December 4, 2002

The Honourable Elinor Caplan, P.C., M.P.
Minister of National Revenue
House of Commons
Room 658, Confederation Building
Ottawa ON K1A 0A6

Dear Minister Caplan:

Re: Charity and "Political Activities"

I am writing on behalf of the Charities and Not-for-Profit Law Section of the Canadian Bar Association. At our meeting in May, we discussed various issues relating to ancillary political activities by registered charities, as outlined in IC-87.1. You requested further information on the relevance of the concept "charitable activities" to the definition of the legal term of art "charity". We are pleased to provide you with a more detailed analysis of the current state of the law.

In this letter, we outline:

1. the conceptual framework;
2. the common law definition of charity;
3. "charity" under the *Income Tax Act;*
4. the use of "charitable activities" in the *Act*;
5. "charitable activity" in the scheme of the *Act*;
6. the basic logic of human activity; and
7. the common law on "charitable activities".

We conclude that "charity" identifies an objective or purpose of human activity and that an activity can only be characterized as charitable if its purpose is charitable. A charitable activity is an activity, the purpose of which is charitable. There is therefore a law of charitable purposes but no separate law of charitable activities.

1. THE CONCEPTUAL FRAMEWORK

"Charity" is a legal term of art. Case law going back centuries determines its meaning.

The concept is used in two main areas of common-law doctrine:

(a) to be valid, a purpose trust (as opposed to a trust that benefits actual persons or persons described by reference to a class description) must be, with a few minor exceptions, for exclusively charitable purposes; and

(b) the courts exercise an inherent equitable jurisdiction over "charities" and the Crown, in its *parens patriae* jurisdiction, will intervene to protect the property of charity.

For these common law functions of the concept "charity", the definition is the same.

2. COMMON LAW DEFINITION OF CHARITY

There are two main sources for the legal definition of charity: the *Preamble* to the *Statute of Elizabeth*[1] and the test set out in the reasons of Lord Macnaghten in the House of Lords decision in *Commissioner for Special Purposes of the Income Tax v. Pemsel.*[2] The virtue of both approaches is their avoidance of any attempt to contain "charity" in a formula or definition. Although this reticence has led to some confusion, it has allowed for a measured development of the law and has minimized false steps.

The *Preamble*, rendered from archaic to modern language by Slade J. in *McGovern v. Attorney General,* stated as follows:

> . . . relief of aged, impotent and poor people . . . the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities . . . repair of bridges, ports, havens, causeways, churches, seabanks and highways . . . education and preferment of orphans . . . the relief, stock or maintenance for houses of correction . . . marriages of poor maids . . . supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed . . . relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.[3]

Although the *Statute of Elizabeth* was repealed long ago,[4] the *Preamble* has been absorbed into the common law and continues to influence Commonwealth jurisprudence on the definition of charity.[5] The *Preamble* lists some of the projects that were charitable in 1601 (ones requiring the regulatory supervision provided for in the Act). Modern readers are supposed to read it by analogy to their own time. This is how common law courts use it and it has served as a useful starting point in many modern decisions.[6]

In *Pemsel*, Lord Macnaghten laid out the following *classifications* of charity:

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1 (1601), 43 Eliz. 1, c. 4. (U.K.).

2 [1891] AC 531 (HL) [hereinafter *Pemsel*]

3 [1982] Ch. 321, at 332.

4 The statute was repealed in 1888 by the *Mortmain and Charitable Uses Act, 1888* (U.K.), 51 & 52 Vict., ch. 42, s. 13(1) but survived the repeal (in England) in legislative form until 1960, when it was finally removed from the statute books with the enactment of the *Charities Act, 1960* (U.K.), 8 & 9 Eliz. 2 c. 58, s. 38.

5 For a recent Australian perspective on the definition see *Report of the Inquiry into the Definition of Charities and Related Organization (Commonwealth of Australia, June, 200*1). A recent Canadian appraisal is Peter Broder "The Legal Definition of Charity and Canada Customs and Revenue Agency's Charitable Registration Process" (The Canadian Centre for Philanthropy, Public Affairs, August, 2001) (hereinafter referred to as "Broder").

6 See, for example, *Vancouver Regional FreeNet Association* v. *MNR,* 96 DTC 6440; [1996] 3 CTC 102 (FCA). In that case, the Appellant established a non-profit, volunteer-run electronic community centre for the purpose of providing free access to the internet as well as communication-related education for the community. The Minister found that the Appellant did not qualify as a registered charity. The Federal Court of Appeal disagreed and held that free access to information has long been recognized as a public good and fit within the ambit of the 1601 English *Charitable Uses Ac*t. See also the decision of Gonthier J. in *Vancouver Society of Immigrant and Visible Minority Women v. MN*R, [1999] 1 SCR 10.

> "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.[7]

The *Pemsel* test is a classification, not a definition. It, too, is a useful starting point for an analysis of "charity."[8]

These two tests and the substantial jurisprudence interpreting and applying them have been most important in the law of trusts, where qualifying as "exclusively charitable" is essential to the validity of a purpose trust (with a few minor exceptions).

In applying these tests, courts require that the purpose of the entity or trust be exclusively charitable and that the entity or trust be for the "public benefit". This means, in general terms, that the charity must pursue the relevant charitable purpose for the benefit of a large enough segment of society, "the public", in an effective way.[9]

The "exclusively charitable" test places significant restrictions on charities. At common law, charities may not pursue political or business-oriented purposes except to the extent that these are merely a means of pursuing their charitable purposes or are ancillary or incidental to those purposes.

There are strong justifications in favour of the restriction on political activity by charities. The most commonly cited is that a court cannot say that a particular political purpose is necessarily beneficial to the public. In the leading case, *Bowman v. Secular Society Ltd.,* the court said this:

> 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.[10]

Most commentators find this argument persuasive. Charity and politics are conceptually distinct activities: X and Y may work together in the soup kitchen in relief of poverty (charity) but be politically active to alleviate the causes of poverty in radically different ways, with X, on the right, supporting workfare programs and Y, on the left, supporting larger welfare cheques.

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7 *Pemsel*, *supra* note 2 at 583.

8 CCRA ventured a version of the *Pemsel* test *(supra* note 12) in IC 77-14, its former information circular dealing with the registration of charities. (IC 77-14 was replaced by IC 80-10R, *Registered Charities: Operating a Registered Charity*, December 17, 1985.) A version of the *Pemsel* test is also set out in T4063, *Registering a Charity for Income Tax Purpose*s, 1999. There is growing literature dealing with the need to reform the definition. For a good review, see Broder, *supr*a, note 5.

9 There is some controversy and confusion with respect to the public benefit criterion. See S.G. Maurice, "The Public Element in Charitable Trusts" (1951), Vol. 15 *Comp. Conv. & Prop. L.N.S.* 328; G.H.L. Fridman, "Doubt and Certainty in the Law of Charities" (1955), 33 *Canadian Bar Review* 898; P.S. Atiyah, "Public Benefit in Charities" (1958), Vol. 21 *Modern Law Review* 138; and T.G. Watkin, "Charity: The Purport of 'Purpose'", [1978] Conv. 277. See also Ontario Law Reform Commission, *Report on the Law of Charity* (1996), at 175-184 and A. Drache and K. Boyle, "Charities, Pubic Benefit and the Canadian Income Tax System: A Proposal for Reform (Ottawa, 1998).

10 (1917), [1916-17] All ER 1 (HL), at 18.

3. "CHARITY" UNDER THE INCOME TAX ACT

The *Income Tax Act* uses "charity" exclusively in its common law sense. In all decisions under the *Act* in which the meaning of charity was in issue, the courts have applied the common law definition.

In the day-to-day administration of the *Act* by the Canada Customs and Revenue Agency (CCRA) and in the tax courts, the most frequent disputes concern the charity/politics boundary.[11] These disputes arise in the registration and deregistration contexts. The tension surfaces most frequently in the education category, and sometimes in the fourth public benefit category. The charity or the applicant for charitable status typically argues that its purposes are educational or of public benefit and that its activities are the means of pursuing these purposes or are ancillary or incidental thereto. CCRA responds that the purposes are, in essence, political or that the relevant activities are not means of pursuing a charitable purpose or are not ancillary or incidental purposes.

4. USE OF "CHARITABLE ACTIVITIES" IN THE ACT

The *Income Tax Act* uses the expression "charitable activities" throughout section 149.1:

- in subsection (1), "charitable organization" is defined as an organization "all the resources of which are devoted to charitable activities carried on by the organization itself";
- in subsection (1), "disbursement quota", the expression is used in item D;
- in subsection (1), "non-qualified investment", the expression is used in item (e);
- subsections (1.1), (2), (3), (4), (4.1), (5), (8) and (21), speak of expenditures on "charitable activities";
- subsections (6) and (6.2) speak of resources being devoted to "charitable activities".

The *Act* also uses the expression "charitable purposes".

There is no definition of "charity" or "charitable purpose" in the *Act*. The common law definition as described above is applied. There is also no definition of "charitable activities" in the *Act*. "Charitable activities" is not a common law concept. The question therefore arises: What is a charitable activity and how does the concept "charitable activity" relate to the common law concept "charitable purpose"?

5. "CHARITABLE ACTIVITY" IN THE SCHEME OF THE ACT

It is quite clear that the *Act* requires a concept like "charitable activity". A registered charity must not only have charity as its exclusive purpose, it must also actually do charity. Hence, the regulation of charities under the *Act* requires charities to devote themselves to charitable purposes by actually doing charity. There is less of a concern (in the mind of the drafters) with foundations because, by and large, foundations only make grants to other charities that actually do the charitable work. Therefore, the concept "charitable activities" is not used in the Act in most of the rules applicable exclusively to foundations.

There is no explicit need for the concept at common law since, trustees of a charitable purpose trust failing to deploy the trust property for the relevant charitable purpose would be in breach of trust. Implicitly, a court finding that the trustee had breached the trust by deploying resources on a non-charitable purpose could

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[11] The other common areas of dispute are the international activities of charities, receipting practices and administrative.

conceivably say that the relevant breach was a non-charitable activity. But there is no need to say anything more than that the trustees had breached the trust.

There can be no objection, therefore, to the validity of the concept "charitable activities" or to its role in the *Act* in the regulation of charities. The only issue is how an activity is characterized as "charitable"?

6. THE BASIC LOGIC OF HUMAN ACTIVITY

For the purposes of moral and legal reasoning, human actions are characterized by either their motives or their purposes. Because both of these are subjective, triers of fact will typically apply some mix of an objective and subjective test in defining the characteristics of an action. Whatever the actual test, the object is to identify the motive or the purpose.

"Charity" is a motive and a purpose of human action. The phrase "charitable activities", therefore, seeks to characterize an activity by determining whether its motive or purpose is charitable. At common law and under the *Act*, the expression also denotes actions that have incidental or ancillary purposes. When these actions are subordinate to the dominant charitable purpose, they are characterized by that dominant purpose. They may not be the means to the end but they promote the achievement of the end.

Thus, charitable actions are charitable either (1) intrinsically, (2) because they are instrumental to or a means of doing an act that is intrinsically charitable, or (3) because their purpose is subordinate to a charitable purpose. (1) Directly administering aid to the sick and infirm is an intrinsically charitable act. (2) Picking up the medicine on the way to assist the sick and infirm is instrumentally charitable. Most charitable activities are charitable only in this second way. (3) The hospital cafeteria business and the parking lot business are subordinate to the purposes of the hospital, and therefore charitable. We make sense of the first, intrinsic act, the second, instrumental act, and the third, subordinate act, only by identifying their motive or purpose.

7. COMMON LAW ON "CHARITABLE ACTIVITIES"

All of these ideas are reflected in the common law jurisprudence and writing on the meaning of charitable purpose. The basic distinctions identified are inescapable.

The law characteristically eschews motive. It focuses on purpose. The following excerpts from commentators and the courts, where these ideas are used freely and intelligibly, illustrate this point clearly.

(a) Maurice C. Cullity, QC, "The Myth of Charitable Activities" (1986) Estates and Trusts Journal 7:

> The distinction between ends and means is fundamental in the law of charity. It is the ends, or purposes, not the means by which they are to be achieved, which determines whether a trust or corporation is charitable in law. It follows that one cannot determine whether a body or trust is charitable merely by focusing on the activities that it is authorized to pursue. A further question is necessary: are the activities to be construed as ends in themselves or are they really means to some other end? Only when that question is answered can the charitable or non-charitable nature of the body or the trust be determined.

(b) Russell L.J., in *Incorporated Council of Law Reporting for England and Wales v. Attorney General* [1972] Ch 73 (C.A.):

> The fact that the association carries on a trade or business is admittedly not inconsistent with a charitable character in its objects. The difference between the two cases is in my view a vital distinction. The element of unselfishness is well recognised as an aspect of charity, and an

important one. Suppose on the one hand a company which publishes the Bible for the profit of its directors and shareholders: plainly the company would not be established for charitable purposes. But suppose an association or company which is non-profit-making, whose members or directors are forbidden to benefit from its activities, and whose object is to publish the Bible; equally plainly it would seem to me that the main object of the association or company would be charitable - the advancement or promotion of religion."

(c) Denning L.J., in *British Launderers' Research Assn v. Hendon Rating Authority*:

It is not sufficient that the society should be instituted 'mainly' or 'primarily' or 'chiefly' for the purposes of science, literature or the fine arts. It must be instituted 'exclusively' for those purposes. The only qualification - which, indeed, is not really a qualification at all – is that other purposes which are merely incidental to the purpose of science and literature or the fine arts that is merely a means to the fulfilment of those purposes, do not deprive a society of the exemption. Once however, the other purposes cease to be merely incidental but become collateral; that is, cease to be a means to an end, but become an end in themselves; that is, become additional purposes of the society: then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption.

(d) Denning, L.J., *National Deposit Friendly Society Trustees v. Skegness Urban District Council*:

Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the ease may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects.

(e) *Scott on Trusts*

The question is not whether the institution may receive a profit, but what disposition is to be made of the profit, if any, which may be received. If the profits are to inure to the benefit of individuals, the institution is not charitable. But if the profits, if any, are to be applied wholly to charitable purposes, the institution is charitable. Thus it has been held that where an educational institution conducts a restaurant but any profits made from the operation of the restaurant are to be applied to educational purposes, the trust is charitable. Similarly, where an institution to assist the poor is authorized to receive by gift or purchase second-hand articles and to conduct a store for the sale of such articles, the profits to be applied to the assistance of the poor, the institution is charitable.

(f) Lord Morris of Borth-y-Gest in *Oxfam v. Birmingham City District Council:*

A charity may have activities which are not intrinsically charitable. It may have activities which are not wholly ancillary to the carrying on of its main charitable purpose (see the speech of Lord Reid in *Glasgow Corporation v. Johnstone*, [1965] A.C. 609) . . .

. . . .

There being a distinction between, on the one hand, activities which a charity may undertake, and, on the other hand, activities which consist in the actual carrying out of its charitable purposes, it is manifest that some activities are on the one side of the line and some activities are on the other.

. . . .

There may . . . be things done by a charity, or a use made of premises by a charity, which greatly help the charity, and which must in one sense be connected with the charitable purposes of the

charity and which are properly within the powers of the charity, but yet which cannot be described as being the carrying out, or part of the carrying out, of the charitable purposes themselves.

(g) Gonthier, J (dissenting) in *Vancouver Society of Immigrant & Visible Minority Woman v. Canada*:

> Very simply, the doctrine provides that political purposes are not charitable purposes. Accordingly, the presence of political objects negates an organization's claim to benefit the community as a charity. Though not without its difficulties, the political purposes doctrine has no application on the facts of this appeal. Yet that does not exhaust the matter, because at issue in this appeal are political activities, not purposes. The rule that a charity cannot be established for political purposes does not mean that the charity cannot engage in political activities in furtherance of those purposes. A charity may engage in political activities, so long as they are "ancillary and incidental" to its charitable purposes. This is confirmed by both the plain language of s. 149.1(6.2) of the ITA, and by the case law: see *Ontario (Public Trustee) v. Toronto Humane Society, supra*, at pp. 254-55.

(h) Iacobucci J in *Vancouver Society of Immigrant & Visible Minority Woman v. Canada*:

> While the definition of "charitable" is one major problem with the standard in s. 149.1(1), it is not the only one. Another is its focus on "charitable activities" rather than purposes. The difficulty is that the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature. Accordingly, this Court held in *Towle Estate, supra*, that the inquiry must focus not only on the activities of an organization but also on its purposes.
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> Unfortunately, this distinction has often been blurred by judicial opinions which have used the terms "purposes" and "activities" almost interchangeably. Such inadvertent confusion inevitably trickles down to the taxpayer organization, which is left to wonder how best to represent its intentions to Revenue Canada in order to qualify for registration. In fact, as may become clear shortly, the Society may have suffered exactly this difficulty in drafting its purposes clause.

We trust that this analysis will be of use as CCRA continues its review of IC-87-1 on ancillary political activities by registered charities. We would be pleased to discuss these issues with you or your officials.

Yours very truly,

Terrance S. Carter
Chair
National Charities and Not-for-Profit Law Section

cc.
Bill McCloskey, Assistant Commissioner, Policy and Legislation Branch
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