deduction are based on the same rationale, on this view, and that rationale is based on a theory of what an income tax system ought to be designed to achieve. Further, since this theory explains the tax-exempt status of only charitable non-profits, another theory is, or other theories are, required to explain the tax-exempt status of non-charitable non-profits, such as private clubs and professional associations.

(b) The Tax Deduction or Tax Credit

There are a number of theories that attempt to explain or justify the favourable treatment provided by the tax system to donations to charity. We briefly mention two of these theories.

The one favoured by economists is premised on the assumption that charities provide public goods. It regards the deduction or the tax credit as a government subsidy to the charity, by conceiving of the tax savings to the donor as a tax expenditure of the government. To the extent that the government forgoes revenue on account of this treatment, all taxpayers are required to pay. Thus the argument becomes one of using the tax system to make freeriders pay a part of the cost of providing public goods. There are several variations on this theme, not worth pursuing in detail here.

This theory is of doubtful plausibility for two reasons. First, charities do not provide public goods, or goods with high positive externalities, to an extent sufficient to make the provision of this type of good a characteristic feature of charities for the purposes of the income tax system. Second, the bias of tax expenditure theories may be false: tax expenditure theories assume that the whole of an individual's income prima facie ought to be subject to taxation and, therefore that any exemptions or credits require independent justification. Why should we assume that? Third, the theory is not clear on details: if the theory were true, instead of a tax expenditure subsidy, governments would do a better job using matching grants, since the amount of the subsidy in the form of a deduction is an arbitrary function of the taxpayer's marginal rate, and the costs of the subsidy are allocated arbitrarily, not just to the freeriders. On account of this third reason, the proponents of this theory are generally in favour of tax credits, since a tax credit, at least, entails that the rate of subsidy is not an arbitrary function of a taxpayer's marginal rate; they prefer tax credits also because the rich, who have higher marginal rates, do not "paradoxically" receive better treatment than the poor, who have lower marginal rates.

A second theory of the tax deduction and/or credit privilege regards the income tax system as aiming to tax only income that is disposable for personal consumption. Thus
gifts to charity are treated favourably because they result in fewer resources in the donor for private use. On this theory, the current twenty percent of income limit in the Income Tax Act, would not be straightforwardly justifiable. This view argues in favour of a deduction over a credit.

(c)Conclusion

The economic perspectives on the tax privileges extended to charities is only slightly more successful than those deployed to explain its existence. They do suggest a healthy skepticism towards the sector, since the revenue cost to government of the subsidies is significant. To the extent that one accepts the second or third explanation in (a) above, one major preoccupation of government ought to be to ensure that the subsidy is properly targeted. This suggests, in turn, scope for differentiation among the various types of nonprofits and the various types of charities, as well as an adequately funded public administration with an effective policing power.

The arguments for and against the deduction versus the credit are inconclusive.

Endnotes:

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2


3

See, for example, A. Ben-Ner, "Nonprofit Organizations: Why Do They Exist in Market Economics?", in Rose-Ackerman, supra, note 1, ch. 6, at 94; D. Easley and M. O'Hara, ”Optimal Nonprofit Firms”, in ibid., at 85; H.B. Hansmann, "The Role of Nonprofit Enterprise" (1980), 89 Yale L.J. 835; and R. Atkinson, "Altruism in Nonprofit Organizations" (1990), 31 B.C.L. Rev. 501.

4

See, for example, H. Hansmann, "The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation (1981), 91 Yale L.J. 54; B. Weisbrod, "Toward a Theory of the Voluntary Non-profit Sector in a Three-Sector Economy", in Phelps, supra, note 1, at 121; Clotfelter, "Tax-induced Distortions in the Voluntary Sector", supra, note 2; W.R. Ginsberg, "The Real Property Tax Exemption of Nonprofit

5

6
See H.B. Hansmann, "Economic Theories of Nonprofit Organization", in Powell, supra, note 1, at 27.

7

8
See Atkinson, supra, note 3.

9
For an explanation of the codes used in this table, see infra, Table III, Key.

10
Ironically, control per se emerges in our preferred classification as a variable that identifies a completely different issue than it does under the first taxonomy. Under the first taxonomy, if the financers control the charity, there is thought to be less of a need for trust between the donor and the donee, and therefore, as will be seen more fully in the next section, a lower risk of market failure. Under our taxonomy, control, to the extent that it is considered, identifies those organizations where the charitable-purpose form is susceptible to a higher risk of corruption to other purposes, namely, the private foundation, where the source of financing is restricted to a small number of people who also make the investment decisions and allocate the income from the investments.

11
R.S.C. 1985, c. 1(5th Supp.).

12
13 Hansmann, supra, note 3, at 842.

14 Ibid., at 843.

15 See supra, Table II.

16 See, for example, J. Douglas, Why Charity? The Case for a Third Sector (Beverley Hills, Ca.: Russell Sage Publications, 1983).

17 Many of these theories exploit the concept of a tax expenditure first developed in S.S. Surrey, Pathways to Tax Reform: The Concept of the Tax Expenditures (Cambridge, Mass.: Harvard University Press, 1973).


19 On the tax credit versus tax deduction debate in Canada, see W.E. Thirsk, "Giving Credit Where Credit is Due: the Choice Between Credits and Deductions Under the Individual Income Tax in Canada" (1980), 28 Can. Tax J. 325, and C. Juneau, "Some Major Issues Affecting Evaluation of the Charities Tax Incentives" (1990), 9 Philanthrop. (No. 4) at 3.

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PART III THE INCOME TAX ACT: REFORMING THE PRIMARY REGIME OF SUPERVISION

CHAPTER 10

SUPERVISION OF CHARITIES BY REVENUE CANADA: A BRIEF HISTORY

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1. INTRODUCTION

In Canada today the most extensive regime of supervision and regulation of charitable organizations is at the federal level. The provisions of the *Income Tax Act* that deal with the deductibility of charitable donations and the tax-exempt status of charitable organizations also establish a comprehensive regime of supervision and regulation. The central feature of this regime is the requirement that all organizations claiming these tax privileges obtain a registered status. With this status comes an annual disclosure requirement and certain restrictions on the financial and operational aspects of the organization.

The legislation that instituted the registration requirement came into force in January 1967. At that time, there were a number of other legislative regimes governing charitable organizations in Canada. Some of these, such as the Ontario legislation that is examined in Part IV of this report and the antecedents to the income tax provisions themselves, originated in the early 1900s. There were also statutory models, some of which dealt with tax matters, in existence in other jurisdictions. By Canadian standards, however, the 1967 tax reform marked a watershed in the legal regulation of charitable organizations. It represented the first time that a realistic effort was made to regulate the sector in a systematic and comprehensive way. What is perhaps unusual about this achievement is that it occurred in the *Income Tax Act*. Consequently the federal regime of regulation has always been, in the eyes of many, somewhat of a disappointment.

There are several reasons for this sense of failure. In part, it is due to the regime's preoccupation with fiscal matters and tax incentives. Given its domination of Canadian charity law, the tax regime has raised these matters to a position of undue national prominence. In part, the disappointment is due to false expectations: it is unrealistic to expect a great deal from a legislative scheme whose underlying logic to promote charity by offering fiscal incentives (on one interpretation) is self-contradictory. A final source of disappointment is the antagonistic character of the principal objective of the regulatory scheme. As will be seen shortly, the main effort of the federal government in this domain, especially in recent years, has been to establish more effective ways to police a costly tax expenditure. This feature of the regime runs contrary to the natural sympathies of most people involved in the sector, including the regulators and politicians who are obliged to administer, enforce, and publicly support it. These individuals will often remark that the
regime is too intrusive or too cumbersome for social organizations run by volunteers in their spare time.11

Whatever the shortcomings of the federal regime of regulation, a knowledge of its workings and a familiarity with its history is of some value in the task of designing the appropriate reform of the law of Ontario, for the following three reasons:

First, a good deal of what is in the realm of conceivable legislation and administrative practice affecting charitable organizations has already been implemented at the federal level or, nearly as helpful for present purposes, abandoned by the federal authorities after extensive consultation with the sector. This wealth of government experience is a useful resource in defining the appropriate law at the provincial level.

Second, as emphasized in chapter of this report, any comprehensive reform of the provincial law of charitable organizations must take account of the total regulatory burden imposed on the sector. Ideally, that burden should be minimized as much as possible, either through inter-governmental cooperation or, where possible, through the integration of the various regulatory regimes. To do this effectively requires an understanding of the current federal regime.

Third, the federal regime is, in a sense, the law of charity in Canada. Perhaps this is an exaggeration, but it is important to emphasize at the outset that the sector's experience of law and government has been largely determined by the sector's relationships with finance and revenue officials at the federal level. This experience, which has not been wholly positive, constitutes the political context in which any proposed provincial reform must take place.

In sections 2 and 3 of this chapter, an examination is made of the history of the federal legislative provisions, with special emphasis on the period after the 1967 reform. Chapter 11 examines the current Revenue Canada regime in some detail, as well as aspects of the income tax treatment of charitable donations and charitable organizations in the United States of America and the United Kingdom. Chapter concludes the study of the tax regime with suggestions for a reform of the federal tax laws that would complement our recommendations for the reform of the law of Ontario.

The first part of this chapter examines the history of the federal tax laws prior to 1967, under the following headings: (a) tax treatment of charitable donations; (b) tax treatment of charitable organizations; (c) restrictions placed on charitable organizations by the federal tax regime; and (d) conclusions. The second part describes the federal experience in this domain from the 1967 reform to the 1983 reform, in chronological order.

2. THE PRE-1967 FEDERAL TAX REGIME12

(a) The Tax Treatment of Charitable Donations

(i) World War I
The origins of the general deduction for charitable donations go back some sixteen years prior to its actual introduction in 1930. The very first income tax Act provided for an exemption and deduction, without limit, for "amounts paid by the taxpayer during the year to the Patriotic and Red Cross Funds, and other patriotic and war funds approved by the Minister". It appears from the parliamentary debate on this measure that the government's intention was to use the deduction as a way of diminishing the need for more direct and substantial government support of the charitable objects identified in the legislation, while at the same time encouraging the enlistment of volunteers for the war effort by assuring them that their families would be looked after in their absence or in the event of their death. The government's decision to deploy this deduction in this way thus anticipated the notions of the tax expenditure theory by some fifty years. From that perspective, it is also interesting to observe that, given the implementation of progressive tax rates in the 1917 legislation, the policy encouraged and rewarded rich donors more than poor donors.

The Canadian Patriotic Fund, the principal beneficiary of the deduction, had been in existence since 1914. It was established by a special Act of incorporation, The Canadian Patriotic Fund Act, 1914, and its members included the Governor General, the Lieutenant Governors General, and leading government and opposition figures of the day. Its main source of funds, in the order of eighty-five percent, was public donations. Its objects were charitable in the traditional sense, and were set out in the incorporating statute's preamble:

WHEREAS it is desirable to provide a fund for the assistance, in case of need, of the wives, children and dependent relatives of officers and men, residents of Canada, who, during the present war, may be on active service with the naval and military forces of the British Empire and Great Britain's allies; and whereas money is now being raised for the said purpose, and it is desirable to provide for the administration of same.

One source reports on the success of the Fund as follows. From the date of its incorporation in 1914 to its dissolution in 1937, over $51 million was raised. Most of this money over $45 million was raised during the war years. In its busiest year, 1916, the Fund provided relief to over 54,000 Canadian families and distributed over $900,000 a month. The Fund was dissolved in 1937 with "regret," due "to the exhaustion of its resources", even though there were "still aged dependants and others in dire straights" in need of assistance.

A number of other organizations besides the Patriotic Fund and the Red Cross were approved by the Minister for the purposes of the war fund deduction. These included the Manitoba Patriotic Fund, the British Red Cross, and the Y.M.C.A., as well as a number of charities registered under complementary legislation, The War Charities Act, 1917.

(ii) 1920

Legislation repealing the war fund deduction was enacted in 1920. The parliamentary debate on the occasion of its repeal is enlightening, since it is the only occasion on which
Parliament debated the justifiability or advisability of a general charitable donation deduction.

The debate on the government's motion to repeal the war charities deduction commenced with a suggestion by Hume Blake Cronyn, M.P. for London North, that Parliament instead adopt a provision permitting a deduction for all donations to "charitable funds". Cronyn's formal proposal read as follows:  

Subject to such regulations as may be made by the minister, amounts paid by the taxpayer during the year to corporations organized and operated exclusively for hospitals, orphan asylums, and other charitable purposes, no part of the net earnings of which enures to the benefit of any private stockholder or individual to an amount not in excess of ten percent of the taxpayer's net income....

Those in favour of extending the deduction cited the precedent of the existing American legislation and argued for the need to do "something helpful" for "the charitable institutions of this country".  

Those against the proposal were more numerous and more vocal. They argued that such a deduction would mainly benefit the rich, even though it was acknowledged in debate that people with lower incomes gave a greater percentage of their incomes to charity. They contended as well that the institutions requiring such public support should be supported directly from tax revenues and not through an indirect subsidy whose allocation would be controlled by donors, and that the deduction would result in considerably lower tax revenues at a time when the government was in difficult financial circumstances. It was also argued that "[c]harity, to be worthy of commendation either in this world or in the other, ought to hurt the person giving it". Parliament's negative reaction to the proposal was also moved by the absence of a need to recruit volunteers for a war effort. In the end, Cronyn's motion in favour of a general charitable deduction was defeated, and the deduction for donations to war funds was simply repealed.

(iii)1930

The first general deduction for charitable donations in Canada, available to corporate and individual taxpayers alike, was enacted in 1930. The government of the day was looking for ways to respond to the economic and social problems posed by the Depression. According to some observers, it was inspired by the American deduction which had been in place since 1917. In the parliamentary debate on the adoption of the measure, it was suggested by the Hon. Richard Bedford Bennett, leader of the opposition at the time, that the tax deductibility of donations would encourage wealthy taxpayers to contribute to "useful, philanthropic and religious purposes". In support of the government's proposal, he alluded to the tithing system of "old Mosaic law", seeking in part to justify the deduction and in part to explain the ten percent of taxable income limit, to be imposed on the deduction's availability.
The real concern in the debate, however, was not with the advisability or justifiability of the deduction, which all sides quite readily acknowledged. Rather, Members of Parliament, including the Minister of Finance himself, the Hon. Charles Avery Dunning, were more concerned with identifying the type of recipient organizations that should benefit from the favourable tax treatment.

Initially, the government's Bill would have allowed the deduction only for donations made to "any church, university, college, school or hospital in Canada". This was criticized at length in the parliamentary debate for excluding both the federated charities, such as the community chests which had recently been formed in several centres, and the smaller non-institutional charities. It was also criticized for inadvertently favouring Catholic charities over Protestant charities, since the former were invariably organized along sectarian lines and the latter generally were not.

Although sympathetic to these concerns, the Minister of Finance at first defended the narrowness of the measure on the basis that this was the first time for this sort of tax relief in Canada, and, therefore, more time and administrative experience were required to adjust to the problems it might present. Interestingly, he also expressed some reservation over the vagueness of the term "charitable". In the end, however, those in favour of a more generous provision prevailed. The eligibility criterion that was enacted made the deduction available for receipted donations made to "any charitable organization". This formulation remained unchanged in the legislation until the institution of the mandatory registration requirement in 1967.

(iv) World War II

The need to encourage volunteers for a war effort arose again in 1939. In a special session of Parliament the government resurrected the Patriotic Fund and the War Charities Act, and introduced legislation permitting the deductibility of donations to war charities of up to fifty percent of a taxpayer's net taxable income. This was reduced to forty percent in 1941. As before, a large number of organizations, such as the I.O.D.E., the Canadian Legion War Services Fund, and the Salvation Army War Services Fund, qualified for the purposes of the deduction. These war-time provisions were repealed in 1948. The 1941 legislation differentiated, for the first time, between corporations and individuals with respect to the general deduction by lowering the limit for corporations to five percent of taxable income.

(v) 1957

The last significant pre-1967 modifications to the charitable donations deduction came in 1957. In that year the government introduced legislation establishing an optional $100 deduction for charitable donations and medical expenses combined. The intention appears to have been to reduce the burden of paperwork imposed on taxpayers and on the government by the statutory requirement that all claims for the deduction be supported by receipts. In addition, Opposition M.P.'s had complained about the unevenness of the administrative practice in enforcing this latter requirement, since it had been reported that
several taxation centres were permitting unreceipted claims for the deduction in amounts less than $25, on the basis of "administrative expediency".44

Government studies at the time showed that over half of Canadian taxpayers claimed $100 or less in charitable donations, medical expenses, and union dues combined. In introducing the measure, the Minister of Finance acknowledged that, as a consequence, the measure would likely cost the government some money in lost tax revenue.45

Another 1957 reform was enacted in response to pressure on the government to raise the ten percent limit. Donors to larger institutions mainly universities, as a number of these were engaged in capital campaigns totalling over $300 million at this time were finding the ten percent limit a significant constraint. In response, the government's amending legislation, instead of raising the limit, made it possible to carry excess deductions forward one year. Similar reasons motivated a legislative provision increasing the limit on corporate deductions from five percent to ten percent of income, putting it on a par once again with the limit applicable to individuals.

(b) The Tax Treatment of Charitable Organizations

The first income tax Act exempted the income of "religious, charitable, agricultural and educational institutions".46 That exemption, in one form or another, has continued ever since.

To clarify the section's intention that all organizations that were charitable according to the common-law definition be eligible for the exemption, the relevant portion of the exempting phase was amended in 1948 to read "charitable organization".47 To ensure that it was clear that charitable trusts as well as charitable corporations were included, a provision was added in 1950 to explicitly exempt "foundations".

There was no requirement in the 1917 income tax legislation that charitable institutions file an annual tax return in order to prove their eligibility for this exemption. Under The War Charities Act, 191748 "war charities" were obliged to meet several stringent requirements, including the requirement to file financial returns semi-annually.49 Legislation enacted in 1922 required tax-exempt institutions to file a return of income for each taxation year.50 Charitable corporations and charitable trusts are now exempt from the obligation to file a return of income.51 All charities, however, must now file an annual information return.

(c) The Restrictions Placed on Charitable Organizations by the Federal Tax Regime

(i) World War I

The first scheme for the regulation of charitable organizations at the federal level was enacted in The War Charities Act, 1917.52 The principal objective of this legislation, according to the Parliamentary debate that preceded its enactment, was to control fraudulent "war-charity" appeals and to encourage the efficient operation of legitimate
war charities. Reference in debate was also made to comparable legislation in the United Kingdom.

The Act established a registration system for "war charities". These were defined to include any fund or institution having for its object, the relief of suffering or distress, or the supplying of needs or comforts to sufferers from the war, or to soldiers, returned soldiers or their families or dependents, or any charitable purpose connected with the present European war.

Organizations without registered status or without a ministerial or statutory exemption from the requirement to register, were prohibited from making appeals to the public for donations for war charity purposes. Registration was denied if the charity was "not established in good faith for charitable purposes" or if it "will not be properly administered". Registered status gave rise to a number of quite onerous requirements dealing with such things as books of account, banking practices, and organizational structure. Regulations promulgated under the Act also provided for a biannual reporting obligation to the federal government.

The War Charities Act was repealed in 1927 because, as explained by a government spokesperson in Parliament, it represented too much of a burden on the very small number of charities remaining on the register. This statutory regime was resurrected from 1939 to 1946, however, to deal with the same sorts of problems arising during World War II.

(ii) World War II to 1967

a. Administrative Practice

As of 1948, the practice of the Department of National Revenue was to maintain lists of local charities at the district level. These lists were, in the words of the Minister in 1948, "constantly changing". There were, he affirmed in Parliament, no master lists. This administrative practice was modified slightly in 1948 to require charitable organizations wanting to issue receipts to apply for recognition at the district level on a prescribed form.

The federal tax authorities issued an information bulletin in 1962 which specified the types of organization that would be recognized for the purposes of the deduction. The bulletin incorporated the four-part definition of "charity" established in Pemsel. Under the fourth limb of the test, the purposes beneficial to the community had to be "analogous to the three other purposes".

b. Legislation

The only significant legislative change during this period (1945-1967) occurred in 1950. For the purposes of the tax-exempt status of charitable organizations, a tripartite classification of charities was enacted. Charities were divided into charitable
organizations, charitable trusts, and charitable corporations. Each of these was subjected to a distinct set of conditions which had to be satisfied in order to qualify for the tax-exempt status.

A "charitable organization" the active or operational charity as per the intention of the legislator was eligible for the tax-exempt status if "all" its resources "were devoted to charitable activities carried on by the organization itself" and "no part" of its income was available for the "personal benefit" of its members.66

A much more stringent regime was made applicable to trusts and corporations. Trusts were coextensive, in the legislator's intention if not in reality, with institutions interested exclusively in funding the operations of the active charities. These were the "foundations" in the American parlance of the day. Corporations were conceived by the legislator to be hybrids of the active and the granting charities, inexplicably and, as it turned out, unworkably identified by their corporate form of organization. The statute provided for the tax-exempt status of these latter two types of charities if they were either,67

\[(eb)\) a corporation no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof, that has not, since June 1, 1950, acquired control of any other corporation and that, during the period,

(i) did not carry on any business,

(ii) had no debts incurred since June 1, 1950, other than obligations arising in respect of salaries, rents and other current operating expenses, and

(iii) expended amounts each of which is

(A) an expenditure in respect of charitable activities carried on by the corporation itself,

(B) a gift to an organization in Canada the income of which for the period is exempt from tax under this Part by virtue of paragraph (ea), or

(C) a gift to a corporation resident in Canada the income of which for the period is exempt from tax under this Part by virtue of this paragraph, and

the aggregate of which is not less than 90 per cent of the corporation's income for the period,

or

\[(ec)\) a trust all the property of which is held absolutely in trust exclusively for charitable purposes, that has not, since June 1st, 1950, acquired control of any corporation and that, during the period,
(i) did not carry on any business,

(ii) had no debts incurred since June 1st, 1950, other than obligations arising in respect of salaries, rents and other current operating expenses, and

(iii) made gifts, the aggregate of which are not less than 90 per cent of its income for the period, to organizations in Canada or corporations resident in Canada the incomes of which for the period is exempt from tax under this Part by virtue of paragraph (ea) or (eb).

In these two provisions we see the origins of some of the restrictions applicable under the current rules to charitable organizations and charitable foundations: there were general prohibitions against carrying on a business and against financing programs with debt, and there was a rudimentary disbursement regime. 68

The inclusion of these two provisions in the income tax law of 1950 was justified by the government in Parliament on the basis of two reasons. First, the restrictions and disbursement requirement were needed to prevent certain abuses that had come to the attention of the government. In his speech[69] explaining the provisions, the Minister alluded to the fact that a number of "foundations" had been created in Canada in recent years, and gave as an example the Massey foundation. The abuses cited by the Minister were that some of these foundations not the ones mentioned had been operating businesses and accumulating their business and investment incomes with the intention of distributing the income to their "proprietors" on dissolution. This was an obvious misuse of the tax exemption which the mandatory restrictions and the disbursement requirement would certainly remedy. It is worth noting that precisely the same concerns were motivating the enactment of the The Charitable Gifts Act, 1949[70] in Ontario at the same time.

Section 21(eb) and (ec) were enacted also because, under the existing legislation, it was not clear whether granting institutions actually qualified for the exemption. A number of Privy Council decisions had indicated that they did not.[71] It was thought best to correct this oversight by making explicit the eligibility of granting institutions for the exemption.

(d)Concluding Observations on the Pre-1967 Federal Law

The pre-1967 tax legislation and administrative practice were, on the whole, quite unsophisticated.

The weight of the arguments on the merits of the general deduction for charitable donations, as measured by the speeches in Parliament during this period, was that it was unjustifiable. Most parliamentarians who expressed their opinion on the advisability of adopting the deduction tended to regard it as a wasteful tax expenditure favouring mostly the rich. The balance of opinion in Parliament turned in favour of the deduction only in response to the massive social dislocation of the Depression and in the concurrent
recognition that government could not carry the whole burden of the social welfare measures the Depression required.

Very little was done during this period to police the tax privileges available to charitable organizations. When Parliament did move in the domain of charity law, it was in response to abuse and tax fraud (perceived or real), as with the foundations in 1950, or in response to fraudulent fundraising and perceived inefficiency in the delivery of valued social welfare services, as with the war charities legislation.

What little legislation there was during this period had more than a tax focus, since some of it was aimed at preserving and promoting the integrity and efficiency of the sector, or a portion of it, for its own sake. The exclusive locus of federal legislation in 1967 and after has been the *Income Tax Act*. The dominant legislative motive, naturally, has been either to protect the public treasury against abuse and fraud, or to "subsidize" the sector through "tax expenditures". The integrity and efficiency of the sector, although important to these objectives, remain only instrumental goals. The repeal of the second *War Charities Act* in the mid-1940s, therefore, marked the retreat of the federal government from the regulation and supervision of charity for its own sake.

3. THE HISTORY OF FEDERAL TAX LEGISLATION FROM 1967 TO 1983

(a) 1967

When asked in the House of Commons, in September 1964, whether he could provide a list of the charitable organizations entitled to the exemption contained in section 62(1)(e) of the 1952 *Income Tax Act*, the Honourable E.J. Benson, Minister of National Revenue for Taxation Division, responded with a list (valid as of 31, 1963) of no fewer than 1,040 charitable organizations. His list contained the names of only national charitable organizations. The Minister was obliged to admit that the Department of National Revenue had no idea how many charitable organizations, local as well as national, there were in Canada claiming the section 62 (1)(e) tax exemption. This failing was probably not, however, indicative of a serious flaw in the federal tax administration at that time. Although there was no comprehensive list of charitable organizations with tax-exempt status, there was a procedure whereby the organizations claiming that status, and claiming the right to issue receipts for tax-deductible donations, were reviewed at the district level.

It was becoming evident by the early 1960s, however, that there was a major problem matching the deductions claimed by taxpayers all of which were supported by receipts as required by the legislation and the amount actually received by charitable organizations. In one example of this problem, a member of Parliament pointed out in the House of Commons that, for 1961, residents of Quebec claimed donations of $164.616 million to charitable organizations while only $137.713 million in charitable donations were claimed by the residents of all the rest of Canada. In 1962, $157 million in donations were reported for Quebec compared to $85.6 million for Ontario. Although these numbers were used in the Parliamentary debate for several purposes, many Members of
Parliament alleged, at least implicitly, that widespread cheating was particularly prevalent in Quebec and that this cheating involved the complicity of the charitable organizations themselves through the fraudulent issuance of receipts.76

The Department's initial response to the problem in Quebec was to audit individual parishes. However, since the records of most parishes were inadequate to establish the amount donated by each of its donors, the Department simply pro-rated the donation income of each parish among its donors. This meant, of course, that the donations of those who had reported accurately were reduced proportionately along with those who had not.77

A more radical solution to the general problem was announced in Parliament on June 7, 1966,78 when National Revenue Minister Benson introduced in Parliament a series of amendments to the *Income Tax Act*. The amendments required all organizations issuing charitable receipts to apply for registration in a central registry and to report annually on their finances and operations to the Department. Every receipt issued by a registered charitable organization was to have the registration number of the charitable organization on it, and charitable organizations would be required to keep a copy of each receipt for auditing purposes.79

The institution of a central registration system was justified by Mr.as both a response to "the abuses which have developed in the matter of exaggerated receipts" and "the possibility that organizations which once had been given formal approval could subsequently change the nature of their activities so that they no longer qualify".80 The proposal had also been encouraged by the Auditor General's Report for 1965. That report had recommended that the government consider "setting up...adequate controls over the many charitable organizations now recognized".81 To administer the new regime, the Minister promised that his Department would organize a new unit, a "charitable organizations section", headed by a registrar general. The unit was to form part of the assessments branch of the taxation division.82

The purpose of the new regime to police the deduction was evident in its placement in the *Income Tax Act*: the amendment implementing the new system was contained in that section of the Act which dealt with the deduction.83 Henceforth, charitable donations were deductible only if they were made to "registered Canadian charitable organizations", and the term "registered Canadian charitable organization", together with the causes of revocation of registered status, were defined in that section. Among the causes of revocation were the failure to file an annual (confidential) information return, and the failure to comply with sections and 126, which, in turn, created the obligation to keep proper records and books of account, "including a duplicate of each receipt".

In the first year of operation of the new central registry, a total of 34,630 applications for registration were processed by the Department of National Revenue, of which 31,373 were approved.84 There were another 4,322 applications processed in 1968, 3,213 of which were approved.85 The impact on charitable organizations was thus "immediate and dramatic".86
Subsequently, however, the federal charities administration failed to develop into anything as sophisticated as the Minister had promised. Federal authorities sought to ensure only that the charitable donation receipts submitted by taxpayers matched one of the names on the list of registered charities. One authority, writing in 1975, claimed, on the basis of discussions with an official from the charitable and nonprofit organizations section, "that once registered, there is virtually no examination or tabulation of the annual information return of...Registered Canadian Charitable Organizations". The same author was also very critical of the consequent lack of statistical information from the Department of National Revenue on the sector.

In terms of concept, if not execution, the 1967 reform was a radical departure in the regulation of charitable organizations in Canada. Charitable organizations, henceforth, would be subject to at least the possibility of annual public accountability through a regime of centralized registration and confidential information returns.

(b) The Carter Commission

Simultaneous with the introduction of the 1967 changes in Parliament, the Royal Commission on Taxation (the "Carter Commission") was in the process of completing its report on the reform of the federal income tax laws. Although the Carter Commission made recommendations with respect to the tax treatment of charitable organizations and charitable donations, according to most knowledgeable commentators and, in the words of two, "the Royal Commission's discussion ...[of the tax treatment of charitable organizations] left much to be desired and fell well below the standard of analysis set in the Report as a whole".

(i) Tax-Exempt Status

With respect to the tax-exempt treatment of charitable organizations, the Commission's report was critical of the number of organizations that had been extended the privilege of tax-exempt status over the years, "without the establishment of any clear principles as to why such exemption[s] should be granted and who should receive [them]". Of those organizations then eligible, the report identified charitable organizations as obviously the most worthy but, in so observing, seemed to dismiss the need to discuss the issue further, since nothing more was said about it in the remainder of the report. It may be, as one commentator has recently observed, that the eligibility of charitable organizations for the exemption simply reflected a fundamental and unquestioned "societal consensus" on the benefits of encouraging the provision of public goods by non-government agencies. There is undoubtedly an element of truth in that observation since, however weak it was, the Carter Commission Report's discussion of this issue was the first and last time it has even been mentioned in a public document in Canada.

(ii) Business Income

An important issue discussed in greater detail in the report was the treatment of the business income of charitable organizations. The Commission's report observed that if
the purpose of charitable organizations was "to manage charitable endeavours, it would be reasonable to expect that the[se] organization[s] would not be actively engaged in...business[es]". A few pages later, the same point was made in a slightly different way: "there should not be any tax concessions that give one business a competitive advantage over another, and the present exemption of business income earned by charities could well be regarded as such an advantage". The final recommendation of the Commission on the issue of business income, therefore, was that the business income of charitable organizations should be taxed at the corporate rate. The report defined business income as any "non-portfolio investment". Notably, the ownership of real property was included in its definition. On the basis of "administrative convenience", however, the report recommended that "a certain minimum amount of income from occasional sales, for example bazaars and rummage sales, and from small sales operations such as gift shops" be excluded.

(iii)The Federal Administration

The Carter Commission also made suggestions concerning the appropriate design of the federal administrative agency responsible for controlling access to the tax privileges. The Commission suggested that the federal government establish "an inter-departmental supervisory body" which would be responsible for assessing the eligibility of organizations for the privileged tax status. The Commission also suggested that, in order to retain the tax-exempt status, charitable organizations be required to submit audited financial statements to this body, and that this body should have the power to review periodically the eligibility of registered organizations for the tax privileges.

(iv)The Charitable Deduction

Finally, the Commission made recommendations with respect to the deductibility of charitable donations. There was a modest gesture in favour of tax credits over tax deductions on the basis of "equity", but that issue was barely pursued in the text of the report, except to observe that the implementation of a scheme of tax credits might discourage wealthy donors. Interestingly, the Commission recommended that the issuance of tax receipts be controlled by the government, an idea to which we shall return in our suggestions for reform. This recommendation was advanced by the Commission as a way to cut back on fraudulent receipts, but such a measure has since been recommended by others as also an effective way to obtain accurate information on the donating habits of Canadians. The Commission suggested a liberalization in the regime governing the deductibility of donations to foreign and charitable organizations. It mooted the idea of permitting the deductibility of charitable donations only if the donations exceeded one percent of the income of the taxpayer. Finally, the Commission recommended that the ceiling for the deductibility of donations for individuals be increased from ten percent to fifteen percent.

(c)The 1972 Tax Reform
The 1972 overhaul of the Canadian income tax system affected the tax treatment of charitable organizations in only one or two minor ways. This was largely because the 1972 reform was developed in the government's White Paper in response to the *Carter Commission Report*, which, as just outlined, failed to put forward any substantial suggestions concerning the tax treatment of the sector. One recommendation contained in the report that the ceiling for the deduction be raised was implemented. However, the new ceiling was established at twenty percent of annual income as suggested by the White Paper, not fifteen percent as recommended by the Carter Commission. Another suggestion contained in the White Paper (which was otherwise silent on the issue of charity and charitable organizations) that national amateur athletic associations be permitted to issue donation receipts was also implemented.

(d) 1973: Gifts In Kind

Until the mid-1960s, the Department of National Revenue officially maintained that gifts in kind were not eligible for the charitable donations deduction. This position was stated explicitly by the Department in respect of inventory and used goods, and was generally accepted as Department policy with respect to other sorts of property.

The reasons the Department took such a dim view of deductions for gifts in kind are not hard to understand. First, gifts in kind posed difficult valuation problems. Determining the fair value of a gift from inventory or of a used good was often especially problematic. Second, as a consequence, policing the valuations of gifts in kind presented major administrative problems. Leaving the matter solely to the discretion of the taxpayer would have allowed far too much room for self-serving appraisals. Third, there was no legislative provision deeming the taxpayer to have received proceeds of disposition equal to the fair value of the gift. This feature of allowing a deduction for gifts in kind seemed mildly subversive to the spirit of the charitable donations deduction, since the custom was that donations were made using income that was otherwise taxable. Despite these mostly practical considerations, the Department's position, initially based on only modest support in the jurisprudence, was eventually abandoned in the face of a strongly contradictory judicial decision.

The implementation of the capital gains tax in 1972 raised the issue of gifts in kind again, in a different context. Among the provisions of the Act establishing the new tax on capital gains was one provision deeming gifts of capital property to be gain-realizing events. This rule had certain inadvertent consequences for some donors. For example, taxpayers making gifts of capital property to charities might, by virtue of this rule, end up having more (deemed) income from the gift than they would be able to deduct under the twenty percent limit. This feature of the new tax treatment of gifts in kind was especially disconcerting for privately owned museums and art galleries which were forced to compete for these gifts with their American counterparts who were not subject to a similar rule.

These problems were addressed in legislation adopted in 1973. In that year, section 110(2.2) was added to the Act. This section permitted taxpayers to choose the amount
(one amount) that would be, for tax purposes, both their deemed proceeds of disposition and the value of the gift for the purposes of the deduction. Taxpayers were given the freedom to select any value for this amount between the adjusted cost base and the market value of the property donated. This concessional treatment, importantly, applied only to "capital property... that could...reasonably be regarded as being suitable for use by the donee in the course of carrying on its charitable...activities". 111

The practical effect of these provisions was that a taxpayer did not pay tax on a capital gain in respect of a particular capital property, when the property was donated to charity. As only a portion of a taxpayer's capital gain was taxable, for many taxpayers this provision constituted a modest inducement to make gifts in kind since the taxable amount would always be less than the amount permitted to be deducted. 112

(e) The 1976-77 Tax Reform

(i) Background

Over the next few years a number of events raised the public profile of the charity sector, heightening the public's interest in the appropriateness of the tax privileges and the adequacy of the federal regime of supervision. Articles on the sector began appearing in Canadian law journals. The Canadian Bar Association commenced publication of its "magazine", The Philanthropist/Le Philanthrope, a forum for the discussion of legal and policy issues affecting the sector. Interestingly, the very weakness of the Carter Commission discussion and the relative insignificance of the consequent reform, when contrasted with the vigorous academic and political interest in nonprofits in the United States, seemed to shame Canadians into taking a greater interest in the sector. One manifestation of this renewed interest was the pace and the breadth of federal reforms over the next fifteen years: there were three of them (1975-76, 1984, and 1988) and each was quite substantial when judged against previous efforts.

Two themes run through the legal writing on the sector in the early 1970s. One, already identified, was the criticism of the lack of depth of the Carter Report's treatment of the sector and the failure of the federal government to pick up on most of what was there. Authors lamented the lack of sophisticated writing in Canada on the justifiability of the tax exemption and the tax deduction, and they criticized the failure of the Commission to focus on these issues seriously. It was claimed that the tax exemption, which had remained largely unaltered since its inception, once again escaped critical examination. Commentators were also critical of the lack of any coherent regulation of the business activities of charities. Some of this criticism echoed concerns expressed in the United States over the "secret" operations of the large family-controlled foundations and their suspected abuses of the tax privileges.113 The "tax expenditure" rhetoric of the American tax economists was deployed in Canada to explain that these organizations, in particular, owed much more in the way of public accountability than they were currently inclined or required to give.114 The anxiety caused by these apparent deficiencies in the regulatory regime was heightened by the lack of statistical data on the sector in Canada.
A second preoccupation of the writing was the positive law at the federal level. Articles on the tax law of charities appeared with increasing regularity in the early 1970s. By contrast and in comparison with the legal writing in the United Kingdom and other Commonwealth countries, very little appeared in legal literature on the provincial law of charity. For one thing, the corporation had replaced the trust as the preferred vehicle of charitable activity. For another, as will be discussed below, all the interesting legislative activity was happening in the *Income Tax Act*.

The upshot of both these developments was that the federal tax regime became the battleground for those with an interest, benevolent or otherwise, in the sector. This in turn simply re-enforced the momentum for change in the federal tax regime. From the point of view of the provincial law of charity and, arguably, from the point of view of the charitable organizations themselves, this preoccupation with tax privileges and policing tax privileges was probably harmful. Nonetheless, until the renewal of interest of the Office of the Public Trustee in its legislative mandate in the mid-1980s, the law of charity in Canada was, for all intents and purposes, in the *Income Tax Act*.

(ii) The 1975 Green Paper

*a. Background*

Renewed interest in changing the law of charity developed at the federal level in 1973, largely as a consequence of E.J. Benson's earlier promises to reconsider the issues in light of the weakness of the *Carter Commission Report*. In that year the Department of Finance formed a study group to reconsider the federal regime in its entirety. Interest in the Department waxed and waned in 1974 and 1975, but the Department's efforts finally resulted in the publication in 1975 of a Green Paper, which looked into a number of issues concerning the tax treatment of charities.

The authors of the Green Paper were very careful to establish the Department's jurisdictional credentials in the opening paragraphs of the Green Paper. While acknowledging the government's appreciation for the contribution made by the sector to the provision of public goods in Canada, the Green Paper went on to point out that there were over 35,000 of these organizations in Canada receiving over $500 million in donations, and that the assets of the fifteen largest charities were in excess of $700 million. These numbers, argued the paper, made it abundantly clear that the tax deduction and the tax exemption were a major public expense. The conclusion was obvious: Every dollar of tax relief represents a cost to the Canadian taxpayer. The government therefore believes that it is appropriate that the rules of taxation ensure that the people of Canada obtain maximum benefit from the charities.

For the first time, federal tax policy was explicitly formulated in the rhetoric of the tax expenditure theorists: the government's ultimate objective was to *deploy* the tax subsidy to the *maximum benefit* of Canadians. In the logic of this view, if perhaps not entirely in the conviction of the government, charitable dollars were considered government dollars.
Since the reform proposals contained in the Green Paper, if implemented, would have constituted a substantial increase in the regulatory control of the federal government over the sector, and since there was very little solid empirical information, the proposals were expressed tentatively. They were "not the definitive position of the government", but only the "proposed direction". The government hoped that the feedback from the sector and from the general public would provide further support for its intention to regulate the sector in a more aggressive fashion. This self-consciously consultative approach had been part of the Department's strategy in many of the previous reforms and would be followed by the Department in most subsequent reform efforts, with modest success. Like the reform efforts before and after it, one of the purposes of this reform effort was to remedy certain perceived abuses, and as before and after, there was only anecdotal evidence, mostly American, to support the claims of abuse. The consultative approach helped diffuse possible negative reactions of the sector. Many observers, though appreciative of the effort put into the Green Paper, nonetheless were sceptical of its motives, critical of its design, and very quick and acute in their reactions against the proposals. Others felt that it was "one of the classic examples of a major tax reform...which was well thought out, well handled and well received[,]...a model of consultation between government and taxpayers".

b. Private Foundations

There were several preoccupations of the Green Paper. Foremost by far were the perceived abuses of the family foundations. Indeed, nearly all the specific recommendations for reform were, at least in part, motivated by a fear that wealthy families were manipulating the charity tax laws for their private advantage. On this issue, the Green Paper's arguments were a reflection of nearly identical arguments expressed much more vigorously by American writers and politicians in the late 1960s. The American effort had led to the enactment of the Tax Reform Act of 1969, which severely curtailed the activities of "private foundations" in the United States. Those reforms served as a model for the 1975-76 reforms in Canada.

One abuse of family foundations was the various types of non-arm's length transactions between family foundations and their principals or their family relations. These transactions included over-compensation of the family members who acted as officers of the foundation or of the business corporation; non-arm's length loans at concessional rates by the foundation to its principals or to a business corporation owned by its principals; the extensive private use of the foundation's property; and sales of property to the foundation, and purchases from it, at non-market values.

Another abuse was the use of family foundations to retain control of the family business while avoiding the tax consequences of intergenerational wealth transfers. The provisions of the Income Tax Act prohibited charitable trusts and corporations from "acquiring control of any corporation" or from "carrying on a business". However, these provisions had been defined or interpreted so as not to prohibit the ownership of a controlling interest in a corporation acquired by gift. A trust could be established, with the family members as trustees, and the controlling interest in the business corporation gifted to the
trust over time. Dividends could be declared on the non-voting preferred shares owned only by family members and very little or no income would accrue to the charitable trust. As a result, very little would have to be spent on charitable activities to comply with the ninety percent disbursement rule. Control of the family business corporation would, however, remain in the members of the family through their position as trustees of the foundation. Also, there would be no capital gains taxes on the equity interest owned by the charitable trust.

The Green Paper contained a number of proposals to remedy these perceived abuses. The most significant was a proposal for a new classification of charitable organizations. Most observers readily admitted the 1950 classification was incoherent. Charitable organizations were identified by virtue of their active capacity, regardless of their legal form, whereas charitable trusts were defined by virtue of both their legal form and their passive or grant-making functions, and charitable corporations, paradoxically, were defined solely in terms of their legal form. The latter two categories were subjected to a stricter regime of regulation, with the consequence that most charities that could, attempted to qualify as "charitable organizations". These divisions made little sense. The Green Paper proposed instead that charities be classified according to their active ("organizations") and passive ("foundations") functions. The former would be permitted to distribute up to only fifty percent of their "income" to other registered charities (and certain other qualified donees). If they exceeded that limit they would be classified as "foundations" and subjected to a stricter regulatory regime.

Although this classification made obvious sense from a regulatory point of view, the further division of foundations into private and public suggested by the Green Paper was slightly more contentious. Its rationale, of course, lay in the desire to remedy the above-mentioned abuses. Its method was first to segregate the offenders into a separate category, then to subject them to an even stricter regulatory regime. "Private foundations" were to be identified by either one of two features: where their directors or trustees did not deal with each other at arm's length, or where seventy-five percent or more of their capital came from one source. Private foundations, so defined, would be required to disburse the greater of ninety percent of their income and five percent of their capital (defined to exclude capital used in the operations of the foundation). Private foundations would also be prohibited from carrying on a business of any sort, related or unrelated. But, importantly, the ownership of equity in a corporation would not count as carrying on a business.

c. Business Income

Another preoccupation of the Green Paper was the extent to which charitable organizations should be permitted to carry on businesses, since it was obvious that many did, and that many had to in order to survive or to fulfil their particular charitable purposes. The Green Paper proposed to legitimize most of the business activities of most charities by permitting charitable organizations and public foundations to carry on "related" businesses, but not otherwise. This proposal was more in the nature of a housekeeping measure than anything else, since the absolute prohibition contained in the
then-existing legislation had long been recognized as unrealistic, and was therefore not enforced.131

d. Accumulation

Similarly, the Green Paper recognized the unfairness of the severe restrictions that the disbursement quotas imposed on the capacity of charitable organizations to accumulate wealth. It was proposed that the Department's administrative practice of turning a blind eye to warranted transgressions of these rules be regularized by creating a statutory discretion in the Minister to permit warranted accumulations.

e. Public Accountability

Another concern expressed in the Green Paper was the lack of public accountability of registered charities. The annual information returns and the annual tax returns of registered charities, if indeed filed, were confidential. The Green Paper argued that the "tax concessions granted to registered charities are so large they entitle the public to know with some precision about the activities of the charity".132 The Green Paper recommended that every registered charity file a public information return annually containing information on income, donations received, gifts made, costs of fundraising, overhead expenses, and salaries.133

f. Fundraising

The Green Paper also made suggestions concerning the establishment in the Act of a power in the Minister to deregister a charity with excessive (defined as fifty percent of the funds donated) fundraising costs.

(iii) The 1976-77 Legislation

The legislation enacted in 1976134 followed the Green Paper's recommendations very closely. It also added a few new provisions. This legislation represented a major innovation in the federal regulatory regime and established the basic framework on which the present law is based.

The basic division in the Act between operating charities "charitable organizations" and granting charities "foundations" was established and foundations were further divided into public and private. The new disbursement quota for private foundations was slightly less onerous than the one suggested in the Green Paper, but it nonetheless made use of the technique of a percentage calculation of capital assets. Private foundations were required to disburse the greater of five percent of the value of their non-arm's length investments and ninety percent of the actual income therefrom, as well as, as before, ninety percent of the income from their other investments.135 The practical effect was to encourage the trustees of private foundations to make sure that the non-arm's length investments earned at least enough to meet the five percent disbursement requirement.136
For the first time, a disbursement quota was also established for charitable organizations, and a new disbursement quota was defined for public foundations. In part, these two quotas were the Department's solution to the problem of high fundraising costs. In the case of organizations, the quota was calculated as a percentage of the previous year's receipted donations. In the case of public foundations, the quota was calculated as a function of a percentage of the previous year's receipted donations. After an initial four-year phase-in period, this percentage amount was set at eighty percent. Thus, the costs of fundraising and administration could not take up more than twenty percent of receipted donations.

Failure to comply with the new quotas was penalized with deregistration and conditional forfeiture of assets. The disbursement quota regime was made difficult to escape since no organization deemed by the Minister to be a charity, and not registered as such, could claim the tax-exempt status available to all non-charitable nonprofits without registration.

The "related business" and "business" problems were resolved in the ways recommended in the Green Paper: public foundations and charitable organizations were permitted to operate related businesses and were prohibited from operating unrelated businesses; private foundations were not permitted to run a business of any kind. The Minister was given a power to permit all charities to accumulate wealth. As well, the new public information disclosure regime was established.

These changes were written into the Act in accordance with the worst traditions of draughtsmanship that Canadians have come to expect from the Income Tax Act, with the consequence that the translation industry moved quickly to interpret the changes for the charity community. Our analysis of the provisions at this stage will remain cursory, however, since we provide a more detailed analysis of the current law in the next chapter and the differences, although important, are too subtle for present purposes.

(f) The 1984 Reform

(i) The MacEachen Budget, 1981

The period between 1976 to 1981 was relatively quiescent on the legislative front. Most legislative changes were of a minor technical nature.

In terms of the administration of the law, however, there were a number of indications that the government's attitude towards the sector was becoming somewhat less benign, perhaps betraying a deepening of the tax expenditure bias first articulated in the 1975 Green Paper and reproduced in several government documents published since that date. For example, there was an ill-fated information circular on political activity which the Department of National Revenue felt obliged to withdraw in the face of very severe criticism from the sector. There was also an attempt at the administrative level to modify the treatment of religious schools, which met with vociferous opposition.
The next significant federal initiative to reform the law came, entirely unexpectedly, in the form of two budget resolutions in the 1981 budget speech. These were Resolutions 138 and 139. Each of these resolutions contained a number of provisions, the primary objective of which was to tighten up the disbursement regime.

Resolution 138(a) and (b) and Resolution 139(c) sought to close what were, from the government's perspective, significant loopholes in the then-existing disbursement rules. These loopholes exploited three features of the disbursement rules: the fact that charitable organizations and public foundations were required to disburse only a percentage of receipted gifts; the fact that one charity could make a grant from its income to another charity in the form an endowment (a "ten-year gift"), turning income in the hands of the first charity into non-disbursable capital in the hands of the second; and, the fact that related charities with different year ends could make grants back and forth forever without ever having to expend a cent on charitable works. The following is an example of how these three features of the disbursement quota regime could work to the disadvantage of the government: a foundation could make a grant from its income to endow a charitable organization, but not take a receipt in the hands of the recipient organization, this money would be completely and forever exempt from the disbursement rules. Resolutions 138(a) and 139(c) sought to foreclose artificial transactions of this type whose principal purpose was to circumvent the disbursement rules. Resolution 138(a) proposed that gifts from one charity to another unrelated charity, whether receipted or not, be included in the recipient charity's income for the purpose of calculating its disbursement quota. Resolution 138(b) proposed that gifts of income between related charities be subject to a one hundred percent disbursement quota. And Resolution 139(c) proposed that only the net of disbursements over receipts from related charities would count towards satisfying the disbursement requirement of a charity.

Resolution 138(c) proposed creating a new penalty for failing to meet the disbursement quota obligation, in addition to the penalty of deregistration and conditional forfeiture of assets, which was thought to be too severe for inadvertent errors. Under the penalty proposed in Resolution 138(c), a charity would lose only its disbursement shortfall, not its registered status and its assets, in the event of an inadvertent breach of the disbursement rules.

Resolution 138(d) suggested raising the quota for private foundations from five percent to ten percent, and would have applied this increased percentage against the greater of the cost amount and the fair market value of the private foundation's non-arm's length investments. Paragraph (e) proposed that the definition of such investments be broadened.

Resolution 139(a) dealt with the minor problem of abuses of or deviations from the Minister's permission to accumulate wealth, for which no provision had been made in the 1976 legislation.

Finally, Resolution 139(b) proposed that, for the purposes of the quota calculation, the income of foundations be calculated to include the capital gains and capital losses.
realized on dispositions of their capital property (defined to exclude capital property used in their operations or their administration). This was by far the most significant provision from the point of view of Canadian foundations, since it would mean considerably less protection for their capital base against inflation.

The reaction of the sector to the budget speech was surprise and dismay. The Association of Canadian Foundations and the Canadian Centre for Philanthropy responded quickly to the proposals with detailed criticisms. The most objectionable proposals, in their view, were those that sought to diminish the capability of both private and public foundations to protect their capital base against inflation: these included Resolutions 138(d), 138(e), and 139(b). The Association’s response pointed to statistics setting out the historic rate of return of investments to show that the long-run implication of these proposals was the gradual weakening and eventual disappearance of foundations. The foundations also questioned the advisability of the proposals in Resolution 138(a) and (b). Although conceding that the avoidance of the disbursement regime should not readily be condoned, they pointed out that one perhaps inadvertent implication of these paragraphs was that an operating charity, such as a hospital or a university, would have great difficulty endowing a related foundation.

(ii) The April 1982 Press Release

The government retreated in the face of general hostility from the sector, and in April 1982 made new suggestions for reform. These were developed after extensive and "very worthwhile" consultations with the foundations. The most significant change dealt with the formulation of the disbursement rule for foundations. The government recommended that the ninety percent of income regime be replaced with a rule requiring both public and private foundations to disburse 4.5 percent of their asset value. Under this formula, there would be no need for foundations to calculate their income, something that had proven quite difficult for many of them, and therefore there would be no need for capital gains to be disbursed, something which would have caused the foundations considerable concern. The new 4.5 percent figure and the retreat on the capital gains issue represented a major policy reversal for the government, since under the newly proposed rule there was a fair chance that most foundations, through prudent investment, would be able to maintain their capital base.

A second change dealt with the problem of non-arm's length investments. Under the proposals contained in the April 1982 press release, these would be subject to both the regular 4.5 percent disbursement rule and to a prescribed rate of return. The latter would be sanctioned by a penalty tax, equal to the benefit received, payable by the offending non-arm's length party.

These new proposals were not, however, implemented. The government decided to delay the reform in October 1982 until the Department and the new Minister of Finance, Marc Lalonde, had had an opportunity to review the issues.

(iii) The May 1983 Discussion Paper
In May 1983 the government published its second major discussion paper dealing with all aspects of the tax treatment of charities.\footnote{146} The style and approach of the discussion paper were very much like its 1975 predecessor.\footnote{147} The Department commenced with praise for the contribution of the sector to Canadian society:\footnote{148}

> The proposals which follow seek to promote the long-standing public policy of providing a tax environment in which charities can thrive and make their valued and essential contribution to the health and well-being of our Canadian society.

The paper went on to establish its jurisdictional credentials with considerable force and impressive statistics. It pointed out that the tax-exempt status of charitable foundations had allowed them to amass "well over $10 billion in property\footnote{149} and that the $2 billion in estimated donations every year was costing the federal and provincial treasuries "some $600 million\footnote{150}"

The discussion paper outlined the problems that required fixing, from both the point of view of charities and the point of view of government. From the point of view of the charities, there were two problems: the inability of charitable organizations to establish endowments under the disbursement rules which required that they disburse eighty percent of receipted donations, without exception; and the erosion caused even by the ninety percent-of-income rule to the capital base of many foundations. From the government's point of view, there was only one problem: the disbursement regime was too easy to subvert. In particular, the paper expressed concern that the disbursement regime could be avoided by the transfer of funds back and forth among (related) charities, by changing their tax status from organization to foundation and back again, on a regular basis, depending on which disbursement regime minimized their payout requirement, and by keeping their investments in high-growth, low-yield assets, since the disbursement rules were mainly a function of income.

The discussion paper contained six specific proposals to address these concerns:

1. \textit{That the legislative distinction between charitable foundations, both public and private, and charitable organizations be eliminated},

The purpose of this recommendation was to allow the government to impose a uniform disbursement regime on all charities so that there would be no incentive for charities to switch from one status to another to minimize their disbursement quota. The government also supported this proposal on the basis that it would "allow charities the flexibility to change their methods of operation to suit changing circumstances\footnote{151}. This proposal represented a major reversal in policy, given the statements in the 1975 Green Paper that "charities in Canada are essentially of two kinds active charities which provide services and carry out charitable activities; and foundations which distribute funds to be employed by others for charitable purposes\footnote{152}. As such, it came as a complete surprise to the sector.

2. \textit{That the concept of "related charities" be introduced.}
This proposal was based on the desire of the government to foreclose the possibility of charities meeting the disbursement requirement by simply making gifts to other "related" charities. The proposed legislation would have imposed an additional disbursement requirement on charities in receipt of donations from related charities. All such receipts would have to be disbursed in the year in which they were received (as in Resolution 138(b)). Further, to address the possibility of back-and-forth gifting between related charities with different year ends, it was proposed that only the net amount of gifts to, over gifts from, related charities would be eligible as disbursements (as in Resolution 139(c)).

The objective of these requirements was laudable. Under the then-existing rules, if one charity made a $100 grant to another charity, the whole amount of the grant could be counted towards the former charity's disbursement requirement. However, but the recipient would not be obliged to spend any of the funds granted until the subsequent year, and in the subsequent year it would be required to spend only $80. Moreover, the second charity in turn could meet its disbursement requirement by granting to another related charity only $64. The possibility of related charities diluting and postponing the disbursement requirement in this way seemed to the government to be obviously contrary to the spirit of the Act. The proposed modifications required, however, that the government define "related charities". The definition proposed in the discussion paper was very broad and quite complex. Charities would be "related" where "they have major donors in common who together have contributed ten percent or more of the gifts received by each of the charities; where they do not deal with each other at arm's length; where one charity was created to further the purposes of the other; or where one is a major donor of the other". In addition to this, the Minister was authorized to designate charities as "related charities" in certain broadly defined circumstances.

(3) That calculation of disbursement quotas for charities be significantly altered.

The government proposed that the ninety percent-of-income rule for foundations be repealed, thereby accommodating some of the concerns of many Canadian foundations regarding the difficulty of applying the ninety percent-of-income test, since it was hard for charities to calculate their income. The proposed rule would have required charities to disburse eighty percent of all gifts received, receipted and unreceipted (with exceptions for endowments and gifts out of the capital of a donor charity), and 4.5 percent of the value of their assets. The discussion paper supported this new rule on the basis that it would permit foundations to protect their capital base against inflation and make it easier for them to calculate their disbursement requirement. It was suggested that charities with investment assets worth less than $250,000, which did not disburse more than twenty-five percent of their outlays to other charities, should be exempted from this requirement. The government thought that this exemption would exclude most "charitable organizations" from the purview of the new disbursement rule. For the purposes of this disbursement rule, the arm's length investments of a charity would be valued at the greater of their fair market value and their cost to the charity. There would also be a new regime for loans: money borrowed by a charity would be included in the amount, eighty percent of which had to be spent to meet the disbursement quota; conversely, amounts spent to repay the
loan would count towards meeting the disbursement quota. Loans by charities would count toward the disbursement requirement, and repayments on such loans would be included in the amount that had to be dispersed.

(4) That charities which fail to meet their disbursement obligations be subjected to a tax on the shortfall.

The discussion paper proposed that deficiencies in the disbursement quota should be sanctioned by a two-part tax: an initial tax equal to fifteen percent of the shortfall, followed by a final tax equal to one hundred percent of the shortfall, if the charity still failed to make up the shortfall.

(5) That the concept of non-qualified investments be introduced and applied to all charities.

The government's discussion paper proposed a new set of restrictions on non-arm's length investments that would apply to all charities. This proposal was motivated by the fact that not only private foundations could engage in non-arm's length transactions to the detriment of a charity. The discussion paper cited one example in which employees of a closely held corporation made donations to a public foundation, which in turn invested the donations in loans to the corporation at non-market rates of return.

(6) That the person who derives a benefit from a non-qualified investment of a charity be required to include twice the amount of the benefit in his income subject to tax.

The new rule for non-arm's length investments would be that they would have to meet a specified rate of return. Failure in this regard, according to this proposal, would result in a tax payable by the individual benefited equal to the value of the benefit.

As can readily be seen, the major preoccupations of the Department of Finance remained the possible abuses of the disbursement regime. A number of very substantial changes, such as the collapsing of the distinction between organizations and foundations, were to be implemented to accommodate this concern. The resulting draft legislation implementing these proposals was substantially more complex than the previous regime.

It is no exaggeration to say that the sector was outraged by these proposals. The reaction of charitable organizations was particularly negative, since they were the major losers under these rules and they had had no warning in the years leading up to the discussion paper that the regime applicable to them would change in such a substantial way. The outcry against the collapsing of the distinction between foundations and organizations was unanimous. The foundations accepted the idea of a disbursement regime based on a percentage of asset value, but strained at the 4.5 percent figure. Both foundations and organizations objected to the eighty percent of all gifts disbursement rule on the basis of fairness: since the only cost in tax dollars to the government was with respect to receipted
donations, they argued, only receipted donations should be counted for the eighty percent disbursement rule.

Many private foundations objected to the rules establishing a prescribed rate of return for non-arm's length investments. The new rules were designed to prevent abuses, but there were many private foundations established with family assets, such as the shares of a closely held corporation, which were not established to take advantage of the tax regime applicable to charities and which would not be able to meet the prescribed rates of return.

All charities objected strenuously to the complexity of the new regime

(iv) The Economic Statement of November 8, 1984

The strongly negative reaction from all quarters of the charity sector caused the government to retreat, in November 1984, to its April position. The long process of consultation on the appropriate reform, which had commenced in late 1981, finally resulted in legislation in 1984. Since the 1984 legislation established what is for the most part today's regime, we will deal with it only briefly here.

The most important effect of the 1984 legislation was the establishment of a disbursement regime for public foundations that included a percentage of their investments. The relevant percentage for both public and private foundations was set at 4.5 percent.

The problem of inter-charity transfers was dealt with by a rule obliging public foundations to disburse eighty percent of the previous years receipts from any registered charity, and requiring private foundations to disburse one hundred percent of the preceding years receipts from any registered charity. This new regime would allow for exemptions for gifts that were endowments. The ninety percent-of-income rule was dropped.

New sections 188 and 189 established penalty taxes for charities whose registration is revoked, and for taxpayers who benefit from the non-arm's length investments of a private foundation. Section 188(3) imposed a penalty tax on certain transactions that were aimed to minimize the disbursement obligations of foundations.

Finally, the status of all charities was fixed by legislation. The Minister was given a power to designate the registration status of a charity as a public foundation, a private foundation, or a charitable organization, in order to limit the opportunity for charities to escape an adverse disbursement regime by changing their registered status.

(g) The 1988 Reform

The last significant reform in the 1980s occurred in 1988. In 1985, legislation had been passed which legitimated to a certain extent the political activities of charitable
organizations and charitable foundations.\textsuperscript{158} However, the extent of political activity permitted by these new sections was probably already permitted under the income tax regime, by virtue of that regime's acceptance of the common-law definition of charity. There had also been, in deference to representations made by charitable organizations themselves, a repeal of the $100 standard deduction.

Michael Wilson's major tax reform initiative in 1988 involved one major and very significant change for charitable organizations. The legislation enacted pursuant to the June 18, 1987 White Paper on tax reform provided that the deduction for charitable donations be changed into a tax credit. That change established the current arrangement whereby gifts of $250 and less are entitled to a seventeen percent federal tax credit, and gifts of more than $250 are entitled to a twenty-nine percent federal tax credit. This change was just as much a part of the philosophy of the 1988 tax reform as it was a result of representations made by the sector. Many in the sector had advocated such a change on the basis that rich and poor donors that is, high and low tax bracket taxpayers should be subsidized to the same extent. To limit the negative "incentive effect" consequences on wealthy donors, however, the 1988 reform increased the subsidy for donations above $250.

(h) The 1990 Reform Effort

The federal government commenced another study to reform the federal tax system applicable to charities in 1990. A discussion paper was issued by Revenue Canada, Taxation in November 1990, and a draft circular and draft reporting form in 1992. The proposals contained in these documents are aimed principally at clarifying the administrative practice of Revenue Canada and of making charities more publicly accountable. We will look at some of these proposed changes, briefly, in the next chapter.

In 1991 national arts councils were explicitly recognized as being entitled, upon registration, to the same treatment as charitable organizations.

(i) Conclusion

The principal motivation of the federal government through this entire period (1967 to 1990) was to protect the two tax privileges from abuse. This required the establishment of a system for policing the deduction by making sure that it is available only for donations to legitimate organizations. The registration system and the disbursement regime were the two principal techniques used by the federal government to achieve this goal. The disbursement regime, though complex, is aimed to ensure that recipients of charitable donations devote donated resources almost exclusively to charity.

This motivation also led to a certain level of policing of the tax-exempt status through measures aimed chiefly at private foundations. The main devices used here were the disbursement quota and, more recently, the penalty tax on taxpayers who benefit from non-arm's length transactions with charities.
All of these measures have resulted in the imposition of substantial discipline on the sector. Generally, the sector's reaction has been to balk at the aggressiveness of some of the federal government's proposals on the basis that they were either too complex for the vast majority of charities or that they were far too onerous to correct minor, infrequent, and often only perceived, abuses.

The whole process since the institution of the registration regime in 1967 has shaped the sector's perspective on the role of government in the charity sector profoundly. Still, a decade after the 1981 to 1984 reform process, there is a great deal of scepticism and even fear about the motives of government regulation. For the most part, the presence of government is felt as antagonistic, counterproductive, and unduly burdensome. To some extent, this negative perspective had been reinforced recently by the actions of the Office of the Public Trustee. As a consequence, very few of the submissions to the Commission on the reform of the law of Ontario expressed any interest in a more positive and more enlightened role for government along the lines of the Charities Commission in the United Kingdom; for the most part, this conception of the role of government is simply beyond the ken of most actors in the sector because it is unrelated to their recent experience.

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1. R.S.C. 1985, c. 1 (5th Supp.).

2. Ibid., s. 110.1, as am. by S.C. 1994, c. 7, Sch. II, s. 79; Sch. VIII, s. 46(1) (deduction for corporations) and s. 118.1, as am. by S.C. 1994, c. 7, Sch. II, s. 88; Sch. VIII, s. 53(1); 1995, c. 3, s. 34(1); c. 38, s. 3 (tax credit for individual tax payers).

3. Ibid., s. 149(1)(f).

4. In order to be eligible for the deduction or credit under ss. 110.1 and 118.1 of the Income Tax Act, ibid., donations must have been made to registered charities. Under s. 149(1)(e) and (f), a charitable organization must be registered as such in order to qualify for the exemption.

5. Ibid., s. 149.1(14).

6
Ibid., s. 149.1.

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In particular, see Charities Accounting Act, R.S.O. 1990, c. C.10 and Charitable Gifts Act, R.S.O. 1990, c. C.8.

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For example, see Charities Act, 1960, 8 & 9 Eliz. 2, c.(U.K.).

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There are many interpretations of the charitable donation deduction and credit. Prominent among these is that of the tax expenditure theorists. See supra, ch. 9

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Revenue Canada's very lax enforcement of the annual reporting requirement is a prime example of the ambivalent posture of the public administration. See the criticisms set out by the Auditor General in Canada, Report of the Auditor General of Canada to the House of Commons: Main Points, (Ottawa: Department of National Revenue, Taxation and Finance, 1991), at 258.

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The Income War Tax Act, 1917, 7-8 Geo 5, c. 28 (Can.).

14

Ibid., s. 3 (1)(c).

15

Ibid., s. 4.

16

Watson, supra, note 12, at 5. Watson notes that the origins of the fund went back to the Boer War.
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5 Geo. 5, c. 8 (Can.).

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Watson, supra, note 12, at 5. The method chosen by the government to support the fund was not without its detractors. A.K. Maclean, M.P., suggested in a speech in Parliament, that it was unwise "to rely solely upon voluntary contributions" and that it was worthy of "serious consideration whether or not some special tax should be imposed directly upon the people to sustain the Patriotic Fund": Can. H. of C. Deb., August 3, 1917, at 4125-26.

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The Canadian Patriotic Fund Act, 1914, supra, note 17, preamble [emphasis added].

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See Watson, supra, note 12.

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These were the words of W.F. Nickle, Honorary Secretary of the Fund, in Canadian Patriotic Fund. A Record of its Activities from 1929 to 1937 and covering the period from August 1914 to March 27, 1937. Fourth and Final Report, at 6, quoted in Watson, supra, note 12, at 6.

23

7-8 Geo. 5, c. 38 (Can.).

24

An Act to amend The Income War Tax Act, 1917, 1920, 10-11 Geo 5, c. 49 (Can.), s. 5.

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W. S. Fielding, M.P. for Shelburne and Queens, ibid., at 3313. The American provision provided for a deduction of up to 15% of net income for gifts made to "corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes": Can. H. of C. Deb., 8, 1920, at 3244, and Watson, supra, note 12, at 7.
A similar debate was taking place in the United Kingdom at the same time, as a result of the appointment in 1918 of a Royal Commission to study the income tax system. As part of that effort, Inland Revenue was asked to submit its views on the exemptions from tax enjoyed by charitable organizations. The result was the U.K. Report of Royal Commission on the Income Tax (Cmd. 615, 1920) (the Colwyn Commission), at 615, and U.K., Royal Commission on the Income Tax, Memorandum by the Board of Inland Revenue on the Subject of the Exemption from Income Tax Enjoyed by Charities in Installment of the Minute of Evidence, (London: HMSO, 1920), Appendix 31, cited in N. Brooks, Charities: The Legal Framework (Ottawa: Secretary of State, 1983) [unpublished], at 25. Harking back to the position it took in Commissioners for Special Purposes of the Income Tax v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28 (H.L.) (hereinafter referred to as "Pemsel"), the Board of Inland Revenue argued that several factors ought to be taken into account in the attempt to define charity for the purposes of the tax exemption (Memorandum, supra, at 25, para. 12):

[E]very exemption from income tax throws an additional burden on the cost of the community; every charitable institution or body which obtains an exemption from income tax may be represented as receiving a concealed subsidy from the State unaccompanied by State control..., the effect of the exemption...is to force the state into the portion of subsidizing charitable societies in perpetuity...

The Board concluded by recommending that the exemption should be confined "to charities concerned primarily to benefit classes of persons with small incomes", and that, if the state wanted to subsidize other groups, it should do so directly.

The amendment to the 1927 *Income War Tax Act*, supra, note 32, was introduced on May 1, 1930 by the Minister of Finance. See 16th Parl., 4th Sess., Vol. II, at 1677. It was debated on May 27, 1930. See *supra*, note 31.

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Montreal and Winnipeg, to name two.

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*An Act to amend the Income War Tax Act*, S.C. 1930, c. 24, s. 3, enacting s. 5(1)(j) of the *Income War Tax Act*, supra, note 32. The relevant portion of s. 3 read as follows: 

"(j) more than ten per centum of the net taxable income of any taxpayer which has been actually paid by way of donation within the taxation period to, and receipted for as such by, any charitable organization in Canada operated exclusively as such and not operated for the benefit of private gain or profit of any person, member or shareholder thereof.

The government suggested this very important modification the day following the initial debate, conceding all of the points made the previous day against the narrowness of the first proposal: *Can. H. of C. Deb.*, May 28, 1930, at 2714-15.

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*An Act to amend the Income War Tax Act*, S.C. 1939 (2d Sess.), c. 6, s. 1, enacting s. 5(1)(n) of the 1927 *Income War Tax Act*, supra, note 32.

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*An Act to amend the Income War Tax Act*, supra, note 32, ss. 7 and 9, repealing and re-enacting s. 5(1)(j) and repealing s. 5(1)(n) of the 1927 *Income War Tax Act*, supra, note 32, respectively.

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*An Act to amend the Income War Tax Act*, supra, note 32, s. 9, enacting s. 5(1)(jj) of the 1927 *Income War Tax Act*, supra, note 32.
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The measure would also cost recipient organizations. See W.D. Goodman, "The Impact of Taxation on Charitable Giving: Some Very Personal Views" (1984), 4 Philanthrop. (No. 4) 5, and McGregor, *supra*, note 30, at 449. The $100 deduction has been criticized on many occasions over the years.

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*The Income War Tax Act, 1917, supra*, note 13, s. 5(d).

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*Supra*, note 23. "War charities" were defined in s. 2(b) as "any fund, institution or association, other than a church or the Salvation Army...having for its object...the relief of suffering or distress, or the supplying of needs or comforts to sufferers from the war, or to soldiers, returned soldiers or their families or dependents...".

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*An Act to amend the Income War Tax Act, 1917*, 1921, 11-12 Geo. 5, c. 33, s. 1 (Can.).

51  

For corporations, see *An Act to amend the Income Tax Act and related statutes*, S.C. 1984, c. 45, s. 58, amending s. 150(1) of the 1952 *Income Tax Act, supra*, note 7. For trusts, see Income Tax Regulations, C.R.C. 1978, c. 945, s. 204(3)(c).

52  

*Supra*, note 23.

Namely, the War Charities Act, 1916, 6 & 7 Geo. 5, c. 43 (U.K.), repealed by the War Charities Act, 1940, 4 & 5 Geo. 6, c. 31, s. 14(3).

The War Charities Act, 1917, supra, note 23, s. 2(b). Interestingly, the definition of "war charities" in the Act provided that whether a charity was a war charity was to be finally determined by the Minister. The Minister was the Secretary of State.

Churches and the Salvation Army were excluded from the Act's purview by virtue of The War Charities Act, 1917, ibid., s. 2(b).

The War Charities Act, 1917, ibid., s. 4(4).


Watson, supra, note 12, at 6, notes that of the 846 associations that had been registered, 671 had left the register. Of those remaining, 143 were local chapters of the Imperial Order of the Daughters of the Empire.

See An Act to amend the Income War Tax Act, supra, note 38. In 1940 the supervisory jurisdiction for this statute was transferred to the Department of National War Services. See The Department of National War Services Act, 1940, S.C. 1940, c. 22.


Canada, Department of National Revenue, Form T.511, "Application for Recognition as a Charitable Organization", as per Directive No. 141 (January 22, 1948), reported in Watson, supra, note 12, at 9.

64

Supra, note 29.

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Ibid., s. 21; repealing and substituting s. 57(1)(e) and enacting s. 57(1)(ea)-(ec) of the 1947-48 Income Tax Act, supra, note 41.

67

Ibid.

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S.O. 1949, c. 10. See, further, ch. 17, infra.

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See Minister of National Revenue v. Trusts & Guarantee Co., supra, note 47, and Burns Executors v. Minister of National Revenue, supra, note 47.

72

Supra, note 7.

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See Martin, supra, note 12, at 203.

See Watson, supra, note 12, at 11.

See Martin, supra, note 12, at 203.

Ibid., at 203-04.


Ibid., at 6115.

Ibid., at 6114.

Ibid., at 6115.

Ibid., at 6115.


See Martin, supra, note 12, at 204.
By the mid-1970s the overwhelming majority of charities, over 90%, were registered as "charitable organizations". Although this type of registration precluded the possibility of making grants to other charities (since all the resources of a charitable organization had to be devoted to charitable activities carried on by it), it did mean that the organization was not subject to the onerous 90% disbursement rule.

86

Ibid., at 204.

87

Ibid., at 204-05.

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Ibid., at 204.

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Ibid., at 205. See, also, E.A. Chater, "Administrative Aspects of the Taxation of Charitable Organizations under the Income Tax Act", in 1973 Report of Proceedings of the Twenty-fifth Tax Conference, supra, note 68, 177 at 180-81, for a brief description of the federal charities administration in the early 1970s. Chater was, at that time, the Director of the Registration Division of the Department of National Revenue.

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Bird and Bucovetsky, supra, note 30, at 20.

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Ibid., at 131.
Ibid., at 134.

Ibid.

Ibid. It will be recalled that the legislation in place at the time prohibited trusts and corporations from operating a business and required organizations to devote all their activities to their charitable work.

Ibid., at 135.

Ibid., at 222. Interestingly, in a brief to the Commission, the Canadian Welfare Council argued the merits of a matching-grants system over the tax deduction:

[It] would avoid use of the fiscal machinery for the direct allocation of public funds to voluntary organizations. It would enhance public knowledge and accountability both concerning the amount of public subsidy to voluntary organizations and concerning the programmes and financing of the voluntary organization. It would close a significant loophole for tax avoidance and evasion. The individual (or corporation) would give to the voluntary organizations of his choice, without consideration of tax advantage or of the present limits for purposes of the tax concession on charitable donations.

See Royal Commission on Taxation, National Hearings Briefs, vol. 10, the Canadian Welfare Council submission (No. 237, November 6, 1963), cited in N. Brooks, Financing the Voluntary Sector: Replacing the Charitable Deduction (Toronto: Law and Economics Workshop Series, University of Toronto, Faculty of Law, 1981) [unpublished]. This suggestion was not pursued in the report.

See infra, ch. 11.

The amendments to the Act in 1966, supra, note 83, permitted donations to only those foreign entities to which the government had donated. The Department also insisted that Canadian charities carry on their activities in Canada. The Commission's recommendations would have relaxed both these rules. See Woodman, supra, note 93, at 544.

This was set out in Information Bulletin No. 17 (1962), supra, note 63.

A case decided in 1955 Gaudin v. Minister of National Revenue (1955), 55 D.T.C. 385 (Tax App. Bd.) seemed to suggest that gifts in kind were not eligible for the deduction. The matter was clarified in favour of the deduction of gifts in kind by a Tax Appeal Board holding in 1968: Consolidated Truck Lines Ltd. v. Minister of National Revenue (1968), 68 D.T.C. 399.


See Bird and Bucovetsky, supra, note 30, for a discussion of the controversy surrounding the adoption of the deemed disposition rule and its anticipated consequences for gifts and bequests of capital property.

The Americans adopted a rule that excepted the gift of capital property to a charity from the deemed disposition rule if the property donated was to be used by the donee. See Bird and Bucovetsky, ibid., at 26.

An Act to amend the statute law relating to income tax, S.C. 1973-74, c. 14, s. 35(7), enacting s. 110(2.2) of the 1952 Income Tax Act, supra, note 7.

The "suitable for use" condition was later repealed by S.C. 1986, c. 6, s. 55(8). In that year as well, taxpayers were permitted the same tax concession in respect of donations of their inventory that was a work
of art created by them: S.C. 1986, c. 6, s. 55(10), enacting s. 110(2. 3) of the 1952 Income Tax Act, supra, note 7.

112

This was not the only modification. Section 110(2.1) was also added in that year by S.C. 1973-74, c. 14, s. 35(6). It permitted taxpayers to deduct gifts made by will as gifts made in the year of death. This had not been possible before and there had been a considerable effort on the part of charities to bring about this change.

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Canada, Department of Finance, The Tax Treatment of Charities (Discussion Paper) (Ottawa: June 1975) (hereinafter referred to as the "Green Paper").

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"Their role is to fill in gaps of service and financial support where government should not or cannot play a significant part": Green Paper, supra, note 115, at 5.

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It appears from the way this figure is stated in the Green Paper, ibid., that the Department was including all amounts claimed pursuant to the $100 standard deduction, as well as receipted donations.

119


One wonders whether that line of type could have been composed anywhere but in Ottawa, and it seems hard to believe that this means anything more than `every dollar of tax relief represents a dollar less for the Canadian government'.
These deficiencies did not escape criticism. Thus, Rickerd, supra, note 119, at 382, commented:

While the Green Paper purports to seek public consultation, it is a curious document in that:

1. It does not reveal clear evidence of any prior preliminary consultation with those professionally involved in the field.

2. It does not give any factual backing for its frequent references to abuses, improper expenditures, costs to the Canadian taxpayer, etc.

3. It gives very little feeling of any deep understanding of the complexities involved in the charitable field in Canada.

4. I am particularly surprised that it does not make any reference to the very carefully compiled two-volume Proposals for a New Not-for-Profit Corporations Law for Canada, prepared and published last year by Professor Peter Cumming of the Osgoode Hall Law School for the Department of Consumer and Corporate Affairs.

Generally the reaction to this procedure was favourable, although a common complaint was that the time-frame was too short. In the words of Rickerd, ibid., at 382:

[The circulation of the Green Paper] represents an attempt to continue the participatory nature of some earlier Canadian tax changes, and is welcomed as an opportunity to contribute thoughts that may be of assistance in the drafting of final material...[But] as no warning of the...issuance of the Green Paper was given, and as it proved difficult to get copies of the Paper, once issued, the time framework [23 June 1975 to 30 September 1975] has proven to be a very difficult one, especially as most charities operate with unpaid Boards and often with unpaid staffs.

The American Congress had recently completed investigations and passed new tax provisions in the Tax Reform Act of 1969, supra, note 107. Many of the measures in this statute were aimed at the abuses, perceived and real, of large family foundations.
Drache, supra, note 116, at 44.

125

Green Paper, supra, note 115, at 9, set out the argument as follows:

It has become evident in recent years that a few taxpayers have been abusing the opportunity to establish private charities. The most common abuse has been in arranging investments and expenses to ensure that the charity has little income and pays out a relatively small sum annually in comparison to its capital. This may be done by having the charity invest in low-yield debt or equity of the donor's business, by renting premises from the donor at high rent, by paying family members high salaries for relatively little work or by lending money to family members at low rates of interest.

126

There was as well, it will be recalled, the precedent of the enactment of the first disbursement regime in Canada in 1950.

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In many situations these transactions would have been contrary to the law of trusts or the law of corporations, usually because they often involved breaches of fiduciary duties by the relevant trustees or directors.

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1952 Income Tax Act, supra, note 7, s. 149(7)(a), rep. by S.C. 1976-77, c. 4, s. 59(6).

129

This was new. Previously, all the resources of a charitable organization had to be devoted to its own activities.

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Interestingly, in light of the Alberta Institute on Mental Retardation v. Canada, [1987] 3 F.C. 286, 87 D.T.C. 5306 (Fed. C.A.) (hereinafter referred to as "Alberta Institute"), the Green Paper, supra, note 115, at 8 stated that the test for "related" "would not be the fact that the income earned by the business is used for charitable purposes, but rather that the business is a usual and necessary concomitant of the charitable activity". The Alberta Institute decision is discussed further, infra, ch. 11.

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132
Green Paper, supra, note 115.

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Ibid.

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Defined to exclude capital gains.

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At least one foundation was persuaded to give up its registered status as consequence of the adoption of these rules. According to L.M. McQuaig, in *Behind Closed Doors* (Markham, Ont.: Penguin Books, 1987), at 53, "[f]or Toronto's Weston family, which controlled the W. Garfield Weston Charitable Foundation, the new rules were excessive. The Westons...decided to give up their foundation's charitable status in December 1976 just before the new rules were to come into effect...”.

137

In the case of public foundations, this was defined to exclude endowments (10-year gifts).

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See Drache, supra, note 116, at 44.

139

See Revenue Canada Information Circular 78-3 (February 27, 1978), where political activity was defined as any activity aimed at influencing government policy. Although the circular was withdrawn, the Department tightened up on political activity of charities by sending letters threatening revocation of registered status to a number of organizations it felt were engaging in political activity, including Oxfam Canada. See, also, *Renaissance Internationale v. Minister of National Revenue*, [1983] 1 F.C. 860, 142 D.L.R. (3d) 539 (Fed. C.A.).

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141

Thus, money that was counted as having been actually disbursed on charity could end up collecting interest in a bank.

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Woodman, supra, note 93, at 552: "The provisions would have effectively limited the 'lifetimes' of many private foundations with non-arm's-length investments to about forty years."

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Canada, Department of Finance, Charities and the Canadian Tax System A Discussion Paper (Ottawa: May 1983) (hereinafter referred to as the "May 1983 Discussion Paper").

147

Green Paper, supra, note 115.

148


149

Ibid., at 1.

150

Ibid.

151

Ibid.

152

Supra, note 115, at 4.

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S.C. 1988, c. 55.

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See *An Act to amend the Income Tax Act [and other legislation]*, S.C. 1986, c. 6, s. 85(2), enacting s. 149.1(6.1) and (6.3) of the 1952 *Income Tax Act*, *supra*, note 7, applicable to 1985 and subsequent taxation years (s. 85(3)).
CHAPTER 11
SUPERVISION OF CHARITIES BY REVENUE CANADA: CURRENT LAW

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A. RECORD-KEEPING AND RETURNS
1. INTRODUCTION

The objective of this chapter is to provide a succinct statement of the current income tax regime in Canada and a short description of the comparable regimes in the United States and the United Kingdom. The discussion on Canada in section 2 is divided into six parts:
(a) of Basic Terms; (b) Registration Requirement; (c) Regulation of the Activities of Registered Charities; (d) Quotas; (e) and (f) Compliance. In sections 3 and 4, the Commission examines the tax treatment of charities in the United States and in the United Kingdom, respectively. In chapter 12 we make suggestions for the reform of the Canadian tax regime, focusing on the regulation of the activities of charities and not on the privileges extended to them, since the main purpose in studying the federal tax regime is to ensure that Ontario charities, in the end result, face an integrated and coherent federal-provincial regulatory regime.

2. THE CURRENT FEDERAL REGIME

(a) Definition of Basic Terms

To be entitled to the privileges offered to charity under the *Income Tax Act*, a charitable entity must have the status of "registered charity". However, the *Income Tax Act* does not define "charity". Revenue Canada previously set out a version of the *Pemsel* test in its information circular dealing with the registration of charities, but it no longer does. Currently, a version of the *Pemsel* test is set out in Form T4063, "Registering a Charity for Income Tax Purposes". In deciding whether an organization is entitled to registered status, Revenue Canada relies on a reasonably traditional interpretation of the common-law tests, as well as the Act's particular rules on such things as political activities and unrelated and related business activities. Some commentators note that Revenue Canada has taken a "hard-line" of late, taking decisions often questionable in law. Others note an opposite trend in the decided cases. Whatever may be the truth on this matter, it is noteworthy that there is in Canada, as there is in the United Kingdom and the United States, a body of case law, albeit small, that takes up the issue of the definition of charity for tax purposes.

"Registered charity" is defined as "a charitable organization, private foundation or public foundation" (or "a branch, section, congregation, parish, or other division" of any of these), that is resident in Canada, that was established or created in Canada, and that is registered with the Minister of National Revenue. Each of the three subdivisions of "registered charity" - "charitable organization", "private foundation", and "public foundation" are in turn separately defined and separately regulated under the Act. Organizations are distinguished from foundations by their service orientation: they are not permitted to make grants totaling more than fifty percent of their income in any one year. Foundations must be organized as trusts or corporations, not as unincorporated associations. Organizations may be organized in any of the three available ways.

Both public and private foundations must be "constituted and operated exclusively for charitable purposes", and no part of the income of a foundation may be available for the personal benefit of any of its members. A charitable organization must devote all its resources to charitable activities carried on by it, and must not distribute any part of its income to its members. Thus, both foundations and organizations must be in purpose and
in fact "exclusively charitable". This "exclusively charitable" requirement is the main regulatory standard under the Act. Permissible and impermissible activities under the Act are defined in terms of this standard. Thus, there are provisions permitting activities either as an exception to this standard, or as deemed compliances with this standard; likewise, most prohibited activities are activities defined to be breaches of this standard.

In addition to these rules, which define the three categories in terms of the dedication of assets and their form of organization, there are provisions that define them in terms of the makeup of their executive (officers, directors, and trustees, etc.) and their sources of capital. More than fifty percent of a charitable organization's or public foundation's executive must deal with each other, and, with each of the other members of the executive, at arm's length, and not more than fifty percent of the capital of a charitable organization or public foundation can have been contributed by one person or by one group of persons who do not deal with each other at arm's length. Governments, charitable organizations, public foundations, and clubs, societies, and associations (as described in s. 149(1)(l)), however, may establish public foundations or charitable organizations by contributing fifty percent or more of the capital. Otherwise, if any of the conditions are not met, the foundation is, by definition, a private foundation.

The Income Tax Act obliges all registered charities to meet certain disbursement requirements. These disbursement requirements, in the intention of the Act, ensure that the resources of registered charities are in fact devoted to charity, and, therefore, that registered charities deserve their tax-exempt status and right to issue tax receipts. It should be emphasized that there are other ways to accomplish this objective, such as placing restrictions on investments, direct supervision, and the enforcement of more general standards. There must be an indication that the tripartite division of registered charities is used in the Act principally to identify three different kinds of charitable entities, which, because they raise slightly different regulatory concerns, are subject to three different disbursement regimes.

One other general term defined in the Act should be introduced at this stage. The class of entities favoured with the right to issue donation receipts is slightly larger than "registered charities". The full list of favoured entities is referred to in the Act as "qualified donees".

They are as follows:

1. registered charities;
2. registered Canadian amateur athletic associations;
3. housing corporations resident in Canada and exempt from tax under Part I by section 149(1)(i);
4. Canadian municipalities;
(5) the United Nations or agencies thereof;

(6) prescribed universities outside Canada;

(7) a charitable organization outside Canada to which Her Majesty in right of Canada has made a gift in the previous twelve months;

(8) Her Majesty in right of Canada or any province; and

(9) National Arts Service Organizations.

(b) The Registration Requirement

Most of what Revenue Canada does in respect of charities is organized by the logic of a registration system. Registered status entails tax-exempt status, the right to issue donation receipts, and the status of qualified donee. Admission to the status is controlled by an administrative process in which Revenue Canada administrative staff make a determination whether the applicant is a charity pursuant to the definitional criteria just discussed. Appeals from negative decisions are infrequent since the only appeal from a refusal of the Minister to register is to the Federal Court of Appeal, a costly and lengthy process. Registered status may be lost for a number of reasons, some of which are discussed in more detail below. It is useful to list these reasons here since loss of registered status is almost the only sanction for non-compliance by a charity with the regulatory regime established under the Act. A charity may be deregistered for failing to continue to meet any of the requirements for initial registration; carrying on any business, if it is a private foundation, or an unrelated business, if it is not; failing to comply with the annual information return requirement; issuing a false donation receipt; failing to keep proper records and books of account; if it is a foundation, acquiring control of any corporation or incurring certain types of debts; attempting to unduly delay its expenditure on charitable activities by making its transfers to another charity; and, most importantly, failing to meet its disbursement quota.

The tax-exempt status of charities is shared by a number of other types of nonprofit entities, including one referred to in the Act as "non-profit organizations". The definition of "non-profit organizations" expressly excludes "a club, society or association that, in the opinion of the Minister" is a charity. This provision, therefore, establishes the scope of application of the registration system since it requires any entity that is a charity in the Minister's view to register as such in order to be eligible for tax-exempt status, as well as the right to issue donation receipts.

Application for registration is completed by filing Form T2050 together with the following documents:

(1) a certified copy of all constating documents;

(2) a statement containing full details of the activities of the applicant;
(3) financial statements for the last completed financial year or, if not available, a budget for the first year of operation;

(4) names and addresses of all executives; and

(5) a statement as to whether the applicant intends to purchase real estate and, if so, the name of the registered owner.

The application for registration process is set out in more detail in Form T4063.

The decision of the Minister to register an applicant is generally considered to be purely administrative in nature. The Minister is not, therefore, obliged to hear or receive submissions from the applicant. The applicant's only recourse on a negative decision is to appeal to the Federal Court of Appeal, pursuant to section 172(3)(a) and (a.1). The appeal procedure has been criticized by several commentators for being superficial in method and scope, as it is based solely on a thin record comprised of the application of the applicant and the Minister's refusal letter.

The decision to revoke a registration is made by the Minister pursuant to section 168(1), which lists the grounds of revocation set out above and provides simply that the Minister may, by registered mail, give notice of his intention to revoke. Revocation is effected thirty days later by publication of the Minister's decision to revoke in the Canada Gazette. An appeal lies, as with appeals from refusals to register, to the Federal Court of Appeal under section 172(3). There is no explicit provision in the Act affording the registrant a right to be heard prior to the appeal. The Federal Court of Appeal has held, however, that the revocation of a registration does give rise to a right to be heard prior to publication of the notice of revocation in the Canada Gazette. In Renaissance International v. Minister of National Revenue, the Federal Court of Appeal held that, as the registrant's rights were "seriously and adversely affected" by the Minister's decision to revoke, the rules of natural justice obliged the Minister to provide the registrant with an opportunity to be heard. Further, the Court held that, since the appeal process was not a trial de novo, the Act itself impliedly obliged the Minister to put in place a process that was capable of generating a record so that a proper appeal could be conducted. This last observation is important since it applies with equal force to the registration process. We return to these questions below in chapter 12.

(c) Regulation of the Activities of "Registered Charities"  

(i) Business Activities

The Act recognizes a distinction between the "related" and "unrelated" business activities of charities. The distinction, as we shall see, is poorly defined at the margins, but the core idea is clear: a business is related if it directly advances the goals of the charity. The sales outlets of Goodwill Industries are a good example. An unrelated business, conversely, is one that does not directly advance the charitable purpose.
There is no provision in the *Income Tax Act* prohibiting a public foundation from carrying on a related business. Therefore, this activity is permitted. Charitable organizations that carry on related businesses are deemed by the Act to be, with respect to those activities, devoting their resources to their charitable activities. Therefore those activities are permitted. Private foundations, however, are explicitly prohibited from carrying on any business at all.

Although "related business" is not defined in the Act, the Act does say that it *includes* a business unrelated to the objects of the charity if "substantially all" the employees in the business are unpaid. This provision thus permits public foundations and charitable organizations to operate gift shops, run bingos, sell Christmas cards, or carry on any other such enterprises provided the staff are mostly volunteers. Otherwise, public foundations and charitable organizations may not carry on unrelated businesses.

The case law indicates that the courts have had some difficulty dealing with the business activities of charities and other nonprofit organizations. Like charities, nonprofit organizations are required under the Act to be "organized and operated exclusively" for their nonprofit purpose. Charities, of course, are also subject to the more explicit provisions just outlined. Otherwise, the issue of permissible and impermissible business activities is the same in the case law. There are several decisions of interest, two involving nonprofit organizations and one involving a charity.

In *Gull Bay Development Corp. v. The Queen*, the taxpayer corporation earned income from a logging operation conducted by paid employees. The income in turn was applied to the purposes of the corporation, which were to advance the economic and social welfare of natives on the Gull Bay Indian Reserve. Walsh J. held that the business activity of the corporation did not jeopardize its exclusively nonprofit nature and, therefore, that the income was exempt from tax. He applied a "preponderant purpose" test and concluded that, despite the business activities, the preponderant purpose, and therefore exclusive purpose, of the corporation remained its tax-exempt social and welfare activities. In *Minister of National Revenue v. Bégin*, profits from the sale of beer in a Quebec community were likewise held exempt from tax because they were used exclusively for purposes of social welfare, charity, education, and civic improvement.

The issue becomes more difficult when charities are involved because of the additional explicit prohibitions concerning unrelated and related businesses. Had the Court in these two cases been required to ask, in addition, whether the nonprofit companies were carrying on unrelated businesses, one might have expected considerably greater difficulty and perhaps a different result. This question did arise, for the first time, in *Alberta Institute on Mental Retardation v. Canada*, a case involving certain commercial activities of a charity. In that case the charity, the Alberta Institute on Mental Retardation, collected and sold used household goods to a retailer, pursuant to a contract which provided for monthly advances of $2,000 and a fifty percent share of profits from retail sales. The Alberta Institute, in turn, remitted all its profits to its associated charity, the Alberta Association for the Mentally Handicapped.
Construably, this was business activity, although it may have been more accurate to regard this activity as simply converting donations-in-kind into money. Nonetheless, the Court characterized the issue as one raising the question whether such business activity was related or unrelated.29

The majority (Heald and Mahoney J. J.) set out a list of four criteria to be used in assessing the nature of the business activity of charities:30

1. The degree of relationship of the activity to the charity;
2. Profit motive;
3. The extent to which the business operation competes with other businessmen; and
4. The length of time the operation has been carried on by the charity.

The majority held, purportedly applying these criteria, that a business such as the business at issue in Alberta Institute is a related business because all the profits from that business are used to advance the charitable purpose.

With respect, the Commission does not think that this reasoning is correct,31 nor do we think that the four criteria established by the majority are particularly helpful or accurate in terms of the issue at hand. We leave the development of our criticisms to chapter 12. It is sufficient to note here that, in our view, a business is unrelated unless the business directly advances the charitable purposes of the charity or is ancillary or incidental to the advancement of those purposes. We therefore respectfully concur with the following reasoning of Pratte J., in dissent, in Alberta Institute:32

The mere fact that the whole of the income derived from a business operated by a charity is used for the charitable purpose of the charity is not sufficient to make that business a related business. And this is so because the necessary relationship must exist between the charitable objects and the commercial activity or business itself. If it were sufficient, in order to create the necessary relationship, that the income of the business be entirely used for charitable purposes, paragraph 149.1(3)(a) [which permits revocation of registered status for carrying on an unrelated business] would be devoid of effect. Indeed, according to that interpretation, the Minister could only cancel a registration on the ground that the charity operates a business ‘that is not related’ if the income derived from that business was not used for charitable purposes; in such a case, however, there would be no need for the Minister to invoke paragraph 149.1(3)(a) since he could revoke the registration on the ground that the foundation is not operated for exclusively charitable purposes.

For now it may be said that the majority decision in Alberta Institute is probably the law on this issue.

(ii) Investment Activities

a. Control of Corporations
Foundations which "acquire control" of a corporation may have their registration revoked. "Control" is defined as fifty percent or more of the issued share capital of the corporation, held by the foundation alone, or in concert with non-arm's length persons. The prohibition does not apply if the corporation has not purchased for consideration more than five percent of the share capital of the corporation. Therefore, small holdings held in concert with non-arm's length persons are permitted. "Control" is permitted when it arises by gift, since "acquire" does not include receiving by gift. Since very large corporations could thus be controlled by foundations, it is unclear what the restriction on the control of corporations is intended to accomplish. Moreover, there is nothing in the Act to prevent a charity from carrying on a business under a trust, and receiving business profits, tax free, as income distributed to it as a beneficiary. Thus, if the purpose of the restriction is to prevent foundations from owning a substantial stake in business enterprises and/or to preclude such businesses from escaping income taxes on their profits, as seems likely, it is seriously inadequate.

b. Investment "Businesses"

The question has arisen whether charitable organizations are in conformity with their obligation to devote all their resources to their charitable activities if they are investing a substantial portion or all of their capital to earn income, which in turn is devoted to their charitable activities. Two cases illustrate the problem.

In The Pas Lumber Co. v. Minister of National Revenue, the taxpayer made a donation of $20,000 to an organization established by it to assist needy persons in the area where it conducted its business. The donation generated a small amount of income which, in turn, was granted to a few needy residents. The taxpayer was denied a deduction for the donation on the basis that the organization failed the "all the resources" test; the capital, the court reasoned, was devoted to earning income, not to doing charity.

In another case, Church of Christ Development Co. v. Minister of National Revenue, the appellant charity was actively investing in real estate and in the stock market. The Tax Appeal Board held:

[T]he investment by the organization of these moneys [donations and bequests] for the precise purpose of causing investment income thereon for the organization would not disqualify that organization from a 'non-taxable status'...[T]he conclusion that a charitable organization must be passive,...rather than active, in its efforts to improve financial resources, is not warranted....[H]owever, the activity of the appellant in buying and selling stocks and bonds and in buying, subdividing, servicing and selling land, was conducting a business...That the profit so earned may eventually find its way into charitable purposes while laudable, is not a redeeming feature it will be only the net profit after the impact of income taxes that will be so available.

The decision in The Pas is incorrect, in our view, and it appears that Revenue Canada has admitted as much: it currently treats the "all the resources" test as merely the direct complement of the rule prohibiting the payment of income to owners or members. A better understanding of the problem, in our submission, is that there is nothing in the "all the resources" test or, to use our phrase, the "exclusively charitable" test, that obliges a
charity to pursue its charitable purpose in a *particular way*. Investing donations to generate income for future charitable expenditure is just as valid a way of pursuing charity as spending the donations upon receipt.

The *Church of Christ* decision, on the other hand, is probably correct. As in *The Pas*, the purpose of the investment activity in *Church of Christ* was undoubtedly to raise money for the relevant charitable purpose. The distinction between the two cases lies, however, at the level of the form of the activity, not its ultimate purpose. As the Board in *Church of Christ* pointed out, the investment activity there was so extensive, it had become a business in itself, not a mere means or way of doing charity.

c. The Non-arm's Length Investments of Private Foundations

The Act regulates the non-arm's length investments of only *private* foundations. These investments are regulated, not prohibited. The Act requires that the non-arm's length investment itself be valued at the greater of its cost amount and its fair market value, and that this deemed value be the value used in the calculation of one component of the disbursement quota of the private foundations. The effect of this rule is to ensure that the foundation and the non-arm's length invested cannot manipulate the valuation of the investment to reduce the private foundation's disbursement quota. Further, to help ensure that the private foundation is actually earning a fair rate of return on the investment, the Act imposes a tax on the non-arm's length invested equal to the difference between a deemed rate of return and the actual return.

"Non-qualified investment" is the specific term used to identify the offending investments, and it is defined in very specific and broadly inclusive terms as follows:

(a) a debt (other than a pledge or undertaking to make a gift) owing to the foundation by

(i) a person (other than an excluded corporation)

(A) who is a member, shareholder, trustee, settlor, officer, official or director of the foundation,

(B) who has, or is a member of a group of persons who do not deal with each other at arm's length who have, contributed more than 50% of the capital of the foundation, or

(C) who does not deal at arm's length with any person described in clause (A) or (B), or

(ii) a corporation (other than an excluded corporation) controlled by the foundation, by any person or group of persons referred to in subparagraph (i), by the foundation and any other private foundation with which it does not deal at arm's length or by any combination thereof;
(b) a share of a class of the capital stock of a corporation (other than an excluded corporation) referred to in paragraph (a) held by the foundation (other than a share listed on a prescribed stock exchange or a share that would be a qualifying share within the meaning assigned by subsection 192(6) if that subsection were read without reference to the expression "issued after May 22, 1985 and before 1987"), and

(c) a right held by the foundation to acquire a share referred to in paragraph (b).

"Excluded corporation" is defined to include a corporation whose property is used exclusively by the charity for its charitable purposes and, importantly, a corporation all the shares of which are held by the foundation.40

The Act imposes no penalty on the private foundation itself where the investment does not achieve the specified rate of return. Nor, in the case where shares of a corporation are owned by the foundation, does the Act regulate in any way the affairs of the underlying business. This is in marked contrast to the American rules, as we shall see.41 It would be possible under these provisions for a private foundation to own all the shares of a (formerly) family business with the members of the family working for and contracting with the business, earning substantial incomes in the process. The only constraint on this type of arrangement is the disbursement quota. However, since the quota is calculated as a function of asset value that is, the value of the shares and since the value of the shares is determined according to the greater of their cost amount and their fair market value, the excessive salaries, to the extent that they depress earnings, may also result in a lower fair market value.

(iii) Political Activities

Charitable foundations and organizations are permitted to engage in political activities under the *Income Tax Act*, but only to a very limited extent. Their right to do so is circumscribed by two sets of rules, one involving a matter of definition, the other relating to compliance with the general expenditure limits established under the disbursement quota.

*a."Ancillary and Incidental"

It will be recalled that "charitable foundation" is defined such that any entity claiming that status must be constituted and operated exclusively for charitable purposes. This means, among other things, that none of a foundation's principal objects or activities can be political. The Act provides, however, that if the foundation devotes "substantially all" its resources to charitable purposes, and only a part of its resources are devoted to non-partisan political activities of an "ancillary and incidental" nature, then the latter expenditures will be considered to be charitable for the purpose of the definition of "charitable foundation". Similarly, although charitable organizations are defined as organizations that devote "all" their resources to charitable activity, if substantially all the
resources are so devoted and only a part are devoted to non-partisan political activities of an "ancillary and incidental" nature, the latter expenditures are considered to be expenditures on charitable activities for the purpose of the definition of "charitable organization." \(^{42}\)

One important element of this rule is the condition which requires that substantially all the resources of the charity be devoted to strictly charitable activities or purposes. In contradistinction to some aspects of the disbursement rule to be discussed shortly, "resources" here refers to all the resources financial, physical, and human owned by or available to the charity, not just those resulting from receipted donations. Revenue Canada defines "substantially all" as equal to ninety percent or more of the resources. \(^{43}\)

The arbitrary ninety percent limit aside, this rule is neither novel nor objectionable. In our view, it is an accurate articulation of the common-law rule on the permissible political activity of charities. \(^{44}\) It is also perfectly in accord with the conclusions reached in chapter 6 in the discussion on the real definition of charity. It simply recognizes, at the level of general principal, the applicability of a means/end distinction in the domain of the political involvements of charities: only political activities that are ancillary and incidental are permissible because only those activities are a means of doing charity.

A modest improvement of the formulation of this rule would distinguish between ancillary political activities and incidental political activities, not in order to treat them differently, but merely to recognize a distinction, however slight. We would suggest that the rule is better phrased if it permits political activity that is ancillary or incidental. Political activity is "ancillary" to the charitable project when it is supportive of it or advances it in an indirect way. An example might be a workshop run by social welfare charities at which government policy is unanimously criticized and to which the media are invited. Political activity is "incidental" to the charitable project when it is a mere byproduct of it. The same social welfare charities might organize a fund raising march. The spectacle of the march would certainly have political ramifications. \(^{45}\)

The application of this rule can be quite difficult, especially in marginal cases. Many charities find the rule to be too vague to be of much help and many of them feel that Revenue Canada's application of it in recent years has been somewhat heavy handed. In part to respond to the call for clearer guidelines, Revenue Canada issued Information Circular 87-1 in 1987. Information Circular 87-1 sets out in more detail Revenue Canada's views on the permissible political activities of a charity. Interestingly, Information Circular 87-1 avoids defining political activity explicitly, perhaps because of Revenue Canada's reticence on this issue given the very negative reaction to its first attempt at a circular in 1978. \(^{46}\) Nonetheless, it is clear through the examples in the circular that Revenue Canada defines as political any act intended to influence government policy directly or indirectly (by affecting public opinion). We think this is correct and that Revenue Canada should not be reticent in setting this out.

The circular develops, nearly correctly in our view, a threefold classification of political, or apparently political, activities. First, there are partisan activities. These could never be
purely instrumental to effecting a charitable goal and therefore are expressly excluded
from the permissible political activities of charities.\textsuperscript{47} The only substantive change we
would make to Revenue Canada's scheme would be to include in this category other
types of political activity such as interest group politics which are also not merely
ancillary or incidental to charitable goals. Second, there are activities that involve
conversing with government on matters of direct or indirect concern to the charity. These
are not political activities, properly understood, although they have some of the same
trappings as political activity, such as the fact that the government is on the receiving end
of some communication of relevance to the formulation of public policy. In this type of
activity, the purpose of the communication is to permit a "full and reasoned" discussion
of an issue, rather than to "influence public opinion" or change public policy. These
activities are not restricted in any way. Third is the intermediate class of activities that are
"ancillary and incidental" to the activities or purposes of the charity. Considered in
isolation, these activities are political in form and content, but considered in their whole
context, they are merely a means of carrying on charitable activity or a merely a
byproduct of charitable activity.\textsuperscript{48} Examples, with which we fully concur, are set out in
the circular as follows:

- (a) publications, conferences, workshops and other forms of communication which are produced,
published, presented or distributed by a charity primarily in order to sway public opinion on
political issues and matters of public policy;
- (b) advertisements in newspapers, magazines or on television or radio to the extent that they are
designed to attract interest in, or gain support for, a charity's position on political issues and
matters of public policy;
- (c) public meetings or lawful demonstrations that are organized to publicize and gain support for a
charity's point of view on matters of public policy and political issues; and
- (d) mail campaigna request by a charity to its members or the public to forward letters or other
written communications to the media and government expressing support for the charity's views
on political issues and matters of public policy.

The circular requires a charity to keep a record of its permissible political activities and
of its expenditures thereon. Where an allocation between charitable and permissible
political activity must be made, the circular requires that the allocation be "reasonable".
The T3010 annual disclosure form, however, requires very little disclosure on political
activities; it asks for only the total amount spent on political activities. We understand
that Revenue Canada is currently redesigning the T3010 form to require more
information on political activities.\textsuperscript{49}

\textit{b. The Disbursement Quota}

The disbursement regimes imposed on charities under the \textit{Income Tax Act} also result in
significant restrictions on the political activities of charities. The Act expressly provides
that an amount spent on \textit{any} political activities may not count as an expenditure on
charitable activities or as a gift to a qualified donee for the purposes of satisfying the
quotas.\textsuperscript{50} Because the relevant quotas are quite high, there is not much room in the
budgets of most charities for permissible political expenses. However, since, in the case of organizations, the quota is calculated as a percentage of only receipted donations, the expenditure of income from other sources on political activity is not restricted by this rule.

(iv) Borrowing Activities

Foundations are severely restricted in the types of debt obligations they are permitted to incur. Debts other than debts for current operating expenses, debts incurred in connection with the purchase and sale of investments, and debts incurred in the course of administering charitable activities, are prohibited. There is no such restriction on organizations. The object of this rule is to limit the permissible risks undertaken by foundations.

Charitable gift annuities are a common fundraising device used by many well-established charitable organizations, mostly religious in purpose. Annuities are debt obligations. In a gift annuity there is also a significant upfront gift element in the initial purchase price. Hence, their attraction for charities. Only charitable organizations may enter into these obligations. Foundations are prohibited from doing so by the rule restricting permissible debt obligations.

(v) Granting Activities

The assumption of the regime is that foundations are mainly funding agencies and organizations are mainly operating agencies. To ensure that making grants to appropriate recipients does not run afoul of the "exclusively charitable" rule, several deeming provisions are used.

For foundations, "charitable purposes" is defined to include the disbursement of funds to qualified donees. This definition thus makes clear that funding the charitable work of other specified entities is itself a charitable act.

For organizations, there are three relevant deeming rules:

(1) Reorganizations: Section 149.1(10) deems gifts of capital by a charitable organization to a qualified donee to be a devotion of the organization's resources to charitable activity. This provision, thus, permits a charitable organization to reorganize itself or cease operations altogether by transferring its capital endowment to a "qualified donee". Without this deeming provision, it might be argued that such a reorganization is contrary to the "exclusively charitable" provision.

(2) Limited granting: Section 149.1(6)(b) deems gifts of up to fifty percent of an organization's "income" to qualified donees to be a devotion of the organization's resources to charitable activities. Such gifts are therefore permitted. This provision thus permits organizations to engage in some grant making.
(3) Coordination of activities of associated charities: Section 149.1(6)(c) deems gifts by an organization of up to one hundred percent of its income to an "associated charity" to be a devotion of its resources to its charitable activities. Such gifts are therefore permitted. This provision thus permits cooperation among charities belonging to an associated group of charities.

Grants failing to comply with any of these restrictions would give rise to a right in the Minister to revoke the organization's registration. In all likelihood, however, the Minister would simply reclassify the charity as a foundation, in which case a stricter disbursement rule would apply.

(vi) International Charity

It will be recalled that, by definition, a registered charity must be resident in Canada. This provision restricts significantly the capacity of Canadians and Canadian charities to do charity abroad. There are, in fact, three ways under the Act for a registered charity to do charitable work abroad.

First, a registered charity may itself carry on its own charitable activities abroad. Practically speaking, this option is open to only a few large and well-established charities, such as relief organizations, which have the financial and administrative wherewithal to send their people abroad.

Second, under sections 110.1(1)(a) and 118.1(1), deductions and credits are allowed for gifts to the United Nations or any of its agencies, to prescribed foreign universities, and to charitable organizations outside Canada to which the Canadian government has made a recent gift. These provisions thus also permit a limited amount of international charitable activity, but the list of eligible donees is very restricted.

Third, a Canadian charity can enter an agency relationship with an entity, usually a foreign charity, which will do the actual charitable work abroad. Information Circular 80-10R establishes a list of conditions that must be satisfied to ensure a valid agency relationship. Essentially, these conditions require that the Canadian charity maintain control over the expenditure of the charity's funds and remain in a position to account for the expenditures fully. Internationally oriented Canadian charities, therefore, are obliged to be creative in the structuring of their international endeavours so that they are able to control and account for the charitable work done as their own, on the one hand, while coping with local restrictions and remaining sensitive to local sensibilities, on the other.

(d) Disbursement Quotas

The disbursement quota was first introduced into the Act in the major reform of 1977. The chief function of the quota is to force charities to do charitable work, or lose their status and its associated privileges. The quota regimes are different for each of the three categories of charity. They are arbitrary in the sense that it is difficult to justify the particular lines drawn, and they do not differentiate among types of charities beyond the
three main types established in the Act. They are considered by most commentators, however, to be reasonable in their requirements, and they do provide an easily administered quantitative measure of whether an organization is exclusively charitable. It is best, then, to understand them as convenient, but partial surrogates for elements of the "exclusively charitable" standard.

The quota is satisfied by a charity if it disburses the required amount on its charitable activities or on to qualified donees. Some definition of charitable activities is therefore required. The Act does not provide a detailed definition of this term, but as we have seen, certain provisions of the Act do attempt to clarify the status, in this regard, of such things as political activities and grant-making activities of organizations. Generally speaking, it is accepted that the direct administrative costs of functioning as a charity clearly qualify, but fundraising costs and legal and accounting costs clearly do not.60

(i) The Quota for Charitable Organizations

The quota for charitable organizations is the least onerous of the three. A charitable organization must spend at least eighty percent of the previous year's receipted donations on its charitable activities or on gifts to "qualified donees".61 Eighty percent of receipted donations, a somewhat arbitrary figure, represents the government's view as to how much of a charitable organization's revenue should be taken up by non-charitable expenses, such as the cost of administration and the cost of fundraising and political activities. The fact that only receipted gifts are included means that gifts from tax-exempt organizations (governments and nonprofits) and non-residents and unreceipted gifts do not form part of the pool of gifts required to be disbursed. A gift from a donor who did not require a tax receipt would therefore be excluded. This might happen where the donor had already reached the deduction limit. Certain receipted gifts are also expressly excepted from the total against which the 80% is calculated in order to permit capital endowments to be formed. These exceptions are gifts by way of bequest or inheritance and gifts subject to a trust to be held for at least ten years.62 Gifts from another registered charity are also excepted for the same reason.63 The point of these exceptions is to permit charitable organizations to build up capital endowments with gifts intended for that purpose.

This disbursement quota regime is quite liberal since all revenue received by an organization other than receipted gifts (investments, related businesses, fundraising events, and non-receipted gifts) is exempt and therefore available for other activities, such as fundraising and, to the limited extent defined above, political activities. Notwithstanding the relative leniency of these rules, there may be occasions where the quota is not achievable. In these situations, the charitable organization may apply to the Minister to obtain a discretionary exemption for the shortfall.64 Likewise the Minister has a discretion to exempt charitable organizations from their full disbursement quota if the shortfall is to be accumulated for a specified capital purpose approved by the Minister.65 There is also provision in the Act for carrying forward for five years and back for one any disbursement quota excess.66

(ii) The Quota for Public Foundations
The quota calculation for a public foundation is considerably more complex. Like the quota for a charitable organization, one of its objectives is to ensure that money donated by the public to charity is actually employed, within a short space of time, in charitable work. Another objective of the quota rules applicable to public foundations is to control against the undue accumulation of wealth by charitable entities.

The quota is an aggregate of a number of distinct elements. The first element is exactly the same as the quota for charitable organizations, that is, eighty percent of the receipted donations of the preceding year, save those received as capital gifts or from other charities. The second element is eighty percent of all gifts from registered charities in the preceding year, save those received as "specified gifts". This provision means that the only gifts received from registered charities to be treated by the Act as gifts of capital are those specified by the donor charity as such. If the donating charity has invoked the specified gift designation, it may not count the gift as an expenditure contributing to the satisfaction of its own disbursement requirement. The third element is the most complex. We will not go into all the details, but will merely indicate the essentials of the provision. In effect, the third element obliges a public foundation to disburse 4.5 percent of the average total value of all its investment properties, as calculated in a specified way, owned during the preceding twenty-four month period. The expectation underlying this requirement is that the foundation should be earning a real rate of return on its investments close to or a bit more than 4.5 percent, and thus the disbursement quota is calculated so that there is little opportunity for capital growth due to investment earnings over the long term.67

The provisions mentioned above in the discussion of charitable organizations, which provide for exceptions to the disbursement quota at the discretion of the Minister and allow the charity to carry forward and back disbursement quota excesses, apply also to public foundations.

(iii) The Quota for Private Foundations

The disbursement quota for private foundations is the same as that for public foundations in respect of the first and third elements. The second element is different. Whereas a public foundation is obliged to disburse only eighty percent of the value of its non-specified gifts from registered charities, a private foundation must disburse one hundred percent. This is due to the fact that there probably is no good reason why a registered charity should be making a donation to a private foundation, so if such a donation is made, all of it must be disbursed. The relieving rules are the same as well.

(iv) Quota Shopping and Disbursement Avoidance

The Minister has the power to designate a charity as being registered in any one of three classifications.68 This power is used to prevent a charity from avoiding more onerous disbursement quotas by manipulating the classification system.
Where one charity makes a gift to another with the intention of unduly delaying expenditures of amounts on charitable activities, the Minister may revoke the registration of the gifting charity and, if culpable, the receiving charity. This is an important, if virtually unenforceable anti-avoidance provision. It is required principally because organizations are not obliged to disburse any portion of their (necessarily) unreceipted gifts from other charities.

(e) Donations

Receipted donations by individuals to registered charities of up to twenty percent of their income qualify for a federal tax credit equal to seventeen percent on the first $200 donated and twenty-nine percent on the remainder. Special provision is made for gifts to American charities by Canadians resident in Canada, but working in the United States, to be treated in the same way. The Canada-United States Income Tax Convention (1980) provides that Canadians with U.S. source income may claim a tax credit in Canada for donations to American charities against taxes owing on that income, for up to twenty percent thereof.

Individuals may also claim a tax credit for gifts to Her Majesty in the right of Canada or the provinces, but without a limit on the amount of income that can be donated for the purposes of the credit. Gifts of Canadian cultural property and ecologically sensitive land to certain designated institutions are treated in a similarly favorable way.

Gifts in kind of capital property to charity are also given favorable tax treatment in respect of any capital gains that might arise because of the disposition by gift. The Act permits the donor to determine the deemed proceeds of disposition at an amount between the adjusted cost base and the fair market value. This flexibility allows the taxpayer to minimize the tax liability that might arise because of the gift.

(f) Compliance

(i) The Annual Disclosure Requirement

Charities are required under the Act to file public information returns and private information returns on an annual basis, within six months of the end of their fiscal year. The public information return is contained in Revenue Canada's Form T3010. It requires fairly detailed information on a charity's receipts and disbursements, its assets and liabilities, the remuneration paid to its employees, the charity's purposes and activities, the names and addresses of its executive officers, and its gifts to qualified donees. In addition, the form contains several schedules requiring information relating to the nature of the charity's operations, its accumulations of property, and the actual calculation of its disbursement quota. With the annual submission of the form, the charity is required also to submit its annual financial statements, not necessarily audited. The information submitted in the schedules and the financial statements are not available to the public.
Charities are also obliged to maintain proper records and books of account, including duplicates of every receipt issued. The obligation with respect to the contents of the records is quite general: section 230(2)(a) requires "information in such form as will enable the Minister to determine whether there are any grounds for revocation...".

(ii) Penalties

The principal sanction under the Act is loss of registered status. This sanction is set out in section 168(1) and is applicable to the list of eight events, set out above in section 2 (b) of this chapter. Essentially, breach of any of the rules governing charities constitutes grounds for revocation of registration. There is, with one minor exception, no provision anywhere in the Act for any sanctions less severe than this. 78

Besides loss of registered status, the Act provides for the assessment of penalty taxes in certain specified situations.

The Act requires a charity which loses its registered status to wind down its operations within a year of its deregistration. 79 If it does not, a penalty tax is assessed against the charity that is equal to one hundred percent of the value of the charity's assets, calculated 120 days prior to Revenue Canada's notice of intention to revoke registration, less the value of any assets transferred to qualified donees, the amounts expended on charitable activities, and the amounts used to repay bona fide debts during the year. If a deregistered charity is not able to wind itself down within a year, Revenue Canada, simply takes its assets. The one hundred percent tax ensures that none of the charity's assets go to non-charitable purposes, but perhaps not in a way that is in compliance with provincial law, since the assets go to Revenue Canada, not to another charity cy-près. This penalty tax complements a Revenue Canada requirement that the charity's constituting document provide that the assets remaining at the time of dissolution be distributed to registered charities, or other qualified donees. Section 188(2) makes the obligation to pay the tax joint and several for any illegitimate recipient of the charity's property, to the extent of the illegitimate receipt. 80

The penalty tax technique is also used to discourage foundations from escaping their disbursement quota requirements by transferring their property to charitable organizations. 81 It will be recalled that the quota regime obliges foundations to disburse 4.5 percent of the total value of their investment assets annually, as calculated by a certain formula. The penalty tax under discussion discourages attempts to escape this obligation through gifts to charitable organizations whose disbursement quota does not include a requirement to disburse a percentage of investment assets. For the tax to apply, the foundation must have transferred more than fifty percent of its assets to a charitable organization, and it must have been one of the main purposes of this transfer must have been to effect a reduction in the foundation's disbursement quota. The tax is equal to twenty-five percent of the value of the assets transferred and the obligation to pay it is joint and several where the recipient charity is acting in concert. To our knowledge, this penalty tax provision has never been applied.
A third penalty tax provision applies in situations where a private foundation makes a non-qualified investment. The penalty tax is assessed against the investee and is equal to the amount, if any, by which the rate of interest prescribed under the Act for late tax payments and refunds exceeds the actual rate of return on the loan or share. The point of the tax, thus, is to make sure that any investments by private foundations in related entities or loans to related persons do in fact earn a reasonable rate of return.

Administration

The Commission itself has not conducted a study of the efficiency of the administration of this regime, having neither the resources nor jurisdiction to do so. The Auditor General's report for 1990 does, however, contain a full review of Revenue Canada's performance in the administration and enforcement of these rules. We list some of those conclusions here, together with some statistics we have gathered on revocations of registrations between 1985 and 1990. These statistics give some indication of the level of enforcement activity over this five-year period.

The objective of the 1990 audit "was to determine if the legislative and administrative rules and procedures applied have been sufficient to secure an effective check on the right of charities to continue to qualify for registration; on the validity of income tax deduction or credits...; and on the reliability of information provided...through the [T3010] returns". The overall conclusion of the report was that the "rules and procedures do not provide effective checks" for any of these three areas of regulation. We look briefly at the main points in the report.

First, the report noted that thirty-one percent of the 63,000 charities do not file their returns on time, but that Revenue Canada had never applied any of the administrative penalties (fines) available and had acted to revoke registrations only when the failure to file Form T3010 continued for two consecutive years. The report concluded:

The Department of National Revenue, Taxation should ensure that administrative rules and procedures provide an incentive for registered charities to file the annual Registered Charity Information and Public Information Return on Time.

Second, the report found that Revenue Canada did not have in place any procedure to follow up on revocations to determine whether the charity had ceased issuing receipts and whether it was liable to pay the revocation tax. The report concluded:

The Department of National Revenue, Taxation should develop administrative rules and procedures to ensure that charities whose registrations have been revoked do not continue to issue receipts that may be used for tax purposes, and that they have paid any required revocation tax.

Third, the report noted that random audits are the only way to confirm compliance with rules. It observed that the level of audit coverage equaled .5 percent of all registered charities. The results of the audits for 1987-1990 are set out in the following table.
The report found nothing wrong with the audit rate or the audit procedures.

Fourth, the report concluded that there are insufficient incentives in the Act to encourage charities to comply. It argued for less onerous sanctions than revocation of registration, such as a tax on unrelated business profits. It concluded with the following recommendation:

To ensure that registered charities have an incentive to comply with the Income Tax Act the legislation should be reviewed, appropriate action should be recommended by the Departments of Finance and National Revenue, Taxation to their Ministers, and Parliament should be informed. The Department of National Revenue should also ensure that its administrative rules and procedures provide an incentive for registered charities to comply with the Income Tax Act.

Fifth, the report noted that in 1988 more than 20 million donation receipts were filed with income tax returns by 4.9 million taxpayers, for a total of over $2.6 billion in donations. The report argued that there was no appropriate validation procedure for the receipts and recommended as follows:

The Department of National Revenue, Taxation should establish an appropriate audit program to determine the validity of charitable deductions and credits claimed by taxpayers.

b. Revocation of Registrations

The information on revocation contained in the following two tables was obtained from Revenue Canada.

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SOURCE: Department of National Revenue, Taxation

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<tr>
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<td>Total</td>
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* "Delinquent" refers to organizations that have not filed T3010 Returns.

3. THE TAX TREATMENT OF CHARITABLE ORGANIZATIONS IN THE UNITED STATES

(a) History

Charitable, religious, and educational organizations in the United have been entitled to tax-exempt treatment since the enactment of the Revenue Act of 1894.92 The tax deduction for charitable organizations was first enacted in 1917 and has continued ever since.93 A deduction for contributions by corporate donors was enacted in 1935.

The extension of these privileges to charitable organizations and their donors was accompanied by a series of enactments designed to restrict and regulate their activities. Private inurement to insiders was prohibited early, in 1909. The political activities of charitable organizations have been restricted since 1934.94 The unrelated business income of tax-exempt organizations has been subject to a separate tax since 1950.
There was a major overhaul of the treatment of tax-exempt organizations in 1969 with the enactment of the *Tax Reform Act of 1969*. Most of the provisions of this legislation were aimed at regulating the activities of private foundations. These foundations were the principal target largely in consequence of a climate of opinion which depicted their activities in a negative light. The *Tax Reform Act of 1969*, however, also put in place a number of other reforms. Principal among these was a provision tightening up the regime governing tax deductible donations by making those deductions conditional on the prior registration of the charity, and provisions extending the applicability of the tax on unrelated business income.

Since 1969, there have been a number of enactments the *Tax Reform Act of 1976*, the *Economic Recovery Tax Act of 1981*, the *Tax Equity and Fiscal Responsibility Act of 1982*, the *Deficit Reduction Act of 1984*, and the *Comprehensive Tax Reform Act of 1986*. The 1976 statute established optional rules on the permissible limits for lobbying by public charities and also allowed for the registration of organizations that sponsor amateur athletic competitions. The Acts subsequent to 1976, for the most part, eased slightly the limitations on tax-exempt organizations, in accordance with the prevailing "Reaganite" political philosophy of the time.

(b) The Current Regime

(i) Overview

a. The Exemption

Our discussion focuses on the organizations identified in section 501(c)(3) of the *Internal Revenue Code*. Section 501 provides for an exemption from taxation for charities as follows:

501.(a) An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section or 503.

....

(c) The following organizations are referred to in subsection (a):

....

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of
In order to qualify for the exemption, a qualifying organization must give notice to the Secretary of the Treasury that it is applying for recognition of such status, and must obtain an exemption certificate. Churches, "their integrated auxiliaries, conventions or associations", and organizations (other than private foundations) with gross receipts of less than $5,000 per year are exempted from this registration requirement, the former for constitutional reasons.

Section 501(c)(3) organizations may be organized in the form of corporations, trusts, and unincorporated associations without attracting significant variation in treatment under the Internal Revenue Code.

b. Classifications

One of the significant 1969 reforms was the classification of charitable organizations into two main groups, private foundations and public charities. All charities are deemed to be the former, and therefore deemed to be subject to a much stricter regime of regulation, unless they establish otherwise by application to the Secretary. "Public charity" is not itself a defined term under the statute. The members of this class, rather, are identified in section 509(a) which provides that the following types of organization (among others) are not private foundations:

(i) churches, educational institutions, hospitals and medical research organizations, organizations which receive a "substantial part" of their income from government or from the contributions from the public;

(ii) organizations which receive more than one-third of their gross support from any combination of public or government gifts and contributions, membership fees, and receipts from activities which do not constitute unrelated business activities and which do not receive more than one-third of their gross support from investments;

(iii) organizations controlled by organizations described in (i) and (ii) and operated exclusively for their benefit.

The rationale for the inclusion of these types of organizations in the less regulated "public charity" category was the belief that these types of organizations already had considerable public accountability and responsiveness built into their operations, both through their reliance on the public or the government for a substantial part of their funding and by virtue of the fact that, because of the nature of their activities, they were generally operating for the direct benefit of the public. Among the many advantages of being classified in this group are the availability of a higher deduction limit for individual donations, more favourable treatment for donors of gifts of appreciated capital property, exemption from numerous record keeping and public filing requirements, exemptions from certain excise taxes such as the excise tax on investment income to which private foundations are subject, and the absence of any personal liability on the part of directors and trustees of these organizations for any of the many excise taxes assessable against
certain proscribed activities of private foundations. They are nonetheless subject to annual filing requirements and the information which is filed is available to the public.

The classification "private foundation" is itself further divided into two sub-classes, operating and non-operating, with the former being subject to a slightly less strict regime. The former is defined in section 4942(j)(2) to include private foundations that use substantially all of their net income in the active conduct of their own charitable activities, and that either devote substantially more than half (sixty-five percent) of their assets to the active conduct of their charitable activities or use more than two-thirds of their investment return in the active conduct of their charitable activities, or that do not derive more than half their support from the return on their investments. The advantages of being classified as an operating foundation include a less onerous minimum annual distribution requirement and a higher donation deductibility limit for donors. This intermediate status was thought to be justified by the greater degree of public accountability and public service of these types of organizations. The status is designed for institutions such as private museums and private art galleries.

(ii) The Donation Deduction

The deduction for contributions charitable organizations is set out in section 170 of the Internal Revenue Code. Limits are established in section (b). Individuals who contribute to public charities and operating foundations may deduct up to fifty percent of their contribution base, individuals who contribute to private non-operating charities may deduct up to thirty percent of their contribution base. Corporations may deduct up to only ten percent of their contribution base, in either case, and corporate donations are deductible only to the extent that the recipient organization uses the donation in the United States. There is provision in both cases (individual and corporate) to carry forward five years of excess donations.

(iii) Regulation of Charities Generally: Section 501(c)(3) of the Internal Revenue Code

Section 501(c)(3) establishes the general regime of regulation applicable to all organizations wanting to qualify for the exemption and the deduction privileges available to charities. More restrictive rules, to be discussed immediately below, apply to private foundations. Section 501(c)(3) sets out the following conditions and modalities.

First, the organization must be "explicitly organized for exclusively charitable purposes". This means that "the provisions of [its] charter or governing instrument ...(a) limit its purposes to one or more exempt purposes and (b) do not expressly empower it to engage, other than as a substantial part of its activities, in activities that in themselves are not in furtherance of one or more exempt purposes".

Second, the assets of the organization must be "permanently dedicated to exempt purposes". This means that the assets must remain dedicated to those exempt purposes...
when the organization is dissolved, either by virtue of specific language in the
constituting instrument or by virtue of the applicable state's doctrine of cy-près.

Third, the organization must be operated "exclusively" for exempt purposes. This is
interpreted by regulation to mean that the organization is operated "primarily" for exempt
purposes and does not devote a "substantial" part of its activities to non-exempt
purposes.109 There is no definition of "primarily" and "substantial" in the regulations
adopted by the Treasury Department under the Internal Revenue Code.

Among the many significant activities of charities partially regulated by this "purpose"
test are their commercial activities. The commercial activities of exempt organizations
are prima facie permitted by this test, provided the primary purpose of the organization
remains its exempt purpose. An early United States Supreme Court decision, Trinidad v.
Segrada Orden,110 and a subsequent Second Circuit Court of Appeal decision, Roche's
Beach Inc. v. Commissioner,111 both held that the commercial activities of an exempt
organization did not contaminate its status, provided only that the purpose of the
commercial activity was to raise funds for the exempt purpose. This is the so-called
"destination of funds" test.112 Despite this early and strong support for it, its current status
under U.S. law remains unclear, since there is a substantial body of case law which does
not seem to follow it.113 As well, as a result of the enactment by Congress of the tax on
the unrelated business income of exempt organizations in 1950, the relevance of the
destination test has been considerably diminished. For separate entities established to
operate commercial enterprises, the profits of which go exclusively to a tax-exempt
charitable parent, the 1950 reform resulted in what is now section of the Internal Revenue
Code. Section 502 makes the following provision for what are called "feeder
organizations":

(a) An organization operated for the primary purpose of carrying on a trade or business
for profit shall not be exempt from taxation under Section on the ground that all of its
profit are payable to one or more organizations exempt from taxation under Section 501.

There are a number of exceptions to the application of this rule. It does not apply where
the trade or business is one in which "substantially all the work ... is performed for the
organization without compensation" or one in which the "business" is the selling of
merchandise, "substantially all of which has been received by the organization as
gifts".114

Fourth, the exempt purposes listed in section 501(c)(3) are: religious, charitable,
scientific, testing for public safety, literary, educational, and prevention of cruelty to
children or animals. There is an extensive jurisprudence and there are lengthy regulations
interpreting these terms.115 That jurisprudence is based on the same classic precedents as
apply in English and Canadian law, including the venerable Statute of Elizabeth,116
although it is considerably richer than the comparable jurisprudence in Canada.

Fifth, no part of the net earnings of the organization may "inure to the benefit of any
private shareholder or individual".117 This provision prohibits, among other things,
unreasonable non-arm's length transactions between the exempt organization and any persons close to it. The proscribed transactions include asset sales, property rentals, and loans to or from the organizations.

Sixth, political activity carrying on propaganda or attempting to influence legislation is only permitted if it does not constitute a "substantial part of the activities" of the organization. Partisan political activities are prohibited altogether. Certain public charities, including certain educational institutions, hospitals, and medical research organizations but not including religious organizations, may elect under section 501(h) to be governed by an alternative rule that permits grass-roots expenditures, defined as expenditures for the purpose of influencing legislation through an attempt to affect public opinion, and lobbying expenditures, defined as expenditures for the purpose of influencing legislation, within certain precisely specified monetary limits. Those limits are established in section and section 501(h). Section 4911 also provides a detailed list of activities considered not to be lobbying and therefore restriction free. Expenditures in excess of the prescribed amounts are subject to a twenty-five percent tax on the excess expenditure. Organizations which exceed the expenditure limits can lose their tax-exempt status.

Section establishes excise taxes on prohibited partisan political expenditures. It imposes an initial tax of ten percent of the amount expended by the organization and a tax of 2.5 percent on culpable management. It also provides that if the expenditure is not corrected within the taxable period, the organization is taxed on one hundred percent of the expenditure, and culpable management is taxed on sixty percent of the expenditure. There is provision for the abatement of the first tier of tax if the organization's political expenditure was not "willful and flagrant".

Challenges to the constitutionality of the restrictions have failed.

(iv) The Treatment of Business Income of Charities

As stated above, an organization may not have as one of its primary purposes the carrying on of a business and it may not have as one of its powers the power to carry on a business for more than an insubstantial part of its activities. Where an organization has as its primary purpose the carrying on of a trade or business for profit, it will be denied the section 501(c)(3) exemption outright. At best, it will be classified as a "feeder" organization under section 502.

The 1950 changes to the Internal Revenue Code, as mentioned above, also introduced a tax on the unrelated business income of tax-exempt organizations. The principal justification for the tax on unrelated business income advanced at the time of its adoption, and still advanced by its supporters today, is the fear of unfair competition from tax-exempt organizations. The tax is imposed under section on the "unrelated business taxable income" of the exempt organization. This, in turn, is defined in section 512 as,
"Unrelated trade or business" is also defined. Section states that "an unrelated business" means,

\[ \text{a trade or business the conduct of which is not substantially related ... to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis of its exemption.} \]

Certain activities are excepted from this broad definition, including business activities performed for the organization without compensation; business activities carried on by the organization primarily for the convenience of its members, students, patients, officers, or employees; and business activities relating to the sale of donated merchandise, the conduct of certain kinds of public entertainment and bingo games, and certain hospital services. Further, section 513 permits certain modifications in the computation of the unrelated business income of tax-exempt organizations. Among these is a provision for the exclusion of passive income, such as dividends, interest payments, royalties, and rents. However, there are complex rules that require the inclusion in income of rent received from certain "debt financed property". The object of this latter provision is to prevent the use of sale and lease back arrangements involving exempt organizations to "launder" otherwise taxable income as rental expenses paid to the purchasing tax-exempt organization.

As severe as the unrelated business tax is, there have been recent suggestions that it is insufficiently broad in its coverage. A report of a subcommittee of the House Ways and Means Committee has suggested recently that the substantially related test should be replaced by a directly related test, and that certain income, such as income from gift shops, bookstores, health and fitness centres, travel and tour services, cafeterias in colleges and universities, and other adjunct food sales, should also be subject to the unrelated business tax.

\( \text{(v) The Treatment of Private Foundations} \)

\[ a. \text{Record-Keeping and Returns} \]

The 1969 reform increased the accountability requirements of private foundations considerably. The basic approach of the statute is to require private foundations to keep detailed records of certain proscribed transactions and to report on these transactions on an annual basis. The obligation to report the transactions is supported by the imposition of a relatively low tax on the proscribed transaction. If, once discovered and reported, the offending transaction is not corrected, the private foundation can be subject to a second and a third tier of taxes, and if the transaction was willful and flagrant, the foundation's charitable status is revoked. We will examine each of the proscribed transactions and the tiered tax applicable to them shortly. At this point, we examine the record-keeping and reporting requirements which are necessary to make this system work.
Private foundations are required to identify "disqualified persons" and to keep detailed records in respect of these persons. "Disqualified persons" is defined in detail in section 4946 to include the following: (a) substantial contributor to the foundation; (b) foundation manager; (c) more than twenty percent owner of a corporation, partnership, beneficial interest in a trust, or unincorporated enterprise which is a substantial contributor to the foundation; (d) family member of any of the above; (e) corporation in which any of the above own more than thirty-five percent; and (f) certain purposes, certain government officials. Records in respect of the names and addresses of these people must be kept in order to guard against innocent violations of the various proscribed transaction rules to be discussed shortly, including in particular those rules governing "self-dealing" transactions and transactions resulting in "excessive business holdings". In the latter case, the foundation will be required to keep a record of the business holdings of "disqualified persons" in order to avoid breaches of the rule against "excessive business holdings".

There are other complex and detailed record-keeping requirements applicable to private foundations. Some of these requirements relate to the proper reporting of the foundation's income and expenses; others relate to the activities of organizations to which the foundation has made grants ("qualifying distributions"); still others relate to the lobbying and other political expenditures of private foundations.

Regardless of its size, the private foundation must file an annual tax return detailing its income from all sources for the year and its activities in the proscribed areas. Section 6033c3 also requires managers of private foundations to furnish copies of the foundation's annual return to state officials.

b. The Two Percent Tax on Investment Income

All non-operating private foundations are subject to an annual two percent excise tax on their net investment income. The object of this tax is to help defray the costs to the Department of the Treasury of administering the provisions of the Internal Revenue Code applicable to private foundations. Section 4940, which imposes the tax, establishes detailed definitions to be used in the calculation of the tax base "net investment income".

c. Related Party Transactions

Section 4941 imposes several tiers of tax on transactions involving "self-dealing" between a disqualified person and a private foundation. A tax of five percent of the amount involved in the "self-dealing" transaction is assessed against the "self-dealer" and a tax of 2.5 percent of the amount involved in the transaction is assessed against the foundation manager (up to a limit of $10,000). The term "self-dealing" is defined in detail. It includes sales, exchanges, or leasing of property, loans, the furnishing of goods and services, the payment of compensation, and the use of foundation assets. Loans by a disqualified person without interest are permitted. The expression "amount involved" is defined as the fair market value of the greater of the permitted property received by the disqualified person as a result of the transaction. If the self-dealing
transaction is not corrected (that is, undone so that it meets the highest fiduciary standards), a second tax of 200 percent is imposed on the self-dealer.

**d. Minimum Distribution Requirements**

Section 4942 imposes an initial fifteen percent tax on the "undistributed income" of a private foundation. Undistributed income is defined as the difference between "the distributable amount" and "the qualifying distributions". In turn, the former term is defined as a function of a prescribed minimum investment return which, at the present time, is equal to five percent of the net fair market value of all non-operating assets of the foundation. If the undistributed income is not distributed within one year of the subsequent taxable period, there is a second tier tax of one hundred percent of the remaining undistributed income.

These disbursement provisions thus encourage private foundations to earn at least a five percent return on their investments and to distribute all of those earnings annually. There are detailed Treasury regulations that establish the valuation procedures to be used in calculating the value of the investment subject to the five percent quota. Generally speaking, these regulations require a valuation at fair market value of all such assets. There are detailed provisions permitting "set-asides" for specific projects approved by the Secretary and for carrying forward excess qualifying distributions.

**e. Excess Business Holdings**

Section imposes a tax equal to five percent of the "excess business holdings" of a private foundation. If the holdings are not disposed of by the end of the taxable period and an additional tax of 200 percent of such "excess business holdings" is imposed, these taxes are imposed on the private foundation. The section provides a detailed definition of "excess business holdings". In essence, an excess business holding is a holding, by the private foundation and all disqualified persons, of an interest in a business that is greater than twenty percent, provided a private foundation itself owns at least two percent of the business. Excess business holdings acquired by a private foundation by gift or bequest may be held for a period of five years, without being subject to the tax on excess business holdings, thus giving the private foundation time to dispose of the excess business holding.

**f. Jeopardizing Investments**

Section 4944 imposes on private foundations and culpable managements a tax equal to five percent of the value of investments that "jeopardize the carrying out of any of [the private foundations] exempt purposes". If the jeopardizing investment is not corrected within the taxable period, there is a further tax of twenty-five percent of the amount of the investment on the private foundation and five percent of the amount of the investment on the management. This provision thus encourages prudent investment behaviour in private foundations and in their management. Program-related investments are of course not treated as jeopardizing investments.
Section 4945 provides for a ten percent tax on the foundation and a 2.5 percent tax on culpable management on the value of any amount made by the foundation to engage in proscribed lobbying activities. These proscribed activities are defined in detail in section and in treasury department regulations. The provisions of section 4945 make the tax applicable where it is the grantee of a grant from a private foundation that makes the illegitimate expenditure, in the case where the private foundation fails to exercise a degree of supervision over the recipient organization.

(vi) Conclusion

Although the statutory and regulatory regime under the United States tax law is considerably more detailed than the analogous Canadian regime, the systems are surprisingly similar in basic design and policy. In part, this is because the 1976 reforms in Canada were inspired by the Tax Reform Act of 1969. Much of the detail in the Canadian regimes continues to be specified at the level of interpretation bulletins and information circulars.

There are some interesting differences, however, especially with regard to the administrative approach of the Internal Revenue Code and its innovative use of sanctions to encourage proper behaviour. The most interesting use of sanctions is the system of tiered excise taxes. The first level of taxation serves as an encouragement to charitable organizations to disclose illegitimate activities. The second and third levels serve to deter and to stop these activities. Another point of interest is the very high level of regulation of the activities of private foundations and the corresponding lack of regulation of public charities. Although there now seems to be political momentum in the United States to increase the accountability of public charities, the American system still recognizes a fundamental distinction between the two kinds of charitable organizations. By contrast, the Canadian regulation of private foundations is much less severe and the Canadian regulation of public foundations and charitable organizations, because of the disbursement quotas, is more onerous. Still another point of interest for Canadian legislators is the Internal Revenue Code's device of defining acceptable expenditure levels on restricted activities and making these defined levels optional. This device is particularly well-suited to this sector because of the sector's inherent diversity, on the one hand, and its reliance on tax-cautious volunteers, on the other. This sort of "safe harbour" formulation of regulatory standards could be usefully employed in many areas of the regulation of charities. That recognition is also expressed in the rules defining the limits of deductibility for donations. Finally of note is the federal requirement that private foundations send their annual filings to the relevant state authorities. This is done in part out of recognition that the federal authorities have limited capacity to supervise the vast number of organizations and in part out of recognition that, to some extent, private foundations should not be able to gain much advantage from changing jurisdictions.

4 THE TAX TREATMENT OF CHARITABLE ORGANIZATIONS IN THE UNITED KINGDOM
(a) History

Charities were first granted tax-exempt status by the *Income Tax Act, 1799*. That Act established an exemption for any "corporation, fraternity or society of persons established for charitable purposes". The tax-exempt status of charities was attacked by Gladstone as an unnecessary and expensive tax expenditure. The scope of the entitlement to the exemption was considered in *Pemsel*, where it was decided that the exemption entitlement applied to the whole range of purposes that were considered to be charitable at common law. On several occasions, it has been suggested that the scope of the exemption be restricted and set out in a codified definition, on the basis that what is considered charitable for the purposes of the law of trusts should not necessarily be entitled to tax-exempt treatment and that the entitlement to the tax exemption should be more clearly stated. No such definition has ever been enacted.

(b) The Current Regime

(i) Donations

There is no standard deduction for donations to charities in the United Kingdom. Charities instead are entitled to claim from Inland Revenue a rebate of the tax paid on the donation by the donor. The donations themselves are treated as exempt income in the hands of the charity. The rebate is calculated as a fixed percentage, the "basic tax rate", of the donation. The donations that qualify for this treatment are subject to several conditions. One-time gifts by individuals or companies must be for an amount of at least £400; otherwise, gifts must be made pursuant to a covenant to make annual payments for a period of at least four years.

(ii) Exemptions

There is no general exemption from the income tax for charities in the United Kingdom, as there is in Canada and the United States. Rather, a tax exemption is specified for each of several charging provisions of the taxing statute. Thus, charities are entitled to exemption from some taxes, but not from others.  

- Exemption from Tax for Income from Land

Section 505(1)(a) of the *Income and Corporation Taxes Act, 1988* provides for "exemption from tax under schedules A and D in respect of the rents and profits of any lands, tenements, hereditaments or heritages belonging to a hospital, public school or alms house, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes".

There is considerable jurisprudence dealing with the definition of the terms "hospital", "public school", and "alms house". For the definition of the last term, "charitable purposes", the common law governing charitable purpose trusts applies. In most instances, a registration under the *Charities Act 1993* is deemed conclusive evidence...
that the registered body is a charity. This is based on section 4(1) of the *Charities Act 1993*, which deems that "an institution shall for all purposes other than rectification of the register be conclusively presumed to be or have been a charity at any time when it is on the register of charities".

**b. Exemption from Tax for Investment Income**

Section 505(1)(c) of the *Income and Corporation Taxes Act, 1988* provides for an exemption from tax in respect of any interest, annuities, dividends, and distributions. The income must be received by a body that is established for charitable purposes only, and the income must be applied to those charitable purposes exclusively. As with the exemption under section 505(1)(a), the law of charitable purpose trusts and section 4(1) of the *Charities Act 1993* applies. Under section 505(1)(d), a similar exemption applies to investment income which is applicable solely towards the repair of any building used exclusively for the purposes of divine worship.

**c. Exemption from Tax for Business Profits**

Section 505(1)(e) provides for an exemption from income tax for trading profits as follows:

[A charity is entitled to an exemption] in respect of the profits of any trade carried on by the charity if the profits are applied solely to the purposes of the charity and either: i) trade is exercised in the course of the actual carrying out of a primary purpose of the charity or ii) work in connection with the trade is mainly carried out by beneficiaries of the charity.

This exemption has been held applicable to "letting out rooms for entertainment, running a restaurant open to outsiders, book selling, carrying on a public school, promoting a music festival to which the public were, on payment, admitted". The exemption is not applicable to profits earned in any business not described in the section, even if all of the profits of such business are dedicated to charity. There is thus no "destination of funds test" applicable to exempt the income of unrelated businesses of charitable organizations in the United Kingdom. To avoid the harsh consequences of this result, charitable organizations in the United Kingdom will often form a separate enterprise to carry on the business, and that separate enterprise will covenant its profits to the charity.

There have been several cases which have taken up the issue whether a charity carrying on a business loses its status as a charitable organization under the *Charities Act 1993* when the business becomes one of its primary purposes. In *Tennant Plays Ltd. v. Inland Revenue Commissioners*, Cohen L.J. "doubted whether a company could be said to be established for charitable purposes only if it carried on a substantial non-charitable purpose, e.g. if it took power permanently to run a public house in order to produce funds for its charitable purpose". The Charity Commissioners in 1980 also dealt with the problem.

Drawing the line between the charity which is really raising funds and furthering its activities by trading and what is in substance a trading institution wearing a charitable mantel is not easy: each case must be considered on its own facts. There can be no
objection to transitory and incidental trading by charities, for example, by jumble sales or by the running of shops to sell articles given by charitably minded people. But running a shop to make profit from goods specially bought for the purpose or other trading on a permanent basis if permitted by the trusts might mean that the institution was not established for exclusively charitable purposes, and accordingly was not a charity within the meaning of sections and 46 of the Charities Act 1960.

**d. Exemption from Tax for Income from Fundraising Events**

Income from fundraising events arranged by voluntary organizations is also, by extra statutory concession, exempt from tax if the organization meets four conditions: (1) is not regularly trading; (2) is not competing with other traders; (3) public is aware that the event is for the benefit of charity; and (4) the profits from the event are transferred or applied to charitable purposes.\(^{(146)}\)

**e. Exemption from Tax on Capital Gains**

Charities are exempt under the statutory provisions which tax capital gains.\(^{(147)}\) Gifts or transfers at less than fair market value of property otherwise subject to capital gains are subject to roll-over provisions so as to avoid tax liability in the donor.\(^{(148)}\)

**f. Exemption from Rates**

The law governing liability for rates is based on section 40 of the General Rate Act,\(^{(149)}\) 1967 which has been preserved by the Local Government Finance Act 1988.\(^{(150)}\) Under this regime, charities "are granted substantial concessions, part mandatory and part discretionary, in relation to liability for rates".\(^{(151)}\)

For preferential tax treatment under this regime, the property subject to tax must be "occupied by" the charity and be "wholly or mainly for charitable purposes". Fleshing out these requirements has led to a substantial body of case law.\(^{(152)}\)

**g. Other Exemptions**

There is no general exemption for charities from the value-added tax. Charities are required to pay and are required to collect the value-added tax on taxable supplies and services. A number of transactions that typically involve charitable organizations are zero rated, such as supplies of magnetic tapes to charities organized for the benefit of the blind, or the supply of medical and scientific equipment to a medical research institution. Supplies made consistently below cost such, as meals on wheels, are also not taxable events because they are not made in the course of a business.

**(iii) Regulation of the Activities of Charities**

There are two regimes of regulation, one for charities with income over £10,000 and one for charities with income under £10,000. For the former, the exemptions are denied to the extent that the charity's total income (including gifts) and capital gains exceed its
"qualifying expenditures" or, if these are less, to the extent of its "non-qualifying expenditures". Where the non-qualifying expenditures are greater than the difference between total income plus gains and the qualifying expenditures, they are, to that extent, taxed as income in previous years.  

Section 506(1) defines "qualifying expenditure as an "expenditure incurred...for charitable purposes only". "Non-qualifying expenditure" is defined as any expenditure which is not a qualifying expenditure. Certain international activities and certain investment and loan activities are specifically identified as "non-qualifying expenditures". In the case of international activities, the charity concerned must "take such steps as may be reasonable in the circumstances to ensure that the payment will be applied for charitable purposes"; otherwise the international activities are "non-qualifying expenditures". In the case of investments and loans, the range permitted under the Act are very narrowly circumscribed. Investments not on the list of permitted investments (this would include non-arm's length transactions) are non-qualifying expenditures. Interestingly, program-related investments are specifically permitted.

For smaller charities those with income of under £10,000 there is a general anti-avoidance provision in section 505(7). Where these charities act in concert by entering transactions whose purpose is to avoid tax, then the strict scheme of expenditure, and investment regulation, just outlined, applies.

Transfers of funds from one charity to another are specifically permitted, provided the funds continue to be used for exclusively charitable purposes. The latter can include saving and investing the funds for future expenditure.

(iv)Conclusion

There are several features of the United Kingdom system that are of particular interest. The first is the fact that the status for tax purposes of a tax-exempt organization is determined by an administrative agency that has general supervisory authority over charitable organizations, and not by administrators under the tax regime. Assuming that it is desirable that the definition of charity be uniform for all purposes, it may make sense to assign full administrative authority to a single expert agency, and make the tax consequences flow automatically from that agency’s assignment of the status.

A second interesting feature of the United Kingdom system is the covenant system. Much of the North American literature on the deduction and tax credit regards their efficiency to be a function of the extent to which they encourage people to donate. This literature thus understands the tax expenditure as a way of attracting private funds to public purposes. The United Kingdom system is not on its face designed to encourage giving. It is a straightforward matching grant system of subsidization of the charity sector.

A third is the use of a tax, in some ways like the American excise taxes, to encourage compliance with the regulatory restrictions. Although those restrictions are not as well defined in the United Kingdom regime as they are in the Canadian and American regime,
it is interesting to note that non-compliance is sanctioned with a loss of the tax exemption, to the extent of the non-compliance. Thus, income from proscribed business activities, investments, and loans are taxed, as are the expenditures on non-charitable purpose activities. The United Kingdom system also uses the "exclusively charitable" test, since recognition of eligibility for the exemptions by the tax authorities is generally conditioned on whether the organization is registered with the Charity Commissioners. Registration with the Charity Commissioners, in turn, requires that a charity be exclusively charitable.

A fourth set of provisions of interest concern the regulation of business activities. The rules parallel the Canadian rules in respect of what we call "related business" income, including the deemed inclusion of businesses run by volunteers. However, it is of interest to note that, through the covenant system, the profits from an unrelated business carried on by a separate entity are entitled to the exemption and rebate, to the extent they are paid to a charity.

Finally, the specific provisions in favour of program-related investment are interesting, and worth following.

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Endnotes:

1
R.S.C. 1985, c. 1 (5th Supp.).

2

3
Information Circular 77-14, replaced by Information Circular 80-10R.

4

5
Income Tax Act, supra, note 1, s. 248(1).
Ibid., s. 149.1(6)(b).

Ibid., s. 149.1(1) "charitable foundation".

Ibid., s. 149.1(1) "charitable organization" and "public foundation". "Arm's length" is defined in s. 251 of the Act, as follows:

251.(1) For the purposes of this Act

(a) related persons shall be deemed not to deal with each other at arm's length; and

(b) it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.

For individuals, any person connected by blood relationship, marriage, or adoption is a related person (s. 251(2)).

Ibid., s. 149.1(1) "charitable organization" and "public foundation". For public foundations created before 1984 or designated by the Minister under ss. 149.1(6.3) or 110(8.1) or (8.2) of R.S.C. 1952, c. 148, the percentage figure is 75%.

Ibid., s. 149.1(1) "charitable organization" and "public foundation".

As in the United Kingdom. See infra, this ch., sec. 4.

We, in fact, recommend infra, in ch. 12 that less reliance be placed on the disbursement regime as a method of ensuring that all charities are in fact devoted to charity.

Income Tax Act, supra, note 1, s. 149.1(1) "qualified donee" and (6.4) as en. by S.C. 1994, c. 7, Sch. II, s. 123(4), s. 110.1(1)(a) and (b), as re-en. by S.C. 1994, c. 7, Sch. II, c. 79(1), and s. 118.1(1) "total charitable gifts" and "total Crown gifts", as re-en. by S.C. 1996, c. 21, s. 23(1), (2).
The Canadian Taxpayer (September 11, 1990), at 138 states that there are between 5,000 and 7,000 applications per year. In 1989-90, there were 4,680, of which 141 were refused and 3,965 accepted. According to The Canadian Taxpayer, the average response time on an initial application is twenty-two weeks. Final determinations can take much longer.

Revenue Canada provided the following more current information:

<table>
<thead>
<tr>
<th>Year</th>
<th>Applications Received</th>
<th>Applications Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>3,932</td>
<td>282/39*</td>
</tr>
<tr>
<td>1993</td>
<td>4,425</td>
<td>369/44</td>
</tr>
<tr>
<td>1994</td>
<td>3,915</td>
<td>539/83</td>
</tr>
<tr>
<td>1995</td>
<td>3,995</td>
<td>618/86</td>
</tr>
</tbody>
</table>

* The first number refers to the initial letter sent by the Division to the applicant organizations indicating that it is not likely to qualify for registration. The second number refers to the final turn-down, which is sent if the organization responds to the initial letter, but fails to satisfy the requirements for registration: Revenue Canada, comment letter to the Chair of the Ontario Law Reform Commission (September 26, 1996).

15 Income Tax Act, supra, note 1, ss. 168(1) and 149.1(2) [as am. by S.C. 1994, c. 21, s. 74(4)], (3) and (4).

16 Ibid., s. 149(1)(1).

17 As re-en. by S.C. 1994, c. 7, Sch. II, s. 141.


In its comments on a draft version of this chapter, Revenue Canada responded:

Despite the decision in Scarborough Community Legal Services v. Her Majesty the Queen (1985), 17 D.L.R. (4th) 308, the Division always provides applicant organizations with an opportunity to respond through an 'administrative fairness letter', which sets out in detail the reasons why the organization will probably not qualify for registration, and invites a reply by the organization within 60 days. If the organization responds and the Division official is still not satisfied, there
may be a request for additional information...

Most charities' files contain a great deal of information by the time they reach the appeal stage.

19

Ibid.

20


Income Tax Act, supra, note 1, s. 149.1(4)(a).

22

Ibid., s. 149.1(1) "related business".

23

Ibid., s. 149.1(3)(a) and 149.1(2)(a), respectively.

24

Ibid., s. 149(1)(l).

25


26

The "preponderant purpose" test has also been applied in two property tax cases Ontario Regional Assessment Commissioner v. Caisse Populaire de Hearst Ltée, [1983] 1 S.C.R. 57, at 64; 143 D.L.R. (3d) 590, at 596, per McIntyre J., and in The King v. Assessors of Sunny Brae, [1952] 2 S.C.R. 76 in the dissenting judgments of Cartwright J., Rinfret C.J., and Kerwin J. In the former case the activities in question were those of a nonprofit credit union. In Sunny Brae, a laundry business was operated by a religious society and the profits from the business were devoted to the education of orphans. The majority in Sunny Brae held that the use of the premises was not charitable, and that the organization itself was not exclusively charitable since it was carrying on a business, even though all the profits were used to support charitable activity only.

27


28
[1987] 3 F.C. 286, 87 D.T.C. 5306 (Fed. C.A.) (subsequent references are to 87 D.T.C.). For a comment, see V. Krishna, (1987/89) 2 Can. Current Tax J. 36. For a similar English case, see Oxfam v. Birmingham City District Council, [1976] A.C. 126, [1975] 2 All E.R. 289 (H.L.), where a gift shop operated by Oxfam was denied a rating exemption, even though all the profits from the shop went to support Oxfam’s charitable purposes. Thus the House of Lords declined to apply a destination-of-profits test in assessing whether the gift shop was using the premises for charitable purposes.

29

It was also argued in Alberta Institute on Mental Retardation v. Canada, supra, note 28, that the activities constituted a breach of the "exclusively charitable" requirement. The Court held that the business activity of the Alberta Institute was "merely a means to the fulfillment" of its charitable purposes, which were exclusively charitable.

30

Ibid., at 5311.

31

As well, the majority of cases are or appear to be against it. See The King and the Assessors of Sunny Brae, supra, note 26; Oxfam v. Birmingham City District Council, supra, note 28; Church of Christ Development Co. v. Minister of National Revenue, [1982] C.T.C. 2467, 82 D.T.C. 1461 (Tax Rev. Bd.) (subsequent references are to 82 D.T.C.); and Hutterian Brethren Church of Wilson v. R., [1980] C.T.C. 1, 31 N.T. 326 (Fed. C.A.) (subsequent references are to [1980] C.T.C.). Compare, also, Comptoir de Roberval Inc. v. Minister of National Revenue (1955), 56 D.T.C. 5, 14 Tax A.B.C. 193. In Comptoir de Roberval all the profits of one corporation, earned through the sale of beer and groceries, were donated to a second exclusively charitable corporation. The Court held, unequivocally, that the income of the first corporation was subject to tax.

32

Alberta Institute on Mental Retardation v. Canada, supra, note 28, at 5312. In an earlier decision, Pratte J. had said, similarly: "a commercial activity like farming for a profit does not become a charitable activity within the meaning of section 149 for the sole reason that it is carried on by a charitable person with the intention of using the income derived from that business for charitable purposes." See Hutterian Brethren Church of Wilson v. R., supra, note 31, at 7.

33

Income Tax Act, supra, note 1, s. 149.1(12).

34


35

Supra, note 31_

36
Ibid., at 1471-72 (emphasis in original).

37


38

Income Tax Act, supra, note 1, s. 189, as am. by S.C. 1994, c. 21, s. 85(1), (2). Paradoxically, the basis of calculation of the penalty tax is different from the basis of calculation of the quota, so that the two amounts will often differ. For the quota, the shares are valued at the greater of their fair market value and their cost amount. For the tax, the shares are always valued at their cost amount to the charity.

39

Income Tax Act, ibid., s. 149.1(1) "non-qualified investment" as am. by S.C. 1994, c. 7, Sch. II, s. 123(2).

40

Ibid., s. 149.1(1) "non-qualified investment" (e), (f), as re-en. by S.C. 1994, c. 7, Sch. II, s. 123(3).

41

Infra, this ch., sec. 3.

42

The legislative provision permitting "ancillary and incidental" political activities was added after the Federal Court of Appeal, in Scarborough Community Legal Services v. The Queen, supra, note 18, upheld Revenue Canada's decision not to register an organization because it had picketed the Ontario Legislature, and expressed its intention to do so again.

43


44


45

See Information Circular 87-1 for a different view. The circular states:

The words 'ancillary and incidental' must not be read separately. At common law the phrase 'ancillary and incidental' has been determined by the courts to mean something that is subordinate, additional or relative to something else. In the context of charity law, an 'ancillary and incidental' activity is one that is naturally connected with and subservient to a charitable purpose or charitable activity, or something that exists only in conjunction with a charitable purpose or activity. An activity which is given such prominence by a charity that it is no longer subservient or incidental
to a charitable purpose, or an activity that exists in and of itself (i.e., independently) is not "ancillary and incidental" but has itself become a purpose.

46

See N. Brooks, Charities: The Legal Framework, (Ottawa: Secretary of State, 1983) [unpublished], at 127 et seq. for a detailed account of the history of the first circular, Information Circular 78-3. Information Circular 78-3 defined political activities as activities "designed to embarrass or otherwise induce a government to take a stand, change a policy, or enact legislation for a purpose particular to the organization carrying on the activity".

47

Information Circular 87-1 states: "A charity may not oppose or endorse a named candidate, party, or politician. The charity's resources may not be devoted directly to such activities, or devoted indirectly through provision of resources to a third party engaged in partisan political activities."

48

The words of Information Circular 87-1 are to like effect: "[Activities] that cannot themselves be considered charitable activities but are subordinate to bona fide charitable purposes".

49

Comment letter, supra, note 14_

50

Income Tax Act, supra, note 1, s. 149.1(1.1).

51

Ibid., s. 149.1(3)(d) and (4)(d).

52

See, further, Interpretation Bulletin IT-111R3.

53

Income Tax Act, supra, note 1, s. 149.1(1) "charitable purposes".

54


55

"Income" is no longer relevant in most contexts under s. 149.1 of the Income Tax Act, supra, note 1. It remains so here, however. The general definition of income under the Act applies. In addition, s. 149.1(12) defines "income" to include all gifts received by the charity save gifts of four kinds. (1) "Specified gifts"
are not included in income. The term "specified gifts" is used in the Act to designate gifts from one charity to another, where the gift is specified by the donating charity not to count towards satisfying its disbursement quota. The designation is thus used to facilitate gifts of capital from one charity to another by treating them favourably under the disbursement quota rules. Here, under rules governing restrictions on grants, the object is to exclude them from the funds that can be granted (again) to another charity. (2) gifts of capital from donors are also excluded, from income, for the same reason. (3) gifts from non-charities are excluded, and (4) of capital from another charity are excluded.

56

The Minister may designate one charity to be associated with another where he is satisfied that the aim or activity of each is substantially the same: Income Tax Act, ibid., s. 149.1(7).

57

Ibid., as re-en. by S.C. 1994, c. 7, Sch. II, ss. 79(1) and 88(1) respectively.

58

See Income Tax Regulations, supra, note 37, s. 3503, Sch. VIII.

59

See Information Circular 84-3R4 for a list of such foreign gifts.

60

See Information Circular 80-10R.

61

Income Tax Act, supra, note 1, s. 149.1 (2)(b), as re-en. by S.C. 1994, c. 21, s. 74 (4).

62

These are included back into the quota regime in the year in which they are actually expended.

63

The Income Tax Act, supra, note 1, s. 149.1(4.1) prohibits this exception from being used to delay unduly the expenditure of amounts on charitable activities of a charity. Where that is the purpose of the payment, the Minister may deregister the charities. Thus one charity cannot grant to another, counting the grant towards the satisfaction of its quota, then the recipient charity, in the second year, grant back to the donor, counting the grant towards the satisfaction of its quota, and so on.

64

This would be available where a charity has had high start-up costs or an unsuccessful and costly fundraising campaign.

65
The amount accumulated is deemed to be expended in the year accumulated, and may not, therefore, be counted towards the satisfaction of the quota in any subsequent year.

66

Income Tax Act, supra, note 1, s. 149.1(20).

67

The 4.5% quota is thought by many to be now too high.

68

See Income Tax Act, supra, note 1, s. 149.1(6.3), (13).

69

Ibid., s. 149.1(4.1).

70

See Interpretation Bulletin IT-110R2 in general. See, also, Interpretation Bulletins IT-111R, IT-226, IT-244R2, and IT-288. These rules are discussed extensively in this report, as our concern with the Income Tax Act, supra, note 1, is not the privileges, per se, but how the Act regulates charity to police their availability.

71

Income Tax Act, ibid., s. 118.1 (3). The 1996 federal Budget raised the annual limit on charitable donations from 20% to 50% of income. The limit in the year of death and the preceding year was raised to 100% of income. The Budget also included a provision to raise the 50% limit by the extent necessary to permit the full amount of donations of appreciated capital property to be eligible for the tax credit.

72

(Enacted in Canada by S.C. 1984, c. 20), art. XXI. See, also Income Tax Act, supra, note 1, s. 118.1(1) "total gifts" (a), as re-en. by S.C. 1994, c. 7, Sch. II, s. 88(1).

73

This limit does not apply to gifts to a college or university at which the taxpayer or a family member is enrolled.

74

Income Tax Act, supra, note 1, s. 118.1(1) "total Crown gifts", as re-en. by S.C. 1994, c. 7, Sch. II, s. 88(1) and am. by S.C. 1996, c. 21, s. 23(2).
Ibid., s. 118.1(7.1) as en. by S.C. 1994, c. 7, Sch. II, s. 88(2). Gifts of cultural property are also treated as income neutral and capital gain neutral events: ss. 118.1(7.1) and 39(1)(a)(i.1), as re-en. by S.C. 1994, c. 7, Sch. II, s. 22(1).

76

Ibid., s. 118.1(6), as am. by S.C. 1994, c. 7, Sch. VIII, s. 53(1) and S.C. 1996, c. 21, s. 23(6).

77

Ibid., s. 230(2)(a), as re-en. by S.C. 1994, c. 21, s. 80.

78

The Income Tax Act, ibid., s. 162(7), as am. by S.C. 1994, c. 21, s. 80, provides generally for a penalty for every person who fails to provide an "information return" as and when required under the Act. The penalty is equal to $25 per day. Registered charities were recently exempted from this provision, possibly in response to the suggestion in the Auditor General's Report, 1990, infra, note 83, that Revenue Canada had never applied the sanction against charities and that it had no authority to waive it. Section 238 does provide that the failure to file a return is an offence, punishable on conviction to a fine of between $1,000 and $25,000, or fine plus imprisonment for up to 12 months.

79

Ibid., s. 188 (1), as re-en. by S.C. 1994, c. 21, s. 84(1).

80

Ibid., s. 188(2), as re-en. by S.C. 1994, c. 21, s. 84(1).

81

Ibid., s. 188(3) and (4).

82

Ibid., s. 189(1).

83


84

The reputation of the Charities Branch of Revenue Canada is quite good. As one commentator said, in The Canadian Taxpayer (November 27, 1990), at 182:

[The lack of media interest in the Auditor General’s report on the charities branch] offers support for the widely held notion that the charities branch of Revenue is the best run of all Revenue
Canada branches (notwithstanding its inability to rapidly handle applications)... unlike other parts of revenue those in the charity/non-profit branch actually seem to be trying to help.

85


86

Ibid., at 260.

87

Ibid., at 261.

88

Ibid., at 262.

89

Ibid., at 264.

90

Ibid., at 264.

91

Ibid., at 265.

92

Ch. 349, §32, 28 Stat. 509, 556 (1894). Other activities and organizations since been added to what is now §501(c) of the Internal Revenue Code, 26 U.S.C. See P.E. Treusch, Tax Exempt Charitable Organizations (Philadelphia: American Law InstituteAmerican Bar Association Committee on Continuing Professional Education, 1988) at 6 and 7. For other discussions of U.S. tax law, see "Developments in the Law Non profit Corporations" (1992), 105 Harv. L. Rev. 1578, at 1612-33; S. Rose-Ackerman, "Unfair Competition and Corporate Income Taxation" (1982), 34 Stan. L. Rev. 1017.

93

See Treusch, supra, note 92.

94

There were restrictions on political activity before then. There was a Treasury Department regulation in 1919 which provided that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute". In 1930, the Judge Learned Hand in the Federal Court of Appeal said, in Skee v. Commissioner of Internal Revenue, 42 F. 2d 184 (1930), cited in Brooks, supra, note 46, at 155:
Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it 'propaganda', a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without the public subvention; the Treasury stands aside from them.

The 1934 legislation restricted attempts "to influence legislation". Regulations were enacted in 1959 to help clarify the restrictions, but there was much litigation throughout the 1960s challenging the law on constitutional grounds principally on the basis that it was vague, that it violated the equal protection clause, and that it restricted free speech. See, further, Brooks, ibid., at 158-59 and works cited therein at footnote 173. There have been several recent cases, for example, challenging the charitable status of church organizations on account of their anti-abortion lobbying.

95


96


In the first place it was alleged that many foundations were being used to provide direct or indirect benefit to major donors and trustees. This could be accomplished by the borrowing of funds from the foundation, the sale of property to the foundation or purchase of property from the foundation. There were arms-length rules outlawing such practices but it was claimed that they were generally ineffective. The second major complaint was that foundations, in particular, were being used to control family businesses and this criticism had a substantial basis in fact. It was suggested that the operation of a foundation for the purpose of controlling business was detrimental to the charitable purpose and might give the business a competitive advantage, even though the foundation might be fully taxable on the activity as an unrelated trade or business. Another criticism was that the grant-making foundations seemed to be operating in a high, wide and handsome fashion in making their awards without paying any significant attention to what the grantees be they individuals or other charities did with the funds. Certain special situations were very much in the limelight. The Ford Foundation had provided substantial support for the voter-registration drive in Cleveland. This was strongly criticized since the registration drive by reason of the facts clearly favoured one party and was a significant factor in the election of that party's candidate. ... Finally, there was a much publicized and criticized circumstance of a Supreme Court Justice's being compensated as an officer of a foundation even though it was recognized that the compensation was reasonable.


97

Internal Revenue Code, supra, note 92, § 508(d)(2)(B).

98


99
But not partnerships and not individuals.

Two notable exceptions concern the treatment of the unrelated business income and the treatment of a private foundation when it surrenders or loses its tax exempt status. In these situations the tax treatment varies according to the form of organization.

Although it should be noted that § 170 and § 501(c)(3)(a) are not precisely co-extensive in definition.

Treusch, supra, note 92, at 90.

Ibid., at 102.

263 U.S. 578 (1924).

96 F. 2d 776 (2nd Cir., 1938), cited in Treusch, supra, note 92, at 95, 110.
See Treusch, ibid., at 107.

Ibid., at 110.

Internal Revenue Code, supra, note 92, § 502(b).

See infra, Appendix F.

Statute of Charitable Uses 1601, 43 Eliz. 1, c. 4 (U.K.).

Internal Revenue Code, supra, note 92, § 501(c)(3).

The exception is intended to protect the confidentiality of their operations from excessive government scrutiny.

The effect of these two provisions is to permit smaller organizations to spend proportionately more on lobbying activity than larger organizations. Small organizations may spend up to 20% of their expenditure on lobbying; the permissible amount declines to $225,000 plus 5% of exempt purpose expenditures over $1.5 million.

Internal Revenue Code, supra, note 92, § 4911.

Tax on excess expenditures to influence legislation

(d) Influencing legislation

(1) General rule. Except as otherwise provided in paragraph (2), for purposes of this section, the term "influencing legislation" means

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, [grass-roots lobbying] and
(B) any attempt to influence any legislation through communication with any member or employee, legislative body, or with any government official, employee who may participate in the formulation of the legislation [lobbying] exempt purpose for organizations with expenditure in excess of $1.5 million.

(2) Exceptions. For purposes of this section, the term "influencing legislation", with respect to an organization, does not include

(A) making available the results of nonpartisan analysis, study, or research;

(B) providing of technical advice or assistance (where such advice would otherwise constitute influencing of legislation) to a governmental body to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;

(C) appearances before, or communications to, legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization;

(D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and

(E) any communication with a government official employee, other than -

(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or

(ii) a communication the principal purpose of which is to influence legislation.

121

Ibid., § 4962(c).

122

Taxation with Representation of Washington v. Regan, 676 F. 2d 715 (D.C. Cir., 1982); rev’d 461 U.S. 540 (1983). The legislative scheme was attacked as an unconstitutional denial of the equal protection rights of charities on the basis that veterans' organizations could lobby without being subject to comparable restrictions. The Supreme Court upheld the validity of the restrictions on the basis that there was a valid distinction between the veterans' organizations and charities, and that Congress was not required to subsidize lobbying and that Congress "has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying": ibid., at 550, cited in Treusch, supra, note 92, at 268.

123

See, for example, United States v. American College of Physicians, 475 U.S. 834 (1986), and United States v. American Bar Endowment, 477 U.S. 105, 106 S.Ct. 426 (1986). In the former, the advertising income of the American College of Physicians from the sale of advertising space in one of its journals was held to be subject to the unrelated business tax. In the latter, dividend income of the American Bar Endowment on insurance policies on the lives of the American Bar Association members was also held to be subject to the unrelated business tax. The income derived from the farm operations of an order of brothers was also held to be subject to the unrelated business tax. See, also, St. Joseph Farms of Indiana Brothers of Congressional Holy Cross, South West Province Inc., 85 T.C. 9 (1985). The cases are cited in Treusch, supra, note 92, at 360.

Internal Revenue Code, supra, note 92, §512(b).

Ibid., §514.

Treusch, supra, note 92, at 422-24. For a critique of the UBIT, see Rose-Ackerman, supra, note 92. Rose-Ackerman argues that unfair competition occurs only where non-profit businesses force their for-profit competitors to accept sub-competitive returns and that this can only arise where a sufficient number of non-profits enter the same business so that they can affect market returns. In her view, therefore, the tax law ought not to channel inadvertently non-profits into the same businesses. Rose-Ackerman argues that the relatedness test of the UBIT, in effect, does just that and is therefore misguided. She argues for repeal of the UBIT so that non-profit business activity will be more diffused and for a better targeted unfair competition tax.

Internal Revenue Code, supra, note 92, § 507(a). On revocation of charitable status, the foundation is liable to pay as tax the lower of its aggregate benefit derived from s. 501(c)(3) status and its net asset value. The tax may be abated if the net assets are distributed to another s. 501(c)(3) charity.

"Self-dealing" is defined, in Internal Revenue Code, ibid., § 4191(d), as follows:

(1) In general. For purposes of this section, the term "self-dealing" means any direct or indirect--

(A) sale or exchange, or leasing, of property between a private foundation and a disqualified person;

(B) lending a money or other extension of credit between a private foundation and a disqualified person;
(C) furnishing of goods, services, or facilities between a private foundation and a disqualified person;

(D) payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person;

(E) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation; and

(F) agreement by a private foundation to make any payment of money or other property to a government official (as defined in section 4946(c)), other than an agreement to employ such individual for any period after the termination of his government service if such individual is terminating his government service within a 90-day period.

The Internal Revenue Code, ibid., § 4945 provides as follows:

(d) For purposes of this section, the term "taxable expenditure" means any amount paid or incurred by a private foundation--

(1) to carry on propaganda, or otherwise to attempt, to influence legislation, within the meaning of subsection (e),

(2) except as provided in subsection (f), to influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive,

(3) as a grant to an individual for travel, study, or other similar purposes by such individual unless such grant satisfies the requirements of subsection (g),

(4) as a grant to an organization unless--

(A) such organization is described in paragraph (1), (2), or (3) of section 509(a) or is an exempt operating foundation (as defined in section 4940(d)(2)), or

(B) the private foundation exercises expenditure responsibility with respect to such grant in accordance with subsection (h), or

(5) for any purpose other than one specified in section 170(c)(2)(B).

(e) For purposes of subsection (d)(1), the term "taxable expenditures" means any amount paid or incurred by a private foundation for--

(1) any attempt to influence any legislation through an attempt to affect the opinion of the general public or any segment thereof, and

(2) any attempt to influence legislation through communication with any member of employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation (except technical advice or assistance provided to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be),
other than through making available the results of non-partisan analysis, study, or research. Paragraph (2) of this subsection shall not apply to any amount paid or incurred in connection with an appearance before, or communication to, any legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation.

132

The U.S. Commission on Private Philanthropy and Public Needs in Giving in America: Toward a Stronger Voluntary Sector (Washington, D.C.: 1975) (Chair: J. H. Filer) (Filer Commission), at 164, recommended far greater accountability for large public charities with budgets of over $100,000. It also recommended that non-arm’s length transactions be restricted for all charities, not just private charities.

133

39 Geo. 3, c. 13 (U.K.).

134


135

Supra, note 2.

136

See, for example, U.K., Report of the Royal Commission on Income Tax (Cmd. 615, 1920), paras. 305-09 (hereinafter referred to as the "Colwyn Commission"), and U.K., Final Report of the Royal Commission on Taxation of Profits and Income (Cmd. 9474, 1955), paras. 168-75 (hereinafter referred to as the "Radcliffe Commission"), cited in Picarda, supra, note 134, at 692. The Radcliffe Commission would have expanded the first three classes of Pemsel, supra, note 2, and omitted the fourth on the basis that tax exemption was a costly tax expenditure. The Colwyn Commission recommended codification of the common-law definition to make it clear that the legal definition is wider than the common conception. See, also, U.K. The Expenditure Committee, Tenth Report: The Charity Commissioners and their Accountability (1974-75) (London: HMSO, 1975), which recommended codification of a modernized Pemsel test.

137


138

Ibid., s. 660.

139

These exemptions apply regardless of the form of organization.

140
Charities Act 1993, c. 10 (U.K.).

Picarda, supra, note 134, at 699. See cases cited therein.


See, further, Picarda, supra, note 134, at 711.


For gifts on death, see, the Inheritance Tax Act 1984, c. 51 (U.K.), s. 23. Section 26 of that Act provides similar relief for gifts of property that are of historic, scenic, artistic, or scientific value. For inter vivos gifts, see Taxation of Chargeable Gains Act, 1992, supra, note 147, s. 257.

General Rate Act, 1967, c. 9 (U.K.).

Local Government Finance Act 1988, c. 9 (U.K.).

See Cracknell, supra, note 144.

Ibid., at 229-37.
153

Income and Corporations Taxes Act, 1988, supra, note 137, s. 505(3).

154

Ibid., Sch. 20.

155

Ibid., s. 505(2).

156

Inland Revenue Commissioners v. Helen Slater Charitable Trust Ltd., supra, note 54.

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CHAPTER 12

THE SUPERVISION OF CHARITIES BY REVENUE CANADA: PROPOSALS FOR REFORM

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1. INTRODUCTION

The basic principles of the scheme of regulation of charities under the Income Tax Act\(^1\) are sound. The Commission therefore does not suggest radical reform of the federal tax law. However, there are many provisions of the Act that should be improved and there are several areas where the legal regulation of charities at the federal level is seriously lacking. We therefore suggest a number of substantial changes that will require a complete redrafting of the provisions.

The recommendations for reform that the Commission suggests in this section are intended to result, as a whole, in a comprehensive and coherent scheme of regulation that is complementary to and consistent with the provincial regulation we recommend in Part IV. Ideally, the federal and provincial governments of Canada should cooperate in any reform, but most of the proposals are such that cooperation is not required.
The structure of this chapter, with one or two exceptions, is the same as section 2 of chapter 11. We make recommendations in each of the six areas discussed. In this introduction we make some general comments and general recommendations concerning (a) the basic premise of federal regulation, (b) the use of qualitative versus quantitative standards in that regulation, and (c) the drafting styles employed in the formulation of the law.

(a) The Basic Premise of the Federal Regulation of Charity

The federal regime of regulation should not be based exclusively or even largely on the general premise that charities are doing the work of government and, therefore, that the exemption, the deduction, and the credit are in some sense state subsidies and/or state incentives. The tax expenditure analysis, in our view, does not do justice to the diversity of the sector; it does not apply to a very substantial number of charities, and even with respect to the ones for which it seems plausible, it often serves merely to undermine the sector's own self-understanding. Few people in the sector think or feel that they are doing the government's work, and many would be mildly offended if the government insisted they were.

This is not to say, however, that there is not an element of truth in the tax expenditure analysis of the sector. For example, social welfare charities do certainly complement the social welfare efforts of the state. The tax privileges, whatever their justification, are substantial and costly. Some targeting of the tax privileges to complement and advance state goals is, thus, a defensible objective in many areas of charitable work. Effectively policing the tax privileges to ensure that eligibility conditions are maintained is only prudent, given the amounts of money involved.

In our view, the best general premise for federal or provincial involvement in the charity sector is that the sector is a third order of organization in society, one whose principal characteristic is that the people who work in it are motivated predominantly by altruistic purposes. The role of the state, on this view, is to facilitate charitable activity and to protect the sector from waste, fraud, and abuse. In our view, however, the provincial government should take the lead in filling this role because the facilitation and protection of charity historically has been the exclusive jurisdiction of the provinces. At the provincial level these goals are pursued mainly through the laws that govern the two main fiduciary duties of charitable fiduciaries, namely, their duty of care, skill, and diligence (the duty of "prudence") and their duty to act in the best interests of the charity (the duty of "loyalty"). Federal regulatory involvement should be restricted to pursuing these goals only to the extent that the resultant federal regulation can also be justified by the need to protect the integrity of the tax system. This implies that the dominant, we would argue exclusive, regulatory standard at the federal level should continue to be the "exclusively charitable" standard that is, entities eligible for favourable tax treatment must be exclusively charitable in their purpose(s) and in their activity(ies). This in turn suggests a federal law oriented more to the regulation of the behaviour of entities than to the behaviour of individuals, since it is entities which ultimately must satisfy the exclusively charitable standard. This somewhat narrower objective justifies a rigorous regime of
regulation and an administration adequate to the task of enforcing those regulations, but one that is somewhat less expansive than what is required at the provincial level.

Since the charity sector shares the nonprofit motive with the other members of the nonprofit sector, there is good reason to include the rest of the nonprofit sector with the charity sector under one common public administration and, in some cases, to the same regime of regulation. In Part IV, we recommend that the provincial law and administration be organized and administered accordingly. In this chapter, we do not follow this suggestion up with any specific recommendations for the federal government, since we have not studied the federal regulation of nonprofits in any detail. We do note that the federal government appears to be heading in this direction with the recent changes to the reporting requirements of nonprofit organizations. The Commission would merely encourage that development.

(b) The Use of Qualitative Versus Quantitative Standards

One of the complaints people in the charity sector have about the law governing the sector is its apparent vagueness on issues where they expect to find clear direction as to what is required and what is prohibited. Sometimes the vagueness results from a poor understanding on the part of the legislator, sometimes from a poor implementation or formulation of a policy that is otherwise well understood. We address these causes throughout the discussion in this chapter and in Part IV. Sometimes, however, the problem arises because the correct formulation of a rule establishes only a general qualitative standard that cannot be stated more precisely or specifically, and that leaves much to the judgment of individuals in particular cases.

One technique for avoiding the uncertainty that this type of rule engenders is to make available to lay decision makers in the sector optional quantitative rules that attempt to state the qualitative standard in approximate quantitative terms. This latter type of rule is best understood as a surrogate or proxy for the qualitative standard. Its appropriateness is measured by the quality of its approximation, which in turn is assessed by comparing the results of its application to the results obtained by applying the qualitative standard to the facts at hand. Similarly, where a quantitative standard is difficult to formulate, the legislator can employ other formulation techniques that foster certainty, but that result in only an approximation of the true standard.

We suggest that the federal tax regime use optional quantitative or other approximate but certain standards in three key areas of regulation of the charity sector, namely, permissible fundraising expenditures, permissible political activity, and permissible commercial or business activity. Fundraising expenditures are currently generally permitted, but are restricted somewhat by the disbursement quotas. The law now permits, or should be construed as permitting, political and business activity that is related or is ancillary or incidental to the charitable purposes of the charity. To some extent, the current law concerning permissible political activity is also formulated as a quantitative standard. Recall that only ten percent of a charity’s resources may be devoted to such political activity, and that not more than twenty percent of its donations can be devoted to
such political activity. In our view, the general qualitative standards in these areas are poorly formulated or poorly understood, and the quantitative standards are inappropriate and, in any event, not optional. In any reformulation and redrafting of the Act, consideration will have to be given to remedying the first defect. As well, we are suggesting that these general standards should be supplemented in some cases by *optional* quantitative or approximate but certain rules. We discuss what we believe are more appropriate quantitative and approximate standards in greater detail below.

(c) The Drafting of the Law

Section 149.1 of the *Income Tax Act* is poorly drafted and in some places inadequately conceived. Too much is accomplished through the use of deeming provisions or by indirection. Section 149.1 is the cumulation of several reforms, and parts of it have been in place for many decades. Fortunately, there have been only a few cases in which the section has had to be interpreted and applied. Most of the federal litigation involving charities has dealt simply with the entitlement to registration, and therefore just the meaning of "charity". There have been cases, however, where the section has proved difficult to decipher, and there are more than a few instances where a court has been led astray. *Alberta Institute on Mental Retardation v. Canada* is perhaps one example. Another is the judgment of Marceau J. in *Scarborough Community Legal Services v. The Queen*. In that case Marceau J. relied on the differences in wording of the definitions for "charitable organization" and "charitable foundation". The former requires that all the resources of the organization be devoted to charitable *activities*. The latter states that a foundation must be constituted and operated exclusively for charitable *purposes*. Relying on the differences in meaning between "activity" and "purpose", Marceau J. came to the conclusion that a means/ends distinction could not be applied to permit incidental political activity in the case of an organization because the concept "activity" did not admit of such a distinction. In our opinion, the mistake was in the drafting of the definitions and the inadvertent use of different formulations of the "exclusively charitable" test. There are several other such traps in section 149.1 which a complete redrafting should aim to eliminate.

Much of the federal regulation of charities is contained in information bulletins and circulars, as well as regulations and forms. We make no general recommendation whether this style of norm presentation is adequate or advisable. It certainly has the virtues of flexibility and adaptability. The basic concepts (except for "charity" itself), however, must be clearly defined in the Act. In our view, the Act is deficient for failing to define the following concepts with sufficient precision: "related" and "unrelated" business, "ancillary" and "incidental" political activity, "charitable activities", and the "exclusively charitable" requirement. In this chapter we will look at the improved approaches to definitions for each of these.

Unlike the American regime, the federal regime does not attempt to make reference to or incorporate elements of the provincial law or the provincial regulatory framework. There are at least three areas where we think it is important for the federal law or administration to do this. First, some effort should be made to accommodate the provincial law
governing changes in the use of charitable funds and the disposition of those funds when the charitable entity ceases to operate. Second, better use should be made of provincial agencies that regulate charities, such as is done in the United States with respect to the annual filings of private foundations. Third, the provincial law establishes sound general norms governing the standard of behaviour of the directors and trustees of charitable organizations. These norms, or elements of them, should be used by the federal regime as well, and there should be tax law consequences attached to their breach. Remarkably, the current federal law nowhere makes any reference to, let alone use of, the fact that the directors, the trustees, and others, are fiduciaries with substantial and well-defined duties of prudence (care and skill) and loyalty under their charity's organic law. There are other areas where integration of the two regimes is advisable and where action is required at the federal level to effect the integration. These issues are examined in more detail as they arise in the following discussion.

2. CRITIQUE AND SUGGESTIONS FOR REFORM OF SPECIFIC PROVISIONS

(a) Definition of Basic Terms

(i) "Charity"

For the reasons advanced in chapter 7, the Commission does not recommend that the federal tax regime adopt a definition of charity. However, we do think that the common-law definition is in need of improvement and, therefore, that federal decision makers should be open to developments in that definition along the lines suggested in Part II. One of our suggestions in Part II, if accepted federally, would make the separate registration status of amateur athletic associations and national arts organizations redundant, since these associations or organizations, to the extent that they pursue the goods of play or aesthetic experience for the benefit of others, are charitable. Perhaps this fact has already been appreciated at the federal level, and it was thought that the separate status was required only because of the failing in this regard of the common law.

Below we take up the possibility of reforming the process by which the registration and revocation decisions are made. Whatever changes the federal government may adopt as a result of those recommendations, we think it would be very helpful if those decisions, at least the contentious or interesting ones, were published. Revenue Canada deals with over 4,000 registration applications a year and decides to revoke over 2,000 registrations annually. The vast majority of the applications for registration are accepted without controversy and without generating a public record of the decision to register. Almost all the revocations occur without generating any public record of the decision to revoke. Most of the "law of charity" in England, by contrast, is a law of definition. In Canada, there is very little such law because almost all the relevant decisions are made in secret by Revenue Canada. It would be beneficial to the sector and to taxpayers in general to have better information on these decisions.

In addition, we think it advisable that Revenue Canada publish an annual report discussing its more important registration decisions, together with other aspects of its
administrative mandate we return to this suggestion below similar in content to the annual report of the Charity Commissioners in the United Kingdom. The sector, and Canadians in general, need far better information on the sector than is currently available. An annual report by the Charities Branch would be a very cost-effective way to make this information available.10

(ii) Tripartite Division of Charities

The tripartite division of charities into public foundations, private foundations, and charitable organizations is, we argued in chapter 9, sound. We also believe the current definition of each of these types of charity is sound. Those definitions describe a certain reality and they divide the sector in a way that permits intelligent regulation. The division is clearer than the comparable definitions under the American law and errs, properly in our view, towards over-inclusiveness in the private foundation category. The distinction between foundations and organizations is also sound and the method of definition organizations are permitted to grant no more than fifty percent of their income although negative in formulation, is adequate. It may, however, be useful to separate out a new sub-classification of private foundations, namely, "operating private foundations", as American law does, for special treatment in some situations. We are thinking, for example, of a private foundation that runs a museum containing the donating family's extensive art collection. Technically, under the current law, this museum could not run a coffee shop since private foundations may not operate a business.

(iii) Organizational Form

We also think the current regime is wise to require that foundations be organized on a more formal legal basis, as trusts or corporations, and not as unincorporated associations. The justification for this, in the Commission's view, is that these entities generally are larger and therefore require a more stable and detailed organic law. Given that the justification is based on size, however, some thought should be given at the federal level to requiring organizations structured as unincorporated associations to reorganize as corporations or as trusts, once they reach a certain size. The chief value of the unincorporated association form of organization is its flexibility and ease of entry. It thus facilitates the spontaneity for which the sector is so highly valued. Once an unincorporated association has reached a certain size and has existed for a certain time, however, concern for the adequacy of its basic law should outweigh the need for flexibility and ease of entry. We make no suggestion as to the appropriate size; obviously any test will be somewhat arbitrary. We suggest only that the test should include an element going to absolute size (in revenue or assets) and an element going to durability or staying power. We suspect that in many instances, entities registered as unincorporated associations would discover that, in fact, they are, in whole or in part, charitable trusts.

(iv) The Exclusively Charitable Test

The exclusively charitable standard should be set out much more clearly than it is at present. The *Income Tax Act* should state clearly that the status of registered charity is
available only to entities whose purposes and activities, whether service oriented or grant oriented, are exclusively charitable, and whose constating documents or applicable organizational law provide that upon dissolution of the entity the property of the entity must be applied to other charitable purposes. The Act should also state clearly that no person, other than legitimate recipients of the charity’s services or grants, may receive any uncompensated benefits from the charity. The statutory language should be the same for all three types of charities. It should also make clear that for the "purposes" part of the test, a distinction between primary or preponderant purposes and secondary or subsidiary purposes is applicable to allow what may for the moment be called "apparently" non-conforming purposes. The same language should be used to permit apparently non-conforming activities.

"Insubstantial" is the concept that is used in American law and, to some extent, in Canadian law to identify those apparently non-conforming purposes and activities that are generally permitted. In our view this concept is misleading and inaccurate. The fundamental principle at issue should be, rather, whether any apparently non-conforming purposes or apparently non-conforming activities are in reality merely ways or means, direct or indirect, of achieving the charitable purposes.

Admittedly, the "insubstantial" test is often an accurate way of assessing this any insubstantial purpose or activity is probably also merely a means. But it is an indirect test and it is, as a consequence, sometimes over-inclusive and sometimes under-inclusive in what it permits. It is indirect because it does not address directly the relevant question: whether there is a substantial rational connection between the apparently non-conforming purpose or activity and the relevant charitable purpose. It is over-inclusive it permits activity that ought to be prohibited since it is possible that non-instrumental but insubstantial activities and purposes would be included. Likewise, it is under-inclusive it prohibits activity that ought to be permitted because certain substantial but definitely instrumental purposes or activities may be excluded. Focusing on the true test may make it clear to all concerned just what is at stake.

A good formulation would permit all purposes and activities that are a direct means of doing charity or that are an indirect means ancillary to (a support to) or incidental to (a byproduct or complement of) doing charity. These concepts are to be preferred to tests that focus exclusively on the relative size of the apparently non-conforming purpose or activity. Some examples will illustrate. foundation established by a hospital to raise donations to be granted subsequently to the hospital is charitable even though all its efforts are taken up soliciting donations. All administrative costs of operating a charity are charitable expenditures even though some, such as accounting fees and legal fees, may seem only remotely connected to the charitable purpose. The cafeteria, parking lot, and research income of a teaching hospital are also all derived from activity which is charitable. In these examples, what may appear to be a non-conforming purpose or activity is, when interpreted properly, charitable because it is merely a direct or indirect means of achieving a charitable purpose. Conversely, any insubstantial amount spent on an activity that does not advance a charitable purpose, or any purpose that is not a charitable purpose, ought to be categorically prohibited. The statutory formulation of the
exclusively charitable test should be clearly based, therefore, on the principle that what counts as charitable purposes or activities are those purposes or activities that advance some common good for the benefit of others, directly or indirectly.

We return to apply these concepts below in the discussion of the political and business activities and purposes of charities. We pause to emphasize this point as it is too often misunderstood and because it is not properly reflected in the current income tax law. The Act explicitly or implicitly restricts all forms of political activity, business activity, fundraising costs, and some administrative costs as non-charitable activity, although it also treats entities that engage in these activities, within the specified limits, as meeting the exclusively charitable standard. Thus there is a certain ambivalence, perhaps even contradiction, in the Act over whether, to the extent these activities are permitted, they are permitted as limited exceptions to the exclusively charitable standard or because they are in full compliance with it. In the view just advanced, the only question that ought to be asked of any such activity is whether it is a direct or indirect means to the end of charity. If the answer is yes, then the exclusively charitable standard is met and any additional restriction on the activity must be justified by some other policy rationale.

(b) The Registration Requirement

(i) The Process

We agree with the criticisms that have been voiced from time to time concerning the process deployed in both the registration and revocation decisions. Improvements in that decision-making process should be aimed at both enhancing the procedural rights of the applicant or registrant and generating a better record of the facts of the case. As we stated above in chapter 11, the reasoning in the Renaissance International v. Minister of National Revenue decision was based both on the failure of the revocation process to meet the requirements of natural justice and on the existence of an implicit requirement in the Income Tax Act that the Minister of National Revenue is required to have in place some process capable of generating a record sufficient to support a section 172 appeal. In our view, the second ground, if not the first, applies with equal force to the process for making registration decisions.

There are two basic design questions. One concerns the issue of competence or expertise: what body should be vested with the authority to decide which entities are charitable and which are not? The other concerns the precise content of the applicant's or registrant's procedural rights.

With respect to the first question, it is worthwhile recalling that comparable decisions are made by the Charity Commissioners in the United Kingdom. The Charity Commissioners are a body whose origin and mandate sit squarely in the law of trusts and whose tax-law functions are important but clearly secondary. The Commissioners have a long and distinguished history and very rich experience from which to draw. It does not appear possible, however, to adapt that particular model of decision-making, as effective and sound as it is, to the Canadian context, since it makes no sense delegating the tax-law
registration and revocation decisions to twelve different provincial and territorial authorities, where the trust-law responsibilities currently are located. The Canadian situation is exactly comparable to that in the United States, with exactly the same consequence. It is clear that reform of the registration and revocation decision-making process, if it is to occur, must occur entirely at the federal level. This approach runs the risk that the body of law dealing with the issue of definition will be too oriented to tax-law considerations and fiscal consequences. The risk is unavoidable but capable of being managed effectively. Additionally, it runs the risk that there will be two or more definitions of charity provincial and federal with the consequence that the sector will be subject to two or more incongruent legal regimes. This risk can be largely avoided.

Two options for federal reform come readily to mind a more robust internal administrative procedure within Revenue Canada or an appeal from the administrative decisions of Revenue Canada to the Tax Court, along the lines of an assessment appeal, which, in essence, is a trial de novo. Expertise is one important factor to take into consideration in making this choice. Expertise argues in favour of a tribunal devoted exclusively to the question of the definition of charity and applying the exclusively charitable test. This may imply a preference for some internal departmental procedure in the Charities Branch of the Registration Directorate. Nevertheless, reducing administrative costs, and accomplishing the other objectives of procedural fairness, openness, and generating a record might more easily be achieved by tying into an existing judicial institution. This suggests the Tax Court, or something higher in the judicial hierarchy. The Tax Court, moreover, would entail a less expensive procedure for all involved. On balance, therefore, we prefer the option of placing the matter under the jurisdiction of the Tax Court, with the hope that a stronger body of case law and a certain expertise will develop over time. Revenue Canada's expertise would therefore be deployed only at the initial administrative stage of the registration and revocation processes, and only the contentious cases would go beyond that.\(^\text{14}\) There should also be a provision in the Act establishing a right in applicants to proceed to the Tax Court after there has been a certain delay and no decision from Revenue Canada, along the lines of section 172(4) of the \textit{Income Tax Act}. This section deems a delay of 180 days to be a refusal to register, thereby giving rise to a right to proceed to the Federal Court of Appeal. We think that 180 days is far too long, however. Half that time should be adequate for Revenue Canada to process applications.

\textbf{(ii)A Provincial Right of Participation in the Decision-Making Process}

In addition to making the process more open and procedurally just, the reform should contain a provision requiring Revenue Canada to consult the provincial agency having jurisdiction over the applicant or registrant. The Commission recommends that the reform contain provisions establishing at least a right of comment in the relevant provincial agency exercisable at the administrative stage and a right to intervene at any judicial stage. Ideally, provincial authorities should have the power to initiate proceedings and to take up the question of initial or continued eligibility for registrations, with full rights of appeal.\(^\text{15}\) As will be seen in Part IV, we will be recommending that all Ontario laws regulating charities be made applicable to all entities that are registered federally as a
charity, a registered Canadian amateur athletic association, or a national arts service organization. This is one justification for allowing the provincial agencies these procedural rights. Such participation rights are also justifiable on the basis that they recognize the provincial interest and expertise in charity law, that they help lower or avoid the risk that the law of definition is too oriented to tax law considerations, and that they encourage greater federal-provincial cooperation and coordination in the regulation of charities.

In the vast majority of cases (if our recommendations in Part IV are implemented), the provincial authority in Ontario will already have passed judgment on the entity’s charitable status when the decision to incorporate or, if our recommendation on the registration of charitable trusts and charitable associations is implemented, the decision to register is made. Therefore, the administrative expense of allowing a right of comment should be low in cases involving Ontario charities, since the provincial decision to incorporate or to register will have been made and the province’s endorsement of the candidacy for federal registration will be evident from the positive incorporation or registration decision. Only where the entity pursues a registration after a negative provincial decision will the federal authority be obliged to communicate with the provincial agency in Ontario directly. In cases where the federal decision is positive and the provincial decision is negative, the Ontario authorities should be obliged by provincial legislation to revise their decision so that it conforms with the federal decision. Such a rule would contribute to the coherence of the law of definition and would make the regulatory regime simpler for charities, since it would make the federal decision-making process the most important source of law on the question of definition. In cases where the provincial decision is positive and the federal decision is negative, there need be no revision of the decisions since the provincial law of charity would remain applicable. Thus all federal charities will be provincial charities, but, possibly, not all provincial charities will be federal charities.

(iii) Third Party Rights

Should other parties be given an opportunity to be heard or any other rights, such as a right to invoke an administrative review of a registrant? For example, should a taxpayer’s association or another nonprofit entity be given some legal recourse to object to the political activities of a registrant or of an applicant for registration? To take another example, should a small business be permitted to object formally to the business activities of a charity or of an applicant for registration? Currently, under section 10 of Ontario’s Charities Accounting Act, two or more persons alleging a breach of trust may apply for and obtain a court order directing the Public Trustee to investigate the charity at issue. Should a similar scheme be put in place at the federal level?

Provided that any such rights of participation or intervention are made conditional on prior approval of some judicial authority, such as the Tax Court or the Federal Court, the Commission believes this innovation would be a very useful one to adopt at the federal level. Both the private interests of some parties (the small business example) and the public interest in the maintenance of the integrity of the sector (the taxpayer association
and other nonprofit examples) warrant creating some right of participation in interested parties and members of the public. Without specifying those rights in too much detail, we would suggest that, where a person or organization alleges a breach of the exclusively charitable rule or, perhaps, any other specific rule under the *Income Tax Act* by a registrant or applicant, then they should be permitted to apply, at their own expense, to a court for an order granting them intervenor status in an ongoing proceeding, an order requiring Revenue Canada to investigate, or an order that the charity comply with the relevant requirement.

(c) Regulation of the Activities of Registered Charities

(i) Regulation of Commercial Activity

a. The Qualitative Standard

The general matter under consideration in this section is better referred to as the "commercial" activities, not the "business" activities of charities. The concept "commercial" is preferable because it identifies the entire subject-matter and only the subject-matter that is of present concern. It captures all transactions that are relevant for consideration here, since it includes isolated commercial transactions and events in a way "business" does not; it captures only the relevant activities those involving an element of commerce in a way that "business" (as in the "business" of charities is charity) does not. Moreover, it provides us with one way to make the distinction that lies at the heart of the legal regulation in this area: commercial activities are and should be permitted to be carried on by charities up to the point where the charity conducting them becomes, in whole or in part, a commercial "business".

The current law and administrative practice regulating the commercial activities of charities is not as clear as it should be. In our submission, this lack of clarity should be rectified by amendments to the *Income Tax Act*. The principal area of concern is the proper classification of the permissible and impermissible commercial activities of charities. As discussed above, the Act prohibits "unrelated business" activity for all charities and permits "related business" activity, defined to include a "business" run substantially by volunteers, for public foundations and charitable organizations only. In our submission these rules are in large measure correct, but require clarification.

As the principal measure of clarification, the twofold classification of business activity into related and unrelated should be discarded and replaced by the following threefold scheme of classification:

1. "related" commercial activity that directly advances the objects of the charity, for example, the sale of merchandise made by the disabled in training and employment workshops, or, in part, a literacy organization holding a book fair, or a church bookstore;
(2) "subordinate" commercial activity that is either (a) "ancillary" to (supports) or (b) "incidental" to (is a byproduct of or a complement of) the charitable activity or purpose, for example, a fundraising golf tournament (ancillary) or a parking lot or coffee shop in a hospital (incidental), and therefore indirectly advances the objects of the charity; and

(3) commercial activity that constitutes a business.

In our view the distinction between (1) and (2), on the one hand, and (3) on the other, although often difficult to make in practice, is foundational. The distinction rests on the difference, just stated, between engaging in commercial activity as merely a means, direct or indirect, of doing charity and engaging in commercial activity as an end in itself, or as a "business". The first two types of activity, though they have several of the attributes of a business, including significant commercial activity and a serious intention to make a profit, are not generally understood as businesses; in common parlance they are usually not referred to as businesses, but as charity. This is because the commercial activities of the first category are always intended to advance directly the goals of the charity or to be a direct extension of the charitable activities of the charity, and the profit realized or income earned from the commercial activity, although important, is incidental to that activity. The commercial activities of the second category are always either ancillary to the charitable endeavour, in the sense that they are intended merely to provide support to the main charitable goal they are principally "fundraising for charity" activity or incidental, in the sense that they are a mere by-product or complement of the main charitable activity. Considered in isolation they could be businesses, but taken in context, they are charitable. The third type of commercial activity, however, is business activity. Its founding logic and its controlling purpose is to trade to make a profit. Activity of the third type remains non-charitable even though the ultimate destination of the profit is the charitable activity of a charity. For this reason, in our view, a destination of funds test is not a helpful criterion in distinguishing between the first two types of activity and the third, since on a destination of funds test, the third category is indistinguishable from the first two. Similarly, the presence or absence of a profit motive in carrying out the activity is not helpful as an identifying criterion, since on the profit motive test the first two types of activity are indistinguishable from the third. The size of the activity, as we suggested above in setting out the relevance of the means/end distinction in general, is a useful indicium. So too is the relative institutional integrity and financial autonomy of the commercial activity.

In our view there is no question that the first (related) and second (subordinate) types of commercial activities are legitimate activities for charitable organizations and public foundations, but not for private foundations (at least the non-operating ones), and that the third type of commercial activity should be prohibited for all charities. This, in essence, is the current position. The Act should be amended, however, to establish the three distinct categories of activity clearly, just as it was amended in 1985 to establish the same distinctions in respect of political activities.
The only consequence we would attach to the distinction between related and subordinate commercial activity, on the one hand, and charities running businesses, on the other, is that the latter be permitted only if carried out by a separate taxable corporation. We also recommend that where a charity owns one hundred percent of the shares of such a separate corporation, that the corporation be permitted to deduct without limit, in any given taxation year, its donations to the parent charity. To ensure that those donations do not find their way back into the businesses, they should be subject to a one hundred percent disbursement requirement in the charity. The explanation for this recommendation is as follows. The prohibition against charities carrying on businesses is justified on the basis of the exclusively charitable standard. The exclusively charitable standard in turn is the benchmark standard for solely practical and administrative reasons: it is the simplest way to target the tax privileges to deserving activities. Where charities running businesses are concerned, the danger is that the tax privileges will be used to subsidize the businesses. This is objectionable for two reasons: first, the tax privilege will have missed its target; second, permitting charities to run businesses subsidized in this way will frequently work unfairly to the disadvantage of competing businesses. If the business is carried on by a separate taxable entity, however, there is no basis for objection on either of these grounds.

We now briefly examine each category of commercial activity in turn. It is important to emphasize at the outset that related commercial activities and subordinate commercial activities may fall partly into one category, partly into another; but that, by definition, those activities, on the one hand, and businesses, on the other, are mutually exclusive. Further, ancillary commercial activity is often accompanied by an element of incidental activity. This is why it is often said (mistakenly) that the test is properly framed as requiring activity that is ancillary and incidental.

(1) Related Commercial Activity

Some commentators misunderstand the nature of the activity in this category. Revenue Canada’s discussion in a recent draft circular, for example, identifies "relatedness" as a relevant criterion, but characterizes it as a "handicap" provision to safeguard against unfair competition in the marketplace, not as the criterion which establishes the activity as charitable per se. This is, in our view, mistaken. What is required by this criterion is that the activity be in direct advancement of the goal of the charity or a direct extension of its activities. If it does or if it is, it is charitable activity.

There are very few instances of commercial activity which fall into this category, and this category alone, of permissible commercial activity. We mentioned the example of thrift shops above. Those shops are an integral part of the provision of productive, fulfilling, and self-sustaining work to the handicapped. The church bookstore, the art gallery that charges admission, and the hospital that charges a premium for a semi-private room are others. Another example that is becoming increasingly important is micro-development enterprises to provide business opportunities for the unemployed. In these activities the
income earned is earned in carrying out the charitable activity itself and the profit, if any, although intended, is entirely incidental.

(2) Subordinate Commercial Activity

A. Ancillary Commercial Activity

Commercial fundraising events are the principal kind of activity of concern here. Their intermittent nature makes them relatively easy to distinguish from businesses. We concur fully with Revenue Canada's recent draft circular in its discussion of the identifying characteristics of legitimate fundraising activity of this type. That activity should generally be "infrequent", as opposed to "regular and systematic"; it should be "subordinate and ancillary", "a minor focus of the charity...clearly...directed to assisting in the achievement of the principal charitable purpose".

More difficult to distinguish are the sustained commercial activities such as UNICEF Christmas card sales or OXFAM used clothing shops of some charities. The distinction between subordinate activities and businesses in this context is solely a question of whether the underlying purpose of the sustained commercial activity remains subordinate to the charitable purpose. This can be discerned only by looking at indicia such as relative size, integrity and autonomy, direct or indirect connections to the charity's purposes, etc. that point, on balance, to one characterization over the other. The difficulty often arises from the fact that there is usually nothing about the commercial activity in itself that necessarily connects it to the charity for which it is established.

If the commercial activity is conducted substantially by volunteers, that is currently taken as conclusive proof that the activity is "related" and therefore permitted. It is probably more true to the intentions of all concerned the charity and the volunteer fundraisers to characterize the commercial fundraising event run by volunteers as donations of time and effort. The Act's deeming this type of commercial activity to be "related" because it is carried on by volunteers is one of its grosser fictions. What is meant, or should be meant, is that the fact the commercial activity is run by volunteers is strong (conclusive) proof that it is ancillary.

B. Incident Activity

Incidental commercial activity is generally easier to characterize as such since there usually is a strong connection between the charity and the activity: the commercial activity arises as a byproduct or complement to the charity's work. Commercial exploitation of university or hospital research, sale of administrative expertise developed in a large service-oriented charity, and sale of recordings by a symphony orchestra are all byproducts or spin-offs of the charitable activity. Another byproduct is the income earned from the exploitation of idle or under-utilized resources. The cafeteria in the hospital and the parking lot at the university are complementary activities: any institution with a large population base must provide for elementary human needs.
C. Businesses

The Federal Court of Appeal in the *Alberta Institute on Mental Retardation v. Canada* decision applied four criteria to determine whether the "business" in that case was an "unrelated business" under the Act:

1. The degree of relationship of the activity to the charity;
2. Profit motive;
3. The extent to which the business operation competes with other businessmen; and
4. The length of time the operation has been carried on by the charity.

The majority in this case, interpreted and applied these criteria in a manner which treated them essentially as a "destination of profits" test.

Revenue Canada has improved upon this formulation of the criteria in a recent draft circular as follows:

(1) whether the business activity is linked to the exercise or performance of the purposes or functions for which the charity has been granted registration;

(2) whether there are indications of a private profit motive;

(3) the extent to which the business operation competes unfairly with the private sector; and,

(4) whether the business is a type that has been traditionally associated with the charitable sector, or has been carried on by charity for many years and is accepted by the community.

Revenue Canada's draft circular mentions two glosses to this version of the test. First, the draft circular requires, as an "overriding consideration", that the "business" remain a means of carrying out the charity, "rather than taking on a substantial character and scope of an additional, non-charitable purpose in its own right". Second, this overriding criterion and the second criterion in the above list the profit motive are identified as necessary conditions, whereas the others are identified as being secondary and optional.

We think the four criteria propounded in the *Alberta Institute* case are misleading and, as we stated above in chapter 11, we think the court in that case was mistaken to apply a "destination of profits" test to the question of whether a "business" is "related" or not. We think that the test Revenue Canada has set out in its draft circular is closer to the proper test, but that it is expressed in a confusing way. In our opinion, the only portion of Revenue Canada's test that is entirely correct, is the first gloss or "overriding
consideration"the commercial activity in question cannot take on the character or scope of "an additional non-charitable purpose in its own right". In other words, the commercial activity must be related or subordinate; it cannot be a business. Revenue Canada's test is confusing because it fails to distinguish between the related and subordinate categories these are conflated by Revenue Canada and the Act into "related"and therefore does not recognize that the real problem in most cases is to distinguish ancillary commercial activity from businesses.

In particular:

Criterion (1) is better expressed in Revenue Canada's test than in the Alberta Institute formulation. It should stand by itself, however, without further qualification, as the test that identifies our first category, "related" commercial activity. It is unclear how the first gloss applies to affect or alter it. In our view, size by itself should not be a disqualifying criterion if the commercial is truly related in the way required.

Criterion (2) is either wrong or redundant. It is wrong if it is intended to prohibit profit as a motive since nearly all the commercial activities under consideration, permitted and unpermitted, will run afoul of that test. All of them, at the least, are run to earn income. It is redundant if it is meant as a way of expressing the non-distribution constraint. That constraint applies to all aspects of a charity's activities, not just its commercial activities, and therefore it is not a useful way to distinguish permitted from unpermitted commercial activity.

It is not clear from Revenue Canada's discussion how criteria (3) and (4) apply. They are admitted in Revenue Canada's discussion to be secondary. In our view these two considerations are two of many considerations and by no means the most useful to be applied in distinguishing between subordinate commercial activity and businesses.

b. Quantitative and Other Approximate but Certain Standards

The qualitative standard we have just set out may be far too uncertain in some cases for both the charity sector and Revenue Canada. We know of no precedent in any other jurisdiction, however, that establishes a truly optional quantitative standard in this domain. In Canada, there are currently two rules that provide a greater measure of certainty. One is the absolute prohibition against private foundations conducting any business. This certainly is clear, but it may be too extreme. We mentioned above the possibility of softening this restriction by recognizing the category "operating private foundation". The thinking behind such an absolute prohibition must be that there are very few, if any, private foundations that could satisfy the qualitative tests just set out, coupled with the perhaps prudent assessment that the risk of inappropriate behaviour with this class of charity is too high. The Commission agrees, and therefore, subject to our one qualification, we would continue this prohibition.

The other rule is the disbursement quota. The quota restricts the amount of money available to capitalize any business activity of a charity, but is probably inadequate as a
significant restriction in the majority of cases, since in most cases it would be relatively easy to finance a profitable business activity without having to resort to donations. It may be somewhat useful to Revenue Canada as a test that helps identify cases of possible inappropriate activity, but since it does not explicitly permit business activity, it is of little use to charities.

We suggest three additional rules to foster greater certainty. The first is a codification of what experience has shown to be acceptable commercial activity for various types of charity. This is in essence the American approach. Thus, a new regime would set out the general standard as discussed above, and this would be supplemented by what would, in effect, be a non-exclusive list of permitted commercial activities in each category.

The second rule would be a power in Revenue Canada to require a charity which is carrying on a business, in Revenue Canada's estimation, to carry on the business in a wholly owned separate taxable corporation. This corporation, as suggested above, could deduct each year all donations to the parent charity, without limitation. The charity that is the subject of such an order would be given a right to appeal it to the Tax Court and would prevail if it could establish that the commercial activity is subordinate or related. The statute would set out a list of criteria for the court to weigh in deciding this question. This rule indeed any regulation of commercial activity would have to be supported by a reporting requirement pursuant to which charities would disclose the nature and extent of their commercial activity.

The third rule would be a special regime to clarify the status of various kinds of micro-development projects. That regime should recognize the essentially charitable nature (or, in some cases, nonprofit/cooperative nature of these projects in their initial years, altering their status once sustainable economic viability has been achieved.

(ii) Regulation of Investment Activities

a. Introduction

There are three reasons why governments might want to regulate the investment activities of charities. One is to ensure that charitably endowed assets remain available over the long term to do charitable work. This is achieved by ensuring, in one way or another, that only sound investment decisions are taken. This objective appears to be the rationale behind that part of the United Kingdom tax regime which provides that only certain investments qualify as "qualifying expenditures". This is also the main justification supporting provincial legislation restricting the investment powers of trustees, such as section 26 of the Trustee Act in Ontario and, in part, the provisions of the Charitable Gifts Act relating to permissible ownership interests in businesses. This objective is generally achieved through the legislative imposition of investment guidelines or restrictions on charitable trustees and directors. These in turn are best understood, in the final analysis, as specifications, in this domain of activity, of one of the two principal duties of all charitable fiduciaries, namely, the duty to exercise a certain level of care,
diligence, and skill what we have called the duty of prudence in the performance of their functions.

A second reason to regulate the investment activity of charities is to prevent the investment activity from becoming an end in itself and to prevent the investing charity from being transformed thereby into an investment business. This objective is concerned with one of the two implications of the exclusively charitable standard in this sphere of activity.

A third reason to control the investment activity of charities is to prevent charitable fiduciaries from profiting from their relationship with the charity either personally or through benefits to their family or associates and, more generally, to prevent the charitable form from becoming a front for the profit-interested activity of the principals behind the charity. This objective is concerned with the second of the two main duties of all charitable fiduciaries, namely, the duty to act with loyalty to and in the best interests of the charity, or what we will refer to simply as the duty of loyalty. It is also concerned with the other application of the exclusively charitable standard in this domain of activity.

Currently there are four sets of provisions in the *Income Tax Act* which, in differing measures, attempt to address these three objectives. Only two of these, however the first two do so by regulating the investments of charity:

1. There is the provision prohibiting foundations from acquiring more than a fifty percent ownership interest of a corporation.  
2. There are the provisions that seek to ensure that the non-qualified investments of private foundations earn a fair return for the foundation.
3. There is the exclusively charitable test which, under its current formulation, prohibits any income from the charity going to "the proprietor, member, shareholder, trustee or settlor thereof” and, as described above, restricts the business activity of charities.
4. And there are the disbursement quotas which, by requiring a specified level of expenditure on charitable purposes and activities, indirectly contribute to the achievement of all three goals.

The discussion in the following paragraphs is an evaluation of the adequacy of these four sets of rules in light of the three objectives. The discussion is organized, however, around the objectives, not the rules, since in our view the rules are not entirely satisfactory. The discussion begins with the first objective capital preservation and the duty to invest prudently then, briefly, the second objective prohibiting investment businesses. In a further section, we examine issues relating to the federal regulation of the charitable fiduciary's duty of loyalty. This latter discussion deals with, but extends beyond, the regulation of investing. It is an important area of regulation that is very poorly developed in the Act. We examine it *in toto* below.
Generally speaking, all our recommendations for the reform of federal legislation in these areas are based on the basic rationale of federal regulation that we set out in the introduction to this section. The primary objective of federal law is to safeguard the integrity of the tax system. We said that this is achieved, in turn, by ensuring that all registered charities maintain their eligibility conditions. Since the foundational eligibility condition is that registered entities remain exclusively charitable, the federal government should legislate to achieve the three objectives only to the extent that such legislation is also justified by the exclusively charitable standard. The dominant role in pursuing the first and third objectives enforcement of the duty of prudence and enforcement of the duty of loyalty in our view, should be left to provincial governments, since these objectives are integral to the exercise of the *parens patriae* jurisdiction of provincial governments or pertain exclusively to the law governing the forms of organization.

The Commission is also of the view that both federal and provincial law should be as permissive as possible in regard to the investment activities of charities. Any proposed restriction on the investment activities of charities, therefore, will require very careful scrutiny. If the proposed restriction is not fully justified by sound legislative goals, it should not be imposed. This posture is in accord with our more general approach to the regulation of charity the controlling purpose of all legislation in the charity sector is to facilitate charity and to protect it from waste and fraud. Charities and charitable fiduciaries should therefore not be constrained by legislative standards that do not clearly and effectively advance these goals.

b. The First Objective: Capital Preservation and Enforcing the Charitable Fiduciary's Duty to Invest Prudently

Only two sets of the provisions mentioned above have any significant effect on the level of skill and care required of charitable fiduciaries in making investment decisions. The most important is the part of the disbursement quota for foundations that requires all foundations to disburse a percentage of the value of their investment properties. This rule encourages foundations and their fiduciaries to invest prudently so that they earn sufficient income to meet the quota, while maintaining the real value of their capital base. The quota is thus a quantitative rule which approximates the prudent investor standard by implicitly stipulating the results the prudent investor should be able to achieve. The sanction for failure, however, is suffered entirely by the foundation it may be required to expend a portion of its capital base not the fiduciaries, even though the duty to invest prudently is or ought to be, arguably, primarily a duty of the fiduciaries.

The second set of relevant provisions are the non-qualified investment rules. They merely supplement the disbursement quota rules just described. They attempt to ensure that the disbursement quota for *private* foundations cannot be diminished through the manipulation of the value of the underlying investment properties. Interestingly, from the tax policy perspective, the principal objective of the foundation disbursement quota is not to encourage charitable fiduciaries to invest prudently. Rather, its main purpose is to prevent charities with investment assets from becoming preoccupied with capital growth and capital accumulation, at the expense of doing charity. This is a revealing observation
since it is certainly conceivable that the tax regime should not be concerned at all with whether charities or their fiduciaries invest prudently. This is, of course, a major concern of provincial law because the duty to invest prudently is an important part of the charitable fiduciary's more general duty of prudence. As such, it is at the heart of the definition of the legal forms which associations of people use to pursue charity together. The policy question from the federal or tax perspective therefore is whether there is any additional or complementary tax law concern over whether charities or charitable fiduciaries do a poor job investing the charity wealth. If there is another tax law concern then, possibly, the tax law ought to do much more to enforce it; first, perhaps, by formulating it as an obligation of charities and/or charitable fiduciaries, and second, perhaps, by sanctioning breaches.

There are three plausible arguments that it is of concern from a tax law perspective that charities and charitable fiduciaries invest prudently. First, from a tax expenditure point of view, it could be argued that, if the charitable fiduciaries are doing an inefficient job in any of their domains of responsibility, including investing the assets of the charity, the efficiency of the tax expenditures made available to charities is adversely affected. Second, from a tax policy standpoint, the federal tax authorities may have reason to intervene in the investment decisions of charities where those decisions are made so imprudently that the imprudence borders on waste. And third, in a similar vein, at a certain point, a poorly run charity ceases, according to the practical utility element of our definition, to be charitable.

The Commission believes only the second and third rationales establish a valid basis for federal regulation concerning the duty to invest prudently. We mentioned in the introduction to this section that the tax expenditure analysis of the tax privileges is of limited, if any, relevance in designing the federal law. We are not persuaded that it applies by exception, in this instance, to justify a tax regime that aims, in part, to encourage efficient investing on the part of charitable fiduciaries. Rather, the second and third arguments in favour of federal regulation are, in our view, the only pertinent ones. They establish a somewhat limited basis for federal regulation. Only investments which are imprudent to the point of being wasteful or ineffectual should be regulated. Such investments should be prohibited. When they occur, they should be sanctioned (as the American law does in the case of "jeopardizing" investments) by applying escalating penalty taxes against the charity and against culpable management, by requiring immediate correction of the offending investments, and, if appropriate, by reregistration. If such an approach is adopted at the federal level, however, we see no reason to restrict its application to private foundations, although one would expect that private foundations would present the greatest risk of non-conforming behaviour. Program-related investments should be explicitly excepted from its application.

Effective enforcement of this rule may prove difficult. One approach to enforcement is to monitor the performance of charitable investments more systematically than is done at present. At a minimum, the level of investment assets (including amounts invested in related and subordinate businesses), investment income (including income from related and subordinate businesses), and net capital losses and gains would have to be reported.
Alternatively, the objective of the reporting requirement might be to monitor the performance of only those investments that constitute a certain threshold percentage value of total investments, and therefore only those investments that present a significant risk to the financial viability of the charity. Finally, there might be no particular provision for the enforcement of the prohibition, save the threat of sanctions in the case of violators who happen to get caught. For the vast majority of charities, a reasonably rigorous disbursement quota would, as at present, be a reasonably adequate substitute for decent enforcement. Our recommendation is to adopt the last of these approaches for organizations and public foundations, and the first of these approaches for private foundations.

If, contrary to our view, it is felt that there is a sufficient interest at the federal level to regulate further in respect of the duty of prudence in general and the duty to invest prudently in particular, then great care should be taken to ensure that the federal regulation in the domain of investment activity is consistent with the applicable provincial regulation, since the provincial interest in regulating in this area is by far the greater of the two.

c. The Second Objective: Preventing Charities from Becoming "Investment Businesses"

We think that the federal tax law is currently effective in regulating the investment activities of charities so that charities cannot develop into investment businesses. We therefore do not have any recommendations for reform in this regard. The current approach, as discussed, employs a general qualitative standard the exclusively charitable standard and a quantitative standard in the form of the disbursement quota for foundations. The first of these, in this area, employs a well-developed tax-law distinction between income from property and income from business. There is extensive case law experience with this distinction generally, and even some experience applying it to the investment activities of charities. The disbursement rules applicable to foundations also contribute to the achievement of this objective to a very limited extent, since they result in less income being available for reinvestment.

(iii) The Third Objective: Enforcing the Charitable Fiduciary's Duty of Loyalty

a. Introduction

The current regulation under the federal tax law of the charitable fiduciary's duty of loyalty not just in investment decisions, but generally is very poorly done and in our view requires substantial reform. There is very little in the Income Tax Act concerning the duty of loyalty and what little there is, is too narrow in application and/or too oblique in formulation. Each of the four sets of rules mentioned above in section 2(c)(ii)a makes some, very limited, contribution to the enforcement of the duty of loyalty:

(1) The disbursement quotas indirectly police for breaches of the duty of loyalty by restricting somewhat the funds available for theft or misdirection.
(2) In the case of private foundations, non-qualified investments are not prohibited or restricted in any way, as they are under provincial law. Rather, those investments are expected, through the disbursement quota mechanism and the penalty tax, to generate a reasonable and fair return to the charity.

(3) There is also that aspect of the exclusively charitable test which, under the current formulation, prohibits any income from the charity going to a "proprietor, member, shareholder trustee or settlor thereof".

(4) And there is the rule that prohibits the acquisition of a fifty percent ownership stake in a corporation, which very weakly limits the occasions for abuses of the duty of loyalty. In our view none of these rules is anywhere near to being adequate in the task of preventing charities from being used as a front for the profiteering activities of their principals.

The rules do not identify all the situations that ought to be regulated and are far too timid in the types of restrictions imposed. We examine these rules and other possible approaches in the discussion that follows. At the outset, however, it is helpful to set out a taxonomy of the sorts of situations in which breaches of the duty of loyalty can arise and to comment generally on the proper approach for the federal authorities to take.

b. A Taxonomy

Breaches of the duty of loyalty can occur in two types of situations: those where the fiduciary is involved in a conflict of interest because the fiduciary, or some associate of the fiduciary, stands to make some gain at the expense of the charity; and those situations, not involving a conflict of interest, that result in other misdirections of charitable funds or resources which do not benefit the fiduciary or some associate of the fiduciary. We look only at the first type here. Instances of the second type are dealt with elsewhere in this chapter wherever we take up other sorts of transactions in which charitable funds are misspent or misdirected.

Breaches of duty of the first type can be divided further into breaches in which the gain to the fiduciaries or the associates of the fiduciary arises directly at the expense of the charity, through outright theft from the charity, or through unfair transactions with the charity; and breaches in which the gain to the fiduciaries or the associates of the fiduciaries arises indirectly at the expense of the charity, through the diversion of value from a corporation (or other entity) in which the charity has an ownership interest. We examine these two types of situations in the discussion below and our recommendations are organized accordingly.

c. The Proper Approach

In general, we recommend a two-tiered approach to the articulation of the norms governing the charitable fiduciary's duty of loyalty, identical in form to the approach one finds in all the modern North American business corporations statutes. First, there should
be some general statement or statements in the law setting out the charitable fiduciary's duty of loyalty. We defer consideration of the precise content of this general statement, however, until Part IV, since the content of this normlike the content of the general duty of prudence raises questions of greater importance to provincial law than to federal law, and since we do not think that it is necessary or advisable for federal law to set out the general standard or standards.

The second tier of the approach to the issue of the charitable fiduciary's duty of loyalty is to identify and specifically regulate the transactions or situations in which harm is caused or may be caused to the charity. It makes considerably greater sense, in our view, for the income tax law to state its own specific rules regulating these types of transactions or situations, since the primary objective of the federal regime in this domain is to prevent charitable funds from being diverted to non-charitable purposes. The basic philosophy of the recommendations that follow, therefore, is that only those transactions in which harm is caused or might be caused to the charity should be regulated, and only those transactions that actually cause harm to the charity should be prohibited. The burden of proving that a transaction does not cause harm to a charity should fall on the fiduciaries involved in the transaction or involved in approving the transaction. This generally permissive approach is justified, in part, on the basis that many charities will want to use the services of their fiduciaries or their fiduciaries' contacts, or to ask their employees to serve as directors, etc., for perfectly valid reasons, such as reliability, cost, and other operational concerns. There is no tax policy reason that would justify preventing them from doing so provided no harm is thereby caused to the charity.

In designing these rules we think that it is advisable for the Act to differentiate among the types of charity according to the classification "organization, private foundation and public foundation" and not according to the classification "trust, corporation and unincorporated association". This is because the level of risk of undesirable behaviour varies significantly according to the type of charity concerned, with private foundations presenting a greater risk than the others. Adopting this strategy to articulate these particular norms may well result in federal and provincial regimes that are inconsistent in terms of what is permitted and what is prohibited, since, in formulating the general statement of the duty of loyalty, provincial law may well be more strict and it may well distinguish among charities chiefly according to their form of organization. In our view, the way to deal with this possibility is to ensure that the federal rules are, if anything, less restrictive than the provincial rules so that no transaction prohibited under the federal rules is permitted provincially. Some transactions permitted federally may, however, be prohibited provincially. This difference in treatment is justifiable on the basis that the tax law concern with the enforcement of the duty of loyalty to prevent charitable funds from being diverted to other purposes may properly result in somewhat less stringent regulation.

We now consider the two main types of transactions or situations in detail.

(1) Transactions or Situations Involving the Possibility of Direct Harm to the Charity
Here we are concerned with situations or transactions in which a fiduciary of the charity or associate of the fiduciary receives some gain or advantage at the direct expense of the charity. There are two sets of rules in the Act that deal with this situation, neither of which, in our view, is adequate. The first line of defence is contained in those elements of the Act's exclusively charitable standard which articulate the non-distribution constraint. The second line of defence is contained in the rules governing the non-qualified investments of private foundations. The strategy of this approach, with which we agree, is a general prohibition against non-compensated private benefits flowing from the charity to a proscribed class of persons, together with specific regulation of some particular transaction(s). The execution of this approach in the Act, however, is seriously deficient.

A. The Formulation of the Non-Distribution Constraint

As currently formulated, the Act's exclusively charitable standard prohibits any part of the "income" of the charity from being "payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor" of the charity.32 There are two problems with the formulation of this rule. First, the list of persons who are not permitted to receive any of the income of the charity we will call them the "proscribed class" in this chapter and in subsequent chapters, for the sake of convenience is under-inclusive, misconceived, and anachronistic. "Proprietor" is probably irrelevant altogether since there will be no proprietor of a charity. "Settlor" does not include all "significant contributors", but it is clear that it is "significant contributors" that is intended.33 Directors, managers, officers, and other fiduciaries are also not mentioned. Neither are significant shareholders in major contributing corporations. Neither are corporations, trusts, and partnerships in which members of the proscribed class have material interests or in which they act in a fiduciary capacity. Non-arm's length associates of any of the relevant persons are also not mentioned. The definition of the proscribed class therefore requires substantial reform.

Second, the prohibition in this test is formulated as a prohibition against receiving income, instead of a prohibition against receiving a gain or advantage at the direct expense of the charity. It thus does not prohibit members of the proscribed class from using the property of the charity without charge. Also, it does not prohibit members of the proscribed class from benefiting from investment, business, and contractual relations with the charity. Thus there is no rule expressly prohibiting a charity from purchasing a recreational property and making it available free of charge to its fiduciaries. There is no rule to prohibit a charity from paying a large salary to the daughter of a major contributor to compensate her, for example, for her investment services. And there is no rule (here) prohibiting a charity from lending to or investing in a corporation at a concessional rate of return in which a member of the proscribed class has a material interest.34 Therefore, a better formulation of the ways in which unfair gains and advantages arise is required.

B. Specific Transactions

The second line of defence in the Act against a very small proportion of unfair transactions are the rules that deal with the non-qualified investments of private
foundations. These rules discourage unfair non-qualified investments in two ways, first,
by penalizing the parties who benefit from them and, second, by requiring that private
foundations make disbursements as though they had achieved what, in the Act's
contemplation, is a fair return on the investment, irrespective of the actual return. These
two rules are inadequate because they deal with only a very limited number of
transactions between members of the proscribed class and the charity.

The Commission recommends the federal authorities put in place a better regime to
regulate investment, business, and other contractual transactions between members of the
proscribed class and the charity. We recommend the adoption of a regime similar to the
regime regulating related-party transactions in the United States, except we would make
that regime applicable, although in varying ways, to all types of charity, not just private
foundations. The regime should have the following elements:

(1) The regime should apply to all types of transactions between members of the
proscribed class and the charity in which value is transferred. A definition,
perhaps together with a non-exclusive list of the main transactions (sales, leases,
loans, contracts of employment or for services, etc.), is required.

(2) These transactions should be prohibited (as stated above) unless they are
approved by the trustees, the board of directors, or members of the charity, and
they are "fair and reasonable" (or perhaps some other, higher standard such as
"utmost fairness") to the charity.

(3) Breaches of this rule should result in sanctions to the charity, to the
individuals involved in the offending transaction, and to the fiduciaries of the
charity who approved the transaction. In appropriate cases, breaches should be
penalized with deregistration.

(4) To ensure that non-complying transactions come to the attention of the federal
authorities, there should be an obligation on charities to report the material
provisions of all transactions between members of the proscribed class and the
charity in which value is transferred. There should be an endorsement by the
trustees, directors, or officers of the charity in the report that the transaction meets
the fair and reasonable (or other) standard. For private foundations the report
should occur prior to the transaction. For public foundations and organizations it
should occur annually, and therefore subsequently to the transactions, in the
annual report. Other techniques to make the reporting requirement simpler for
organizations and public foundations should be explored. For example, the report
might be required in respect of transactions involving a group of persons smaller
than the proscribed class.

(5) In any administrative or judicial proceeding where there is a question whether
a transaction is complying or not, the burden of proving that it complies should be
on the persons alleging that it does.
Transactions or Situations Involving the Possibility of Indirect Harm to the Charity

Here we are concerned with situations where value is diverted from the charity indirectly through transactions between members of the proscribed class and a corporation in which the charity has an ownership stake. These transactions are of concern since, if they are not restricted, they could be a very effective way of taking value from the charity for the private benefit of members of the proscribed class.

One easy, moderately effective, way to deal with this type of problem is to prohibit charities from having ownership interests in corporations beyond a certain level for example, twenty percent (charity and disqualified persons combined) as in the United States, ten percent as in Ontario under the Charitable Gifts Act, or fifty percent (charity alone) as in Canada. Another similar approach is to establish a restrictive legal list of permissible investments, as in the United Kingdom. The objective of these two approaches is to limit the charity's exposure to harm of this type, and to limit the opportunity for these types of transactions by restricting the proscribed class of persons' control or influence over the management of the investee corporation (through their control or influence over the affairs of the owning charity). A second approach is to ensure that the charity's return on its ownership stake in the investee corporation is fair or reasonable (or some other standard), regardless of whether there is also a diversion of value from the investee corporation to a member of the proscribed class. A third approach is to regulate directly the affairs of the investee corporation, so as to restrict or prohibit harmful self-dealing transactions. The Charities Accounting Act and Charitable Gifts Act in Ontario, in part, do this as well.

The fifty percent control rule is one of two sets of rules which address this problem under the Income Tax Act. In our view it is clearly inadequate. It applies only to ownership interests of foundations that are obtained by acquisition and, in any event, the fifty percent level is too high to catch most of the offending transactions. Its regulation of the problem is therefore far too weak and far too oblique.

The non-qualified investment rules also attempt to address this problem. They also fail. The non-qualified investment rules do two things here: they require the investee corporation to pay what in the Act's contemplation is a "fair" rate of return on the charity's investment, on pain of a penalty tax applied to it equal to that rate of return, and they penalize the charity by requiring it to meet a disbursement quota calculated as though such a "fair" return had been earned. As suggested already, these rules are inadequate for several reasons. First, the transaction between the investee corporation and the member of the proscribed class itself may reduce or depress the fair market value of the shares in the investee corporation, thereby undermining the effectiveness of the disbursement quota since the quota calculation is based on the greater of the cost amount and the fair market value of the shares in the investee corporation. Second, the penalty tax is calculated using only the cost amount of the shares, not the higher of the cost amount and the fair market value of the shares. In consequence of these two failings, members of the proscribed class can direct much of the entire value of the growth of the
investee corporation to themselves with impunity. Third, and in any event, these two rules apply only to private foundations and only to combined control positions greater than fifty percent and less than one hundred percent that are acquired by the charity. 39

We prefer the third type of approach to this problem, namely, direct regulation of the offending transactions. What is required, is, first, some threshold ownership stake held by the charity and members of the proscribed class in the investee corporation. This threshold should be sufficiently low to identify the vast majority of situations where the charity (and therefore the fiduciaries of the charity), or the charity together with the proscribed class of persons, are in a position to influence the investee corporation’s affairs to the detriment of the charity. Other requisites are, second, a standard of fairness for the transactions and, third, an obligation to report. There should also be sanctions for offending transactions.

We suggest a threshold of no higher than thirty percent; the thirty percent threshold should be comprised of the combined equity stakes of the charity and all members of the proscribed class of persons. 40 To make matters somewhat easier for all charities, these rules would not apply in respect of interests in publicly traded corporations on the theory that the affairs of such a corporation are policed well enough by other shareholders. Similarly, to make matters simpler for organizations and public foundations, there should be an exempting provision that exempts them from these rules, in whole or perhaps only in part, where the charity’s own stake is less than five percent of the equity of the investee corporation or, perhaps, where the charity’s total investment in the investee corporation is less than five percent of its total investment property. By way of contrast, for private foundations, provided the thirty percent threshold is met, a one-share interest would be sufficient to attract the application of these rules. Private foundations should also be treated more stringently by restricting their ownership interests in all cases to a maximum of ten percent of any corporation.

The reporting requirement in respect of these "controlled corporations" we will use this term in subsequent chapters would have to contain some type of disclosure requirement concerning the existence of the relevant investment interests, as well as disclosure of possibly offending transactions (loans, leases, investments, contracts, etc.). The first element could end up being quite complex given the very broad definition we recommend for "proscribed class". The effect of such a reporting requirement may therefore be to discourage organizations and public foundations from taking greater than a five percent stake in any one corporation. We are cognizant of this difficulty but see no simple way to avoid it.

In all other respects, the rules should be the same as the rules established to deal with self-dealing transactions between members of the proscribed class and the charity.

As a supplementary regime to this, perhaps there ought to be some regulation concerning the general duty of prudence of the fiduciaries of these controlled corporations. Value may be diverted as effectively through wasteful and ineffective management as by fraud or breaches of fiduciary duty. To some extent this federal interest will be looked after by
the rule suggested above to deal with the duty to invest prudently, since a poorly run corporation will also likely be a wasteful or ineffectual investment. Nevertheless some direct regulation is also advisable. As a minimum, there also ought to be financial disclosure of the affairs of these corporations, so that such imprudent expenditures might be detected.

*d.Conclusions*

It is useful to summarize our recommendations above in section 2(c)(ii) and (iii) in the form of specific recommendations for reform:

(1) The duty to invest prudently

The duty to invest prudently should not be enforced under federal law except to the extent that the imprudent investing is wasteful or ineffectual. Investments that are wasteful or ineffectual should be prohibited. Breaches of this rule should be sanctioned with penalty taxes applied against the charity and culpable management. The rule should apply to all types of charities. Compliance monitoring ought to vary according to whether the charity is an organization or a public foundation, on the one hand, or a private foundation, on the other.

(2) Investment businesses

There is no need to reform the rules that deal with the possibility of the investment activities of a charity becoming an end in itself.

(3) The duty of loyalty

Federal law should regulate only specifically identified transactions. Articulation and enforcement of the general duty of loyalty should be left to provincial law.

(a) The exclusively charitable standard in the *Income Tax Act* should be reformulated to prohibit non-compensated benefits flowing to members of the proscribed class of persons. The latter concept requires a better and fuller definition in the Act.

(b) The Act should identify all possible types of transactions between members of the proscribed class and the charity that might result in non-compensated benefits flowing to members of the proscribed class. These transactions need not be prohibited under federal law. However, they should be regulated by rules requiring that they meet a certain standard of fairness and that they be reported, either prior to their occurrence, in the case of private foundations, or subsequently, in the case of other types of charity. Breaches of the rule should result in sanctions against the charity, the benefiting fiduciaries, and culpable management.
(c) Transactions between a member of the proscribed class and any corporations (or other entity) in which a charity together with members of the proscribed class of persons hold more than thirty percent of the equity should be subject to the rules set out in (b). Private foundations, however, should be prohibited from owning more than ten percent share of any corporation.

(4) The duty of prudence of the fiduciaries of "controlled corporations"

At a minimum, charities which own shares in controlled corporations should be required to report annually on the affairs of such corporations.

(iv) Regulation of Political Activities

We indicated above that the basic regime of the Income Tax Act and the administration of the Act as it concerns political activity of charities are sound. However, there is room for improvement. The following recommendations are inspired largely by the American regulation of the political activities of charities.

First, political activity should be defined, and the threefold classification of political or apparently political activity should be set out more clearly in the Act, with definitions and perhaps non-exclusive lists of examples, although the latter could also be set out, as at present, in a circular.

Second, partisan and other impermissible political activity should be clearly prohibited on pain of deregistration and with sanctions in the form of penalty taxes against the charity and culpable fiduciaries of the charity. Ancillary or incidental activities should be clearly permitted. What we called "apparently" political activities in chapter 11 should not be restricted at all.

Third, although the current regime uses the technique of a quantitative rule the "ten percent of resources" rule, as well as the restrictions imposed by the disbursement quotas his regime is too difficult to apply to be of much use or assurance to charities. Moreover, this quantitative standard is obligatory, not optional, so it applies in some cases to restrict ancillary or political activities that should be permitted. A better and fully optional quantitative rule is required, and the American rule, which uses a percentage of total expenditures test, is much clearer and easier to apply. If such a technique is adopted, then it makes sense for the Act to be more definitive and precise in the description of what is ancillary and/or incidental and what is merely apparent political activity, and therefore permitted without restrictions, as the American rules are. In our view it also makes sense to permit a larger proportion of the expenditures of smaller organizations to be spent on such permissible political activity.

Fourth, the Act and the administration of the Act should recognize as much as possible that social welfare charities, because of their nature and their mission, and because of the role played in social welfare matters by the modern state, are going to be involved in more ancillary and incidental political activity than, for example, arts organizations or
amateur sports organizations. Recognition can be given to this fact in a number of ways, ranging from explicit permission to spend more on ancillary and political activity by setting a higher expenditure limit for social welfare charities in the optional quantitative rule, to including in the list of permitted ancillary and incidental activities and in the list of apparent political activities, the typical political and apparently political activities of social welfare charities. Our suggestion to make the quantitative standard fully optional also contributes to the achievement of this end, since it permits social welfare charities to remain under the general regime and to argue, when the need arises, that their political expenditures are permitted because they are ancillary or incidental to their charitable activities.

Fifth, consideration should be given to putting in place different and more stringent regulations concerning the political activities of private foundations. The American rules do this. The justification is simply that private foundations present a greater risk concerning partisan political activity, coupled with the observation that they generally have few operational involvements, and therefore less of an argument that a given political activity is ancillary, incidental, or merely apparent. However, as with all regulation which treats private foundations more severely than other charities, this suggestion might result in the frustration of the legitimate aspirations and activities of some private foundations. For example, one can imagine quite easily a private foundation taking a financing and organizational role in lobbying the government to improve income security regimes. Provided such activity remains ancillary and incidental, why should it be arbitrarily prohibited? The harm caused by an absolute prohibition in this domain is much more severe than the harm caused by similar restrictions on the investment activities of private foundations, since, in the latter case, a private foundation will always be able to find other investment vehicles that meet its investment needs. This argument suggests that the regime applicable to private foundations concerning political activities should be carefully crafted. Our suggestion is that a non-optional quantitative rule be designed to apply to private foundations and that this rule be slightly more restrictive than the optional quantitative rule available for other charities.

(v) Regulation of Borrowing Activities

The Income Tax Act, it will be recalled, restricts the permissible debt obligations of foundations to those required to fund current operations, incidental investment debts, and incidental administrative debts. We see no good reason, however, for these restrictions and recommend, therefore, that they be abolished.

The only sort of justification for the current restrictions is that they are an approximate or surrogate standard for some other policy concern. There are two possibilities. Restrictions on the level or kinds of debt obligations may be intended as a way of ensuring that the foundations focus on charity and not allow themselves to be distracted by other goals. We think this concern is adequately addressed by a well-crafted exclusively charitable standard. It should be sufficient if foundations (indeed all charities) are obliged to report on their borrowing activities annually as at present, but in greater detail so that possible problems concerning compliance with the exclusively charitable standard might be
detected. The other possibility is that the restriction is supported by a concern that charitable fiduciaries conduct the activities of the charity with the requisite level of care and competence, perhaps on the theory that the prohibited types of borrowing could never or rarely meet this standard. In our view, even if the theory is sound, there is no sufficient income tax law concern to enforce the charitable fiduciary’s duty of prudence, except as in the case of investments, where the borrowing activity is imprudent to the point of being wasteful or ineffectual. Thus, the current borrowing restrictions might be replaced by a provision sanctioning such wasteful or ineffectual borrowing activity. If so, the new rule should apply to all charities. The sanctions for its breach should apply to the charity and to culpable fiduciaries of the charity.

(vi) Regulation of Granting Activities

a. Current Objectives

The rules governing permissible granting activities of charities are intended to accomplish three objectives, all of which apply exclusively to the affairs of charitable organizations. First, they are used to identify the major point of distinction between a foundation and an organization. Second, they are designed to permit legitimate reorganizations of charitable organizations and to permit coordination of activities among associated charitable organizations. Third, they are designed, in part, to inhibit the use of granting practices to circumvent the disbursement rules.

These rules are unnecessarily complicated, but in spite of that, largely adequate. The ultimate source of the complexity is the fact that the method for calculating the disbursement quota applicable to organizations does not require inclusion of gifts from other charities, unreceipted gifts, or income from investment properties. Separate regulation of dispositions of moneys coming from these sources is therefore required and the rules under consideration here are rules intended in large measure to deal with the most significant problems concerning money from these three sources. Our recommendation for reform is based partly on the need to simplify matters, but also partly on the need to put in place a more rigorous disbursement requirement applicable to organizations. As will be seen below, we recommend that the disbursement quota for organizations be structurally similar to that applicable to foundations and, therefore, that it include a percentage of the value of investment properties, as well as a percentage of gifts from other charities. If this is done, much of the regulation concerning granting activities could be simplified. We make suggestions as to how, in what follows.

With respect to the first objective, the Income Tax Act should use a clearer standard. Currently, the rule is that an organization may not grant more than fifty percent of its income, and "income" is given a special definition, so that it includes all gifts, except gifts intended as gifts of capital and gifts for which the donor cannot claim a credit or deduction. The difficulty is that "income" has only two other, very minor, functions in the regulation of charities under the Act. It is therefore burdensome to charities to have to make separate calculations for the purposes of this particular rule. A simplification would tie the calculation required by this rule to the disbursement quota, since it does not matter
what basis for the calculation is actually chosen. The rule might henceforth be that organizations may not grant more than a certain percentage, for example, fifty percent, of their disbursement quota redefined as suggested in more detail below on gifts to qualified donees.

The current sanction for failure to meet this requirement is deregistration, although most observers suggest that Revenue Canada would never revoke a registration on account of a breach of this requirement. Rather, most observers believe Revenue Canada would simply reclassify the offending organization as a foundation. This issue requires clarification. Clearly, revocation of registration is too severe. There should be a specific provision, perhaps one that automatically changes the disbursement requirement of the offending organization to that applicable to a public or private foundation, depending on the case.

The second objective to permit legitimate reorganization and to permit legitimate coordination of activities among associated charities is accomplished in an extraordinarily oblique fashion through two provisions. These provisions which deem grants "not made out of income" (that is, gifts made from capital) to qualified donees and gifts of income among associated charities both to be acceptable "charitable activities" for organizations. The first rule is intended as an exception to the exclusively charitable standard as formulated in the Act for organizations, since organizations are otherwise obliged to devote all their "resources" to activities carried on by them. The second rule is intended as an exception to the fifty percent of income limit which marks the distinction between organizations and foundations just described.

The approach in any revised regulation of these two types of granting practices should be simpler and more direct, and therefore more readily understood and more easily enforced. If the rule implementing the first objective is recast in the way suggested, these two types of granting activities can be cast as exceptions to the first rule. Thus, organizations would not be permitted to grant more than a certain percentage of their disbursement quota to qualified donees, except in the case of reorganizations or in the case of grants within a group of associated charities. With respect to the first type of granting activity, federal law should explicitly provide for legitimate reorganizations of charities. If the federal authorities do address this issue more directly and explicitly, we also recommend that they should require that the reorganization be acceptable under provincial cy-près law.

The third objective is to prevent charities from evading their disbursement quotas through back-and-forth granting between two or more charities, with the effect that the funds involved in the back-and-forth grants are never actually expended on charity. Regulation of this sort of behaviour in foundations is more exacting than in the case of organizations. With foundations, inter-charity grants are included in the calculation of the subsequent years quota for the recipient foundation. For both foundations and organizations, there is also the general rule that the gifting and, if culpable, receiving charities, may have their registrations revoked. However, there is nothing else covering organizations, except very obliquely and rather weakly in the rules under consideration. In particular, since only fifty percent of an organization's "income" may be granted to another charity, and since
"income" is defined to include gifts from another charity which are not intended as gifts of capital, this rule restricts somewhat the ability of an organization to engage in this sort of back-and-forth granting. The restriction is far too weak though. It would be better as a first step if the gifts from one charity to an organization, not intended as capital gifts, were simply included in the disbursement quota of the recipient organizations. However, this will not stop back-and-forth granting, and more effort is required. We return to this issue below, when we take up disbursement quotas.

b.A Fourth Objective

Nowhere does the Act impose an obligation on granting charities, largely but not exclusively foundations, to make sure that the funds they grant are used in accordance with the terms and conditions of the grant or in furtherance of objectives which are exclusively charitable. This is particularly worrisome in light of the fact, just mentioned, that there is only very light regulation of the uses of funds received by an organization from another charity. To remedy this failing of the Act, there ought to be a provision placing some responsibility on the granting charities to ensure that the granted funds are properly expended. Perhaps an obligation to put in place follow-up or accountability procedures would suffice. A breach of this obligation might be sanctioned by a penalty tax in cases where it is shown that the granted funds have been misapplied and that their misapplication would have been detected by prudent "follow-up" or accountability procedures.

(vii) Regulation of International Charity

The general rule under the Act is that charities may either do charity work or donate to qualified donees. This rule has presented problems for charities wanting to work internationally with foreign charities (or other non-governmental organizations) or with governments abroad, and it presents problems for Canadian donors who want to make donations to charitable organizations which operate outside Canada. Under the present and proposed administration of the Income Tax Act, a charity operating abroad must operate through agents, use contracts that establish performance objectives in the foreign party, or enter joint venture or partnership arrangements or legitimate self-help projects. Revenue Canada requires documentation establishing the nature and terms of the foreign relationship, as well as adequate interim monitoring of the relationship. Ownership of foreign land and buildings must remain in the charity, unless it is manifestly destined to a charitable purpose or is turned over to a public authority.

Many Canadian charities operating abroad feel that the current administration of the Act in regard to international charity could be improved. In our view this is largely, but not exclusively, an administrative not a legal matter since in our view the fundamental regime that a charity must either do charity or grant to a qualified donee is essentially correct. There are a number of possible minor improvements, some of which may require amendments to the Act. First, it should be possible for foreign charities to obtain something akin to registered status in Canada by filing an application and meeting the annual reporting requirements. Second, a procedure could be established under which
foreign projects of Canadian charities could be pre-cleared with Revenue Canada by having the foreign charity involved in the project make the same level of financial and other disclosures required of Canadian charities. In some cases the foreign charity’s disclosure could be confidential. Third, the federal government could make a practice of using section 110.1(1)(a)(vii)\(^{42}\) to "designate" charities outside Canada as eligible for qualified donee status.

(d) Disbursement Quotas

(i) Introduction

There are six main sources of revenue or funds available to charities: donations; revenues from capital properties; government grants; grants from other charities; loan proceeds; and "other", chiefly income from permitted commercial operations. There are three components to a disbursement quota the percentage figure used in the calculation, the revenue base against which the percentage figure is applied, and the types of expenditures eligible to satisfy the quota. In the following discussion, we analyze the appropriate elements of the disbursement quota for all types of charity.

The main, and we would suggest sole, objective of a disbursement quota is to make charities *spend* rather than *save and accumulate* their wealth.\(^{43}\) Requiring charities to spend forces them to *do* charity, as opposed to merely saving and/or doing nothing. Given this objective, the quota should seek to strike a sensible balance between forcing current expenditures and permitting savings for future expenditures. No matter what rule is chosen, however, it is bound to define a somewhat arbitrary line. Therefore there should continue to be considerable discretion in the Minister to allow *ad hoc* exceptions to the quota. A more streamlined procedure might even be designed to allow for exceptions as a matter of course. One method of doing this is to base the quota calculation on average annual expenditures over a five- or seven-year period. These issues are addressed to some extent in the current Act.\(^{44}\) We merely suggest that the rationale supporting flexibility on this issue that the line imposed by the quota between savings and expenditures is arbitrary is quite strong and justifies considerable latitude.

If the sole function of the disbursement quota is to strike a balance between expenditures and savings, then, subject to two exceptions namely, that organizations will be restricted by definition in the level of their granting activity, and that permissible capital transfers, because they are transfers of savings, should not be part of any disbursement quota calculation for the donor or doneethere is no reason that the third element of the quota calculation the eligible expenditures should not be completely congruent with the expenditures permitted under the exclusively charitable standard.\(^{45}\) The current regime, however, deploys the disbursement quota to achieve several additional objectives. In particular, and as we have seen, it is used to define one of several limits on the political and commercial expenditures of charities, to encourage fairness in transactions involving non-qualified investments, and to restrict fundraising and administrative costs. The strategy of the Act in regulating most of these matters is to impose the relevant limits by modifying the third element of the quota calculation. We would argue that this multi-
function approach to the use of the disbursement quota is misguided and ought to be abandoned. It not only unduly complicates matters, and therefore compromises the achievement of all the objectives concerned, but it is also the source of a fundamental tension, indeed contradiction, in the Act concerning the charitable nature of the expenditures on these activities; for the purposes of the Act's exclusively charitable standard these expenditures count as eligible expenditures, but for the purposes of the disbursement quota, they sometimes do not. It would be better, in our view, if the tax regime dealt with special problems such as these independently of the quota calculation, so that the regulation in these areas is simple and clear, the objective and operation of the quota is simple and clear, and the overall scheme of regulation under the Act is not compromised by a contradiction lying at its foundation.

The Commission has already suggested completely separate regimes to govern non-arm's length investments, political activities, and commercial activities. We will deal with the regulation of the costs of fundraising and administration before going on to discuss the central issues of importance to the quota in more detail.

(ii) Regulation of Fundraising and Administrative Costs at the Federal Level

a. Definitions

As a preliminary matter, a definition of "fundraising expenditures" and of "administrative expenditures" is required. With respect to the former, it is not certain under the current rules to what extent, if any, educational and cause-oriented publicity is included. Further, since the current rules do not distinguish at all between commercial fundraising and donation fundraising, it is not clear whether the expenses of commercial fundraising are to be counted as fundraising expenditures or administrative expenditures, and whether they should be accounted for on a net or gross basis. The current definition of "administrative expenditures" is also confused. This is due to the current regime's ill-advised attempt to distinguish between program-related and non-program-related or "pure" administrative expenditures. Any new regime should resolve this confusion by being as clear as possible about what is meant by the regulatory concepts used.

In our view, there are three basic concepts, but as we will argue, only the first is capable of being defined in a way that can be easily applied in this context. The three concepts are donation fundraising, permissible commercial activities (or commercial fundraising), and administrative costs, which can be divided again into "pure" and program-related. "Donation fundraising" should be defined to include all expenditures, one of the main purposes of which is to raise donations. This would include everything from the cost of a simple direct appeal to the cost of public relations campaigns and newsletters, to the cost of a charity dinner where a portion of the ticket price is receipted as a donation. To make matters more clear to the sector, it may be necessary to name this category "donation fundraising and public relations" or some such similar name. Ideally the second category, commercial fundraising, should include all expenditures on permissible commercial activities, and the third category, administration costs, should include all administrative expenditures. However, a moment's reflection reveals that approaching the last two
categories of expenditures in this way is highly problematic. It may be reasonably easy for most charities to identify their expenditures on ancillary commercial activities, because most of these will be discrete fundraising events or discrete commercial units for which profit and loss calculations can be made. Many will not be discrete entities, however. Moreover, the profits and losses deriving from incidental commercial activities such as the hospital coffee shop, the rental of surplus space, or income from a university-owned patent will be very difficult for most charities to identify. This is due to the degree of integration these activities have in the general operations of the charity and, therefore, due to their call on the basic administrative infrastructure of the charity. Further, the distinction between ancillary and incidental commercial activities, although conceptually sound, will certainly blur in practice. Similarly, the purely administrative expenses, as opposed to program-delivery expenses that is, the administrative expenses that we might especially want to isolate for regulatory purposes of any reasonably complex charity with a service orientation will also be quite difficult to identify and quantify; most of these expenses are tied intimately to the very existence of the organization. It is difficult to understand, therefore, how reasonably useable definitions of "commercial fundraising expenditures" and "administration expenditures" could be created.46

An alternative approach for commercial fundraising and administrative expenditures is therefore required. We set out our suggestions in what follows, organized so that the suggested regulation is tied explicitly to a legitimate federal regulatory objective. Generally speaking, we resolve the problem of definition by avoiding it. Instead, we isolate certain specific "problematic" expenditures which come within one or both of these broad categories and regulate appropriately.

b.Regulation

The general fear concerning fundraising costs and administrative costs is that these costs may be incurred either imprudently or fraudulently. The federal government might be interested in this, and therefore regulate administrative and/or fundraising expenditures, for the sorts of reasons mentioned above in the discussion of the federal role in enforcing the charitable fiduciary's duties of prudence and loyalty. We look at each of the possible reasons in turn.

First, there is the tax expenditure point of view. It suggests a federal role in the regulation of fundraising and administrative expenditures is required to protect the overall efficiency of the tax expenditures. We were not persuaded by this reasoning above, however, and are not persuaded that it applies here.

Second, there is the government's interest in enforcing the charitable fiduciary's duty of prudence. We argued above that there is some justification supporting federal regulation in respect of the duty of prudence. The justification derives from the exclusively charitable standard and the recognition of the fact that, at a certain level of inefficiency, an inefficient charity is no longer effectively doing charity. We defined that situation above as the point at which the imprudence of the fiduciaries results in wasteful or ineffectual investments. We would use that as the point at which, under the federal law, a
charity’s fundraising (donation and commercial) or administrative expenditures exceed the permissible and ought to be prohibited. We would recommend, therefore, the adoption of a qualitative rule, similar to the one recommended above governing imprudent investments, to govern such imprudent fundraising (donation and commercial) and administrative expenditures. This qualitative rule should be supported by an annual disclosure requirement. That requirement should mandate disclosure of the following categories of information:

1. Legal fees and accounting fees;

2. Total salaries of all employees and some related information, such as the number of employees; highest, lowest, and median salary; etc.;

3. Total expenditures on donation fundraising and public relations, including an estimate of the proportion of legal fees, accounting fees, and salaries spent on such activities;\(^4\)

4. The nature and essential elements of contracts with third-party fundraisers for both commercial and donation fundraising. For commercial fundraising there should be a description of the project or event, and a disclosure of the amount of compensation paid to the third party (including amounts paid to employees of the third party hired by the charity), the total cost of all inputs (even if these are paid directly by purchasers of the products sold), and gross revenues. For donation fundraising there should be disclosure of compensation paid (including amounts paid to employees of the third party hired by the charity) and gross donations directly related to the campaign.

5. The nature of commercial activities and financial disclosure with respect to those activities, itemized to include specific disclosure of rental income.

The only objective of these disclosure requirements is to aid in the detection of the breaches of the qualitative standard. Breach of the qualitative standard should result in sanctions against the charity and culpable management.

We also recommend the adoption of an optional quantitative rule available in regard to donation fundraising expenditures. This optional quantitative rule for donation fundraising expenditures should exempt those expenditures from the application of the qualitative rule where the net amount of those expenditures constitutes less than a certain percentage, for example, ten percent of the total disbursement quota.\(^5\) Charities that meet this requirement could not subsequently be attacked for failing to comply with the qualitative standard. This will provide complying charities with a certain measure of security.

At the same time, to address the particular issue of payments to third-party fundraisers (donation or commercial), the federal government might also exempt from the qualitative rule charities which apply for and obtain prior approval of their third-party fundraising...
contracts. Such a procedure may, however, require more personnel than Revenue Canada is capable of allocating to the regulation of this sector. Alternatively, therefore, there might be some provision in the *Income Tax Act* or regulations to accept as reasonable any such expenditure where there has been a similar provincial process of approval.

Third, there is the state's role in enforcing the duty of loyalty. The Commission has argued for a transactions-based approach to this role at the federal level. If that approach is adopted in the way we suggested above, then any fraudulent fundraising that involves a benefit to a member of the proscribed class will be caught by the rules we recommended. Similarly, fraudulently inflated administrative expenditures that benefit members of the proscribed class will also be caught.

Fourth, governments have concerns with fraudulent fundraising to the extent that innocent donors are victimized or charity in general is given a bad name by people who have no intention of benefiting charity. Similarly, governments have concerns with fundraising schemes of less than unquestionable integrity, but not quite fraudulent. We think these problems are of exclusive concern to the provincial governments.

If these problems are handled in the ways suggested, there will be no need to distinguish between different types of administrative expenditures, at least in the way that seems to be required now, since all such expenditures that are a direct or indirect means of doing charity would be charitable. Similarly, there would be no need to distinguish between fundraising expenses and program-related education campaigns, since all fundraising for charity being an indirect means of accomplishing charitable purposes would be charitable. All that charitable fiduciaries need concern themselves with henceforth, insofar as the federal regime is concerned, is whether the particular expenditure at issue is so imprudent as to be wasteful or ineffectual.

(iii) What are the Proper Elements of a Disbursement Quota?

The Commission will examine each of the sources of revenue in turn. In each case where we think the component should be included in the base of revenue, we make suggestions as to the proper percentage amount. If our suggestion regarding the objective of this rule is accepted, it might be thought that the percentage amount should increase systematically since the quota is no longer intended to restrict a certain amount of pseudo-legitimate activity, but merely to establish a rough estimate of an appropriate savings/expenditure ratio. Accordingly we would recommend slightly higher percentage amounts in many cases. A second implication of our suggestion is that the appropriate savings/expenditure ratio should generally not be a function of the source of revenue or funds, since this would result in arbitrary distinctions among charities. Rather, the reasons supporting the exclusion or special treatment of any particular source of revenue or funds will have to be identified separately. As a third preliminary observation, it is worth asking whether, given our rationale for the quota, there is a basis for distinguishing between foundations and organizations. We think there is. Organizations, given their operational commitments, will require more flexibility in planning for future contingencies than will foundations and, therefore, greater flexibility in the rate of
savings allowed. This need should be reflected systematically in lower percentage amounts for organizations compared to foundations. As a final preliminary observation, the timing of the eligible expenditures should generally continue to be based on the principle that last year's revenues are this year's base of revenue for the purpose of the quota. This approach is adopted for the convenience of charities. It makes calculating the quota easier and it permits some expenditure flexibility.

a. Donations

Donations can be divided into receipted and unreceipted donations. They can also be distinguished on the basis of whether the donor intended them as gifts of capital, as term gifts (gifts to be spent over a limited period of time), or as unrestricted gifts. Gifts of capital can be divided into gifts intended as endowments and gifts intended to fund improvements to operational capital.

Generally the disbursement requirement should respect the donor's intention. Subject to what is said below concerning the treatment of receipted versus unreceipted gifts, donations intended as endowments, as funds for operational capital, and as term gifts should therefore not be subject to any disbursement requirement that is inconsistent with the donor's intention as to how the gift is to be spent. Endowments, therefore, should be excepted from the base of revenue for the quota altogether. They would subsequently fall to be regulated by the rules governing revenues from capital properties. Gifts to fund operational capital and term gifts might be treated as a separate category, subject to quotas derived from the terms of the gift. The terms of the former will generally be established by the charity in designing its campaign and making its solicitation. The terms of the latter might be established in this way or by the donor as a condition of the gift. In both cases the reason for the exemption from the regular regime also justifies restricting the eligible expenditures to those established in the campaign or gift. Provided a reporting requirement could be devised to accommodate these elements, gifts to fund operational capital and term gifts should be treated in this way. Otherwise, a broader exemption, as at present, should apply.

Unrestricted and receipted donations are the easiest case. They should continue to be included in the revenue base for all charities. The percentage amounts should be lower for organizations than for foundations. Gifts from "controlled corporations" should be subject to a one hundred percent disbursement requirement.

Unreceipted gifts are not currently included in the disbursement quota of any type of charity, regardless of whether they are intended as an endowment, term, operational capital, or unrestricted gift. The only argument in favour of this exclusion is that, since in these cases there is no deduction or credit to the donor, there is no tax policy concern with the ultimate use of these funds. One might argue, to the contrary, that these donations still benefit from the tax exemption, but this argument is not persuasive since this money will be brought into the quota calculation once it is invested and is earning revenue. Up until that point there is no revenue under any conventional definition of revenue that reaps any advantage from the tax exemption. It could also be reasoned that
the argument in favour of exclusion is based on the false assumption that the tax regime, in general, and the disbursement quota, in particular, are justified in whole or in part as measures to protect a tax expenditure. Our view has been that they are not: the objective of the quota, rather, is to ensure that entities entitled to charitable status do charity exclusively. On that basis we think that these donations ought to be included in the base of revenue and subject to the same percentage amount as receipted donations.

b. Revenue from Capital Properties

Revenues from capital properties can be divided into three kinds: investment returns (capital gains on and interest and dividend income from an investment property); the proceeds of a liquidation of an investment property; and the proceeds of a liquidation of a capital property that is used by the charity for its charitable purposes. We see no reason to include the latter two in the base. Since they are, prior to the liquidation, legitimate savings, they should be permitted to keep that status.

Investment revenue is a significant source of support for many charities yet it is currently taken into account in the calculation of the quota of only foundations. We believe this is a mistake since many organizations derive significant income from their investment holdings. The concession made in favour of organizations may be intended as a way of identifying a group of charities which do not have the administrative resources to comply with a disbursement quota that takes into account revenues from investments. This is a valid objective, but the target for the concessional treatment is too wide and the concession itself too generous. A better technique would be to exclude organizations whose investment holdings are below a certain threshold for example, $100,000 from any obligation to spend revenues from those investments.

The technique of the Act in establishing the quota in respect of investment revenues is clever and should be kept. That technique avoids the necessity of actually calculating investment income and instead requires charities to expend a percentage of the total average value of their investment holdings. As a rough approximation of the revenues, however, the percentage should be chosen so that it errs, if at all, at an under-estimation of the revenues. It should also allow for a certain amount from the revenues being recapitalized to protect against inflation. Finally, it should aim to permit, roughly speaking, the same level of real savings that the other percentage amounts permit. It would be fair to base the figure on the assumption that private foundations are better investors than public foundations and that the latter are better than organizations. Also it would be fair to differentiate between foundations and organizations on the basis that the latter will need more flexibility to plan for operational contingencies. Finally, charities might be given the option of satisfying a quota based on their actual returns. The chief negative implication of this last suggestion is that the quota will not encourage effective investing. We stated above, however, that this effect of the quota was only an incidental benefit. The value of allowing charities the option to choose a different basis of calculation for that portion of their quota tied to their income from investment capital is that it may be much easier for charities to make the calculation and it may, especially for smaller charities, be lower.
c. Government Grants

In our view there is no need for the disbursement rules to require charities to expend any portion of their funds coming from governments. Other systems of control that are currently in place, or that we recommend be put in place in Part IV, are better at regulating the use of these funds. Essentially, the granting agency should itself ensure that its expenditure requirements are met by the recipient charity.

d. Grants from Other Charities

Currently grants from other charities are included in the base of revenue only for foundations. This is a mistake, we believe, especially considering the significant size of foundation grants and the fact the current regime imposes no accountability requirements on foundations for the use of their funds.

These grants may be motivated by one of three intentions. First, may be intended as an unrestricted donation, like any other unrestricted donation, to be expended more or less immediately. Second, they may be intended as an endowment, a gift of operational capital, or a term gift that is to remain available to generate revenue to fund charity over the medium or long term. Finally, they may be intended as a way for the granting charity to avoid the disbursement quota. Any quota that includes grants from other charities in its base will have to distinguish adequately among these three motivations and, as with donations from non-charities, the donor's intention should be respected, provided it is charitable. The method of regulation will have to pay attention to the treatment of the grant in both the granting and the recipient charity.

The first type of gift should be treated as a grant out of the granting charity's base of revenue for that year and, therefore, qualify as an eligible expenditure of the granting charity for that year. In the recipient charity, it should be treated as part of the base of revenue, but be subject to a one hundred percent disbursement requirement, since the grant will already have been the subject of a savings calculation in the granting charity.

The second type of grant should be treated as a transfer of the granting charity's savings for that year (if it comes out of revenues) or of its stock of investment capital. In either case, since it is in effect a transfer of savings, current or accumulated, from the granting charity, it will not have been included in the revenue base of the granting charity, and therefore should not count towards the satisfaction of its quota. Similarly, as a transfer of savings it should not form part of the revenue base of the recipient charity.

The third transaction is an attempt to evade the quota and should be prohibited. The rules just suggested to deal with the first type of grant preclude inter-charity grants from being used to avoid the quota to the extent that one hundred percent of any such grant must be disbursed. This rule does not solve the problem of quota avoidance through back-and-forth granting, however. The best way to deal with this is to prohibit it and institute a reporting requirement to detect it. If charities are obliged to report on receipts of grants from other charities in the previous two years, together with their own grants to other
charities in the year of the report, and/or to list all the charities to which they are "related" a term to be defined then that should be sufficient to detect most, if not all, cases of back-and-forth granting to avoid the quota. The former may be the only feasible approach since, as experience has shown, defining "related charity" may prove too complex a task.

**e. Loan Proceeds**

The rules must also be designed to account for borrowed moneys. The rules should parallel the purpose of the loan. If the loan is to fund current operations, then the loan proceeds should be included in the base of revenue in the year in which they are received. If the loan is to fund capital expenditures, then it should not form part of the base of revenues in that or any other year, nor should its expenditure on the capital project count towards the satisfaction of the quota. Rather, the loan repayments should count as eligible expenditures.

**f. Revenue from Permissible Commercial Activity**

Revenue from commercial activity and other revenue generally is not currently included in any of the quotas although, to the very limited extent that "income" is used as a regulatory concept under the *Income Tax Act*, such revenue is brought within the regulatory regime. There is good reason to exclude revenue derived from commercial activity from the revenue base of the quota, because the profits from the commercial activity may be its only source of capital. There is also the argument that the sweep of the disbursement quota rule ought not to be too stringent. The revenue from commercial activity of charities seems to be an acceptable place to exercise a little latitude. For these reasons, we recommend that this source of revenue continue to be excluded from the revenue base.

**(e) Donations**

The Commission does not provide in-depth criticisms of the rules dealing with donations for the reason, stated above, that our only major concern with the federal regime is with the way in which it regulates charity and the way in which this scheme of regulation interacts with the provincial scheme.

We do make a number of suggestions for improvement, however.

First, the federal regime might make provision for a new classification of donor called "feeder" organizations. These are the entities that would carry on businesses owned by a charity. These organizations might be permitted to make donations back to the charity without limit, provided that the donations are subject to a one hundred percent disbursement requirement so that they do not find their way back into the business and thereby give rise to the possibility of unfair competition. To give effect to this latter suggestion, a separate element of the disbursement quota calculation would have to be established to identify this source of revenue for distinct treatment.
Second the donation credit and deduction, together with the limits on these, might be raised for charities in sectors such as social welfare or health in which the government also has an interest, on the theory that the tax expenditure analysis does have some limited validity.

Third, the system should allow for some flexibility with regard to the deductibility or creditability of donations to entities that do not satisfy the exclusively charitable test but do pursue charitable purposes or purposes that are, under the circumstances of the gift, charitable. Service clubs do not usually meet the exclusively charitable standard, but they often pursue charitable purposes. A system might be set up that would allow them to obtain fast-track registration of their charitable projects or programs, perhaps through an initial registration of the service club as an entity entitled to this privilege, followed by registration and disclosure of projects on a fast-track basis, as the need arises. Similarly, some mutual benefits, such as the neighbourhood cooperative daycare, and some community development projects, such as self-help micro-enterprise, might be permitted to issue receipts under certain special conditions.

Fourth, the regime should prohibit the use of name of "registered charity" by entities that are not registered charities.

(f) The Tax Exemption

We also do not provide in-depth criticisms of the rules that extend the tax exemption to charities. However, one or two points are in order. First, the regime should be extremely careful that the tax-exempt status of charities cannot be exploited for profit by others. For the most part, the exclusively charitable standard and the specific rules governing the duty of loyalty will be sufficient to manage this problem. In most (perhaps all) cases of abuse, the exempt status will be the subject of exploitation that benefits, ultimately, members of the proscribed class. The abuse will often also be easily characterized as involving the charity in non-charitable activity. However, there may still be techniques, not caught by these rules, that result in the exploitation for private profit of that status. For example, the income from a business trust having a charity as the sole beneficiary would not be subject to tax, but could be used to recapitalize the business, thereby giving the business an unfair advantage a lower cost of capital over competitors. Another example might be a taxpayer who sells his business undertaking to a feeder-corporation-owned charity, which in turn might lease it back to the taxpayer; the rental payments would be tax-free income if donated to the charity, and could therefore be used to finance a higher purchase price as well as transform income into capital gains. To guard against this sort of possibility, some thought should be given to dealing with this type of problem either by enacting a general anti-abuse provision or by enacting a specific rule which ensures that the tax-exempt income is not available to capitalize or finance businesses.

Second, some thought might be given to extending the exemption to dividend income by making the dividend tax credit refundable for tax-exempt organizations.

(g) Compliance
(i) The Annual Disclosure Requirement

The annual disclosure requirement should be designed in consultation with the provincial authorities so that it is capable of satisfying their regulatory needs as well. It should vary in the level of disclosure required according to the type of charity involved and the size of the charity. It should be designed so that it provides the best source of aggregate data on the sector. Therefore it might require disclosure of information not directly relevant to any federal regulatory objective, such as disclosure on sources and levels of government funding and disclosure on the level of donations from corporate versus individual donors. The disclosure document should be public, not confidential, except to the extent that it may contain information about specific sources of individual or corporate donations. Accompanying financial statements should be required in all cases. They should be in accord with generally accepted accounting principles as interpreted and adopted by the Canadian Institute of Chartered Accountants. The statements should be audited for charities with gross revenues over a certain amount (we would suggest $250,000) or with net assets over a certain amount (again we would suggest $250,000). The annual reports of private foundations should be sent directly to the relevant provincial agency, either by Revenue Canada or by the private foundation. The disclosure statements of other charities should be made readily available to these agencies as requested.

Disclosure of information should be required on the matters set out in the tables at the end of this section.

No change to the books and records obligations are required.

(ii) Penalties

The penalties for non-compliance require greater gradation than exists at present. The sanction of deregistration is too severe to impose for the vast majority of cases of non-compliance, but it is virtually the only effective penalty in the Income Tax Act to encourage charities to comply. We recommend a greater use of penalty or excise taxes, escalating in some cases, and imposed on the charity and on culpable fiduciaries, in accordance with what is reasonable, taking into account the importance of the provision in question and severity of the transgression. Taxes collected in this way should go either to defray the costs of administering the provisions of the Act or to other charities in the same sector.

One very effective lever to encourage compliance is Revenue Canada's control over the availability of the credits or deductions. One possible way of using this lever to the fullest is as follows. Donation receipts could be issued by Revenue Canada to charities on an annual basis and only after compliance by the charity with the annual reporting requirements. These receipts should be in a form that is readable by a computer, so that they can be easily verified and can be used to generate useful aggregate data on the sector. The receipts would be valid for a limited time, and the expiry date should be stated plainly on them. Any receipt issued after the expiry date would be invalid.
If deregistration is applied as a penalty, then the one hundred percent penalty tax should be imposed in a way that ensures compliance with provincial *cy-près* law. There should also be some type of interim sequestration or receivership intervention available to Revenue Canada. In both cases deregistration and interim sequestration Revenue Canada should cede jurisdiction as soon as possible to the relevant provincial authorities. We say this because the issues raised at these stages of a charity’s existence raise matters of greater concern to the provinces, which in their *parens patriae* role have a more substantial interest in seeing that charitable funds are spent on charitable projects, in accordance with the intentions of donors. The federal jurisdiction is exhausted if the tax system is protected from leakages.

(iii) **Administration**

Once it is determined that a certain level of annual public accountability is required and is applicable to a defined range of organizations, then Revenue Canada should put in place the resources to ensure a very high compliance rate and be prepared to apply the sanctions for non-compliance rigorously.

More attention should be paid on an annual basis as to whether a charity still belongs in the classification in which it was registered, since proper classification is one of the linchpins of the whole system.

To raise the profile of the federal charities administration and the profile of the sector, the federal government might change the name of the Charities Branch of the Registration Directorate to the "National Charities and Non-Profit Directorate", still within Revenue Canada. This Directorate might incorporate the functions of the Voluntary Action Program to create a federal agency more comprehensive in scope. In any event, the federal charities administration should issue an annual report discussing its activities for the year, including statistics with respect to registrations and deregistrations, problem cases, investigations and audits, and changes in administrative techniques.

The Commission makes these suggestions while acknowledging, as we did at the end of chapter 11, that the Charities Branch has done a very good job in recent years in fulfilling its statutory mandate.

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**Elements of the Reporting Requirement**

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<th>Reporting Requirement</th>
<th>Organization</th>
<th>Private Foundation</th>
<th>Public Foundation</th>
<th>Comments</th>
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<td>Reporting Requirement</td>
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<td>1. IDENTIFICATION INFORMATION</td>
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<td>(a) name, address, registration number, name of person to contact, fiscal year, location of books and records</td>
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<td>(b) classification, as organization, public foundation, or private foundation</td>
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<td>(c) organic law: trust, corporation, or unincorporated association, including jurisdiction</td>
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<td>(d) category: religion, health, education, social welfare, benefits to the community, others, etc.</td>
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<td>this is not required at present, although charities must describe their main activities</td>
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<td>2. SUPPLEMENTAL INFORMATION</td>
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<td>this would affect a relatively small number of charities</td>
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<td>- financial statements, audited for charities with revenues in excess of $250,000 or assets in excess of $250,000</td>
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<td>- constitutional changes, including formal changes in purposes, powers, and activities</td>
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<td>- names and addresses of executive</td>
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<td>- geographic location of charitable activities</td>
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<td>- statement of primary purposes and - statement of main activities</td>
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<td>3. DISCLOSURE</td>
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<td>(a) to verify continued eligibility for classification</td>
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<td>(b) concerning commercial activities</td>
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<td>- disclosure of nature and extent of related commercial activity</td>
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<td>(c) concerning quality of investment decisions</td>
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<td>- report on performance of investments</td>
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<td>(d) concerning transactions between members of proscribed class and charity</td>
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<td>- prior disclosure of nature and content of transactions</td>
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<td>- subsequent (annual) disclosure of nature and content of transactions</td>
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<td>Reporting Requirement</td>
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<td>(e) concerning transactions between members of proscribed class and a &quot;controlled corporation&quot; or a feeder corporation</td>
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<td>- annual disclosure regarding existence of such investments</td>
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<td>- prior disclosure of nature and content of transaction between members of proscribed class and controlled corporation</td>
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<td>(f) concerning affairs of &quot;controlled or feeder corporations&quot;</td>
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<td>- annual financial disclosure</td>
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<td>(g) concerning political activities</td>
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<td>- declaration regarding partisan and other impermissible political activity</td>
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<td>- optional declaration to demonstrate compliance with optional quantitative rule concerning non-partisan political activity</td>
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<td>- declaration to demonstrate compliance with non-optional quantitative rule concerning otherwise permissible political activity</td>
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<td>(h) concerning borrowing activities</td>
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<tr>
<td>(i) concerning granting activities</td>
<td>- declaration reporting grants to qualified donees, including amounts, names of recipients, etc.</td>
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<td>- declaration reporting grants from other charities, including amounts, names of granting charities, etc.</td>
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<td>- statement of expenditure accountability procedures</td>
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<td>(k) concerning donation fundraising expenses</td>
<td>- declaration regarding donation fundraising expenses</td>
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<td></td>
<td>- declaration regarding nature and elements of third-party donation fundraising contracts</td>
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<td>- declaration, by category of expenditure of total administrative expenses (legal fees, accounting fees, and salaries)</td>
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<td>(m) concerning information required to calculate disbursement quota of total</td>
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<td>(n) concerning information required for statistical purposes (level and source of government grants, amount of municipal tax paid)</td>
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Endnotes:

1
R.S.C. 1985, c. 1 (5th Supp.).

2

*Income Tax Act*, *ibid.*, s. 149 (12).

3
Another technique, of course, is to provide explanations, interpretations, and examples in information circulars and information bulletins.

4
The Commission recommends *infra*, this ch., sec. 2(c)(i), that the correct focus for regulation is commercial, not business, activity.

5

*Supra*, note 1, as am. by S.C. 1994, c. 7, Sch. II, s. 123; 1994, c. 21, s. 74.

6


7


8
A different problem arising out of the same language was discussed in *Toronto Volgograd Committee v. Minister of National Revenue*, [1983] 3 F.C. 251, 83 N.R. 241 (Fed. C.A.). In that case it was argued, without success, that the Court could not look at an organization's purposes, only its activities, to determine if it is charitable.

9
This failing results from its focus on the behaviour of entities. We suggested above that this basic approach is correct. The argument in the text here is that it needs to be tempered.

10
The cost of publication could be recovered by charging for copies of the report, as is the practice in the United Kingdom. The report could also be published in *The Philanthropist*.

11

We deal with the disposition of the unexpended funds of a deregistered charity *infra*, this ch., sec. 2(g)(ii), when we address the 100% penalty tax.

12

Legitimate recipients should include members in distress (a parish helping a parishioner) and member organizations (the national office distributing the regional chapters).

13


14

Revenue Canada's decision should still be reported, as suggested above.

15

This right would be similar to the right of the tax authorities in the United Kingdom to appeal the registration decision of the Charity Commissioner under s. 4 of the *Charities Act 1993*, c. 10 (U.K.).

16

Provincial law would remain applicable to entities not so registered but which are, under the common-law definition, charities.

17


18

Care should be taken in drafting the rules that implement this recommendation to ensure that it cannot be circumvented by carrying on the unrelated business as a trust.

19

Other donations would be subject to a 80% disbursement rule: 80% of donations would have to be spent on non-investment activities.

20

Additionally, donors might be afraid that their donations to charity will be used instead as risk capital in a profit-making venture. This is the trust law concern which we take up *infra*, in Part IV.
Revenue Canada, Taxation, Charities Division, 1990 Draft Circular.

22

Ibid.

23

Supra, note 6. For a similar English case, see Oxfam v. Birmingham City District Council, [1976] A.C. 126, [1975] 2 All E.R. 289 (H.L.), where a gift shop operated by Oxfam was denied a rating exemption, even though all the profits from the shop went to support Oxfam's charitable purposes. Thus the House of Lords declined to apply a destination of profits test in assessing whether the gift shop was using the premises for charitable purposes.

24

Supra, note 21.

25


26


27

Income Tax Act, supra, note 1, s. 149.1(3)(c), (4)(c).

28

See, in particular, Income Tax Act, ibid., s. 189.

29

Ibid., s. 149.1(1) "charitable foundation" and "charitable organizations".

30

Ibid., s. 149.1(1) "disbursement quota".

31

A third possibly relevant rule is the 50% ownership rule. As we stated above in this ch., sec. 1, it is unclear what the objective of this rule is. Perhaps in part it is meant as an application of the duty of prudence on the theory that more than a 50% stake in a corporation is not generally a prudent investment. The explanation accepted at the time of its enactment, however, was that it was adopted to control for self-dealing. See supra, ch. 10.
The concept, not the term "significant contributors" is used elsewhere in the Income Tax Act, ibid., s. 149.1. For example, see s. 149.1 "non-qualified investment" (a)(i)(B).

It could be argued that the phrases "operated exclusively" and "all the resources of which" cover these cases. As a necessary retreat position, these may prove adequate. However, a clearer expression of the prohibition against distributions would be far better.

Or other entity such as a business trust or partnership. We deal only with stakes in corporations in the text. The possibility of investments in other business forms would have to be addressed in any reform of this area.

Supra, note 26.

Supra, note 17, s. 2.

Supra, note 26, s. 4.

They are deficient for other reasons as well. For example, there is no general exception for program-related investments.

Program-related investments should be excluded. On program-related investments, see K. Wessel, The Case for Program Related Investments in Canada: Investing Today for Profits Tomorrow (1995) [unpublished].

Partisan activity would still be clearly prohibited.

Income Tax Act, supra, note 1, s. 110.1(1), as re-en. by S.C. 1994, c. 7, Sch II, s. 79(1).
A permissible secondary objective might be to encourage prudent investing. This objective would come into play at the stage where the quota calculation is being designed.

44

The *Income Tax Act, supra*, note 1, s. 149.1(20) permits disbursement excesses to be carried back one year and forward five years, and s. 149.1(8), as re-en. by S.C. 1994, c. 21, s. 74(5), permits accumulations.

45

Even if the definition of eligible expenditures is completely congruent with expenditures permitted by the exclusively charitable test, special provisions may still have to be enacted to deal with the accounting aspects of certain types of expenditures. Program-related investments, for example, might be dealt with by treating the entire value of the investment as an expenditure, and the return on the investment and repayment of the investment as equivalent to gift income, for the purposes of the calculation of the disbursement quota. The annual reporting requirement will therefore require a section on program-related investments. Similarly, permitted accumulations and term gifts will require special accounting for the year of receipt and the year of expenditure.

46

This issue is completely fudged in the current regime.

47

Donation fundraising would be defined to include any event where receipts are issued.

48

By net amount, we mean expenditures less any expenditure recovery, but not net of donations received as a result of the expenditures. Therefore, in the case of a charity dinner where the price of the event includes a donation for which receipts are issued, the net expenditures would be the non-donation revenue less the costs of the event.
1. INTRODUCTION

In the remaining chapters of this study, we examine the provincial law governing charitable organizations and present proposals for reform. The discussion is divided into two main parts: chapters 13 to 16 deal with forms of organization, and chapters 17, 18, and 19 discuss the supervision of the nonprofit sector in Ontario.

There are two main historical sources for the provincial law the parens patriae jurisdiction of the Crown under the Crown prerogative, and the traditional role of courts of equity in the supervision of charitable trusts. The former is a power in the Crown to protect property devoted to charity. It has now been delegated largely, but not entirely, to the Public Trustee. The latter is a general jurisdiction of courts of equity over charitable purpose trusts. Since the latter is the source of the law on the trust form of organization, it is also a source of the privileges that, in part, define that form of organization. There are several subsidiary sources of provincial law; many of the privileges, for example, are statutory in origin, and corporations statutes establish the main elements of the corporations law.

The proposals for the reform that we suggest in this part, like those suggested for the federal laws in Part III, do not constitute a radical departure from the current law. In essence, we agree with the basic policy of the current law and therefore recommend reforms that improve and clarify its execution or modernize it by bringing it into line with developments in other related areas of the law. Our proposals are not based on the assumption that the federal reform that we recommend in Part III are implemented, although the total regulatory framework for charities would be much better if they were. One significant choice we have made is to recommend that the general reporting requirements of charities in Ontario not be increased substantially, even though the current reporting requirement at the federal level is deficient in a number of respects. Similarly, we do not recommend that Ontario adopt a new separate registration system equivalent in scope or intention to the current federal regime, even if elements of the federal regime remain seriously deficient. These improvements must await the decision and action of the federal government.
The dominant regulatory objectives of the provincial law are to facilitate charity by making available to it adequate legal forms, to protect charity from fraud and waste, and to aid in the pursuit of charitable purposes by compelling, in appropriate cases, charitable fiduciaries to fulfil their duties of loyalty and prudence. These objectives, which are all complementary, are informed by a long-held respect for the work of the sector and for the charitable intentions of donors. Provincial governments are also interested in policing the eligibility of entities for fiscal privileges and in fostering the health of the sector so that it is available to collaborate in the pursuit of government ends. As we suggested several times in the discussion in Part III, these provincial objectives will require a more rigorous level of regulation than that required by the exclusively charitable standard, the foundational regulatory principle at the federal level. However, this heightened interest does not imply that the basic rules will be radically different. On the contrary, in most instances we use the same rules and the same classifications and categories as apply or that we recommend apply at the federal level. Our objective is the complete congruency of provincial and federal regulation. What changes at the provincial level is the organization and mandate of the public administration, the enforcement and compliance techniques, and, to some extent, the targeting of the rules.

We recommend in chapter 17 that a new provincial agency be established by consolidating the operations of the various provincial ministry branches responsible for charities matters. The main justification for this recommendation is to permit a rationalization of resources and an opportunity for greater administrative expertise to develop. We recommend that the agency be established as a quasi-autonomous commission within the Ministry of the Attorney General and that it be called the "Nonprofit Organizations Commission" (NOC). As its name suggests, its mandate will include matters of relevance to the nonprofit sector generally, not just the charities portion of it. The composition, functions, and powers of the NOC will be developed in detail in chapter 17. The point of introducing the recommendation at this juncture is so that we can make reference to it in the following chapters on forms of organizations.

Throughout Part IV, we use the classification of the nonprofit sector which we developed in chapter 9: religious, charitable (which can be divided into social welfare and philanthropic), political, mutual benefit and other, or general nonprofit. In some instances, we recommend that this classification system be used in the new law. Two minor comments are in order at the outset. First, recall that the first two purposes are charitable at common law. The point of our distinction between religious and charitable is not to deny that, and in the chapter on trusts, for example, we do not use the distinction at all. We use it only where we think religious charities ought to be treated differently. Second, federal law, it will be recalled, includes more in the category "charity" than the entities which are classified as charity at common law. Recall that federal "charities" are permitted to make grants to entities "qualified donees" which may not be charitable at common law, and that national amateur sports associations and arts organizations are extended the same advantages as charities. The provincial regime of regulation must accommodate this extended definition, and throughout Part IV, where relevant, we indicate the ways that this should be done.
There arises one final preliminary issue which cannot, due to its complexity, be resolved immediately, but which should be identified at the outset, and respecting which we can give some indication of our general approach to its proper resolution. As will be seen, we envisage the enactment of at least five new statutes, one for each form of organization, one establishing the jurisdiction and constitution of the NOC, and one to regulate fundraising as well as, perhaps, deal with other regulatory issues. There will be numerous amendments to many other statutes as well. We refer to the NOC statute and the other regulatory statutes compendiously as the "regulatory statutes" in what follows. The difficulty is in devising a principle for the organization and distribution of all the resultant rules. Our general approach will be as follows. The law of organizational form will be concerned principally with the state's interest in facilitating charity through the provision of forms of organization and, to a lesser extent, with enforcing the duties of fiduciaries. The content of the fiduciary duties should be set in the organizational law since the duties are owed to the organization. Since the content of the fiduciary duties will be stated in the organizational law, the organizational law should also specify a role for the NOC in their enforcement. The regulatory statutes will be concerned with the enforcement of the fiduciary duties of charitable fiduciaries by a public agency, establishing the constitution and mandate of that agency, and establishing regulatory regimes on other specific issues. The regulatory classifications used in these statutes will be either the Income Tax Act's division of charities into foundations (public and private) and organizations, or the specific subject-matter or activity requiring regulation, such as "gaming" or "fundraising", which do not, it should be emphasized, always pertain exclusively to charities. The regulatory statutes will not, in other words, use categories derived from the law of organizational form. In our view, they should not, and it is one of the major mistakes in the drafting of the Charities Accounting Act,⁴ and the Charitable Gifts Act,⁵ for example, that these Acts currently do.

2. REFORMING ORGANIZATIONAL LAW

No common-law jurisdiction, to our knowledge, has ever formally addressed the question of the appropriateness of the various legal forms available to charitable organizations. It has never been asked: What are the natural or essential characteristics of this type of social organization and what, as a consequence, are its appropriate legal forms? Rather, circumstances have led to the adaptation of three main forms of organization, principally the trust and the corporation, but also the unincorporated association, which in essence is based in contract.

The law of trusts was adapted to the purposes of charitable activity in order to give effect to the intentions of donors, usually testators, to advance the cause of charity.⁶ The principal adaptation was the permission given by the state to the existence of a trust in favour of a purpose, as opposed to a person. This form's chief advantage is that it permits wealth to be endowed to a charitable purpose, in perpetuity if desired. Its chief deficiency is the lack of any reliable internal mechanism of accountability: who is there to ensure that the trustees diligently devote the endowed capital to the charitable purpose?
The corporate form also addresses the problem of the legal existence of entities devoted to the pursuit of purposes, but in a more versatile way. This form, in addition, is available to purposes well beyond the limited class of charitable objects recognized by the courts of equity. Its versatility has made the charitable purpose trust a much less appealing form of organization today. Yet the corporate form also suffers from a lack of a stable and rigorous system of internal accountability, since the only conceivable agency of internal supervision, the membership, is often disinterested or disorganized.

The reality is that the need for charity and the fundamental concerns of organizing for charity are perpetual. There can therefore be little objection in principle to the law’s recognition of several forms of organization that permit wealth to be endowed for viable charitable purposes. The problem has been how to do it and, in particular, how to ensure that the human agents of the purpose fulfil their obligations.

In chapters 13, 15, and 16, we examine four general issues as they relate to the three forms of organizing for charity:

1. **Definition and Attributes**: is the essential nature of each form and what is its intrinsic advantages and disadvantages?

2. **Formation and Entry**: What are the conditions of entry into the form, and what conditions are imposed on the retention of status?

3. **Governance**: What standards of care and loyalty and what duties do the directing agents of the organization have, under what circumstances are they permitted to deal with the organization, and how are they held accountable?

4. **Reorganization and Dissolution**: When and under what circumstances is it permissible to alter the specific objects of the organization or the particular mandated means of pursuing those objects, and how are the assets of the organization treated on dissolution or when the organization’s purposes become impracticable or impossible?

The law’s answers to these questions have been affected as much by the form used as by the imperatives of the social reality. Thus, for example, directors of a charitable corporation are held to the standard of care of directors generally, while trustees of a charitable trust are held to the higher standard of trustees. Trust assets are applied cy-près when the trust objects become impossible, but there is no clear restriction in the common law on the treatment of corporate assets on the reorganization or dissolution of a charitable corporation. It is discrepancies such as these that are the source of many of the most obvious current difficulties in this area.

In our proposals for reform, we take the following general approach. To resolve issues relating to organizational form, we look to the basic area of law from which the form is derived. Where an issue relates chiefly to the charitable function of the form, however, we resolve it by choosing rules that are best for charity, and, subject to necessary but
minor variations, in a way that is identical for all three forms. In other words, we attempt to treat issues relating to organizational form distinctly from issues relating to regulation of the sector, although, of course, there is no possibility of completely separate treatment. As examples, issues such as the content of the fiduciary duties, the powers of charitable fiduciaries, and the structure of governance of charities are all resolved in our recommendations by looking primarily to the law of trusts for charitable trusts, modern corporations law for the charitable corporation, and basic contract law for the unincorporated association. But the treatment of a charity's property on dissolution, although inspired by the trust law cy-près doctrine, should, in our recommendation, be roughly the same regardless of the form of organization. And the state's involvement in ensuring that charitable fiduciaries fulfil their obligations of loyalty and prudence, should, again in our recommendation, be the same, regardless of the form.

There really is no viable alternative to this way of dealing with issues of organizational form. The primary objective of the law with respect to the issues of organizational form is to facilitate charity. The three current forms provide a readily accessible and readily understood range of forms of sufficient variety to accommodate the needs of the sector. They are based on fundamental legal conceptions that are intellectually sound, that are generally understood, and that work. There is little or no appeal in designing some single common form of organization for all charities, and there is no need to import foreign models, since they could not add to the current flexibility.

3. PROVINCIAL SUPERVISION OF THE NONPROFIT SECTOR

In chapters 17, 18, and 19, we describe the general scheme of the regulation and supervision of charities by the provincial government and make recommendations for reform. There are two statutes of central relevance the Charities Accounting Act\(^8\) and the Charitable Gifts Act\(^9\) as well as many isolated statutory provisions, perhaps a hundred or more, contained in over sixty Ontario public statutes.\(^10\)

The historical origin of the supervisory authority of the provincial government is the prerogative parens patriae of the Crown which has already been described. The Crown, it will be recalled, exercises a parens patriae jurisdiction overall charities through the Office of the Attorney General. The Crown also, it will be recalled, exercises a prerogative power in relation to the disposition of general gifts to charity that do not involve the interposition of a trust. This power is often referred to as "prerogative cy-près". Pursuant to it, the Crown through the Office of the Attorney General will devise a scheme for the specific disposition of property left to charity in general.\(^11\)

The historical parens patriae jurisdiction of the Crown has many facets. Generally speaking, at common law, the Attorney General was a necessary party in all proceedings in which there was a question regarding a charitable purpose trust or the powers of the trustees of a charitable purpose trust. Much, but apparently not all, of this power has now been delegated to the Public Trustee under the various provisions of the Charities Accounting Act.\(^13\)
In our proposals for reform, we take the following general approach. In chapter 17, we describe and recommend reforms to the agencies of the public administration in Ontario that have jurisdiction over charities, and other nonprofit entities, and we recommend reforms to the general regulatory framework governing charities. We also take up the principal areas of regulatory concern fundraising, investment, political activity, and international activity seriatus. Our basic recommendation is that a new agency be established and be given ample and effective powers of supervision over the sector. With respect to the other matters, we recommend greater regulation of fundraising activity, but otherwise our proposals for the provincial regulation of charities are more or less exactly the same as what we have already recommended at the federal level. For the most part, the aim of the reform of this latter regulation is to clarify it and, in most cases, simplify it.

The issue of transfer payment accountability is taken up as a separate topic in chapter 18. Our recommendation is that a new general statute be adopted establishing fundamental norms governing transfer payment accountability at both the government end and the recipient end. Much of that regulation should be based on the same principles that justify the regulation of the charity sector and of fundraising. However, due to its complexity and different policy concerns, it is a discrete topic requiring discrete, albeit similar, treatment. We recommend in chapter that the NOC be given some jurisdiction over this issue, but suggest that the definition of the precise scope of that jurisdiction must await further comprehensive study of the issue of transfer payment accountability by the government.

The form of the new law will have to be given careful consideration. Generally speaking, we think that our approach of treating different issues discretely should be reflected in the new law. Thus, just as we have recommended that three new statutes be enacted to govern the three organizational forms, we would recommend that each area of regulatory activity be treated as a discrete and integral unit, either in its own statute, or an option which we prefer less, in a separate division of a comprehensive regulatory statute. Our preferred approach is likely to lead to greater coherence in the law and greater flexibility and adaptability. For example, the regulation of fundraising activities and the regulation of gaming services are sufficiently different in scope and approach as to require separate statutory instruments. Neither of these areas of regulation need or should, in our view be a part of the statutory regime that establishes the public administration of charities.

Some of the new law should be established in a form that will permit it to be modified on a regular basis. For example, where we recommend that the provincial regulation follow exactly the federal regulation, it will be important for the provincial regulation to be able to adapt quickly and easily to changes in the federal law. The adaptability of the provincial law in this way is critical to the achievement of one of our primary objectives in all our proposals for reform, namely, that the charity sector not be faced with multiple levels of conflicting rules, at least to the extent that this can be avoided through better intergovernmental coordination.
Endnotes:

1

The court's jurisdiction extends to "trusts by analogy", meaning charitable purpose corporations and associations. The nature and extent of this jurisdiction, however, is not entirely clear. We examine the problem \textit{infra}, chs. 15 and 16.

2

See \textit{Ludlow Corp. v. Greenhouse} (1872), 1 Bli. N.S. 17 at 48, 4 E.R. 780 at 791, for a traditional formulation of the \textit{parens patriae} role of the Crown. "That the King is to be considered as the \textit{parens patriae}, that he is the protector of every part of his subjects, and that, therefore, it is the duty of his officer, the Attorney General, to see that justice is done to every part of those subjects". And, see, W. Blackstone, \textit{Commentaries on the Laws of England}, Vol. III (Oxford: Clarendon Press, 1768) at 427. See H. Picarda, \textit{The Law and Practice Relating to Charities}, 2d ed. (London: Butterworths, 1995), at 513-19 for a discussion. The origins of this Crown prerogative lay in the secularization of charity in the late middle ages and its gradual removal formed the stewardship of the church and the supervision of ecclesiastical courts. See G. Jones, \textit{History of the Law of Charity} 1532-1827 (London: Cambridge University Press, 1969) at 329.

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Other legal systems have invented other ways of permitting individuals to endow wealth to a charitable or public purpose in perpetuity. The Greeks created perpetual endowments by gifts to a divinity, or a temple, or to a city by declaration in front of the popular assembly. Such gifts could be devoted to education, the support of athletes, the worship of a god or hero, or the construction and maintenance of public baths. Imperial Roman law permitted emperors to create charitable endowments for the relief of the poor by treating the endowments as a separate part to the \textit{fiscus}. Roman citizens could do the same thing by gifts to permanent entities such as a \textit{collegium} or \textit{municipum}. The universal Christian church provided a vehicle for charitable sentiments and a model which inspired the founding of church-sponsored charitable institutions, such as orphanages, hostels for pilgrims, and hospitals. Contemporary civil law systems envisage a category of juristic person which has as its substratum charitably endowed assets, not shareholders or members. On these examples, see, generally, P.C. Hemphill, "The Civil-Law Foundation as a Model for the Reform of Charitable Trusts Law" (1990), 64 Australian L.J. 404; and R.-J. Dupuy, ed., \textit{Le droit des fondations en France et à l'étranger} (Paris: La Documentation française, 1989). See, also, P.W. Duff, \textit{Personality in Roman Private Law} (Cambridge: Cambridge University Press, 1938); M. Pomey, \textit{Traité des Fondations d'utilité publique} (Paris: P.U.F., 1980). Now see the \textit{Civil Code of Quebec}, arts. 1256-1259, for a modern version of the civil law foundation. See M. Boodman, \textit{Les libéralités à des fins charitables au Québec et en France} (Montreal: Corporation Margo, 1980); J.E.C. Brierley, "Le régime

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Supra, note 4.

9

Supra, note 5.

10

See Appendix B for a list of statutory provisions.

11

See, further, Picarda, supra, note 2.

12

See Re Centenary Hospital Association and Public Trustee, supra, note 3.

13

Supra, note 4.

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CHAPTER 13

THE CHARITABLE PURPOSE TRUST

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1. INTRODUCTION

A trust is a legal institution in which one person holds property for the benefit of another person or, in the limited circumstances discussed in this chapter, a purpose. Since the early eighteenth century, the valid constitution of a trust has required that "three certainties" be met. First, it must be shown that the person establishing the trust the settlor, testator, or donor (we use "dispenser" as much as possible in what follows) actually intended to establish the trust. The point of this requirement is to distinguish between mere precatory words establishing only a moral obligation to do the dispenser's bidding, and a legal obligation arising out of the dispenser's opting-in to, and the trustee's accepting, the legal institution of the trust. Second, the words establishing the trust must
definitively identify the subject-matter or the property to be held in trust. Third, the words
establishing the trust must identify with sufficient certainty the "object" of benefaction,
the person or persons to be benefited.

Charitable purpose trusts run afoul of the last of these certainties in two ways: the objects
of a charitable trust are never persons, but purposes; and the lack of concreteness or
specificity in the description of the charitable purposes has never been fatal to the validity
of a charitable trust. The courts and the legislature have given recognition to other trusts
for specific non-charitable purposes, but the number of such trusts is limited and their
attributes are restricted. Thus, common-law trusts to maintain a grave or a pet are valid,
even though they are not charitable, but they may not last beyond the perpetuity period
and they are subject to all facets of the rule against remoteness of vesting. The charitable
purpose trust, by contrast, is not subject to the rule against indestructible trusts nor is it
subject to all aspects of the rule against remoteness of vesting. These latter points are
taken up in more detail below.

The basis of the Commission's recommendations for the reform of the law governing
charitable purpose trusts is that the charitable purpose trust should be subject to the same
basic regime as applies to private trusts. Exceptions should be made only where there are
problems that are peculiar to the charitable purpose trust, in which case separate
provisions ought to be enacted in a separate part of a new Trustee Act. Since we have
dealt with the many of the difficult issues concerning the law of trusts and the law of
charitable purpose trusts in our 1984 report on the law of trusts, many of our reform
suggestions in this chapter are a reiteration of the reform recommendations made in that
report.

The discussion is divided into section 2 "Definition and Attributes"; section 3 "Formation
and Entry"; section 4 "Governance"; and section 5 "Reorganization and Dissolution". In
chapter 14 below, we discuss whether the purpose trust should be made available to
purposes other than charitable purposes.

2. DEFINITION AND ATTRIBUTES

(a) Introduction

The Restatement of Trusts §348 defines the charitable purpose trust in the following
terms:

A charitable trust is a fiduciary relationship with respect to property arising as a result of
a manifestation of an intention to create it, and subjecting the person by whom the
property is held to equitable duties to deal with the property for a charitable purpose.

It is difficult to analyze this legal institution in terms of correlative rights and duties,
since it does not appear possible to identify a person or persons having any rights
correlative to the trustee's very clearly defined duties. With a private trust, it is
conceivable that the correlative rights are in the beneficiaries or the disponer, but this
solution is definitely not available for the charitable purpose trust since there is, by
definition, no beneficiary, only a purpose, and since, as we shall see, the charitable trust may continue to exist long after the disponent has died. The charitable purpose trust is perhaps best analyzed as a promise or undertaking made by the initial trustee, followed by undertakings of his or her successor trustees, to apply a certain locus of wealth, sometimes in perpetuity, to a particular purpose. So analyzed, it is more akin to an oath or a vow, albeit legally enforceable, than to a bilateral contract. It is this feature that gives it its special and problematic juridical character.

This initial concession to viability has two aspects. Dispensing with the requirement that there be a beneficiary means, first, that there is no one to enforce the trust and, second, that, when the trust is enforced by a court, there is no immediately identifiable beneficiary in whose favour it can be executed. The first is an exception to what has been called "the beneficiary principle"; the second is an exception to the "certainty requirement". This initial concession is supplemented by three others, all of which serve to establish the contours of this institution. These are cy-près application of the trust in the face of an initial impossibility or impracticability; an exemption from the rule against remoteness of vesting; and an exemption from the rule against indestructible trusts. Next we briefly explore each of these aspects of the law.

Our concern in what follows is twofold. First, we are concerned with investigating whether the features of this institution are adequate and proper. The short answer is that, generally speaking, they are and that there is no need for any general or fundamental reform of the law governing the definition and attributes of the purpose trust, although, as we will observe, certain statutory improvements could and, in our view, should be made. Second, our concern is whether this form of organization, or variations of it, should be made available for the pursuit of non-charitable purposes. This question is taken up below in chapter 14 on the non-charitable purpose trust. Our answer to this question is more complex. In essence, we recommend that, subject to minor exceptions, the institution of the perpetual purpose trust continue to be available for charitable purposes only.

It is important in this area of the law to distinguish among the several kinds of gifts that can be made to advance the cause of charity. There are two axes in the classification: first, gifts can be made either indirectly that is, in trust or directly; and, second, they can be made to or in favour of either purposes or legally recognized persons. Thus, besides a gift in trust for charitable purposes, which is the principal focus of our study in this chapter, there can be gifts, intended to advance the cause of charity, which are given in trust for the benefit of a person (for example, "to X, in trust for Mother Theresa") or a charitable corporation (for example, "to X, in trust for the Salvation Army"), as well as direct gifts to such a person (for example, "to Mother Theresa") or a charitable corporation (for example, "to the Salvation Army"), and direct gifts to, simply, "charity" (for example, "all my property to charity"). This list exhausts the possibilities. The first type we refer to as "charitable purpose trusts" or "charitable trusts"; it is the institution which courts of equity have fashioned. Almost all of what is said in this section applies only to it. Some of the rules discussed below in (c) and (e), however, also apply to charitable corporations and gifts made directly to charity.
The Commission now examines the five attributes of the charitable purpose trust.

(b) Exemption from the Application of the "Beneficiary Principle"

Charitable purpose trusts are exempt from the application of the "beneficiary principle". What is the "beneficiary principle"? Until recently, it was thought that a trust for a purpose that is not charitable and that is not within one of the historical and anomalous exceptions, is, because of the lack of a beneficiary or beneficiaries, void. This seemed to have been the holding in Morice v. Bishop of Durham, and it was understood to have been the law in several leading cases down to the decision of Goff J. in Re Denley's Trust Deed. In Re Wood, for example, Harman J. said, "[A] gift on trust must have a cestui que trust, and there being here no cestui que trust the gift must fail". In Leahy v. Attorney-General for New South Wales, Viscount Simonds said:

[A] trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it.

In Re Denley's Trust Deed, however, Goff J. took a slightly different view, holding that the beneficiary principle, as he called it, applies to void non-charitable purpose trusts only when there is no one with a sufficient interest to enforce the trust, and therefore not in every case where there is no beneficiary. In that case, real property had been conveyed to trustees for the purpose of creating a sports ground for the benefit of employees of the disponent company. Goff J. held that this trust was not in violation of the beneficiary principle since the employees who were to benefit had a direct interest in seeing to the trust's enforcement. Goff J.'s relaxation of the common-law test of validity applies to all non-charitable purpose trusts where there is someone with a sufficient direct or indirect interest to act to enforce them. His holding has been applied in Canada and is now generally considered good law.

Goff J.'s version of the beneficiary principle does not, however, assist a non-charitable purpose trust where there are only residuary beneficiaries who take the trust property on a failure of the trustees to exhaust it in pursuit of the designated non-charitable purpose. These persons have what has been called an interest in the "negative" enforcement of the trust: their concern is to ensure that the trust property is not expended on purposes other than the designated purposes. They have no material interest in ensuring that the trust property is expended on the designated purpose, and in fact, in most cases, they probably hope that it is not, since what is left unexpended goes to them. The validity of purpose trusts which meet only the condition of "negative" enforceability have been uniformly rejected by the courts in Canada and England on the basis that accepting them would be tantamount to treating such purpose trusts as mere powers, and that would be contrary to the express intention of the settlor to create a trust.

We address the question of extending the scope of the exemption from the beneficiary principle below in chapter 14. For the present, it is sufficient to conclude that there is no need to reform this doctrine insofar as charity is concerned.
(c) Exemption from the Applicability of the Certainty Requirement

(i) The Scheme-Making Power of the Court

Where the disposer of a charitable purpose trust expresses a clear but non-specific charitable intention or fails to specify the specific modes of carrying out the charitable intention, or does so unclearly or ineffectively, the court may, as part of its inherent jurisdiction and on the application of the executor or trustee, devise a "scheme" for the deployment of the trust property. Examples of gifts attracting the scheme-making power of the court are a gift in trust "to charity", a gift in trust for "the advancement of education", and a gift in trust for the "relief of poverty". In situations such as these, the court supplies the details of the trust, either in respect of more specific purposes or more specific means. In so doing, the court attempts to specify purposes or means that are in conformity with the donor's expressed intentions, as determined from the instrument creating the trust.

The power to devise a scheme is different from the power to apply trust assets cy-près. The cy-près doctrines both initial and supervening permit a court to devise a scheme of deployment when the original specific object is impossible or impracticable at the date of vesting in interest (initial), or has become impossible or impracticable (supervening). It permits a court in these circumstances to alter the objects. The power of the court to devise a scheme, by contrast, applies only to ensure that a charitable trust does not fail at the outset for want of certainty or for want of specification of projects or modalities. The distinction supplying specifics versus altering objects although logically valid, is often difficult to draw since the nature of the court's intervention in any particular case will depend on how the court initially defines the problematic object. A broad definition of the problematic object will result in a need for a scheme; a narrow definition will, most likely, require a cy-près application. There is some confusion in the case law that arises out of this difficulty. It is contributed to by the law's use of the word "scheme" for the outcome of both, and by the fact that, in the case of initial cy-près, the court must always find a general (that is, non-specific) charitable intention as a condition of applying that doctrine. However, the confusion causes no real harm since the doctrines are motivated by the same spirit and they seek to accomplish the same general objective. Provided the cy-près doctrines are modified as we recommend below, there is no need for statutory clarification or resolution of the confusion.

If, however, the purpose is uncertain and not charitable, the trust fails for breach of the certainty requirement. The traditional reasoning is that, as a trust, the purpose must be capable of execution by the court. The point has been expressed as follows:

[Even] if...an enumeration of purposes outside the realm of charities can take the place of an enumeration of beneficiaries, the purposes must, in my judgment, be stated in phrases which embody definite concepts and the means by which the trustees are to try to attain them must also be prescribed with a sufficient degree of certainty.

The reasoning supporting the principle was stated in *Morice v. Bishop of Durham*.
As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust.

The question arises whether, if the beneficiary principle is relaxed, either in the limited way suggested by *Re Denley's Trust Deed* or more radically, such as the statutory conversion of the non-charitable purpose trust into a power or through the general recognition of all non-charitable purpose trusts as valid trusts, should the certainty principle also be relaxed? Our answer, set out more fully below in chapter 14, is that it should not be.

(ii) Interpretive Leniency in the Face of an Obvious Charitable Intention

The scheme-making power and the *cy-près* doctrines form part of larger policy of the law not to frustrate an obviously charitable intention with a narrow interpretive spirit. This larger policy does not pertain exclusively to the law of charitable purpose trusts. It applies as well to gifts to advance the cause of charity made directly to a charitable institution or, simply, to charity. For lack of a better term, we refer to this policy as interpretive leniency in the face of an obviously charitable intent. In *Weir v. Crum-Brown*, Lord Loreburn expressed the principle as follows: "[T]here is no better rule than that a benignant construction will be placed upon charitable bequests." The policy has been applied in various ways. There are a significant number of cases, for example, where the donor has stated his or her intention ambiguously by incorrectly naming or misdescribing a recipient institution, or overlooking or not discovering the fact that a named recipient institution has been amalgamated with another between the time the will was drafted and the time of the donor's death. In these cases, the courts take a generous view of the donor's words, look for the true intention, and, where possible, salvage the gift. Further, if the gift is in the form of a trust in favour of an institution, and the ambiguity arising from the mistake cannot be resolved so as to identify the recipient institution, then the gift might be interpretable as a gift to the purposes of the named institution; and the property, depending on the circumstances, can then be applied *cy-près* or, in the appropriate case, a scheme can be devised. Similarly, in the case where the gift is in trust for a recipient institution that has ceased to exist altogether, courts will look to see whether the testator intended the gift for the purposes of that institution rather than the institution itself and apply the gift *cy-près*. In cases of direct gifts where the recipient institution is misnamed, courts will use extrinsic evidence, in accordance with the general rules governing the interpretation of wills, to discover what institution was intended. Where a direct gift is made to an institution that has merged with another, courts will often find that the recipient can still be identified in the amalgamated entity. Alternatively, in this instance, if the gift can be interpreted as a gift in trust for purposes, it can be applied for the benefit of the amalgamated entity *cy-près*. Finally, if the gift is to, simply, "charity", the property is technically *bona vacantia*, but will be applied by the Crown, or by the court with the Crown's permission, *cy-près*, pursuant to its prerogative *cy-près* power.
In all these situations when applying the various means identified, courts act generously in the face of an obvious charitable intention. In our view, this is proper, and the relevant doctrines require no reform insofar as charity is concerned.

(iii) Exemption from the Application of the Principle Against Delegation of Testamentary Powers

If the gift is in trust to charity, but the choice of the specific means is left to the trustee or the testator's spouse or someone else, the gift is still valid even though the specific purpose or means is not certain and even if it seems as though the testator has simply delegated the power of testamentary disposition. The law does not regard this sort of gift as an invalid delegation of testamentary power. This dispensation from an otherwise strict policy may be regarded as yet another concession to the charitable purpose trust.\(^{37}\) In virtue of it, the institution is available to both very general and very specific charitable purposes, in the same manner that the corporate form is available to a wide variety of general and specific purposes. Again, in our view, this is proper, and this doctrine requires no reform insofar as charity is concerned.

(d) Cy-près Application of the Trust in the Face of an Initial Impossibility or Impracticability: Initial Cy-près

As stated above, there are two cy-près doctrines.\(^ {38}\) They have slightly different functions, rationales, and formulations. It is appropriate to include the first, dealing with situations of initial impossibility and initial impracticability, in the portion of the discussion dealing with the attributes of the purpose trust form of organization. This is because, like the previous two attributes, it deals with problems relating to the initial viability of a charitable trust and therefore relates to the form that is created when a charitable purpose trust comes into existence.

If, at the time the charitable purpose trust is to take effect, there is some initial impracticability or impossibility with respect to the implementation of the object, provided the court is able to discern a more general charitable intent, the court will apply the property "cy-près", that is, in a manner "as near as possible" ("aussi-près", "near this", or "ici-près")\(^ {39}\) to the specific charitable intention of the disponer.\(^ {40}\) Otherwise if there is no general charitable intent the gift fails, or the bequest or devise lapses. The supervening cy-près doctrine, by contrast, applies where there is a supervening impracticability or supervening impossibility and the charitable intention of the disponer is exclusive, meaning, simply, that there was no provision in the disponer's act of gift for a gift over. The posture of the law in these situations is, again, to meet a charitable intention with interpretive kindness.

In cases where the application of the initial cy-près doctrine is in issue, there are four questions that must be addressed. The first is whether the gift is charitable, and therefore whether it is eligible for the application of the initial cy-près doctrine. The second is whether the selected object is impracticable or impossible. The third is whether there is a more general charitable intention. The fourth concerns the extent to which the court is
bound by the donor's express intention in fashioning a new scheme. The last three questions are largely interpretive. The first question raises, again, the issue of the extension of the attributes of the charitable purpose trust to other purposes.

The basic approach of the initial cy-près doctrine is essentially correct, in our view, although there are aspects of it that could and should be improved. We have discussed the case law, the issues, and reforms implemented in other jurisdictions, as well as making recommendations for the reform of this area of the law in our previous report on the law of trusts. We remain satisfied that those recommendations are the correct ones and therefore merely summarize them here. The last three questions will be examined first.

(i) Meaning of the "Impracticable" and "Impossible" Test

Clear cases of impracticability and impossibility present no difficulty. The difficult cases are those on the margin where it seems obvious that, although the specific purpose or project is still feasible, there are far better purposes or projects. In this situation the problem, in our view, is to identify the best way to implement the charitable intentions of donors. Is this to be done by adhering to his or her plan verbatim, no matter how badly conceived or out-of-date, or by applying the gift to a project that is basically the same, but more effective? Erring by being too ready to intervene may frustrate feasible projects, but erring the other way may equally frustrate the disponer's ultimate intentions. In our previous report, we recommended that the test for the availability of the initial cy-près jurisdiction of the courts should be slightly broader to include all situations falling within the following statutory language:

[ Where] an impracticability, impossibility or other difficulty has arisen...that hinders or prevents the carrying out of the intention of the terms of the trust; or...[where] a variation of the terms of the trust or an enlargement of the powers of the trustee would facilitate the carrying out of that intent.

In our view the common-law test of impracticability or impossibility, although correctly formulated, has been applied too strictly. A slight lowering of the threshold for intervention and a statement of the point of the intervention might encourage courts to intervene more frequently to shore up projects that are, or have become, ineffective executions of the disponer's charitable intention.

(ii) The "General Charitable Intention" Requirement

Second, there is the requirement that there be a general charitable intention in cases of initial failure. This requirement also relates to the content of the disponer's wishes: was it the disponer's intention that the gift should fail altogether, or would he or she have preferred that the gift be applied to another similar purpose or project? We recommended the adoption of a rule that, in effect, presumes a general intention to benefit charity in cases of initial failure unless the disponer has expressly provided for a gift over. In the case of charitable public appeals which initially fail, this same approach is implemented by adopting a rule that requires a disponer to stipulate expressly in his or her gift that on an initial (or supervening) failure, the donation is to revert back to him or her.
justification for these recommendations, in our view, is that the identification of a general charitable intention is often a costly and time-consuming matter that results in wasted expenditures in the vast majority of cases because the intention to benefit charity generally is invariably present. It is thus better to presume it and require specific refutation in the form of an explicit expression of the relevant contrary intention.

The abolition of the requirement that there be a general charitable intention solves another minor problem. A difficulty arises in the situation where a non-contingent remainder interest is impossible or impracticable at the date of vesting in interest but perfectly feasible at the time when the interest is ready to vest in possession. The doctrinally correct date for assessment of the gift is the date of vesting in interest. However, if it is assessed at that date the gift may fail altogether since such gifts are often specific and not, therefore, amenable to the finding of a general charitable intention. This difficulty is dealt with under our recommendation by removing the only point of distinction between the two cy-près doctrines, namely the requirement of a general charitable intention in the case of initial cy-près. Courts faced with a request to apply such a gift cy-près would and should simply defer intervention until the date of vesting in possession. At that date, if the project is possible and practicable, the court would apply the gift to that project.

(iii) The "Near as Possible" Requirement

The third issue is the extent to which a court applying the initial cy-près doctrine must cling to the donor's original purpose or design, once it is decided to apply the gift to another project. We think that it is advisable to require only that the new project chosen be "as close as is practicable or reasonable" to the original project. Again, this formulation represents a slight lowering of the standard. In our view, the law should signal to courts that the objective is to create a viable project that implements the disponent's charitable intention effectively.

(iv) Non-charitable Purposes and Initial Cy-près

Fourth, there is the issue whether the initial cy-près doctrine should be available in cases where the purpose trust sought to be created is not charitable. Since, in many cases, such trusts are void from the outset, there often is no issue. However, there are situations where the law, either by statute or at common law, has made a concession to the initial viability of a non-charitable purpose trust. The common-law and statutory exceptions are one example. The Re Denley's trust is another. The statutory conversion of a trust for a "specific non-charitable" purpose into a power is still another. Some treatment of the question of what is to happen to these trusts in the case of an initial impracticability or impossibility is required. Our recommendation in section V is that the viability of these trusts be made conditional on their being, and remaining, practicable and possible. Therefore we would not recommend that the initial cy-près doctrine be applied to them.

(e) Exemption from the Rule Against Remoteness of Vesting
The "modern" rule against perpetuities is a common-law rule which requires that a contingent interest in property vest in interest within the perpetuity period. A contingent interest "vests in interest" when all conditions of its vesting are satisfied. The object of the rule against perpetuities is to place some limit on the power of property owners to determine the devolution of their property into the future. Alternatively stated, the object is to enhance the alienability and consumability of property by liberating it from remote conditional interests. For that reason the rule is also referred to, perhaps more accurately, as the rule against remoteness of vesting. The rule isolates only contingent interests because, in fact, it is quite liberal. If a disponer can actually name the succession of future owners, the interests given to each of them is vested in interest, provided no further conditions of vesting are imposed, and therefore, the rule does not apply. However, if the disponer must identify future owners by description only (for example, "the first son of the first son"), then the particular interest is not vested in interest until the donee is actually identified. It is this vesting which must occur within the perpetuity period. The period is the length of any life in being at the time the instrument establishing the contingent interest is created, plus twenty-one years.

Historically, the rule was applied so that the contingent interest was void if it could be shown that there was a possibility, no matter how remote, that the interest might vest outside the perpetuity period. This aspect of the rule was substantially modified by a wave of reform in the mid-1960s. In the reform jurisdictions, which include Ontario, instead of asking what could conceivably happen, we now "wait and see" whether the interest under consideration does, in fact, vest within the period. Thus, today in Ontario, a contingent interest is void only if it must vest or actually does vest outside the perpetuity period.

The reform in Ontario, and also in other jurisdictions, for the first time made the reformed rule against remoteness of vesting applicable to the interest arising after a determinable interest in the same way it had always applied to the interest arising after a defeasible interest. In the case of land, these interests are called possibilities of reverter. In the case of other types of property, there has never been a term of art, so the reforming statute in Ontario refers to them as "a possibility of a resulting trust on the determination of any determinable interest in...personal property". In the case of land, interests arising after a defeasible interest are called rights of re-entry, but, since there is no term of art applicable to equivalent interests in respect of personality, the reforming statute refers to them as "equivalent rights". We use "possibility" and "right of re-entry" as compendious terms. At common law, possibilities were considered to be vested in interest. Only the vesting in possession was considered contingent. The reasoning was that the determinable interest was said to end naturally, as opposed to being interrupted, when the named event happened. Therefore, the possibility was not contingent, but merely residual, that is, it was the necessarily remaining ownership interest. Although logically plausible, this treatment always seemed to subvert the basic policy of the rule against remoteness of vesting, hence the reform. The reform treats the provision containing the determining event as void if the event does not happen within the perpetuity period. The determinable interest under the statute, like the defeasible interest at common law, at that point becomes absolute.
Charities and charitable purpose trusts do not have a blanket exemption from the rule against remoteness of vesting. In general, if a gift to a charity or charitable purpose trust is conditional, in unreformed jurisdictions, the rule applies to require that the gift necessarily vest within the perpetuity period; in reformed jurisdictions, we ask whether it must so vest, and if not, we wait and see whether in fact it does so vest. In the converse situation, the case of a conditional gift to a person subject to a prior determinable or defeasible gift to a charity or a charitable purpose trust, the gift to the person is subject to the rule against remoteness of vesting.

The one exemption that charities and charitable purpose trusts have from the application of the rule against remoteness of vesting arises in the situation where a defeasible gift is given to one charity followed by a (necessarily conditional) gift over to another charity. For example, a testator might devise realty "to Charity X, but if Charity X should cease to exist, then to Charity Y". Charity Y's gift in this case is conditional. It need not vest within the perpetuity period and it may well vest outside it. Nonetheless, the conditional gift in favour of Charity Y is not void for perpetuity at common law. The rationale for this exemption is that, despite the change in ownership, the property remains devoted exclusively to charity. We agree with this reasoning and, therefore, do not think that this exemption per se should be taken away. Given the fact that the reforming legislation now makes the rule against remoteness of vesting applicable to possibilities, perhaps this common-law exemption should also be explicitly extended to possibilities. Such an extension has been implemented by statute in some jurisdictions. A reform along these lines might also be adopted in Ontario. In our view, however, the suggestion is so sensible that it will, in all probability, be adopted and applied by a court the first time the problem arises. The problem is too minor to justify a legislative solution. In the following discussion, therefore, we assume that this rule is also law.

There are three further minor problems involving charity and the rule against remoteness of vesting. Clarification or resolution of these problems could also be effected through statutory reform, although it is our view that it should be possible to achieve the required clarification or resolution through the normal development of the common law. In what follows we describe the problems and suggest the proper approach to their clarification or resolution. If legislation governing charities is adopted in Ontario, then it may be advisable to enact statutory provisions dealing with some or all of these issues.

The limited exemption that charity has from the application of the rule against remoteness of vesting may permit more freedom to control the devolution of property into the future than is desirable. The exemption may permit an owner to create something akin to a non-charitable purpose trust simply by making the retention of the gift to Charity X in the above example subject to a condition that benefits a non-charitable purpose. Thus, "to Charity X but if it fails to maintain my grave, to Charity Y" may fall within the exemption. If it does, then something similar to a perpetual non-charitable purpose trust in favour of maintaining the disponer's grave is created. This would be an anomalous and inadvertent circumvention of the beneficiary principle and, as such, ought not to be allowed. If the law is going to permit non-charitable purpose trusts or other similar devices, an issue to which we return in chapter 14, it should, in our view, do so
expressly and not inadvertently. The way to deal with this particular anomaly is to treat
the determinable or defeasible gift to Charity X as absolute if the contingent gift to
Charity Y does not vest within the perpetuity period. Only if the condition of vesting
relates solely to the cessation of the prior interest should it be permissible for the
contingent interest to vest outside the perpetuity period.

Is there a need for reforming legislation? In our view, the answer is clearly no. Under the
current law, it remains open to the courts to interpret the exemption in the more
restrictive way just suggested. This is because the rationale advanced in the case that first
stated the exemption was that there was nothing objectionable from the point of view of
the rule against remoteness of vesting to successive interests in favour of charity, since
the law already permitted property to be devoted to charity in perpetuity. This rationale
does not support the possibility of creating something akin to a non-charitable purpose
trust. Rather, the rationale suggests an exemption that merely permits a disposer to
anticipate the failure of the first gift by designating the second, in the same way that, had
he or she not specified the second, a court on the cessation of the first through an
impracticability or impossibility would have applied the property cy-près. If this is the
rationale for the exemption, then the exemption should apply only where the event which
determines or defeases the prior interest relates exclusively to the cessation of the first
charitable purpose.

A second problem arises in the situation where there is a defeasible or determinable gift
to a charity or in favour of a charitable purpose, followed by a contingent interest in
favour of something other than charity. What happens if the contingent interest is, or
under the reformed rule becomes, void for perpetuity, and the charity subsequently ceases
to function? For example, consider the situation, arising under the reformed rule, where
there is a gift "to Charity X in trust for its purposes, but if it should cease to function (or,
to provide another example, "if it should fail to maintain my grave"), to the heirs of my
friend R" and, after the close of the perpetuity period, Charity X ceases to function? In
situations where the defeasible or determinable interest does not involve charity, that
interest simply becomes absolute and the property may be dealt with by the new absolute
owner without restriction. Where the defeasible or determinable interest involves
charity, as in the example, however, a difficulty arises reconciling this result with the
result achieved by resorting, on these facts, to the supervening cy-près rule. In this
circumstance, the supervening cy-près rule does not, without modification, apply because
there is a gift over, and therefore, an indication that the charitable intention was not
exclusive. Should the property nonetheless be applied cy-près on the theory that the
interest of Charity X is absolute because of the rule against remoteness of vesting? Or
should the property revert to the initial donor or his or her heirs, since the gift over is void
(because of the rule against remoteness of vesting) but the charitable intention is
exhausted? In our view, it is obviously better to apply the property cy-près. In order to
achieve this result, the reformed rule against remoteness of vesting must be interpreted to
mean that the prior interest becomes absolute for the purposes of both the rule against
remoteness of vesting and the supervening cy-près rule. This result is certainly consistent
with the objective of the rule against remoteness of vesting. The alternative allowing the
property to fall back into the disposer’s estate would, curiously, allow the disposer’s
intention to control the disposition of the property to the extent that, on the occurrence of
the determining or defeasing event, the property leaves charity, but not to the extent,
because of the rule against remoteness of vesting, of controlling its ultimate destination.
If the point of adopting this alternative view is to act in accordance with the donor's
intention, then the effect of doing so in this way, paradoxically, is to have the property
end up in a place he or she never contemplated.

Legislation might help clarify this, but in our view, the preferred interpretation of the
effect of the rule against remoteness of vesting is obviously the correct one and,
therefore, already available to courts to adopt. Legislation has been adopted in British
Columbia, Alberta, and the Yukon Territories, however. Section 20(2) of the British
Columbia *Perpetuity Act* provides, for example:

> Subsection (1) [which makes possibilities subject to the perpetuities rule in the same way
> as rights of re-entry are] does not apply where the event, which determines the prior
> interest, or on which the prior interest could be determined, is the cessation of a
> charitable purpose, but in such a case if the cessation of the charitable purpose takes place
> after the expiration of the perpetuity period the property shall be treated as if it were the
> subject of a charitable trust to which the cy-pres doctrine applies.

There are at least two deficiencies with this formulation. First, it does not mention
nor is there any other provision which mentions what happens where the prior interest is a
defeasible interest. Second, it applies only where the determining event is the cessation of
the charitable purpose and, therefore, does not apply to a gift, for example, "to Charity X
so long as it maintains my grave, and if it ceases to do so, to my heirs". Obviously, it
should apply in all cases where the reformed rule results in an absolute vesting in charity.
In our view, in any event, a statutory rule is probably redundant.

A third problem arises where there is a gift to a named charitable institution or a gift in
favour of a particular charitable project, not yet in existence or commenced. These gifts
often have two plausible interpretations, one which interprets them as a gift to a more
general charitable purpose of which the named institution or project is merely the
designated means, the other which interprets them as a gift to the named institution or the
particular project. A gift "to St. Michael's Anglican Church" and a gift to "the
construction of St. Michael's Anglican church", where the named institution is not yet
formed and not yet built, or the project identified is not yet commenced, are examples.
The donor's intention in such a gift is, usually, to contribute to a project to which it is
hoped others will contribute but which may not be viable unless and until others
contribute. Under the first interpretation, the gift creates an absolute interest. Under the
second interpretation, the gift creates a contingent interest since the vesting in interest
must await the formation of the named institution or the commencement of the project. If
the first interpretation is adopted and the church is not formed or the project does not
proceed, the gift will be applied cy-près. However, if the second interpretation is
accepted, then, under the old remoteness of vesting rule, the gift is void from the outset
since the vesting in interest may not occur within the perpetuity period. Under the new
rule, we are permitted to wait and see if the gift vests during the perpetuity period. Due to
the harsh consequences of the operation of the second interpretation under the old rule,
prior to perpetuities reform, there was a strong incentive for courts to prefer the first interpretation. Under the reformed remoteness of vesting rule, however, there is no such incentive since a court can wait and see whether the gift vests. Consequently, interpretations operating under the influence of the reformed rule may now probably exhibit a tendency to the second interpretation, since this is usually the truest interpretation of the donor's intention in this sort of gift.

There is no need for legislative intervention here. Courts should merely be aware that the existence of the unreformed remoteness of vesting rule tended to skew interpretations of testamentary dispositions and therefore the relevant case law should be approached with care.65

(f) Exemption from the Rule Against Indestructible Trusts

The common law prohibits tying up capital in trust in a manner that makes it impossible to identify the absolute equitable owner or owners for a period greater than the perpetuity period. This is the so-called rule against indestructible or perpetual trusts. It complements the rule against remoteness of vesting and itself forms part of the larger policy of the law to restrict restraints on the alienability and consumability of property.66

The rule against indestructible trusts does not apply to charitable purpose trusts. It applies only to the limited number of permitted non-charitable purpose trusts.67 Thus, the income from a trust fund may be devoted to charitable purposes in perpetuity, while the fund itself may not be touched. Similarly, land may be devoted to a charitable purpose in perpetuity. In addition, a trust benefiting a particular charitable institution may be created to endure beyond the perpetuity period.68

However, many jurisdictions, including Ontario, have statutes that restrict the possibility of accumulating income. Thus, section 1 of the Ontario Accumulations Act69 prohibits dispositions of property directing that the income therefrom be accumulated for any one of six specified periods, the period usually applicable being twenty-one years. The sanction for a contravention of the rule is that the wrongfully accumulated income is to be received by the person that would have received it had the wrongful direction to accumulate not been given. There is some dispute in the case law, but it is probable that this means that a donor cannot mandate the protection of the capital endowment of a charitable purpose trust against inflation by obliging his trustees to re-invest a portion of the income. It certainly does not mean that the trustees themselves are prohibited from capitalizing a portion of the income. The effect of the accumulations rule on charities is similar to the effect on charities of the disbursement regime under the Income Tax Act.70

It will be recalled that we recommended that the quota be set so that charities with endowments be permitted to protect the endowment from deteriorations in its real value due to inflation. Since there is nothing in the accumulations rule that prohibits this, there is no need to modify it unless it is thought that disponers should have the power to mandate such protection. We see no harm in extending this power to disponers in principle, but we see no great need to do so either. Given the difficulty in formulating such a power, it is perhaps better to leave the matter alone.
(g) Conclusion

The possibility of endowing wealth to a charitable purpose and the possibility of doing so in perpetuity are the two defining features of the charitable purpose trust. No other organizational form precisely shares these features. They are the chief comparative advantages of the trust form over the other forms. Is there any reason to modify them, especially the second feature? In our view the answer is obviously no. There is no scope for the improvement of these features: the law is clear and coherent and there are no deficiencies. There is no reason to remove them or diminish them; given the inherent value of charitable projects, wealth devoted to them for long periods of time or in perpetuity is wealth well devoted. Provided there is some effective method of reforming projects that have lost their practical usefulness, there is no need for modifications in the law. We return to this particular issue below in section 5 "Reorganization and Dissolution".

The converse question is whether there is any reason to extend this form of organization, and in particular the perpetual existence feature, to other purposes. Again, we will come back to this question below in chapter 14.

3. FORMATION AND ENTRY

(a) Introduction

Entry to the form of the charitable purpose trust is straightforward. All that is required is satisfaction of the three certainties, with the third considerably modified as described above in section 2. The real difficulty in terms of access to the form is satisfying the condition that the purpose be exclusively charitable, since the form is available to charitable purposes only. The penalty for missing the mark is that the trust is void. It is possible to miss the mark not only by failing to name a charitable purpose but also by mixing a charitable purpose with a non-charitable purpose, as the famous English decision known as the "Diplock litigation" illustrates. There, the impugned gift was to "charitable or benevolent" purposes. It was held that, since benevolent purposes are, at law, not charitable purposes, the whole trust failed.

There are two doctrinal questions to be considered here: first, whether the form, in whole or in part, should be made available to other purposes, which we take up in section 5; and, second, the appropriate treatment of mixed-purposes trusts. We will consider this latter question in (b) below. The discussion is brief, since we have already examined this issue in detail in our Report on the Law of Trusts. In (c) we examine the question whether charitable trusts should be subject to a provincial registration requirement and, if so, what the modalities of that requirement should be and whether, in particular, viability should be conditioned on such registration.

(b) The Exclusively Charitable Condition: Imperfect Trust Provisions
In our 1984 report\textsuperscript{25} we examined the issue of mixed-purposes trusts extensively and recommended the adoption of statutory provisions to alleviate the hardships caused by the severity of the common-law rules just described. We merely reiterate our arguments and recommendations here.

Imperfect purpose trust provisions can arise through the disponer's use of a single compendious term, such as "benevolent" or "philanthropic", which includes both charitable and non-charitable purposes; through a list of purposes some of which are and some of which are not charitable; through a gift in trust for the general purposes of an institution, some of which may not be charitable; and through a grant to a trustee who is given a discretion to select recipients from a group, some of which are not charitable.\textsuperscript{26} Since such trusts are in violation of the exclusively charitable provision, unless the disponer's intention was to apportion or divide the trust into severable portions or to establish the offending purposes as merely ancillary, the whole trust must fail.

This doctrine frustrates the charitable intentions of many disponers. In the Commission's view, it requires radical statutory modification. It was our view in the 1984 report, and it remains our view today, that it is obviously more consistent with the intentions of most disponers who run afoul of this rule that the gift be salvaged as much as possible for the benefit of the valid charitable purposes identified, than it is to allow it to fail altogether and fall back into his or her estate. The point of the reform, therefore, should be to give effect to the disponer's charitable intentions. The objectives of the reforming legislation should be as follows:

(1) It should be as comprehensive a solution as possible. Consequently, the statutory term "imperfect trust provisions" should be defined widely to include all situations where the disponer proposes to advance a charitable as well as a non-charitable purpose.

(2) The reform should seek to validate the gift in a way that is consistent with the donor's stated intention, but which does not inadvertently extend validity to non-charitable purpose trusts.

(3) To the extent that the law now or after reform recognizes as valid some non-charitable purposes, the reform must be consistent with that validity. In particular, to the extent that the purposes of a disposer are not charitable and that a particular element of his or her gift is validated as a power under section 16(1) of the \textit{Perpetuities Act}\textsuperscript{27} that element should continue to be valid as a power. Unexpended funds at the end of the twenty-one-year period of validity provided for in section 16(1) should go to the charitable purposes, provided that this would not be inconsistent with the donor's express intention.

We recommended statutory language to implement these objectives in our previous report. That language is set out above in chapter 2.\textsuperscript{28}

\textit{(c)Status Registration}
Charitable trusts are currently obliged to register with the Office of the Public Trustee pursuant to section 1 of the *Charities Accounting Act.* They must also provide financial and other information to that office, on demand, pursuant to section 2 of that Act. These provisions of the *Charities Accounting Act* are primarily regulatory in nature; the viability of the trust, thus, is not conditional on satisfaction of these requirements. Rather, the objective seems to be to maintain a registry of charitable trusts in order to facilitate their administrative and regulatory control. In our view, however, general registration and annual disclosure requirements at the provincial level could also be justified as a condition of viability in the same way as registration is presently a condition of validity for the corporation.

There are difficulties with basing the design of a provincial registration regime exclusively on one or other of these two objectives. Establishing a registration requirement aimed exclusively at achieving the first objective would run the risk of creating a regime which merely duplicated the work done at the federal level. Attempting to implement the second objective is problematic because of the direct connection, in the case of the charitable purpose trust, between the issue of viability and the issue of entitlement to the federal tax privileges: both depend on the meaning of "charity". This may well mean that the power of decision on the question of status could be vested in two distinct authorities, and this, in turn, could lead to conflicting decisions.

It is our recommendation that a provincial registration requirement be implemented to address both these objectives, but only partially and in a way that takes account of these difficulties. With respect to the first difficulty, the registration and annual disclosure requirements need only mandate a level of disclosure roughly equivalent to that currently required under the *Corporations Information Act.* The information disclosed should, therefore, be almost entirely non-financial in nature. It should include only the names and addresses of the trustees, the place of operation of the trust, a list of only the special powers and duties of the trustees, the charitable objects of the trust, and, perhaps, the total amount of funds held subject to the trust. It might also contain limited information concerning key elements of the trustee's fiduciary duties and of the charity's compliance with the non-distribution constraint. This latter type of disclosure should not, however, be detailed, and its point should be simply to remind the charity of its fiduciary obligations.

The second problem should be addressed in the provisions that govern the legal effect of a registration and establish the sanctions for non-compliance. We recommend that failure to register and to file annual returns have no legal effect insofar as the viability of the trust is concerned. It should merely establish a jurisdiction in the proposed "Nonprofit Organizations Commission" (NOC) to exercise whatever powers it has over charitable trusts and/or to confer whatever privileges it or the province may confer on charities. A positive or negative decision of the NOC on the issue of whether a particular trust is charitable should, insofar as the viability issue is concerned, be merely an expression of the NOC's opinion on the question. Issues relating to viability should be left to the Ontario courts. However the NOC, among others, should have the power to apply to the court to determine whether a trust is charitable and therefore viable. Where an Ontario court holds that a trust is not viable, then, under federal law, there is, and should continue
to be, no right to federal registration, since viability (as determined provincially) is a condition of registration federally. Prior to, or in the absence of, such a decision, the NOC should be required to register a trust which might otherwise fail to obtain registered status in Ontario, but which has obtained a registration federally. In keeping with these recommendations, non-compliance with the registration requirement at the provincial level should not be sanctioned with nullity. Instead the sanction for failing to register and the sanction for failing to file an annual information return should, in the first instance, be a fine imposed on the trustees. Repeated violation of the obligation to register should be subject to the sanction of dissolution of the trust by order of the court, and/or the application of its property cy-près. Detection would be straightforward, since most of these trusts will be registering federally.

The provincial law should also accommodate the fact that many entities that may or may not qualify at common law as charities can register federally as charities or are treated federally in the same way as charities. This happens because the federal law permits registered charities to make grants to "qualified donees", some of whom may or may not be charities at common law, and because it treats national amateur athletic associations and national arts organizations in the same way as it treats charities. In our view, the provincial law should accommodate this extended definition of charity by incorporating it into the definition of trusts entitled to be classified in the provincial registration system as charities. We suggest a way that these entities could be accorded viability below in chapter 14.

Finally these registration provisions should be moved from the regulatory statute to the Trustee Act to signal that the primary objective is the regulation of status. As will be seen, we recommend that exactly analogous provisions be incorporated into a new Non-Profit Corporations Act and a new Unincorporated Associations Act.

4.GOVERNANCE

(a) Introduction

We think that governance issues concerning the charitable purpose trust ought to be treated, as much as possible, in the same manner as they are treated in private trusts. Since we have dealt extensively with these matters, insofar as private trusts are concerned in our previous report, our discussion in this section is brief. It is confined to identifying areas where the treatment of the charitable purpose trust might be, or should be, different. The discussion follows the structure of our 1984 report and the conclusions are expressed as recommendations concerning modifications to the draft Bill recommended in that report.

Since our general recommendation is that most of the provisions of the draft Bill ought to apply to charitable trusts, the first modification to the draft Bill is to section 1(p)(i), the provision which excludes the Bill's general application to charitable trusts. Further, to ensure that the obligations and restrictions on trustees set out in that Bill are enforceable by the NOC in the same way that such obligations and restrictions are enforceable by the
beneficiaries of a private trust, a provision stating as much should be set out at the beginning of the statute. This provision would be part of the more general delegation of the Crown's parens patriae jurisdiction to the NOC, which we recommend below in chapter 15.

(b) Trustee's Duty of Care: Sections 4 and 7 of the Draft Bill

The standards governing the conduct of trustees developed by courts of equity are quite strict. To some extent they have been modified in their harshness by the Trustee Act.84 They may also be, and often are, modified by the parties to the constituting trust deed.

As a general proposition, a trustee is held to an objective standard in the performance of his or her duties under the trust. The actual rule has several formulations. Often, it is expressed as follows: "[T]he law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs."85 In another formulation, what is required is the "ordinary skill and care" of the "prudent man of discretion and intelligence". The only deviations permitted from this standard are those agreed to by the disponer of the trust in the trust instrument. These may range from a general exoneration from the stringencies of the objective test to specific exceptions, for example, in regard to investment decisions.

In our 1984 report, we recommended that the trustee's duty of care be codified in two imperative provisions: one applicable to all trustees and one applicable to those trustees who in fact possess or, who, because of their profession, business, or calling, ought to possess, a higher level of skill or knowledge. The first provision requires "that degree of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person".86 The second requires the person who has the particular skill, or who ought to have the particular skill, to employ it in the administration of the trust.87 We remain satisfied with this approach to the formulation of the trustee's duty of care, and we are also satisfied that this approach is valid for charitable trusts. We therefore recommend no change to these two provisions of the draft Bill.

(c) Power to Delegate Tasks: Sections 5, 6, 7, and 8 of the Draft Bill

Although courts exercising equitable jurisdiction initially were very restrictive in their definition of a trustee's power to delegate tasks to agents, statutes in England and in the Canadian provinces now generally provide for a liberal power of delegation.88 In our 1984 report, we recommended the adoption of a suppletive statutory provision that would give trustees the power to delegate acts of administration to agents in circumstances where it is "reasonable and prudent" to do so.89 Under the provisions of the draft Bill, provided the selection of the agent is made personally by the trustee, the trustee is satisfied as to the agent's suitability, and the trustee supervises the agent in a reasonable and prudent manner, the trustee is not to be liable for any loss to the trust due to the fault of the agent. The power to delegate contained in the draft Bill does not include a power to delegate dispositive decisions, but the draft Bill also does not prohibit the disponer
himself or herself from creating such a power in the instrument. In the draft Bill, we also recommended the adoption of a provision that would exonerate trustees from liability for losses suffered by the trust if the trustees relied "reasonably and in good faith upon a written statement of an agent" who is an accredited professional. Finally, we recommended that trustees be permitted to delegate to any person the execution or exercise of all or any of the duties and powers vested in him as trustee by power of attorney for a period not exceeding twelve months. In such case, the trustee would remain liable for the acts and defaults of the donee of the power.

We are of the view that all of these provisions are appropriate for charitable purpose trusts and therefore recommend that they be adopted without modification.

(d) Trustee’s Duty of Loyalty

(i) Conflicts of Interest and Duty: Sections 9, 10, and 12 of the Draft Bill

Trustees, like all fiduciaries, must not allow themselves to be put in situations where their interest conflicts with their duty to act in the best interests of the trust. This is a very strict rule. It applies across a whole range of circumstances. The rule does not require that there be a fraudulent or dishonest intention on the part of the trustee; it applies even to a trustee who permits a conflict of interest and duty to arise in the most innocent of circumstances. Its applicability is also not contingent on the trustee actually profiting at the expense of the trust. If a profit does arise, however, the trustee is obliged to disgorge it to the trust. The rule is enforced very strictly by the courts. The case law is voluminous.

The rule is suppletive, however. The trust instrument may authorize a trustee to continue to act as trustee even though a conflict of interest and duty has arisen. The trustee may also be permitted by the trust instrument to act in a conflict situation with the unanimous prior consent of the beneficiaries. Further, the court has an inherent jurisdiction to authorize conflicts. This jurisdiction is exercised almost exclusively to authorize purchase by the trustee of trust property. Finally, when there are beneficiaries who are unborn, who are infants, or who are incapacitated, the court has a general statutory jurisdiction to vary the terms of a trust under the Variations of Trusts Act. This power can be used to vary the terms of the trust in regard to the prohibition against conflicts of interest and duty.

The current rules regarding permissible conflicts are slightly more restrictive in the case of charitable trusts. In the case of a charitable purpose trust, there is no possibility of obtaining the unanimous prior consent of the beneficiaries, since there are none. The Variation of Trusts Act does not apply since it is available only where there are beneficiaries who cannot consent to a variation. The inherent jurisdiction of the court to approve transactions between the trustees and the trust is, however, available in the case of a charitable purpose trust.

In our 1984 report, we recommended that the conflict of interest and duty rule be codified as a suppletive rule. Under the provisions of the draft Bill, and notwithstanding any contrary provision in the trust instrument, however, beneficiaries would be permitted to
apply to the court to delete or vary any term in a trust instrument which permits a conflict of interest and duty. We also recommended in our 1984 report that the court be given an express power to pre-authorize conflicts of interest and duty and to excuse trustees from liability for breaches of the conflict of interest rule where it can be shown that the breach is or was for the benefit of the trust and its beneficiaries, and even though there may be beneficiaries who do not consent.  

We also recommended the adoption of a power in favour of trust company trustees to deposit trust funds in any account or security maintained by it or an affiliate or subsidiary, up to the amount not exceeding the insurable sum under the Canada Deposit Insurance Corporation Act. 

We are satisfied that these 1984 recommendations concerning the conflict of interest and duty rule should apply to charitable trusts, subject to four modifications. First, the power of the court to pre-authorize or excuse breaches of the duty of loyalty should be exercisable, in the case of charitable trusts, only upon prior notice to the NOC. 

Second, at least for charitable trusts, but perhaps for all trusts, some more explicit regulation of transactions between members of the proscribed class (as that term is defined above in chapter 9) and the charity or any "controlled corporation" (as that term is defined above in chapter 9) is required. In our view, these transactions ought to be expressly prohibited as part of the suppletive codified conflict of interest and duty rule, or as part of a non-exclusive list, perhaps contained in the regulations under the Act, of transactions which are deemed to be in violation of the conflict of interest and duty rule. 

Third, although we believe that it is acceptable that the codified conflict of interest and duty rule remain suppletive for charitable trusts, we think that additional safeguards should be put in place to ensure that all conflict situations, including transactions between the proscribed class and the trust or between the proscribed class and a controlled corporation, do not result in harm to the trust. We recommend this, of course, because there is no one in a position equivalent to the beneficiaries available to ensure that otherwise permitted conflicts do not result in detriment to the trust. 

Thus, in our view, an appropriate rule for charitable trusts would permit the trust instrument to authorize conflicts of interest and duty, but would require two things: first, any trustee who wants to act in accordance with the permission must disclose the nature of the conflict to the meeting of the trustees at which the transaction is considered and must recuse themselves from the meeting; second, the transaction must be approved by the NOC as being fair and reasonable to the trust. Where the decision of the NOC is negative and the decision of the trustees is positive, the charity should be able to appeal the decision of the NOC to the court. 

Fourth, a new Trustee Act should also permit the NOC to apply to the court to delete or vary any term permitting a conflict of interest and duty. Since we are recommending that charitable trusts must register with the NOC, the existence of the authorization will be
known by the NOC from the outset. This right parallels the right of beneficiary mentioned in the previous paragraph.

(ii) Reimbursement of Expenses and Remuneration: Sections 11, 35(p), 71, 72, and 73

Reimbursement of expenses, since it involves the payment of money to the trustee, appears to raise an issue of conflict and duty. The current Trustee Act provides that trustees may reimburse themselves for expenses incurred in the execution of the trust. The draft Bill contains two provisions to like effect, one of which makes clear that there is in fact no issue concerning the duty of loyalty where there is merely reimbursement. These provisions of the draft Bill should apply with one modification to charitable trusts. A summary report, perhaps done on an annual basis in the annual information return, should be made to the NOC of all reimbursements made to all trustees. This requirement will help ensure that payments in excess of what are truly reimbursements of reasonable expenses are not made. The NOC, exercising its powers as beneficiary, could attack excessive payments as breaches of the duty of loyalty.

Remuneration for trustees for their work as trustees does raise issues involving the duty of loyalty. It is simply a special case of the conflict of interest and duty rule. Under the current law, the disponer may expressly provide for the compensation of his or her trustees for their work as trustees. There are also statutory provisions in Ontario and other jurisdictions which permit a trustee, with court approval, to be compensated for his or her work as a trustee at a fair and reasonable rate. This may be done on an interim basis or on a final passing of accounts. Further, the court has an inherent and statutory jurisdiction to award compensation where a lawyer who is a trustee has performed functions beyond those of an ordinary trustee. Finally, the rule which permits beneficiaries to authorize breaches of the duty of loyalty applies in this context to allow beneficiaries to approve compensation for trustees for their work as trustees. These provisions, except of course the last, currently apply to charitable purpose trusts.

We recommended in our 1984 report that these rules regarding compensation continue with one significant change. We recommended that trustees be permitted to pay themselves compensation on an interim basis, provided they give notice of such "pre-taking" to the beneficiaries, provide an account for the services rendered, and, when requested, satisfy the court that the sum taken was fair and reasonable. We also recommended a power in the Lieutenant Governor to make regulations prescribing compensation guidelines.

The provisions of the draft Bill providing for compensation authorized by the court ought to be applicable to charitable trusts provided that the application to the court is made on notice to the NOC. In the absence of prior court approval, no compensation should be paid to trustees of a charitable trust. Therefore, we recommend that the interim payment rules in the draft Bill not apply to charitable trusts.
(e) Unanimity and the Number of Trustees: Sections 13, 15, and 18 of the Draft Bill

(i) Maximum Number of Trustees

The common law requires trustees to act unanimously. In the event that they cannot, under section 60 of the Trustee Act, the court may remove one or more of them if circumstances require. A court may not, however, exercise a discretion within the power of the trustees.

In our 1984 report, we recommended that the unanimity rule be codified as a suppletive provision in a new Act. We made this recommendation while acknowledging that there are other jurisdictions, such as Quebec, which have adopted a simple majority-vote rule. We also recommended, as an imperative provision, that no trust be permitted to have more than four trustees.

In our view, these provisions ought not to apply to charitable trusts. Many charitable trusts will be foundations with substantial granting activity. In many cases, the ultimate beneficiaries of these trusts will be selected by the trustees, in accordance with the trust's purposes, which will often be quite broad. It may be advisable in these instances to have a larger number of trustees selected, for example, from a cross-section of the community or from the sector to be benefited, involved in the decision-making process. We see no reason why the law should prohibit this. In our view, further, it should be permissible for a charitable trust to have up to ten trustees. If such a larger number of trustees is to be permitted, however, the unanimity rule is clearly the wrong suppletive rule for charitable trusts. Rather, the suppletive rule ought to be that a majority of trustees are permitted to make decisions. If these two suggestions are implemented, then it follows that the Act should also establish suppletive meeting rules governing the notice of meetings, quorum, and the conduct of meetings. It should deal as well with the responsibility of trustees who dissent from decisions of the majority which constitute, for one reason or another, a breach of trust. For these rules, we think that the Act should be based on the analogous provisions governing directors' meetings under the Ontario Business Corporations Act.

(ii) Minimum Number of Trustees

Section 15 of the draft Bill provides that the sole surviving trustee, in the case where more than one trustee with joint powers was initially appointed, who is not a trust company may not act alone without the court's approval. Otherwise, there is nothing in the draft Bill requiring that there be a minimum number of trustees. For charitable trusts, we think it advisable to require that there be a minimum of at least three trustees. This requirement would enhance the internal accountability of the charitable trust and it would reduce the likelihood that the charitable trust form will be abused by disponers with ulterior motives. If this proposal is adopted, as just suggested, meeting rules and rules governing the responsibility of trustees who dissent from the decisions of the majority would also have to be adopted. We think the suggestions made above in subsection (i) in this regard should simply apply to all charitable trusts. Where the number of trustees falls
below the statutory minimum, the statute should provide that the remaining trustees may
not act without the approval of the NOC, except to appoint new trustees in accordance
with the trust instrument and/or the Act.

(f) Powers of Beneficiaries: Sections 14, 15, and 16 of the Draft Bill

Section 14 of the draft Bill affirms that the powers of the trustee are exercisable solely by
them and not the beneficiaries, even if they are all of age. Section 16 provides that
beneficiaries may apply to the court to obtain an order against the trustees to discharge
duty. The first of these provisions would be redundant if made applicable in the
case of charitable trusts. Its purpose is to make clear that the powers of trustees are their
powers and not the powers of the beneficiaries. Section 16 obviously does not work for
charitable trusts. We recommend, therefore, the adoption of a similar right in the new
Trustee Act in favour of the NOC.

(g) Appointment and Discharge of Trustees: Sections 19 to 33 of the Draft Bill

We recommended in our 1984 report the adoption of a number of provisions which
would improve and enhance the non-judicial powers of appointment and discharge of
trustees. We have reviewed those recommendations during the course of this study, and
we have reviewed the sections of our draft Bill, sections 19 to 33, designed to implement
them. We are of the view that these provisions should also apply to charitable trusts,
subject to two provisos. First, any change in trustees of a charitable trust made pursuant
to the non-judicial powers of appointment and discharge should be reported immediately
to the NOC. Second, we are of the view that the state has an interest in regulating who
may serve as trustees of charitable purpose trusts, and therefore that, as part of the new
trustee legislation, a provision be included disqualifying people who are bankrupt,
persons declared by a court to be of unsound mind, persons under the age of eighteen,
and persons convicted of an indictable offence or a summary conviction offence
involving fraud or dishonesty, from acting as trustees of a charitable purpose trust.105

(h) Investments: Section 34 of the Draft Bill

The general standard of care discussed above applies in the case of the investment
decisions taken by trustees. Different standards of care and other restrictions can always
be chosen by the disponer. In addition to the general standard of care, since the mid-
nineteenth century, English statutes have provided a "legal list" of investments which, if
followed, insulate trustees from criticism for failing to meet the "prudent man of
disccretion and intelligence" test. The contents on the "legal list" have changed over time,
with a gradually greater representation of conservative equity stocks permitted, and lower
representation of government securities. The first such legislation in Canada was adopted
in Ontario in 1868. In its current version it is still quite restrictive.106 There have been
arguments, growing stronger in recent years, that the "legal list" technique should be
abandoned in favour of the simpler "prudent man" test, which has been influential in the
United States since as early as 1830. One indication of the inadequacy of the current
"legal list" is the statistic that over ninety percent of professionally drafted trust
instruments today provide that the trustee is to have a free hand in choosing investments.

In our 1984 report, we recommended, as a suppletive provision, that the standard of care applicable to the actions of trustees generally namely, that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another personal also apply to the investment decisions of trustees. In section 34(1) of the draft Bill, therefore, it is stated that the trustees may invest trust money in any kind of property. Section 34(2) of the draft Bill sets out a list of guidelines appropriate for trustees to consider when making investment decisions. We see no reason why this general method of regulating investment decisions should not also apply to charitable trusts. 107

(i) Administrative Powers of Trustees: Section 35 of the Draft Bill

In our 1984 report and in our draft Bill in section 35, we recommended the adoption of a list of suppletive administrative powers that trustees would, subject to the settlor's decision to the contrary, be able to exercise in the course of their administration of the trust. Our list of powers is quite extensive and was designed on the basis that the powers included would, in the usual case, be powers intended by the disponer for the trustees to have. We also suggested the adoption of a provision, section 63 of the draft Bill, which would permit trustees to apply to the court for a conferral of a power or powers, either generally or in a particular case, and as circumstances warrant, where a transaction cannot be effected because of the absence of a power in the original trust instrument. We are satisfied that these sections of the draft Bill should also apply to charitable trusts, provided that a further provision be added which states that none of the powers listed in section 35 are available to charitable trustees insofar as their exercise would constitute a breach of the regulatory provisions we recommend for the sector as a whole in chapter 18. Section 35(b), for example, permits the trustees to carry on any business, something which, in chapter 18, we recommend be regulated strictly.

(j) Passing Accounts: Section 36 of the Draft Bill

Section 36 of the draft Bill provides for the voluntary and compulsory passing of accounts by testamentary and inter vivos trustees. We discuss this provision in our 1984 report and we discuss the passing of accounts procedure itself in our 1991 report on estates administration. 108 We are of the view that this mode of accountability is not appropriate to charity trustees and would recommend that section 36 be made non-applicable to charitable trusts. Passing of accounts is a financial accountability procedure designed principally with an estate administration in mind, where an inventory of estate assets is gathered, followed by a liquidation and/or a distribution. It is workable in the case of similar types of institutions, such as testamentary trusts and some inter vivos trusts, but not, in our view, in the case of charitable trusts. Modern charities, including those organized as trusts, have operational and administrative characteristics more akin to business organizations than estates and private trusts, and the accounting profession in Canada has developed and is in the process of developing financial statements adapted to
their operations. Moreover, the appropriate initial forum for accountability in the case of
charities is the public administration designed specifically to regulate them the Charities
Branch of Revenue Canada and the NOC and it would be a waste of resources to involve
the courts prematurely in any accountability exercise. We develop in more detail methods
of accountability to the NOC in chapter 17. It is sufficient to observe now that the passing
of accounts is not among the techniques we recommend.

(k) Allocation of Receipts and Outgoings Between Income and Capital
Beneficiaries: Sections 37 to 43 of the Draft Bill

The provisions of the draft Bill under consideration here are all intended as aids to
trustees who otherwise may not have instructions in the trust instrument concerning the
treatment of receipts and outgoings insofar as there are capital and income beneficiaries.
These provisions also ought to be of general application.

(l) Dispositive Powers of Trustees: Sections 44 to 52 of the Draft Bill

The provisions in sections 44 to 52 of the draft Bill pertain exclusively to private trusts in
favour of natural persons. They deal with statutory powers of maintenance traditionally a
power in the trustees to apply the income and in certain circumstances, capital, of the
trust for the benefit of a minor in need and advancement the power of trustees to advance
a portion of the capital of the trust to a minor so that he or she may take advantage of
some life-advancing opportunity and apply in circumstances where the minor's interest,
either in income or capital, is a contingent, determinable, or defeasible interest, or where
minors have a vested interest but payment to them is delayed on account of their
minority. They also deal with "protective trusts" designed to shelter trust assets from the
claims of the creditors of beneficiaries. None of these provisions should therefore apply
to charitable trusts or to trusts in favour of a charity. The present language of the draft
Bill is perhaps sufficient to accomplish this objective since most of the provisions by
their terms apply only where the beneficiary is a natural person. However, in some of the
provisions this intention is only implicit, albeit necessarily implicit. This matter ought to
be clarified. The rule of construction in section 47, since it is intended as an aid in matters
involving the new provisions, should also not apply to charitable trusts or to trusts in
favour of a charity.

(m) Contribution and Indemnity Among Trustees: Sections 53, 54, and 55 of the
Draft Bill

The provisions of the draft Bill dealing with the liabilities of trustees to indemnify one
another or to make contribution to one another should apply without modification to
trustees of charitable purpose trusts. The principles of liability and the case in favour of
reform are indistinguishable.

(n) Court Powers, Not Including the Power to Vary the Terms of the Trust and Not
Including Issues Relating to the Compensation of Trustees: Sections 56 to 62, 68
to 70, and 74
These provisions set out the power of the court to supervise trusts and trustees and to make vesting orders. They should apply without change to charitable trusts.

(o) Books and Records

Trustees of charitable trusts should be subject to an obligation to maintain proper records and financial accounts, at a specific place and in the possession of a specific person, as set out in the registered declaration described above in section 3.

5. REORGANIZATION AND DISSOLUTION

If the initial vesting of the property was exclusively charitable that is, there is no subsequent interest in another beneficiary but that charitable purpose can no longer be carried out due to its impracticability or impossibility, the supervening cy-près doctrine provides that a court may apply it to a charitable purpose as near as possible to the original purpose. The disponer's intention, on the better view of this doctrine, is mostly irrelevant since it is exhausted in the initial absolute gift to charity. It is incorrect to say that the disponer's intention is entirely irrelevant, however, since the court's application of the property is constrained by the "as near as possible" doctrine to some purpose analogous to the initial purpose. In addition, as discussed above, there may be an initial question whether the disponer intended a gift over and, therefore, whether the gift was exclusively charitable. However, there is no requirement of a general charitable intent and, therefore, no possibility of the gift, at this point, failing.

We have addressed most of the issues in our previous Report on the Law of Trusts and, for the most part, merely summarize them here. Our recommendation was for a very broad and simply stated power in the courts to vary charitable purpose trusts, one that would be equivalent in scope to their power to vary private trusts. The simplification and broadening was achieved, as discussed in part above, through the elimination of the requirement to find a general charitable intention, through a broadening of the grounds of court intervention beyond impracticality and impossibility, and by broadening the powers to alter the objects or administration. With respect to the problem of surpluses remaining after the purposes of a public appeal have been fulfilled, we doubted the English authorities to the effect that in this circumstance a general charitable intention is required, and, in any event, recommended the abolition of that requirement in all circumstances. Instead, surpluses should be returned only to donors who expressly stipulate that their donation should be returned in the event of a surplus. Otherwise the surpluses would be applied cy-près.

There was one problem not treated in the 1984 report which we recommended be addressed in any future report on the law of charities. It concerns the power of the court to deal with the capital of an endowment established to last for an indefinite duration. There are three types of gifts where a problem might arise: a gift in trust in favour of a charitable corporation (for example: "$10,000 in trust to be used to pay my church $500 each year"); a gift to a charitable corporation in trust for (some of) its purposes (for example "$10,000 to my university to be held in trust, the income to be used to fund an
annual scholarship in my name”); and, a gift in favour of a charitable purpose (for example, "$10,000 in trust, the income to fund an annual award in my name”). In these examples, the endowment is intended to last indefinitely. In all of them, there may arise circumstances which give rise to a need to modify the terms of the trust in a way that affects the capital or the "endowment". Yet on the face of things, there is no power in the court in effecting such a modification to touch the endowment. This is so for two reasons. First, in the situation where the charity's interest is in the income of the endowment only as in the second and third examples the ownership interest in the capital will not, apparently, have been disposed of to anybody, let alone the charity. It would appear, therefore, that the capital cannot be touched in a way that benefits the charity. Second, even if the difficulty concerning ownership could be resolved in a way that is favourable to the charity which certainly is possible in the first example assuming the amount to be expended is greater than the income the testator's precise and explicit instructions in each case were that the capital not be expended immediately or, in some cases, at all. We look at each difficulty in turn and examine more precisely whether and how it impedes a modification of the terms of the trust under the established doctrines that permit such variations.

(a) Ownership of the Capital

Where there is a gift of the entire income of property to an individual, there is a rule of construction which applies to the effect that the capital is also given. The rationale for the rule of construction is that, without it, there would be an intestacy with respect to the capital, and presumably, it could not have been the testator's intention to create an intestacy.\textsuperscript{111} In England and Canada, however, it has been held that this rule of construction does not apply to gifts of income to charity in any one of the three ways listed above, since the rationale for the rule does not apply: a trust in favour of charity is exempt from the rule against indestructible trusts and, therefore, a gift of income to charity may last indefinitely; the interest in the capital, therefore, is not undisposed of so much as it is merely unconsumable. There is Australian authority to the contrary,\textsuperscript{112} but the Canadian position appears to be clearly established.

The same Australian authority\textsuperscript{113} has held that where the charitable beneficiary is a legal person, as in the first example given above, and the charity's interest is in the income only, the charity may not apply under the rule in \textit{Saunders v. Vautier} to terminate the trust.\textsuperscript{114} The rule does not apply, it is said, because the charity has no beneficial interest in the corpus. In the case where the charity is not a legal person but merely a purpose, the rule is not available additionally, of course, because there is no beneficiary to seek its application.

The rule in \textit{Saunders v. Vautier} applies, however, where the charity is a legal person and is entitled, ultimately, to the capital.\textsuperscript{115} It should therefore be available in the first example, if one assumes that the amount to be expended\$500 is greater than the income actually earned.\textsuperscript{116}
The supervening cy-près doctrine, the last possible source for a power in the court to alter the terms of the trust in a way that affects the capital, is also unavailable because of the ownership problem. Supervening cy-près is available only in respect of the allocation of the income. Even if the ownership difficulty could be resolved so the capital is subject to the cy-près power, the present scope of the impossibility or impracticability test is too narrow for the many situations where the charity might simply be seeking a different, more effective, application of the funds.\textsuperscript{117}

So, the lack of an ownership interest in the corpus probably means that the court has little or no power to vary these trusts in a way that would give the charity access to the capital.

(b) The Disponer's Intention

The intention of the disponer that the capital not be available immediately or at all is the second barrier to altering these trusts. Courts have relied on the precisely expressed intention of the disponer that the trust last indefinitely to justify a refusal to modify these trusts in a way that gives the charity immediate access to the capital. In this way, the perpetual purpose trust is regarded primarily as an aspect of the dispositive powers of an owner rather than as an institution available to advance charity. In other words, the indefinite duration of the trust takes precedence over the cause of advancing charity effectively.

(c) Solutions

The issues under consideration here require a statutory solution. There are two principles to be balanced in fashioning the statutory solution. On the one hand, a disponer's intentions should not be upset lightly. On the other, indefinite duration should not be regarded as an end itself. In the Commission's view the ownership problem should not, in fact, present a barrier to a proper solution, since in our view it does not matter that the ownership interest in the capital has not been disposed of to charity. Provided the endowment is devoted exclusively to charity which of course it must be to be a charitable purpose trust and/or to avoid the rule against indestructible trusts and provided that the statutory solution does not upset this exclusive devotion in any way, the ownership of the capital is irrelevant. What matters is the owner's intention to benefit charity by establishing an endowment to last for an indefinite duration.

The problem has been addressed in a limited way in the United Kingdom in section 4 of the Charities Act 1985.\textsuperscript{118} That statutory provision permits trustees in certain prescribed circumstances to expend an endowment of twenty-five pounds or less where the gross income in the previous accounting period was less than five pounds and the trustees are of the opinion that the endowment is too small in relation to its objects. The difficulty with this approach is that the conditions of application are too restrictive. This statutory provision does not identify all the situations where the indefinite duration of the endowment is not, on balance, beneficial to the charitable institution or the charitable purpose. Certainly, it will identify a good number since the relative smallness of the size of the income stream is often the reason why such trusts are or become ineffective. But
consider the situation where the beneficiary is a charitable institution and its continued existence depends on raising funds sufficient to effect a major capital renovation. Would it not be more in accord with the disponer’s intention to collapse a $10,000 endowment to contribute to the project, thus ensuring the continued long-term viability of the institution he or she wanted to support, than to maintain the endowment? This sort of difficulty leads us to the conclusion that the indefinite duration feature of endowments should be subject to the same cy-près jurisdiction as any other aspect of charitable gifts, provided, as we have suggested in our previous report, that the intention of the disponer remains one of the principal constraints on the power of the court to apply the property cy-près. The intention of the disponer that is important, however, is not the intention to create a perpetual institution, but the intention to aid charity in a particular way. The point is that the former may, in certain circumstances, actually frustrate rather than advance the latter. As a safeguard, it might be advisable to require these cy-près applications to proceed with notification to the disponer, if still alive, or members of his or her immediate family, if not. This obligation to notify might be limited to applications arising within a certain length of time, for example, twenty-one years or forty years, of the date of the gift. The selection of the time period should be based on the likelihood of there being an interest on the part of someone, either the disponer or someone connected to the disponer, in maintaining the endowment and balanced against the difficulty to the charity or the trustees of actually locating the persons to be notified. A nice way to balance these two factors is to make the obligation to notify more onerous for the first twenty-one years for example, personal notification at the last-known address, notification to the firm of lawyers who acted for the disponer and to the executor and less onerous for the remaining nineteen years.

This departure from the English precedent is supported in part by the fact that the reformed cy-près jurisdiction in the United Kingdom is much narrower, more conservative, and circumspect than the jurisdiction that we have recommended for Ontario courts. The explanation for this divergence, as we explained in our previous report, is the marked difference between the two jurisdictions in the nature and organization of the charity sector. It also reflects a different attitude towards styles of lawmaking, with our approach giving a broader but well-defined discretion to courts.

Assuming that these changes to the cy-près power are made, the cy-près power should be the only power of variation applicable to charitable trusts. Sections 63 to 67 of the draft Bill, therefore, should not be applicable to charitable trusts since these sections contain powers of variation that should apply to only private trusts.

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Endnotes:

1 The general requirement that the object be a person stems from Morice v. Bishop of Durham (1804), 9 Ves. J. 399 at 405, 32 E.R. 656 at 658 (S.C); aff’d (1805), 10 Ves. J. 522, 32 E.R. 947 (L.C); “[T]here must be somebody in whose favour the Court can decree performance”. See, also, Re Wood; Barton v. Chilcott.

For a discussion of these anomalous exceptions, see Re Astor’s Settlement Trusts; Astor v. Scholfield, [1952] Ch. 534, [1952] 1 All E.R. 1067 (subsequent references are to [1952] Ch.) (a trust to promote ethical standards in journalism held invalid). For examples, see Pettingall v. Pettingall (1842), 11 L.J. Ch. 176 (a bequest in favour of the testator's horse); Mitford v. Reynolds (1848), 16 Sim. 105, 60 E.R. 812 (S.C.) (a bequest to maintain a sepulchral monument and a horse); Re Dean; Cooper-Dean v. Stevens (1889), 41 Ch. D. 552, 58 L.J. Ch. 693 (a bequest to maintain horse and hounds); Pirbright v. Salwey, [1896] W.N. 86 (a bequest to maintain a grave); and Re Hooper; Parker v. Ward, [1932] 1 Ch. 38, [1931] All E.R. Rep. 129 (a bequest to maintain a grave). The list of common-law exceptions is closed. See Re Endacott; Corpe v. Endacott, [1960] Ch. 232, [1959] 3 All E.R. 562 (C.A.).

For example, several provincial Cemeteries Acts provide for trusts for the perpetual care of graves. In Ontario, see Cemeteries Act (Revised), R.S.O. 1990, c. C.4, s. 35. See similar legislation in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island.


American Law Institute, Restatement (Second) of Trusts (Washington, D.C.: 1957) (hereinafter referred to as "Restatement of Trusts").


See Re Denley’s Trust Deed, supra, note 1, for a statement of these two aspects of the concession to validity.

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Sir William Grant M.R. said in *Morice v. Bishop of Durham* *supra* note 1, at 404-05 (9 Ves. J.), 658 (E.R.):

> There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favour the Court can decree performance.

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*Supra*, note 1.

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*Supra*, note 1, at 501.

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*Supra*, note 1, at 479. It was thought prior to *Leahy* that gifts in trust for the purposes of an unincorporated association are not in violation of this principle since the members of such an association are well-placed to enforce such a trust. See, for example, H.A.J. Ford, *Unincorporated Non-Profit Associations: Their Property and Their Liability* (Oxford: Clarendon Press, 1959), at 24, and D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 507. The Privy Council decision in *Leahy* changed this. See the discussion *infra*, ch. 14.

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*Supra*, note 1.

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See *Keewatin Tribal Council Inc. v. City of Thompson*, [1989] 5 W.W.R. 202, 61 Man. R. (2d) 241 (Q.B.). There are few cases, however, and therefore the limits of the doctrine are not known. Perhaps it is even available to validate gifts to the purposes of an association, provided there is no indestructible trust or remoteness of vesting problem. See Waters, *supra*, note 13, at 511. See *infra*, ch. 14.

However, as we shall see infra, ch. 14, statutory provisions have been enacted in Ontario and other jurisdictions, that convert some non-charitable purpose trusts into powers of appointment. The common-law position, thus, has been modified by statute in Ontario and other jurisdictions. See Perpetuities Act, R.S.O. 1990, c. P.9, s. 16, discussed further infra. See, also, Restatement of Trusts, supra, note 5, §124.

See Re Gott; Glazebrook v. Leeds University, [1944] Ch. 193, [1944] 1 All E.R. 293; Re Robinson; Besant v. German Reich, [1931] 2 Ch. 122, 145 L.T. 254; and Re Fallis Estate, [1947] 2 W.W.R. 883 (Sask. C.A.). The trustee or executor may also himself or herself be empowered implicitly or explicitly to choose specific objects and the settlor may expressly give any other person the right to select specific objects: Re Hammond (1921), 51 O.L.R. 149, 68 D.L.R. 590 (C.A.). The scheme-making power of the court applies where trustees are not appointed, where they died, and where they decline to act, as well as where the terms of the trust are broad and unspecified.

If the gift is not subject to trust, then it is the Crown, not the courts, which devises the scheme. See D. Waters, Case Comment: Re Centenary Hospital Association'' (1990), 9 Philanthrop. (No. 1) 3. As Professor Waters describes, the property is then bona vacantia and the "Crown of its clemency" will specify a scheme. This practice is usually referred to as prerogative cy-près. Courts often exercise this power with the permission of the Crown. See Re Conroy Estate, [1973] 4 W.W.R. 537, 35 D.L.R. (3d) 752 (B.C. S.C.).

For other examples, see Re Lea; Lea v. Cooke (1887), 34 Ch. D. 528, 56 L.J. Ch. 671 (a bequest of £4,000 to "General William Booth...for the spread of the gospel"); and Re White; White v. White, [1893] 2 Ch. 41, [1891-4] All E.R. Rep. 242 (C.A.) (a fund "to the following religious societies" where none were named). See, also, Re Leslie Estate, [1940] O.W.N. 345 (H.C.J.).

On rare occasions, gifts in trust to charitable purposes are expressed in such vague terms that the court is unable to supply a scheme. An example is Cameron v. Church of Christ, Scientist (1918), 57 S.C.R. 298, 43 D.L.R. 668, where the trust was to establish a fund "towards helping to supply such institutions as may in the near future be demonstrated to show that God's people are willing to help others to see the Light that is so real, near and universal for all who will receive". These institutions, in the testator's intention, were to take the place of hospitals and jails. In that case, the Supreme Court of Canada was unwilling to supply a scheme because the objects, in its view, were too vague and chimerical. These sorts of cases are rare occurrences. For a discussion, see Waters, supra, note 13, at 515-16.
Some clarification of our use of terminology is required. "Object" is a trust law term of art that refers to the person, purpose(s), or project(s) that benefit from the trust. By "purpose", we mean to refer to the disponer's ultimate intention regarding action. By "project", we mean the specific plan or "scheme" adopted in order to implement a purpose. All charitable projects therefore have charitable purposes.

In the case of charitable purpose trusts, the objects may be purposes—for example, "an endowment for the advancement of religion" or projects—for example, "an endowment to build almshouses" or "an endowment to build and maintain a chapel". Obviously, more specificity is required before anything can be done in pursuance of the former: that is, a "project" must be identified or designed. When we say that an object is impossible or impracticable, we mean that the specific purpose or project identified as the object of the trust is impossible or impracticable.

"Scheme" is a trust law term of art. Its meaning is essentially the same as our term "project", namely a practical plan whose purpose, in the case of charitable schemes or projects, is charitable. "Project" may be preferable to "scheme". It seems to us to be more accurate in its connotations, especially in the way it evokes ideas of practicality, utility, and action. "Scheme" is, perhaps, now quaint and archaic.

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See Waters, supra, note 13, at 620.

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Re Astor's Settlement Trusts, supra, note 2, at 547.

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Supra, note 1, 10 Ves. at 539, 32 E.R. at 954.

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Supra, note 1.

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Wood v. R., [1977] 6 W.W.R. 273, 1 E.T.R. 285 sub nom. Re Russell (Alta). (subsequent references are to [1977] 6 W.W.R.) is the only case on point. It dealt with the interpretation of a statutory provision validating "specific" non-charitable purpose trusts as powers. See Perpetuities Act (Ontario), supra, note 17, s. 16, and Perpetuities Act, R.S.A. 1980, c. P-4. Stevenson L.J.S.C. of the Alberta Supreme Court held, correctly in our view, that the word "specific" in that statutory provision meant that the purpose had to be certain. He applied, again correctly in our view, the test for certainty that now applies in the case of discretionary trusts and powers, namely, whether it can be said with certainty that any given individual, or in the case of a purpose trust, any given purpose, is or is not a member of the class to be benefited.

This is referred to as the "conceptual certainty" or "individual ascertainability" test. It is also sometimes called the "linguistic or semantic certainty" test. It is to be contrasted with the "class ascertainability" test which applies in the case of fixed trusts and which

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For a full discussion of these cases, see Waters, supra, note 13, at 613-19, and Picarda, supra, note 31, ch. 26.


See A.H. Oosterhoff and E.E. Gillese, Text, Commentary and Cases on Trusts, 4th ed. (Toronto: Carswell, 1992), at 865, where it is explained that the latter was probably the original sense in ecclesiastical courts prior to the assumption of jurisdiction over testaments of personalty by the Court of Chancery.

There are many examples of the doctrine's application. Typical instances include situations where: (1) charitable purpose identified has already been fulfilled; (2) amount donated is insufficient to accomplish the purpose; (3) property donated was not suited to the charitable project; (4) amount donated is surplus to needs (cases involving gifts that are surplus to needs may also raise questions of construction); (5) designated trustee who is somehow necessarily implicated in the project refuses to or cannot act; (6) activity of the trust can better be carried on by a corporation; (7) trust or a part of it are illegal, for example, for being discriminatory; and (8) named institution does not exist. See H.A.J. Ford and W.A. Lee, Principles of the Law of Trusts, 2d ed. (Sydney: Law Book Co., 1990), at 892-907, and Picarda, supra, note 31, ch. 25, for a fuller discussion of these situations.

The traditional posture of English law is quite strict in its interpretation of these criteria, on the basis of the belief that "the function and duty of the Court is to give effect to the testator's will": Attorney-General v. Haberdashers' Co. (1791), 1 Ves. J. 295, 30 E.R. 351. Recent case law in England suggests a more relaxed posture. See Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney-General, [1947] Ch. 183, [1947] L.J.R. 371.

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The traditional common-law test was to ask "whether the desires or directions of the author of the trust, with which it is found impracticable to comply, are essential to his purposes": Attorney-General (N.S.W.) v. Perpetual Trustee Co., [1940] A.L.R. 209, 63 C.L.R. 209, at 225. A general charitable intent could be inferred from the fact that the gift in question is one of several, is of the residuary estate, or is followed by a gift over to another charity. A great deal of specificity in description of the gift or identification of the recipients will tend to negative the existence of a general charitable intent.

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With respect to public appeals that fail initially (because, for example, an insufficient amount is raised, the project becomes redundant, or too much is raised), there is the preliminary question whether in fact there are such cases. In all proffered instances of them, it could easily be argued that the project failed after the gift had been made, therefore, raising an instance for supervening cy-près, which according to the better view, does not require any general charitable intention. It is argued by some, however, that such gifts are usually implicitly conditional until the date for expenditure arrives, and that it is at that date the failure is to be assessed. For the first view, see R. Thompson, "'Public' Charitable Trusts Which Fail: an Appeal for Judicial Consistency" (1971-72), 36 Sask. L. Rev. 110. We need not resolve this question, since in our recommendation a general charitable intention ought not to be required in any event.

The case law exhibits mixed results on the issue whether failed public appeals raise questions of initial as opposed to or supervening cy-près. Further confusion in the case law arises from the fact that there are public appeal cases (as noted supra note 44) where it was held that a general charitable intention is required even in cases of supervening cy-près. See Re Welsh Hospital (Netley) Fund, supra, note 44 (supervening cy-près applicable to surplus remaining after appeal funds expended on project due to general
charitable intention of donors); Re Y.M.C.A. Extension Campaign Fund, [1934] 3 W.W.R. 49 (Sask. K.B.) (initial cy-près not available where public appeal was for extension to building and not enough money was raised since there was no general charitable intention on the part of donors); Re Hillier; Hillier v. Attorney-General, [1954] 1 W.L.R. 700, [1954] 2 All E.R. 59 (C.A.) (initial cy-près available where funds raised pursuant to a public appeal to build hospital made redundant by introduction of National Health Service since anonymity of donors is strong evidence or conclusive evidence of a general charitable intention); and Re Ulverston & District New Hospital Fund; Birkett v. Barrow & Furness Hospital Management Committee, [1956] Ch. 622, [1956] 3 All E.R. 164 (C.A.) (subscribers who gave their names to hospital appeal made redundant by National Health Service entitled to return of donations on a resulting trust since this was a case of initial failure and there was no general charitable intention).

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See Re Tacon; Public Trustee v. Tacon, [1958] Ch. 447, [1958] 1 All E.R. 163 (C.A.), for an illustration of the converse situation. In that case, the gift, a remainder interest, was held adequate at the date of vesting in interest (death) in 1919 but was inadequate at the date of vesting in possession in 1952, and was applied cy-près in the absence of a general charitable intention, since this was not a case of initial failure.

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For a fuller discussion of this problem, see J. Phillips, "The Problem of Surpluses in Funds Raised by Public Appeal" (1990), 9 Philanthrop. (No. 2) 3. For a Canadian case, see Re Y.W.C.A. Extension Campaign Fund, supra, note 46.

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The rule is called the "modern" rule even though it dates from a seventeenth century case, Duke of Norfolk's Case (1683), 3 Ch. Cas. 1. The "old" rule is the rule in Whitby v. Mitchell (1890), 44 Ch.D. 85, 59 L.J. Ch. 485 (C.A.) It prohibits the limitation, after a life interest in an unborn person, to the unborn issue of any unborn person. The old rule is abolished in Ontario pursuant to s.17 of the Perpetuities Act, supra, note 17.

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See Perpetuities Act, ibid.

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"Gifts over" after a determinable interest assuming they are valid have always been subject to the rule. There is at least one case that treated what appeared to be a gift over as a conveyance of the possibility.

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Perpetuities Act, supra, note 17, s. 15.

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For applications of this logic, see *Re Cooper's Conveyance Trusts; Crewdson v. Bagot*, [1956] 1 W.L.R. 1096, [1956] 3 All E.R. 28.

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See *Christ's Hospital v. Grainger* (1848), 16 Sim. 83, 60 E.R. 804 (S.C.); aff'd. (1849), 1 Mac. & G. 460, 41 E.R. 1343 (L.C.), and *Re Mountain* (1912), 26 O.L.R. 163, 4 D.L.R. 737 (C.A.). See, also, the *Perpetuities Act* (Alta.), *supra*, note 27, s. 19(4), and the *Perpetuity Act*, R.S.B.C. 1979, c. 321, s. 20(3), where this rule is codified. Codification is probably not necessary.

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See, for example, *Perpetuities Act* (Alta.), *supra*, note 27, s. 19(4), and *Perpetuity Act* (B.C.), *supra*, note 56, s. 20(3).

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It is technically inappropriate to refer to a possibility as a contingent interest, even under the reform, since the reform does not affect the logic of the distinction between a possibility and a right of re-entry. It touches only on the effects of the logic.

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In *Christ's Hospital v. Grainger*, *supra*, note 56, at 100 Sim., 810 E.R., Shadwell V.C. said: "There is no more perpetuity created by giving it to two charities in that form than by giving it to one. The evil meant to be guarded against by the rule against perpetuities is the making of property inalienable". For a view contrary to ours, see *Re Tyler; Tyler v. Tyler*, [1891] 3 Ch. 252, 60 L.J. Ch. 686 (C.A.), where a gift over from one charity to another which was made contingent on the first charity maintaining the testator's grave, a non-charitable purpose, was held valid. There is Canadian authority for this view of the exception. See *Re Harding Estate*, *supra*, note 44, There is Australian authority for this view of the exception as well. See *Roman Catholic Archbishop of Melbourne v. Lawlor*, [1934] A.L.R. 202, 51 C.L.R. 1 (Aus. H.C.), and *Royal Society for the Prevention of Cruelty to Animals v. Benevolent Society of N.S.W.*, [1960] A.L.R. 223, 102 C.L.R. 629 (Aus. H.C.). The first case is criticized in C. Sweet, "The Monstrous Regiment of the Rule Against Perpetuities", [1906] Juridical Rev. 132. The Alberta and British Columbia perpetuities legislation are open to the interpretation that this view of the exception is valid since they specifically validate the exception in the following vague (on this issue) terms: "[T]he rule against perpetuities [does not] apply to a gift over from one charity to another." See *Perpetuities Act* (Alta.), *supra*, note 27, s. 19(4), and *Perpetuity Act* (B.C.), *supra*, note 56, s. 20(3).
For support see Ford and Lee, supra, note 40, at 298 n. 7.

Perpetuities Act (Ont.), supra, note 17, s. 15.

For the supervening cy-près rule there does not have to be a general charitable intention, but there must be an exclusive charitable intention. The supervening cy-près doctrine would not, therefore, apply when there is a gift over.

Supra, note 56.

For examples of these gifts, see Re Schjaastad Estate, [1920] 1 W.W.R. 327, 50 D.L.R. 445 (Sask. C.A.) (a gift to “the first Norwegian Luther Orphans’ Home built in Saskatchewan or Alberta” where there was no possibility of such a home being built); Jewish Home for the Aged of British Columbia v. Toronto General Trusts Co., supra, note 55 (gifts for Jewish hospital, orphanage, and old men; home built in British Columbia); Re McNab Estate (1925), 56 O.L.R. 676, [1925] 2 D.L.R. 1100 (C.A.) (gift for first home built for orphans of veterans); and Re Pearse, supra, note 55.

See cases cited in Waters, supra, note 13, at 523-27.

There is some controversy whether the rule is: (1) a rule against the inalienability of either (a) the trust corpus or (b) the beneficial interest in the trust property. The first of these has little plausibility. It is doubtful that the rule prohibits restraints on the alienability of the trust corpus, since if it did, it should apply to all trusts which it does not just non-charitable purpose trusts. Further, and in any event, the rule is not satisfied even if the trustee is given power to alter the trust corpus. The second interpretation of the first rule (that is, (1)(b)) has greater plausibility. It seems possible that the rule could be a rule against restrictions on the alienability of beneficial interests. This might, for example, explain its exclusive application to perpetual non-charitable
purpose trusts, since these trusts have no beneficiary who could otherwise act to alienate the beneficial interest. However, it is hard to see how this formulation of the rule implements any intelligible policy. We therefore reject it.

The second main interpretation of the rule a rule that prohibits beneficial interests extending beyond the perpetuity period also does not seem valid since there is sufficient authority to the effect that beneficial interests may indeed extend beyond the perpetuity period. See, for example, *Re Chardon; Johnston v. Davies*, [1928] Ch. 464, [1927] All E.R. 483, where an equitably determinable fee simple in favour of a non-charitable corporation was held valid.

The third interpretation of the rule of the prohibiting the indestructibility of trusts beyond the perpetuity period is, in our view, the best of the three. Under this construal of the rule, the rule is based on the same policy as the rule against remoteness of vesting. The rule would be saying that the equitable ownership interest in the trust capital must be identified within the perpetuity period, or conversely, that no contingent equitable ownership in the trust capital is valid unless it must vest within the perpetuity period. See Ford and Lee, *supra*, where the point is made that what the law is concerned with here is to ensure that "absolute equitable ownership" is identified within the perpetuity period.

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For example, a perpetual trust to maintain a tomb would be void for violating this rule. See *Re Harding Estate, supra*, note 44, and *Re Oldfield Estate*, [1949] 2 D.L.R. 175, 57 Man. R. 193 (K.B.).

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R.S.O. 1990, c. A.5, s. 1, as am. by S.O. 1993, c. 27, Sch.

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Chichester Diocesan Fund v. Simpson, supra, note 37, followed by the Supreme Court of Canada in Brewer v. McCauley, supra, note 37.

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Ibid., at 434-35.

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Ibid.

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Supra, note 17.

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An Act to revise the Trustee Act, set out in the Report on the Law of Trusts, ibid., at 479 (hereinafter referred to as the "draft Bill").

Supra, note 81, ss. 17 to 35, especially s. 33

See Learoyd v. Whiteley (1887), 12 App. Cas. 727 at 733, 57 L.J. Ch. 390 (H.L.), per Lord Watson.

Draft Bill, supra, note 83, s. 4(1).

Ibid., s. 4(2).

See Trustee Act, supra, note 81, ss. 20, 33.


Draft Bill, supra, note 83, s. 5(4).


In recent years, however, it has been applied to pension in situations where adult beneficiaries have not given their consent. See, for example, Versatile Pacific Shipyards, Inc. v. Royal Trust Corp. of Canada (1991), 84 D.L.R. (4th) 761 (B.C.S.C.).

We recommended as much in our Report on the Law of Trusts, supra, note 4, by way of special exception to our approach in that report of not dealing with matters pertaining to charitable trusts.

That list could also be used as a specification of deemed breaches of the duty of loyalty for directors of unincorporated associations and nonprofit corporations.

We recognize that charities require as much, in some instances more, flexibility in this regard than do private trusts, especially charities with an operational dimension. However, charities with a significant operational dimension should and for the most part probably will organize as corporations, not trusts. The conflict of interest and duty rule in the case of corporations is not as severe (currently and in our recommendation) and there will be a membership and a board of directors to watch for harmful transactions.

Supra, note 81, s. 33.

Draft Bill, supra, note 83, ss. 11 and 35(p).

Trustee Act, supra, note 81, s. 61. In determining what is fair and reasonable, the court considers "(1)magnitude of the trust; (2)care and responsibility springing therefrom; (3)time occupied at performing its duties; (4)skill and ability displayed; (5)success which has attended [the trustees]": Re Toronto General Trust Corp. and Central Ontario Railway Co. (1905), 6 O.W.R. 350 at 354, per Teetzel J. See, also, [1981] Ch. Comm. Rep., para. 64; [1988] Ch. Comm. Rep., para. 38; and Phillips, supra, note 48.

See Trustee Act, supra, note 81, s. 61, 23(2).


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The provision should mirror the equivalent provision in the Ontario *Business Corporations Act*, *ibid.*, s. 118.

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The prudent-man test has already been adopted for pension-fund investors in s. 23(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8.

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See *Re Welsh Hospital (Netley) Fund, supra*, note 44, and *Re North Devon & West Somerset Relief Funds Trusts, supra*, note 44.

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The rule is usually referred to as the rule in *Re Coward; Coward v. Larkman*, [1886-90] All E.R. Rep. 896, 60 L.T. 1 (H.L.).

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*Congregational Union of New South Wales v. Thistlewayte, ibid.*
The rule in *Saunders v. Vautier*, supra, note 68, permits a *sui juris* beneficiary of a trust to have it terminated and obtain a transfer of the capital, even though the disponer has specified that such transfer should be delayed until the beneficiary is older.

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However, compare *Re Bell*, supra, note 68, where this solution was not followed because doing so would be contrary to the testator's intention. See A.H. Oosterhoff, Annotation: "Circumventing Capital Endowments in Favour of Charity" (1980), 7 E.T.R. 129 at 131.

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1985, c. 20 (U.K.).

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CHAPTER 14

THE PURPOSE TRUST: SHOULD IT BE EXTENDED TO NON-CHARITABLE PURPOSES?

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1. INTRODUCTION

In chapter 13 the Commission canvassed the reasons the state has had historically for restricting access to the purpose trust. One might wonder whether there is any reason today to restrict access to the purpose trust to purely charitable purposes when one considers that access to entities having perpetual succession is nearly a matter of right in the case of non-charitable purpose corporations. The answer lies, in our view, in the fact that the Crown, in its parens patriae jurisdiction, and the courts, exercising their equitable jurisdiction, will take measures to enforce these trusts and in the fact that the courts, also in their equitable jurisdiction, will take measures to ensure their long-term viability. The directors of a non-charitable corporation, although constrained by the objects of the corporation, cannot be forced to pursue them by the Crown or the courts; viability of the corporation is ensured primarily by an interested membership. Hence, access to the
purpose trust form might still be restricted on the basis that it offers considerable state-sponsored enforcement and viability advantages. To understand why the form is available to charity, we would have to look at why charity might be preferred to other purposes. This was in part the object of the discussion in chapter 13. The Commission's concern in this chapter is whether the form, or variations of it, should be made more widely available. Our view, set out more fully in what follows is that, as such, the purpose trust should not be made available to non-charitable purposes, but that other devices of nearly equivalent value should be designed and implemented by statute. The key differences between these other devices and the charitable purpose trust are that, first, with these other devices the state is co-opted into enforcement or viability interventions only when there is a valid state interest in becoming involved; and, second, with these other devices, when the period of viability has ended, the remaining property is returned to the disposer instead of being applied cy-près.

However, law reform commissions in Manitoba\(^2\) and British Columbia\(^3\) have recently recommended that the exclusively charitable condition be dropped and that the availability of the purpose trust be extended to all purposes. Leading scholars in the law of trusts\(^4\) have recommended likewise, and several jurisdictions, most notably Quebec\(^5\), Bermuda\(^6\), California\(^7\), and Liechtenstein\(^8\) have moved forward with legislation. These developments in other jurisdictions require careful consideration.

2. THE PROPOSAL CONSIDERED AND REJECTED

Under the schemes adopted or recommended for adoption in these jurisdictions, a new institution, the non-charitable purpose trust, is created. The legislation and proposals for legislation address the question of enforcement in slightly different ways. Under the Bermudian legislation and Manitoba proposal, enforcement rights and obligations are given to a third party, called the "enforcer". Where initially or subsequently the office of enforcer is or becomes vacant, such persons as may be allowed by the court, including the trustee, the settlor, the owner of a residuary interest, and persons who derive a direct or tangible benefit from the trust, may apply to have the court appoint a replacement. Likewise, where the enforcer is not fulfilling his or her duties to enforce the provisions of the trust using due diligence and care, these same persons may seek the removal of the enforcer. Under the British Columbia proposal, there is no "enforcer". Rather, the Attorney General, the settlor, the trustee, or any person "appearing to have a sufficient interest in the matter" is empowered to apply to the court for enforcement of the trust.\(^9\) The proposals and legislation also extend the benefit of certain of the other privileges to this new institution scheme-making, initial and supervening cy-près, and perpetual existence.\(^10\) In the contemplation of these legislative schemes, then, there is a much expanded role for the state in the pursuit of non-charitable purpose trusts.

There are basically two sets of arguments advanced to support the extension of validity of some sort to non-charitable purpose trusts. First, it is argued that there are many worthy purposes that do not come within the common-law definition of charity but are, arguably, worthy of public support. One author has said, for example: "It would seem unjustifiable to deny a donor the ability to assist goals and causes which benefit society and sorely
need funding, such as protection of the environment."11 Of course, it is not a prohibition against funding these other worthy causes with which we are concerned; it is only endowment funding that is restricted due to the unavailability of a non-charitable purpose trust. The British Columbia Law Reform Commission in its report is also careful to emphasize that it is the benefits of endowment-type funding that are sought,12 and these are sought for the benefit, in its view, of "philanthropic" purposes. Professor Waters has argued that there may be other sorts of purposes that are of benefit to the public besides those which may be called philanthropic. He describes in detail the use of a purpose trust to help fund the performance of a mining company's obligation to clean up a mine site once the mining is completed. Under the scheme he describes, a percentage of the mining profits are put aside at regular intervals, saved, and invested, then repaid to the mining company, as the obligation to clean up the site is performed.13

A second argument supports the creation of such an institution on the basis that it enhances the freedom of property owners to dispose of their property. Certainly, the common law's categorical prohibition frustrated the unobjectionable intentions of many disponers. However, enhanced freedom for one person often entails increased restraints on another. The law has always been careful to balance the two interests in the form of doctrines such as the perpetuities rules, preferences for early vesting, and the doctrine of repugnancy. The argument, therefore, must be an argument for relatively greater freedom for property owners to control economic resources after their death.

The risks or costs of making any concessions to the non-charitable purpose trust and the arguments against adopting such an institution may be presented in the form of responses to the two arguments in favour. First, if the critique is that the common-law definition of charity is too narrow, then that may be answered, perhaps only partially, by an appropriate widening of the definition, one that is in accordance with our suggestion in chapters 6, 7, and 8. The critique which generates the proposal is a critique of the definition, but the proposal goes much further than is justified by the critique and results in validating such trusts, "as trusts for the purposes of the liberal party", trusts "for the maintenance of my ant collection", and trusts "for the purpose of educating my heirs"; and all this, in the proposals of some, in perpetuity, if the disponer so desires. Second, if the criticism is that legitimate desires of disponers are frustrated by an unduly restrictive common-law rule, then the response is not necessarily the creation of a right to establish a purpose trust. There are measures much short of this, such as the ones we suggest in what follows, which address the problem without engaging the state or the courts unduly in the execution of the idiosyncratic intention of disponers.

Our preference, then, is for a middle course, one which makes appropriate concessions to the arguments in favour, but one which also recognizes that the peculiar characteristics of the purpose trust are, as a package, appropriate only where the disponer's act is charitable or where the state is otherwise amenable to taking on the obligations imposed on it to ensure viability and enforcement. Our method in what follows is to canvass three models of partial viability available under the current law and, in the case of the last two, suggest substantial statutory improvements. We then revisit the special case of non-charitable public appeals and, finally, conclude with a recommendation in favour of permitting the
government through the proposed Nonprofit Organization Commission (NOC) to approve certain public benefit non-charitable purpose trusts on a discretionary basis.

3. ENFORCEABLE AND UNENFORCEABLE CONTRACTUAL UNDERTAKINGS

Here, we explore the possibility of a disponent achieving some or all of the effects of a valid purpose trust through the institutions of contract law. We apply the insights achieved in this exercise in the design of the reforms suggested below in sections 4 and 5.

One way to achieve a viability of sorts is to avoid the application of the beneficiary principle by the disponent drafting an instrument a "contract" that creates an arrangement just short of a trust. On one variation of this approach, the disponent would rely solely on the honesty and good faith of the person "the promisor" to whom his or her property is conveyed. Under this variation, the promisor makes a legally unenforceable promise to apply that property in a particular way. On another variation, a right to enforce the promisor's promise is granted in the contract to the disponent or to anyone else he or she might designate compendiously, "the promisee". The key characteristic of this approach, on either variation, is that the state (including the courts) remains neutral vis-à-vis the promisor's undertaking, intervening, in the second variation only, at the suit of the promisee who would be seeking to enforce his or her own contractual rights.

The first variation requires no legislative modification of the law. To avoid the application of the doctrine that voids non-charitable purpose trusts, the disponent need only use precatory words in the contract. When the promisor takes the property under the contract, he or she takes with no legal only a moral obligation to spend the fund in any particular way. Although in theory this arrangement is currently available, it may be difficult to create, since the precatory words used by the disponent may easily slip into the language of obligation, betraying an intention to create a purpose trust. Further, given the difficulties inherent in the interpretative exercise, courts might prefer that the gift fail rather than fall unencumbered by any legal responsibilities into the hands of the promisor. Nonetheless, with careful drafting, this arrangement is currently available. The beneficiary principle is not abolished, merely avoided. There is, interestingly, precedent for this arrangement under the old Quebec law of trusts.14

If the second variation is desired, then all that is required is the possibility in law of the promisee having a right to enforce the promisor's promise. This too, however, may already be permissible. The beneficiary principle, it could be argued, may defeat this approach since a court could well say that this contract is really a non-charitable purpose trust and, therefore, void. However, careful drafting by the disponent's lawyer should be able to prevail.

Under this second arrangement, it is difficult for the disponent to control the use of the property for long periods into the future, since his or her control, ultimately, extends only so far as others are willing to do his or her bidding, either by pursuing the purposes or pursuing those who are to pursue the purposes.15 This arrangement would attract the application of contract law (as opposed to trust law) doctrines relating to certainty.
Proprietary protection might be afforded by the disposer taking a security right over the property in his or her favour or by making the transfer of the property conditional on fulfillment of the promise. Finally, since the promisee, apparently, suffers no loss on a breach of the promise to pursue the purpose, he or she might have to seek specific performance of the promise or, perhaps, attempt to enforce a subsidiary promise to return the property or its value if the primary promise is breached. Nevertheless, whatever the modalities and this is the key point this arrangement does not entail any state expenditure or involvement beyond what is generally provided to the enforcement of promises.

There are other permutations. It has been useful to explore these two to this limited extent. This exploration gives rise to two observations. First, achieving either variation requires little or no legislative modification of the law, although to enhance the level of certainty in the law, we recommend below in sections 4 and 5 that portions of the approach be codified. Second, and more important, to the extent that this solution, on either variation, is thought deficient by the proponents of the non-charitable purpose trust, that deficiency must arise from the absence of a state role in the pursuit of the disposer's purposes, either through enforcement or ensuring viability. However, it is precisely that role which the proponents of the non-charitable purpose trust cannot justify.

4. SECTION 16 OF THE PERPETUITIES ACT: THE NON-CHARITABLE PURPOSE TRUST AS A POWER

Another middle course is currently pursued in section 16 of the Perpetuities Act. This section, at least partially, addresses the criticism voiced against the common law that the evident and laudable intentions of many disposers are frustrated too frequently by an unduly restrictive common-law doctrine which declares void non-charitable purpose trusts. Section 16 validates non-charitable purpose trusts, but as powers not as trusts, in the following language:

16.(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised ... within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but in case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or person's, or the person or person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital.
Similar legislation has been enacted in other Canadian jurisdictions. Under this approach, there is no obligation in the holder of the power to exercise it, and there are no enforcement or viability advantages provided by the state. Enforcement of the power can only be “negative” in the sense that those who take upon a failure to exercise the power may restrain its improper exercise, but they have no standing and no material interest in seeking to ensure that the power is exercised.

There are a number of serious difficulties with the section 16 approach. In what follows, we suggest a number of substantial reforms to it, some of which are derived from the discussion above in section 3. The end result is a legal institution which is no longer exclusively characterizable as a power and which is similar in substance to the non-charitable purpose trust recommended by others, but which falls short of that institution by not involving the state or the courts unnecessarily in enforcement or viability measures and by requiring, in general, that the property be returned to the disposer or his or her estate once the period of viability has ended. The new institution has the proprietary characteristics of a trust (which, arguably, the device described in section 3 has as well), but in order to clarify that it is not a full-fledged purpose trust, it may be better, for the purpose of discussion, to refer to it as a “fund” or a “section 16 trust”, and to the persons who control it as “administrators” or “section 16 trustees”.

Now we examine the difficulties with section 16.

First, it is unclear why, if the section is intended to address all aspects of the non-charitable purpose trust problem, it is included in the Perpetuities Act. This placement gives the impression that it is only the indestructible trust problem that is being addressed, but of course, the language of the section clearly addresses the problems presented by the beneficiary principle, the certainty principle, and by the situations in which initial and supervening cy-près are relevant. The fact that the provision has such a significant impact on trust doctrine argues in favour of moving the provision from the Perpetuities Act into the Trustee Act. We recommended as much in our previous report.

Second, section 16 is drafted to address the non-charitable purpose trust problem with only the testamentary disposition in mind. Its orientation should be more general and include and address all situations where a fund is sought to be devoted to a non-charitable purpose.

Third, if the orientation of the new provision is made more general, then the new provision should also identify more precisely who may enforce the administrator’s duties and whether the right to enforce those duties is “positive” or “negative” or both. In our view, positive enforcement should be available to anyone to whom a promise to pursue the relevant non-charitable purpose has been made, our “promisee” in the discussion above in section 3. There will usually be no such person in the case of a testamentary disposition hence the preference in section 16 to construe the trust as a power but where funds are raised by public appeal to support a non-charitable purpose, for example, all donors are promisees and they should be entitled to enforce the promise made by the
administrator to apply the funds raised to the particular non-charitable purpose. Where there are no such promisees, this should only be a negative enforcement power in those who take the residue.

A fourth problem concerns the issue of certainty of purposes. Where the purposes are entirely uncertain, in our view, the fund should simply fail. Where some of the named purposes are certain and some are not, and the administrator is given a discretion to choose freely among the purposes, then the administrator should be permitted to choose among the set of certain purposes, and the uncertain purposes should be void.

A fifth difficulty concerns the restrictiveness of the twenty-one-year limit on duration. Professor Waters argues that this number "might just as well have been produced by the process of `think-of-a-number'." The number derives from the common-law perpetuity period of a life in being plus twenty-one years, which in the case of purpose trusts would almost always have been twenty-one years. The number has been enacted in all but one of the reforming statutes in Canada. Professor Waters has suggested that the period should be extended to forty years. He also suggests a discretion in the court to extend the period beyond the forty-year period where the section 16 trust maintains its utility. This suggestion is based on a very fine but nonetheless valid distinction between requiring a finding that the section 16 trust objects remain useful and requiring a finding that the property should be applied cy-près in a particular way because the purposes are impracticable or impossible.

Before resolving this issue, it is important to look once more at the sorts of situations in which section 16 trusts can be created and the reason why a period of limited duration is imposed. These trusts may arise in wills, in trust deeds, and in public appeals, and they can be the expression of everything from whimsical intention to a serious and socially beneficial purpose. If continued viability ought to be a function of continued private interest, as we would argue, imposing a short period of duration is one way to ensure that the people associated with the founding of the section 16 trust are still alive to ensure its viability. Looked at in this way, the restrictive period is intended both as a perpetuity period aimed at addressing issues relating to limiting the disponer's power of control and enhancing the alienability of property, as well as an estimate of the period of interest in the viability of the section 16 trust into the future. In the case of whimsical section 16 trusts, the heirs who take after the twenty-one years are at least available to ensure that the trust property is not spent on anything other than proper purposes. In the case of a section 16 trust to fund the further training of members of a union in perpetuity, for example, the purpose is viable so long as the union exists and is vital, which may well be decades. This suggests to us that the solution is to select a reasonably short period of initial validity of twenty-one years, and if the section 16 trust, although not charitable, has socially redeeming qualities, the NOC be empowered to extend the period of validity beyond the perpetuity period. To that end, the trustees of such trusts will need statutory authority to negotiate with the NOC to convert what is a section 16 trust (or, perhaps, a Re Denley's trust as discussed below in section 5 into a purpose trust whose period of viability extends beyond the perpetuity period. Such authority should allow the section 16
trustee to negotiate in such a way so as not to exceed any aspect of the disponer's intentions.

A sixth difficulty concerns the treatment of the section 16 trust where there is an initial or supervening impossibility or impracticability. We recommend that a revised section 16 make continued practicability and possibility a condition of viability.

Finally, there is the question of what should happen to the property remaining after the period of viability, as extended, has expired. The case of non-charitable public appeals may require special consideration and we return to it below in section 6. Otherwise, we recommend two solutions. Where the section 16 trust is part of an imperfect charitable trust, any funds remaining should be applied cy-près to the charitable purposes. We have already suggested this in our 1984 report. Where it is not, the treatment afforded under the current law that is, section 16(2) is, in our view, correct: the property should be dealt with as it would have been had the disposition been void from the outset.

5. THE RE DENLEY'S TRUST: A NON-CHARITABLE PURPOSE TRUST WITH INDIRECT BENEFICIARIES

The Re Denley's purpose trust, according to Lord Goff, is not exempt from the certainty requirement. It also attracts none of the enforcement privileges extended by the state to charitable purpose trusts, but it is enforceable by the indirect beneficiaries. It is subject to the rule against indestructible trusts and, presumably, the rule against remote vesting. It is not clear whether the cy-près doctrines apply to it. The reasoning in the Re Denley decision itself would seem to indicate that the cy-près doctrines are not available, since Lord Goff emphasizes the fact that the trust is not charitable in holding that it is subject to the certainty requirement. Thus, if the purpose in such a trust is or becomes impracticable or impossible, there is no jurisdiction in the court to modify the purpose to make it viable once again. If either of these contingencies arises, it is, therefore, an open question what becomes of the property. In the worst case scenario, it would merely linger, subject to the (now impracticable or impossible) trust for the non-charitable purpose, until the gift over takes effect. There must, in any event, be a gift over that takes effect within the perpetuity period, otherwise the gift is void for breaching the rule against indestructible trusts. Lord Goff did not address these questions since the gift in Re Denley's explicitly limited the duration of the trust to the perpetuity period and also explicitly dealt with the possibility of the purpose being or becoming impracticable or impossible.

We recommend that the Re Denley's trust be revised and codified in a new Trustee Act in substantially the same way as the reforms to the section 16 trust. Thus, the revisions should be as follows. First, the right to enforce these trusts should be extended to the disponer and his or her personal representative. Second, where there are certain and uncertain trusts contained in one disposition, and the trustee's power is entirely discretionary, then only the certain ones should be valid. Third, the Re Denley's trust should be available even if it is created in a way that breaches the rule against indestructible trusts. Where that rule is breached, however, the trust should be deemed viable for a period of twenty-one years only, and only if the court is of the opinion that
declaring the trust valid more closely approximates the disponer's intention than declaring it void. Fourth, as soon as the trust becomes impracticable or impossible, its period of viability should cease. Fifth, once the period of viability has ended, any remaining property should be treated in the same way it would have been treated had the trust been invalid from the outset, unless the disponer has provided for a gift over in favour of a person or a charitable trust. Where there is an element of public benefit to the trust and where the NOC agrees, as discussed above in section 4, a different viability period should apply. The reform and codification of the section 16 trust and the Re Denley trust could take the form of a single provision by ensuring that the right to enforce the trust is in the promisee or in any indirect beneficiary, as defined in Re Denley. We will, however, continue to refer to them separately.

6. PUBLIC APPEALS FOR NON-CHARITABLE PURPOSES

Often, moneys raised through a public appeal for funds are raised for a purpose that is not charitable. Therefore, such funds are not held pursuant to a valid purpose trust. This difficulty is now addressed by section 16 of the Perpetuities Act and in some instances by the Re Denley's trust. As already discussed, section 16 treats the funds as being held subject to a power, and if our reform proposal is implemented, the donors and their representatives would have standing to complain when the funds have been misspent. The purpose, under our recommendation, would have to be specific or certain, and the section 16 trust is and would continue to be valid for only twenty-one years. Similarly, where there are indirect beneficiaries of the non-charitable public appeal purpose trust, under our recommendation there would be analogous statutory provisions creating a modified Re Denley's trust. The only remaining issue to be addressed is the treatment of the non-charitable public appeal funds in the case of initial and supervening impracticability or impossibility and in the case where the period of viability has otherwise expired. There are three possible approaches: (a) apply a doctrine analogous to the cy-près doctrines; (b) treat the property as bona vacantia; or (c) treat the property as though the initial gift was void, as we suggested above for the usual case. This question arises for consideration because returning the property to the donors in these situations is highly problematic from a practical standpoint since they are often difficult to identify and locate. Therefore it may seem that (c) is not a sound approach.

We examine each of the possibilities in turn and in the end opt for a combination of the principles underlying (b) and (c). In our 1984 report, we recommended (a), but have changed our view because we now see no real distinction among the different types of reformed section 16 or Re Denley trusts they are all non-charitable and therefore all equally worthy or unworthy of state aid; and because, since the publication of our 1984 report, the Legislature has enacted the Unclaimed Intangible Property Act, which establishes a comprehensive regime for the treatment of unclaimed property. The latter point is relevant in the case of public appeals, of course, since as stated, in many cases it will not be possible to identify or locate the donors to the public appeal.

(a) Cy-près Approach
One difficulty in designing a *cy-près* doctrine for these situations is defining a test similar to the general charitable intention test to determine whether the disposer's wishes over all are best implemented by applying the gift *cy-près* or by allowing the gift to fail and revert to him or her, or to his or her estate. The doctrine would also have to specify what sorts of alternative purposes were eligible for selection: should the new project, for example, be as close as possible to the old, or should it be that *and* charitable? Under the *cy-près* doctrine, the first issue is addressed by asking whether there is a general intention of the requisite kind; in our 1984 recommended reform, the existence of such an intention would be presumed. That approach, it seems to us, may work in most non-charitable public appeal type situations. The fact that donors to a public appeal remain anonymous or contribute to a fund to which the vast majority of donors are anonymous is strong evidence of an intention to give not just to that purpose, but absolutely. Our recommendation in the 1984 report, therefore, was that this sort of fund should be eligible for *cy-près* treatment. If so, the second question arises: what purposes are eligible for selection? Should the court attempt to design a project as close as possible to the initial project, no matter how personal, private, or whimsical; or should there be some public value to the project, given the state's co-option in its implementation? Again, for public appeals the answer is relatively easy since the appeal will invariably be for a purpose that has some public value even though it is not recognized (by hypothesis) as charitable. We recommended that in the case of public appeals the fund be applied *cy-près*, but in order to guarantee the existence of a rationale for state involvement, it should be applied *cy-près* to a purpose that is charitable. This is one of several minor concessions to the viability of the non-charitable purpose trusts that we recommended in 1984, but as stated, that we no longer recommend.

(b) *Bona Vacantia* Approach

The second approach is to treat the property as *bona vacantia* on the basis that since the donor's intention was to abandon all property interest in the donated sum, there is no owner. In support of this approach, it has been argued by some that the intention to give up all property interest and the intention to benefit other purposes in the event that the stated purpose becomes impracticable, impossible, or non-viable are distinct, and the existence of the first does not entail the existence of the second. Therefore, we argued, it is artificial to seek any *cy-près* application of such funds on the basis that such application is in furtherance of the disposer's intention. Treated as *bona vacantia*, however, there still remains the decision of what to do with the funds. Should the funds fall into the consolidated revenue fund, or should the Crown exercise a prerogative *cy-près* power, as it would do in the case of failed gifts to charity unmediated by a trust? In other words, granting some validity to the distinction between the intention to abandon and an intention to benefit some more general purpose, what is the Crown to do with the funds? We were of the view that the application of the funds *cy-près* is likely to be closer to the wishes of most donors most of the time than allowing the donated funds to fall into the consolidated revenue fund as a voluntary tax. We are now of the view that if the donor no longer takes an interest in the disposition of the property, then state purposes supported by the consolidated revenue fund are as valid as any *cy-près* charitable
purpose, and the time and expense devoted to keeping the section 16 trust or Re Denley trust alive is not worth it.

(c) Return of Property to Donor Approach

The third approach is to argue that the property should revert to the donor. Our current view is that, provided donors can prove they are donors, they should be entitled to have their donations back, on a proportionate basis and after legitimate expenses have been taken into account. A procedure to manage the return of these moneys indeed of all moneys held under a section 16 or Re Denley's trust should be established by statute. The statute would state that such funds are held in trust for the donors and provide that the trustee is obliged to take reasonable measures to notify the donors and return the money. If, within a specified time period the money is not reclaimed, it should be treated as unclaimed intangible property and dealt with under the Unclaimed Intangible Property Act.35 That statute currently provides for a five-year period before beneficial interests in trust property become "unclaimed" under the Act.36 This clearly is too long for the situations under consideration here. We suggest two years.

As an additional measure, the Unclaimed Intangible Property Act might also be amended to permit the NOC to apply such section 16 and Re Denley trust funds to some public purpose, other than the consolidated revenue fund, in trust, under the "public trust" provisions to be suggested below in section 7. Several such funds might be established, for example, to fund education projects in the charity sector or for disaster relief. The value of this approach is the flexibility it gives the state with respect to the particular projects pursued, their size (several such funds could be consolidated), and scope, while respecting somewhat the benevolent intentions of donors.

7. PUBLIC BENEFIT TRUSTS

As a final reform measure, there should be a power in the NOC to adopt specific or general regulations establishing the viability of non-charitable purpose trusts that are, in its opinion, of sufficient public benefit to warrant state participation in their enforcement and viability. As purpose trusts, these trusts should be subject to the charitable purpose trusts rules set out in the proposed new Trustee Act, including the rules governing status registration, reorganization, and dissolution.

8. CONCLUSION

Our solutions do not require the involuntary involvement of the state in the enforcement of private purpose trusts, and courts are not co-opted into ensuring viability where there is no public interest in doing so. Long-term existence is also generally a function of continued private interest. We believe this is the best policy, and that it would be a misallocation of public resources if all non-charitable purpose trusts were treated as viable. However, we emphasize that a major part of our argument in support of this position is that the common-law definition of charity requires substantial judicial reform.
Endnotes:

1

See, for example, H.A.J. Ford and W.A. Lee, Principles of the Law of Trusts, 2d ed. (Sydney: Law Book Co., 1990), at 818, where it is suggested that this difference between the two forms makes the charitable purpose trust a more attractive form of organization for foundations.

2

Manitoba Law Reform Commission, Non-charitable Purpose Trusts (Report No. 77) (Winnipeg: Queen's Printer, 1992)

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The new Civil Code of Quebec recognizes two kinds of perpetual trusts. The first, referred to in art. 1268, was a private trust is "created for the object of erecting, maintaining or preserving a thing or of using property appropriated to a specific use...for some...private purpose". The second, referred to in art. 1270 and called a social trust, is "constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purposes". Under the new Code, social trusts and private trusts may be constituted in perpetuity. They are subject to a supervisory jurisdiction, to be specified in an as yet unenacted statute, and to supervision by the settlor. Note that the essential characteristic of the social trust is that it be for a purpose that is of general interest. This may or may not be similar in meaning and scope to the "public benefit" of the common law.

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With respect to scheme-making, the proposal in Manitoba Law Reform Commission report, *supra*, note 2, provides:

103.(1) Where a non-charitable purpose trust has a purpose that is certain and the trust

(a) does not state a method to achieve that purpose, a court may order the use of the method that, in its opinion, fulfills the intention of the creator of the trust;

(b) states an unclear method to achieve that purpose, a court may order any clarification of the method that, in its opinion, fulfills the intention of the creator of the trust; or

(c) states a method to achieve that purpose and that method is or becomes impossible, impracticable or obsolete, a court may revoke that method and order the use of another method to achieve that purpose.

....

(3) A court acting under clause (1)(c) is not obliged to substitute a method that is similar to the original method.


44.(5) Subject to subsection (8), the court may vary a non-charitable purpose trust by analogy with the doctrine of cy-près as if it were a charitable trust

(a) through substitution of a purpose that is as similar to the original purpose of the trust as is reasonably practicable, and

(b) if the court is unable to find a purpose that is reasonably similar to the original purpose of the trust, through substitution of a purpose that is not contrary to the spirit of the original settlement.

(6) Subject to subsections (7) and (8), the court may vary a non-charitable purpose trust by approval of a scheme substituting a new purpose for the trust that is not contrary to the spirit of the original settlement if the court is of the opinion that the purpose of the trust is obsolete, or no longer useful or expedient, due to a change in circumstances since the creation of the trust.

On the perpetual existence point, the British Columbia's proposal provides:
44.(4) The rule of law limits the time during which the capital of a trust may remain unexpendable to the perpetuity period under the rule against perpetuities does not apply to a non-charitable purpose trust.

11
Anderson, supra, note 6, at 101.

12
B. C. Report, supra, note 3, at 29-32.

13
Waters, supra, note 4.

14
The charitable trust under the Civil Code of Lower Canada was similar in form to the "trust" described in the text. In Valois v. de Boucherville, [1929] S.C.R. 234, [1929] 3 D.L.R. 801, the Supreme Court of Canada held valid a charitable purpose trust even though the disponer expressly exempted her trustee from rendering any account of her trusteeship and even though the Court found that there was no inherent jurisdiction in the Superior Court of Quebec to enforce or supervise the trust. See, also, Sabatier v. Royal Trust Co., [1978] C. S. 954, 2 E.T.R. 308 (Que. S.C.).

15
The use of corporations as promisor and promisee may aid in this quest for perpetual existence.

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Suppose that an explorer were to invite subscriptions to a fund to finance an expedition to explore some unexplored area of the world. That would clearly not be a charitable purpose and there is no unincorporated association which can be conjured up as the owner of the subscribed fund. Counsel's submission for the Crown, if well founded, would lead to the conclusion that either the subscribers would remain the beneficial owners of the moneys subscribed, the explorer having no more than a revocable mandate to use them for the stated purpose, or alternatively the subscribed fund would belong beneficially to the explorer who would be free to abandon the exploration and spend the moneys on himself. Counsel for the Crown frankly accepted that this consequence follows from his argument and said that the latter alternative is the correct one. The law would be in a very sorry state if it were so, but I do not think it is. It appears to me that if someone invites subscriptions on the representation that he will use the fund subscribed for a particular purpose, he undertakes to use the fund for that purpose and for no other and to keep the subscribed fund and any accretions to it (including any income earned by investing the fund pending its application in pursuance of the stated purpose) separate from his own moneys. I can see no reason why if the purpose is sufficiently well defined, and if the order would not necessitate constant and possibly ineffective supervision by the court, the court should not make an order directing him to apply the subscribed fund and any accretions to it for the stated purpose. The example I have given would probably not meet these criteria, but it is not difficult to imagine a case where a fund was
subscribed for a purpose which would meet these criteria, for instance, a fund raised by subscription for immediate distribution to a class of persons who were not objects of charity, the subscriptions being invited on terms which did not give rise to any private trust. There appears to me to be a clear analogy between an invitation to subscribe to a fund on a representation that it will be used for a particular purpose and a third party contract of the kind considered in Beswick v. Beswick [1967] 2 All ER 1197, [1968] A.C. 58. However, apart from the possible remedy of specific performance I can see no reason why the court should not restrain the recipient of such a fund from applying it (or any accretions to it such as income of investments made with it) otherwise that [sic] pursuant of the stated purpose. If that is so, then it appears to me that the recipient of the fund is clearly not the beneficial owner of it and that the income of it is not part of his total income for tax purposes. Equally, whilst the purpose remains unperformed and capable of performance the subscribers are clearly not the beneficial owners of the fund or of the income (if any) derived from it. If the stated purpose proves impossible to achieve or if there is any surplus remaining after it has been accomplished there will be an implied obligation to return the fund and any accretions thereto to the subscribers in proportion to their original contributions, save that a proportion of the fund representing subscriptions made anonymously or in circumstances in which the subscribers receive some benefit (for instance, by subscription to a whist drive or raffle) might then devolve as bona vacantia.

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See Perpetuity Act, R.S.B.C. 1979, c. 321, s. 21(1); Perpetuities Act, R.S.A. 1980, c. P-4, s. 20(1); Perpetuities Act, R.S.N.W.T. 1988, c. P-3, s. 17(1); and Perpetuities Act, R.S.Y. 1986, c. 129, s. 20(1). This partial solution was inspired by the American Law Institute, Restatement (Second) of Trusts (Washington, D.C.: 1957), §124, and was first recommended for adoption in Canada by the Ontario Law Reform Commission, Report on the Rule Against Perpetuities (Toronto: Ministry of Attorney General, 1965).

19
As the B.C. Report, supra, note 3, at 35-37, points out, however, it is not clear whether s. 21 of the B.C. Perpetuity Act, supra, note 18 (the equivalent of s. of the Ontario Perpetuities Act, supra, note 17) intends that the trust be treated as a trust or a power or a trust power, that is whether it gives rise to an obligation in the trustee to execute (a trust or trust power) or not (a power), since the section says that "the trust is valid”. In our view, the statutory language is better interpreted as creating a power. If our proposals concerning the non-recognition of non-charitable purpose trusts is accepted, then this statutory language should be clarified.

20
The beneficiary principle is addressed by permitting non-purpose trusts to exist as powers. Certainty is addressed in the opening phrase which requires that the non-charitable purposes be "specific". And the cy-près issues are circumvented through the technique of creating a permission, as opposed to an obligation, to spend, so that if the specific non-charitable purpose is or becomes impracticable or impossible, there is no insurmountable problem because the money does not have to be spent anyway, and if it is not spent by the end of the 21-year period, it reverts to those who would have been entitled had the trust been invalid from the outset. See Wood v. R., [1977] 6 W.W.R. 273 at 281, sub nom. Re Russell 1 E.T.R. 285 at 301 (Alta. T.D.): "The...Act does not remedy only the perpetuities problem." See, also, L.I.U.N.A. Local 537 Members' Training Trust Fund v. R. (1992), 47 E.T.R. 29 at 49, 92 D.T.C. 2365 at 2373 (Tax Ct. Can.), to the same effect. In Wood v. R., supra, it will be recalled, it was held that what was required by "specific" was "conceptual" certainty or "linguistic or semantic certainty". We agreed with this approach in Ontario

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R.S.O. 1990, c. U.1 [to come into force on proclamation].

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For an application of this line of reasoning in the context of a charitable appeal, see *Re Welsh Hospital (Netley Fund)*; *Thomas v. Attorney-General*, [1921] 1 Ch. 655, [1921] All E.R. Rep. 170; *Halifax School for the Blind v. Attorney General of Nova Scotia*, [1935] 2 D.L.R. 347 (N.S.T.D); *Re Hillier; Hillier v. Attorney-General*, [1954] 1 W.L.R. 700, [1954] 2 All E.R. 59 (C.A.), per Evershed M.R. *Contra*, see *Re Y.M.C.A. Extension Campaign Fund*, [1934] 3 W.W.R. 49 (Sask. K.B.), and *Re Ulverston & District New Hospital Building Fund; Birkett v. Barrow & Furness Hospital Management Committee*, [1956] Ch. 622, [1956] 3 All E.R. 164 (C.A.) (the latter insofar as the known donors were concerned). In some judicial decisions there is even a hint that a distinct doctrine applies to the effect that in the case of charitable public appeals there is no need to find a general charitable intention and that the mere intention to part with the property absolutely is sufficient to attract the application of the *cy-près* doctrines. See Harman J. *in obiter* in *Re British School of Egyptian Archaeology: Murray v. Public Trustee*, [1954] 1 W.L.R. 546, [1954] 1 All E.R. 887 (supervening *cy-près*) and Denning L.J. in *Re Hillier, supra* (initial *cy-près*).

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See, generally, M.A. Hickling, "The Destination of the Funds of Defunct Voluntary Associations" (1966), 30 Conv. (N.S.) 117.

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There are many statutes which apply abandoned or confiscated property to charitable purposes. See, for example, the *Bread Sales Act*, R.S.O. 1990, c. B. 1, s. 9 (3) (this statute was repealed by S.O. 1996, c. 1, Sch. M, s. 70). In many instances the property concerned is perishable.

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*Supra*, note 27.

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CHAPTER 15

THE NONPROFIT CORPORATION: CURRENT LAW AND PROPOSALS FOR
REFORM

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1. INTRODUCTION

No one disputes that the current statutory regime governing nonprofit corporations in Ontario is in serious need of reform. Since at least the time of the publication of The Interim Report of the Select Committee on Company Law (the Lawrence Committee Report) in 1967, it has been recognized that the provisions of Part III of the Ontario Corporations Act are badly out of date. Most observers of the nonprofit sector recognize that very little is done in the current statutory regime to reflect the peculiar characteristics of nonprofit corporations. This criticism applies both at the level of the policy of the statute and at the level of its organization and manner of expression.

In this chapter the Commission proposes that Ontario undertake a major reform of the organizational law governing nonprofit corporations. This reform should result in the adoption of an entirely new statute to govern the organizational law of all types of nonprofit corporation. We examine the principal features of the current law and our proposals for reform, employing the same headings used in the previous chapter on the trust form of organization: Definition and Attributes; Formation; Governance; and Reorganization and Dissolution. By way of introduction, five preliminary issues are discussed: the appropriate form of the proposed legislation; basic principles of the new statute; appropriate models for reform; the relationship between trust law and corporations law; and the classifications of nonprofit corporations and the definition of "nonprofit ".

(a) Form of Proposed Legislation

The strategy of the current statute in Ontario, and of similar statutes federally and in the province of Quebec, is to append a few provisions dealing specifically with nonprofit corporations law onto a generally applicable corporations law, and to make a large number of the provisions of the latter applicable, mutatis mutandis, to the former. In our view this approach clearly no longer works. A new statute designed exclusively for
nonprofit corporations is required. This is so, first, because of drafting considerations. The most modern and up-to-date corporations statute in Ontario—the one that would presumably serve as the base statute—deals solely with the business corporation. It contains a substantial number of provisions that are clearly inappropriate for nonprofit corporations. Using the current drafting technique, with that statute serving as the base statute, would result in far too many complex provisions adjusting rules designed with the business organization in mind to the needs of the nonprofit sector. This difficulty indicates a second, more important consideration in favour of a separate statute. Despite the fact that there are a great many similarities between the two types of corporation, there are a significant number of important differences. There are principal differences, however, which are easily stated. First, the nonprofit corporation does not have a constituency equivalent in influence and interest to shareholders to monitor the performance of management. Second, due to the fact that nonprofit corporations pursue a diverse range of nonprofit purposes, the success or effectiveness of a nonprofit enterprise is often not easily gauged and, therefore, the task of evaluating the performance of management and holding them accountable for errors is usually more difficult. These differences have important consequences for the design of the nonprofit corporation, all of which we develop in greater detail in due course.

We agree with the current approach, however, to the extent that it deals with all nonprofit corporations in the same statute. Although we recommend some differentiation in treatment among the various types of nonprofit corporations, the differentiation is too insignificant to warrant separate statutes.

(b) Basic Principles of Proposed Statute

The new nonprofit corporations law should be designed and drafted in accordance with a number of fundamental principles. We list these here without argument, since we believe they are sufficiently obvious.

(1)(a) In many cases, all that is required in the statute is a modernization of the law along the lines of the modernization of corporate law that occurred with the adoption of the Business Corporations Act in 1970 and again in 1982. As a general principle, we recommend the new nonprofit corporations law follow the new business corporations law in Ontario as much as possible and deviate from the provisions of that law only where there is sufficient justification for treating nonprofit corporations differently from business corporations or where that law is clearly in error or obviously deficient.

(1)(b) As a general principle, as well, the new statute should be as similar as possible in structure, content, statutory language, and drafting style to the new business corporations law. This will render it more readily accessible to the legal profession and other users of the statute, and reduce confusion in the nonprofit sector on key issues, such as the rights and responsibilities of directors.
(2) The new law should deal only with organizations that cannot and do not make distributions to their members prior to dissolution and that pursue purposes other than making profit. (We return to the task of defining these terms more precisely below in point 5). Cooperative corporations and credit unions, as at present, therefore, should be dealt with in separate statutes.

(3) The new statute should avoid dealing with regulatory issues. It should focus on the organizational law of nonprofit corporations. The regulation of charity and of other related matters (such as fundraising and accountability for the use of government grants and donated funds) should be dealt with in separate statutes—the “regulatory statutes” in much the same way that similar matters are the subject of separate regulation in the business sector.

(4) The new statute and the regulations adopted thereunder should provide as complete an organizational framework as possible, so that all questions of importance to the operation of a nonprofit corporation are addressed and answered in a way that provides a complete set of minimum standards based on generally accepted norms. In this regard, the statute and regulations may need to be more specific in some instances than the provisions of the Business Corporations Act. The regime should, for example, provide for a presumptive general bylaw, perhaps in the regulations. In most cases, these minimum standards will be suppletive, in order to allow the incorporators of nonprofit corporations the freedom to select standards more appropriate to their organization. This approach is recommended on the theory that nonprofit incorporators on the whole will lack the administrative resources and professional expertise required to draft basic constitutional provisions and general bylaws and that, because they often are staffed by volunteers, will tend to conduct their affairs with a relatively greater degree of informality.

(5) The organizational law governing nonprofit corporations should take account of the fact that more and more nonprofit corporations are being called upon to perform government services on a contract basis. The statutory regime should provide sufficient flexibility to permit this to happen. At a minimum, it must recognize that charities and nonprofit corporations will be engaged in service enterprises which entail many of the same kinds of liability risks present in the case of business corporations, and therefore that their directors and officers will require the same level of protection from risk exposure.

(c) Models for Reform

The reform of the law governing nonprofit corporations has been on the legislative agenda of several jurisdictions in Canada and across the United States over the past twenty years. We mentioned above the federal government’s study published in 1974 setting out proposals for a new not-for-profit corporations law. The statute recommended by that study was never enacted at the federal level, but it was accepted as the basis of the Non-Profit Corporations Act enacted in Saskatchewan in 1979. We also mentioned the
current reform effort in Alberta where a report of the Alberta Law Reform Institute led to the introduction of the Volunteer Incorporations Act before the provincial Legislature. There has been substantial activity in the United States as well. The American Bar Association and American Law Institute published a model nonprofit corporation Act in 1952 and a revised version of that Act in 1964. In 1987, the American Bar Association published a completely revised draft of a not-for-profit corporations law; the Model Act. The most recent and all-encompassing reform of nonprofit corporations law in the United States has taken place in California and New York. However, there have been substantial amendments in other states in recent years as well. This wave of reform of the nonprofit corporation laws follows in the wake of the major reforms of business corporations law in North America during the 1970s and 1980s. Its objective, as with the case of the reform of business corporations law, has been to modernize the law governing nonprofit corporations.

We have looked carefully at these developments and, in our following commentary and reform proposals, rely most heavily on the statutes in Saskatchewan, California, and New York, the proposed legislation in Alberta, as well as the American Bar Association Model Act. The Saskatchewan Act and the Model Act have been particularly influential. We do not examine English developments given the recent divergence of Ontario corporations law from the English model. Our recommendation is that the new statute in Ontario be based substantially on elements taken from the Saskatchewan Non-Profit Corporations Act, 1995 and the American Model Act.

(d) Relationship between Trust Law and Corporations Law

There is much confusion in the current law as to the proper characterization of the status of a corporation with charitable purposes. There are a number of recent decisions which have held that the charitable corporation is a trustee of its property for its purposes, or that its directors are trustees of its property for its purposes, or that the charitable purpose corporation is a "trust by analogy." The principal cause of the confusion is the fact that the law of charity both in its organizational and regulatory aspects; is equitable in origin and applied initially only to the charitable purpose trust, coupled with the fact that most modern charities are organized as corporations, and therefore are not, apparently, subject to this body of law. Thus, situations have arisen where due to deficiencies, apparent and real, in the legal regime governing charitable purpose corporations, courts have felt the need to adopt one or more of these three fictions.

The problem has arisen in three related contexts. First, it has arisen in situations involving charitable purpose corporations where the issue was the scope of the supervisory jurisdiction of the court. We stated in the introduction to Part IV that the sole basis of the court's jurisdiction is the existence of a trust. It will be recalled also that the basis of the Attorney General's jurisdiction is the more extensive parens patriae power of the Crown over charity. The scope of these two jurisdictions is sometimes confused and, arguably out of necessity, courts have in some instances assumed that they have jurisdiction over charitable corporations because they are charitable. Sometimes, more appropriately
perhaps, this jurisdiction is justified as a jurisdiction not over charity, but over entities "analogous to trusts", whatever that may mean.

The second manifestation follows directly from the first: courts of equity take jurisdiction over charitable corporations in order to apply trust law rules to charitable corporations. This is done to correct the deficiencies, apparent and real, in the law governing charitable corporations. The most significant deficiency is the lack of corporate law principles controlling the disposition of the property of charitable corporations on reorganization or dissolution. Courts have also applied trust law rules to define the fiduciary obligations of directors. The following passages from some of the leading decisions on these questions provide a representative sampling of these two manifestations of the problem.

In *Liverpool & District Hospital for Diseases of the Heart v. Attorney-General*, on the question of jurisdiction of the court in a case where the issue was the disposition of corporate assets on dissolution, Slade J. said:

> [Authorities] establish that [a company formed for charitable purposes] is in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily give rise to the jurisdiction of the court to intervene in its affairs.

Again, on the question of jurisdiction, in a case involving the fiduciary obligation of the directors of a charitable corporation, Anderson J., in *Re Ontario Public Trustee and Toronto Humane Society*, said:

> [I]s a charitable corporation a trust and, second, are its directors trustees? It appears that neither of these questions has been explicitly answered in Ontario. ...

> ....

> [W]ithout going the length of holding that the Society is in all respects and for all purposes a trustee, I have concluded that it is answerable in certain respects for its activities and the disposition of its property as though it were a trustee: specifically I am satisfied that it is amenable to the ancient supervisory equitable jurisdiction of the court.

There is broad inherent jurisdiction in the court in charitable matters exercisable by virtue of its special position in the law of charities.

On the nature of the fiduciary obligation of directors of a charitable corporation, Danckwerts J. in *Re French Protestant Hospital and Attorney-General*, said:

> The property of the charity is, of course, vested in and held by the corporation. It is a perpetual person which exists, however, only according to the rules of law, and it is not an actual person capable of acting on its own motion in any way whatever. It seems to me that in a case of this kind the court is bound to look at the real situation which exists in fact. It is obvious that the corporation is completely controlled ... by the governor, deputy governor and directors, and that those are the persons who in fact control the corporation and decide what shall be done. It is plain that those persons are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property. It is quite plain that it would be entirely illegal if they were simply to put the property, or the proceeds of the property of the corporation, into their pockets and make
use of it for their own individual purposes or for their purposes as a whole, and not for the purposes of the charitable trust for which the property is held. Therefore it seems to me plain that they are, to all intents and purposes, bound by the rules which affect trustees.

Again, on the question of the standard of fiduciary obligation owed by charitable directors, Anderson J., in *Re Ontario Public Trustee and Toronto Humane Society*, said:

Whatever doubts may surround the status of directors of charitable corporations, I am satisfied that it partakes sufficiently of trust to make them amenable to direction made in pursuance of the *Trustee Act*. ...  

...  

Whether one calls them trustees in the pure sense (and it would be a blessing if for a moment one could get away from the problems of terminology), the directors are undoubtedly under a fiduciary obligation to the Society and the Society is dealing with funds solicited or otherwise obtained from the public for charitable purposes. If such persons are to pay themselves, it seems to me only proper that it should be upon the terms upon which alone a trustee can obtain remuneration, either by express provision in the trust document or by the order of the court.

Finally, a passage from the leading text on the law of trusts in the United States comes to the following conclusion on the general question of the status of the charitable purpose corporation:

The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trustee. The question is in each case whether a rule that is applicable to trustees is applicable to charitable corporations, with respect to unrestricted or restricted property. Ordinarily, the rules that are applicable to charitable trusts are applicable to charitable corporations, as we have seen, although some are not. It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications. Thus, where property is left by will to a charitable corporation, whether it may be used for the general purposes of a corporation or whether the devise or bequest is subject to restrictions as to its use, and the property is conveyed by the executor to the corporation, a corporation is not thereafter bound to account as if it were a testamentary trustee.

These passages provide a sufficient indication of the nature of the problem in the first two contexts. There are many others of similar import.  

A third manifestation of the problem, specific to Ontario, is that the principal regulatory statute—the *Charities Accounting Act*—takes jurisdiction over charitable corporations by "deeming" them to be "trustees", the instrument of incorporation to be, in effect, a trust deed, and its property to be, in effect, held in trust. This statutory fiction has an administrative counterpart in the practice of certain agencies of the public administration in Ontario which make a practice of referring to directors as "trustees" and to charitable corporations as "trusts".

We return to the specific questions raised in these passages in the following discussion. Our only recommendation at this stage is that none of the problems dealt with in these
passages be approached or solved in the future through the direct application of trust law concepts or trust law terminology to the charitable corporation, its directors, or its property. These are fictions that are highly confusing in effect. They are easily discarded in any reform. We recommend that they be discarded completely. Rather, where the current trust law treatment of an issue seems appropriate, the relevant new corporate law rule should be formulated using the same principle, but expressed in terms and concepts appropriate to corporate law.

(e) Classifications of Nonprofit Corporations and Definition of "Nonprofit"

(i) Introduction

"Nonprofit", or as some prefer "not-for-profit", has two related meanings that are often confused. These terms refer to the fact that the entities described pursue purposes other than profit and to the fact that they pursue purposes other than the pecuniary advantage ("profit") of their members. Thus, they are not business or commercial entities and they do not make distributions of their property to their members, at least not prior to dissolution. We will refer to the first interpretation as the "non-commercial purpose constraint", the second as the "non-distribution constraint". The two together we call the "nonprofit principle". They constitute a negative definition of the entities identified since they define those entities in terms of what they are not or what they may not do. We examine negative formulations of the nonprofit principle in what follows and make recommendations concerning the proper formulation of the nonprofit principle.

We also examine classifications of nonprofit corporations according to their purposes, recommending, as we suggested already, the adoption of the classification advanced at the end of chapter 9—religious, charitable, mutual benefit, political, and general nonprofit. This classification constitutes the positive formulation of the nonprofit principle since it defines the entities identified in terms of what they are or what they do. This proposition requires, of course, that they do not pursue commercial purposes and that they do not make distributions to their members, but it means much more. Hence, as argued in chapter 9, the need for, indeed, priority of the positive definition. As will be seen, however, the positive definition is also required in order to arrive at a sound formulation of the negative definition, since the formulation of that definition varies according to the kind of nonprofit corporation under consideration. The discussion is divided into the current law; the law of other jurisdictions; and the reform proposal.

(ii) Current Law

The Ontario Corporations Act formerly provided in section 118 [now repealed] that a Part III (that is, nonprofit) corporation may be incorporated with "objects that are of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic nature, or that are of any other useful nature". Section 126 (1) of the same statute requires that a Part III corporation "shall be carried on without the purpose of gain for its members" and that "any profits or other accretions to the corporation shall be used in promoting its objects and the letters patent
shall so provide”. Thus, the current law of Ontario provides for only one class of nonprofit corporation and that class is identified by the open-ended list of nonprofit purposes in section 118. That corporation is subject to the prohibition against gains to its members in section 126.

Likewise, the *Canada Corporations Act* provides for the incorporation of “a body corporate and politic, without share capital, for the purpose of carrying on, without pecuniary gain to its members, objects, to which the legislative authority of the Parliament of Canada extends, of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects”.

There are three problems with these formulations.

First, it is not clear what is intended by the prohibition in these two statutes against “gains to the members” of the corporation. One possibility is that this prohibition is meant to exclude gains in any form. If so, these statutes would seem to preclude the incorporation of associations which advance the pecuniary interest of their members by advancing a common interest (for example, a trade association) or which pay their members or some of their members a salary. Social clubs and fraternal societies might also conceivably be excluded by this provision. Alternatively, the prohibition might be interpreted less strictly as precluding only the distribution of profits to members through dividends or some other form of direct distribution. Clearly, if the first interpretation is intended, the provision is mistaken, but if the second is intended, it is poorly stated. What is required, therefore, is a better statement of the non-distribution constraint.

A second difficulty with this statutory prohibition is that it is unclear whether nonprofit corporations are permitted to carry on ancillary or incidental commercial activities. In principle, there is no reason why nonprofits should be prohibited from carrying on any commercial activities, provided the activities are ancillary and incidental to their nonprofit purpose and profits earned are all applied to the objects of corporation. The prohibition, however, could be interpreted as a prohibition of commercial activities. What is required, therefore, is a better formulation of the non-commercial purpose constraint.

Finally, neither the Ontario nor the federal legislation distinguishes among the different types of nonprofit corporations according to their purpose. This is the source of several serious difficulties, the most significant of which is the failure of the statutes to regulate fundamental changes of charitable and religious corporations appropriately, and the failure of the statutes to require that the assets of charitable and religious corporations be re-applied to other charitable or religious purposes upon the dissolution of the corporation. Isolating charitable and religious corporations for special treatment in the basic corporate law would permit stricter regulation on these and other issues. What is required, therefore, is a more discriminating positive definition of the nonprofit corporation so that the peculiar problems of each type can be identified and addressed.
Before setting out our proposals, we look briefly at the treatment of these questions in other jurisdictions.

(iii) Other Jurisdictions

The Saskatchewan Non-Profit Corporations Act, 1995⁴⁵ establishes a fundamental distinction between two types of nonprofit corporation; the "charitable" corporation, which carries on its activities primarily for the benefit of the public, and the "membership" corporation, which carries on its activities primarily for the benefit of its members.⁴⁶ However, "charitable corporation" is defined in an unusual and, we would suggest, inappropriate way. It is defined broadly to include any corporation that 
(i) carries on activities that are not primarily for the benefit of its members; 
(ii) solicits or has solicited donations...from the public; 
(iii) receives or has received any grant of money...from a government or government agency...in excess of 10%...of its total income for that fiscal year; or 
(iv) is a registered charity within the meaning of the Income Tax Act (Canada).⁴⁷ This definition thus includes a substantial number of corporations that are not charitable at common law. The classification of corporations into "charitable" and "membership" corporations is used in the Act in the design of the rules that regulate fundamental changes, as well as in the formulation of the non-distribution constraint. With respect to fundamental changes, the power of a "charitable" corporation to amend its articles is strictly controlled: subject to a minor exception,⁴⁸ after the amendment the corporation must continue to be charitable⁴⁹ and, in some cases, prior court approval is required⁵⁰. With respect to the non-distribution constraint, section 209 restricts the distribution of the assets of a "charitable" corporation on dissolution to ensure their continued dedication to charitable purposes.

Alberta’s Volunteer Incorporations Act⁵¹ deploys a different classification. Section 5 of that Bill requires that the articles of incorporation contain one of the following provisions:

(a) a provision that no income or property of the incorporated association shall be distributed to a member, director or officer except on or after the liquidation of the unincorporated association and

(b) a provision that no income or property of the incorporated association shall be distributed to a member, director or officer either during the existence of the incorporated association or on or after its liquidation.

This is a classification by 'types of distribution' constraint. Nowhere does the Bill explicitly provide a positive definition, but there is an implicit one in these provisions. The first provision is an 'income' distribution constraint and the second is an 'income' distribution and 'liquidation' distribution constraint. The former would be used by incorporators in cases where the main object of the corporation was to benefit members-the mutual benefit corporation-and the latter would be used by incorporators in cases where the object was to benefit the public-that is, and only in part, the religious and charitable corporation. If the latter provision is chosen, the Bill provides that the articles
may not be amended in any way that affects that restriction. There is a further classification used in the Bill to deal with incorporated associations of either type which receive public or government funds. These are referred to in the Bill as “soliciting incorporated associations” and are defined as incorporated associations which have within the current fiscal year, or any of the three preceding fiscal years, solicited money from the public within the meaning of the regulations, or received a grant or similar financial assistance from a municipal or provincial government in Canada, the government of Canada, or an agency government. A number of further provisions apply to these organizations: they are prohibited from changing their purposes without the permission of the court; they must have at least three directors instead of one; and they are required to have an auditor.

The New York statute applies to any nonprofit purpose corporation “no part of the assets, income or profit of which is distributable to or enures to the benefit of its members, directors or officers” except as permitted under the statute. The statute classifies nonprofit corporations into four types: Type A nonprofit corporations include not-for-profit corporations whose purposes include civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, as well as animal husbandry aims and professional, commercial, industrial, trade, or service associations; Type B nonprofit corporations are formed for charitable, educational, religious, scientific, literary, or cultural purposes, or for the prevention of cruelty to children or animals; Type C nonprofit corporations are founded for any lawful business purpose to achieve a lawful public or quasi-public objective; and Type D nonprofit corporations are corporations whose incorporation is authorized by any other corporate law. This statute thus focuses on purpose and divides the universe of nonprofit corporations into, essentially, mutual benefit, “charitable “in the traditional sense, and nonprofit businesses.

The California statute distinguishes among three classes of nonprofit corporations: public benefit corporations, mutual benefit corporations, and religious corporations.

In both the New York and California statutes, the function of the classification is to provide different levels of regulation in the nonprofit corporation statutes. In both cases, the Type B or public benefit corporations are the most highly regulated, while the least regulated are the mutual benefit corporations as well as, in the case of California, the religious corporations.

Finally, the Model Act uses a classification containing three types of nonprofit corporations—mutual benefit, public benefit, and religious. None is permitted to make distributions while they exist, and the second two may not dissolve without the permission of the Attorney General.

(iv) Reform Proposal

Our recommendation is based on a combination of all of these. First, in our view, the statute must state a classification, preferably our five-part classification, of nonprofit corporations, that is clear and accessible to users; and the statute should require all
nonprofit corporations to be incorporated as one of these five types. In the case of
religious and charitable corporations, and subject to court review, the initial decision on
classification should be in the power of the proposed Nonprofit Organizations
Commission (NOC). Otherwise, incorporators should be free to choose whichever
purpose suits them best. Religious and charitable corporations, to be registered as such,
should be exclusively charitable in the common-law sense, as discussed above in chapters
6, 7, and 8. The charitable designation under the statute should also be available for
entities that are treated like charities (Canadian amateur athletic associations and national
arts service organizations) under the Income Tax Act.63 The statutes should, finally,
require the NOC to reclassify a corporation if Revenue Canada’s decision regarding the
charitable status of an applicant is positive when the NOC’s decision was negative.

Second, the statute should include two non-distribution constraint rules, one prohibiting
distributions to members and to members of a broadly defined proscribed class of related
persons during the existence of the corporation, the other prohibiting distributions to
members or members of the proscribed class on dissolution. The first non-distribution
rule should apply to all five types of nonprofit corporations. The second rule should apply
to only religious and charitable corporations. On dissolution the property of these latter
corporations should be subject to a special cy-près rule designed for corporations, the
exact formulation of which we develop below. ‘Distribution’ in these two rules should be
defined widely and comprehensively as the provision of any non-compensated advantage
or benefit to members or to members of the proscribed class. It should, however,
expressly allow for a number of exceptions, including an exception to permit a
corporation to provide distress or poor relief to its members (such as, for example, a
parish or fraternal society might do), an exception to permit a corporation to make grants
to its members to carry on the corporation’s work (such as a national federation might do
with its provincial chapters), and an exception to permit a mutual benefit corporation to
repurchase memberships, if solvent.

Third, the non-commercial purpose constraint should be defined so that it excludes
commercial activity as a dominant or main objective of all nonprofit corporations. Beyond
that, the corporations statute should not attempt to regulate the commercial
activities of nonprofit corporations. This type of regulation should be left to the
regulatory statutes. A formulation of the constraint that mentions “dominant”, “main”, or
“principal” would make clear by necessary implication that ancillary and incidental
commercial activity, so far as the corporations statute is concerned, is permitted. It would
also make clear that business or commercial purpose corporations are not permitted to
incorporate under the nonprofit corporations statute.

Finally, the statute should require that a corporation’s classification, its concomitant non-
distribution constraint(s), and the non-commercial purpose constraint be set out in its
articles.

2.DEFINITION AND ATTRIBUTES

   (a) Introduction
In this section we address the following topics: the capacity and powers of the nonprofit corporation; the constitution of the nonprofit corporation; limited liability; and the corporate name.

(b) Capacity and Powers of the Corporation

(i) Introduction

It is common in older corporations statutes to attempt to regulate certain activities of corporations by restricting the powers of the corporation or of the directors of the corporations and declaring actions in excess of the declared powers void. We recommend that this approach to regulatory issues be completely abandoned and that, as under the Business Corporations Act, nonprofit corporations be deemed to have the same capacity and powers as natural persons. Our discussion on capacity and powers is divided into the ultra vires doctrine, the constructive notice doctrine, the capacity to hold land, incidental powers, and the power to borrow.

(ii) Ultra Vires Doctrine

Section 274 of the Ontario Corporations Act provides that, "unless otherwise expressly provided in the Act or in the instrument creating a [corporation, a corporation] has ...from its creation the capacity of a natural person and may exercise its powers beyond the boundaries of Ontario to the extent... [permitted by the jurisdiction in which it exercises those powers]". There are two aspects to this rule, one which speaks to the powers of the corporation and a second which speaks to the extra-provincial effect of incorporation. Both aspects are derived, in part, from the holding of the Privy Council in Bonanza Creek Gold Mining Co. v. R. It was held in that case that the doctrine of ultra vires, as articulated in the House of Lords decision, Ashbury Railway Carriage & Iron Co. v. Riche, did not apply to corporations incorporated by letters patent issued by the Lieutenant Governor. The doctrine was held not to apply to letters patent corporations on the basis that letters patent corporations receive their legal capacity by a grant in exercise of the royal prerogative, not by statute, and that therefore the powers held by a letters patent corporation are those of a natural person. Bonanza Creek Gold Mining Co. v. R. also stands for the proposition, perhaps mistaken but nonetheless now deeply entrenched, that the provincial power of incorporation includes the power to incorporate a corporation that can exercise its powers outside the jurisdiction.

Ostensibly, the purpose of the ultra vires doctrine is to protect the investors in and creditors of a corporation by restricting the activities of the corporation and therefore the risks presented by the corporation. Its effect, however, has been to declare countless valid contracts void, invariably to the detriment of innocent third parties. The predecessor of section 274 was enacted in 1916 presumably to codify the result in Bonanza Creek Gold Mining Co. v. R. As subsequent jurisprudence has shown, however, its effect is unclear, since the statutory language seems to preserve the doctrine to the extent that limitations on the powers of the corporation are expressly set out in the statute or in the incorporating instrument. The current Business Corporations Act abolishes the doctrine more clearly by
stating simply that a corporation has the "capacity and the rights, powers and privileges of a natural person." That statute also provides that a corporation has the power to conduct its affairs outside the province. We recommend that the same provisions be adopted in the new nonprofit corporations statute.

To the extent that protection of members (the analogue to investors) and creditors of nonprofit corporations is required, the law can provide other avenues of relief. In particular, the new Act should provide, as does section 17(2) of the Business Corporations Act, that acts of the corporation that exceed any constitutional restriction are still illegal and, when they occur, give rise to rights of recourse against the persons, usually the directors, responsible.

It has been suggested that the Business Corporations Act regime goes too far in the other direction. By deeming a corporation to have the powers of a natural person, it fails to sanction with nullity not only actions in excess of the powers and capacities of the corporation under its articles, but also actions of the corporation in contravention of its constituting statute, and even the constitution of Canada. Thus, it seems, a blatant violation of a basic policy of the statute would not be sanctioned with nullity, even in the case where all parties to the transaction knew that the transaction was in violation of the statute. We do not think, however, that this is a telling criticism since any such contract would still be illegal and therefore subject to the sanctions generally available at common law for illegal contracts. In the appropriate case, a court could still declare such a contract void as an illegal contract and oblige the party contracting in bad faith to return any enrichment he or she received as a consequence of the transaction.

(iii) The Doctrine of Constructive Notice and the Rule in Turquand's Case

As a practical matter, a corporation can act only through the agency of natural persons. The question often arises whether a particular individual who purports to act on behalf of a corporation has the actual or apparent authority to do so. An agent’s actual authority is based in part on the constitutional documents of the corporation and, in part, on the contract establishing their relationship with the corporation. English courts have developed two doctrines relevant to the power of a person to bind a corporation. The first, called the doctrine of constructive notice, holds that outsiders of the corporation are affected with constructive notice of the registered public documents of the corporation. This deemed notice, in turn, means that any constitutional limits on a purported agent’s authority to bind the corporation are deemed to be known by the other contracting party, thereby undermining any possible argument that the purported agent had the actual or apparent authority to act on behalf of the corporation. The second, a complementary rule called ‘the indoor management rule’, or ‘the rule in Turquand’s case’, holds that outsiders need not go beyond the officially published record and therefore need not actually assure themselves that all that is required to be done to constitute the authority of the purported agent, has been done. The doctrine of constructive notice has a far greater impact in jurisdictions such as the United Kingdom, where more of the constitutional documents are required to be registered. Since only the letters patent of incorporation are registered in Ontario, the doctrine is of lesser relevance here.
The Lawrence Committee recommended that the doctrine of constructive notice be abolished in Ontario because, like the *ultra vires* doctrine, it has served more as a trap for unwary outsiders than a source of protection for creditors and investors. The Dickerson Committee recommended likewise. In consequence, the *Business Corporations Act* and the *Canada Business Corporations Act* both contain provisions-section 18 and section 17 respectively-abolishing the constructive notice doctrine. We recommend that the same provision be adopted in the new nonprofit corporations Act.

These two statutes also contain provisions codifying and amplifying the rule in *Turquand's* case. In the *Business Corporations Act*, section 19 restricts the circumstances under which a corporation may controvert an allegation that a self-styled agent had actual authority to bind the corporation. Since, by virtue of the provisions in section 19, there is very little the corporation is permitted to say to controvert an allegation that a particular self-styled agent had actual authority, it has been suggested that in most cases where only ostensible authority exists, plaintiffs will simply argue actual authority.

Although we think this criticism is justified, there are no harmful consequences since the liability outcome for the corporation on the two bases of liability is the same. Perhaps this defect in section 19 should be remedied, but in our view, the nonprofit corporations statute is not the place to remedy it. We therefore recommend that a provision like section 19 be included in the new nonprofit corporations statute.

(iv) Ownership of Land

Section 275 of the *Corporations Act* formerly provided that a corporation also has the power:

275.- (a) to construct, maintain and alter any buildings or works necessary or convenient for its objects;

(b) to acquire by purchase, lease or otherwise and to hold any land or interest therein necessary for its actual use and occupation or for carrying on its undertaking and when no longer necessary to call, alienate and convey the same.

Until recently, section 276 of the *Corporations Act* required a corporation to sell land it is not actually using or occupying to carry on its undertaking within seven years of its acquisition, if it was never used for that purpose, or of its change in use, if it was. This latter provision fulfilled mortmain-related functions for corporations incorporated under the *Corporations Act*. Charitable corporations are currently subject to an additional restriction to the same effect under sections 7 and 8 of the *Charities Accounting Act*. Section 278 required corporations with objects of a social nature to obtain the permission of the Minister before changing the location of any of its premises. It is not clear what protection this provision was intended to provide, and "social nature" is nowhere defined in the statute.

Recently, section 275 was amended to read as follows:
275. – (a) to construct, maintain and alter any buildings or works necessary or convenient for its objects;

(b) to acquire by purchase, lease or otherwise and to hold any land or interest therein.

Sections 276 and 278 were repealed in their entirety.85

The Commission agrees with these recent amendments to the *Corporations Act*. We recommend that all restrictions in the corporations law on the power of corporation to hold land be completely abolished. Such mortmain-related restrictions make little sense today. This was recognized almost thirty years ago by the Lawrence Committee and nearly fifty years ago by the Nathan Committee.86 The Lawrence Committee characterized this type of restriction as an anachronism based on a “feudal fear” that land may become inalienable. We agree.

(v) Incidental Powers

The *Corporations Act* contains in section 23(1) a list of incidental powers that corporations incorporated under that statute are deemed to have unless provided otherwise in the letters patent.83 Excluded from that list for Part III corporations are three items: the power to issue shares; the power to make distributions to shareholders; and the power to invest the corporation’s moneys in such manner as may be determined.88 The first two excluded items are self-explanatory. The third constitutes a partial regulation of the power of nonprofit corporations to invest.

The list of incidental powers is redundant under a statutory regime that gives corporations the capacity, rights, powers, and privileges of natural persons (as section 274 of the *Corporations Act* purports to do). It should not be replicated in the proposed new statute. This type of regulation of the investment powers of corporations in the corporation statute is also best abandoned. Instead, the investment decisions of the corporation are best regulated in the corporation statute by regulating the standard of care with which they are made. This, in turn, implies a rule aimed at directors, the persons responsible for investment decisions. We return to the formulation of this standard of care below.

(vi) Borrowing and Finance

Section 59 of the *Corporations Act* permits directors to pass a borrowing bylaw, effective once confirmed by a two-thirds vote at a general meeting of members, permitting the corporation to borrow funds, issue debt securities and hypothecate the corporation’s property. Without such a bylaw, there is, notwithstanding section 274, no power in the directors to borrow on behalf of the corporation. The *Business Corporations Act*89 currently provides, simply, that the articles of incorporation are deemed to state that the directors have the power to pledge the credit of the corporation and to hypothecate and pledge its property without the authorization of the shareholders, unless there is a contrary provision in the articles or the bylaws. A bylaw is not required to confer power to borrow on the corporation or on the directors.90
In our view, the power of the corporation to borrow, properly conceived, is merely one aspect of its capacity and powers as a natural person, and the power of directors to borrow on behalf of the corporation is merely one aspect of their more general power to manage or supervise the management of the affairs of a corporation. We do not think, therefore, that it is appropriate to restrict by general regulation the borrowing powers of a nonprofit corporation or its directors on its behalf. As was suggested in the chapters above on income tax law, the only interest the state might have in restricting borrowing in some general way—such as permitting borrowing to finance operations only or permitting borrowing only if it is secured—is to enforce the obligations of prudence and loyalty of the fiduciaries of the corporation. The theory of such a restriction would be that any borrowing that is not in compliance with the applicable restrictions would always or usually, or in a sufficient number of cases, be imprudent and/or constitute a breach of the duty of loyalty. This theory, in our view, makes little sense. In arm’s length transactions, the creditor can be expected to ensure that the borrowing corporation is an acceptable credit risk, and the directors and officers of the borrowing corporation should be capable of assessing the value to the corporation of the borrowing. In non-arm’s length transactions, the duty of loyalty and the public enforcement of the duty of loyalty are sufficient protection against collusive transactions that are harmful to the nonprofit corporation. There is no need, therefore, for a specific regulation of borrowing. Like the power to invest, it is best regulated in the corporation statute by properly stating the fiduciary obligations of prudence and loyalty. We recommend, therefore, that there be no restriction on the power of nonprofit corporations to borrow or on the power of the directors of nonprofit corporations to borrow on the corporation’s behalf.

We also recommend that the new corporations law include provisions to facilitate the issuance of debt securities by all nonprofit corporations. In this respect, we think that Ontario law ought to follow the Saskatchewan Non-Profit Corporations Act, 1995 and the Alberta Volunteer Incorporations Act by adapting and including provisions similar in substance to those in Part V of the Business Corporations Act, which deals with indenture trustees, and Part VI of the Business Corporations Act, which deals with the negotiability of investment securities. The adapted provisions would apply, of course, to only debt securities. If this recommendation is accepted, then serious consideration should be given to removing the exemption that charitable and other nonprofit organizations have under the Securities Act.

(c) The Constitution of the Corporation

(i) Introduction

In section 3 of this chapter, we recommend that the new nonprofit corporations Act be a registration-type statute, with incorporation available as a matter of right. Assuming that recommendation is implemented, the nonprofit corporation’s constitution will be set out in the articles of incorporation, in its bylaws, and in the imperative and suppletive constitutional provisions contained in the corporations law. We examine each of these in turn.
(ii) Articles of Incorporation

Section 119(1) of the Corporations Act requires that an application for letters patent contain:

1. The names in full, the place of residence and the calling of each of the applicants.

2. The name of the corporation to be incorporated.

3. The objects for which the corporation is to be incorporated.

4. The place in Ontario where the head office of the corporation is to be situated.

5. The names of the applicants who are to be the first directors of the corporation.

6. Any other matters that the applicants desire to have embodied in the letters patent.

Section 119(2) goes on to provide that the letters patent may also contain provisions which may be the subject of the bylaws of the corporation.

The registration statutes such as the Business Corporations Act and the Canada Business Corporations Act contain similar requirements regarding the filing and the contents of the articles of incorporation. However, the requirements concerning the contents of the articles are more detailed. The proposed Volunteer Incorporations Act, the Non-Profit Corporations Act, 1995, and the Model Act are likewise more detailed in their requirements. We recommend that the articles be required to include all of the following items:

(1) full identification of all the applicants for incorporation;

(2) full address, in Ontario, of the corporation's head office;

(3) the class(es) of membership and the rights, duties, and restrictions of each class, with a provision that at least one class has full voting powers;

(4) the number of directors or the minimum and maximum number of directors;

(5) full identification of initial directors;

(6) a statement of the nonprofit purposes of the corporation;

(7) the classification of the corporation as religious, charitable, mutual benefit, political, or general;

(8) a statement, in the language of the statute, of the relevant applicable nonprofit constraints; and
(9) any restrictions on the activity or powers of the corporation.

The statute should also provide that the articles may contain any provision that may be contained in the bylaws of the corporation.

(iii) Statutory Rules

We make recommendations regarding suppletive and imperative rules to govern constitutional aspects of the nonprofit corporation in the discussion that follows in the remainder of this chapter. The imperative provisions of the statute will, in time, become familiar to the users of the statute. Except for a few key provisions—such as, for example, the two nonprofit constraints—we do not recommend that the imperative provisions be included in a corporation’s articles of incorporation. Suppletive provisions—those that are deemed to apply in the absence of a contrary choice by the incorporators—may be avoided by the incorporators making their choice, in most cases, in the articles of incorporation.

(iv) Bylaws

Sections 129 and 130 of the Corporations Act establish the directors’ power to pass bylaws. The former provides for the promulgation of a general bylaw establishing the modalities of membership and the conduct of the affairs of the corporation. It requires confirmation to be effective. The latter establishes the power to create by bylaw a delegate system and regional or other segmented representation to the board. It requires the support of two-thirds of the members at a meeting called to consider it prior to its taking effect.

We recommend the adoption in the proposed new Act of provisions governing the adoption, amendment, and repeal of bylaws similar to those contained in the Business Corporations Act. Under the new statute, therefore, there should be, first, a suppletive provision establishing the power in directors to make, amend, and repeal bylaws, with a complementary power in members to confirm, reject, or amend the bylaw at the next meeting of members. Second, members should also have the right to initiate the adoption of bylaws under a “members proposal.” Bylaws establishing delegate and other similar systems of member representation to the board should not be subject to any special majority adoption requirement in the new Act.

Some corporations laws make the validity of a nonprofit corporation’s bylaws subject to a prior registration requirement. The Alberta Volunteer Incorporations Act, for example, in section 41(1) requires, as a condition of validity, that bylaws be registered as part of the incorporation process and that the Registrar be notified of changes to bylaws under the statute. In our view, this type of provision has two serious drawbacks: it will undoubtedly result in many otherwise legitimate bylaws being invalid; and it will result in an onerous additional government record-keeping function at considerable public expense, but of limited value. The principal issue is whether it is important for outsiders to have ready access to the governing instruments of the nonprofit corporations. Our view is that, beyond what is included in the articles and the annual information return, outsiders do not
need access to information concerning the detailed constitutional arrangements of the corporation. Members and other insiders can be protected by enacting mandatory provisions in the statute facilitating access to corporate information. We therefore do not believe that the new law should impose a registration requirement in respect of the bylaws of a corporation. There is no similar provision under the *Business Corporations Act*, so imposing it in the nonprofit corporations statute may subject its users to a formality which they may inadvertently overlook.

The Alberta Bill also provides that the Minister may prescribe generally applicable bylaws and that these prescribed bylaws are the bylaws of every incorporated association unless and until different bylaws are adopted, by special resolution, by the incorporated association. The notion of a prescribed default bylaw is an innovation of greater utility. For a great many nonprofit corporations that are unable to afford the services of a lawyer to draft their constitutional documents, it would be particularly useful. We recommend that there be a default bylaw—perhaps several, varying according to the type of corporation—established by regulation, whose existence and content are made known to incorporators at the time of incorporation. The default bylaw could be ousted where a corporation has at any point duly adopted its own conflicting bylaw. Any person alleging the validity of a bylaw in any proceeding should have the burden of proving, on the balance of probabilities, that it was duly adopted and therefore that it is valid. Where that burden is not discharged, the default bylaw would still apply.

(d) Limited Liability

Section 122 of the *Corporations Act* states that members are not as such responsible for any act, default, obligation, or liability of the corporation. Limited liability is forfeited, however, if the number of members falls below three. In that case, the remaining members are personally liable on debts arising six months after the number of members has, with their knowledge, dropped below three.

The new statute should likewise establish that members as such should not be liable in any way for the obligations of the corporation. The provision establishing that limited liability is lost when membership falls below three should not, however, be enacted. Requiring nonprofit corporations to maintain a minimum number of members may be advisable—this issue is addressed below—but sanctioning a breach of such a condition with loss of limited liability is not.

(e) Corporate Name

The corporation should be required to have a name, although the statute might also make provision for all corporations incorporated under it to have numbers. The usual restrictions on the selection of a name should apply, and some provision should be made for reserving names pending the incorporation application process, as is commonly done in modern corporations statutes. A name reservation system might also be made available to foreign corporations.
The current Ontario Corporations Act and the Canada Corporations Act do not require the inclusion of any distinctive element in the nonprofit corporation’s name that would readily identify it as a nonprofit corporation. We believe that it is advisable to make some provision in the new statute requiring nonprofit corporations to identify themselves as such in their names. We note that the Volunteer Incorporations Act requires corporations incorporated under it to include the letters "IA" at the end of their name ("incorporated association") and prohibits the use of "limited" "limitée" "incorporated", etc. The analogous provisions of the New York and Saskatchewan statutes do not require any indication in the corporate name that the corporation is a nonprofit corporation. The Alberta Task Force recommended that nonprofit corporations be identified by the letters "NPC" standing for nonprofit corporations in their name and that they be required to use that instead of "IA", as provided for in the Bill. We think that it would be useful if the statute required nonprofit corporations to identify themselves as such, and we agree with the Alberta Task Force that the designation "NPC", or some variation of this such as "Nonprofit Corporation", "NP Corp", "NP Incorp" or "NP Ltd." is acceptable.

3.FORMATION

(a)Introduction

The Commission looks at two issues relating to conditions governing entry to this form of organization: whether incorporation should be discretionary or right, and who may incorporate. We examine a third issue concerning the treatment of transactions entered into prior to incorporation. We also suggest an annual reporting requirement, justified largely as status regulation, but not sanctioned with loss of corporate status.

(b)Creation of a Nonprofit Corporation

The Corporations Act is a letters patent statute. This means, among other things, that the grant of letters patent of incorporation is a discretionary act of the government. Section 4(1) thus states:

4.- (1) The Lieutenant Governor may in his or her discretion, by letters patent, issue a charter to any number of persons, not fewer than three, of eighteen or more years of age, who apply therefor, constituting them and any others who become shareholders or members of the corporation thereby created a corporation for any of the objects to which the authority of the Legislature extends ....

Section 5(1) likewise provides for a discretion in the Lieutenant Governor to issue supplementary letters patent.

The fact that incorporation of a nonprofit corporation is a discretionary act has allowed for the development in Ontario of an administrative practice which has permitted government officials to impose certain restrictions on entry to the nonprofit corporation form. The Company’s Branch of the Ministry of Corporate and Consumer Affairs has, for a number of years, made a practice of consulting with the Office of the Public Trustee on
applications for letters patent of incorporation where charitable objects are involved. The
Public Trustee is also consulted in cases involving applications for amendments and
renewal of letters patent of incorporation of these corporations. The Public Trustee has
announced that it will oppose an application for incorporation on the basis of any one of a
number of factors: 110

(1) that the objects of the corporation are not wholly and exclusively charitable;

(2) that the objects of the corporation are stated in "broad and vague
terminology";

(3) that the "power clauses purportedly authorize the trustees [sic] to engage in
purposes which are beyond the purposes of charity";

(4) that the documentation in favour of the application is insufficient;

(5) that the Public Trustee is of the view that the corporation will not be properly
administered, assessed on the basis of the incorporator's previous inability to
comply with the law related to charities;

(6) that the proposed corporation is not appropriately named;

(7) that the objects of the proposed corporation seek primarily to promote its
members' interests or benefits; and

(8) that the objects of the corporation include political purposes.

Under this administrative practice, the Public Trustee has also required that the following
provisions be placed in the powers clause of the incorporating document: 111

(1) the corporation shall be carried on without the purpose of gain for its members and any profits
of other accreditation to the corporation shall be used in promoting its objects;

(2) the corporations shall be subject to the Charities Accounting Act and the Charitable Gifts Act;

(3) the directors shall serve as such without remuneration and no directors shall directly or
indirectly receive any profit from their position as such, provided that directors may be paid
reasonable expenses incurred by them in performance of their duties;

(4) the borrowing power of the corporation pursuant to any bylaw passed and confirmed in
accordance with section 59 of the Corporations Act shall be limited to borrowing money for
current operating expenses provided that the borrowing power of the corporation shall not be so
limited if it borrows on the security of real or personal property;

(5) upon the dissolution of the corporation and after the payment of all debts and liabilities, its
remaining property shall be distributed or disposed of to charitable corporations which carry on
their work fully in Ontario (or alternatively in Canada).
This administrative arrangement has been in place for a number of years. It is not, in our view, the best solution to the problems presented by an outdated statute. Rather, in our view, the norms governing restrictions on the activities of charitable corporations should be established by the Legislature pursuant to a coherent legislative policy.

We also recommend the adoption of a registration-type corporations statute permitting incorporation as of right, subject to certain statutory conditions similar in intention to those now imposed administratively. Incorporation by registration is the system of incorporation in place in all Canadian jurisdictions in respect of business corporations and under the Saskatchewan *Non-Profit Corporations Act, 1995*, the New York *Non-Profit Corporation Law*, and the California *Nonprofit Corporation Law*.

**(c) Who May Incorporate?**

The Ontario *Corporations Act* requires a minimum of three applicants who are eighteen or more years of age. Until recently, ten applicants were required where the objects of the corporation to be incorporated are in whole or in part of a social nature. The *Business Corporations Act* permits a single individual or a single corporation to incorporate a business corporation. Individual incorporators under the Alberta *Volunteer Incorporations Act* must be at least eighteen years of age, not of unsound mind, and not bankrupt. The Alberta *Volunteer Incorporations Act* and the Saskatchewan *Non-Profit Corporations Act, 1995* permit one or more "persons" to incorporate as of right, and "person" is defined to include corporations and partnerships (among others). If an individual is involved in the incorporation, the *Non-Profit Corporations Act, 1995* requires that the individual be at least eighteen, not of unsound mind, and not bankrupt.

We think there should be similar age and character qualifications imposed on all individual applicants for incorporation. For charitable and religious corporations, a "good character" type qualification might also be imposed. We also think it should be permissible for a corporation to incorporate a more stringent nonprofit corporation.

There may also be some utility in maintaining a requirement for several initial members and a membership roster that does not decline below a certain number. For example, corporations from which the public should expect greater accountability, such as charitable corporations, might be expected to have several continuing members and perhaps several directors, in order to heighten the nature of the responsibility of managing and distributing donated money and government grants. One could also argue that a religious corporation and a mutual benefit corporation, by their very nature, ought to have several initial and continuing members. In our view, the objectives identified in these observations, especially the first, have some validity. The current regime is defective, however, in the formulation of the relevant requirement. The obligation ought to be formulated as an obligation to maintain a minimum number of directors, not members, since it is the directors who have the fiduciary responsibilities. Accordingly, we think that religious and charitable corporations should be required to maintain from the outset a minimum of three directors and that the sanction for failing to do so should be as set out in the current section 311 of the *Corporation Act*, a loss of limited liability.
protection for the remaining directors. There should also be a power in the NOC to enforce this requirement.

(d) Pre-Incorporation Contracts

The Lawrence Committee concluded in 1967 that "the present state of the law relating to the pre-incorporation contracts generally is unsatisfactory and replete with serious difficulties." That law still applies to nonprofit corporations. It is in serious need of reform.

The leading case on the issue of liability for pre-incorporation contracts is Kelner v. Baxter. It is usually taken for the proposition that a contract signed by a person professing to be signing "as agent", but who has no principal existing at the time, is binding on the person who signed it. In Kelner, on the basis of this principle, it was held that the future directors of an unincorporated corporation were liable personally on a contract they had signed "on behalf of" their future company, and that once the company came into existence, it could not "ratify" that contract since "ratification" "can only be by a person ascertained at the time of the act done". Applying this view of the holding in Kelner v. Baxter, courts have invariably found that a full novation is required in order to ensure that the initial signatories of the contract are not liable under the contract and to ensure that the corporation is entitled to the benefits of the contract.

More recent cases have given what is in our view a more accurate interpretation to the Kelner v. Baxter holding. On the issue of the liabilities of the signatories, an Australian decision, Black v. Smallwood, held that the fundamental question in every case must be what the [contracting] parties intended or must be thoroughly understood to have intended. In that case, the signatories were not held liable as there was no intention in their signing to be personally bound.

The correct approach to the problem of pre-incorporation contracts requires that close attention be paid to the intention of the parties. There are three paradigmatic fact patterns, each exhibiting different basic intentions and each, therefore, leading to a different liability result. The patterns and results are set out in what follows.

(i) Pattern I-Both parties know at the date the contract is entered that the corporation does not yet exist. In our view, when the future directors sign "on behalf of" the future corporation in this circumstance, their implicit intention, accepted by the other contracting party, is to take on the liabilities under the contract pending incorporation, then transfer them to the corporation with no further personal liability in themselves, once the corporation is formed. This is the Kelner v. Baxter situation, but with a different conclusion on the liability result. We think, in other words, that Kelner v. Baxter was wrongly decided. The Lawrence Committee did as well and recommended a statutory solution. There are now provisions in the Business Corporations Act and the Canada Business Corporations Act which regulate this situation in a way we think is correct. The relevant provisions under the Business Corporations Act, section 21(1) and (2), provide as follows:
21-(1) Except as provided in this section, a person who enters into an oral or written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof.

(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,

(a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and

(b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

This or a similar provision should be adopted in the proposed new Act to govern Pattern I fact situations.

(ii) **Pattern II-Both parties are mistaken as to the existence of the corporation.** In this situation the “agent” believes that a corporation has been incorporated and purports to contract on its behalf with another person who simply relies on the agent’s mistaken representation. Here the correct result, in our view, is that there is no contract because of the mistake. These, in essence, are the facts and holding of the Australian decision *Black v. Smallwood*.\(^{132}\) This holding is not easily accommodated under the traditional interpretation of *Kelner v. Baxter*,\(^{133}\) which would require the agent to be liable on the contract. The statutory language quoted above was drafted with only the *Kelner v. Baxter* situation in mind and therefore is also deficient on this question. The deficiency is addressed in part, and quite poorly in our view, in section 21(3) and (4) of the *Business Corporations Act*:

21-(3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit.

(4) If expressly so provided in the oral or written contract referred to in subsection (1), a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof.

Section 21(3) provides a discretion for a court to fix the obligations under a contract as either joint, joint and several, or to apportion liability in any other way between the corporation and the person who signed on its behalf, and “make any order it thinks fit”. Section 21(4) permits the person signing the contract to agree with the other party that he or she will not be bound by the contract or be entitled to the benefits thereunder in any event.\(^{134}\) The new nonprofit corporation’s statute should address this deficiency by
explicitly addressing the problem presented in Pattern II. In our view, the decision in *Black v. Smallwood* is clearly the correct approach.

(iii) **Pattern III- The agent knows there is no corporation and the other party does not.** Here, the correct solution is liability in the agent for the value of the contract on the basis of his or her breach of warranty of authority.135 As with Pattern II, this fact situation is not easily accommodated by the traditional *Kelner v. Baxter* rule or by the current statutory language. This deficiency should also be rectified in the new nonprofit corporations Act.

**(e) Status Registration**

Currently, corporations must register to be incorporated. Thus, unlike the current situation for trusts or associations, registration is a condition of viability. This should continue to be the case. Religious and charitable corporations must in addition be "exclusively charitable", under our proposals as outlined in the introduction, in order to be registered as such.

Continued eligibility for the status of nonprofit corporation or of religious or charitable nonprofit corporation should be regulated with an annual disclosure requirement. Annual disclosure of basic information is currently required under the *Corporations Information Act*,136 sections 2, 3, and 4. Sections 2 and 3 require an initial information filing for provincial and extra-provincial corporations; section 4 imposes an obligation on registered corporations to file a "notice of change" filing when and as changes in the information already filed occur.137 Section 7 empowers the Minister to request information from registered corporations at any time, on thirty days’ notice. The information required under these provisions relates to the identification of directors, the place of business of the corporation, and its date of incorporation. The filings are required to be verified by a director or officer with knowledge of the matters set out in the filing.139 The resultant records may be kept in computerized form and are to be open to examination by the public.141 The obligation to file is sanctioned by individual and corporate fines for filing false information, for failing to file, and for filing late, and the Minister may apply to the courts for compliance orders. Breach by the corporation of its obligations is not sanctioned with a removal of its legal capacity. Rather, under section 18, the right of a corporation in default under the Act to sue is restricted.

A public register containing basic information on all Ontario nonprofit corporations and all extra-provincial corporations that conduct some of their affairs in Ontario is a necessity in our view. The publicly accessible information need not, however, extend much beyond the information that currently is required under this Act. Like the parallel requirements we recommend for charitable trusts and religious and charitable associations, its main function is to regulate the corporation as an entity of a particular juridical form and its status as a nonprofit. In addition to the identification of directors, etc., there might be included a brief description of its activities and a statement about financial size (for example, total assets, total liabilities, total revenue, and total expenditures). There should be limited information and simple declarations concerning
key elements of the fiduciary duties of directors and compliance by the corporation with the non-distribution constraint. The disclosure requirement should be substantially the same as the one we recommend for charitable trusts and for charitable associations. The requirement should be applied equally to all provincial and extra-provincial corporations. The current sanctions are adequate, although the regime could be more explicit about the responsibility of individuals. The requirements should be set out in the main corporations statute and be administered by the NOC.

Extra-provincial corporations should be subject to the additional requirements of maintaining a registered office and designating a registered agent in Ontario. A separate regime governing these matters should be set out in a separate chapter of the new statute, as under chapter 15 of the Model Act and Part III of the Non-Profit Corporations Act, 1995.

4. GOVERNANCE

(a) Introduction

In this section the Commission examines issues relating to the governance structure of the nonprofit corporation and make numerous suggestions for reform. We look at the rights and duties of membership, of the board of directors, and of the officers, as well as the obligation of the corporation and its officers to maintain proper records. We also examine the role of external agencies in governance matters. With respect to the NOC, we recommend that, in the case of religious and charitable corporations, it be given some of the same rights, subject to the same conditions of exercise, as members of those corporations so that it is able to enforce the statutory and fiduciary duties of directors and officers. In particular, the NOC should have the same rights as members in respect of access to information and in respect of members’ remedies. It should not, however, have any extensive participation rights, except perhaps a right to attend, but not participate in, meetings of members.

(b) Rights and Duties of Membership

(i) Introduction

One of the major deficiencies of the Corporations Act is that its provisions dealing with the rights and duties of membership are dated and inadequate. We review these provisions here under several headings, in each case making recommendations for reform.

(ii) Classes of Membership

The Corporations Act provides for the possibility of classes of membership. It requires only that the letters patent set out the terms and conditions attaching to each class. This provision is fine and should be continued. The new provision should require that all terms and conditions of each class relating to voting rights, rights on dissolution, redemption
rights, and rights to transfer be contained in the articles. The proposed Act should also contain a rule stating that, where there are multiple classes of membership, there be at least one class that is entitled to vote at all meetings. It should also establish the possibility of all corporations incorporated under the Act having honourary members, without voting rights, even though no such class of membership has been created in the articles of incorporation. A like provision ought to permit the creation of an honourary board of directors, stating that it has none of the powers or rights or responsibilities of the real board.

(iii) Minimum Membership

Many organizations are currently run as de facto self-perpetuating boards. This reality raises the question whether the proposed new Act should impose the requirement that all nonprofit corporations have members or have a minimum number of members. In our view, there is no need for such a requirement. In our view, therefore, the Act ought to acknowledge explicitly the possibility of the self-perpetuating board structure. As a practical matter, such recognition would permit these organizations to dispense with the many cumbersome legal formalities associated with the existence of a membership.

(iv) Maximum Membership

The current Corporations Act provides that, subject to the letters patent or bylaws, there is no limit on the number of members. The new statute should contain a similar provision.

(v) Delegate System

Section 130 of the Corporations Act provides that the directors may pass a bylaw (subject to confirmation by a two-thirds vote of members) dividing the membership into groups or territories and permitting the groups or territories to elect delegates to represent them at meetings, or elect members of the board of directors. We recommend that the new statute continue the explicit recognition of this type of governance structure, as it is a reasonably common one, but provide that it be placed in the articles, not the bylaws, since it directly affects voting rights.

(vi) Transferability and Repurchase of Memberships

The Corporations Act provides that, subject to a contrary provision in the letters patent or supplementary letters patent, membership interests are not transferable and that membership ceases on the death of a member. The Volunteer Incorporations Act and Non-Profit Corporations Act, 1995 provide likewise, but are slightly more explicit. The Model Act in our view has the best rule on this matter. It makes the non-transferability rule suppletive in the case of mutual benefit corporations, and imperative in the case of religious and charitable corporations. We recommend that the rule against transferability be imperative for religious and charitable corporations and
suppletive for all other nonprofits. All restrictions on the transferability of membership should be contained in the articles of incorporation.

Repurchase or redemption of memberships should be prohibited for religious and charitable corporations, but permitted for others, subject to an imperative requirement that the corporation remain solvent after any repurchase or redemption. This rule should be enforced by imposing personal liability on directors who consent to, or are deemed to have consented to, a contravening repurchase or redemption, and on the members involved in it, unless they were not knowing participants in the contravention or they have changed their positions.

(vii) Restrictions on Distributions to Members

The two non-distribution constraints we set out in the introduction should be included in the part of the statute that describes the rights and responsibilities of membership. The non-distribution constraints applicable to each class of membership of a corporation, if any, should also be set out in the articles of incorporation.

(viii) Admission of Members

The Corporations Act establishes a rule to the effect that the board may admit new members by resolution, and if the letters patent or bylaws so provide, the admission of new members may be delayed subject to confirmation by the membership at a general meeting. We think it is helpful to have a default rule on the question of admission to membership, and we believe the default rule in the current Act-admission by resolution of the board-is the correct one. However, incorporators should be completely free to design other schemes governing admission, and it should be possible to set out these other schemes in the articles or in the bylaws. The new Act should also make clear that the articles or bylaws may provide for the issuance of memberships with or without consideration.

(ix) Resignation and Termination of Membership and Disciplinary Measures Against Members

The Corporations Act mentions the termination of membership interests, only in the context of the provision establishing the general bylaw-making power of directors. There are, therefore, no default rules established in the Act in respect of the termination of membership interests and the resignation of members. In our view, the proposed Act should establish an imperative provision stating that members may resign their membership at any time and a concomitant provision stating that resignation per se does not relieve a member of the member's existing financial obligations to the corporation. The new statute should also establish a suppletive provision governing the decision to terminate a membership and the decision to discipline members. A rule empowering the board to act by resolution in such matters would be sufficient. As part of that rule, however, there ought to be an imperative requirement that the corporation and
the board treat the members concerned "fairly". The new statute should also set out minimum standards of fairness.

(x) Members’ Meetings

a. Calling Meetings and Conduct of Meetings in General

The Corporations Act establishes suppletive rules governing the calling, conduct, and place of meetings of members. It requires the holding of annual meetings and empowers the directors to call a general meeting at any time. Like provisions should be included in the proposed new Act, but the new Act ought to go much further than the current provisions and specify a comprehensive suppletive regime governing all important aspects of the members’ meeting, as does the Volunteer Incorporations Act, the Model Act, and the Business Corporations Act. In particular, suppletive provisions governing quorum requirements, notice requirements, waiver of notice, record dates (establishing a list of members entitled to participate), and balloting rules should be enacted.

The proposed Act should also provide for the passing of members’ resolutions by written consent of all or perhaps a substantial majority of members. The Business Corporations Act and the Volunteer Incorporations Act require that such a resolution be approved unanimously. The Model Act requires the support of only eighty percent of members. We prefer the latter rule, but the more important principle is that a convenient decision-making process be provided for members. To that end, the new Act should also include, as does the Model Act, a suppletive provision permitting any action to be approved by written ballot.

b. Voting Entitlements

As stated already, the articles should set out clearly the voting rights of all classes of membership. Where there is, for some reason, a failure to do this, the Act should provide for a suppletive rule that each member is entitled to one vote.

c. Proxies

The Corporations Act permits voting by proxy, but the provisions of the Act establishing an obligation in management to solicit proxies and requiring proxy solicitations to be accompanied by information circulars, do not apply to Part III corporations. The Model Act and the Non-Profit Corporations Act, 1995 also permit voting by proxy, but the Volunteer Incorporations Act does not.

We recommend that the new law continue to allow for proxies but permit the articles or bylaws to provide otherwise. There should be no obligation on management to solicit proxies, but if management does solicit proxies, there should be an imperative statutory obligation on management to distribute, as part of the proxy solicitation, an information circular in a prescribed form. As a suppletive rule, only members should be permitted to
act as proxies. Solicitation of proxies by non-management members should be permitted and should also be subject to a similar imperative information circular requirement. Any information circulars so published and distributed should be required to be filed with NOC.\textsuperscript{179}

(xi) Cumulative Voting for Directors

Section 65 of the \textit{Corporations Act} provides for cumulative voting for directors where the letters patent or bylaws so provide, but it is not, for some reason, made applicable to Part III corporations. This deficiency probably does not mean that cumulative voting is prohibited in the case of Part III corporations. The \textit{Model Act}\textsuperscript{180} also contemplates cumulative voting. We recommend that a provision allowing cumulative voting, similar to the one contained in the \textit{Model Act}, be enacted in the new law. The Act should also permit the articles to contain other voting rules governing the election of directors, such as, as already suggested, election by region or chapter.

(xii) Voting Agreements

The \textit{Model Act}\textsuperscript{181} permits voting agreements among two or more members. For public and charitable corporations, the \textit{Model Act} requires that such agreements have "a reasonable purpose not inconsistent with the corporation's public or charitable purpose".\textsuperscript{182} Like provisions should be adopted in the new Act.

(xiii) Rights and Remedies of Members

\textit{a. Members' Right of Access to Information}

There is very little in the \textit{Corporations Act} establishing the rights and remedies of members. However, there are substantial provisions that give and govern a right of access to information, including a right of access to the list of members\textsuperscript{183} and to the corporate records.\textsuperscript{184} There is an obligation on the directors to make annual financial disclosure at the annual meeting.\textsuperscript{185} All of these should be continued in the new law. Under the \textit{Model Act}'s analogous provisions,\textsuperscript{186} the statutory access rights in the case of religious corporations may be limited or abolished in its articles or bylaws. We agree with the sponsors of the \textit{Model Act} that differential treatment of religious corporations is warranted in this instance. In the case of religious and charitable corporations, the NOC should not have rights of access more extensive than those of members.

\textit{b. Members' Right to Apply to Court to Have Inspector Appointed}

Section 310 of the \textit{Corporations Act} provides for the appointment by the court, on the application of members, of an 'inspector' or an 'auditor'. The \textit{Business Corporations Act} contains similar but more extensive provisions.\textsuperscript{187} We think like provisions should be included in the proposed Act, subject to the proviso that the right of access to information that any such provision may provide should not, in the case of religious corporations, be any more extensive than the rights of access to information set out in a religious
corporation’s bylaws or articles. The NOC should not have more extensive rights in this regard than members in the case of religious corporations.

**c. Members’ Rights to Requisition Meetings and Initiate Proposals**

Members may requisition a meeting and require the distribution of a statement of a member’s resolution under the *Corporations Act*. They may apply to request the court to call a meeting. Like provisions should be included in the proposed Act. The *Non-Profit Corporations Act, 1995* and the *Model Act* contain similar provisions. The *Model Act* makes the members’ right to call a meeting inapplicable to religious corporations unless its articles or bylaws provide otherwise. Once again, we agree that differential treatment of religious corporations is valid in this instance. We do not think that the NOC, as a public authority, should participate directly in the decision-making process of any nonprofit, and therefore believe that none of these rights should be available to the NOC.

**d. Members’ Right to Initiate Legal Action Against Fiduciaries of Corporation**

There is no derivative action or action for relief from oppression under the *Corporations Act*. The *Model Act* provides for a derivative action and compliance orders. The *Volunteer Incorporations Act* provides for a derivative action, compliance orders, and rectification orders. The *Non-Profit Corporations Act, 1995* provides for derivative actions, applications for relief from oppression, compliance orders, and rectification orders. We recommend that the new law contain provisions on all of these matters similar to those found in the *Non-Profit Corporations Act, 1995*. The right to bring a derivative action and an action for relief from oppression, however, should be qualified, in the case of religious corporations, to exclude the possibility of litigating the truth or legitimacy of a religion’s doctrine or the tenets of its faith. None of the statutes from other jurisdictions which we have studied do this, but perhaps only one, the *Non-Profit Corporations Act, 1995*, contains a provision—the oppression remedy—which is likely wide enough to raise the danger of a court being called upon to deal with this type of matter. The rights established in the Act need not be restricted to members *per se* but could, and in our view should, be extended to legitimate "complainants", as this term is defined in section 222 of the *Non-Profit Corporations Act, 1995*. They should likewise be extended to the NOC, in the case of religious and charitable corporations.

**(c) Rights and Duties of Board of Directors**

**(i) Introduction**

The directors are elected by the members in accordance with the voting entitlements as established, in our recommendation, in the articles of incorporation. In our recommendation, the first directors should be installed and fully identified as part of the incorporation process. In addition to the process of electing directors, it should also be possible for the articles to stipulate that certain persons become directors *ex officio*. This
is currently provided for in section 127 of the Corporations Act. The proposed Act ought also to permit the articles to allow that some directors may be appointed.

Like the provisions of the Act already examined, those that govern the rights and responsibilities of directors are either dated or not entirely appropriate for nonprofit corporations. We examine these issues in turn.

(ii) Directors’ Duty to Manage

The Corporations Act provides that the corporation "shall be managed" by a board of directors. Most modern corporations statutes provide that the directors have ultimate authority, but recognize that the management of the corporation is often under the immediate direction of professional management. Thus, the Business Corporations Act states that the directors “shall manage or supervise the management of the business and affairs of a corporation”. Similarly, the Model Act states that “all corporate powers shall be exercised by or under the authority of...its board.” The proposed Act should set out the powers of the directors in a similar fashion, to give statutory recognition to the reality that many modern nonprofit corporations are not actually managed by the board of directors.

(iii) Delegation of Powers to Managing Director or Executive Committee

The Corporations Act contemplates the possibility of the board of directors delegating a part or all of its authority to an executive committee, by bylaw. However, there is no provision allowing the corporation to place the power to delegate in the articles. The Business Corporations Act provides that the directors duty to manage is subject to unanimous shareholders agreement to the contrary. The Business Corporations Act also provides for the appointment, with extensive but ultimately limited authority, of a managing director or a management committee. The Non-Profit Corporations Act, 1995 contains similar provisions. The Model Act provides that the articles may authorize “a person or persons to exercise some or all of the powers” of the board, and where there has been such a delegation in the articles, the directors are relieved to that extent from their duties.

We recommend that the proposed statute provide similarly for the delegation of directors’ duties in the articles or by unanimous members’ agreement. The power to delegate in the former case should include the power to delegate all duties and powers except the duty to submit to members any question or matter requiring their approval; the power to appoint or to fill a vacancy among the directors; the power to appoint the auditors, or any of the officers of the corporation; the power to approve the annual financial statements of the corporation; the power to approve the issue of any debt securities; and the adoption, amendment, or repeal of any bylaws of the corporation.

(iv) Number of Directors
The Corporations Act requires that the number of directors be fixed and that there be at least three directors. The number of directors may be increased or decreased by special resolution. Under the Business Corporations Act, the articles need only specify a minimum and maximum number of directors. We recommend that the proposed Act require a minimum of three directors in all cases, and that it also permit the articles to specify a maximum number and a minimum number of directors, provided the minimum number specified does not fall below three. For religious and charitable corporations, at least two-thirds of the directors should not be officers or employees.

(v)Term of Office

The Corporations Act provides, as a suppletive rule, for terms of office of one year. It also provides that a director continue to serve until his or her successor is elected. The Model Act contains provisions to a similar effect (section 8.05). These provisions should be continued in the new Act. The proposed new Act should also state a mandatory maximum term of, at most, five years and provide that terms of office may be staggered.

(vi)Qualifications

Under the Corporations Act and subject to minor exceptions, a director must be a member, eighteen years of age or more, and not an undischarged bankrupt. These provisions should be continued. Three further conditions ought to be imposed: first, no person of unsound mind, as adjudged by a court, should be able to serve or continue to serve as a director; second, with respect to religious and charitable corporations, persons of possible unsound character—however defined—ought to be excluded or be subject to a screening requirement, perhaps through an application for clearance to the NOC subject to court review; and, finally, the proposed Act ought to make clear that only individuals may serve as directors.

(vii)Meetings of Directors

The current Corporations Act provides very little on the matter of meetings of directors essentially only the quorum that is necessary and the place of the meetings. The Model Act, the Non-Profit Corporations Act, 1995, and the Business Corporations Act contain more extensive rules on directors’ meetings. The new Act should provide comprehensive suppletive rules governing the calling and conduct of directors meetings. It should also provide for the conduct of the business of the board by telephone conference and by written unanimous resolution. The latter provision is common in modern corporations Acts.

(viii)Standards of Conduct

a. Duty of Loyalty and Duty of Prudence

The current Corporations Act does not set out the duty of loyalty or the duty of prudence applicable to directors. Under the common law, the duty of prudence is formulated in a
way that takes account of the particular skills of each director: directors are liable only if they fail to exercise the care and skill they bring to their position. A director is expected to display only "ordinary prudence" and is not expected to exercise any greater skill than can be expected from a person with his or her knowledge. Directors are not liable for mere errors in judgment, and are not bound to pay continuous attention to the affairs of the company. Directors may delegate tasks, when justified, to others.\textsuperscript{219} The general duty of loyalty is sometimes stated as strictly as the duty of loyalty that applies in the case of almost any fiduciary.\textsuperscript{220} As a fiduciary, a director may not allow his interest to conflict with his duty. As we shall see in the next section, however, this strict standard has been modified at common law and by statute.

One of the major reforms of the modern corporations Acts was to set out the content of these duties explicitly in the corporations statute. We recommend that formulations of these duties be set out in the proposed nonprofit corporations Act in exactly the same language as the \textit{Business Corporations Act}\textsuperscript{221} We also recommend that these statutory standards be made imperative, as is done in \textit{Business Corporations Act}.\textsuperscript{222} It follows that the rules in section 135 of the \textit{Business Corporations Act} respecting the individual responsibility of each director under these statutory standards should also be adopted. In essence, section 135 provides that an individual director is liable for such action as he or she has consented to or to which he or she has failed to register a dissent. There is no liability where a director has relied in good faith upon the information or advice of certain experts. We have examined other similar provisions—for example, in the \textit{Model Act}\textsuperscript{223}—but believe that, on this question, the uniformity of the law governing directors in Ontario is of paramount importance. It also follows that the provisions in the \textit{Business Corporations Act}\textsuperscript{224} on the indemnification of directors for breaches of the duty of prudence, and regarding the purchase by the corporation of liability insurance against directors’ liabilities arising in their capacity as director,\textsuperscript{225} should be enacted in the proposed Act. Again we have examined other similar provisions,\textsuperscript{226} but believe uniformity of legislative provisions is critical here too.

\textbf{b. Conflicts of Interest}

Under the general trust law standard, conflicts of interest and duty are absolutely prohibited, regardless of whether harm is caused to the corporation. Under that standard, it would not be possible for directors of a nonprofit corporation to be remunerated as directors or in any other capacity, nor would it be possible for directors to deal with their corporations. The trust law standard, however, probably does not apply to nonprofit corporations. Speaking generally, only conflicts of interest and duty that result in harm to the corporation are prohibited. These are sanctioned with a liability in the offending director to account.\textsuperscript{227} The position under the \textit{Business Corporations Act}\textsuperscript{228} has two parts. First, directors are obliged to "act honestly and in good faith with a view to the best interests of the corporation."\textsuperscript{229} This general fiduciary standard does not, on its face, prohibit directors from dealing with their corporation.\textsuperscript{230} Second, the conflict of interest and duty situation is treated under a subsidiary rule which requires that all such dealings be procedurally and substantively fair.\textsuperscript{231} Generally speaking, under the modern statutes such as the \textit{Business Corporations Act}, this requirement entails that the director must
disclose in writing the nature and extent of his or her interest in the contract to the board prior to the transaction, he or she must not vote on the transaction, the transaction must be approved by the board, and the transaction must be fair and reasonable to the corporation.232 There is an alternative approval process involving shareholders. The sanction for failing to comply with these provisions is that a court may set the transaction aside and make the director involved account for profits. There are a number of exceptions to this general regime under the Business Corporations Act, including a power in the directors to decide on their own compensation.233

The provisions of the Business Corporations Act, in our view, are generally adequate for all nonprofit corporations except religious corporations and charitable corporations. For the latter, we believe additional requirements should be imposed. First, directors of these corporations should not be permitted to be paid in their capacity as a director. Second, the definition of persons subject to the conflict of interest and duty rules should be wider than the definition of directors. In our view, the rule should apply to dealings between the corporation and all members and members of the proscribed class. Third, the transactions which are affected should include transactions between these persons and any controlled corporation of the corporation. Fourth, “transactions” should be defined widely to include all transfers of value from the corporation or the controlled corporation to the members or the members of the proscribed class, with or without consideration. Finally, prior notification of the proposed transaction to the NOC should be required with a power in the NOC to prohibit the transaction where it is of the opinion that the transaction is not fair and reasonable (or some higher standard). The decision of the NOC should be subject to court review. These rules should govern all transactions involving members, members of the proscribed class, the corporation, and any controlled corporation.

Reimbursement of expenses, however, should not generally be covered by these rules. To ensure that the reimbursement of expenses is not utilized as a surreptitious method of circumventing these rules, a summary report detailing all payments to directors, members, and members of the proscribed class, submitted to the NOC perhaps on an annual basis as part of the annual information return, should be required of directors of charitable and religious corporations.

(ix) Bylaws

As under the Corporations Act234 and the Business Corporations Act,235 the directors should have the power to make, amend, or repeal any bylaws of the corporation, subject to the members’ right of confirmation at the next meeting of shareholders.

(x) Removal, Resignation, and Vacancies

Members under the Corporations Act236 may remove a director by a two-thirds vote before the expiration of his or her term. The Business Corporations Act237 requires only an ordinary resolution. We recommend the adoption of a similar imperative provision—an ordinary resolution should be sufficient—provided it is drafted in such a way as to respect any class or cumulative or other rights in respect of the election of directors. The Model
Act\textsuperscript{238} is a model of clarity in this regard. It also makes this rule suppletive in the case of religious corporations, a provision with which we agree. Provision should also be made for the immediate election of a replacement director.

An appointed director should be removable only by the person appointing him or her, subject to any contrary provision in the articles. The Model Act does this.\textsuperscript{239}

Directors, except initial directors, should be permitted to resign at any time. Initial directors should not be permitted to resign unless a successor has been elected.\textsuperscript{240}

Directors who resign or are removed should have, as under section 123(2) of the Business Corporations Act, a right to present their reasons for resignation or for opposing their removal to a meeting of members.

As under section 124 of the Business Corporations Act, the new Act should also make provision for the filling of vacancies on the board of directors, on an interim basis only, by the remaining directors.

(xi) Other Liabilities of Directors

Section 131 of the Business Corporations Act establishes liability in directors, under certain conditions, for the wages of employees. Section 81 of the Corporations Act\textsuperscript{241} provides likewise. A like provision should be enacted in the new statute. Directors should also be personally liable for distributions to members in contravention of any of the provisions of the proposed Act.\textsuperscript{242}

(d) Rights and Duties of Officers

The Corporations Act contains very few provisions on officers. It requires the election of a president and the appointment of a secretary.\textsuperscript{243} Other officers and a chairman may be appointed or elected.\textsuperscript{244} Only the president and chairman need be members.\textsuperscript{245}

The Model Act\textsuperscript{246} contains provisions stipulating that a president, treasurer, and secretary are required unless otherwise stipulated. The Model Act also sets out what their duties are,\textsuperscript{247} the required standard of conduct,\textsuperscript{248} provisions governing their resignation and removal, their contract rights, and matters relating to their indemnification\textsuperscript{249} and insurance.\textsuperscript{250} Similar, but less extensive provisions, are found in the Business Corporations Act\textsuperscript{251} and the Non-Profit Corporations Act, 1995.\textsuperscript{252} We recommend that the proposed new statute contain provisions similar in scope and content to those found in the Model Act.

(e) Creditors

Creditors should be given some of the same rights and remedies under the new nonprofit corporation law as they have under the Business Corporations Act. At the least, they
should be entitled to qualify as a complainant in a derivative or oppression action, subject to the discretion of the court. The Non-Profit Corporations Act, 1995 does this.253

(f) Auditors

Auditors are required under the Corporations Act, but there is no requirement that they have any special training in accounting. The auditor is obliged to report on the financial statements of the corporation and must state whether they present fairly the financial position of the company. The financial statements and the auditor’s report must be presented to the annual meeting of members. The Model Act does not require the appointment of an auditor, but if the financial statements have been commented upon by an accountant, members are entitled to have access to the accountant’s report. Otherwise, the president or the person preparing the statements is obliged to state whether they were prepared in conformity with generally accepted accounting principles. Under the Business Corporations Act, smaller, non-offering corporations are not required to have an auditor, provided all the shareholders agree. Otherwise, an auditor must be appointed, and the Act sets out detailed provisions governing their rights and duties. The Business Corporations Act also provides for the appointment of audit committees who report to the board. These provisions, again, are suppletive in the case of non-offering corporations.

In our view, the provisions of the Model Act are to be preferred. The proposed Act should not impose the requirement of auditor on nonprofit corporations per se. We return to this issue again, however, in chapter 17, where we take up the regulation of the sector in general and the regulation of fundraising.

(g) Records

All corporations laws provide that the corporation maintain certain documents, registers, and records. Under the Ontario Corporations Act, corporations are obliged to maintain minutes of all proceedings at members’ meetings, a copy of the letters patent and supplementary letters patent and bylaws, a register of members with the names and addresses of members for the previous ten years, a register of all current and previous directors with the relevant dates of their tenure of office and their addresses, and “proper books of account and accounting records with respect to all financial and other transactions of the corporation”. The statute goes on to provide that these records are to be kept at the head office of the corporation and be subject to inspection during normal business hours by any director. Section 305 provides that the minutes of members’ meetings and all documents and registers except the books of account should be open for inspection, during normal business hours, by members and creditors and that these persons have the right to make extracts from these records. Lists of members may only be provided to members who undertake to use the list “only for purposes connected with” the corporation. Non-members may obtain a copy of the list of members upon the payment of a reasonable fee, again, “only for purposes connected with” the corporation. “Purposes connected with the corporation” is defined to include “any effort to influence the voting of...members at any meeting of the corporation...or any
effort to effect an amalgamation or reorganization and any other purpose approved by the Minister”.

The proposed new statute should impose similar record-keeping obligations on corporations, modified as per the current provisions of the *Business Corporations Act* or the *Model Act*.

**External Supervision**

The *Corporations Act* provides in numerous places for the formal intervention of the Minister, the Lieutenant Governor, the Lieutenant Governor in Council, or the court where the requirements of the Act have not been met or upon a complaint that a governance norm has been breached. In addition, there are general and specific powers of supervision in the Minister or the Lieutenant Governor or the Lieutenant Governor in Council. Among these, the Minister has the power to appoint an auditor if the corporation does not appoint one, order the corporation’s powers forfeited where the corporation is inoperative for two years, and dissolve the corporation for "sufficient cause", including failure to comply with the *Corporations Information Act* or allowing the number of its members to fall below three. Under specified conditions, the court may order a members’ meeting or an audit, and, upon the application of a member or creditor of the corporation, it may order the corporation to perform any duty required under the *Corporations Act*. The Minister also retains a discretionary role in other areas such as amalgamation, allowing books and records of the corporation to be kept elsewhere than at its head office, and reviving a dissolved corporation.

We have already suggested in various places that the NOC should have most of the same rights as members do in the case of charitable and religious corporations. The proposed new statute should also contain provisions establishing specific powers in the NOC, similar in intent to the provisions just described, but more restricted and modeled, more appropriately, on the powers of the Director under the *Business Corporations Act*. As under the current *Corporations Act*, the principal role of the court under the new Act should be to control access to members’ remedies. The precise role of the court in this regard should be modeled on the role the court has in the *Business Corporations Act* provisions which should serve as the basis for the remedies in the proposed Act.

**5. REORGANIZATION AND DISSOLUTION**

**Introduction**

The *Corporations Act* provides that the letters patent may be amended by special resolution-two-thirds of the votes cast at a members’ meeting—and in special cases—those involving a conversion of a nonprofit corporation into a corporation with share capital—the written authorization of one hundred percent of the members or at least ninety-five percent of the members on twenty-one days’ notice. Amalgamation and continuance to another jurisdiction is also accomplished by a two-thirds vote. In keeping with the letters patent nature of the *Corporations Act* regime, all these fundamental changes
require an application to the Lieutenant Governor. The application is for supplementary letters patent or new letters patent. Issuance of these is a discretionary act.

Voluntary dissolution is provided for under section 319.283 This section permits a corporation to surrender its charter, provided the members agree in accordance with the relevant governing provisions of the charter, and creditors are not disadvantaged. We mentioned above that the Lieutenant Governor has the power to dissolve a corporation in any case where sufficient cause is shown. On dissolution of the corporation, its property is distributed \textit{pro rata} among the members, but the property remains liable for the debts of the corporation for a year.284 Undisposed-of property is forfeited to the Crown.

Corporations may pass a bylaw, confirmed by a two-thirds vote of members, requiring its remaining property to be distributed to charitable organizations or to organizations whose objects are beneficial to the community.285 Thus there is no requirement in the statute that, upon dissolution of a charitable or religious corporation, its property must go to charity.286

As has been observed already, the incorporating document is now required by the Office of the Public Trustee to state that, upon dissolution, the assets will be distributed to another charitable corporation or charitable purpose trust.

These provisions of the Act are among its weakest. This is due primarily to two factors: the Act’s failure to regulate the destination of the property of religious and charitable corporations when a fundamental change-amendments to the articles (including changes in its nonprofit classification and changes in its name), mergers and amalgamation, sales of substantially all assets, and continuance-occurs or on dissolution; and the fact that provisions are dated. The proposed Act should address the first deficiency by putting in place a corporate \textit{cy-près} rule applicable to all fundamental changes and dissolutions of charitable and religious corporations. It should address the second deficiency by modernizing the law governing fundamental changes and dissolutions by bringing it into line with the regulation of fundamental changes and dissolutions under the \textit{Business Corporations Act}. We examine each of these issues in turn.

\textbf{(b)Corporate \textit{Cy-Près} Rule}

The corporate \textit{cy-près} rule should be more liberal than the trust law \textit{cy-près} rule since there is less reason in the case of corporations to pay special attention to the wishes of donors. In our view, it should have the following principal elements:

(1) The assets in all cases must remain devoted to a charitable or religious purpose and no fundamental change can result in the corporation losing its exclusively charitable designation.

(2) The power to make fundamental changes or to decide on the destination of the corporate property after dissolution should generally be exercisable by the corporation and its members in accordance with the generally applicable rules governing fundamental changes and dissolutions (to be discussed shortly). This
power should be subject only to a power in the NOC or the court, depending on the type of change or dissolution under consideration, to prohibit the change if the change is, in its opinion, dishonest to the persons who have contributed to the corporation in the previous five years, or the change would result in an application of the corporation’s property that is, all things considered, ineffectual.

Property held in trust by a corporation would be dealt with by trust law rules. Such trusts can be private or purpose trusts; they should be governed accordingly.

(c) Fundamental Changes

(i) Introduction

In this section we look briefly at the rules governing each of the types of fundamental change and dissolution. We present our proposals in outline and recommend that the drafting of the provisions follow as closely as possible the equivalent provisions in the Business Corporations Act, with the necessary changes being made. On the general question of dissenter’s rights and the appraisal remedy, we recommend that provision for these be made in the statute, but that they be available only in the case of mutual benefit corporations, political corporations, and general nonprofit corporations, and only in the case where the articles of the corporation so provide. The statute should permit the articles to provide for an appraisal remedy, in the case of mutual benefits corporations, requiring the compulsory repurchase of the membership interests of those who dissent from fundamental changes, and for the other types of corporations, requiring the annual membership fee to be paid in the year of the fundamental change.

(ii) Amendments to Articles

The proposed Act should contain a suppletive rule requiring a ‘special resolution’—defined as a two-thirds vote of the votes cast—to approve any amendments to the articles, including changes to the name of the corporation and changes in its classification. Some amendments, such as changes in name, should be subject to other requirements, such as a solvency condition and a condition that the corporation has not engaged in any substantial fundraising in a relevant previous period. In the case of religious and charitable corporations, amendments to the articles should also require approval of the NOC, which would apply the corporate cy-près rule as just defined. The rules should ensure that members have had sufficient advance notice of the resolution which will amend the articles. Class voting should be required. The Model Act differentiates in a useful way between public benefit corporations and religious corporations in this regard. For the former, class voting is required only where the amendment affects different classes differently; for mutual benefits, class voting is required where a class is affected in almost any way; and for a religious corporation, class voting is required only if required by the articles. We think this differentiation should be adopted in the new Act.

(iii) Mergers and Amalgamation
Detailed requirements regarding the required contents of the merger plan should be set out in the proposed Act. The merger plan should be subject to adoption by special resolution, and also be subject to class voting under the same conditions as set out above. Approval of the NOC should be required. The corporate cy-près rule in the case of a merger should be formulated to require that the merged corporation meets the exclusively charitable standard. If so, charitable and non-charitable corporations, for example, should be permitted to merge. There should be an explicit proviso mentioning that future gifts in the name of one of the merged corporations go to the merged corporation, unless there is a contrary explicit intention expressed in the gift.

(iv) Asset Sales and Continuances

Continuances and sales of substantially all of the assets of the corporation, likewise, should be subject to approval by special resolution and, in the case of religious and charitable corporations, approval by the NOC.

(v) Dissolutions

Voluntary dissolutions should be subject to special resolution. Distribution of the corporation’s property should be subject to the relevant applicable non-distribution constraint. For religious and charitable corporations, dissolution and distribution of the property should also be subject to court approval and the court should be empowered to approve any distribution of the property duly approved by the corporation, and in accordance with the specially formulated cy-près rule for corporations. The NOC and Revenue Canada should be notified of the application to dissolve.

Judicial dissolutions should be permitted on application of the NOC or of a member and be available on conditions similar to those specified in section 207 of the Business Corporations Act. These conditions should include such exceptional circumstances as fraud, misapplication of corporate property, insolvency, oppression, deadlock, and in the case of charitable and religious corporations, waste or a failure to pursue its purposes. In a judicial proceeding to dissolve a nonprofit corporation, the court should have the power to appoint an interim receiver and the court should have the power to dispose of the property in accordance with the corporate cy-près rule, on the recommendation of the NOC.

Endnotes:

1

On nonprofit corporations law generally, see J.M. Hodgson and A.C. McNeely, "Directors and Trustees: The Charitable Corporation and Trusteeship", in Charitable Mosaic (Toronto: Canadian Bar Association-Ontario, 1983) [unpublished]; P.A. Cumming, 'Corporate Law Reform and Canadian Not-For-Profit Corporations "(1973), 1 Philanthrop. (No. 2) 10; W.H. Hurlburt, 'Towards a Reformed Non-Profit Corporations Statute "(1988), 7 Philanthrop (No. 3) 17; H.L. Oleck, Non-profit Corporations,

2


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In the words of the Detailed Background Paper for the Canada Non-Profit Corporations Bill (Ottawa: Consumer and Corporate Affairs, 1980) (hereinafter referred to as "Background Paper"), at 11, the current non-profit corporations law was "rendered positively archaic "with the adoption of the modern business corporations statutes in the 1970s.

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See Corporations Act, supra, note 3, Part III, ss. 117-133, as amended.

6


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See Companies Act, supra, note 4, Part III.

8
See, for example, Ontario *Corporations Act, supra,* note 3, s. 133, as am. by S.O. 1994, c. 27, s. 78(7). This is, in fact, roughly the same approach we recommend in ch. 13, *supra,* with respect to the form of legislation to govern charitable purpose trusts. This technique works for charitable purpose trusts because the differences between the private trust and the purpose trust are less marked. This is due, in part, to the comparatively less important role that beneficiaries play in monitoring the trustees of a private trust and, in part, to the generally passive nature of the responsibilities of the trustees.

9

See, for example, the *Business Corporations Act, supra,* note 4, Part III (dealing with corporate finance); Part IV (dealing with the sale of restricted shares); Parts VII and VIII (dealing with shareholders and proxies); Part X (dealing with insider trading); and Parts XIV and XV (dealing with reorganizations and takeovers).

10

These differences were instrumental in persuading the *Lawrence Committee Report, supra,* note 2, to proceed with an interim report dealing with the business corporation only.

11

For a similar recommendation, see the *Background Paper, supra,* note 4, at 11, and the Alberta Institute of Law Research and Reform, *Proposals for a New Alberta Incorporated Associations Act,* Report No. 39 (Edmonton: March 1987) (hereinafter referred to as "*Alberta Proposal*"), at 15

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The *Background Paper, supra,* note 4, at 11, recommended likewise.

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See *Co-operative Corporations Act, R.S.O.* 1990, c. C.35, and *Credit Unions and Caisses Populaires Act, R.S.O.* 1990, c. C.44.

16

This is not to suggest, however, that the entire provincial regime governing nonprofit organizations should not be within the administrative jurisdiction of a single government agency.

17

Canada, Proposals for a New Not-For-Profit Corporations Law for Canada (Ottawa: Department of Consumer and Corporate Affairs, 1974). See supra, ch. 2.

19


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Alberta Proposal, supra, note 11.

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Volunteer Incorporations Act, Bill 54, Alta. 1987 (21st Leg., 2nd Sess.).

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N.Y. Not-For-Profit Corporation Law, ch. 35 (Consol. 1969), Chap. 1066, effective September 1, 1970.

27


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English charities may use (1) the company limited by guarantee under the Companies Act 1985, c. 6 (U.K.); (2) the Friendly Societies Act, 1974, c. 46 (U.K.), Part 1 which is available for charities with a benevolent purpose or a purpose authorized by the Treasury; and (3) Industrial and Provident Societies Act, 1965, c. 12 (U.K.), as well as various other statutes. See Warburton and Morris, supra, note 17.

As the common law has developed, numerous situations have arisen in which legal forms have been interbred; purity has been lost to expediency and the needs of the day have spawned some curious results. Forms, once strangers to each other, have been joined out of wedlock and the result has been the birth of a 'nullius filius.' Of all the bastard legal forms it is my contention that the charitable corporation ranks close to the top of the list. It has strains of both corporation law and trusts and on the paternal side one sees shades of the Chancellor's foot!


The nature of the jurisdictions is complicated by the historic existence of the now largely defunct office of visitor. Some aspects of the Crown's authority in the case of ecclesiastical and eleemosynary corporations derives from its historical jurisdiction as visitor to these institutions. The origins of this aspect of the Crown's role lay in pre-reformation ecclesiastical law and in the power of the Bishop or Ordinary to visit and arbitrate disputes at the parish level.

*Supra*, note 29, at 209. Historically, see *Incorporated Society v. Richards* (1841), 1 Dr. & War. 258, 4 Ir. Eq. R. 177, and *Re Manchester Royal Infirmary; Manchester Royal Infirmary v. Attorney-General* (1889), 43 Ch. Div. 420, 59 L.J. Ch. 370.

*Supra*, note 29, at 243-44.
A bequest to a corporate body...takes effect simply as a gift to that body beneficially, unless there are circumstances which show that the recipient is to take the gift as a trustee. There is no need in such a case to infer a trust for any particular purpose. The objects to which the corporate body can properly apply its funds may be restricted by its constitution, but this does not necessitate inferring as a matter of construction of the testator’s will a direction that the bequest is to be held in trust to be applied for those purposes: the natural construction is that the bequest is made to the corporate body as part of its general funds, that is to say, beneficially and without the imposition of any trust.


34 Supra, note 29, at 245, 247.


36 See, for example, Re Harold G. Fox Education Fund and Public Trustee, supra, note 29, and Re Faith Haven Bible Training Centre, supra, note 29, on the status of directors as trustees and the applicability of the Trustee Act, R.S.O. 1980, c. 512, to them on the issue of remuneration.


38 See, infra, ch. 17.

39 Corporations Act, supra, note 3, s. 118, as rep. & sub. by S.O. 1994, c. 27, s. 78(5). The Act was amended in 1994 to replace the list of possible purposes with the phrase "that has objects that are within the jurisdiction of the Province of Ontario".

40 Ibid., s. 126(1).

41 Supra, note 6, s. 154.
See Cumming, supra, note 1, at 24-25, for a similar discussion.

The lack of clarity on this point persuaded the drafters of the New York statute to change the name of the entity from "nonprofit" to "not-for-profit": see Not-For-Profit Corporation Law, supra, note 26. This nomenclature is intended to indicate that commercial activities are not prohibited altogether.

But see Guaranty Trust Co. of Canada v. Minister of National Revenue, [1967] S.C.R. 133 at 152, 60 D.L.R. (2d) 481 at 494 (subsequent references are to [1967] S.C.R.) per Ritchie J. (Spence and Hall J.J. concurring), where the statutory language under discussion was interpreted as requiring the property of a charitable corporation to continue to be devoted to exclusively charitable purposes on dissolution. The British Columbia Society Act, R.S.B.C. 1979, c. 390, addresses this problem, but only in respect of its second branch. Section 73 of the British Columbia statute provides that on dissolution of a society "with a charitable purpose", the assets shall not be distributed among members but shall be either paid to a charitable institution or charitable trust pursuant to the constitution bylaws or members' resolution of the society or be paid to the Ministry of Finance.

Supra, note 19.

Ibid., s. 2.

Ibid., s. 2 (9).

Ibid., s. 116 (3).

Ibid., s. 161(2). There is an incoherence here because the statute in this provision is using "charitable" in some sense other than the defined sense.

Ibid., s. 161(4).

Supra, note 21.
52
Ibid., s. 80(2).

53
Ibid., s. 1(1), (2).

54
Ibid., s. 80(4).

55
Ibid., s. 42(2).

56
Ibid., s. 68(2).

57
Not-For-Profit Corporation Law, supra, note 26, §102(5).

58
Ibid., §201.

59
Nonprofit Corporation Law, supra, note 25, §5060.

60
Ibid., §5059.

61
Ibid., §5061.

62
Supra, note 24.

63
R.S.C. 1985, c. 1 (5th Supp.).
Supra, note 4.


See B.L. Welling, *Corporate Law in Canada: The Governing Principles*, 2d ed. (Toronto: Butterworths, 1991) at 3-9, for an explanation of the constitutional difficulties with this doctrine.

See L. Getz, "Ultra Vires and Some Related Problems" (1968), 3 U.B.C.L. Rev. 30. The repeal of the *ultra vires* doctrine has been one of the major elements in the reform of corporations law in Canada and the United Kingdom over the last two decades. The history of the reform of the *ultra vires* doctrine begins with the report of the Cohen Committee which reported to the president of the Board of Trade in England in 1945: Cohen Committee on *Company Law Reform in the United Kingdom* (Cmd. 6659, 1945). The Cohen Committee concluded (paras. 11 and 12) that "the doctrine of *ultra vires* is an illusory protection for the shareholder and yet may be a pitfall for third parties dealing with the company...[and] as now applied to companies the *ultra vires* doctrine serves no positive purpose but is on the other hand a cause of unnecessary prolixity and vexation ". In 1962, the Jenkins Committee on *Company Law Amendment* (Cmnd. 1749, 1962) recommended, however, that the *ultra vires* doctrine be retained on the basis that it provided shareholders and creditors with a certain measure of protection against the ever growing powers of directors. In Canada, the Lawrence Committee Report, *supra*, note 2, recommended that the *ultra vires* doctrine be repealed on the basis that there are far better ways to protect the interests of shareholders and creditors against the exercise of excess powers by directors. The Lawrence Committee's recommendation on *ultra vires* was not, however, implemented in the first version of the new Ontario *Business Corporations Act*, *supra*, note 2. The Lawrence Committee had recommended that any new statute declare that a corporation has the capacity of a natural person and that its capacity "as regards third parties is not limited by the terms of its charter ". The 1970 Ontario Act did not repeal the *ultra vires* doctrine as such, but it did proclaim that any act entered into by a corporation in excess of its powers would not be "invalid by reason of the fact that the corporation was without capacity or power ". The relevant section of that statute – s. 16 – went on to provide, however, that shareholders could obtain a restraining order against any corporation
about to exceed its capacity or powers, and, more importantly, that the court could set aside, on terms, any contract entered into in excess of the corporation's powers. The later statutes, the Canada Business Corporations Act, supra, note 4 and the Ontario Business Corporations Act, 1982, supra, note 13, declared that a corporation has the power and capacity of a natural person but prohibited a corporation from carrying on any business or exercising any power that is restricted by its articles.

71

Business Corporations Act, supra, note 4, s. 15.

72

Ibid., s. 16.

73

See Welling, supra, note 69, ch. 4.

74


75

There are two views on the role of natural persons in respect of transactions involving a corporation. On one view, the role is exclusively one of agency, that is, the natural person acts as agent for the corporation principal. For this view, see Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd., [1964] 2 Q.B. 480, [1964] 1 All E.R. 630 (C.A.). The other view is that in some instances, it is a question of agency, but in others, the natural person acts "for", not "on behalf of", the corporation, and therefore their act is the act "of" the corporation. For this view, see Newborne v. Sensolid (Great Britain) Ltd., [1953] 1 All E.R. 708, [1954] 1 Q.B. 45 (C.A.), and Welling, supra, note 69, at 275. This view relies more strongly on the fiction that the corporation is a real person and is therefore itself capable of acting. See Phonogram Ltd. v. Lane, [1982] Q.B. 938, [1981] 3 All E.R. 182 (C.A.), where this distinction between signing "for" and signing "as agent" is rejected. In the text, our discussion is premised on the first view.

76

The origin of the doctrine is usually taken to be Ernest v. Nicholls (1857), 6 H.L. Cas. 401, 10 E.R. 1351.

77


78


79

Supra, note 4.
R.S.C. 1985, c. C-44.

81

See Welling, supra, note 69, at 228-30.

82

Section 275 of the Corporations Act, 1982, supra, note 3, exempted these corporations from the provisions of the Mortmain and Charitable Uses Act, R.S.O. 1980, c. 297, rep. by 1982, c. 12, s. 1(1), because s. 2(1) of the latter Act stated that it did not apply to corporations authorized to acquire and hold land under another statute.

83

Supra, note 37.

84

S.O. 1994, c. 27, s. 78(8).

85

S.O. 1994, c. 27, s. 78(9).

86


87

Corporations Act, supra, note 3, s. 23(2).

88

Ibid., s. 23(1)(q), (r), (t).

89

Business Corporations Act, supra, note 4, s. 184(1).

90

Ibid., s. 17(1).

91

Supra, note 19, Divisions Part II, V, VI, and VII.
Supra, note 21, Part 14.

93

R.S.O. 1990, c. S.5, s. 35(2)¶7.

94

Supra, note 3.

95

Supra, note 4.

96

Supra, note 80.

97

Supra, note 21.

98

Supra, note 19.

99

Supra, note 24.

100

Business Corporations Act, supra, note 4, s. 116.

101

Corporations Act, supra, note 3, s. 311.

102

The Corporations Act, ibid., s. 311(2) and (3) go on to provide a way for the remaining members to displace the liability. If the member protests to the Minister that the number has fallen below three, then the member is exonerated for debts arising after the date of notification.

103

Supra, note 21, s. 12(3).

104

Not-For-Profit Corporation Law, supra, note 26, §301.
105

*Nonprofit Corporations Act, 1995, supra, note 19, s. 10.*

106


107

We recommend in ch. 17, *infra*, that another statute dealing with the regulation of charities generally ought to have provisions in it restricting the use of certain distinctive names, such as "community foundation", "charity", "foundation", "nonprofit", and "not-for-profit".

108

*Supra*, note 3.

109

Section 154(1) of the *Canada Corporations Act, supra, note 6*, is to a similar effect.

110


111

*Ibid.*, at 51. The informal link between corporations law and law of trusts evident in the administrative procedures just described is enhanced further by the general posture of these two agencies toward the charitable corporation. For example, the *Handbook* does not hesitate to refer to the directors of a charitable corporation as "trustees". It gives the advice that these directors are permitted to avail themselves of s. 60 of the *Trustee Act* (now R.S.O. 1990, c. T. 23), and it also states that "trustees" are not permitted to be remunerated in any capacity whatsoever. It goes on to describe the directors’ duties and powers almost exclusively in the terms of trust law.

112

*Supra*, note 19.

113

*Supra*, note 26.

114

*Supra*, note 25. Indeed, as was pointed out in the *Lawrence Committee Report, supra*, note 2, it is not clear why a letters patent system of incorporation was adopted in Canada in 1864 considering that two years
earlier the United Kingdom had enacted the *Companies Act, 1862, 25 & 26 Vict., c. 89 (U.K.)*, which permitted incorporation by registration as a matter of right.

115

*Corporations Act, supra,* note 3, s. 4(1).

116

*Ibid,* s. 4(2), rep. by S.O. 1994, c. 27, s. 78(1).

117

*Supra,* note 4.

118

The argument in favour of one-person business corporations was thought to be compelling by the *Lawrence Committee Report, supra,* note 2. In making its recommendation in favour of one-person corporations, the Lawrence Committee followed the practice of at least 16 states of the United States and s. 47 of the *Model Business Corporations Act,* Committee on Corporate Laws of the American Bar Association, Section of Corporation, Banking and Business Law (Philadelphia: ALI ABA, 1964). Now see American Bar Association, Section of Business Law, *Revised Model Business Corporations Act* (Chicago: ALI ABA), §2.01.

119

*Volunteer Incorporations Act, supra,* note 21 s. 4(1), (2).

120

*Ibid,* s. 2.

121

*Supra,* note 19, s. 5.

122

*Ibid,* s. 5.

123

The *Volunteer Incorporations Act, supra,* note 21, s. 42(1) contains a similar provision applicable to "soliciting" corporations as does the Saskatchewan *Nonprofit Corporations Act, 1995, supra,* note 19, s. 89. This latter section imposes the requirement of a minimum of three directors also on corporations which have made a solicitation to the public. We would recommend likewise. See, *infra,* ch. 16.

124

*Lawrence Committee Report, supra,* note 2, at 10.


Compare Newborne v. Sensolid (Great Britain) Ltd., supra, note 75, where the issue was whether the signor could take the benefit of the contract after it was realized that the company for which he signed had not been incorporated at the time of the contract. There, the Court of Queen’s Bench in England held that the signor had signed, not as agent for the company (in which case the doctrine of Kelner v. Baxter, supra, note 125, according to its conventional interpretation, would have applied both to impose liability and give the benefit of the contract), but for the company.

For the division of the fact situations, see J. Ziegel, R.J. McKintosh, and D. Johnston, Cases and Materials on Partnerships and Canadian Business Corporations, 3d ed. (Toronto: Carswell, 1994), at 269.

Supra, note 4, s. 21.

Supra, note 80.

Supra, note 127.

Supra, note 125.


R.S.O. 1990, c. C.39, ss. 2, 3, and 4, as am. by 1994, c. 17, ss. 33, 34, and 36 respectively.

Under an amendment to the *Corporations Information Act*, ibid. (S.O. 1994, c. 17, s. 36), s. 4 is repealed and replaced by a provision pursuant to which the corporation must file a notice of change only in respect of a change in its address. Corporations under the new rule may file, but are not obliged to file, a notice of change concerning other information contained in the initial filing.

*Corporations Information Act*, ibid., s. 7, as rep. & sub. by S.O. 1994, c.17, s. 38.

Ibid., s. 5, as am. by S.O. 1995, c. 3, s. 3(1), (2) (to come into force on proclamation).

Ibid., s. 9, as am. by S.O. 1994, c. 27, s. 79.

Ibid., s. 10.

Ibid., s.13, 14.

Ibid., s.16.

Ibid., s.18, as am. by 1994, c.17, s. 41.

For example, see *Model Act*, supra, note 24, § 15.07.
Supra, note 19.

Supra, note 3.

Ibid, s.120.

See, for example, Non-Profit Corporations Act, 1995, supra, note 19, s.113(2), and Volunteer Incorporations Act, supra, note 21, s. 30(b).

See Model Act, supra, note 24, §§6.03, 6.40, and 8.04(b).

Supra, note 3, s. 123.

See, also, Model Act, supra, note 24, §6.40, and Non-Profit Corporations Act, 1995, supra, note 19, s.113(3).

Corporations Act, supra, note 3, s. 128.

Supra, note 21, s. 36.

Supra, note 19, s. 116.

Model Act, supra, note 24, §6.11.

Supra, note 3, s. 124.
See Volunteer Incorporations Act, supra, note 21, s. 31(1).

160

See Model Act, supra, note 24, §6.02.

161

Corporations Act, supra, note 3, s. 129(1)(d).

162

See Model Act, supra, note 24, §6.20(a).

163

See Model Act, ibid., §6.20(b).

164

See Non-Profit Corporations Act, 1995, supra, note 19, s. 120, and the Model Act, supra, note 24, §6.21(a).

165

See Model Act, ibid., §6.21(b), which requires 15 days' notice of the decision to terminate and or reasons for the termination and an opportunity in the terminated members to be heard.

166

Corporations Act, supra, note 3, ss. 93 and 82.

167

Ibid., s. 293.

168

Ibid., s. 294.

169

Supra, note 21, ss. 53-63.

170

Supra, note 24, §§7.01-7.30.

171

Supra, note 4, ss. 92-114.
172


173

*Supra*, note 21, s. 61(1).

174

*Supra*, note 24, §7.04.

175


176

*Corporations Act*, *supra*, note 3, s. 84.

177

*Supra*, note 24, §7.24.

178

*Supra*, note 19, ss. 134-141.

179

See *Business Corporations Act*, *supra*, note 4, s. 112.

180

*Supra*, note 24, §7.25.

181


182

*Ibid*.

183

*Corporations Act*, *supra*, note 3, ss. 306-308.
Ibid., s. 305.

Ibid., s. 97.

Model Act, supra, note 24, §§16.02 and 16.20.

Business Corporations Act, supra, note 4, ss. 161-167 (s. 161 am. by S.O. 1994, c. 27, s. 71(19)).

Corporations Act, supra, note 3, s. 295.

Ibid., s. 296.

Ibid., s. 297.

Supra, note 19, ss. 127 and 133.

Supra, note 24, §7.01.

Ibid., §6.30.

Ibid., §16.04.

Volunteer Incorporations Act, supra, note 21, s. 127.

Ibid., s. 135.
197

Ibid., s. 131.

198

Non-Profit Corporations Act, 1995, supra, note 19, ss. 222-233.

199

Supra, note 4, s. 115(1).

200

Supra, note 24, §8.01.

201

Corporations Act, supra, note 3, s. 70.

202

Supra, note 4, s. 115.

203

Ibid., s. 127, as am. by S.O. 1994, c. 27, s. 71(16).

204

Supra, note 19, s. 102.

205

Supra, note 24, §8.01.

206

Supra, note 3, s. 283(2).

207

Ibid., s. 285.

208

Supra, note 4, ss. 5, as am. by S.O. 1994, c. 27, s. 71(2), and 125, as am. by S.O. 1994, c. 27, s. 71(5).

209
See *Non-Profit Corporations Act, 1995*, *supra*, note 19, s. 89, for a similar provision.

210

_Corporations Act, supra,* note 3, s. 287(2).

211

_Ibid., s. 287(4).

212

_Ibid., s. 286(4), (5).

213

_Ibid., note 3, s. 288.

214

_Ibid., s. 82.

215

*Supra,* note 24, §§8.20-8.25.

216

*Supra,* note 19, ss. 91, 97, and 101.

217

*Supra,* note 4, s. 126.

218

See, for example, *Business Corporations Act*, *ibid.*, ss. 126(13) and 129.

219

_Re City Equitable Fire Insurance Co., [1925] 1 Ch. 407, [1924] All E.R. Rep. 485 (C.A.), and Re Brazilian Rubber Plantations & Estates Ltd., [1911] 1 Ch. 425, 80 L.J. Ch. 221 (C.A. ) are the leading cases.

220


221
Supra, note 4, s.134(1)(a), (b), (2).

222

Ibid., s. 134(3).

223

Supra, note 24, §8.30.

224

Supra, note 4, s. 136.

225

Ibid., s. 136(4).

226

For example, see the Model Act, supra, note 24, §§8.50-8.58, and Corporations Act, supra, note 3, s. 80. On this issue, see D.A. Bailey and K.B. Bills, "D & O Liability Exposure of Nonprofit and Privately-held Organizations" (1993), 61 Assurances 41.

227

See Welling, supra, note 69, at 378-454, for a full discussion of the fiduciary obligation of directors.

228

Supra, note 4.

229

Ibid, s. 134(1)(a).

230

The Corporations Act, supra, note 3, s. 69, permits payment of directors as director if a bylaw to that effect is confirmed by members.

231

Business Corporations Act, supra, note 4, s. 132.

232

The Corporations Act, supra, note 3, s. 71, imposes similar procedural requirements, but no requirement as to substantive fairness.

233
Business Corporations Act, supra, note 4, s. 137.

234

Supra, note 3, s. 68.

235

Supra, note 4, s. 116.

236

Supra, note 3, s. 67.

237

Supra, note 4, s. 122.

238

Supra, note 24, §8.08.

239

Ibid., §8.09.

240

For a similar provision, see Business Corporations Act, supra, note 4, ss. 119(2), as rep. & sub. by 1994, c. 27, s. 71(13), and 121.

241

Supra, note 3, s. 81, as am. by S.O. 1992, c. 32, s. 6(6).

242

See Model Act, supra, note 24, §8.33, and the Business Corporations Act, supra, note 4, s. 130, for similar provisions.

243

Corporations Act, supra, note 3, s. 289.

244

Ibid., ss. 289 and 290.

245

Ibid., s. 291.
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*Supra*, note 24, §8.40.

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*Supra*, note 4, ss. 133, 134, and 136.

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*Supra*, note 19, ss. 108, 109, and 111.

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*Supra*, note 3, s. 94.

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258
Supra, note 4, s. 148, as am. by S.O. 1994, c. 27, s. 71(18).

259

Ibid., ss. 149-157.

260

Ibid., s. 158.

261

Corporations Act, supra, note 3, s. 299.

262

Ibid., s. 300, paras. 1 and 2.

263

Ibid., s. 300, para. 3.

264

Ibid., s. 300, para. 4.

265

Ibid., s. 302.

266

Ibid., s. 304.

267

Ibid., s. 306.

268

Ibid., s. 307.

269

Ibid., s. 307(6).

270

Supra, note 4, Part XI.
Supra, note 24, §16.01.

Corporations Act, supra, note 3, s. 94(6).

Ibid., s. 315.

Ibid., s. 317, as am. by S.O. 1993, c. 16, s. 3; 1994, c. 27, s. 78(10), (11).

Ibid., s. 317(9), as am. by S.O. 1993, c. 16, s. 3; 1994, c. 27, s. 78(10).

Ibid., s. 311(3).

Ibid., s. 297.

Ibid., s. 310.

Ibid., s. 333.

Ibid., ss. 113(4), 304(3), and 317(10), as am. by S.O. 1994, c. 27, s. 78(11), respectively.

Ibid., s. 131.

Ibid., ss. 113 and 313, respectively.
See, however, *Guaranty Trust Co. of Canada v. Minister of National Revenue*, supra, note 44, where the Minister argued that this possibility precluded the organization from being registered as a charity. Ritchie J. stated, on the contrary, at p. 152:

> It seems to me that a corporation with exclusively charitable objects, the Letters Patent of which expressly provide that ‘any profits or other accretions to the corporation shall be used in promoting its objects’, cannot be one to which the provisions of s. 115 were intended to apply. On the dissolution of such a corporation ‘its remaining property’ is in my opinion, under the terms of its Letters Patent, required to be used in promoting objects ‘beneficial to the community’ and the enactment of any such bylaw as is contemplated by s. 115 would therefore be redundant.
CHAPTER 16

THE UNINCORPORATED ASSOCIATION

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1. INTRODUCTION
Of the three forms of organization available to nonprofit entities today, the unincorporated association requires the minimum in the way of legal sophistication to enter and maintain. Despite that, it seems unlikely that it is the most common form of organization for charities in Canada. The fact, however, is that we have little idea of the extent of its use since there are few statistics available. It is the form used by many social clubs, debating societies, political interest groups and interest group coalitions, alumni associations, religious organizations and churches, home and school associations, sports associations (the NHL, for example), and trade associations. It is, thus, as diverse in its uses as the corporation.

The basic law of the association is the law of contract.\(^1\) It is probable that in many cases of the form's use, the contract between the members of the association is mostly or entirely implicit, since many groups which lack the interest or wherewithal to incorporate also lack the interest or resources required to make the terms and conditions of their association explicit. There are many associations, of course, that do have very precise terms of association. Many religious organizations, for example, have very stable financial, administrative, and institutional arrangements, supported by sophisticated explicit, as well as implicit, rules of association.

On the whole, the law governing nonprofit associations is poorly developed and not well understood generally. One author, some time ago, stated that the law "has failed to provide a settled place for the unincorporated group not organized for profit".\(^2\) This statement, in our view, remains true of the current law of Ontario. This is a somewhat surprising state of affairs given the range of nonprofit purposes served by the unincorporated association.

There are two main groups of issues to be considered in the examination of the law governing unincorporated associations. First, since the association has no legal personality, it has no civil capacity. This feature of the association raises difficulties concerning the ownership of its property, its rights and its liabilities in contract, tort and unjust enrichment, and its ability to sue and be sued. Second, given the fact that in many cases the contract or contracts establishing the association are only implicit, it is often not clear what the basic governance norms of an association are. The first set of issues will be examined in section 2 under the heading "Definition and Attributes" and in section 5 under the heading "Reorganization and Dissolution". The second set of issues will be discussed in section 4 under the heading "Governance."

The basic recommendation of the Commission is that the law should be reformed through the enactment of a statute dealing exclusively and comprehensively with the unincorporated association. The statute should set out suppletive and in one or two cases imperative norms based on or derived from the concepts underlying the contract of partnership. The foundational concept of partnership is the concept of reciprocal or mutual agency which means, in essence, that each partner has the power to bind the
others, and the "firm", civilly. The provisions of the proposed statute should be based on an appropriate adaptation of this concept to the unincorporated association. The proposed statute should also make available to the association certain privileges of juridical personality, some of which should be available only upon maintenance of registered status.

Our model for the adaptation of the mutual agency concept to this use is section V of chapter 10 of the Civil Code of Quebec and, to some extent, similar statutory provisions in California, New York, and in the new Unincorporated Associations Act, 1992. Much of what we recommend is simply an adaptation of the Partnerships Act, informed by the case law experience of the last 200 years and the practical reality of the unincorporated association. Indeed, at one point in its history, the common law explicitly conceived of the unincorporated association as a partnership. The main objective of the reform, therefore, might be said to recover, clarify, and refine that understanding.

The following two preliminary points deal with the scope of our study and with issue of classification of unincorporated associations.

(a) Scope of Study

In this chapter we put two questions completely to one side. We do not engage in any reconsideration of questions relating to land ownership and succession mechanisms made available to religious organizations. These questions were examined extensively in our 1976 report on the law of mortmain, charitable uses, and religious institutions. Our recommendations for reform in that report were substantially accepted and enacted into law in the Religious Organizations' Lands Act. We do not think that the trust facility granted religious organizations under that Act essentially that land may be held in perpetual succession by the trustees of the organization and their successors for the benefit of the religious organization, without the need for conveyances to new trustees should be taken away or modified in any way, nor do we think that any similar facility should be made available to non-religious associations. In our view religious organizations are sufficiently distinct by virtue of their generally active membership, their requirements for land for the purposes of worship and assembly, their exclusively charitable nature, and their institutional sophistication and historical continuity that this limited special treatment should continue. Moreover, as we argue in what follows, the partnership concept, as adapted, provides a juridical basis for the unincorporated association that is more accurate and just as ample. Using that concept, we recommend below a way in which associations may hold land that is similar in purpose and effect to the technique used under the Religious Organizations' Lands Act. We also suggest below that the partnership concept, as adapted, accommodates the possibility of land being held in trust for the benefit of the association, or in the case of charities, for the purposes of the association. The only advantage that religious organizations will have over other unincorporated associations is the law's greater facilitation of perpetual succession.

The other area of law that we do not examine in any detail is the law governing the internal disputes of religious organizations. These disputes often involve issues
concerning the orthodoxy or correctness of competing interpretations of a religion’s teaching, or questions relating to the legitimacy of the accession of some members to the ruling hierarchy or to the governing council and the validity of decisions taken by such governing authority. These issues, it should be noted, arise in the context of religions organized both as associations and corporations. They are beyond the scope of our study.\(^\text{11}\)

(b) Classification of Unincorporated Associations

The proposed statute should use the classifications and terms developed in chapter 15 to define the types of unincorporated associations: religious, charitable (redefined as suggested to accord with federal law), mutual benefit, political, and general. It should use the same definitions of the nonprofit principle and apply them in the same way. Thus religious and charitable associations should be subject to the same non-commercial purpose constraint and the same non-distribution constraints as are charitable and religious corporations, and they should be subject to an "exclusively charitable" requirement. For these, we recommend a registration requirement similar in intention and in scope to what is recommended for charitable trusts and nonprofit corporations. We discuss this requirement further below. The others should be subject to the non-commercial purpose constraint and only the first non-distribution constraint.

2. DEFINITION AND ATTRIBUTES

(a) Introduction

In this section we examine questions relating to the contractual nature of the association, the ownership of property, and the civil liability of members.

(b) Legal Basis of the Association

(i) Basis of Association in Contract Between Members

That the foundation of the relationship between the members of an association is contractual is abundantly clear from the decisions.\(^\text{12}\) In *Re Caledonian Employees’ Benevolent Society*,\(^\text{13}\) the following description is provided:\(^\text{14}\)

It is not, I think, open to doubt that the fundamental and essential characteristic of the whole class of bodies described in the Act as companies, associations, and partnerships, is that they are bodies constituted by some species of contract of society, and founded on the contractual obligations thus undertaken by the members, or socii, inter se...No doubt the word 'association' is by itself capable of including a wide variety of much more loosely and irregularly constituted bodies of persons; but looking to the context in which it appears...I see no reason to doubt that what is meant is a society (whatever its object) based on consensual contract among its constituent members whereby their mutual relations inter se with regard to some common object are regulated and enforced.

It is also clear that under a contract of association, an association may be formed for the exclusive benefit of the members, for the pursuit of some common object, or for a
combination of these two reasons. In *Re Recher's Will Trusts*; *National Westminster Bank Ltd. v. National Anti-Vivisection Society*, Brightman J. said:

> [I]t is not essential that the members should only intend to secure direct personal advantages to themselves. The association may be one in which personal advantages to the members are combined with the pursuit of some outside purpose. Or the association may be one which offers no personal benefit at all to the members, the funds of the association being applied exclusively to the pursuit of some outside purpose. Such an association of persons is bound, I would think, to have some sort of constitution; that is to say, the rights and liabilities of the members of the association will inevitably depend on some form of contract inter se, usually evidenced by a set of rules.

It is, finally, clear that the contract of association need not be in writing, need not be reduced to a written constitutional form or to written rules, and that, indeed, it may be entirely oral. In *Re Thackrah; Thackrah v. Wilson*, it was said:

> Before one can find an association, there must be some rules, either written or oral, by which those who are supposed to be members of it are tied together. I think that they would probably be written rules. There must be some constitution.

We do not propose, of course, that the consensual or contractual nature of the association be modified in any significant way. Almost all of our proposals for reform, therefore, recommend the adoption of statutory rules of association that are entirely suppletive: they are merely presumed to be the terms to which the members of the association have agreed, and they prevail and will be applied by the court unless there is a contrary, explicitly or implicitly expressed, intention. The proposed statute should, therefore, make clear that it is defining the usual provisions of a special contract in a way that the *Partnerships Act*, unfortunately, in some places does not. The definition of the contract of association in article 2186-2 of the *Quebec Civil Code*, we think, does this reasonably well and, subject to our comments on classification, we would recommend the adoption of a similar provision:

> 2186 A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared between the members of the association.

The proposed statute should also provide that the association is created on the date the contract is formed, where no other date is indicated by the parties. It might also provide, as article 2268 of the *Quebec Civil Code* does, that it is assumed that it governs "the object, functioning, management and conditions of the association", although this is so obvious no one would be misled if such a provision were not included.

(ii) Suppletive Rule Governing Admission of New Members

Given its foundation in contract, the admission of new members to an association would, in theory and in the absence of a contrary provision, require the consent of all existing members for all to be bound by any new admission. In our view the implicit intention of the members of most associations is to the opposite effect: new admissions are permitted
as a matter of course. A suppletive rule that the contract of association is presumed to allow for the admission of new members without the consent of all should therefore be adopted. Article 2268-2 of the Civil Code of Quebec provides appropriately as follows: "It [the contract of association] is presumed to allow the admission of members other than the founding members."

(iii) Modifications to Contract of Association

Similarly, modifications to the contract of association would, in theory and in the absence of any provision to the contrary, require the unanimous consent of all parties. There is, in fact, a suppletive rule to this effect currently applicable to partnerships. In our view, most contracts of association are based on the assumption that the terms and conditions of the association are subject to majority rule. Therefore, in our view, a suppletive rule in favour of majority rule ought to be adopted. Article 2272-2 of the Civil Code of Quebec provides appropriately, as follows:

Collective decisions, including those to amend the contract of association, are taken by a majority vote of the members, unless otherwise stipulated in the contract.

A certain number of fundamental changes, however, should be governed by a suppletive rule requiring a special majority. We return to this point briefly below.

(iv) Right to Withdraw and Power to Expel

The right to withdraw from the association ought to be accorded by statute to all members regardless of any contrary stipulation in the contract of association, and be made subject only to the withdrawing member performing any of his or her outstanding financial obligations to the association. Concomitantly, the association ought to be presumed to have the right to expel any member from the association. It seems to us that these two provisions reinforce the completely voluntary nature of the association. The first, however, should be imperative to signal to association members that despite any lifetime commitment or vow of membership that they may have made, the court will enforce only their undertakings regarding pecuniary contributions. Article 2276 of the Civil Code of Quebec provides appropriately, as follows:

2276 Notwithstanding any stipulation to the contrary, a member may withdraw from the association, even if it has been established for a fixed term; if he withdraws, he is bound to pay the promised contribution and any subscriptions due.

A member may be excluded from the association by decision of the members.

The second provision ought to be subject to an imperative duty of fairness.

(v) Use of Term "The Association": A Legal Fiction

The law ought to have no compunction about using the expression "the association" (as well as "the contract of association"), but it ought to do so without also affirming or
appearing to affirm that the association is a real entity. The underlying intuition of this expression is that the contract or nexus of contracts that forms the association is sufficiently dense, and the solidarity of the membership sufficiently real, that it makes sense to speak of an entity, "the association". It should, similarly, be possible to speak of that entity as having civil personality, in the manner defined below. Nevertheless, since the foundational juridical concept is a contract or contracts among members, there is no real entity and all such locutions must therefore be capable of explanation, in the final analysis, as arising out of that contract or contracts. In other words, the referent of the term "association" is a fiction. The expression is used out of convenience. Provided that is understood, the proposed statute can be drafted using that term as seems appropriate. We therefore recommend the adoption of a provision similar in intention and substance to section 5 of the Partnerships Act.21

5. Persons who have entered into partnership with one another are, for the purposes of this Act, called collectively a firm, and the name under which their business is carried on is called the firm name.

We further recommend that the statute use such expressions as "the association's property" and "the association's rights", as appropriate. We would also recommend the adoption of a regime of mandatory registration of association names similar to what is currently in place for business under the Business Names Act.22

(c)Ownership of Property

(i)Introduction

Our task in this section is to describe the ways in which the law currently provides for the possibility of association ownership and to recommend proposals for reform. This task is made exceptionally difficult by a number of very complex factors. First, unfortunately, there are numerous possibilities, all with some support in the case law, available to define or analyze correctly the location of the title to the property that is spoken of as belonging to the association. Secondly, the task of identifying these possibilities is complicated by the fact that it can be approached from two distinct perspectives. The first perspective investigates the question of association property directly by analyzing how ownership is possible. The second perspective investigates the question of association property indirectly by examining the ways in which people can benefit associations through testamentary and non-testamentary giving. Third, there is a substantial discontinuity between the words or formulations that people use to create property entitlements in associations and the juridical forms available to give legal expression to those formulations. The root of all this complexity is the fact that the association is not a legal person. One way to resolve all the difficulties, then, is to invest it with legal personality. We do not opt for that solution, however, since it would undermine the contractual nature of the association. Instead, we propose to speak of the association's property, but to give it a contractual analysis.

In what follows, we approach the question of association ownership from the second perspective since it is more inclusive and since almost all of the case law on this topic
arises out of situations involving testamentary or non-testamentary gifts. We start by listing all the fact situations that can arise if the question of association ownership is approached from this perspective, then, putting these aside, we examine and critique all juridical forms currently available to give legal expression to the intentions of the disponers identified in the fact situations. We end with the analysis which we think is correct and which is already available, to some extent, in an emerging case law. We do not propose that this understanding be codified, but we do use it to generate rules which should be contained in any new statute.

(ii) Fact Situations

There are ten basic fact patterns involving gifts to associations. These may be listed, in a stylized form, as follows. The disponer may make a gift by saying: (1) "to the association", (2) "to the present members of the association", (3) "to the present and future members of the association", (4) "to the purposes of the association", (5) "to the members of the association to be held subject to the rules of the association", and (6) to (10) "to X in trust for ..." where the object of the trust is any one of the gift destinations identified in (1) through (5).

In most cases, regardless of the actual form of words used, the dominant intention of the disponer is best expressed in (1) or (6) because the disponer is usually thinking of the association as a legal person, like the corporation. However, as stated already, this intention is juridically impossible. The other formulations are almost equally problematic: (3) and (8), as gifts to an indeterminable class, are void for perpetuity; (2) and (7) may be valid but are very rarely actually intended; and (4) and (9), when the association is not charitable, may be void for vagueness, for breach of the indestructible trust rule, and for breach of the beneficiary principle. Options (5) and (10), we believe, offer the correct approach, but are objectionable because they do not fit easily with existing categories of common ownership. Thus, on the face of things, at least, looking at these formulations and/or their apparent underlying intentions, it is virtually impossible to make a gift to an association or for an association to hold property. Indeed, this was substantially the conclusion of the Privy Council in *Leahy v. Attorney-General for New South Wales*. That decision is still regarded as the leading decision on this question, even though it has been criticized by many and even though it has been overtaken, as we shall see, by some recent developments. *Leahy*'s approach was to say that disponers generally had one of three intentions in making gifts to associations to create a purpose trust (9), to make a gift to current members, either in trust or in common ownership (2) and (7), or to create a trust for present and future members (3) and (8). Only the second of these is, in the usual case, legally valid but, ironically, seldom if ever actually intended.

This list is presented initially as a list of possible formulations/intentions, that is, as a list of fact situations. It is important to recognize that the courts respond to these ten formulations/intentions in the context of individual fact patterns and therefore often construe one formulation to mean another. Indeed, there are many decisions where courts have explicitly selected an interpretation at odds with the straightforward meaning of the disponer's words in order to give legal effect to the disponer's obvious liberal intention.
It is not our intention to discuss this particular aspect of case law in any detail. Rather, in what follows, we set out the available juridical forms, leaving what we believe to be the best juridical conceptualizations until last.

(iii) Juridical Forms

Irrespective of the words used, then, what are the juridical possibilities? What forms does the law provide to permit courts to respond to these formulations/intentions adequately?

(a) Charitable Purpose Trust

As discussed above in chapter 12, a trust for some or all of the purposes of a nonprofit association is not generally valid due to the failure of most associations to meet the exclusively charitable condition. This juridical form, therefore, has no appeal as a general solution to the association ownership problem. In fact, it has often proved more of a hindrance than a help, since any appearance of an attempt by a disposer to create a non-charitable purpose trust in favour of an association's purposes runs a significant risk of being held void. Indeed, there are cases where courts have salvaged gifts in apparent violation of the prohibition against non-charitable purpose trusts by construing the apparent words of the trust for a purpose as merely precatory or as an expression merely of the disposer's motive, and by holding the gift valid on one of the other basis to be examined shortly.

(b) Trust for Current Members

It is also certainly possible that a trust can be created where the object of the trust is not the purposes of the association but the current members. This characterization of a gift to an association is often simply not available on the facts, however, since it is rarely actually intended. Therefore the trust for members, as Leahy pointed out, has a very limited role to play in understanding association ownership.

Where trust language is used, it is usually the disposer's intention to advance the purposes of the association, not the private interests of current members; or, if the intention is to benefit the private interest of members, it is likely the disposer had in mind present and future members of the association, not just present members. Since neither of these other forms is legally available, courts have sometimes used this private trust characterization with the express intention of salvaging the gift. Where the bonds of association are strong, as in the case of a religious community, fraternity, or gentlemen's club, this form, even though it is not truly applicable, is workable in a rough sort of way. One practical difficulty with this form is that the admission of new members to the association will require the old members to convey a portion of their beneficial interests to the new members. (This is perhaps a clue that the characterization is not usually apt.) For cohesive groups, organizing and compelling the transfer of beneficial rights will not be difficult and will often be provided for in the rules of the association.

(c) Gift to Current Members
Property can be held in common ownership either by a tenancy in common or by a joint tenancy. It is possible that the members of an association own the association's property as joint tenants or tenants in common, and it is possible that gifts of property to associations are intended to take effect as gifts to current members as owners in common. However, it is extremely unlikely. In the case of gifts, the two common-law forms of common ownership are, once again, not generally available on the facts, since the disponer's intention is usually that the property remain undivided until the dissolution of the association, and, in particular, that it not be available for distribution to the member or the member's estate upon the member's death, withdrawal, expulsion, or bankruptcy. Also, like the private trust, the common-law forms of ownership make transfers of ownership upon changes in membership, necessary. The recognized forms of common ownership do not accommodate the intention of the typical disponer or of the typical contract of association. Common ownership is, therefore, generally undesirable and inapplicable as a form of ownership for associations. As a way to "salvage" a liberal intention, it was criticized in Leahy v. Attorney-General for New South Wales, accurately if unfortunately, in our view, on the basis that such a construction is obviously not in keeping with the disponer's intention.

These arguments regarding the inaptness of the common ownership form might be answered in two ways. First, it has been suggested that the case law in this area has in fact created a new kind of "equitable" common ownership, with the members taking legal title under one of the common-law forms of co-ownership, but holding their interests subject to the rules of the association which would be enforced by a court of equity. A leading author has said:

The ownership of property by associates thus appears to be a special form of co-ownership with incidents different from those of joint tenancy or tenancy in common. Whether this type of co-ownership is a new form which the courts have developed or whether it is the result of contractual variation of the incidents of well-established forms of co-ownership is debatable.

Second, a common ownership analysis might be more readily available on the facts and more readily implemented by the courts where only personal property is involved, due to the absence of difficulties arising from the need to perform conveyances by deed and the absence of any requirement to register deeds of conveyance. The two following passages are indicative of this type of analysis, which solves the problems with the co-ownership analysis by ignoring them:

It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad.

And:
So in my opinion a bequest to any unincorporated society or association not charitable is good because, and only because, it is treated as being and is a bequest to the several members of such society or association, who can spend the money as they please. If there should be any understanding, or even contract, between these persons as to how the moneys so derived, that is from legacies, are to be expended, that is something with which in the absence of any express trust or direction in the will the executors who pay the legacy have nothing whatever to do.

In our view, although workable, these strategies for coping with the difficulties are obviously a temporizing second-best strategy: they do the job, but only by circumventing the difficulties.

(d) Re Denley's Trust

A Re Denley's type trust, it will be recalled, is a purpose trust in which there are indirect beneficiaries who have a sufficient interest in its enforcement. Such a trust may not last beyond the perpetuity period, and it must meet the condition of certainty of objects. The state has no obligation to oversee its enforcement.

This form is also certainly appropriate in the context of nonprofit associations and, by its terms, it is presently available to them. It may be difficult in some circumstances to establish the existence of the indirect beneficiaries. In the case of cause-oriented associations, as opposed to social clubs, for example, it is debatable whether the shared cause of the association, the advancement of which is presumably desired by all members, is sufficient to identify such members as the indirect beneficiaries under the Re Denley's trust. There is no case law. In any event, the Re Denley's trust is no substitute for a full-fledged ownership interest.

(e) Section 16 of Perpetuities Act

In the appropriate circumstances, the current and the recommended section 16 trust is also available as a way of benefiting an association. Unfortunately, it too falls short of what most associations require.

(f) Trust for "Association" or Conveyance to "Association"

We now come to our preferred solution. We prefer it because, in our view, it corresponds exactly to the intention of the association members or the disponer in the usual case; and we see no reason why it should not be accepted and implemented in law. In our view, none of the forms discussed to this point should be resorted to where it is clear that the members or the disponer intend that the property be held directly or in trust by "the association" the usual case. We refer to this notion as "association ownership". Essentially, the analysis supporting it is that the property entitlement in question is held subject to the contract of association, which will, implicitly or explicitly, have provided for the distribution of all the rights, privileges, powers, and liberties inherent to the kind of property entitlement in question. All incidents of ownership, in other words, are parcelled out among the members according to their contract of association. There is no
owner of the property as such. This notion does not require that the association be granted legal personality, but, provided no one is misled on this last point, it should be permissible to speak of the "association's property". This notion has a precise analogue in section 21(1) of the Partnerships Act,\textsuperscript{39} which provides as follows:

\begin{quote}
21.(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act 'partnership property', and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.
\end{quote}

We recommend that a similar provision be included in the proposed Act.

Unfortunately, this characterization has not found a great deal of support in the cases since Leahy v. Attorney-General for New South Wales,\textsuperscript{40} but, in several forms, it was often the characterization of choice prior to Leahy. This characterization of the location of the ownership interest has been resisted to some extent on account of the belief that property must be held either by a trustee beneficially for a person or some legally valid purpose, or directly by an individual or individuals, or a legal person or persons. There is in fact not much authority supporting this proposition, and there are \textit{dicta} against it.\textsuperscript{41} For example, in \textit{Wood Preservation Ltd. v. Prior}, Lord Donovan said: \textsuperscript{42}

\begin{quote}
It is possible for property to lack any beneficial owner for a time, for example property which is still being administered by an executor which will go eventually to the residuary legatee.
\end{quote}

Lord Donovan in that case was dealing with the location of title to shares which had been tendered to a purchaser whose obligation to purchase the shares was still conditional on the subject company maintaining a contractual arrangement with a third party. Lord Donovan concluded that, pending completion of the sale, there was no beneficial ownership interest in the shares in the seller. His reasoning was accepted and applied in \textit{Conservative & Unionist Central Office v. Burrell (Inspector of Taxes)}.\textsuperscript{43}

It has also been resisted because of the holding in Leahy to the effect that there are only the three available characterizations the purpose trust, a trust for current members or co-ownership, and a trust for current and future members only the second of which was valid. The Leahy position is probably wrong. It has been severely criticized, and subsequent decisions have shown that the classification of possibilities was under-inclusive. In \textit{Re Recher's Will Trusts},\textsuperscript{44} it was said:

\begin{quote}
The funds of such an association may, of course, be derived not only from the subscriptions of the contracting parties but also from donations from non-contracting parties and legacies from persons who have died. In the case of a donation which is not accompanied by any words which purport to impose a trust, it seems to me that the gift takes effect in favour of the existing members of the association as an accretion to the funds which are the subject-matter of the contract which such members have made inter se, and falls to be dealt with in precisely the same way as the funds which the members themselves have subscribed. So, in the case of a legacy. In the absence of words which purport to impose a trust, the legacy is a gift to the members beneficially, not as joint
tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject-matter of the contract which the members have made inter se.

In *Neville Estates Ltd. v. Madden*, it was said:

[I]t may be a gift to the existing members not as joint tenants, but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case, a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect. If this is the effect of the gift, it will not be open to objection on the score of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which precludes the members...from dividing the subject of the gift between them....

If this characterization is accepted, then three further problems must be addressed: in whose name is the property held and, in the case of interests in land, registered; who has the power to convey title and how is that fact to be determined by interested third parties; and what claims do the creditors of the individual members have to the property so held.

The first question arises due to the lack of legal personality of the association. This difficulty presents less of a problem in the case of wills than deeds, since a testator's words need be looked at only as an indication of his or her intention, not as words of conveyance. A deed in the name of the association would appear to name a non-entity as the owner, and therefore be void. A deed in the name of the current members would appear to establish a joint tenancy or a tenancy in common, which would be inaccurate. The proper solution to this problem is to permit associations to take title in one of three ways: (1) in the name of the association; (2) in their members names "in association"; and (3) the names of individuals or legal persons in trust for the association.

The answer to the second question must lie in the contract of association itself, since if all the rights, powers, privileges, and liberties in the property have been parcelled out to the members, the power to give good title also ought to have been parcelled out. In the majority of cases, it will be the executive of the association which will have this power. Where the property is held in trust for the association, the trustees have that power. Where all the members are named in the deed, all the members have that power. The only remaining problem arises where the title is in the name of the "association" and it is the executive, for example, who have the power to convey: how are third parties to know this? The same issue arises in partnership law and is resolved through the use of two tools. First, until recently, the law required the partners to register a declaration of partnership, so that third parties might know who the partners are. Second, there is the principle that all partners are bound by any act including a conveyance of any partner acting with actual, usual, or ostensible authority. We would adapt both these approaches to the purposes of association law by requiring associations to register a declaration of association as a condition of owning real property in the name of the association, and by enacting a rule which would allow third-party purchasers acting in good faith to presume the persons named in the registered declaration have the power to convey title. With respect to personal property, the proposed statute should simply provide for a defence of
bona fide purchaser for value for purchasers from any member with actual, usual, or ostensible authority.  

The third question is ultimately a question for federal law. At most, the trustee in bankruptcy of a bankrupt member succeeds to the contractual rights of such a member. A member’s claims to the property of the association and to the other privileges and rights of membership are usually non-transferable and, in any event, often of little pecuniary value since any right to a distribution is conditional on a dissolution of the association. In short, the member under the contract of association does not own any "equity" that would be available for his or her creditors. To the extent, however, that this is not true and there is in fact some equity, then the proposed provincial associations statute should approach the problem of the creditor’s rights in the same way that it approaches this problem in the case of partnerships. The federal statute should do likewise. The Partnerships Act currently provides:

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm, and for that purpose any partner or the partner’s representative may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm.

If our preferred understanding of the place of the title is accepted, then it should also be possible to create a trust in favour of the "association". If it is and we see no reason why it should not be the question arises, is such a trust a purpose trust or a private trust? If it is construed as a purpose trust, it clearly would have to be exclusively charitable to be valid or it would have to fall under either the Re Denley's or the section 16 Perpetuities Act exceptions. If it is a private trust, the question arises: is it permitted to last beyond the perpetuity period, and what set of modification rules is it subject to the reformed Saunders v. Vautier rule or a special "association" cy-près rule? The difficulty here, again, is the lack of legal personality. That deficiency seems to preclude classifying the trust as a private trust. Nevertheless, it should be possible to overcome that difficulty in the same way that the ownership difficulty was resolved. Where a discretionary or fixed trust is created in favour of an association, then the incidents of title of the beneficial interest are distributed according to the terms of the trust and the terms of the association. In our view this is the correct solution, and the trust for an association should be construed as a private trust.

To conclude, it is our recommendation that the proposed statute provide that, in the usual case, the property of an association is held by the members of the association, according to the rules of association, that it is available in priority to satisfy the claims of the creditors of the association, and that, subject to the condition regarding the registration of a declaration, it may be held in the name of the association. The following provisions from Title 3 of the California Corporations Code present a partial example of the type of provisions we have in mind:
§20001. Any unincorporated society or association, and every lodge or branch of any such society or association, and any labor organization, may, without incorporation, purchase, receive, own, hold, lease, mortgage, pledge, or encumber, by deed of trust or otherwise, manage, and sell all such real estate and other property as may be necessary for the business purposes and objects of the society, association, lodge, branch or regulations of the society, association, lodge, or branch and of the grand lodge thereof, or labor organization; and also may take and receive by will or deed all property not so necessary, and hold it until disposed of within a period of 10 years from the acquisition thereof.

§20002. All conveyances transferring or in any manner affecting the title to real estate owned or held by an unincorporated benevolent or fraternal society or association, or lodge or branch thereof, or labor organization, shall be executed by its presiding officer and recording secretary under its seal after resolution duly adopted by the society, association, lodge, or branch authorizing the conveyance, and in the case of other unincorporated associations for which no specific provision is made by statute shall be executed by (a) its president or other head and secretary, recording secretary, or other comparable officer, or (b) other officers or persons specifically designated by a resolution duly adopted by the association or by a committee or body duly authorized to act by the articles of association or bylaws.

An unincorporated association not otherwise authorized by statute may record in any county in which it owns or has an interest in real property a verified and acknowledged statement, or a certified copy of such statement recorded in another county, setting forth the name of the association, the names of its officers and the title or capacity of its officers and other persons who are authorized on its behalf to execute conveyances of real property owned or held by the association. It shall be conclusively presumed in favor of any bona fide purchaser or encumbrancer for value of real property of the association located in the county in which such statement or certified copy has been recorded that the officers and persons designated in the statement are duly authorized to execute such conveyances unless there is recorded in such county by anyone claiming to be a member of the association a statement, verified and acknowledged by the person executing it, which shall set forth the name of the association, particularly identifying the recorded statement of the unincorporated association, ...

(d) Civil Capacity

(i) Contract, Tort, and Unjust Enrichment

We examine civil capacity first by examining how the association may be a debtor or creditor of voluntary (contractual) and involuntary (tort and unjust enrichment) obligations. We look at capacity to sue and be sued below in "(ii) Civil Capacity in Legal Proceedings".

Contract presents an initial problem that tort and unjust enrichment do not, since, as a voluntary obligation, it will usually require the association to use its name to be a party to a contract, which, of course, as the law currently stands, it cannot do. This difficulty, surprisingly, is often more troublesome than the analogous rules governing title to real property and has been applied, for example, to deny associations the right to enter leases in their own names. Devices such as the common ownership device used in some of the title to land cases are generally thought not to be available in the case of leases due to the need for a continuing contractual obligation and the seeming incoherence of dividing the
liability to pay rent among the members. The problem is exacerbated, as in the case of joint property ownership, when members leave or new members join.

Notwithstanding this difficulty, there are techniques that permit the association or more precisely its property to be ultimately benefited as creditor and obligated as debtor of contractual obligations. We examine these and other issues in what follows.

Our method in this section is to set out the rights and duties in private law "of the association" by examining, in turn, the possible liability and entitlement of all or a select few of the members of the association in general; the person, usually a member of the association, who acts for the association in the relevant transaction; and the property of the association. We take this approach for the following reason. Given the association has no civil capacity, liability and entitlement must reside in one or more of these three locations. That is, either the individual members of the association, or some of them, are the parties to the obligations; and/or the person (or persons) who actually signs the contract, commits the act or omission, or possesses the enrichment is the party to the obligation; and/or the property of the association is benefited or is liable.

It is helpful before describing the law to set out what we ultimately recommend, since the law, as we shall see, is already converging on our preferred solution.

The appropriate basis for the analysis of these problems is the juridical relationship of principal and agent, or, more particularly, reciprocal agency, and our recommendation will be a simple adaptation of these concepts to the contract of association. We recommend below the adoption of several codified suppletive rules which in essence will establish that the "executive" of an association act as reciprocal agents of each other for contractual liability and as agents of the association for contractual and tort-based liability. As such, their acts or omissions committed within their ostensible, actual, or usual authority, in the case of contractual obligations, and within the scope of their actual authority, in the case of tort obligations, bind and/or benefit each other and the association's patrimony for contract liability and the association for tort liability but do not affect the personal liability of any of the other members of the association beyond the extent of the other member's pre-existing financial obligations to the association.58 This modified reciprocal agency conceptualization of the relationship, with one or two modifications, is taken directly from the Partnerships Act59 and constitutes the foundational idea of the partnership relationship.60 The major consequences of it insofar as the personal liability of each member of the executive is concerned, is that each is bound to contribute to the indemnification of those among them that have been held liable in contract, if the funds of the association are inadequate.

(a)Liability of Members

(1)Contractual Liabilities on Basis of Mutual Agency

There are two lines of authority on the issue of a member's personal liability for the acts or omissions of other members of the association qua members of the association, usually
the executive of the association. One says that the executive may not act in a way that
binds the members personally if the association contract provides only for an entrance
fee, annual subscription, and limited, if any, credit for services provided to members (that
is, it is run on a "ready money" basis). This term of the contract has been described as
follows: 61

Clubs are associations of a peculiar nature. They are societies the members of which are
perpetually changing. They are not partnerships; they are not associations for gain; and
the feature which distinguishes them from other societies is that no member as such
becomes liable to pay to the funds of the society or to any one else any money beyond the
subscriptions required by the rules of the club to be paid so long as he remains a member.
It is upon this fundamental condition, not usually expressed but understood by every one,
that clubs are formed; and this distinguishing feature has been often judicially recognised.
It has been so recognised in actions by creditors and in winding-up proceedings.

Sometimes this rule is read, properly in our view, merely as a list of indicia on the more
central question of whether the contract of association provides explicitly or implicitly for
the authority of the executive to bind the members personally. Frequently it is read,
mistakenly in our view, as automatically excluding any legal possibility of that authority
existing in any case.62 The statement of the rule in the quoted passage is essentially
correct, since it states the rule as one particular to the sort of association under
consideration in other words as entirely contingent on the relevant governing contract and
it poses the question as an issue concerning the authority of the management to bind the
members personally.63 Unfortunately, the rule has been applied to other situations where
it probably was not appropriate, such that, in the words of Professor Ford, "the trend of
English authority has been almost to exclude any possibility of imposition of personal
liability on the basis of...management authority". 64

Prior to the decision in the case just cited, there had been cases which did hold the
members personally liable for undertakings of the management. 65 Professor Ford
summarizes the effect of these decisions as follows: 66

Thus on the basis of these authorities it could be said that in some situations the
committee of an association to which the care and management of the association had
been entrusted under the rules might enter into contracts so as to make the members
personally liable even though some of those members had no knowledge that the
particular contract was being made. The personal liability of those members would
depend on the persons who entered the contract being the members' agents who acted
within the scope of their authority. The agency would depend on the rules of the
association. If the contract were one necessary to further the objects of the association
entry into it would be within the scope of the authority. Whether the member would be
personally liable would depend on whether there was any basis for inferring that the
agent was not intended to deal for credit. Payment of a subscription might or might not
support such an inference. It would be simply a fact assisting determination of the
question of what authority was given in the particular case through the rules.

Some of the older American authority 67 also demonstrates a willingness to impose
liability on the basis that the association is a quasi-partnership.
The error in the case law lies in the failure of the law to recognize and apply the general distinction between a suppletive and a imperative rule. The current law governing the contract of association developed in the context of one kind of association the English gentlemen's club. The mistake that has been made is to treat some of the rules arising out of the particular contract which establishes the characteristic nineteenth-century gentlemen's club as applicable to all contracts of association. As it turns out, on the particular question under consideration the personal liability of the members we think that the rule adopted for the gentleman's club ought to be the suppletive rule for associations in general, so the only difference between our recommendation and the current law is the status suppletive, not imperative of this rule.

Recall, however, that this suppletive rule should state that the members of the executive of the association are mutual agents of each other and the association as far as contracts are concerned. This is justifiable as a suppletive rule since the members of the executive have knowledge of the state of and control over the association's finances and they are in the best position to police each other.

(2) Contractual Liabilities on Basis of Promise of Indemnity

Where there is a relationship of mutual or reciprocal agency, there is invariably an implicit obligation in the mutual agents to indemnify in whole or in part the one held liable. Courts have been reluctant, however, to find an obligation in members of an association to indemnify the executive on the basis, just stated, that there is no such agency relationship. Although the circumstances must be rare where there is an obligation to indemnify but no principal-agent relationship, it is possible that the contract of association might contain certain obligations in the members to indemnify the executive even though the relationship between members and the executive is not construed as one of full reciprocal agency. This might arise, for example, where the court construes the ownership of the property of the association as being held in trust by a few members of the executive for the use of the association. In that circumstance, it would not be unusual to find that the members, or some of them, had promised implicitly or explicitly to indemnify the trustees against liability on certain contractual and legal obligations arising out of the administration of the property held in trust.

(3) Vicarious Tort Liability

There is some, but very little, Commonwealth authority on the liability of members for the torts committed by other members in the course of their duties. Most of the decisions have found liability only in the members of the executive committee of the association and only on a personal basis, not vicariously. There have, however, been a few American decisions where members have been held liable simply because they were members. Some older Commonwealth decisions involving unions and political organizations have found the common fund of an organization answerable for torts committed by members and have implied, necessarily (because the common fund is usually conceived of as common property), that such liability is vicarious. The vicarious liability of the member, to the extent that it exists, could only arise out of an obligation in
the member to indemnify the agent who commits the tort. That obligation would be an implicit or explicit term of the contract of agency.

In the usual case, there should be no vicarious liability in one person for the tort of another. Imposing vicarious liability makes sense in the situation where a principal benefits personally from the activities of an agent and is best explained as flowing from the principal's promise to the agent to indemnify the agent against injuries arising to the agent here, the civil liability of the agent during the course of his or her employment. There is usually no such personal gain in the association context and therefore no concomitant promise to indemnify. This line of reasoning applies, in our view to every member of the association including, perhaps especially including, the executive, who often are volunteers who have undertaken the brunt of the work of the association and are therefore giving to rather than benefiting from the association. Recent case law affirms these conclusions. There are no cases of which we are aware where one member qua member has been held vicariously liable for the tort of another member qua member.

(4)Liability of Person Acting Alone

The person acting on behalf of the association is personally liable in contract only if he or she is also liable as principal under the contract or if he or she has breached a warranty of authority. In either case, the liability is for the value of the contract, but in the second case the source of the obligation is the breach of the independent promise that the person acting has the ability to contract on behalf of the association. Where there is liability in the person acting "as principal", it is usually shared with some other members of the association in most cases according to the discussion above, only the executive on a joint and several basis. Liability in tort, as discussed, is entirely personal. Liability in unjust enrichment depends on the agent actually having the enrichment.

(5)Liability of and Benefit to Property of Association

Since the most common conception of the ownership interest of the members of the association is that they hold the property as common owners jointly or as tenants in common (sometimes subject to certain equitable rights and duties), and since the prevailing rule is that the executive does not act as agents for the members, there is some difficulty in the current law understanding how the association's property can be held liable for the contractual and tort-based obligations incurred by the members or the executive on behalf of the association. If contracts are construed as not generally binding on all the members, then the common ownership shares of a non-obligated member appear to be free from any liability. Similarly, the common ownership shares of members who join the association subsequent to the creation of the obligation would also be immune. Further, since the nature of the liability is personal to each obligated member, a plaintiff would have to name each member in the action in order to ultimately attach any of their portion of the common fund. These difficulties cannot be overcome until the nature of the association and the nature of its property interests are properly characterized.
The law is obviously deficient. In this instance vicarious liability of the common fund makes some sense where the member acting tortiously was acting within the scope of his or her duty. Although no member *qua* member gains from the activity of the association's agents, the association does. Obviously, the common fund must also be available to contract creditors of the association. These would be contractors who contracted "with the association" through any actual or ostensible agent. A statutory provision is required to do this.

*(6) Recommendation for Reform*

The basis of liability of members of an association for the civil obligations of other members should be clearly established. Our preferred solution, as stated, is a statutory suppletive rule which establishes, so far as contractual liability is concerned, a reciprocal agency relationship among the members of the executive and which makes the executive agents of the association, thereby engaging civilly the association's property. For tort liability, the suppletive rule should provide that only the common fund is vicariously liable for the torts committed by the association's agents in the course of their agency. These are suppletive rules on the theory that the liability of one person for the acts of another is based generally in contract and, more particularly, on a promise by one to indemnify, in whole or in part, the other who has been held primarily liable. The following two sets of provisions, the first from the *Civil Code of Quebec* and the second from Title 3 of the California *Corporations Code*, in our view, are appropriate partial expressions of the proper suppletive rules.

*Civil Code of Quebec:*

§2270. The directors act as mandatories of the members of the association.

Their only powers are those conferred on them by the contract of association or by law, or those arising from their mandate.

§2274. Where the property of the association is insufficient, the directors and any member administering in fact the affairs of the association are solidarily or jointly liable for the obligations of the association resulting from decisions to which they gave their approval during their administration, whether or not the obligations have been contracted for the service or operation of an enterprise of the association.

The property of each of these persons is not applied to the payment of creditors of the association, however, until after his own creditors are paid.

§2275. A member who has not administered the association is liable for the debts of the association only up to the promised contribution and the subscriptions due for payment.

*California Corporations Code:*

§21100. Liability for Debts Involving Realty.

Members of a nonprofit association are not individually or personally liable for debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or
the purchase, leasing, designing, planning, architectural supervision, erection, construction, repair, or furnishing of buildings or other structures, to be used for the purposes of the association.

§21101. Member's Contract Assuming Liability to Be in Writing.

Any contract by which a member of a nonprofit association assumes any such debt or liability is invalid unless the contract or some note or memorandum thereof, specifically identifying the contract which is assumed, is in writing and signed by the party to be charged or by his agent.

§21102. No Presumption of Consent to Obligation From Membership.

No presumption or inference existed prior to September 15, 1945, or exists after that date, that a member of a nonprofit association has consented or agreed to the incurring of any obligation by the association, from the fact of joining or being a member of the association, or signing its by-laws.

§24002. A money judgment against an unincorporated association may be enforced only against the property of the association.

§24001. (a) Except as otherwise provided by statute, an unincorporated association is liable to a person who is not a member of the association for an act or omission of the association, and for the act or omission of its officer, agent, or employee acting within the scope of his office, agency, or employment, to the same extent as if the association were a natural person.

(b) Nothing in this section in any way affects the rules of law which determine the liability between an association and a member of the association.

(ii) Civil Capacity in Legal Proceedings

Much of the relevant case law here involves suits against labour unions seeking liability of their common fund, in tort, for the actions of their members. Some decisions have recognized the possibility of a class action or representative suit by or against the members of the association according to principles developed in equity.76 If the right alleged by the group was substantially similar meaning usually a beneficial interest in the common fund or the liability asserted was collective or common, courts have sometimes recognized the possibility of suits by or against the association in its own name.77 However, this procedure was not always available, and where there had been a substantial change in the membership prior to the suit, for example, the liability was no longer common and the availability of the representative suit denied.78

The current Rules of Civil Procedure79 make no express provisions for suits by or against associations.80 They do, however, contemplate suits by or against a partnership using the firm name.81 We recommend the adoption of parallel rules in the Rules of Civil Procedure to govern suits by or against associations.

3. FORMATION
Formation is straightforward. There are currently no restrictions on entry. Entry is governed by the generally applicable rules of contract formation. A rule stating as much should be adopted. Thus, article 2267 of the *Civil Code of Quebec* provides:

§2267. The contract by which an association is established may be written or verbal. It may also arise from overt acts indicating the intention to form an association.

However, in the case of religious and charitable associations, a status registration regime, similar to the one recommended for charitable trusts and all nonprofit corporations, ought to be adopted. In particular, we recommend that any association registered federally must also register provincially. As a further eligibility condition for registration, associations seeking registration should have an executive comprised of at least three persons and they should be subject to the two distribution constraints mentioned above in chapter 15.

4. GOVERNANCE

There is very little law on the internal relations of the association. From what has been said concerning civil capacity, it is clear that courts have not relied to an appropriate extent on the concept of partnership to develop the principles. In our view these matters should be dealt with in a way similar to the way they are handled under the *Partnerships Act*. The following provisions from the *Civil Code of Quebec* are, in our view, appropriate.

§2269. Failing any special rules in the contract of association, the directors of the association are elected from among its members, and the founding members are, of right, the directors of the association until they are replaced.

§2272. Every member is entitled to participate in collective decisions, and he may not be prevented from exercising that right by the contract of association.

§2273. Collective decisions, including those to amend the contract of association, are taken by a majority vote of the members, unless otherwise stipulated in the contract. Notwithstanding any stipulation to the contrary, any member may inform himself of the affairs of the association and consult its books and records even if he is excluded from management.

In exercising this right, the member is bound not to impede the activities of the association unduly nor to prevent the other members from exercising the same right.

Some effort should also be made at this stage in the development of the law to formulate explicitly the duties of prudence and loyalty owed by the fiduciaries of the association. It is clear that the duty of loyalty requires the fiduciary to act in the interests of the association, and that the general principles should be based on what already applies in the law of agency and the law of partnership. We recommend, for the sake of greater clarity, however, that the executive be called "directors" and that their duties of loyalty and prudence be stipulated to be the same as those that apply to directors under the reformed nonprofit corporations statute, including the rules governing conflicts of interest and duty. In the case of religious and charitable associations, the duties should be made
enforceable by the Nonprofit Organizations Commission (the NOC) and therefore the NOC should have the status roughly equivalent to that of a member in religious and charitable associations.

5. REORGANIZATION AND DISSOLUTION

It follows from the contractual nature of the association that issues concerning reorganization and dissolution are governed by the contract of association and, in the absence of terms governing these questions, by the general principles of contract law. The former may provide that the contract of association may be varied or amended by majority vote; with respect to the latter, variation or "novation" of the contract can occur only by mutual consent, which would mean unanimity.84 These provisions governing reorganization and dissolution apply also to the disposition of the funds belonging to the association.

In our view, where the association is non-charitable, the appropriate suppletive rule regarding both questions is in some cases, majority rule but, in most cases of fundamental charge, rule by special majority. Some questions such as mergers or sales of substantially all assets should, as in the case of corporations, require special majorities.85 On dissolution, the property should be disposed of in accordance with the terms of the contract and, in the absence of any terms, equally among the members.86 Where there is property held in trust for the association, as a private trust, it will be subject to reformed Saunders v. Vautier rules,87 in addition to the constitutional rules of the association.

It currently is unclear what the default rule governing dissolution and distribution is where the association is religious or charitable. There is conflicting authority.88 There are dicta from English decisions which show that courts recognize the problem.89 In some cases, the difficulty has been resolved by a preference to interpret gifts to charitable associations as held on trust, regardless of the precise words used. The object of course is to make the cy-près doctrine applicable. For example, in Re Finger's Will Trusts; Turner v. Ministry of Health,90 Goff J. said:

If the matter were res integra I would have thought that there would be much to be said for the view that the status of the donee, whether corporate or unincorporate, can make no difference to the question whether as a matter of construction a gift is absolute or on trust for purposes. Certainly drawing such a distinction produces anomalous results.

In our view, where the association is religious or charitable, its property should be subject to the corporate cy-près rule we recommend in chapter 15, as modified to fit the association form of organization. For these types of associations, fundamental changes and dissolutions including the disposal of the association's property should be subject to either court or NOC approval. "Fundamental change" will require definition. The court should permit the fundamental change or dissolution under the same circumstances and on the same basis as provided for under the corporate cy-près rule. Similarly, with trust property, the rules governing the modification of private trusts should apply, subject to the constraints imposed by a corporate cy-près rule.
Endnotes:

1

2
Ford, supra, note 1, at xix.

3
Cal. Corp. Code, Title 3, "Unincorporated Associations".

4
N.Y. Gen. Ass'ns Law, c. 29 (Consol.). In particular, see §§12-17.

5

6

7
See Civil Code of Quebec, arts. 2186-2192, for a definition.

8
Some unincorporated associations are exclusively charitable. In many cases it happens that donations received or property held by an exclusively charitable unincorporated association are, in fact, held by the membership, or by a part of it (usually the executive or the association's treasurer) in trust for the charitable purposes of the association. Where this type of trust arises, the law binds the trustees (and only the trustees) and the law of charitable purpose trusts applies. This use of the purpose trust is often deployed by unincorporated associations with exclusively charitable purposes as a convenient way of circumventing some of the problems, to be examined more closely below, presented by their lack of civil capacity. Commonwealth courts have found such trusts to exist even in circumstances where there was no express interposition of a trust. An older leading case is *Cocks v. Manners* (1871), L.R. 12 Eq. 574, 10 L.J. Ch. 640. See, also, *Re Tyler; Tyler v. Tyler*, [1891] 3 Ch. 252, 60 L.J. Ch. 686 (C.A.); *Re Delany; Conoley v. Quick*, [1902] 2 Ch. 642, 71 L.J. Ch. 811; *Re Schoales; Schoales v. Schoales*, [1930] 2 Ch. 75, 99 L.J. Ch. *Re Gwynne Estate* (1912), 22 O.W.R. 405, 5 D.L.R. 713 (H.C.J.). Trusts have been found to exist in circumstances where no specific member of the association was selected as the recipient of the funds and therefore as trustee of the trust. See *Walsh v. Gladstone* (1843), 1 Ph. 290, 41 E.R. 642, and *In the Goods of M'Auliffe*, [1895] P. 290. In some circumstances the court can construe the gift as a gift to members in trust for the association's purposes, but the result of this reasoning may lead to an unadministrable trust where the membership is large. A court of equity could reduce the number of trustees in this situation, however. But some courts have felt inhibited to appoint a trustee or trustees, especially in the case of an *inter vivos* gift, since this would appear to be contrary to the doctrine that equity will not complete an incompleted gift.


*Ibid.*, at 635.


The Partnerships Act, *ibid.*, s. 20 provides: "The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners...."


See cases referred to in note 19, *supra*, for a similar view.


*Cocks v. Manners, supra*, note 10, is the oldest leading decision. There, a gift "to the Dominican Convent at Carisbrooke" was construed as a gift to present members, as opposed to either a gift to present and future members or a gift in trust for the convent or its purposes, both of which would have been void. See Ford, *supra*, note 1, at 15-17, for a discussion of this "salvage" jurisdiction.

*Carne v. Long* (1860), 2 De G.F. & J. 75, 45 E.R. 550 (L.C.) is the oldest leading case. There, a gift to "the trustees...of the Penzance Library...forever, for the use, benefit and support of the said library" was held void for breach of the rule against indestructible trusts.

*Re Lipinski's Will Trusts*, [1976] Ch. 235, [1977] 1 All E.R. 33 is an example of this technique. There was "in trust for the Hull Judeans (Maccabi) Association to be used to construct and improve new buildings for
the association”. The Court construed this as a gift in trust for members subject to their rights *inter se*, and not as a gift in trust for the purposes identified.

28

An example of a valid one is a benefits trust for the membership of a union. See, for example, *Re Board of Trustees of Provincial Plasterers' Benefit Trust Fund and Provincial Plasterer's Trust Fund* (1990), 71 O.R. (2d) 558, 65 D.L.R. (4th) 723 (H.C.J.).

29

See, for example, *Re Drummond; Ashworth v. Drummond*, [1914] 2 Ch. 90, 83 L.J. Ch. 817.

30

See *Stewart v. Green* (1870), I.R. 5 Eq. 470 (Ir.), where the gift was in trust for "the Community of Sisters of the Order of Mercy" and was "salvaged" as a private trust for current members. See, also, *Re Wilkinson's Trust* (1887), 19 L.R. Ir. 531.

31

See *Neville Estates Ltd. v. Madden*, [1962] Ch. 832, [1961] 3 All E.R. 769 (subsequent references are to [1962] Ch.), *per* Cross J.

32

The form is resorted to, as with private trusts, sometimes in order to "salvage" a gift. See *Cocks v. Manners*, *supra*, note 10; *Re Wilkinson's Trust*, *supra*, note 30; *Re Delany*, *supra*, note 10; and *Bradshaw v. Jackman* (1887), 21 L.R. Ir. 12.

33

The "gift to present members” possibility would only be available, according to *Leahy v. Attorney-General for New South Wales*, *supra*, note 23, where it truly reflects the disponer's intention. Such matters as the use of trust language, the size and dispersion of the membership, the nature of the property, and its amenability to common ownership, and the capacity and the likelihood of the members of the association putting an end to their association and distributing the property, are to be taken into account in assessing this intention. In *Leahy*, the subject of the gift was grazing property and the beneficiary was "such order of nuns of the Catholic church or the christian brothers selected by the executors". The gift was construed as creating a purpose trust and was held void for breach of the rule against indestructible trusts.

34

See *Ford*, *supra*, note 1, at 5.

35

*Re Clarke; Clarke v. Clarke*, [1901] 2 Ch. 110 at 114, 70 L.J. Ch. 631.

36

*Re Smith; Johnson v. Bright-Smith*, [1914] 1 Ch. 937 at 948, 83 L.J. Ch. 687.


Supra, note 6.

Supra, note 23.

The classic statement is in Coke on Littleton: "So a community not incorporated cannot purchase, as the parishioners or inhabitants of Dale."


Supra, note 15, at 539.


There is a difficulty, of lesser importance, concerning the technicalities governing the transfer of membership interests where the association owns land. In the usual case there will be a right to division of the property only in the unlikely event of a dissolution of the association. Therefore admissions and resignations will involve in some sense transfers of title in the underlying assets. Do the transfers have to meet the formality and capacity requirements of the law, such as the Statute of Frauds, R.S.O. 1990, c. S.19, or such as those governing the incapacity of minors? In our view the answer should be no, and the statute should make it clear that admission and resignation do not give rise to transfers requiring compliance with the Statute of Frauds. In this respect, the model of the Partnerships Act, supra, note 6, is not appropriate. The difference between the two regimes on this point arises out of the ease with which new members may join an association in the usual case.

See Partnerships Registration Act, R.S.O. 1980, c. 371, repealed by the Business Names Act, 1990, S.O. 1990, c. 5, s. 12. Under s. 2(3) of the present Business Names Act, supra, note 22, partnerships are still required to register their business names.

See Partnerships Act, supra, note 6, s. 6.

For complex provisions to this effect, see Partnerships Act, ibid., ss. 6 and 7.

Ibid., s. 39.

(1841), 4 Beav. 115, 49 E.R. 282 (S.C.); aff'd (1841), Cr. & Ph. 240, 41 E.R. 482 (L.C.).


Supra, note 3.

We use "tort" to designate all non-contractual liability arising from the breach of a duty and therefore to include the commission of so-called equitable wrongs.


Liability in unjust enrichment depends on who has possession of the enrichment and therefore the principal/agent analysis is not relevant to it. A member will be liable in unjust enrichment if and only if the member possesses the enrichment.

_Supra_, note 6.

It is interesting to observe, à propos of the current situation, that in the early nineteenth century there were a number of decisions which explicitly conceived of the association as a nonprofit partnership. Lord Eldon characterized a mutual benefit society as a partnership in _Beaumont v. Meredith_ (1814), 3 Ves. & B. 180, 35 E.R. 447 (L.C.). See, also, _Fleming v. Hector_ (1836), 2 M. & W. 172, 150 E.R. 716.


However, the denial that the association is not a partnership is misleading, unless it is read as meaning that the member's responsibility is not the same as the responsibility of a general partner.

_Ford_, _supra_, note 1, at 61, n. 1 [emphasis added].


_Ford_, _supra_, note 1, at 55-56.


69


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See *Ford*, *supra*, note 1, at 93-113.

72


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*Supra*, note 3.

76


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See *Ford*, *supra*, note 1, ch. 7.
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_Supra_, note 6.

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See _Re Recher's Will Trusts_, _supra_, note 15, at 539:

Just as the two parties to a bi-partite bargain can vary or terminate their contract by mutual assent, so it must follow that the life members, ordinary members and associate members of the...society could, at any moment of time, by unanimous agreement (or by majority vote, if the rules so prescribe), vary or terminate their multi-partite contract. There would be no limit to the type of variation or termination to which all might agree. There is no private trust or trust for charitable purposes or other trust to hinder the process. It follows that if all members agreed, they could decide to wind up the...society and divide the net assets among themselves beneficially. No one would have any locus standi to stop them so doing. The contract is the same as any other contract and concerns only those who are parties to it, that is to say, the members of the society.

85


86

This is the common-law rule: see Re Bucks Constabulary Widows & Orphan's Fund Friendly Society (No. 2); Thompson v. Holdsworth, [1979] 1 W.L.R. 936, [1979] 1 All E.R. 623.

87

See Saunders v. Vautier, supra, note 52.

88


89

See, for example, Re Vernon’s Will Trusts; Lloyds Bank Ltd. v. Group 20 Hospital Management Committee (Country), [1972] Ch 300n, [1971] 3 All E.R. 1061n, and Re Morrison; Wakefield v. Falmouth (1967), 111 Sol. J. 758.

90

CHAPTER 17

THE SUPERVISION OF CHARITIES

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1. INTRODUCTION

This chapter examines the current law and makes recommendations for reform concerning the agency of the government responsible for the general supervision of charities. The chapter is divided into five parts. We start with a history of the regulation of charities in Ontario in section 2. In section 3 we set out the current law, in section 4 we examine regimes in place in other jurisdictions, and in section 5 we set out our recommendations for reform. In the next chapter we look at the specific areas of possible regulatory interest: fundraising, investments, political activity, and privileges. Our concern in this chapter is the state’s role in the supervision of charitable fiduciaries generally.

In the view of the Commission, Ontario law concerning the supervision of charities should be designed with Ontario's distinctive situation in mind. Although we devote some discussion to the description of the supervision of charity in other jurisdictions, we do not derive much of the detail of our reform proposals from these other jurisdictions. This is due principally to two factors. First, it is due to the presence in Ontario of a very substantial federal supervisory jurisdiction over charities and the consequent need for a provincial regime that complements, not duplicates or contradicts, already existing measures. Second, our recommended strategy of carefully defining the duties owed by fiduciaries of charities as set out in chapters 13, 14, and 16, and of giving the proposed
Nonprofit Organization Commission (NOC) the power to enforce many of these duties will, if adopted, alleviate some of the need for creating and defining other supervisory powers in the regulatory regime.

Examining the law of other jurisdictions does, however, show that the supervision of the sector is of some concern to other governments, and that many of the regulatory techniques we suggest the registration requirement and a separate public administration agency with power to pursue delinquent charitable fiduciaries are common ones. It also shows that these laws and the resources devoted to enforcing them are often inadequate in ways similar to the ways we describe for Ontario.

2. HISTORY OF GENERAL SUPERVISION OF CHARITIES IN ONTARIO

(a) Introduction

The Charities Accounting Act establishes a regime for the supervision of charities in Ontario. The statute empowers the Public Trustee to investigate the affairs of charities and to require them to provide him or her with information as to the "condition, disposition or such other particulars" of the property subject to the charitable objects. All charities, regardless of their form of organization, are obliged to give notice of their constituting instrument to the Public Trustee. The statute also makes provision for the Public Trustee to apply to the court for orders enforcing the obligations imposed on trustees and directors under the statute and under the general law governing the duties of trustees and directors.

We look briefly at the English antecedents of these provisions in (b) and the history of significant amendments to the Act in (c).

(b) English Antecedents to Charities Accounting Act, Sections 1 to 6, 10 to 12

The Act is based on the English law and legal practice prevailing at the time of its enactment in 1915. There were two principal sources for its provisions.

(1) The obligation on charitable organizations to notify the Public Trustee of the provisions of their constituting instruments is derived from an early nineteenth-century English enactment, the Charitable Donations Registration Act, 1812. That statute was designed to save charitable purpose trusts from being lost or neglected. It required that the trustees of charitable purpose trusts register the details of their trust with local authorities who, in turn, were obliged to send a copy of the registration to the Court of Chancery. This obligation, had it been fulfilled, would have resulted in a nearly complete registry of charitable purpose trusts in England. By the time of the Nathan Report, however, it was considered to be a "dead letter" and, as the Nathan Report commented, seems to have never been more than half-heartedly observed.
The powers of inquiry of the Public Trustee under the *Charities Accounting Act* are based on the powers of the English Charity Commissioners established in a series of three mid-nineteenth century reforming statutes: the *Charitable Trusts Act, 1853* (in particular, sections to 12, 14, 15, and 61), the *Charitable Trusts Amendment Act, 1855* (in particular, sections to 9, 44, and 45), and the *Charitable Trusts Act, 1860* (in particular, section 19). These statutes, in summary, provided for a very broad power of inquiry in the Charity Commissioners "to examine and enquire into all or any charities in England or Wales, and the nature and objects, administration, management, and results thereof, and the value, condition, management, and application of the estates, funds, property, and income belonging thereto". They also provided that the trustees of charitable trusts could be required to render to the Commissioners such accounts and statements in writing as the Commissioners might require, and that the trustees were obliged, in any event, to submit their accounts to the Commissioners on an annual basis. The sanction for failing to comply with these requirements was a citation for contempt of the High Court of Chancery.

By the time of the *Nathan Report*, indeed well before, the powers of inquiry were being exercised in a "light handed" fashion. The Commissioners intervened only in situations where "something serious [was] brought to light". This was the case even though the powers of inquiry were quite explicitly intended to permit more frequent interventions. By the 1950s, according to the *Nathan Report*, only a third of the charities in England were complying with the obligation to submit their accounts to the Charity Commissioners on an annual basis. This failure was attributed to a number of factors, including the lack of administrative resources on the part of the Commissioners, ignorance of the obligation on the part of charitable trustees, and the reluctance on the part of the Commissioners to seek application of the sanction.

These mid-nineteenth century English statutes were the culmination of a long history of state interest in the protection and efficiency of charities. Two precursors, in particular, are worth mentioning. The first was the *Statute of Elizabeth* or, more formally, the *Charitable Uses Act, 1601*. That statute, as discussed above in chapter 7, is the origin of the modern definition of charity. Its objective was to ensure the fulfilment of charitable purposes and to protect them against "frauds, breaches of trust and negligence in those that should pay, deliver and employ" them. The administration set up under that statute established local commissions with extensive powers to ensure that "property devoted to the charitable uses set out in the preamble [of the statute] was employed in accordance with the intention of the donors". In the words of the statute, the Commissioners were empowered to set down such orders, judgments and decrees as the said land, tenements, rents, annuities, profits, goods, chattels, money and stocks money may be duly and faithfully employed to enforce such of the charitable uses and intents before rehearsed.

The local commissions, comprised of five persons, were chosen by the Lord Chancellor from the local gentry and clergy. This regime worked well until the mid-seventeenth century when, because of a general lack of interest, its procedure was revealed to be
"cumbersome..., dilatory..., and costly". The commissions were held infrequently thereafter and the last commission was held in England in 1803.

The second precursor to mid-nineteenth century reform was a series of commissions, including the most famous, the Brougham Commission (named after its chairman, Lord Brougham), established between 1818 and 1837 to record charitable trusts in England and Wales, and to discover and investigate cases of maladministration. The result of these investigations was a recommendation by the Select Committee on Public Charities in 1835 to establish an independent authority which would have the powers of the Court of Chancery to supervise charitable purpose trusts. It was as a result of this committee's report that, some eighteen years later, the Charitable Trusts Act, 1853 was enacted. Numerous previous attempts to enact legislation had failed, largely because of serious opposition in Parliament to the establishment of a "despotic tribunal" with "arbitrary and despotic powers".

(c) Significant Amendments to Charities Accounting Act

The Charities Accounting Act has been amended several times since its enactment in 1915. We mention five sets of amendments in particular.

(1) In 1919, the supervisory jurisdiction and powers of inquiry under the statute were taken from the Attorney General and placed in the Office of the Public Trustee.

(2) In 1951, an awkwardly worded section, now section 1(2), was added to make religious, educational, charitable, and public purpose corporations subject to the supervisory jurisdiction and powers of inquiry of the Public Trustee. That same statute also put in place what is now section 6, which provides for a mechanism for members of the public to complain about methods of solicitation of funds and the expenditure of solicited funds by charitable organizations.

(3) In 1957 an amendment added what is now section 2(2). Under section 2(2), the Public Trustee has the power to require the officers of a corporation controlled by a charity to furnish the Public Trustee with information on its assets, profits, and the general state of its finances. This power is supported by the possibility of an application, under what is now section 2(3), to the Supreme Court by the Public Trustee to compel the production of the relevant information.

(4) The statute was amended in 1982 at the time of the repeal of the Mortmain and Charitable Uses Act to add several new and revised mortmain rules applicable to charities only. These amendments are discussed in more detail below in chapter 18. That same statute also added what is now section 10 of the Act. Section 10 permits any two or more persons to apply to a court for directions regarding the administration of the trust or to allege a breach of trust, and to request that the court cause the Public Trustee to investigate.
(5) The statute was recently amended (in October 1996) to add section 5.1. Section 5.1 grants power to the Attorney General to make regulations providing that acts or omissions requiring approval of the court are deemed approved. It is expected that this provision will result in regulations that will streamline the approval process governing fiduciary compensation. Other minor amendments are pending. These would make other procedures under the Act somewhat less cumbersome.

3. CURRENT LAW OF ONTARIO

(a) Introduction

We now turn to a description of the current law of Ontario. We look at the constitution of the government agency in (b) and its various administrative powers in (c).

(b) The Charities Division of the Public Trustee

The principal supervisory authority in Ontario is the Public Trustee. The Public Trustee is established as a corporation sole under the Public Guardian and Trustee Act. Most of its jurisdiction over charities is set out in the Charities Accounting Act. The Public Trustee is required to report annually on its affairs to the Attorney General. The Attorney General, in turn, submits the report to the Lieutenant Governor in Council, who presents the report to the Assembly. The Public Trustee is also subject to a mandatory annual audit by the Provincial Auditor and to the supervisory authority of advisory committees, whose members are "visitors" of the office. Each advisory committee is also required to report annually on its own affairs to the Lieutenant Governor in Council. Under the Public Guardian and Trustee Act, the Public Trustee is also given authority to act as trustee of any "charitable or public [sic] trust".

The regulatory and supervisory jurisdiction of the Public Trustee is exercised by its Charities Division. The Charities Division currently has a staff of seven persons: three office staff, three lawyers, and a chartered accountant. Its statements of revenues and expenses for the years ending March 31, 1988, 1989, and 1990 are as follows:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court awarded costs</td>
<td>$28,000</td>
<td>$33,518</td>
<td>$96,867</td>
</tr>
<tr>
<td>Expenses</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Salaries</td>
<td>162,598</td>
<td>186,285</td>
<td>253,217</td>
</tr>
<tr>
<td>Employee benefits</td>
<td>23,381</td>
<td>27,942</td>
<td>37,982</td>
</tr>
<tr>
<td>Transportation and miscellaneous services</td>
<td>16,010</td>
<td>13,720</td>
<td>16,564</td>
</tr>
<tr>
<td>Supplies and equipment</td>
<td>50,628</td>
<td>9,446</td>
<td>7,098</td>
</tr>
<tr>
<td>Total administration expenses</td>
<td>$252,617</td>
<td>$237,393</td>
<td>$314,861</td>
</tr>
<tr>
<td>Excess of expenses over revenue</td>
<td>(224,617)</td>
<td>(203,879)</td>
<td>(217,994)</td>
</tr>
</tbody>
</table>
As can be seen, this is a relatively small administration when it is considered that there are over 40,000 charities in Ontario.

(c) The Public Trustee's Supervisory Powers

(i) Registration Requirement

Section 1(1) of the Charities Accounting Act requires "the executor or trustee" of a charitable purpose trust created by the terms of "a will or an instrument in writing" under which property is given to or vested in such person for a charitable purpose, to give notice of such trust to the Public Trustee and to the designated beneficiary, if any.

Section 1(2) of the Act, in a somewhat awkward fashion, makes the requirement under section 1(1) applicable also to corporations incorporated for charitable purposes. It does this by deeming such corporations to be "trustees" within the meaning of the Act and deeming the instrument of incorporation to be an "instrument in writing", notice of which is to be given to the Public Trustee. Section 1(2), oddly, also deems any property acquired by the corporation to be property within the meaning of the Act. Thus, it would seem, the Public Trustee must be notified of all acquisitions of property by a charitable corporation.

The notice required by these two provisions must contain information relating to the "nature" of the property acquired. The trustee must also send a notarial copy of the vesting instrument. These tasks must be completed within one month of the date of execution or, if the instrument is a will, of the death of the testator.

If all charities complied with these filing requirements, the Public Trustee would have a record of all assets acquired by instrument in writing by all charities in Ontario. Since assets might come into the possession of a charity other than "under the terms of an instrument in writing" (for example, door-to-door fundraising, corner stand, cheques in the mail), this compilation would represent only a fraction, perhaps a large one, of all charitably held assets. The assumption of the drafters of the section was that the vast majority of charities are created by will or trust deed and are in the form of charitable trusts. It is fair to say this assumption is now false. It is also fair to say that the adaptation of these statutory provisions to the charitable corporation is badly done.

The statute is further defective because there is no effective sanction for failing to comply with the obligation to register. There is little incentive to comply, therefore, and the compliance rate is, in fact, quite poor. The section 1 filing requirement is subject to the general sanctions for breaches of duties contained in section 4 of the statute. In brief, section 4 provides that, among other things, upon a failure to comply with section 1, a judge, upon application of the Public Trustee, may direct "the trustee" to comply with section 1. This is a very cumbersome sanction for a simple failure to register. It has rarely, if ever, been applied. There are more serious sanctions provided for in section 4, but it seems very unlikely that any of these would be applied even to intentional breaches of section 1 and, to our knowledge, none of them have been.
The section 1 filing requirement is supplemented by another filing requirement contained in section 5(3). This provision requires the local registrar of the court to transmit a copy of any will submitted to the court for probate that contains a provision pursuant to which property is vested in "a person as executor or administrator for a religious, educational, charitable or public purpose". The language emphasized does not, for some reason, track the language of section 1"executor or trustee"but, despite that, the obligation of the registrar does seem to be co-extensive with the obligation of trustees under section 1(1). This provision has been the only successful one in terms of attracting the compliance of its addressees.48 Thus, at least as far as charitable trusts created in wills are concerned, the Public Trustee's records are reasonably complete.49

A closer study of section 1 would reveal a raft of further in congruencies. There is little point in rehearsing these, however, since they are well known and readily apparent. More important is the overall lack of policy justification for the section 1 registration requirement as it is currently formulated. There are two main difficulties. First, the mind set of the provision is of a time when most charities were organized as trusts with endowments and, perhaps, when most property entitlements were less fluid and less fungible. Although we agree that a provincial registration requirement might be concerned with identifying the size of charitable entities as measured by their property holdings, there is little point in recording the "nature" of the property held or each individual acquisition of property, unless the aim were to regulate the investment responsibilities of charitable fiduciaries, which seems unlikely in the case of the section 1 filing requirement.50 A more coherent approach, insofar as the concern is over property held for charitable purposes, would require information about the value of property held, from entries on a balance sheet. Second, the only point of a registration requirement which mandates disclosure of the value of property held and the purposes for which it is held, is to have a register of charitable entities. If that is indeed the objective of section 1, the most important types of information relating to the identity of the fiduciaries and to the location of the entity are not, for some reason, required. Perhaps it is presumed that this information will be supplied as a matter of course. Such a presumption may have made sense when charities were organized as trusts and established in wills or by trust deeds, but it does not make much sense today.

The registration requirement, therefore, is in need of reform. We have already mentioned our recommendation in favour of a registration requirement and an annual disclosure requirement aimed primarily at regulating access to the status of charitable trust, charitable corporation, and charitable association. We return to describe other details of this recommendation in section 5 of this chapter.

(ii)Random Accountability

Under section 2 of the statute, the Public Trustee can require "from time to time" that the trustee of a charitable trust or a charitable corporation furnish particulars in writing of the condition or disposition of the property described above, the names and addresses of the trustees (the section does not mention directors), and the administration or management of the trust.51
The wording of this section does not take into account different organizational structures of the charitable corporations, so, as noted, it fails to mention "directors" in section 2(b). It also speaks of the administration or management of the "the trust" in section 2(c) not, say, the "assets". This infelicity in drafting has led some to conclude, in our view mistakenly, that a charitable corporation holds all its assets on trust for its corporate objects.

This power to impose accountability on a random basis is an important one in the current scheme of things. In the current *Charities Accounting Act*, however, it stands almost alone as the one reasonably practical investigative power of the Public Trustee. Moreover, since there is no general register of charities, candidates for the accountability exercise are chosen reactively or randomly, not scientifically or systematically. Furthermore, in recent years the Public Trustee appears to be using this power to establish a generally applicable annual reporting requirement.

**(iii) Power to Force Passing of Accounts**

The investigative power just discussed is supplemented by a power in the Public Trustee to require the "trustee" (again, there is no accommodation in the statutory language for the corporation) to "submit the accounts of dealings with the property" coming into his or her hands under the terms of a bequest or gift, to be "passed and examined and audited" by a judge of the Ontario Court (General Division). This power is, perhaps, the ultimate recourse of the Public Trustee. Passing of accounts is a tedious and costly investigative procedure borrowed from the general law of trusts and estates. It is entirely inappropriate for the accounts of an operating organization and has been widely criticized as being unduly intrusive and cumbersome. We already mentioned in chapter 13 that it should not be available in the case of charitable trusts. We recommend here that it be abandoned in the new supervisory law as well.

**(iv) Power to Investigate Affairs of Controlled Corporations**

Sections 2(2) and 2(3) of the *Charities Accounting Act* empower the Public Trustee to investigate the affairs of a corporation "controlled" by the "executor or trustee" and to apply to the court to compel the disclosure of information concerning the corporation. This is a useful power, but, as currently formulated, it is poorly defined. We return to this power in chapter 18 in the discussion on the regulation of investments, since the purpose of the power is to ensure that the fiduciaries of the charity do not cause harm to the charity indirectly by being imprudent or disloyal in exercising their control over the internal affairs of corporations in which the charity has invested.

**(v) Powers of Court**

The court is given broad supervisory powers over charitable purpose trusts and charitable corporations in section 4 of the Act. The court may exercise its powers where there has been a failure to comply with the provisions mentioned so far, where there has been a misapplication or misappropriation of charitable funds, and where there has been an
improper investment or non-compliance with the provisions of an instrument or will. Upon application of the Public Trustee, the court may make orders ranging from directing compliance, to removing the trustees and appointing new trustees, to imprisonment and fines. We have recommended in previous chapters, and we recommend below, that most of the important decision-making powers concerning charities remain under the jurisdiction of the court.

(vi) Public Trustee's Power to Represent Charities

The Public Trustee may, pursuant to section 5(4) of the Act, intervene in any proceeding where it is sought to set aside, vary, or construe a will or other instrument if no one appears for a charity named in the will, if there is no named charity, or if the executor or trustee is given a discretion in choosing the charity. This is a very limited power of intervention that we recommend be continued, subject to the existing conditions.

(vii) Publicly Initiated Investigations

Under section of the Charities Accounting Act, added in 1982, any two or more persons who allege a "breach of a trust created for a charitable purpose" (again, there is no effort in the drafting of the provision to include charitable corporations) are permitted to apply to the court, which may hear the application and make any order it considers just for "the carrying out of the trust". The Public Trustee may appear on the application. The court can order the Public Trustee to make such an investigation as he or she considers appropriate. The Public Trustee, in conducting such an investigation, has the powers of a commission under Part of the Public Inquiries Act. He or she reports to the Attorney General and to the court. We recommend below that a similar provision be contained in any new legislation.

(viii) Fundraising Complaints

Section 6 of the Charities Accounting Act provides that any person may complain to the court as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose not just charitable purposes or as to the particular use of the funds raised. As in section 10, the court can order the Public Trustee to investigate. In making such investigations, the Public Trustee has the powers of a commission under Part II of the Public Inquiries Act. The Public Trustee reports to the court and to the Attorney General, and the court may make a further order requiring the passing of the accounts in question.

(ix) Mortmain and Charitable Uses Restrictions on Land Holding and Related Powers of the Public Trustee

Section 8 of the Charities Accounting Act establishes rules governing the ownership of land for a charitable purpose. The Public Trustee has certain enforcement powers in respect of these provisions, which we discuss, and recommend be abolished, in chapter 18 below.
(x) Power to Make Regulations.

Sections 5 and 5.1 of the Charities Accounting Act establish a power in the Attorney General, on the advice of the Public Trustee, to make regulations. Section 5 deals with regulations concerning the implementation of the various provisions of the Act. Section 5.1 allows for regulations to circumvent the need to obtain court approval of payments to fiduciaries.

(xi) Conclusion

In our view, the current law governing state supervision of the charity sector is inadequate. It is badly conceived and it is outdated; it requires reform. Before setting out our reform proposals, we examine the current law in other jurisdictions.

4. THE SUPERVISION OF CHARITIES IN OTHER JURISDICTIONS

(a) England and Wales

(i) Public Administration in England and Wales: Charity Commissioners

The Charity Commissioners have been in existence since 1853. The original statute, the Charitable Trusts Act, 1853, provided for three paid Commissioners, two of whom had to be barristers of at least twelve years' standing, one of which was to be the Chief Commissioner. Until 1960, the practice was to have two paid barristers and one member of the House of Commons, known as the Parliamentary Charity Commissioner, to Act as the three Charity Commissioners. The Charities Act 1960 modified this arrangement slightly. The first schedule of the current Act, Charities Act 1993, provides for three commissioners, at least two of whom must come from either branch of the legal profession. The Chief Commissioner need not be a lawyer. The position of Parliamentary Commissioner was abolished in 1960. The Commissioners are appointed from the regular civil service and therefore need not necessarily remain as Charity Commissioners for their entire public lives. The Commissioners are appointed by the Secretary of State for Home Affairs. The Secretary of State has the power to appoint two additional commissioners. Currently, there are five Commissioners.

Although the Commissioners are represented in Parliament by the Secretary of State for Home Affairs, the Secretary has no supervisory jurisdiction over the Commissioners and cannot do more than advise them of any criticisms brought before Parliament and recommend possible remedies. The principal means of accountability is the requirement that the Commissioners file an annual report with the Home Secretary, which deals with "their operations during [the]...year". The Charities Act 1993 provides that the Secretary of State must lay a copy of the report before Parliament. Other than that, the Charity Commissioners are not answerable to any Minister in respect of the exercise of any of their powers under the statute. The Secretary of State for Home Affairs also has various powers to make regulations under the Act, the Charity Commissioners do not. The Act provides in a number of places for a power in the Secretary of State to "except"
any charity from the requirements of the Act. For example, the requirement to register and the requirement to file an annual statement of accounts are the subject of a power of exception in the Secretary of State for Home Affairs.\footnote{66}

The Charity Commissioners used to share all aspects of their jurisdiction over educational trusts with the Secretary of State for Education and Science who, historically, exercised exclusive jurisdiction under the \textit{Endowed Schools Acts 1869}\footnote{67} with respect to charitable trusts in favour of educational and as of 1949 quasi-educational purposes. Prior to 1960, this division of jurisdiction resulted in some charities falling under the jurisdiction of both the Charity Commissioners and the Minister of Education because their charitable purposes included educational and non-educational objects. The \textit{Charities Act, 1960} provided formally, in section 2, that the general jurisdiction of the Minister of Education and the Charity Commissioners is concurrent. The jurisdiction of the Secretary of State for Education and Science was abolished in 1973.\footnote{68}

The Charity Commissioners have a staff of over 700 people in three offices located in London, Liverpool, and Taunton. The Commission is organized into five divisions: the Registration Division; the Charities Divisions; the Monitoring and Investigations Division; Official Custodian's Division; and the Secretariat. The Registration Division is staffed by non-legal personnel. It processes applications for charitable status. Charities that use a model trust deed or have constitutions which have been approved by Inland Revenue are processed entirely by the administrative staff. The Charities Division provides support to existing charities in matters ranging from preparing \textit{cy-près} schemes to advising trustees on their duties and powers. Much of the preliminary work in the Charities Divisions is done by non-legal personnel. Legal points or issues are referred to a lawyer or, if a particular principle is in question, to the assistant Commissioner heading that particular division. The Monitoring and Investigations Division investigates complaints made against or by charities. It also looks into matters where a charity's accounts are being scrutinized or there has been information provided by Inland Revenue. The Official Custodian position is occupied by an official appointed by the Charity Commissioners. Generally speaking, the twofold purpose of the office is to ensure that the property of charities is in safe hands and to alleviate the need for transfer of title when trustees change. The Official Custodian is a corporation sole with perpetual succession. As a custodian trustee, the Official Custodian must comply with the directions of the charity's trustees, insofar as they are in accordance with the terms of the trust, in dealing with the property. The Official Custodian may not interfere with the actual management of the charity nor with the administration of the property. The Official Custodian also provides investment advice to trustees and holds investments for them.

\begin{enumerate}
\item \textbf{Supervisory Powers of the Charity Commissioners}

\begin{enumerate}
\item \textit{Scope of Jurisdiction}

The \textit{Charities Act 1993}\footnote{69} provides the Commissioners with an educational, advisory, and regulatory role over charity. The Act defines the jurisdiction of the Commissioners, initially, as one in respect of the subject-matter "charity". The \textit{Charities Act 1993} does
not provide a definition of "charity" or "charitable purposes". Section 96(1) provides that "charity" means any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities”. Section 97(1) provides that "charitable purposes" means purposes which are exclusively charitable according to the law of England and Wales. The term "institution" is itself defined as including "any trust or undertaking". Section 97(1) defines "trusts" to mean "the provisions establishing...[a charity] and regulating its purposes and administration, whether those provisions take effect by way of trust or not, and in relation to other institutions has a corresponding meaning", (emphasis added) seeming thereby to encompass corporate objects. "Charity trustees" is defined in the same section to mean any persons "having the general control and management of the administration of a charity", thus, presumably, including the directors, and possibly the officers, of a charitable corporation. Besides being made generally subject to the provisions of the Charity Act, 1993, charitable corporations are provided for explicitly in sections to 69, which, among other things, preclude charitable companies from altering their constitutional status by ceasing to be a charity in a way that would affect property previously granted to the corporation by gift.

Certain institutions are excluded from the definition of charity. Thus, section 96(2) excludes trust property that has been consecrated and the property of purely ecclesiastical corporations. The Act also exempts certain institutions from its purview. These exemptions are long-standing and, for the most part, based on the rationale that the law has made provision for the supervision of the affected entities elsewhere. These institutions are called "exempt charities" in the statute and are listed in a schedule to the statute. They include such institutions as universities, museums, and church commissioners.

The statute also deploys a concept of "excepted charities". Certain provisions of the statute provide that the Charity Commissioners or the Secretary of State may decide that certain charities are "excepted" from certain specific obligations under the Act, principally the obligation to register. These powers provide that the exception can be made on a permanent or temporary basis.

In general, the Charity Commissioners are not allowed to take part in the actual administration of any particular charity, but they do have the power to permit any administrative act of a charity that is expedient and not expressly prohibited by the Act or trust deed. Their main function is to oversee all charities and ensure that those who manage the charities are doing so properly.

b. Registration Requirement and Public Accountability

All charities, except exempted and specifically excepted charities, are required to register under section 3 of the Act. Although registration of an organization does not conclusively confer charitable status, registration does result in an automatic entitlement to the tax advantages. The register is public, and information collected by the Commissioners on the register is conveyed to local authorities and to other government departments.
Failure to register with the Commission can result in a compliance order by the Commissioners that is enforceable by contempt proceedings. Any person affected by the registration of an institution may object to its being registered or apply to have it removed. The decision of the Commissioners on this question is appealable to the court. The fact that a registered entity is a charity must be indicated on its public documents.

Section 41 of the Charities Act 1993 requires that the trustees of all charities keep proper books of account. The accounts must be "sufficient to show and explain all the charity's transactions", and be comprised of a general ledger and a balance sheet, at the very least. All books and statements are to be preserved for a minimum of six years unless the charity ceases to exist and permission to dispose of the records is granted by the Commissioners.

Section 42 of the Charities Act 1993 requires that charities (companies are excluded) that are not excepted by order or regulations submit statements of account annually to the Commission. Charities whose gross income does not exceed £25,000 (this describes approximately seventy-five percent of charities in England and Wales) are subject to a less stringent annual reporting requirement. The accounts must be audited if the charity's gross income or expenditures exceed £100,000 or if the Commissioners require an audit.

Under the Charities Act 1993, county councils may maintain a public register of local charities. Local authorities may conduct reviews of local charities and make suggestions for their improvement, such as recommending that a group of charities be amalgamated. As well, local authorities may cooperate and coordinate their activities with local charities.

Currently, failure to submit accounts may result in a compliance order from the Commissioners and a conviction of a summary offence subject to a fine for the person responsible.

### c. Powers of Inquiry

The Commissioners' power to conduct inquiries is found in sections 8 to 12 of the 1993 Act. Should the Commissioners discover any misconduct or mismanagement in a charity's administration and form the opinion that steps must be taken to protect the charity's property, they may, under section 18, take the necessary action to ensure the security of the charity's assets. Measures which may be taken include suspension or removal of trustees or other responsible parties, the freezing of bank accounts and transactions, and the appointment of a more suitable trustee if deemed necessary.

The Commissioners may remove or appoint charity trustees without first conducting a section 8 inquiry in situations where the trustee is bankrupt or is incapable of acting by reason of mental disorder, or where a corporation is in liquidation. The Commissioners may also act in cases where the trustee has not acted and refuses to declare his/her
willingness or unwillingness to act. If the trustee is outside England or Wales and cannot be found or fails to act, then the Commissioners may remove him or her and appoint a more suitable trustee in his or her place.

**d. Judicial Powers**

The Commissioners have concurrent jurisdiction with that of the High Court in *cy-près*, scheme-making and trust administration matters.

**e. Advisory Functions**

The Commissioners may advise charity trustees. Any action of a charity trustee in accordance with such advice is deemed to be in accordance with his or her duties as trustee.

**f. Conclusion**

On first blush, it seems there is very little in the English and Welsh model that is directly useful to Ontario’s situation, since the Charity Commissioners are a mature public administration agency and have been given the lead role in the supervision of charity for over a century, and since some of what they do is currently done in Canada at the federal level. However, elements of it are useful, such as the Commissioners’ educative and advice-giving functions; the concepts of "exempt" and "excepted" charities; their powers of inquiry; and the role of the Minister in making regulations and in selecting charities to be excepted.

**(b) Northern Ireland**

The *Charities Act (Northern Ireland) 1964* provides that the supervision of charity lies within the purview of the Ministry of Finance. Any charity seeking advice or support must apply to the Department of Finance and Personnel. Where there is cause to believe that legal action should be taken against a particular charity, the Ministry must send a certificate attesting to this to the Attorney General, who then institutes the legal proceedings necessary. The Ministry is the "support base" for charities in Northern Ireland. For example, a charity wishing to incorporate applies to the Ministry for approval of the scheme. Where the Ministry ascertains that a charity should have one or more new trustees appointed in order to effect proper administration of the charity, the Ministry may do so by its own order or by order of the court. This power is limited, however, to situations where the incumbent trustee wishes to be discharged from or refuses to perform his/her responsibilities. Where a charity has no trustees and suitable ones cannot be found, the Ministry, with the consent of the Attorney General, may appoint itself as the sole trustee of the charity. The Ministry of Finance also has this power with respect to the administration of charity property and a limited *cy-près* jurisdiction.
There is no register in Northern Ireland similar to that in England and Wales. In 1984, the Finance and Personnel Committee of the Northern Ireland Assembly recommended that a register be established, and that the powers of the Charity Commissioners of England and Wales be extended such that one Commissioner would be responsible for overseeing charity activity in Northern Ireland.\textsuperscript{101} The government rejected these proposals and, instead, made other changes to the \textit{Charities Act (Northern Ireland) 1964}.

The \textit{Charities Act (Northern Ireland) 1964} provides that proper accounts must be kept by trustees of a charitable organization.\textsuperscript{102} Presumably, a charity must provide this information to the Ministry, if it so requests, but there is no provision for submission of these accounts to a government authority, nor is there a statutory obligation to make them available to the public. Deeds or other instruments relating to a charity may be deposited with the Ministry for safe-keeping, but, again, charities are under no obligation to do so.\textsuperscript{103} Only where the Ministry has reasonable grounds to believe that there has been mismanagement of charity property, can it, with the consent of the Attorney General, order an inspection of a charity's books and records.\textsuperscript{104}

\textbf{(c) Republic of Ireland}

In the Republic of Ireland, the \textit{Charities Acts, 1961 and 1973} establish a supervisory law of charities. The main supervisory body to which charities are subject is the Commissioners of Charitable Donations and Bequests for Ireland. The Commissioners are accountable to the Minister of Local Government, and they report annually to each House of the Legislature. They have the power to replace trustees and to require the production of certain documents.\textsuperscript{106} The Commissioners are vested with the power to advise trustees as to the proper administration of charitable trusts.\textsuperscript{107} The Commissioners may also act as mediators should trustees of a charity request that a compromise be reached between them and a person related in some way to the charity.\textsuperscript{108} Power to sue for the recovery of charitable gifts that have been misappropriated or misapplied is vested in the Commissioners, although the Commissioners must obtain the consent of the Attorney General prior to taking action.\textsuperscript{109} Other cases in which the Commissioners may be of the opinion that legal action is warranted may be certified by the Attorney General.\textsuperscript{110} The Commissioners are also vested with a scheme-making power, and may authorize the sale, exchange, or surrender of a lease of charity land, as well as make investments of charitable funds held by it if necessary.\textsuperscript{111} They can replace trustees. The Commissioners do not, however, have the same wide discretionary powers to conduct inquiries as do the English Charity Commissioners.

\textbf{(d) New Zealand}

Under section 58 of the \textit{Charitable Trusts Act, 1957}, the Attorney General has a full discretionary power to "examine and inquire into all or any charities in New Zealand...and to inquire into the nature and objects, administration management and results thereof, and the value, condition, management and application of [its] property ". The power to inquire may be delegated. In conducting his or her inquiry, the Attorney General may require the production of any documents relating to the charity or
its administration. Under section 60, the Attorney General may apply to the court for an appropriate order with respect to any breaches of trust.

The effectiveness of the Attorney General's supervision is somewhat hampered by the fact that the Attorney General lacks a means of obtaining information concerning the existence of a trust, much less the efficiency of its administration. Only when trustees of a charitable organization make an application to the court for approval of a scheme, or if a complaint is made by a member of the public, does the Attorney General become involved. Thus, the supervision of charities in New Zealand is relatively non-existent, and they are more or less free to operate as they wish.

In a 1979 report, the Property Law and Equity Reform Committee were of the opinion that, given the relatively low number of mismanagement or misappropriation cases which do occur, establishing a body of officials similar to that of the Charity Commission in England would be excessive. An alternative possibility considered was to legally require that all charitable trusts have their accounts audited. However, the conclusion reached in the report was that current procedures were sufficient to deal with any breaches of charitable trusts and there was no justification for implementing further control mechanisms.

(e) Australia

(i) Introduction

The degree of supervision in Australia varies from state to state. We examine five states: Victoria, Queensland, New South Wales, South Australia, and Western Australia. Generally, the administrative apparatus is rudimentary, and the focus is on charitable appeals, not charity generally. New legislation in New South Wales, however, may be of interest.

(ii) Victoria

Under the Charities Act 1978 of Victoria, the Attorney General has the power to appoint inspectors to inquire into the administration or management of any charity or charitable estate. The Act also outlines the inspectors' rights and duties while investigating a charity. Any report submitted to the Attorney General by an inspector may be retained for use in legal proceedings and for perusal by interested parties who apply to do so. The report may lead to the removal of a trustee by order of the court. Inspectors may be appointed to inquire into registered benevolent societies, incorporated institutions, or scheduled hospitals which fall within the purview of the Hospitals and Charities Act 1958, if consent has first been obtained from the Minister of Health.

(iii) Queensland

In Queensland, the Minister responsible and the Attorney General are given wide powers of supervision over funds raised by collection for any "charitable purpose" under the
Charitable Funds Acts, 1958 to 1964 and over charitable appeals under the Charitable Collections Acts, 1966-1981. The former is concerned mainly with cy-près schemes for funds raised by charitable appeals. The latter is concerned mainly with the regulation of such appeals. Under the latter, persons making an appeal for support of a charity must register. There are exemptions for specified religions. The Minister is given the power to remove from the charities register those charities who have been found to have misappropriated or mismanaged funds raised through solicitation. Similarly, a charity exempt from registering may lose that exemption status. Investigations may be conducted to examine the management of a charity, and inspectors may be appointed to examine witnesses under oath, as well as review statements and documents. Penalties for offences against this Act range from removal of charitable status, to fines, to indictment.

(iv) New South Wales

The Charitable Trusts Act 1993 establishes a scheme-making power in the Attorney General and extends the power of the court to apply property cy-près. The Charitable Fundraising Act 1991 regulates charitable fundraising appeals. Registration, with exceptions, is required, and charities are subject to accounting and audit requirements, and inspection. The scope of the statute extends beyond charitable purposes to benevolent, philanthropic, and patriotic purposes. In a miscellaneous provision, the remuneration of nonprofit fiduciaries is regulated.

(v) South Australia

Legislation in South Australia establishes the Commissioners of Charitable Funds to supervise those charities who receive public funding. Private charitable trusts are left relatively free of supervision by the government. There is no register system or commission overseeing private charities to the degree present in other states.

(vi) Western Australia

The Western Australia Charitable Trusts Act, 1962 vests the Attorney General with the power to conduct investigations into the condition and management of charities. The Attorney General may also appoint an officer from the public service to conduct any examination deemed necessary. Charities are required to produce any records, books, or documents pertaining to the administration of any trust, property, or income required by the Attorney General to effect a thorough investigation. Should mismanagement be discovered, the Attorney General may apply to the court to have a new scheme approved.

(f) United States

(i) Introduction

We commence with a short survey of the situation with respect to the supervision of charity in the United States generally, then focus specifically on California, one of the
states which has enacted the *Uniform Act for the Supervision of Trustees for Charitable Purposes*.  

(ii) General Survey

Only four states California, Illinois, Michigan, and Oregon have adopted the *Uniform Act*. Other states have some statutory provisions regarding such matters as allowable investments and other actions taken by trustees. States that have adopted the *Uniform Act* have established supervisory roles that include the regulation of trusts, charitable corporations, and corporations holding property for charitable purposes. The Washington statute is specifically limited to charitable trusts and to corporations holding property in trust. Some states have further expanded their respective legislation to include unincorporated associations in the definition of "trustee".

Supervisory functions in states that have not adopted the *Uniform Act* range from regulating only charitable trusts to supervising every "public charity". Most statutes exempt religious organizations such as churches, cemeteries, or orphanages, while others exempt any property held for religious purposes. Other exemptions include educational institutions, some veterans' organizations, and banking institutions. Illinois also exempts those organizations which hold property whose value is less than $4,000.

Most states' statutes make provision for a form of register to which charities must report. Charities in those states must register and provide information such as the form of the organization, how the property is held, and any other information deemed necessary by the Attorney General. Generally, whether there is a register or not, charities are required to file, with the appropriate authority, the instrument which created the charity and, in some states, an inventory of assets. Most registers of charities are open to public inspection, although their inspection is usually subject to the discretion of the Attorney General. Some states withhold public disclosure of those parts of the documents filed that do not relate directly to the charitable purpose.

The Attorney General (or secretary of state, or state auditor) is generally vested with the power to investigate charities and to formulate the rules and regulations pertaining to charities. The scope of such powers varies by state. Some have general provisions, while others, such as Oregon and Washington limit the Attorney General's or secretary of state's regulation-making power to rules pertaining to the filing and contents of reports required by statute. In Massachusetts, the Director of Public Charities has the power to make rules and regulations that pertain to the filing of reports and the manner in which examinations and investigations are to be conducted.

Penalties for non-compliance are also enforced by the Attorneys General in most states. In many states, failure to file a report may be deemed a breach of trust. The filing of false information or the refusal to file can result in fines and possible imprisonment. In Massachusetts, foreign corporations failing to file may be enjoined from the transaction of any business in that state. In Washington, refusals and fraudulent representations
constitute "gross misdemeanors." In New York, the person responsible for the infraction may be judicially removed from his/her position.

(iii)California

California's Uniform Supervision of Trustees for Charitable Purposes Act applies to both charitable corporations and to trustees holding property for charitable purposes. Supervisory powers similar to those held by the Charity Commissioners in England and Wales are held by the Attorney General.

The corporations and California Uniform Act requires the Attorney General to establish a register of those charitable trusts that are subject to disclosure requirements of the Act. The California Registry of Charitable Trusts was created in 1959. Its main purpose is to compile the registration statements and annual reports of California charities for review. The collected documents are also available for public inspection. Should the Registry's review of a charity's records uncover any questionable management of its assets, the matter is referred to the Attorney General. Those who are not registered, but should be, are contacted by the Registry's auditors.

Originally, Registry personnel annually examined the records of every registered charity. As the number of charities grew, however, and the number of registry personnel did not, review of annual reports became limited to those charities whose assets exceeded $100,000. In 1973, the Registry implemented a computer program which performs initial screenings of annual reports. These reports are each assigned an audit "score". Those with the highest scores are examined by an auditor. Those with apparent discrepancies are contacted, and, generally, most of these charities offer acceptable explanations. Those which do not are forwarded to the Attorney General for field investigation or legal action.

There are a number of reasons why a case would be referred to the Attorney General for further action. The most common reason is that there have been complaints by minority trustees or beneficiaries with respect to perceived asset mismanagement by majority trustees. The second most common reason is notification by a court. The California Uniform Act requires that the Attorney General be a party to any proceedings that involve a possible modification or termination of a trust instrument. A third source of referrals is the result of the Registry's auditing report. Finally, an organization's trustees may approach the Attorney General to inquire, in advance, whether a particular transaction is acceptable.

The cases dealt with by the Attorney General fall into two basic categories: mismanagement by trustees or contested wills. In cases of mismanagement, the Attorney General may bring an action in restitution against the charity's trustees. Rarely is there an application to have a trustee removed entirely, and courts are reluctant to remove a trustee without strong evidence that there is a likelihood of future misconduct. Often, the trustee in question will voluntarily resign his/her office. As mismanagement can easily occur during the dissolution of a charitable organization and the subsequent distribution
of its assets, the Attorney General is party to all dissolution proceedings. The Attorney General is also a party in will contests. Many cases involve charities that are too small to afford counsel for a potentially time-consuming process. Often, a will has named no specific beneficiary. In such situations, the Attorney General intervenes on behalf of the public interest.

The Attorney General also plays an important part in the supervision of charitable corporations. The General Nonprofit Corporations Act provides that charitable corporations are subject to examination by the Attorney General acting on behalf of the state. Should there be any discrepancy or failure to comply with the trust document or general purpose of the corporation, the Attorney General is empowered to take action to correct any such noncompliance or departure. As well, the Attorney General may examine financial records to ensure that a corporation has not accumulated income for a period exceeding five years. The Attorney General is vested with the power to appoint a replacement trustee for a corporation which has failed to comply with its trust.

5. PROPOSALS FOR REFORM

(a) Introduction

Although the basic policy underlying the current law and public administration in Ontario is sound, the law is poorly conceived and the current system of public administration is, due to its size and lack of resources, ineffectual. The province's administration of charities is ill-equipped in terms of staff, financial support, and the legal powers needed to implement its policy mandate. This criticism is in no way intended to reflect negatively on the performance of the Office of the Public Trustee or those other public administration agencies in recent years. Rather, the point is that the current approach to the execution of the underlying policy has long outlived its relevance, and it seriously requires a modernization and rationalization.

The provincial government's objectives in enacting laws and establishing a public administration in this area are the traditional parens patriae ones, supplemented by the modern state's need for a partnership with the nonprofit sector in order to meet some of contemporary society's social welfare demands. Therefore, the law cannot be designed, nor can the public administration approach its task, with the attitude that the nonprofit sector, or its charity component, is somehow subordinate to government. Rather, the overall message of the law, and tone of the public administration in its application, ought to be that the nonprofit sector is an autonomous order in society, valued for its contributions to the welfare of society.

With these preliminary points in mind we describe the specific features of a new public administration, its mandate, jurisdiction, and powers.

(b) Composition, Mandate, and Powers of the Nonprofit Organizations Commission
The new law should establish a commission, the "Nonprofit Organizations Commission" (the "NOC"), with administrative, educational, and investigative powers, but, initially, no judicial or quasi-judicial powers and no power to make regulations. Judicial and quasi-judicial decisions involving nonprofits and other actors in the sector should be made by the Ontario Court (General Division). Regulations should be adopted by the Minister responsible for the Commission on the advice of the Commission. Transfer of powers of judicial or quasi-judicial decision-making and law-making to the NOC should await greater government expertise in the sector and greater confidence on the part of the sector in the government's ability to contribute positively to their work. The NOC should, however, have power to issue policy statements, guidelines, and the like, none of which would be legally binding, but all of which would provide badly needed guidance. The NOC should not have the power to act in the "public interest", rather, all of its powers should be specifically defined in its enabling statute or in the regulations. Like the Public Trustee, the NOC should be part of the Ministry of the Attorney General. It should report annually to the Minister and to the Legislature.

The new statute should use the same basic nomenclature and classifications as appear in the Income Tax Act. It should use one comprehensive word, such as "fiduciary", to refer to trustees and directors and officers, and "charity", to refer to trusts, corporations, and associations which are charitable. It should establish a general power in the Minister to make regulations, and, in particular, a power in the Minister to adopt by regulation any provision of federal law governing charitable and nonprofit organizations. It should establish that certain terms, such as "charity", "foundation", "trust", etc., cannot be used publicly other than in a sense defined in the statute.

There should be five main divisions or areas of responsibility, each headed by a commissioner: registrations, fundraising, audits and investigations, education, and chair. The Commission's most significant mandate should concern charities, but it should also have some jurisdiction over other nonprofit entities. In particular, it should run the registration system for all nonprofit corporations, and it should have powers of regulation in respect of all public appeals (to be defined more precisely in chapter 18), and in respect of all recipients of government grants (to be defined more precisely in chapter 19). Insofar as the government regulates standards or quality in a particular area, such regulatory authority should generally remain with the relevant government ministry. For example, the Ministry of Community and Social Services should continue to regulate the objectives and the standards of performance applicable to the delivery of social services. The NOC, however, would regulate transfer payment accountability at both the government level and at the level of the individual recipient agencies. Its jurisdiction to supervise transfer payment accountability might extend to a power to comment on the effectiveness and efficiency of the methods chosen to deliver government programs, just as the provincial Auditor General currently does, but should not extend beyond this power.

The NOC should consolidate some or all of the functions of the following government agencies insofar as they currently have a mandate that affects the nonprofit sector: the Charities Division of the Public Trustee; the Director of Gaming Services and the
Entertainment Standards Branch; the Companies Branch; and the Treasury and Management Board of Cabinet. One of the objectives of the reform is to coordinate the development of greater governmental administrative expertise respecting the charitable sector. The proposed reform aims to rationalize government resources and effort. Cost implications need not be significant since the reform aims mostly to rationalize resources. However, an agency like the NOC would probably warrant a greater commitment of resources since it would have a stronger statutory mandate and a very coherent rationale for existence.

We look briefly at the five main areas of responsibility.

(i) Registrations Division

The NOC should administer a province-wide computerized registration system in which are registered all nonprofit corporations, all charitable trusts, and all charitable associations. The contents of the database and the initial and annual filing requirements for these entities have already been described in previous chapters. The commissioner in charge of registrations should be empowered to make the initial decision with respect to whether an entity is charitable, and therefore entitled to be recorded as such. That decision, however, should be subject to court review and, subject to the contrary decision of a court, should be required to be consistent with any positive decision of Revenue Canada in the matter.

We recommend in the following chapters that, subject to certain exceptions, nonprofit entities which do fundraising or receive government grants should be subject to further registration requirements. We also recommend that third-party fundraisers and their employees be required to register. These registration systems should also be under the jurisdiction of the commissioner in charge of registrations. The registration regime established under the *Gaming Controls Act, 1992*, might, in time, be moved to the NOC.

These various registration databases should be open to the public and easily accessible, perhaps in the registry offices or over the World-Wide Web. The registers should allow information to be accessed in numerous ways, including name inquiries, subject-matter inquiries, or geographic inquiries. These registration systems might be partially financed by the sector itself through the imposition of modest registration fees. The rationale for the imposition of the fee is that the sector as a whole, and each entity in it, benefits from sound regulation.

We recommended in previous chapters that there should be an obligation on charities and/or on charitable fiduciaries to file information relating to conflicts of interest involving the fiduciaries of the charity, members of the proscribed class, and controlled corporations of the charity. In all cases these reports, according to our previous recommendations, should be filed in advance of the transaction in order to obtain NOC approval. This filing requirement should be administered by the registration division, which should also have the power to approve the transaction.
In the following chapter, we recommend that third-party fundraisers should be required to file copies of the fundraising contracts which they have entered with any nonprofit corporation. In chapter 19 we recommend that any nonprofit corporation which receives government grants and which is not already subject to the obligation to file the T3010 form with the federal government should be subject to an obligation to file a similar type of report with the NOC. Any federal charity that has failed to meet its T3010 filing requirement for a stipulated period of time (perhaps, over a period of default of at least six months) should also, in our recommendation, be subject to a power in the commissioner to require the filing of the T3010 with the NOC. All of these various filing requirements, in addition to various others mentioned throughout this report, should be administered by the registration division.

We have already discussed what we believe should be the obligations of charities with respect to an annual filing requirement at the provincial level. In each of the chapters on organizational form, we suggested a minimal "status"-oriented filing obligation. We did not suggest a more onerous obligation than this on account of the already substantial requirement at the federal level. We assume that, through intergovernmental cooperation, the NOC will have convenient access to the T3010 forms filed with Revenue Canada. However, it may be useful to require some small subset of Ontario charities to file their T3010 forms directly with the NOC. The subset would be defined in order to identify "higher risk" entities and be imposed on the basis of administrative convenience. The categories of "higher risk" entities could be established by regulation.

(ii) Fundraising Division

In chapter 18, we develop in greater detail the jurisdiction of the commission over fundraising. The main function of the commissioner responsible for fundraising should be to review registered fundraising campaign documents for compliance with the law. We do not recommend that there be any provincial follow-up accountability report of nonprofit fundraising, but we do recommend that the commissioner responsible for fundraising be mandated to pursue accountability issues through the use of the instruments generally available to the NOC. This would include speaking to the fiduciaries involved in the campaign, examining the T3010 forms of charities engaged in fundraising as is necessary, and, in appropriate cases, requesting that the commissioner responsible for audits and investigations conduct an audit or investigation.

(iii) Inquiries, Audits, and Investigations

The supervisory powers of the NOC should be tiered, with the more substantial powers subject to prior judicial or quasi-judicial approval. The first tier, already suggested in the chapters on organizational form, would empower the NOC with most of the same rights as members or trust beneficiaries have under the relevant organizational law, including the right of access to information. A second tier would empower the NOC to make inquiries. Neither of these two tiers would require prior judicial or quasi-judicial authorization. Exceptions however, could be made in some cases, especially for religious entities.
The third tier would be a power to "audit" a nonprofit. This would mean, in effect, the power to conduct the type of financial audit examination that is currently conducted by professional auditors of public corporations. The NOC should have a power to "audit" any entity registered in Ontario or federally as a "charity", and any other organization that is the recipient of government grants or public contributions, and any corporation or other entity controlled by a charity. The power to audit should be defined in a way that permits the NOC to have access to all the books and records of the entity, at the premises of the entity, in a way that would permit a full financial audit. In the case of non-religious charitable organizations, the decision to conduct an audit should be taken by the commission as a whole, or perhaps a subset of it, with a right in the entity to object and to show cause why an audit is unwarranted. There should be no appeal from the commission's decision. In the case of religious organizations, the right to conduct an audit should require court authorization. Also with regard to religious organizations, audits should be permitted by the court only where there is a reasonable apprehension of fraud with respect to the status of the organization as religious or the religious nature of the activities pursued by it, or if two or more members of the organization request an audit and there is a reasonable apprehension that its fiduciaries have breached their fiduciary duties of loyalty or any other duties imposed on them by law.

Subject to court authorization, the NOC should have the power to "investigate" any charitable organization that is the recipient of government grants or public contributions, and any corporation or other entity controlled by a charity. Its investigative powers should be extensive, similar to or the same as the powers of a commission of inquiry under Part II of the *Public Inquiries Act.*¹⁷³

Third parties, as at present, should be able to apply to the court for an order requiring an investigation or an audit.

(iv) Education

The NOC should have a mandate to give advice and counsel to charitable fiduciaries. The legal effect of a charitable fiduciary following such advice should be to insulate that person from any liability for breach of his or her fiduciary duty, to the extent that the advice is followed. The NOC should have the mandate to prepare guidelines, draft articles of incorporation and bylaws, and other documents as needed. It should be empowered to work in conjunction with other government and private agencies, to run educational programs, conduct research, and make available library collections. It should also be mandated to study ways and means of achieving greater efficiency in the sector and to encourage charities to coordinate activities.

(v) Chair

The NOC would require a chair. The chair should be mandated to call and chair meetings of the commission, be in charge of commission staff, set NOC policy priorities, and meet with Minister. The chair should also be mandated to oversee the legal operations of the commission.
(vi) Powers of Commissioners

The commissioners, or perhaps a subset of them, acting in concert should have the following powers:

(1) All the powers assigned to the NOC under the organizational laws;

(2) The power to intervene in any proceeding involving charity under the same conditions as are currently imposed by section 5(4) of the Charities Accounting Act; \(^{174}\)

(3) The power to apply to the court for

(a) an order on an interim or permanent basis to remove and replace a charitable fiduciary,
(b) an order to compel a charity, its fiduciaries, or any other person to comply with the law,
(c) an order dissolving a charity or placing a charity under the "stewardship" of the NOC, temporarily or indefinitely,
(d) an order that a meeting of the directors or members be called,
(e) an order requiring charitable fiduciaries or any other person to account,
(f) an order, on an interim or permanent basis, to preserve the property of a charity, and
(g) an order permitting an audit of a religious charity or an investigation.

Enforcement provisions might contemplate financial penalties on charitable fiduciaries and others for breach of certain statutory obligations. These could be enforceable as provincial offences under the Provincial Offences Acts.\(^{175}\)

In addition to the NOC, there should be a Nonprofits Advisory Council which should meet formally at fixed intervals. Its mandate should be to oversee the NOC's operations, comment officially on its annual report, and participate, in an advisory capacity at the request of the NOC, in some of its decisions. The Council should be comprised of approximately ten persons appointed by the Attorney General and representative of a fair cross-section of the nonprofit sector. The Council is intended to give the sector more say in the formulation and application of norms and thereby legitimize the regulation and constrain inappropriate government action. It would also provide government with a much better idea of what is going on in the charity sector.

Endnotes:

1

The preamble of the statute provided as follows:

whereas charitable donations have been given for the benefit of the poor and other persons in England and Wales to a very considerable amount and many of the aforesaid donations appear to have been lost, and others from the neglected payment and the inattention of those persons who ought to superintend them, are in danger of being lost or rendered very difficult to be preserved.

This was cited in U.K., Report of the Committee on the Law and Practice Relating to Charitable Trusts (Cmd. 8710, 1952) (hereinafter referred to as the "Nathan Report"), at 38. The Nathan Report is discussed in greater detail supra, in ch. 2.

The Nathan Report, ibid., at 39, mentions the following as the principal methods by which newly founded trusts were discovered by the Charity Commissioners at the time of Lord Nathan's study:

(a) By watching particulars of wills published in the Times and other papers; (b) an arrangement with the estate duty office at Somerset House whereby they are notified of wills containing charitable gifts; (c) by watching the recording deeds under s. 29(4) of the Settled Land Act, 1925; (d) the trustees themselves making the trust known by submitting their annual accounts...or, (e) some application for advice.

As a result, the information on charitable purpose trusts in England held by the Commissioners was seriously incomplete. The Nathan Report therefore recommended the establishment of a comprehensive registry of charitable organizations. See supra, ch. 2.
These mid-nineteenth century English statutes contained other provisions of interest, none of which was adopted in Ontario. Under another provision of the Charitable Trusts Act, 1860, supra, note 8, the Commissioners were given the power to revise charitable purpose trusts within the limits established by the cy-près doctrine. These statutes also established an administrative apparatus to facilitate dealings with land and other property belonging to a charitable trust. A corporation sole, the "Official Trustee of Charity Land", could on the order of a judge, be held vested of any land belonging to a charitable trust. Likewise, the Official Trustee of Charitable Funds, also a corporation sole, could be held vested of other charitable property. The Official Trustees were intended to help simplify dealings with title to land and title to personalty when new trustees were appointed. They acted as bare trustees, leaving the daily administration and possession of assets in the hands of charitable trustees. Finally, these statutes provided for control by the Charity Commissioners of certain transactions involving land held subject to a charitable purpose trust. Several provisions empowered the Commissioners to permit certain dealings with land, such as its sale or exchange or its improvement with the use of trust funds. Other provisions prohibited, other transactions notwithstanding the powers given to the trustees in the trust instruments such as the mortgage of land or the lease of land for more than three years.

Nathan Report, supra, note 4, at 46.

Ibid., at 45.

43 Eliz. 1, c. 4 (U.K.) (hereinafter referred to as "Statute of Elizabeth").


Jones, ibid., at 47.

20

See *Nathan Report*, *supra*, note 4, at 18.

21

See *Nathan Report, ibid.*, at 19.

22

*Supra*, note 6.

23


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*The Ontario Public Trustee Act*, S.O. 1919, c. 32, s. 5.

26

*The Charities Accounting Amendment Act, 1951*, S.O. 1951, c. 10, s. 1.

27


28


29

*Charities Accounting Amendment Act, 1982*, S.O. 1982, c. 11.

30


31
See Courts Improvement Act, 1996, S.O. 1996, c. 25, s. 2(2), enacting s. 5.1 of the Charities Accounting Act, supra, note 1.

32


33

Technically, the proper name is "Public Guardian and Trustee". See Public Guardian and Trustee Act, R.S.O. 1990, c. P.51, as am. by S.O. 1992, c. 32, s. 25(11). However, as stated supra, in ch. 1, for convenience sake, we use the former title.

34

Ibid., s. 1, rep. & sub. by S.O. 1992, c. 32, s. 25(1).

35

Ibid., s. 19, as am. by S.O. 1992, c. 32, s. 25(2).

36

Ibid.

37

Ibid., s. 17, as am. by S.O. 1992, c. 32, s. 25(2).

38

Ibid., s. 15, rep. & sub. by S.O. 1992, c. 32, s. 25(10).

39

Ibid., s. 15(4).

40

Ibid., s. 12, as am. by S.O. 1992, c. 32, s. 25(2).

41

This information was provided to the Commission by the Office of the Public Trustee. We understand that the current budget is just over $500,000 and that half of this amount is generated by court-authorized fees. See R. Hirshhorn and D. Stevens, Organizational and Supervisory Law in the Nonprofit Sector (Canadian Policy Research Networks and the Kahanoff Foundation) [forthcoming].

42
As stated above, s. 1(2) of the Act was added by S.O. 1951, c. 10, s. 1. None of the other provisions of the Act were amended at the same time to accommodate the application of the statute to corporations. This creates considerable confusion. It was held in Re Centenary Hospital Association and Public Trustee (1989), 69 O.R. (2d) 1, 59 D.L.R. (4th) 449 (H.C.J.), supplementary reasons at (1989), 69 O.R. (2d) 447, 60 D.L.R. (4th) 768 (H.C.J.), that the section only applies to the trust properties of the corporation, not to the corporation's property itself. This conclusion is, in our respectful submission, probably mistaken.

It is proposed in Bill 61, supra, note 32, s. 3(2), that the Public Trustee be allowed to waive this requirement.

Charities Accounting Act, supra, note 1, s. 1(3).

Office of the Public Trustee, interview with the Commission (1990).

Charities Accounting Act, supra, note 1, s. 4(a), (e).

As of 1987, a total of 32,571 testamentary bequests had come to the Public Trustee's attention. This number increased by 2,570 in 1988, 2,697 in 1989, and 1,783 as of August 1990. The vast majority of these notifications were effected by the procedure contemplated in the Charities Accounting Act, ibid., note 1, s. 5(3).

It is proposed under Bill 61, supra, note 32, s. 3(3), that s. 5(3) be repealed.

We return to investment infra, in ch. 18.

This has been turned into an annual requirement according to the current administrative practice. The following "Notice For Charities" itemizes the information generally required. The compliance rate is probably under 25%.

Pursuant to the Charities Accounting Act, charities are required to provide to the Public Trustee the following documentation and information:
1) A copy of the complete Letters Patent or other document that brought the charity into existence, together with a copy of any Supplementary Letters Patent or other documents amending the terms of the charity.

2) The street and mailing address of the charity and the names and street addresses of the Directors and Officers, or Trustees, together with the dates and particulars of all changes thereto for the last three years and upon any change hereafter.

3) A short summary of any assets and liabilities on inception.

4) The date chosen as the financial year end.

5) The Official Charitable Registration Number given by Revenue Canada-Taxation for tax-deductible donation purposes. If not issued, or if revoked, please explain.

6) A copy of the annual audited Financial Statements (signed both by the auditors and by two or more Directors on behalf of the Board of Directors or by all Trustees) for the last three years of the charity and for each year hereafter within three months of the financial year end.

Audited financial statements are required by the Corporations Act, Section 133 and Sections 94, 96 and 97(1); Section 95(1) indicates the qualifications for an auditor if not performed by a professional firm of chartered accountants.

When audited financial statements are submitted, they should be prepared in a summarized way that still conveys all the information. Financial statements prepared with a business format and terminology are not sufficient. They require to be enlarged to demonstrate how the stated charitable purposes have in fact been carried out. Explanatory notes should be added to characterize the unique nature of the actual activities and to make the information relevant and understandable. Specific disclosure should be made of any non-arm's-length transactions. If more than one charitable activity or project is carried on, the financial statements should distinguish between them.

There are trusteeship implications inherent in charitable matters resulting in additional responsibility and liability for the Directors and Officers or Trustees of a charity. They are the charitable objects set out in the document creating the charity. A Court audit would require full and complete disclosure of all aspects of the operations.

7) Any other information that may be required.

52

Charities Accounting Act, supra, note 1, s. 3.

53

S.O. 1982, c. 11, s. 1.

54

We return to this section *infra*, in ch. 18. For a recent case, see Boldrini *v.* Hamilton Naturalists’ Club, [1995] O.J. No. 3321 (Gen. Div.) [QL].

Supra, note 1. Section 5.1 was enacted by S.O. 1996, c. 25, s. 2(2).

For an earlier survey of other jurisdictions, see M. Cullity, “Statutory Machinery for Supervising Charities” (1972), 1 Philanthrop. (No. 2) 22.

Supra, note 6.

*Charities Act, 1960, 8 & 9 Eliz. 2, c. 58 (U.K.)*.

*Charities Act, 1993, c. 10 (U.K.), Sch. 1, s. 1(1), (2).*

*Ibid.*, Sch. 1, s. 1(3).

*Ibid.*, Sch. 1, s. 1(5).


See, for example, *ibid.*, ss. 42, 44, 45, and 86.

*Ibid.*, ss. 3(5)(b) and 42(3), (6), respectively.
32 & 33 Vict., c. 56 (U.K.).

68

*Education Act 1973*, c. 16 (U.K.).

69

*Supra*, note 60.

70

*Ibid.*, s. 97(1).

71

*Ibid.*, s. 97(1).

72

*Ibid.*, s. 96(1) and Sch. 2.

73

*Ibid.*, s. 3(5)(b).

74


75


76

*Ibid.*, s. 3(8).

77

*Ibid.*, s. 88. Contempt proceedings can be slow and laborious, but the government White Paper that led to the recent reforms concluded that financial penalties would not be appropriate, as failure to register is usually a result of negligence rather than deliberate evasion. See U.K., *Charities: A Framework for the Future* (Cmnd. 694, 1989) (hereinafter referred to as the "1989 White Paper"), at 14.

78

*Charities Act 1993*, supra, note 60, s. 4(2).

79
Ibid., s. 4(3).

80

Ibid., s. 5(1), (2). The register is now fully computerized and searchable in several ways.

81

Ibid., s. 41(1).

82

Ibid., s. 41(3), (4).

83

Ibid., s. 41(5).

84


85

*Charities Act 1993*, supra, note 60, s. 43.

86

Ibid., s. 76.

87

Ibid., s. 77.

88

Ibid., s. 78.

89

Ibid., s. 49.

90

Ibid., s. 18(4)(a)-(c).

91

Ibid., s. 18(4)(d).
92
Ibid., s. 18(4)(e).

93
Ibid., ss. 13 to 20.

94
Ibid., s. 29.

95
Charities Act (Northern Ireland) 1964, c. 33 (N. Ir.).

96
Ibid., s. 1.

97
Ibid., s. 2.

98
Ibid., s. 10.

99
Ibid., s. 12(3).

100
Ibid., ss. 13 and 14.

101

102
Charities Act (Northern Ireland) 1964, supra, note 95, s. 27.

103
Ibid., s. 28.

104

Charities Acts, 1961 and 1973, ibid., ss. 43 and 42 respectively.

Ibid., s. 21.

Ibid., s. 22.

Ibid., ss. 23 and 24.

Ibid., s. 26.

Ibid., ss. 29 to 34.


Ibid., s. 58.

Ibid., s. 53.

Ibid., s. 58.

117

Ibid., at 6.

118


119

27 Eliz. No. 9227 (Vict.), as am. by the *Charities (Amendment) Act 1981*, 30 Eliz., No. 9710 (Vict.).

120

Ibid., s. 9.

121

Ibid., s. 12(3).

122

Ibid., s. 17.

123


124


125

Ibid.

126

Ibid.

127


128

Supra, note 118, ss. 22-24, 26-30.
129
Ibid., s. 4.

130
Ibid., s. 48.

131
Public Charities Fund Act 1935-1974 (S. Aust.).

132

133
Ibid., s. 20.

134
Ibid., s. 20(3).

135
Ibid., s. 21(1)(b).

136
Adopted in 1954 by the National Conference of Commissioners as Uniform State Laws (hereinafter referred to as "Uniform Act").

137

138

139

140

142


143

Ibid., at 528. See, for example, Iowa Code Ann. §13.1 (West).

144

Ibid., at 528-29. See, for example, in Massachusetts, Mass. Gen. Laws Ann. ch. 12, §8§8N (West).

145

For example, New York. See N.Y., Est. Powers & Trusts Law ch. 17-B, art. 8, Pt. 1, §8-1.4(b).

146


147

See Fisch, Freed, and Schachter, supra, note 142, at 532.

148

Ibid., at 534.

149


150


151


152

Ibid., §8E.

153

Wa. Stat. Title 11, ch. 11.120.


Cal. Stats. ch. 128; Cal. Gov't. Code §§12580-12597 (West) (hereinafter referred to as "California *Uniform Act*").


*Ibid.*, at 451-52. One example of trustees voluntarily resigning because of their misconduct involved the University of San Fernando. The trustees were accused by the Attorney General of self-dealing in a building leased to the university. The trustees borrowed $500,000 from the same school while renegotiating the lease to receive additional payments. The later settlement transferred the facilities to the university for $300,000 and cancelled the $500,000 debt. The trustees resigned their positions and surrendered all of their rights under the employment contracts with the university. See, also, *ibid.*, at 452, *n.* 121.
Ibid., at 452. California's leading case in this area is *Re Veteran's Industries Inc.*, 8 Cal. 3d 902, 88 Cal. Rptr. 303 (1970).

165

Bell and Bell, *supra*, note 160, at 455.

166


167


168

*Ibid*.

169

*Ibid*.

170

This is in contrast to the powers of the Ontario Securities Commission under the *Securities Act*, R.S.O. 1990, c. S.5, s. 127, as rep. & sub. by S.O. 1994, c. 11, s. 375.

171

R.S.C. 1985, c.1 (5th Supp.).

172

S.O. 1992, c. 24, s. 4, as am. by S.O. 1993, c. 25, s. 31; title am. by S.O. 1993, c. 25, s. 25.

173

*Supra*, note 54.

174

*Supra*, note 1.

175

CHAPTER 18
SPECIFIC AREAS OF REGULATORY CONCERN:
FUNDRAISING, INVESTMENTS, POLITICAL ACTIVITY, AND PRIVILEGES

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1. INTRODUCTION

In this chapter the Commission examines the current law governing four areas of specific regulatory concern: fundraising, investments, political activity, and privileges and makes recommendations for reform.

2. FUNDRAISING

   (a) Introduction

We discuss three broad categories of activity in this section: donation and commercial fundraising in (b); charitable gambling in (c); and borrowing, with exclusive emphasis on charitable gift annuities in (d). In this introduction, we take up two preliminary matters, the first concerning terminology, the second concerning the proper rationale and target of the new laws that we recommend be adopted to regulate the financing activities of charities.

   (i) Terminology
The topic of this section is the regulation of financing activity, or, as is more frequently said, "fundraising" activity in the nonprofit sector. In chapter 12, we identified six main sources of funds to finance nonprofit activity: donations; revenues from capital properties (investment income); government grants; grants from other nonprofits; borrowing; and revenues from commercial or business activities. In this section of this chapter, we are concerned with only three of these sources: donations, borrowing, and commercial activities. The regulation of investment activities is discussed in the next section, and the regulation of government grants is discussed below in chapter 19. In our view, the regulation of grants from other nonprofits is dealt with adequately, insofar as the charity sector is concerned, under federal law, either as it currently stands or, preferably, as reformed in accordance with our suggestions in chapter 12.

(ii) Rationale of the New Laws

a. Rationale of Laws Regulating Commercial and Donation Fundraising

There are at least six objectives that might be pursued in any new law or laws regulating donation fundraising and commercial fundraising activity. In our view, only the third, the fourth, and to a limited extent the fifth objectives in the following list justify the enactment of legislation to regulate certain aspects of donation and commercial fundraising in Ontario at this time.

A first possible objective of such regulation might be the enforcement of the charitable fiduciary's duty of prudence. Regulation aimed at achieving this objective would seek to ensure that the expenditures made by charitable fiduciaries to raise money are made with the requisite level of care and skill. In our view, however, the appropriate type and level of regulation with respect to this objective has already been suggested in chapters 13, 15, and 16: the proposed Nonprofit Organizations Commission (NOC) will have a status equivalent to a trust beneficiary, a member of a charitable corporation, or a charitable unincorporated association, and, in appropriate cases, will be able to pursue charitable fiduciaries for breach of their duty of prudence or, in very serious cases, apply to the court to have the charity placed under its stewardship. We do not recommend, therefore, that there be any quantitative or other general restrictions establishing permissible types or levels of charitable fundraising expenditures. In any event, we think it would be very difficult, if not impossible, to design rules to do this in an appropriate way. Our view on this matter is in part borne out by the limited American experience with this type of regulation. The main difficulty is the immense diversity in the types of organizations in the sector and, therefore, in the vastly differing fundraising needs.

A second objective of such regulation might be the enforcement of the duty of loyalty of charitable fiduciaries. This objective too, in our view, is addressed adequately by the method just described. A breach of the duty of loyalty or a breach of the more specific conflict of interest rules can be pursued by the NOC, either in its status as beneficiary/member of the charity or through the prosecution of fiduciaries and others in cases where there has been an illegal gain at the expense of the charity or at the expense of a controlled corporation. In the fundraising context, these rules would be relevant in
the situation where the charity, for example, enters a contract with a fiduciary to use the fiduciary's restaurant for a fundraising event or the fiduciary's bulk mailing company in its donation solicitation drive. Our suggestion here is that there is no reason to treat this type of breach of fiduciary duty any differently from any other type of breach.

A third objective might be to regulate the nature and relative size of permissible commercial fundraising efforts so that these efforts do not become too large, and therefore in breach of the "exclusively" charitable standard. This objective is addressed adequately, in our view, under the provincial and federal laws that regulate or will regulate the commercial activities of charities. We have already looked at the federal law in this regard and suggested improvements. Here we recommend the adoption of parallel rules at the provincial level. In summary, new provincial statutory provisions should be enacted containing the following rules:

1. Three categories of commercial activity-"related", "subordinate" (ancillary and incidental), and "business"-should be identified and defined.

2. Related and subordinate commercial activity should be permitted for charitable organizations, public foundations, and operating private foundations, but not for non-operating private foundations.

3. All charities should be prohibited from running "businesses" unless these are carried on in separate taxable corporations.

4. The NOC-like Revenue Canada in our recommendations above-should have the power to order a charity, which in its view is carrying on an impermissible "business", to cease or to incorporate the business in a separate taxable corporation.

These rules are best placed in the organizational laws. They might be addressed generally to nonprofit entities, since the principle they represent applies equally to all nonprofit entities. There should be no separate provincial reporting requirement to support this regime of regulation since, in our view, the federal reporting requirement on this point suggested in chapter 12 should suffice.

Fourth, there is the problem of dishonest or fraudulent fundraising schemes. Legislation might be adopted to restrict, prohibit, and/or police these. The principal beneficiaries of such a law would be the individual nonprofits and individual donors who are directly protected by them. The nonprofit sector as a whole, however, would also benefit from this type of law to the extent that it acquires greater credibility with the donating public. We think that this objective is a valid one for provincial governments and we think that the current law in this area in Ontario does not address it adequately. Therefore, the Commission recommends below in section 2(b) that Ontario enact legislation regulating donation and commercial fundraising, with particular emphasis on the regulation of third party fundraisers.
Fifth, there is the problem, of much lesser importance, presented by the lack of aggregate information on nonprofit fundraising campaigns. Such information may be of use to sophisticated donors planning their spending. It may also be of use to governments and to individuals conducting research on the sector. To the extent that measures taken to achieve the fourth objective also contribute to the achievement of this objective, then that is an added benefit of the regulation. We would not, however, recommend the implementation of a scheme of regulation to achieve this objective by itself, since it is not of sufficient importance.

Finally, sixth, there is the problem of the nuisance caused by some forms of fundraising, such as telemarketing, bulk mail, and door-to-door solicitations. We do not make any recommendations in respect of this problem, if it is a problem, since it is beyond the scope of our study.

b. Rationale of Laws Regulating Borrowing Activities

In our view, there is no sufficient rationale supporting any general regulation of the borrowing activities of charities. To the extent that there is any concern on the part of the government or society with respect to the borrowing activities of charities, it is probably over issues relating to the duty of prudence or, less likely, issues relating to the duty of loyalty of charitable fiduciaries. These are, however, already adequately dealt with in our recommendations concerning those duties. Another possible rationale supporting the regulation of borrowing activity is the enforcement of the exclusively charitable standard. We suggested a modest reporting requirement at the federal level in chapter 12 to aid in the pursuit of this regulatory objective. We do not think any further regulation at the provincial level is required.

With respect to charitable gift annuities, however, there are legitimate concerns, relating principally to the solvency of annuity issuers, supporting the case for greater provincial government involvement. We address this issue below in (d).

(b) Regulation of Commercial and Donation Fundraising

(i) Current Law of Ontario

There is no general regulation of charitable fundraising in Ontario. There is a very modest right on the part of any member of the public to complain "as to the manner in which a person or organization has...solicited funds...from the public for any purpose, or as to the manner in which such funds have been dealt with or disposed of ". The complaint must be in writing to a judge and the judge, in turn, is empowered to order the Public Trustee to investigate the matter pursuant to Part of the Public Inquiries Act and to report to the Attorney General and the judge. The latter may then order a passing of accounts. The section does not apply to any religious or fraternal organization. In addition, municipalities are empowered to enact bylaws regulating the days on which charities may solicit funds.
Current regulation of commercial and donation fundraising is, thus, slight.

(ii) Law of Other Jurisdictions

We examine the laws regulating fundraising in a number of jurisdictions, leaving to the end the Charitable Fund-raising Act of Alberta and the American Model Act Concerning the Solicitation of Funds for Charitable Purposes, both of which we recommend serve as models for a new law in Ontario.

a. England and Wales

Charitable fundraising in England and Wales used to be regulated under the House to House Collections Act 1939, the Police, Factories etc. (Miscellaneous Provisions) Act 1916, and the War Charities Act 1940. The last of these was extended to charities for disabled persons by the National Assistance Act 1948. The main purpose of these laws was to prevent fraudulent collections. Street and house-to-house collections were regulated by a licence system. Licences were issued by district councils, the Metropolitan Police, or the Common Council of the City of London. The law imposed requirements concerning the conduct of collections and the submission of accounts. It also permitted "licensing authorities" to adopt further regulations, subject to confirmation by the Home Secretary.

In 1992 the Charities Act 1992 was enacted in response to a growing public sentiment in favour of a greater government presence in fundraising matters. Part III of that Act consolidates and harmonizes the regimes, just described, governing public charitable collections. Essentially, under Part III, "charitable appeals" and public collections may not be conducted without a permit. Permits may be refused on a number of grounds, including public convenience and the past record of the applicant. Part II of the Act puts in place an entirely new regime to govern professional fundraising and "commercial participators" (those who promote commercial ventures which they claim will benefit charities), to ensure greater public disclosure of information to potential donors, and to prevent fundraising fraud. The new regime is applicable not only to charities, but also to institutions established for "benevolent or philanthropic" purposes. The regulatory techniques, in essence, are as follows:

1. Professional fundraisers who solicit funds on behalf of charitable institutions and commercial participators who promote commercial ventures which they claim will benefit charities must do so pursuant to contracts complying with prescribed requirements, on pain of nullity.

2. Solicitation by professional fundraisers and representations by commercial participators, as well as radio and television solicitations and representations are subject to mandatory disclosure requirements.
(3) Representations by businesses to the effect that charitable contributions will be made in the course of the business are subject to certain mandatory disclosure requirements.\(^19\)

(4) Cooling-off periods giving donors a right to require the refund of a donation apply in the case of television and radio solicitations and in the case of certain solicitations made where the person soliciting is not in the presence of the donor.\(^20\)

(5) The payment of the money raised must be made to the charity as soon as "practically possible" after receipt by the professional fundraiser.\(^21\)

(6) Charities may apply to the court to obtain an injunction to restrain solicitations or representations for their benefit.\(^22\)

\textit{b. Australia}

Fundraising by charitable organizations is regulated at the state level in Australia. In Queensland, the \textit{Charitable Collections Acts, 1966-1981} regulates charities and charitable collections. Certain religious denominations are exempted from its provisions.\(^23\) Otherwise, charities must register before conducting public appeals, and they must submit their accounts to the Attorney General for inspection. The conduct of charitable appeals, broadly defined, is also regulated under a new statute in New South Wales. There, the \textit{Charitable Fundraising Act 1991}\(^24\) regulates collections made for charitable purposes with a registration and reporting requirement, subject to exemptions in favour of religious charities. There is legislation as well in Victoria (\textit{Patriotic Funds Act 1958}), in South Australia (\textit{Collections for Charitable Purpose Act 1939}), and in Western Australia (\textit{Charitable Collections Act 1946} and \textit{Street Collections (Regulation) Act 1940}).

\textit{c. United States}

\textit{(1) Introduction}

Over thirty-five states have statutes regulating charitable solicitations. Although the specifics vary greatly from state to state, the legislation generally has one or both of two goals: to regulate for and/or prohibit fraudulent and deceptive practices in the collection of funds, and to regulate the costs associated with charitable solicitations and help ensure that charities spend public contributions efficiently and effectively.\(^25\)

Most of this legislation requires some form of licensing of the solicitors. North Carolina, for example, requires that any person who "intends to solicit contributions in this State, to have funds solicited on its behalf, or to participate in a charitable sales promotion...should obtain a license."\(^26\) Pennsylvania requires that, prior to any solicitation, a registration statement be filed with the appropriate government department.\(^27\) Some states simply review the application for a permit or licence and if the requested information is provided, issue the permit. Other states provide their regulatory agencies with the power
to conduct investigations to determine that the information provided is accurate. Some organizations are typically exempt from such licensing requirements. These generally include churches and religious organizations, educational organizations, and solicitations in which the amount collected is below a certain level.

Professional fundraisers are also generally required to register and obtain a licence. A bond is usually required. Limitations are often imposed by the states upon the percentage of funds raised which may be paid out to the solicitor or fundraiser as compensation. Only if the charity itself demonstrates that special circumstances resulted in higher costs will permission be granted to exceed the statutorily set limit.

Many states require the solicitor to display a "solicitor information card" containing the name and address of the organization, the percentage of the total received that will be used for administrative purposes, and the tax-exempt status of the organization. In Maine, the disclosure obligation is more onerous if less than seventy percent of the total raised will be used for program services.28

Penalties for committing fraud or misrepresentation, selling lists of contributors to organizations, or any other such acts can range from revocation of licences or permits to fines and criminal penalties. Specific authority to investigate organizations is usually provided for. Such authority may be vested in the secretary of state, the attorney general, the regulatory agency, or any combination of the three.

Charitable solicitation legislation is currently in a precarious position in the United States. Between 1980 and 1988, the United States Supreme Court decided four major cases and, in each, struck down legislation dealing with the regulation of solicitation activity on the basis, generally, that restriction on professional fundraisers and mandatory point-of-solicitation disclosure are undue restrictions on freedom of speech.29 This development has severely curtailed the supervisory ability of state authorities and is forcing a re-examination of existing regulatory statutes.

(2) California

California30 enacted its Charitable Solicitation Disclosure Law in 1972.31 The form and extent of disclosure required under this law depends upon the type of solicitation being made, "sales" or "non-sales".32 The form and extent of disclosure required also depends upon whether the solicitation is conducted by a volunteer or a professional fundraiser, and whether the solicitation is done through personal contact or otherwise.33

If a professional fundraiser is personally soliciting a potential donor, the solicitor is required to present a "Solicitation or Sale for Charitable Purposes Card" or printed material containing required information. The card must be signed and dated by an official of the charitable organization and must provide information with respect to the name and address of all the organizations to benefit from the solicitation, the percentage of funds raised to be expended on direct fundraising expenses, the tax-exempt status of
the organization(s), and the percentage of the total donation that may be deducted under federal and state tax law.\textsuperscript{34}

A volunteer in a sales solicitation must provide the potential purchaser with the same information as a non-volunteer. If, however, a volunteer is conducting non-sales solicitation and will receive no compensation for this activity, then he/she need only provide the name, address, and charitable purpose of the organization.\textsuperscript{35} If any information is in fact requested by a donor, the charitable organization is required to comply with the request within seven days.\textsuperscript{36} In both cases, the volunteer must inform the donor that any other information pertaining to administration and fundraising costs may be obtained at the organization. If the volunteer is under the age of eighteen, no disclosure at all is required.

If there is no personal contact and the solicitation is in the form of a letter, telephone call, or means other than radio or television, the same level of disclosure is required, but it need not be in the same form.\textsuperscript{37} If the solicitation is by radio or television and is less than sixty seconds, disclosure in the solicitation itself is not required. If the radio or television spot is longer than sixty seconds, disclosure in the solicitation itself is required, but the extent of disclosure required depends on whether the preparation and broadcast was a volunteer effort and whether it is a sales or non-sales solicitation.\textsuperscript{38}

Violation of the Charitable Solicitation Disclosure Law can result in civil penalties not exceeding $2,500 for each violation. The Attorney General, any district attorney, county counsel, or city attorney may prosecute anyone violating the provisions of the law. There are exemptions from disclosure requirements in situations where the solicitations or sales are conducted within the membership of a charitable organization or upon its premises.\textsuperscript{39} An exemption also applies to cases where a solicitor or fundraiser complies with city and county ordinances that require substantially similar or more extensive disclosures.\textsuperscript{40}

An amendment to the law in 1992\textsuperscript{41} provided that a fiduciary relationship exists between a charity (and persons soliciting on its behalf) and donors. In a series of amendments in 1993\textsuperscript{42} and 1994,\textsuperscript{43} more extensive regulations governing commercial fundraisers were added. Commercial fundraisers are now required to register with the Attorney General and they must declare themselves to be commercial fundraisers at the point of solicitation.\textsuperscript{44} Charities that rely on public donations for more than fifty percent of their funding, raise over one million dollars in public donations annually, and spend more than twenty-five percent of their income on nonprogram activities, must file a report with the Attorney General.\textsuperscript{45} The report must disclose, among other things, salaries, fundraising, and travel expenses.

\textit{(3)U.S. Model Act}

In October 1986, the National Association of Attorneys General, Committee on Trusts and Solicitations (NAAG), and the National Association of State Charity Officials (NASCO) published the Model Act Concerning the Solicitation of Funds for Charitable Purposes (Model Act).\textsuperscript{46} The Model Act is the result of a project conducted jointly by
NAAG and NASCO, in consultation with fundraising professionals, charitable organizations, and members of the legal and accounting professions. The project took over two and half years to complete. The Act has received substantial support from representatives from most areas of the charity sector.

There was some doubt at the time of the Model Act's publication whether some of its provisions, particularly those mandating point of solicitation disclosure, would, if adopted, be in compliance with the then existing constitutional rulings on charitable solicitation statutes. Subsequently, the United States Supreme Court rendered its decision in Riley v. National Federation of the Blind of North Carolina, holding, inter alia, that mandatory point of solicitation disclosure of financial information by persons soliciting on behalf of charitable organizations is an unconstitutional restriction on speech. Consequently, some of the key provisions of the Model Act are problematic from the perspective of American constitutional law.

We describe the basic elements of the Model Act in what follows. Many of our recommendations are based on the provisions of the Model Act.

A. Scope of Application and Definitions

The Model Act contains a very broad definition of "charitable organization" and "charitable purpose", the two key terms used to define the scope of applicability of the Act. These terms are defined to include not only those organizations and purposes recognized as tax-exempt organizations under the Internal Revenue Code, but also practically all organizations and purposes that are of a nonprofit nature. Thus "charitable organization" is defined in section 1(a) as any organization established for any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic or other eleemosynary purpose or for the benefit of law enforcement personnel, fire fighters or other persons who protect public safety or any person who in any manner employs a charitable appeal as the basis of any solicitation or an appeal which has a tendency to suggest that there is a charitable purpose to any such solicitation.

"Charitable purpose" is defined in similar terms. Likewise, "solicit" and "solicitation" are defined broadly in section 1(c) as any request directly or indirectly for money, credit, property, financial assistance or other thing of any kind or value on the plea or representation that such money, credit, property, financial assistance or other thing of any kind or value or any portion thereof will be used for a charitable purpose or benefit a charitable organization.

Thus, using our terminology, the Model Act applies to all commercial and donation fundraising for all nonprofit organizations and purposes. However, under section of the Model Act, there are a series of exemptions from many of the Act's provisions. These exemptions include, for example, exemptions in favour of churches, the explicitly religious activities of religious orders, political parties, and small charitable organizations.
measured in terms of their gross revenue or maximum number of contributors provided none of their assets or income enures to the benefit of any member of the organization.

Finally the Act, in section 1(f), distinguishes between two kinds of third party fundraiser: "fundraising counsel", meaning a person who, "for compensation, plans, manages, advises, consults or prepares material for the solicitation...of contributions...but who does not solicit contributions", and "paid solicitor" meaning a person who, for compensation, directly or indirectly solicits contributions.

B. Annual Registration Requirement

Under section 2, every charitable organization, except those exempted, that intends to solicit in the enacting state is required to file a registration statement with the enacting state. The registration statement must contain the following types of information:

(1) the name and purpose of the organization;

(2) the address and telephone number of the organization;

(3) the names and addresses of officers, directors and trustees, and principal salaried officers;

(4) the previous years' financial statements of the organization, which, in the case of larger organizations, must be audited;

(5) the purpose of the solicitation; and

(6) such other information as the enacting state may require.

In addition to this initial registration, charitable organizations are required to file their constitutional documents and documents establishing their tax-exempt status under federal law.

C. Annual Reporting Requirement

Under section 3, all registered charitable organizations are also required to file annual financial reports. These may be duplicate originals of the financial statements filed with the Internal Revenue Service. There is an exemption from this annual filing requirement in favour of organizations whose gross revenues do not exceed a specified amount and for larger organizations, again measured in terms of gross revenues. There is a requirement that the financial statements filed be audited.

D. Regulation of Fundraising Counsel

Under section 5 of the Model Act, fundraising counsel are required to enter into written contracts with their charitable organizations, and those written contracts must be filed
with the relevant authority of the enacting state. Where it is proposed that the fundraising counsel will have possession of any of the funds raised, there is an additional requirement that the counsel enter and file a bond in which one or more sureties guarantee the liability of the fundraising counsel to pay the funds over to the charitable organization. Fundraising counsel who take possession of funds are obliged to account to the charitable organization in writing and are required to keep contributions received in a separate trust account for the charitable organization.

E. Regulation of Paid Solicitors

Under section 6, paid solicitors are obliged to register with the relevant authority of the enacting state, and to enter into and file a bond in which one or more sureties guarantee their obligations to their client charitable organizations. A paid solicitor is also obliged to file a "solicitation notice" prior to the commencement of each solicitation campaign. In addition to information concerning the dates of the campaign and the address and telephone numbers of the paid solicitor, the solicitation notice must be accompanied by the contract between the paid solicitor and the charitable organization, and that contract is required to set out clearly the compensation to be received by the paid solicitor. The paid solicitor is also required to clearly and conspicuously disclose the following further information at the point of solicitation: the name of the paid solicitor; and the percentage amount of the contribution to be received by the charity. No paid solicitation may occur without written consent signed by two authorized officers of the charitable organization. Within ninety days of the campaign, a joint financial report must be filed by the charitable organization and the paid solicitor. Finally, the paid solicitor is obliged to keep all contributions received in a separate trust account in favour of the charitable organization.

F. Regulation of Charitable Sales Promotions

Section 7 of the Model Act provides for the regulation of "charitable sales promotions" or, in our terminology, commercial fundraising. "Charitable sales promotions" are defined in section 1(i) of the statute to include a sales or advertising campaign "conducted by a commercial co-venturer which represents that the purchase or use of goods or services offered by the commercial co-venturer will benefit in whole or in part a charitable organization or purpose". Charitable organizations that undertake a charitable sales promotion are required under section of the Model Act to file a notice of such promotion prior to its commencement. The organization is also obliged to enter into a contract with the commercial co-venturer and that contract is required by statute to include a number of provisions, including the maximum dollar amount that will benefit the charitable organization; the manner in which the charitable organization's name will be used, including the representation to be made to the public; and a provision for a final accounting to the charitable organization on a per-unit basis. The Model Act requires that the commercial co-venturer disclose; in each advertisement for the charitable sales promotion, the dollar amount or percent per unit of goods or services to be purchased that will benefit the charitable organization.
The *Model Act* requires in section 8 that every charitable organization soliciting for donations provide the following information at the point of solicitation: the name, address, and telephone number of the organization; a full and fair description of the charitable program for which the solicitation is being carried out; and fact that full financial statements will be provided upon request.

**d.Alberta**

The Alberta *Public Contributions Act* was first enacted in 1951. It was modified substantially in 1965. Initially the statute imposed only a registration and information filing requirement. In its 1965 version, it imposed a licensing requirement on all "campaigns to obtain funds for a charitable purpose". The statute was recently declared unconstitutional for infringing the freedom of speech provisions of the *Canadian Charter of Rights and Freedoms*, primarily because the discretion in the province to refuse to authorize or license a campaign was not restricted by any explicit relevant criteria. New legislation—the *Charitable Fund-raising Act*—was enacted in 1995. We examine both statutes briefly.

**(1) Public Contributions Act**

The scheme of the statute is quite straightforward. First, "charitable purpose" was defined broadly to include "any benevolent, philanthropic, patriotic, artistic, athletic, recreational or civic purpose and any purpose that has as its object the promotion or provision of a public service". The Act did not apply to organizations soliciting contributions from only their members and the spouses, parents, and children of their members. Otherwise, no organization was permitted to conduct a campaign to obtain funds for a charitable purpose unless it was authorized in writing to do so either by the Director, under the statute, or, where a city had passed a bylaw pursuant to section 18 of the statute, by the city. Organizations which planned to raise less than $5,000 were permitted to apply for an exemption from the provisions of the Act. Otherwise the application for authorization was required to set out the following information:

- (a) the name and address of the organization seeking to obtain funds;
- (b) the names, addresses and occupations of the officers of the organization;
- (c) the names, addresses and occupations of persons in charge of the campaign;
- (c.1) the name and address of the charitable promotion business with which the organization has entered into a charitable promotion contract;
- (d) the place or area in which the organization will attempt to obtain funds;
- (e) the objective of the campaign;
- (f) the duration of the campaign;
(g) the budgeted expenses of the campaign, in detail;

(h) the budgeted salaries, wages, subsistence and travelling expenses that will be paid to organizers, employees and campaign workers;

(i) the purpose for which the money obtained will be used;

(j) the estimated percentage of the funds obtained that will be expended in Alberta for the services stated in the application to raise funds;

(k) the proportion of the funds obtained in any annual canvass or campaign that will be placed in a sinking fund for long-term projects, to meet debenture and a reserve fund for programs or expansion;

(l) any other information that may be required.

Organizations which were refused a licence under the statute were permitted to appeal the negative decision to an appeal board established under the statute.62

The statute obliged organizations and officers of organizations conducting campaigns to provide information on request to any person from whom a contribution was received or solicited, to a peace officer, or to the Director. The information required to be disclosed included the name of the organization, its purpose or the purpose for which the money was to be used; the percentage of the funds collected that were to be provided for the purpose; and the name, address, and telephone number of the persons in charge of the campaign.63

There was also a statutory obligation on charitable organizations conducting campaigns to account to the Director, according to the statute, or to the city, in accordance with regulations established under the statute.64 The regulations in turn provided that the organization, within sixty days after the completion of the campaign, must set out the list of expenses, the total amount of money raised in Alberta, and the disposition of the money raised.

Under the statute, organizations which obtained funds from the public were obliged to permit the Director or his delegate to inspect their books.65

Finally, the statute66 required any organization that is a "charitable promotion business" to register under the Licensing of Trades and Businesses Act.67 "Charitable promotion business" was defined as the business of conducting a campaign on behalf of an organization, or participating in a campaign with an organization, to obtain funds for a charitable purpose.68

(2)Charitable Fund-raising Act

The new Alberta legislation has three objectives: to ensure that donors are adequately informed; to protect the public from fraudulent or misleading solicitations; and to establish standards for professional fundraisers and soliciting organizations.69 The Act
contains rules on four key areas. In Part I, solicitations by professional fundraisers and by charitable organizations (broadly defined to include organizations with purposes that are "philanthropic, benevolent, educational, health, humane, religious, cultural or artistic") are, if the amount raised is over $10,000, regulated in various ways: telephone solicitations must be conducted between 8 a.m. and 9 p.m. point-of-solicitation disclosure must be made; financial records must be maintained and made available to persons who request them; and professional fundraisers must hold all money raised in trust and must deposit it in a bank account under the sole control of the charity within two days of receipt. Part 2 establishes requirements for charitable organizations engaged in solicitations for more than $10,000, and for professional fundraisers. Registration may be refused by the Minister where the organization or its principals have previously committed an offence which, in the Minister's opinion, renders the person unsuitable to deal with contributions. Professional fundraisers must be licensed and the contents of their agreements with charitable organizations are strictly regulated. Part 4 sets out the enforcement provisions. These permit "inspections" and "investigations", the latter subject to ministerial authorization.

They also establish ministerial powers to preserve contributions pending an investigation. Part sets out several rules establishing standards of behaviour in solicitation, such as a prohibition against false statements and a duty to refrain from soliciting from a person who has previously requested that no further solicitation by the organization be made.

(iii) Recommendations for Reform

a. Introduction

We think that it is in the public interest and in the interest of the nonprofit sector in general that the government of Ontario enact legislation governing the solicitation of funds for nonprofit purposes in Ontario. As suggested at the outset of this section, the main objective of the legislation should be to help lower the incidence of fundraising fraud in the sector. The statute proposed here would require that both fundraising campaigns and third-party fundraisers be registered, and it would impose obligations on all solicitors to provide limited point of solicitation disclosure. In our view, it is not advisable to enact legislation containing more precise or more aggressive provisions. In particular, it does not make sense in our view to restrict fundraising expenditures, to restrict or regulate compensation for third-party fundraisers, or to regulate access to charitable solicitations through a broadly discretionary licensing requirement, as some of the American legislation does and as the Alberta system used to. In addition to the prospect of such legislation being declared unconstitutional for unduly restricting the right of freedom of speech under the Canadian Charter of Rights and Freedoms, there is the objection that it is just not possible to design imperative quantitative standards governing permissible fundraising expenditures or criteria establishing a right of access to raise money for nonprofit purposes. In our submission, most of these issues are better addressed through the norms governing the duty of charitable fiduciaries to act loyally and with prudence in the interests of the charity. To that end, the best instrument of
public regulation will be the right of the NOC to, if necessary, enforce those norms in appropriate cases. Thus, the function of the various registration requirements that we propose in the following discussion is to provide disclosure to the NOC, and to the public in general, concerning fundraising campaigns in Ontario, so that fraud is discouraged and can be more easily detected.

**b. Scope of the New Law**

The statute should apply, subject to exemptions, to all donation and commercial fundraising campaigns in Ontario for all types of nonprofit purposes. If our previous recommendations concerning the initial registration and annual disclosure requirements for charitable trusts, nonprofit corporations, and charitable associations is followed, then there is no need for the legislation governing fundraising to impose a further general registration or annual disclosure requirement on these organizations. However, it should be a condition of the right to fundraise in Ontario that these status registrations are up to date. Further, since the legislation proposed here will apply to organizations that are not charitable at common law and to organizations from outside Ontario (and therefore organizations that will not have registered), there should be provision in the proposed legislation requiring organizations not already registered to register. The legislation should also require these latter organizations to meet some of the basic or minimum governance requirements which their charitable counterparts are already required to meet by virtue of the laws governing the various forms of organizations. In particular, they should be subject to an obligation to keep records, an obligation to have at least three directors or trustees, most of the self-dealing rules, and a prohibition against undergoing a "fundamental change" (perhaps within a certain time period (three years) of the end of the campaign) without prior court authorization, similar in form and substance to what will be required of charitable organizations. The legislation should also subject them to all the NOC enforcement powers, including the powers contained in the organization laws.

The statute should distinguish between "donation" and "commercial" fundraising and between "fundraising counsel", "paid solicitors", and "commercial co-venturers".

**c. Campaign Registration Requirement**

Subject to exemptions, the legislation should require all nonprofit commercial and donation fundraising campaigns to be registered. The point of such registration would be to obtain public disclosure and disclosure to the NOC of the key elements of all fundraising campaigns being conducted in Ontario at any particular time. For this purpose, the legislation should make a distinction between commercial and donation fundraising, and the disclosure requirements should be designed appropriately. With respect to donation fundraising, the nonprofit corporation should be obliged to state the monetary objective and duration of the campaign, the budgeted expenses of the campaign, the purpose for which the money obtained will be used, and specific disclosure with respect to the involvement of and compensation to be paid to fundraising counsel and paid solicitors. With respect to commercial fundraising, there should also be
disclosure relating to costs, profits, and compensation to be paid to the commercial co-
venturer, on a per-unit basis if possible.

The NOC would not have a discretion to refuse registration except in the case where the
information provided is not in compliance with the legislation; where the information
provided is not truthful; and perhaps where the organization, or any of its principals, are
known to be unreliable. The information provided would be available to the public in
computerized form, as already suggested in chapter 17.

**d. Exemptions**

Exemptions from the obligation to register fundraising campaigns should be available
where the amounts raised or expected to be raised do not exceed a certain minimum
amount, and where the campaign takes place solely within an organization, among its
own members. There should be no such exemption, however, where there is a third-party
fundraiser involved. Federated appeals might also be exempted. The Minister, on the
advice of the NOC, should have the power to exempt other organizations or categories of
organizations by regulation.

**e. Third-Party Fundraisers**

The legislation should require the registration of all third-party fundraisers. Third-party
fundraisers should be divided into two classes, as under the *Model Act*, namely,
fundraising counsel that is, third-party fundraisers who do not actually participate in the
solicitation of contributions and paid solicitors. There should be an obligation on all
third-party fundraisers who are in receipt of contributions to keep those contributions
separate in a trust account and to enter into a bond pursuant to which a surety or sureties
guarantees the third-party fundraisers’ obligations to hand the funds over to the charity.
There should be an obligation on third-party fundraisers of all types to file their client
contracts with the NOC prior to the commencement of the campaign. The contents of the
contracts should be regulated, as under the *Model Act*, so that they contain disclosure to
the nonprofit organization with respect to certain key elements. The fiduciary obligations
of third-party fundraisers should be codified in the statute.

**f. Point-of-Solicitation Disclosure**

Every nonprofit organization engaged in a commercial or donation fundraising campaign
should be required to make minimal point-of-solicitation disclosure setting out the
following information: the name, address, and telephone number of the nonprofit
organization; the description of the purposes for which the funds are being raised; a
statement that the financial statements of the organization can be obtained upon request; a
statement that a copy of any contract with the third-party fundraiser is available upon
request; and a statement that the campaign is registered. In cases where a third-party
fundraiser is involved, there should be a statement concerning the amount of the
contribution or, in the case of commercial fundraising, the sale price that is reasonably
estimated will go to the charity.
**g. Fundraising Standards**

The proposed legislation might also include rules establishing certain basic fundraising norms, such as one finds in other laws of this type. In order to facilitate cooperation with the nonprofit sector and with professional fundraisers in Canada, the statute might provide for the adoption of such norms by regulation.

**h. Power to Make Regulations**

The Minister, on the advice of NOC, should have a broad power to adopt regulations under the Act.

**i. Enforcement**

Many of the requirements under the new law should be formulated such that their breach would constitute a provincial offence. Additionally, all of the NOC powers of enforcement should be available to police for and sanction breaches of fiduciary duties of all fundraising organizations and all third-party fundraisers.

(c) **Regulation of Charitable Gambling**

The *Criminal Code* exempts, from the general prohibition against conducting lotteries and games of chance, charitable or religious organizations who have a licence issued by the Lieutenant Governor in Council of a province, if the proceeds are used for a charitable or religious object or purpose. Currently, pursuant to Ontario orders-in-council, the licensing jurisdiction in Ontario is shared between the Entertainment Standards Branch of the Ministry of Consumer and Commercial Relations and Ontario municipalities and band councils. Larger events are subject to Branch approval, smaller ones are subject to municipal or band council approval. The orders-in-council establish limits on administrative expenses, prize levels, and profit levels, in addition to regulating the conduct of the gaming event. The Branch supervises the licence-granting process province-wide by reviewing all municipal licences granted and supplying the application and approval forms.

The Branch conducted a major review of its policies during the winter of 1990, largely on account of the very significant growth in the number of commercially owned bingo halls. The Ministry proposed a major legislative change in the summer of 1990. Legislation was enacted in 1992 to regulate commercial gaming service providers.

Our only recommendation with respect to charitable gambling is that the authority to license gambling events be consolidated in the NOC and that the administration of the recently adopted legislation be entrusted to the NOC. The point of these reforms is to ensure that all matters affecting nonprofit corporations in Ontario are in the administrative jurisdiction of a single government agency.

(d) **Charitable Gift Annuities**
A number of charities in Canada have the power either, under their letters patent of incorporation or by virtue of a private act of Parliament or the Legislature of Ontario, to issue annuity policies. Benefactors of these charities may purchase annuity policies from them and include in the price paid for the annuity a significant gift element. To our knowledge, there are no precise statistics as to the number of charitable gift annuity policies in Canada, nor as to the amount of assets held as reserves to support the liabilities of these policies. According to the Canadian Association on Charitable Gift Annuities (CACGA), as of 1990, there were approximately 5,500 charitable gift annuity policies and approximately $45 million held in reserve to support the liabilities under these policies. 85 Charitable gift annuities have been issued by Canadian charities since at least 1902. The earliest use of this fundraising technique was by one of the predecessors of the United Church of Canada. Charitable gift annuities have been issued by the Canadian Bible Society since 1926 and by the Salvation Army since at least 1955. 86 In all known cases, charities that have issued charitable gift annuities have been empowered to do so by Act of Parliament or the provincial legislature. It appears that any charity is permitted under the current law to issue this type of debt obligation, although the Public Trustee has let it be known that it does not approve of charities issuing annuities.

Currently, there is no explicit or implicit government regulation of the issuers of charitable gift annuities. In some cases, the enactment which empowers the specific charity to issue annuity contracts requires a periodic actuarial review of the annuity liabilities of the issuing charity. Provision is made by Revenue Canada87 for the calculation of the gift element of a charitable gift annuity. However, neither federal nor provincial regulators of financial institutions at the federal level, the Superintendent of Financial Institutions, and at the provincial level, most recently, the Ministry of Financial Institutions assert any jurisdiction over charities issuing charitable gift annuities. This position has been taken, it seems, on the basis that there is no statutory authority in the relevant regulator to regulate charities issuing annuities.

In its submission to the Commission, the Canadian Association of Charitable Gift Annuities described its practice of issuing guidelines to its members concerning the issuing of charitable gift annuities. The Association stated: 88

Although the Association has no legal regulatory authority, its philosophy is one of protecting the general public while promoting among its members the most responsible and conservative method of carrying on such a fundraising activity. In particular, the Association recommends that any charity issuing CGAs should employ an actuary to periodically complete an actuarial evaluation. This would involve calculating the estimated future annuity liabilities under the contracts issued by the particular charity. Such liability should be supported by assets set aside, invested and used to pay these liabilities. Ultimately, these investments should be sound, conservative and such investments as a prudent man would acquire in circumstances to meet future liabilities.

The assets should also be matched with liabilities so that the maturity of assets or the liquidity of assets is satisfactory to meet the liabilities as they come due. For example, a charity should not acquire an asset which matures in twenty years to pay an annuity liability which will have to be paid in say five years. The Association also recommends that premium rates, and the underlying interest assumptions and the mortality annuity tables used to compute them be sound, conservative and recommended by an actuary. To
The Association also expressed a favourable view towards the adoption of more formal regulation of the issuance of charitable gift annuities. In particular, the Association made the following recommendations for reform: that charitable organizations (as defined under the Income Tax Act\(^\text{89}\)) and public charitable foundations (as defined under the Income Tax Act), but not private foundations, be permitted to issue charitable gift annuities; that all charitable gift annuity issuers be registered with some government authority; that regulations be established governing the content of the charitable gift annuity contract and, in particular, that the contract should be required to contain a statement that the annuitant intends a portion of the cost of the annuity to be a gift to the charity; that there be a ten-day grace period following the issuance of an annuity contract allowing the purchaser to withdraw from the contract; that the government authority having responsibility for the regulation of charitable gift annuity issuers also regulate the advertising of such products; that all charitable gift annuities be required to report annually to the regulatory authority; and that the investments of charitable gift annuity issuers be governed by a regulation establishing the types of investments permitted, either of the legal list sort or a prudent man test.

The Commission is inclined to agree with the general thrust of the comments and recommendations provided to the Commission by the Canadian Association of Charitable Gift Annuities. Provided that the issuing of annuities is regulated in a sound fashion, we see no reason for a general prohibition against charities using this financing technique. The only issue is the method and means of regulation. We recommend that legislation be adopted to regulate the matter and that the regulation of charitable gift annuities be under the jurisdiction of the NOC.

3. REGULATION OF INVESTMENTS

(a) Introduction

In this section we review the existing regulations governing the investment powers of charities and make recommendations for reform. Generally speaking, we recommend that there be no specific restrictions on the investment powers of charities. Rather, the best approach to the problems which such restrictions usually seek to address per se is, simply, the proper enforcement of the fiduciary duties of charitable fiduciaries. The discussion is divided into three parts: (b) "Restrictions on Land"; (c) "Passive Investments"; and (d) "Investments in Businesses".

(b) Restrictions on Investment in Land

(i) Introduction

The ownership and use of land by charitable organizations is at present regulated under the revised mortmain rules contained in the Charities Accounting Act.\(^\text{90}\) These provisions provide that land owned but not actually used by a charity for its charitable purpose must
be disposed of within three years of the date of its acquisition or its change in use. Under the Religious Organizations' Lands Act, a religious organization (as defined in that statute), as an exception to this regime, is permitted to lease land for a period of up to forty years. Otherwise, the mortmain provisions of the Charities Accounting Act apply to the religious organizations as well. We examine the history of these rules in (ii), restate the current law in (iii), and propose reform in (iv).

(ii) History of Mortmain Law and Religious Organizations' Lands Act

These provisions have a long history. We have reviewed this area of the law in detail in our previous study on the law of mortmain and charitable uses. Therefore, our review here of that history is brief.

a. Mortmain Law

Mortmain law is concerned with the control by the state of ownership interests in land by corporations, religious institutions, and charitable purpose trusts. Historically, there have been two main types of mortmain legislation: legislation restricting or prohibiting corporations from holding land, and legislation restricting the power of charitable organizations to acquire or hold land and restrictions on the power of donors and testators to donate land to charitable uses. There are at least three versions of the latter type of legislation: (a) that which restricts the quantity of land that a charitable organization may hold; (b) which voids devises of land to charitable uses made within a certain time of a donor's death; and (c) that which restricts the proportion of land that the donor or testator is permitted to give to a charitable organization.

Mortmain legislation of the first type was abolished in Ontario in 1982 following a recommendation of this Commission to that effect. Mortmain of the second type remains in force in sections 79 the Charities Accounting Act. These provisions are of the sub-class described in (a) above: that is, they restrict the land that can be owned by a charity to land that is actually used for the charitable purpose. Where land is held and not so used, it must be sold within three years of its acquisition or change in use.

Historically, mortmain legislation has been justified on the basis of one or more of several reasons. During the feudal period, it was aimed at protecting the temporal dues of the king and the feudal lords. At a later time, it was feared that lands in the ownership of a corporation or charitable trust would, because of the limited powers of corporations and trusts to deal with their land, "not always [be] put to uses most desirable in the national interest". It was also feared that, because these entities do not die, land held by them would come on to the market less frequently and therefore be taken out of commerce. Finally, it was feared that, in devising or granting land to corporations or charitable trusts, donors might be unfairly disinheriting the rightful heirs.

The law of mortmain stretches back centuries to the early middle ages and the efforts of the early Christian emperors to restrict the power of the church by limiting the church's power to acquire land. The direct antecedents of the mortmain statutes of the modern era
were several provisions of the *Magna Carta* which prohibited acquisitions of land by religious houses. Later versions of mortmain law permitted such alienations, but only under licence of the Crown or the chief lord. The principal objective of all these early laws was to protect the temporal dues of the king and the feudal lords. In 1391, these prohibitions were extended to apply to alienations to lay corporations as well as religious houses for these reasons, but also as a check on the economic and political power of guilds and trading companies.

Legislation in respect of alienations of land to charitable uses was first enacted in 1736. The period 1730 to 1750 has been described by one author as marking a "low ebb of public decency, order and principle". According to another, "there had never been time when the established ministers of religion were held in so much contempt ..., or when satire upon churchmen were so congenial to general feeling". With this change in temper came a radical change in the attitudes of English society towards charitable trusts. Prior to the early eighteenth century, the policy of English law, as exhibited in the *Statute of Elizabeth*, was to use the power and machinery of the state to protect and enforce charitable trusts. With the enactment of the *Mortmain Act 1736*, that policy changed to one of general antagonism. According to Professor Jones:

The laity feared the wealth of the Church; they feared that great ecclesiastical charities, like Queen Ann's Bounty, whose constitution allowed to receive any amount of property ... would garner in all the land of the kingdom; they feared the power of prelates like Edmund Gibson; and they feared that the clergy would emulate what they thought to be the example of their medieval predecessors and terrorize them into making deathbed devises ... to the ruin of their heirs.

The *Mortmain Act, 1736*, thus, was ostensibly based on the fear that charities might acquire too much land (as with previous mortmain legislation) and on the fear that overzealous clergy would exact deathbed gifts to the detriment of the rightful heirs. Many commentators have observed that these reasons were not particularly cogent even at the time of the enactment of the statute. It was said by a select committee of Parliament in 1844, for example, that "the insufficiency of the reasons [for the enactment of the law] assigned in the reported debates is such as would rather lead to the inference that some apprehensions, which it would not be wise to make public, must have operated in addition to the avowed motives".

The Act prohibited the conveyance of land to charitable uses on pain of nullity, unless the conveyance occurred twelve months prior to the death of the donor under a deed signed, sealed, and delivered in the presence of two or more witnesses, or unless there was full consideration actually paid. Devises of land to charitable uses were thus, in effect, prohibited. Exceptions were made in the legislation for Oxford and Cambridge and several other colleges.

If the prohibition was harsh, its interpretation and application were harsher. As noted above in the discussion of the definition of "charity" at common law in chapter 7, the courts early on in the application of the statute tended to give the word "charity" a very liberal construction in order to "repel the mischief and advance the remedy".
provisions of the Act were also construed widely, so that the prohibition in the Act was held to apply in many circumstances not strictly called for under any reasonable interpretation of the Act.105

In England, the mortmain laws were revised and consolidated in 1888 in the Mortmain and Charitable Uses Act, 1888.106 That statute, interestingly enough, re-enacted the preamble to the Statute of Elizabeth as a definition of charity used in the statute to determine its scope of application. In 1891 the laws were amended again,107 this time to liberalize significantly the restrictions on devises to charitable uses. The 1891 law at last permitted devises of land to charitable uses, but land so devised had to be disposed of within one year of the testator's death, unless the High Court or the Charity Commissioners decided that the land was required for the actual use of the charity. With this modification, the justification for the charitable uses legislation became focused more on the traditional mortmain concern, that is, to ensure that land did not become tied up or accumulated in the hands of non-commercial entities.

The Nathan Report108 recommended that all mortmain rules, including those applicable to charities, be abolished. With respect to the mortmain rules applicable to charities, the report argued that as a matter of history the [sale] requirement is presumably founded on the same conception as that of mortmain, that is, the danger to public welfare of land being locked in the hands of religious and other religious bodies. We regard this conception as an anachronism, more particularly in view of the fact that there is hardly any purpose for which the state or local or public authority cannot now purchase land by compulsion.

On the recommendation of the Nathan Report, the Mortmain and Charitable Uses Acts, 1888 and 1891 were repealed in section 38 of the Charities Act, 1960.110

The English law of mortmain was accepted as part of the law of Ontario by a series of cases in the mid nineteenth century. In 1892 the Ontario Legislature enacted An Act to amend the law relating to Mortmain and Charitable Uses Act111 to revise, codify, and consolidate the mortmain law. This statute was based entirely upon the English Act of 1891, except that the time limit governing the required sale was two years, not one. It thus permitted devises of land to charitable uses, subject to the requirement that such land be sold within two years of the testator's death. Another Mortmain and Charitable Uses Act was enacted in 1902.112 This statute consolidated all of the law of mortmain applicable to inter vivos dispositions in Ontario at that time. It contained provisions restricting inter vivos dispositions of land to charitable uses, declaring them void unless, among other conditions, they were made six months prior to the "assuror's" death. A few years later, conveyances by the owner to the charity for full consideration were exempted from this restriction.113 In 1909, the divestment provisions applicable to land held pursuant to a devise were extended to land held pursuant to an inter vivos assurance. It is not clear why this was done, as there was no model for it in England, but Professor Oosterhoff, in his extensive study of the law of mortmain, refers to a statement of the Attorney General at the time, Mr. Dymond, to the effect that "church corporations ought not to be able to hold tracts of land in urban areas without making them productive and
that the best way to solve the problem was to apply the two-year sale provision to grants as well as to devises".114

As stated above, the mortmain provisions of the Ontario statute applicable to corporations were repealed in 1982, but the charitable uses portion were, after some remodelling, retained and enacted as sections 7 to 9 of the Charities Accounting Act. There had been no other significant changes between the 1909 Act and 1982. Thus, in 1982, on the eve of the remodelling of the rules applicable to charities, those rules restricted the land ownership rights of charities in two ways:

(1) The validity of inter vivos conveyances not made for full consideration was subject to a number of conditions, the main one being that the conveyance had to have been made within six months prior to the death of the "assuror"; and, in any event, all land acquired by any inter vivos conveyance had to be disposed of within two years of the date of the acquisition or longer if ordered by a judge, unless the judge was satisfied that the land was required for actual use by the charity for its charitable purposes.

(2) Testamentary dispositions of land were subject to a requirement to dispose of the land within two years unless the judge was satisfied that the land was required for the occupation of the charity for its charitable purposes.

In both cases, failure to comply with the disposal requirement resulted in automatic vesting in the Public Trustee.

These provisions, it should be noted, were subject to numerous exceptions, some contained in the statute itself,115 many in a myriad of ad hoc statutory provisions, principally private Acts.116 The statute was also full of inconsistencies, all of which are detailed in our 1976 report.117 That report recommended tentatively in favour of the remodelling effected in the 1982 enactment.118 We are now of a different opinion. These matters are pursued further below.

b. Religious Organizations' Lands Act

The Religious Organizations' Lands Act119 was enacted in 1979 also in response to the Commission's Report on Mortmain, Charitable Uses and Religious Organizations.120 That report called for a modest reform and revision of this area of the law. The purpose of the Act is to provide a formal method by which unincorporated religious organizations might own land. The current statute provides that such land can be held by a trustee for the benefit of the church, congregation, or religious body. The trustee has quasi-corporate status so that upon his or her death or retirement from the trust, there is no need for a conveyance to new trustees appointed by the religious organization. The Act also permits religious organizations to lease lands they do not own for up to forty years. Otherwise, religious organizations are subject to sections 7 to 9 of the Charities Accounting Act.
Although there is and has been comparable English legislation governing the power of religious bodies to hold land, the Religious Organizations’ Lands Act and its precursors in Ontario, dating back to 1828, are a distinctive Canadian creation. Besides creating in these religious bodies a quasi-corporate status by granting their trustees perpetual succession, this statute also exempted religious organizations from the application of the English Mortmain Act, 1736. The 1828 Act was amended several times throughout the nineteenth century, generally to provide for its extension to other religions. Initially, the exemption from the Mortmain Act, 1736 provided for a right to acquire land by gift or devise if such gift or devise was made at least six months before the donor's death. There was also an obligation to dispose of the land so acquired within seven years of acquisition. In 1887, the sale requirement was amended to apply only to land not required for actual use. In 1912, these exemptions were dropped and religious organizations were made subject to the new, less restrictive, general mortmain rules, subject to a power in religious organizations to lease their land for a period not exceeding forty years.

The current statute is a modernization and consolidation of the basic policy found in the various versions of the statutes since 1828.

(iii) Current Law

Section 8 of the Charities Accounting Act provides that "a person [defined to include a corporation] who holds land for a charitable purpose shall hold the land only for the purpose of actual use or occupation for the charitable purpose". "Charitable purpose" is defined using the Pemsel test. Section 10 of the Religious Organizations’ Lands Act gives religious organizations a modest exemption from this general prohibition: they are permitted to lease land that they are not occupying or using for a period of up to forty years. Land not so leased, however, falls under the provisions of section 8 of the Charities Accounting Act.

Section 8 also creates a procedure whereby land owned by a charity, but not used for actual use or occupation, may be transferred to and sold by the Public Trustee, with proceeds going to the charity. Sections 14 and 15 of the Trustee Act establish a power in the court to order the sale of land held but not used by a charity and to establish an investment plan with the funds realized from the sale.

There is very little case law dealing with section 8 or its predecessors. The more recent court decisions might be construed as demonstrating a tendency on the part of courts to avoid or circumvent the prohibition where possible, generally through recourse to more specific provisions contained in other statutes.

(iv) Recommendations for Reform

The historic fears were that families would be disinherited, undue pressure would be imposed on the dying to encourage gifts to charity, or that large quantities of land would become tied up in the hands of charitable organizations controlled by a few individuals.
The focus of the current provisions in the *Charities Accounting Act* are, obviously, based only on the third concern. We expressed that third concern this way in our 1976 report:

> [I]f charities are to be allowed to invest in land freely, it is not inconceivable that potentially great concentrations of economic wealth consisting of land, a scarce resource, will be controlled in perpetuity by a few wealthy individuals through 'private' trusts or foundations.

We recommended in our 1976 report that the then existing charitable uses restrictions be repealed in their entirety, but that, if the government was of the view that the objective just set out was valid, the old law should be replaced with a new and simpler rule aimed specifically to meet that objective. Hence the enactment of section of the *Charities Accounting Act*.

Our thinking on this subject has changed, largely because we have had a chance to study the whole of the law of charity and therefore have been able to discern better ways to give effect to the legitimate concerns underlying mortmain and charitable uses legislation, without jeopardizing the legitimate interests of charities. Any policy expressed which is to be justified by the fear that charities should not be permitted to own too much land is basically unintelligible until it is stated why the owning of land, or any other form of wealth, is objectionable. In our current view, there is in fact nothing *per se* objectionable about a charity owning real estate, since it may well be that investing in real estate offers the charity the best investment return on its savings. We would suggest, therefore, that the real fear underlying such a policy must be one or more of the following: (a) such a large charity with such a large real estate portfolio is no longer a charity, but a "property developer"; (b) such a charity cannot be abiding by all the other rules applicable to it as a charity (it is not meeting its disbursement quota, it is engaging in disadvantageous non-arms length transactions, etc.); or (c) is not abiding by the rules applicable to it generally (it is letting land remain undeveloped and thereby cause urban blight, for example). If any of these are the true fears underlying the current prohibition, then the prohibition is merely a surrogate rule, an indirect way of addressing the real problem(s). The public policy question then becomes whether on balance, the general prohibition is the best way to address these questions. Our view now is that it decidedly is not. We therefore suggest that the general prohibition be repealed. Instead, we think a prohibition against owning land not actually being used should apply only to private foundations, since private foundations present the highest risk of abusing the rules applicable to charities as such. Otherwise, with respect to the concerns expressed in (a) and (b), these are all addressed more effectively in the various recommendations we have made in previous chapters and we see no need to address them again with special rules to govern the case of investments in land. With respect to concern (c), there is no reason why a charity in breach of some generally applicable law or regulation should not be pursued under it, and therefore the concern expressed in (c) also does not support the case in favour of a general prohibition.

(c)Passive Investments
The only statutory restrictions governing the passive investments of charities are section of the Charitable Gifts Act\textsuperscript{132} and sections to 32 of the Trustee Act.\textsuperscript{133} The former provision has very limited applicability. It requires that the proceeds from the sale of a greater than ten percent interest in business be invested in Insurance Act\textsuperscript{134} investments. With respect to the latter, we saw in chapter 13 that the Trustee Act uses a "legal list" approach to regulate the investment powers of charitable trustees. In chapter 13, we recommended that this approach be abandoned. We recommended that the fiduciaries of charitable trusts be subject to the same duties regarding investments as are the fiduciaries of private trusts and that this duty be formulated as a simple duty of prudence, supported by a list of factors which fiduciaries should take into account in planning their investments. We noted the recent development of a new model Prudent Investor Rule Act\textsuperscript{135} and suggested that if such a rule is adopted, it be made applicable to charitable trustees. We think the same rule should apply to all charities, no matter what their form of organization and therefore recommend that whatever rules are adopted for trustees should also be made applicable to corporations and unincorporated associations. Section of the Charitable Gifts Act should be repealed.

(d) Investments in Business

(i) Current Law

\textit{a. Charitable Gifts Act}

The Charitable Gifts Act\textsuperscript{136} restricts severely the extent to which charities may own businesses. The principal provision, section 2(1), provides that whenever "an interest in a business" is "given to or vested in" a "person" (corporation or individual) for any "religious, charitable, educational or public purpose", that person has the power and the obligation to dispose of that portion of the interest representing more than ten percent of the business. Organizations of religious denominations are exempted from this requirement.\textsuperscript{137} "Interest in a business" is defined in a somewhat obscure, but inclusive way. The disposition of the portion of the interest over ten percent must occur within seven years of its receipt, with a power in the court to extend the time for compliance, if need be.\textsuperscript{138}

A second set of provisions contained in the Act regulates the interim period between the date of receipt and disposal of the interest in the business. These require a charity controlling a business to provide certain financial information to the Public Trustee. They also require that the charity, the management of the business, and the Public Trustee determine jointly the profits of the business. These profits must be paid to the charity promptly, failing which the court has full power to make the relevant determination and distribution.\textsuperscript{139} As stated above, section of the Act requires that the proceeds of disposition be invested in investments authorized under the Insurance Act.\textsuperscript{140} Finally, there are general investigatory and supervisory powers vested in the Treasurer of Ontario and the Attorney General to investigate matters arising under the Act.\textsuperscript{141}
The *Charitable Gifts Act* was first enacted in 1949. It was amended and significantly rewritten in 1959, in part to clarify its applicability and in part to broaden its scope in several minor ways. It has been amended on a number of other occasions since in several unimportant ways. To understand the origins and policy impetus of the Act, therefore, it is necessary to go back to the debates at the time of its first enactment.

 Provincial Treasurer Leslie Frost introduced and defended Bill 169, the future *Charitable Gifts Act*, as a legislative device required to close down a loophole in the succession duty exemption, bolster confidence in the tax system, prevent unfair competition, and ensure that the cover of charity was not used by unscrupulous businessmen for profit. The occasion was the bequest by Joseph E. Atkinson of most of his personal fortune, comprised largely of shares in *The Toronto Star*, to a family-run foundation. The fear was that such a large gift of such a large business interest was in reality only a means of escaping substantial succession duties since bequests to charity were exempt while keeping the business under the control of the testator's family. Frost argued:

> If legislation is not enacted we may have, by this time next year, scores of businesses, and there is no doubt they will multiply as time goes along....[A]s matters stand the province is hugely subsidizing these trusts by way of succession duty exemptions. Within a short time they will create havoc in legitimate business. They will undermine confidence in our tax system and create a type of unfair competition subsidized with the people's money that can have no other result than to be completely unfair to the taxpayer.

CCF leader E.B. Jolliffe filibustered against the Bill and was roundly criticized in the Legislature and the press for attempting to defeat such an overtly socialistic measure. The reason, one presumes, for Jolliffe's position on the issue was *The Star*'s editorial policy in favour of the CCF. Farquhar Oliver, Liberal leader in the provincial Legislature, also opposed the measure and promised that the Liberal Party, at first opportunity would "repeal this iniquitous legislation".

Although the justification for the Act was very narrowly focused on protecting the revenue and saving charities from possible abuse, the scope of its prohibition is incredibly wide. It may even preclude a charity from running a related business. We return to a fuller discussion of the statute below; then we simply note this obvious discrepancy between its intended and its actual target.

**b. Charities Accounting Act**

Section 2(2) of the *Charities Accounting Act* requires the managers and officers of a corporation that is "controlled" by the "trustee" under a charitable trust to furnish financial and other information concerning the controlled corporation to the Public Trustee, upon request. Section 2(3) of that Act provides that the Public Trustee may apply to the court for any order necessary to obtain the information requested under section 2(2) or to protect or preserve the assets of the corporation or to ensure its proper management. These two statutory provisions clearly envisage the possibility of a charity controlling a corporation that carries on a business, something severely restricted by the *Charitable*
Gifts Act, which was enacted some thirty-five years later, and by the Income Tax Act, with respect to foundations. The sections are, therefore, somewhat anomalous.

(ii) Criticisms and Recommendations for Reform

The Charitable Gifts Act is unclear as to which types of ownership interests are regulated. It appears to cover ownership interests in corporations that run businesses, ownership interests in trusts that run businesses, and charities running businesses directly. If that, indeed, is the intention with respect to the scope of application of the statute and it was our assumption above that it is then the statute may be seeking to address two quite distinct issues, neither of which is made explicit and neither of which, in our view, is addressed adequately. One objective might be to ensure that the fiduciaries of entities controlled by a charity fulfill their fiduciary obligations to the entity so that the charity's investment in the entity maintains its value. A second objective might be to ensure that charities themselves do not breach the exclusively charitable standard by running businesses directly.

In the Commission's view, the first objective is poorly addressed in the statute. The general prohibition against owning a greater than ten percent interest in a business is both too broad and too narrow a rule. It is too broad because it precludes all charities from owning a greater than ten percent interest in an entity when the proper target of the regulation should be merely the enforcement of the fiduciary duties owed to these entities. It is too narrow because it does not pick up all the situations in which a breach of these fiduciary duties is a real possibility. We suggest a better set of rules below.

With respect to the second possible objective to control for breaches of the exclusively charitable standard the ten percent limit is simply wrong. It suggests that it is not permissible for a charity to carry on what we have called "related" and "subordinate" commercial activity. This is clearly misguided.

There are two further difficulties with the Act. First, it appears that the statute may apply only to "gifts" of interests of businesses to charities and, therefore, not to acquisitions. If the objectives of the legislation are as just set out, there is no reason why the provisions of the Act should apply only to gifts of more than ten percent interests of businesses to charities.

Second, there is an implicit contradiction, alluded to above, between the Charitable Gifts Act, which prohibits a greater than ten percent interest in a business, and the provisions of the Charities Accounting Act, which requires corporations controlled by charities to furnish financial and other information to the Public Trustee. As stated above, it seems that the provisions of the Charities Accounting Act implicitly contemplate a possibility which is prohibited by the Charitable Gifts Act. This is a minor criticism, however, because it is possible to read the provisions of the Charities Accounting Act so that they apply only to corporations in which the controlling interest was purchased as opposed to being received by gift (on the assumption that the Charitable Gifts Act applies only to interests greater than ten percent, which are obtained by gift) and, where the interest is
acquired by gift, only to the interim period between the date of the gift and the date of the
required disposition. Although that reading of the provision achieves some measure of
consistency between the two statutes, the distinctions required to achieve consistency
have little merit. Rather, it seems more likely that the cause of the inconsistency is the
fact that the Charitable Gifts Act was hastedly drafted and hastedly enacted.

These are the main difficulties with the current regime governing the investments in
businesses of charities. We propose that the offending provisions be repealed in their
entirety and that a new regime be put in place. We have already described in chapter 12,
what, in our view, would be a good regime for the regulation of the investments in
businesses. Those recommendations are summarized again here.

(1) The first step is to identify the objectives of the legislation. As just stated,
there are essentially two aims. The first is to ensure that value is not diverted from
the charity indirectly through transactions between the members of the proscribed
class and the entity in which the charity has an ownership or other beneficial
interest. The second is to ensure that the commercial activities of charities are not
in breach of the exclusively charitable standard. The second objective is addressed
under the federal and provincial regulations that govern the commercial activities
of charities. We stated our reform recommendation on this issue above in chapter
and, in summary form, at the outset of this chapter: Nonprofit organizational laws
should distinguish between related, subordinate, and unrelated business activity,
and prohibit only the last.

(2) The basic approach of the legislation seeking to achieve the first objective
should be to regulate directly the fiduciary obligations of the fiduciaries of the
corporation or business trust in which the charity has a stake and to regulate
directly transactions between that entity and the members of the proscribed class.
The first element of the required legislation is to define "proscribed class", that is,
the group of non-arm's length persons who should be prohibited from dealing
with the entity in a way that harms the entity. The second element of the
regulation should identify some threshold ownership stake by the charity in the
entity, upon which is conditioned the application of the self-dealing restrictions.
In chapter 12, we suggested the following rule: a threshold of no higher than a
thirty percent interest, which would be calculated by combining the equity stake
of the charity together with the equity stake of all members of the proscribed class
of persons. We suggested in chapter 12 that there might be two types of
exceptions applied in making this calculation. First, the rule should not apply in
respect of interests in publicly traded corporations on the theory that self-dealing
in these corporations is policed sufficiently by the other shareholders. Second, in
the case of charitable organizations and public foundations, there might be an
exception where the charity's own stake in the controlled entity is less than five
percent of the equity of the controlled corporation. For private foundations,
however, provided the thirty percent threshold is met, a minimal ownership stake
by the charity (that is, one share) would be sufficient to attract the application of
the restrictions and other rules set out in what follows.
(3) Private foundations should in all cases be restricted to a maximum of a ten percent interest in any business corporation or business trust.

(4) There should be a reporting requirement with respect to all transactions between controlled entities and members of the proscribed class. These reports should be required to be submitted to the NOC prior to the transaction. This rule might discourage organizations and public foundations from taking a greater than five percent stake in any business corporation or business trust. We are cognizant of this difficulty, but see no simple way around it.

(5) The transactions with members of the proscribed class should be prohibited unless they are approved by the fiduciaries of the controlled entity and are "fair and reasonable" (or perhaps are held to some other higher standard such as "utmost fairness") to the controlled entity. The court should have the power to make this determination.

(6) The NOC should have the status of shareholder/beneficiary of these controlled entities and therefore the power to enforce the fiduciary duties of the fiduciaries of these controlled entities. The controlled entities should also be made subject to the general enforcement powers of the NOC.

(7) The controlled entity and the charity should be under a joint obligation to submit audited financial statements of the controlled entity on an annual basis to the NOC.

(8) These rules should also apply to non charitable nonprofit corporations that have raised funds from the public.

(e) Political Activity of Charities

The political activities of charities are currently regulated through the application of the common-law definition of charity discussed in detail above in chapters 7 and 8. Any breach of the exclusively charitable standard through the carrying on of illegitimate political activity by a charity would, under provincial law, constitute a violation of the fiduciary duties of the fiduciaries of the charity who participated in the breach. Any authorization of illegitimate political activity in the objectives of the organization would automatically mean that it could not be classified as a charity under provincial law.

We do not recommend that legislation be adopted to modify the common-law position on these issues. However, we do think it would be useful if the organizational law of each form of organization specified clearly the logic of the exclusively charitable standard as it pertains to political objectives and political activity. That legislation should identify three types of activity: (1) or apparent political activities, by which we mean activities that have some of the trappings of true political activity, but whose objective is not to influence public opinion or change public policy; (2) and incidental political activities, by which we mean activities which, considered in isolation, are political in form and content, but
considered in their context, are merely means of carrying on charitable activity or merely a byproduct of such charitable activity; and (3) partisan and other impermissible political activity. The organizational law should state that only the third type of activity is not permitted. The value of this legislative provision would be to clarify the possibilities for the sector and reassure it that not all forms of political activity are prohibited.

There is no further need for the regulation of the political activities of charities. There is sufficient power in the NOC to police the fiduciary duties of the fiduciaries of charities who, contrary to the objectives of their organization, engage in impermissible charitable activity. It might be of help to the sector as a whole to have some more detailed guidance as to what is permitted and what is not permitted. However, in our view, it would not be appropriate to provide this guidance in the form of more detailed legislation regulating the political activities of charities. Rather, the NOC, as part of its educational mandate, could issue discussion papers or brochures setting out what in its view is permissible and impermissible. In establishing and stating its view, it would only be prudent of the NOC to ensure that its pronouncements on these difficult issues are consistent with the views of Revenue Canada.

(f) Privileges

Charities, or at least some charities, are the beneficiaries of statutory privileges in Ontario, some of them carrying considerable advantages. There are three main sets of provisions, all establishing entitlements to tax exemptions of one form or another.

(i) Assessment Act

(a) Section 3 paragraph 12 of the Assessment Act exempts certain charities from property taxes for land owned and usually used for the charitable purposes of the charity. The precise description of the entities which qualify for the exempt status is as follows:

3. ¶12 Land of an incorporated charitable institution organized for the relief of the poor, The Canadian Red Cross Society, St. John Ambulance Association, or any similar incorporated institution conducted on philanthropic principles and not for the purpose of profit or gain, that is supported, in part at least, by public funds, but only when the land is owned by the institution and occupied and used for the purposes of the institution.

(b) Section 3, paragraphs 3, 5, and 6 exempt land held for certain religious purposes. They provide as follows:

3. ¶3 Every place of worship and land used in connection therewith and every churchyard, cemetery or burying ground.

(a) Where land is acquired for the purpose of a cemetery or burying ground but is not immediately required for that purpose, it is not entitled to exemption from taxation under this paragraph until it has been enclosed and actually and in good faith required, used and occupied for the interment of the dead.
(b) The exemption from taxation under this paragraph does not apply to lands rented or leased to a church or religious organization by any person other than another church or religious organization.

3. ¶5 The buildings and grounds of and attached to or otherwise used in connection with and for the purposes of a seminary of learning maintained for philanthropic or religious purposes, the whole profits from which are devoted or applied to such purposes, but the grounds and buildings are exempt only while actually used and occupied by the seminary.

3. ¶6 The buildings and grounds not exceeding in the whole fifty acres of and attached to or otherwise used in connection with and for the purposes of a seminary of learning maintained for educational purposes, the whole profits from which are devoted or applied to such purposes, but the grounds and buildings are exempt only while actually used and occupied by the seminary, and the exemption does not extend to include any part of the lands of such a seminary that are used for farming or agricultural pursuits and are worked on shares with any other person, or if the annual or other crops, or any part thereof, from the lands are sold.

(a) The exemption from taxation under this paragraph does not apply to lands rented or leased to a seminary of learning mentioned in this paragraph by any person other than another such seminary of learning or a person already exempt from taxation in respect of the property rented or leased.

Section 4 provides that municipalities may, by bylaw, further exempt other religious institutions:

4. The council of any local municipality may pass by-laws exempting from taxes, other than school taxes and local improvement rates, the land of any religious institution named in the by-law, provided that the land is owned by the institution and occupied and used solely for recreational purposes, on such conditions as may be set out in the by-law.

(c) Section 3, paragraph exempts land held for certain educational purposes. It provides as follows:

3. ¶4 The buildings and grounds of and attached to or otherwise used in connection with and for the purposes of a university, high school, public or separate school, whether vested in a trustee or otherwise, so long as the buildings and grounds are actually used and occupied by the institution, but not if otherwise occupie

(a) The exemption from taxation under this paragraph does not apply to lands rented or leased to an educational institution mentioned in this paragraph by any person other than another such institution or a person already exempt from taxation in respect of the property rented or leased.

(d) Section 3, paragraph 7 exempts land held for certain health-related purposes. It provides as follows:

3. ¶7 Every public hospital receiving aid under the Public Hospitals Act with the land attached thereto, but not land of a public hospital when occupied by any person as tenant or lessee.
(a) Land owned and used by such a public hospital for farming purposes shall be deemed attached to the hospital within the meaning of this paragraph, despite the fact that it is separated therefrom by a highway.

(e) Section 3, paragraph 10 exempts land held by the Boys Scouts or Girl Guides Associations.

3. ¶10 Property owned, occupied and used solely and only by The Boy Scouts Association or The Canadian Girl Guides Association or by any provincial or local association or other local group in Ontario that is a member of either Association or is otherwise chartered or officially recognized by it.

(ii) Retail Sales Act

There are also very specific exemptions under the Retail Sales Tax Act.

(a) Section 7(1), paragraphs 20 and 55 provide:

7.(1) "The purchaser of the following classes of tangible personal property and taxable services is exempt from the tax imposed by section 2.

......

20. Used clothing or used footwear or a combination thereof sold by a religious, charitable, benevolent or non-profit organization in one transaction the total consideration for which does not exceed $50.

......

55. Publications, as defined by the Minister, of a religious, charitable or benevolent organization.

(b) Sections 2(5) and 9(2) provide:

2.(5) Every purchaser of admission to a place or places of amusement shall pay to Her Majesty in right of Ontario a tax computed at the rate of 10 per cent of the price of admission where the price of admission exceeds $4.00.

9.(2) The tax imposed by subsection 2(5) is not payable in respect of the price of admission to any entertainment, event, dance, performance or exhibition staged or held where no performer taking part in that entertainment, event, dance, performance or exhibition receives, or will receive, either directly or indirectly, any remuneration or any other consideration for the performance or where ninety percent of the performers who regularly participate in the cast of a theatrical or musical performance staged or held in a place of amusement are persons who are permanent residents in Canada as defined in the Immigration Act (Canada) or to any entertainment, event, dance, performance or exhibition that is staged or held in a place of amusement by or under the auspices or sponsorship of

(a) a registered Canadian amateur athletic association, as defined by paragraph 248(1) of the Income Tax Act (Canada), including a branch or affiliate association to which the
registration under that Act of the Canadian amateur association of which it is a branch or affiliate has been extended;

(b) a registered charity, as defined by paragraph 248(1) of the Income Tax Act (Canada).

(iii) Corporations Tax Act

Charitable corporations as defined in the Income Tax Act\textsuperscript{152} are exempt under sections 57(1) and 71(1) of the Corporations Tax Act\textsuperscript{153}. They provide as follows:

57.(1) Except as hereinafter provided, no tax is payable under this Part upon the taxable income of a corporation for a period when that corporation was,

(a) a corporation referred to in paragraph 149(1)(c), (d), (e), (f), (h.1), (i), (j), (k), (m), (n), (o.1), (o.2), (o.3) or (t) of the Income Tax Act (Canada); or

(b) a club, society or association that, in the opinion of the Minister, was not a charity within the meaning given to that expression by subsection 149.1(1) of the Income Tax Act (Canada) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, which has not in the taxation year or in any previous taxation year distributed any part of its income to any proprietor, member or shareholder thereof, or appropriated any of its funds or property in any manner whatever to or for the benefit of any proprietor, member or shareholder, unless the proprietor, member or shareholder was a club, society or association, the primary purpose and function of which was the promotion of amateur athletics in Canada.

71.(1) Except as provided in subsection 11(15), every corporation referred to in subsection 57(1), other than,

(a) a corporation subject to the rules in subsection 149(10) of the Income Tax Act (Canada) as made applicable by subsection 57(7) of this Act; and

(b) a corporation referred to in paragraph 149(1)(m) of the Income Tax Act (Canada) to which the rules in subsection 149(10) of that Act do not apply,

shall not be required to pay taxes otherwise payable under this Part.

In addition to these provisions, there are many private Acts conferring specific exemptions-usually from municipal taxes-on specific associations. These are listed below in Appendix B-4.

We make no recommendations concerning any of these provisions. Rather, we defer entirely to the recommendations of the Ontario Fair Tax Commission\textsuperscript{154} contained in a 1993 report. We do this because, in our view, the question of the eligibility of charitable and other entities for favourable tax treatment under the taxation laws of Ontario is too bound up with the basic objectives, premises, and terms of those laws. Although we are, in general, favourable to the idea of concessional tax treatment for charities, the nature and extent of any exemptions must be determined in the context of a fuller examination of those laws.
Endnotes:

1
On fundraising generally, see P. Luxton, *Charity Fund-Raising and the Public Interest: An Anglo-American Legal Perspective* (Avebury, 1992). For an excellent survey of the law, practice, and opinion in Canada, see Canada West Foundation and the Canadian Centre for Philanthropy, *Fundraising for Charities* [forthcoming].

2

3

4
*Charities Accounting Act*, supra, note 2, s. 6(7).

5
*Ibid.*, s. 6(8).

6

7

8

9
2 & 3 Geo. 6, c. 44 (U.K.).

10
6 & 7 Geo. 5, c. 31 (U.K.).
3 & 4 Geo. 6, c. 31 (U.K.).

12

11 & 12 Geo. 6, c. 29 (U.K.).

13


14

Ibid., ss. 66, 67.

15

Ibid., s. 69.

16

Ibid., s. 58(1) "charitable institution".

17

Ibid., s. 59(1), (2).

18

Ibid., s. 60.

19

Ibid., s. 60.

20

Ibid., s. 61.

21

Charitable Institutions (Fund-Raising) Regulations 1994, c. 6(1).

22

Charities Act 1992, supra, note 13, s. 62(1).

23

Charitable Collections Acts, 1966-1981 (Queensland), s. 3(2).


Me. Stat. Title 9 Pt. 13 ch. 385, §§5005, 5012.

Joseph H. Munson v. Secretary of State of Maryland, 104 S. Ct. 2839 (1984) (statute restricting the use of funds raised by fundraising campaignno more than 25%, subject to discretionary exceptions, could be used to cover costs of fundraising declared unconstitutional for violating first amendment guarantee); Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (a prohibition of solicitation in which less than 75% of proceeds go directly to organization's charitable purpose declared unconstitutional for violating the first amendment guarantee of freedom of speech); and Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (S.C.) (statute restricting by percentage amounts payable to professional fundraisers and requiring point of solicitation of disclosure of fundraising fees declared unconstitutional in both respects for violating first amendment guarantees).


32 Ibid., §17510.2.

33 Ibid., §17510.3.

34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid., §17510.4.

38 Ibid.

39 Ibid., §17510.6.

40 Ibid.


42 Stats. 1993, ch. 589.

Charitable Solicitation Disclosure Law, supra, note 31, §17510.85.

Ibid., §17510.9.

Supra, note 8.

Supra, note 29.

Supra, note 8.


For a summary of the situation in Alberta, see Canada West Foundation and Canadian Centre for Philanthropy, Regulation of Charities in Alberta (Calgary: Canada West Foundation, 1995). Several other jurisdictions in Canada regulate fundraising. See Charities Act, R.S.P.E.I. 1988, c. C-4 (charities soliciting funds are required to register with Minister of Justice; exemptions for solicitations by church of members; registration granted if there is adequate provision for charity's establishment and control and need not already met by some other group); and The Charities Endorsement Act, R.S.M. 1987, c. C60 (no fundraising without authorization of Civic Charities Endorsement Bureau in Winnipeg or the Minister for Consumer and Corporate Affairs; exemptions for solicitations among members or by religious denomination for its own purposes; in Winnipeg, authorization is granted only if charity has responsible local management and accounts audited to satisfaction of Bureau; in Winnipeg, financial statements for each campaign must be filed within 9 days of its completion).


Ibid., s. 3(1).

54


55

Epilepsy Canada v. Attorney General for Alberta (1994), 20 Alta. L.R. (3d) 44 and 57, 115 D.L.R. (4th) 501 and 514 (C.A.); additional reasons at (1994), 155 A.R. 259, 73 W.A.C. 259 (C.A.) and (1994), 157 A.R. 268, 77 W.A.C. 268 (C.A.). In Epilepsy Canada, the Alberta Court of Appeal declared the Act unconstitutional for violating the guarantee of freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court reasoned that, although the objectives of the legislation—donor protection, promoting efficiency in the nonprofit sector, and protecting the credibility of charities that do solicitations—were valid, the legislation itself, by prohibiting solicitation without a licence and making the granting of the licence subject to a broad discretionary power in a government or municipal official, violated the s. 2(b) right and could not be justified under s. 1, mainly because the legislative instruments used to achieve the objectives were in not proportional to the importance of objectives.

56

Supra, note 7.

57

Public Contributions Act, supra, note 51, s. 1(1)(b).

58

Ibid., s. 2.

59

Ibid., s. 3, as am. by S.A. 1987, c. 16, s. 4(4).

60

Ibid., s. 4(4), as am. by S.A. 1987, c. 16, s. 4(5).

61

Ibid., s. 5(1), as am. by S.A. 1987, c. 16, s. 4(6).

62

Ibid., s. 7, as am. by S.A. 1987, c. 16, s. 4(8).

63

Ibid., s. 7.1, as am. by S.A. 1987, c. 16, s. 4(9).
Ibid., s. 8, rep. & sub. by S.A. 1987, c. 16, s. 4(10).

Ibid., s. 10, rep. & sub. by S.A. 1987, c. 16, s. 4(12).

Ibid., s. 3, rep. & sub. by S.A. 1987, c. 16, s. 4(3).


Public Contributions Act, supra, note 51, s. 1(1)(a), rep. & sub. by S.A. 1987, c. 16, s. 4(2).

Charitable Fund-raising Act, supra, note 7, s. 2.

Ibid., s. 1(1)(b).

Ibid., s. 4.

Ibid., s. 5.

Ibid., ss. 6, 7.

Ibid., s. 9(1).

Ibid., s. 11.
There are a number of associations of professional fundraisers in Canada: Canadian Council for the Advancement of Education (CAE); Canadian Association of Gift Planners (CAGP); Association of Health Care Philanthropy (AHP); Canadian Society of Fund Raising Executives (CSFRE); Alberta Association of Fund Raising Executives (AAFRE); and the National Society for Fund Raising Executives. These organizations have implemented codes of conduct and ethical guidelines for their members. They should be consulted prior to the adoption of any rules governing standards of behaviour in the industry.


The Canadian Association on Charitable Gift Annuities (CACGA) is a voluntary non-sectarian association whose members issue charitable gift annuities throughout Canada. Most, but not all, of the members of the association are religious organizations. The primary responsibility of the association is to "establish guidelines and standards for organizations that issue charitable gift annuities and to assist such charities in understanding how to issue charitable gift annuities appropriately and responsibly": CACGA submission to the Ontario Law Reform Commission (May 24, 1990), at 1. Members include the United Church of Canada, the Salvation Army, the Canadian Bible Society, and the Catholic Church Extension Society.
See Interpretation Bulletin IT111R.

CACGA submission, supra, note 85.

R.S.C. 1985, c. 1 (5th Supp.).

Supra, note 2, ss. 7-9.


Ibid.


W.S. Holdsworth, An Historical Introduction to the Land Law (1927) at 110, cited in Oosterhoff, supra, note 93, at 279.

Holdsworth, supra, note 96.

99


100

Statute of Charitable Uses 1601, 43 Eliz. 1, c. 4 (U.K.).

101

An Act To Restrain the Disposition of Lands, whereby the same become Unalienable 1736, 9 Geo. 2, c. 36 (U.K.).

102

Jones, supra, note 98, at 109.

103


104


105

See Oosterhoff, supra, note 93, at 285-87.

106

51 & 52 Vict., c. (U.K.).

107

Mortmain and Charitable Uses Act, 1891, 54 & 55 Vict., c. 73.

108


109

Ibid.

110

8 & 9 Eliz. 2, c. 58 (U.K.).

111
The Mortmain and Charitable Uses Act, 1892, S.O. 1892, c. 20.

112

The Mortmain and Charitable Uses Act, 1902, S.O. 1902, c. 2.

113

This last exception was added in 1909 by The Mortmain and Charitable Uses Act, 1909, S.O. 1909, c. 58, ss. 6, 7.

114

Oosterhoff, supra, note 93, at 310, n. 371.

115

The Mortmain and Charitable Uses Act, R.S.O. 1970, c. 280, ss. 8, 9.

116


117


118


119

S.O. 1979, c. 45. See, now, supra, note 91.

120

Supra, note 92.

121

An Act for the relief of the religious societies Therein Mentioned, 1828, Geo. 4, c.(Ont.).
Supra, note 101.

The Religious Institutions Act, S.O. 1912, c. 81.

Supra, note 2.


Supra, note 91.

Ibid., s. 12(2).

The Charities Accounting Act, supra, note 2, s. 9, should also be mentioned. It does not deal with restrictions on the power to hold land per se. The immediate precursor to s. 9 is s.of the 1970 Mortmain and Charitable Uses Act, supra, note 115, and the origin of this provision dates to the 1909 revision of the mortmain legislation. It was introduced into the Bill hastily between the second and third readings and appears (from a provision which makes its effect retroactive) to have been intended to rectify a specific problem. In effect, s. 9 merely makes it possible for certain public bodies to hold land as trustees for charitable purposes in circumstances where the relevant constituting instruments of the public body may not permit it to do so. To use the example from our 1976 Report on Mortmain, Charitable Uses and Religious Organizations, supra, note 92, an old house might be left in trust to a city to run as a museum in a situation where there is no power in the city's constituting instrument to run a museum. We see no reason why this provision should not be continued in any new law.


132


133

Supra, note 129.

134


135


136

Supra, note 132.

137

Ibid., s. 2(2).

138

Ibid., s. 3.

139

Ibid., s. 4.

140

Supra, note 134.

141

Charitable Gifts Act, supra, note 132, ss. 7, 8.

142


143

In the Legislature, Frost also defended the measure on the basis that keeping charities out of business would also be good for business, as charities might become too distracted by their primary mission to run a business properly: *ibid.*

*Supra,* note 2.

*Supra,* note 89.


Amended by S.O. 1992, c. 13, s. 5.

*R.S.O. 1990, c. C.40.* Section 57(1) was am. by S.O. 1994, c. 14, s. 20.

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CHAPTER 19

CURRENT GOVERNMENT GRANTING PRACTICES AND SYSTEMS OF ACCOUNTABILITY

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4. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS FOR REFORM

1. INTRODUCTION

Transfer payments from the Ontario government to charities, non-profit organizations, and other institutions constitute a large proportion of government spending.\(^1\) In 1995-96, transfer payments accounted for seventy-four percent of the provincial budget or a total of $41.2 billion.\(^2\) In this chapter, the Commission presents a brief account of the granting practices and accountability mechanisms in place in several Ontario government ministries.\(^3\) It is important to recognize, however, that government involvement in the charity and nonprofit sector is not restricted to grants to nonprofit agencies. There is a range of policy vehicles used by the government to foster a strong nonprofit sector and to advance state interests. These include grants to quasi-public bodies,\(^4\) loans and loan guarantees,\(^5\) licensing and inspectorate administrations,\(^6\) and autonomous spending agencies, such as the Arts Council.

In the second section of this chapter, we describe a Management Board of Cabinet directive and its related guideline issued to all ministries. The directive and guideline are designed to encourage effective transfer payment accountability. They provide a point of reference for the description and evaluation of the accountability systems in place in several of the more important granting ministries. In the third section we describe the granting practices of several of the larger ministries, namely: the Ministry of Community and Social Services; the Ministry of Citizenship, Culture and Recreation; the Ministry of
We do not address issues relating to the performance of any of the selected ministries in applying its accountability process nor the adequacy of their resource allocation to this task. Although we feel a proper review of government practices would be incomplete without at least some attention being paid to these matters, we did not have the resources to conduct the required audit. We understand, however, that the Management Board of Cabinet is currently engaged in such a task. In the fourth section, we conclude with an overall evaluation of the transfer payment accountability process. We also make recommendations for reform.

Although there are a vast array of statutory regimes governing transfer payment accountability, there is only one section, of only one statute, in addition to the Management Board of Cabinet Act of central and general relevance on the matter of transfer payment accountability. This is the Hospitals and Charitable Institutions Inquiries Act. It empowers the Lieutenant Governor in Council "to cause inquiry to be made concerning any matter connected with...[any] organization that is granted aid out of money appropriated by the Legislature", by appointing a commission of inquiry with the power of a commission under Part II of the Public Inquiries Act. This statute is rarely used and, given the instrument of accountability it deploys, of little value in the general scheme of things.

2. THE MANAGEMENT BOARD OF CABINET DIRECTIVE 1-11

The Management Board of Cabinet Act and the Treasury Board Act, 1991 establish two committees of Cabinet respectively, the Management Board of Cabinet and the Treasury Board for managing the operations of government. These bodies, which in fact operate as a single committee, coordinate the financial and administrative operations of the Ontario government. Section 3 of the Management Board of Cabinet Act and section of the Treasury Board Act, 1991 set out the powers and responsibilities of the two boards. Among other things, they are required to ensure that public moneys are managed prudently and effectively. Management Board of Cabinet Directive 1-11 provides guidelines for the establishment of mechanisms that foster transfer payment accountability.

Directive 1-11, "Transfer Payment Accountability", states that each ministry must develop and maintain an appropriate accountability regime. The responsibility for doing this falls on the shoulders of the relevant Deputy Minister, who is to be assisted, when necessary, by the Secretariat of the Management Board. Guideline 1-5, "Transfer Payment Accountability: A Manager's Guide", provides detailed suggestions about how to manage an accountability system. It is divided into five parts. The first is a general section on the accountability process. It states that there are four steps for ministries to follow in setting up their own regimes: setting expectations; contracting; reporting; and corrective action. We examine each of these briefly.

(a) Setting Expectations
Guideline 1-5 explains that "setting expectations" involves "deciding on the objectives and results that the recipient is to achieve with the transfer payment". This step in the accountability process seeks to produce a rough sketch of a given project. To establish the basis for a concrete contractual agreement, the guideline suggests a number of points that require clarification before moving on to step two in the accountability process. These include: establishing a clear indication of the limits on the powers of a recipient over grant moneys; establishing the extent to which the ministry may involve itself in the use of grant moneys; establishing how a project receiving a grant is to be monitored; and determining precise goals that may be efficiently attained.

(b) Contracting

The second stage "involves arriving at an understanding between the ministry and the recipient on the conditions applicable to the transfer payment". This step formalizes and finalizes the dialogue undertaken in the "setting expectations" stage. The guideline suggests that an ideal contract between ministry and recipient will be contained in one document. It states that the content of the contract will necessarily vary from case to case and explains that, at a minimum, particular consideration should be afforded to three things: that both parties commit to a "specified level" of funding, as well as the intervals at which payments are to be made; that the final agreement attempts to cover all the expected objectives of the project in a way that leaves little guesswork to the contracting parties; and that the contract makes clear what information the recipient is required to provide to the ministry and what rights the ministry has to obtain information on the project by itself.

(c) Reporting

Guideline 1-5 establishes the basic requirements of an effective reporting scheme. Information that is to be reported to a granting ministry should be relevant and timely and should be provided on a regular basis. The guideline suggests a few techniques to maintain a successful reporting scheme, including use of both external and in-house auditors.

(d) Corrective Action

The need for corrective action arises when "objectives and results, expenditure limits or information requirements" are not being met. Guideline 1-5 suggests that the use of audit reports and other information received from recipients are relevant to this process.

3. PRIMARY GRANTING MINISTRIES

(a) Ministry of Community and Social Services

The Ministry of Community and Social Services Act provides the legislative foundation for one of Ontario's largest ministries. Section 3 gives the Minister the mandate to administer the Act and any others assigned to him or her by the Legislature or by the
Lieutenant Governor in Council. Section 6 enumerates the duties of the Minister, including a broad mandate to "secure the observance and execution of all Acts and regulations for the administration of which he or she is responsible". Section 15 of the Act establishes the Social Assistance Review Board, whose mandate is to "conduct hearings and perform duties assigned to it" under the Act or any other Act.

Wide granting powers are provided under sections 7, 11 and 12. Section 9 allows the Minister to require that grant recipients prepare and disclose financial statements which detail how grant moneys were used. There are also various other Acts under which the Ministry has granting powers, including the Charitable Institutions Act.

Under the various Acts it administers, the Ministry of Community and Social Services annually grants a large amount of money to a wide variety of organizations. A detailed breakdown of expenditures for the years 1989/91 through 1995/96, according to the Acts under which they were disbursed, is provided below.

**Ministry of Community and Social Services**

**Expenditures 1992/93 to 1995/96**

|--------------------|------------------------------------------------------|-------------------|-------------------|-------------------|-------------------|
| **Charitable Institutions Act** | (1) Charitable Homes for the Aged                   | 7,216,838         | 6,748,123         | 6,819,941         | 843,090
<p>|                     | (2) Adult Group Homes Halfway Houses                |                   |                   |                   | 6,630,650         |
|                     | (3) Special Grants                                  |                   |                   |                   |                   |
| <strong>Total</strong>           |                                                      | <strong>7,216,838</strong>     | <strong>6,748,123</strong>     | <strong>6,819,941</strong>     | <strong>7,473,740</strong>     |
| <strong>Child and Family Services Act</strong> | Community Support Services                          | 19,683,492        | 25,196,920        | 19,022,005        | 19,673,855        |
|                     | (4) Child Welfare Services                          | 360,491,079       | 357,872,074       | 351,139,746       | 354,715,737       |
|                     | Child &amp; Family Intervention Serv.                   | 198,033,116       | 199,015,891       | 192,992,245       | 189,048,238       |
|                     | Child Treatment Services                            | 22,479,660        | 21,711,324        | 23,529,911        | 23,879,588        |
| <strong>Total</strong>           |                                                      | <strong>600,687,347</strong>   | <strong>603,796,209</strong>   | <strong>586,683,907</strong>   | <strong>587,317,618</strong>   |
| <strong>Day Nurseries Act</strong> | (6) Child Care                                      | 533,112,757       | 461,499,754       | 450,520,371       | 432,923,116       |
| <strong>Total</strong>           |                                                      | <strong>533,112,757</strong>   | <strong>461,499,754</strong>   | <strong>450,520,371</strong>   | <strong>432,923,116</strong>   |</p>
<table>
<thead>
<tr>
<th>Act</th>
<th>Facilities &amp; Services</th>
<th>Child</th>
<th>(5) Supportive Services</th>
<th>Total</th>
<th>Elderly Persons' Centres Act</th>
<th>Homes for Retarded Persons Act</th>
<th>Ministry of Community and Social Services</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Developmental Services Act</td>
<td>Sched. II Facilities &amp; Comm. Res. Ctrs.</td>
<td>30,528,409</td>
<td>42,113,532</td>
<td>43,149,290</td>
<td>45,270,768</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td></td>
<td>Community Accommodation -</td>
<td>186,336,973</td>
<td>41,256,767</td>
<td>43,412,962</td>
<td>46,187,637</td>
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<td>Child</td>
<td>351,187,878</td>
<td>339,549,365</td>
<td>326,991,016</td>
<td>230,015,152</td>
<td>0</td>
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<tr>
<td></td>
<td>(5) Supportive Services</td>
<td>30,528,409</td>
<td>42,113,532</td>
<td>43,149,290</td>
<td>45,270,768</td>
<td>0</td>
<td>0</td>
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<td>Total</td>
<td>568,053,260</td>
<td>422,919,664</td>
<td>413,553,268</td>
<td>321,473,557</td>
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</tr>
<tr>
<td>Homes for Retarded Persons Act</td>
<td>Community Accommodation - Adults</td>
<td>186,336,973</td>
<td>189,710,980</td>
<td>175,582,779</td>
<td>156,164,620</td>
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<tr>
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<td>Total</td>
<td>186,336,973</td>
<td>189,710,980</td>
<td>175,582,779</td>
<td>156,164,620</td>
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<tr>
<td>Ministry of Community and Social Services</td>
<td>Ministry Purchase of Counselling Serv. Social Service Support Fund</td>
<td>22,022,321</td>
<td>25,999,133</td>
<td>26,839,971</td>
<td>36,744,001</td>
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<tr>
<td></td>
<td>(1) Home Support Services for the Elderly</td>
<td>139,964</td>
<td>231,830</td>
<td>174,562</td>
<td>210,759</td>
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<td>(1) Integrated Homemaker Prog.</td>
<td>4,765,811</td>
<td>6,738,539</td>
<td>6,536,842</td>
<td>6,375,078</td>
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<tr>
<td></td>
<td>(1) Supp. Serv. for the Phys. Handicapped</td>
<td>7,084,101</td>
<td>18,632,219</td>
<td>48,733,041</td>
<td>66,949,761</td>
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<tr>
<td></td>
<td>(3) Grants to Agencies for Credit Counsel Community &amp; Neighborhood Support Serv.</td>
<td>67,654,612</td>
<td>71,407,368</td>
<td>69,470,246</td>
<td>76,929,064</td>
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<td></td>
<td>(7) Employment Services Family Violence</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>Total</td>
<td>101,666,809</td>
<td>123,009,069</td>
<td>151,754,662</td>
<td>176,208,663</td>
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<tr>
<td>Vocational Rehabilitation Services Act</td>
<td>Shelter Wkshops.-Non Dev. Handicapped</td>
<td>13,276,571</td>
<td>14,468,793</td>
<td>15,718,170</td>
<td>20,743,536</td>
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<td></td>
<td>Rehabilitation Serv. for the Disabled Shelter Wkshops. - Dev.</td>
<td>7,658,000</td>
<td>6,318,312</td>
<td>6,304,284</td>
<td>5,876,085</td>
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<td>Total</td>
<td>36,272,062</td>
<td>42,025,749</td>
<td>43,654,655</td>
<td>46,382,421</td>
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<tr>
<td>Handicapped</td>
<td></td>
<td>57,206,633</td>
<td>62,812,854</td>
<td>65,677,109</td>
<td>73,002,042</td>
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<td><strong>Total</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Young Offenders’ Implementation Act</td>
<td>Young Offenders' Services</td>
<td>80,491,087</td>
<td>85,167,891</td>
<td>80,805,316</td>
<td>78,257,515</td>
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<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>80,491,087</td>
<td>85,167,891</td>
<td>80,805,316</td>
<td>78,257,515</td>
<td></td>
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<tr>
<td><strong>Total</strong></td>
<td></td>
<td>2,134,771,704</td>
<td>1,955,864,564</td>
<td>1,931,397,353</td>
<td>1,832,820,671</td>
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Ministry of Community and Social Services
Expenditures 1989/90 to 1991/92

<table>
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<tr>
<th></th>
<th></th>
<th></th>
<th></th>
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<tbody>
<tr>
<td>Charitable Institutions Act</td>
<td>(1) Charitable Homes for the Aged</td>
<td>86,298,472</td>
<td>77,145,643</td>
<td>68,939,463</td>
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<td>(2) Adult Group Homes Halfway Houses</td>
<td>1,073,014</td>
<td>1,301,383</td>
<td>720,924</td>
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<td>(3) Special Grants</td>
<td>6,792,273</td>
<td>7,122,841</td>
<td>6,189,729</td>
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<tr>
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<td>(4) Special Grants</td>
<td>20,102,797</td>
<td>14,108,961</td>
<td>14,584,908</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>114,266,556</td>
<td>99,678,828</td>
<td>90,435,024</td>
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<tr>
<td>Child and Family Services Act</td>
<td>Community Support Services</td>
<td>17,821,378</td>
<td>14,821,456</td>
<td>13,884,399</td>
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<tr>
<td></td>
<td>(4) Child Welfare Services Child &amp; Family Intervention Serv.</td>
<td>347,768,461</td>
<td>312,371,856</td>
<td>277,587,221</td>
</tr>
<tr>
<td></td>
<td>Child Treatment Services</td>
<td>186,841,303</td>
<td>178,294,920</td>
<td>158,716,777</td>
</tr>
<tr>
<td></td>
<td></td>
<td>22,781,125</td>
<td>22,552,629</td>
<td>20,148,433</td>
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<tr>
<td><strong>Total</strong></td>
<td></td>
<td>575,302,267</td>
<td>528,040,861</td>
<td>470,336,830</td>
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<tr>
<td><strong>Total</strong></td>
<td></td>
<td>417,645,605</td>
<td>350,336,550</td>
<td>291,985,420</td>
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<td>Community Accommodation - Child</td>
<td>47,522,794</td>
<td>40,403,856</td>
<td>38,284,335</td>
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<td>(5) Supportive Services</td>
<td>266,729,923</td>
<td>223,719,434</td>
<td>182,895,499</td>
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<tr>
<td><strong>Total</strong></td>
<td></td>
<td>366,512,151</td>
<td>351,735,957</td>
<td>268,733,758</td>
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<tr>
<td>Elderly Persons Centres Act</td>
<td>(1) Elderly Persons Centre</td>
<td>5,159,810</td>
<td>5,110,282</td>
<td>4,274,759</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>5,159,810</td>
<td>5,110,282</td>
<td>4,274,759</td>
</tr>
<tr>
<td>Homes For Retarded Persons Act</td>
<td>Community Accommodation - Adults</td>
<td>146,449,360</td>
<td>129,198,171</td>
<td>105,744,751</td>
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<tr>
<td><strong>Total</strong></td>
<td></td>
<td>146,449,360</td>
<td>129,198,171</td>
<td>105,744,751</td>
</tr>
<tr>
<td>Ministry of Community and Social Services Act</td>
<td>Ministry Purchase of</td>
<td>25,291,625</td>
<td>22,351,054</td>
<td>17,009,715</td>
</tr>
<tr>
<td>Program Description</td>
<td>Fiscal Year 1</td>
<td>Fiscal Year 2</td>
<td>Fiscal Year 3</td>
<td></td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------</td>
<td>--------------</td>
<td>--------------</td>
<td></td>
</tr>
<tr>
<td>Counselling Serv.</td>
<td>255,303</td>
<td>214,484</td>
<td>261,337</td>
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<tr>
<td>Social Service Support Fund</td>
<td>62,360,242</td>
<td>58,210,597</td>
<td>44,117,590</td>
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<tr>
<td>(1) Home Support Services for the Elderly</td>
<td>65,420,067</td>
<td>48,448,991</td>
<td>38,340,312</td>
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<tr>
<td>(1) Integrated Homemaker Prog.</td>
<td>54,377,514</td>
<td>45,070,675</td>
<td>31,061,934</td>
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<tr>
<td>(1) Supp. Serv. for the Phys. Handicapped</td>
<td>2,555,791</td>
<td>2,172,600</td>
<td>2,349,553</td>
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<tr>
<td>(3) Grants to Agencies for Credit Counsel.</td>
<td>7,977,923</td>
<td>8,143,439</td>
<td>7,698,635</td>
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<tr>
<td>Community &amp; Neighbhd. Support Serv.</td>
<td>100,947,024</td>
<td>59,385,044</td>
<td>48,487,802</td>
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<tr>
<td>Family Violence</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>379,491,959</strong></td>
<td><strong>293,900,067</strong></td>
<td><strong>231,167,498</strong></td>
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</table>

**Vocational Rehabilitation Services Act**

<table>
<thead>
<tr>
<th>Program Description</th>
<th>Fiscal Year 1</th>
<th>Fiscal Year 2</th>
<th>Fiscal Year 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shelter Wkshops. Non Dev. Handicapped</td>
<td>20,663,454</td>
<td>19,520,849</td>
<td>16,327,806</td>
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<td>Rehabilitation Serv. for the Disabled</td>
<td>5,616,930</td>
<td>6,046,142</td>
<td>4,939,084</td>
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<tr>
<td>Shelter Wkshops. Dev. Handicapped</td>
<td>45,620,642</td>
<td>43,537,656</td>
<td>36,289,940</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>71,901,026</strong></td>
<td><strong>69,104,647</strong></td>
<td><strong>57,556,830</strong></td>
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**Young Offenders Implementation Act**

<table>
<thead>
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<th>Program Description</th>
<th>Fiscal Year 1</th>
<th>Fiscal Year 2</th>
<th>Fiscal Year 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Young Offenders' Services</td>
<td>76,479,895</td>
<td>67,010,697</td>
<td>53,868,090</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>76,479,895</strong></td>
<td><strong>67,010,697</strong></td>
<td><strong>53,868,090</strong></td>
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**Grand Total**

<table>
<thead>
<tr>
<th>Fiscal Year 1</th>
<th>Fiscal Year 2</th>
<th>Fiscal Year 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>2,153,208,629</td>
<td>1,858,116,060</td>
<td>1,574,102,960</td>
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</table>

Note (1): These programs were transferred to Ministry of Health - Long Term Care Division in 1992/93

Note (2): Adult Group Homes program discontinued in 1993/94.

Note (3): Grants to Agencies for Credit Counselling program discontinued in 1992/93.

Note (4): Child Welfare Services includes expenditures for Children's Aid Societies, Child Abuse programs, and Child Native Programs.

Note (5): Supportive Services includes expenditures for Life Skills, Protective Services, Special Service at Home, Tri-Ministry, etc.
The Ministry of Community and Social Services has developed an extensive accountability framework to accompany the many granting programs it administers. Overall, the Ministry follows the guidelines established by the Management Board of Cabinet guidelines discussed above. An internal bulletin entitled "Accountability" lists several ways in which grant accountability is encouraged. These include: legislation/regulations; multi-year planning; legal agreements; information systems; financial accounting/allocation systems; licensing; program standards; compliance reviews; program evaluation; APER (Annual Program Expenditure Report), and Service Planning. We look briefly at APER and Service Planning.

(i) The Annual Program Expenditure Report

The APER "is designed to provide the Ministry of Community and Social Services...with information on an agency's annual financial performance relating to programs operated by the Ministry. This information assures the Ministry that the funds provided have been appropriately expended and properly recorded in the agency's books of account."

The requirement to complete an APER applies to a multitude of agencies that receive grants from the Ministry. The table below lists the programs which require submission of an APER, and the statute under which the programs are established. In addition to those programs listed below, the Ministry has the discretion to require an APER from any other agency.

<table>
<thead>
<tr>
<th>PROGRAMS REQUIRING APER</th>
<th>CORRESPONDING LEGISLATION</th>
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</thead>
<tbody>
<tr>
<td>Halfway Houses</td>
<td>The Charitable Institutions Act</td>
</tr>
<tr>
<td>Homes for the Aged</td>
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<tr>
<td>Children's Aid Societies</td>
<td>The Child and Family Services Act</td>
</tr>
<tr>
<td>Other Agencies approved to provide Services under the Act</td>
<td></td>
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<tr>
<td>Services purchased under the Act</td>
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<tr>
<td>Regular Day Nurseries</td>
<td>The Day Nurseries Act</td>
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<tr>
<td>Day Nurseries for the Developmentally Handicapped</td>
<td>The Developmental Services Act</td>
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<tr>
<td>Schedule II and II Facilities</td>
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<tr>
<td>Life Skills</td>
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</tbody>
</table>
Once an APER is prepared, it must be audited both by a licensed public accountant and checked by the executive director of the agency in question. This verification process is to be carried out in accordance with standards issued by the Ministry on a periodic basis.

(ii) Service Planning

The Ministry of Community and Social Services has established a standardized system of "service planning" as part of its accountability scheme. Service planning is a tool used to support the management process. Its intent is to set out the relationship between an agency's financial operations (expenditure and revenue) and its service delivery, for the coming year.

Related to the accountability goals of service planning, the Ministry has committed itself to:

- establishing a consistent approach to planning, funding and evaluation across all ministry areas; recognizing that service providers have responsibility for the development and delivery of services; reducing the burden of administration on service providers; ensuring service providers have the information and support they need to run effective programs; and undertaking broadly-based consultation with service providers on ministry policies and procedures.

The Ministry has produced a manual and a book containing relevant forms to implement the service planning process. The manual explains how to make use of the forms. In turn, the forms are intended to describe such things as an agency's planned expenditures including human resource needs, administrative support required from the Ministry, and so on. As well, space is allotted to describe how an agency anticipates dealing with a surplus or deficit and how it intends to make use of volunteers.

(b) Ministry of Citizenship, Culture and Recreation

The Ministry of Citizenship and Culture Act and the Ministry of Tourism and Recreation Act provide the legal basis for this Ministry. For the fiscal year 1995-96, the
Ministry paid out $286,569,200 in grants or subsidies. Of this total, $12,867,116 was disbursed to the Trillium Foundation.

The Ministry administers several granting programs under its various branches and their corresponding enabling statutes. As an example, the Recreation Division provides funding for provincial sports organizations, and sport and fitness safety. The transfer payment process follows the format of the Management Board of Cabinet directives and guidelines, including planning, contracting, reporting, and corrective action stages.

The Ministry of Citizenship, Culture and Recreation details the terms and conditions of grants. An example is the Ministry's funding criteria for provincial sports organizations.

The Trillium Foundation, which reports to the Legislative Assembly through the Ministry of Citizenship, Culture and Recreation, pledged and granted $18 million to 284 voluntary organizations in 1994/95. From 1982 to 1994, $184 million was granted to over 600 organizations, which raised more than $275 million in new fund-raising dollars, for services to over two million clients. The transfer payment accountability mechanism used by the Foundation is basically the same as that employed in ministries already discussed.

(c) Ministry of Education

The Ministry of Education's granting powers are set out in the Education Act. The Ministry granted $4,477,689,852 for the fiscal year 1989-90. The vast majority of this money went to school boards. The total granted under Named and Miscellaneous Grants for the same year was $4,430,900 of which $2,740,325 went to nonprofit government agencies.

In general, the Ministry follows an accountability format similar to other ministries, in accordance with the format suggested by the Management Board of Cabinet.

The process is described as follows by the Ministry:

Transfer payments for operating and capital support of elementary and secondary education are made exclusively to school boards. Transfer payments to organizations which further educational objectives are available mainly through the Named and Miscellaneous Grants Programs.

There are two parts to the Miscellaneous Grants program, core support funding and project support funding. The Miscellaneous Core Support Grants offer recurring financial support to non-profit organizations whose support for schooling is regarded as crucial for the future of schools in Ontario. The Miscellaneous Project Support Grants offer financial support to non-profit organizations for one-time projects which meet the set criteria.

To be considered for a Miscellaneous Grant, organizations must complete a ministry application form. All grant requests are reviewed by the miscellaneous Grants
Committee. Recommendations for or against funding are made by the Committee to the Minister and deputy Minister who review them and, if in agreement, must indicate their approval in writing before funding is granted...

All recipients are required to send to the ministry a report and financial statement generally within four months from the project's completion or the organization's fiscal year end. The reports and statements are reviewed by the Financial Services Branch (and the ministry liaison in the case of core support funding). Any unusual items or concerns noted from the initial proposal are dealt with on an individual basis. Serious concerns are brought to the attention of the Miscellaneous Grants Committee Chair for recommendation on the follow up action, if any, that should be taken.

In addition, every third year each core support organization undergoes a triennial review, which is an in-depth review process to ensure the ministry's objectives will continue to be furthered in the upcoming years.

(d) Ministry of Correctional Services

The *Ministry of Correctional Services Act* is the enabling legislation for this Ministry. For the fiscal year 1989-90, the Ministry granted $1,234,484. For the 1990/91 year, the following groups or agencies received grants from the Ministry: Salvation Army Correctional and Justice Services Prison Arts Foundation; Canadian Criminal Justice Association; John Howard Society of Ontario; various branches of the Elizabeth Fry Society; Hamilton and District Literacy Council; Church Army in Canada; Church Council on Justice and Corrections; and the St. Leonard's Society of Canada.

In 1989, the Ministry's grant procedure was changed to allow for a greater degree of transfer payment accountability. For the fiscal year 1990-91, a formal application and review process was initiated. It is modelled along the recommendations of the Management Board of Cabinet's directives and does not differ substantially from the accountability schemes we have looked at so far in this chapter.

4. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS FOR REFORM

Formally, and it seems in practice, the accountability mechanisms in place are generally adequate. However, our study of the current situation is hindered by the lack of good information on this aspect of government activities. Except for the Management Board directives and guidelines, the mechanisms of accountability are established and implemented at the Ministry and program level. As a consequence, there is, in our view, insufficient general recognition of the fact that nonprofit agencies are doing much of the traditional work of government. With this in mind, we make the following recommendations:

1. Much of the information available on the extent to which the government of Ontario uses the services of nonprofit organizations is very difficult to access. The public accounts do not consistently provide this information in a way which is readily usable for the purposes of analyzing and evaluating government involvement in the third sector. It would be helpful, in our view, if the collection and presentation of this information were changed so that: each ministry's grants
were listed by programme and statutory authorization; grantees were identified by their status as "for-profit" or "not-for-profit"; and the different kinds of government involvement grants, subsidies, service contracts, etc. were identified.

(2) We think a study along the lines of the one recently published in England, *Efficiency Scrutiny of Government Funding of the Voluntary Sector*, would be useful at this time. It would take more resources than are at our disposal to investigate the efficiency and effectiveness of the different modes of government involvement in the sector, but, given the absolute and relative size of the expenditures and the lack of knowledge about them, such a study is well overdue. We understand that the Management Board is currently conducting such a review.

(3a) We think that random audits of the performance of nonprofit organizations and charities in receipt of government money is a useful device in the enforcement of the obligations of nonprofits. Audits of recipient agencies is an occasional preoccupation of the Provincial Auditor's Office, which reviews recipient agencies for efficiency and effectiveness, as well as for financial integrity. But these reviews are periodic and reactive, not systematic or based on explicitly stated criteria. Serious thought should therefore be given to establishing a general audit power in the proposed Nonprofit Organizations Commission (NOC) over all recipients of government grants. This jurisdiction would be similar in scope to that of the Ontario Municipal Audit Bureau which performs audit services for all provincial-municipal transfer payment programs for several ministries. The centralization of this audit function in an independent agency with expertise in the nonprofit sector would raise the level of accountability considerably by helping to ensure that all government granting programs are administered in accordance with the Management Board directives.

(3b) Internal accountability would be enhanced further still if some government agency in our suggestion, the NOCoversaw the development, implementation, and enforcement of ministry level spending guidelines. To that end, it could be given a power to recommend changes to the directive and guideline, and to granting and reporting practices, as well as a power to audit compliance with norms by ministries and other government agencies.

(3c) These two recommendations suggest a third, more comprehensive one. The statutory and regulatory framework governing transfer payment accountability is exceptionally complex, distributed in a multitude of statutes, some of which establish detailed supervisory and accountability mechanisms, such as the *Charitable Institutions Act*, and some which do not. As part of the study recommended in (2), the government might also study the feasibility of standardizing transfer payment accountability mechanisms in a single statutory regime. That regime would establish a coherent distribution of supervisory powers in the granting ministries and in the NOC, or some other central audit agency, with adequate provision for information exchange between granting
ministries and the central agency. The regime should also establish some generally applicable eligibility conditions, performance standards, and accountability requirements. In our view, for example, grant eligibility should be conditioned on the applicant maintaining registered status with the NOC, having an executive of at least three persons, and having met all applicable federal and provincial filing requirements. Rules governing fundamental changes in recipient organizations should be imposed. At a minimum, proof of compliance with the generally and specifically applicable accountability requirements should be a precondition to any fundamental change. More stringent conditions than these might also be imposed. For example, a merger or dissolution might require proof that no government funds remain or that, if such funds do remain, adequate provision for their proper expenditure has been made. The corporate *cy-près* rule we have recommended would not be adequate to deal with these issues since they allow for more latitude where government funds are involved. Annual reporting requirements for non-charities equivalent to the Form T3010 requirement should also be imposed, and the reports should be made available for public inspection, as are the T3010 forms.

Endnotes:

1. See supra, ch. 5.
3. Since the time of writing of this chapter in July 1992, several of the ministries discussed in this chapter have been reorganized and some of the statutory mandates have been reallocated. We have updated much of the material since then, but due to severe time constraints, we have not been able to review and update all the material in this chapter.
Our study of accountability systems focuses primarily on four granting ministries. However, it should be noted that almost all ministries of the Ontario government make grants to nonprofit and charitable organizations. For example, in the fiscal year 1989-90, the Cabinet Office granted $964,610; the Office of the Attorney General granted or subsidized (including payments to the Legal Aid Fund), $137,208,837; the Office for Disabled Persons granted $3,965,943; and the Office Responsible for Senior Citizens Affairs granted $2,145,624. The list here is not exhaustive, but helps give an idea of the importance of granting ministries other than those we are focusing on in this report.

In January 1996 the Corporate Audit Committee of the Management Board of Cabinet submitted a report on the transfer payment accountability issue. See supra, note 2.
17

18
This information was obtained by the Commission directly from the Ministry.

19
The Provincial Auditor's 1993 report, Ontario, Office of the Provincial Auditor, 1993 Annual Report: Accounting Accountability Value for Money (Toronto: Queen's Printer, 1993) contains an evaluation of the Child and Family Intervention Program (CFI) of the Ministry. Approximately 200 nonprofit agencies receive funds under this program. The Provincial Auditor's report gives a generally favourable evaluation to the Ministry's accountability process: "Generally, we found that the process was satisfactory and that agencies had complied with the Ministry's reporting requirements" (at 43) but modestly critical evaluation of the Ministry's controls on the cost-effectiveness of its granting program: "We concluded that overall the Ministry has limited assurance that agencies are providing adequate and cost-effective services to children and/or their families" (at 44).

20

21
Ibid., at 3.

22
Supra, note 5.

23

24
For a detailed account of these grants, see the Trillium Foundation's Annual Report, 1994-95.

25
Now the Ministry of Education and Training.

26
See Ontario, *Public Accounts of Ontario, 1989-90*, vol. 3 (Toronto: Queen's Printer) at 86.


Now the Ministry of the Solicitor General and Correctional Services.


*Supra*, note 17.

See, for example, *Charitable Institutions Act, ibid.*
SUMMARY OF RECOMMENDATIONS

The Commission sets out a general summary of the recommendations for reform contained in this report. We do not provide a detailed list of all the recommendations in this report, since most of them relate to very specific and detailed changes to the various areas of the law. In Recommendation 35, we recommend the establishment of a government agency to oversee the work of the sector. We call it the "Nonprofit Organizations Commission", "NOC" for short. We introduce that recommendation at this juncture because we refer to this agency in the earlier recommendations.

CHAPTER 1: INTRODUCTION AND BACKGROUND

1. A comprehensive rethinking, redrafting and re-organizing of the laws governing nonprofit organizations in Ontario is required. Much of the current legal framework is anachronistic, confused and contradictory. As a consequence, the government of Ontario is not currently fulfilling its traditional facilitative and protective mandate in the sector.

2. The comprehensive reform of the legal framework recommended by the Commission in this report should only be effected after extensive further consultation with the nonprofit sector.

3. The government's involvement in the sector should be motivated by the following objectives:

   (1) to facilitate nonprofit activity and protect it from fraud and waste;

   (2) to ensure that government support of the sector through grants and favourable tax treatment is not abused;

   (3) to protect the sector from being used as a front for profit-motivated activities;

   (4) to help maintain a variety of agencies capable of delivering publicly funded social and cultural programs; and

   (5) to aid in the development of intermediate level social institutions whose existence will serve to enrich the lives of the people of Ontario.

CHAPTER 2: PREVIOUS STUDIES

4. Since governments in Canada have never attempted a systematic evaluation of the role of the nonprofit sector in Canadian society, the reforms recommended in this study should proceed only after further comprehensive consultation with the sector. Initially, the increased role of government in the sector, recommended in this report, should be careful not to be too ambitious. A more extensive reform effort should await the
development of greater government expertise and greater confidence on the part of the sector that the government's contribution to the work of the sector can be positive.

5. To the extent that the reforms recommended in this study draw on the experience of other jurisdictions, their implementation in Ontario should remain cognizant of the important and substantial differences between the situation in Ontario and the situation elsewhere, especially in the United Kingdom and the United States.

CHAPTER 3: SOURCES OF INSTITUTIONAL SUPPORT AND PROSPECTS FOR SELF-GOVERNANCE

6. The Ontario government need not involve itself in the organization of the sector since the sector has shown a strong capacity to organize itself. To the extent that the Ontario government becomes further involved in governance issues in the sector, it should do so collaboratively with the existing umbrella organizations in the sector.

7. The sector has not been effective in presenting its views to governments in Canada. The reform of the public administration in Ontario responsible for nonprofits should be aware of this historic difficulty. To that end, we propose that an Advisory Council, comprised of representatives selected from the sector, should be appointed to oversee the work of the NOC. See, further, Recommendation 10.

8. Government funds could be usefully spent on subsidising research into the issues facing the sector.

CHAPTER 4: SOURCES OF EMPIRICAL INFORMATION ON THE CHARITY SECTOR IN CANADA: AN OPPORTUNITY FOR GOVERNMENT

9. Statistics Canada should undertake a review of its statistical operation in the third sector with a view to generating a better framework for the collection and publication of information on the sector.

10. Canadian governments should encourage the development of administrative and regulatory practices which will, to the extent that they generate information on the sector, produce that information in a useful form and accessible way. Currently, the information on the demographics of individual charitable giving, on volunteering, on business involvement in the sector, on the financing and operations of charities, on fundraising campaigns, and on government involvement in the sector is weak or non-existent.

CHAPTER 5: OVERVIEW OF THE CHARITY SECTOR IN ONTARIO

11. Government participation in the sector should not be designed on the premise that government measures can effectively influence the level or direction of altruism in Ontario society.
12. The design of the laws should reflect the fact that religious charities show a distinctive pattern of support and that they have tended historically to be the most favoured destination of charitable donations. Recognition that most of this support is member-based, and therefore presents fewer accountability issues, should be reflected in the design of the new laws.

13. The design of the new laws should reflect the fact that Ontario has a disproportionate share (measured by assets and grants) of private foundations and that an inappropriate regulatory environment in Ontario might lead to some of these foundations changing jurisdiction to the possible detriment of charitable activity in Ontario.

14. The design of the laws should reflect the fact that governments are major supporters of the sector.

15. The design of the new laws and of the public administration should reflect the fact that the sector is moving towards greater secularization.

16. The design of the new laws should reflect the fact that, overall, charities in Canada do not seem to spend an inappropriate amount of their resources on fundraising.

CHAPTER 6: A WORKING DEFINITION OF CHARITY

17. The reform should proceed on the understanding that the central concept "charity", although covering a diverse range of activities, has a central intelligible meaning which is capable of serving as the basis of the new legal and regulatory regime. In essence, a charitable act is an act whose form, effect and motive are the provision of the means of pursuing a common goodlife, knowledge, play, religion, work, friendship, aesthetic experience, and practical reasonableness to persons who are remote in affection and to whom no moral or legal obligation is owed.

18. Public policy and the legal regulation of nonprofit activity must therefore recognize a categorical distinction between charitable and political activity and between charitable and commercial activity. This categorical distinction, however, does not entail that political or commercial activity of a charitable organization that is integrally related to the organization's purpose, or is purely incidental or ancillary to its charitable activities, jeopardizes the organization's exclusively charitable status.

19. The evaluation of the activities of a charitable organization by courts or administrators is always a context-sensitive judgment. This observation leads to two conclusions:

   (1) it would be folly to attempt to define "charity" in any legislative scheme in anything but the most general of terms; and

   (2) contemporary decision makers should not feel unduly bound by particular decisions of past decision makers.
CHAPTER 7: THE LEGAL DEFINITION OF CHARITY: THE CURRENT APPROACH AND PROPOSALS FOR REFORM

20. The common-law definition of "charity" serves numerous functions in the law. The main function is to identify those entities entitled to the privileged treatment that charities receive under the law of trusts and under the taxation laws. These various uses of "charity" do not warrant various separate definitions. The law should continue to use only one definition of charity.

21. The Legislature should not enact a statutory definition of "charity". The law should continue to use the common-law definition of the term. However, to the extent that the common-law definition of charity is deficient, courts and administrators should seek to reform it incrementally, based on the suggestions set out in this report and in accordance with the historic common-law methodology.

22. The emerging general definition under the fourth limb of the Pemsel test that the purpose must be beneficial to the public to be charitable is essentially correct if it is understood as meaning that the purpose must advance a common good, in a practically useful way, for the benefit of strangers.

CHAPTER 8: THE LEGAL DEFINITION OF CHARITY: SPECIFIC PROBLEMS

23. Specific problems in several areas ought to be dealt with by courts and administrators as follows:

(1) "Relief of poverty" ought to be interpreted broadly, as it presently is in some cases, to include projects that aid all categories of disadvantaged people.

(2) The law could be more direct in its evaluation of whether particular entities truly qualify as religious in purpose. To the extent that the evaluation of religious practices is required in any case, this evaluation should typically be conducted from the internal point of view. To the extent that a religious practice is called into question, it should not be evaluated on the basis of whether or not some material benefit is produced - the core religious practices of most religions would not pass that test - but on the basis, simply, of whether the good of religion is advanced.

(3) Education should be construed broadly to include the advancement of the goods of knowledge, play, practical reasonableness, friendship, and aesthetic experience, for the benefit of others.
(4) The law should accord independent recognition to the good of knowledge and recognize as charitable projects those which advance this good for the benefit of others in contexts other than strictly educational contexts.

(5) The law should accord independent recognition to the goods of friendship, aesthetic experience, and practical reasonableness, and not always require that they be advanced in educational contexts.

(6) To the extent that the advancement of knowledge is recognized as an independent good, "knowledge" should be given a meaning wide enough to encompass knowledge of all kinds, including theoretical and practical knowledge, speculative and technical knowledge, and scientific and moral knowledge.

(7) There should be no presumption that a project is charitable just because it pursues public policy.

(8) Discriminatory projects ought to be evaluated principally on the basis of whether they are properly motivated, since it ought to be permissible to construct a project which benefits a group identified on the basis of religion, sex, or cultural, but not if the point of the gift, in part, is to express an irrationally sexist, bigoted, or racist opinion.

(9) The mere fact that a project benefits persons outside the jurisdiction should not affect charitable status.

(10) The law ought to recognize a distinction between political purposes which are not charitable, on the one hand, and projects to advance international friendship or fellowship, on the other.

(11) The law should recognize sports or play as independent charitable purposes.

CHAPTER 9: POLICY PERSPECTIVES ON THE CHARITY SECTOR

24. The law should incorporate the following classifications of nonprofit organizations, and use these classifications, where appropriate, in the articulation of rules: religious, charitable, political, mutual benefit, and other. "Charitable" could be further divided into "social welfare" and "philanthropic".

CHAPTER 10: SUPERVISION OF CHARITIES BY REVENUE CANADA:

A BRIEF HISTORY

25. The recent history of the federal government's involvement in the sector has not been, from the sector's point of view, an entirely positive experience. This suggests that the sector will require some persuading that the government can play a supportive role.
26. The Commission makes a number of recommendations for the improvement of the federal supervision of charity:

(1) Although the basic premise of the federal regime is sound, there are many instances of provisions which are seriously lacking.

(2) Any reform at the federal level should take account of and attempt to integrate with the provincial regime of regulation so that the regulatory regime as a whole is as simple and coherent as possible.

(3) The best general premise of federal government regulation of the sector is to ensure that entities which avail themselves of the tax privileges are sufficiently loyal to their purpose and are sufficiently effective in its pursuit to ensure that the tax privileges are merited.

(4) The federal regulation should deploy optional quantitative rules to make compliance on the part of the sector easier, especially in the areas of fundraising expenditures, permissible political activity, and permissible commercial activity.

(5) The provisions of the Income Tax Act governing charity should be redrafted so that they express more directly and clearly the rules governing the sector. In the reformulation of the tax provisions, more of an effort to integrate the federal regime with the provincial regimes should be made.

(6) Revenue Canada should publish an annual report summarizing the more important registration decisions for the year as well as other important aspects of its surveillance of the sector.

(7) The Income Tax Act should not attempt to define "charity". It should continue to use the basic classifications "public" and "private" "foundations" and "charitable organizations". It should require every charity over a certain size to be organized as a trust or a corporation.

(8) The basic regulatory standard under the Income Tax Act should continue to be the "exclusively charitable" standard, but this standard should not be interpreted to exclude activity which is ancillary or incidental to charitable activity.

(9) The decision to register or deregister a charity is of general public importance and therefore should be accompanied at the initial stages by greater publicity. We recommend that the Tax Court be given initial judicial authority over the registration and deregistration decisions and that provincial authorities and third
parties be given a right to participate in the decision-making process at the administrative and judicial stages.

(10) Commercial activity should be classified in the law as "related", "subordinate" ("ancillary" and "incidental"), and "unrelated". The first two types should be permitted, and the last prohibited. Where a charity carries on an unrelated business, it should be forced to divest itself of the business, or to incorporate it in a separate taxable entity. This entity should be given the right to deduct from its income, without limit, its donations to its owning charity. To make compliance with the rules governing commercial matters easier, the law should provide a list of the types of businesses which meet the related and the subordinate requirements. Program-related investments should be expressly provided for to remove any doubt that they are not prohibited by the rules regulating commercial activities.

(11) The federal regime ought to attempt to regulate the investment activities of charities only to prevent investments which are imprudent or wasteful, or what the American law refers to as "jeopardizing" investments. This regulation of investments ought to be supported by a reporting requirement in the case of private foundations only.

(12) The federal regime should regulate the charitable fiduciary's duty of loyalty by clearly and expressly prohibiting all transactions involving fiduciaries or their associates which benefit unfairly, directly or indirectly, the fiduciary or associate to the detriment of the charitable entity. These new rules should be supported by a reporting requirement. They should extend to cover transactions involving fiduciaries or their associates and entities in which the charity has a significant investment stake.

(13) The Income Tax Act should be redrafted to clarify the regulation of the political and apparently political activity of charities. Partisan and other unrelated political activity should be prohibited; subordinate and apparently political activity should be permitted. The Act should also implement an optional quantitative rule to make compliance easier for most charities. Stricter regulation of political activity in the case of private foundations and laxer regulation of the political activities in the case of social welfare charities might also be implemented.

(14) The Act should not attempt to regulate the borrowing activities of charities, except where the borrowing is so imprudent that it jeopardizes the existence of the charity.

(15) The rules in the Act governing the permissible granting activity of charities are unnecessarily complex. These should be simplified. There should also be an obligation on granting charities to require their recipients to account for the expenditure of grants received.
(16) The rules governing the international activities of charities could be improved by allowing foreign entities or foreign projects of domestic charities to register for the special tax treatment in Canada.

(17) Imprudent fundraising and administrative expenditures should be prohibited. The prohibition should be supported by an annual reporting requirement which would require charities to report amounts expended on several categories of expenditures, such as legal and accounting fees, total staff salaries, and total expenditures, and on donation fundraising. In the case of donation fundraising expenditures, there should be an optional quantitative rule, compliance with which would be deemed to be compliance with the general qualitative rule.

(18) The revenue base for the disbursement quota should be the same for all charities, but the percentage amounts required to be spent should be lower for charitable organizations than for foundations. The disbursement quota should be simplified and used only to require charities to do charity.

(19) The public administration established at the federal level to administer the Income Tax Act requires more financial and administrative support. The regime of available penalties for non-compliance is not adequate because it relies too much on deregistration, which usually is too severe a sanction.

CHAPTER 13: THE CHARITABLE PURPOSE TRUST: CURRENT LAW AND PROPOSALS FOR REFORM

27. It is not necessary to reform the basic attributes of the charitable purpose trust, but there are features of the law of trusts, as it applies to the charitable purpose trust, which require reformation. These are as follows:

(1) The cy-près doctrine should be reformulated in a statutory provision to permit court reformulation of charitable projects in a wider range of circumstances and in way that does not require as close conformity with the original purposes as is required at present.

(2) The rule governing mixed purpose trusts should be reformed in a way that permits these trusts to survive.

(3) Trustees of purpose trusts should be required to register the trust and provide information annually concerning key features of its existence.

(4) The Trustee Act should be reformed in the way suggested in our 1984 Report on the Law of Trusts. The reform should apply to purpose trusts, with the following additional special provisions:
(a) The NOC should be given the same rights that beneficiaries of a private trust have. The NOC should have the power to pre-authorize or excuse breaches of the duty of loyalty.

(b) Specific regulation of transactions between fiduciaries of the trust and their associates and an entity controlled by the trust is required.

(c) A summary report of payments made by the trust to its fiduciaries and their associates should be required on an annual basis, and no remuneration to a fiduciary should be permitted without the prior authorization of the NOC.

(d) Unanimity should not be required for decisions of trustees of a charitable trust. There should be suppletive rules in the statute dealing with trustee meetings.

(e) There should be no special regulation of the investment powers of trustees of charitable trusts except that which applies to trustees generally.

(f) Passing accounts should be abolished. Trustees should be obliged to maintain proper books of account.

(g) Rules governing the disposition of the capital of an endowment should be enacted.

CHAPTER 14: THE PURPOSE TRUST: SHOULD IT BE EXTENDED TO NON-CHARITABLE PURPOSES?

28. There is no need to extend the availability of the purpose trust to non-charitable purposes.

29. Section 16 of the Perpetuities Act should be redrafted to permit more readily the pursuit of non-charitable purposes, but in a way that does not necessarily entail state involvement in enforcement or continued viability.

30. The NOC should be empowered to adopt regulations establishing the viability of non-charitable purpose trusts that are, in its view, of sufficient public interest to warrant state participation in their enforcement and viability.

CHAPTER 15: THE NONPROFIT CORPORATION: CURRENT LAW AND PROPOSALS FOR REFORM

31. The general law governing nonprofit corporations requires fundamental reform. A new law should be enacted, and it should incorporate the following elements:
(1) The new law should be contained in a separate corporation statute dealing with nonprofit corporations only.

(2) The new statute should be a modernization of the basic corporate law along the lines of what occurred in the reform of business corporations law in the 1970s.

(3) The best basic model for the new law is the American Bar Association's and the American Law Institute's Revised Model Nonprofit Corporation Act.

(4) None of the conceptual framework of the law of trusts should be explicitly incorporated in the formulation of the rules in the new statute, and in particular, the fiduciaries of the corporation should be conceived of as and referred to as "directors", not "trustees".

(5) Nonprofit corporations should be classified as "charitable", "religious", "mutual benefit", "political", and "others". They should be subject to clearly defined non-distribution constraint rules.

(6) The ultra vires doctrine should be abolished. The constructive notice doctrine should be abolished.

(7) The incorporation of a nonprofit corporation should be by registration of articles of incorporation, and it should be available as a matter of right.

(8) The corporate name of a nonprofit corporation should contain an element which indicates its nonprofit status.

(9) The rules governing pre-incorporation contracts require reform.

(10) Nonprofit corporations should be required to file annually an updated registration statement containing basic information pertaining to its principals, assets, and activities.

(11) The statute should contain a complete code, some of the provisions of which would be mandatory and some of which would suppletive, dealing with governance issues, including

   (a) the rights and duties and remedies of members;
   
   (b) the rights and duties of the board of directors and of officers;
   
   (c) the rights of creditors;
   
   (d) the rights of auditors; and
   
   (e) the record-keeping obligations of nonprofit corporations.
(12) In the case of charitable corporations, the NOC should have most of the same rights as members so that it is in a position to enforce the fiduciary duties of directors.

(13) Specific rules governing reorganizations and fundamental changes should be enacted.

CHAPTER 16: THE UNINCORPORATED ASSOCIATION

32. The basic law of the unincorporated association should be reformed and codified in a statute, similar in basic concept and form to the *Partnerships Act*.

33. The model for this reform should be section 4 of chapter 10 of the *Civil Code of Quebec*.

34. In the case of charitable associations, the NOC should have the same powers as the members of the association.

CHAPTER 17: THE SUPERVISION OF CHARITIES

35. An agency of the government of Ontario, called the Nonprofit Organizations Commission (NOC), should be established. It should have comprehensive jurisdiction to administer all laws governing nonprofit organizations in Ontario.

36. The *Charities Accounting Act* and the *Charitable Gifts Act* should be repealed.

37. The NOC should not have judicial or quasi-judicial authority. The power to make regulations affecting the nonprofit sector should be vested in the Attorney General, on the advice of the NOC.

38. The NOC should have four main areas of responsibility: registrations; fundraising; audits and investigations; and education.

39. It should have the following powers:

   (1) All the powers assigned to the NOC under the organizational laws;

   (2) The power to intervene in any proceeding involving charity under the same conditions as are currently imposed by section 5(4) of the *Charities Accounting Act*;

   (3) The power to apply to the court for

       (a) an order on an interim or permanent basis to remove and replace a charitable fiduciary,
(b) an order to compel a charity, its fiduciaries, or any other person to comply with the law,

(c) an order dissolving a charity or placing a charity under the "stewardship" of the NOC, temporarily or indefinitely,

(d) an order that a meeting of the directors or members be called,

(e) an order requiring charitable fiduciaries or any other person to account,

(f) an order, on an interim or permanent basis, to preserve the property of a charity, and

(g) an order permitting an audit of a religious charity or an investigation.

40. There should be a Nonprofits Advisory Council to oversee the work of the NOC.

CHAPTER 18: SPECIFIC AREAS OF REGULATORY CONCERN:

FUNDRAISING, INVESTMENTS, POLITICAL ACTIVITY, AND PRIVILEGES

41. A new law regulating nonprofit fundraising should be enacted. The sole objective of the law should be to police nonprofit fundraising to prevent fraudulent schemes. The new law should require that all fundraising campaigns, subject to substantial exceptions, be registered, that all third-party fundraisers be registered, and that all third-party fundraising contracts be registered with the NOC. It would also require minimal point of solicitation disclosure.

42. Charitable gambling, as it is presently regulated, should be under the jurisdiction of the NOC.

43. Charitable gift annuities should be regulated.

44. Special restrictions on permissible investments by charity fiduciaries should be abolished. Charity fiduciaries should be subject to the same investment restrictions as trustees.

45. Investments in active businesses which are unrelated or which are not ancillary or incidental to a nonprofit purpose should be prohibited. These should be carried on by a separate, taxable, corporate entity.

46. Political activities which are unrelated to or which are not ancillary or incidental to a charity's purpose should be prohibited under the organizational laws.

CHAPTER 19: CURRENT GOVERNMENT GRANTING PRACTICES AND
SYSTEMS OF ACCOUNTABILITY

47. The public accounts of the province of Ontario should be presented in a way which will render more accessible the financial information concerning the government's involvement in and support of the third sector.

48. The NOC should have the power to audit nonprofit entities in receipt of government funds. The NOC should be given the power to establish guidelines applicable to all government agencies making grants to the nonprofit sector.

49. The statutory framework governing transfer payment accountability in Ontario should be reformed.

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APPENDIX A
THE LAW OF CHARITIES: REFERENCE BY THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO TO THE ONTARIO LAW REFORM COMMISSION

The following are some of the questions that may be dealt with under the heads of discussion referred to in the letter of the Attorney General dated June 20, 1989.

1. Status

The present legal rules to determine what constitutes a charity have their origins in the early 17th century Statute of Elizabeth, with amendments based largely on judicial opinions since that time.

   (a) What type of activity should benefit from the advantages that we accord to charities and be subject to the corresponding duties?

   (b) Should organizations aimed at accomplishing political purposes be considered charitable, and if so, in what circumstances?

   (c) Should the organization claiming to be charitable have the onus of proof that it qualifies or should the state be required to demonstrate the absence of charitable purpose when the question arises?

   (d) Should the rules used to determine charitable status be codified, be supplemented by statute, or continue to be left largely to the common law?

2. Legal Form

Charities may now be trusts, corporations, or unincorporated associations. If corporations, they may be created under the general law or by private statute. Charities that are trusts may have different powers than charities that are corporations. The powers and liabilities of trustees appear to differ from the powers and liabilities of directors of corporations.

   (a) Is it appropriate that charities be created through different legal forms?

   (b) Should the powers and liabilities of charities and those that govern them be unified, regardless of the legal form in which the charity has been created

   (c) If so, what should that standard be: that of trustees or that of corporate directors, or some mix?

3. Revenue
Different kinds of charities have different sources of revenue, whether from government, from fundraising from individuals, corporations, and foundations (the latter themselves being charities), or from revenue earned through their activities. The law restricts to some extent sources of revenue open to charities, both to avoid risking the solvency of the organization and to prevent competition with for-profit organizations that do not benefit from legal advantages available to charities.

(a) Should the investment powers of charities be subject to restriction, either under the *Trustee Act* or otherwise?

(b) Should the ability of charities to own for-profit organizations be restricted as it now is in most cases?

(c) Should the ability of charities to carry on business directly be restricted as it now is (to "related" business) or at all? In this regard does it matter if a charity sets up a related foundation to carry on the business, as is sometimes done by Ontario hospitals?

(d) Should the activities of charities in raising funds from the public be regulated and if so, how?

(e) Should the activities of fundraisers, whether private or affiliated with charities, be regulated in some way? A federal-provincial-territorial working group has studied this question without publishing a final report as yet.

4. Supervision

At present, the Public Trustee is charged with supervising the operation of charities in Ontario. Several statutes prescribe rules. Both the Surrogate Court and the Supreme Court play their own parts. The Ministry of Consumer and Commercial Relations is responsible for incorporation. Revenue Canada registers charities to formalize their tax-exempt status and their ability to provide tax credits for donors. This complexity creates problems for the public, which does not know which way to turn; for charities, which often do not have the resources to sort out the various if not conflicting requirements; and for the regulators who seek to promote sound regulation.

(a) Who should be responsible for regulation of charities in Ontario?

(b) Should the regulation be primarily accomplished by public reporting, by interventionist action by the regulator, by court review, or some combination of these?

Besides the questions that arise under these four heads, you might wish to consider certain other issues. Without going into similar amounts of detail, these include the variation of charitable purposes, the fate of assets of charities on voluntary or involuntary winding up, and the special status accorded to religious organizations.
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APPENDIX B-1
FEDERAL PUBLIC ACTS AFFECTING CHARITIES

(8) *Copyright Act*, R.S.C. 1985, c. C-42, s. 10(2)(g).

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SC 1977-78, c. 42 Royal Canadian Legion, an Act respecting the

SC 1974-76, c. 112 Royal Canadian Legion, an Act Respecting

SC 1974, c. 13 The Eastern Canada Synod of the Lutheran Church in America

SC 1970-72, c. 67 Royal Victoria Hospital, an Act respecting

SC 1968-69, c. 68 Boy Scouts of Canada, an Act respecting, and to incorporate, L'Association des Scouts du Canada

SC 1966-67, c. 111 Canadian Board of Missions of the church of God, an act to incorporate

(General offices: Anderson, Indiana)

SC 1966-67, c. 112 Evangelical Covenant Church of Canada, an Act to incorporate the

SC 1966-67, c. 113 Evangelistic Tabernacle Incorporated, an Act to incorporate

SC 1966-67, c. 114 Lutheran Church in America - Canada Section, an Act to incorporate

SC 1966-67, c. 115 Mennonite Central Committee (Canada), an Act to incorporate

SC 1966-67, c. 116 Presbyterian Church in Canada, an Act respecting the Trustee Board of the
SC 1966-67, c.117 United Baptist Woman's Missionary Union of the Maritime Provinces, an Act respecting

SC 1964-65, c. 66 Canadian Conference of the Brethren in Christ Church

SC 1964-65, c. 67 Congrégation des Soeurs Maristes

SC 1964-65, c. 68 Seicho - No - Ie

SC 1963, c. 61 Baptist Convention of Ontario & Québec, an Act to incorporate

SC 1963, c. 62 Canada Board of American Missions of the United Luthern Church in America, an Act respecting the

SC 1963, c. 63 Evangelical Lutheran Augustana Synod of North America, an Act respecting the Executive Board of the Canada Conference of the

SC 1963, c. 64 Evangelical Lutheran Synod of Canada, an Act respecting the

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SC 1963, c. 66 Seventh-day Adventists, an Act respecting the Canadian Union conference Corporation of

SC 1963, c. 67 Slavic Churches of Evangelical Christians and Slavic Baptists of Canada, an Act to incorporate the Union of

SC 1963, c. 78 Ukranian Canadian Foundation of Taras Shevchenko, an Act to incorporate

SC 1963, c. 79 Ukranian National Federation of Canada, an Act respecting

SC 1962-63, c. 22 Christian Brothers of Ireland in Canada, an Act to incorporate the

SC 1962-63, c. 23 Trustee Board of the Presbyterian Church in Canada, an Act respecting the

SC 1962, c. 39 Evangelical Mennonite Mission Conference, an Act to incorporate

SC 1962, c. 40 Salvation Army, Governing Council of Canada East and Canada West, an Act respecting

SC 1962, c. 41 United Church of Canada, an Act respecting

SC 1960-61, c. 82 Canadian General Council of the Boy Scouts Association, an Act
respecting

SC 1960-61, c. 83 Canadian Legion, an Act respecting

SC 1960-61, c. 75 Congregation of the Sisters of the Holy Family of Bordeaux in Canada

SC 1960-61, c. 84 International Brain Research Organization, an Act to incorporate

SC 1960-61, c. 85 Queen's University of Kingston, an Act respecting

SC 1960-61, c. 76 Ukranian Evangelical Baptist Convention of Canada, an Act to incorporate

SC 1960, c. 64 British and Foreign Bible Society in Canada

SC 1960, c. 68 Canadian Public Health Association

SC 1960, c. 65 Evangelical Lutheran Church of Canada
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(2) *Assessment Act*, R.S.O. 1990, c. A.31, s. 3.
(3) *Athletics Control Act*, R.S.O. 1990, c. A.34, s. 5.
(9) *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 192
(21) *Financial Administration Act*, R.S.O. 1990, c. F.12, s. 6(2).
(22) *Game and Fish Act*, R.S.O. 1990, c. G.1, s. 16.
(33) *Long-Term Care Act, 1994*, S.O. 1994, c. 26, s. 10.
(39) *Nursing Homes Act*, R.S.O. 1990, c. N.7, s. 1.
(40) Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 1.
(41) Ontario Heritage Act, R.S.O. 1990, c. O.18, s. 15.
(42) Ontario Pensioners Property Tax Assistance Act, R.S.O. 1990, c. O.33, s. 1.
(43) Pay Equity Act, R.S.O. 1990, c. P.7 Appendix I.
(44) Perpetuities Act, R.S.O. 1990, c. P.9, s. 16.
(45) Planning Act, R.S.O. 1990, c. P.13, s. 28.
(47) Provincial Parks Act, R.S.O. 1990, c. P.34, s. 15.
(49) Regional Municipalities Act, R.S.O. 1990, c. R.8, s. 106.
(50) Regional Municipality of Ottawa-Carleton Act, R.S.O. 1990, c. R.14, ss. 11, 12, 59.
(51) Regional Municipality of Waterloo Act, R.S.O. 1990, c. R.17, s. 36.
(53) Rental Housing Protection Act, R.S.O. 1990, c. R.24, s. 1.
(55) Repair and Storage Liens Act, R.S.O. 1990, c. R.25, ss. 19, 20, 22.
(56) Retail Sales Tax Act, R.S.O. 1990, c. R.31, ss. 7(4), (5), 9, 48(4).
(57) St. Clair Parkway Commission Act, R.S.O. 1990, c. S.23, s. 23.
(58) St. Lawrence Parks Commission Act, R.S.O. 1990, c. S.24, s. 17.
(59) Securities Act, R.S.O. 1990, c. S.5, s. 35(1-3).
(60) South African Trust Investments Act, R.S.O. 1990, c. S.16, ss. 1, 2.
(63) Tourism Act, R.S.O. 1990, c. T.16, s. 1.
(64) Trustee Act, R.S.O.1990, c. T.23, ss. 4, 15.
(65) Toronto Islands Residential Community Stewardship Act, 1993, S.O. 1993, s. 15.

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<td>Alliance Fran Haise de Toronto Act, 1986, c. Pr15</td>
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<td>Apostolic Catholic Assyrian Church of the East Act, 1992, c. Pr58</td>
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<td>Association of the Chemical Profession of Ontario Act, 1984, c. Pr10</td>
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<td>Association of Registered Wood Energy Technicians of Ontario Act, 1988, c. Pr5</td>
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<td>Association of Translators and Interpreters Act, 1989, c. Pr2</td>
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<td>Baptist Bible College Canada and Theological Seminary Act, 1984, c. Pr11</td>
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<td>Berean Baptist Church of Collingwood, 1994, c. Pr50</td>
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<td>Beth Shalom Synagogue Act, 1983, c. Pr4</td>
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<td>Big Cedar Association Act, 1988, c. Pr12</td>
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<td>Big Sisters Organization of the Regional Municipality of Sudbury, 1991, c. Pr7</td>
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<td>Brampton Bramalea Christian Fellowship, 1994, c. Pr45</td>
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<td>Brantford General Hospital Act, 1985, c. Pr6</td>
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<td>Oakville YM and YWCA Act, 1984, c. Pr 8</td>
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<td>Ontario Association of Veterinary Technicians, 1993, c.3 Pr 3</td>
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<td>Ontario Bible College and Ontario Theological Seminary Act, 1986, c. Pr 5</td>
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<td>Ottawa Jewish Home for the Aged Act, 1993, c. Pr 42</td>
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<td>Port Elgin Sportsmen's Club Act, 1992, c. Pr20</td>
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<td>Rainbow Halfway House Act, 1992, c. Pr51</td>
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<td>S.A.W. Gallery Inc. Act, 1994, c. Pr61</td>
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<td>St.Seminary Act, 1983, c. Pr20</td>
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<td>St.Home Society Act, 1986, c. Pr11</td>
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<td>Star of Progress Spiritual Church Act, 1983, c. Pr17</td>
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<td>Strathray Middlesex General Hospital Act, 1989, c. Pr10</td>
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<td>Sudbury Cardiothoracic Foundation Act, 1988, c. Pr 6</td>
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<td>J.G. Taylor Community Centre Inc. Act, 1994, c. Pr40</td>
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<td>Theological College of the Canadian Reformed Churches Act, 1981, c. 80</td>
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<td>Thunder Bay United Church Camps Inc. Act, 1983, c. Pr 9</td>
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<td>Townships of Osgoode Care Centre Act, 1985, c. Pr 26</td>
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<td>City of London Act, 1982, c. Pr75</td>
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<td>Ukrainian People's Home in Preston Act, 1993, c. Pr51</td>
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<td>University of St. Jerome's College Act, 1986, c. Pr23</td>
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*remove restriction on property it may hold*

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APPENDIX C
PROJECT RESEARCH TEAM, ADVISORY GROUP,
and CONSULTATIVE GROUPS

APPENDIX C-1
RESEARCH TEAM

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Research Papers:

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"The Law of Charities in Ontario" (Sept. 1990, 144 pp. plus Appendices)

2. Professor Bruce Chapman
Faculty of Law, University of Toronto
78 Queen's Park
Toronto, Ontario
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"Charitable Giving and the Choice of Organizational Form: Some Implications of Agency Cost Theory for the Public Regulation of Charities" (Sept. 1990, 29 pp.)

"Between Markets and Politics: Towards an Understanding and Appreciation of the Charitable Sector" (Sept. 1990, 71 pp.)

3. Professor Eugene Meehan

Faculty of Law, University of Ottawa

Ottawa, Ontario

K1N 6N5

"The Law of Other Jurisdictions" (Sept. 1990, 81 pp. plus Appendices)

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(9) International  

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Canadian Unicef Committee  
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APPENDIX C-4
CANADIAN BAR ASSOCIATION (ONTARIO)
Special Committee on Charities

Alex Langford, Chair
Miller, Thomson

Wolfe Goodman
Goodman and Carr

John Hodgson
Blake Cassels and Graydon

Mary Louise Dickson
Dunbar Sachs & Appell

Patricia Robinson
Goodman & Goodman

Elena Hoffstein
Fasken & Calvin

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APPENDIX D
LIST OF WRITTEN SUBMISSIONS

(A) Organizations

1. Adventist Development and Relief Agency
2. Advocacy Resource Centre for the Handicapped
3. Anselma House
4. Appleby College
5. Baycrest Centre for Geriatric Care
6. Bethesda Programs
7. J.P. Bickell Foundation
8. Canadian Association on Charitable Gift Annuities
9. Canadian Bar Association - Ont. (Special Committee on Charities)
10. Canadian Bible Society
11. The Canadian Centre for Philanthropy
12. Canadian Citizenship Federation
13. Canadian Conference of the Arts
14. Canadian Criminal Justice Association
15. Canadian Diabetes Association
16. Canadian Forestry Association
17. Canadian Organization for Development Through Education
18. Canadian Mental Health Association
19. The Canadian Red Cross Society
20. Canadian Rights and Liberties Federation
21. The Canadian Shaare Zedek Hospital Foundation
22. Canadian Wildlife Federation
23. Catholic Charities of the Archdiocese of Toronto
24. The Catholic Church Extension Society of Canada
25. Catholic New Times
26. The Catholic Women's League of Canada
27. Christian Blind Mission International (Canada)
28. Christian Children's Fund of Canada
29. Christian Horizons
30. Christian Reformed World Relief Committee
31. Community Foundation of Ottawa-Carleton
32. Community Foundation of Ottawa-Carleton
33. Conrad Grebel College
34. Council of Elizabeth Fry Societies of Ontario
35. Council of Ontario Universities
36. The Counselling Foundation of Canada
37. The Delcrest Children's Centre
38. Epilepsy Canada
39. The Eaton Foundation
40. Family Service Association of Metropolitan Toronto
41. Sir Sandford Fleming College
42. The Foodbank of Waterloo Region
43. Freeport Hospital Health Care Village
44. Goodman & Goodman
45. Goodwill Industries of Toronto
46. The Grey Bruce Regional Health Centre Foundation Inc.
47. J.D. Griffin Adolescent Centre
48. Guelph Spring Festival
49. Heart and Stroke Foundation of Canada
50. Heritage Canada
51. Hospital for Sick Children Foundation
52. Huntington University
53. Iler, Campbell
54. The Richard and Jean Ivey Fund
55. Jackman Foundation
56. The Junior League of Hamilton-Burlington Inc.
57. The Junior League of Toronto
58. Kerry's Place Administrative Office
59. The Kidney Foundation of Canada
60. Kinark Child and Family Services
61. Lakehead Social Planning Council
62. Lang, Lang & Lang
63. The Lung Association
64. Lutherwood Child and Family Foundation
65. Metro Agencies Representatives' Council
66. Metropolitan T.O. Community Foundation
67. Ministry of Citizenship

68. Ministry of Culture and Communications

69. F.K. Morrow Foundation

70. McLennan, Wright

71. N'Swakamok Native Friendship Centre

72. Ontario Arts Council

73. The Ontario Council of Teaching Hospitals

74. The Ontario Heritage Foundation

75. Ontario Hospital Association

76. Ontario March of Dimes

77. Ontario Monument Builders Association

78. Order of Malta (Ontario) Charitable Foundation

79. Ottawa Valley Autistic Homes

80. Perth Foundation for the Enrichment of Education

81. The Physicians' Services Incorporated Foundation

82. Pickering College

83. The Office of the Public Trustee

84. Revenue Canada Taxation

85. The Salvation Army

86. Second Mile Club of Toronto

87. Social Planning Council of Kitchener-Waterloo

88. Social Planning Council of Metropolitan Toronto

89. The Social Planning Council of Peel
90. The Society of Saint Vincent de Paul
91. Superior Memorials
92. Surrey Place Centre
93. Théâtre Direct Canada
94. Le Théâtre du Nouvel-Ont. Inc.
95. Toronto Theatre Alliance
96. TV Ontario
97. University of Guelph
98. University of Western Ontario
99. Upper Canada College
100. Victoria Order of Nurses of Canada
101. Vision Institute
102. The War Amputations of Canada
103. Welland Canals Society
104. Wesway Family Support Program
105. World Wildlife Fund
106. YMCA of Metropolitan Toronto
107. The Young Naturalist Foundation
108. The Y.W.C.A. of Canada
109. The Y.W.C.A. of Kitchener-Waterloo

(B) Individuals

1. E. Blake Bromley
2. Mr. Stanley Crow
3. Mr. Armia Mittias
4. Ms. Catherine McKeehan
5. Professor A.H. Oosterhoff