Taxing charities, imposer les organismes de bienfaisance: harmonization and dissonance in Canadian charity law

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Abstract

For many years, the determination of which organizations should qualify for the significant tax benefits accorded to "registered charities"("*organismes de bienfaisance enregistrés*") under the Canadian *Income Tax Act* has been based, in all provinces, on the concept of charity developed by the English common law of charitable trusts. However, there are other sources of meaning for the concept of "charity" ("*bienfaisance*") in Canada, including ancient, civil law sources that continue to form part of the basic law of Quebec.

This study challenges the longstanding, unijural approach to the registered charity provisions on the basis of the constitutional division of powers, and the federal government's commitment to respecting bijuralism and bilingualism in its legislative texts. It explores the diverse, legal sources concerning charity and the devotion of property to the public good that form part of the law of property and civil rights in the provinces. Finally, it examines how these diverse provincial sources might affect the current approach to the registered charity provisions, and the project of ensuring that federal laws are accessible to each of Canada's Francophone civil law, Francophone common law, Anglophone civil law and Anglophone common law audiences.

Résumé

Pendant plusieurs années, la désignation des organismes de bienfaisance enregistrés habilités à bénéficier des avantages fiscaux considérables accordés par la *Loi de l'Impôt sur le revenu* s'est fondée, dans l'ensemble des provinces, sur le concept de « bienfaisance » (*charity*) tel que défini par la common law britannique dans les articles portant sur les fiducies caritatives. Il existe cependant au Canada d'autres interprétations du concept de bienfaisance, par exemple dans certains passages du code civil québécois (un texte législatif ancien faisant toujours partie du droit fondamental de la province).

Cette étude, prenant appui sur la répartition constitutionnelle des pouvoirs ainsi que sur l'engagement du gouvernement fédéral à respecter le bijuridisme et le bilinguisme dans ses textes législatifs, entend remettre en cause l'approche unijuridique toujours en vigueur en ce qui concerne les dispositions relatives aux organismes de bienfaisance enregistrés. Elle examine de plus près divers textes de droit – intégrés aux lois provinciales sur la propriété et les droits civils – qui portent sur la bienfaisance et l'affectation des biens personnels à l'usage du bien public. Enfin elle analyse, d'une part, comment ces textes divers pourraient modifier l'approche actuelle sur les dispositions relatives aux organismes de bienfaisance enregistrés et comment ils pourraient affecter également la volonté des autorités de faire en sorte que les lois fédérales soient accessibles à tout justiciable, francophone ou anglophone, qu'il soit sous la juridiction du code civil ou de la common law.

Table of Contents

Introduction

> As the word 'charity' is abused by all sorts of Christians in the persecution of their enemies, and even heretics affirm that they are practising Christian charity in persecuting other heretics, I have sought for a term which might convey to us a precise idea of doing good to our neighbours, and I can form none more proper to make myself understood than the term of *bienfaisance,* good-doing. Let those who like, use it; I would only be understood, and it is not equivocal.[1]

Of all the words chosen by Parliament to describe the phenomena that give rise to fiscal consequences under the federal *Income Tax Act*[2], few have the normative weight or the descriptive breadth of the words *charity* and *bienfaisance*. These two terms, which together express the primary legal criteria for a class of fiscally privileged entities in Canada[3], have no well-defined popular meaning[4]; rather, they express a wide range of moral, religious, and legal concepts, which have meaning in particular contexts or for particular groups. To the Christian theologian, the word *charity* may represent the biblical ideal of "love in its perfect sense"[5]; to the man on the street, it may simply signify a moral duty to provide food for the hungry or alms for the poor. To the devout believer, the word *bienfaisance* may represent only good works that glorify a supreme being; to the wealthy patriot, it may encompass any act that enhances public life. The words *charity* and *bienfaisance* are, in other words, intrinsically plural, in a way that goes to their normative core. For while charity may be, as John Gardner argues, a humanitarian rather than a civic virtue[6], it is also a virtue which is most often justified and defined by the values of communities much smaller than the state.

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[1] Abbé de St. Pierre, cited in Isaac Disraeli, *Curiosities of Literature,* vol. 3 (London: Routledge, Warnes and Routledege, 1859) at 29

[2] *Income Tax Act,* R.S.C. 1985, 5th Supp., c. 1, as amended [*ITA*]

[3] Under Part I of the *ITA,* "charitable organizations" (*oeuvres de bienfaisance*) and "charitable foundations" (*fondations de bienfaisance*), which are defined principally as entities which carry out exclusively "charitable purposes" (*fins de bienfaisance*) and "charitable activities" (*oeuvres de bienfaisance*), are exempt from income tax and are permitted to issue tax receipts to individual and corporate donors: see below, ch. I.

[4] See, in this regard, the comments of Lord Watson and Lord Herschell in the seminal case of *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531 at 558, 572-73 [*Pemsel*].

[5] Hubert Picarda, *The Law and Practice relating to Charities,* 3rd ed. (London: Butterworths, 1999) at 3

[6] John Gardner, "The Virtue of Charity and its Foils" in Charles Mitchell and Susan Moody, eds., *Foundations of Charity* (Oxford: Hart Publishing, 2000) 1 at 15-16: ("to be impeccably charitable…one must exhibit the capacity to look upon those involved as human beings with none of whom one has any special person bonds…beyond those of shared humanity")

Given the multiple meanings attached to the words *charity* and *bienfaisance*, one might imagine that a Canadian federal statute such as the *Income Tax Act* would provide an ideal environment in which to preserve at least some of the richness of the terms. Canada is, after all, a bijural state, within which the common law tradition received from England and the civil law tradition received from France have long co-existed and interacted.[7] It is also a bilingual state, which has long recognized the lack of equivalency between specific linguistic concepts in the legal sphere.[8] Finally, Canada is a federal state, within which ten provinces have the exclusive authority to make their own laws regarding a number of subjects, including the management of charities, and property and civil rights. Thus the Canadian legal system recognizes multiple sources of legal meaning, which have all functioned to provide "definitional content" to federal statutory concepts that cannot be fully understood on their own.[9]

However, despite the many recognized sources of legal meaning for Canadian federal statutes, the undefined words *charity* and *bienfaisance* in the *Income Tax Act* have, to date, been given a singularly uniform construction. The Canadian courts have never looked to the civil law of Quebec or any provincial statute to determine whether an organization qualified as a "charitable organization" (*oeuvre de bienfaisance*) or "charitable foundation" (*fondation de bienfaisance*) under the *Income Tax Act*. They have not, except in a few early cases, considered the ordinary meaning of the words *charity* and *bienfaisance,* nor their religious and moral dimensions. Rather, the determination of which organizations should qualify for the significant tax benefits accorded to registered charities in Canada has been based, in all provinces, on the common law test for charitable purpose trusts which evolved in the English Chancery

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[7] As several commentators have pointed out, it may be more appropriate to describe Canada as a multijural state, which encompasses the sources and traditions of Aboriginal law: see, for example, Ruth Sullivan, "The Challenges of Interpreting Multilingual, Multijural Legislation" (2004) 29 Brook J. Int'l. L. 986 [Sullivan, "Challenges"]

[8] See, generally, Michael Beaupré, *Interpreting Bilingual Legislation,* 2nd ed. (Toronto: The Carswell Company Limited, 1986)

[9] Roderick A. Macdonald, "Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: the Unique Situation of Quebec Civil Law" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies* (Ottawa: Department of Justice, 1999) 29 at 46-51 [Macdonald, "Harmonizing"].

courts and was most famously articulated by the House of Lords in *Commissioners for Special Purposes of Income Tax v. Pemsel.*[10]

Historically, this uniform, common law interpretation of the charitable tax provisions has not been entirely without justification. The early Canadian income tax acts were drafted exclusively in English (although subsequently translated into French), and were modeled closely on the tax legislation of the United Kingdom, which was itself construed in accordance with the common law. In this situation, it was not illogical for the courts and revenue authorities to attribute to Parliament an intention to rely on the common law as the default legislative dictionary for the *Income Tax Act*. Further, while the principle that federal legislation should be interpreted in a manner which respects the provinces' exclusive jurisdiction over property and civil rights is as old as Canadian federalism itself, courts applying the *Income Tax Act* have often had to balance the "complementarity" principle against the competing legal principle that federal legislation should apply uniformly across the country.[11] If the registered charity provisions have unfailingly been subject to judicial interpretations that favoured the uniformity principle over the complementarity principle, they have not been alone in suffering that fate.[12]

However, the historical justifications for a uniform, common law interpretation of the registered charity provisions have waned dramatically since the original enactment of the *Income War Tax Act* in 1917. The Parliament of Canada can no longer be said to rely on the Parliament of the United Kingdom in formulating its tax policy or tax rules. More importantly, perhaps, since 1952 Parliament has made several amendments to the registered charity provisions, which have improved their compatibility with the civil

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[10]See *Pemsel, supra* note 4. For an application of the *Pemsel* decision in Quebec, see *N.D.G. Neighbourhood Association v. Canada (Revenue, Taxation Department)* (1988), 85 N.R. 73 (F.C.A.), where MacGuigan J. explicitly relied on the *Pemsel* test in determining that a Montreal community association was not charitable within the meaning of the *ITA*.

[11] Alban Garon, "The Civil Law's Place in Federal Tax Legislation" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies in Canadian Tax Law* (Montreal: Association de planification fiscale et financière, 2002), 1:1-8 at 1:1

[12] For a review of various *ITA* concepts that have historically been dissociated from provincial law, see David G. Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation, and Canadian Bijuralism" (2003) 51 Cdn. Tax J. 1.

law of Quebec. A policy of co-drafting has been put in place, and all of Canada's federal statutes, including the French version of the *Income Tax Act,* have been reviewed and revised to ensure their legal and linguistic accuracy.[13] The end result of these processes has been two, equally authoritative versions of the registered charity provisions, both of which are consistent with the *droit commun* of the province of Quebec[14], but only one of which is consistent with the common law of charitable purpose trusts. In light of these developments, it can no longer be lightly assumed that Parliament's choice of the term "charitable" (*bienfaisance*) was mistaken, or that it intends to continue to construe the registered charity provisions solely in accordance with the common law.

The arguments in favour of a uniform, common law interpretation of the registered charity provisions have also been weakened in recent years as a result of the enactment of the new *Civil Code of Québec,* and the federal government's renewed efforts to promote bilingualism and bijuralism in Canada by making federal legislation accessible to each of its Francophone civil law, Francophone common law, Anglophone civil law and Anglophone common law audiences. In 2001, these efforts culminated in two major amendments to the federal *Interpretation Act,* which affirm that unless otherwise provided by law, it is provincial law, in relation to property and civil rights, that completes federal legislation when applied in a province[15]. In light of this development, it is no longer appropriate to assume that in interpreting federal statutes, the uniformity principle should take precedence over the principle of the complementarity of federal and provincial law.

Where, then, does this leave us? The thesis of this paper is that the registered charity provisions of the federal *Income Tax Act* are, in themselves and in the current manner of

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[13] Donald Revell, "Authoring Bilingual Laws: the Importance of Process" (2004) 29 Brook. J. Int'l L. 1086 at 1100

[14] See John E.C. Brierley, "Quebec's 'Common laws' (*droits communs*): How Many Are There?" in E. Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson and Lafleur, 1989) 109.

[15] R.S.C. 1985, c. I-21, as amended, sections 8.1 and 8.2 (added by S.C. 2001, c. 4, s. 8, proclaimed in force June 1, 2001)

their application, at odds with the principle of complementarity enshrined in the federal *Interpretation Act,* and with the federal government's commitment to bijural and bilingual legislative texts. The paper claims that the concepts of *charity* and *bienfaisance* form part of the law of property and civil rights in the common law provinces and in Quebec, and that any undefined references to these concepts in the *ITA* must therefore, to the extent possible, be interpreted according to provincial law. While this approach to the registered charity provisions may cause the criteria for charitable registration to vary across the country, the burden of avoiding this result rests primarily with the legislative rather than the judicial branch. The judicial recognition that the *ITA* concept of charity is *not,* in fact, "uniform federal law" would do much to bring this area of legal regulation in line with the government's bijuralism efforts. However, legislative reform may ultimately be required if all of the objectives underlying the registered charity scheme are to be achieved.

The theme underlying the substance of this paper is that in blindly excluding provincial law from our construction of the registered charity provisions, we may be losing more than we think. The common law is not the only legal tradition which has explored notions of altruism, giving, and the types of activities that are of particular benefit to society. The civil law turned its attention to these questions long before the common law, and some of our provincial legislatures have done so long since. The great diversity of legal sources in Canada has been lauded as one of our greatest strengths.[16] Therefore, before undertaking any reform that either confirms or alters existing understandings of the registered charity provisions, we should be exploring what these diverse, legal sources regarding the devotion of property to the public good might be able to offer our modern charitable regime.

This paper undertakes to explore these themes and theses in the following four parts. Chapter I of the paper reviews the legislative history of the registered charity provisions

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[16] See, for example, Michel Bastarache, "Bijuralism in Canada" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, Second Publication* (Ottawa: Department of Justice, 2001), booklet 1, 19-26 at 26.

and the significant terminological changes that have been made to the French version of the *ITA*. It describes the current, unijural approach to the interpretation and application of the registered charity provisions, and examines the tensions this approach creates with basic principles of statutory construction and constitutional law, and the federal *Interpretation Act*. In Chapter II, the paper turns its focus to four, alternative sources of meaning for the undefined term "charitable" (*bienfaisance*) in the *Income Tax Act*: the common law of charitable trusts, the customary civil law rules regarding *legs pieux,* the Roman law sources on foundations and gifts, and the various statutes governing the administration of charities in the provinces Chapter III explores the impact these various sources of "charity law" might have in our bijural, bilingual state, by analyzing how the registered charity provisions should be interpreted in the common law provinces, in Quebec, and in provinces that have enacted valid legislation defining the notion of "charity" (*bienfaisance*). The paper concludes with some thoughts on the various options for reform.

Chapter I: "Charity" (*bienfaisance*) as a unitary notion: the current approach to the registered charity provisions of the *Income Tax Act*

A. Tax benefits for registered charities under the *Income Tax Act*

i. The history of tax benefits for charities in Canada

In Canada, as in the country upon which it modeled its tax system, tax benefits for charities have existed as long as income tax itself.[17] Canada's very first income tax statute, the *Income War Tax Act* of 1917, followed the longstanding English practice of granting statutory tax relief to charities[18] by exempting "the income of any religious, charitable, agricultural and educational institutions, Boards of Trade and Chamber of Commerce" from taxation.[19] The *Income War Tax Act* of 1927 continued this

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[17] English charities have enjoyed tax privileges ever since income tax was introduced in England in 1799: see Picarda, *supra* note 5 at 733.

[18] For a brief history of the early English income tax provisions relating to charities, see Stephen Dowell, *The Acts relating to the Income Tax* (London: Butterworth & Co., 1919) at 62-69.

[19] *The Income War Tax Act, 1917,* S.C. 1917, c. 28, s. 5(d). Interestingly, the *Act* also provided that taxpayers could deduct from their income any "amounts paid by the taxpayer during the year to the Patriotic and Canadian Red Cross Funds, and other patriotic and war funds approved by the Minister": see *ibid,* s. 3(1)(c).

exemption, adding only the requirement that no part of the income of any such institution "inure to the personal profit of, or be paid or payable to any proprietor thereof."[20] In 1930, Parliament added a provision which allowed any taxpayer to exempt up to ten percent of their net taxable income which was "actually paid by way of donation within the taxation period to, and receipted for as such by, any charitable organization in Canada..."[21] Beginning in 1972, this federal tax exemption for gifts made to Canadian charities was gradually made more significant and more complex.[22]

Today, organizations and foundations that succeed in being registered as charities by the Minister of National Revenue continue to enjoy the two major fiscal benefits that have been in place since 1930. First, registered charities are one of a rather long list of legal entities that are exempted from paying income tax under the *ITA*.[23] Second, registered charities are among a shorter list of designated "qualified donees" which are entitled to issue tax receipts to corporate and individual donors.[24] As the Supreme Court of Canada noted in the *Vancouver Society* decision, this latter benefit, which is "designed to encourage the funding of activities which are generally regarded as being of special benefit to society" is often a "major determinant" of an organization's success.[25]

ii. The current statutory framework for charitable registration

The practice of registering charities with the Minister of National Revenue dates back to 1966, when Parliament determined that a central registration system was required to

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[20] *Income War Tax Act,* R.S.C. 1927, c. 97, s. 4(e). Section 4 also granted exemptions to municipal undertakings, labour organizations, and "co-operative companies and associations."
[21] *Ibid,* as am. by S.C. 1930, c. 24, s. 3.
[22] The first change was made in 1972, when the level of the tax deduction for gifts to charities was raised to 20 percent: see *An Act to amend the Income Tax Act and to make certain provisions and alterations in the statute law related to or consequential upon the amendments to that Act,* S.C. 1970-71-72, c. 63, s. 110(1)(a) [*An Act to amend the ITA,* S.C. 1970-71-72, c. 63]
[23] S. 149(1)(f), *ITA.* Other exempted entities include non-profit organizations, labour organizations, low-cost housing corporations for the aged and municipal authorities.
[24] S. 110.1(1) of the *ITA* allows a corporation to deduct amounts given to a registered charity or other qualified donee. Individuals receive tax credits for gifts to registered charities pursuant to *ITA,* s. 118.1. The other qualified donees recognized by the *ITA* include low-cost housing corporations for the aged, registered Canadian amateur athletic associations, the UN, and prescribed universities outside of Canada. However, registered charities form by far the largest class of qualified donees.
[25] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.,* [1999]1 S.C.R. 10, 169 D.L.R. (4th) 34 at para. 128 [*Vancouver Society*].

address abuses relating to exaggerated donation receipts and charitable organizations that changed the nature of their activities after having been giving formal approval.[26] Originally, however, there were few statutory obstacles to obtaining charitable registration, and the Minister granted registered charity status to organizations on a fairly "haphazard" basis.[27] Moreover, until 1977, only those charities that wanted to issue tax receipts to donors were required to register under the *ITA*: the tax-free status of charitable entities "flowed from the nature of [their] operations, not from any government imprimatur."[28]

With the major amendments to the *Income Tax Act* that took effect in 1977[29], the charitable registration process became both more complex and more crucial to the Canadian voluntary sector. The amended *ITA* created three categories of registered charities - charitable organizations, public foundations and private foundations – which were subject to different statutory rules. Pursuant to the revised subsection 149(1), only these *registered* charities were exempt from income tax.[30] Further, non-profit organizations, which had previously enjoyed unqualified tax-free status, were now only exempt if they were, in the opinion of the Minister, not charities within the meaning of the *ITA*.[31] Being an unregistered charitable entity, whatever this could be said to mean, was suddenly a very unfavourable fiscal position to be in.

Today, the statutory framework for obtaining registered charity status is set out in section 149.1 and subsection 248(1) of the *Income Tax Act.* The Minister's authority to "register" qualified organizations flows from subsection 248(1), which defines a "registered charity" (*organisme de bienfaisance enregistré*) as:

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[26] Canada, House of Common *Debates* (June 7, 1996), cited in P. Monahan and E. Roth, *Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform* (Canada: York University, 2000) at 13

[27] Arthur Drache, *Canadian Taxation of Charities and Donations* (Toronto: Thomson Canada Limited, 2003) at 1-31. Drache notes that in 1977, there were hundreds, if not thousands, of registered charities that probably would not be registered today.

[28] *Ibid,* at 1-30

[29] See *An Act to amend the statute law relating to income tax,* S.C. 1976-77, c. 4, amending the *Income Tax Act,* R.S.C. 1952, c. 148.

[30] *ITA,* R.S.C. 1952, s. 149(1)(f), as amended by S.C. 1976-77, c. 4, s. 59(1).

[31] *ITA,* R.S.C. 1952, s. 149(1)(l), as amended by S.C. 1976-77, c. 4, s. 59(2).

> A charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1) [or a branch thereof], that is registered in Canada and was either created or established in Canada...that has applied to the Minister in prescribed form and that is at that time registered as a charitable organization, private foundation or public foundation.
>
> L'organisme suivant, qui a présenté au ministre une demande d'enregistrement sur formulaire prescrit et qui est enregistré, au moment considéré, comme oeuvre de bienfaisance, comme fondation privée ou comme fondation publique... oeuvre de bienfaisance, fondation privée ou fondation publique au sens du paragraphe 149.1(1), qui réside au Canada et qui y a été constituée ou y est établie;

Thus, subsection 149.1(1), which defines the three categories of charitable entities that may be registered by the Minister, establishes the basic statutory criteria for charitable registration under the *Act*. The provision defines a "charitable organization" (*œuvre de bienfaisance*), in part, as an "organization, whether or not incorporated, which devotes all of its resources to charitable activities carried on by the organization itself" (*oeuvre, constituée ou non en société, dont la totalité des ressources est consacrée à des activités de bienfaisance qu'elle mène elle-même*).[32] A "charitable foundation" (*fondation de bienfaisance*) is defined as "a corporation or trust that is constituted and operated exclusively for charitable purposes...and that is not a charitable organization" (*société ou fiducie constituée ou administrée exclusivement à des fins de bienfaisance....et qui n'est pas une oeuvre de bienfaisance*)[33], and may be public or private.[34] Subsection 149.1(1) also requires that no part of the income of either entity be available for the personal benefit of any proprietor, member, shareholder, trustee or settlor.[35]

The upshot of these definitions is that the obtaining of registered charity status depends primarily on the Minister's determination of whether an organization is constituted

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[32] *ITA*, s. 149.1(1), "charitable organization" (*oeuvre de bienfaisance*).
[33] *ITA*, s. 149.1(1), "charitable foundation" (*fondation de bienfaisance*).
[34] Pursuant to s. 149.1(1), a "public foundation" (*fondation publique*) means a charitable foundation of which more than 50% of the officials deal with each other at arms' length, and not more than 50% of the capital contributed to the foundation is contributed by persons who do not deal at arms' length (or 75%, for foundations registered before 1984). A "private foundation" (*fondation privée*) is a charitable foundation that is not a "public foundation": see *ibid*, s. 149.1(1).
[35] *ITA*, s. 149.1(1), "charitable organization" (*oeuvre de bienfaisance*) and "charitable foundation" (*fondation de bienfaisance*).

exclusively for "charitable purposes" (*fins de bienfaisance*) or "charitable activities" (*activités de bienfaisance)* within the meaning of the *ITA*. While section 149.1 does designate certain activities and purposes, such as the disbursement of funds to qualified donees, as "charitable"[36], it does not comprehensively define either of these terms. As a result, it has always been necessary for officials charged with administering the registration of charities in Canada to refer to some external source in order to make sense of the statutory scheme.

iii. The terminological changes to the French version of the *Income Tax Act*

Finally, in tracing the legislative history of the registered charity provisions, it is important to note the important changes in terminology that have been made over the years to the French version of the *Income Tax Act*. For the first sixty years of the life of Canada's charitable tax provisions, the current practice of "co-drafting" federal legislation in French and English did not exist. To fulfill the constitutional requirement that all Acts of the Parliament of Canada be printed and published in both official languages, successive versions of the federal *Income Tax Act* were drafted in English in Ottawa, and then shipped to Hull for translation into French by translators with no legal training.[37] Within this somewhat unsatisfactory translation system[38], the English term "charitable" was translated by the French term "*charitable*", while the English term "benevolent" was translated by the French term "*bienfaisance.*"[39]

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[36] S. 149.1 specifies that the carrying on of a related business, the disbursement of income to an associated charity or qualified donee, and the devotion of part of an organization's income to "ancillary" non-partisan political activities are all charitable activities. Section 149.1 also provides that the disbursement of funds to the qualified donees set out in s. 110.1 is a charitable purpose: see *ibid,* s. 149.1(1), (6) and (6.2).

[37] Revell, *supra* note 13 at 1100; Lionel A. Levert, "La cohabitation du bilinguisme et du bijuridisme dans la législation fédérale canadienne: mythe ou réalité?" (2000) 3 R.C.L.F. 127 at 129-30.

[38] Revell, *ibid.* (In this system, there was "virtually no contact between drafters and translators" and "countless discrepancies between the English and French texts. This was not a highly credible system.")

[39] *Loi de l'Impôt de Guerre sur le Revenu, 1917,* S.C. 1917, c. 28, s. 5(d) and (e) exempted from taxation the income of "charitable institutions" (*institutions charitables*) and "benevolent societies" (*sociétés de bienfaisance*).

The bilingual term "charitable" (*charitable*) was used consistently throughout the *Income Tax Act* for many years. By the middle of the century, however, a significant shift towards the use of the term "charitable" (*bienfaisance*) had started to take place. The *Income Tax Act* of 1952 granted exemption and receipting privileges to three categories of 'charitable' entities: the charitable organization (*organisation de charité*), the non-profit corporation (*corporation sans but lucratif*), and the charitable trust (*fiducie aux fins de charité*). The English version of the 1952 *Act* described all of these entities in terms of their devotion to "charitable" purposes and activities. However, the French version alternated between the terms "*charitable*" and "*bienfaisance*", defining the three entities, respectively, as "*une oeuvre de charité...dont toutes les ressources étaient consacrées à des oeuvres de bienfaisance*", "*une corporation constituée exclusivement à des fins charitables*", and "*une fiducie dont tous les biens sont absolument détenus...exclusivement pour fins charitables.*"[40] The tax reform legislation enacted by Parliament in 1972 modified this terminology further by defining the "charitable trust" (*fiducie aux fins de charité*) as "*une fiducie dont tous les biens sont détenus...exclusivement à des fins de bienfaisance.*"[41] The English term "benevolent society" continued to be translated as "*société de bienfaisance.*"[42]

These seemingly inexplicable inconsistencies in the French version of the registered charity provisions remained on the federal statute book until the general statutory revision of 1985[43], when a committee charged with revising federal acts for legal and linguistic accuracy expunged the French term *charité/charitable* from the *ITA*. Unlike the 1952 and 1972 changes, this terminological modification appears to have been made under the authority of the *Statute Revision Act,* which authorizes appointed employees of the Department of Justice to:

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[40] *Loi de l'impôt sur le revenu,* S.R.C. 1952, c 148, s. 27(1)(a), s. 62(1)(e)-(g).

[41] *An Act to amend the ITA,* S.C. 1970-71-72, c. 63, *supra* note 22, ss. 149(1)(f)-(h). While the 1977 amendments changed the categories of charitable entities, the basic pattern of French terminological use remained the same: see *An Act to amend the statute law relating to income tax,* S.C. 1976-77, c. 4, s. 59.

[42] *An Act to amend the ITA, ibid,* s. 149(1)(k).

[43] For a brief review of the process of statute revision, see Pierre-André Côté, *The Interpretation of Legislation in Canada,* 3rd ed. (Scarborough : Carswell, 2000) at 49-51.

> make such minor improvements in the language of the statutes as may be required to bring out more clearly the intention of Parliament, or make the form of expression of the statute in one of the official languages more compatible with its expression in the other official language, without changing the substance of any enactment.[44]

The result of this revision, which was included in the Revised Statutes of Canada 1985[45] but did not appear in French commercial editions of the *ITA* until 1994[46], was the consistent use of the term *bienfaisance* to describe the primary criteria for charitable registration under the *ITA*. Thus, the *fondation de bienfaisance*, which had previously been identified as the *fondation de charité*, was defined as an entity devoted to "*fins de bienfaisance*", and the "*oeuvre de charité*" was renamed the "*oeuvre de bienfaisance*". As we have seen, this revised statutory language continues to be used in the current version of the *ITA*.

B. The current interpretation of the term "charitable" (*bienfaisance*) under the *Income Tax Act*

i. The historical approach

Contrary to what might be assumed, the Canadian courts have not always relied on common law principles to interpret and apply tax exemptions for "charitable" institutions. In 1904, for example, a Nova Scotia court deciding that the Sisters of Mercy fell within a provincial property tax exemption for "educational and charitable institutions" concluded only that the statutory provision should be interpreted broadly, "in such manner as to exempt all institutions of this nature that can fairly be brought within its language."[47] In 1925, the Supreme Court of Canada held that the term "charitable institution" in the Ontario *Assessment Act* took its meaning from the other institutions listed in the section.[48] A leading income tax text published in 1938 asserted that while the phrase "charitable organizations" was to be construed in

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[44] *Statute Revision Act,* R.S.C. 1985, c. 85, s. 6(f).
[45] R.S.C. 1985, 5th supp., c. 1
[46] *La Loi de l'impôt sur le revenu du Canada et Règlement,* L.R.C. 1985 (5th supp.), ch. 1, tel que modifié, 23e édition, 1994 (Québec : Les Publications CCH/FM Ltée, 1994).
[47] *City of Halifax v. Sisters of Charity* (1904), 40 N.S.R. 481 at 486, per Russell J.
[48] *Canadian National Railway v. Caperol (Town)* [1925] S.C.R. 499.

accordance with the English common law test, the "charitable institutions" exempt from federal income tax were confined to those for the relief of poverty.[49]

However, in the 1952 case of *Dames Religieuses de Notre Dame de Charité du Bon Pasteur v. Sunny Brae (Town) Assessors,* a case arising under the New Brunswick *Rates and Taxes Act*, the Supreme Court of Canada followed the British courts in holding that the word "charitable" in a taxing statute was used in its technical, rather than its popular sense.[50] In doing so, the Court effectively signaled its intention to apply the common law definition of charity that had evolved in the English Chancery courts to Canadian tax legislation, as the English House of Lords had done in *Pemsel* in 1891[51]. In his judgment, Justice Rand articulated the essence of the test set out in the English case:

> A charity or charitable society is, I should say, one whose purposes are those described in the preamble to the statute 43 Eliz. c. 4 or purposes analogous to them. They can be classified generally, as for the advancement of religion, for the relief of poverty, for the promotion of education, and for other purposes bearing a public interest: and the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare.[52]

Fifteen years later, in a case considering whether a testamentary gift to an Ontario alumni association was subject to federal estate tax, the Supreme Court of Canada indicated that the common law definition of charity had "received general acceptance" in Canada[53]. This second major decision on the meaning of "charitable" in federal tax legislation seems to have cemented the view that the *ITA* registered charity provisions should be interpreted, in all provinces, according to the principles and rules of the common law of charitable purpose trusts. In the wake of the *Guaranty Trust* decision, the institutions charged with interpreting and applying the registered charity provisions

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[49] H. Plaxton, *The Law Relating to Income Tax of the Dominion of Canada* (Toronto: The Carswell Company Limited, 1939).
[50] [1952] 2 S.C.R. 76 at 95-97, per Kellock J.
[51] *Pemsel, supra* note 4 at 587, per Macnaghten J.
[52] *Sunny Brae, supra* note 50 at 88, per Rand J. The three dissenting judges did not find it necessary to decide whether the word "charitable" should be construed in its legal or ordinary sense.
[53] See *Towle Estate v. Canada (M.N.R.)* [1967] S.C.R. 133 (aka *Guaranty Trust*), where the Supreme Court of Canada determined that the Medical Alumni Association of the University of Toronto was a "charitable organization" within the meaning of the federal *Estate Tax Act.*

appear to have accepted without qualification that the meaning of "charitable" (*charitable/bienfaisance*) under the *Income Tax Act* was to be determined by way of "analogy with those purposes already found to be charitable at common law, and which are classified for convenience in *Pemsel.*"[54]

ii. The current judicial approach

Between 1967 and 1999, the judicial interpretation of subsection 248(1) and section 149.1 of the *ITA* fell entirely to the Federal Court of Appeal, which encountered little or no resistance to the view that the terms "charitable purposes" (*fins charitables/de bienfaisance*) and "charitable activities" (*activités de bienfaisance*) should be interpreted according to common law principles, even when applied to organizations operating exclusively in Quebec.[55] In 1999, however, the Supreme Court of Canada was finally called upon to hear an appeal from a decision regarding registered charity status[56], and to face arguments that directly challenged the traditional common law approach. *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R* arose when a British Columbia society, whose primary purpose was to "provide educational forums, classes, workshops and seminars" to immigrant women to help them find employment, challenged the Minister's refusal to register it as a "charitable organization" (*oeuvre de bienfaisance*) under subsection 248(1), *ITA*. The Society, which had modified its objects twice before receiving a final refusal letter from the Minister, argued that it was "charitable" within the traditional common law framework, in that it advanced education and fell within the scope of various English cases upholding trusts for the assistance of immigrants and refugees. However, the Society also argued that the Court should adopt a new "contextual" approach to the registered charity provisions, which focused on whether an organization was providing a "public benefit" as commonly understood.[57] The intervener, the Canadian Centre for

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[54] *Vancouver Society, supra* note 25 at para. 148.
[55] See *N.D.G. Neighbourhood Association, supra* note 4 above.
[56] *Vancouver Society*, supra note 25.
[57] *Ibid.* at para. 196 ff.

Philanthropy, proposed a similar, public benefit-based broadening of the traditional, common law test.[58]

The Supreme Court of Canada split five judges to three in favour of the Minister of National Revenue, with the majority ultimately holding that one of the Society's objects was too vague and indeterminate to qualify as exclusively charitable under the advancement of education head.[59] However, despite the narrow basis on which it was decided, *Vancouver Society* contains a number of broad pronouncements on the proper interpretation and application of subsection 248(1) and section 149.1, *ITA*. Given *Vancouver Society*'s current status as the only Supreme Court of Canada decision on the *ITA* registered charity scheme, it is important to examine these pronouncements in some detail.

First, the *Vancouver Society* decision signals beyond any doubt that the common law of charitable purpose trusts should continue to function as the suppletive law for the registered charity provisions of the *ITA*.[60] While the Court expressed sympathy for the parties' arguments that a new approach to the *ITA* concept of charity should be adopted, it was unwavering in its view that the type of sweeping changes being suggested should be effected by Parliament rather than the courts.[61] Thus, although *Vancouver Society* affirms that the definition of charity is an "an area crying out for clarification"[62], it also affirms that in the absence of legislative intervention, the four *Pemsel* categories of the relief of poverty, the advancement of education, the advancement of religion, and "other

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[58] *Ibid.* at para. 202.

[59] The majority of the Court ultimately found that while the Society's primary purpose was charitable under the "advancement of education" head, some of its purposes were broad enough to accommodate non-charitable activities, such as the provision of a job skills directory and the establishment of support groups for professionals. As such, they were "too vague and indeterminate to permit the Society to qualify for charitable status": *ibid.* at para. 195.

[60] Both the majority and dissenting judges began their analysis of the Society's claim by affirming an earlier statement of the Federal Court of Appeal that "the Act appears clearly to envisage a resort to the common law for a definition of "charity" in its legal sense as well as for the principles that should guide us in applying that definition": *Vancouver Society, supra* note 25 at paras. 28 and 143.

[61] *Ibid.* at paras. 196-203. Notably, however, the parties did not argue that alternate sources of law should provide definitional content to subsection 248(1) and section 149.1, but only that the common law approach should be modified to allow the registration of a wider range of "public benefit" organizations.

[62] *Ibid.* at para. 149.

purposes beneficial to the community" must remain the "starting point" for determining the charitable character of applicants for charitable registration.[63] Where an organization with novel objects applies for registration under subsection 248(1), therefore, the question continues to be not whether the organization "*should* be considered charitable but whether the common law recognizes it to be charitable".[64]

Second, *Vancouver Society* states that despite the fact that subsection 149.1(1) of the *ITA* defines a "charitable organization" (*oeuvre de bienfaisance*) in terms of charitable activities, "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."[65] Thus, to be registered as a charitable organization under subsection 248(1) of the *ITA,* an organization must be constituted for charitable purposes, which "define the scope of the activities engaged in by the organization".[66] As Gonthier J. explained, this is largely a question of whether the activities of the organization are "substantially connected to, and in furtherance of" its charitable purposes. The activities must bear a coherent relationship to the purposes sought to be achieved.[67]

Finally, the *Vancouver Society* decision suggests that the significant practical role that the federal courts have played in the evolution of the law of charity in Canada has produced a federal legal concept of charity, which operates to exclude provincial law from the interpretation of the registered charity provisions. This was the view expressed in the dissenting judgment of Gonthier J., who prefaced his analysis of the applicable charity law principles with the following comments on the statutory context:

> Because the law of charity had its origin in the law of trusts, many of the leading authorities in this area arose in the context of determining the essential validity

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[63] *Ibid.* at para. 144.
[64] *Ibid.* at para. 179. In his dissenting judgment, however, Justice Gonthier noted: "this is not to suggest that the courts are precluded from...revisiting the *Pemsel* classification itself should an appropriate case come before us": *ibid.* at para 122.
[65] *Ibid.* at para. 152.
[66] In addition, all of the organization's resources must be devoted to these activities unless the organization falls within the specific exemptions of s. 149.1(6.1) or (6.2): see *ibid.* at para. 159.
[67] *Ibid.* at paras. 52 and 56.

> of a putative charitable trust. Since the introduction of the *ITA,* the tax dimension of charities law has assumed much greater practical importance. Most cases now concern a pre-existing organization...seeking registration under the *ITA,* rather than the evaluation of the essential validity of a trust. Parliament has, in effect, incorporated the common law definition of "charity" into the *ITA,* and in doing so, has implicitly accepted that the courts have a continuing role to rationalize and update that definition to keep it in tune with social and economic developments. I note in passing that the definitions of "charity" and "charitable" under the *ITA* may not accord precisely with the way those terms are understood in the common law provinces, due to judicial decisions and provincial statutory incursions into the common law. The *ITA*'s conception of charity, by contrast, is uniform federal law across the country.[68]

According to the dissenting judgment in *Vancouver Society,* then, not only does one body of unenacted law provide definitional content to the undefined terms in the registered charity provisions in every Canadian province, but that body of law is federal in character. The majority did not comment on Justice Gonthier's note in passing, which was not necessary to address the arguments made in the case.

iii. The current administrative approach

If the majority of the Supreme Court of Canada has not yet passed judgment on Justice Gonthier's suggestion that the definition of charity under the *ITA* is uniform federal law, there is no doubt that the Charities Division of the Canada Revenue Agency ("CRA") has fully embraced that position. The CRA is not a law-making body. In the context of the regulation of the charitable sector, however, it does exercise a broad responsibility and discretion in adopting and administering policies that clarify the registered charity scheme. Because the CRA is the body that initially decides which organizations are granted charitable status under the *ITA*, and because of the "extraordinarily small number of appeals"[69] that have historically been brought against decisions to refuse charitable registration, the CRA plays a crucial role in determining what purposes and activities are recognized as charitable in Canada.

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[68] *Ibid.* at para. 28, per Gonthier J.
[69] Monahan and Roth, *supra* note 24 at 12.

The practices and publications of the CRA provide ample evidence of its view that there is only one source of meaning for the term "charitable" (*bienfaisance*) under the *ITA,* which is made up of the common law jurisprudence of the English and Canadian federal courts[70]. As the companion publication to the *T2050 Application to register a Charity under the Income Tax Act* confirms, the CRA only grants charitable registration to organizations whose purposes fall within one of the four *Pemsel* categories, and who meet the common law public benefit test.[71] CRA's views on what *specific* activities and purposes are charitable have historically been kept largely out of the public domain.[72] Recently, however, CRA has begun to post policy documents online, which articulate its views on whether and in what circumstances specific purposes such as the promotion of art or the promotion of holistic medicine are charitable. [73] For the most part, these policy documents appear to be highly abbreviated summaries of English and Federal Court of Appeal cases. None of CRA's policy documents allow for the possibility of provincial variation in the application of the registered charity provisions, or cite any provincial law.

Finally, it is worth noting that at present, even the legislation and administrative policies of the province of Quebec support the view that there is one, uniform, federal, common law concept of charity in Canada, at least insofar as the taxation of charitable organizations is concerned. The Quebec *Taxation Act,* like the *ITA,* establishes a central registration system to regulate the entities entitled to issue provincial tax receipts for charitable gifts.[74] Pursuant to subsection 985.1, the provincial Minister of Revenue may approve for registration any charitable organization, private foundation or public foundation that applies in prescribed form. As in the *ITA,* all three of these designations are defined in terms of "charitable purposes" (*fins de bienfaisance*) and "charitable

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[70] The CRA's views on this matter appear to predate the *Vancouver Society* decision, as evidenced by its longstanding refusal to register amateur athletic organizations as charities: see above at 76-78.
[71] Canada Revenue Agency, *Registering a Charity for Income Tax Purposes* (guide T4063(E) rev. 01), available online at: http://www.cra-arc.gc.ca/E/pub/tg/t4063/t4063-01e.pdf
[72] Monahan and Roth, *supra* note 24 at 14-16.
[73] Canada Revenue Agency, *Summary Policies* (last modified November 2005), available online at: http://www.cra-arc.gc.ca/tax/charities/policy/csp/csp_menu-e.html
[74] *Taxation Act,* LRQ, c. I-3, ss. 752.0.10.3 and 985.5.

activities" (*activités de bienfaisance*), which terms are not defined in the *Taxation Act*.[75] However, the application form prescribed by the *Taxation Act* requires applicants to prove that they have previously been registered as charities by the CRA. The end result of this procedure is that the federal, common law concept dictates the range of organizations that can be registered as charities in Quebec.[76]

C. Tension created by the current unitary approach

As the preceding paragraphs have shown, the current practice of applying a uniform, federal, common law concept of charity to the registered charity provisions of the *ITA* is well entrenched at all levels of regulation of the charitable sector. At the judicial level, the Federal Court of Appeal follows the guidelines set out in *Vancouver Society,* and updates the definition of charity by making analogies to its own decisions, as well as an increasingly dated body of English law. At the administrative level, both the CRA and the Quebec Revenue Agency administer and apply policies that are consistent with this uniform approach. To the extent that Justice Gonthier's comments in *Vancouver Society* are merely descriptive of an existing state of affairs, therefore, they seem to be correct: the *ITA* conception of charity *is* uniform federal law, at least in the eyes of those who apply it.

To date, the practice of applying subsection 248(1) and section 149.1 uniformly across the provinces has not been considered problematic or controversial[77]. Despite its widespread acceptance, however, the current interpretational approach to the registered charity provisions fits uneasily with a number of fundamental principles relating to the

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[75] *Ibid.*, s. 985.1.

[76] S. 985.5 provides that organizations be approved for charitable registration "on application to the Minister in prescribed form." The prescribed form, *Application for Registration as a Charity or as a Quebec or Canadian Amateur Athletic Association, TP-985.5-V,* requires that applicants for registered charity status include the Business Number assigned to them by CRA. Revenue Quebec will even deem a charitable organization to have been registered in Quebec on the day it was registered by CRA, if it submits the TP-985.5-V within 30 days of confirmation of that registration: see *Registered Charities and Certain Recognized Organizations: Guide to Filing the Information Return,* available online at: http://www.revenu.gouv.qc.ca/documents/eng/formulaires/tp/tp-985.22.g-v(2005-10).pdf.

[77] While there have been repeated calls to replace the *Pemsel* test with a test that better reflects modern Canadian society, the issue of whether the ITA definition of charity should be federal has never been raised, to the author's knowledge, until the recent case of *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency),* [2006] F.C.J. No. 542, 2006 FCA 136 ["*AYSA*"].

interpretation of tax legislation, the constitutional division of powers, the federal government's policies on legislative bilingualism and bijuralism, and the application of the federal *Interpretation Act.* Each of these areas of tension will be examined in turn, starting with the relationship between the heavy judicial reliance on common law trust principles to interpret section 149.1, and the specific words of the statutory text.

i. Textual interpretation

It is well established that in interpreting the *Income Tax Act,* the correct approach is to read the words of the Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[78] However, with the interpretation of tax legislation in particular, great weight is placed on the specific words of the statutory text.[79] As the Supreme Court of Canada observed in *Antosko*, "[it] would introduce intolerable uncertainty into the *ITA* if clear language in a detailed provision of the *Act* were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision..."[80]. Only where the meaning of a provision or its application to the facts is unclear should an inquiry into the object and purpose of the provision be undergone.[81]

The Canadian courts have gone to great lengths to affirm the interconnectedness of the registered charity provisions and the law of charity, a connection which is based on the historical origins of our income tax legislation and on the observable affinities between certain provisions of section 149.1 and the common law of charitable trusts. The statutory definition of a "charitable foundation" (*fondation de bienfaisance*), for example, can be seen to reflect the common law requirement that a charitable trust be constituted for exclusively charitable purposes. Similarly, subsection 149.1(6.1), which

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[78] *Friesen v. Canada,* [1995] 3 S.C.R. 103 at 112-14.
[79] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (Canada: Butterworths Canada Ltd., 2002) at 447 ("Although the Supreme Court of Canada has repeatedly stated that fiscal legislation is to be interpreted in accordance with Driedger's modern principle, an emphasis on literalism has persisted in the Court's tax decisions and appears to have become the dominant approach.")
[80] *Canada v. Antosko,* [1994] 2 S.C.R. 312 at 326-7, citing P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (Scarborough: Carswell, 1995) at 453-54.
[81] *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, [1996] 1 S.C.R. 963 at 976-77.

establishes a limited exception to this exclusive charitability requirement, mirrors the common law rules on political purpose trusts[82] by providing that an entity that devotes substantially all of its resources to charitable purposes, but devotes part of its resources to non-partisan, "ancillary and incidental" political activities is considered to be devoting that part of its resources to charitable purposes.[83]

However, while provisions such as subsection 149.1(6.2) can be said, on their face, to reflect trust law principles, not all of the registered charity provisions fit quite so comfortably with the common law scheme. A case in point is the subsection 149.1(1) definition of a "charitable organization" (*oeuvre de bienfaisance*), which requires the exclusive devotion of resources to charitable activities but does not refer to charitable purposes. This statutory definition has always fit uneasily with the trust law concept, which "focuses on charitable purposes and not charitable activities."[84]

In *Vancouver Society*, the Supreme Court of Canada identified this incongruence between the common law and subsection 149.1(1) of the *ITA* as a "major problem" with the legislation, which it resolved by holding that it is really "the *purpose* in furtherance of which an activity is carried out" that determines whether an organization is charitable under the *Act*.[85] The Court justified this interpretation by asserting that "the character of an activity is at best ambiguous"[86], and by relying on the traditional framework of the common law of trusts. However, the *ITA* has defined a "charitable organization" (*oeuvre de charité/bienfaisance*) in terms of its activities since at least 1952, through a series of major amendments, and despite the fact that all of the other charitable entities recognized by the *ITA* have always been defined solely in terms of charitable

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[82] The common law courts have long accepted that a trust for "political purposes" is not charitable because it cannot be said to be for the public benefit. However, a trust with a political purpose may be charitable if that purpose, in reality, is only a means to carry out the trust's other charitable purposes: see *IRC v. Yorkshire Agricultural Society* [1927] All E.R. 536. In addition, the fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable: *McGovern v. Attorney General* [1982] Ch.321.
[83] *ITA*, s.149.1(6.2).
[84] *Vancouver Society, supra* note 25 at para. 144.
[85] *Ibid.* at para. 152.
[86] *Ibid.*

purposes[87]. Given the long legislative history of the statutory definition, and its explicit reference to charitable activities, it seems legitimate to ask whether the Supreme Court of Canada has subordinated a clearly expressed, longstanding statutory definition to its view of the object and purpose of the registered charity scheme, in a way which compromises the textual integrity of the *Income Tax Act.*

ii. Provincial jurisdiction over charities

The second major concern with the current interpretational approach to the *ITA* registered charity provisions relates to the constitutional division of authority over charities, and its relationship with Justice Gonthier's view that the undefined terms in section 149.1, *ITA* rely for definitional content on a body of unenacted, *federal* law.

Under the *Constitution Act, 1867,* jurisdiction over the charitable sector is divided between the federal and provincial levels of government.[88] The federal Parliament exercises an incidental authority over charities by virtue of its subsection 91(3) taxation power.[89] However, primary legislative authority over charities, trusts and charitable gifts is vested in the provinces by virtue of two, separate constitutional provisions. The first of these provisions, subsection 92(7) of the *Constitution Act, 1867*, specifically grants the provinces jurisdiction over the "establishment, maintenance and management of charities...in and for the provinces." The second, subsection 92(13), gives them exclusive authority over "property and civil rights in the province", a phrase which has always been construed in its largest sense.[90] Historically, the provinces have not put their legislative authority over charities to much use, leaving it to the federal government to regulate the charitable sector through the scheme set out in the *ITA*[91]. Recently, however, a number of provinces have developed their own system for the registration and regulation of charitable organizations that want to fundraise in the

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[87] See above at 11.
[88] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, ss. 91-92, reprinted in R.S.C. 1985 App. II, No. 5.
[89] S. 91(3) of the *Constitution Act, 1867* gives Parliament the authority to make laws regarding "the raising of money by any mode or system of taxation." See, generally, G.V. LaForest, *The Allocation of Taxing Power under the Canadian Constitution* (Toronto: Canadian Tax Foundation, 1981).
[90] *Insurance Co. of Canada v. Parsons* (1881), 7 App.Cas. 96 (J.C.P.C.).
[91] Monahan and Roth, *supra* note 24 at 7.

province.[92] As Patrick Monahan has pointed out, "the fact that the [other] provinces have chosen not to exercise a role in this field does not diminish their constitutional authority or add to the legislative authority of Parliament".[93]

Given the division of authority over charities mandated by the *Constitution Act, 1867*, what can we make of Justice Gonthier's assertion that "the *ITA*'s conception of charity is uniform federal law"? Because of Parliament's exclusive jurisdiction over income tax, Parliament could undoubtedly determine what entities should qualify for charitable tax benefits by enacting a statutory definition of charity, or by providing that the term "charity" (*bienfaisance*) should be defined according to English law. However, because Parliament has not exercised this legislative authority to date, the proposition that the undefined terms in section 149.1 have a federal meaning presupposes the existence of an *unenacted* body of federal law, which acts as the default legislative dictionary for the registered charity provisions, and which the provinces can not amend. Is it possible that a "federal common law of charities" serves as the suppletive law for the undefined terms "charitable purposes" (*fins de bienfaisance*) and "charitable activities" (*activités de bienfaisance*)?

The debate over the existence of a federal common law has, to date, taken place in the context of a series of cases dealing with the extent of the federal courts' jurisdiction over the "Laws of Canada" pursuant to s. 101 of the *Constitution Act, 1867.* Following the landmark decisions of *Quebec North Shore*[94] and *McNamara Construction*[95], it was generally accepted that there was no "body of federal common law that was co-extensive with the unexercised legislative competence of Parliament over matters assigned to it"[96], and thus that the mere fact of Parliament's legislative authority over a particular subject matter was insufficient to support proceedings before the Federal

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[92] See, for example, the *Charitable Fund-Raising Act,* RSA 2000, c. C-9 and *The Charitable Fund-Raising Businesses Act,* R.S.S. 2002, c. C-6.2

[93] Monahan and Roth, *supra* note 24 at 7

[94] *Quebec North Shore Paper Co. v. Cdn. Pacific Ltd.* [1977] 2 S.C.R. 1054

[95] *McNamara Construction (Western) Ltd. v. the Queen* [1977] 2 S.C.R. 654, rev'g [1976] 2 F.C. 292 (C.A.)

[96] J. Evans, "Federal Jurisdiction – A Lamentable Situation" (1981) 59 Can. Bar Rev. 124 at 125, cited in *Roberts v. Canada,* [1989] 1 S.C.R. 322.

Court. In recent years, however, the Supreme Court of Canada has tempered the restrictive impact of *Quebec North Shore*, recognizing the federal courts' authority over private law disputes that are sufficiently linked to a federal statutory framework[97], and acknowledging that a body of federal common law does exist in "some areas."[98] To date, the law of aboriginal title, the law of execution of a Federal Court judgment[99], and the torts of abuse of process, wrongful arrest, false imprisonment and malicious prosecution[100] have been recognized by the courts as areas of federal common law.

While both the existence and the content of a federal common law continue to be a matter of debate[101], it seems highly unlikely that the body of unenacted rules received in Canada from the English law of charitable purpose trusts could fall within this concept. As Professor Roderick Macdonald explains in *Encoding Canadian Civil Law*, a federal common law can be said to exist because at the time of Confederation, all of the law in force in each the colonies was continued, by virtue of section 129 of the *Constitution Act, 1867,* for all purposes in each province, but was placed under the authority of either Parliament or the provincial legislatures by virtue of sections 91 and 92.[102] In this sense, any unenacted, pre-Confederation law which since 1867 has only been subject to codification or amendment by competent provincial legislation may fairly be described as "provincial" common law, while unenacted pre-Confederation law that falls within the legislative authority of Parliament may be described as "federal" common law. The

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[97] *R v. Rhine* [1980] 2 S.C.R. 442.
[98] *Roberts, supra* note 96 at para. 29, per Wilson J.
[99] *Roberts, ibid.; British Columbia (Deputy Sheriff) v. Canada* (1992) 66 BCLR (2d) 371 (CA)
[100] *Kealey v. Canada (AG)* [1992] 1 F.C. 195 (T.D.)
[101] See, for example, Jean-Maurice Brisson, "L'impact du Code civil du Québec sur le droit fédéral: une problématique" (1992), 52 R. du B. 345 (translation) at 347-38 ("there is no set of fundamental legal rules in federal law that can serve as a reservoir for [federal] legislation, because the federal government, unlike the territories that make up Canada, has never received any such rules"); André Morel, "Harmonizing Federal Legislation with the *Civil Code of Québec:* Why and Wherefore?" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of Studies, supra* note 9, 1 at 3. [Morel, "Harmonizing"] ("the consensus is that there is no federal *jus commune*").
[102] Roderick A. Macdonald, "Encoding Canadian Civil Law" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies, supra* note 9, 135 at 173-85 [Macdonald, "Encoding"].

term federal common law thus encompasses any "pre-Confederation, [unenacted] law in each colony that is insulated from direct supercession by provincial statutes."[103]

The law of aboriginal title, the tort of wrongful arrest, and the legal rules that have so far been recognized as "federal common law" by the courts are all constitutionally insulated from provincial amendment, and therefore fall comfortably within the definition offered by Professor Macdonald. However, the body of unenacted law that purportedly forms the basis of a "uniform federal law" of charities falls, as we have seen, squarely within the legislative authority of the provinces. Therefore, leaving aside the question of whether the common law of charitable purpose trusts should continue to provide definitional content to the registered charity provisions in every Canadian province, the *Constitution Act, 1867* requires that this suppletive source of meaning be recognized as provincial. While the abdication of provincial responsibility for charities and the jurisprudence of the federal courts may have made the federal common law of charities a *de facto* reality in Canada, it is a reality without any constitutional basis.

iii. The terminological changes to the French version of the *Income Tax Act*

The terminology changes to the French language version of the *ITA,* which have resulted in the term *bienfaisance* being used to describe the primary legal criteria for charitable registration, pose yet another challenge to the view that the registered charity provisions embody a uniform, federal, common law conception of charity. Because the changes to the French version of the registered charity provisions resulted from both statutory amendments and revisions, it is difficult to say whether the gradual replacement of the word *charité* with the word *bienfaisance* was intended to change the substance of the test for charitable registration[104]. However, whatever the effect on the registered charity scheme, it is clear that the revisions did not improve the compatibility of the French and English versions of section 149.1 and subsection 248(1) of the *Income Tax Act.*

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[103] *Ibid.* at 176.
[104] See below at 81-83.

First, far from clarifying that Parliament intended that the registered charity provisions be interpreted in accordance with common law trust principles, the revisions placed the *ITA* at odds with the prevailing views on the proper French common law terminology for charitable trusts. At the time that section 149.1 and subsection 248(1) were revised by the Department of Justice, the leading Supreme Court of Canada decisions on the common law of charity referred, in their French versions, to *fiducies de charité, fins de charité,* and *oeuvres de charité.*[105] In addition, the University of Moncton's *Vocabulaire du Common Law,* then the leading authority on French common law terminology in Canada, translated the term "charitable purpose" as "*fin charitable*", and the term "charitable activity" as "*oeuvre de charité*".[106] More recently, the federally-sponsored National Program for the Integration of both Official Languages in the Administration of Justice (PAJLO) has recommended that the translation of the terms "charitable purpose" and "activity ("charity")" be standardized as "*but caritatif*" and "*activité caritative*".[107] In light of all these authorities, the legislative choice of the word *bienfaisance* must be seen to have undermined the common law interpretational approach, and to have impeded the access of Francophones in Canada's common law provinces to the registered charity scheme.

Second, far from clarifying that Parliament did not intend the registered charity provisions to be interpreted according to the civil law of Quebec, the terminology changes actually improved the conceptual coherence between the *ITA* and the predecessor to the current *Civil Code of Québec,* the *Civil Code of Lower Canada* (CCLC). Unlike the bilingual authorities on common law trusts, the CCLC article dealing with charitable legacies refers, in its two language versions, to "charitable

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[105] *Towle Estate* [1967] S.C.R. 133, *Jones c. T. Eaton Co.* [1973] S.C.R. 635.

[106] Centre de traduction et de terminologie juridiques (CTTJ), *Vocabulaire Anglais-Français et lexique français-anglais de la common law, tome 2 : Les fiducies* (Moncton : Les Éditions du Centre universitaire de Moncton, 1982) at 16, 31

[107] PAJLO, *Normalisation du Vocabulaire du droit des trusts: Termes de base et fiducies expresses (généralités),* CTDJ-5E, available online at : http://www.pajlo.org/fr/ressources/normalisation/ctdj-5e.pdf. Notably, the French-English dictionary on the common law of property published by PAJLO in 1997 did not contain the terms *charity, charitable purpose* or *charitable activity:* see PAJLO, *Canadian Common Law Dictionary: Law of Property and Estates* (Cowansville, Qc.: Yvon Blais, 1997)

purposes" and "*fins de bienfaisance*"[108]. It appears, therefore, that the revisions to the French versions of the *ITA* may have had an unforeseen result, for there are now two equally authoritative versions of the registered charity provisions, both of which reflect a concept recognized the civil law of Quebec, but only one of which is consistent with the common law of charitable purpose trusts.

iv. Complementarity, dissociation, and the project of harmonizing the *Income Tax Act*

A final concern raised by the current interpretational approach to the registered charity provisions relates to the "principles and presumptions governing the designation of [the] federal legislative default dictionary"[109] in a federal statute such as the *ITA*, and their relationship with the view that the undefined terms in section 149.1 take their meaning, in all Canadian provinces, from the common law of charitable trusts. These principles and presumptions, as André Morel has pointed out, flow from our constitutional history and the logic of the legislative division of powers and are thus "as old as Canada itself."[110] However, both their significance and the stringency of their application have arguably increased since they were codified as rules of general application in sections 8.1 and 8.2 of the federal *Interpretation Act.* [111]

Over the last decade, a great deal of scholarly and judicial attention has been devoted to explaining the nature of the relationship between federal legislation and provincial private law.[112] While several points of controversy remain[113], there seems to be broad

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[108] Art. 869 CCLC.
[109] Macdonald, "Harmonizing", *supra* note 9 at 66. See also Macdonald, "Encoding", *supra* note 102 at 151.
[110] Morel, "Harmonizing", *supra* note 97 at 6.
[111] For a description of the central role that the *Interpretation Act* has always played in facilitating the drafting and interpretation of federal statutes, see H. L. Molot, "Clause 8 of Bill S-4: Amending the *Interpretation Act*" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism: Second Publication, supra* note 14, booklet 6, 1-19 at 6-7.
[112] See, for example, the collection of studies in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies, supra* note 9 and *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, Second Publication, supra* note 14; Brisson, *supra* note 97; *St- Hilaire v. Canada (Attorney-General),* [2001] 4 F.C. 289 (F.C.A.); Duff, *supra* note 12; Roderick A. Macdonald, "Provincial Law and Federal Commercial Law: Is *Atomic Slipper* a New Beginning?" (1992), 7 Banking & Finance Law Rev. 437.

agreement on the basic notions of complementarity and dissociation that are applicable to federal provisions such as those making up the registered charity scheme. The need for a rule of complementarity arises from the fact that "virtually all" federal statutes are implicitly dependent on some other law[114]. Generally speaking, neither private nor public federal statutes "form a self-contained legal system or an autonomous body of rules"; they rely on undefined terms, concepts and rules that require external "conceptual support" if the statutes are to be sensibly interpreted and applied.[115] At least in cases where these undefined terms and concepts form part of the private law within provincial legislative authority, that conceptual support is presumed to be provided by the contemporary *ius commune*[116] of the province in which the federal statute is being applied.[117] Despite the frequent perception that "there is a sort of organic bond, an association inherent in the nature of things, between federal law and common law", this general rule of complementarity is equally applicable in all of Canada's provinces.[118]

Of course, because of Parliament's exclusive jurisdiction over the law it enacts, it is "entirely within the hands of Parliament" to determine the relationship between any

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[Macdonald, "*Atomic Slipper*"]. With regard to the particular relationship between provincial private law and federal tax legislation, see *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies in Canadian Tax Law, supra* note 11, and the articles by David Duff, Marc Cuerrier, Sandra Hassan, Marie-Claude Gaudreault, Diane Bruneau, Mark Brender and Catherine Brown in (2003) 51 Cdn. Tax J. 1.

[113] In particular, there is disagreement over whether, in addition to the provincial *ius communes,* there exists a federal *ius commune* which can act as the suppletive law for federal legislation: see above note 101. Many of the harmonization studies commissioned by the Department of Justice have also been criticized on the basis that they are exclusively civilist in focus, and that they underestimate the ability of judges to create law in interpreting federal legislation: see Sullivan, "Challenges", *supra* note 7 at 1026-44.

[114] Jean-Maurice Brisson and André Morel, "Federal Law and Civil Law: Complementarity and Dissociation" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies, supra* note 9, 217 at 231.

[115] Morel, "Harmonizing", *supra* note 97 at 1-2.

[116] As Professor Macdonald explains, the term *ius commune* can be used to express the substantive concept of a general regime of law governing civil relations, or the utilitarian concept of a "reservoir of legal concepts and rules that will implicitly be used to complete the regulatory scheme of any statute": Macdonald, "Encoding", *supra* note 102 at 151. In this paper, the term is used in the latter sense.

[117] Macdonald, "Harmonizing", *supra* note 9 at 46 – 49. Where the doctrine of interjurisdictional immunity prevents the application of provincial legislation, the default dictionary will be the *ius commune* as it existed at Confederation, subject to any modifications resulting from post-Confederation legislation: *ibid.* at 48-49. See also Molot, *supra* note 111 at 4.

[118] Morel, "Harmonizing", *supra* note 97 at 6.

particular provision of a federal statute and an external source of law.[119] It is clear, for example, that Parliament may dissociate federal legislation from provincial sources by comprehensively defining its statutory terms, or by designating a law of reference other than the law of the provinces to complement a federal rule.[120] It may also enact rules or schemes that are incompatible with the law of any or all of the provinces, or adopt terms that are "constitutionally neutral and independent of provincial law".[121] As Morel has pointed out, "the federal Parliament...has the power to create in its statutes any concept or legal institution that it considers useful in achieving the objectives it has set for itself."[122] The only question is how clearly it must speak before its intention to dissociate provincial private law from its statutes will be inferred.

Just as the principles of federal-provincial complementarity and dissociation date back to Confederation, so their application to federal income tax legislation must be seen to date back to the original enactment of the *Income Tax Act*. As the Tax Court stated in 1960:

> If income tax is a creation of the Act which imposes it, that Act must apply within the framework of the civil laws governing legal relationships between individuals...the legal relationship of the parties to a contract and the consequences of that contract must be respected by the persons responsible for administering the *Income Tax Act*.[123]

Historically, however, tax law in particular has been influenced by another important principle, namely that federal legislation should be interpreted so that it applies uniformly across all of the Canadian provinces.[124] The interpretation of the *ITA* has always involved a struggle between these competing legal principles, whose

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[119] Molot, *supra* note 111 at 3. See also Brisson and Morel, *supra* note 114 at 246.
[120] See, for example, section 9 of the *Bills of Exchange Act,* R.S.C. 1985, c. B-5, which makes "the rules of the common law of England" applicable to bills and cheques.
[121] Molot, *supra* note 111 at 3.
[122] Brisson and Morel, *supra* note 114 at 239.
[123] *Perron v. MNR* (1960) 60 D.T.C. 554.
[124] D. Duff, *supra* note 12 at 49 ("it is often a reasonable presumption that Parliament intends that its laws should apply uniformly throughout Canada, particularly in the area of taxation, where equity and anti-avoidance considerations can weigh so heavily")

relationship flows from the very nature of a federal state.[125] In situations where federal legislation relies on a private law concept whose meaning is not identical in every Canadian province, a judicial interpretation that favours either uniformity or complementarity will often produce directly opposite results. Nonetheless, the relationship between these two competing principles has remained an ambiguous one, which has been resolved in particular contexts according to principles of interjurisdictional immunity or implicit dissociation or sometimes no principle at all. In the absence of any specific direction as to which principle should prevail, the Canadian courts have not favoured either uniformity or complementarity consistently.[126] In the interpretation of the registered charity provisions, however, uniformity has always prevailed over the application of provincial law.

In the last decade, however, Parliament has renewed its commitment to bijuralism and bilingualism in the federal legal system, and in doing so has clarified the relationship between the principles of complementarity and uniformity, and between federal statutes and provincial law. In 1995, spurred by the enactment of the new *Civil Code of Québec*, and the gulf it had created between the terminology of federal legislation and the civil law of Quebec, the Department of Justice adopted a formal *Policy on Legislative Bijuralism,* which recognizes that:

> [it] is imperative that the four Canadian legal audiences...may, on the one hand, read federal statutes and regulations in the official language of their choice and, on the other, be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system (civil law or common law) of their province or territory[127].

In 1999, the federal Cabinet replaced its existing directive on the preparation of legislation with a new *Cabinet Directive on Law-Making*, which aims "to ensure that

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[125] See, for example, Macdonald, "Harmonizing", *supra* note 9 at 52 ("The potential for dissonance and the desire for harmonization derive from the very nature of a federal system").
[126] See, generally, D. Duff, *supra* note 12. However, as Duff notes, the *ITA* has often been interpreted without regard to provincial private law, particularly in cases arising in Quebec: *ibid.* at 20-21.
[127] Department of Justice, *Policy on Legislative Bijuralism* (Ottawa, June 1995), appended to Louise Maguire Wellington, "Bijuralism in Canada: Harmonization Methodology and Terminology" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, Second Publication, supra* note 14, booklet 4, 10 at 22.

proposed laws are properly drafted in both official languages and that they respect both the common law and civil law legal systems."[128] In 2001, the *Federal-Civil Law Harmonization Act No. 1*[129] followed through on this commitment to bijural and bilingual drafting by amending several federal statutes that did not adequately address the four Canadian legal audiences.

While the federal government does ultimately intend to assess and review the entire federal statute book, it was clear from the beginning that it would take time to harmonize all seven hundred of Canada's federal statutes with provincial private law.[130] A second, more general strategy was needed to support the harmonization goal.[131] In addition to amending several statutory provisions to reflect the bijural nature of the Canadian legal system, therefore, the *Harmonization Act, No. 1* also added two rules of general application to the federal *Interpretation Act*, which confirm that it is "the provincial law, in relation to property and civil rights...that completes federal legislation when applied in a province, unless otherwise provided by law"[132]. Section 8.1 of the *Interpretation Act* now states:

> Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles, or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles, or concepts in force in the province at the time the enactment is being applied.
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> Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans

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[128] *Cabinet Directive on Law-Making,* Privy Council Office, Government of Canada, available online at: http://www.pco-bcp.gc.ca/default.asp?page=publications&Language=E&doc=legislation/directive_e.htm
[129] S.C. 2001, c. 4 (hereinafter the "*Harmonization Act, No. 1*")
[130] Marie-Noelle Pourbaix, "S-4: A First Harmonization Bill" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism: Second Publication, supra* note 14, booklet 6, 1-12 at 2.
[131] Molot, *supra* note 111 at 1.
[132] *Harmonization Act, No.1, supra* note 129, Preamble. The Preamble also affirms that "the harmonious interaction of federal and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be..."

> une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

Section 8.2 states:

> Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Québec and the common law terminology or meaning is to be adopted in the other provinces.
>
> Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

What is the significance of these new rules of interpretation, which apply to all federal statutes? First, by codifying the constitutional principles applicable to the construction of federal statutory schemes[133], Parliament has affirmed federal-provincial complementarity as the general rule applicable to the interpretation of federal legislation[134], and confirmed that the complementarity principle extends beyond respecting the broad concepts of the "common law" and the "civil law." Section 8.1, for example, clarifies that the common law and the civil law are equally authoritative, but not the only possible sources, of the private law elements of a federal act.[135] In addition, both sections implicitly recognize that provincial rules, principles and concepts may vary between common law provinces, as well as between the common law provinces and Quebec.[136]

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[133] Courts and commentators have noted that s. 8.1 does not create a "new" principle of law: see *9041-6868 Quebec Inc. c. Canada (M.R.N.)* 2005 CAF 334, [2005] A.C.F. No. 1720 (Q.L.) at para. 5. See also Pourbaix, *supra* note 130 at 7.

[134] D. Duff, *supra* note 12 at 47 (section 8.1 "affirms complementarity as the appropriate approach to the interpretation of federal legislation relating to provincial private law, and establishes an ambulatory principle according to which the relevant provincial private law is stipulated to be that "in force in the province...")

[135] Molot, *supra* note 111 at 18.

[136] *Ibid.* at 18. See, in particular, the French version of s. 8.2, which clarifies that the common law meaning to be adopted is that "*compatible avec le système juridique de la province d'application*".

Second, the recent additions to the *Interpretation Act* must be seen to have decreased both the courts' ability to evade the principle of complementarity by focusing on the uniformity principle, and Parliament's ability to evade complementarity through some vague indication of contrary intent. This is because pursuant to section 8.1, there are only two situations in which federal-provincial complementarity will not apply to a federal enactment: first, where it is not "necessary to refer to" provincial rules, principles or concepts in interpreting the federal enactment[137], and second, where it is "otherwise provided by law"[138]. Unless it can be said that it is "unnecessary" to refer to provincial property law rules in interpreting the registered charity provisions, or that Parliament has provided otherwise by law, therefore, it appears that section 149.1 and 248(1) *ITA* must be interpreted by reference to the rules, principles or concepts in force in the province where they are being applied.

Chapter II: "Charity" (*bienfaisance*) as a plural notion: four sources of meaning for the registered charity provisions of the *Income Tax Act*

A. Introduction

Taken together, the statutory language of section 149.1, the constitutional division of authority over charities and the new provisions of the *Interpretation Act* do much to destabilize the currently accepted view that the *ITA*'s conception of charity is uniform, federal common law. In weakening the prevailing view, they implicitly strengthen the opposite one: that there are multiple legal definitions of charity in Canada, which operate to complete the *ITA* registered charity provisions when they are applied in the provinces. The merits of this claim will be examined closely in this section, through the exploration of four possible sources of meaning for the terms *charity* and

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[137] The precise meaning of these two phrases has not yet been judicially determined. The most comprehensive analysis of s. 8.1, to date, has been carried out by Molot. According to Molot, the "necessity" envisaged by s. 8.1 will only arise where federal legislation is being applied within a particular province, and where it expressly or impliedly relies on a *provincial* rule, concept or principle that relates to "property and civil rights". However, Molot argues that a statutory provision must not necessarily contain civil law or common law terminology to engage s. 8.1; the 'necessity to refer to provincial rules, principles or concepts' may be generated by either "an express reference, or by an implicit gap or reference" in the federal act: Molot, *supra* note 111 at 14-16.

[138] With regard to this second condition, Molot argues that the appearance of a "contrary intention", as provided in s.3 (1) of the *Interpretation Act,* is not sufficient to avoid the rule in s. 8.1; there must in fact be a legislative provision to the contrary or "règle de droit opposant": Molot, *supra* note 111 at 18-19.

bienfaisance.[139] As a starting point, however, there seem to be several intuitive reasons to expect that multiple, distinct legal notions of charity would exist in a federal, bijural state.

First, legal concepts of what it means to 'be charitable' or 'do good' are highly sensitive to the values of the societies and legal traditions in which the concepts arise. The words *charity* and *bienfaisance* both mean something absolute in their purest, etymological sense.[140] However, insofar as the words have functioned and continue to function as standards for some form of legal regulation within a given social order, both can be said to be relative terms, which refer to purposes and activities that are "generally regarded as being of special benefit to society".[141] And notions of what activities are particularly beneficial to society, and what causes are worthy of support, change dramatically across cultures and through time. For example, aiding the poor and destitute, which has always been central to the Christian concept of charity, was not a high priority for philanthropists in ancient Rome, who generally viewed persons living in absolute poverty as idle and dishonest.[142] Notions of what activities and purposes have a particular social benefit also generally reflect the competing values and agendas at play within a social context. For example, legal concepts of charity have during certain historical periods been shaped by prevailing views on the "natural right" of heirs to inherit family wealth.[143]

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[139] There may, of course, be others: see, for example, Martin Boodman, *Les libéralités à des fins charitables au Québec et en France* (D. Jur thesis, Université de droit, d'économies et de sciences sociales de Paris (Paris 2), 1980) (Montreal: Corporation Margo, 1980) at 64 ff.

[140] The word "charity" is derived from the ecclesiastical Latin *caritas,* which means 'love in its perfect sense': see Picarda, *supra* note 5 at 3. See also N. Kasirer, "*Agapé*" (2001) 3 R.I.D.C. 575 at 578 (*caritas* expresses "l'amour de l'homme pour son prochain, y compris son ennemi, comme manifestation de l'amour de Dieu"). *Bienfaisance* is a word that was invented in the 17th century to convey the concept of 'doing good'; it has subsequently been defined as "l' inclination à faire du bien aux autres": see *Dictionnaire de l'Académie Française,* 8th ed., (1932-35), available online at : http://colet.uchicago.edu/cgi-bin/dico1look.pl?strippedhw=bienfaisance&dicoid=ACAD1932

[141] *Vancouver Society, supra* note 25 at para. 95.

[142] See A.R. Hands, *Charities and Social Aid in Greece and Rome* (New York: Cornell University Press, 1968) at 63-65. Similarly, aiding the Roman Catholic Church, which represented the pinnacle of charitable giving in medieval France, was neither charitable nor legal in post-Reformation England.

[143] This fear of disinheritance was particularly strong in 17th century England, during which the Lord Chancellor remarked that his role in charity cases was 'to do justice to all, and not to oppress any man for the sake of a charity": *Att.-Ge. V. Lord Gower* (1736), 2 Eq. Cas. Abr. 195, cited in G. Jones, *History of the Law of Charity: 1532-1827* (Cambridge: Cambridge University Press, 1969) at 106.

The second reason one might expect multiple, divergent concepts of charity to exist in a bijural state is that legal concepts of charity generally reflect the *methods* whereby property is transferred for the accomplishment of charitable purposes within a legal tradition or regime. As Professor Rickett explains:

> ...the legal definition of charity becomes a problem only in those legal systems which rely solely, or at the very least primarily, on...the transfer of property subject to a legal obligation. In this case only does the law have to face up to important questions. Should the law be used to enforce a gift for this or that purpose? Should it be permitted for property to be used for an alternative purpose if the original purpose is regarded as non-charitable, or becomes impossible for practical reasons to carry out?....These questions make it vital that the relevant law-makers reach a definition of charity enforceable through a legal process.[144]

Rickett's comments provide a compelling explanation of why the meaning of a term such as *charity* or *bienfaisance* might vary dramatically from one legal tradition to another. Where the designation of an organization or transfer of property as "charitable" imposes significant legal rights or obligations on private persons or the state, the boundaries of the concept will need to be precisely delineated; where the term merely describes a transfer that it is within the rights of a party to effect, a more fluid concept will suffice. The question of the legal definition of charity is, in other words, a question of form begetting substance, and an illustration of "the counterpoint that exists in a legal system between the freedom of content of a legal institution and the remedies by which it is protected."[145]

Based on these fundamental characteristics of the notion of charity, it seems highly unlikely that one, uniform concept of charity would exist throughout the Canadian state. The common law, civil law and provincial statutory traditions regarding charitable giving emerged in different societies and historical periods, each with their own social values and religious mores. In addition, the civil law tradition, for long periods of its

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[144] C.E.F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 Cambridge L.J. 118 at 122.
[145] D. Johnston, *The Roman Law of Trusts* (Oxford: Clarendon Press, 1988) at 221.

history, accomplished the transfer of property to charitable purposes by simply allowing persons to make gifts with non-legal obligations attached.[146] By contrast, the common law, from almost its inception, strictly enforced the obligation of trustees to transfer property to charitable purposes, and granted extensive supervisory powers over such transfers to representatives of the Crown. To test this hypothesis more fully, however, it is necessary to take a closer look at four possible sources of meaning for the registered charity provisions of the *ITA*: the common law of charitable trusts, the customary civil law rules regarding *legs pieux*, the Roman law sources on foundations and gifts, and the various statutes regulating charities in the provinces.

B. The common law of charitable trusts

As the courts have often affirmed, there is no precise or comprehensive common law definition of charity[147]. Rather, a purpose is said to be charitable if it benefits a sufficient section of the community, and if it can be linked by analogy to one of the purposes listed in the preamble to a 17th century English statute, which have subsequently been classified into the four divisions of the relief of poverty, the advancement of education, the advancement of religion and "other purposes beneficial to the community"[148].

While the common law concept of charity often seems to have acquired a quality of universality in Canada through the consistency of its application, it is in fact a highly particular notion, whose meaning is far from self-evident to the common man. In fact, a leading author has commented that the common law and popular meanings of charity are "so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning."[149] How, then, did the common law come to adopt a notion of charity that was so far from popular understandings? The answer, it seems, relates to

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[146] Rickett, *supra* note 144 at 194.
[147] *IRC v. Baddeley* [1955] AC 572.
[148] *Vancouver Society, supra* note 25 at para. 148.
[149] Picarda, *supra* note 5 at 7. As Picarda points out, public opinion is considered irrelevant to the common law meaning of charity.

the particular historical context in which the law of charities developed, and the significant privileges attached to the designation of a charitable trust.

i. Charity as a product of historical circumstance and legal form

During the medieval period, notions of what constituted charitable giving in England do not appear to have differed in any essential respect from those prevailing in Italy or France. In the highly religious, Church-dominated societies of medieval Europe, people generally gave of their wealth in order to secure their personal salvation, and to ensure their families did not suffer the wrath of the Church during their remaining time on earth[150]. The devotion of personal property to "pious causes" through the making of legacies *ad pias causas*, *legs pieux,* or charitable legacies[151] was a matter of religious obligation for anyone under the divine command of the Pope[152]. The English medieval concept of what purposes were of special benefit to society was thus, as on the Continent, essentially a Judeo-Christian one, although testamentary evidence suggests that the English understanding of pious causes encompassed not only "religious" gifts for the saying of masses and repair of churches, but also gifts for the relief of poverty, and the repair of hospitals, bridges and roads.[153]

By the 19th century, however, England had a well-entrenched, unique legal meaning for the word "charity", which was essentially secular, and which had no parallel on the Continent. Why did this divergence occur? While it would be beyond the scope of this paper to summarize the entire history of philanthropy in Europe, it is possible to isolate several factors which contributed to the move from a pan-European, religious

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[150] Jones, *supra* note 143 at 3. As Jones notes, the testator who refused to bequeath wealth to pious causes "might be denied the Eucharist and interred in unconsecrated ground." If he died intestate, the Church gained the right to make the pious distribution for him. For the existence of similar practices in France, see Boodman, *supra* note 139 at 11.

[151] These legacies *ad pias causus* were governed by Roman canon law, administered by the churches, and under the jurisdiction of the ecclesiastical courts: Jones, *supra* note 143 at 5.

[152] In his *Letter of Authorisation for Collectors for Charitable Institutions,* Pope Gregory IX stated that "the day of harvest should be anticipated with works of great mercy, and, for the sake of things eternal, to sow on earth what we should gather in Heaven, the Lord returning it with increased fruit": see *ibid.* at 1.

[153] *Ibid.* at 4. See also *Pemsel, supra* note 4 at 559, where Lord Watson explains the extensive meaning that the words "godly" and "pious" had in 17th century England.

conception of charity to the particular common law notion that prevails in the Commonwealth today.

The first factor that led to the development of a unique, common law concept of charity was the development in England of a distinct scheme of equitable rules and equitable courts, and the emergence within this scheme of the unique institution of the charitable trust[154]. The charitable legacy of the canon law tradition was inherently limited as a method of philanthropic giving in England, as the common law generally prohibited devising land by will.[155] Beginning in the 13th century, therefore, English testators began transferring property to purposes by making *inter vivos* transfers of lands to persons (called *feoffees to uses*), who held the land "to the use" of the testator until his death, and thereafter unto such uses as were set out in his last will.[156] While the "use" had something in common with two civil law concepts that preceded it - the usufruct and the *fideicommissum* - it was a novel concept that recognized for the first time the complete and permanent ownership of land by persons who were obligated to use the land as directed by the *cestui que use.*[157]

Originally, uses were, like most of the civil law instruments for devoting property to purposes, entirely dependent on the good faith of the *feoffee*[158]; had this remained the case, the common law of charity might not have veered so far off the course being followed on the Continent. However, the development of the use in England was paralleled by the growing role of the English Chancellor, and the recognition of the equitable principles he applied as an independent source of law.[159] By the early 15th century, Chancery was an established court, which had begun to hear petitions brought

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[154] As Lord Macnaghten explained in *Pemsel,* the English courts of law were not concerned with charities at all until the enactment of the *Mortmain Act, 1736*: *Pemsel, supra* note 4 at 581.
[155] Jones, *supra* note 143 at 6.
[156] *Ibid.* at 7.
[157] Jill E. Martin, *Hanbury & Martin Modern Equity,* 14th ed. (London: Sweet & Maxwell, 1993) at 8-9.
[158] W.K. Jordan, *Philanthropy in England 1480-1660: A Study of the Changing Pattern of English Social Aspirations* (London: George Allen & Unwin Ltd., 1959) at 109.
[159] The role of the English Chancellor had expanded from the 13th century onward, when it became accepted that the rigid writ system required an independent source of law which could grant relief to plaintiffs who were unable to obtain justice in the common law courts: see, for example, R. Megarry and P. Baker, *Snell's Principles of Equity,* 27th ed. (London: Sweet & Maxwell, 1973) at 7-11.

by individuals to enforce the duties of feofees, and to recognize that holders of uses had an *equitable* interest in the property being held for their use.[160] As the use evolved into the modern charitable trust, the Chancellor continued to retain jurisdiction over these transfers and to protect the equitable interest of the holder of the use. The obligation to transfer property to charitable purposes had been transformed into an enforceable, legal obligation, making it "vital", in Rickett's words, that the tradition develop a definition of charity enforceable through a legal process.[161]

The extensive privileges and protections that were granted to the charitable trust to ensure that philanthropic efforts "were not frustrated by the formalism and rigidity of the common law"[162] only increased the importance of the legal definition of charity within the common law tradition. [163] Many of these privileges arose from the early acceptance that the Crown had a *parens patriae* jurisdiction over charitable trusts, which imposed duties on the Attorney-General and the courts to protect property devoted to charitable purposes. Where a donor's directions are indefinite or ambiguous, therefore, a court may order a scheme to carry out the donor's charitable intention.[164] Where a donor makes a general gift to charity without creating a trust, the Attorney-General has the power to dispose of the charitable gift.[165] And where a settlor has a paramount intention to devote property to charitable purposes, but devotes the property to a particular charitable purpose that becomes impossible or impracticable to carry out, the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[166] Charitable trusts were not bound by any statute of limitation until 1833, and continue to be exempt from the

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[160] Jones, *supra* note 143 at 8-9.
[161] Rickett, *supra* note 144 at 122.
[162] Jones, *supra* note 143 at 59.
[163] The significant protections bestowed on charities by the Crown and the Chancery court also "increased enormously" the number and value of religious and secular charitable trusts created in the 16th century: see Jordan, *supra,* at 111.
[164] Picarda, *supra* note 5 at 360.
[165] *Ibid.* at 552
[166] This rule, known as the *cy-près* rule, is unique to charitable trusts: see *ibid.* at 301.

general rule against perpetuities.[167] All of these privileges reinforced the need for a definition of charity that was ascertainable and enforceable by the courts.

In addition to the unique contribution of the charitable trust, there are a number of specific historical events that can be said to have contributed to the development of the particular common law definition of charity that exists today. One of these events was King Henry VIII's decision to abridge the influence of the Roman Catholic pope in England and declare himself the Supreme Head of the Church of England in 1534.[168] In the ensuing decades of religious strife, the wealth of the Roman Catholic Church was appropriated to the use of the Crown, and the practice of Roman Catholicism was made illegal in England. While gifts of property to "charitable" uses were still treated with favour, gifts supporting illegal, or "superstitious" religious activities were forfeit to the Crown.[169]

The doctrine of superstitious uses, whose effects were gradually attenuated by toleration legislation, was rejected by the House of Lords in 1919[170], and was never recognized as part of the common law in Canada.[171] Nonetheless, the Reformation had at least two lasting effects on the notion of charity that would come to be adopted by the common law tradition. First, it was in the wake of the Reformation that the Crown began to act as the protector of charitable trusts, bringing petitions in the name of the Attorney-General to ensure that Anglican ministers were supported and that the English were instructed in the tenets of the Established Church.[172] Second, the Reformation dissociated the notions of piety and charity that had so long been synonymous descriptors of a charitable gift. [173] Because gifts to the Catholic Church were no longer

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[167] Picarda, *supra* note 5 at 496.
[168] *Act of Supremacy, 1534* (U.K.), 26 Hen. 8 c. 1
[169] See E. B. Bromley, "Contemporary Philanthropy – Is the Legal Concept of Charity any longer Adequate?" in Donovan Waters, ed., *Equity, Fiduciaries and Trusts 1993* (Scarborough: Carswell, 1993) 59 at 62.
[170] *Bourne v. Keane* [1919] A.C. 815 (UKHL)
[171] Donovan Waters, Mark Gillen and Lionel Smith, eds., *Waters' Law of Trusts in Canada,* 3rd ed. (Toronto: Carswell, 2005) at 705
[172] Jones, *supra* note 143 at 34.
[173] *Ibid.*at 15 ("Piety and charity could no longer be to all Englishmen synonymous conceptions.")

viewed by the English state as gifts that were beneficial to society, the canonical concept of a pious cause could no longer function as the standard for the legal definition of charity. A new conception of charity would have to be found.

A second historical event that was to have a determinative impact on the common law meaning of charity was the enactment of the *Charitable Uses Act* or "Statute of Elizabeth" in 1601[174]. By the end of the 16th century, it had become apparent that the mechanisms in place in England to ensure that charitable gifts were in fact devoted to their intended charitable purposes were not succeeding in preventing abuses.[175] During the reign of Queen Elizabeth I, therefore, legislation was enacted that aimed to address these abuses through the establishment of a commission with extensive powers to inquire into and remedy breaches of charitable trusts.[176] The preamble to the Statute of Elizabeth listed the 'good, godly and charitable' uses within the jurisdiction of the commissioners, which have been rendered in their modern form as:

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

The preamble to the Statute of Elizabeth was always meant to serve a limited purpose: the fact that a use was not within the equity of the statute simply meant that the commissioners had no jurisdiction over it and the petitioner had to proceed by simple

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[174] *An Acte to redress the Misemployment of Lands, Goods, and Stocks of Money heretofore given to Charitable Uses,* 43 Elizabeth I c. 4 ["Statute of Elizabeth"]

[175] In the 16th century, there was still no procedure in place for the Crown to protect charitable gifts as the Bishop had done in the ecclesiastical courts, and the Chancery procedure was becoming complex, expensive, and correspondingly unpopular: see Jones, *supra* note 143 at 21.

[176] An initial statute, *An Acte to reforme Deceits and Breaches of Trust, touching Lands given to Charitable Uses,* 39 Elizabeth I c. 6, was re-enacted in 1601 as the Statute of Elizabeth. For a review of the broader social and legislative context within which the Statute of Elizabeth was enacted, see Blake Bromley, "1601 Preamble: the State's Agenda for Charity" (2001) 7 Charity L. & Pr. Rev. 177 [Bromley, "1601 Preamble"]

bill to the Chancellor.[177] The Preamble was also not regarded as an exclusive list of charitable uses; the enumerated uses were, rather, seen as instances of a more general conception of charity as anything that benefited the public.[178] However, despite the limited purpose for which the Preamble was created, it came to be employed by the Chancery courts as an index or chart of charitable uses, even after the statute had become irrelevant.[179] By the 19th century, this long-standing "practice of referring to the Preamble for guidance had...become a rule of law".[180]

A final historical event which can be said to have contributed to the particular, common law concept of charity that exists today was the enactment, in the 18th century, of legislation which prohibited testamentary gifts of land to charity and vested any land so transferred in the testator's heirs. The purpose of the English *Mortmain Act, 1736*[181] was to respond to the growing popular distrust of charities and particularly the Church by stemming the tide of charitable giving and safeguarding family wealth. However, because the judges of the day shared Parliament's sympathies with the interests of wealthy heirs[182], the Mortmain legislation also had the effect of encouraging a very generous judicial interpretation of "charity" in cases involving devises of land, and a much narrower one in cases involving gifts that fell outside the scope of the act. This well-documented judicial bias[183] produced some peculiar results: by the end of the 18th century, for example, a gift to establish a perpetual botanical garden was charitable, while a legacy aimed at raising the "degraded state" of society in Africa was not.[184]

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[177] Thus, religious uses, which had been omitted from the preamble in the charged religious atmosphere of the time were enforced by the Chancellor in the old procedure, provided they were not superstitious: Jones, *supra* note 143 at 33-34 and 56.

[178] Sir Frances Moore, one of the first common law scholars of the law of charity, expressed the view that the Preamble should be generously construed to protect "uses whose endowments could be applied for the public benefit": *ibid.* at 29. See also *Jones v. Williams,* Amb. 651, where "charity" is defined as a "general public use": *ibid.*

[179] When, in the late 17th c., it was accepted that the procedure of bringing informations in the name of the Attorney-General was preferable for all charitable uses, the definitional aspect of the preamble became irrelevant: Jones, *ibid.*

[180] Picarda, *supra* note 5 at 10.

[181] 9 Geo. II c. 36.

[182] Jones, *supra* note 143 at 117.

[183] As Jones notes, there is no reported case of a devise being saved from the *Mortmain Act, 1736,* by a finding that the particular public object was not charitable: *ibid.* at 128.

[184] *Ibid.* at 132, footnote 3.

Because most actions brought under the *Mortmain Act* involved gifts of realty[185], however, the overall effect of the legislation was to broaden the concept of charity embraced by the common law.

ii. Purposes encompassed by the common law meaning of charity

What, then, are the purposes that the common law has come to recognize as having the "generic character of charity" as a result of the particular, historical development of the charitable trust? According to the House of Lords' decision in *Pemsel*[186], which was affirmed by the Supreme Court of Canada in 1999[187], the common law concept of charity has four principal divisions. First, the common law concept of charity includes the relief of poverty. This head, which lies "at the very heart" of the Judeo-Christian understanding of charity[188], is broadly construed and benefits from an exception to the general requirement that a charitable purpose benefit a substantial section of the community. Thus, a gift to relieve the poverty of one's needy relations or employees is charitable, in the same way as a gift to support a public soup kitchen, orphanage or low rent housing facility[189].

Second, the common law concept of charity includes the advancement of education. In Canada, this category is understood to include the improvement of useful branches of human knowledge and the formal training of the mind, as well as "more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end."[190] The second *Pemsel* division is a broad one, which encompasses the provision of prizes and scholarships[191] and the dissemination of research[192], as well as a wide range of extracurricular activities carried out by

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[185] Jones, *supra* note 143 at 128-33.
[186] *Pemsel, supra* note 4.
[187] *Vancouver Society, supra* note 25.
[188] Picarda, *supra* note 5 at 35.
[189] Waters, *supra* note 171 at 689-94.
[190] *Vancouver Society, supra* note 25 at para. 168.
[191] See, for example, *Re Spencer Estate* (1928), 34 OWN 29 (Ont. HC).
[192] *Inc. Council of Law Reporting for England & Wales v. Attorney General* [1972] Ch. 73 (Eng. C.A.) at 102.

universities and colleges[193], and the promotion of various artistic and cultural pursuits[194]. However, instruction that has no discernable structure or is aimed solely at promoting a particular point of view or political orientation is not charitable at common law.[195]

Despite the conspicuous dearth of religious uses listed in the Preamble, "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" is also considered a charitable purpose[196]. The "advancement of religion", which constitutes the third principal division of the common law concept of charity, has expanded gradually over time from the "repair of churches" to include the upkeep of churches and burial sites, the training and support of religious ministers, and missionary activities[197]. However, the common law's understanding of religious charitable purposes is limited somewhat by a historically rooted definition of religion that requires faith in a supreme being, and worship of that supreme being.[198] The advancement of religion category also excludes religious purposes whose beneficial effects are not susceptible of proof, such as intercessory prayer.[199]

Finally, the common law concept of charity includes a residual division of purposes, which was described in *Pemsel* as comprising "purposes beneficial to the community, not falling under any of the preceding heads."[200] This description is deceptively broad, however, as the only purposes which the common law recognizes as falling within this

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[193] A gift for the construction of athletic facilities at a university, for example, is a charitable object: *Re Mariette* [1915] 2 A.C. 284 (Eng. Ch. Div.)
[194] See, for example, *Re Shaw* [1952] 1 Ch. 163 at 171-72 (education includes "the promotion or encouragement of the arts and graces of life which are, after all, perhaps the first and part of the human character")
[195] *Vancouver Society, supra* note 25 at para 171.
[196] *Keren Kayemeth Le Jisroel Ltd. v. I.R.C.* [1931] 2 K.B. 465 (C.A.).
[197] Waters, *supra* note 171 at 704 ff.
[198] For a more detailed review of the common law understanding of religion, see K. Bromley [now Chan], "The Definition of Religion in Charity Law in the Age of Fundamental Human Rights" (2000), 7 Charity L. & Pr. Rev. 39 at 85-91.
[199] *Gilmour v. Coats* [1949] A.C. 426 (UKHL). As Professor Waters notes, the status of *Gilmour v. Coats* in Canada is not entirely clear: Waters, *supra* note 171 at 714.
[200] *Pemsel, supra* note 4 at 583.

division are those whose "nature or quality...conforms to the notion of charity derived from the 1601 Act."[201] As Lord Wilberforce explained in *Scottish Burial Reform*:

> The purposes in question, to be charitable, must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment of the preamble to the statute 43 Eliz. 1, c. 4. The latter requirement does not mean quite what it says; for it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied.[202]

It is not possible to summarize all of the diverse purposes that have been found, throughout the ages, to benefit the public within the intendment of the Statute of Elizabeth. However, some of the major groupings of purposes that fall under this residual division include the provision of public works or services, the protection of lives and property, the preservation of public order, the promotion of health, the preservation of the environment and the care of children.[203] Of course, to be charitable, all of the purposes must benefit the community or a sufficient section of the community.

iii. Characteristics of the common law concept of charity

The four-fold classification of the relief of poverty, the advancement of education, the advancement of religion and "other purposes beneficial to the community" that was established by the House of Lords in *Pemsel* has for many years provided a useful "starting point" for courts faced with determining whether a purpose is charitable at common law. However, as the courts have often noted, the *Pemsel* divisions are merely a "classification of convenience"[204] for the diverse purposes that have been recognized as charitable, not a source of meaning in themselves. The *meaning* of the term charity remains tied to Queen Elizabeth's 17th century statute, and the long line of cases

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[201] Waters, *supra* note 171 at 723.
[202] *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corporation* [1968] A.C. 138 (H.L.)
[203] S.G. Maurice and D.P. Parker, *Tudor on Charities,* 7th ed. (London: Sweet & Maxwell, 1984) at 90-134.
[204] *ibid,* at 154

drawing ever more remote analogies with the purposes set out therein. As even a brief review of this body of cases reveals, the concept of charity that has evolved from the common law method of analogical reasoning is one characterized by its idiosyncrasies, its regional variation, and its exclusive relationship with a single, legal term.

To describe the common law concept of charity as idiosyncratic is to cast a positive light on what have been criticized as the "illogical and even capricious"[205] results of drawing analogies to earlier analogies over a period of 400 years. These illogical results include a number of anomalous exceptions within the common law concept of charity: a gift for the erection of a private memorial inside a place of worship is charitable, for example, while a gift for the erection of a private memorial in a churchyard is not.[206] The seemingly capricious results, as Peter Hemphill has pointed out, include the charitable status of a number of objects - "the production not for private gain of law reports; the encouragement of good domestic servants; bell-ringing on 29 May to commemorate the restoration of the monarchy; the promotion of vegetarianism"[207] – that seem neither connected by a common thread nor reflective of contemporary social needs. In Canada, the idiosyncratic character of the common law concept has been compounded by the infrequency with which the legal meaning of charity has been addressed by the courts. In Ontario, for example, it remains the case that a trust to produce religious materials for use in public elementary schools is charitable[208], even though the use of such materials by a public school would likely violate the *Charter of Rights*[209]. While the law of charity is intended to keep "moving" to conform to new social needs, this principle is not always easily reconciled with the

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[205] *Gilmour v. Coats* [1949] AC 426 at 443, cited in P. C. Hemphill, "The Civil-law Foundation as a Model for the Reform of Charitable Trusts Law", (1990) 64 Aust. LJ 404 at 408.
[206] Waters, *supra* note 171 at 707.
[207] Hemphill, *supra* note 205 at 408.
[208] *Re Anderson Estate* (1943), 4 D.L.R. 268 (Ont. H.C.), reversed on other grounds [1943] OWN 698 (CA)
[209] See, for example, *Zybelberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (C.A.); *Canadian Civil Liberties Assn. v. Ontario (M. of Education)* (1990), 71 O.R. (2d) 341 (C.A.).

empirical way in which it has developed and the self-referential nature of its legal tests[210].

The judicial development of the concept of charity by all varieties and levels of common law courts has also led to regional variations in what charity means throughout the Commonwealth. As a general rule, for example, broadcasting and media communications are not considered to fall within the spirit and intendment of the Statute of Elizabeth. In Canada, however, publishing a non-profit newspaper on subjects relevant to aboriginal peoples has been held to fall within the fourth *Pemsel* head, largely because of the special legal position of aboriginal peoples in Canadian society.[211] Another good example of the regional variation in the meaning of charity relates to the charitable status of sporting activities. In England, it is generally accepted that the promotion of sport is not charitable at common law, unless it is ancillary to another charitable purpose such as the advancement of education.[212] In Canada, however, an Ontario court has held that "the promotion of an amateur athletic sport which involves the pursuit of physical fitness is *prima facie*...within the spirit and intendment of the Statute of Elizabeth."[213] It is arguable, therefore, that at least one important aspect of the English common law definition of charity is no longer part of the common law of Ontario.[214]

Finally, the concept of charity that has evolved under the common law must be characterized as a highly exclusive concept, which is inextricably tied to the term that describes it. As we have seen, the concept of charity that developed in the Chancery courts did not always have this exclusive character: even after the enactment of the Statute of Elizabeth, a general criteria of 'public benefit' was employed to identify a

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[210] See *Vancouver Society, supra* note 25 at para 177, where Iacobucci J. noted the "obviously circular" nature of the test under the fourth *Pemsel* head, which requires that a purpose benefit the community "in a way the law regards as charitable".
[211] *Native Communications Society of British Columbia v. MNR* [1986] 3 F.C. 471 (C.A.).
[212] This position has been accepted by the courts in New Zealand: see *Laing v. Commissioner of Stamp Duties,* [1948] N.Z.L.R. 154
[213] *Re Laidlaw Foundation* (1984), 13 D.L.R. (4th) 491 (Ont. Surr. Ct.).
[214] However, the *Laidlaw* court went on to hold that it was no longer necessary to rely on the Statute of Elizabeth in determining whether a given purpose was charitable: see below at 77.

charitable use[215]. However, in an 1805 decision that has been followed ever since, the common law meaning of charity was decisively affixed to the Preamble, and just as decisively severed off from the parallel notions of benevolence and liberality that were part of the broader understanding of charity embraced by the civil law[216].

Morice v. Bishop of Durham, which addressed the question of whether objects of benevolence and liberality could be the objects of a valid charitable trust, marked a pivotal point in the evolution of the common law concept of charity. The case arose, typically, when the next-of-kin of a wealthy testatrix challenged her bequest of all of her personal property to "such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve." Counsel for the testatrix argued that her intention must be considered the same, whether expressed by the term "charitable", "benevolent", or "liberality", and that "upon the authorities almost everything, from which the public derive benefit, may be considered a charity."[217] The next-of-kin, for their part, relied on the work of Roman legal scholars and English theologians to highlight the various species of liberality which could not be considered charity "in any sense of the word"[218]. In finding for the next-of-kin, both the Master of the Rolls and Lord Chancellor Eldon held that the term charity was not synonymous with either benevolence or liberality, and fixed its meaning firmly to these objects set out in the Preamble. Grant M. R. asked:

> Then is this is a trust for a charity? 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 by the Court. Here its signification is derived chiefly from the Statute of Elizabeth. Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment..."[219]

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[215] Jones, *supra* note 143 at 27.
[216] *Morice v. Durham,* 9 Ves. 399 (Ch. 1804); aff'd in 10 Ves. 522 (Ch. 1805)
[217] *Morice v. Durham,* 10 Ves. 522 (Ch. 1805) at 523.
[218] *Ibid.* at 529-30.
[219] *Morice v. Durham,* 9 Ves. 399 (Ch. 1804) at 400, per Grant M.R.

Significantly, the decision in *Morice* had nothing to do with the intrinsic meaning of the word charitable, but was based on a perceived need to establish ascertainable principles upon which the Crown and Court could carry out their duties to reform and administer charitable trusts[220]. This rationale provides us with a potential common law "definition" of a charitable purpose: it is one that "falls within the scope of those purposes which the courts consider sufficiently in the public interest to be upheld and enforced at the suit of the Attorney General". [221]

The decision in *Morice* may have been motivated by a prevailing judicial bias against the disinheritance of natural heirs, or by a suspicion that objects of liberality might indeed include 'the giving of liquor for the sake of popularity' as alleged by the next-of-kin. Regardless of its intended scope, however, *Morice* was soon accepted as authority "that there could be *no* synonym for 'charitable' and no substitute for the Preamble as the source of the definition of legal charity."[222] As the years went by, the effects of this view came to be felt, as gifts for philanthropic, benevolent[223], public, and even pious purposes were held to fall outside the common law definition of charity, and thus invalidated on grounds of uncertainty.[224] The word *charitable* had, at common law, become a technical and exclusive legal term.

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[220] *Morice v. Durham,* 10 Ves. 522 (Ch. 1805) at 539, per Eldon L.C. ("As it is a maxim that the execution of a [charitable] trust shall be under the control of the Court, it must be of such a nature that it can be under that control ...then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration nor direct a due administration...Looking back at the history of the Law upon this subject...a case has not been yet decided, in which the Court has executed a charitable purpose; or devotes the property to purposes of charity in general.")

[221] Austin Wakeman Scott, "Trusts for Charitable and Benevolent Purposes" (1945) 58 Harvard L.Rev. 548 at 550.

[222] Jones, *supra* note 143 at 126.

[223] See, for example, *Att-Gen for New Zealand v. Brown* [1917] A.C. 393; *Chichester Diocesan Fund and Board of Finance v. Simpson* [1944] A.C. 341.

[224] Similary, gifts for utilitarian purposes, for hospitality, for good and worthy objects and for missionary purposes have been held void by common law courts: see Picarda, *supra* note 5 at 221.

C. The customary civil law rules regarding *legs pieux*

i. The starting point – article 869 CCLC and the *ancien droit*

The common law of charitable purpose trusts, which was born in the Chancery courts of Reformation England and confirmed as the suppletive law for Britain's charitable tax exemptions in 1891, constitutes one, well-established source of meaning for the registered charity provisions of the *ITA*. As a detailed body of private law with a well-recorded history, it is a source that has historically added structure and definitional content to the indeterminate provisions of section 149.1. However, as the Chief Justice of Canada confirmed at the turn of the last century, the common law of charitable purpose trusts is also a private law source that has no application in at least one Canadian province, the civil or mixed law jurisdiction of Quebec.[225] It is logical to begin in Quebec, therefore, where the meaning of charity has "nothing to do with technical charities under the English law and the statute of Elizabeth"[226], in exploring whether other sources of meaning might exist for the term "charitable" (*bienfaisance*) in the *ITA*.

The private law of Quebec is based on the civil law tradition that was established by the French Crown in the colony of New France in 1663[227], and continued by the British Crown for matters of "property and civil rights" by virtue of the *Quebec Act* of 1774.[228] Since 1866, this civil law tradition has found its chief expression in two, successive Civil Codes[229], the first of which was explicitly modeled on the general plan, if not the

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[225] See *Ross v. Ross* (1894), 25 S.C.R. 307, per Strong C.J.C.
[226] *Ibid.* at 330-331.
[227] Pursuant to a royal edict of King Louis XIV, the private law of New France was established as that set out in the *Coutume de Paris,* the body of customary law recorded in writing in 1580, and governing the jurisdiction of Paris: see John E.C. Brierley and Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery Publications, 1993) at 7. This body of law was supplemented by royal ordinances, ordinances of Canadian administrative authorities, and judgments of the local courts: see F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Toronto: Butterworth & Co., 1980) at 38
[228] *An Act for making more effectual Provision for the Government of the Province of Quebec in North America,* (U.K.) 14 Geo. III, c. 83.
[229] See the *Civil Code of Lower Canada* of 1866 ["CCLC"] and the *Civil Code of Québec,* S.Q. 1991, c. 64 ["CCQ"].

substance, of the Napoleonic Code of 1804[230]. Quebec's civilian tradition "differs fundamentally" from that of the common law, both in terms of its basic views on the nature of law and the proper scope of judicial power, and in terms of its more concrete characteristics such as its codified form of expression, its deductive mode of reasoning, and its absence of a doctrine of precedent.[231] A great deal of literature has been written on the unique character of Quebec's private law, and the features that distinguish it from the common law tradition that governs the other, nine Canadian provinces.[232]

For present purposes, however, it is sufficient to note two features of Quebec's civil law tradition that are fundamentally incompatible with the common law of charitable trusts. First, no distinct system of equitable rules or of equitable courts ever developed in the civil law tradition of France or in New France.[233] Thus, the whole institutional framework within which the Chancery courts of England were able to protect the interests of the beneficiaries of a trust, and were eventually recognized as the *parens patriae* of charities, was never instituted or replicated in the province of Quebec.[234] Second, since the abolition of the seigneurial system in Quebec in 1854[235], the institutions and structures of Quebec's civil law theory have been based on a Romanist conception of property, according to which ownership is regarded as indivisible, absolute, and vested in a single individual[236]. This conception of exclusive and indivisible ownership is not compatible with the common law's acceptance of multiple rights of ownership in a single piece of property, or with the division between legal and

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[230] *An Act respecting the Codification of the Laws of Lower Canada relative to Civil matters and Procedure,* Stats. Prov. Can. 1857, c. 43, s. 7 (the CCLC "shall be framed upon the same general plan, and shall contain, as nearly as may be found convenient, the like amount of detail upon each subject as the French [Code].")

[231] C. Valcke, "Quebec Civil Law and Canadian Federalism", (1996) 21 Yale J.I.L. 67 at 73-88.

[232] See, generally, Brierley and Macdonald, *supra* note 227; H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2004); Roderick A. Macdonald, "Understanding Civil Law Scholarship in Quebec" (1985) 23 Osgoode Hall L.J. 573.

[233] Brierley and Macdonald, *ibid.* at 14.

[234] M. Morin, "La compétence *parens patriae* et le droit québécois : un emprunt inutile, un affront à l'histoire" (1990) 13 R. du B. 827. Morin notes that while a Court of Chancery was established in Canada in the years immediately following the British conquest, its existence was short-lived, ending with the enactment of the *Quebec Act* in 1774: *ibid,* at 848-849.

[235] *An Act for the Abolition of Feudal Rights and Duties in Lower Canada,* Stats. Prov. Can. 1854, c. 3, cited in Brierley and Macdonald, *supra* note 227 at 21.

[236] See, for example, *Royal Trust Co. v. Tucker* [1982] 1 S.C.R. 250 at 261.

equitable title that formed the basis of the common law of charitable trusts.[237] While Quebec's civilian tradition has long recognized a form of trust, therefore, it has never been suggested that the entire body of English trust law, with its concept of dual ownership, could be incorporated into Quebec law[238].

Given that the common law of charitable purpose trusts is both inapplicable in and incompatible with the private law tradition of Quebec, where should one look in that province for the meaning of the *ITA* term "charitable" (*bienfaisance*)? The present Code, which would provide the natural starting point for this inquiry,[239] contains only a passing reference to the term, naming a "charitable institution" *(organisme de bienfaisance)* as one destination for the disposal of perishable and found things[240]. However, the concept of a "charitable purpose" (*fin de bienfaisance*) was central to one of the articles contained in the CCQ's predecessor, the CCLC. Article 869 CCLC, which was found in the chapter entitled "On Wills", chapter III of the Title "Of Gifts 'inter vivos' and by will", stated:

> Un testateur peut établir des légataires seulement fiduciaries ou simples ministres pour des fins de bienfaisance ou autres fin permises et dans les limites voulues par les lois; il peut aussi remettre les biens pour les mêmes fins à ses executeurs testamentaires, ou y donner effet comme charge imposé à ses héritiers et légataires.
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> A testator may name legatees who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law; he may also

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[237] Waters, *supra* note 171 at 10-15.

[238] *Royal Trust Co., supra* note 236 at 261.

[239] Brierley and Macdonald, *supra* note 227 at 135 ("Every source of law, and every authority, is today understood first and foremost in relation to its bearing on the Code. Despite its multiple historical, material, and formal sources, Quebec Civil law is seen, from a doctrinal perspective, to be centrally determined by the Civil Code. Whatever their ultimate weight in legal decision making, other sources (including other legislative sources such as statutes) are viewed as vehicles of interpretation, and all interpretive exercises must necessarily begin with the Code.")

[240] Articles 644, 942, and 945 CCQ. Article 945, for example, provides: "The holder of a thing entrusted but forgotten disposes of it by auction sale as in the case of a found thing, or by agreement. He may also give a thing that cannot be sold to a charitable institution or, if that is not possible, dispose of it as he sees it." (*Le détenteur du bien confié mais oublié dispose du bien soit aux enchères comme s'il agissait d'un bien trouvé, soit de gré à gré. Il peut aussi donner à un organisme de bienfaisance le bien qui ne peut être vendu et, s'il ne peut être donné, il en dispose à son gré.*)

> deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees.

Might article 869 CCLC provide an entry point into the current meaning of the term "charitable" (*bienfaisance*) in Quebec?

In order to generate at least a tentative answer to this question, it is necessary to examine briefly the provisions that replaced article 869 CCLC in the re-codification of Quebec's private law in 1994.[241] The new Civil Code of Québec contains no article precisely parallel to article 869 CCLC. Rather, the devotion of property to purposes is now regulated principally by a series of articles on "patrimonies by appropriation", located within Title Six of Book Four. Title Six, which introduces the concepts of the foundation[242] and the trust, as well as setting down the details of their administration and termination, is likely to serve in future as the primary legal framework for gratuitous dispositions to charitable purposes in Quebec. However, it is still possible to appropriate property to a purpose by way of a legacy with a charge, or by transferring property to a testamentary executor with an obligation to act.[243] Thus, all of the modes that were available for achieving the devotion of property to charitable purposes under article 869 CCLC continue to be available under the CCQ.

Of all the changes brought about by the recodification process to the law of property in Quebec, the most far-reaching is likely this introduction of a general regime of trusts, based on a concept of trust property as an independent patrimony appropriated to a purpose, in which neither the settlor, trustee nor beneficiary has any real right.[244] No

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[241] John B. Claxton, "Language of the Law of the Trust" (2002) 62 R. du B. 275 at 311 ("...with the reforms of 1994, article 869 CCLC was repealed and articles 1270 and 1283 were substituted. Today the text of the law supporting all charitable gifts for innominate beneficiaries has been commuted to the text of these articles.")

[242] The CCQ defines the foundation, in part, as the result of "an act whereby a person irrevocably appropriates the whole or part of his or her property to the lasting fulfillment of a socially beneficial purpose", and specifies that it may not have as its principal object the making of profit or the operation of an enterprise: see Article 1256 C.C.Q.

[243] John E.C. Brierley, "Certain Patrimonies by Appropriation" in *Reform of the Civil Code,* vol. 1, trans. by J. Daniel Phelan (Quebec: Quebec Bar Association, 1993) 1at 2.

[244] Art. 1261 C.C.Q. There is a great deal of literature that explains the legal framework of the new Quebec trust and assesses its merit as an answer to the longstanding doctrinal debate about who "owned"

longer one, limited and controversial mode of achieving gifts or legacies in Quebec, the trust is now a "general declarative and facilitative institution" of the civil law[245], which results wherever "a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer."[246] Article 1266 CCQ classifies trusts according to the various purposes for which they may be established: personal purposes, purposes of private utility and purposes of social utility. While personal trusts are aimed at securing a benefit for a determinate or determinable person, private trusts and social trusts are constituted for an abstract purpose, and do not name particular individuals as beneficiaries.[247]

It is, in particular, the new social trust that has been described as "a restatement of the idea of article 869 CCLC"[248]. Pursuant to article 1270 CCQ, a social trust is defined as "a trust constituted for a purpose of general interest (*but d'intérêt général*), such as a cultural, educational, philanthropic, religious, or scientific purpose", which does not have the making of profit or the operation of an enterprise as its main object. Like its article 869 CCLC predecessor, a social trust may be perpetual[249], and the ability of its trustees to appoint beneficiaries and determine their respective shares of the trust property is presumed.[250]

There are, admittedly, several significant differences between the language and scope of article 869 CCLC and the social trust regime set out in the CCQ. For one thing, the CCQ uses the new, broad term "purpose of general interest" (*but d'intérêt général*) to

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trust property in Quebec: see, for example, Brierley, "The New Quebec Law of Trusts", *infra* note 252; Brierley, "Certain Patrimonies by Appropriation, *supra* note 243; Rainer Becker, *A Question of Trust – an Analysis and a Comparative Assessment of the new Quebec Trust* (LLM. Thesis, McGill University, 1995) [unpublished].

[245] John B. Claxton, *Studies on the Quebec Law of Trust* (Toronto: Carswell Publishing, 2005) at 102. [Claxton, *Studies*]

[246] Art. 1260 CCQ.

[247] Arts. 1267-1270 CCQ. See also Brierley, "Certain Patrimonies by Appropriation", *supra* note 243 at 12.

[248] *Ibid.* at 13.

[249] Art. 1273 CCQ.

[250] Art. 1282 CCQ.

describe the scope of purposes encompassed by the social trust.[251] The term "charitable" (*bienfaisance*) is conspicuously absent from Title 6, appearing neither as a general descriptor of the social trust nor as one of the examples of a "general interest" purpose set out in article 1270. For another, the CCQ, unlike article 869 CCLC, assigns a prominent role over the administration of social trusts to the courts and public authorities.[252] Nonetheless, as we shall see in chapter three, it is arguable that article 869 CCLC continues to form part of Quebec's unenacted civil law, either because of its continued application to transfers of property constituted other than as a trust, or because the CCLC term "charitable purposes" (*fins de bienfaisance*) and the CCQ term "purpose of general interest" (*but d'intérêt général*) may rely for their meaning on the same legal sources[253]. For this reason, it seems justifiable to take article 869 CCLC as a starting point in deciphering the meaning of "charitable" (*bienfaisance*) in Quebec.

The basic purpose of article 869 CCLC, which was described by the codifiers of the 1866 Code as "a summary of the [ancient] law relating to legacies for pious, charitable, or benevolent purposes"[254], was to affirm the validity of certain legacies made to undefined beneficiaries by allowing testators to confide to another person the authority to direct their property to a charitable or lawful purpose[255]. Pursuant to article 869, this special power of appointment could be exercised in three different ways: "as a trust, by transferring the property to testamentary executors or by a legacy with a charge." [256]

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[251] While early proposals used the terms "purpose of public interest" and "purpose of charity or of general interest", Parliament settled on the broad term "purpose of general interest" to set the bounds of the new institution: see Brierley, "Certain Patrimonies by Appropriation", *supra* note 243 at 13.

[252] Articles 1277, 1287, 1294 and 1298 CCQ. For an overview of the new expanded role accorded to the public authorities, see John E.C. Brierley, "The New Quebec Law of Trusts: the Adaptation of Common Law Thought to Civil Law Concepts" in Glenn, Patrick, ed., *Droit québécois et droit français: communauté, autonomie, concordance* (Cowanswille: Éditions Yvon Blais, 1993) 383 at 388-90.

[253] Claxton, *Studies, supra* note 245 at 10 (the findings of *Valois v. de Boucherville* were "the forerunner" of articles 1270 and 1262 CCQ). Brierley expresses the opinion that article 1270 CCQ was broader in scope than article 869 CCLC, but also seems to suggest that the cases on article 869 might be relevant to its interpretation: Brierley, "Certain Patrimonies by Appropriation", *supra* note 243 at 13. See below at 97-98.

[254] Quebec, Commission for the Codification of the Laws of Lower Canada relating to Civil Matters, 3 Vols., *Fourth and Fifth Reports* (vol. 2) (Quebec: George E. Desbarats, 1865) [Codifiers' *Fifth Report* (1865)] at 181.

[255] John E.C. Brierley, "Powers of Appointment in Quebec Civil Law (First Part)" (1992) 95 R. du N. 131 at 131.

[256] Brierley, "Certain Patrimonies by Appropriation", *supra* note 243 at 2.

However, while article 869 was used frequently throughout the 19th and 20th centuries to accomplish philanthropic goals in Quebec[257], the precise details of the juridical regime it encompassed remained somewhat obscure.[258] In particular, little attention was devoted to the nature of the obligations imposed on the intermediaries, or the remedies available to residuary heirs.[259]

Consistent with its role as a compendium of "meaningful generalities"[260], the CCLC also did not define the term "charitable purposes" (*fins de bienfaisance*) in article 869. Nevertheless, it is possible to draw some speculative conclusions about the nature and function of the designation "charitable" (*bienfaisance*), based on certain features of the codal rule. First, within the context of article 869, the term "charitable" (*bienfaisance*) did not function as an exclusive category; rather, a testator was permitted to deliver property to legatees or executors for "charitable or other lawful purposes" (*fins de bienfaisance ou autres fins permises*), within the limits permitted by law. It seems reasonable to assume that one effect of the fact that a testator did not have to establish a "charitable" purpose to bring herself within the scope of article 869 was that the particular meaning of the term "charitable" (*bienfaisance*) was rarely a contentious issue. An examination of the judicial decisions applying article 869 shows that this was in fact the case. The courts seldom entered into discussion of whether a testator's purposes were charitable, taking it for granted that any purpose broadly in the public interest was either "charitable or otherwise lawful" within the meaning of article 869.[261]

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[257] *Ibid.*

[258] M. Cantin Cumyn, "L'origine de la fiducie québécoise" in *Mélanges Paul-André Crépeau* (Cowansville, Qc.: Yvon Blais, 1997) at 203 ("S'il y a concordance des sources coutumières pour admettre la validité des legs pieux et de bienfaisance, leur régime juridique est le plus souvent laissé dans l'ombre."). See also M. Boodman, *"Fleury v. Trust Général du Canada"* (1981) 9 E.T.R. 248 at 248, noting that the laws governing charitable liberalities in Quebec have only "infrequently" been the object of judicial scrutiny.

[259] For example, Hervé Roch devoted only one paragraph of his treatise on chapter III of the CCLC to these questions, and his conclusion was equivocal: see H. Roch, *Traité de Droit Civil en Québec,* vol. 5 (Montreal: Wilson et Lafleur, 1953) at 388. See also Cantin Cumyn, *supra* note 258 at 203.

[260] John E.C. Brierley, "The Renewal of Quebec's Distinct Legal Culture: the new *Civil Code of Québec*" (1992), 42 U.T.L.J. 484 at 492. See also Valcke, *supra* note 231 at 80.

[261] The early cases tended to focus on whether legacies were "permitted by law", particularly if the institution to be benefited did not yet exist. The specific meaning of the term "charitable" (*bienfaisance*) was rarely discussed. See, for example, *Freligh v. Seymour* [1855] 5 L.C.R. 492 and *Abbott v. Fraser*

A second noteworthy feature of article 869 relates to the different French terminology used to express the concept of charity in the CCLC and in the accompanying codifiers' *Report*. As we have seen, article 869 employed the term "charitable" (*bienfaisance*) to express the primary category of purposes to which testators could devote their property. However, in their comments which accompanied the draft version of article 869, the codifiers equated the English term "charitable" with the French term "*charité*", and the French term "*bienfaisance*" with the English term "benevolent".[262]. While it may not be possible to draw any definitive conclusions from this linguistic discrepancy, it does seem to suggest that unlike in the common law tradition, the *ancien droit*'s understanding of what purposes and activities were of special benefit to society was not definitively tied to a single word.

Finally, it is significant that article 869 CCLC provided no mechanism for the supervision of charitable legacies by either the courts or a representative of the Crown. Charitable legacies were not always without oversight in Quebec: under the ancient law, high legal functionaries known as the *procureurs du roi* represented before the courts uncertain persons, such as the poor, whose interests would otherwise not have been protected[263]. However, unlike the superior courts of the common law provinces, the Superior Court of Quebec was never vested with the *parens patriae* jurisdiction of the Court of Chancery in England, and the Attorney-General of Quebec no longer plays the supervisory role of the *procureur du roi.*[264] Article 869 charitable legacies were therefore not subject to any degree of administrative control, either at the time of their creation or during their operation.[265]

[1874] 20 L.C.J. 197, where the court concluded without reasons that a bequest for a public library etc. was "a disposition for a lawful purpose" within the meaning of article 869 CCLC.

[262] Codifiers' *Fifth Report* (1865), *supra* note 254 at 181.

[263] *Ibid,* at 181

[264] Morin, *supra* note 234 at 864. See also *Valois v. de Boucherville* [1929] S.C.R. 234 at 242 and *Ross, supra* note at 225, per Fournier J. ("La 34 Geo. 3, tout en conférant à la cour du Banc du Roi remplacée par la cour Supérieure, la juridiction de la Prévoté de Paris, a cependant déclaré qu'aucun pouvoir législatif possédé par aucune cour avant la Conquête n'était transféré à la Cour du Banc du Roi.")

[265] Brierley and Macdonald, *supra* note 227 at 371. See also John E.C. Brierley, "The New Quebec Law of Trusts: the Adaptation of Common Law Thought to Civil Law Concepts" in Glenn, Patrick, ed., *Droit québécois et droit français: communauté, autonomie, concordance* (Cowanswille: Éditions Yvon Blais, 1993) 383 at 390 (the existence of "an unenforceable trust for public charitable purposes" is an anomaly of Quebec law).

The codifiers were not unaware of the problems arising from the absence of oversight over charitable legacies. In their *Report,* they noted that in certain cases, charitable legacies, "although perfectly lawful, might fail of their effect because according to the technicalities of the will there might be no one capable of exercising the right".[266] Quebec courts also struggled with the implications of their lack of administrative powers: in fact, a series of decisions rendered in the early 20th century suggested strongly that, despite the clear wording of article 869, the rule of the *ancien droit* permitting bequests to uncertain charitable objects no longer applied in Quebec.[267] However, despite the codifiers' recommendation that the public authorities consider re-establishing the functions formerly filled by the *procureur du roi*[268], no legislative enactment ever reinstituted administrative control over charitable legacies in Quebec. In *Valois v. de Boucherville,* the Supreme Court of Canada confirmed that while a bequest "to relieve the sufferings of humanity" was lawful under article 869, the legatee had only a moral obligation to carry out the terms of the bequest.[269]

Based on the above-noted features of article 869 CCLC, one might venture the following description of the nature and function of the term "charitable" (*bienfaisance*) under the CCLC: it was a non-exclusive descriptor of a set of purposes to which

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[266] *Codifiers' Fifth Report* (1865), *supra* note 254 at 181.

[267] See, for example, *Cinq-Mars v. Atkinson* (1915) 24 R.J.Q. 534, in which the court, following the *Ross* decision, struck down a testamentary direction that property be distributed, at the executor's discretion, to "oeuvres de charité" in part because "nos tribunaux n'ont pas le pouvoir ni le devoir de chercher les personnes qui pourraient être appelées à recueillir les sommes qui ne sont léguées à personne en particulier."[267] As Pelletier J. noted, an executor could even conclude that the most worthy act of charity would be to keep the money himself, and no one would have a remedy. However, the Supreme Court of Canada rejected this *ratio* in *Valois*: *Valois, supra* note 264 at 257.

[268] Following their comments on the absence of supervision over charitable legacies, the codifiers made the following recommendation for the consideration of the public authorities: "it would perhaps be important to re-establish in certain respects, for this purpose, the functions formerly filled by the *procureur du roi,* either by making it the duty of a person specially appointed or of the ordinary law officers to watch over and take action for the protection of such interests, or even by making it incumbent upon the courts to order that the case, when justice requires it, shall be communicated to such functionaries. Under the law of England the Court of Chancery and its judges exercise similar protective powers.": *Codifiers' Fifth Report* (1865), *supra* note 254 at 181

[269] *Valois, supra* note 264. In *Valois,* the testatrix had specified in her will that the fiduciary legatee should only be accountable to his conscience for the accomplishment of his charge"; the Court held that this clause was valid under the CCLC. Where such a clause did not exist, it seem that the heirs of the testatrix would have a right to demand that the legatee carry out his charge, or return the objects of the legacy to the succession.: see Roch, *supra* note 259 at 388.

property could be transferred, but which were subject to very limited legal protection. However, in order to get a better sense of the concept of charity that was incorporated into article 869, it is necessary to take a closer look at "the law relating to legacies for pious, charitable, or benevolent purposes" which was already in force in Lower Canada at the time the CCLC was enacted, and was therefore reduced to codal form by the codifiers in accordance with their legislative mandate.[270] This law, in basic terms, was "l'ancien droit en matière de charité"[271], which was made up, among other things, of the Custom of Paris and the commentaries devoted to its interpretation, the royal ordinances of the French Crown, and the Roman law sources that were already an integral part of the legal tradition of France at the time of reception.[272]

ii. *Legs pieux* in Roman and French law

What, then, was the content of the ancient law relating to legacies for pious, charitable, or benevolent purposes to which the codifiers referred? In the leading case on article 869, *Valois v. de Boucherville,* the Supreme Court of Canada relied on French scholarship from both before and after the British conquest of New France to link article 869 to the ancient rule that bequests left in furtherance of certain pious and charitable works were valid, despite the fact that they were made to uncertain persons[273]. This rule of exception in favour of *legs pieux* was summarized by the French scholar Planiol, in a passage adopted by the Court:

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[270] The mandate of commissioners was to reduce into one Code those Laws of Lower Canada that were currently in force, and of a general and permanent nature: see *An Act respecting the Codification of the Laws of Lower Canada relative to Civil matters and Procedure,* Stats. Prov. Can. 1857, c. 43, ss. 4 and 6. See also Brierley and Macdonald, *supra* note 227 at 26-30.

[271] *Valois, supra* note 264 at 246 ("Les Commissaires ont voulu, par cet article, introduire dans le code la loi qui jusque-là régissait les legs pour des objets pieux, de charité ou de bienfaisance. C'est donc l'ancien droit en matière de charité....que l'article 869 CC reproduit.")

[272] Brierley and Macdonald, *supra* note 227 at 9 ("even though Roman law, as such, is nowhere explicitly said to constitute a formal source of Quebec Civil Law, it was, at the time critical to New France, already a part of its legal tradition through the doctrinal and judicial activity of the previous centuries").

[273] *Valois, supra* note 264 at 263 ("L'exposé que nous venons de faire de la doctrine reconnue par l'ancien droit français antérieurement au code de la province de Québec est utile pour nous aider à comprendre le sens de l'article 869 C.C. Le but de cet article est évidemment de permettre des legs à des personnes indéterminées pour des fins qui ne sont pas précisées autrement que par l'indication qu'elles seront affectées à la charité ou à la bienfaisance.")

> 2991. Importance des legs charitables – Depuis l'avènement du christianisme les libéralités au profit des pauvres ont été de tout temps très nombreuses. Dès le Ve siècle, les empereurs Valentinien et Marcien décidaient qu'un legs fait aux pauvres était valable (C 1 3.23) et il est probable que depuis longtemps des libéralités charitables étaient faites aux églises, à qui Constantin avait permis d'adresser des legs par une constitution de l'an 321. Au moyen age, un testateur n'aurait pas voulu écrire ses dernières volontés sans y insérer quelques legs pieux, destinés à de bonnes œuvres et au soulagement des pauvres. De nos jours encore rien n'est plus fréquent que de voir des libéralités souvent considérables faites aux pauvres par testament.
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> 2992. Capacité de recevoir reconnue aux pauvres – Les pauvres sont-ils des personnes incertaines ? Le droit romain les considérait certainement comme tels, et s'il a permis de leur faire des legs, c'est en introduisant en leur faveur une véritable exception inspirée par l'influence chrétienne. Mais, comme on l'a vu plus haut...la prohibition ancienne de gratifier des personnes incertaines, au sens romain du mot, n'existe plus en droit français ; il ne subsiste qu'un obstacle de fait tenant à l'indétermination des bénéficiaires...[274]

According to *Valois,* it is this body of law that constitutes the primary source of meaning for the term "charitable" (*bienfaisance*) within the CCLC.

As Planiol's work explains, the rule of the *ancien droit* permitting pious bequests to uncertain charitable objects originated as a decreed exception to the rules of Roman private law, which sought to incorporate into Roman society the doctrines of the Christian religion that had been embraced by Emperor Constantine in the 4th century A.D. Because Roman law considered that bequests, by their very nature, flowed from the testator's feeling of goodwill towards the legatee, bequests to uncertain persons, who could not possibly have merited the affection of the testator, were presumed to be capricious and were considered null and void.[275] However, following the adoption of Christianity, successive Emperors qualified this rule by decreeing that such bequests to uncertain persons were valid where there was a plausible motive for the bequest.[276] Bequests to the poor, the sick, and captives were considered to fall within this exception, as they flowed from a plausible motive, the motive of charity.[277]

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[274] *Valois, supra* note 264 at 261-62.
[275] M. Bugnet, ed., *Oeuvres de Pothier,* t. 8, 3d ed. (Paris: Marchal et Billard, 1890) at 251.
[276] *Ibid.*
[277] *Ibid.* at 251.

Accordingly, whenever a testator bequeathed property to a class of uncertain persons such as "the poor", his estate passed to the person appointed by him, or alternatively a local bishop, steward, or hospital, to be employed for the benefit of the needy persons referred to in his will.[278]

While the rule permitting pious bequests to uncertain objects began as a decree of the Roman Emperors, however, it was not long before it came to fall under the aegis of the Catholic Church.[279] By the 12th century, ancient testamentary practices had re-emerged in Western Europe, spurred by the revival of Roman law and the Church's practice of "encouraging" charitable gifts through spiritual coercion. [280] While civil courts generally dealt with testamentary dispositions on the Continent, *legs pieux* fell under the jurisdiction of the canonical courts[281]. As creatures of canon law, these charitable bequests could be exempted from many of the strictures of the civil law. It is perhaps not surprising, therefore, to find l*egs pieux* described by a leading French scholar as "non seulement autorisé...mais les plus favorables de toutes les dispositions."[282]

The legal advantages which attached to the making of a pious bequest in medieval France were manifold and varied. *Legs pieux* could be given by persons who otherwise lacked the capacity to give because of a statutory prohibition, such as women with children.[283] They could be given to religious institutions that were otherwise

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[278] Cod. 1.3.28 ; Cod. 1.3.37

[279] J. Brundage, *Medieval Canon Law* (London : Longman Group, 1995) at 71.

[280] After the fall of the Roman Empire, the practice of making charitable bequests (and other testamentary dispositions) declined markedly, as the Germanic peoples who conquered Western Europe preferred to transmit property by intestate succession. However, testamentary practices re-emerged in the 12th century, encouraged by the revival of Roman law and the increasingly pervasive influence of the Church: see *ibid.* at 88. See also Boodman, *supra* note 139 at 11 ("c'est l'Église par le biais de sa pratique de « charité forcée » qui a ressuscité le testament en droit germanique pour les besoins de ses fondations charitables").

[281] On the Continent, jurisdiction over testamentary dispositions was split between the Church and civil courts: the former controlled matters involving testamentary formalities and legacies for pious causes, while the latter dealt with most other disputes involving testamentary dispositions: Brundage, *ibid.* at 89.

[282] J.-M. Ricard, *Traité des donations entrevifs et testamentaires,* t. 1, éd rév., (Paris: Guignard, 1701) at 135.

[283] C. de Ferrière, *Dictionnaire de droit et de pratique: contenant l'explication des termes de droit, d'ordonnances, de coutumes et de pratique; avec les jurisdictions de France* (Toulouse: Dupleix, 1779) at 132

considered incapable of receiving bequests because of their vows of poverty[284]. *Legs pieux* also benefited from an exception to the general rule that the interest and other revenues deriving from property held by the executor were due only from the time they were demanded by a legatee – in the case of legacies to pious uses, the executor was accountable for any revenues from the time set by the testator or an appropriate time.[285] Where a will was declared invalid (because, for example, the instituted heir refused to accept his inheritance) a court could order that the will subsisted for the pious legacies only.[286] Perhaps most significantly, *legs pieux* were generally considered exempt from the "Falcidian portion" rule, which appropriated one fourth of every inheritance to the testamentary heir or executor[287].

In medieval France, as in ancient Rome, there were also a number of special rules enabling the administration or variation of *legs pieux*. If a pious bequest was made for the distribution of alms to the "poor" or the "sick" on a particular day, but no particular house or hospital was named, the officers of justice would be required to direct the distribution at the request of the *procureurs du roi*.[288] If a pious bequest was directed to a purpose which was no longer necessary or useful, it could be redirected to other related works.[289] If a testator failed to name a testamentary executor, and the integrity of the testamentary heir could not be trusted, "the ordinary judge would give directions [as to how the pious bequest was to be applied], at the instance of the persons whose duty it should be to see these legacies duly applied."[290] As we have seen, however, these *cy-près*-like powers exercised by the canonical courts in France did not survive the reorganization of the judicial system of New France by the British Crown.[291]

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[284] *Oeuvres de Pothier, supra* note 275 at 265.
[285] Jean Domat, *The Civil Law in its Natural Order,* ed. by Luther Cushing, trans. by William Strahan (Colorado: Fred B. Rothman & Co., 1980), vol. 2 at 552.
[286] De Ferrière, *supra* note 283 at 133.
[287] Domat, *supra* note 285 at 585; de Ferrière, *supra* note 283 at 132.
[288] Domat, *ibid.* at 585.
[289] *Ibid.* at 537. The source cited for this rule is the classical jurist Modestinus, who proposed that a legacy left for annual games that were illegal should not revert to the heirs, but be employed to commemorate the deceased in some other lawful manner.
[290] *Ibid.* at 536.
[291] See above at 51.

iii. Purposes encompassed by the canonical understanding of charity

As the foregoing picture of the juridical treatment of *legs pieux* makes clear, the question of what privileges attached to pious gifts was of considerable interest to the doctrinal commentators of the *ancien droit*[292]. However, in marked contrast to the common law's focus on the definition of charity, the question of what purposes or works should be considered sufficiently "pious" or "charitable" to benefit from these privileges does not appear to have been of great concern. Discussions of what purposes were considered to fall within the canonical rule of exception are rare among the major doctrinal writers of the *ancien régime*. The provisions of the Code of Justinian, to which French scholars such as Domat and Ricard refer, speak only of bequests for the poor and the redemption of captives.[293] The Edict of 1749, which placed restrictions on the creation and property-holding capacity of charitable foundations in France, provides only a slightly more detailed indication of what objects were considered pious under the *ancien droit*, listing

> la célébration des messes ou obits, la subsistence d'étudiants pauvres ou de pauvres ecclésiastique ou séculiers, les mariages de pauvres filles, écoles de charité, [et le] soulagement des prisonniers ou incendiés

as examples of pious works within the meaning of that instrument.[294]

What we do know, however, is that the rule permitting pious and charitable bequests to uncertain objects, which was directly correlated to the advent of Christianity in Rome, was based on the premise that such bequests were, effectively, gifts to God.[295] It seems reasonable to assume, therefore, that the concept of charitable or pious purposes underlying the rule to which the Supreme Court of Canada made reference in *Valois* was limited to purposes that glorified God in some direct or indirect way. This was

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[292] Marcel Faribault, *Traité Théorique et Pratique de la Fiducie ou Trust du Droit Civil dans la Province de Québec* (Montréal : Wilson et Lafleur Limitée, 1936) at 44.
[293] Cod. 1.3.28.
[294] G. de Lapradelle, *Théorie et Pratique des Fondations Perpétuelles* (Paris : V. Girard & E. Brière, 1895) at 67.
[295] *Ibid.* at 53 ("On sait que les dons et les legs pieux jouissaient des faveurs particulières...Or, sur quelle principe reposaient ces faveurs? Sur quelles bases s'appuyaient-elles? Sur celles-ci que les dons et legs pieux étaient censés donnés à Dieu").

certainly the view of Claude de Ferrière, a leading French scholar whose work was well known in the colony of New France[296]:

> ... legs pieux est celui qui est fait *ob piam causam,* c'est-à-dire, à un lieu consacré à Dieu, et destiné aux bonnes œuvres, comme pour une église, un monastère, un hôpital, etc., et qui est fait pour une fin bonne et pieuse. Ainsi, pour qu'un legs soit pieux, il ne suffit pas qu'il soit fait à une personne consacrée à Dieu ; il faut encore que la fin en soit pieuse. [297]

Jean Domat, another leading scholar of the *ancien régime,* echoed this view, writing that the concept of charity underlying the rules on *legs pieux* clearly did "not include all legacies destined for the public good" [298]. Domat even provided a few examples of this principle, stating that a legacy for a public ornament, or "a prize to be given to the person who should excel others in some art or science" would not qualify as a *legs pieux.*[299] The views expressed by these scholars appear to be largely consistent with modern canon law views on pious purposes. As one American text explains, the essential criteria of a pious cause lies in the intention of the donor – was he or she acting "to merit grace or glory with God or in satisfaction for [his or her] own or another's sins"? [300] In accordance with this reasoning, a bequest for a theater or recreational facility, or for a hospital, orphanage or school founded for purely "philanthropic" reasons would not qualify as a pious bequest.[301]

D. The Roman law sources on foundations and gifts

i. A wider reading of article 869 – "le bien, le vrai, le beau"

Based on the Supreme Court of Canada's analysis of article 869 CCLC in *Valois,* it seems fair to conclude that the ancient, canon law doctrine permitting pious bequests to uncertain objects constitutes the clearest customary source of meaning for the term

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[296] Brierley and Macdonald, *supra* note 227 at 9.
[297] de Ferrière, *supra* note 283 at 132. See also Domat, *supra* note 285 at 535 ("the name of legacies to pious causes is properly given only to those legacies which are destined to some work of piety and charity, and which have their motive independent of the consideration which the merit of the legatees might procure them")
[298] Domat, *ibid.* at 535.
[299] *Ibid.*
[300] T. L. Bouscaren, A. Ellis, and F. North, *Canon Law: a Text and Commentary,* 4th ed. (Milwaukee: The Bruce Publishing Company, 1966) at 821
[301] *Ibid.*

"charitable purposes" (*fins de bienfaisance*) under the CCLC. If this canonical rule of exception is indeed the only legal source that was incorporated into article 869 at the time of codification, it may also be fair to conclude that the concept of charity that existed under the CCLC was a Christian concept, with a significantly narrower scope than that of its common law counterpart.

However, there is nothing in the codifiers' *Report,* or in the judicial or doctrinal commentary on article 869, which suggests that the notion of "charitable purposes" (*fins de bienfaisance*) embodied in the CCLC was limited to purposes which brought glory to God. The codifiers themselves described article 869 as encompassing legacies for pious, charitable, and benevolent purposes. In *Valois*, the Supreme Court of Canada affirmed that article 869 should be interpreted as broadly as possible[302], and indicated that the expression *fins de bienfaisance* encompassed a broader set of purposes than would be denoted by the term *charité.*[303] Marcel Faribault, who himself saw no difference between the concepts of *bienfaisance* and *charité,* painted a similarly broad picture of article 869 in his treatise on the Quebec trust, stating:

> La bienfaisance n'étant rien autre chose que la charité, il faut entendre par l'expression «fins de bienfaisance ou autres fins permises » tout d'abord les dispositions en faveur des pauvres; mais on doit y inclure également tout ce qui rattache a la charité et notamment les oeuvres de miséricorde spirituelle et corporelle. On arrive ainsi a toucher le rachat des captifs tant en honneur dans l'ancien droit, la disparition de l'esclavage, l'hospitalisation des malades, des infirmes et des vieillards, l'inhumation des morts, les messes pour le repos des âmes, l'instruction des ignorants.
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> Quant aux autres fins permises, nous croyons, en réponse à l'interrogation posée par la Cour Suprême, que l'on doit comprendre par la des œuvres *ejusdem generis*. S'il est besoin de plus de précision, nous dirons simplement que ces trois-là vont ensemble : le bien, le vrai, le beau. On voit suffisament, sans plus

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[302] *Valois, supra* note 264 at 259.

[303] In responding to the next-of-kin's argument that the proposed interpretation of article 869 would have the effect of permitting any bequest to an uncertain object, Rinfret J stated: "Les legs de Madame Valois sont des legs charitables. Ils sont donc couverts par l'expression « fins de bienfaisance », qui comprend la charité mais qui nous paraît avoir un sens plus étendu » : see *Valois, supra* note 264 at 263. This passage, whose translation in the Dominion Law Reports refers to « fins de bienfaisance » as « benevolent purposes », raises interesting questions about the interpretation of bilingual judgments : see Leckey, *infra* note 369 at 128-29.

> d'explication, comment justifier ainsi, dans une interprétation la plus naturelle qu'il nous paraisse, les dispositions pour les instituts de recherche, les académies littéraires et autres, les musées, l'embellissement des villes, les universités, les missions religieuses, etc.[304]

In fact, the only clear limitation on article 869 that emerges from the judicial and scholarly commentaries is that it applied only to public, rather than private charitable dispositions.[305] Given these indications that the concept of charity contained in article 869 was broader than that underlying the ancient law on *legs pieux*, it seems important to consider whether there might have been *other* "laws relating to legacies for pious, charitable, or benevolent purposes" which were in force in Lower Canada in 1866, and thus incorporated into the CCLC.

Did the body of civil law that was received in the colony of New France contain laws on charitable legacies beyond those relating to *legs pieux*? While the question has never been the subject of a detailed historical analysis, there are good reasons to expect that such an analysis would yield a positive answer. For just as the idea of devoting one's property in perpetuity to purposes beneficial to society did not begin with the advent of Christianity[306], the rules permitting *legs pieux* were not the first or only "laws relating to legacies for pious, charitable and benevolent purposes" to form part of the civil law tradition. In fact, the concept of giving to purposes, or "*fonder*"[307], as it is commonly referred to in France, can be traced back far before the birth of Christ, to the early societies of Ancient Greece and Rome. The history of the civil law charitable foundation is complex, and often dominated by debates about when the modern

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[304] Faribault, *supra* note 292 at 200. See also *Sabatier v. Royal Trust Co.* [1978] C.S. 954, where the pursuit of a "humanitarian work", such as a hospital or foundation, was found to be a charitable purpose within the meaning of article 869.

[305] *Valois, supra* note 264 at 259; Roch, *supra* note 259 at 388. In fact, even this is a matter of some debate. As Brierley points out, at the time *Valois* was decided, the jurisprudence had already admitted the validity of a testamentary trust for a funeral headstone, and the validity of a legacy to pay for the celebration of Masses in memory of a deceased was well established: see Brierley, "Certain patrimonies by appropriation", *supra* note 243, footnote 26 at 23.

[306] Paul Veyne, *Bread and Circuses: historical sociology and political pluralism,* trans. by Brian Pearce (Great Britain, The Penguin Press, 1990) at 31 ("The attitude of charity, though greatly developed by certain religions, was not invented by them. In paganism it coexisted with another theme, that of the civic patrimony".)

[307] De Lapradelle, *supra* note 294 at 8 ("Fonder, c'est assigner un fonds, à perpétuité, à un but").

Continental concept of the foundation as a juridical person devoted to purposes actually came into existence.[308] What is clear, however, is that various "phenomena corresponding to modern foundations"[309], of which the *legs pieux* was arguably only one type, were recognized under both Roman law and the *ancien droit* of France. An analysis of these phenomena and the laws that governed them may provide us with another potential source of meaning for the term "charitable purposes" (*fins de bienfaisance*) in the CCLC.

ii. Gifts to public purposes in Roman law

Ancient Rome, despite being a pre-Christian society, was a society in which the devotion of private wealth for public purposes was common. Wealthy Romans, concerned with securing political friendship and loyalty from the *populus*, made donations during their lifetime to attract the prestige and respect that flowed from the publicity of generous acts to the poor.[310] Upon death, it was common for the wealthy to distribute their property widely, seeking in this way to achieve honour and immortality, and to repay their obligations to a society "in which during a lifetime much was achieved by friendship and patronage."[311] Because of the important role which posthumous remembrance played in Roman philanthropy, Roman donors almost always specified the particular purpose which their money or land was to support.[312]

In the early days of the Roman republic, despite the relatively high levels of philanthropic or beneficent activity, the standard methods of dedicating property to public purposes were all "non-legal" in nature. The conceptual structure of Roman law, which placed great emphasis on privity of relations, precluded the existence of any direct remedy for the breach of dispositions which aimed to benefit third parties or serve abstract purposes.[313] Thus, while Roman citizens could make both legacies and *inter*

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[308] See, for example, de Lapradelle, *supra* note 294.
[309] Hemphill, *supra* note 205 at 409.
[310] Rickett, *supra* note 144 at 131.
[311] *Ibid.* at 133l; Johnston, *supra* note 125 at 5.
[312] D. Johnston, "Munificence and Municipia: Bequests to Towns in Classical Roman Law" (1985) 75 J. Roman Studies 105 at 106.
[313] Johnston, *supra* note 125 at 239.

vivos gifts *sub modo* (with a direction that the property transferred be used in a particular way), there was no legal way of ensuring that this direction would be carried out. Similarly, while the *fideicommissa* allowed a testator to entrust property (*commissum*) to the good faith (*fides*) of the recipient for the benefit of another, this institution was originally "dependent on no legal bond but solely on the decency of those to whom they were entrusted."[314] Testators who wished to devote their property to public or charitable purposes were forced to rely on the honor and good faith of their heirs and legatees to carry out their instructions as to its use.

Over time, however, Roman jurists and statesmen who recognized the importance of having the wishes of donors honored devised ways of ensuring that the obligations of recipients were carried out. In the first century A.D., the Emperor Augustus made *fideicommissa* actionable: consuls, and later a fideicommissary praetor, were empowered to compel trustees to act in accordance with their *fides*.[315] Roman jurists devised ways of enforcing the obligations imposed by modal gifts and legacies, such as allowing donors to reclaim the value of unfulfilled gifts *sub modo*, and allowing testators to take guarantees from legatees for the performance of a *modus*[316].

Roman law also made important contributions to the development of the civil law of charity by gradually expanding the categories of legal persons entitled to receive and administer property at law.[317] In the early Republic, a testator who wished to devote his property perpetually to a public purpose could only do so by bequeathing the property *sub modo* to a natural person, with directions that he pass on both the property, and the directions as to its use, to another before his own death[318]. By the first century BC,

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[314] Johnston, *supra* note 145 at 12.
[315] *Ibid.* at 34.
[316] See Rickett, *supra* note 144 at 134-135 (The *modus* was "the closest that classical Roman law came conceptually to attaching a legal obligation on the recipient of property to use it in a specified manner"); Johnston, *supra* note 145 at 120.
[317] See, generally, P.W. Duff, *Personality in Roman Private Law* (Cambridge: Cambridge University Press, 1938)
[318] De Lapradelle illustrates this technique by describing the will of Theophrastus, who bequeathed his gardens to ten friends to be used for a school of philosophy, with instructions that upon their death the property be left to a younger student, who would in turn appoint ten other students to carry out Theophrastus's purpose: see de Lapradelle, *supra* note 294 at 13.

however, Romans had begun to recognize associations of persons as 'immutable undying persons'. Towns and colleges, and later ecclesiastical establishments and other charitable foundations, came to be regarded as capable of directly receiving gifts and bequests[319].

The legal techniques developed by the Romans to facilitate and enforce the devotion of property to charitable purposes continued to be elaborated and theorized by jurists in pre-Revolutionary France. Thus, the Roman concept of devoting property to a purpose by giving a recipient directions as to its application was carried on by the French device of the *libéralité avec charge*[320], and the Roman actions allowing the taking of guarantees from legatees, and the revocation of gifts with unfulfilled charges continued to be available to French donors. [321] Continental scholars began to further develop the Roman concept of the foundation, conceiving it as a "category of juristic person different from the corporation", which was made up of a mass of assets devoted to a purpose established by the founder.[322] The institution of the testamentary executor was also developed during this time[323]. As Martin Boodman points out, however, the principal, juristic foundations of the civil law regime that came to govern charitable giving in France were put into place by the Roman law.[324] On this basis, it seems reasonable to assume that the Roman law sources relating to legacies for pious,

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[319] A. Schluter, V. Then, & P. Walkenhorst, eds., *Foundations in Europe: Society, Management and Law* (London, Bertelsmann Foundation, 2001) at 6; P.W. Duff, *supra* note 317 at 49, 173

[320] Boodman, *supra* note 139 at 12 ("Pendant le moyen-age, les deux systèmes de droit en France (romain et Germanique) connaissaient les libéralités charitables sous la forme de libéralités avec charge").

[321] Revocation on the grounds of inexecution of charge was a personal action available to donors who, until the end of the 17th century, had to arm themselves with "lettres de chancellerie" to assert a Roman theory: see F. Olivier-Martin, *Histoire de la coutume de la Prévôté et Vicomté de Paris,* vol. 2 (Paris: Leroux, 1930) at 490 and Bouyssou, *infra* note 323 at 34-39.

[322] Hemphill, *supra* note 205 at 410. Thus, in medieval France, testators began to draft wills which purported to create independent and sovereign legal entities, devoted to their chosen endeavour: see de Lapradelle, *supra* note 294 at 50. De Lapradelle describes this as an « acte *sui generis,* en vertu duquel le fondateur, élevé au pouvoir souverain, donne naissance à une personne abstraite, qui est son oeuvre et la dôte. » : de Lapradelle, *supra* note 294 at 8.

[323] M. A. Bouyssou, *Les Libéralités avec charges en droit civil français* (Paris: Librairie du Recueil Sirey, 1947) at 30-31.

[324] Boodman, *supra* note 139 at 9 (« En comparaison avec le droit romain, le droit français ne s'est guère développé dans le domaine des moyens techniques de disposer à des fins charitables. Cette mission avait été accomplie par les juriconsultes romains. »).

charitable and benevolent purposes were an integral part of the French legal tradition that was received in the colony of New France in 1763.

iii. Purposes encompassed by the Roman understanding of charity

As even a brief review of the phenomena that preceded the modern charitable foundation makes clear, Roman law recognized a whole variety of laws and customs that enabled the making and enforcement of legacies for pious, charitable, or benevolent purposes. To the extent that these laws were incorporated into article 869 CCLC, they raise the prospect that yet other sources might contribute to the meaning of "charitable purposes" (*fins de bienfaisance*) in Quebec. The question that remains, therefore, is what type of purposes were recognized as falling within the ambit of the modal legacies, *fideicommissa,* and foundations devoted to the benefit of society in ancient Rome and pre-Revolutionary France.

The question is a difficult one, which is complicated by the length of the historical period over which these laws developed, and the incomplete and uneven quality of the evidence that remains from the classical period. [325] Two issues in particular must be considered. First, because it appears that property which was the object of a modal legacy, *fideicommissa,* or foundation could, as matter of law, be devoted to any public or private purpose, the question of whether any particular concept of charity underlay these legal institutions must be considered primarily as a question of historical fact, rather than a question of law. Second, because of the decisive impact which the ascendance of Christianity had on attitudes towards charity and patterns of giving in the late Roman Empire and in medieval France[326], any inquiry into what purposes were

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[325] As A.R. Hands notes in his comprehensive study of charitable giving in Greece and Rome, the evidence which remains from the classical period is incomplete and geographically uneven, and documents only the practices of the wealthy upper classes: Hands, *supra* note 142 at 15. Hands also notes that it is impossible to draw a clear distinction between "the private actions and public policy of the upper class", as private gifts were often tied to political positions or called forth by the state: *ibid.* at 15.

[326] See P.W. Duff, *supra* note 317 at 173 (following the acceptance of Christianity by Emperor Constantine in 321 A.D., "the duty of a charitable Christian – and before long the bulk of charitable people were Christians – was clear and unequivocal. He could and should give his property to the

considered of special benefit to society in relation to these legal institutions must be taken from either a pre-Christian or post-Christian perspective. For present purposes, it will be most instructive to adopt the former perspective, and to explore the very different attitudes towards giving and the public good which underpinned the early phenomena corresponding to the modern foundation in ancient Rome.

As the inscriptions that have survived from the classical period attest, the wealthy philanthropists of ancient Rome devoted property to a wide variety of public purposes, "erecting monuments and public buildings, ransoming captives, providing dowries and other forms of assistance to the poor, and sustaining festivals, banquets, votive offerings and religious sacrifices."[327] In fact, gift giving was an integral part of Roman society, which produced some level of benefit for every class of the population[328]. However, although the early Romans' acts of generosity might loosely be described as charitable, they were not, strictly speaking, acts of "charity" at all. Rather, until the Christian ethic became part of the culture of Rome, gifts by individuals to the community were understood as acts of benefaction or *euergetism*[329], a concept which differed from the Christian concept of charity "in ideology, in beneficiaries and in agents, in the motivations of agents and in their behaviour"[330]. As David Veyne explains:

> The *euergetai* gave what they gave in order to acquire social standing, or out of patriotism and a sense of civic responsibility – in any case, from interest in the things of this world. Bequests to the Church, however, were intended to redeem the sins of the testator at the expense of the heirs: they were made for the sake of the other world.[331]

To the extent that the diverse objects of Roman *euergetism* were linked by some unifying principle, the principle appears to have been one of benefit to the

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Church, and either trust the Church authorities to spend it as they thought best, or ask that it might be devoted to the particular causes he had at heart").

[327] Schluter, Then & Walkenhorst, *supra* note 319 at 4.

[328] *Ibid.* at 5.

[329] Veyne, *supra* note 306 at 10 (The term *euergetism* was created by French historians from the wording of Hellenistic decrees which honoured people who, through money or public activity, 'did good to the city' (*euergetein ten polin*) Euergetism means "private liberality for the community benefit").

[330] *Ibid.* at 19.

[331] *Ibid.* at 27-28.

community[332] or public utility, which formed "the criterion for the acceptance of a bequest by a town."[333]

To be sure, many of the purposes to which private property was devoted in ancient Rome benefited the community in ways that would also have conformed to the social agenda of Queen Elizabeth I, or even the pious standards of the Catholic Church. Roman testators devoted private wealth to supporting higher education, and to improving public health and hygiene in crowded Roman cities, funding projects such as the cleansing of public latrines and sewage systems, and the maintenance of municipal water supplies.[334] Others left funds to cities for the construction of essential public works, such as bridges, markets, temples and public baths.[335] The evidence also documents a large number of private gifts of basic commodities, which were distributed to the *populus* on popular religious occasions or other special days.[336]

However, the evidence on Roman giving in the pre-Christian period also confirms several distinctions between the Roman understanding of *euergetism* and the later understandings of charity embraced by the canonical and common law courts. First, in addition to making practical gifts which contributed to the material or intellectual well-being of the *populus*, Roman testators commonly left money for games, sporting events or annual dinners which commemorated their own generosity or honoured the date of their birth.[337] The legacy left by Lucius Caecilius Optatus to the municipality of Barcino in the 2nd century AD is not untypical in this regard:

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[332] Hubert Picarda, "Charity in Roman Law: Roots and Parallels" (1993) 1 Charity L. & Pr. Rev. 9 at 13.
[333] Thus, a municipal authority could refuse to accept a legacy for a spectacle that it found immoral or otherwise subject to objection on the basis that it had no public utility: Johnston, "Munificence and Municipia", *supra* note 312 at 114-115. The test of public utility remains in use in parts of Europe: while Italy places no legislative restrictions on the purposes a foundation may pursue, Italian jurisprudence and doctrine require that foundations pursue "purposes of social or public utility.": Hemphill, *supra* note 205 at 416.
[334] Hands, *supra* note 142 at 144-45.
[335] Schluter, *supra* note 319 at 5.
[336] Hands, *supra* note 142 at 89-92.
[337] Johnston, "Munificence and Municipia", *supra* note 312 at 106.

> I give, bequeath and desire to have given 7,500 *denarii,* with six per cent interest whereby I desire a boxing contest to be held each year on June 10th at a cost of up to 250 *denarii,* and on the same day 200 *denarii* worth of oil to be supplied to the public in the public baths.[338]

It was also considered acceptable, and within the Roman concept of public utility, to devote testamentary property to a purpose which contributed to the esteem (*honos*) or embellishment (*ornatus)* of a town[339]. Thus, ancient benefactors commonly left funds for the construction of municipal "embellishments" such as statues or stadiums, or for the gladiatorial shows, hunting expeditions, and circus performances which were said to contribute to a municipality's esteem. It was, perhaps, the prevalence of these very public and visible endowments which led Cicero to observe in the 1st century B.C. that most Romans were "generous in their gifts not so much by natural inclination as by reason of the lure of honour – they simply want to be seen as beneficent."[340]

The other feature of Roman *euergetism,* which distinguishes it from later canonical and common law conceptions of charity, relates to its views on the worthy and appropriate beneficiaries of private gifts. Within Christian societies such as medieval France, acts of charity were principally directed towards the relief of the poor.[341] While the Christian concept of charity expanded under the common law to encompass objects which incidentally benefited the rich, the poor remained central to the common law conception of a charitable gift. By contrast, the pagan societies of Greece and Rome did not even have a concept equivalent to the Judeo-Christian concept of "poverty."[342] When Romans did refer to the 'the poor', they did not mean the truly destitute, but the general mass of working people, who lived frugally and enjoyed only minimal political rights[343]. In practice, the lower classes were never singled out for favorable treatment, even in gifts of basic commodities; gifts that were limited to certain classes of citizens

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[338] Hands, *supra* note 142 at 207.
[339] Johnston, "Munificence and Municipia", *supra* note 312 at 113.
[340] See Hands, *supra* note 142 at 49.
[341] Veyne, *supra* note 306 at 31 ("Almsgiving was the central imperative of the new [Christian] morality").
[342] *Ibid,* at 30.
[343] Hands, *supra* note 142 at 62.

generally benefited officials and the wealthy, rather than "the starving, the old and the sick."[344]

E. Statutory meanings of "charitable" (*bienfaisance*)

As the foregoing review has shown, the common law and civil law traditions have embraced similar but distinct notions of the type of purposes that are of special benefit to society. To the extent that these notions are encompassed by the terms *charitable* and *bienfaisance*, their existence signals that the question of how the registered charity provisions should be interpreted may be more complicated than has heretofore been assumed. This question will be reconsidered in light of the principles of Canadian bilingualism and bijuralism in chapter three. First, however, a final set of sources of legal meaning for the term charitable (*bienfaisance*) needs to be considered: the various provincial statutes which regulate charitable giving in the provinces. Because, as we have seen, the provinces have historically chosen not to exercise a great deal of authority over charities, "provincial statutory incursions into the common [or civil] law"[345] have not so far been an area of broad concern. Nevertheless, it is instructive to examine the case of Ontario to consider the extent to which exercises of provincial legislative authority over charities might re-shape the meaning and foundations of the terms.

Due to a series of peculiar developments that culminated in the English *Mortmain Act* of 1763 being accepted as the law of Upper Canada in 1846[346], Ontario was the first and, for a long time, the only common law province to have specific legislation regulating the transfer of property to charitable purposes in the province. In 1902, Ontario passed the *Mortmain and Charitable Uses Act,* which restricted conveyances of

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[344] Veyne, *supra* note 306, at 33 ("Paganism had abandoned without much remorse the starving, the old and the sick. Old people's homes, orphanages, hospitals and so on are institutions that appear only in the Christian epoch, the very names for them being neologisms in Latin and Greek.") See also Hands, *supra* note 142 at 89.

[345] *Vancouver Society, supra* note 25 at para. 28.

[346] For a review of these historical developments, see A.H. Oosterhoff, "The Law of Mortmain: A Historical and Comparative Review" (1977), 27 U.T.L.J. 257. As Oosterhoff notes, Ontario was "virtually the only jurisdiction in which mortmain and charitable uses legislation in its original form was ever adopted and retained": *ibid.* at 296.

land to charitable uses along the same lines as contemporary English legislation.[347] The 1902 *Act* established a statutory definition for the term "charitable uses", which included the objects listed in the Statute of Elizabeth and any other "similar" objects.[348] In 1909, Ontario replaced the 1902 *Act* with another *Mortmain and Charitable Uses Act,* which imposed further restrictions on *inter vivos* transfers of land to charities. Subsection 2(2) of the 1909 *Act* also amended the earlier definition of a charitable use by deeming the relief of poverty, education, the advancement of religion, and "any purpose beneficial to the community, not falling under the foregoing heads" to be the charitable uses within the meaning of the *Act.*[349] This definition was incorporated into the Revised Statutes of 1914, and continues to form the basis of the definition of a "charitable purpose" in the successor to the *Mortmain and Charitable Uses Act*, the *Charities Accounting Act.*[350]

Given the Legislature's decision to adopt verbatim the four-fold classification of charitable purposes articulated by the House of Lords in *Pemsel,* the 1909 *Mortmain and Charitable Uses Act* might easily have been interpreted as incorporating the English common law in the same way as its 1902 predecessor. However, in the 1917 case of *Re Orr*[351], a majority of the Appellate Division of the Supreme Court of Ontario held that this legislative change was intended to *prevent* the English doctrine from being applied in Ontario in determining whether "any purpose beneficial to the community" was charitable in the legal sense.[352] Notably, it also held that the *Act*'s definition of a charitable use extended beyond the statute to transfers of personal property:

> [S. 2(2) of the 1909 *Act*] is an express declaration that the purposes which it enumerates shall be deemed to be charitable uses within the meaning of the Act; and the Courts of this Province are, in my opinion, warranted in looking to it, as the Courts in England look to the statute of Elizabeth, for the purpose of

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[347] Stats. Ont. 1902, c. 2
[348] *Ibid,* s. 6
[349] Stats. Ont. 1909, c. 58
[350] R.S.O. 1990, c. C-10, s. 7. For a review of this legislative history, see *Re Laidlaw, supra* note __ at 525
[351] *Re Orr (sub nom. Cameron v. Church of Christ, Scientist)* (1917) 40 O.L.R. 567 (C.A.), reversed (1918), 57 S.C.R. 298, leave to appeal refused (1919), 57 S.C.R. vii (S.C.C.)
[352] *Re Orr* (Ont. C.A.), at 595-597

> determining what in law is a charitable gift in the case of personalty, to which the provision does not apply.[353]

On appeal, Chief Justice Fitzpatrick expressly disapproved of this view that Ontario's mortmain legislation had replaced the Statute of Elizabeth as the reference point for the meaning of charity in Ontario.[354] Nevertheless, the position expressed by the Appellate Court has prevailed in several subsequent decisions, which affirm that the Preamble no longer defines charitable trusts in the province.[355]

The most troubling of these Ontario decisions, from the perspective of the revenue authorities, is *Re Laidlaw Foundation,* which suggests that the promotion of sport is charitable in Canada's most populous province[356]. *Re Laidlaw* arose when the Public Trustee of Ontario requested a judicial passing of accounts of the Laidlaw Foundation under section 3 of the *Charities Accounting Act*, to determine whether gifts made by the foundation to various amateur athletic organizations, including the Special Olympics and a national track and field association, were gifts to "charitable organizations" as required by the foundation's objects. The surrogate court judge upheld all of the foundation's gifts, and held that "the promotion of an amateur athletic sport which involves the pursuit of physical fitness" was *prima facie* within the spirit and intendment of the Statute of Elizabeth. The Public Trustee appealed the decision to the Ontario Divisional Court.

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[353] *Ibid,* at 597.

[354] *Re Orr* (S.C.C.) at 304, per Meredith C.J.O. ("The law relating to charitable bequests in this province is not the English law, though no doubt like most of our law derived from English law. This law having existed in the province from the beginning I do not think so great a change could be effected by the jurisprudence of the courts. It would require legislation and there is nothing in the "Mortmain and Charitable Uses Act" even to suggest that by this Act, dealing solely with land, there was any intention of indirectly altering the established law relating to charitable bequests.")

[355] *Re Laidlaw Foundation* (1984), 13 D.L.R. (4th) 491 (Ont. Surr. Ct.), affirmed (1984), 13 D.L.R. (4th) 491 (Ont. Div. Ct.); *Re Levy Estate* (1989), 58 D.L.R. (4th) 375 (C.A.). In *Re Laidlaw,* Southey J. noted that the Chief Justice was the only member of the Supreme Court of Canada to comment on the effect of the Ontario statute. As such, Southey J. concluded that Fiztpatrick CJC's comments were not binding, and adopted the reasons of the Appellate Court: *Re Laidlaw, ibid.* at 528.

[356] *Re Laidlaw* is also the decision most likely to have prompted Justice Gonthier's comments in *Vancouver Society* on the different provincial understandings of charity.

The Divisional Court explicitly agreed with the surrogate court judge's analysis of the English authorities, and with her conclusion that the promotion of an amateur sport which involved the pursuit of physical fitness was charitable within the traditional, common law approach.[357] However, Southey J. went on to hold that it was no longer necessary, and in fact "highly artificial" for the Ontario courts to continue to rely on the Statute of Elizabeth in determining whether a given purpose was charitable.[358] Since the athletic organizations were "charitable" under the restrictive English definition of charity, Southey J. concluded, it followed that they were also charitable under the "more liberal definition of charity" embodied by the *Charities Accounting Act.*[359] The clear implication was that in case of a conflict, this latter definition would prevail.

At present, the decision in *Re Laidlaw* is somewhat of an anomaly in Canadian charity law: there are not a great number of provincial court decisions offering alternative conceptions of charity based on a statutory regime. Because of this, and because of the huge fiscal consequences that would flow from recognizing the promotion of sport as a "charitable purpose" (*fin de bienfaisance*) under the *ITA, Re Laidlaw* has been resolutely ignored by the CRA for twenty years, and its potential implications have been largely unexplored. However, this may change as the result of the recent enactment of a number of provincial statutes directed at the regulation of charities in the province, which define the meaning of charity in a manner that diverges sharply from common law norms. For example, the Manitoba *Charities Endorsement Act,* which regulates the solicitation practices of charities, defines a "charitable purpose" (*oeuvre de charité)* to include any "charitable, benevolent, philanthropic, patriotic, athletic, artistic, or civic purpose and any purpose that has as its object the promotion of a civic improvement or the provision of a public service".[360] As the provinces continue to increase their supervision over the activities of charities in the provinces, it is likely that the number

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[357] *Ibid.* at 523.
[358] *Ibid.* at 524.
[359] *Ibid.* at 528.
[360] CCSM, c. 60, s. 1(1). See also the Alberta *Charitable Fund-Raising Act,* RSA 2000, c. C-9, s. 1(1)(c), which defines a "charitable purpose" to include "a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business.[360]

and significance of these legislative sources of meaning for the concept of a charitable purpose will increase.

Chapter III: What does a plural notion of "charity" (*bienfaisance*) mean for the registered charity scheme?

Between the Elizabethan statutes, the Roman foundations, the canonical rules on *legs pieux*, and the various statutes of our provincial legislatures, it is clear that there are multiple sources of legal meaning in Canada for the term "charitable" (*bienfaisance*). These sources offer us a valuable picture of the purposes and activities that have been "regarded as being of special benefit to society"[361] in different societies and at different times. However, these sources also seem to demand that we challenge the current, uniform interpretation of the registered charity provisions, and reexamine how federal and provincial law interact within the context of section 149.1 of the *Income Tax Act*. In particular, three questions must be addressed. First, assuming that, from a common law perspective, the French term *bienfaisance* is not an accurate translation of the English term *charitable,* how should the registered charity provisions be interpreted in the common law provinces? Second, how should the registered charity provisions be interpreted in Quebec? Finally, how should the registered charity provisions be interpreted in provinces that have enacted legislation that establishes a statutory meaning for the term *charitable* or *bienfaisance*?

A. The Bilingualism Question: how should the registered charity provisions be interpreted in the common law provinces?

As we have seen, none of the judicial, academic or administrative authorities on French common law terminology in Canada support the view that the English common law term *charitable* should be translated as *bienfaisance.*[362] In light of this apparent consensus, there is a strong argument that at common law, the better translation of *bienfaisance* is *benevolence*, a term that has specifically been found to fall outside of

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[361] *Vancouver Society, supra* note 25 at para. 95.
[362] See above at 26.

charity's privileged scope.[363] But if *charitable* and *bienfaisance* do not mean the same thing, what does this mean for the application of the registered charity provisions within the common law provinces, and for the government's policy of respecting all four Canadian legal audiences? This question must be answered by reference to the particular principles of statutory interpretation that apply to bilingual legislation.

i. The principles of bilingual legislation

The starting point for the interpretation of all federal legislation in Canada is that both language versions, being enactments of Parliament[364], are equally authoritative[365], and that neither version can therefore "be assigned paramountcy over the other."[366] While the French and English versions of Canadian statutes have equal authority, however, it has long been recognized that they do not always say exactly the same thing, and that both versions must be examined to determine legislative intent.[367] Where the French and English versions of a law diverge, the interpretation of bilingual legislation is carried out in accordance with the "shared meaning" rule, which Côté formulates in the following terms:

> Unless otherwise provided, differences between two official versions of the same enactment are reconciled by deducing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.[368]

Where one language version of a statutory provision is ambiguous and the other is clear, the clearer meaning of the two versions is generally preferred.[369] Preference has also

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[363] *Chichester Diocesan Fund, supra* note 223.
[364] Under s. 133 of the *Constitution Act, 1867*, federal legislation must be enacted in English and French: *Constitution Act, 1867, supra.*
[365] *R v. Dubois,* [1935] S.C.R. 378; *Constitution Act, 1982* (U.K.) 1982, c. 11.
[366] Sullivan, *supra* note 79 at 76; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721. As Sullivan notes, the equal authenticity rule applies even where one language version is actually a translation of the other: *ibid,* at 76.
[367] Sullivan, *supra* note 79 at 77; *Re Estabrooks Pontiac Buick* (1982), 44 NBR (2d) 201 at 210 (CA).
[368] Côté, *supra* note 43 at 326.
[369] Sullivan, *supra* note 79 at 83. But see Robert Leckey, "Bilingualism and Legislation" in Michel Bastarache, ed., *Language Rights in Canada* (Cowansville, Quebec: Éditions Y. Blais, 2004).

often been granted to the more restricted of two divergent meanings[370], although whether this tendency qualifies as a general principle is open to doubt.[371]

As Côté's description makes clear, however, the shared meaning rule is by no means absolute, and does not automatically override all other canons of construction.[372] Where the discrepancies between the language versions are such that no common meaning can be found, a court must rely on other interpretive techniques. A shared meaning may also be rejected where it is contrary to the intent or purpose of a statute[373], or where one language version is the result of a drafting mistake.[374] In reconciling or choosing between different language versions of a legislative provision, courts will sometimes use the technique of tracing the provision back to its origin. If it can be shown that the provision was meant "to incorporate a solution or concept from another jurisdiction or to codify a pre-existing rule" the language version that best expresses that solution, concept or rule will generally be adopted.[375]

ii. Applying the principles

Given the multiple circumstances in which the shared meaning rule may be rejected, and the preference for respecting the legislative origin of longstanding statutory rules, it

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[370] Côté lists several examples of this tendency to prefer the more restrictive meaning: Côté, *supra* note 43 at 328.

[371] See *Beothuk Data Systems Ltd., Seawatch Division v. Dean,* [1998] 1 F.C. 433 (C.A.) at para. 30,where the Federal Court of Appeal found that the Motions Judge erred in assuming that, because the French text of s. 240(1)(a) of the *Canada Labour Code* had a more restrictive meaning than the English version, it was "a clearer and more precise expression of legislative intent." See also Sullivan, *supra* note 79 at 83.

[372] Côté, *supra* note 43 at 329 ("principle of "shared meaning" is no more absolute than the rule respecting the ordinary meaning of words")

[373] Sullivan, *supra* note 79 at 92 ("In testing the acceptability of the share meaning, or in deciding which version to prefer if there is no shared meaning, the courts rely most heavily on purposive analysis"). See also *R v. Compagnie Immobilière BCN Ltée* [1979] 1 S.C.R. 865 at 871, per Pratte J. ("The [shared meaning] rule…is a guide….[It] should not be given such an absolute effect that it would necessarily override all other canons of construction. In my view…the narrower meaning of one of the two versions should not be preferred where such meaning would clearly run contrary to the intent of the legislation and would consequently tend to defeat rather than assist the attainment of its objects").

[374] Beaupré, *supra* note 8 at 110-112.

[375] Sullivan, *supra* note 79 at 93. This technique appears to be related to the original meaning rule, which posits that statutory terms "must be construed as they would have been the day after the statute was passed": *Perka v. R.* [1984] 2 S.C.R. 232, citing *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239 at 242, per Lord Esher M.R.

is unlikely that even a court persuaded of the different meanings of the terms *charitable* and *bienfaisance* would devote much energy to applying the shared meaning rule to the definitions set out in section 149.1. As we have seen, Canada's first income tax act was modeled on the tax statutes of the English Parliament, whose own references to "charitable" institutions had long been interpreted according to common law rules. The English roots of the registered charity provisions, combined with the unilingual drafting of the early Canadian statutes and the translators' initial choice of the term *charité*, make it difficult to deny that at their origin, the provisions establishing charitable tax benefits were meant to take their meaning from the common law of charitable trusts. This factor would likely be sufficient to override the application of the shared meaning rule in the common law provinces, particularly in light of the supporting presumption that common law terms used in statutes keep their common law meaning[376], and the principle that "courts should hesitate to depart from interpretations that have become well established... through a long line of cases...or through customary reliance on a particular interpretation."[377] If a court did apply the shared meaning rule, it is likely that the English term *charitable* would be preferred on the basis that it is less ambiguous and narrower than the French term *bienfaisance.* [378]

It is more debatable whether the changes made to the French version of the registered charity provisions should be sufficient to override the principle that the language version reflecting a provision's legislative origin should be preferred. Certainly, the gradual terminology change from *charité* to *bienfaisance* brings into play one form of the presumption against tautology: namely, that "amendments to the wording of a legislative provision are made for some intelligible purpose- to clarify the meaning, to

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[376] As Sullivan notes, this presumption may conflict with the presumption that favours the ordinary, non-technical meaning of words over their technical meaning: Sullivan, *supra* note 79 at 343. In *Jodfrey's Estate v. Province of Nova Scotia and the Attorney-Generals of British Columbia and Quebec* [1980] 2 S.C.R. 774, for example, the majority found that in interpreting the words "beneficially entitled" in a provincial succession duties statute, the court should not be "rigidly bound...by rules of equity evolved in the courts of chancery in connection with trusts."

[377] Sullivan, *supra* note 79 at 109.

[378] The use of the term *bienfaisance* in the French version of at least one provincial statute, the *Charities Accounting Act,* R.S.O. 1990, c. C-10, might be seen to provide further support of the view that charity and *bienfaisance* have a shared meaning.

correct a mistake, to change the law."[379] In *R v. Klippert,* this presumption led a majority of the Supreme Court of Canada to favour the English *Criminal Code* definition of a "dangerous sexual offender", which had recently been amended by Parliament, over the French definition, which had undergone no change.[380] However, legislative changes that are intended only to improve the language or style of a statute are presumed not to change the meaning or substance of a provision.[381] More importantly, there is authority that even changes that do modify the substantive meaning of legislative provisions may be ignored, if they amount to a mistake or were made without statutory authority.[382] Presumably, then, changes made by the Statute Revision Committee in 1985 would not be found to have changed the meaning of the French version of section 149.1. The more difficult question is whether the earlier tax amendments, which commenced the terminological shift, should be taken to have had a substantive effect.

Overall, it appears that despite the highly significant legal discordance between the terms *charity* and *bienfaisance* at common law, the bilingual registered charity provisions will likely continue to be interpreted in accordance with the common law of charitable trusts within Canada's common law provinces. Nonetheless, the two language versions are clearly an uncomfortable fit, particularly from the point of view of a French common law audience. Three factors make the language discrepancy between the two versions of section 149.1 particularly egregious. First, even since 1985, when the Statute Revision Committee made the use of the term *bienfaisance* consistent throughout the *ITA,* Parliament has made several amendments to section 149.1 that incorporate the revised terminology[383]. To the extent it can be said that

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[379] *Statute Revision Act, supra* note 44, s. 6 (f); Sullivan, *supra* note 79 at 473. For a criticism of this presumption, see Leckey, *supra* note 369 at 127

[380] [1967] S.C.R. 822.

[381] Sullivan, *supra* note 79 at 476.

[382] In *Beothuk, supra,* at para. 44, the Federal Court of Appeal held that in changing the phrase "terminer douze mois consecutifs d'emploi" in the French version of the *Canada Labour Code* to "travailler sans interruption depuis au moins douze mois", the Statute Revision changed the substance of the provision without statutory authority. As a result, the Court held that the pre-amendment version, which was consistent with the English version of the paragraph, was more reflective of Parliament's intent.

[383] See, for example, *An Act to revise certain income tax law amendments in terms of the revised Income Tax Act and Income Tax Application Rules,* S.C. 1994, c. 7, s. 123, and *An Act to amend the Income Tax*

Parliament has implicitly approved the use of the term *bienfaisance* in so doing, it is arguable that the revised language should be accorded greater weight. Second, the official languages bureau sponsored by the federal government has specifically recommended that the translation of the common law term "charitable" be standardized as "*caritatif*".[384] Given the frequency with which the *ITA* is modified and amended, this should not be a difficult recommendation to implement. Finally, it is noteworthy that the *Canada Corporations Act*, Part II of which regulates the incorporation of the federal not-for-profit organizations that are the primary applicants for registered charity status under the *ITA*, equates the English term "charitable" with the French term "*charitable*", and the English term "benevolent" with the French term "*bienfaisance*".[385] The inconsistency between these two statutes, both integral parts of the registered charity scheme, constitutes a notable infringement of the principle that the entire federal statute book is consistent and coherent, particularly with regard to statutes that deal with the same subject matter or form part of a single scheme.[386]

B. The Bijuralism Question: how should the registered charity provisions be interpreted in Quebec?

i. Complementarity, dissociation, and the federal *Harmonization Act*

If the common law sources on the concept of charity raise questions about the interpretation of section 149.1 from the perspective of legislative bilingualism, the civil law sources on the concept of charity raise the even more complex, 'legislative bijuralism' question of how the registered charity provisions should be interpreted in the

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Act, the Income Tax Application Rules, the Canada Pension Plan, the Canada Business Corporations Act, the Excise Tax Act, the Unemployment Insurance Act and certain related Acts, S.C. 1994, c. 21, s. 74

[384] See above at 26.

[385] See, in particular, s. 154(1) of the *Canada Corporations Act,* R.S.C. 1970, c. C-32, which allows the Minister by letters patent to grant a charter to persons who apply to form "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/ *("objets d'un caractère national, patriotique, religieux, philanthropique, charitable, scientifique, artistique, social, professionnel ou sportif ou des objets analogues, qui ressortissent à l'autorité législative du Parlement du Canada*"). See also *ibid.*, s. 16(1)(e) and s. 158

[386] Sullivan, *supra* note 79 at 324. Sullivan notes that in this regard, previously enacted legislation carries the same weight as subsequently enacted legislation.

province of Quebec. Should the *ITA* term "charitable" (*bienfaisance*) be interpreted and applied in Quebec in accordance with the customary law sources that were summarized by the codifiers in article 869 CCLC? One might assume, given the significant progress already made on the harmonization of the *ITA* with Quebec civil law and the potentially broader scope of the concept of charity in Quebec, that civilian lawyers would be actively engaged in a debate about the application of these sources to Quebec applicants for charitable registration. To date, however, no such debate has occurred. The few who have raised the possibility of a bijural concept of charity have quickly dismissed it, relying either on the purportedly public nature of charitable organizations, the presumed intent of the Legislature, or the 'dissociative' effect of the new social trust provisions of the CCQ.[387] But do any of these factors preclude the application of civil law sources to the registered charity provisions in the province of Quebec?

In order to answer this question, it is necessary to set aside for a moment our deeply-entrenched views about the "common law meaning" of the registered charity provisions, and to re-examine this federal law in light of the constitutional principles established early on in Canada's history, and re-affirmed by Parliament throughout the harmonization process. The essence of these principles of bijural interpretation can be summarized briefly. First, since the enactment of the *Quebec Act* in 1774, the law of Quebec has been composed of "the French civil law as it existed prior to 1760 with its subsequent alterations in Quebec in regard to anything affecting property and civil rights, and the common law as it existed in England at the same time with its subsequent alterations in Quebec and in Canada in regard to anything affecting the public law."[388] The federal public law in Quebec is thus composed of federal public law legislation and the public common law, while the federal private law is composed of federal private law legislation and the civil law.[389] Second, as section 8.1 of the

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[387] See below at 88, 95. But see B. Bromley, "1601 Preamble", *supra* note 107 at 207.

[388] *St.-Hilaire, supra* note 107 at para. 40. This state of affairs dates back to the British conquest of New France in 1760, at which point, according to the seminal case of *Campbell v. Hall* (1770) Cowper 204, French law "ceased to apply to questions of government" but continued to govern in other areas: see S. Arrowsmith, "Government Liability in Quebec and the Public Law-Private Law Distinction" (1990) P.L. 481

[389] *Ibid.* at paras. 42 and 43.

federal *Interpretation Act* has confirmed, complementarity is the general rule governing the relationship between federal statutes and the private law of Quebec. However, it is still possible for Parliament to derogate from the law of any province when it legislates on subjects within its constitutional authority.[390] The limits of permissible derogation have now been codified by section 8.2 of the *Interpretation Act,* which provides that the civil law meaning of terminology must be adopted in the province of Quebec, and section 8.1, which states that "*unless otherwise provided by law,* if in interpreting an enactment it is *necessary to refer to* a province's rules, principles, or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles, or concepts *in force in the province at the time the enactment is being applied.*[391]

While the general principles governing the bijural interpretation of federal legislation may be clear and uncontroversial, determining whether a *particular* provincial rule or concept is applicable to a *particular* federal law can be somewhat more complex. For this reason, it seems wise to approach the question of a bijural interpretation of the registered charity provisions by considering each of the bases upon which the civil law sources on charity could be *excluded* from section 149.1. As Martin Lamoureux explains in his article on dissociation in fiscal laws[392], there are five such "exceptions" to the general rule of complementarity established by the case law and section 8.1. First, the principle of federal-provincial complementarity does not apply to federal areas of competence that are entirely autonomous of provincial private law. Second, complementarity does not apply to terms or concepts that either are not part of the law of property and civil rights, or that are interpreted within a statutory context according to their ordinary, non-technical meaning.[393] Third, within the province of Quebec, the

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[390] *St.-Hilaire, supra* note 107 at para. 44

[391] *Interpretation Act, supra* note 15, sections 8.1 and 8.2.

[392] M. Lamoureux, "Harmonisation des Lois Fiscales – La Dissociation: un Mécanisme d'Exception" (2002) 23 :4 Rev. de Plan. Fiscale et Successorale 735.

[393] The concept of "residence", for example, has a technical meaning in both the common law and civil law, but has been interpreted within the *ITA* by reference to the ordinary meaning of the word and dictionary definitions: see *ibid.* at 743; D. Duff, *supra* note 12 at 36.

civil law does not complement public law concepts or rules in federal legislation.[394] Fourth, complementarity does not apply where Parliament explicitly dissociates provincial private law from a federal statute. Finally, complementarity does not apply where Parliament *implicitly* dissociates provincial private law from a federal statute by, for example, using constitutionally neutral terms or devising a detailed statutory scheme that makes reference to provincial concepts unnecessary[395].

Considered in relation to the registered charity provisions, it is apparent that three of the five exceptions to the general rule of complementarity would not function to exclude Quebec civil law from the interpretation of section 149.1. With regard to the first, while the courts have held that certain areas of federal jurisdiction, including "Navigation and Shipping" and "Indians, and Lands reserved for the Indians", are protected even from provincial laws of general application through the doctrine of interjurisdictional immunity[396], federal tax law has always been regarded as an "accessory system", which imposes fiscal consequences on legal concepts governed by provincial private law.[397] There is, accordingly, no authority for the suggestion that the federal taxation and regulation of charities is entirely autonomous of provincial law. With regard to the second exception, the term "charitable purposes" (*fins de bienfaisance*) was used in the CCLC, and represents (at least in its English version) a key concept under the common law of charitable trusts. Given the place that charity has been shown to occupy in both the common law and civil law traditions, it would be very difficult to argue that the concept forms no part of the law of property and civil rights in the provinces, or that it should be given its "ordinary meaning" within the context of the *ITA*.

Finally, there is no textual support for the view that Parliament has *explicitly* dissociated the civil law of Quebec from the registered charity provisions. Unlike certain sections of the *ITA,* which openly exclude provincial law by providing that a rule applies

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[394] *St.-Hilaire, supra* note 107 at paras. 56-58, 65
[395] *Ibid.* See also Molot, *supra* note 111 at 18.
[396] *Ordon Estate v. Grail* [1998] 3 S.C.R. 437
[397] *R. v. Lagueux & Freres Inc.* [1974] 2 F.C. 97 (T.D.) at para. 26

"notwithstanding any enactment of a province"[398], the registered charity provisions contain no clear indication of their relationship with any other source of law. And while section 149.1 does define the terms "charitable foundation" (*fondation de bienfaisance*), "charitable organization" (*oeuvre de bienfaisance*), and "charitable purposes" (*fins de bienfaisance*), none of these definitions can be considered complete or intelligible without reference to some external source.[399]

ii. Public law or private law?

The two remaining exceptions listed by Lamoureux merit somewhat greater attention, as they raise legitimate issues regarding the interpretation of the registered charity provisions in Quebec. The first of these, namely the lack of complementarity between the civil law and public law concepts or rules in federal legislation, is a product of the fact that "common law rules that are public in nature apply in the province of Quebec"[400]. With this rule presumably in mind, a number of recent articles on the harmonization of the *ITA* have proposed, although with little supporting analysis, that the concept of a "charitable organization" (*oeuvre de bienfaisance*) could be considered a *public law* concept at common law. If, as these authors suggest, the common law rules that complete the registered charity scheme are public in nature, the section 149.1 definitions would not be subject to a bijural interpretation.[401]

It is certainly reasonable to raise questions about where the common law of charity falls on the public law-private law divide. As Mark Freedland has pointed out, while charity law has always been classified in England as part of the law of trusts and, thus, as private law, some of its historical and modern aspects have a markedly "public" character:

> Charitable trusts used to be primarily known as "public trusts", and contrasted as such with what we still call "private trusts". Quite a lot of the pre-history and

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[398] *ITA*, s. 227(4.1)
[399] See the definitions set out in s. 149.1(1), *ITA*.
[400] *Prud'homme v. Prud'homme* [2002] 4 S.C.R. 663 at para. 46
[401] See, for, example, Lamoureux, *supra,* at 742 (l'organisme de bienfaisance "pourrait vraisemblablement être considéré comme un concept de droit public").

> early history of what we now regard as public law is to be found in cases concerned with the judicial control of the actions and decisions of trustees of charitable trusts, or of the corporators of charitable corporations – such as charity hospitals, or Oxford or Cambridge colleges. This incidentally reminds us that the law of charity does not consist entirely in the regulation of charitable *trusts,* for it also consists in part of the regulation of charitable *corporations.* [402]

For Freedland, the existence of these "creatures of private law...defined in terms of public benefit" calls into question the very adequacy of the public-private distinction as commonly understood.[403] This leads him to call for a more nuanced, multi-dimensional analysis of social relations and activities, which recognizes that activities such as those the common law describes as "charitable" can not be easily be assigned to the public or private sphere[404].

Freedland's decision to focus on reformulating the criteria of the public-private distinction is of some interest to our analysis of the registered charity provisions, for it underlines that the difficulty of classifying the common law of charity as public or private arises as much from the ambiguity surrounding the concepts of "public law" and "private law" as from the ambiguous character of charity law itself. Unlike the Continental legal tradition, which has long treated the distinction between the concepts of public law and private law as being of fundamental importance to both legal theory and practice, the common law developed "without reference to the public-private cleavage"[405], and does not, generally speaking, distinguish between public law and private law at all.[406] In the common law world, therefore, public law tends to be defined in very general terms, as simply that branch of law that deals with relationships between the citizen and the state, rather than between private individuals. On those

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[402] Mark Freedland, "Charity Law and the Public/Private Distinction" in Mitchell and Moody, *supra* note 6, 111 at 113. Freedland also notes that the judicial control exercised over the powers and discretions of charitable trustees and corporation is similar to "the techniques and reasoning of public law".
[403] *Ibid.* at 114.
[404] *Ibid.*
[405] J. H. Merryman, "The Public Law-Private Law Distinction in European and American Law" (1969), 17 J. Pub. Law 3 at 7.
[406] Arrowsmith, *supra* note 388 at 481. For a review of the reasons for the relative importance of the public law-private law distinction in the common law and civil law traditions, see Merryman, *supra* note 405.

occasions when the public-private dichotomy receives more detailed attention from the courts, it is usually because a specific circumstance, or a statute such as the *Quebec Act* or the Canadian *Charter,* demands it[407]. It is not surprising, therefore, that the common law authorities continue to evidence a "deep lack of agreement about what constitutes a coherent set of criteria" for distinguishing between the public and private sphere.[408]

Given the admittedly public aspects of charity law, and the current ambiguity surrounding the public-private distinction within the common law tradition, it may in future be desirable to consider, from a policy perspective, whether certain charitable entities should be considered as public or quasi-public institutions in Canada. Nonetheless, there seem to be strong reasons to resist the view that the body of common law rules that has completed the registered charity provisions for many years is a body of public law. First, while the federal government grants significant support to registered charities and sets the outer limits of the purposes they are permitted to pursue, Canadian charities are created, primarily funded and entirely directed by private actors. As such, it would not be accurate to describe them as "arms of the state."[409] Second, while a determination that charities *are* public bodies might resolve the thorny issue of how section 149.1 should be interpreted in Quebec, it would almost certainly raise a number of even thornier issues by making registered charities subject to the Canadian *Charter.*[410]

Finally, the specific statutory term in section 149.1 which is currently interpreted by reference to the common law, and whose public or private nature must therefore be the focus of the inquiry, is not "charitable organization" (*oeuvre de bienfaisance*) or "charitable foundation" (*foundation de bienfaisance*), but "charitable purpose" (*fin de*

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[407] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[408] Freedland, *supra* note 402 at 115.
[409] Mayo Moran, "Rethinking Public Benefit: The Definition of Charity in the Age of the *Charter*" in Jim Phillips, Bruce Chapman and David Stevens, eds., *Between State and Market: Essays on Charity Law and Policy in Canada* (Montreal: McGill-Queens University Press, 2001) at 10.
[410] In *Retail, Wholesale & Department Store Union, Local 580 et al v. Dolphin Delivery Ltd.*(1986) 33 DLR (4th) 1, the Supreme Court of Canada delineated the bounds of Charter application based on the view that it was intended to govern relations between the state and the individual.

bienfaisance).[411] And at common law, the concept of what purposes are charitable has always raised not only the somewhat "public" issue of what purposes the courts should use their resources to enforce, but also the very "private" issue of the circumstances in which individuals should be able to devote their personal property to unascertainable beneficiaries for an unlimited amount of time. Until such time as a clear consensus or authority emerges that the law of charity in Canada is a matter of public law, therefore, Quebec taxpayers should be entitled to rely on the longstanding view that the common law rules that complete the registered charity provisions are a subsection of the private, common law of trusts. [412]

iii. Implicit dissociation

The final "exception" to the general rule of complementarity raised by Lamoureux consists of situations where Parliament dissociates provincial private law from a federal statute by *implication* rather than express language. This raises two possibilities with regard to section 149.1. The first is whether Parliament has implicitly dissociated *all* external sources from the registered charity provisions, or from certain aspects of the registered charity provisions, by "occupying the field" or enacting a "complete code". The second is whether Parliament has implicitly dissociated the *civil law* sources on charitable gifts and legacies from the registered charity provisions by employing vocabulary and concepts that are incompatible with the civil law tradition.

a. General principles

There are a number of circumstances in which it may be concluded that the dissociation of provincial private law from a federal statute is "implicit in the language or purposes of the statutory text."[413] Such an implication may be raised where Parliament employs a statutory term that is "constitutionally neutral" or part of the vocabulary of only one

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[411] Although the meaning of the undefined *ITA* term "charitable activities" (*activites de bienfaisance*) must also be addressed, the focus is currently on "charitable purposes" (*fins de bienfaisance*) as a result of the *Vancouver Society* decision, *supra* note 25.
[412] See *Anderson v. Todd* (1845) 2 U.C.R. 82, [1845] O.J. No. 19 (U.C.C.Q.B.).
[413] D. Duff, *supra* note 12 at 49.

legal tradition[414]. Parliament may also implicitly dissociate provincial law from a federal sphere by devising a detailed statutory scheme that makes reference to provincial concepts inappropriate or unnecessary. Where federal legislation leaves "no room...for the operation of provincial legislation"[415], or where its "clearly intended objectives" would be thwarted by the application of an external source[416], it is generally held to constitute a "complete code", which is insulated from the suppletive application of provincial law.

The difficulty is in knowing how clearly Parliament must speak before the dissociation of private law may be regarded as being implicit in the statutory text. In the context of the *ITA,* the courts have often imposed only a low burden of clarity on Parliament, favouring in this way the principle of the uniform application of fiscal burdens and benefits. The decision of the Federal Court of Appeal in *Canada v. Construction Bérou,* for example, suggests that the explicit dissociation of one private law concept from an *ITA* provision may be sufficient indication that Parliament intended to dissociate a related private law concept from a separate provision.[417] However, most commentators appear to favour a much higher standard, which would make provincial private law subject to displacement by federal law only where this intention is "necessarily implied by the language of the statutory text."[418] This higher standard is

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[414] Molot, *supra* note 111 at 18.

[415] *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121 at 155.

[416] *Husky Oil Operations Ltd. v. Canada (MNR),* [1995] 3 S.C.R. 453 at para. 85. See also *St.-Hilaire, supra* note 107 at para. 43 (complete code where "no need to resort to an external source").

[417] In *Canada v. Construction Bérou Inc.* (1999), 251 N.R. 115 (F.C.A.), the Federal Court of Appeal addressed the issue of whether the *ITA* concept of "property acquired by the taxpayer" should be interpreted in Quebec, as in the common law provinces, to include property beneficially but not legally owned. While the *ITA* did not define the concept of acquisition at the time, it did define a 'disposition' to include a transaction in which there was a transfer of beneficial ownership but the seller retained legal ownership. In addition, s. 248(3) of the *ITA* deemed rights under the civil law concepts of usufruct, right of use and habitation to be beneficial interests for purposes of the *ITA.* A majority of the Court found that these two provisions were sufficient indication of the legislature's intent to incorporate a common law concept of acquisition into the *ITA.* Noel J.A. disagreed with this conclusion, finding there was no indication that the *ITA* "cast aside" the applicable private law: *ibid.* at para. 115.

[418] D. Duff, *supra* note 12 at 49 (courts should only dissociate the interpretation of federal legislation from the private law where Parliament's intention to do so is "necessarily implied by the language of the statutory text"). See also Macdonald, "*Atomic Slipper*", *supra* note 112 at 447 (provincial private law should be subject to displacement by federal law only "explicitly" or "by absolutely necessary implication")

far more consistent with the new provisions of the *Interpretation Act* which, as we have seen, demand that relevant provincial private law concepts be applied "unless otherwise provided" by another valid, federal law.[419]

While the "necessary implication" standard is certainly still flexible enough to accommodate a variety of opinions on when Parliament has displaced provincial law, it can be seen to lay down certain guidelines for the interpretation of a federal statute such as the *ITA*. First, it is evident that a necessary implication can only arise where no other reasonable alternatives exist. If a statute can be reasonably interpreted so that it is complemented by the private law of the province in which it is being applied, therefore, this interpretation should be preferred over one that dissociates provincial law. Second, as Duff points out, a necessary implication of dissociation can only arise from the language of a statutory text.[420] While this should not prevent a court from reading statutory language "in its entire context... harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament"[421], it does mean that an intent to dissociate provincial law should not be inferred simply from the general presumption that Parliament intends the *ITA* to apply uniformly[422], or from the statute's legislative origins. With these guidelines in mind, we can turn to examine the specific ways in which Parliament might be said to have dissociated provincial law sources from section 149.1 of the *Income Tax Act.*

b. The "complete code" argument

Until very recently, it has never been suggested that the registered charity provisions could in any way be considered a "complete code." On the contrary, the courts have always relied heavily on an external source, the common law, for both the definition of charity and the principles to be followed in applying that definition.[423] However, in a recent decision involving an amateur sports association, the Federal Court of Appeal

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[419] *Interpretation Act, supra* note 15 , ss. 8.1 and 8.2.
[420] D. Duff, *supra* note 12 at 49.
[421] *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 at 40, 41.
[422] D. Duff, *supra* note 12 at 55.
[423] *Vancouver Society, supra* note 25 at paras. 143 and 28.

took the view that Parliament *has* "occupied the field" and created a complete code with regard to the charitable status of one at least one class of applicants, through its creation of a similar tax benefit for a subset of that class[424]. The decision therefore requires us to reconsider whether the dissociation of external sources from at least part of the registered charity scheme is implicit in the provisions of the *ITA*.

AYSA v. CRA arose when a society established to promote amateur youth soccer in Ontario appealed the Minister's decision not to register it as a charitable organization pursuant to subsection 248(1) and section 149.1 of the *ITA*. The appellant argued that pursuant to section 8.1 of the *Interpretation Act,* the undefined terms "charitable purposes" (*fins de bienfaisance*) and "charitable activities" (*activités de bienfaisance*) in section 149.1 should be interpreted by reference to the common law of Ontario, which recognizes the promotion of amateur sport involving the pursuit of physical fitness as a charitable purpose. However, the Federal Court of Appeal concluded that s. 8.1 was "of no assistance to the appellant" because the legislative scheme precluded the possibility that an amateur sport association be treated as a charity under the act.[425] The Court relied on the fact that in 1972, at a time when it was clear that the promotion of amateur sport was not charitable at common law, Parliament had accorded "charity-like status" to certain amateur sports clubs that operated on a nation-wide basis by conferring tax benefits on a category of "registered Canadian amateur athletic organizations" defined in subsection 248(1). In light of this apparently "clearly expressed intent to limit the federal funding of amateur sports associations to those which operate nationally", the Court concluded that Parliament had "occupied the field respecting the tax treatment of amateur sports associations, regardless of their status in the law of charity."[426]

The *AYSA* decision does not go far as to suggest that the registered charity provisions leave no room for the operation of provincial law or any other external source. What it does suggest, however, is that Parliament may be regarded as having dissociated

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[424] *AYSA, supra* note 77.
[425] *Ibid.* at para. 23.
[426] *Ibid.* at para. 22.

specific aspects of a provincial law concept from a provision of the *ITA*, to the extent that these aspects are incompatible with the language or intent of a related provision. In the common law provinces, this phenomenon of what we might call 'selective dissociation' could mean that because low-cost housing facilities for seniors have charity-like status under sections 110.1 and 118.1 of the *ITA*, providing shelter to the elderly is not a "charitable purpose" within the meaning of section 149.1. In Quebec, it could mean that the permissive civilian attitude to 'political' activities, which are specifically regulated under subsection 149(6.1), has also been cast aside. However, there are clearly other reasonable interpretations of the joint effect of the RCAAA and registered charity schemes. Most obviously, it is quite plausible that Parliament intended to fund nationally-operating amateur sports associations (whether charitable or not), as well as any sports organizations that carry out "charitable purposes" *(fins de bienfaisance)* within the meaning of section 149.1. While Parliament may have intended its tax treatment of sports organizations to apply uniformly across Canada, this would not be enough to displace provincial law under section 8.1 of the *Interpretation Act*. It must be concluded, therefore, that the *AYSA* decision does not meet the "necessary implication" standard for the dissociation of provincial law.

c. The "inconsistent language" argument

If we turn to the question of whether the *civil law* sources on charity have been dissociated from the registered charity provisions, through the incorporation of vocabulary and concepts that are incompatible with that tradition, the application of the necessary implication standard becomes slightly more complex.

As we have seen, since the repeal of the CCLC in 1994, Quebec's civil code no longer makes express reference to the concept of "charitable purposes" (*fins de bienfaisance*) in the provisions relating to testamentary legacies or *inter vivos* gifts. Rather, the CCQ introduces several new concepts dealing with the appropriation of property to purposes, which define the classes of permitted purposes in similar but distinct terms. The foundation, for example, encompasses all appropriations of property made to the lasting

fulfillment of a "socially beneficial purpose" (*fin d'utilité sociale*). The social trust, for its part, encompasses transfers of property to any "purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose" (*but d'intérêt général, notamment à caractère culturel, éducatif, philanthropique, religieux ou scientifique*). Based on the notable divergence between the language used by the CCQ and the *ITA*, scholars such as David Duff have argued that the interpretation of the term "charitable"(*bienfaisance*) in the *ITA* must necessarily be dissociated from Quebec's private law.[427]

However, there seem to be at least two plausible views of the current status of the concept of "charitable purposes" (*fins de bienfaisance*) in Quebec which are not necessarily inconsistent with a relationship of complementarity between the civil law and the *ITA*. The first is that the rule expressed in article 869 CCLC remains part of Quebec's unenacted civil law, as a result of its continued application to situations where a testator seeks to effect a particular purpose by means other than the constitution of a trust. This argument is based on the premise that the CCQ, being a law of "replacement"[428], did not have the effect of implicitly repealing provisions of the CCLC that were consistent with the new Code. As Maurice Tancelin explains:

> Le principe qui domine est l'absence d'abrogation implicite par une loi de « remplacement ». Dans une telle loi, un article non reproduit qui n'est pas contredit par un ou plusieurs articles de la nouvelle rédaction ou d'autres lois peut être considéré comme étant toujours en vigueur.[429]

Given the presumption in favour of the continuance of prior law through codal enactments[430], it cannot automatically be assumed that article 869 CCLC was entirely abrogated with the coming into force of the CCQ.

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[427] D. Duff, *supra* note 12 at 55.
[428] The "Final Provisions" of the CCQ provide that the Code "replaces" the CCLC, as well as certain other statutory provisions.
[429] M. Tancelin, "Les Silences du *Code Civil du Québec*" (1993) 39 McGill L.J.747 at 756-7.
[430] The English version of article 2712 CCLC stated "The laws in force at the time of the coming into force of this code are abrogated in all cases: In which there is a provision herein having expressly or impliedly that effect; In which such laws are contrary to or inconsistent with any provision herein contained; In which express provision is herein made upon the particular matter to which such laws

To what extent can the rule expressed in article 869 CCLC be considered to be still in effect, notwithstanding the new CCQ regime of foundations and trusts? Clearly, the CCQ definitions of social, private and personal trusts now govern all transfers of property to purposes that meet the criteria set out in article 1260, CCQ. Where a person devotes property to a public purpose by constituting an autonomous patrimony which a trustee agrees to hold and administer, therefore, the relevant question is not whether the purpose is "charitable or otherwise lawful", but whether it is "of general interest" (*d'intérêt general*) within the meaning of article 1270 CCQ. However, as we have seen, the new trust provisions do not apply to alternative methods of dedicating property to purposes, which are available but not explicitly regulated under the CCQ[431]. It seems, therefore, that where a person devotes property to a public purpose by imposing a charge or other obligation on a legatee or testamentary executor, the standard of a "charitable or otherwise lawful purpose" may continue to apply. To the extent that this is the case, it may be said that article 869 CCLC continues to be part of the private law of Quebec, which is available to provide meaning and content to undefined federal statutory terms.

The second possibility which would support a relationship of complementarity between the registered charity provisions and Quebec's private law is that within the civil law tradition of Quebec, the terms "charitable purpose" (*fin de bienfaisance*), "purpose of general interest" (*but d'intérêt général*), and "purpose of social utility" (*fin d'utilité sociale*) all *mean* essentially the same thing. This interpretation of three, closely related statutory terms would not be convincing in the context of a technical, fiscal statute such as the *ITA,* where great emphasis would be placed on the specific statutory text and the effect of linguistic changes.[432] It would also be difficult to support in a common law jurisdiction, where the word "charitable" has an exclusive, technical meaning. However, within the context of civilian interpretation, which is typically

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relate." As Claxton notes, although this principle was not explicitly restated in the CCQ, it remains the law in Quebec: see Claxton, *supra* note 245 at 304, footnote 14-102.

[431] See above at 54-56.

[432] Sullivan, *supra* note 79 at 447.

functional and purposive in nature[433], it is quite plausible that the spirit if not the letter of the three terms could be regarded as being of the same kind. As Brierley has noted, the CCQ concept of a general interest purpose, while "extremely wide", is also a very fluid concept, whose parameters will have to be clarified by the courts in the context of particular fact situations.[434] In doing so, the courts will likely look to civilian sources on the purposes that were considered as being of particular benefit to society, including the sources that were incorporated into article 869 CCLC[435].

The social trust provisions of the new CCQ have not, so far, received enough judicial or scholarly attention to confirm how this will take shape. At present, however, there is nothing to suggest that the CCQ concepts of a general interest and social utility purpose differ in any significant sense from that of the charitable purpose articulated in article 869 CCLC. The *Commentaires* of the Ministry of Justice state that the new definition of a social trust is "généralement conforme au droit antérieur."[436] The enumerated examples of a general interest purpose in article 1270 CCQ all seem to be consistent with the broad conception of charitable giving that existed in Roman times. And the courts so far seem willing to conclude that charitable legacies established under article 869 CCLC "identify equally" with the new definition of a social trust.[437]

If the CCLC term "charitable purpose" (*fin de bienfaisance*) and the CCQ terms "purpose of general interest" (*but d'intérêt général*) and "purpose of social utility" (*fin d'utilité sociale*) do all mean the same thing, in that they all take their meaning from the various civilian sources on the purposes that were considered of special benefit to society, the *ITA's* use of the term "charitable" (*bienfaisance*) may not be sufficient to dissociate the registered charity provisions from even the new trust law of Quebec. As Molot argues in his analysis of the amended *Interpretation Act,* "it is not strictly

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[433] Sullivan, *supra* note 79 at 40-41.
[434] Brierley, "Certain Patrimonies by Appropriation", *supra* note 243 at 13.
[435] It may be that Brierley's statement that article 1270 CCQ is "broader in scope" than article 869 CCLC should be read in light of the fact that only the civil law sources on *legs pieux* were ever discussed by the Quebec courts. If the Roman law sources discussed in this study are also considered, the breadth of article 869 CCLC can be viewed in quite a different light: see *ibid.* at 13.
[436] Commentaires du ministère de la Justice, vol. 1 (Québec : Publications du Québec, 1993) at 421
[437] *Speirs Dufty Estate c. Raymond Chabot Inc.* (2001), 45 E.T.R. (2d) 311.

necessary for the operation of section 8.1 that a federal enactment contain either or both civil law and common law terminology"; the "necessity" to refer to provincial rules or concepts may be generated by either an express or an *implicit* reference in the federal enactment.[438]

In conclusion, then, it appears that within the province of Quebec, where the meaning of the term "charitable" (*bienfaisance*) has "nothing to do" with the common law of charitable trusts[439], the registered charity provisions of the *ITA* should be interpreted, to the extent possible, in accordance with the civil law. The relevant provincial "rules, principles, or concepts" are to be gleaned from the customary sources that inspired the codification of article 869 CCLC, that continue to govern certain testamentary legacies, and that appear, at present, to provide the primary source of meaning for the new trust provisions of the CCQ. If Parliament wishes to prevent the application of this body of law to the undefined terms in section 149.1 of the *ITA*, it will have to speak clearly enough that no other reasonable interpretation can be implied.

C. The Complementarity Question: how should the registered charity provisions be interpreted in provinces that have enacted a statutory meaning for the term *charitable* or *bienfaisance*?

The final question raised with regard to the interpretation of the registered charity provisions in the provinces concerns the relationship between the *ITA,* and provincial legislation that establishes a statutory meaning for the term *charitable* or *bienfaisance.* While the role of ordinary provincial legislation has not figured prominently in the harmonization project, given the admitted focus of that project on recognizing the equal authority of the common and civil law, it represents an important aspect of the principles of complementarity and provincial autonomy and should not be passed by. It would be beyond the scope of this study to analyze the particular relationship of the registered charity provisions with all of the various enactments regulating charitable

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[438] Molot, *supra* note 111 at 16.
[439] *Ross v. Ross, supra* note 225 at 330-331.

activity in the provinces. A few general comments on the impact of these enactments, however, are not out of place.

As we have seen, every jurisdiction in Canada has its own reservoir of legal concepts and rules that functions as the suppletive law for legislation that can not be fully understood on its own.[440] While the *ius communes* of the civil law and common law provinces are principally constituted, respectively, by the CCQ and the common law jurisprudence, they also include ordinary statutes that modify basic laws of property and civil rights.[441] Even prior to the enactment of the *Harmonization Act, No. 1,* therefore, it was the case that valid provincial enactments other than a civil code could "indirectly modify the meaning of terms used in federal legislation, subject to limitations flowing from doctrines of paramountcy, interjurisdictional immunity or intergovernmental immunity."[442] This suppletive function of provincial private law legislation was recognized in cases such as *Continental Bank Leasing,* where the Supreme Court of Canada considered both the common law and the Ontario *Partnerships Act* in applying the *ITA* concept of a "partnership" to a taxpayer resident in Ontario.[443]

The enactment of the *Harmonization Act, No. 1,* which affirms in its preamble that "the harmonious interaction of federal legislation and provincial legislation is essential"[444], has provided further confirmation of the general relationship of complementarity between federal and provincial statutes. While the harmonization legislation is generally seen to be focused primarily on reconciling federal legislation with the civil law, amended section 8.1 of the *Interpretation Act* in fact makes no reference to the civil law or the common law at all, but requires that federal legislation be interpreted, where necessary, by reference to any "provincial rules, principles and concepts forming part of the law of property and civil rights"[445]. As Molot points out, section 8.1

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[440] Macdonald, "Encoding", *supra* note 102 at 155.
[441] *Ibid.* at 165.
[442] *Ibid.* at 200.
[443] *Continental Bank Leasing Corp. v. Canada* [1998] 2 S.C.R. 298.
[444] *Harmonization Act, No.1, supra* note 129, Preamble.
[445] *Interpretation Act, supra* note 15, s. 8.1.

implicitly recognizes that "even among common law provinces, the [rules, principles and concepts] may well differ from one province to the other."[446]

Given the *Interpretation Act's* confirmation of the general applicability of provincial statutory law, it seems that the primary question which will have to be addressed with regard to the effect of particular provincial charity statutes is whether they are sufficiently general or sufficiently important to act as part of the default legislative dictionary for the *ITA*. Prior to the amendment of the *Interpretation Act,* this inquiry would have focused on whether the provincial legislation could reasonably be considered part of the province's "implicit, general, residual, suppletive law."[447] It remains to be seen whether the threshold for being "part of the law of property and civil rights" within the meaning of section. 8.1 is as high. In any event, it seems likely that provincial legislation which defines the notion of *charity* or *bienfaisance* for a narrow purpose, such as an exemption from municipal property tax, would not have the effect of modifying the *ius commune.* On the other hand, a statute such as the Ontario *Charities Accounting Act,* which has been interpreted as establishing the scope of the term "charity" for gifts of both land and personalty in the province[448], would likely be considered sufficiently fundamental to function as the suppletive law for a statute such as the *ITA.*

Conclusion

The purpose of this study has been to challenge the prevailing assumption that there is only one source of meaning for the registered charity provisions of the *ITA,* to explore the multiple legal sources relating to the concept of "charity" (*bienfaisance*) in Canada, and to expose the challenges that these sources present for the ongoing project of ensuring that federal legislation respects the language and traditions of the four legal audiences in Canada.

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[446] Molot, *supra* note 111 at 16.
[447] Macdonald, "Encoding", *supra* note 102 at 138.
[448] *Re Orr, supra,* at 597.

The primary conclusions of this study may be summarized as follows. First, the current interpretational approach to the registered charity provisions, and particularly the position that the *ITA* concept of charity is "uniform federal law", is at odds with fundamental principles of statutory construction and constitutional law, as well as the federal government's policies on legislative bilingualism and bijuralism, and the explicit terms of sections 8.1 and 8.2 of the *Interpretation Act.* Second, there are at least four legal sources of meaning for the terms *charity* and *bienfaisance* in Canada – the common law of charitable trusts, the customary civil law rules regarding *legs pieux,* the Roman laws on foundations and gifts, and the various statutes governing the administration of charities in the provinces. Third, while on balance the canons of construction may favour interpreting the *ITA* term "charitable" (*bienfaisance*) in accordance with its common law meaning in the common law provinces, *bienfaisance* is a problematic translation of the common law term *charitable*, because it is more consistent with another English term, "benevolent", which has consistently been held to fall outside of charity's legal scope. Fourth, where valid provincial legislation establishes a meaning for the term *charitable* or *bienfaisance* that can be said to have modified the province's basic law of property and civil rights, that statutory meaning must be referred to in applying the *ITA* within that province.

Finally, this study concludes that within the province of Quebec, there is no basis for interpreting the term "charitable" (*bienfaisance*) in accordance with the common law of charitable trusts, a body of private law (although admittedly one with public aspects) that has no application in the province. While Quebec's civil law tradition never developed a stringent or detailed conception of charity, due largely to the historical lack of administrative control over charitable legacies and trusts, the reception of the *ancien droit* from France did ensure that a wide variety of customary law sources on transfers to charitable purposes came to form part of Quebec law. These sources were expressly incorporated into article 869 CCLC, and continue to be relevant to the new CCQ. Although these sources will require further study, they clearly form part of the law of property and civil rights in Quebec, and therefore part of the default legislative dictionary applicable to federal legislation such as the *ITA.*

Based on these conclusions, it is clear that as presently drafted and interpreted, the registered charity provisions of the *ITA* present a major obstacle to the Government of Canada's declared goal of "facilitat[ing] access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions"[449]. Undoubtedly, the current approach to the federal registration of charities will have to be changed if the principles and objectives underlying the harmonization project are to be extended to Canada's charitable sector. The difficult question is what shape this reform should take and what particular branch of government – judicial, legislative, or bureaucratic – should carry it out. This question will require detailed examination, which is beyond the scope of the present work. However, this paper will conclude with some general comments on reforming the charitable registration scheme and some brief observations on the various ways this reform could be brought about.

In general terms, the objective of the reform exercise should be to devise an approach to the registration of charities that respects all of Parliament's diverse legislative aims. While the federal government changes the specific fiscal and administrative rules applicable to registered charities relatively frequently, this study has identified a number of more general, longstanding legislative objectives that can be presumed to underlie the *ITA* registered charity scheme. First, Parliament wants to confer fiscal privileges on organizations that carry out purposes and activities that are "of special benefit to society"[450]. Second, Parliament wants to ensure that the *ITA*, in both of its language versions, takes into account both of Canada's private law traditions. Third, Parliament wants to ensure that the registered charity provisions apply relatively uniformly throughout the whole of Canada, so that taxpayers do not bear unequal fiscal burdens based on their place of residence.[451] Finally, it can be assumed that Parliament wants the registered charity scheme to be clear as possible, so that taxpayers can identify Parliament's intentions, and judicial and administrative interpretations of the provisions

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[449] *Harmonization Act, No. 1, supra* note 129, Preamble.
[450] *Vancouver Society, supra* note 25 at para. 95.
[451] This principle, which is sometimes seen to be supported by section 8 of the *Interpretation Act, supra* note 15, has been generally accepted by the courts. See, for example, *Minister of Finance v. Smith* [1927] C.T.C. 251 at 254.

accurately reflect the government's fiscal aims. These objectives, as we have seen, are not always easily reconciled. However, the aim of the reform exercise should be to find a solution that accommodates all of these diverse legislative objectives to the greatest possible extent.

Before the various options for reforming the registered charity scheme are briefly examined, three additional comments should be made. First, while the bijuralism and bilingualism issues that have been raised by this study are highly interconnected, due to the *ITA's* use of a single bilingual term – "charitable" (*bienfaisance*) - that expresses two legal concepts in one tradition and one in another, it is important to remember that they are separate issues that must each be addressed. Second, in part *because* of the interconnectedness of the bijuralism and bilingualism issues, any change to the language used to describe the primary criteria for charitable registration under the *ITA* will substantively change the meaning of the statute.[452] It would not seem appropriate, therefore, for the revision of section 149.1 to be carried out under the authority of the *Statute Revision Act*. Finally, because of Quebec's status as the only province which collects and administers all of its own provincial income taxes[453], all of the reform options that are open to the federal government could also be applied to its provincial tax scheme. Because Quebec is free to create its own tax base, in other words, it has the authority and ability to determine which entities are of special benefit to society for fiscal purposes in the province.

The first alternative in terms of reforming the current approach to the registered charity provisions would be for the judiciary to interpret section 149.1, as currently drafted, in strict accordance with section 8.1 of the *Interpretation Act*. As we have seen, the likely result of this would be that a different test of "charitable purposes" (*fins de*

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[452] For the suggestion that altering one linguistic version of an enactment always alters the substantive meaning of a law, see N. Kasirer, "Dire ou définir le droit?" (1994) 28 R.J.T. 141 at 162.

[453] Most of the Canadian provinces have entered into tax collection agreements with the federal government, which require them to levy their tax by reference to the tax base set by the federal government. However, Quebec collects its own corporate and individual income taxes, making it the only province where the provincial income tax payable by individuals is not based on the federal definition of taxable income: V. Krishna, *The Fundamentals of Canadian Income Tax,* 8th ed. (Toronto: Thomson Carswell, 2004) at 10.

bienfaisance) and "charitable activities" (*activités de bienfaisance*) would apply to applicants for charitable registration in certain common law provinces, as well as in the province of Quebec[454]. Depending what civil law sources on charitable giving are ultimately found to constitute Quebec's *ius commune,* the scope of purposes and activities entitling Quebec taxpayers to charitable tax benefits could either be narrowed to include only religiously motivated acts of generosity or worship, or expanded to encompass a wide variety of objects, including the promotion of sports and games.

A 'judicial harmonization' of the registered charity provisions would have the advantage of affirming the clearly expressed intent in section 8.1 of the *Interpretation Act*, that provincial private law constitutes the default legislative dictionary for undefined terms in federal statutes "unless otherwise provided by law." It would also provide a powerful confirmation of the basic allocation of responsibility made by that act: Parliament bears the burden of ensuring that its legislation that applies with a sufficient degree of uniformity across Canada, while the courts must interpret federal legislation in a way that safeguards private, provincial law. However, a strictly judicial harmonization of the registered charity scheme would also likely undermine the government's uniformity objective by giving rise to a system where a different standard was applied to applicants for charitable status according to their province of residence. This would necessarily entail a major, judicially-led shift in the federal government's tax policy, something the courts would be loathe to do.[455] Finally, while a strict application of sections 8.1 and 8.2 to the registered charity provisions would do much to affirm the suppletive role of provincial law, it would not be likely to address the concerns of Canada's French common law minority, who are entitled to a clarification of the criteria for charitable registration in the French version of the *Income Tax Act.*

The second possible way of reforming the current registered charity scheme would be for Parliament to modify the language of section 149.1 to better account for its French

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[454] This raises an interesting issue regarding federally-incorporated charities that operate in more than one province: would they be allowed to engage in different activities from coast to coast?

[455] *Canderel Ltée v. Canada* [1998] 1 S.C.R. 147, per Iacobucci J. ("the law of income tax is sufficiently complicated without unhelpful judicial incursions into the realm of lawmaking.")

and English, civil law and common law audiences. From a common law perspective, the task of improving the legal and linguistic accuracy of the registered charity provisions would be straightforward: Parliament could simply replace the term *bienfaisance* with the term *caritatif*, to reflect PAJLO's recommendations on the proper French terminology for the common law of charitable trusts.[456] While such a modification would change the meaning of the definitions set out in section 149.1, it would greatly improve the compatibility of the two forms of linguistic expression in the common law provinces, and clarify Parliament's intent to incorporate the common law of charitable trusts into the *Income Tax Act*

From a civil law perspective, the question of how the registered charity provisions could be modified to address the existence of civil law sources on charitable gifts is rather more complex. The reason for this, as we have seen, is that the *ITA* term "charitable purposes" (*fins de bienfaisance*) has always been consistent with both language versions of the CCLC, and continues to form part of the private law lexicon of Quebec. As a result, any modification that simply replaced the term *bienfaisance* with an alternative term such as *caritatif* would suggest, though not with the benefit of great clarity, that the civil law sources on charitable legacies and gifts were being dissociated from the registered charity scheme.

Given the interconnectedness of the bilingualism and bijuralism issues in the context of section 149.1, there would seem to be two general avenues of harmonization that Parliament could take. The first option would be for Parliament to *embrace* the common law and civil law sources on charity by integrating into section 149.1 an asymmetrical simple double – "charitable" (*caritatif*) and "charitable" (*bienfaisance*) - that expresses the legal rule applicable to each system. For example, the definition of a "charitable foundation" (*fondation de bienfaisance*) could be amended to mean:

> a corporation or trust that is constituted and operated exclusively for charitable purposes...and that is not a charitable organization (*société ou fiducie constituée*

[456] Of course, to ensure consistency throughout the federal statute book, the relevant provisions of Part II of the *Canada Corporations Act* would also have to be amended.

> *ou administrée exclusivement à des fins de bienfaisance ou fins caritatives....et qui n'est pas une oeuvre de bienfaisance ou œuvre caritative*).

Alternatively, Parliament could choose to explicitly *dissociate* the civil law sources from the registered charity provisions by providing that the terms "charitable purpose" (*fin de bienfaisance*) and "charitable activity" (*activité de bienfaisance*) were to be construed, in all provinces, according to the common law of charitable trusts.[457]

In assessing the merits of a 'legislative harmonization' reform of the registered charity scheme, it is important to keep in mind that *any* legislative revision which clarified the relationship between section 149.1 and the private law of the provinces would go a long way in affirming the government's respect for the principles of federal-provincial complementarity, and of bijuralism and bilingualism in Canadian law[458]. An explicit decision by Parliament to either dissociate or incorporate the civil law sources on charity into the *ITA* would amount to an implicit acknowledgement that a unique civilian concept of charity does exist. A legislative harmonization of the registered charity provisions would also relieve the courts and the CRA of the unenviable task of deciphering the present meaning of section 149.1, and reduce the likelihood of litigation regarding Parliament's intent.[459]

However, a legislative revision of the registered charity provisions which is focused solely on meeting the basic requirements of bijuralism and bilingualism may not succeed in furthering the other important objectives of the registered charity scheme. The use of a simple double, for example, would work against the objective of

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[457] There would be other ways to dissociate the civil law clearly from the registered charity provisions. See, for example, the solutions proposed by M. Lamoureux to harmonize the *ITA* concept of a "real right" (*droit réel*) : M. Lamoureux, "The Income Tax Act, the Excise Tax Act and the term Interest: an interesting case for harmonization" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies in Canadian Tax Law, supra* note 11, 7:1 at 7:30-33.

[458] Macdonald, "*Atomic Slipper*", *supra* note 112 at 450 ("forcing Parliament itself to make its choices explicitly is the best guarantee that the distinctive civil law and common law traditions in Canada will be respected in any legislative reordering").

[459] The reduction of the caseload of litigation has been identified as one of the principal objectives of the harmonization project: see M. Cuerrier, S. Hassan and L. L'Heureux, "Harmonization des lois fiscals fédérales avec le droit québécois et le bijuridisme canadien" in *Congrès 00* (Montréal, Association de planification fiscale et financière, 2000) at 16:25.

uniformity in fiscal laws, due to the significant impact that it would have on the consideration of applications for charitable registration in Quebec. It would likely *increase* the litigation arising under section 149.1 and subsection 248 (1) of the *ITA*, due to the current lack of clarity regarding the notion of charity in Quebec. On the other hand, if Parliament chose to dissociate the civil law and provincial statutory law sources from the registered charity provisions, it would lose a precious set of perspectives on the types of purposes and activities which have been found, by legal communities that continue to exist in Canada, to be of special benefit to society. Given the widespread dissatisfaction with the current, common law approach to the definition of charity, such a legislative choice might well be seen as an opportunity passed by.

The final alternative in terms of reforming the current registered charity scheme would be for Parliament to include within the *ITA* a statutory definition of charity, or of a closely related term such as "philanthropy" which does not have such a strong presence in the provincial law lexicons. Such a definition could obviously take many forms: Parliament could, like the English Parliament, attempt to catalogue the categories of purposes or activities that are considered to be of special benefit to Canadian society[460], or articulate a more general test based on a concept of public utility or public benefit. However, the basic function of any statutory definition of charity would be to articulate the basic qualitative criteria for charitable registration in the *ITA,* thereby reducing the current reliance on extrinsic legal sources, and promoting the goal of the uniformity of fiscal law. In contrast to the legislative harmonization option, a statutory definition of charity would also allow for the "cross-fertilization and sharing of solutions"[461] and ideas from Canada's multiple legal traditions and institutions.

The idea of defining the meaning of charity in federal tax legislation is neither novel nor new. Since 1952, in fact, it has been considered by a variety of law reform

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[460] In 2005, the English House of Lords gave third reading to draft legislation of charities, which defines charity in terms of thirteen charitable "heads": see Bill 83, *Charities Bill* [HL], 2005-2006 Sess., available online at: http://www.publications.parliament.uk/pa/cm200506/cmbills/083/06083.i-v.html.

[461] Leckey, *supra* note 369 at 121.

commissions and government bodies in Canada, England, Scotland, Australia, New Zealand, Barbados and South Africa[462], who have generally been motivated by an interest in replacing the common law test. To date, however, the proposals to enact a statutory definition of charity in these Commonwealth countries have been largely rejected[463]. The reason, it seems, is that the difficulty of drafting a satisfactory definition and the potential drawbacks of creating an entrenched standard have always been seen to outweigh the potential benefits of codifying a definition which reflects contemporary social values and needs. As the Ontario Law Reform Commission concluded following its extensive review of Canada's registered charity scheme in the 1990's, "[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."[464]

However, the debate over the desirability of enacting a statutory definition of charity in Canada has never been conducted from the perspective of Canadian bijuralism and bilingualism, nor accounted for the multiplicity of 'charity law' sources that exist in Canadian law. Clearly, these factors must distinguish Canada's consideration of the issue from that of the other countries engaged in this debate. In Canada, in other words, it is not just a question of improving the clarity of our tax legislation, or of modernizing an outdated body of case law that continues to rely on antiquated social attitudes and beliefs. It is not just a question of resolving the legal void being created by the paucity of recent law on the purposes the common law deems charitable, or of curbing the hefty discretion currently exercised by an administrative agency with an interest in conserving the fisc. In Canada, the question of whether the concept of charity should be defined in federal legislation is a question of the bijural nature and constitutional structure of our federal state, and the consequential co-existence of different legal

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[462] For a review of the various initiatives to reform the legal definition of charity, see P. Broder, *The Legal Definition of Charity and Canada Customs and Revenue Agency's Charitable Registration Process* (Canada: Canadian Centre for Philanthropy, 2001), available online at: http://www.cbc.ca/disclosure/archives/0111_charity/documents/LegalDefinitionofCharity.pdf.

[463] See *ibid.* at 7-15. It remains to be seen if the English *Charities Bill* becomes law. But see the *Charities and Trustee Investment (Scotland) Act 2005, infra* note 469.

[464] Ontario Law Reform Commission, *Report on the Law of Charities,* vol.1 (Toronto: OLRC, 1996) at 145.

concepts of what purposes and activities are of special benefit to society. It is a question of Canada's diverse legal and linguistic communities, and of the federal government's commitment to ensuring that these communities can recognize themselves in federal law[465]. Until these elements of the Canadian legal system are properly addressed, the debate over whether a statutory definition of charity should be enacted in Canada cannot be said to be closed.

Finally, just as the bilingual and bijural nature of Canada must serve to refocus the debate over the enactment of a statutory definition of charity, it should also change the shape of any definition of charity that is ultimately devised. While the common law may well be unique in terms of the detailed attention it has devoted to the question of the legal definition of charity, there are other Canadian legal traditions and institutions that have addressed the question of what public purposes are especially deserving of protection and support. In the modern world, where charities face growing demands on their services and the debates over whether sports clubs or missionary organizations or advocacy groups should be entitled to charitable tax support have only grown more intense, there is no reason we should not be drawing on *all* of these legal sources, and seeking to construct a charitable regime which reflects both the shared values and the plural character of the Canadian state.

Postcript

The *locus classicus* of the common law of charity, the *Pemsel* decision of the House of Lords, is usually cited as an authority on the four "heads" of charity, or on the general applicability to income tax legislation of the law of charitable trusts. In fact, it may also be the earliest authority on the harmonization of charity law sources in a bijural state. *Pemsel* arose because the commissioners of the *Income Tax Act, 1842,* which applied throughout the United Kingdom, refused to refund tax paid by a Scottish church on income devoted in trust to missionary activities. In their view, the purpose of

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[465] Stéphane Dion, Address for Symposium (1997), available online at: http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1d.html ("The harmonization project is designed first and foremost to allow Quebecers to recognize themselves better in federal legislation")

supporting missionary establishments among heathen nations was not, at least in Scotland, a "charitable purpose" within the meaning of the UK *Income Tax Act*. The basis of the commissioners' argument was that the Statute of Elizabeth had been enacted for England only, and that a narrower concept of charity had historically been articulated in the Scottish courts[466].

The argument of the income tax commissioners was ultimately rejected by the House of Lords. Lord Watson offered up a factual resolution to the harmonization issue, finding that the word "charitable" had, overall, borne a similar legislative meaning in English and Scottish law[467]. However, it was Lord Macnaghten who summed up, better than anyone, the arguments against the plural construction of a charitable tax exemption in a multijural state.

> Where there are two countries with different systems of jurisprudence under one legislature, the expressions in statutes applying to both are almost always taken from the language or style of one, and do not always harmonize equally with the genius or terms of both systems of law...
>
> ...you must taken the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries. Thus you get what Lord Hardwicke calls "a consistent, sensible construction". A simpler plan is now recommended. Though the words have a definite legal meaning in England, you must not, it is now said, look at that meaning unless it be in vogue north of the Tweed. You must put out the light you have, unless it penetrates to the furthest part of the room. That was not Lord Hardwicke's view. He seems to have thought reflected light better than none.[468]

These sentiments are certain to resurface, in the event that the harmonization of Canada's registered charity scheme is ever given serious attention or thought. Hopefully, those who believe, like Lord Macnaghten, that the concept of charity "properly belongs" to the English common law tradition will also consider that Scotland now has its own statutory definition of charity, which differs from the common law and

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[466] *Pemsel, supra* note 4 at 534-36.
[467] *Ibid.* at 558-63.
[468] *Ibid.* at 579-80.

the proposed English statutory definition in several material respects[469]. The multiplicity of legal sources on the meaning of charity in Canada may well serve to complicate the task of Parliament, as it considers the future of Canada's charitable sector and of section 149.1 and subsection 248(1) of the *Income Tax Act*. But surely, if the unique Canadian project of harmonizing our federal legislation is based on any underlying conviction, it is that several reflected lights are better than one...

[469] *Charities and Trustee Investment (Scotland) Act 2005,* A.S.P. 2005, c. 10, available online at: http://www.opsi.gov.uk/legislation/scotland/acts2005/20050010.htm.

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