The Public-Private Nature of Charity Law in England and Canada

Kathryn Chan, Wolfson College

Submitted for the degree of DPhil (law), University of Oxford

Michaelmas Term, 2013/14

Acknowledgements

The author gratefully acknowledges the support of the Social Sciences and Humanities Research Council of Canada and the Pierre Elliott Trudeau Foundation in funding this doctoral project, and Wolfson College, Oxford, in providing institutional support and a home. Being a part of the Trudeau Foundation community in particular has been an incredible experience, and I will treasure the friendships and insights that I have gained.

I am also deeply grateful to the many people who have provided support and guidance throughout my time as a graduate student. In particular, my thanks go to:

My supervisor, Professor Mark Freedland FBA, whose guidance and great generosity made the envisioning and completion of this thesis possible. I will miss our conversations about the law of charities, and will strive, in future, to treat my own students with the same courtesy and respect he always showed me.

The numerous mentors and advisors who supported my applications for doctoral work and funding. In particular, I am grateful to Professors Shauna Van Praagh and Jane Glenn of McGill University, and the Honourable Nicholas Kasirer of the Quebec Court of Appeal, for helping me to embark on this endeavour. I am also grateful to Professor Peter Oliver, who provided early encouragement to attend Oxford and pointed me to some of the theoretical material upon which this thesis is based.

The faculty and staff at the University of Victoria Faculty of Law, particularly Dean Jeremy Webber, former Dean Donna Greschner, Associate Dean Elizabeth Adjin-Tettey, Associate Dean Heather Raven and Professor Gillian Calder, for hiring me and then providing me with the space and support to finish this work.

Myrna Ramos, and the staff at the Wolfson College and University of Victoria child care centres, for caring well for my children during the many hours I devoted to this thesis.

My father, Blake Bromley, who loves the law of charities more than anyone I know and who taught me to think critically about its subject matter. I am also grateful to my mother, Marion Bromley, who loves us both despite the law of charities, and stepped up to provide support and assistance at crucial times.

Lastly, and most importantly, I am grateful to my husband Gus, who travelled to Oxford with me and made considerable sacrifices (and many dinners) in order for me to be able to complete this work. And I am grateful to, and for, Noah, Molly and Jerome, who made coming home each day a joyful event.

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Abstract

This thesis examines various aspects of English and Canadian charity law in terms of their relationship with the contested categories of 'public law' and 'private law'. It argues that the law of charities can be regarded as a *hybrid* legal discipline in both a general or categorical sense, and in the context-specific or functional sense that both the conditions for obtaining charitable status, and the regulation of the conduct of charities and their trustees, are continually being adjusted in such a way as to maintain in a broad sense a functional equilibrium between individual project pursuit and collective project pursuit; that is to say, an equilibrium between the protection of the autonomy of property-owning individuals to control and direct their own wealth, and the furtherance of competing public interests or visions of the good.

After sketching out the history and nature of the common law charities tradition and the contemporary English and Canadian regulatory regimes, the thesis pursues its analytical and comparative hypotheses by examining two important features of English and Canadian charity law, the public benefit doctrine and the rules of *locus standi* that determine who may seek relief for misapplications of charity property. It then addresses the comparatively modern issue of the governmental co-optation of charitable resources, considering to what extent modern pressures associated with the retrenchment of welfare states threaten to destabilize charity law's hybrid equilibrium in EW and Canada.

The thesis then turns to the emerging phenomenon of social enterprise, arguing that shifts to charity law's functional equilibrium may explain the emergence of this 'post-charitable' legal form. The thesis concludes with some observations on the hybrid nature of the law of charities, and on the different functional equilibriums between individual project pursuit and collective project pursuit that have been reached by English and Canadian charity law.

Word count: 95,472
(Includes footnotes; excludes tables and bibliography)

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Table of Abbreviations

BCBCA	*Business Corporations Act,* SBC 2002, c 57
CA 2011	Charities Act 2011 (UK)
CAA (Ont)	*Charities Accounting Act*, RSO 1990, c C-10
Canadian Charter of Rights and Freedoms	*Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK) 1982, c 11
Charity Commission	Charity Commission for England and Wales
Constitution Act 1867	*Constitution Act, 1867* (UK), 30 & 31 Vict c 3, as amended, reprinted in RSC 1985, App II, No 5
Companies (AICE) Act 2004	Companies (Audit, Investigations and Community Enterprise) Act 2004 (UK)
CRA	Canada Revenue Agency
CTA 1853	Charitable Trusts Act 1853 (16 & 17 Vict c 137)
CTAA 1855	Charitable Trusts Amendment Act 1855 (18 & 19 Vict c 124)
CTA 1860	Charitable Trusts Act 1860 (23 & 24 Vict c 136)
ECHR	European Convention on Human Rights and Fundamental Freedoms
EW	England and Wales
Final Brougham Report (1837)	Report of the commissioners appointed in pursuance of an act of Parliament made and passed in the 5th and 6th years of King William IV, c 71, intituled, 'an act for appointing commissioners to continue the inquiries concerning charities in England and Wales, until the first day of March 1837'.
HMRC	Her Majesty's Revenue and Customs

Hodgson Review (2012)	Trusted and Independent: Giving Charity back to Charities – a Review of the Charities Act 2006 (by Lord Hodgson of Astley Abbotts)
ITA	*Income Tax Act*, RSC 1985, c 1 (5th supp), as amended
Nathan Report	Report of the Committee on the Law and Practice related to Charitable Trusts (Cmd 8710, 1952) (Chaired by Lord Nathan)
OLRC Report	Ontario Law Reform Commission, 'Report on the Law of Charities' (Canada, 1996)
Private Action, Public Benefit	Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector (London: Strategy Unit Report, 2002)
SC on Public Charities (1835)	Report from the Select Committee appointed to examine and consider evidence in the several reports presented to the House from the commissioners appointed to inquire concerning charities in England and Wales, together with the minutes of evidence, HC (1835)

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I. Introduction to the Law of Charities and the Public Law-Private Law Divide

'In my judgment…the world of charity is essentially private.'[1]

'Charitable trusts are public, not private, trusts.'[2]

The law of charities has not traditionally displayed a great deal of concern for how its own subject matter should be analyzed or understood. Rooted in the practices of England's equitable and ecclesiastical courts, and anchored for centuries to the preamble of an Elizabethan statute, the charity law tradition of the common law world is most commonly described through a narrative, and thus perceived through a lens, which emphasizes these features of its rich history. The historical lens, as any other, has certain optical effects. It accentuates the judicial provenance of much of the law of charities, and the casuistic quality of the decisions establishing which philanthropic impulses the courts will in perpetuity enforce. It highlights the isolated quality of the law of charities, the way in which it seems to perch, an abiding reminder of equity's historic separateness, somewhere outside the core disciplines of the private law. And it accentuates the extent to which the law of charities is 'common' to the common law world.

The historical lens, then, captures much that is true about the law of charities. However, it also has a number of limitations, the gravity of which has increased in recent

[1] *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587 [155] (Rix LJ in dissent).

[2] *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* [2010] EWHC 520 (Ch) [65].

years. The lens does not fully capture, for example, the extent to which charity law is now rooted in statutory instruments and controlled by statutory regulators, not only in EW but also in other parts of the common law world. It fails to convey the degree to which charities, and thus the laws pertaining to charities, are enmeshed in debates about the proper scope of the welfare state and the proper scope of human rights instruments. The historical lens understates the degree of variation between the laws governing charities in different common law jurisdictions, and the effect that different institutional settings have had on the core doctrines of the tradition. And it masks a lack of theory about the purpose of charity law, and its place on our legal map.[3]

The project of this thesis is to address some of these limitations by bringing another 'lens' to bear on the modern law of charities in two, predominantly common law jurisdictions. The chosen lens is that of the public law-private law divide, and the chosen jurisdictions are EW, the place of origin of the common law of charities, and Canada, the place of origin of the author and a place whose law of charities contains both intrinsically and comparatively interesting features. The thesis examines various aspects of the law of charities in these jurisdictions in terms of their relationship with the contested categories of 'public law' and 'private law', doing so in the hope of achieving three related goals. The first of these may, in the tradition of Peter Birks, be identified as the *mapping* goal: it is to begin exposing where the law of charities 'sits' in a doctrinal world that can be viewed as conceptually divided into the public and the private. The second, and related,

[3] On the undertheorization of charity law, see M Harding, 'What is the point of Charity Law?' (Private and Public Law – Intersections in Law and Method Conference, Brisbane, 2011) http://www.law.uq.edu.au/documents/cli-sem-series/2011/What-is-the-point-of-charity-law.pdf (accessed May 2013).

goal of the thesis is a *comparative* mapping goal: it is to identify the similarities and differences between certain laws governing charities in the chosen jurisdictions, in order to illustrate the range of existing charity law 'maps' within the common law world, and the corresponding range of views about charities to which those maps give effect. Finally, the thesis has an *evaluative* goal, which is to contribute to the creation of a useful normative discourse about the function of charity law in modern society and the merit of specific charity law rules.

In pursuing these goals, the thesis makes three central claims. The first claim is that the charity law tradition that evolved in the English Chancery courts (the 'common law charities tradition') was historically a true 'hybrid' of private law and public law, in the sense that it accorded equal or near equal importance to the autonomy interests of benevolent property owners, and to the public interest in properly directed and administered charity property. The second claim is that the contemporary regimes of charities regulation in EW and in Canada are also legal hybrids, but in changed and varied senses, which reflect the diverse public interests that have come to bear on the law of charities through the tradition's interaction with tax law, human rights law, and modern government welfare policies. The final claim is that these public interests have combined to make charity law an increasingly *public-leaning* hybrid, which development is reflected in the contemporary emergence of 'social enterprise' vehicles that are more autonomous in character and that are subject to lighter-touch regulatory regimes.

The public law-private law lens that is applied throughout this thesis is substantially doctrinal, in the sense that it relies on 'language and concepts that are internal rather than external to law.'[4] Nevertheless, it seeks to expand charity law's self-understanding in ways that require elaboration.[5] In what follows, therefore, this introduction will examine the concept of the public law-private law divide, its relationship to the law of charities, and the particular account of the divide that will be employed for purposes of this thesis. Finally, the introduction will outline and explain the structure of the remainder of the work.

1. The public law-private law divide: the history of a concept

The conceptual division of law into public and private, though a relatively recent phenomenon in the common law, has preoccupied jurists since the earliest days of the Western legal tradition. The history of the division has been extensively examined in the literature,[6] and my aim at this point is to provide only a very brief preliminary summary of that literature. For the Romans, the distinction between public law – that concerning the Roman state - and private law – that concerning the well-being of individuals - stood at the forefront of their system of legal classification,[7] although little doctrinal energy was

[4] Stephen A Smith, 'Taking Law Seriously' (2000) 50 UTLJ 241, 255.

[5] For a classic treatment of private law as a 'dynamic, self-understanding enterprise', see E Weinrib, *The Idea of Private Law* (Harvard University Press 1995). The term 'self-understanding' is also used by Smith: Smith (n 4) 249-50 .

[6] See, for example, A Erh-Soon Tay and E Kamenka, 'Public Law-Private Law' in S Benn and G Gaus (eds), *Public and Private in Social Life* (Croom Helm 1983) 67; JH Merryman, 'The Public Law-Private Law in European and American Law (1969) 17 J Pub Law 3; F Pollock, 'The Contact of Public and Private Law' (1923) 1 CLJ 255; HF Jolowicz, *Roman Foundations of Modern Law* (Clarendon Press 1957).

[7] J. Inst. 1.1.4. See also D. I.I.I.2.

spent delimiting the scope of each legal sphere.[8] With the collapse of the Roman Empire and the ascendancy of feudalism and Germanic law, the distinction lost for a time its practical and intellectual force, medieval society being governed by an assortment of laws deriving from a variety of relationships and sources of authority.[9] Following the revival of classical Roman legal learning in the 12th century, however, the public law-private law distinction became foundational to the structure of European law, ultimately underpinning the organization of the continental codes, and the formal separation of civil courts and administrative tribunals in countries such as Germany and France.[10]

EW was much slower than the Continent to develop a 'consciously articulated distinction' between public law and private law.[11] The historical English aversion to the notion of a separate category of public law, traceable back to the 12th century,[12] was concretized by the Victorian jurist Albert Dicey, who argued in his *Introduction to the Law of the Constitution* that the 'universal subjection of all classes to one law administered by the ordinary courts' was a key element of the rule of law.[13] Despite the various criticisms to which it was subjected, Dicey's defence of formal equality before the

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[8] Jolowicz (n 6) 49-53.

[9] Tay and Kamenka (n 6) 69-70; see also Jolowicz (n 6) 52, calling it a 'modern commonplace' that in medieval times, public and private law were indistinguishable.

[10] Jolowicz (n 6) 49.

[11] Peter Cane, *Administrative Law* (4th edn, OUP 2004) 12. See also *O'Reilly v Mackman* [1983] 2 AC 237 (HL) 277 (Diplock L) ('the appreciation of the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system')

[12] See Tay and Kamenka (n 6) 73, describing how England's single system of royal courts 'eschewed any division' that might put the King into a special category of law.

[13] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan Press Ltd 1959) 193.

law and his criticism of the French system of *droit administratif* is widely credited with having held back the development of a distinct, English public law tradition for almost a century.[14] Dicey's work was also 'remarkably influential' in Canada, to which England's common law tradition had spread.[15]

It was during the course of the twentieth century that unique 'public law' traditions developed in EW and in Canada. The emergence of administrative law as a distinct legal discipline was particularly remarkable, with the subject going from 'supposed nonexistence to professional acceptance and respectability' in the course of five or six decades.[16] The intellectual history of the Anglo-Commonwealth 'public law' tradition is a complex history, and much of it remains to be written.[17] For purposes of this brief introduction, it is sufficient to note that administrative law theory and doctrine were an established part of the British legal landscape by the 1960s, and that Canada followed closely behind.[18] By the end of the twentieth century, constitutional law and administrative law were functioning as central organizing concepts in the common law's self-understanding, the two central pillars of a broader public law tradition. They were also being recognized as increasingly intertwined.[19]

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[14] Mark Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law' in Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide: une entente assez cordiale?* (Hart 2006) 96-97.

[15] *National Corn Growers Association v Canada (Import Tribunal)* [1990] 2 SCR 1324 [3]; Harry Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 Osgoode Hall LJ 1, 4-5.

[16] Michael Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: the case of John Willis and Canadian Administrative Law' (2005) 43 Osgoode Hall LJ 223 [12].

[17] Taggart makes this point: see ibid.

[18] ibid [13].

[19] See, for example, David Dyzenhaus (ed), *The Unity of Public Law* (Hart 2004).

The development of a distinctive 'public law' tradition in the Anglo-Commonwealth world has been paralleled by the development of a sizeable Anglo-Commonwealth literature debating the validity and the function of the public law-private law divide. This literature provides the starting point for this project's analysis of various aspects of English and Canadian charity law, and we will have occasion to examine it more fully in what follows. By way of context, however, it is important to note that the body of literature upon which this thesis relies has been driven to a large extent by major statutory developments in the UK, which have had the effect of making the distinction between public law and private law an issue of dispositive concern. Principal among these developments has been the introduction, now thirty years past, of a separate procedure for judicial review matters in the UK, built around the concept of a 'public law claim.'[20] The enactment of the UK Human Rights Act 1998, which imposes liability for human rights infractions on a range of 'public authorities', has been equally influential.[21]

This historical context has significantly influenced the shape of recent Anglo-Commonwealth debates over the public law-private law divide. Two characteristics of these debates are particularly worthy of note. First, a significant proportion of the early academic commentary on the distinction between public law and private law was written from a 'public law' perspective, and focused either on the appropriateness of having a

[20] The history of these procedural changes is outlined in most English administrative law texts: see, for example, Paul Craig, *Administrative Law* (7th ed, Sweet & Maxwell, 2012) 836.

[21] Scholarly interest in the public law-private law divide was also driven by the privatization agenda of the government of Margaret Thatcher and the rise of the 'new public management'. For a useful summary of these developments, see Cane, *Administrative Law* (n 11) 1-7, 11-18; Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 256.

separate judicial review procedure or of subjecting particular decisions to judicial or human rights review.[22] This focus gave a distinctive hue to the debate,[23] and cast many of the later 'private law' perspectives on the nature of the divide as responses to these public law arguments.[24] Second, the public law-private law literature upon which this thesis relies, though broadly an Anglo-Commonwealth literature, is oriented towards the structure and concerns of English law. While Canadian legal scholars (particularly feminist legal scholars) have addressed the distinction between 'the public' and 'the private' in a variety of contexts,[25] there is little literature that examines the public law-private law divide from the specific perspective of the Canadian legal system.[26] Various explanations could be offered for this state of affairs, but a major factor appears to be that the designations 'public law' and 'private law', and their close relations, have fewer dispositive consequences in Canadian law. We shall examine this claim more closely in what follows. For present purposes, it is sufficient to note that the debate over the existence and the validity of the public law-private law divide does not presently have the

[22] Carol Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 250; Gillian S Morris and Sandra Fredman, 'The costs of exclusivity: public and private re-examined' [1994] PL 69. See also Dawn Oliver, noting in 2001 that 'more attention is paid to defining public law than private law': Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999) 15.

[23] For an argument that this focus 'distorted' the debate, see Nicholas Bamforth, 'The Public Law-Private Law Distinction: A Comparative and Philosophical Approach' in Peter Leyland and Terry Woods (eds), *Administrative law facing the Future: Old Constraints and New Horizons* (Blackstone 1997) 137.

[24] See, for example, Geoffrey Samuel, 'Public and Private Law: a Private Lawyer's Response' (1983) 46 MLR 558.

[25] See, for example, Susan Boyd, *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press 1997). The Law Commission of Canada also published a collection of essays organized around the theme of the public-private divide in 2003: see Law Commission of Canada (ed) *New Perspectives on the Public-Private Divide* (UBC Press 2003).

[26] Canadian scholars have been involved in broader Anglo-Commonwealth debates over the distinctive character of 'public law' and 'private law', however: see, for example, Weinrib (n 5) and the Canadian contributions in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) and Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart 2009).

same status in Canadian legal circles as it does in EW.[27] As such, the thesis will rely principally on the work of English legal theorists in developing its claims about the relationship between charity law and the respective spheres of public law and private law.

2. Why organize our thinking about the law of charities around the public law-private law divide?

a. Why map at all?

As I indicated in the previous section, this thesis is, initially at least, concerned with mapping. It examines the common law charities tradition through the lens of the public law-private law divide, in order to better understand how the tradition stands in relationship to the public law and the private law spheres. It examines two contemporary regimes of charities regulation through this same lens, and aims to also understand how these regimes relate to the common law and to each other. In these varied, relational senses, the thesis aims to 'situate' the law of charities on a fundamental doctrinal map.

I argue that this mapping project is one worth pursuing. It is worthwhile despite the common law's well-known aversion to sorting methodology,[28] and despite the

[27] The leading Canadian public law texts contain virtually no discussion of the divide. Jones and de Villars mention the English debate only briefly: David P. Jones and Anne S. De Villars, *Principles of Administrative Law* (5th edn, Carswell 2009). Hogg raises the 'public-private distinction' in his discussion of the Canadian Charter of Rights and Freedoms, but takes the view that the terms can be 'seriously misleading' in that context: Peter Hogg, *Constitutional Law of Canada*, vol 2 (Thomson Reuters Canada Ltd 2007) 37-30.1.

[28] On the common law's perceived complexity and messiness, see Stephen A Smith, 'A Map of the Common Law' (2004) 40 Can Bus LJ 364, 367. See also Nicholas Kasirer, 'English Private Law, Outside-In' (2003) 3 OUCLJ 249, 253.

notoriously 'baffling and unsystematic' character of charity law.[29] Indeed, it may be worthwhile for just these reasons. The act of sorting information is valuable because it forces us to evaluate the significance of the information at hand.[30] And the act of sorting *law* is valuable because it tends towards clarity and predictability, two requirements of the rule of law. 'A good map', as Stephen Smith observes, will help ensure that like cases are decided alike, and reduce the amount of discretion exercised by judges and officials.[31] These are compelling arguments for applying a sorting methodology to the law of charities, particularly in Canada, where administrative discretion has become the hallmark of the field. The project of mapping the law of charities is worthwhile, in sum, because it orients the field towards coherence and justice, and because even if the end result turns out to be unsatisfying, we will have learned something important along the way.[32]

Despite embracing a sorting methodology, however, I do not start from the position that charity law, or even the individual doctrines and procedures that constitute it, are simply or straightforwardly amenable to a binary classificatory scheme. Such a position is neither intuitive, in my view, nor consistent with the literature that exists. I do not intend to argue, therefore, that the law of charities is exclusively a 'public law' or

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[29] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL) 307. Scholars have long complained about the variable and unpredictable character of charity law: see, for example, GHL Fridman, 'Charities and Public Benefit' (1953) 31 Can B Rev 537, 539.

[30] Smith, 'A Map of the Common Law' (n 28) 365. See also Peter Birks, *English Private Law* (Oxford University Press 2000) li ('Information which cannot be sorted is not knowledge. And information which can be sorted only by the alphabet is knowledge only of the spelling of names.')

[31] Smith 'Map of the Common Law' (n 28) 366, 382; see also Kasirer (n 28) 262.

[32] Smith, 'Map of the Common Law' (n 28) 365 (The *process* of mapping, of classification, is inseparable from the process of attaining knowledge.')

‘private law’ discipline. Rather, the argument will be that charity law lies somewhere within the contested border zone between public law and private law, and that it partakes in significant ways of each. This public-private *hybridity*, I claim, is an essential characteristic of the law of charities. It is also a characteristic that may improve our understanding of the function of charity law in modern society and our ability to evaluate specific charity law rules.

In focusing on the hybrid character of the charity law tradition, this thesis departs somewhat from an existing body of doctrinal work examining the relationship between public law and private law. In recent years, courts and commentators have increasingly shown an interest in identifying areas where public law and private law doctrines ‘intersect’, and in debating the merits of their cross-fertilization.[33] Some, like Dawn Oliver, have drawn attention to the similar values and functions served by public law and private law in general,[34] while others, like Matthew Conaglen, have conducted more detailed analyses of the similarities and differences between specific legal rules.[35] A substantial number of commentators have addressed the impact of constitutional principles

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[33] See, for example, the discussion of *Edge v Pensions Ombudsman* [1998] Ch 512 in David Hayton and Charles Mitchell, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (12th edn, Sweet & Maxwell 2005) 656.

[34] Oliver, *Common Values* (n 22).

[35] Matthew Conaglen, ‘Public-private intersection: comparing fiduciary conflict doctrine and bias’ [2008] PL 58.

on substantive, private law doctrines,[36] while a smaller number have considered how 'private law' principles might flow the other way.[37]

While this body of literature has unquestionably enriched our understanding of the relationship between public law and private law, the language of 'intersection' and 'cross-fertilization' does tend to reinforce the picture of a binary legal world in which legal doctrines, procedures, and institutions have a single, or at least primary, site of belonging. Thus, within Conaglen's comparative analysis, fiduciary conflict doctrine is clearly identified as a private law doctrine, although one that may share certain characteristics with the public law of bias.[38] Similarly, in Mayo Moran's work, discrimination law is clearly understood to be a 'public law' subject, although one that may draw on private law concepts of personhood to give it substance.[39] The picture of public law and private law that emerges from this context is one of mutually constitutive, but still in essence mutually exclusive spheres.

It may indeed be the case, as this body of work suggests, that most doctrines, procedures, and institutions have a single or primary site of belonging within either the public law or private law sphere. This question, while important, is far beyond this thesis'

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[36] See, for example, the collection of essays in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (OUP 2001).

[37] See Mayo Moran, 'The Mutually Constitutive Nature of Public and Private Law' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart Publishing 2009).

[38] Conaglen, 'Public-private intersection' (n 35).

[39] Moran, 'The Mutually Constitutive Nature of Public and Private Law' (n 37) 31. As we shall see, however, Moran was one of the first to recognize the hybrid nature of the law of charitable trusts: see n 52 below.

scope. What this thesis claims is that whatever the answer to this question, it is also possible to envisage public and private colliding *within* a singular legal doctrine, procedure, or institution, such that that doctrine, procedure, or institution could not safely be said to have a primary site of belonging in *either* the public law or private law sphere. Faced with such a doctrine, procedure, or institution, the natural focus of a doctrinal inquiry would be on how the subject's identity was divided between its constituent private and public elements.[40] While the concepts of cross-fertilization and intersection might assist in this inquiry, the concept of hybridity would seem to provide the most appropriate analytical and evaluative tool.

The use of hybridity as an academic discourse has become current in only the last three or four decades.[41] Today, however, the concept of a hybrid – a 'thing composed of mixed or incongruous elements'[42] - plays an important role in a variety of disciplines, ranging from genetics to cultural studies to anthropology. Hybridity theory depends on the 'prior assumption of…fixed boundaries', but often seeks to problematize and destabilize these boundaries, and to explore the border zones that surround them.[43] In the context of cultural and literary studies, hybridity and the related concepts of métissage, creolisation, and border identity are invoked primarily to explain 'new' hybrid forms - the 'increasingly mixed sites' of contemporary belonging and affiliation that exist in modern

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[40] Sherry Simon, 'Cultural and Textual Hybridity' (2001) 2 Across Languages and Cultures 217, 226.

[41] Pieterse traces the thematization of hybridity back to the 1980's: see N Pieterse, 'Hybridity, So What?: The Anti-Hybridity Backlash and the Riddles of Recognition' (2001) 18 Theory, Culture & Society 219, 222-3.

[42] Katherine Barber (ed) *The Canadian Oxford dictionary* (OUP 1998) 693 ('hybrid').

[43] Pieterse (n 41) 220, 226.

societies.[44] However, the concept of hybridity may also be applied to 'existing or, so to speak, old hybridity, and thus involves different ways of looking at historical and existing cultural and institutional arrangements.'[45] According to Pieterse, this is 'a more radical and penetrating angle that suggests not only that things are no longer the way they used to be, but were never really the way they used to be, or used to be viewed.'[46]

Hybridity theory, as developed in the field of cultural and literary studies, provides a useful conceptual tool for this thesis' mapping and evaluative goals. By acknowledging but at the same time destabilizing perceived boundaries, hybridity theory creates space for the mapping of a legal discipline, such as the law of charities, which does not have a primary site of belonging in either the public law or private law sphere. Hybridity theory also offers a promising source of language and imagery for this thesis' evaluative goal of contributing to a useful normative discourse about the place of charity law in modern society. Literary studies of hybrid texts by post-colonial authors describe hybrids as 'locuses of conflict' between differing values and ideas,[47] which make us aware of 'the lack of total reciprocity between signifying systems.'[48] Some authors suggest that the hybrid occupies a 'space in-between' that may have its own moral dimensions and

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[44] Simon (n 40).

[45] Pieterse (n 41) 221.

[46] ibid.

[47] C Schaffner and B Adab, 'The Idea of the Hybrid Text in Translation: Contact as Conflict' (2001) 2 Across Languages and Cultures 167.

[48] Simon (n 40) 221.

identity.[49] Hybrid *texts,* for their part, are described as being characterized by dissonances, disparate vocabulary, and a lack of cohesion, which characteristics are attributable to differences in the prevalent assumptions of their composite linguistic cultures.[50] Finally, literary hybridity studies describe hybridization as a *dynamic* phenomenon, and suggest that the subject components of the hybrid form may be alternately dominant and subsidiary.[51] We will find that many of these descriptors of hybrid literary phenomena are equally apt descriptors of the law of charities, and its constituent doctrines, procedures, and institutions.

b. Why this mapping tool?

The more difficult question, in many ways, is whether the public law-private law divide is the best concept upon which to build a map of English and Canadian charity law. Previous scholarship has considered the relationship between the law of charities and the respective categories of public law and private law, and suggested that it is worthy of further study.[52] However, it is not the only possible sorting tool.[53] Justice Maurice

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[49] Simon (n 40) 220; Mary Snell-Hornby, 'The Space 'In Between': What is a Hybrid Text?' (2001) 2 Across Languages and Cultures 207, 208.

[50] Simon (n 40) 217; Niall Bond, 'Interpreting the Objectively Strange and the Strangely Objective: Hybrid Texts in Social Discourse and in the Social Sciences' (2001) 2 Across Languages and Cultures 251; Schaffner and Adab (n 47) 175.

[51] Schaffner and Adab (n 47) 168-9; Alexis Nouss, 'The Butterfly and the Translator: Reflections on Hybrid Textuality' (2001) 2 Across Languages and Cultures 227. In a hybrid composition, Nouss writes, 'the components are still visible and it is the tension between them, not the resolution, which gives its full value and its character to the alloying. It is neither blending nor confronting but a principle of alternance where there is no domination and no certainty'.

[52] The first scholar to explore these relationships appears to have been Harold Hanbury, a leading authority on the English law of equity: see Harold Greville Hanbury, *Essays in Equity* (The Clarendon Press 1934) 93-101. The lens has been applied, to varying extents, by several authors since then: see, for example, Mark Freedland, 'Charity Law and the Public/Private Distinction' in Charles Mitchell and Susan R. Moody (eds),

Cullity, for example, has examined the ways in which the law of charities is a 'hybrid' of several distinct legal disciplines, including trust law, corporate law, and taxation law.[54] A more recent co-authored work categorizes the rules governing charities in several jurisdictions according to an identified set of 'core functions' of charity law.[55] All of these mapping schemes may enhance our understanding of the law of charities, and improve the law's coherence and predictability. Nevertheless, there are several compelling arguments for organizing our thinking about the law of charities around the public law-private law divide.

The first reason why the public law-private law divide is an appropriate sorting tool for the law of charities is simply that the divide represents a fundamental 'organizational claim' of the law.[56] The relationship between a given classificatory scheme and the public law-private law divide will therefore often loom as a question, even

Foundations of Charity (Hart 2000); Mayo Moran, 'Rethinking Public Benefit: The Definition of Charity in the Era of the Charter' in Jim Phillips, Bruce Chapman and David Stevens (eds), *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen's University Press 2001); Adam Parachin, 'Regulating Philanthropy: Is Charity Public or Private?' (CBA National Charity Law Symposium, Toronto, 4 May 2012). I briefly considered the lens in an earlier work, suggesting at that time that there were reasons to resist the view that the common law of charities was public: Kathryn Chan, 'Taxing Charities/Imposer les Organismes de Bienfaisance: Harmonization and Dissonance in Canadian Charity Law' (2007) 55 Cdn Tax J 481, 541. In the American context, see Evelyn Brody, 'Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?' (2010) 85 Chi-Kent L Rev 571. Mayo Moran was possibly the first to identify the charitable trust as a 'hybrid of public and private relationships.': ibid at 257. However, her piece did not analyze these relationships in detail.

[53] Birks (n 30) xliii ('Particular taxonomies always arise in response to questions. Each question provokes its own taxonomized answer, and every such taxonomy cuts across every other').

[54] Maurice Cullity, 'The Charitable Corporation: a "Bastard" Legal Form Revisited' (2001) 17 The Philanthropist 17.

[55] Myles McGregor-Lowndes Kerry O'Halloran, Karla Simon, *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer 2008). The identified core functions are protection, policing, mediation and adjustment, and support.

[56] Smith, 'Taking Law Seriously' (n 4) 250-51.

if it is a question the classifier wishes to avoid. Peter Birks' ambitious project to map all of the core subjects of the common law according to a broadly Romanist model aptly illustrates this reality. As Birks was careful to point out in the preface to *English Private Law*, the object of that work was not to investigate the 'boundary disputes' between private law and public law, but rather to decipher the internal structure of each 'sub-unity' of the law, and articulate its principal components.[57] Even before the publication of a companion volume entitled *English Public Law*, however, the most basic division that Birks' taxonomy communicated was precisely that between public law and private law.[58] While charity law's location within section G (Property for Purposes) of chapter 4 (Property (General Principles)) of Birks' scheme is undoubtedly significant, therefore, the more fundamental implication of the *Private Law* and *Public Law* volumes is that the law of charities belongs to the private law sphere.[59]

A second and related reason for applying the public law-private law lens to the law of charities is that public law and private law provide 'two distinct sets of starting points' for thinking about legal regulation.[60] While private law is concerned with rendering intelligible the immediate connection between two litigating parties, public law casts its gaze over a wider group of persons that are indirectly connected through politically

[57] Birks (n 30) xxxvi.

[58] ibid xxxvi-xxxix, asserting that the whole law is 'either public law or private law'.

[59] See ibid [4.485] and onwards. Charities also receive a very brief mention in the Private Law chapter on succession, and in the Public Law sections on offences against property and Standards of Review and Human Rights in English law: see 7.170 (wills); 7.144, 26.33.

[60] Freedland, 'Public/Private Distinction' (n 14) 123.

determined goals.[61] And while private law operates against a general backdrop of freedom, public law demands that the actions of its subjects be grounded in a legal rule:

> For private persons, the rule is that you may do anything you choose which the law does not prohibit…But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law.[62]

One consequence of these distinct starting points is that the labels 'public' and 'private' have tremendous rhetorical force in the field of charities regulation, as they do in other legal spheres.[63] To say that charities are 'private' is generally to imply that neither government nor the broader community may normally interfere in their governance or in the expenditure of their resources without substantial justification. To label charities as 'public', on the other hand, is to suggest the opposite – namely, that the actions charities take to define their benefiting community and distribute the charitable resources they hold must normally be authorized and controlled by rules of law.

A third reason why the public law-private law divide is an appropriate sorting tool for the law of charities is that binary public/private classifications are increasingly being used in legal regimes with which the law of charities intersects. The UK's Civil Procedure Rules, for example, provide that an institution will be amenable to judicial review if it acts or fails to act 'in relation to the exercise of a public function.' The Human

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[61] Weinrib (n 5) 8.

[62] *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513, 524, *(*Laws LJ). See also Taggart, 'The Province of Administrative Law Determined?' in *The Province of Administrative Law* (n 26) 5; Charles Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 Fed LR 185. In Canada, see *Reference re Provincial Judges* [1997] 3 SCR 3 [10].

[63] On the significance of public/private terminology in American charity law, see Brody (n 52).

Rights Act 1998, the Equality Act 2006, and the Companies Act 2006 are on a growing list of British legislative instruments that impose obligations and liabilities on institutions that perform 'functions of a public nature.'[64] If the relationship between these instruments and the English charitable sector was at one time largely theoretical, this is clearly no longer the case. Claimants in EW are increasingly relying on their provisions to argue that charities must give a fair hearing to those affected by their decisions, or protect their legitimate expectations, or respect their human rights.[65]

Public/private designations have historically been less prominent in the Canadian statutory lexicon, as I have already suggested, and have therefore played a smaller dispositive role. While the UK's reformed judicial review procedure is built around the concept of a 'public law claim', for example, the jurisdiction-defining concept in Canada's reformed federal judicial review procedure is that of a 'federal board, commission or other tribunal', defined in terms of the source of its powers.[66] While the statutory terms 'public authority' and 'public function' have been central to the debate over the application of the UK Human Rights Act 1998, the terms 'public' and 'private' do not appear in the application provision of the Canadian Charter of Rights and Freedoms and have been described as 'seriously misleading' in that context.[67] The fact that the distinction between

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[64] CPR 54.1(2)(a)(ii); Human Rights Act 1998 (UK), s 6; Equality Act 2006 (UK), s 52; Companies Act 2006 (UK), s 54. For a more complete list, see Harry Woolf and others, *De Smith's judicial review* (7th edn, Sweet & Maxwell 2013) [3-075] and the accompanying footnotes.

[65] *Scott v National Trust* [1998] 2 All ER 705 (Ch); *R (Baldwin) v Charity Commissioners for England and Wales* (2001) 33 HLR 48 (QB) [55]. See also Jonathan Garton, 'The judicial review of the decisions of charity trustees' [2006] Trust L Int'l 160, 178-9

[66] Federal Court Act, RSC 1970, c 10 (2nd Supp) s 2(1).

[67] Hogg (n 27) 37-30.1.

public law and private law plays no formal dispositive role in the major arenas of federal judicial review and constitutional human rights law goes a long way in explaining Canada's relative inattention to the subject.

While public/private designations do not play as great a dispositive role in Canadian as in English law, it would be misleading to suggest that they are not important. Notions of 'the public' and 'the private' play an implicit or indirect role in some regulatory areas: this is the case with the Charter of Rights and Freedoms, as we shall see in chapter five. In other Canadian contexts, public/private designations play a *direct* dispositive role. This is the case in an increasing number of specific statutory regimes,[68] and in the provincial administrative law sphere, where Canadian courts, like their English counterparts, consider whether particular bodies are sufficiently 'public' to be subject to judicial review.[69] Most importantly, the distinction between public law and private law plays a crucial role in delineating the particular balance of civil law and common law that makes up the bijural legal tradition of the province of Quebec.[70] This work will not address the interesting consequences that might flow, in Quebec, from an acceptance that the common law of charities is properly regarded as a *hybrid* legal tradition, which is composed of both public law and private law elements.[71] The very possibility of those

[68] The Canadian Trade-marks Act, for example, relies on the concept of a 'public authority': *Canadian Jewish Congress v Chosen People Ministries* 2002 FCT 613, [2003] 1 FC 29, [52] - [59].

[69] See, for example, *Knox v Conservative Party of Canada,* 2007 ABCA 295.

[70] *St.-Hilaire v Canada* [2001] 4 FC 289 (CA). See also *Prud'homme v Prud'homme* 2002 SCC 85, [2002] 4 SCR 663 [46].

[71] The author has canvassed some of these themes in an earlier work: see Chan, 'Taxing Charities' (n 52) 494, 497, 500, 504, 507, 540-544.

consequences indicates that the contested boundary between public law and private law is a highly significant constitutional issue in Canada, which is worthy of more attention than it has heretofore received.

A final reason why the public law-private law divide is an appropriate sorting tool for the law of charities is that the identity of charity law has *always* been significantly divided between its public and private elements. Indeed, looking back at the history of the law in this area, it is plausible to claim that the charitable trust was a public-private hybrid from its very inception, in the sense that it represented the adaptation of a private law institution in the service of a perceived public interest. As historical accounts of trust law point out, medieval landowners and their lawyers developed the legal predecessor of the trust in order to 'evade certain incidents associated with the transmission of land to their heirs under the rules of common law, and to have a wider power of disposition of land than these common-law rules permitted.'[72] The trust was designed as a facilitative institution for the transfer and usage of property, which would maximize a property owner's autonomy to determine how he or she would give that property away.[73] In this sense, the trust has always been anchored firmly to the law of property, one of the 'twin pillars' of private law.[74]

From the time of its early beginnings, however, the apparatus of the trust was also employed to facilitate gifts of property for pious causes, and eventually charitable

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[72] MR Chesterman, *Charities, Trusts, and Social Welfare* (Weidenfeld and Nicolson 1979) 3. See also LA Sheridan and GW Keeton, *Keeton & Sheridan's The modern law of charities* (4th edn, Barry Rose 1992).

[73] Simon Gardner, *An Introduction to the Law of Trusts* (2nd edn, OUP 2003) 29.

[74] Birks (n 30) xxxviii. This is indeed where it fits within Birks' scheme: see sections III(4)(D) and (G).

objects.[75] In cases where the trust was so employed, the institution adapted itself to reflect the perceived public interest in such uses of property. As Gareth Jones notes, extensive privileges and protections were granted to charitable trusts in the sixteenth and seventeenth centuries, to ensure that philanthropic efforts were not 'frustrated by the formalism and rigidity of the common law'.[76] Charitable trusts were not bound by any statute of limitations until 1833, and were exempted from most aspects of the rule against perpetuities.[77] In cases where the perceived public interest in the charitable use of property was seen to be under threat, the Crown and the Chancellor would also step in to ensure the property's proper management, or to direct it to a more suitable charitable use. The courts described this jurisdiction over the administration of charity property in public law terms from early days. In the eighteenth century case of *AG v Downing*, for example, Lord Wilmot rejected an argument that the court should not enforce a charitable trust because the trustees had predeceased the settlor, stressing that the court's role in administering and protecting charitable trusts was mandated by the constitution itself:

> The individuals, named as trustees, are only the nominal instruments to execute that intention. And if they fail, either by death, or being under disability to act, or refusing to act, *the constitution has provided a trustee*. The King, as parens patriæ, has the superintending power over all charities, abstracted from the Statute of 43 Eliz and antecedent to it, 2 P Wms 119; and that paternal care and protection is delegated to this Court.[78]

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[75] Chesterman (n 72) 4.

[76] Gareth H. Jones, *History of the Law of Charity, 1532-1827* (CUP 1969) 59.

[77] Hubert Picarda, *The Law and Practice relating to Charities* (4th edn, Bloomsbury Professional 2010) 496.

[78] *A-G v Lady Downing* (1767) Wilmot 1, 97 ER 1 (Ch) 24.

In the leading nineteenth century case of *Moggridge v Thackwell*, Lord Eldon again described the role of the courts and the Crown in administering property dedicated to charitable purposes in public law terms, calling it 'the doctrine of the constitution of the country.'[79]

It appears, then, that there are compelling arguments for seeking to bring the public law-private law lens to bear on the contemporary law of charities in EW and in Canada. The centrality of the divide as an organizational claim of Western law, the important dispositive implications it carries, and the longstanding identification of charity law with both the public law and private law spheres all suggest that this is a project worth pursuing. At the same time, legitimate concerns might be raised about a proposal to compare two complex regimes of charities regulation from the perspective of the public law-private law divide. A first concern relates to the potentially vast scope of the project; the final part of this introduction seeks to address this concern by clarifying the thesis' limited ambit. A more serious concern, as I have already indicated, is that people 'mean different things' when they talk about the public law-private law divide.[80] The danger of divergent conceptual paradigms increases when one starts to talk about multiple jurisdictions.[81] Before outlining the thesis' comparative hypothesis, therefore, this

[79] *Moggridge v Thackwell* (1803) 7 Ves 36, 32 ER 15 (Ch) 34. See also *Morice v Bishop of Durham* (1804) 9 Ves 399 (Ch) 539; on appeal (1805) 10 Ves 522.

[80] Cane, 'Accountability' (n 22) 275.

[81] *Re Norway's Application* [1990] 1 AC 723 (HL) 802-3, cited in Woolf and others (n 64) [3-001] ('the identification of public law matters differs from country to country, sometimes in minor respects and sometimes in major respects.').

introduction will seek to offer a working account, for the purposes of this thesis, of how the public law and private law spheres are constituted, and how they are distinguished.

3. Theorizing the public law-private law divide for purposes of mapping the law of charities

As the ever-expanding literature on the topic attests, the concept of the public law-private law divide has generated rather more controversy than consensus amongst the academy, the bar and the bench. Two debates dominate the modern literature. The first regards the very existence of the public law-private law divide, and its value as a legal tool.[82] The second regards the *nature* of the divide, and the basis or bases upon which a distinction between public law and private law can properly or usefully be drawn.[83] Competing accounts of the boundary between public law and private law continue to be put forward, as scholars aim to construct a theory of the divide that explains all of modern law.

The present project is not focused on entering this theoretical debate, so much as engaging with its key lines of argument and applying them to the charity law domain. It is not my intention to articulate a 'new' theory of the public law-private law divide in this introduction, nor to make essentialist claims about the nature of either legal sphere to a greater extent than necessary. Rather, my objective is to review the main currents of the Anglo-Commonwealth literature on the public law-private law divide, and to extract from that literature a theory of the divide that will provide useful insights into the law of

[82] Samuel (n 24); Harlow (n 22); Oliver, *Common Values* (n 22).

[83] Bamforth (n 23) 140; William Lucy, 'What's Private about Private Law' in Andrew Robertson and Tang Hang Wu (ed), *The Goals of Private Law* (Hart Publishing 2009) 47.

charities in Canada and in EW. The exercise of extraction will evidently involve the making of a number of normative choices. However, I proceed on the basis that the public law-private law divide is what Brian Tamanaha would call a 'non-falsifiable' concept: it provides a vocabulary and a framework for understanding and organizing legal information, but is not, in itself, prone to proof or disproof. Such a non-falsifiable concept, as Tamanaha points out, is best understood in terms of its *usefulness*, and its use value is 'a function of the purposes for which it is constructed'.[84] My focus, therefore, is to extract an account of the public law-private law divide that will be adequate to sustain the thesis' mapping and evaluative goals.

a. The existence of the public law-private law divide

If there is any point on which scholars of the public law-private law divide are unanimous, it is that there is some level of operational, descriptive distinction between public law and private law. A number of central common law phenomena are routinely explained in terms of their relationship with one domain, and their non-relationship with the other.[85] In Canada and in EW, jurists commonly describe the core disciplines of constitutional law and administrative law as 'public law' disciplines, while property law, tort law, and contract law are understood to fall within the 'private law' domain. Other legal subjects, of course, fit less easily with this nomenclature. Nevertheless, even those who criticize

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[84] Brian Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) J of L and Soc 296, 300, citing B Bix, 'Conceptual Questions in Jurisprudence' (1995) 1 Legal Theory 465. See also C Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?' (1982) 130 U Pennsylvania L Rev 1441, 1442 ('A concept has a valid place, as long as it can germinate good coherent insights').

[85] Lucy, 'What's Private about Private Law' (n 83) 49. The rules of standing and certain interventionist remedies such as *mandamus* provide good examples of phenomena that are understood in terms of their relationship to public law.

the public law-private law distinction most vociferously accept that it is in fact used to draw divisions within the law.[86] At the very least, the terms 'public law' and 'private law' may be said to describe the law's self-understanding of certain paradigmatic legal rules, which govern relations between individuals and the state, on the one hand, and relations between individuals, on the other.

If jurists have recognized the existence of an operational public law-private law divide, they have also subjected it to trenchant criticism.[87] Many of these criticisms reflect the ever-increasing difficulties of distinguishing public and private law in practice. The coherence of the idea of a *single*, descriptive public law-private law divide has been undermined by the growing number of legal regimes and contexts in which terms such as 'public law', 'private law', and 'public function' play a dispositive role.[88] In addition, critics allege, the hybridization of our institutional and functional arrangements has compromised any capacity that the descriptive public law-private law divide once had to explain or categorize modern laws and institutions.[89] In a world where government entities are being corporatized, public utilities are being privatized, and government services are being contracted out, a binary classificatory scheme made up of 'the public' and 'the private' is seen to be of little descriptive use.

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[86] Sampford (n 61) 187; Oliver (n 22) 1; Harlow (n 22).

[87] See again Sampford (n 61); Oliver (n 22); Harlow (n 22).

[88] See Taggart, 'The Province of Administrative Law Determined?' (n 61) 4, noting that 'there is not one public-private distinction but many'. See also Oliver (n 22) 14.

[89] Cane, 'Accountability' (n 22) 248; Oliver (n 22) 12.

With the growing consensus about the limited descriptive capacity of a binary 'public law-private law' framework, the focus of the debate around the public law-private law divide has shifted significantly from the divide's descriptive or operational function to its *conceptual* function of evaluating, directing, and nurturing operational rules.[90] This revised focus has raised questions about the divide's normative basis. There is no consensus, of course, that such a 'normative' divide even exists. Dawn Oliver, perhaps the most notable dissenting voice, claims that a common set of 'key values' underlies *all* legal rules and principles, whether these rules are conventionally classified as public law or private law.[91] Critics of this position allege that Oliver's value set is sufficiently broad and abstract as to obscure any possible distinction.[92] The opposing view, most prominently articulated by Peter Cane, is that there *is* a normative or values-based public law-private law divide, which can be maintained even in the boundary areas where the descriptive divide is of little use.[93] This thesis adopts Cane's view that the public law and private law spheres are each focused on protecting a distinct set of values. It also accepts his associated claim that faced with this divide, the task of legal regulation is to strike a

[90] For an early example of this focus, see Stone (n 84) 1442-43. Stone uses the term 'meta-language' function to describe the latter, conceptual role.

[91] Dawn Oliver, 'The Underlying Values of Public and Private Law' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing 1997) 217; Oliver (n 35) ch 3. The values that Oliver identifies are individual dignity, autonomy, respect, status and security.

[92] Cane, 'Accountability' (n 22) 268; Anna Grear, 'Theorising the Rainbow? The Puzzle of the Public-Private Divide' (2003) 9 Res Publica 169, 175.

[93] Cane, 'Accountability' (n 22) 274-75. Cane relies heavily on the work of Gunther Teubner in developing his argument: see Gunther Teubner, 'After Privatization? The Many Autonomies of Private Law' (1998) 51 Current Legal Problems 393.

balance between the demands of competing public law and private law values in the context of particular social activities.[94]

b. The nature of the public law-private law divide

Of course, having accepted that a normative public law-private law divide exists, the challenge remains of identifying the values associated with each pole. Scholars have responded to this challenge in a variety of ways, which generally reflect the particular 'side' of the divide from which they write. Private law theorists, many of whom have been concerned to defend private law from being understood in terms of external goods or ends, have premised 'internalist' accounts of the private law on 'the normative primacy of individual personality',[95] and associated the private law sphere with the values of autonomy, privacy, freedom, and consent.[96] Public law theorists, who have been concerned to protect the identity of public law in the face of deregulatory and privatizing trends, have associated the public law sphere with the values of openness, fairness, participation, impartiality, accountability, and rationality.[97] Rather less common law scholarship is expressly directed to the question of how these public law and private law values are divided from each other and how they interrelate. Ernest Weinrib's important account distinguishes private law from 'other legal orderings' on the basis of the distinct

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[94] ibid 275.

[95] See, for example, Alan Brudner, *The Unity of the Common Law* (University of California Press 1997) 13.

[96] Sampford (n 61) 190-91.

[97] See Taggart, 'The Province of Administrative Law Determined?' (n 61) 3, and the sources cited therein.

justificatory structures and normative bases of corrective and distributive justice.[98] However, given its focus on liability and the bilateral relationship of the two parties to a private action, Weinrib's account is not ideally tailored to the issues raised by the transfer of property to purposes.[99] From the perspective of the law of charities, a more useful account of the values-based dichotomy between public law and private law is an account framed in terms of the law's relationship with the respective spheres of individual project pursuit and collective project pursuit.

The claim that the public law and private law spheres should be understood in terms of the value they respectively accord to collective project pursuit and individual project pursuit was originally made by Nigel Simmonds, in the context of an article aimed at defending private law from public law's distributive and aggregative perspectives.[100] In the article, Simmonds describes the distinction between public law and private law as 'the expression of a deep tension within our political aspirations':

> On the one hand is the value we place upon individual project pursuit: the freedom of the individual to formulate and execute his or her own plans and projects without regard to the value or disvalue placed upon the content of those plans and projects by others. On the other hand is our recognition of the contingency of social formations and the impossibility of wholly abdicating responsibility for the overall character of our own society. Such recognition leads us to the value of collective project pursuit: our collective freedom and responsibility to determine,

[98] Weinrib (n 5), in particular section 1.7. See also the discussion in Lucy, 'What's Private about Private Law' (n 83) 52-58, and Weinrib, 'Legal Formalism' (1988) 97 Yale LJ 949.

[99] Weinrib himself acknolwedges that his work is focused on liability rather than property: Weinrib (n 5) 2. As William Lucy points out, it does not seem inherently problematic that several values-based accounts of the divide could co-exist: Lucy, 'What's Private about Private Law' (n 83) 74.

[100] NE Simmonds, 'The Possibility of Private Law' in John Tasioulas (ed), *Law, Values and Social Practices* (Dartmouth 1997) 130.

> through appropriate mechanisms, the broad structural features of our own society.[101]

Private law is the law of individual project pursuit, according to Simmonds, while public law protects the projects of the collectivity and regulates the powers exercised on its behalf.[102]

Simmonds' work on the tension between individual and collective project pursuit has been picked up and elaborated by William Lucy, who also believes that the dichotomy may provide a convincing normative account of the public law-private law divide.[103] There is a certain realm, Lucy asserts, within which liberalism places great value on the ability of individuals to author their own lives.[104] Lucy does not define this realm, but asserts that it includes our choices about where we work, whether we have a family, what we consume, and the nature of our emotional and sexual lives.[105] Liberalism is committed to protecting the conditions of individual autonomy within this realm of 'private project pursuit', without regard to whether the individual choices made are good or bad.[106] For some liberals, Lucy claims, this commitment to an individual's self-authoring is the outworking of a perfectionist view of a good human life. However, such a commitment may also be based on 'skepticism about humankind's ability to know what

[101] ibid 144.

[102] ibid 145.

[103] William Lucy, *Philosophy of Private Law* (OUP 2007); William Lucy, 'What's Private about Private Law' (n 83).

[104] Lucy, 'What's Private about Private Law' (n 83) 58-59.

[105] ibid 59.

[106] ibid. It is not clear why Lucy prefers the terms 'private project pursuit' and 'public project pursuit' to the terms 'individual project pursuit' and 'collective project pursuit'.

such a life looks like, and a worry about the use of political power to realize and maintain such a picture.' [107]

While liberalism is committed to protecting autonomy in the realm of our 'private' projects, however, there is another realm within which liberalism places greater value on our collective power to coordinate and organize aspects of our life together.[108] Lucy is even more tentative about defining this realm of 'public project pursuit', but ventures that it includes the realization of certain public goods, and 'all that activity which is conducted through the various instruments of the state.'[109] The value that we associate with the realm of 'public' project pursuit, according to Lucy, has two distinct components. The first component consists of the value we place upon the substantive goal being pursued by the collectivity – the specific (and possibly transient) 'public interest' that is purportedly being advanced. The second component consists of the value we place upon the virtues and constraints in accordance with which we require our collective goals to be pursued – the 'public law' values of fairness, rationality, and the like. [110]

The realms of private and public project pursuit, Lucy claims, are either equally valuable or incommensurable; in either case, the choice between them cannot be

[107] ibid 60.

[108] ibid 61.

[109] This includes the realization of public goods, and all activity that is conducted through the instruments of state: ibid 60-61.

[110] ibid 61-2.

compelled by reasons, and the choice process is likely to be an 'anguished' one.[111] Since this is the case, and since any one instance of conduct can often have both private and public aspects, we can expect a 'constant tension' between the realms of collective project pursuit and individual project pursuit.[112] It is this tension that is embodied in the distinction between public law and private law.

c. A project-based account of the public law-private law divide with which to map the law of charities

Simmonds and Lucy's 'project-based' account of the public law-private law divide provides the theoretical starting point for this comparative study of the law of charities. It is a compelling starting point, I claim, because the tension that the authors identify between individual/private project pursuit and collective/public project pursuit maps on very closely to what may be the central tension in the law of charities - that between enabling property-owning individuals to improve the world in accordance with their own individual vision, and setting limits on that ability to ensure conformity with a more collective ideal of the public good. 'The Philanthropic Motive is in practice a specialist motive', William Beveridge once declared, in the context of his famous post-war report on voluntary action; 'it drives men to combat a particular evil or meet a particular need that arouses their interest.'[113] Specialist motives and idiosyncratic acts of generosity have been responsible for much of the charitable sector's wealth since the earliest days of the

[111] ibid 62-3.

[112] ibid 64.

[113] William Henry Beveridge, *Voluntary Action : a report on methods of social advance* (G Allen & Unwin 1948) 125.

common law tradition. Throughout charity law's history, however, the individuality of these motives and acts has had to be balanced against a variety of competing public interests – in properly administered and effectively applied charity property, in the integrity of the tax base, in a society without discrimination, and in other collective goals. We shall see that the tension between these competing priorities - protecting the autonomy of donors and charities and protecting the public interest in their activities - is a deep and recurring theme of the law of charities. Moreover, it is a tension that mirrors what Simmonds and Lucy identify as the deep tension between public law and private law.

Simmonds and Lucy's project-based account, then, offers this thesis a seemingly useful lens through which to pursue its mapping and evaluative goals. It may nonetheless be helpful to refine the account in certain specific respects that are particularly relevant to the charity law context. A first refinement regards Lucy's claim that we attach additional virtues and constraints to public projects, and not to private ones. Lucy himself does not explain why this is so. However, Christopher Stone offers a compelling explanation of this phenomenon, which he calls the 'moral exemplar model'.[114] Virtues such as fairness, Stone claims, are public goods. Nevertheless, a legal system that forced individual citizens to be virtuous would both suffer from incoherence, and unacceptably extend the reach of government. Our solution to this predicament is to assign the role of moral exemplar to certain 'public' bodies, and to require them to exemplify these virtues for the benefit of the collectivity. Government, according to Stone, is the paradigmatic moral exemplar.[115]

[114] Stone (n 84) 1493-6.

[115] ibid 1492.

However, this thesis will suggest that charities and charity trustees, who apparently enjoy higher levels of public trust than politicians,[116] may also be assigned this moral exemplar role.

A second refinement of the project-based account that may usefully be put forward relates to Lucy's identification of public project and private project 'realms'. Based on the tentativeness with which he describes these realms,[117] Lucy may be taken to accept that there is a significant border zone between them. Taken on its own, however, the language of realms tends to suggest that all projects are readily classifiable as *either* collective *or* individual projects, a position this thesis has already rejected. While it will often be convenient to speak of the 'realms' of individual project pursuit and collective project pursuit, therefore, it is likely more accurate to envision them as two opposing poles, with a spectrum of projects extending between them.[118] Archetypal projects of each variety will be identifiable at each pole - a person's decision to enter an amorous relationship, say, versus a government's decision to impose a tax for the national defence – but many projects, including charitable projects, will sit somewhere in the hybrid zone between.

A third refinement of our project-based account, which is attributable to Mark Freedland, is that the public law-private law divide exists in multiple legal dimensions.[119] In one dimension, it might serve to characterize a project, function or institution in terms of whether it attracts the regulatory impulses of private law or public law. In another, it

[116] For a suggestion to this effect, see Hodgson Report, 15.

[117] Lucy, 'What's Private about Private Law' (n 83) 58-61.

[118] Grear makes an argument in this vein: see Grear (n 92).

[119] Freedland, 'Public/Private Distinction' (n 14) 108.

might serve as a tool for characterizing processes of adjudication and regulation. In yet another dimension, the concern of the public law-private law divide might be to characterize substantive rules or doctrines in terms of their relationship to each pole.[120] A multidimensional public law-private law divide that admits of the existence of hybrids is admittedly a complex analytical tool. However, an acknowledgment of the divide's multidimensionality is likely to assist us in breaking charity law down into its constituent elements, and in analyzing how the relative strength of public law and private law thinking is felt in each. In this sense, a multidimensional account of the public law-private law divide is likely to further the thesis' mapping and evaluative goals.

The assertion that we may envision spectrums of projects, institutions, procedures and rules extending between the respective poles of collective and individual project pursuit within the various dimensions of the public law-private law divide raises a further question about our project-based account: how are we to determine where on these spectrums charities, and the laws governing charities, lie? One might approach this question by seeking an answer in liberal theory; one might alternatively choose to advance a normative view about how charitable projects should be understood.[121] However, the primary concern of this thesis is to map the extent to which, and the ways in which, different regulatory regimes treat charitable projects as either collective or individual

[120] ibid.

[121] For an argument that the labels 'public' and 'private' are ultimately normative labels, see Peter Cane, 'Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept' in J Bell and J Eekelaar (eds), *Oxford Essays in Jurisprudence (Third Series)* (Clarendon Press 1987) 65.

projects. This concern requires that we adopt some theory of how the law typically responds to projects at the collective project and individual project poles.

While a comprehensive treatment of this issue lies beyond the scope of this introduction, there are strong indications that within the common law tradition, the spectrum of individual/collective projects exists in parallel with a spectrum of regulatory impulses, which also extend between two poles.[122] At the individual project/private law end of the spectrum, where the law's normative commitment is to protecting the freedom and personality of the individual, the law's *impulse* is to regulate lightly so as to maximize that freedom.[123] At the collective project/public law end, where there is a perceived public interest in the activity in question, the law's impulse is to regulate more intensively, with a dual view to protecting whatever *specific* public interest the collective project is understood to raise, and to protecting a perceived *general* public interest in having entities that carry out collective projects model fairness, rationality and other public virtues. The true public law-private law *hybrid,* I would argue, occurs at a point on this spectrum where these two sets of regulatory impulses appear to bear down with equal or near equal weight on a project, institution, procedure, or rule.

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[122] Evidence of this general spectrum of regulatory impulses can be identified very early in the common law tradition, suggesting that the impulse to regulate more intensely in cases of perceived public interest existed long before the terms 'public law' and 'private law' were in common use: see, for example, Paul Craig, 'Constitutions, Property and Regulation' (1991) PL 538; Michael Taggart, ''The Peculiarities of the English': Resisting the Public/Private Law Distinction' in P Craig and R Rawlings (eds), *Law and Administration in Europe: essays in honour of Carol Harlow* (OUP 2003) 110.

[123] Taggart speaks of 'the private law's instinctive privileging of self-regarding behaviour': see Taggart, 'The Province of Administrative Law Determined?'(n 61) 5.

4. The law of charities as a public law-private law hybrid

Based on the foregoing account of the public law-private law divide, we are now in a position to set out the analytical and comparative hypotheses that will be explored in the remainder of the work. The analytical hypothesis of this thesis is that we can regard the law of charities as a hybrid legal discipline in both a *general* or *categorical* sense, and in a *context-specific* or *functional* sense. The charitable trust is a public law-private law hybrid in the general sense that it represents the adaptation of a primarily private law institution (the trust) to a variant which is more of a public law nature, in cases where there is deemed to be a public interest in, or public benefit arising from, the trust. Where that condition is satisfied, the settlor's project is specially privileged – the conditions for the validity of the trust are loosened, and the project is generally permitted to endure forever, but on the other hand the donor's project is specially regulated in ways that are more akin to the ways in which the projects of public authorities or actors are controlled by public law. The charitable corporation was historically also a public law-private law hybrid in this general sense, although, as we shall in chapter two, its constituent public law and private law elements were somewhat different.

Within this framework of general hybridity, charities also function and are regulated as a public law-private law hybrid in the *context-specific* or *functional* sense that both the conditions for obtaining charitable status and its attendant fiscal benefits, and the regulation of the conduct of charities and their trustees, are continually being adjusted in such a way as to maintain in a broad sense a functional equilibrium between individual project pursuit and collective project pursuit; that is to say, an equilibrium between the protection of the autonomy of property-owning individuals to control and direct their own wealth (and, by extension, the protection of the autonomy of the trustees appointed by those individuals), and the furtherance of competing public interests or visions of the good.

We find these context-specific equilibrium adjustments occurring within various dimensions of the law of charities:

(i) First, within the law's substantive dimension, we witness adjustments in the detailed working out of the definition of charitable purposes, the laws regulating the conduct of charity trustees, and particularly the foundational public benefit doctrine. These adjustments occur along two continuums:

   (a) a continuum between wholly altruistic projects and wholly self-regarding projects; and

   (b) a further, more context-specific continuum between projects which are fully aligned to the public welfare goals of the state or polity in question, and projects which, although altruistic, are nevertheless at variance with those public welfare goals – in shorthand, public-welfare-compliant projects and public-welfare-deviant projects.

(ii) Second, we witness equilibrium adjustments in the very regulatory institutions and procedures that make and maintain these substantive equilibrium

> adjustments to the doctrines of the law of charities. These regulatory institutions and procedures, whether administrative, legislative, or judicial, may in various ways manifest 'public-leaning' or 'private-leaning' tendencies in the texture of their processes.

This scheme of analysis shapes the comparative hypothesis that will be pursued in the following chapters: namely, that while the contemporary English and Canadian regimes of charities regulation continue to treat charities as hybrids in the general sense, they exhibit different public-leaning and private-leaning tendencies at the context-specific level. The thesis will argue, first, that the common law charities tradition that originated in EW was a true hybrid of private law and public law, in the general sense that it accorded equal or near equal importance to the autonomy interests of persons who create and manage charities, and to the public interest in the proper and effective administration of charity property. This hybridity was evident in the common law's approach to supervising and remedying the actions of charity trustees, in its approach to applying charity property cy-près, and in its central public benefit doctrine. The rules of *locus standi* that determined who could sue for a misuse of charity property in the courts of Chancery suggest that certain *procedural* features of the common law of charities were historically more 'public' than 'private'. Even in this procedural dimension, however, the common law of charities has partaken in selective ways of private law.

The English Charity Commission regime was created in the image of the English common law,[124] and reflects the same duality of focus on the autonomy interests of benevolent property-holders, and the public interest in properly administered charity property. However, the regime was created for the explicit purpose of protecting this public interest better than the common law had done. Its development also reflected a growing political consensus that charities, and the trustees that manage them, should be models of virtue to rival the state. Certain recent trends have demonstrated a swing back towards the protection of charity autonomy in EW, while others have demonstrated the extent to which other public interests are now bearing down on the field. Overall, however, we may say that while the Charity Commission regime continues to balance the same interests as the common law tradition, and thus treats charities as public law-private law hybrids in the general or categorical sense, it has shifted the equilibrium between these interests in a way that privileges the public interest in the proper and effective administration of charity property, as well as the public interest in the advancement of equality norms. The retrenchment of the welfare state and the related development of a culture of the contracting out of public welfare services in EW have placed additional pressures on the charitable sector to be public-welfare-compliant. So far, however, the Charity Commission regime appears to be resisting those pressures on the sector's behalf.

In Canada, I will argue, the trajectory from the common law tradition to the contemporary regime of charities regulation has been markedly different. Canada received the English common law of charities in most of its provinces, and continues to

[124] Meaning, in this context and in the remainder of the thesis, the English law of equity as fashioned by the Chancery courts.

rely heavily on the substantive doctrines of that body of law. However, the procedural and institutional dimensions of the common law tradition have been substantially left by the wayside. Unlike the Charity Commission regime, Canada's primary regime of charities regulation was not created to protect a perceived public interest in properly administered charity property, but rather to protect a perceived public interest in the elimination of tax abuses by donors and charities themselves. Embedded in the federal system of tax administration, the registered charity regime has altered the traditional equilibrium of the common law of charities, requiring Canadian charities to be significantly more public-welfare-compliant than their English counterparts, and providing few protections against the pressures posed by a retreating welfare state. While Canadian charity law is like English charity law in treating charities as public-leaning hybrids, its equilibrium adjustments are not tied to the 'charitable' collective project that the common law has always been concerned to protect.

We have already noted the potentially vast scope of this project; the discussion thus far has done little to alleviate concerns about breadth, and it is important clarify the project's parameters. This thesis does not purport to conduct an exhaustive survey of the law of charities in either of its subject jurisdictions. Rather, after sketching out in broad terms the history and nature of the common law charities tradition and the contemporary English and Canadian regulatory regimes, the thesis applies the public law-private law lens to an eclectic set of charity law issues, which are intended to shed light on the analytical and comparative hypotheses that have already been set out. Certain of these issues, in particular the evolution of the public benefit doctrine, have been selected because of their particular centrality to charity law's hybrid character. Others, such as charity law's rules of *locus standi*, have been selected in part because they have so far received comparatively little attention in EW, and little to no attention in Canada. The selection of 'institutional', 'doctrinal', 'functional', and 'procedural' charity law issues is also designed to cast some light on, or at least take seriously, the multidimensional nature of the public law-private law divide.

The thesis thus proceeds in the following way. Chapter two introduces the regulatory institutions that have historically had primary responsibility for the oversight of charities in EW and in Canada, tracing in broad strokes the transference of supervisory functions from the courts of Chancery to the Charity Commission for EW and the Canada Revenue Agency's Charities Directorate. This story provides us with the best sense of the *general* public law-private law hybridity of charities and the laws that govern them. The chapter also introduces the concept of context-specific hybridity by identifying the different interests that the Charity Commission and the Charities Directorate were created to protect.

Following chapter two's overview of the thesis' subject regulatory regimes, chapters three through five consider a series of specific charity law issues, examining the ways in which private law and public law impulses have come to bear on these issues in specific regulatory contexts. Chapter three pursues the hypothesis that the public benefit rule is a *doctrinal hybrid*, and traces how the equilibrium between its constituent public law and private law elements has been adjusted, in recent years, under the contemporary

English and Canadian charity law regimes. Chapter four examines an important procedural feature of the law of charities, the rules of *locus standi* that determine who may seek relief for misapplications of charity property under each regulatory regime. Chapter five addresses the comparatively modern issue of the governmental co-optation of charitable resources, arguing that modern pressures associated with the retrenchment of the welfare state threaten to destabilize charity law's hybrid equilibrium, and considering what protections English and Canadian law offer against those pressures. In chapter six, the thesis turns to the emerging phenomenon of social enterprise, arguing that shifts to the functional equilibrium between charity law's public law and private law elements may explain the emergence of this 'post-charitable' legal form. The thesis concludes in chapter seven with some final observations on the law of charities as a public law-private law hybrid, and on the different functional equilibriums between individual project pursuit and collective project pursuit that have been reached by English and Canadian charity law.

II. Charities Regulators and the Institutional Public Law-Private Law Divide

In its introductory chapter, this thesis put forward the claim that it is useful to envisage the public law-private law divide as a spectrum of regulatory impulses, which corresponds to a parallel spectrum of projects that extend between two opposing poles. Archetypally 'individual projects' – those we consider ourselves entitled to formulate and pursue without regard to the value placed upon the projects by others – are situated at one of these poles, while archetypally 'collective projects' – those in which every member of society is understood to have an interest or a stake – are situated at the other. Where an activity is understood to be part of an individual project, I argued, the law's impulse is generally to regulate lightly, so as to maximize the individual project pursuer's autonomy and his or her capacity for creativity and innovation. Where an activity is understood to be part of a collective project, on the other hand, the law's impulse is to regulate more intensively, both so as to protect the perceived public interest in that collective project, and so as to ensure that the project is pursued in a 'virtuous' way. These conflicting impulses exist in multiple legal dimensions, I claimed, and may often be used to measure the particularly 'private' or 'public' character of a project, institution, procedure or rule.

This chapter focuses on the nature and disposition of the regulatory institutions that have historically had primary responsibility for the oversight of charities in EW and Canada, with a view to situating them within this notional public law-private law framework. It has three main objectives. First, the chapter seeks to lay the groundwork for the remainder of the thesis by tracing the transference of supervisory functions from the courts of Chancery to the modern English and Canadian charities regulators, and by outlining the regulatory domain within which the work will pursue its mapping and evaluative goals. Second, the chapter makes the case for the *general* hybridity of the common law charities tradition, outlining some of the ways in which this tradition historically partook of private law and public law. Finally, the chapter starts to make the case for the *context-specific* hybridity of contemporary English and Canadian charity law, examining the extent to which the primary commitment of the English and Canadian charities regulators is to protecting the autonomy interests of benevolent property owners, on the one hand, or to intervening in a public interest, on the other, and identifying the distinct public interests that each regulator is concerned to protect.

The chapter pursues these objectives in the following way. By way of background, part one introduces the common law's concept of a charity and the tradition's 'charities regulators', the Crown and the Chancery Court. It reviews the court's inherent jurisdiction to administer and control charities, and the extensive remedial powers that jurisdiction entails. It also draws attention to the distinction between charitable trusts and charitable corporations, and to the unique mixture of public law and private law elements that was embodied in the law of charitable corporations. In part two, I introduce the modern charities regulators that are the focus of the thesis' comparative study, the Charity Commission for EW and the Canada Revenue Agency's Charities Directorate. I explain their selection, and discuss some of the challenges of meaningfully comparing the two bodies. Parts three and four describe the origins of each regulatory institution in more detail, with a view to highlighting the distinct mischief that each was created to address. They also outline the supervisory and remedial powers of each regulator, and the relationship each regulatory regime has with the common law. I conclude in part five with some observations on the 'public-private' character of each jurisdiction's charities regulator, and the specific nature of the public interest that each seeks to protect.

1. The common law's charities regulators

The English Crown has, since at least the seventeenth century, been recognized as having a 'superintending power' over charities,[125] which is a legacy of the historic, feudal relationship of ligeance between the English people and the Crown. Just as the law of nature required that every subject obey and serve the King, so it also required that the King maintain and defend his subjects, particularly those who could not defend themselves. Charities, and the objects of charity, fell into this latter category, along with children and the infirm.[126] As the King could not appear in His own courts,[127] it fell to his law officers to carry out the advocacy aspects of this *parens patriae* prerogative. Thus it came to be accepted, 'by long and immemorial custom', that it was the right and duty of the Attorney General, as the chief law officer of the Crown, to enforce rights of a charitable nature in the courts in order to ensure the realization of the charitable object.[128]

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[125] Picarda (n 77) 727.

[126] See *Calvin's Case* (1608) 7 Co Rep 1a, 5a; Jean Warburton and others, *Tudor on Charities* (9th edn, Sweet & Maxwell 2003) 367; see also *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) 63.

[127] See, for example, *R v Austen* (1821) 9 Price 142n.

[128] *A-G v Magdalen College, Oxford* (1854) 18 Beav 223, 241; 52 ER 88, 96. See also *Wallis v Solicitor-General for New Zealand* [1903] AC 173 (HL) 181-2 (Lord MacNaghten).

The bulk of the Crown's superintending power over charities, however, has been delegated to the courts themselves.[129] From almost its inception, the Court of Chancery exercised a broad, remedial jurisdiction over charities, an 'inherent jurisdiction' that is now vested in the English High Court and Canada's provincial superior courts.[130] The court's jurisdiction over charities is generally portrayed as a branch of the court's jurisdiction over the administration of trusts,[131] and the two jurisdictions do certainly overlap. As Jones has established, however, the ecclesiastical courts enjoyed an authority to 'cure' uncertain charitable legacies of personal property and apply them *cy-près* before trusts were even a recognized legal form.[132] Only gradually, as the use of the trust increased and the Chancellor came to assume jurisdiction over a growing number of charitable dispositions, did the Chancellor begin to adopt many of these ecclesiastical practices as his own.[133]

Jones' comments on the lineage of the charities jurisdiction remind us that charities have long existed in more than one legal form. The trust was for a long period the legal structure of choice for charitable activity, since it allowed private individuals to devote property to specific charitable purposes, appoint trustees, and dictate how those

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[129] Picarda (n 77) 727; *A-G v Lady Downing* (n 78) 24.

[130] Picarda (n 77) 729.

[131] ibid, noting that the 8th edition of *Tudor on Charities* suggested that the inherent jurisdiction depended exclusively on the existence of a trust. See also *Construction Industry Training Board v A-G* [1973] Ch 173 (CA) 176.

[132] Jones (n 76) 5, 59. See also Marion R. Fremont-Smith, *Foundations and Government: state and federal law and supervision* (Russell Sage Foundation 1965) 17.

[133] Jones (n 76) 59.

trustees should manage the property, without asking anything from the state.[134] However, the 'corporate' charity, which today plays such an important role in the charitable sector, also has a significant place in the history of the common law tradition. The charitable trust and the charitable corporation were each composed of a distinctive blend of public law and private law elements, and our doctrinal map should reflect these differences. In what follows, therefore, I will seek to distinguish between the judicial powers that flow from the court's inherent jurisdiction over trusts in general, and those that flow from its 'charities jurisdiction' to protect resources devoted to charitable purposes. I will also highlight the differences between the supervisory regimes applicable to charitable corporations and trusts. To begin, however, I will provide a very brief summary of the common law conception of charity, so that we have a clearer picture of the institutions of which we speak.

a. The common law conception of charity

It is a unique feature of the common law of charities that the label 'charity' attaches to institutions not by virtue of their form, but by virtue of the purposes and activities that they carry out.[135] In the very early days of the English charity law tradition, the meaning of charity was 'fluid and relatively unformulated.'[136] In 1601, however, the Parliament of Queen Elizabeth I passed an act entitled the Statute of Charitable Uses (commonly and

[134] See Chesterman (n 72) 22, noting that 'the trust's versatility in catering for the specific desires of trust founders…rendered it particularly suitable for the highly individualistic nature of Tudor philanthropy'.

[135] The label 'charitable' may equally attach to gifts and bequests, but I will focus on charitable institutions in this work.

[136] Chesterman (n 72) 24.

hereafter known as the Statute of Elizabeth), the Preamble to which set out the following list of 'good, godly and charitable' objects:

> 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.[137]

The Preamble did not purport to establish a definition of charity for all purposes, but only to delineate the jurisdiction of the commissioners who, under the Act, were empowered to inquire into and remedy breaches of charitable trust. Over time, however, the courts came to accept that the objects enumerated in the Statute of Elizabeth 'and all other objects which by analogy are deemed within its spirit and intendment and no other objects' were legally charitable.[138] Through this process, the English courts of equity transformed the Preamble definition into a general rule of law.[139]

With the passage of time and the process of judicial interpretation, the common law concept of charity expanded and evolved from its legislative roots. In the 1891 *Pemsel* decision, the House of Lords effectively created a new starting point for the common law definition by holding that charity had four principal divisions: the relief of poverty, the advancement of education, the advancement of religion and "other purposes beneficial to

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[137] Statute of Charitable Uses 43 Eliz 1 c 4.

[138] *Gilmour v Coats* [1949] AC 426 (HL) 443.

[139] For a similar observation, see Picarda (n 77) 10.

the community."[140] A substantial case law and commentary grew up around each of the four *Pemsel* divisions, which it falls beyond the scope of this work to discuss. However, the Statute of Elizabeth and *Pemsel* remain the dual touchstones of the common law definition.[141] To be charitable, a purpose must also benefit the community or a substantial segment of the community within the meaning of the public benefit doctrine.[142]

b. Supervisory jurisdiction over the charitable trust

The court's inherent jurisdiction to control the administration of a trust at the request of an appropriate person was described by Lord Eldon in the nineteenth century as a 'main part, originally almost the whole' of the Chancery Court's jurisdiction.[143] It was also a defining feature of the trust. As the Master of the Rolls stated in *Morice v Durham,* 'there can be no trust, over the exercise of which this court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust.'[144] Charitable trusts fell within this inherent jurisdiction, as we will see, but were subject to an even higher standard of judicial control than private trusts.

[140] *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL) 583. The Supreme Court of Canada has taken the position that *Pemsel* is now the starting point: see *Vancouver Society of Immigrant & Visible Minority Women v MNR* [1999] 1 SCR 10, 169 DLR (4th) 34 [144].

[141] *Vancouver Society* (n140) [144].

[142] See, for example, *Oppenheim* (n 30). The public benefit doctrine is the subject of chapter three.

[143] *A-G v Brown* (1818) 1 Sw 265, 36 ER 384 (Ch) 291.

[144] *Morice* (n 79) 404-5.

The precise scope of the court's general trusts jurisdiction is notoriously difficult to define.[145] However, its key characteristics – remedial flexibility and a 'rigorous standard of judicial control over the use and management of property'[146] – are well known. The rigor of the standard of judicial control is reflected in the wide range of actions that constitute a breach of trust; the court has the authority to remedy any act or omission by a trustee that is contrary to the duties imposed upon him, whether or not the breach is deliberate, and whether or not it causes any harm.[147] Even where no breach of trust has been established, the court may sometimes exercise control over the discretionary decisions of trustees. While the court does not generally review discretionary decisions reached honestly and in good faith, there are a number of circumstances in which it will intervene.[148]

The second characteristic of the trusts jurisdiction, its remedial flexibility, is equally pronounced. In the exercise of its inherent jurisdiction over trusts, the Court of Chancery may appoint trustees who will promote the execution of a trust,[149] and remove trustees whose continuance in their office will not.[150] It may sanction departures from the

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[145] *Re Royal Society's Charitable Trusts* [1956] Ch 87, 91, cited in Donovan Waters, 'Changing the Purpose of Gifts: the Fate of Administrative and Cy-Pres Judicial Schemes in Canada' (2010) 23 The Philanthropist 93, 96.

[146] John McGhee (ed) *Snell's Equity* (32nd edn, Thompson Reuters (Legal) Limited 2010) 19.

[147] Hayton and Mitchell (n 33) 704.

[148] *Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440 (Ch). For a fuller discussion of the judicial control of trustees, see Hayton and Mitchell (n 33) 651-73.

[149] *Re Tempest* (1866) LR 1 Ch 485, 35 LJ Ch 632 (CA).

[150] *Letterstedt v Broers* (1884) 9 App Cas 371; 51 LT 169 (PC). This applied even where no misconduct was proven.

terms of the trust instrument in certain circumstances,[151] and prevent trustees from exercising any power without the sanction of the court in others.[152] The court has the inherent jurisdiction to aid a formal defect in a trustee's execution of a power by ordering the making good of the defect.[153] And where trustees fail to exercise an imperative power to distribute funds under a discretionary trust, the court can exercise the power by authorizing representative beneficiaries to prepare a scheme of distribution, or by preparing one itself.[154]

The rules and principles that make up the court's trusts jurisdiction are, for the most part, equally applicable to private and charitable trusts.[155] Nevertheless, it has long been recognized that in the case of charitable trusts, the courts exercise a 'power and discretion that does not belong to them in the case of a private trust.'[156] A court may direct the errant trustees of either a private or a charitable trust to rectify errors in the application of trust funds or to take steps towards the fulfillment of the trust objects.[157] In the charitable trust context, however, the court also has the inherent jurisdiction to confer

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[151] John Mowbray and others, *Lewin on Trusts* (18th edn, Sweet & Maxwell 2008) 1854-6.

[152] *Minors v Battison* (1876) 1 AC 428, 453 (HL) as cited in Mowbray and others (n 151) 1110.

[153] Mowbray and others (n 151) 1053.

[154] *McPhail v Doulton* [1971] AC 424 (HL) 456-7.

[155] McGhee (ed) (n 146) 684.

[156] *Andrews v M'Guffog* (1886) LR 11 AC 313 (HL). See also *A-G v Gleg* (1738) Amb 584 ('the court has a particular free and extensive jurisdiction in the case of a charity').

[157] *A-G v Coopers Co* (1812) 19 Ves 186, 34 ER 488 (Ch).

powers on trustees that they lack under the trust instrument,[158] and to discharge trustees from their trust obligations.[159] The courts have tended to apply a heightened level of judicial control to the discretionary decisions of charity trustees, ordering trustees to account for the distribution of charitable funds for which they are responsible, and even retaining custody of charity funds.[160] The court's jurisdiction to regulate the administration of a charity has been described as 'unlimited',[161] and may be invoked in any case where the court deems that an administrative change is advisable.[162] Charitable trusts and trustees are specially regulated at common law, in other words, in ways that are reminiscent of the special ways in which public authorities and actors are regulated by public law.

If charitable projects are specially regulated within the common law tradition, they are also specially favoured, in ways that are reminiscent of the special privileges and protections that may attach to the projects of government.[163] The charities jurisdiction encompasses a number of specific curative powers, which allow the courts to remedy

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[158] In *Re Royal Society,* for example, the court extended the range of investments that trustees were permitted to make under the trust document. This was not possible in private trusts until a statutory amendment in the mid-20th century: see Waters, 'Changing the Purpose of Gifts' (n 145) 95-96, 100-101.

[159] *Re JW Laing Trust* [1984] Ch 143.

[160] Picarda (n 77) 528, citing *A-G v Gleg* (n 156) and *M'Coll v Atherton* (1848) 12 Jury 1042. See also *A-G v Governors of Harrow School* (1754) 2 Ves Sr 551, 28 ER 351 (Ch), and *Re Devlin's Estate* (1889) 23 LR Ir 516, where the Chancery Court required a charity trustee to swear an affidavit stating how he would exercise his discretion before charity funds were paid out of court.

[161] See for example the argument of the Attorney General in *Re JW Laing* (n 159) 146.

[162] Warburton and others, *Tudor on Charities* (n 126) 374, citing *A-G v Dedham School* (1857) 23 Beav 350 (Ch).

[163] On the 'special treatment' that charity has always received under English law, see *Gaudiya Mission v Brahmachary* [1998] Ch 341, 350. On the special treatment that government may receive, see A Davies, *The Public Law of Government Contracts* (OUP 2008) ch 3.

formal and substantive defects in charitable trusts in order to ensure the application of their resources to charitable purposes. Equity has always taken the position that where a settlor manifests a general intention to give to charity, the failure of the particular 'mode' in which the charity is to be put into effect should not destroy the charity.[164] From early times, therefore, where a settlor's transfer of property to a charitable use was defective, for example because the appointed trustee lacked capacity to hold property at common law, the Chancellor could intervene to perfect the transfer and enforce the use.[165] Where a settlor intended to establish a charitable trust, but failed to prescribe all the details of its administration, the court would direct an appropriate scheme.[166]

The court's curative powers with respect to charitable trusts apply to substantive as well as formal defects. While private trust documents must be interpreted according to ordinary rules of construction, a court may give a benignant construction to a document in order to save a charitable trust.[167] A private trust for uncertain objects is necessarily void.[168] Where property is given in trust for charity generally, however, with no directions as to the specific objects to be carried out, a court may apply the fund in the manner it

[164] *Moggridge* (n 79) 69.

[165] Jones (n 77) 60-68. It was originally thought that this jurisdiction flowed from the preamble of the 1601 Statute, but by the late 17th century it was accepted that imperfect transfers could be perfected in Chancery, even if the proceedings were brought by bill or information.

[166] *Wellbeloved v Jones* (1822) 57 ER 16*; A-G v Stepney* (1804) 10 Ves 22, cited in Picarda (n 77) 512.

[167] Philip Henry Pettit, *Equity and the Law of Trusts* (11th edn, OUP 2009) 49.

[168] Mowbray and others (n 151) 99.

deems most expedient.[169] In earlier times, where the designated object of a fund was illegal or superstitious, the court could likewise apply the fund to another charitable purpose at its discretion. It should be noted that the court's ability to 'fill in' the intention of a benevolent settlor in order to perfect an uncertain or illegal trust was always controversial, particularly since the courts often justified the exercise of this power as a way of fulfilling the settlor's intent. Lord Eldon called it a 'strange doctrine' that one could 'find a charitable purpose in a purpose that is to fail altogether', or discover an intention to build a Foundling Hospital in a declared intention to build a Jewish Synagogue.[170] Nevertheless, the curative jurisdiction of the court remains exercisable, provided there is a clear intention that property be held on trust for charitable purposes;[171] where there is no trust, but only an uncertain absolute gift to charity, the power to direct the gift's application devolves to the Crown.[172]

Finally, the charities jurisdiction encompasses a unique judicial power to alter the objects of a trust. Pursuant to the cy-près doctrine, if property is given in trust for a particular charitable purpose, which is or becomes impossible or impracticable to carry out, and the settlor demonstrated a paramount charitable intention to devote the property to charity, a court may direct that the property be applied to a purpose 'as near as possible'

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[169] *A-G v Syderfen* (1683) 1 Vern 224. Similarly, where money was given in trust for a specific charitable purpose, but given in terms too vague to be applied, the court could 'give effect to the drift of the ideas' embodied in the trust through an administrative scheme: see *Re Gott* [1944] Ch 193.

[170] *Moggridge* (n 79) 81, 87.

[171] Unlike the cy-près jurisdiction, the court's jurisdiction to perfect uncertain or illegal charitable trusts did not depend on the finding of a 'general charitable intention'. Settlors of these trusts were deemed to have a general charitable intention: Jones (n 77) 148.

[172] *Moggridge* (n 79) 83.

to that intended by the testator.[173] The origins of cy-près are debated, but by the early seventeenth century it was a 'sophisticated and mature doctrine',[174] which allowed a court to redirect charity funds where the amount of a gift was insufficient to carry out the donor's intentions, or there was no suitable site for the charitable project, or the object of the gift had already been achieved.[175] Unlike later statutory versions of the doctrine, however, the common law cy-près doctrine did not authorize a court to redirect charity funds on the basis that it could identify a more expedient or beneficial application of the property.[176] The court's duty was to 'carry into effect the intentions expressed by the founders so far as those intentions are not inconsistent with any existing law.[177]

The foregoing paragraphs represent only a brief overview of the court's inherent jurisdiction over charitable trusts. Nonetheless, they provide an indication of how the primarily private law institution of the trust, and the laws that governed that institution, were adapted to reflect a perceived public interest in charitable projects and gifts, producing a variant which is more of a public law nature. The cy-près doctrine provides a particularly good illustration of the general hybridity of the common law of charitable trusts, and the deep tension within its canon between the value placed on individual project pursuit and collective project pursuit. Like the other curative powers that make up

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[173] In earlier times, the court's substitution of a new mode to carry out the settlor's charitable intention was considered as part of the cy-près doctrine, but most authors now restrict the doctrine to situations where a particular purpose cannot be carried out: see Jones (n 76) 73; Picarda (n 77) 438.

[174] Jones (n 76) 74.

[175] See Picarda (n 77) 446-54, and the cases cited therein.

[176] *Philpott v St George's Hospital* (1859) 27 Beav 107,111. Compare CA 2011, s 62(1)(e).

[177] *A-G v Boucherett* (1858) 25 Beav 116, 53 ER 580 (Ch) 583.

the charities jurisdiction, the court's ability to apply charity property to purposes not specifically envisaged by the charity's settlor manifests a distinctly *public law* impulse to protect the public interest in the use of property for charitable purposes. On the other hand, the strict limitations on the cy-près power, and the court's frequent reliance on the settlor's intentions as a way of justifying the exercise of the power,[178] manifest a distinctly *private law* impulse to protect the autonomy and will of the settlor. The cy-près doctrine thus provides us with a compelling example of the general hybridity of the common law tradition, in the sense that it accords equal or near equal importance to the autonomy interest of benevolent property owners, and to the public interest in properly and effectively administered charity property.

c. Supervisory jurisdiction over the charitable corporation

Although the exact parameters of the court's jurisdiction to control and administer charitable trusts have always been somewhat obscure, the existence of the jurisdiction and its broad and remedial character are not open to doubt. The relationship between the courts and the charitable *corporation*, on the other hand, has always been more complex. A charitable corporation is a corporation whose corporate purposes are charitable.[179] Historically, charitable corporations were created either by Royal Charter, by a grant of letters patent, or by a special Act of Parliament.[180] Prior to the development of the Charity Commission regime, the supervision of charitable corporations was carried out primarily

[178] For a discussion of this and other justifications for the cy-près doctrine, see Jonathan Garton, 'Justifying the Cy-Près Doctrine' (2007) 21 Trust L Int'l 134.

[179] Picarda (n 77) 267.

[180] ibid 270.

through the exercise of a private jurisdiction, based on legal rules created by the corporation's founder. However, the court enjoyed a 'residual' jurisdiction over charitable corporations, which it exercised where there was no one else to ensure that charitable funds were properly administered, or where the court's intervention could be justified by the existence of a clear and distinct trust. We will examine these unique features of the supervisory regime for charitable corporations in the ensuing section, with a view to gaining a fuller, more nuanced picture of the public law-private law hybridity of the common law charities tradition.

The common law historically treated charitable corporations as 'the creatures of the founder.'[181] The connection between a founder and his founded property was elemental: Coke opined that foundership (the role of being the founder) was 'so inseparably incident to the blood of the founder' that it could not be transferred to anybody else.[182] In recognition of this connection, the common law allowed the founder of a charitable corporation to dictate the objects to which his property and the property of subsequent supporters would be directed, and the 'laws' that would govern his foundation. The founder of a charitable corporation also had the power to appoint a 'visitor' to interpret and apply his foundation's laws.[183] The visitor was said to enjoy a 'domestic jurisdiction', which authorized him to interpret not only the foundation's laws, but also the

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[181] *St John's, Cambridge v Toddington* (1757) 1 Burrow 158, 97 ER 245

[182] Stewart Kyd, *A Treatise on the Law of Corporations*, vol 1 (J Butterworth 1793) 51.

[183] The settlor of a charitable trust could apparently also appoint a visitor of the charity, but this was not a common practice: Warburton and others, *Tudor on Charities* (n 126) 412. Trusts, as we have seen, remained under the court's control: *Morice* (n 79); *A-G v St Cross Hospital* (1854) 18 Beav 475, 52 ER 187 (Ch).

‘internal powers and discretions’ that derived from them.[184] If a founder failed to appoint a visitor, the law presumed that the foundation was to be visited by the founder and his heirs.[185]

The unique power of the founder of a charitable corporation to establish the legal regime governing his entity set the charitable corporation apart from other corporations. Ecclesiastical corporations, which also generally owed their existence to gifts of property from private individuals, were subject to the visitation of the Ordinary, and civil corporations were subject to the visitation of the ordinary courts.[186] Charitable corporations, on the other hand, could have as their visitor any private individual, although those founded by the Crown were generally visited by the sovereign or his or her appointee.[187] In *Philips v Bury,* the *locus classicus* of the law of visitors,[188] Holt CJ summed up this distinction by declaring that while corporations were subject to the general laws of the realm, the charitable corporation was *entirely private,* and wholly subject to the rules, law, statutes and ordinances which the founder ordains, and to the visitor whom he appoints, and to no others...’[189]

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[184] *Thomas v University of Bradford,* [1987] AC 795 (HL) 820-1.

[185] *Philips v Bury* (1690) 1 Ld Ray 5, 91 ER 900, 903-4. See also Picarda (n 77) 736.

[186] Colin Arthur Cooke, *Corporation, trust and company; an essay in legal history* (Manchester University Press 1950) 69.

[187] JW Bridge, ‘Keeping Peace in the Universities: The Role of the Visitor’ (1970) 86 LQR 531, 534.

[188] *R v Hull University Visitor, ex parte Page* [1993] AC 682, 698.

[189] *Philips v Bury* (n 185) 903-4.

The fact that charitable corporations were generally governed not by the common law, but by a system of private law established by their founder, had the effect of significantly insulating charitable corporations from the supervision of the courts.[190] There was no right of appeal from the decisions of a visitor, and the High Court would intervene only where the visitor dealt with a matter outside his jurisdiction, or refused to deal with a matter within his jurisdiction.[191] In 1747, Wright J put the matter starkly, stating: 'Visitors have an absolute power; the only absolute one I know of in England'.[192] Two and a half centuries later, the House of Lords reaffirmed the near-absolute power of English visitors to decide matters deriving from the founder's laws.[193]

However, the relative insulation of charitable corporations from judicial supervision was not attributable solely to the entitlements of their property-owning founders, and the private jurisdiction that arose therefrom. The autonomy of charitable corporations and the self-governance they exercised were at least equally related to the role that the Crown played in their establishment. Until the general corporate laws of the nineteenth century made incorporation the automatic consequence of stipulated, preliminary acts, the granting of corporate status was a royal prerogative in English law, and so the foundation of charitable corporations could typically only be accomplished by

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[190] *ex parte Page* (n 188) 698, 700 ('the courts' inability to review the decisions of the founder is based on the fact that a charitable corporation is governed by a system of private law which is not the common law but the particular laws and constitutions assigned by the founder')

[191] *Thomas* (n 184) 825.

[192] *R v Bishop of Chester* (1748) 1 W Bl 22, 96 ER 12, cited in *ex parte Page* (n 188) 698.

[193] *Thomas* (n 184) 811-14; *ex parte Page* (n 188) 704.

the sovereign's consent.[194] A charitable corporation could be created by a grant of letters patent, or the enactment of a special Parliamentary Act.[195] In the early days, however, it was most often the sovereign alone that performed the creative act of incorporation, through the instrument of the Royal Charter.[196] The usual practice was for a body of persons to draft the contents of a Royal Charter, and then present a petition for the Charter to the Crown.[197] Ultimately, however, it was the sovereign who either dictated or approved the powers exercisable by the corporation, the ends towards which those powers would be used, and the manner in which the powers would be exercised. It is perhaps for this reason that Blackstone compared charitable corporations to republics,[198] and wrote that 'the founder of all corporations, in the strictest and original sense, is the King alone.'[199]

The Crown's involvement in the foundation of charitable corporations vested them with a certain 'public' authority, which was reflected in the limitations on the judiciary's authority to supervise them. Thus, a number of eighteenth century cases confirm that the court has no inherent jurisdiction to alter the trusts of a charity founded by Royal Charter,

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[194] 1 Bl Comm 271-3, 472. Even special Acts required royal assent, but as we will discuss further in chapter five, charitable corporations created by special Act are likely best understood as creatures of the legislature.

[195] Picarda (n 77) 270. See also Kyd (n 182) (such consent could be explicit, as in the case of corporations created by statute or Royal Charter, or implicit, as in the case of corporations created by prescription.)

[196] 1 Bl Comm 473. See also LCB Gower, *Gower's Principles of Modern Company Law* (4th edn, Stevens & Sons 1979) 22, noting that it was not until the latter part of the 18th century that it became the practice for Acts of Parliament actually to effect incorporation.

[197] Picarda (n 77) 270. See also *A-G v National Hospital for the Relief and Cure of the Paralysed and Epileptic* [1904] 2 Ch 252, 256.

[198] 1 Bl Comm 468.

[199] 1 Bl Comm 480-1.

because such charities owe their existence to the authority of the Crown, which is a 'higher authority than [the] court'.[200] The court also has no jurisdiction to alter the trusts of a charity that is comprehensively regulated by statute, unless it is given that jurisdiction under the Act.[201] Indeed, where a charity is established by Royal Charter or by statute, the court may not exercise its jurisdiction in any way that conflicts with those instruments.[202] Today, of course, individuals may create corporate charities by their own acts and association. Historically, however, these common law rules placed significant limits on the court's ability to supervise charities that were not charitable trusts.

Until the development of the Charity Commission regime, then, the private jurisdiction of the visitor served as the primary mode of supervision for the charitable corporation in EW. Nevertheless, there were circumstances in which questions regarding the administration of such corporations were understood to fall within the inherent jurisdiction of the courts. First, the courts were prepared to exercise a supervisory jurisdiction over charitable corporations in cases where they could find within the corporate structure a trust upon which their authority could be based. The judicial usage of this technique increased, Justice Cullity has argued, as it became apparent that

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[200] *A-G v Smart* (1748) 1 Ves Sen 72 (Ch); *A-G v Middleton* (1751) 2 Ves Sr 327, 28 ER 210 (Ch). See also Warburton and others, *Tudor on Charities* (n 126) 371. The Charities Act has extended the court's jurisdiction to make schemes for chartered charities, but provides that such schemes may not take effect until Her Majesty thinks fit to amend the charter: CA 2011, s 68.

[201] *Re Shrewsbury Grammar School* (1849) 1 Mac & G 324, 333. See also Warburton and others, *Tudor on Charities* (n 126) 372-3.

[202] *Construction Industry* (n 131) 187. See also *Re Whitworth Art Gallery Trusts* [1958] Ch 461, [1958] 1 All ER 176, 176.

corporate law was inadequate to prevent abuses in the use of charitable funds.[203] Thus, in the nineteenth century case of *Attorney General v St. Cross Hospital,* Sir John Romilly MR found that a twelfth-century charter for a hospital foundation constituted 'as clear and distinct a trust for the general support of charity as ever was created'.[204] As a result, he concluded, the visitorship of the Bishop of Winchester did not take away the court's jurisdiction, for it was the Court's duty to administer and enforce the performance of a trust 'as much where there is a visitor as where there is none'.[205]

Even where no trust could be identified, the Court of Chancery sometimes interfered with the administration of a charitable corporation where such interference was 'necessary', in the sense that there was no other person to ensure that corporate funds were properly administered in furtherance of the corporation's charitable objects.[206] Thus, in the eighteenth century case of *Attorney General v Middleton*, the Court of Chancery held that while a foundation that had a charter with proper powers would provide 'no ground to come into this court', a foundation with no charter would fall within its jurisdiction as a matter of necessity.[207] A charitable corporation with no visitor could likewise be the subject of an administrative scheme.[208] And where the 'visitor' of a charitable corporation

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[203] Cullity (n 54) 19.

[204] *A-G v St. Cross Hospital* (1853) 17 Beav 435, 51 ER 1103 (Ch) 459.

[205] Ibid 466. See also *A-G v Dedham School* (n 162) 356 ('this Court does not interfere with the visitatorial power, unless it finds a breach of trust').

[206] Maurice Cullity makes this argument in more detail: see Cullity (n 54) 23.

[207] *Middleton* (n 200).

[208] This is implicit in *A-G v The Governors of the Foundling Hospital* (1793) 2 Ves J 42, 30 ER 514, 47.

was also the person charged with the management of its estate and revenues, the courts were willing to supervise that management, since there must somewhere be a power to regulate, and no person should be allowed to judge his own cause.[209] While the court's jurisdiction over the charitable corporation was subject to substantial limits, therefore, it appears that the court's impulse to protect property devoted to charity sometimes prevailed over its impulse to protect the settlor's private supervisory regime, even where there was no trust.

As the foregoing paragraphs indicate, the 'regulatory regime' that was applicable to charitable corporations at common law was quite a different regime than that associated with charitable trusts. Like its trust law counterpart, however, the regime felt the equal or near equal weight of the respective regulatory impulses of public and private law. The common law provided an unrivalled protection of the autonomy interests of the founders of charitable corporations, allowing them not only to formulate their own charitable projects, but also to establish the framework and the arbiter for their continued regulation. Because charitable corporations were all creatures of the royal prerogative, however, it is arguable that the common law in fact viewed all charitable corporations as *public* projects, and the sovereign as their true founder. Whether or not this is so, the efforts that the courts made to exercise a residual jurisdiction over charitable corporations, in the face of significant limitations on their power, demonstrate that the impulse to protect the public interest in charity property attached to charitable corporations as well as trusts. While the existence of separate supervisory regimes for charitable trusts and corporations necessarily

[209] ibid. See also *A-G v Lock* (1744) 3 Atk 164 (Ch); *Middleton* (n 200).

complicates our doctrinal map, therefore, it does not undermine our claims about the general hybridity of the common law charities tradition.

2. The modern charities regulators: challenges of the comparative task

In many common law jurisdictions, the functions of the common law's charities regulators, the Crown and the superior courts, have been replaced, supplemented or delegated to other regulatory institutions through the mechanisms of a modern regime of charities regulation. A major purpose of this thesis is to map the interface between the common law tradition and these modern, regulatory regimes. Two regimes have been selected to provide the focus of the study: the 'Charity Commission regime' established under the English Charities Act 2011, and the 'registered charity regime' established under the Canadian Income Tax Act.

There are a number of reasons for these selections. Both regimes emerged against the background of the common law of charities, although each regime relates to that tradition in very different ways. Both regimes constitute in fact the *primary* regimes of charities regulation within their respective jurisdictions,[210] although they coexist with other bodies of law. The particular selection of the Charity Commission regime reflects its status as the oldest statutory regime of charities regulation in the common law world, as well as its continued prominence. The registered charity regime provides an interesting

[210] This is not a controversial proposition in EW, nor, I would argue, in Canada: see P Monahan and E Roth, *Federal Regulation of Charities: a Critical Assessment of Recent Proposals for Legislative and Regulatory Reform* (York University 2000) 7; Arthur BC Drache, Robert B Hayhoe and David P Stevens, *Charities taxation, policy and practice. Taxation* (Carswell 2007) 1.2 and chapter 10.

comparator to the English regime, and has also been selected because of the relatively small amount of Canadian literature addressing the doctrinal topics of this work. Nevertheless, the project of comparing the Charity Commission and registered charity regimes poses a number of significant, analytical challenges. It is important to acknowledge these challenges at the outset, and keep them in mind in what follows.

The first and most evident challenge relates to the fundamentally different nature of each regulatory institution. The Charity Commission, as the thesis will show, is best understood as the successor of the English Crown and the superior courts with respect to their charities jurisdiction; it is a largely independent statutory body that was created with the explicit goal of improving the administration of charitable resources in EW. The Charities Directorate, by contrast, is a tax authority, a body under ministerial direction that was created with the goal of stemming the abuse of *tax* resources by charities within its jurisdiction. The distinctive origins, functions and powers of the Commission and the Charities Directorate will be discussed in further detail in parts three and four. Even this preliminary summary, however, indicates the extent to which the regulators are, by their very nature, unlike.

A second comparative challenge stems from the imbalance in the *amount* of law that is encompassed by each regime. The Charities Act 2011 is a relatively long statute, with 358 sections and eleven schedules that articulate in great detail Parliament's intentions regarding the legal definition of charity, the functions and powers of the Commission, the reporting and registration requirements for charities, and the ongoing role of the Crown and the courts.[211] Many of these provisions have a long legislative history, and an associated case law that continues to guide their interpretation. The rules of the Canadian registered charity regime, on the other hand, are set out in a dozen sections of the Income Tax Act,[212] which are very often noted for what they do *not* say.[213] The various silences of the registered charity provisions, on matters as important as the meaning of charity itself, do provide insight into the matters that are outside the Directorate's jurisdiction, as well as the matters that Parliament has left for the determination of the courts. However, the relatively scant legislative and jurisprudential material on the registered charity regime does tend towards a comparative study that puts more weight on English law.

Yet a third comparative challenge arises from the very different timelines and contexts within which each charities regulator was created. In 1853, when the centuries-old Parliament of the United Kingdom decided to create a public body to address longstanding issues relating to the abuse of charitable trusts, the federation that was to form the basis of the Canadian state did not even exist. While the lands on Canada's eastern shores were settled English colonies and the future provinces of Quebec and Ontario existed as a single political entity, much of the massive territory to the west was

[211]It has been said that the Charities Act 2006 was subject to 'more consideration and more parliamentary scrutiny than any other piece of legislation in the UK': Lindsay Driscoll, 'England and Wales: *Pemsel* plus' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar 2010) 48.

[212] The core provisions of the registered charity regime are set out in sections 149(1), 149.1, 168, 172, 188, 188.1, 189 and 248(1) of the ITA.

[213] *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 SCC 42, [2007] 3 SCR 217 [8], [15].

still unsettled and without government.[214] In this context of abundant land and sparse populations, it is unsurprising that the English project of protecting property held in trust for charity did not have a contemporary Canadian parallel. By the time the Canadian government had become concerned enough about the charitable sector to create its own charities regulator in 1967, a very different set of issues were in play.

A fourth challenge of comparing the Charity Commission and registered charity regimes is that each regime reflects, and exists in relationship with, a distinctive and complex policy on the tax treatment of charitable resources. Both Canada and the UK grant significant tax privileges to charitable gifts and charitable institutions. However, they do so to different extents and in different ways. To take just one example, individual taxpayers in the UK make charitable gifts with after-tax dollars, and the government then transfers to the recipient charities an amount roughly equal to the bottom-tax-rate tax payable on the gift.[215] In Canada, by contrast, individuals claim tax credits for charitable gifts directly from the government. There are a myriad of other important differences between the tax treatment of charity property in the UK and Canada, which it lies beyond the scope of this thesis to address.[216] It is nevertheless important to emphasize that in Canada, where the primary regime of charities regulation is embedded in the nation's foremost tax instrument, the substantive and procedural rules of contemporary charity law

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[214] JE Cote, 'The Reception of English Law' (1977) 15 Alberta L Rev 29, 87-92.

[215] Individuals who are in higher tax brackets can reclaim the defference between the tax they paid on the donation and the amount received by the charity: for a brief summary, see Matthew Doeringer, 'Fostering Social Enterprise: a Historical and International Analysis' (2010) 20 Duke J of Intl & Comp L 291, 311.

[216] The tax treatment of charitable gifts in the UK is covered in a number of leading texts, including Picarda (n 77) ch 55, and J Kessler and S Kamal, *Venables and Kessler on the Taxation of Charities* (6th edn, Key Haven 2007). The leading text in Canada is Drache, Hayhoe and Stevens (n 210).

are deeply intertwined with tax policy. The Charity Commission regime is far more independent from its jurisdiction's tax policy, although the two bodies of law do interrelate.[217]

Finally, any comparison of the Charity Commission and registered charity regimes must contend with a series of complexities that are the legacy of Canada's colonial and constitutional past. In 1867, seven years after the Charity Commissioners for EW had been granted concurrent jurisdiction with the Chancery Court, the constitutional structure for the Dominion of Canada was finally put into place.[218] In dividing legislative authority between Canada and the provinces, the Constitution Act 1867 assigned to the provinces the exclusive authority to make laws regarding the 'establishment, maintenance and management of…charities and eleemosynary institutions', and over property and civil rights in the province.[219] The rights of the Crown were similarly distributed, with 'the Crown in each right receiving the prerogatives and duties appropriate to its property and legislative competence.'[220] The implication of this federal structure, from the perspective of the law of charities, is that the Crown in right of Canada did not inherit the English Crown's prerogative powers with respect to charities, and that the federal government has

[217] While the Charities Act 2011 sets out the general meaning of charity for purposes of English law, the Finance Act 2010 establishes a more complex definition of charity for purposes of the UK's taxation statutes: see CA 2011, s 1; Finance Act 2010, s 30 and sch 6.

[218] This was accomplished by the British North America Act 1867 (30 & 31 Vict c 3), subsequently renamed the Constitution Act 1867.

[219] Constitution Act 1867, ss 92(7), (13).

[220] Cote (n 214) 61.

no authority to regulate the administration of charities *per se*.[221] The corollary, of course, is that the Crowns in right of the provinces *did* receive these prerogative powers, and that the provinces are fully authorized to regulate the charitable sphere.

The various and varying ways that the provinces have exercised (or not exercised) their jurisdiction over charities in Canada are not a primary focus of this study. It is important to recognize, however, that the registered charity regime exists against the background of these provincial laws and can only fully be understood in terms of its relationship with them. Without claiming to fully represent the legal position in each of Canada's ten provinces, therefore, this thesis will at times highlight aspects of provincial law that are particularly relevant to the matter being addressed. In most parts of the country, the amount of this law is negligible; indeed, the well-documented failure of the provinces to regulate charities is a major reason for this thesis' focus on the federal sphere.[222] The particular position of two provinces is nonetheless worthy of note, for one has an especially strong affiliation with the English charity law tradition, while the other may have none at all.

The province of Ontario, the most populous of Canada's nine common law provinces, has a particularly strong relationship with the English charity law tradition. The English law of equity was introduced into the colony of Upper Canada, by most

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[221] The federal Parliament's jurisdiction over charities is generally taken to flow exclusively from its authority over taxation: Constitution Act 1867, s 91(3). There are, however, other possible bases for its jurisdiction that will not be discussed here.

[222] See, for example, Monahan and Roth (n 210) 7.

accounts, by a local statute in 1832,[223] and was continued in the province of Ontario by virtue of section 129 of the Constitution Act 1867.[224] The Crown in right of Ontario and the Ontario superior courts therefore enjoy prerogative powers over charities, just like their counterparts in Canada's other common law provinces.

Ontario is unique, however, in having established a statutory regime of charities regulation that is based loosely on the Charity Commission model.[225] In 1915, the Ontario legislature enacted the Charities Accounting Act, which put into place a basic regime of supervision applicable to every gift made under a written instrument for any 'religious, educational, charitable or public purpose.'[226] The Act gave the Attorney General powers to inquire into the use of charity property, which have since been delegated to the province's Public Guardian and Trustee.[227] Like the English charity law reformers of the nineteenth century, the Ontario legislature aimed, in enacting the Charities Accounting Act, to protect the jurisdiction's charitable resources by establishing a public officer to oversee those who controlled and administered them. Like earlier English charities legislation, the Act also aimed to create a public record of charitable trusts to prevent those trusts from being lost or neglected.[228]

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[223] See Cote (n 214) 88-90.

[224] Constitution Act 1867, s 129.

[225] OLRC Report, 536, stating that the Charities Accounting Act was based on the 'English law and legal practice prevailing at the time of its enactment in 1915'.

[226] CAA (Ont).

[227] CAA (Ont) s 2.

[228] The Ontario Law Reform Commission suggested that the requirement to notify the Public Guardian and Trustee of the existence of a charitable trust was modelled on the Charitable Donations Registration Act 1812 (52 Geo 3 c 102) (UK).

There are, of course, very significant differences between the English Charity Commission regime and that established by the Ontario Charities Accounting Act. On the one hand, the Ontario statute is significantly broader in its application: while EW's charities legislation historically applied solely to endowed institutions constituted for purposes that were charitable at common law, and even today remains largely circumscribed by the common law tradition,[229] the Charities Accounting Act applies to property given for any *public purpose*, whether or not that purpose falls within the parameters of the Statute of Elizabeth. On the other hand, Ontario's 'charities regulator' has a far narrower jurisdiction than the Charity Commission: while the Public Guardian and Trustee carries out some of the historic functions of the Attorney General, the officer enjoys none of the judicial powers of the superior courts.[230] Nevertheless, the existence of a public officer with a mandate to oversee the administration of charitable trusts and corporations distinguishes Ontario from the rest of the Canadian provinces. It can also be assumed to be responsible for the disproportionate number of Canadian charity law cases decided by the Ontario courts.

The situation is quite the opposite in Quebec, where the province's private law is not based on the common law, but on the civil law tradition established by the French Crown in the seventeenth century in the colony of New France.[231] Following its conquest by England in 1763, pursuant to the common law rules of reception, Quebec 'received',

[229] CTA 1853, s 62; CA 2011, ss 1-3.

[230] The PGT is limited to applying to the Ontario Superior Court of Justice for a remedial order where it believes a charity trustee has acted unlawfully: CAA (Ont), s 4.

[231] John EC Brierley and Roderick A Macdonald (eds), *Quebec Civil Law : an introduction to Quebec private law* (Emond Montgomery 1993) 7.

and became subject to, all relevant and applicable English law.[232] However, the Quebec Act of 1774 provided that from that time forward, matters of 'property and civil rights' in Quebec would be determined according to the French civil law tradition. [233] The phrase, which made its way into the provisions of the Constitution Act 1867 on the distribution of legislative powers, was understood as a 'compendious description of the entire body of private law which governs the relationships between subject and subject.'[234] As a result, it is generally understood that the law of Quebec consists of the pre-1760 French civil law as subsequently altered by Quebec in regard to anything affecting the private law, 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.'[235]

This colonial history has a number of implications that are relevant to this study. The first implication is that, according to all of the prevailing authority, the common law of charities has no application in Quebec.[236] This means that the superior courts of Quebec have no inherent jurisdiction to administer charitable resources, and that the Crown in right of Quebec does not enjoy the English Crown's prerogative powers over charities. The common law of charities does exert an influence in the province, as it is relied on as

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[232] Cote (n 214) 42 and footnotes 61-67; *Donegani v Donegani* (1835) 3 Knapp 62, 12 ER 571. England also appointed Quebec's first Attorney-General at this time: Philip C Stenning, *Appearing for the crown : a legal and historical review of criminal prosecutorial authority in Canada* (Brown Legal Publications Inc 1986) 45.

[233]Quebec Act 1774 (14 Geo 3 c 83) s 8.

[234] Hogg (n 27) 21-2.

[235] *St-Hilaire* (n 70) [40]. See also *Prud'homme* (n 70) [46].

[236] *Ross v Ross* (1894) 25 SCR 307.

providing the suppletive law for the interpretation and application of the federal registered charity provisions in Quebec, and for Quebec's own tax code.[237] In general, however, the registered charity regime operates in Quebec against the background of a distinctive private law tradition of devoting property to social purposes, which is rooted in the unenacted civil law, and the Civil Code of Québec. [238]

Quebec's colonial history has a second implication for the law of charities in Canada, which is potentially in conflict with the first. For if it is indeed the case that certain elements of the common law of charities are 'public' in nature, and common law rules that are public in nature apply in Quebec,[239] this would seem to suggest that contrary to the prevailing authority, certain elements of the common law charities tradition *could* form part of Quebec law. While a determination of this issue falls outside of the scope of this thesis, it is illustrative of the constitutional complexity that attaches to Canadian charity law.

All of this constitutional complexity contributes to the very different ways in which the English and Canadian regimes of charity regulation coexist with, and relate to, other sources of domestic law. Charities in both jurisdictions are governed by a large number of additional regulatory regimes.[240] We have already noted that while the UK's

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[237] Chan. 'Taxing Charities' (n 52) 520.

[238] *Civil Code of Québec*, LRQ c C-1991, art 1270, 1277, 1287, 1294, and 1298.

[239] *Prud'homme* (n 70) [46].

[240] A commercial compilation of legislation applicable to charities in Ontario, for example, contains excerpts from 153 statutes and 76 regulations: see Terrance S Carter, Adam Parachin and Maria Elena Hoffstein, *Charities Legislation & Commentary* (LexisNexis Canada 2012).

tax administration body is not the primary regulator of English charities, Her Majesty's Revenue and Customs does regulate the fiscal incidents of charitable status in the UK, and English charities that wish to benefit from those fiscal incidents must comply with the complex web of provisions set out in the Finance Act 2010 and a variety of taxation statutes.[241] Several Canadian provinces apart from Ontario regulate charitable fundraising and related activities. Corporate charities in both EW and Canada must comply with their governing corporate law statutes.[242] Charities in both jurisdictions must also comply with applicable human rights law instruments, which in EW, at least, are having a growing impact on the exercise of the regulator's powers. Aspects of these supplemental regulatory regimes will be considered in subsequent chapters. However, keeping in mind the challenges of comparing two very different regulators, the focus of this thesis will continue to be upon the Charity Commission and registered charity regimes.

3. A tale of two regulators: the origins and disposition of the Charity Commission for England and Wales

a. Origins

We have seen that at common law, a charity could be subject to either a public or private supervisory jurisdiction, depending on its legal form and the manner of its establishment. While all charitable trusts fell within the inherent jurisdiction of the courts, the supervision

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[241] For example, the Income Tax Act 2007, the Corporation Tax Act 2010, and the Taxation of Chargeable Gains Act 1992 all contain provisions on the tax treatment of charity property: for a discussion of these provisions, see Picarda (n 77) 1006-1039.

[242] See, for example, Companies Act 2006 (UK), ss 380-474; *Canada Not-for-profit Corporations Act,* SC 2009, c C-23, ss 28-36, 172-178. Each Canadian province also has legislation governing provincially incorporated bodies.

of charitable corporations depended on the directions of their founder, who could both establish the charity's laws and appoint the person who would apply them. In any case where a charity encompassed a trust or lacked a competent regulator, however, the Crown could invoke the court's inherent jurisdiction to control and administer charity property. If a uniting principle underlay this web of common law rules, it was that there must always be some competent person with broad powers to oversee the administration of charitable funds.

This belief in the need for competent oversight of charities appears to have been shared by many English citizens and politicians, whose efforts over the course of two centuries culminated in the creation of the Charity Commission regime. In the 18th century, a number of English communities carried out local charity inquiries, hoping that by publicizing and documenting charitable gifts, they would protect themselves against the disappearance of charitable funds.[243] In 1786, a Parliamentarian named Thomas Gilbert successfully introduced a Bill that required churchwardens to provide the authorities with details of charitable donations given in their parishes for the benefit of the poor.[244] The majority of parishes responded to the Gilbert survey, but the responses were far from complete, and the survey was not followed up by any legislative action.[245] Nonetheless, as Owen notes, the Gilbert Return did 'arouse some slight interest in endowments as a national asset and public problem', and laid the foundation for 'a more

[243] Richard S. Tompson, *The Charity Commission and the Age of Reform* (Routledge & Kegan Paul 1979) 78-81.

[244] 26 Geo III c 58. A similar, earlier Bill introduced by Gilbert was defeated in the House of Lords: see Tompson (n 243) 83.

[245] Tompson (n 243) 84.

rational and responsible attitude [to charitable resources] on the part of the State.'[246] It was followed, in 1812, by the enactment of two charity statutes, which sought to simplify the common law procedure for remedying breaches of charitable trusts,[247] and required charities to register declarations of their property and income with the local Clerk of the Peace and the Chancery Court. [248]

The immediate story of the establishment of the Charity Commissioners for EW begins with Lord Brougham, a Scottish advocate and Opposition Member of Parliament with a 'consuming interest in the education of the poor.'[249] In 1816, Lord Brougham persuaded the House of Commons to appoint a Select Committee to inquire into the education of the 'lower orders' in London. The Committee included several active charity law reformers, and when it rendered its first report in June 1816, it alluded to evidence it had received "which show[ed] the necessity of Parliament as speedily as possible instituting an inquiry into the management of charitable donations and other funds for the instruction of the Poor'.[250] The need for a distinct body to inquire into charity abuses became a central theme in the Committee's reports, and in the spring of 1818 Lord Brougham introduced a bill for the creation of just such a body to the House of Commons. By August 1818, the Tory government had appointed the first 'Commissioners to inquire

[246] DE Owen, *English Philanthropy, 1660-1960* (OUP 1965) 86-87.

[247] An Act to provide a summary remedy in cases of Abuses of Trusts created for Charitable Purposes (52 Geo III c 101).

[248] Charitable Donations Registration Act 1812 (52 Geo III c 102).

[249] Chester W New, *The life of Henry Brougham to 1830* (Clarendon Press 1961) 211.

[250] See Tompson (n 243) 95-6.

concerning Charities in England for the Education of the Poor',[251] and one year later, the Commissioners' jurisdiction was expanded to encompass all of the charities in EW.[252] The question that took another thirty-five years to answer was whether Parliament should create a *permanent* charities regulator.

The records of the legislative proceedings that preceded the appointment of the first Charity Commissioners provide some indication of the propositions upon which the reformers' case for a new regulatory authority was based. The first was that the property devoted to charitable uses in EW was a valuable resource that was worthy of protection. This does not appear to have been a matter of great debate. The Gilbert Return, which had been republished in 1810 and again in 1816, served in its incompleteness to evoke the enormity of the true value of the nation's charitable trusts,[253] and the Parliamentary speeches of Lord Brougham and others contain references to 'how amply the poor of this country have in all ages been endowed by the pious munificence of individuals'.[254]

The second assertion made by the reformers was that the nation's valuable charitable resources were being abused, whether by design, neglect, or because of defects in trust instruments and in the law.[255] On May 8, 1818, Lord Brougham described to the

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[251] ibid 107.

[252] 59 Geo III c 81, s V.

[253] 1 Hansard vol 38 col 595-6 (8 May 1818).

[254] 1 Hansard vol 38 col 596 page 610. See also 3 Hansard vol 80 (22 May 1845), noting that the Report of the Commissioners identified 25,000 charities with an annual income of less that 50 pounds

[255] 1 Hansard vol 38 col 596, 609 (8 May 1818).

House in heightened rhetoric just a few of the 'fifty or more instances of abuse' that had been brought to the attention of the Special Committee on Education:

> At a place in Devonshire the question, What funds exist, destined to the purposes of education, is answered by a statement, "that the funds of the Foundation School are known only to Mr. Such-a-one." In another return it is said, that no account whatever can be obtained of the funds; and in a third, the estate belonging to the charity is alleged to have been let on a ninety-nine years' lease. Now this lease of itself I hold to be an abuse. To let and take a fine is an abuse; to let for so long a term without taking a fine is a gross mismanagement of the property. What then will the House say of leases for eight and nine hundred years? We have evidence of both; and in one case for a peppercorn rent.[256]

Whether or not Lord Brougham's tales of charity abuse were exaggerated,[257] they were not challenged in either House.

The third proposition upon which the reformers' movement for a permanent commission was based was that the existing remedies for breaches of charitable trusts, and the existing mechanisms for modifying charitable trusts, were grossly inadequate. In his early speeches in support of a charity commission, Lord Brougham chronicled the demise of the Statute of Elizabeth, which, though once the accepted procedure for the investigation of charitable abuses, had fallen into disuse.[258] However, he reserved his harshest words for the Court of Chancery, which, in addition to its inherent jurisdiction

[256] 1 Hansard vol 38 col 599 (8 May 1818).

[257] For the suggestion that Lord Brougham's descriptions of charity abuse were exaggerated and, in some cases, lacking an evidentiary foundation, see Tompson (n 243) 96-97.

[258] 1 Hansard vol 38 col 607 (8 May 1818).

over charitable trusts, had final authority over any decrees made by a commission under the Elizabethan statute:

> I have mentioned that only one commission had issued since 1787, and I am now enabled to state the result of its execution. It was fully executed in 1803; and in 1804, a decree was made, and the court was petitioned to confirm it. Exceptions were taken as usual. Much and solemn argument was held, and I will venture to say, from what I know of that court, the case was most learnedly and plentifully debated. In 1808 the matter was deemed ripe for a decision, and since that time it has, to use the technical, but significant expression, "stood over for judgment." For ten years it has awaited this final issue; and during the last four years it has stood at the head of the lord chancellor's paper, first among the causes waiting for judgment. Now, in the language of the profession, "this is my case".[259]

Lord Brougham's criticism of the Chancery Court, and his assertion that it was not an effective or affordable body for the resolution of disputes over charitable property, proved considerably more controversial than his tales of charity abuse. Lord Chancellor Eldon in particular was unsurprisingly vexed by the criticisms of his court, and responded by endorsing a wide range of legislative amendments that significantly reduced the powers of the first Commission.[260] Ultimately, however, Lord Brougham's views of the Chancery Court gained widespread acceptance, and by 1835 even the representatives of the Crown were attesting to the 'prejudicial delay and destructive costs' incident to Chancery proceedings.[261]

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[259] 1 Hansard vol 38 col 608 (8 May 1818). See also the discussion in Jones (n 76) 163-5.

[260] Owen (n 246) 186; Tompson (n 243) 106.

[261] SC on Public Charities (1835) vi. Lord Chancellor Lyndhurst, in introducing the Charitable Trusts Bill, took the view that the Court of Chancery was well suited to deal with large endowments but not with small charities: 3 Hansard vol 80 (22 May 1845).

Finally, the legislative records suggest that from the earliest days of the debate over the English Charity Commission, the political field was split between those who saw charity property as private property, and thus prioritized the autonomy interests of charity founders and trustees, and those who saw charity property as public property, and thus prioritized the public interest in the usage of those resources. Lord Brougham, once again, offered a provocative summation of this debate:

> …let me here notice the clamour which has already been raised against the powers proposed to be conferred upon the commissioners charged with this important inquiry. I hear it said, that they are inconsistent with the rights of private property. Under the flimsy pretence of great tenderness for those sacred rights, I am well aware that the authors of the outcry conceal their own dread of being themselves dragged to light as robbers of the poor, and I will tell those shameless persons, that the doctrine which they promulge, of charitable funds in a trustee's hands being private property, is utterly repugnant to the whole law of England. That law regards the inheritance of the poor as matter of public, not of private jurisdiction, and deals with it as it does with the rights of the Crown and the Church…I therefore again assert, that a more gross abuse of language never was committed by ignorant or by willful perversion, than the statement that charitable funds are of a private nature.'[262]

Other early proponents of charity law reform joined Lord Brougham in describing charities as the 'property of the public',[263] and in 1846 the Lord Chancellor defended the Charitable Trusts Bill on the ground that charity trustees were '*public* officers, invested with *public* powers and *public* duties', who should be treated accordingly by the law.[264] Other powerful politicians disagreed, however, and pushed hard to protect the autonomy

[262] 1 Hansard vol 38 col 603-4 (8 May 1818).

[263] 1 Hansard vol 38 col 976 (27 May 1818), per Lord Earl of Rosslyn.

[264] 3 Hansard vol 85 col 155-56 (27 March 1846), per Lord Lyndhurst; see also 3 Hansard vol 80 col 766-80 (22 May 1845).

of donors and trustees by opposing the Bill or seeking to exempt their constituents from the Commissioners' domain.[265]

In 1853, some thirty-five years after Lord Brougham began his quest to remedy the abuse of charity resources, Parliament finally created a 'public and permanent authority' to oversee the administration of charitable trusts in EW. Due to the strength of the arguments for protecting the autonomy of wealthy individuals, however, the statute was far narrower than Lord Brougham had hoped. The Charitable Trusts Act 1853, which authorized the appointment of four charity commissioners, provided those officers with only a limited mandate to 'examine and inquire' into the administration of charities in EW, and the management and application of their resources.[266] It also excluded places of worship, charities maintained by voluntary subscriptions, and a number of the nation's most powerful charities from its scope.[267] In 1860, Parliament substantially expanded this mandate by granting the Charity Commissioners concurrent jurisdiction with the Lord Chancellor over certain matters of charity administration, although the Commissioners could not make orders with respect to charities whose annual income exceeded fifty pounds except upon application of the trustees.[268] Thus began the Commissioners' role as

[265] See, for example, 3 Hansard vol 85 col 150, 153 (27 March 1846). See also Owen (n 246) 306-7.

[266] CTA 1853, s 9; see also LA Sheridan and GW Keeton, *The modern law of charities* (3rd edn, University College Cardiff Press 1983) 253.

[267] CTA 1853, s 66; Charitable Trusts Amendment Act 1855 (18 & 19 Vict c 124) s 49.

[268] CTA 1860, s 2. Jurisdiction over these matters had already been devolved to lesser judicial authorities under the 1853 Act: see CTA 1853 ss 28, 32.

the '*alter ego*' of the Chancery Court in matters related to poor charities,[269] and a statutory regime of charities regulation that builds upon, and seeks to improve, the common law tradition of the judicial supervision of charities at the behest of the Crown.

b. Nature and disposition

In order to shift our focus from the origins of the Charity Commissioners for EW to the nature and disposition of the contemporary Charity Commission, we need to skip over 150 years of developments in the field. The basic trajectory runs from the Commission's humble beginnings as the 'poor man's Chancery' to its current status as the powerful, if underfunded, regulator of most English charities.[270] Since these developments have been chronicled in great detail elsewhere,[271] only the briefest sketch will be offered here. The statutory framework governing the Charity Commissioners remained relatively static from 1860, when the Commissioners were endowed with concurrent judicial powers, until the middle of the twentieth century. Change began to occur in 1952, when the government, concerned to consider how the post-war development of the welfare state had impacted the role of the charitable sector, appointed Lord Nathan to report on the changes to the law of charitable trusts 'which would be necessary to enable the maximum benefit to the

[269] Owen (n 246) 308.

[270] For a summary of the role and budget of the contemporary Charity Commission, see Hodgson Review (2012) ch 5.

[271] For a concise summary of these developments, see Hodgson Review (2012) 10-12. A more detailed history of the Charity Commission can be gleaned from old editions of charity law textbooks: see, for example, OD Tudor, LS Bristowe and WI Cook, *The Law of Charities and Mortmain being a third edition of Tudor's Charitable Trusts* (3rd edn, Reeves and Turner 1889); Spencer Maurice, *The Charities Act, 1960* (Sweet & Maxwell 1961).

community to be derived from them'.[272] The Charities Act 1960 implemented many of the Nathan Report's recommendations, introducing the first charities register, modifying the cy-près rule to allow charitable resources to be used more effectively, and reforming the three-person board of Charity Commissioners into a larger, more independent, and more powerful body. It also amended the statutory definition of charity, thereby extending the jurisdiction of the Charity Commissioners to charities that were not trusts.[273] The Charities Act 1992 effected further changes, extending the registration requirements for charities and further enhancing the Commission's supervisory powers.[274] These and other changes were consolidated in the Charities Act 1993.

The most recent phase in the evolution of the Charity Commission regime began in 2001, when then-Prime Minister Tony Blair announced that the Cabinet Office's Strategy Unit would undertake a major review of charities and the not-for-profit sector.[275] The Strategy Unit had a broad mandate, and its final consultation paper, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector,* contained a number of recommendations for regulatory reforms. *Private Action, Public Benefit*, together with the consultation and government response that followed it, formed the basis of the reform measures that were proposed in the Charities Bill 2004 and eventually enacted as the

[272] Nathan Report, 1.

[273] Charities Act 1960, s 45(1).

[274] Charities Act 1992, ss 2-3, 6-12.

[275] Hodgson Review (2012); see also A Dunn and CA Riley, 'Supporting the Not-for-Profit Sector: the Government's Review of Charitable and Social Enterprise' (2004) 67 MLR 632, 632-33.

Charities Act 2006. The Charities Act 2006 represented a comprehensive overhaul of the English law of charities; because of this, Parliament built an automatic review procedure into the legislation, requiring that the statute be reviewed within five years. This review has recently been completed by Lord Hodgson of Astley Abbotts, and provides a valuable perspective on the first five years of the Act.[276] The provisions of the Charities Act 2006 and earlier charity law statutes have recently been consolidated into the Charities Act 2011,[277] a lengthy statute that articulates the functions and powers of the contemporary Charity Commission for EW in great detail. My intent in what follows is not to comprehensively summarize those provisions, but rather to highlight the provisions that clarify the Commission's relationship to the common law's charities regulators, and those that shed light on the nature of the Commission's regulatory impulse towards charities and their trustees.

The nature and disposition of the modern Charity Commission are in large part dictated by Part two of the Charities Act 2011, which contains a detailed articulation of the institution's composition, objectives, functions, and duties. Pursuant to part two, the Charity Commission is now a corporate body, whose members are appointed by the Minister for the Cabinet Office.[278] The Charity Commission has a chief executive that the Commission itself appoints, a staff of approximately 300 persons, and an annual budget of

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[276] Charities Act 2006, s 73; Hodgson Review (2012).

[277] Unless otherwise specified, future references to the English Charities Act will be to this consolidating statute.

[278] CA 2011, s 13(1), sch 1, para 1(1).

approximately 25 million pounds sterling.[279] The functions of the Commission are performed on behalf of the Crown, but the Act specifies that the Commission itself is not subject to the direction or control of any Minister of the Crown or other government department.[280]

Pursuant to section 14 of the Act, the Commission has five statutory objectives:

1. To increase public trust and confidence in charities (the 'public confidence objective')

2. To promote awareness and understanding of the operation of the public benefit requirement (the 'public benefit objective');

3. to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities (the 'compliance objective');

4. to promote the effective use of charitable resources (the 'charitable resources objective'); and

5. to enhance the accountability of charities to donors, beneficiaries and the general public (the 'accountability objective').[281]

The Act also establishes the functions of the Commission, which include determining whether institutions are or are not charities; encouraging and facilitating the better administration of charities; and 'identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action

[279] The staff structure and payroll costs of the Charity Commission are available on its website: see http://www.charity-commission.gov.uk/About_us/About_the_Commission/salary.aspx. The Commission's present and forecast future budget is set out in the Hodgson Review: Hodgson Review (2012) 45.

[280] Unless the control is provided for under another enactment: see CA 2011, s 13(3)-(5).

[281] CA 2011, s 14.

in connection with' such misconduct or mismanagement.[282] Section 15 clarifies that the Commission may give advice or guidance with respect to the administration of charities in connection with its general functions,[283] and that it must maintain an accurate and up-to-date charities register.[284] Section 16 addresses itself to the *manner* in which the Commission must perform these functions, stipulating (among other things) that the regulator must perform its functions in a way that is compatible with its statutory objectives.[285] It also provides that the Commission must, so far as is practicable or appropriate, act in a way which is compatible with the encouragement of charitable giving, and the facilitation of innovation by or on behalf of charities.[286]

The Charities Act 2011 endows the Commission with extensive powers to carry out its statutory functions and duties. Some of these powers are best understood as the extension *to* the Commission of the historical charities jurisdiction of the Chancery Court. Thus, pursuant to section 69, a provision that has existed in similar form since the initial conferral of concurrent jurisdiction on the Charity Commissioners in 1860,[287] the Commission may by order 'exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings' for the purposes of establishing a scheme for the

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282 CA 2011, s 15(1). The other general functions involve the issuance of public collections certificates, and the dissemination of information and advice relating to the Commission's other functions and objectives.

283 CA 2011, s 15(2).

284 CA 2011, s 15(4).

285 CA 2011, s 16(1).

286 CA 2011, s 16(2), (5).

287 CTA 1860, s 2.

administration of a charity; appointing, discharging or removing a charity trustee; or vesting or transferring charity property.[288] The Commission has long had concurrent jurisdiction to make schemes for the application of charity property cy-près,[289] and now also enjoys the same power as the High Court to relieve a charity trustee of liability for a breach of trust or duty.[290] The Act does place certain restrictions on the Commission's concurrent jurisdiction. Most notably, the Commission does not have jurisdiction to determine title to a property as between a charity and an adverse party, nor to try or determine any question as to the existence or extent of any charge or trust.[291] While the Commission cannot confer charitable status on an institution in the context of such a dispute, however, the Commission routinely confers charitable status on trusts and companies in the context of its registration function. Overall, then, the Act provides the Commission with most of the supervisory and curative powers that make up the court's inherent jurisdiction over charities.

Some of the Commission's powers must alternatively or additionally be understood as an extension *of* the charities jurisdiction itself. For example, the Charities Act 2011 relaxes the common law rules that prohibited the courts from altering the trusts of a chartered or statutory charity; the Commission shares this expanded jurisdiction with

[288] CA 2011, s 69(1). Disobedience to a section 69 order of the Commission may be dealt with as disobedience to an order of the High Court: s 336. For the original version of this provision, see CTA 1860, s 2.

[289] CA 2011, s 67.

[290] CA 2011, s 191.

[291] CA 2011, s 70(1).

the court.[292] The Act also expands the circumstances in which charity property may be applied cy-près, allowing the court and the Commission to consider whether the original purposes have ceased to provide a 'suitable and effective' method of using the property, regard being had to the spirit of the gift and the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.[293] The Commission, but not the court, also has the power to authorize charity trustees to temporarily apply a limited amount of a charity's income cy-près in the absence of a scheme.[294] In these and other ways, the contemporary Charity Commission may be regarded as exercising a sort of 'charities jurisdiction plus'.

The powers described thus far are powers that the Commission, like the courts, must generally exercise on the application of a person with standing to bring the application. As we will explore further in chapter four, however, the Charities Act 2011 also gives the Commission a variety of powers to regulate charities of its own motion. Pursuant to section 70(5), for example, the Commission may exercise its section 69 concurrent jurisdiction where it is satisfied that charity trustees ought in the interests of charity to apply for a scheme, but have unreasonably refused or neglected to do so.[295] Pursuant to sections 80 and 81, the Commission may remove and appoint charity trustees of its own motion in a variety of other circumstances, and make associated vesting

[292] CA 2011, ss 68 and 69; see also Picarda (n 77) 787.

[293] CA 2011, s 62, 67.

[294] CA 2011, s 75.

[295] The Commission must also have given the charity the opportunity to make representations: CA 2011, s 75(4).

orders.[296] The Commission may, of its own motion, order a charity trustee to reimburse to the charity any remuneration to which it is not entitled under the Act.[297] And a new provision in the Charities Act 2011 empowers the Commission to order a person in control of charity property to apply that property in a specified manner, in cases where the Commission is satisfied that the person is unwilling to apply it properly for the purposes of the charity, and that it is necessary or desirable to make an order to secure a proper application of the property.[298]

Even more significantly, perhaps, the Commission has a broad discretion to 'institute inquiries with regard to charities or a particular charity or class of charities' of its own motion, either generally or for particular purposes.[299] There are no preconditions to the exercise of this power of inquiry,[300] which is complemented by a wide array of powers to obtain documents and other information.[301] Moreover, where the Commission is satisfied, at any time after the institution of an inquiry, that there has been misconduct or mismanagement in a charity's administration, or that it is necessary or desirable to act for the purpose of protecting charity property, it may of its own motion take one or more of a range of protective and remedial measures specified in the Act.[302] The Commission

[296] CA 2011, s 80(2), 81.

[297] CA 2011, s 186.

[298] CA 2011, s 85.

[299] CA 2011, s 46(1).

[300] A section 46 inquiry is, however, subject to review by the Charity Tribunal: see CA 2011, sch 6.

[301] See, for example, CA 2011 s 52. Since the enactment of the 2006 Act, the Commission has also had the power to enter and search premises: CA 2011, s 48.

[302] CA 2011, ss 76, 78, 79, 84.

model builds upon the remedial flexibility of the common law tradition, in other words, but frees the Commission from depending on third parties for the exercise of its regulatory authority. In this important sense, the contemporary Charity Commission must be understood as a more powerful charities regulator than the Chancery Court.

What, then, may we posit about the general regulatory impulse of the contemporary Commission, based on the provisions of the Charities Act 2011? Certainly, the Act contains some provisions that promote the autonomy interests of charities and their trustees. Section 185 provides charities with a new power to remunerate their trustees where the charity's trusts do not expressly prohibit such remuneration.[303] Section 124 extends the circumstances in which charities can mortgage their land without an order of the Commission. Most notably, section 20 specifies that while the Commission has broad powers to act in furtherance of its statutory duties and functions, it does *not* have the authority to exercise functions corresponding to those of a charity trustee in relation to a charity, or otherwise to be directly involved in the administration of a charity.[304]

In spite of these autonomy-enhancing provisions, however, there is little doubt that the regulatory body constituted by the Charities Act 2011 is institutionally oriented towards intervening in an identified public interest, namely the public interest in properly administered and effectively employed charity property. This conclusion flows strongly from the Commission's statutory objectives, none of which are concerned with protecting

[303] There are other conditions precedent to the exercise of this power, including that the remuneration does not exceed what is reasonable: CA 2011, s 185.

[304] CA 2011, s 20.

the autonomy interests of charities and their trustees. It is bolstered by the Commission's extended statutory powers to address misconduct and mismanagement in charities, and to alter a charity's original trust. And it is consistent with the Commission's own portrayal of its regulatory approach. 'The public has an interest in charities', the Commission's regulatory policy declares, 'in particular as charity beneficiaries, donors, volunteers and taxpayers.'[305] The Charity Commission's 'core role', as it sees it, is to protect this public interest in charity.[306] In privileging this public interest, however, the Charity Commission places correspondingly less value on the autonomy interests of charities and their trustees. This balancing did not escape the notice of Lord Hodgson, who argued in his review that the Act should go further in 'deregulating and freeing up charities', and in placing more control and responsibility in the hands of trustees.[307]

4. A tale of two regulators: the origins and jurisdiction of the Charities Directorate of the CRA

a. Origins

We have seen in part two that when the fathers of Confederation finally emerged from the bargaining table with the template for Canada's federal democracy, it was the provinces that had been accorded jurisdiction over charities and eleemosynary institutions in and for the province, and over property and civil rights in the province. Correspondingly, it was

[305] Charity Commission, 'Risk Framework' <http://www.charitycommission.gov.uk/Our_regulatory_activity/Our_approach/Risk_framework.aspx> accessed 11 March 2013.

[306] Charity Commission, 'Our Regulatory Approach' <http://www.charitycommission.gov.uk/Our_regulatory_activity/Our_approach/default.aspx> accessed 15 March 2013.

[307] Hodgson Review (2012) [2.17]-[2.18].

the provincial Crowns (apart from the Crown in right of Quebec) who received the prerogatives and duties associated with the common law of charitable trusts. For its part, the federal government was accorded residual authority to make laws in relation to matters not falling under provincial jurisdiction,[308] and specific authority over 'the raising of money by any mode or system of taxation'.[309] Given this division of powers, it is somewhat surprising that the primary regime of charities regulation in Canada emerged at the federal level, but rather less surprising that the institution that emerged as the country's charities regulation was the institution charged with the administration of the federal Income Tax Act.

However, the first federal scheme for the regulation of charities in Canada was not tied to tax administration. Rather, it arose during the First World War in response to a perceived need to 'control fraudulent "war charity" appeals and to encourage the efficient operation of legitimate war charities.'[310] Based closely on a British statute enacted the previous year,[311] the War Charities Act 1917 prohibited any fund or association whose objects were 'connected with the present European war' from raising money unless it was registered under the Act.[312] Registration was based on a written application, and could be refused where the registration authority believed the war charity was not established in

[308] This residual authority has not been construed as expansively as it might have been: Hogg (n 27) ch 17.

[309] Constitution Act 1867, ss 91, 91(3), 92(7), & 92(13).

[310] OLRC Report, 258. See also Canada HC Debates (1 February 1917) 377-78.

[311] The War Charities Act 1916 (6 & 7 Geo 5) c 43 (UK).

[312] *The War Charities Act, 1917,* 7 & 8 Geo 5, c 38 (Canada).

good faith for charitable purposes, would not comply with the conditions of the Act, or would not be properly administered.[313] War charities that succeeded in obtaining registered status were subject to a number of regulatory burdens, including an obligation to keep audited accounts and open them to inspection by authorized persons, and an obligation to report biannually to the federal government.[314]

The regulatory regime put into place by the War Charities Act 1917 was not a permanent regime, nor one that applied to all, or even most, of the country's charitable institutions.[315] Nevertheless, as the only piece of federal legislation that ever 'aimed at preserving and promoting the integrity and efficiency of the sector for its own sake',[316] it forms an important part of the history of federal charities regulation in Canada. Of particular interest is the fact that the federal government's authority to enact the War Charities Act 1917, and to regulate even provincially incorporated charities under its auspices, did not derive from its taxation power.[317] This reminds us that the constitutional possibilities for federal involvement in the charitable sphere are somewhat broader than is often thought.

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313 ibid s 4(4).

314 ibid s 6, and *Regulation to the War Charities Act, 1917*, Can Gaz (January 12, 1918) 2337.

315 The War Charities Act was in effect from 1917 until 1927, and again from 1939 to 1947: see R Watson, 'Charity and the Canadian Income Tax: An Erratic History' (1985) 5 The Philanthropist 3.

316 OLRC Report 262.

317 Presumably, the federal government enacted *The War Charities Act, 1917* pursuant to its emergency power during wartime: see Hogg (n 27) ch 17.

The emergence of Canada's revenue agency as the primary regulator of charities was a more gradual process, which was tied to the development of substantive rules concerning charitable donations under the nation's federal income tax statutes. The first of these statutes, the Income War Tax Act 1917, exempted from taxation the income of 'religious, charitable, agricultural and educational institutions', and provided for the deduction, without limit, of amounts paid to 'the Patriotic and Canadian Red Cross Funds, and other approved patriotic and war funds.[318] It was initially administered by the federal Minister of Finance, who was given specific authority over 'the control and management of the collection of the taxation levied… and of all matters incident thereto.'[319] In 1927, however, Parliament created a Department of National Revenue with its own responsible minister,[320] who assumed the administrative duties of the Minister of Finance.[321] This arrangement has stayed in place, with tax administration being carried out by the Canada Revenue Agency and tax policy being developed by the Department of Finance.

The Department of National Revenue's relationship with charities grew as the tax rules pertaining to charities and charitable gifts multiplied. An amendment to the Income War Tax Act in 1922 made it mandatory for charities and other tax-exempt entities to file annual income returns.[322] Another in 1930 allowed taxpayers to deduct up to ten percent

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[318] *Income War Tax Act 1917,* SC 1917, c 28, ss 3(1)(c) and 5(d). The war fund deduction was repealed in 1920: see *An Act to amend the Income War Tax Act 1917*, 10-11 Geo 5, c 49 (Can) s 5.

[319] *Income War Tax Act 1917* (n 318) s 22.

[320] *Department of National Revenue Act,* SC 1927, c 34.

[321] ibid ss 3, 5. The Minister of National Revenue was also given responsibility for the collection of customs and excise duties.

[322] See Watson (n 315) 7 for this history.

of their net income for donations paid and *receipted by* any charitable organization.[323] In 1948, the Department issued a policy directive that required charitable organizations wanting to issue receipts to apply for recognition at the district level' and provided a prescribed form for that purpose.[324] Prior to 1967, however, there was no body or unit dedicated specifically to the supervision of charities or charitable gifts, and the Department of National Revenue's administration of charities was considered 'quite unsophisticated'.[325]

When the Canadian Parliament finally acted to create a body dedicated to the supervision of charities and charitable gifts, it was, like the nineteenth century English Parliament, reacting to a specific problem that was garnering increasing public attention. Significantly, however, the identified problem was not that charitable resources were being subject to abuse and neglect at the hand of individuals, but that *government* resources were being subject to abuse and neglect at the hand of *charities*, primarily through the issuance of tax receipts for amounts that had not been received.[326] The government was also concerned that organizations that did not qualify as charitable organizations were improperly issuing donation receipts.

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[323] *An Act to amend the Income War Tax Act*, SC 1930, c 24, s 3.

[324] OLRC Report, 259.

[325] OLRC Report, 261.

[326] Canada, House of Common Debates (7 June 1966) 6114; see also Watson (n 315) 11.

In 1966, then-Minister of National Revenue Edgar Benson introduced a series of amendments to the Income Tax Act to address these perceived abuses. The amendments required all charitable organizations issuing donation tax receipts to be registered with the Minister of National Revenue, to keep records and books of accounts for the purpose of verifying donations, and to report annually to the revenue agency on their finances and operations.[327] Speaking in Parliament, Minister Benson described the proposed registration system in the following terms:

> '…this is a move toward a system of control whereby people may not abuse the right of being a charitable organization to the detriment of all other taxpayers in Canada, and thus force those taxpayers to pay more tax to make up for the advantage taken of this system by people who should not do so.'[328]

While the government was acting in a perceived public interest in creating Canada's federal charities regulator, therefore, the public interest that was identified was *not* an interest in the proper administration of charity property, but an interest in the integrity of the federal tax base.[329] In 1967, the National Revenue Minister created a new unit of the department's assessments branch, the Charitable and Non-Profit Organizations Section, to administer the new registered charity regime.[330] Its successor, the 'Charities Directorate' of the Canada Revenue Agency (CRA), remains the primary regulator of Canadian charities today.

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[327] *An Act to amend the Income Tax Act*, SC 1966-67, c 47, s 3.

[328] Canada, House of Common Debates (7 June 1966) 6115.

[329] See Monahan and Roth (n 210) 13, describing this as the 'main rationale' for involving the federal government in charities regulation.

[330] See Monahan and Roth (n 210) 12 and OLRC Report, 264.

b. Nature and disposition

In seeking to compare the nature and disposition of the Canadian Charities Directorate with that of the Charity Commission for EW, we immediately come up against many of the challenges that were identified in part two of this chapter. As we have already seen, the Charities Directorate was not set up to be the regulatory heir of the charities jurisdiction of the Chancery Court. It is a *revenue* authority, or more precisely an internal administrative unit of Canada's federal revenue agency, the CRA. Unlike the Charity Commission, the Charities Directorate has no constituting statute that is specific to that body, and the Income Tax Act contains no explicit statement of the Directorate's objectives, functions or duties. Acknowledging this situation of significant 'unlikeness', this part will nonetheless seek to identify the principal functions and powers of the Charities Directorate, and to contrast its disposition with that of the Charity Commission.

As an internal government unit, the Charities Directorate has a mandate and authority that are identical to those of the broader revenue agency within which it is housed. The mandate is to support and assist the Minister of National Revenue, the elected Cabinet member charged with administering and enforcing the federal Income Tax Act.[331] Pursuant to s 220 (2.01) of that Act, the Minister has delegated to the Director General of the Charities Directorate responsibility for exercising powers and performing functions arising from the registered charity provisions of the Income Tax Act.[332] The

[331] *Canada Revenue Agency Act,* SC 1999, c 17, s 5(1)(a); ITA, s 220(1). The Agency is for all purposes an agent of Her Majesty in right of Canada: *Canada Revenue Agency Act,* s 4(2).

[332] ITA, s 220 (2.01). The most recent administrative consolidation of this delegation is posted on the Government of Canada website: see <http://www.cra-arc.gc.ca/tx/tchncl/dlgtnfpwrs/mnstr/del-ita2-eng.pdf>.

Director General carries out these functions with a staff of approximately 250 employees, which are spread throughout the Directorate's six divisions. There are also approximately forty field auditors that carry out charity audits across the country.[333]

Based on the CRA's constituting statute and the substance of the registered charity provisions, it is possible to identify three primary functions of the Charities Directorate. The first function is to determine whether applicant institutions qualify as registered charities under the Income Tax Act, and to register those institutions that do qualify.[334] The second is to identify and investigate apparent violations of the Act by registered charities, and to take remedial action in connection with such violations.[335] The third, 'ancillary' function of the Charities Directorate is to provide to registered charities such support, advice and services as are consistent with the Directorate's objective of administering and enforcing the Income Tax Act.[336] Unlike the Charities Act 2011, the statutory regime contains no explicit statement of how or to what end the Charities Directorate must carry these functions out.

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[333] These include an assessments division, which reviews applications for registration, and a compliance division: see CRA, 'Policy Priorities for the Charities Directorate, CRA' (powerpoint presentation delivered 14 May 2010) <http://www.globalphilanthropy.ca/images/uploads/Presentation_to_ICFO_by_Bryan_McLean_Director_Policy,_Planning_and_Legislation_Division_Canada_Revenue_Agency_in_PDF.pdf > accessed 19 March 2013.

[334] This function, which flows from the statutory definition of a registered charity, will be explored in further detail in chapter five: see ITA, s 248(1) ('registered charity').

[335] The Charities Directorate also monitors non-charitable entities, such as registered Canadian amateur athletic associations.

[336] Canada Revenue Agency Act, s 5(2).

Like the Charity Commission, the Charities Directorate has broad powers to institute inquiries (called audits) into registered charities of its own motion, in order to identify cases of abuse. Section 231.1 of the Income Tax Act authorizes the CRA to inspect the books and records of any registered charity, as well as any document that may relate to the information contained in those records.[337] The CRA is authorized to issue search warrants, and to require a registered charity to provide any additional information that is relevant to its compliance with the Act.[338] A registered charity that is the subject of a CRA audit is required to provide 'all reasonable assistance' to the auditor, and hindering or interfering with the work of an auditor is a specific offence under the Act.[339]

Consistently with Canada's federal structure and the Charities Directorate's status as part of a revenue agency, Canada's primary charities regulator has no jurisdiction to address the misadministration or misuse of charity property, unless that misuse also constitutes a violation of the Income Tax Act. However there is a significant degree of functional overlap between the acts that the registered charity regime prohibits, and the 'misconduct or mismanagement' that the Charity Commission for EW is tasked to address. It is a violation of the Income Tax Act, for example, for a registered charity to confer an 'undue' personal benefit on any of its settlors, members, or trustees.[340] It is a violation of the Income Tax Act for a registered charity to appoint as director a person

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[337] ITA, s 231.1.

[338] ITA, ss 231.2, 231.3.

[339] ITA, ss 231.1(1)(d) and s 231.5(2). Charities audits are discussed further in Drache, Hayhoe and Stevens (n 210) ch 10.

[340] ITA, s 188.1(4)-(5).

who has been convicted of an offence that is relevant to the operation of the charity, or to keep incomplete or inaccurate records.[341] Most importantly, it is a violation of the Income Tax Act for a registered charity to cease operating exclusively for charitable purposes or to cease devoting all of its resources to charitable activities.[342] Effectively, these provisions authorize the Charities Directorate to address many of the same instances of misconduct and mismanagement in the administration of charity property as the Charity Commission and the superior courts.

Where the Charity Commission and the Charities Directorate part ways significantly is in the remedial powers available to each. The Commission, as we have seen, has at its disposal most of the panoply of remedies that inhered in the charities jurisdiction of the Chancery Court. Where the Commission identifies an institution that is not properly applying its resources to charitable purposes, therefore, the Commission's approach is not to remove that charity from the register, but to replace or give directions to charity trustees.[343] The Charities Directorate, by contrast, has only two types of tools to remedy cases of charity 'abuse'. First, the Directorate may impose monetary penalties on or suspend registered charities that engage in specified prohibited behaviours.[344] Second, the Directorate may revoke the registration of any registered charity that fails to comply with the requirements of the Income Tax Act.[345] Where the Minister revokes the

[341] ITA, ss 149.1(4.1)(e) and 230(2).

[342] ITA, ss 168(1) and 149.1(1).

[343] Charity Commission, RR6 - Maintenance of an Accurate Register of Charities (Nov 2000), [12]-[14]

[344] ITA, s 188.1.

[345] ITA, s 168(1).

registration of a charity, the charity becomes liable for a revocation tax equivalent to the fair market value of all its property, minus amounts expended during a one-year 'winding-up period' on charitable activities and gifts to arms'-length charities.[346] At the end of the one-year period, the charity must turn over any property that has not been so expended to the federal Receiver General.[347] The registered charity regime thus departs from a key common law principle; namely, that property that has once been devoted to charity must stay forever in the charitable sphere.[348]

What, then, may we say about the nature and regulatory disposition of the Charities Directorate, based on its admittedly sparse statutory foundations? Despite the Directorate's efforts to portray itself as a regulator that aims to improve the 'integrity of the charitable sector and the social well-being of Canadians',[349] the internal CRA unit that administers the registered charity regime has neither the statutory mandate nor any clear constitutional authority to further a public interest in the proper and effective administration of charitable resources. The registered charity provisions adopt some of the vocabulary of the common law charities tradition, and address many similar instances of misconduct. Nevertheless, the Charities Directorate is neither in fact nor in spirit a regulatory heir of the charities jurisdiction of the Chancery Court. It lacks the remedial flexibility to effectively address instances of trustee misconduct, and exercises of its

[346] ITA*,* s 188(1), (1.1), (1.2), (1.3).

[347] ITA*,* s 189(6.1)(c).

[348] For a fuller discussion, see Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales' (2010) 89 Cdn Bar Rev 373, 398-99.

[349] Canada Revenue Agency, 'About the Directorate' < http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/mssn_vsn-eng.html> accessed 4 February 2013.

regulatory authority may ultimately lead to charitable resources ceasing to be charitable at all.

At the same time, however, there is little in the registered charity regime to suggest that the Charities Directorate is a 'light-touch' regulator that is committed to protecting the autonomy interests of charities and their trustees. On the contrary, rules like the undue benefit rule, which indirectly exert control over the administration of charity property, manifest the federal government's intention to push to the constitutional limits of its regulatory authority in the field.[350] Like the Charity Commission, then, the Charities Directorate is best understood as a regulator that is oriented towards intervening in the affairs of charities in a perceived public interest. However, the public interest that the Directorate aims to protect is not a public interest in properly and effectively administered charity property, but a public interest in the integrity of the tax base.

5. Conclusion

In outlining the nature and disposition of the regulatory institutions that have historically had primary responsibility for the oversight of charities in EW and Canada, this chapter has started to make the case for the *general hybridity* of the common law charities tradition, and the *context-specific hybridity* of contemporary English and Canadian charity law. The common law tradition of the judicial supervision of charitable trusts and corporations was a hybrid in the general sense that it experienced the tension between protecting the autonomy of property-owning individuals to direct and control their own

[350] Drache, Hayhoe and Stevens (n 210) 10.3.2.

wealth, and protecting the public interest in the proper and effective administration of charity property, and accorded these opposing values equal or near equal weight. In the case of the charitable trust, the common law achieved this balance by adapting a primarily private law institution to a variant that was more of a public law nature. In the case of the charitable corporation, the common law achieved this balance by developing a primarily public law institution that greatly protected the autonomy interests of the founder, and then tempering that private protection with a reassertion of the supervisory role of the courts.

Our initial survey of the contemporary regimes of charities regulation in EW and Canada supports the position that charities in both jurisdictions are now regulated as more 'public-leaning' public law-private law hybrids, but that this hybridity is context-specific. The English charities regulator is a relatively autonomous regulatory institution that was constituted to continue and improve upon the English common law tradition of the oversight of charities by the courts and the Crown. While the Commission is, in limited respects, required to respect the autonomy of charities and their trustees, it is strongly oriented towards intervening in the affairs of English charities to protect the public's interest in properly and effectively administered charity property. The Charities Directorate, for its part, is one internal unit of a larger federal agency with general, revenue administration purposes. It was created by a government that enjoys neither the English Crown's prerogative powers over charities, nor primary constitutional authority over their administration, in order to prevent the fiscal privileges of registered charity status from being abused to the detriment of other Canadian taxpayers. Once this background is understood, we may more confidently assert that the Canadian registered charity regime has rather tenuous links with the English common law tradition, and that the affinity of the Charities Directorate and the Charity Commission is limited. While both charities regulators are oriented towards restricting the autonomy of charities in the name of a broader public interest, it is the public interest in the integrity of the tax base that the Directorate is concerned to protect.

III. The Public Benefit Doctrine: Hybridity across the Substantive Public Law-Private Law divide

The rule that an institution must be 'for the public benefit' in order to be charitable is perhaps the most distinguishing, and the most controversial, substantive doctrine of the law of charities. The public benefit that a charity provides is the institution's most prominent 'public element',[351] and the element that is most often used to justify the special treatment that charities receive.[352] Much has been written about the public benefit doctrine during the years since its development, and particularly since the enactment of the Charities Act 2006.[353] This chapter seeks to add a new perspective to the existing literature, by examining the public benefit doctrine through the lens of the 'substantive' public law-private law divide and testing out a claim about the doctrine's hybrid character. Indeed, I will suggest that the public benefit doctrine is one of the central hinges upon which turns the whole notion of charity law's public law-private law hybridity.

The project of the public law-private law divide in its substantive dimension is to identify and categorize specific rules and doctrines as 'public law' or 'private law' doctrines, and to examine their interrelationship.[354] We saw in chapter one that this project has received increasing attention in recent years, such that there is now a

[351] S Maurice, 'The Public Element in Charitable Trusts' (1951) 15 Conv 338.

[352] See, for example, *Dingle v Turner* [1972] AC 601, [1972] 1 All ER 878 (HL) (Lord Cross) 889-890.

[353] A non-exclusive list of this literature includes Maurice (n 351); GHL Fridman, 'Charities and Public Benefit' (1953) 31 Can B Rev 537; Moran, 'Rethinking Public Benefit' (n 52); Jeffrey Hackney, 'Charities and Public Benefit' (2008) 124 LQR 34; Jean Warburton, 'Charities and Public Benefit - from Confusion to Light?' (2008) 10 Charity L & Practice Rev 1.

[354] Freedland, 'Public/Private Distinction' (n 14) 108.

substantial body of literature examining areas where public law and private law doctrines intersect, and debating the merits of their cross-fertilization.[355] As I suggested in that chapter, however, it is also possible to imagine public and private colliding *within* a singular legal doctrine, such that the doctrine could not be said to have a single or even primary site of belonging within either the public law or private law sphere. Such a doctrine, I argued, would best be characterized as a *hybrid* legal doctrine, within which the strength of public law and private law thinking are felt in equal or near equal measure.

This chapter explores the claim that the public benefit doctrine is such a legal hybrid. More specifically, it depicts the development of the public benefit doctrine as a prime example of the way in which charity law has continually adjusted its substantive doctrines in order to maintain in a broad sense a functional equilibrium between the protection of the autonomy of property-owning individuals to control and direct their own wealth (and, by extension, the autonomy of the trustees appointed by those individuals), and the furtherance of competing public interests or public welfare goals. Charity law makes these equilibrium adjustments, I claimed in chapter one, along two principal continuums. The first continuum extends between projects that are perceived to be wholly *altruistic* (or other-regarding) and projects that are perceived to be wholly *self-interested* (or self-regarding). The second continuum extends between projects that are fully aligned with the public welfare goals of the state or polity in question, and projects which, although altruistic, are nevertheless at variance with those public welfare goals – in shorthand, public-welfare-compliant projects and public-welfare-deviant projects. The

[355] See, for example, the discussion of *Edge v Pensions Ombudsman* [1998] Ch 512 in Hayton and Mitchell (n 33) 656. See also Conaglen, 'Public-private intersection' (n 36).

underlying and intrinsic principle that government must act in the public interest[356] is archetypally 'public' in both of the above-mentioned senses. The public benefit doctrine's relationship with each of these continuums is markedly more complex.

This chapter seeks to clarify the particular balance that the common law public benefit doctrine set between individual and collective project pursuit along these two continuums, and to trace the equilibrium adjustments that the doctrine has recently undergone in English and Canadian law. It proceeds in the following way. In part one, I review the history of the common law public benefit doctrine, and its basic constituting principles. I argue that while the common law doctrine has always required charities to be mostly 'other-regarding', and embodies public law thinking to this extent, it provides charities with considerable autonomy to define *what type* of benefit the charity will provide and *what 'public'* will receive that benefit. It does not require the founders and trustees of charities to have regard to the needs of *all* their fellow citizens, nor necessarily to treat them equitably. In relation to the continuum between public-welfare-compliance and public-welfare-deviance, therefore, the doctrine is largely public-welfare neutral, and experiences the substantial weight of private law thought. These public law and private law impulses have historically borne down with equal or near equal weight on the public benefit doctrine, producing what we may understand as a hybrid legal rule.

Following this discussion of the common law doctrine, parts two and three examine the context-specific ways in which the equilibrium between the doctrine's public

[356] It is generally accepted in EW and Canada that government must act in the general public interest: see, for example, Oliver, *Common Values* (n 22) 13. The precise meaning of this principle is considerably more controversial: see text to n 544-549.

and private elements has been adjusted under the contemporary English and Canadian regimes of charities regulation. Part two considers how the English public benefit doctrine has been affected by the enactment of the Charities Act 2006, focusing particularly on the Charity Commission's statutory public benefit guidance, and two important decisions that have been rendered in its wake. Part three analyses the Charities Directorate's interpretation and application of the public benefit doctrine during the same period, and its use of alternative legal tools to police the altruism of charitable projects in Canada. Finally, in part four, I consider whether these equilibrium adjustments have undermined claims about the doctrine's hybridity, by contrasting the public benefit doctrine with the quintessentially public law rule that government must act 'in the public interest'.

1. The common law public benefit doctrine

a. History and nature

The lineage of the rule that an institution must be 'for the public benefit' to be charitable is generally traced back to the 1767 case of *Jones v Williams,* in which Lord Hardwicke, referring to the Statute of Elizabeth, defined a charity as 'a gift to a general public use, which extends to the poor as well as to the rich…'[357] Public benefit's emergence as a separate doctrinal requirement came rather later, as the implications of Lord MacNaghten's famous description of charity as comprising the relief of poverty, the advancement of education, the advancement of religion, and 'other purposes beneficial to

[357] *Jones v Williams* (1767) Amb 651, 27 ER 422 (Ch). See also Warburton, 'Charities and Public Benefit' (n 353) 3.

the community' were worked out.[358] Nevertheless, recent authority has confirmed that public benefit was 'from early times' inherent in the concept of charity and thus of what fell within the Statute of Elizabeth.[359]

The courts have never attempted to define comprehensively what is, or is not, of public benefit. The common law doctrine built up 'not logically but empirically',[360] with the result that it has proved highly resistant to rationalization. A particular set of problems arose from the courts' historical tendency to assume that a purpose was charitable where it appeared to be for the relief of poverty, the advancement of education, or the advancement of religion. This meant, first, that many cases did not consider the public benefit issue at all,[361] and second, that those that did applied 'markedly different' standards of public benefit to the different heads of charity.[362] The practice also came to be widely understood as a rebuttable 'presumption' that charities under the first three heads benefited the public in the requisite way.[363] For all these reasons, commentators have described the public benefit doctrine as 'difficult', 'artificial', 'intangible' and 'nebulous', and as producing

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[358] *R (Independent Schools Council) v Charity Commission for England and Wales (National Council for Voluntary Organizations and another intervening) A-G v Charity Commission for England and Wales* [2011] UKUT 421, 2012 2 WLR 10 (TCC) (*Independent Schools Council)* [42]-[51], explaining that in early days, the public benefit concept was subsumed in the requirement that a purpose fall within, or within the spirit of the Preamble.

[359] *Independent Schools Council* (n 358) [42]. Indeed, the prominent 17th-century Chancery lawyer Sir Francis Moore described public benefit as 'the key to the statute': see Chesterman (n 72) 26.

[360] *Gilmour v Coats* [1949] AC 426 (HL).

[361] Warburton, 'Charities and Public Benefit' (n 353) 4.

[362] *Gilmour* (n 360).

[363] See, for example, Warburton (n 353) 4; Francesca Quint, 'Schools and the Reform of Charity Law: the Draft Charities Bill' [2004] Education LJ 151,152. For a view that such a presumption never existed, see Picarda (n 77) 39B.

‘variable and unpredictable’ results.[364] It is sometimes said that the authorities provide only a ‘series of examples’ of when a particular purpose may benefit the public within the meaning of the common law.[365]

b. Fundamental principles

Despite the ‘variable and unpredictable’ nature of the public benefit doctrine, its basic features are well known. There are two fundamental ‘pillars’ of the common law rule: first, the purposes of the institution must confer a *benefit* on the public, and second, the class of persons eligible to benefit from the institution must constitute *the public,* or a sufficient section of it.[366] The first question - does the institution confer a benefit? – is to be answered by the court by forming an opinion upon the evidence before it. The intention of the donors cannot be taken into account.[367] Indirect and intangible benefits may satisfy the requirement, but any benefit must be capable of proof in a court of law.[368] The common law’s conception of what purposes benefit the public is not static – it may evolve to reflect society’s changed habits, knowledge and laws.[369] Nonetheless, the

[364] *Oppenheim* (n 30) 307; Fridman (n 353) 539; Maurice (n 351) 341.

[365] *Independent Schools Council* (n 358) [44].

[366] Warburton and others, *Tudor on Charities* (n 126) 7. Some scholars identify the principle that there must be no undue private benefit as a third element: see Warburton, ‘Charities and Public Benefit’ (n 353) 3.

[367] *Re Hummeltenberg* (1923) 1 Ch 237, 242, affirmed in *Anti-Vivisection* (n 126) 44.

[368] *Gilmour* (n 360) 446.

[369] *Anti-Vivisection* (n 126) 74 (Lord Simonds).

concept tends to favour the status quo, since courts are hesitant to disrupt public benefit decisions of 'respectable antiquity', even where they are confusing or out-of-date.[370]

Many of the finer points of the common law's conception of what constitutes a charitable 'benefit' can be traced back to the House of Lords' decision in *National Anti-Vivisection Society v IRC*.[371] In that case, a society that sought the abolition of vivisection in all its forms sought an exemption from income tax on the basis that it was charitable within the fourth head. In considering this request, the tax commissioners found as a fact that experiments on living animals had produced valuable medical and scientific knowledge, and that any assumed public benefit related to the advancement of morals and education was greatly outweighed by the detriment to medical research and public health that would follow if the society achieved its goal. On appeal, the society argued that the protection of animals was a purpose beneficial to the community because of the moral benefit it produced, and that the court could not weigh this moral benefit against the material benefits of vivisection.[372] However, the majority of the House of Lords decided it *could* weigh the relative value of these benefits, and that the material benefits of vivisection were to be greatly preferred.

The *Anti-Vivisection* decision is generally understood to establish at least four public benefit principles. First, it is the court, not the public, which is the ultimate arbiter

[370] *Oppenheim* (n 30) 309.

[371] *Anti-Vivisection* (n 126).

[372] A useful summary of the decision is provided in *Independent Schools Council* (n 358) [99].

of what is beneficial for purposes of charity law.[373] As Lord Wright noted, a determination of charitable status is not a determination of the public consensus on the alleged worth of an institution's aims. The community's views on whether a purpose is beneficial may sometimes be taken into account, but ultimately it is for the courts to weigh advantage against disadvantage, even where the purpose relates to a controversial ethical or political issue.[374] The test, purportedly objective,[375] is whether the purpose reflects the 'true interests of mankind.'[376] Second, while a court may sometimes take the views of the people into account in determining public benefit, only the 'enlightened' opinions of the community are generally considered.[377] In practice, as the *Anti-Vivisection* case showed, enlightened views may be attributed to 'the people' without their direct input;[378] the personal value judgments of judges also play a role.[379]

The third principle that is often associated with the *Anti-Vivisection* case is that a charitable purpose must confer a 'net benefit' on the public in order to meet the public benefit test. This concept of a 'net benefit' is derivable from the general structure of the court's reasoning, and from Lord Wright's statement that courts must imagine the whole

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[373] *Anti-Vivisection* (n 126) 41; see also *Everywoman's Health Centre Society (1988) v MNR* [1992] 2 FC 52 (CA).

[374] *Anti-Vivisection* (n 126) 49, 72-73.

[375] *IRC v City of Glasgow Police Athletic Association* [1953] AC 380 (HL) 396.

[376] *Anti-Vivisection* (n 126) 73 (Lord Simonds).

[377] ibid 49 (Lord Wright).

[378] ibid 47 (Lord Wright) ('a man who has a beefsteak for dinner, if he thinks at all about the slaughter of the beast, reflects that that is inevitable in the present constitution of society').

[379] ibid 48. See also *McGovern v A-G* [1982] Ch 321, 336.

complex of circumstances, good and bad, that may result from the pursuit of objects in order to estimate whether an object will benefit the community.[380] Finally, the *Anti-Vivisection* case establishes that objects that are 'contrary to the law' cannot be regarded as beneficial.[381] Lord Wright took specific note of the situation of religious societies, stating that such a society 'may fail to satisfy the test if it is unlawful, and the test may vary from generation to generation…'[382] As we will see, the significance of these latter two principles has greatly increased in EW since the enactment of the Human Rights Act 1998 and the Charities Act 2006.

The second pillar of the public benefit rule asserts that in order for a purpose to be charitable, the persons it benefits must be sufficiently numerous, and identified in such a way, as to constitute what the authorities have variously described as 'the public', 'a sufficient section of the public'[383] or 'an appreciably important class of the community'.[384] There is, however, no general or *a priori* rule as to what constitutes a sufficient section of the public.[385] The points of consensus on the limitations imposed by the common law authorities are in fact relatively few. A first is that a charity's benefit must be to some

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[380] *Anti-Vivisection* (n 126) 47.

[381] *Anti-Vivisection* (n 126) 41 (Lord Wright).

[382] ibid.

[383] *Oppenheim* (n 30) 314, 318.

[384] *Verge v Sommerville* [1924] AC 496, 499.

[385] *Oppenheim* (n 30) 309. The standard varies for each head of charity: see *IRC v Baddeley* [1955] AC 572, 615, suggesting that a section of the public sufficient to support the validity of one type of charitable trust might not be sufficient to support another type.

section of the *human* community.[386] A second is that any 'private' benefit that a charity confers on individuals that are not proper beneficiaries must be merely incidental to its charitable functions.[387] Finally, there is consensus that the quality that distinguishes a charity's beneficiaries from other members of the public must not depend on their relationship to a particular person or employer.[388] However, this 'personal nexus' rule does not apply to charities for the relief of poverty, nor does it prevent the settlor of an educational trust from suggesting that the trustees give preference to her descendants or employees.[389]

In addition to these agreed limitations on a charity's ability to define its public at common law, various additional possible limitations have been the subject of debate. A first point of debate is whether a charity with numerically few possible beneficiaries benefits a sufficient section of the public. Lord Simonds suggested in *Oppenheim* that it would not,[390] but subsequently affirmed in *Baddeley* that a valid charity might 'by its very nature' benefit only a limited number of people.[391] A second point of debate is whether a charity is entitled to accord a benefit to 'a selected few out of a larger number equally willing and able to take advantage of it.'[392] The issue was classically illustrated by Lord

[386] *Anti-Vivisection* (n 126) 41 (Lord Wright).

[387] *IRC v Oldham Training and Enterprise Council* [1996] STC 1218, 1234.

[388] *Oppenheim* (n 30) 306; *Re Compton* [1945] Ch 123 (CA).

[389] *Re Koettgen's Will Trusts* [1954] 1 Ch 252; see also Peter Luxton, *The Law of Charities* (OUP 2001) 178.

[390] *Oppenheim* (n 30) 306 (Lord Simonds).

[391] *Baddeley* (n 385) 592.

[392] *Baddeley* (n 385) 592.

Simonds' dictum in *Baddeley* that a bridge that could only be crossed by 'impecunious Methodists' would not be for the public benefit.[393] Both the Charity Commission and the Charities Directorate have chosen to read Lord Simonds' comments broadly, relying on *Baddeley* for the proposition that no charity's benefiting 'public' may be unreasonably restricted in relation to the purposes of the charity.[394] However, the jurisprudence contains multiple examples of cases where courts have upheld trusts that defined their 'public' in a way that had no evident relationship to their charitable purposes.[395] As a result, some commentators have endorsed the narrower view that at common law, the requirement of a rational relationship between a charity's 'public' and its purposes is only applicable to charities established for purposes of general public utility.[396]

A final 'second pillar' issue that has historically created great controversy is whether a charity's benefiting 'public' may rightly exclude the poor.[397] The view in the early days of the common law tradition appears to have been that such exclusion was impermissible; indeed, in his 1607 Reading on the Statute of Elizabeth, Sir Frances

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[393] *Baddeley* (n 385) 615.

[394] Charity Commission, *Charities and Public Benefit* (January 2008) [F3]. CRA's public benefit policy similarly claims that a charity cannot restrict delivery of the benefits to a certain group or class of persons unless the restriction is 'necessary in relation to the charitable purpose': CRA, *Guidelines for Registering a Charity: Meeting the Public Benefit Test* (CPS-024, March 2006) (*CRA Public Benefit Guidelines)* [3.2.2].

[395] See *Re Koettgen's Will Trusts* (n 389) and the other cases cited in Parachin (n 52) 13-14.

[396] Adam Parachin makes this argument: see Parachin (n 52) 12. Peter Luxton cites *Baddeley* for the proposition that fourth head charities must not impose two sets of restrictions on the beneficiary class: Luxton, *The Law of Charities* (n 389) 180.

[397] Jean Warburton, for example, takes the view that if a charity sets its fees 'at a level which deters or excludes a substantial proportion of the beneficial class the public benefit requirement will not be met': Warburton and others, *Tudor on Charities* (n 126) 11. Others have denied that the common law requires charities to benefit the poor: see Mary Synge, 'Poverty: An Essential Element in Charity Law After All?' (2011) 70 CLJ 649.

Moore, a leading Chancery lawyer, declared that poverty was 'the principal and essential circumstance' for bringing a gift within the compass of the statute.[398] In the ensuing centuries, however, a long line of ambiguous and conflicting judicial decisions cast doubt on Moore's position.[399] In the 1969 case of *Re Resch*, the Privy Council waded into the debate by upholding the validity of a charitable bequest for the general purposes of a private hospital that charged substantial fees, in this way excluding poor persons who were not in receipt of medical benefits from access to its services.[400] In his decision, Lord Wilberforce stated that while a nursing home that limited its admission to the rich would not be charitable, a trust for the provision of medical facilities could be charitable, despite the fact that 'by reason of expense they could only be made use of by persons of some means'.[401] Indirect as well as direct benefit had to be taken into account, and in the case before him the element of public benefit was 'strongly present', for reasons that included the relief on the public system that flowed from the services of the private hospital.[402] The reasoning of the Privy Council allowed for a wide range of defensible positions on what degree of inclusion of the poor the common law required. Lord Phillips captured the position well when he referred to *Re Resch* during the Parliamentary debates over the

[398] Chesterman (n 72) 26.

[399] For an extensive review of these cases, see *Independent Schools Council* (n 358) [118] and onwards.

[400] *Re Resch's Will Trusts* [1969] 1 AC 514 (PC).

[401] ibid 544.

[402] ibid.

Charities Act 2006: 'read, and read, and read ye may, but a certain conclusion you will not find…'[403]

The various principles that have been associated with the common law public benefit doctrine over the years provide initial support for our claim that the doctrine is a hybrid of public law and private law. The doctrine cannot comfortably be described as a purely *private law* doctrine, for it is primarily concerned with furthering the public's interest in deriving a tangible benefit from charity property by limiting the autonomy of property-owning individuals to define their own benevolent projects. On the other hand, the doctrine cannot comfortably be described as a purely *public law* doctrine, for it does not require charities to benefit a particularly large or representative section of the political community, nor categorically prohibit them from conferring private benefits. The common law public benefit doctrine appears to self-consciously balance individual project pursuit and collective project pursuit in setting the parameters of charitable projects. In order to map its particular hybrid character more accurately, however, we need to consider where public benefit situates charities on the continuum between altruistic and self-regarding projects, and where it situates them on the continuum between public-welfare-compliant projects and public-welfare-deviant projects. We can then reassess the relative strength of the public law and private law impulses that bear down upon the rule.

It is important at this point to describe in somewhat further detail the two continuums along which I have claimed charity law repeatedly moves. For purposes of

[403] HL Deb, vol 672, col 794 (7 June 2005), cited in Stephen Lloyd, *Charities - The New Law 2006 : a practical guide to the Charities Acts* (Jordans 2007) 25.

this work, I accept the assertion of the Ontario Law Reform Commission (OLRC) that true *altruism* involves the doing of good works for strangers, 'strangers' being taken in this context to mean persons that are 'remote in our affections [and] to whom we are not otherwise obligated.'[404] The first continuum of which I speak can thus be seen to extend from projects that are intended to benefit total strangers, to projects that are intended for the sole benefit of those who pursue them. Most projects, of course, lie somewhere in mid-continuum; projects that are intended to benefit family members or persons with whom we have various emotional and obligational connections generally fall within this class.

The continuum between public-welfare-compliant projects and public-welfare-deviant projects is somewhat more difficult to define, and will be the subject of further discussion in chapter five. As a starting point, we may posit that government is the paradigmatic champion of the public welfare; indeed, along with the public interest, the 'public welfare' is a concept that government may largely define. In defining and pursuing the public welfare, however, it is generally understood that government must 'bear *the interests of the community as a whole* constantly in mind.'[405] This characteristic of government allows us to suggest that for charitable projects, an important (if not exclusive) condition of public-welfare-compliance is that a charity's benefits be *accessible and useful to the entire political community.* We will refine the concept of public-welfare-compliance in due course.

[404] OLRC Report, 150.

[405] Cane, *Administrative Law* (n 11) 15. See also *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [62] (Baroness Hale).

How do the various components of the public benefit doctrine relate to each of these two continuums? Of the three rules that are conceded to limit public benefit at common law, two appear to be primarily concerned with affirming and protecting the *altruistic* quality of charitable projects. We have seen that one of these, the personal nexus rule, prohibits the founder of a charity from defining the charity's beneficiary class by reference to a personal relationship. The effect of this rule, as the OLRC report pointed out, is to ensure that the founder of a charity has a measure of emotional and obligational distance from the beneficiaries he or she selects.[406] It is true that the House of Lords' extension of the personal nexus rule to beneficiary classes defined by reference to an arm's-length employer may in some cases extend the rule's application to situations where the founder has a substantial degree of emotional and obligational distance from the charity's beneficiaries.[407] Nevertheless, the most convincing justification for the personal nexus rule is that it prevents individuals who have a 'special interest' in the welfare of a particular class from constituting a charity in their favour.[408] The poor relations exception to the personal nexus rule, which has been justified on the basis that poverty relief is 'of so altruistic a character that the public element may be necessarily inferred thereby',[409] only reinforces the conclusion that the rule is concerned to preserve the altruistic quality of charitable projects.

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[406] This was the expression used by the OLRC: OLRC Report, 176. Parachin describes this as the 'stranger or arm's length function' of the public benefit rule: Parachin (n 52) 6-9.

[407] For an argument to this effect, see OLRC Report, 179.

[408] See *Oppenheim* (n 30) 39 (per Lord MacDermott).

[409] *Re Scarisbrick* [1951] Ch 622, 639.

The rule that charities may not confer 'private benefits', though similarly resistant to rationalization, also appears to be primarily concerned with protecting the *altruistic* quality of charity. The private benefit rule, as we have seen, functions to prevent a charity from conferring benefits on an individual other than as a beneficiary.[410] Occasionally, the rule may function to deny charitable status to an institution that benefits individuals with which it has no emotional or obligational connection.[411] However, the private benefit rule arises most often where an institution seeks to pursue educational or other purportedly charitable objects in a field in which most of its members have a commercial or professional interest.[412] The question that the court will consider in such a case is whether the institution will benefit its own members in a way that is more than merely incidental to the institution's 'public object'.[413] In this way, the private benefit rule, like the personal nexus rule, manifests the common law's view that if an institution's benefits accrue to persons with whom the founder has an emotional or obligational connection, that institution will lack the 'element of unselfishness' that is a crucial aspect of charity.[414]

The remaining elements of the public benefit doctrine – the human community requirement, the minimum threshold rule, the 'reasonable restriction' test, and the rule

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[410] *Incorporated Council for Law Reporting for England and Wales v A-G and others* [1972] Ch 73 (CA). The Charity Commission now refers to this as 'personal benefit': Charity Commission, *Public Benefit: the public benefit requirement (PB1)* (2013) pt 6.

[411] This was the case in the recent Helena Housing decision: see *Helena Partnerships Ltd v Revenue and Customs Commissioners* [2012] EWCA Civ 569.

[412] See Luxton, *The Law of Charities* (n 389) 189-90, and the cases cited therein.

[413] *Royal College of Nursing v St Marylebone Borough Council* [1959] 1 WLR 1077 (CA) 1085, citing *Geologists' Association v IRC* (1928) 14 TC 271, 283.

[414] *Incorporated Council for Law Reporting* (n 410) 86. In this context, Russell LJ used the descriptor in reference to the non-profit-making character of a charity.

against the exclusion of the poor – are arguably less concerned with protecting the altruistic quality of charitable projects, and more concerned with ensuring that charitable projects are aligned with the public welfare goals of the state. The rule requiring that charities benefit a section of the human community, to take a first example, is not directed at the protection of altruism in the sense that we have defined it – indeed, it prohibits the conferral of charitable benefits on species with which humans generally have *no* obligational connection. Its function is presumably to ensure that charitable benefits be accessible and useful to the members of the political community itself. Similarly, if one seeks to explain why the common law will not condone an educational trust for the benefit of three persons, or a trust for the construction of a bridge that may only be crossed by members of a particular faith, it does not appear to be because those projects are necessarily self-regarding, but because they are too far out of alignment with the state's public welfare goal of making such benefits accessible to the entire political community. The rule against the exclusion of the poor, though reflective of a longstanding association between altruism and poor relief, also requires more than that charities benefit the stranger. It reflects a concern, more reminiscent of the public welfare policy of governments, that those most in need should not be excluded from the benefits of charitable gifts.

If certain components of the common law public benefit doctrine can therefore be seen to reflect, in a basic sense, a desire for charities to be public-welfare-compliant, these components are comparatively weak. The human community rule, while uncontroversial, only limits individual project pursuit to the extent of preventing charities from being constituted for the sole benefit of non-human animals. The minimum threshold rule has been qualified, and is rarely applied. And while a prohibition on the exclusion of the poor and a 'reasonable restriction' test would both seem to reflect a concern that charities improve the wellbeing of all members of the political community, the status and scope of these rules are unclear. In sum, while the common law public benefit doctrine feels the greater weight of public law thinking in regards to the altruistic quality of charitable projects, private law thinking dominates on the continuum between public-welfare-compliance and public-welfare-deviance, such that charity founders and trustees retain substantial autonomy to define what type of benefit their charity will provide and who will receive that benefit.

2. The public benefit doctrine under the Charities Act 2011

The uncertain state of the common law public benefit doctrine was an important factor in the debates leading to the enactment of the Charities Act 2006. The Cabinet Office's 2002 report, *Private Action, Public Benefit,* had recommended that public benefit should remain 'at the heart of the definition of charity', and it was widely accepted that the Government wanted to strengthen the public benefit rule in its application.[415] In the period following the release of the Cabinet Office report, there were calls for the Government to provide a statutory definition of public benefit, as the Scottish Parliament

[415] Peter Luxton, *Making Law? Parliament v the Charity Commission* (Politeia 2009) 25.

had proposed, or to enumerate statutory public benefit criteria.[416] The idea of replacing the public benefit requirement with a 'public character test' was also proposed.[417] Ultimately, however, Parliament rejected all of these approaches, determining that the existing public benefit case law should stay in place.

Despite Parliament's decision not to 'replace' the common law authorities with a statutory definition, the enactment of the Charities Act 2006 (which has since, it will be recalled, been consolidated into the Charities Act 2011) marked the start of a new public benefit era in EW. For the first time since the creation of the Charity Commission regime, the statutory definition of charity explicitly provides that a charitable purpose is a purpose that is 'for the public benefit'.[418] The content of the public benefit requirement is addressed in subsection 4(3), which states that 'any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in EW'.[419] However, subsection 4(3) is explicitly made subject to subsection 4(2),[420] which states that in determining whether the public benefit requirement is satisfied in relation to any otherwise charitable purpose, 'it is not to be presumed that a purpose of a particular description is for the public benefit.'[421] Prior to the *Independent*

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[416] Francesca Quint, 'Schools and the Reform of Charity Law: the Draft Charities Bill' [2004] Education LJ 151, 153. Scotland did enact a partial definition of public benefit in its own charities legislation: see Charities and Trustee Investment (Scotland) Act 2005, s 8.

[417] Picarda (n 77) 39.

[418] CA 2011, s 2(1)(b).

[419] CA 2011, s 4(3).

[420] CA 2011, s 4(4).

[421] CA 2011, s 3(2).

Schools Council decision, this provision was widely understood to represent a change in the law for religious, education, and poverty charities, which had (it was understood) previously benefited from a presumption of public benefit at common law.[422]

The Charities Act 2011 places the challenge of elucidating the new public benefit requirement squarely in the hands of the Charity Commission. We have already seen that under the Act, one of the Commission's five statutory objectives is 'to promote awareness and understanding of the operation of the statutory public benefit requirement.'[423] In pursuance of this objective, the Act specifically requires the Commission to issue and revise public benefit guidance, following public and other consultation.[424] Charity trustees are obliged to 'have regard to' such guidance when exercising any powers or duties to which the guidance is relevant.[425] In their annual report, charity trustees must confirm that they have complied with this duty, and identify the activities undertaken by their charity during the year to further its charitable purposes for the public benefit.[426] These obligations have only heightened the controversy surrounding the Charity Commission's public benefit guidance in the years since the statute's enactment.

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[422] Lloyd (n 403) 24. Both the Supreme Court of Canada and the Charities Directorate have taken the position that the English common law contained such a presumption: see *Vancouver Society* (n 140) [41]; *CRA Public Benefit Guidelines* (n 394) [3.3], citing *Anti-Vivisection* (n 126).

[423] CA 2011, s 14.

[424] CA 2011, s 17.

[425] CA 2011, s 17(5).

[426] Charities (Accounts and Reports) Regulations 2008, SI 2008/629, pt 5.

The Charity Commission published its initial public benefit guidance in January 2008, following a four-month consultation that produced nearly 1000 responses. *Charities and Public Benefit*, a forty-page document that was made available with an accompanying legal analysis on the Charity Commission website, summarized the regulator's views on the common law authorities, and on what charity trustees were required do to meet their public benefit duties under the Act.[427] It was followed by the issuance of several supplementary guidance documents, which addressed public benefit's particular application to charities concerned with poverty relief, the advancement of religion, and the advancement of education, as well as its application to charities that charged fees.[428] We shall see that since the release of the *Independent Schools Council* decision in 2011,[429] the Commission's public benefit guidance has been substantially revised. However, since my aim in this chapter is to trace the equilibrium shifts that the public benefit doctrine has undergone since 2006, we will begin with the original guidance. For ease of reference, I will underline those sections of *Charities and Public Benefit* that were withdrawn in the wake of *Independent Schools Council*.

The starting point of the Commission's understanding of the statutory public benefit requirement, as communicated in *Charities and Public Benefit*, was that *all* organizations wishing to be recognized as charities must explicitly demonstrate to the

[427] Charity Commission, *Charities and Public Benefit* (January 2008) (since withdrawn).

[428] See, in particular, Charity Commission, *Public Benefit and Fee-Charging* (December 2008) (since withdrawn).

[429] *Independent Schools Council* (n 358).

Commission that their aims are for the public benefit.[430] In extrapolating that requirement, *Charities and Public Benefit* put forward seven public benefit principles, which were structured around the two pillars of the common law rule. With regard to the rule that a charity must confer an identifiable *benefit*, the guidance identified the following principles as 'important factors' to be considered in all cases:

a. *It must be clear what the benefits are.*
b. *The benefits must be related to the charitable aims of the organization*.
c. *The benefits must be balanced against any detriment or harm.*[431]

In expanding upon factor (c), the Commission stated that where the detrimental or harmful consequences of an organization's aims were greater than its benefits, the organization would not be charitable.[432] Damage to the environment was given as one example of a relevant harm; the promotion of hatred towards others was another.

With regard to the 'second pillar' rule that any benefit must be to *the public,* or a sufficient section of it, *Charities and Public Benefit* identified four principles:

a. *The beneficiaries must be appropriate to the aims.*
b. *Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted by geographical or other restrictions, or <u>by ability to pay any fees charged.</u>*

[430] Charity Commission, *Charities and Public Benefit* (n 427) 8.

[431] ibid 7.

[432] ibid 13-16.

c. *People in poverty must not be excluded from the opportunity to benefit*.

d. *Any private benefits must be incidental.*

With regard to principle 2(b), the guidance asserted that the 'usual' starting point for a charity would be 'to provide as much benefit as possible, given the nature of its aims and what resources it has.'[433] Any restrictions on who could benefit from a charity had to be 'legitimate, proportionate, rational and justifiable' given the nature of the organization's charitable aims.[434] Where an organization restricted its beneficiary class based on the personal characteristics of its beneficiaries, *Charities and Public Benefit* confirmed that the Commission would have regard to the effects of discrimination legislation in determining the organization's public benefit.[435]

More controversial, as it turned out, was the guidance's assertion that an organization that excluded people from the opportunity to benefit based on their inability to pay fees charged by the organization would not meet the public benefit test.[436] 'Not excluding' people who were unable to pay the fees meant allowing them to benefit 'in some material way related to the charity's aims'.[437] *Charities and Public Benefit* gave a number of examples of how such other benefits might be provided. In line with its stated approach to interpreting the law in the light of changing social and economic conditions,

[433] ibid 18.

[434] ibid 18.

[435] ibid 20.

[436] ibid 23.

[437] ibid.

the Commission also asserted that in assessing whether the 'other benefits' provided by fee-charging charities fulfilled the public benefit requirement, it would consider how far the service or facility provided was one for which there was a public need.[438] These sections of *Charities and Public Benefit* were supplemented by a further, forty-page guidance entitled *Public Benefit and Fee-charging,* which was designed to help the trustees of fee-charging charities to find ways of maximizing the benefits their charities provided to persons who could not afford its fees.[439]

The Charity Commission's published understanding of the operation of the statutory public benefit requirement created a great deal of controversy within the charitable sector and beyond. Several influential commentators disputed the Commission's starting position that the effect of section 3(2) was to require all charities to positively show that their purposes were for the public benefit in both the 'first pillar' and 'second pillar' senses of the rule.[440] Others contested the Commission's scrutiny of charitable activities, calling this an 'unwarranted departure' from the common law's focus on charitable purposes.[441] Peter Luxton emerged as the most vociferous critic, charging that the Commission had crossed the line between applying the law and making new law in its public benefit guidance, that it had done so to further the political intentions of the

[438] ibid 10, 25.

[439] Charity Commission, *Public Benefit and Fee-Charging* (n 428).

[440] Luxton, *Making Law* (n 415) 17. See also Hackney (n 353) 348; Picarda (n 77) 37-39F.

[441] A Iwobi, 'Out with the old, in with the new: religion, charitable status and the Charities Act 2006' (2009) 29 Legal Studies 619.

government, and had thus fatally compromised its independence.[442] The detail of these critiques, each significant in its own right, lies beyond the scope of the present work. However, the very volume and intensity of the criticism generated by the Commission's position is reflective of just how substantially the 2008 guidance altered the functional equilibrium that the common law public benefit doctrine had established between individual and collective project pursuit. *Charities and Public Benefit* marked a shift towards a more heavy-handed and 'public-law-oriented' interpretation of the public benefit doctrine, which placed new limits on the autonomy of property-owning individuals to control and direct their own wealth.

There are several ways in which the statutory public benefit requirement, and the Charity Commission's initial guidance on the operation of that requirement, reflected a shift in the equilibrium that the common law public benefit doctrine had traditionally set between individual and collective project pursuit. By requiring the Commission to issue public benefit guidance and requiring trustees to have regard to that guidance, Parliament manifested its desire to regulate public benefit more intensely, and to correspondingly reduce the autonomy of charities, their founders and trustees. By issuing guidance in the volume and detail that it did, and by requiring all charities to explicitly demonstrate the public benefit of their aims, the Charity Commission made this statutory approach even more heavy-handed. In general terms, then, the enactment of the Charities Act 2006 occasioned an intensification of public benefit regulation, a restricting of charity autonomy in furtherance of several competing public welfare goals.

[442] Luxton, *Making Law* (n 415) 27-8, 34.

In terms of the specific, substantive ways that the Commission's original public benefit guidance limited the autonomy of charities, two are particularly worthy of note. First, in confirming that the 'benefit' charities provide and the 'public' they serve would be evaluated by reference to human rights legislation, the Commission limited the autonomy of charities whose projects were targeted at persons sharing a protected characteristic, such as ethnicity, sexual orientation, or creed. In doing so, the Commission sought to align English charities with a particular public welfare goal that is largely external to the charity law tradition - the goal of eliminating discrimination in all its forms. Second, in confirming and expounding the common law's controversial 'rule' regarding the exclusion of the poor, the Commission limited the autonomy of charities whose project were targeted at persons of some wealth. In doing so, the Commission arguably sought to align English charities with a different, and more controversial public welfare goal – the goal of creating a society in which all citizens are able to benefit from opportunities for human flourishing, and in which the benefits of charitable activity correspond to social need. The courts have had occasion to respond to both of these regulatory limitations on charity autonomy in the years since *Charities and Public Benefit* was published. We will examine the judicial response to each of the limitations in turn.

a. The *Catholic Care* Decisions

The first challenge to the Charity Commission's interpretation of the public benefit requirement in the post-Charities Act 2006 era centered on the Commission's interpretation of the terms 'benefit' and 'public' by reference to human rights law. Since

October 2000, section 3 of the Human Rights Act 1998 has required that all domestic legislation in the UK be read and given effect, so far as possible, in a way that is compatible with the rights set out in the ECHR. Therefore, once the public benefit rule was enshrined in the Charities Act 2006, the Commission's consideration of its human rights dimensions became mandatory. The most significant of these dimensions, to date, has been the relationship between the public benefit rule and ECHR Article 14, which provides that the enjoyment of the rights and freedoms set out in the ECHR shall be secured without discrimination on any protected ground. Differential treatment based on a protected ground can only be justified, according to the article 14 jurisprudence, where it constitutes a proportionate means of achieving a legitimate aim.[443]

The ECHR law on discrimination has come to bear on the charitable sector in a major way, in the context of the difficult relationship between homosexuals and the Catholic Church. In 2007, the UK Parliament approved the Equality Act (Sexual Orientation) Regulations 2007, making it unlawful for any person to discriminate on the grounds of sexual orientation in the provision of goods, facilities, and services. Faith-based adoption and fostering agencies were a major target of these regulations, which included transitional protection for publicly-funded agencies of this type.[444] Like many of the UK's human rights instruments, however, the Regulations also included an exemption for persons who acted pursuant to a charitable instrument. Regulation 18 provided that the

[443] *Catholic Care v the Charity Commission for England and Wales* [2010] EWHC 520 (Ch) [56], citing *Schmidt v Germany* [1994] EHRR 513.

[444] Equality Act (Sexual Orientation) Regulations 2007, reg 15, cited in *Catholic Care* (n 443) [40]. These regulations have subsequently been embodied in the Equality Act 2010.

Regulations did not make it unlawful for a person to provide benefits only to persons of a particular sexual orientation, if (a) that person acted in pursuance of a charitable instrument, and (b) the restriction of benefits was imposed by reason of or on the grounds of the provisions of the charitable instrument. It was a dispute over the scope of this charitable instrument exemption that led to the High Court decision in *Catholic Care v Charity Commission for EW*.[445]

Catholic Care was a charitable company, funded partly by payments from local authorities and partly from charitable gifts raised through the Roman Catholic Church, which provided the services of an adoption agency in the diocese of Leeds.[446] As a consequence of its religious beliefs, it did not offer its adoption services to same-sex couples or civil partners.[447] Following the approval of the Equality Act (Sexual Orientation) Regulations, Catholic Care sought to bring itself within the Regulation 18 exemption by amending its objects clause to clarify that it would only provide adoption services to heterosexuals in accordance with the tenets of the Catholic Church. Pursuant to the requirements of the Charities Act 1993,[448] it sought the Charity Commission's consent to this amendment. The Commission refused to consent, on the ground that the proposed amendment would not bring the charity within the Regulation 18 exemption in any event. The Charity Tribunal reached a similar decision on appeal, although basing

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[445] *Catholic Care* (HC) (n 443).

[446] ibid [2].

[447] ibid [4].

[448] Under then section 64 of the Charities Act 1993, any alteration of the objects clause of a charitable corporation required the prior written consent of the Commission, and was ineffective if such consent was not obtained. This provision is substantially reproduced in the Charities Act 2011: see CA 2011, s 198.

its decision on somewhat different grounds. Catholic Care appealed the Tribunal's decision to the High Court.[449]

In considering whether the Tribunal had erred in concluding that Catholic Care could not lawfully decline to provide adoption services on the basis of sexual orientation even if it adopted the proposed objects, the High Court focused its attention on the proper interpretation of Regulation 18. In this regard, Briggs J held that Regulation 18 must be read as permitting charities to provide benefits on the basis of differential treatment only where such provision would be justified under Article 14 of the ECHR. Because Briggs J took the view that Regulation 18 had to be interpreted in terms of its relationship with the law of charities and the regulatory role of the Charity Commission, however, he also made several rulings speaking to the nature of the public benefit rule in an age of enshrined human rights. First, Briggs J confirmed that the ECHR compatibility rule applies to the definition of public benefit set out in the Charities Act 2006.[450] Second, he affirmed the previously untested assertion of the Commission's public benefit guidance that the question of whether a particular purpose is charitable 'may require a weighing of the public benefits and dis-benefits associated with its implementation.'[451] If the detrimental consequences of a purpose outweigh an institution's benefits, the institution will not be

[449] The procedure for appealing decisions of the Charity Commission has since changed, due to the introduction of the Tribunal, Courts and Enforcement Act 2007: see CA 2011, Part 17.

[450] *Catholic Care* (HC) (n 443) [70].

[451] Scotland specifically included the concept of 'disbenefit' in its charity legislation, requiring the courts to weigh the public benefit a charity might provide against any public 'disbenefit' that it might produce: Charities and Trustee Investment (Scotland) Act 2005, s 8. However, the Charities Act 2011 does not include such a provision. For a discussion, see Debra Morris, 'Charities and the Modern Equality Framework - Heading for a Collision?' (2012) 65 Current Legal Problems 295, 306.

charitable.[452] Finally, Briggs J held that a charity that discriminated otherwise than as a proportionate means of achieving a legitimate aim - the test for the justification of differential treatment under Article 14 - would not likely meet the public benefit test, 'precisely because of the large public dis-benefit likely to flow from any unjustified, and therefore discriminatory treatment'.[453] In the result, Briggs J remitted the matter to the Charity Commission to be decided according to the principles he had set down.[454]

While Briggs J declined, in his judgment, to go so far as to draw a 'precise equation' between the public benefit rule and the anti-discrimination norms established by the ECHR,[455] Parliament confirmed such an equation shortly thereafter. In 2010, the various statutory exemptions that had previously authorized many charities to confer benefits on groups of persons defined by a protected personal characteristic without justification were consolidated into one, ECHR-compliant, charitable instrument exemption. Pursuant to section 193 of the Equality Act 2010, a charity may restrict the provision of benefits to persons who share a protected characteristic only if such provision is a proportionate means of achieving a legitimate aim, or is for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.[456] Based on this provision and the ruling in *Catholic Care,* the Charity Commission issued a further supplement to its Public Benefit Guidance in 2011, clarifying that an institution that

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[452] *Catholic Care* (HC) (n 443) [67-68]

[453] ibid [97-99].

[454] ibid [111].

[455] ibid [99].

[456] Equality Act 2010, s 193.

restricts its beneficiaries to people who share a protected characteristic, and cannot justify the restriction under the Equality Act test '*will not be able to show that it is for public benefit and cannot therefore be a charity*'.[457]

The Commission's re-evaluation of Catholic Care's request to amend its charitable objects took place against the backdrop of these developments. The regulator again turned down Catholic Care's application to amend its objects, and was confirmed in its decision by two appellate courts.[458] The nine decisions that have so far emerged from the Catholic Care litigation have raised a number of difficult questions,[459] and demonstrated the strength of the opposing views on matters that pit equality rights against the autonomy of the church. From the perspective of our concern with equilibrium shifts, however, the most striking feature of the extended litigation may be that Catholic Care did not deem it advisable to even argue that its seemingly evident interest in protecting its institutional autonomy and controlling its own wealth should prevail over the public interest in eliminating discrimination. On the contrary, adapting its position to the established human rights framework, Catholic Care conceded that the religious convictions that allegedly lay at the heart of its charitable project would *not* justify the denial of its adoption services to same sex couples.[460] The charity's case was that the amendment of

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[457] Charity Commission, *Equality Act guidance for charities: Restricting who can benefit from charities* (2011) 10.

[458] Charity Commission for EW, *Catholic Care (Diocese of Leeds) - Decision Made on 21 July 2010: Application for Consent to a Change of Objects under s 64 of the Charities Act 1993; Catholic Care (Diocese of Leeds) v Charity Commision for EW,* CA/2010/0007 (First Tier Tribunal (Charity)); *Catholic Care (Diocese of Leeds) v Charity Commission for EW* [2012] UKUT 395 (TCC).

[459] For a discussion of these issues, see Morris, 'Charities and the Modern Equality Framework' (n 451).

[460] *Catholic Care* (TCC) (n 458) [15].

its objects would serve a more public goal - the 'legitimate aim' of increasing the number of children (especially hard-to-place children) placed with adoptive families. The case boiled down to a debate about whether this legitimate aim, which was of 'importance to society generally', would actually be achieved by the proposed amendment, and whether the proposed discrimination on the grounds of sexual orientation would constitute a 'proportionate means' of achieving this legitimate aim.[461]

Together with the Equality Act guidance, the *Catholic Care* decisions provide the first part of the story about how the equilibrium that the public benefit doctrine traditionally set between individual and collective project pursuit has shifted since the enactment of the Charities Act 2006. The High Court decision, it is worth noting, did little to alter the public benefit doctrine itself. The common law had long established that objects contrary to the law are not for the public benefit, and on one view Briggs J simply applied that principle. What *Catholic Care* has made clear, however, is that with the development and ascendance of human rights law, the public benefit doctrine's 'illegality' rule has become a far more substantial limitation on the autonomy of property-owning individuals than it has been in a very long time.[462] Parliament and the courts have confirmed the position implicitly taken by the Charity Commission in *Charities and Public Benefit* – namely, that the autonomy interest of charity founders and trustees in

[461] ibid [21].

[462] Ironically, perhaps, the last time that the illegality rule played a major rule in constraining the autonomy of the founders of charity in EW was during the period of religious intolerance, when the concept of a 'superstitious use' emerged: see Jones (n76) 10-11.

defining their own beneficiary group will generally be required to yield to a competing public interest– the public interest in eliminating discrimination.

b. The *Independent Schools Council* Decision

The second part of our story about the changing equilibrium between individual and collective project pursuit in the public benefit context is best illustrated by examining the initiation and resolution of the conflict between the Charity Commission and EW's independent schools. The Commission's guidance on public benefit and fee-charging, as developed and applied in its public benefit assessment reports,[463] was seen by many in EW as a direct challenge to the autonomy of the nation's fee-charging charities, and particularly its independent schools. Few were surprised, therefore, when the Independent Schools Council applied for judicial review of the guidance in February 2010, seeking to have several of its sections quashed. In January 2011, the Attorney General also entered the fray, employing for the first time its statutory power to refer any question regarding the operation or application of charity law to a particular state of affairs to the Charity Tribunal.[464] The Attorney General's reference set out a series of fact-specific questions that were designed to determine what types and levels of benefits provided by independent

[463] In 2009, the Charity Commission began carrying out 'public benefit assessments' of a number of individual charities, in order to illustrate to the broader charitable sector how the Commission would apply its guidance in practice. Two independent schools, as well as one care home and one tennis club, failed the assessment. In the case of the two schools, a central criticism was that the schools did not make sufficient provision for the poor to participate by way of means-tested bursaries. See Charity Commission, *Public benefit Assessments - Emerging Findings for Charity Trustees from the Charity Commission Public benefit assessment work: 2009-11* (March 2011).

[464] This power is now set out in the Charities Act 2011, s 236. On 27 January 2011, the Attorney General lodged a separate reference to determine whether trusts with a restricted pool of beneficiaries defined by a relationship to an individual or a company and established for the purpose of relieving poverty, satisfied the public benefit test following the implementation of the Charities Act 2006. The Upper Tribunal answered this question in the affirmative: see *AG v Charity Commission for EW* [2012] UKUT 420 (TCC).

schools to persons who could not afford the school fees would be in accordance with the law of charities. [465]

A three-judge panel of the Upper Tribunal (Tax and Chancery Chamber) heard the reference and the judicial review claim alongside each other in May 2011. The end result, as we have already indicated, was that the Commission withdrew substantial portions of *Charities and Public Benefit* (including the previously underlined sections), and the whole of the Fee-Charging supplement.[466] *Independent Schools Council v Charity Commission for EW* is a lengthy and detailed decision, which contains an extensive review of the common law public benefit authorities and a commentary on many of the hypothetical scenarios set out in the Attorney General's reference.[467] I will only highlight two features of the decision that are particularly important to our story.

The first noteworthy feature of the *Independent Schools Council* decision is that it has resolved the longstanding controversy over whether the common law ever 'presumed' institutions falling within the first three heads of charity to be for the public benefit, and the related controversy over the effect of section 4(2) of the Charities Act 2011. According to the decision, such a common law presumption never existed in the strict sense: while judges were in practice 'predisposed' to find that such purpose were for the

[465] For a list of the questions, see *Independent Schools Council* (n 358) Annex A.

[466] The Tribunal was prepared to make a direction quashing the relevant parts of the guidance, but agreed to let the Commission withdraw it instead: *Independent Schools Council* (n 358) supplementary judgment [25]-[26].

[467] For a more extensive review of the decision, see Mary Synge, 'Case Note: *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421(TCC)' (2012) 75 MLR 624.

benefit of the community, evidence was not required to overcome this predisposition, which could be displaced by argument or by the judge's own consideration of the purpose at bar.[468] As a result, *Independent Schools Council* confirms, section 4(2)'s declaration that 'it is not to be presumed that a purpose of a particular description is for the public benefit' did not substantially change the law.

Second, *Independent Schools Council* has clarified, or at least expounded, the public benefit doctrine's disputed limitation on the ability of charities to target their services at persons of some wealth. Prior to *Independent Schools Council*, as we have seen, there was little consensus on whether and to what extent the public benefit doctrine required charities to make provision for the poor. Contrary to the position of the Charity Commission, many charity lawyers took the view that in the education context, at least, the public benefit requirement was satisfied where the class of beneficiaries met the criteria of not being connected by a personal nexus, and not being unreasonably restricted in relation to the charity's objects. This, indeed, was the position of the Independent Schools Council at trial.[469] In its submission, where a school's purpose was to offer educational services upon payment of its fees, the only relevant question was whether those who could pay the fees were disqualified by these negative tests. The public benefit doctrine, the Council argued, was simply a finite set of prohibitions, *not* a source of positive obligations designed to ensure reasonable access to charitable benefits 'for the

[468] *Independent Schools Council* (n 358) [67]-[68].

[469] Statement of Facts and Grounds Relied Upon by the Claimant, the Independent Schools Council [63].

entire public.'[470] If an institution met the negative criteria, the Council submitted, no more was required.[471]

The Upper Tribunal firmly rejected the Council's submissions regarding the purely negative character of the public benefit doctrine, and in so doing suggested that the doctrine *is* a source of positive obligations to benefit certain sections of the public.[472] *Independent Schools Council* describes the personal nexus rule as 'no more than…one test' by reference to which a purpose might be excluded from the ranks of charitable purposes, and makes clear that even where the link between a charity's beneficiaries is impersonal and the class of potential beneficiaries is not numerically negligible, the public benefit requirement may not be satisfied.[473] More specifically, *Independent Schools Council* declares that an institution that excludes the poor from benefit as a matter of its governing instrument cannot be a charity.[474] The Upper Tribunal agreed that no previous case had decided the point, but 'consider[ed] it right as a matter of principle, given the underlying concept of charity from early times.'[475]

[470] ibid [64].

[471] The Independent Schools Council also argued that indirect benefits were just as important to an assessment of public benefit as direct benefits, and that ensuring a reasonable level of direct access for poor persons to the charity's core services was not a prerequisite to any wider or more indirect benefits being taken into account: ibid [3], [82].

[472] See *Independent Schools Council* (n 358) [213] ('the concern here is…about what schools are not doing rather than what they actually do…the concern is that they must be seen to be doing enough for those who cannot afford fees.')

[473] ibid [141].

[474] ibid [162], [178].

[475] ibid [178].

Independent Schools Council's pronouncement that no charity may exclude the poor from benefit by the terms of its governing instrument is an important pronouncement, with significant rhetorical weight. Taken in context, however, its effect is somewhat more limited. As the Upper Tribunal itself recognized, it is not by the terms of their governing instruments that institutions generally exclude the poor.[476] The poor are most often excluded by *practice,* and this observation applied equally to the independent schools involved in the litigation in question. The charitable nature of these institutions was not in issue, since charitable status in EW is generally assessed without reference to the activities an institution carries out.[477] Instead, the debate over the 'public benefit' of fee-charging schools focused on the public benefit duties of their charity trustees. The Upper Tribunal's treatment of this debate in *Independent Schools Council* provides us with a graphic illustration of what it looks like when private law and public law impulses come to bear with near equal force on a substantive legal rule.

In considering the nature of the duties that charity trustees have to 'operate in a way which [is] for the public benefit', the Upper Tribunal appeared equally concerned to protect the autonomy of the trustees to whom charity founders entrust the management of their property, and to further the public welfare goal of creating a society in which all citizens have reasonable access to the benefits of charitable activity. On the one hand, the Tribunal emphasized that charity trustees are not under a legal obligation to act in a way

[476] ibid [186], noting that it 'highly unlikely' that any schools actually do exclude the poor as a matter of their constitution.

[477] ibid [187], [191], [228].

which the Charity Commission or anyone else would consider '"reasonable" or "appropriate."[478] The courts have never imposed their view of what is reasonable on the trustees of private trusts, the Upper Tribunal stated, 'and the same should apply to charities.'[479] In the context of fee-charging schools, the Upper Tribunal stated that it was not possible to be prescriptive about the nature of the benefits a school must provide to the poor, nor the extent of them.[480] Both the level of benefit and the method of its provision were properly 'matter[s] of judgment for the trustees'.[481]

On the other hand, the Upper Tribunal emphasized that the law has always limited the range of actions that charity trustees can properly take in a given situation.[482] The Upper Tribunal stressed that these limits are not based on a test of reasonableness, but suggested that the autonomy of charity trustees to determine the nature of their charity's benefits is limited by the requirement that they make 'adequate provision for access by and benefits for certain sub-classes of the potential beneficiary class', other than fee-paying students.[483] The fact that an institution saves the government money through the private provision of an otherwise public service is unlikely to supply the requisite public benefit.[484] The standard, the Upper Tribunal emphasized, is not a *de minimis* standard, but

[478] ibid [221].

[479] ibid [220].

[480] ibid [217].

[481] ibid [220].

[482] ibid [220].

[483] ibid [214].

[484] ibid [207].

rather a question of 'what a trustee, *acting in the interests of the community as a whole*, would do in all the circumstances of the particular school under consideration.'[485] In an ensuing paragraph, the Upper Tribunal framed the public dimension of the duty even more strongly:

> Trustees need to consider the question of access more generally and how to treat all their potential beneficiaries fairly. This is not to say that trustees cannot properly make policy decisions which have the effect of ruling out of consideration large numbers of potential beneficiaries. But such policy decisions must be rational and justifiable *in the promotion of the public interest*.[486]

The Upper Tribunal, as Mary Synge notes, did not define the public interest that such decisions would promote.[487] But whatever the alluded-to public interest may be, certain passages of *Independent Schools Council* suggest that it is the notion of public interest so understood, and *not* the autonomy interests of charity founders and trustees, that may justify charity trustees in excluding large numbers of potential beneficiaries through the charging of substantial fees for a charity's services.

What, then, does *Independent Schools Council* add to our understanding of the hybridity of the English public benefit doctrine, and the changing equilibrium between that doctrine's public and private elements since the enactment of the Charities Act 2006? Viewed apart from its regulatory repercussions, the primary significance of *Independent Schools Council* may lie in its exemplification of a hybrid legal text. The Upper Tribunal

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[485] ibid [217].

[486] ibid [218].

[487] Synge (n 467) 632.

decision displays many of the qualities that were associated with hybrid texts in chapter one. It is a 'locus of conflict' between competing values – the relieving of human need, equity, individual and institutional autonomy – which are not entirely reciprocal. It looks backwards at a historical legal doctrine and suggests that it 'never really was' the way it used to be viewed. *Independent Schools Council* is marked by dissonances, such as its holding that a charity that excludes the destitute does not thereby exclude the poor. And it is plagued by a lack of cohesion, such that both parties to the litigation were able to declare the decision a victory, while charity trustees continued to struggle to understand what public benefit means. [488]

Of course, the meaning of a legal decision often comes to be clarified by the patterns of 'commitment, resistance and understanding' that it generates,[489] and this has proved to be the case with *Independent Schools Council.* As Synge predicted, the Charity Commission has displayed little enthusiasm for enforcing the public law-oriented passages of the Upper Tribunal's decision, or for engaging in further battles with the independent schools.[490] Subsequent to the forced withdrawal of most of its guidance on public benefit and fee-charging, the Charity Commission has published substantially revised public benefit guidance, which gives the trustees of fee-charging charities very broad discretion

[488] ibid 624, 638. Synge herself declared the decision a 'compromise'.

[489] On the generation of legal meaning by communities, see Robert M Cover, 'Foreword: *Nomos* and Narrative' (1983-84) 97 Harvard L Rev 4.

[490] Synge (n 467) 636. This is unsurprising, given the recent reductions in the Commission's resources and the other political battles in which it is involved.

to set the amounts they charge for their services, and to determine what provision is made for the poor.[491] In practice, therefore, it appears that the Commission has been forced to pull back from its public-law-oriented position on public benefit's role in ensuring a more accessible and equitable distribution of charitable benefits in EW. Despite the hybrid nature of the *Independent Schools Council* decision, and unlike in the anti-discrimination context, the autonomy interest of charity founders and trustees in defining their own beneficiary group has prevailed over the competing public interest in a society where the entire political community has reasonable access to charitable benefits, and where the distribution of these benefits conforms more closely to social need.

3. The public benefit doctrine in Canada

a. Status

In turning from the English public benefit debates to the 'Canadian version' of the doctrine, the first thing that must be observed is that although the public benefit doctrine is part of Canadian charity law, it has not played nearly as prominent a role in its operation or development. The Parliament of Canada has never articulated the public benefit concept within the registered charity regime, nor entered into a substantive debate over its proper meaning and application.[492] Moreover, only a handful of Canadian cases, most of them involving disputes over the scope of the poor relations exception, have considered

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[491] Charity Commission, *Public Benefit: Running a Charity (PB2)* (2013), particularly Annex C: *Charging for Services*.

[492] This despite the fact that the court and members of the charitable sector have periodically suggested that it do so: see, for example, *Vancouver Society* (n 140) [197]

the common law doctrine in any depth.[493] In the leading Canadian case on the registered charity regime, *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue,* the Supreme Court of Canada confirmed that public benefit is a condition of charitable registration under the Income Tax Act, with the majority describing the doctrine as a reflection of the general concern that charitable activity should seek the welfare of the public,[494] and the minority describing it as a requirement that an 'objectively measurable and socially useful benefit' be conferred.[495] Ultimately, however, the public benefit rule figured only 'obliquely' in the Court's analysis of the applicant society's purposes.[496] In fact, apart from being cited as the justification for the political purposes rule, public benefit has very seldom formed the basis of a judicial ruling on registered charity status in Canada.[497] In cases where public benefit has been raised, Canadian courts have tended to invoke the leading English authorities, without engaging in any substantial analysis of the principles set out therein.[498]

[493] See, for example, *Jones v T Eaton Co* [1973] SCR 635. A review of the Canadian case law on public benefit is available in DWM Waters, Mark R Gillen and Lionel D Smith, *Waters' Law of Trusts in Canada* (4th edn, Thomson Reuters 2012) at 730-35, 743-45, 760-63.

[494] *Vancouver Society* (n 140) [147] and [177].

[495] ibid [41].

[496] ibid [41].

[497] For a rare instance, see *Seventh Division, Pacific Northwest Region, National Model Railroad Association v MNR* [1989] FCJ No 63 (CA), where the Court affirmed the Minister's finding that the applicant's activities were 'too member-oriented to have a truly public character.'

[498] See, for example, *Vancouver Society* (n 140) [41], [147]; *Everywoman's Health* (n 373)[22].

There are a number of overlapping explanations for why there is so little Canadian law on the public benefit doctrine. Many of these are linked to the constitutional division of powers in Canada, and the failure of most of Canada's provincial governments to either exercise their legislative authority over the regulation of charities, or carry out the English Crown's historical role in enforcing charitable trusts. Canada has not produced much case law on *any* aspect of the law of charities; the dearth of judicial guidance on the public benefit doctrine is one significant product of this phenomenon. In addition, as we will see in what follows, Canadian tax law structures its charitable tax exemptions in a way that provides little incentive for the Charities Directorate to monitor the public benefit that charities provide. Finally, in the overwhelming majority of the judicial decisions that *have* been rendered on the meaning of charity under the Income Tax Act, the applicants have lost their appeal for registered charity status on the basis that their purposes did not fall within the spirit and intendment of the Statute of Elizabeth.[499] As a result, any public benefit issues that might have been raised have generally been rendered irrelevant.

The relative inattention of Canadian law to what is, on any view of the matter, a central doctrine of the common law charities tradition makes our comparative task more challenging. The Income Tax Act contains no provision that is comparable to section 3 of the Charities Act 2011, and there is no recent Canadian case law that clarifies how the public benefit doctrine should be understood in Canada in the post-*Catholic Care* and post-*Independent Schools Council* era. The Canadian courts have traditionally followed

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[499] This pattern is consistent with CRA's position that 'the "benefit" test is generally more simply met than demonstrating a new charitable purpose': *CRA Public Benefit Guidelines* (n 394) [3.1].

the lead of the English courts in interpreting the public benefit doctrine, and might well continue to do so. On the other hand, a Canadian court could quite plausibly decline to accept the persuasive value of a public benefit decision rendered under a foreign domestic statute such as the Charities Act 2011. Until a public benefit issue comes squarely before the Canadian courts, therefore, it will be difficult to draw any definitive conclusions on the relationship between contemporary English and Canadian public benefit law.

However, the scarcity of Canadian law on the public benefit doctrine has not stopped the Charities Directorate from applying the public benefit requirement to applicants for registered charity status, nor from adjusting its own institutional understanding of the doctrine's function and substance. As in so many areas of Canadian charity law, it is these administrative or institutional developments that provide us with a basis for comparison with EW. In particular, we may observe two context-specific equilibrium adjustments going on within and around the public benefit doctrine in Canada. First, within a regulatory context where public benefit plays only a minor role in the ongoing regulation of charities, we witness other legal tools being used to police where charities lie on the continuum between altruistic and self-regarding projects.[500] Second, within a regulatory context where the regulator's public benefit guidance has not been reviewed by the courts, we witness an effort to align the projects of registered charities more closely with various public welfare goals of the state.

[500] Strictly speaking, this equilibrium adjustment is external to the public benefit doctrine, but it affects both the operation of the public benefit doctrine and the ability of property-owning individuals to control their wealth within the charitable sphere.

b. Alternative tools for policing altruism

As I suggested in the previous part, the respective structures of UK and Canadian tax law create different incentives for tax regulators in each jurisdiction to monitor the public benefit that charities provide. Under UK tax law, charities are subject to a complex and qualified series of tax concessions. While most significant sources of charity revenue are eligible for UK income tax exemptions,[501] the exemptions may only be claimed so far as the charity *applies* the income 'to charitable purposes only'.[502] Charities that incur non-charitable expenditures will have their exemptions from income, corporation and capital gains tax restricted by an amount equal to those expenditures.[503] The result of these tax rules is that, in addition to the Charity Commission's public benefit functions, HMRC has a fiscal incentive to monitor whether English charities are expending all of their resources for the public benefit, and to take remedial measures where they are not.

Under the Canadian Income Tax Act, by contrast, registered charities enjoy a blanket exemption from most categories of income tax.[504] They are required, by definition, to devote all of their income to charitable purposes and activities, and if they

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[501] Voluntary gifts from individuals and government grants are not considered 'income' under UK law: see *Stedeford (Inspector of Taxes) v Beloe* [1932] AC 388 (HL) 390. However, most other sources of charity revenue are treated as income that is eligible for an exemption.

[502] See, for example, Income Tax Act 2007 (UK) s 521(4), 522(5), 531(3); Taxation of Chargeable Gains Act 1992 s 256(1) ('applicable and applied for charitable purposes'). For a more complete list of the tax exemptions enjoyed by charities and charitable donors, see Picarda (n 77) 1006-1039.

[503] Picarda (n 77) 1032. See also HMRC, *Tax and charitable or non-charitable expenditure* http://www.hmrc.gov.uk/charities/tax/expenditure.htm accessed 30 July 2013.

[504] ITA, s 149(1)(f).

fail to do so, the Charities Directorate is authorized to revoke their charitable registration on behalf of the Minister of National Revenue.[505] Since 2004, the Directorate has also had the power to impose monetary penalties on registered charities that confer 'undue benefits' upon a member, trustee, settlor, or significant donor, or a person who deals not at arm's length with such a person or with the charity.[506] However, the Income Tax Act concept of an undue benefit is narrower than the behavior prohibited by the public benefit rule,[507] and the Act does not authorize the Charities Directorate to impose monetary penalties on registered charities on the sole basis that they have incurred non-charitable expenditures. Unlike UK tax law, in other words, Canadian tax law does not provide the CRA with a regularized context within which to tax registered charities on the basis that some of their income is not being applied for the public benefit.

Given a regulatory context where the primary charities regulator is the tax regulator, and that tax regulator has little fiscal incentive to police the public benefit that charities provide, one might expect to find that property-owning individuals in Canada have *more autonomy* to control and direct their own wealth in the charitable sphere, and specifically more autonomy to locate their charitable projects further along the continuum towards self-regarding projects. Instead, in addition to imposing penalties for 'undue benefits', we witness the CRA policing the altruism of charitable projects through a different legal tool, the ITA concept of a 'gift'. The CRA regularly relies on the legal

[505] This authority is the combined effect of ITA, s 149.1(1) 'charitable organization' (*oeuvre de bienfaisance*) , s 149.1(1) 'charitable foundation' (*fondation de bienfaisance*), and s 168(1)(b).

[506] ITA, s 188.1(4).

[507] For example, the ITA definition of an 'undue benefit' specifically excludes benefits conferred in the course of a charity's ordinary charitable activities, unless the beneficiary's eligibility for the benefit 'relates *solely* to the relationship of the beneficiary to the charity': ITA, s 188.1(5)(b).

meaning of the term ‘gift’ to reassess tax on charitable donations that are perceived to benefit the donor, often on the basis that the donor has some emotional or obligational connection to the charity’s beneficiary class. The gift concept has generated a number of cases involving registered charities, far more than the public benefit rule.[508] By comparing a recent one of these cases to an older English case involving a similar educational grant-making scheme, we may strengthen our hypothesis that in the Canadian regulatory context, it is the ITA gift concept that generally fulfills the ‘altruism-protecting’ function of the public benefit rule.

The English case of *IRC v Educational Grants Association Ltd* involved an educational grant-making charity that was established and managed by the directors and solicitors of Metal Box Ltd.[509] The purposes of the association were, in the view of the revenue authority, exclusively charitable, and any child was in principle eligible to apply for an EGA grant. However, the program was only advertised among Metal Box employees, and the council that awarded the grants was composed entirely of persons associated with Metal Box. The revenue authority objected to these aspects of the scheme, and the fact that 75 to 85 per cent of the association’s income was applied to advance the education of the children of Metal Box employees.[510] It decided, and the court agreed, that the charity’s claim for a tax exemption should be rejected on the basis that its

[508] See, for example, *The Queen v McBurney* [1985] 2 CTC 2124 (FCA); *Friedberg v Canada* [1992] 1 CTC 1 (FCA).

[509] *IRC v Educational Grants Association Ltd* [1967] Ch 993 (CA).

[510] ibid 1009-1010.

income had not benefited a sufficient section of the public and thus was not applied for 'charitable purposes only' within the meaning of the Income Tax Act 1952.

Canada recently produced a counterpoint to *Educational Grants Association*, a case called *Coleman v Canada (MNR)*.[511] *Coleman* also had its genesis in the grant-making practices of an educational institution with admittedly charitable purposes. Pursuant to its 'Christian Higher Education Assistance Fund program', the charity, the National Foundation for Christian Leadership (NFCL), encouraged students to solicit donations to NFCL, and provided bursaries and scholarships to the soliciting students in accordance with an established set of eligibility criteria. Donations to NFCL could not be designated to a specific student, and the charity testified that it regarded itself as having the discretion to award whatever amounts it saw fit to any worthy individual.[512] In practice, however, the court found that NFCL informed students of the amount of the bursary for which they were eligible, issued tax receipts to their relatives for corresponding donations to NFCL, and then provided bursaries to students that correlated closely to the amounts that they had raised.[513]

The similarity between the grant-making schemes being contested in *Educational Grants Association* and *Coleman* brings into sharp relief the different structures of the Canadian and UK tax provisions affecting charities, and bolsters our claim that the

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[511] *Coleman v Canada* 2010 TCC 109, [2010] TCJ No 63; *Coleman v Canada* 2011 FCA 82, [2011] FCJ No 264.

[512] *Coleman* (TCC) [3].

[513] ibid [14], [50].

Charities Directorate relies on the gift concept, rather than the public benefit doctrine, to police the altruism of charitable projects in Canada. The schemes carried out by EGA and NFCL presumably raised a common objection on the part of the revenue authority: namely, that the vast majority of the beneficiaries of the charity's educational grants were distinguishable from other members of the public on the basis of their relationship to a person or employer that financed the charity.[514] The schemes were simply, in the terms we have adopted, not altruistic enough. Based on the governing tax law, the British tax regulator addressed this objection by rejecting the *charity's* tax exemption claim, and arguing that it had not applied the income it received for charitable purposes only. The ensuing judicial appeal accordingly focused on the scope and application of the public benefit rule.

Given the structure of the Canadian tax law regime, it was presumably equally within the power of CRA to sanction NFCL for carrying out its grant-making scheme, on the ground that the scheme was not for the public benefit and the foundation was therefore not operating for 'exclusively charitable purposes'. As we have seen, however, CRA could only have done so by revoking NFCL's registration, a penalty that would have been harsh and, perhaps more importantly, unlikely to produce any tax revenue. Whether for these or other reasons, a tax audit of NFCL's bursary scheme did not result in the charity's revocation,[515] and the case came to court after CRA rejected the *donors'* tax exemption

[514] See *Coleman* (TCC) [49].

[515] This audit is referred to in *Coleman* (TCC) [3].

claims on the basis that the donations to NFCL were not 'gifts' under the ITA. [516] This approach to regulating the altruism of charitable projects raises a number of important policy questions, particularly in a context where a registered charity actively promotes a fundraising scheme to unsophisticated donors.[517] For purposes of this chapter, however, it is sufficient to note that while the CRA is concerned to monitor the altruistic quality of charitable projects, the public benefit doctrine is not its primary legal tool.

c. Regulatory alignment with public welfare goals

If CRA does not rely heavily on the public benefit doctrine to regulate charities on an ongoing basis, it does apply the doctrine at the registration stage. In this regard, the second context-specific equilibrium adjustment that is observable in Canada is that of an as of yet unreviewed effort by the charities regulator to use the public benefit doctrine to align charitable projects more closely with various public welfare goals of the state. In March 2006, responding in part to the considerable attention being devoted to the public benefit issue in EW, the Charities Directorate released a new policy entitled 'Guidelines for Registering a Charity: Meeting the Public Benefit Test.'[518] The purpose of the Guidelines, in the document's own words, is to articulate how CRA understands and applies the public benefit concept when making determinations of registered charity

[516] *Coleman* (FCA) [2].

[517] For example, who should bear the burden of ensuring that charitable programs are carried out in accordance with charity law? In *Coleman,* the court found that at least one of the donors had 'relied on NFCL to properly implement the program.': *Coleman* (TCC) [49].

[518] *CRA Public Benefit Guidelines* (n 394).

status.[519] The Guidelines rely heavily on the English common law authorities and the regulatory decisions of the Charity Commission for EW.[520] They are structured around the two pillars of the public benefit rule, and set out all of the major principles associated with pre-Charities Act 2006 cases such as *Anti-Vivisection* and *Gilmour v Coats.* To this extent, the Guidelines are broadly consistent with the common law public benefit doctrine and the English regulatory approach.

However, the Guidelines also contain a number of unique statements, which evidence the Charities Directorate also seeking to adjust the equilibrium that the common law public benefit doctrine has traditionally set between individual and collective project pursuit, in order to align Canadian charities with various public welfare goals. Two of these adjustments restrain the autonomy of charity founders and trustees in ways that are broadly consistent with the English adjustments we discussed in part three.[521] The final adjustment is uniquely Canadian, and reflective of a more radical effort to align charitable projects in Canada with the substantive welfare agenda of the Canadian state.

The first public law-oriented position that CRA takes in the Guidelines is broadly consistent with the English position that an organization that defines its benefiting 'public' in a discriminatory way will not meet the public benefit test. Institutions that restrict their benefits to a 'specific group of beneficiaries', the Guidelines declare, 'must always ensure

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[519] ibid [1.0].

[520] See, for example, ibid [3.1.3].

[521] Notably, however, the CRA Guidelines predate the publication of the Charity Commission's guidance, *Charities and Public Benefit*.

that the restrictions proposed are not illegal or contrary to public policy. *Any such restrictions are incapable of providing a public benefit*.'[522] However, the Guidelines are far less clear on what types of restrictions on the distribution of charitable benefits are illegal because they contravene Canadian human rights law. CRA's analysis of the discrimination issue continues rather obliquely as follows:

> Organizations with purposes that are discriminatory or based on notions of racism may, depending on the nature of the discriminatory purpose, offend the norms in the *Canadian Charter of Rights and Freedoms*. They may also be in contravention of the various human rights regimes either federally or provincially, or contrary to public policy as expressed in those constitutional and legislative regimes.[523]

As the ambiguous language in this passage suggests, Canada's challenges in this regard are unique. In EW, as we have seen, there is now a single statutory provision that specifies the conditions under which an English charity may restrict the provision of benefits to persons who share a protected characteristic under human rights law. While the language of section 193 of the UK Equality Act may raise problems of interpretation and application, the statute provides a solid foundation for the analysis of the public benefit issue, which is consistent with the ECHR. Canada, on the other hand, has over a dozen human rights instruments, which all set out different conditions under which a discriminatory distribution of benefits may be allowed. It also has a constitutionally entrenched Charter of Rights and Freedoms, which would certainly be applicable to some Canadian charities[524] as well as the provincial human rights instruments themselves.[525] As

[522] *CRA Public Benefit Guidelines* (n 394) [3.2.2].

[523] ibid.

[524] Canadian scholars, commenting on the issue without reference to the *Catholic Care* decisions, have reached different conclusions on whether Canadian courts should interpret the public benefit doctrine in a manner consistent with the *Canadian Charter of Rights and Freedoms*: see, for example, Moran,

a result, it is almost impossible to analyze the relationship between the public benefit doctrine and Canadian anti-discrimination law in the abstract.

The complexity of the Canadian paradigm can be illustrated by considering how the public benefit and equality compliance of a Catholic Care-type institution would be evaluated in different Canadian jurisdictions. We may imagine, for example, that a registered charity incorporated and operating in Ontario sought to amend its objects to state that, in accordance with the tenets of the Catholic Church, it would only provide adoption services to married same-sex couples. The proposed amendment would almost certainly offend Part I of the Ontario Human Rights Code, which guarantees every person the right to equal treatment with respect to services, goods and facilities.[526] Depending on the evidence, however, the amendment's legality might be saved by section 18 of the Code, which states that Part I rights 'are not infringed where membership or participation in a religious….organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.'[527]

'Rethinking Public Benefit' (n 52). As we will see in chapter five, however, many Canadian charities would meet the legal test for the application of the *Canadian Charter of Rights and Freedoms*.

[525] The Supreme Court of Canada has denied that human rights legislation has to 'mirror' the Charter: see *Vriend v Alberta* [1998] 1 SCR 493, *McKinney v University of Guelph* [1990] 3 SCR 229 [131]. However, it has also struck down human rights legislation that omitted a ground of discrimination identified in the Charter: see Hogg (n 27) 37-31, fn 151.

[526] *Ontario Human Rights Code*, RSO 1990, c H19, s 1.

[527] ibid s 18. For a discussion of the similar exemption provision set out in section 24(1)(a) of the Code, see *Ontario (Human Rights Commission) v Christian Horizons,* 2010 ONSC 2105, (2010) 102 OR (3d) 267.

A similar analysis would apply in British Columbia, but the exemption question would be whether, in restricting its adoption services to married same-sex couples, the Catholic charity was 'granting a preference' to the class of persons whose interests the charity was constituted to promote.[528] Unlike in Ontario, the same-sex restriction could also be defended in British Columbia on the basis that the adoption service was not 'customarily available to the public', or on the basis that the charity had a 'bona fide and reasonable justification' for the restriction.[529] In Nova Scotia, on the other hand, the legality of the proposed amendment would depend on whether the adoption activities of the Catholic charity were characterized as 'volunteer public service',[530] and on whether the province's Human Rights Commission perceived a 'bona fide reason' to exempt the adoption activities from the province's general non-discrimination norms.[531] Were a Catholic charity to seek a like amendment to its objects in Manitoba, on the other hand, it would find no 'associational rights' exemption under the province's human rights code.[532] In sum, it is difficult to make any general assertions about when a Canadian charity may restrict the provision of benefits to persons who share a protected characteristic; the field is characterized by provincial variation, but some provinces appear to accord more value than English law to the associational and autonomy interests of charities.

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[528] *Human Rights Code*, RSBC 1996, c 210, s 41.

[529] ibid s 8.

[530] *Human Rights Act*, RSNS 1989, c 214, s 6(d).

[531] *Human Rights Act*, RSNS 1989, c 214, s 9.

[532] *The Human Rights Code (Manitoba),* CCSM, c H175. In Manitoba, discrimination with respect to a service available to the public is only legal where 'bona fide and reasonable cause exists for the discrimination': s 13(1).

The second significant position that is articulated in CRA's Public Benefit Guidelines is that a charity 'cannot charge fees for its services where the effect of the charge would be to unduly exclude members of the public'.[533] The Guidelines state that any fees charged by a charity 'should be reasonable in the circumstances and…typically aim at cost recovery', and that a charity's services 'should not in practice cater only to those who are financially well-off'.[534] The CRA has cited *Independent Schools Council* in more recently drafted policy documents,[535] suggesting that it would likely accede to the Upper Tribunal's views on the common law authorities regarding the exclusion of the poor. As we have seen, however, the hybrid character of the *Independent Schools Council* decision leaves it open to several interpretations. All that may be said for certain is that like the Charity Commission, the CRA has tended to view the public benefit doctrine to some extent as a means of limiting the autonomy of property-owning individuals in order to further a competing public interest in a society where the entire political community has reasonable access to charitable benefits, and where the distribution of these benefits conforms more closely to social need.

Finally, and most controversially, CRA's Public Benefit Guidelines indicate that in assessing the public benefit of an applicant for registered charity status, CRA does not only consider the relevant case law, but also takes into account how closely the applicant's purposes and activities align with government policy and existing government programs. After noting that the existence of public benefit 'must be demonstrated through evidence',

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[533] *CRA Public Benefit Guidelines* (n 394) [2.0].

[534] ibid [3.2.5].

[535] CRA, *Charitable Purposes and Activities that Benefit Youth* (CG-020, June 2013), fn 5.

the Guidelines advise applicant institutions to support their applications for registered charity status with some of the following information:

- Identification of government programs addressing the community need in question along with details on how the [applicant's] program complements or supplements the government program;
- Identification of explicit statements of government policy that may be consistent with the goals and objects of their organization;
- Demonstration of existing public sources of financial support for the organization; and
- Identification of new or recent legislative initiatives consistent with the proposed purpose; and
- Any other types of objective material that supports the proposal.[536]

The implication of this 'advice', which is inconsistent with the common law position but consistent with the co-optative regulatory trends that we will examine in chapter five, is that the public benefit of a charity can be measured by its alignment with the contemporary government's policy agenda, and by the level of public support for its aims.

What, then, may we conclude about the public benefit doctrine in Canada, in terms of its operation, its hybrid character, and its relationship to English public benefit law? While CRA appears in recent years to have embraced a similarly 'public-law oriented' approach to the public benefit doctrine, adjusting the doctrine's functional equilibrium in such a way as to further collective goals, there are several important ways in which its regulatory approach differs from that of the Charity Commission for EW. First, while

[536] *CRA Public Benefit Guidelines* (n 394) [3.3].

both regulators remain concerned with protecting the *altruistic* quality of charitable projects, CRA tends to police the altruism of donors rather than charities, and thus relies on the legal concept of the 'gift' rather than public benefit to achieve this aim. Second, CRA's Public Benefit Guidelines suggest that the Canadian charities regulator is more equivocal than the Charity Commission about the ability of charities to define their beneficiaries according to a protected characteristic under human rights law. This equivocality is a reflection of the great diversity of Canadian human rights instruments, and the strong protection that some of these contain for associational and institutional rights. Finally, the Guidelines suggest that unlike the Charity Commission, the CRA is of the view that the public benefit of an institution may be measured in part by its alignment with existing government policy. This unique stance hints at the existence of a more substantial dissimilarity between the English and Canadian charity law regimes, which will be explored further in chapter five.

4. Public Benefit: a Concluding Assessment

We are now in a position to draw some conclusions about the public benefit doctrine, and about its suggested hybridity across the substantive public law-private law divide. Based on what we have learned about what it means for a charity to be 'for the public benefit' at common law, we may claim to have identified a common law doctrine without a single or even primary site of belonging within either the public law or the private law sphere. In relation to the continuum between altruistic and self-regarding projects, the public benefit doctrine treats charitable projects as resolutely *altruistic* projects, purposefully insulating the sector from self-regarding behavior through a strict application of the personal nexus rule and the prohibition on 'private benefits'. Public law thinking prevails, such that the doctrine's concern with protecting the 'other-regarding' quality of charitable projects outweighs its concern to protect the individual autonomy of charity founders and their appointed trustees. In relation to the perceived spectrum between public-welfare-compliant projects and public-welfare-deviant projects, on the other hand, the common law doctrine treats charitable projects, for the most part, as public-welfare-neutral, only rarely limiting the types of benefits a charity can pursue, and placing only a minimal number of restrictions on an individual's ability to direct a charitable benefit to a group of his or her choosing. Private law thinking prevails, such that the doctrine's concern with protecting the ability of individuals to formulate their own benevolent projects outweighs its concern with ensuring that charitable benefits are reasonably available to all citizens in a political state.

Given the near equal force of these public law and private law impulses, it seems not unreasonable to conclude that the public benefit doctrine is, or was, a 'true hybrid' at common law. The more difficult question is whether the doctrine *remains* a true hybrid in light of the various equilibrium adjustments that it has undergone under the contemporary English and Canadian regulatory regimes. We have previously noted that hybrid phenomena are *dynamic* phenomena, whose subject components may be alternately dominant and subsidiary.[537] If we conclude that the dominance of one component of the public benefit doctrine has become complete and permanent, however, we may also conclude that the term hybrid is no longer apt.

[537] Schaffner and Adab (n 47) 168-9; Nouss (n 51) 227.

We have seen that under the contemporary English and Canadian regimes of charities regulation, additional public law impulses have come to bear on the public benefit rule. Whether or not the common law ever 'presumed' charities under the first three heads to be for the public benefit, the Charities Act 2011 and accompanying Commission guidance have clearly occasioned an operational shift in the degree and quality of public benefit evidence that charity trustees must provide. The Commission and the CRA have both promoted a more 'equitable' interpretation of the public benefit doctrine, and the Upper Tribunal has partly, though not entirely, affirmed the Commission's position. The CRA has put an additional 'public' spin on the doctrine, suggesting that it might require some degree of alignment with the existing government's policy agenda, although this position has not been tested in court. Finally, the evolving anti-discrimination law has come to bear with full force on the public benefit doctrine in EW, and appears poised to have a similar effect in Canada. In all of these ways, the public law elements of the public benefit doctrine are on the rise.

So ascendant is the public element of the public benefit doctrine, in fact, that judges and scholars have begun to equate the doctrine with another, unquestionably public law rule. As we shall see in chapter five, the development of the concept of a 'hybrid public authority' under the Human Rights Act 1998 (UK) has given rise to judicial disputes over the circumstances in which a charity may be considered sufficiently 'of or like' government to incur human rights obligations. The test that the courts have developed for hybrid public authority status is multi-factoral, but in *Aston Cantlow,* Lord

Nicholls held that an ‘obligation to act only in the public interest’ constitutes one indicator of a body whose nature is governmental.[538] Subsequent courts have relied on this factor to distinguish charities from other kinds of institutions, suggesting that charities are ‘like the government’ in this way. In *YL v Birmingham City Council,* for example, the House of Lords contrasted the profit motivation of the alleged hybrid public authority at bar with the ‘public interest’ motivation of a charity: the fact that the defendant for-profit care home, *unlike a charity or philanthropist*, had no obligation to act in the public interest contributed to the House of Lords’ decision that it was not a person with a function of a public nature.[539] In *Weaver,* a majority of the Court of Appeal also appeared to link the public interest criterion to charitable status, stating that the fact that a housing trust was ‘acting in the public interest and [had] charitable objectives’ reinforced the conclusion that its functions were public under the Human Rights Act 1998.[540] The charity law literature is beginning to echo these judicial pronouncements, with Matthew Harding recently asserting that governments and charities are in fact ‘in the same business…to enable the pursuit of, or even directly to pursue, the common good.’[541]

[538] *Aston Cantlow* (n 405).

[539] *YL v Birmingham City Council* [2008] 1 AC 95 (HL) [116], per Lord Mance (‘The private and commercial motivation behind Southern Cross’s operations does…point against treating Southern Cross as a person with a function of a public nature.’) See also the judgment of Lord Scott at [26]. But see Lord Neuberger at [135] (‘the fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature. Nor does it follow as a matter or logic or policy. Otherwise, the services of all charities, indeed, it seems to me, of all private organisations which provide services which could be offered by charities, would be caught by s 6.’)

[540] *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363 (CA) [71].

[541] M Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 Sydney L Rev 559.

These recent suggestions that charities must act 'in the public interest' or 'for the common good' provide us with another way of thinking about the equilibrium that public benefit sets between individual and collective project pursuit, and the adjustments that this equilibrium has undergone under contemporary English and Canadian law. For unless the English courts are in fact seeking to impose an independent public interest duty on charities, their comments suggest they view the 'public interest' and 'public benefit' as substantially equivalent concepts. Is this correct? Has the rule that charities must act 'for the public benefit' become so public-law-oriented in recent years that it can be equated with the 'public interest' concept that applies to the conduct of government? This is the issue that the final section of this chapter seeks to address.

There is general agreement that one of the 'distinguishing features' of democratic government, and one that may be used to justify the existence of separate public law rules, is that the government acts not in its own interest, but in the public interest.[542] However, the meaning of the term 'public interest' has long been the subject of intense debate. 'Not only do scholars disagree on the defining of the public interest', Frank Sorauf wrote in 1955, 'they disagree as well about what they are trying to define: a goal, a process, or a myth.'[543]

In the years since Sorauf's pronouncement, political science has developed a range of competing theories on how the public interest should be defined. Early theories put

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[542] Davies (n 163) ch 3.

[543] Sorauf is cited in V Held, *The Public Interest and Individual Interests* (Basic Books Inc 1970) 1-2.

forward a 'normative' or 'unitary' view of the public interest, asserting that it represented a moral standard that was capable of being judged according to a coherent, unitary set of values.[544] A more recent and more widely accepted set of theories equate the public interest with the interests of the democratic majority,[545] asserting that in a democracy, the public interest must continually be defined through a process of citizen consent.[546] A third, competing group of public interest theories, often called common interest theories, equate the public interest with the interests that *all* members of a polity may share, and focus on values of societal unanimity, compatibility and fraternity.[547] Half a century after Sorauf's pronouncement, then, the meaning and usefulness of the principle that government must act in 'the public interest' is still not entirely clear.[548] Enough points of consensus exist, however, to allow us to compare the public interest concept with charity law's public benefit rule.

The first point of relative consensus on the public interest concept is that 'the public' whose interests the government must consider consists of the whole political community.[549] The position of certain groups on the periphery of this community, such as

[544] Held (n 544) 135. See also C Cohran, 'Political Science and "The Public Interest"' (1974) 36 *The Journal of Politics* 327, 330.

[545] Held (n 544) 49-98. Held's category of 'preponderance theories' overlaps with what Cochran calls 'process theories', where the public interest is identified with the result of the democratic interest-conflict process, or with the process itself: Cochran (n 545) 339-347.

[546] Cochran (n 545) 330.

[547] Held (n 544) 99-134. See also RE Goodin, 'Institutionalizing the Public Interest: The Defense of Deadlock and Beyond' (1996) 90 American Political Science Rev 331.

[548] See, for example, M Feintuck, *The Public Interest in Regulation* (OUP 2004).

[549] Held (n 544) 151-2.

as-yet-unborn citizens and residents with less than full citizenship status, remains a matter of debate.[550] However, it is clear that a government would not be 'acting in the public interest' if it focused exclusively on the interests of a community in a foreign jurisdiction. Nor would government be acting in the public interest if, in reaching its policy decisions, it considered the interests of only a subset of the political community, defined in geographical, ethnic or religious terms.[551] As we have previously noted, the representative role of democratic government requires it to 'bear *the interests of the community as a whole* constantly in mind.'[552]

If we compare this conception of the public with the 'public' that charities are obliged to benefit under contemporary charity law, the continuing distinction between the two concepts becomes apparent. In the wake of *Independent Schools Council*, it is clear that English charities, like government, must at least consider the needs of an important section of the political community, namely the 'not-so-well-off'. In the wake of the *Catholic Care* decisions, it is also clear that English charities, like government, must act in the interests of the *entire* political community to the extent of refraining from acts of unlawful discrimination that may 'dis-benefit' any of the political community's members. Subject to these important qualifications, however, the public benefit doctrine still does not require charities to benefit the whole political community, nor to bear the interests of

[550]Cochran (n 545) 347, citing JR Pennock, 'The One and the Many: a Note on the Concept'.

[551] This is not to say that government can not pursue projects that target particular subsets of the political community: *R (Kaur and Shah) v Ealing LBC* [2008] EWHC 2062, cited in Morris, 'Charities and the Modern Equality Framework' (n 451) 9. Ultimately, however, government must have the interests of the whole political community in mind.

[552] Cane, *Administrative Law* (n 11) 15. See also *Aston Cantlow* (n 405) [62] (Baroness Hale).

the community as a whole in mind. Charities may quite legitimately focus on the needs of a community defined by geography, religion, or a particular affliction; they may even devote all of their resources to assisting a foreign community such as German veterans or the 'native inhabitants of Dacca.'[553] In essence, as Lord Hobhouse observed of the church council whose public authority status was at issue in *Aston Cantlow,* charities may act 'in the sectional not the public interest'[554] without damage to the public benefit rule.

A second distinction between the public interest and public benefit concepts relates to the nature of each concept's arbiter. There is relative consensus that in a democracy, it is the democratically elected representatives of the political community that are charged with determining the substantive content of the 'public interest' at any time. This point, which is generally assumed in the political science literature, was recently confirmed by the House of Lords in *R (Alconbury Developments Ltd.),* a case that considered whether the Human Rights Act 1998 required that an impartial tribunal, rather than the government executive, make decisions that affected rights to the ownership and enjoyment of land. [555] Lord Hoffmann was emphatic that in a democratic state such as the UK, 'decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them.' [556] A decision as to the public interest, he held, 'is not a judicial or

[553] *Re Robinson* [1931] 2 Ch 122; *Mitford v Reynolds* (1842) 1 Ph 185. The courts have sometimes, but not always, taken the view that such charitable works benefit in a general sense the community in the UK: see Picarda (n 77) 39F-H.

[554] *Aston Cantlow* (n 405) [86].

[555] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions (SSETR)* [2001] UKHL 23, [2003] AC 295.

[556] ibid [69].

quasi-judicial act…[i]t is the exercise of a power delegated by the people as a whole to decide what the public interest requires.' [557] In resolutely distancing the judicial branch of government from the realm of public interest, or 'policy' decisions, Lord Hoffmann reinforced earlier House of Lords' authority that decisions as to the public interest 'are not such as courts are fitted or equipped to make'.[558]

The paradigm described in *Alconbury Developments*, within which the legislative and executive branches are expected to make decisions about the public interest without interference by the judiciary, stands in stark contrast to the charity law paradigm within which the courts (and their regulatory alter egos) are expected to make decisions about the public benefit without assistance from the legislative or executive branch. This distinction does not *necessarily* speak to the public or private character of the public benefit rule; indeed, the courts are the primary arbiters of many legal concepts that fall squarely within the public law sphere. However, the fact that the public interest and public benefit concepts are interpreted and applied by different arbiters has implications for the nature of each concept. The legislative and executive branches determine the substantive content of the public interest on an ongoing basis, taking the will of the political community into account. The courts, on the other hand, modify the substance of the public benefit rule only where litigation demands it, and generally make only incremental adjustments to the types of benefits that charities can provide.[559] The effect

[557] ibid [74].

[558] *Gouriet v Union of Post Office Workers, sub nom AG v Gouriet* [1978] AC 435 (HL) 482.

[559] The substance of the public benefit doctrine could, of course, be determined by the legislative branch. As we have seen, however, neither EW nor Canada has taken this course.

of this different methodology is that the public benefit concept is more stable, more transparent, and less tied to the will of the public than the public interest that government is bound to pursue.

A final distinction between the public interest and public benefit concepts relates to the kinds of interests that each concept allows its subject to have and pursue. In their quest to construct a coherent theory of the public interest, philosophers and political scientists have often sought to define the public interest in contradistinction to other kinds of interests. The major conceptual division is between the public interest, on the one hand, and individual interests, on the other. In 1966, however, Richard Flathman usefully distinguished *two* kinds of individual interests: individual self-regarding interests, and individual other-regarding interests. Individual other-regarding interests, according to Flathman, are such that 'if I have an other-regarding interest, it is *my* interest, but my interest is *in* the advantage, profit or welfare of others'.[560] Unlike self-regarding interests, they are always subjectively defined.

Flathman's division of the universe of interests into the public interest, individual self-regarding interests, and individual other-regarding interests highlights another important difference between the public interest and public benefit concepts, which recalls the two continuums with which we began. When it is said that government must act 'in the public interest', what is meant is that government can have *neither* individual self-regarding interests, *nor* individual other-regarding interests in the advantage or welfare of

[560] Richard Flathman, *In the Public Interest* (Wiley 1966), cited in Held (n 544) 23.

a group of individuals that is other than the entire political community. The public interest rule requires the government to be *both* altruistic *and* public-welfare-compliant, in the sense that government must pursue projects that are ultimately aimed at improving the welfare of every member of the polity.

When we say that charities must be 'for the public benefit', on the other hand, we imply that charities may not have *individual self-regarding* interests,[561] but we do not deny that they may have *individual other-regarding* interests in the advantage, profit, or welfare of a particular group. Indeed, as Lord Beveridge recognized, charities may well be the paradigmatic manifestation of interests of this kind.[562] Unlike government, charities do not generally emerge as an embodiment of the will of the public; rather, they are the creation of individuals with a strong interest in a particular cause, such as the advancement of their own religion, or the relief of persons burdened by a particular need. These individual interests are embodied in a charity's governing documents, and become the foundation of the duties of the charity's trustees. The public benefit doctrine does not displace the centrality of individual other-regarding interests to charitable projects, although it does place limitations on the manner in which these interests are framed and carried out. In this sense, the public benefit doctrine diverges sharply from the rule that government must act in the public interest, or for the common good.

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[561] The individuals who found and contribute to charities, in contrast to charities themselves, *may* be motivated by an individual self-regarding interest: see, for example, *Incorporated Council for Law Reporting for England and Wales v A-G and others* [1972] Ch 73 (CA) 93.

[562] Beveridge (n 113) 125; see also text to n 125.

In the course of this chapter, I have sought to show that the public benefit doctrine has become a more 'public-law-oriented' rule since the enactment of the Charities Act 2006. In both EW and Canada, charities regulators have demonstrated that their impulse is to shift the traditional equilibrium of the common law public benefit doctrine, reducing the autonomy of charity founders and trustees in order to further a variety of competing public welfare goals. However, the public benefit doctrine continues to place significant value on the ability of individuals to define what type of benefit their charity will provide and what 'public' will receive that benefit. It allows the expression of most individual other-regarding interests, and (leaving aside CRA's 'advice' to the contrary) still normally requires that charitable projects be public in only the altruistic, and not the public-welfare-compliant sense. To be for the public benefit, a charitable project is not required to further the public interest, only a sectional interest that the charity defines with some constraints. Despite the ascendance of the doctrine's public components in recent years, therefore, the rule that charities must be for the public benefit remains a *hybrid* legal doctrine, and not a rule of public law.

IV. Charity Law Rules of Standing and the Procedural Public law-Private law Divide

1. Introduction

We have, to this point, explored the general and context-specific hybridity of English and Canadian charity law primarily from the perspective of the law's institutional and substantive dimensions. In chapter two, we examined the nature and disposition of the regulatory institutions that are primarily responsible for the supervision of charities in EW and Canada, their relationship to the common law tradition, and the distinct public interests that each is concerned to protect. In chapter three, we focused on the public benefit doctrine, characterizing it as a doctrinal hybrid, and exploring how the equilibrium between its constituent 'public law' and 'private law' elements has shifted in EW and Canada in the period since the enactment of the Charities Act 2006. Claims about the public law-private law hybridity of the charity law may also be examined from the perspective of the law's *procedural* dimension. This chapter will consider one notable procedural feature of the law of charities, its rules of *locus standi*, and consider how those rules partake of the respective spheres of public law and private law.

The question of who may initiate legal proceedings against another, and the manner of answer to that question, are matters that may properly be considered as defining features of the procedural public law-private law divide.[563] The 'public law' and 'private law' approaches to the issue of entitlement to bring legal proceedings differ in at least two

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[563] See, for example, Cane, *Administrative Law* (n 11) 62.

interrelated respects. First, each legal sphere poses the question ‘who can sue?’ at a different time and in a different manner. Within a quintessential private law paradigm, the question is generally integrated into the definition of individual causes of action. While certain private law concepts (such as privity of contract and the tort law duty of care) are directly concerned with determining who can sue, the inquiry is nestled within, and treated as part of, the substantive merits of the private law claim.[564] Within a quintessential public law paradigm, on the other hand, the question of a person’s entitlement to seek judicial relief for a wrong is not fully integrated into the cause of action, and is still addressed as a partially independent matter.[565] The issue is described as an issue of ‘standing’, and determined by a self-standing body of rules that address ‘who, in the circumstances of conduct that the law recognizes as wrongful, should be entitled to seek relief, and what sort of relief they should be permitted to seek, and for what purpose.’[566] As Peter Cane points out, this feature of the ‘public law’ approach to who can sue is a reflection of the fact that public law wrongs are ‘first and foremost wrongs *against the public’*, so that ‘the wrong is defined in terms of the public interest whereas the right to sue in respect of it is described in terms of the claimant’s interest in the matter.’ [567]

[564] ibid 62.

[565] There has been some movement towards the fusion of standing and merits in the administrative law field, but this movement has not been uniform. For a discussion, see Craig, *Administrative Law* (n 20) 779-82, 786.

[566] Janet Walker and Lorne Sossin, *Civil Litigation* (Irwin Law 2010) 55.

[567]Cane, *Administrative Law* (n 11) 62.

A second distinction between the public law and private law approaches to the question of who can sue relates to *the basis upon which* potential litigants are permitted, or excluded from, judicial relief. This distinction is somewhat less clear-cut, but its broad outlines may nonetheless be traced. Within a quintessential private law paradigm, a plaintiff's ability to sue another is rooted firmly in the plaintiff's personal rights and interests. As Peter Benson has explained, the juridical conception of rights that characterizes private law presupposes that, in order to establish a valid claim against a defendant, the plaintiff must have:

> …something that is by rights his or her own (*suum*), with which the defendant is duty-bound not to interfere...unless and until one has such an ownership interest, one lacks a basis, within the juridical conception of rights to make a valid claim against others.'[568]

Without a personal right or interest, then, the potential private law plaintiff has no entitlement to seek judicial relief. Where a potential private law plaintiff *does* have a personal right or interest, however, and that interest is injured in a way that meets the conditions of an established cause of action, the question of the plaintiff's ability to sue is easily resolved. For within a quintessential private law paradigm, a plaintiff that can establish the elements of a cause of action has a *right* to bring that cause of action, and to obtain 'affirmative assistance' (in the form of judicial access) from the state.[569] The court generally has no discretion to refuse the private law plaintiff access to the courts on the basis of extraneous considerations.

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[568] Peter Benson, 'Philosophy of Property Law' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 755. See also Arthur Ripstein, 'Philsophy of Tort Law' in Coleman (eds) (n 569) 657.

[569] Benjamin Zipursky, 'Philosophy of Private Law' in Coleman (eds) (n 569) 635.

Historically, public law also rooted an individual plaintiff's right to sue for a public wrong in the plaintiff's personal rights and interests. In the classic English case of *Boyce v Paddington Borough Council,* for example, the Court of Chancery held that an individual plaintiff could only bring an action for an injunction where she showed that the interference with the public right also infringed her private right or caused her special damage.[570] In Paul Craig's view, this requirement of a personal right or interest was in part the result of public law's 'unthinking adoption of rules from private law'.[571] However, it also reflected a longstanding view that the proper role of the individual in the judicial sphere, and of the court, was to vindicate private rights.[572] The court was recognized as having an occasional role in adjudicating matters of purely public interest, but only at the instance of the officer to whom the constitution had assigned the protection of the public interest - the Attorney General, the chief law officer of the Crown.[573]

As Craig has noted in the English administrative law context, however, the general theme that has characterized recent developments to the law of standing is a movement *away* from this insistence on a private legal right.[574] The historical view that the primary function of the court's supervisory jurisdiction in the public law sphere is to redress

[570] [1903] 1 Ch 109, 114. The Supreme Court of Canada cited *Boyce* with approval in the first half of the twentieth century: see *MacIlreith v Hart* (1908) 39 SCR 657, 663-4.

[571] Craig, *Administrative Law* (n 20) 790.

[572] Craig, *Administrative Law* (n 20) 792 ('This function of the individual [in vindicating private rights] mirrored that of the courts, which perceived their role as the settling of private disputes.')

[573] See *Gouriet* (n 559). See also JLlJ Edwards, *The Law Officers of the Crown* (Sweet & Maxwell 1964) 287, describing the Attorney General as 'the repository of the public conscience'.

[574] Craig, *Administrative Law* (n 20) 790. The Supreme Court of Canada has recently made a similar observation: see *Canada (AG) v Downtown Eastside Sex Workers United against Violence Society* [2012] 2 SCR 524 [1].

individual grievances has been displaced, to some extent, by a view that the court should be concerned more broadly with the maintenance of the rule of law.[575] In a variety of public law contexts, therefore, both UK and Canadian law have come to view the determination of *locus standi* as a more *discretionary* judicial task, a 'balancing act' that takes into account a variety of factors and concerns.[576] While the courts may place great weight on the applicant's personal rights and interests in carrying out this balancing act, they also consider other factors, such as the strength of the applicant's legal argument, the presence or absence of other challengers, and the value assigned to the specific public interest that is asserted in a particular case.[577]

A major impact of this development is that the standing rules in many paradigmatic public law contexts no longer require claimants to demonstrate a special interest in the matter they wish to litigate that goes beyond that 'shared with the generality of the public.'[578] A public interest claimant does not even need to belong to the section of the community that has been affected by the alleged breach.[579] In recent years, for example, an English court has granted standing to a non-partisan English pressure group that sought to challenge a controversial government decision regarding the use of

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[575] Woolf and others (n 64) [2-003].

[576] ibid [2-021], citing *R v North Somerset DC Ex p Garnett* [1998] Env LR 91. In Canada, see *Downtown Eastside Sex Workers* (n 574) [1]-[3], [35]-[36]

[577] Woolf and others (n 64) [2-029], [2-033]; *Finlay v Canada* [1986] 2 SCR 607 [31].

[578] Woolf and others (n 64) [2-032], citing *R (on the application of Dixon) v Somerset CC* [1997] EWHC Admin 393 [13].

[579] ibid, citing *R (on the application of Williams) v Surrey CC* [2012] EWHC 516 (Admin).

international aid funds, even though the group had no direct interest in the government's funding decision and was only purporting to represent the interest of potential overseas aid recipients.[580] The Supreme Court of Canada has adopted an equally liberal approach to 'public interest standing' in the constitutional and administrative law fields, holding that the court has the discretion to grant standing to individuals with no personal interest in a matter after weighing certain identified criteria.[581] In response to these judicial developments, public law scholars have begun to develop a taxonomy of sorts for the law of *locus standi*. Peter Cane identifies four categories of standing: 'personal standing' (for applicants who seek to establish standing on the basis of their own personal interests), 'associational standing' (for applicants who seek standing to represent the interests of their members or constituents), 'surrogate standing' (for applicants who seek standing to represent another person who is not well placed to bring the action) and 'public interest standing' (for applicants who seek standing to represent the general public interest, rather than that of a group).[582]

In general, then, it seems possible to identify a two-pronged distinction between the quintessential 'private law' and 'public law' approaches to the question of who can sue: private law integrates the question into its causes of action and grants standing as a matter of right on the basis of the plaintiff's personal rights and interests, while public law considers the question separately and grants standing as a matter of discretion on the basis

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[580] *R v Foreign Secretary, ex parte World Development Movement* [1995] 1 WLR 386.

[581] This development is generally traced back to *Thorson v AG of Canada* [1975] 1 SCR 138. The Supreme Court of Canada has recently reasserted the flexibility of the test: see *Downtown Eastside Sex Workers* (n 574) [36].

[582] Peter Cane, 'Standing up for the Public' [1995] PL 276.

of a variety of factors. As we have witnessed in other contexts, however, the boundary between the 'public law' and 'private law' approaches to who can sue is rather less neat than it might first appear. In particular, several areas of ostensibly 'private law' doctrine also address questions of entitlement to sue somewhat apart from questions of the substantive merits of the claim.[583] The most famous of these areas is likely the law of public nuisance, which provides remedies for activities that unreasonably interfere 'with the public's interest in questions of health, safety, morality, comfort or convenience'.[584] While public nuisance is a species of tort and thus generally classified as a 'private law wrong', a plaintiff who wishes to sue in public nuisance must either obtain the permission of the Attorney General to do so or establish some damage that is special or peculiar to herself.[585]

Though less often mentioned in discussions of the law of *locus standi,* charity law also addresses the question of a plaintiff's entitlement to seek relief for a wrong apart from questions of the substantive merits of the claim. This chapter aims to shed some light on this procedural feature of charity law by examining how our subject regulatory regimes approach the question of who can seek relief in matters relating to charity property, and by identifying the 'public law-leaning' and 'private law-leaning' tendencies that those approaches embody. While issues of *locus standi* may arise in a number of charity law

[583] This is the basic formulation employed in Thomas A. Cromwell, *Locus standi : a commentary on the law of standing in Canada* (Carswell 1986) 7. Cromwell also makes clear that it excludes questions about the legal capacity of the plaintiff.

[584] Lewis Klar, *Tort Law* (4th edn, Thomson Carswell 2008) 715, citing OM Reynolds Jr, 'Public Nuisance: A Crime in Tort Law' (1978) 31 Okla LR 318.

[585] See Estey, 'Public Nuisance and Standing to Sue' (1972) Osgoode Hall LJ 563.

contexts,[586] this chapter focuses solely on the question of who has standing to seek relief for legally recognized wrongs that involve a misapplication or misadministration of charity property. On the other hand, the chapter extends its gaze beyond the issue of entitlement to sue, attempting instead to address the question of what *judicial and administrative* remedies persons are entitled to seek for misapplications of charity property in EW and in Canada.

The answer to this question, I suggest in this chapter, is both more important and more informative than has generally been recognized. At a general level, the law of standing is important because it determines the persons who do or do not have access to legal remedies, and the circumstances in which 'otherwise illegal action may go without redress'.[587] Within the specific context of a regime of charities regulation, the law of *locus standi* may also provide us with insight into three important matters. First, because the question of *locus standi* goes directly to the question of a decision-maker's jurisdiction,[588] standing rules tell us something about how extensive and effective a regulator's supervisory authority over charities actually is. Second, standing rules tell us something about *what manner of rights* a legal regime perceives in charity property, and

[586] For example, the issue of standing might arise in a challenge to the validity of a charitable gift, or on a *cy-près* application.

[587] LA Stein, 'The Theoretical Bases of Locus Standi' in LA Stein (ed), *Locus Standi* (The Law Book Company Ltd 1979) 4. See also Konrad Schiemann, 'Locus Standi' [1990] PL 342, 342, noting that where a person is excluded from seeking relief on the basis of the rules of *locus standi,* 'the law regards it as preferable that an illegality should continue than that the person excluded should have access' to relief.

[588] *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1989] 1 All ER 1047 (CA) 1055 ('the question of *locus standi* goes to the jurisdiction of the court...the parties are not entitled to confer jurisdiction, which the court does not have, on the court by consent…) For the same principle in Canada, see *LIUNA Local 527 Members Training Trust Fund v R* [1992] 2 CTC 2410 (TCC).

what manner of wrongs are created by that property's misuse. Finally, standing rules tell us something about the value that a particular regime of charities regulation attaches to the protection of those rights.

The chapter proceeds in the following way. Part one begins by looking at the standing rules that traditionally limited access to charity proceedings within the English common law tradition, highlighting the constitutional role that the Crown's chief law officer historically played in enforcing charitable trusts, and the limited recognition of standing for other parties. Part two recounts how the Charity Commission regime ended the Attorney General's 'effective monopoly' over charity proceedings, and considers just how far the standing rules under the Charities Act 2011 have modified the common law position. In part three, I turn to the question of who has standing to seek relief for the misapplication of charity property in Canada, emphasizing the patchwork of different approaches, and the absence of any rights of standing under the registered charity regime. Finally, in part four, I seek to draw some conclusions about the public law-leaning and private law-leaning tendencies of each regime's rules of *locus standi,* and consider what light these procedural tendencies shed on the substantive content of each regime.

2. Standing to seek relief for the misadministration of charity property at common law

As we saw in chapter two, the court has always enjoyed rather extraordinary powers at common law to supervise the administration of charity property and to remedy its misuse. Under the authority of its inherent charities jurisdiction, the court has responded to misapplications of charity property by setting aside sales of the property, removing the charity's trustees, or giving directions for an administrative scheme. The court has also sometimes ordered charity trustees to account for the distribution of charitable funds, or retained custody of a charitable trust fund itself. It was in this sense that we described the court's jurisdiction to regulate the administration of a charity as 'unlimited', and likened it to its extended jurisdiction over public authorities and actors. [589]

As in the sphere of judicial review, however, the court's broad, inherent authority to remedy abuses of charity property has always been subject to an important limitation: it can only be exercised at the suit of a person who has standing to invoke the court's powers. Who, then, does the common law recognize as being entitled to sue to remedy a misapplication of charity property? In private trusts, it is accepted that the trust beneficiary is the proper party to initiate proceedings against the trustees for breach or to recover trust property from a third party.[590] However, charitable trusts are constituted for purposes rather than persons, and generally do not establish ascertainable beneficiaries who are entitled to the trust's performance. In this situation, the common law has assigned to the Attorney General the primary role of seeking judicial relief for the misapplication of charitable funds. The more difficult question, as we shall see, is whether anyone else has standing to bring such charity proceedings.

[589] See text to n 181.

[590] Waters and others, *Waters' Law of Trusts in Canada* (n 493) 173.

a. The role of the Attorney General

It is a fundamental principle of the law of trusts that a court of equity will not uphold a trust that it cannot administer and control at the suit of a person who has standing to enforce the trustee's duties.[591] 'There must be somebody in whose favour the court can decree performance',[592] as *Morice v Durham* confirms; the operation of a trust cannot be made to rest upon the good will of the trustees. The general rule, therefore, is that 'a trust to be valid must be for the benefit of individuals.'[593] There are a limited number of cases where trusts for purposes have been upheld, irrespective of whether they could be actively enforced, but these exceptions are generally regarded as anomalous and aberrant.[594]

The major exception to the trust law requirement of individual beneficiaries is the exception for charitable trusts. This is because at common law, the Crown's chief law officer, the Attorney General, is charged with this vital enforcement function. The Attorney General's role in initiating proceedings to protect against the misadministration of charitable funds emerged during the seventeenth century, in parallel to the decline of the Charity Commission procedure established by the Statute of Elizabeth.[595] By the

[591] Hayton and Mitchell (n 33) 201.

[592] *Morice* (n 79).

[593] *Bowman v Secular Society Ltd* [1917] AC 406 (HL) 441; *Re Endacott* [1960] Ch 232, 246.

[594] See *Re Astor's Settlement Trusts* [1952] Ch 534, 542-47, and *Re Endacott* (n 900) 251.

[595] See Jones (n 80) 8,16-21, and 52-56, noting at 21 that there is no evidence of the Crown bringing an information in Chancery to enforce a charitable gift prior to the enactment of the Statute of Elizabeth in 1601. Before that, interested or representative persons could petition the Chancellor or an ecclesiastical court to enforce a charitable use, but such suits were not common.

nineteenth century, the Attorney General's enforcement role with regard to charitable trusts was well established. As Lord Eldon stated in *A-G v Brown*:

> It is the duty of a court of equity, a main part, originally almost the whole, of its jurisdiction, to administer trusts…From this principle has arisen the practice of administering the trust of a public charity: persons possessed of funds appropriated to such purposes are within the general rule; but no one being entitled by an immediate and peculiar interest to prefer a complaint, who is to compel the performance of their obligations, and to enforce their responsibility? It is the duty of the King, as *parens patriae*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the Crown for all forensic purposes.[596]

Thus, where a trustee of charity property is alleged not to be applying the property to its intended charitable use, the Attorney General may act to protect the interests of charity by initiating proceedings to bring the trustee to account and to ensure the charity property is properly applied.[597] In this way the trust law requirement of a person able to compel performance of the trust is met.

Prior to the enactment of the Judicature Acts and the fusion of the legal and equitable jurisdictions, the ordinary practice was for the Attorney General to institute charity proceedings in the Chancery Court by way of an information, which set out the acts of the defendant that were alleged to be injurious to those whose rights the Crown was charged to protect.[598] Then, as now, the Attorney General was entitled to begin proceedings against a charity in his own name, or at the request of a private individual,

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[596] *A-G v Brown* (1818) 1 Swans 265 (Ch) 290 (Lord Eldon LC).

[597] See, for example, *A-G v Compton* (1842) 1 Y& C 417, 62 ER 951 (Ch). For earlier instances, see *A-G v Newman* (1670) 1 Ch Ca 158; *A-G v Herrick* (1772) Amb 712, 27 ER 461 (Ch).

[598] John Mitford Redesdale and others, *A treatise on the pleadings in suits in the Court of Chancery, by English bill* (6th American, from the 5th London edn, JS Voorhies 1849) 120.

called a relator, who believed that a charity has been the subject of abuse.[599] Until the mid-nineteenth century, relator actions to enforce a charity were consented to as a matter of course, it being the apparent position of the Crown that the Attorney General could not 'with propriety refuse the use of his name, if there be any arguable question to be submitted to a court.'[600] However, it was extremely rare for the Attorney General to bring charity proceedings in his own name, because of the convention that the Crown paid no costs.[601]

Historically, therefore, relator proceedings in the Chancery Court constituted the primary procedure through which misapplications of charity property were addressed. The Crown brought relator proceedings against both charitable trusts and charitable corporations, though the jurisdiction of the court to remedy abuses by the latter type of charity depended, as we have seen, on whether there was an alternate supervisory mechanism in place. While relators often had a personal interest in the matter for which they sought a remedy, it was not necessary for a relator to have 'the least particle of private interest' in the due administration of a charity.[602] The law treated relators as persons 'aggrieved *in a matter of public interest*…who [had] satisfie[d] the Attorney General that the subject matter of the action [was] such as to justify the use of that

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[599] Picarda (n 77) at 924-928.

[600] *Gouriet* (n 559) 478-9, citing *Shore v Wilson* (1842) 9 Cl & F 355, 407. In *Shore,* in fact, the Attorney General appeared as counsel for the defendants to the information filed in his name.

[601] Redesdale and others (n 598) 23, fn(d).

[602] *A-G v Vivian* (1826) 1 Russ 225, 38 ER 88 (Ch) 236.

officer's name.'[603] The relator historically assumed the liability for any costs arising out of the action,[604] and sometimes directed the conduct of the suit.[605] As a matter of law, however, it was the Attorney General who had control of relator proceedings, and determined how they should proceed.[606] Whether acting *ex relatio* or *ex officio,* the role of the Crown was to represent what was variously described as the interest of 'all persons beneficially interested in charity funds',[607] every object of a charity,[608] or charity in general,[609] and to ensure that justice was done, not only to the objects of charity, but to all of the subjects of the realm.[610]

b. An exclusive role?

It is apparent, then, that at common law, the Attorney General is the party that is ordinarily entitled and expected to initiate legal proceedings to remedy misapplications of charity property. The Crown's legal officer is the constitutional defender of charity in general, and 'the only person who can represent a charity and sue on its behalf'.[611] To say that the

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[603] Picarda (n 77) 928.

[604] In a relator proceeding, the relator was personally liable for the defendants' costs if the proceeding failed, was deemed improper or unnecessary, or was brought for improper cause: see Jones (n 76) 161.

[605] *A-G v Vivian* (n 602) 236. But see *A-G v Logan* [1891] 2 QB 100, suggesting that the relator was not effectively a party to the proceedings

[606] Picarda (n 77) 933.

[607] *Re Sekeford's Charity* (1861) 5 LT 488 (Ch)

[608] *A-G v St. Cross Hospital* (1854) 18 Beav 475; *A-G v Bishop of Worcester* (1851) 9 Hare 328, 68 ER 530.

[609] *Ware v Cumberlege* (1855) 20 Beav 503 (Ch).

[610] *The Corporation of Ludlow v Greenhouse* (1827) 1 Bligh NS 17, 4 ER 780.

[611] *Strickland v Weldon* (1885) LR 28 Ch D 426 (Ch).

Attorney General is the only person who can sue on *behalf* of a charity, however, is not necessarily to say that he is the only person with *standing* to sue to remedy a misapplication of charity property. The conventional position, which Frederic Maitland articulated in his course of lectures on Equity, is that charitable trusts have no *cestui que trust* and that no private person can enforce a charitable trust in his own name.[612] However, the cases suggest that the common law's historical approach to the issue of entitlement to bring charity proceedings was somewhat more nuanced than the conventional position suggests.

As a first matter, it is clear that the trustees of a charitable trust have standing to apply for the advice or direction of the court on any question respecting the administration of trust property,[613] and that a single trustee may, for his own protection and that of the charity's beneficiaries, initiate proceedings against his co-trustees to recover and secure charity property. The latter proposition was confirmed in the Canadian case of *Boulton v Church Society of the Diocese of Toronto,* where the court held that members of a charitable corporation who were trustees of its funds were entitled to sue to correct breaches of trust by the corporation, and that the Attorney General was not a necessary

[612] Charles Mitchell, 'Redefining Charity in English Law' (1999) 13 Trust L Int'l 21 51.

[613] At common law, this power was only available where a trustee paid trust funds into court and sought a judicial administration of the trust. Since the mid-19th century, however, statutes in EW and Canada have made the power independent to the institution of any action: Waters and others, *Waters' Law of Trusts in Canada* (n 493) 1154-5.

party.[614] A charitable corporation may also sue certain of its directors and officers if they have breached their trust or fiduciary duties with regard to charity property.[615]

The jurisprudence also contains cases where parties who are *not* trustees have been permitted to sue in their own names to remedy misapplications of charity property. In order to determine what these cases add to charity law's rules of *locus standi*, it is necessary to know something of the procedural rules that historically attended pleadings in the Chancery Court. Prior to the enactment of the Judicature Acts, we have seen, the Crown instituted proceedings in the Chancery Court by filing an information; individuals, on the other hand, commenced Chancery actions by filing a bill. Any person with the requisite capacity was entitled to file a bill praying relief against another, provided the remedy sought was one that would most effectually be provided by a court of equity.[616] A defendant could seek to have a plaintiff's bill dismissed, however, on the basis that the plaintiff did not have the proper interest in the suit.[617] Thus, while almost any individual could initiate proceedings in Chancery to remedy a misapplication of charity funds, the issue of the plaintiff's entitlement to bring the claim could also be raised as a preliminary issue distinct from the claim's substantive merits. The cases that this procedure produced

[614] *Boulton v Church Society of the Diocese of Toronto* (1867) 14 Gr 123 UC Ct (Ch). See also *Nash v Morley* (1842) 5 Beav 177, 49 ER 545 (Ch).

[615] *Charitable Corporation v Sutton* (1742) 2 Atk 400.

[616] Redesdale and others (n 598) 38. Infants, lunatics, and married women were considered not to have the requisite capacity.

[617] ibid. 177-9. The case law indicates that litigants in charity proceedings relied upon the demurrer, which was 'a plea by one party that the other party's pleadings, even if proved, did not entitle him to succeed': see David M Walker, *The Oxford Companion to Law* (OUP 1980) 350; *A-G v The East India Company and Others* (1840) 11 Sim 380 (Ch) 387-8. Demurrers were abolished in 1883 and replaced by provision for hearing objections on points of law.': Walker (ibid).

can usefully be divided into two categories: those dealing with the standing of charity beneficiaries, and those dealing with the standing of other litigants with an alleged 'interest' in charity property.

During the nineteenth century, a number of courts reached different conclusions on the standing of potential beneficiaries of a charity to enforce a charitable trust. In *Attorney General v The East India Company,* for example, two almspersons that were entitled to receive the benefit of a charity were among a group that filed an information and bill, seeking to set aside a lease of charity property on the basis that it was obtained fraudulently and did not benefit the charity. On a demurrer, Shadwell V-C held that the plaintiffs did not have the requisite interest to support a bill, since they asked no relief for themselves individually, and did not show that they were 'individually entitled to anything.'[618]

The question of beneficiary standing resurfaced in a different context a number of years later, when the Attorney General brought an information seeking to set aside an improper conveyance of charity property that was held for the benefit of the parish poor. The impropriety of the conveyance was not contested; the only issue was whether relief was barred by a statute of limitations, which provided that 'persons claiming or entitled to some estate, interest or right in land' were required to bring their action within twenty years. Sir John Romilly MR concluded that the statute had no application to the information, on the basis that neither the parish poor nor any other class of persons could,

[618] *A-G v The East India Company and Others* (n 617) 387-8.

by themselves individually, have instituted any proceeding to redress the breach.[619] However, the House of Lords reversed the Master of the Rolls' decision as to the application of the statute, describing the parish poor as *cestuis que trust* with equitable rights in the trust property,[620] and suggesting (though not confirming) that a group of the parish poor, as representing themselves and all others entitled, could have sued the defendants on their own.[621] In *Lang v Purves,* the Privy Council appeared to affirm this suggestion, stating, in the context of a dispute over church property: 'if the Attorney General declines to interfere, and the *cestuis que trust* differ amongst themselves as to the proper mode of administration of the trust, a certain number may file a Bill on behalf of themselves and others, making some of the dissentients and the Attorney General, Defendants…[622]

A second set of cases, addressing the standing of persons other than charity beneficiaries, indicate that the Chancery court recognized other limited circumstances in which individuals might have a sufficient personal interest in remedying a charity's misadministration to sue in their own name. In *Davis v Jenkins,* for example, the pew owners of a chapel for Protestant dissenters filed a bill seeking relief against a trustee who

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[619] *A-G v Magdalen College, Oxford* (1854) 18 Beav 223, 52 ER 88 (Ch) 242, 253-4.

[620] *The President and Scholars of the College of St. Mary Magdalen, Oxford v A-G* (1857) VI HL Cases (Clark's) 189, 210-12; 10 ER 1267, 1276-7, holding that the poor of two parishes were 'mere *cestui que trusts*'.

[621] ibid. See also *A-G v Winnipeg Electric R Co* (1912) 5 DLR 823 (Man KB), commenting that the parish poor in *Mary Magdalen* were capable of 'exact ascertainment', and affirming Lord Wensleydale's suggestion that 'some of them, as representing themselves and all others entitled, could…have sued without the intervention of the Attorney General at all.'

[622] *Lang v Purves* (1862) XV Moore 389, 15 ER 541 (PC) 422.

had allegedly claimed the chapel property as his own.[623] The defendant trustee brought a preliminary motion, arguing that the suit ought to have been instituted by information, but the Chancery court dismissed his motion. Lord Eldon acknowledged that the question of what species of suit could not proceed upon a Bill presented ‘a point of great Difficulty’, but nonetheless rejected the view that a suit must be by Information whenever the subject of the suit was a ‘public Right’.[624] Where, as in the case before him, the charity had no endowment but depended on voluntary contributions and rent from the pews to pay the minister, Lord Eldon concluded that the owners of the pew were entitled to bring a bill.[625] Similarly, in *Ward v Hipwell*, the court accepted that a minister who had the right to reside in a parish property under the terms of a charitable trust could bring a bill to enforce the trust along with some of the trustees.[626]

More often, however, the Chancery Court appears to have concluded that parties who were neither beneficiaries nor trustees of a charity did *not* have a sufficient interest to sue to remedy its misadministration. In *A-G v Vivian,* for example, Parish Church A, which had been legally united with Parish Church B following the fire of London, filed an information and bill, seeking to have charity property that had been devised to Parish Church B applied to the repair of the church of the united parish. The Chancery court upheld the information, opining that the trust required the court’s administration, but dismissed the related bill on the basis that Parish Church A had no right or interest in the

[623] *Davis v Jenkins* (1814) 3 Ves & B 151, 35 ER 436 (Ch).

[624] ibid 154.

[625] ibid 157.

[626] *Ward v Hipwell* (1862) 3 Giff 547 (Ch).

bequest.[627] In *A-G v East India Company,* the court concluded that members of the governing body of a company that was alleged to have misapplied charity property were not entitled to bring a bill, for they were not seeking individual relief. And in *Lang v Purves,* the Privy Council held that members of the Australian Synod of the Church of Scotland had no standing to bring a bill relating to the alleged misuse of church property by one of its ministers, since they had no 'private interest' in the suit.[628]

In contrast to the modern administrative law context, where the courts are consistently concerned to justify the limits they place on standing,[629] the Court of Chancery was rarely explicit about its rationale for excluding an individual who could establish a misapplication of charity property from seeking relief for that wrong. The Chancery court did at times express concern over the unnecessary expenditure of charity resources on litigation, warning that charity proceedings might cause the 'destruction of charity…by costs'.[630] The court also occasionally expressed a concern to exercise its charities jurisdiction in a way that would not 'deter all prudent persons' from serving as charity trustees,[631] suggesting that it might have factored the protection of the autonomy interests of those trustees into its standing decisions. Most commonly, however, the court

[627] *A-G v Vivian* (n 604)

[628] *Lang v Purves* (n 622)

[629] These justifications include preserving scarce judicial resources, ensuring that courts benefit from the arguments of the persons most directly affected by the issue, and limiting the various branches of government to their appropriate, constitutional role. For a discussion, see Cromwell (n 583) ch 4.

[630] *A-G v St Cross Hospital* (n 183).

[631] *A-G v Corporation of Exeter* (1826) 2 Russ 45, 38 ER 252 (Ch).

simply proceeded by reaffirming the ancient tradition whereby the Attorney General protected rights in charity property on behalf of the Crown. [632]

In sum, then, we can say the following about the standing rules that applied to charity proceedings in EW prior to the creation of the Charity Commission. Trustees could sue co-trustees, and charitable corporations could sue corporate officers and directors, alleging the abuse or misadministration of charity property. In the rare case where the beneficiaries of a charitable trust were capable of exact ascertainment, the court sometimes recognized that they were entitled to sue to enforce its administration, in the same way as the beneficiaries of a private trust. Persons other than beneficiaries were also occasionally permitted to sue a charity, if they had a proprietary or direct personal interest in the charity property. However, persons with less direct interests in having a charity properly administered had no standing to sue. In practice, there appear to have been a very limited number of situations where an individual had both the requisite legal interest to bring a bill to remedy the misapplication of charity property, and the means to do so. [633] In general, the only way in which persons could bring their concerns about charity abuses before the court was to convince the Attorney General that the subject matter of the action was such as to justify the use of the officer's name.

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[632] See, for example, *Wallis v Solicitor-General for New Zealand* [1903] AC 173, 181-2.

[633] See Jones (n 80) 20, citing the Charity Commissioners' statement in 1857 that 'it has always been a 'peculiarity' of charitable trusts that 'the persons who may be beneficially interested under them are seldom in a position to originate measures affecting their government.'

3. Standing to seek relief for the misadministration of charity property in EW

Ending the Attorney General's 'effective monopoly'[634] over the enforcement of charitable trusts was always a major goal of EW's charity law reformers.[635] One of the nation's earliest charity law statutes, the Charities Procedure Act of 1812, sought to simplify the common law relator procedure by allowing 'any two persons' to petition for a hearing into an abuse of a charitable trust, with the Attorney General's approval.[636] The Chancery court reportedly limited the availability of this statutory procedure, restricting its application to 'plain' breaches of trust, and refusing to apply it where jurisdiction could not be exercised with justice to all parties.[637] However, the Charitable Trusts Act 1853 definitively ended the Attorney General's effective monopoly over the enforcement of charities by providing that charity proceedings could be started, with the Commissioners' permission, by anyone with an interest in a charity, including any two inhabitants of the place where the charity applied.[638]

With the gradual extension to the Charity Commissioners of concurrent administration over the administration of charities, the question of who had standing to seek relief for the misadministration of charity property in EW became more complex.

[634] John Barratt, 'Public Trusts' (2006) 69 MLR 514, 542.

[635] See text to fn 257 ff. See also the discussion in Jones (n 76) 165.

[636] An Act to provide a summary remedy in cases of Abuses of Trusts created for charitable Purposes (52 Geo 3 c 101) ss 1, 2.

[637] Jones (n 76) 166.

[638] CTA 1853, s 43.

The Charities Act 2011, we have already seen, establishes several separate procedures through which such misadministration can be addressed. First, the Charity Commission may institute an inquiry into a charity under section 46 of the Act, and, where it finds evidence of misconduct or mismanagement in the charity's administration in the course of that inquiry, address such misconduct through a large variety of remedial measures.[639] Second, even where no section 46 inquiry has been commenced, the Commission may in certain circumstances exercise the same judicial powers as the High Court for the purposes of establishing a scheme for the administration of a charity, appointing or removing charity officers or trustees, and vesting or transferring charity property.[640] Third, pursuant to section 115 of the Act, an authorized party may bring 'charity proceedings' in any court in EW.[641] Different rules of standing apply to each procedure; we will examine each in turn.

With regard to the statutory inquiry process and the exercise of the Commission's post-inquiry remedial powers, the rules regarding entitlement to seek relief are simple. The Commission exercises all of these powers of its own motion; no third party has anything akin to 'standing' to invoke this remedial route. Of course, a person who believes that a charity is administering its funds improperly may draw this to the attention of the Commission and ask that it commence an inquiry. If the Commission decides not to act in response to the complaint, however, its decision is not subject to appeal.[642]

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[639] CA 2011, s 46, 76, 78, 79, 84.

[640] CA 2011, s 69

[641] CA 2011, s 115.

[642] Lloyd (n 403) 79.

More nuanced rules of standing apply to exercises of the Commission's concurrent judicial powers. As a general rule, the persons who are entitled to apply for an exercise of the Commission's jurisdiction to establish an administrative scheme or remove charity trustees are the Attorney General, and the charity in whose respect the exercise is being sought.[643] An application by the charity means an application by all or a majority of the charity trustees.[644] The general rule of standing applicable to exercises of the Commission's section 69 powers is thus narrower than that applicable to common law charity proceedings, since a single charity trustee is not entitled to seek this form of relief.

The Charities Act 2011 does establish a number of exceptions to this general standing rule. In the case of charities whose gross annual income does not exceed 500 pounds, an application for an exercise of the Commission's judicial powers may be made by one or more of the charity's trustees, 'any person interested in the charity', or any two or more inhabitants of the area of the charity if it is a local charity.[645] Additionally, where the Commission is satisfied that the trustees ought in the interests of the charity to apply for a scheme, and have 'unreasonably refused or neglected to do so', and the trustees have been given an opportunity to make representations, it may proceed as if an application for

[643] CA 2011, s 70(2). A court that directs a scheme for the administration of a charity may also hand the matter over to the Commission for preparation and putting into effect: s 69 (3).

[644] Picarda (n 81) 529.

[645] CA 2011, s 70(3). This income threshold has increased from its original amount of fifty pounds: see CTA 1853, s 43.

a scheme has been made.[646] Effectively, this entitles the Commission to exercise its concurrent judicial powers of its own motion in cases where charity property is being improperly administered and neither the trustees nor any other party is inclined to seek relief.

The third way in which a party may seek to remedy the misadministration of charity property under the Charities Act 2011 is to initiate proceedings in any court in EW, invoking the inherent charities jurisdiction of the superior courts.[647] The statutory procedure for initiating such 'charity proceedings' is set out in sections 114 and 115 of the Act. These sections identify four categories of persons with standing to bring charity proceedings: the Attorney General or Charity Commission, the charity or any of its trustees, 'any person interested in the charity', and any two or more inhabitants of an area served by a local charity.[648] Other than the Attorney General and the Charity Commission, however, no person is entitled to bring charity proceedings without the authorisation of the Commission or the leave of the High Court.[649] The purpose of this authorisation requirement, according to the case law, is to prevent charities from 'frittering

[646] CA 2011, ss 70(4), (5). The Commission may not generally alter a charity's purposes when it acts pursuant to this section.

[647] Pursuant to CA 2011, s 115(8), 'charity proceedings' means proceedings in any court in EW brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.

[648] CA 2011, s 114(1), (3).

[649] CA 2011, s 115(2), (5). The Commission may not, without special reasons, authorise charity proceedings where it believes it can deal with the matter itself: s 115(3).

away money subject to charitable trusts in pursuing litigation relating to internal disputes',[650] and to protect them from frivolous and ill-founded claims.[651]

With regard to the first two categories of parties named in section 114, the standing rules that govern access to charity proceedings under the Charities Act 2011 are broadly reflective of the common law position. The contribution of the statutory regime has been to give the Charity Commission shared responsibility for the Attorney General's historical enforcement function, while retaining a supervisory role for the chief law officer of the Crown. Pursuant to subsection 114(3) of the Act, the Commission has the same powers to take 'legal proceedings with reference to charities or the property or affairs of charities' as the Attorney General acting *ex officio*, and the same practices and procedures apply.[652] The Commission may exercise these powers of its own motion, but only with the agreement of the Attorney General on each occasion.[653] Where it appears desirable to the Commission for charity proceedings to be taken by the Attorney General himself or herself, the Commission has a duty to so inform the Attorney General and to provide relevant particulars.[654]

If the extension of standing rights to the Charity Commission merely represents a devolution of the Attorney General's traditional enforcement role, the extension of

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[650] *Muman v Nagasena* [1999] 4 All ER 178 (CA) 183.

[651] *Re Hampton Fuel Allotment Charity* [1989] Ch 484 (CA) 494 .

[652] CA 2011, s 114(3).

[653] CA 2011, s 114(5).

[654] CA 2011, s 115(7).

standing to 'any person interested in the charity' and 'any two or more inhabitants of an area served by a local charity' represents a more significant departure from the common law position. The Charity Commission does not have an official policy on 'local charities', nor does it categorize charities as such on the register, and the scope of the latter provision has never been tested in court.[655] However, the Act defines a 'local charity' broadly, as a charity that is 'in relation to any area… established for purposes which are by their nature or by the trusts of the charity directed wholly or mainly to the benefit of that area or of part of it.'[656] While the scope of this provision has never been tested in court, it would appear, on its face, to allow any two persons to sue an English charity whose benefits are directed towards the region in which they live.

The meaning of a 'person interested' in a charity has more often been in contention before the courts. The leading case is *Re Hampton Fuel Allotment Charity,* a 1989 decision of the English Court of Appeal that began when two charity trustees and a local city council sued to prevent the sale of the charity's land at what was alleged to be a grossly undervalued price.[657] A preliminary point was taken as to whether the council was a 'person interested' within the meaning of the Charities Act 1960.[658] Speaking for the court, Nicholls LJ began by noting the 'dearth of authority' on the statutory expression, and by choosing, by implication, not to incorporate the pre-statute common law on the

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[655] Email from Charity Commission (First Contact Email Team) to author (31 November 2012).

[656] CA 2011, s 293.

[657] *Hampton Fuel* (n 651).

[658] The provision at issue was s 28(1) of the Charities Act 1960, but the language of the provision was the same.

interested persons entitled to bring a Chancery bill to remedy a charity's misadministration. Overturning in part the two existing authorities on the statutory provision, the court held that to qualify as an interested person, it was not necessary that a person either be capable of benefiting from the charity or be entitled to participate in its management. While a person would not qualify as interested in a charity 'simply because he [had] a sentimental or altruistic interest in it or provided modest financial support for it', a person who founded and financed a charity might well have the requisite interest. [659]

The *Hampton* court considered a variety of contextual factors in devising a 'person interested' test for the purposes of (now) section 115. On the one hand, the court noted that the requirement that a litigant obtain the authorisation of the Commission or the High Court before proceeding already provided a 'protective filter' for charity proceedings under the statute, so that the court did not need to narrow the meaning of a 'person interested' in order to prevent frivolous or ill founded claims.[660] On the other hand, the court accorded great significance to the fact that the Charities Act preserved the Attorney General's historical enforcement role in the charity law field:

> Thus the interest which ordinary members of the public…have in seeing that a charity is properly administered is a matter in respect of which the Attorney General remains charged with responsibilities…This suggests, therefore, that to qualify as a plaintiff in his own right a person generally needs to have an interest *materially greater than or different from that possessed by ordinary members of the public*.[661]

[659] *Hampton Fuel* (n 651) 493

[660] ibid 494.

[661] ibid (italics added).

In the result, the court concluded that while a local authority did not *ipso facto* have standing with regard to a local charity in its area, the circumstances in the case at bar – including the close nexus between the services the council and charity provided – placed the plaintiff council within the 'person interested' test.

In the years since the *Hampton Fuel* decision, the English courts have treated the 'person interested' test not as a 'technical' rule of law, but as 'a practical rule of justice affording a degree of flexibility responding to the facts of each particular case'.[662] The decisions on standing to bring charity proceedings evidence this flexibility, confirming that a wide range of interests may be 'materially greater than or different from' the public's interest in the proper administration of a charity. In *Gunning v Buckfast Abbey Trustees Registered,* fee-paying parents of children attending a preparatory school run as a charitable trust were held to have a materially greater interest in the due administration of the school than ordinary members of the public, despite being neither subscribers nor beneficiaries.[663] In *Scott v National Trust,* the members of staghound hunting clubs and tenant farmers who opposed the Trust's decision to end deer-hunting with hounds on its land were found to be 'persons interested' in the charity, on the basis that they were, 'in a real sense, partners with the charity in its management of the land and its preservation of the deer population.'[664] However, a person who has only the interest of 'an ordinary member of the public' in the proper administration of a charity remains excluded from

[662] *Royal Society for the Prevention of Cruelty to Animals v A-G* [2002] 1 WLR 44 (Ch D) [21], noting how this is similar to the 'parallel rule requiring the applicant for judicial review to have a sufficient interest').

[663] *Gunning v Buckfast Abbey Trustees Registered* (Times, 9 June 1994) (Ch D).

[664] *Scott v National Trust* [1998] 2 All ER 705 (Ch)

seeking relief in charity proceedings under the Charities Act 2011. The effect of this exclusion is that the test for obtaining standing in charity proceedings in EW is substantially narrower than the parallel test for obtaining standing to seek judicial review.[665] The Charities Act standard 'is laid down as a form of protection of charity trustees', and thus a litigant will not be allowed to circumvent it by instead commencing judicial review proceedings against them.[666]

In conclusion, then, the standing rules that govern access to relief for the misapplication of charity property under the Charities Act 2011 may be summarized as follows. While the Charity Commission has the statutory authority to inquire into the administration of any English charity and to remedy any misconduct or mismanagement that it finds through its inquiry, no other individual is entitled to invoke these remedial powers. Except in the case of small charities, only the Attorney General, the majority of a charity's trustees, and (in specified cases) the Commission itself, have standing to request that the Commission exercise its concurrent judicial powers to remedy misapplications of charity property by replacing trustees, transferring charity property, or establishing an administrative scheme. However, a broader range of parties, including any person interested in a charity, have standing to bring charity proceedings under section 115 of the Act, provided that they obtain the authorisation of the Commission or the leave of the High Court. Only persons with a 'merely public' interest in the proper administration of a charity are excluded from seeking relief under the Act.

[665] Woolf and others (n 64) [2-010].

[666] *Royal Society for the Prevention of Cruelty to Animals* (n 662) [22].

4. Standing to seek relief for the misadministration of charity property in Canada

a. Standing rules under the registered charity regime

We have seen in chapter two that while the CRA is not vested with any of the prerogative powers of the English Crown, and has no authority to address misconduct or mismanagement in the administration of charities *per se,* the Agency's Charities Directorate does address certain instances of charity mismanagement in the course of its function of identifying violations of the registered charity provisions of the Income Tax Act. Where a registered charity fails to devote all of its funds to charitable purposes and activities as required by the Act's definitional provisions, the Charities Directorate may revoke its registration.[667] Where a registered charity confers an undue benefit on its directors or trustees, a range of sanctions may apply.[668] Effectively, as we noted in chapter two, these provisions confer on the CRA a remedial authority with respect to charities that to some extent parallels the jurisdiction of the Charity Commission and the superior courts.

Despite vesting the CRA with these 'parallel' remedial powers, however, the Income Tax Act contains no procedures akin to those set out in the Charities Act 2011, which would entitle a person other than the CRA to seek relief for the misapplication of charity property. Unlike the Charity Commission, the CRA acts in all instances of its own

[667] ITA, ss 168(1) and 149.1(1).

[668] ITA, s 188.1(4)-(5).

motion in addressing violations of the registered charity regime. A member of the public is free to contact the regulator to make a complaint about a registered charity; indeed, such complaints have been known to trigger charity audits.[669] However, there is no ordinary context in which a person has a legal entitlement to request that the CRA address the misadministration of a registered charity's funds.

The registered charity regime, as this work has already established, has only limited connections with the common law charities tradition. It is unsurprising, therefore, that in excluding persons from seeking relief for the misadministration of charity property, the Income Tax Act does not display the same thinking as the common law or the English Charity Commission regime. Distinct rationales for the Income Tax Act's position on standing present themselves. First, the CRA's function of identifying and remedying instances of charity misconduct that constitute violations of the registered charity provisions is carried out against the general regime of privacy protection that is associated with taxation regimes.[670] The Income Tax Act generally protects the confidentiality of taxpayer information, prohibiting government officials from knowingly disclosing such information to any person except as specifically authorized by the Act.[671] Registered charities have been the subject of an increasing number of exceptions to the general rule, such that CRA officials are now authorized to provide to any person a registered charity's governing documents, a list of its directors, or financial statements that the charity filed

[669] Drache, Hayhoe and Stevens (n 210) 10.2.4.

[670] See Colin Campbell, *Administration of Income Tax 2012* (Thomson Carswell 2012), citing *Slattery (Trustee of) v Slattery* [1993] CTC 243, 247 (SCC).

[671] ITA, s 241(1).

pursuant to the Income Tax Act.[672] Nevertheless, the general confidentiality of taxpayer information provides one rationale for the view that only CRA is competent to establish the type of misapplication of charity property that would constitute a violation of the Income Tax Act.

The second identifiable rationale for the registered charity regime's exclusionary approach to standing is that the 'maintenance and management of charities' in Canada is a matter of provincial, rather than federal, jurisdiction.[673] It seems both logical and constitutionally appropriate, therefore, that persons seeking relief for the misadministration of charity property would proceed under provincial rather than federal law. The question of who may seek what form of relief for a misapplication of charity property in every Canadian province is a complex question, which will not be dealt with comprehensively. However, the next section will seek to outline the most evident remedial routes that are available, and the standing rules applicable to each.

b. Alternative Remedial Routes

Given that the primary regime of Canadian charities regulation does not recognize the standing of any person other than the Minister of National Revenue to seek relief for the misapplication of charity property, persons who wish to seek such relief in Canada must do so through an alternative route. One of at least three possible routes may be available to a potential litigant, depending on the organizational form of the charity and the

[672] ITA, s 241(3.2).

[673] Constitution Act 1867, s 92(7).

jurisdiction in which it is located. In Ontario, the provincial Charities Accounting Act establishes several procedures for bringing proceedings against charity trustees or a charitable corporation. In certain other provinces, the corporate oppression remedy may be available. Finally, within the common law provinces, it may be possible to seek relief for the misapplication of charity property by invoking the inherent charities jurisdiction of the superior courts. As in the English context, different rules of standing apply to each procedure.

As we have seen in chapter two, the rules governing the supervision of property held by charitable trusts and corporations in Ontario are set down in provincial legislation, which delegates some of the *parens patriae* powers of the provincial attorney general to the Public Guardian and Trustee (PGT).[674] Like the Charities Act 2011, the Ontario Charities Accounting Act sets out three principal procedures for addressing misuses of charity property, each of which is subject to separate standing rules. First, like the Charity Commission, the PGT is authorized to investigate alleged misapplications of charity property.[675] There is a well-publicized procedure for members of the public to complain to the PGT about such misapplications,[676] but there is no statutory entitlement to do so and the PGT's decision to investigate or not investigate is not subject to review. Second, where it is alleged that funds collected from the public for a charitable purpose have been

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[674] CAA (Ont). The Act brings charitable corporations within its scope by deeming them to be trustees: CAA (Ont), s 1(2).

[675] CAA (Ont), s 2. Unlike the Commission, however, the PGT lacks the power to remedy any misapplications that it identifies: CAA (Ont), s 4.

[676] See Ontario Ministry of the Attorney General, 'Complaining About Charities' http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet4.asp accessed July 2013.

misused, 'any person' is entitled to make a written complaint to a judge of the Superior Court of Justice, who will order the PGT to investigate the complaint where this may serve the public interest.[677] Finally, section 10(1) provides that *any two or more persons* who allege a breach of a charitable trust or seek the court's direction for its administration may apply to the Superior Court of Justice, and the court may make such order as it considers just for the carrying out of the trust under the law.[678] In sum, Ontario law permits a wide range of people to seek a variety of forms of relief for the misapplication of charity property within the province.

In certain Canadian jurisdictions, a person may also be able to seek relief for the misapplication of charity property by suing under the oppression remedy set out in an applicable corporate statute. While most of Canada's not-for-profit corporation statutes either model their oppression remedy directly on that of their for-profit counterpart[679] or establish no oppression remedy at all,[680] the Saskatchewan Non-Profit Corporations Act expressly extends its oppression remedy to charitable corporations, providing that a wide range of judicial relief may be available where a charitable corporation exercises its powers in a manner which is oppressive or unfairly prejudicial to or unfairly disregards

[677] CAA (Ont), s 6(1)-(3).

[678] CAA (Ont), s 10(1); see also *Ontario Society for the Prevention of Cruelty to Animals v Toronto Humane Society* (2010) 100 OR (3d) 340, 2010 ONSC 608 [32]

[679] Compare, for example, *Canada Business Corporations Act*, RSC 1985, c C-44, s 241 and *Canada Not-for-Profit Corporations Act*, SC 2009, c C-23, s 253.

[680] This is the case under the new Ontario legislation: see *Ontario Not-for-Profit Corporations Act* (SO 2010 c 15) (not yet in force).

the interests of a member, director, officer, or 'the public generally'. [681] In *Thiessen v Borden Hospital Foundation,* the director of a charitable foundation relied on this section to challenge an allegedly negligent disbursement of the foundation's funds by his co-directors.[682]

The persons with standing to apply to the court for an oppression order against a charitable corporation in Saskatchewan include the charity's members, directors and officers, as well as 'any other person who, in the discretion of the court, is a proper person to make an application'.[683] The courts have described this discretion as a 'grant to the Court of a broad power to do justice and equity in the circumstances of a particular case where a person who otherwise would not be a 'complainant' ought to be permitted to bring an action…'[684] While 'proper person' standing has generally been sought, to date, by creditors or the corporation itself,[685] it would seem to provide a basis for an oppression claim by any person who believes a charitable corporation has misused charity property in a manner that is prejudicial or oppressive to the public interest. In provinces where no

[681] *The Non-Profit Corporations Act 1995* (Sask), SS 1995, c N-4.2, s 225.

[682] *Thiessen v Borden Hospital Foundation* (2011) 378 Sask R 238, 2011 SKQB 232.

[683] *The Non-Profit Corporations Act 1995* (Sask), SS 1995, c N-4.2, s 222 ('complainant').

[684] *First Edmonton Place Ltd v 315888 Alberta Ltd* (1989), 71 Alta LR (2d) 61 (CA), cited in J Anthony VanDuzer, *The Law of Partnerships and Corporations* (3rd edn, Irwin Law 2009) 430.

[685] VanDuzer (n 684) 428-30.

effective alternative remedy exists, the courts may be more likely to find that justice and equity demand that standing be granted.[686]

Given that no province apart from Ontario has enacted anything close to comprehensive legislation regarding charity proceedings, one would expect to find that instances of charity misadministration in Canada's common law provinces are generally adjudicated by the provincial superior courts, pursuant to common law procedures. It was these courts, after all, that inherited the English court's inherent jurisdiction to administer charitable corporations and trusts,[687] just as the provincial attorneys general inherited the English Attorney General's powers to protect them.[688] Nevertheless, there does not appear to be a single reported decision where a provincial attorney general in Canada has brought charity proceedings at the instance of a relator, or in his own capacity.

This lacuna in the Canadian law of charities came to the fore in a recent case before the British Columbia Supreme Court. In *Lee v North Vancouver School District No 44,* the co-founder of a charitable trust fund established in honour of her mother brought a petition alleging that the fund had been improperly invested and disbursed by the charity's trustees.[689] The trustees objected to Lee's petition for an accounting,

[686] The courts have been reluctant to grant discretionary standing to creditors where there are other bases of liability for the act complained of, suggesting that if there are no alternate remedial routes, they may be more likely to grant standing: ibid 424.

[687] See, for example, *Courts of Justice Act*, RSO 1990, c C-43, s 11(2) ('The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario').

[688] *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566 (HL) 579.

[689] *Lee v North Vancouver School District No 44* 2008 BCSC 896, 42 ETR (3d) 249

claiming that standing to enforce a charitable trust resided exclusively in the Attorney General. Lee disputed this claim, relying on *Re Hampton Fuel* and the related English case law to argue that she also had the requisite interest to enforce the trust.[690] Neither party, the trial judge noted, was able to cite any Canadian authority on the subject of 'standing to bring an action in relation to charitable trusts'.[691]

With no Canadian authority to rely on, the court chose to resolve the issue of the petitioner's entitlement to sue on the basis of the English case law, and the 'basic rules of standing' articulated in Thomas Cromwell's leading (though by that time dated) text on *locus standi*. The court cited the following passage from the textbook's introduction:

> The law of standing to sue in Canada can be put in a nutshell. There are two fundamental rules. The first is that apart from certain cases in which standing is in the discretion of the Court, the plaintiff must possess an interest in the issues raised in the proceeding. The second is that where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney General consents to a relator action, or the plaintiff can establish some special interest beyond that possessed by the public generally.[692]

'Assuming without deciding' that what was at stake in the petition was the enforcement of a private right, and relying on the reasoning in *Re Hampton Fuel,* the court concluded that as a person who founded and financed the charity, the petitioner had an interest in the issues raised.[693] The court went on to say, however, that if what was at issue was the enforcement of a *public* right, then either the Attorney General had consented to the

[690] ibid [16]-[19].

[691] ibid [23].

[692] ibid [24], citing Cromwell (n 583).

[693] ibid [26].

petitioner's action, or the petitioner had established a 'special interest beyond that possessed by the public generally': the petitioner's involvement in the establishment and financing of the trust, her previous efforts to rectify its wayward administration, and her entitlement to receipt of audited financial statements all combined to distinguish her interest from that of the general public.[694]

In the wake of the *Lee* decision, it will certainly be open to litigants to argue that the common law rules of standing applicable to charity proceedings in Canada recognize the same spectrum of 'interests' in the proper administration of a charity as section 115 of the Charities Act 2011. The decision is nonetheless open to several criticisms, which may weaken the argument that it should apply in every common law province. First, the 'nutshell' statement of the law of standing that the *Lee* court relied on was portrayed by Cromwell himself as a descriptive summary of the general principles underlying the 'particular and specialized standing rules'[695] applicable to the four substantive legal areas he explored in his book.[696] Since Cromwell's text does not examine the law of charities, however, the court's use of his nutshell description to *prescribe* the content of the standing rules applicable to charity proceedings may be regarded as somewhat suspect. Second, as we have already noted, the English case law that the *Lee* court relied on to recognize the standing of the petitioner is based on a provision of the Charities Act 2011 that has no equivalent in British Columbia, and that operates in parallel with an authorization

[694] ibid [27].

[695] Cromwell (n 583) 165. See also Schiemann (n 587) 343 (not all substantive areas of the law have the same standing rules, nor the same purpose behind the standing rules).

[696] Cromwell (n 583) 165.

requirement that supplies an additional protective filter for charity proceedings. The English court's recognition of a wide range of interests giving rise to standing to sue a charity is connected with this statutory scheme. Finally, as we saw in the introduction to this chapter, the law of standing has evolved significantly since the publication of Cromwell's book, particularly in regard to claims involving the enforcement of public rights. Cromwell J himself has been involved in the movement away from an insistence on 'special interests' and 'private rights', and towards a more flexible exercise of judicial discretion.[697]

In any event, the upshot of this patchwork of provincial and federal law is that there is no straightforward answer to the question of who is entitled to seek relief for the misapplication of charity property in Canada. The country's primary regime of charities regulation does not entitle any person other than the Minister of National Revenue and his delegates to seek relief for misapplications of charity property. On the other end of the spectrum, the Ontario Charities Accounting Act establishes very broad standing rules, which ensure that any person can seek judicial or administrative relief with respect to property held by a charity in the province. Throughout the rest of the country, the position is far less clear. In certain provinces, misuses of corporate charity property may provide the basis for a statutory oppression claim, and discretionary standing may be available. Where charity property is held by an unincorporated trust or located in a jurisdiction with no corporate oppression remedy, however, persons seeking relief for its misadministration must rely on a judicial interpretation of the English Charities Act 2011 to argue that they

697 *Downtown Eastside Sex Workers* (n 574).

are entitled at common law to invoke the charities jurisdiction of the Canadian superior courts.

5. Charity law rules of standing: a concluding assessment

We are now in a position to articulate some conclusions about the standing rules applicable to charity proceedings in EW and in Canada, and the manner in which they may be said to partake of public law and private law. We may begin by reiterating our claim that the quintessential 'private law' and 'public law' approaches to the question of who can sue can be distinguished on two grounds: private law integrates the question into its causes of action and grants standing as a matter of right on the basis of the plaintiff's personal rights and interests, while public law considers the question separately and grants standing as a matter of discretion on the basis of a variety of factors. In respect of the first prong of this distinction, we may quite confidently situate the law of charities at the 'public' end of the procedural public law-private law divide. For as in a paradigmatic public law action, the common law and the modern English and Canadian regulatory regimes all address the question of a person's entitlement to bring charity proceedings separately from the substantive merits of the claim.

The relationship between charity law's standing rules and the second prong of our posited distinction is more complex. In the common law context, we have seen that the Court of Chancery did on occasion recognize the standing of persons with proprietary or direct personal interests in charity property to sue on the basis of those interests, whether they were potential beneficiaries of the charity or not. In the ordinary course of things, however, it was the Attorney General, and the Attorney General alone, that was entitled and expected to initiate proceedings to remedy misapplications of charity property on the public's behalf. To adopt the terminology that has evolved in the administrative law context, the common law recognized a narrow category of persons with personal or associational standing to sue for the misapplication of charity property. However, charity proceedings were ordinarily commenced on the basis of a *public* interest in charity property, and public interest standing to bring charity proceedings resided exclusively with the chief law officer of the Crown. On this basis, we may conclude that the common law charities tradition is broadly aligned with the historical 'public law' approach to the question of who can sue, which (as we have seen) requires individual plaintiffs to show 'special damage', and regards the Attorney General as the only proper representative of the public interest.

This 'procedural' conclusion as to the standing rules applicable to charity proceedings at common law provides us, as I suggested in the introduction, with a number of interesting insights into the substantive dimension of the common law charities tradition. First, because the law of *locus standi* effectively acts as a limitation on a court's jurisdiction to adjudicate disputes, we may conclude from the foregoing study that the notionally 'unlimited' inherent jurisdiction of the superior courts to regulate the administration of a charity at common law has always been limited in its practical scope. In the Chancery context, it was limited *de jure* by the small number of individuals who were entitled to bring a Bill to enforce a charity, and *de facto* by the reality that many of the individuals that did have a strong argument for entitlement were generally poor or otherwise unable to initiate a claim. The court's jurisdiction was also limited by the Attorney General's control over the initiation of relator proceedings, and the fact that exercises of that control were not subject to judicial review.

A second insight that our procedural study provides into the substantive dimension of the common law of charities is that the common law historically perceived rights in charity property primarily as *public* rights. This conclusion is implicit in the House of Lords' description of the relator action for the protection of charity property as 'an action to assert a public right.'[698] However, the nuances of the position were articulated most eloquently by the great Chancery lawyer Sir Samuel Romilly, while appearing as counsel in a nineteenth century relator action concerning property devoted to protecting coastal residents from the encroachment of the sea:

> All property in this kingdom belongs either to private individuals, including bodies corporate, or to the public; for injuries to the former the ordinary remedy is an action; for injuries to the latter, an information by the Attorney General. To one species of private property, however, the policy of the law extends a particular protection, and injuries to it are redressed neither by action nor by mere information, but information at the relation of individuals, upon whom the assumption of that character imposes a liability to costs. *Property of this description, to a certain degree private, partakes the character of public property, as devoted to purposes in which, though more peculiarly beneficial to certain individuals, every subject is interested.*'[699]

The full consequences of characterizing rights in charity property as public rights are not immediately apparent. However, it would seem to mean, at the least, that the public in general has a legally recognized interest in the administration of charities, which is

[698] *Gouriet* (n 559) 477.

[699] *A-G v Brown* (1818) 1 Swanston 265, 36 ER 384, 391-92 (emphasis added).

independent of their privileged tax status and their particular ‘public’ or ‘private’ face. The characterization of rights in charity property as public rights also reinforces the conclusion that the common law regards the proper administration of charity property first and foremost as an aspect of our *collective project*, and only secondarily as the *individual project* of charity founders, beneficiaries or trustees. It suggests, in other words, that where the property of a hospital or even a house of worship is improperly administered, it is the public, rather than merely patients or worshippers, who should care.

The third insight that the procedural rules of *locus standi* provide into the substantive dimension of the common law of charities is that the common law traditionally attributed great value to these public rights in charity property. This value is evidenced by the Crown’s historical and deeply symbolic role as the constitutional defender of charity property, and the court’s role as its constitutional trustee.[700] It is supported by the English Attorney General’s consistent practice of acceding to requests to bring relator proceedings for the protection of charity property in cases where there was an arguable question to be submitted to the court. And despite the major delay and expense associated with charity proceedings in the Chancery Court, the importance attributed to public rights in charity property is attested to by the substantial number of charity law decisions that were rendered by the eighteenth and nineteenth century Chancery Courts at the behest of the Crown.

Based on this analysis of the common law position, what may we conclude about the standing rules that today regulate access to relief for misapplications of charity

[700] *Moggridge* (n 79).

property in EW and Canada? While each contemporary regime encompasses a broad range of judicial and administrative remedies and an equally broad range of standing rules, certain significant trends may be identified. First, in both EW and Canada, the primary charities regulators, the Charity Commission and the CRA, are authorized to act of their own motion in a large variety of circumstances, in order to remedy misapplications of charity property that they are informed of or otherwise perceive. While the remedial powers that these modern regulators enjoy may not be as extensive as the remedial powers of the superior courts, therefore, the practical scope of their jurisdiction is far broader. For unlike the courts, the Charity Commission and the CRA can both address misapplications of charity property without the intervention of an interested party.

Second, within the Charity Commission regime (and, to a less clear extent, the Canadian common law), we can identify both 'public law-leaning' and 'private law-leaning' adjustments to the common law approach, which allow us to conclude that the rules of *locus standi* governing actions for a misapplication of charity property in EW and Canadian are broadly of a context-specific hybrid character. In both jurisdictions, on the one hand, the question of who can seek relief for a misapplication of charity property continues to be considered apart from the substantive merits of the claim. Further, the English courts have interpreted the section 115 'person interested' test not as a rigid rule of law but as 'a practical rule of justice' that affords the courts a measure of flexibility and discretion in responding to particular charity law disputes. This approach is consistent with the broader public law trend towards viewing the determination of *locus standi* as a discretionary judicial task involving the balancing of a variety of factors and concerns.

On the other hand, the contemporary standing regimes also reflect certain 'private law-leaning' adjustments to the common law approach. In particular, the Charities Act 2011 has greatly expanded the range of persons who may be awarded standing to bring charity proceedings on the basis of a 'greater-than-public' interest in the administration of a charity. This expansion of personal and associational standing has significantly increased the opportunities for misuses of charity property to be remedied in EW. It has also, as we have seen, prompted an expansion of the common law standing rules applicable to charity proceedings in at least one Canadian province. However, the expansion of personal and associational standing also takes these charity law regimes some way away from the historical common law view that the protection of charity property is primarily a *collective project* concerned with the protection of public rights, and towards the view that it is the project of interested *individuals* or *groups.* For it suggests that where the property of a hospital or a house of worship is improperly administered, it is primarily the patients and worshippers who should care.

In expanding the categories of personal and associational standing for charity proceedings, while at the same time keeping the category of public interest standing closed, the Charities Act 2011 has also diverged from the broader public law trend towards granting individuals standing to represent the public interest where illegalities are alleged. The registered charity regime and the laws of most Canadian jurisdictions are of the same effect: no private person is entitled to seek relief for the misapplication of charity property on the public's behalf. The justifiability of charity law's continued non-recognition of public interest standing to bring charity proceedings is debatable, particularly in circumstances where charities play a government-like role in providing welfare services or distributing overseas aid.[701] In the English context, however, the effects of not recognizing public interest standing under section 115 are attenuated by the continued interest and involvement of the Attorney General and the Charity Commission in the proper administration of charity property, and their statutory functions under the Act. While the non-recognition of public interest standing under the Charities Act 2011 may represent an outdated view of the Attorney General and his delegates as the only proper representatives of the public interest, in other words, it does not necessarily suggest that the English regime assigns less value to the public rights in charity property than did the common law.

In the Canadian context, it is considerably more difficult to rationalize the continued control that the provincial attorneys general exercise over the public's access to judicial relief for the misapplication of charity property. Canada's primary regime of charities regulation, as we have seen, contains no procedure for any person other than the Minister of National Revenue to seek relief for the misapplication of property by a registered charity. Outside of the registered charity regime, common law relator proceedings are virtually unknown, and the provincial attorneys general have not exercised their inherited role of bringing judicial proceedings where misapplications of

[701] See, in particular, *R v Foreign Secretary, ex parte World Development Movement* [1995] 1 WLR 386, where a non-partisan pressure group was granted public interest standing to challenge the British government's decision to use aid money to fund a controversial development project. The court based its decision largely on the fact that there was unlikely to be any other responsible challenger, and the fact that important issues had been raised.

charity property are alleged. Only Ontario has replaced the historical common law procedure with a statutory scheme. And while the *Lee* decision opens the door for individuals to seek personal or associational standing to sue for a breach of a charitable trust, its reliance on judicial interpretations of an English statute makes the decision weak. The effect of these combined factors is that in most parts of Canada, the public is effectively excluded from participating in the collective project of overseeing the proper administration of charity property, and the notionally 'unlimited' charities jurisdiction of the superior courts is of very little effect. The substantive message that this patchwork of procedural rules communicates is that Canadian law assigns considerably less value to the public's rights in charity property than did the English common law tradition it received.

V. The co-optation of charitable resources by threatened welfare states: challenges to the hybrid equilibrium

1. Introduction

The hypothesis that has been pursued up to this point in the work is that the law of charities may properly be regarded as a *hybrid* of public law and private law. I have claimed that charity law is a public law-private law hybrid in both a *general* or *categorical* sense, and in the *context-specific* or *functional* sense that within different regulatory regimes, both the conditions for obtaining charitable status and the regulation of charities' conduct are continually being adjusted so as to maintain a broad equilibrium between individual project pursuit and collective project pursuit within the charitable sphere. We have seen that in several respects, the law of charities has tended to fall off towards the 'public' end of the public law-private law spectrum: the Charity Commission's 2008 public benefit guidance illustrates this tendency, as does the English court's 'discretionary' approach to determining standing to bring charity proceedings under the Charities Act 2011. However, we have also witnessed these 'publicizing' tendencies being offset by legal developments that reassert the importance of protecting the autonomy of donors and trustees. The *Independent Schools Council* decision falls into this latter camp, as do the continuing limits on public interest standing in English and Canadian charity law. Nothing we have seen to this point, in other words, poses a serious challenge to the claim that charity law has achieved a long-term, functional equilibrium between the protection of the autonomy of property-owning individuals to control and direct their own wealth, and the furtherance of competing public interests or visions of the good.

Any conclusion as to the ongoing hybridity of the charity law tradition must be reassessed, however, in light of an increasing consensus about the contemporary use (or misuse) of charities in many post-welfare states. To put the matter briefly, there is a growing chorus of voices from across the Anglo-Commonwealth world expressing concern that charities are increasingly being treated as instruments of government welfare policy, rather than as independent institutions.[702] These concerns raise the spectre of a more radical form of 'publicization' in the charitable sphere, suggesting that in certain economic and political contexts, charities may experience regulatory or other government activity that so greatly tends towards compelling them to conform to or carry out the government's welfare objects that charities may be said to be *co-opted* to the policy agenda of the state. Such co-optation, to the extent it exists, represents a more significant challenge to charity autonomy than anything this work has heretofore described, and has the potential to significantly destabilize charity law's hybrid equilibrium.

The co-optation of charitable resources by government can take a great variety of different forms. A legislative body with authority over the regulation of charities may at any time enact a definition of charity that reflects, in its chosen degree of specificity, the

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[702] See, in particular, the collection of essays in Matthew Smerdon (ed) The First Principle of Voluntary Action: Essays on the independence of the voluntary sector from government in Canada, England, Germany, Northern Ireland, Scotland, United States of America and Wales (The Baring Foundation 2009). See also Debra Morris, 'Paying the Piper: The "Contract Culture" as Dependency Culture for Charities?' in Alison Dunn (ed), *The Voluntary Sector, the State and the Law* (Hart 2000); Alison Dunn, 'Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process' (2008) 71 MLR 247. Morris has also described how these concerns have been compounded by the Conservative government's 'Big Society' agenda: Debra Morris, 'Charities and the Big Society: a doomed coalition?' (2012) 32 LS 132, 144.

policy agenda of the incumbent government.[703] Government may put in place tax laws that assign greater or lesser fiscal advantages to different *categories* of charities, depending on how closely their objects align with the objects of the state.[704] It may provide for the placement of government representatives on the boards of charities that it wishes to influence or control. Alternatively, government may provide funding to charities on terms that prohibit them from criticizing government policy, or ensure that the government's own welfare priorities are carried out.

If the specific mechanisms and manifestations of government co-optation in the charitable sphere are potentially infinite, they may nonetheless generally be understood to fall within one of two broad categories of co-optation: definitional (or existential) co-optation, and contractual co-optation. *Definitional* or *existential* co-optation stems, at root, from the government's ultimate power to define (or redefine) the concept of charity, and to make the acquisition or retention of charitable status dependent upon compliance with the government's laws and administrative policies. *Contractual* co-optation, on the other hand, stems from the ability of government to enter into contractual arrangements with charities, and to negotiate the terms upon which charities will be paid for the services they provide.

[703] Oonagh Breen, 'Ireland: *Pemsel* Plus' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar 2010) 74 ('At its core, the power to determine what constitutes a charitable purpose is -- and always has been -- a political one.')

[704] Under Australian law, for example, only certain categories of charities can receive tax deductible gifts. The tax law sets out general categories of "designated gift recipients" and lists others by name. Religious charities do not constitute one of the categories of DGRs: see Australian Tax Office, *GiftPack Guide* http://www.ato.gov.au/Non-profit/Guides/In-detail/Guides---booklets/Gifts---fundraising/GiftPack/?anchor=P255-20813#P255-20813. (accessed Nov 2013).

Instances of definitional and contractual co-optation have occurred throughout the history of the law of charities.[705] However, the theme of governmental co-optation of charitable resources is a theme that becomes particularly intense in a 'post-welfare' or 'threatened welfare' state, where the government has made extensive public service commitments that are increasingly difficult to sustain. It is thus a theme that has particular resonance in contemporary EW, where the espoused commitment of the British political establishment to the charitable sector's independence[706] has not stemmed the growing tide of concern that charitable resources are being 'harnessed' to the welfare agendas of central and local governments.[707] Anxieties about the precarious independence of the English charitable sector increased markedly in the 1980s, when the government of Margaret Thatcher began the process of 'slimming down the welfare state' by contracting out its statutory functions to charities and other non-governmental organizations.[708] They have increased again since 2010, when the government of David Cameron embarked on its 'Big Society' agenda of (further) decentralizing government functions, and involving charities even more heavily in the delivery of public services.[709] Today, in a climate of significant economic austerity, increasing numbers of charities deliver social welfare services that

[705] Morris provides nineteenth century examples of charities providing services in return for payment by the state: Morris, 'Paying the Piper' (n 702) 124. See also Nicholas Deakin, 'Voluntary Action and the Future of Civil Society' in Alison Dunn (ed), *The Voluntary Sector, the State and the Law* (Hart 2000) at 241, noting that at the start of the twentieth century, the leader of the Charity Organization Society expressed his concern about 'the overbearing State asserting its financial control'.

[706] For examples of governmental assertions of the independence of the English charitable sector, see Private Action, Public Benefit [1.3]; HM Treasury, *Exploring the Role of the Third Sector in Public Service Delivery and Reform: a Discussion Document* (2005).

[707] See the sources listed in n 702. Dunn, in particular, describes how the role of charities in contributing to political change has been 'harnessed' into governmental objectives: Dunn (n 702) 249.

[708] For a short review of this history, see Woolf and others (n 64) [3-057]. See also Deakin (n 705) 246-7; Dunn (n 702) 249-50.

[709] Morris, 'Charities and the Big Society' (n 702) 133.

were previously delivered directly by government on the basis of performance-based contracts. In this climate, as Ben Cairns notes, there is a growing perception that the British government views charities and other voluntary sector organizations as 'instruments of government policy rather than independent agents.'[710] The Baring Foundation has set up a special panel to study and monitor the situation. The 2013 report of this Panel on the Independence of the Voluntary Sector found that the conditions for sectoral independence had continued to deteriorate over the last twelve months, such that 'the very identity of the sector is in question'.[711]

In Canada, where there is no equivalent political commitment to the charitable sector's independence, the evidence of definitional and contractual co-optation is arguably even stronger. As Peter Elson has documented, Canadian charities have historically worked in 'interdependent partnership' with their federal and provincial governments, delivering government-funded services such as health care and education within the context of a 'mixed social economy of social service delivery'.[712] The Canadian charitable sector has also never achieved the representational capacity or the political clout of its English counterpart. When the Canadian government began cutting block funding for charities as part of its own welfare retrenchment program in the 1980s, therefore, the charitable sector mustered little opposition. Instead, Canadian charities gradually

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[710] Ben Cairns, 'The independence of the voluntary sector from government in England' in Smerdon (n 702) 37.

[711] Panel on the Independence of the Voluntary Sector, *Independence under Threat: the Voluntary sector in 2013* (Baring Foundation, 2013). See also Hodgson Report [3.15], [4.21]-[4.23].

[712] Peter Elson, 'Independence in a Cold Climate: a Profile of the Nonprofit and Voluntary Sector in Canada' in Smerdon (n 702) 17.

decreased their role in policy advocacy and increased their role in service delivery under performance-based contracts with government.[713] In 2001, then-Prime Minister Jean Chrétien's Liberal government made a rare political commitment to the principle of charity independence, describing the voluntary sector as 'autonomous', and affirming its right to advocate for change.[714] Today, however, most people working in the Canadian charitable sector consider the 2001 Accord a dead letter. Charities complain not only of onerous reporting requirements and of unpredictable project-based funding,[715] but also of 'witch hunts' against charities that are opposed to the government's policies.[716]

What are we to make of these perceived threats to the 'independence' of the charitable sector? It is important to note at the outset that there are competing views of the desirability of using charities to carry out the government's welfare objects, and that the inappropriateness of the various forms of co-optation explored in this chapter cannot be lightly assumed. Those who advocate for the strict independence of the charitable sector from government must take into account the very significant ways in which the activities of charities are subsidized by tax. They must also address growing concerns about just how far charities have strayed from the core needs of their communities in some parts of

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[713] For a overview of this process, see Susan D Phillips, 'Dual Restructuring: civil society and the welfare state in Canada, 1985-2005' (2012) 25 British J of Cdn Studies 161.

[714] Government of Canada, *Accord between the Government of Canada and the Voluntary Sector* (Ottawa: Voluntary Sector Task Force, Privy Council Office, 2001)

[715] L Eakin, *An Overview of the Funding of Canada's Voluntary Sector* (2001), cited in Elson (n 728) 24

[716] Shawn McCarthy, 'Tax audit targets charity group that was singled out by Tories' *The Globe and Mail* (Canada, 8 May 2012).

the world.[717] Indeed, it must be acknowledged that the very language of 'co-optation' - of government taking or assuming charity property for its own use – communicates a negative view of a trend that some would cast in a positive light.

On the other hand, there seem to be good reasons to be concerned about regulatory or other institutional mechanisms that tend towards compelling charities to conform to or carry out the government's welfare agenda. First, as we shall see in the next part, co-opted charities are likely to find themselves subject to public law standards that are designed to address the special powers and responsibilities of the state. While the extension of public law liabilities to charities that carry out 'public functions' or 'government activities' may be perfectly appropriate from the perspective of the consumers of those services, it may also work hardship on small charities that are effectively compelled to carry out a governmental agenda against their better judgment, and that are ill-equipped to meet public law standards. Second, processes of co-optation appear to pose a serious threat to the spirit of 'voluntariness' that typically characterizes charitable activity, and that has historically been understood as its greatest strength.[718] Voluntary action does not preclude co-operation between charities and government agencies, as Beveridge noted in his post-war report, but it does require that charities have 'a will and a life of their own'.[719] Charities whose resources have been co-opted by the

[717] Stephanie Strom, 'Donors weigh the ideals of meaningful giving' *The New York Times* (1 Nov 2011), (citing Emmett Carson, chief executive of the Silicone Valley Community Foundation, which has $2 B in assets).

[718] The classic statement of this view is generally attributed to Lord Beveridge: Beveridge (n 113).

[719] See Beveridge (n 113) 8, describing voluntary action as 'action not under the directions of any authority wielding the power of the state'. See also Dunn (n 702) 248-9, noting that the great achievements and

state are also unlikely to have the capacity to play their historic role in 'pioneering' new types of educational, social and cultural projects.[720] If voluntariness and a capacity to innovate are among the greatest strengths of the charitable sector, we should be wary of phenomena that seem to work against those strengths.

Ultimately, however, this chapter is less concerned with resolving the debate over the use of charitable resources to fulfill governmental objectives than with giving it a clearer shape. In this vein, the chapter aims to advance a theoretical contrast between 'independent' and 'co-opted' charities, and to identify certain legal and institutional mechanisms that may either encourage or limit the co-optation of charitable resources by governments. I begin in part two by articulating two *indicia* of a 'co-opted' charity, and by relating these *indicia* to an important body of Anglo-Commonwealth law on the functional public law-private law divide. In part three, I examine the first, most direct form of *definitional* co-optation: the exertion of government influence over the legal definition of charity so as to align charities with government policy goals. In part four, I examine a second, less obvious form of *definitional* (or *existential*) co-optation – the creation of statutory charities that are controlled by government or directed towards its purposes. In part five, I turn to the phenomena of *contractual* co-optation, examining the extent to which governments in EW and Canada may influence the administration of particular charities through the negotiation of contractual terms or the appointment of government authority trustees. The chapter concludes with some comments on the relative threat that

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innovations of the Victorian philanthropists were due in part to laissez-faire policy and a moderate regulatory framework.

[720] For a description of this pioneering role, see Nathan Report, 162, 166.

processes of co-optation present to the hybrid nature of the law of charities in EW and in Canada.

2. Co-optation and the Functional Public Law-Private Law Divide

The balance of this chapter, as we have seen, is devoted to examining certain modern phenomena that tend towards the co-optation of charitable resources by government, and to considering how English and Canadian law either promote or limit these phenomena. In order to embark upon this task, however, we need a more robust account of what constitutes a co-opted charity, and how this concept relates to the spectrum we have put forward between projects that are 'public-welfare-compliant', and projects that are deviant from the public welfare policy of the state. I argued in chapter three that, as a starting point, we might regard public-welfare-compliance as requiring that a charity's benefits be accessible and useful to the entire political community.[721] Co-optation, I would now suggest, may be regarded as a more radical form of public-welfare-compliance, which envisages a charity's benefits being aligned with, and directly supportive of, the government's policy agenda. Co-optation represents one end of a continuum that extends, at the opposite pole, to a state of full independence from the public welfare goals of the state. Without purporting to articulate an exhaustive list, we may identify two key *indicia* of a co-opted charity. A first is that the charity *furthers a specific government policy or program* in carrying out its purposes and activities. A second is that in carrying out its purposes and activities, the charity is *subject to governmental influence and control*.

[721] See text immediately before and following n 405.

These *indicia* of a co-opted charity have not been plucked from thin air. Rather, they are reflective of, and largely consistent with, a growing body of Anglo-Commonwealth law that is focused on controlling the exercise of public (or government) functions by non-governmental institutions.[722] During the last thirty years, as the widespread impacts of corporatization, privatization, and the contracting out of government services have come to be felt and understood, jurists have become increasingly attuned to the reality that modern society contains a range of institutions that are not self-evidently public bodies or private persons.[723] They have also become acutely aware that these 'hybrid institutions' may perpetrate the types of abuses of power that have historically been associated with government.[724] This awareness has given rise to a number of important legal developments, chief among which has been the expansion of the 'province' of public law.[725] In the significant arenas of human rights law and judicial review, English public law has achieved this expansion by shifting its focus 'from controlling the *institutions of...government* to controlling the exercise of *functions of governance*…whether performed by government or non-government entities.'[726] In practice, the courts continue to also take into account the *institutional* character of the body whose functions are being judged, and the *relationships* that body may have with a

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[722] For a short summary of the evolution of this body of law, see Cane, 'Accountability' (n 22) 249 ff.

[723] ibid.

[724] See, for example, Sir Gordon Borrie, 'The Regulation of Public and Private Power' [1989] PL 552.

[725] See Michael Taggart, 'The Province of Administrative Law Determined?' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997). Another significant development has been the reassertion of the court's private supervisory jurisdiction in contexts such as a restraint of trade: see *Bradley v Jockey Club* [2005] EWCA Civ 1056.

[726] Cane, *Administrative Law* (n 11) 5. The concept of a public function, or 'function of a public nature' is increasingly being employed in other legislative contexts: see Woolf and others (n 66) [3-075]. This work will not address the debate over whether there is any difference between the two terms.

core governmental authority.[727] However, in EW at least, the statutory language requires that the 'ultimate focus…be upon the nature of the functions undertaken.' [728]

Charities have increasingly found themselves at the centre of judicial disputes over the contours of this developing distinction between public and private functions and acts.[729] In particular, English charities have played a leading role in disputes over the scope of section 6(3)(b) of the Human Rights Act 1998, which partially defines the 'public authorities' that are prohibited from acting in a way which is incompatible with a Convention right.[730] The criteria of a public function vary between jurisdictions and between legislative contexts; in the context of the Canadian Charter of Rights and Freedoms, as we shall see, the terms 'public' and 'function' are not used at all. In all of these contexts, however, the fundamental normative question that courts are being asked to address is whether an entity that is not strictly governmental should nonetheless, in relation to a particular function or act it carries out, be considered sufficiently of or like government to 'bear the special responsibilities of the state.'[731] The analysis is applied in

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[727] Dawn Oliver, 'Functions of a public nature under the Human Rights Act' [2004] PL 329, 331; see also *YL* (n 539) [103], per Lord Mance (the 'hallmarks of a core public authority throw light on the nature of a person's functions'). Woolf and others make a similar observation of the judicial review cases: Woolf and others (n 66) [3-045].

[728] *YL* (n 539) [105] (Lord Mance) and [61] (per Baroness Hale).

[729] For example, *R v Servite Houses ex p Goldsmith* [2001] LGR 55, an early case on the meaning of a public function in the judicial review context, involved a charitable housing association that provided community care services to the elderly.

[730] The defendant in *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936 was a charity. Two other major cases on section 6(3)(b) also involved charities: see *Aston Cantlow* (n 405); *Weaver* (n 540).

[731] Bamforth (n 23) 151.

the field of judicial review, and under a variety of particular statutory instruments.[732] For our purposes, however, a brief review of the chief human rights instruments in EW and Canada will suffice to illustrate, in a preliminary way, how the answer to this normative question has come to depend on whether in carrying out these functions or acts the entity furthers a specific government policy or program, or is subject to governmental influence and control.

Human rights law presents an important context in which the application of public law standards to a charity will depend on whether the charity is characterized as exercising public (or governmental) functions (or acts).[733] In 1998, as we have already seen, the UK Parliament incorporated a number of the rights referred to in the ECHR into domestic law. Section 6(1) of the Human Rights Act 1998 makes it unlawful for a 'public authority' to act in a way which is incompatible with these rights. The term 'public authority' is not comprehensively defined in the Act, but section 6(3)(b) states that it includes 'any person certain of whose functions are functions of a public nature.'[734] Such 'hybrid public authorities', as they have come to be known, assume human rights obligations in respect of their public acts.[735]

[732] In the UK, judicial review claims are generally brought under Part 54 of the Civil Procedure Rules, which defines a claim for judicial review as a claim regarding the lawfulness of 'a decision, action, or failure to act in relation to the exercise of a public function.' For a review of the evolving case law in this area, see Woolf and others (n 64) ch 3. For a suggestion that a charity established by statute to preserve land for the benefit of the nation might be subject to judicial review, see *Scott v National Trust* [1998] 2 All ER 705 (Ch).

[733] In the context of judicial review and human rights law, 'public' is understood to mean 'governmental': see *R (Mullins) v Jockey Club* [2005] EWHC (Admin) 2197 [15], and *Aston Cantlow* (n 405) [163]

[734] Section 6(5) clarifies that a person will not be considered a public authority in relation to a particular act if the nature of the act is private.

[735] Human Rights Act 1998, s 6(5).

There is no 'single test of universal application' to determine whether a body exercise functions of a public nature within the meaning of the Human Rights Act 1998. Rather, as the English Court of Appeal has affirmed, the courts 'have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not, and weigh them in the round'.[736] The acknowledged starting point for this rather fluid 'factor-based approach'[737] is the judgment of Lord Nicholls in *Aston Cantlow,* which states that the relevant factors include 'the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'[738] Subsequent decisions, in building upon Lord Nicholls' list, have considered whether the function is 'intrinsically an activity of government',[739] whether government has assumed responsibility for seeing the function performed,[740] and whether those appointed to carry out the function are subject to government influence and control.[741] In *Aston Cantlow* itself, a majority of the House of Lords concluded that the parochial charity at bar was not exercising a function of a public nature in enforcing a liability for chancel repair. More recently, however, the English

[736] *Weave*r (n 540) [35].

[737] *YL* (n 539) [91] (Lord Mance).

[738] *Aston Cantlow* (n 405) [11]-[12] (Lord Nicholls).

[739] *Cameron v Network Rail Infrastructure Ltd (formerly Railtrack Plc)* [2006] EWHC 1133; [2007] 1 WLR 163 [29].

[740] *YL* (n 539) [66].

[741]*Cameron Cameron* (n 739) [29].

Court of Appeal held that the HRA was applicable to a charity that assisted government in achieving its statutory objectives under the Housing Act 1996.[742]

In the Canadian constitutional context, where the relevance of the public law-private law distinction is sometimes questioned,[743] and the courts have officially rejected a 'public function' test,[744] the substance of the test for the imposition of human rights liability is nonetheless similar. Pursuant to section 32(1) of the Canadian Charter of Rights and Freedoms, the application of Canada's constitutional human rights instrument is limited to 'the Parliament and government of Canada' and to 'the legislation and government of each province.'[745] However, the decisions interpreting this section have established that there are at least two bases upon which the Charter may be found to apply to an entity that is not, by its very nature, 'government'. First, an entity may be characterized as 'government' within the meaning of section 32(1) by virtue of the degree of governmental control exercised over it. Second, a non-governmental entity may be found to attract Charter scrutiny to the extent that it 'performs governmental activities'.[746] The fact that an entity performs a 'public service' will not be sufficient to make it subject to the Charter, even if it is subject to government regulation and receives funding from the public purse.[747] However, if an institution performs an act that is truly 'governmental' in

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742 *Weaver* (n 540) [69].

743 Hogg (n 27) 37-30.1; see also the text of n 27.

744 *McKinney v University of Guelph* [1990] 3 SCR 229, per Laforest J.

745 *Canadian Charter of Rights and Freedoms*, s 32(1).

746 See *Eldridge v British Columbia (AG)* [1997] 3 SCR 624; *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component* [2009] 2 SCR 295 [16].

nature – for example, by implementing a specific statutory scheme or a government program -- the institution will be subject to Charter review in respect of that act.[748]

In sum, the tests that are emerging to determine when an entity is sufficiently of or like government to bear the special responsibilities of the state have many parallels with the *indicia* of a co-opted charity that I put forward in this part. The parallels are notable because they suggest that where charities are co-opted in the ways outlined in this chapter, they are more likely to be amenable to human rights liability, judicial review and other public law standards. The question of how far Canadian and English charities *in fact* further government policies or are subject to government influence and control is a complex and multifaceted question, which is well beyond the scope of this doctrinal work. However, by examining certain modern phenomena that tend towards the co-optation of charitable resources by government, and assessing the ways in which English and Canadian law address those phenomena, we may hope to reach some conclusions on the extent to which English and Canadian law either *enable government to, or prevent government from,* compelling charities to conform to or carry out a particular public welfare agenda.

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[747] *McKinney v University of Guelph* (n 474) [35]

[748] *Eldridge* (n 746). Note that this standard is apparently higher than that set by the HRA 1998; in the UK, an entity may be amenable to human rights liability if it performs functions that government 'typically' performs: *Aston Cantlow* (n 405) [12] as interpreted by *Weaver* (n 540) [70] (the provision of subsidised housing is 'typically, although not necessarily, a function which government provides' and can properly be described as a public service within the meaning of *Aston Cantlow*).

3. Mechanisms of co-optation: government influence over the definition of charity

A first modern phenomenon that tends towards the co-optation of charitable resources by government involves the exertion of government influence over the interpretation and application of the legal definition of charity. The legal definition of charity plays the crucial function of setting the outer bounds of the purposes and activities which charities are authorized to pursue. Thus, a government that exercises a high degree of control over that definition has a greater capacity to align the resources of the charitable sector with its own policies and programs.

a. Historical roots

The exertion of government influence over the formation, interpretation and application of the legal definition of charity is a modern phenomenon with distinct historical roots. The Preamble to the Statute of Elizabeth, the statutory list of 'good, godly and charitable uses' that emerged as the 'judicial lodestar'[749] as to the objects the common law would recognize as charitable, was itself a manifestation of the legislature's ultimate authority to give legal meaning to the term charity, and to align this legal definition with a specific welfare agenda. While there is debate about the precise provenance of the Preamble,[750] there is significant consensus that the charitable uses set out therein were designed to reinforce a broader Tudor policy agenda involving matters such as the construction of

[749] *Vancouver Society* (n 140) [144], citing Donovan Waters, *Law of Trusts in Canada* (2nd ed, 1984) 550.

[750] See Picarda (n 77) 12, suggesting that the Preamble took its inspiration from a 14th century poem.

public works, local taxation, forced labour, and the criminalization of vagrancy.[751] The Elizabethan Parliament defined the concept of a charitable use in 1601, in a way that was explicitly designed to reflect, and draw philanthropic resources towards, the governmental agenda of the day.[752]

From 1601 until the middle of the twentieth century, however, the task of articulating the legal meaning of charity fell largely to the independent courts. In both EW and Canada, the courts developed and refined the common law concept of a charitable purpose in the course of adjudicating disputes over the validity of charitable trusts, the application of mortmain legislation, and, eventually, the application of tax legislation. Over the course of several centuries, the judicial practice of drawing analogies to the Preamble list, and analogies to those analogies, produced a legal concept of charity that would have been neither within the intention nor the imagination of the Elizabethan Parliament. In 1891, Lord MacNaghten's four-fold classification of charitable purposes - the relief of poverty, the advancement of education, the advancement of religion and 'other purposes beneficial to the community' - effectively replaced the Preamble as the starting point of the law.[753]

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[751] See Blake Bromley, '1601 Preamble: The State's Agenda for Charity' (2002) 7 Charity L & Practice Rev 177, arguing, among other things, that the Statute's protection of gifts for 'the relief, stock or maintenance of houses of correction' was designed to support Elizabeth I's broader policy of criminalizing vagrancy and punishing the able-bodied poor. See also Chesterman (n 72) 18.

[752] See Nathan Report, 18, noting that the Statute of Elizabeth 'formed part of a concerted plan for dealing with the economic and social problems of the day.' See also Fremont-Smith (n 132) 26.

[753] See *Vancouver Society* (n 140) [144]; text of n 140.

The courts also developed a new charity law doctrine in the twentieth century, which placed some distance between the legal definition of charitable purposes and the government policy realm. According to the political purposes doctrine, charities cannot have as a principal purpose to further the interests of a particular political party, or to procure changes in domestic or foreign law, or to procure reversals of government policy or of particular government decisions.[754] It is also generally accepted that an institution whose purpose is to *promote* the maintenance of an existing law or government policy falls within the scope of the prohibition.[755] Thus, in *Re Hopkinson,* the English Chancery Division held that a gift to four members of the ruling Labour party, to be applied for the advancement of adult education with reference to a Labour Party memorandum, was intended to secure a certain line of political administration and policy and was not charitable.[756] Similarly, in *Re Co-operative College of Canada,* the Saskatchewan Court of Appeal concluded that a college that (like the incumbent government) encouraged the 'specific economic principles' of co-operatives and credit unions was not charitable, holding that any effort to change existing laws, enact new laws, or to 'resist any such change or enactment' would fall outside the concept of charity.[757]

While the political purposes doctrine prevents charities from having the furtherance of government policy as a principal purpose, it does not prevent charities from

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[754] *McGovern v A-G* (n 379) 340.

[755] See the discussion in Picarda (n 77) 240.

[756] *Re Hopkinson* [1949] 1 All ER 346 (Ch) 350.

[757] *Re Co-operative College of Canada et al and Saskatchewan Human Rights Commission* (1975) 64 DLR (3d) 531 (Sask CA) [21]. *Re Hopkinson* was also referred to with apparent approval.

furthering the *same* policies as government, nor from assisting government in its own policy implementation. As the Nathan Committee noted in 1960, the theory of 'mutual exclusiveness' as between charitable and government functions was pressed for a time by the Court of Chancery, which sought to prevent charitable endowments from being applied in relief of rates to a greater extent than necessary.[758] However, the theory was at odds with the fact that some of the charitable uses listed in the Preamble, such as the repair of bridges, had been provided by local authorities for centuries, and that others, such as assisting the poor in the payment of their taxes, were directly in aid of the National Revenue.[759] The theory was (and is) also at odds with the endlessly shifting scope of the government's welfare role, which ensures that functions that are, at one time, understood to be charitable may, at another time, come to be understood as the responsibility of the state. The theory of mutual exclusiveness as between charitable and government functions never gained much ground, therefore: a charitable purpose may coincide with an existing government policy if it otherwise meets the common law test.[760] However, the courts (and later the Charity Commissioners) maintained a preference for applying charitable resources to purposes that fell outside the government's mandatory functions when they settled cy-près schemes.[761]

[758] Nathan Report, 157-8.

[759] Picarda (n 77) 201-2, citing *Newland v A-G* (1809) 3 Mer 684, 36 ER 262 and others.

[760] Jonathan Garton, 'Charities and the State' (2000) 14 Trust L Int'l 93 32. Since the motive of the settlor or founder is irrelevant to the charitable nature of a gift, it will be irrelevant that such settlor desires to further government policy through their charity: Picarda (n 77) 24.

[761] Nathan Report, 157.

By the mid-20th century, then, the courts had assumed most of the responsibility for the legal definition of charity, and had placed some degree of distance between that definition and the government policy realm. The trend that has characterized the last half-century, however, has been the shifting of control over the legal definition of charity to *outside* the judicial domain. A number of factors have contributed to this shift, including the rise of systems of charitable registration and the role of charities regulators therein, the cost of appealing regulatory decisions,[762] and (in Canada) the general failure of the provincial attorneys general to bring charity law matters before the courts. The shift may also be seen to reflect varying degrees of dissatisfaction with the methodology of analogical reasoning through which the common law definition of charity has developed, and with the disjuncture between the objects that the common law considers charitable, and those that are, in fact, of special importance to contemporary societies.[763] Canada and EW have both experienced this shift away from judicial control over the legal definition of charity, but each has filled the gap left by this shift in a different way. The legal and institutional framework within which the definition of charity is interpreted and applied in each jurisdiction affects the capacity of each jurisdiction's government to align the resources of the charitable sector with its own policies and programs.

b. Government influence over the definition of charity in EW

Until quite recently, the Statute of Elizabeth remained the most up-to-date statement of the purposes that the English Parliament considered charitable at law. The Charitable Trusts

[762] See Mitchell, 'Redefining Charity' (n 612) 31.

[763] For an exploration of the particular disjuncture that exists in Quebec, see Kathryn Chan, 'Charitable according to whom? The clash between Quebec's societal values and the law governing the registration of charities' (2008) 49 Les Cahiers de Droit 277.

Act 1853, which established the jurisdiction of the Charity Commissioners, defined the term 'charity' by reference to 'the meaning, purview or interpretation' of the seventeenth century statute.[764] Despite the issuance of several subsequent reports recommending a 'new' statutory definition of charity,[765] the 1960 and 1993 versions of the Charities Act defined charitable purposes as 'purposes which are exclusively charitable according to the law of EW,[766] leaving the Preamble and existing case law in place.

Once the Charity Commission became responsible for maintaining the official register of charities in 1960, however, it effectively replaced the judiciary as the body with primary responsibility for determining questions of charitable status.[767] Over time, the Commission came to the position that it had 'the same powers as the court' to recognize new purposes as charitable in the carrying out of its registration function.[768] In the absence of any official opposition to that view, the Commission became the institution that effectively set the parameters of the charitable sector in EW. During the years prior to 2006, the Commission exercised its perceived powers to recognize new charitable purposes actively, adding the relief of unemployment, the promotion of community capacity building, the promotion of human rights and other purposes to the definition's

[764] CTA 1853, s 66.

[765] The Nathan Report and the 1976 Goodman Report both recommended a statutory definition: see Driscoll (n 211) 48.

[766] CA 1993, s 93.

[767] While the Commissioners of Inland Revenue and the Commissioners of Customs and Excise also had to decide whether institutions were 'charities' for purposes of various statutory schemes, the Charities Acts provided that any institution registered by the Charity Commission was conclusively presumed to be a legal charity: see Mitchell, 'Redefining Charity' (n 612) 31.

[768] Charity Commission, *RR1a – Recognising New Charitable Purposes* (October 2001).

fourth head.[769] It also determined in the *Trafford and Wigan* decision that if an organization was otherwise exclusively charitable and independent, it could have as its purpose 'a function or service that a governmental authority had a responsibility to provide.'[770] The recognition that public service delivery was a valid charitable objective marked 'a new juncture in state/charity relations'[771], as Dunn notes, extinguishing any embers of the theory of mutual exclusiveness as between charitable and government functions. And while the Commission was careful to assert its neutrality in carrying out its registration function, many of the purposes it recognized had a 'distinct public policy theme'.[772]

The Charity Commission's status as the primary developer of the legal definition of charity in EW changed somewhat with the enactment of the Charities Act 2006. The English Parliament seized upon its political opportunity to redraw the outer boundaries of the charitable sector, making EW only the third Commonwealth jurisdiction to adopt a statutory definition of charitable purposes since the time of Elizabeth I.[773] Pursuant to section two of what is now the Charities Act 2011, a purpose may be charitable if it falls within one of thirteen 'descriptions of purposes' set out in section three.[774] Section three's

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[769] Dunn (n 702) 252. See also Driscoll (n 211) 53-54.

[770] *Decisions of the Charity Commissioners for EW made on 21 April 2004: Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust (Trafford and Wigan).* [6.1.5]

[771] Dunn (n 702) 253.

[772] ibid 252.

[773] The first and second were Barbados and Scotland: see Lloyd (n 403) 3.

[774] CA 2011, s 2(1)(a). The purpose must also be for the public benefit within the meaning of s 4: see s 2(1)(b).

list begins with a slightly modified version of the first three *Pemsel* heads: the relief and prevention of poverty, the advancement of education, and the advancement of religion.[775] It continues with nine other descriptions of purposes, which are largely, but not entirely, a 'restatement' of purposes that the courts and the Commission had already recognized as charitable under the 'fourth head' of the *Pemsel* test.[776] The list concludes with a 'catch-all' provision, which specifies that the definition of charitable purposes includes any purpose that was recognized as charitable prior to the coming in force of the Charities Act 2006, and any purpose that may 'reasonably be regarded as analogous to' an existing charitable purpose.[777]

At one level, the definition of charitable purposes in the Charities Act 2011 can be seen as a re-assertion of the perennial power of the legislature to direct the charitable sector towards the ends of its choosing. While section three's list does in large part restate purposes that had previously been recognized as charitable by the courts and the Commission, it is nonetheless a *statutory* list, which emerged from a long and contentious process of democratic deliberation.[778] Moreover, the statutory definition alters the common law status quo in several material respects. It provides, for example, that the 'religions' that a charity may properly advance include multi-deity and non-deity faiths; this position had little support in the common law jurisprudence, and was the subject of

[775] CA 2011, s 3(1)(a)-(c). The 'prevention' of poverty is a new addition: see Driscoll (n 211) 56-58.

[776] Driscoll (n 211) 55.

[777] CA 2011, s 3(1)(m).

[778] See Lloyd (n 403) 15, noting that the statutory list of charitable purposes and public benefit test were the 'most high profile and hotly debated elements of the new legislation'.

extensive legislative debate.[779] The Act also makes the advancement of amateur sport (and of health-promoting mental games such as chess) charitable, an extension the Supreme Court of Canada has been unwilling to carry out by judicial analogy.[780] Finally, the Act undoes the link drawn by the common law between the definition of charitable purposes and the Statute of Elizabeth, and makes its own list of purposes the starting point for any extension of the definition by analogy.

While the Charities Act 2011 reasserts Parliament's ultimate sovereignty over the legal definition of charity, however, it does little to enable the English government to shift the boundaries of the charitable sector, on an ongoing basis, in accordance with the government's own shifts in policy. The Act's preservation of the common law method of analogical reasoning has admittedly ensured that the Charity Commission will continue to enjoy substantial discretion in the exercise of its charitable registration function. However, in view of its relative specificity, the new statutory definition of charity must be said to have *reduced*, not increased, the scope for the Commission to use personal assessments in its application.[781] The enumeration of thirteen descriptions of charitable purposes has made the outer boundary of the English charitable sector less malleable and discretionary than it was before 2006.

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[779] CA 2011, s 3(2)(a). The question of how far the concept of religion should extend was a matter of extended Parliamentary debate: see Driscoll (n 211) 59.

[780] CA 2011, s 3(1)(g), 3(2)(d). Cf *AYSA* (n 213).

[781] See Denis Galligan, *Discretionary Powers* (Clarendon Press 1986) 8-9, arguing that the concept of discretion is based around two variables: the scope for personal assessments in the course of a decision, and the extent to which such assessments are accepted as final and conclusive by other officials.

In addition to establishing a detailed definition of charity, the Charities Act 2011 places a number of institutional barriers in the way of the Commission's discretion becoming subject to political influence. While the Charities Act 2011 does not make the Charity Commission a wholly independent body, it does constitute the Commission as a non-ministerial government department, and specifically provides that in the exercise of its functions 'it shall not be subject to the direction or control of any Minister of the Crown or of another government department.[782] The Act also goes a long way in ensuring that the Commission remains oriented towards the goal of promoting the public interest in charity property, providing, among other things, that the Commission must carry out its registration function in a manner consistent with its statutory objective of increasing public trust and confidence in charities.[783] Finally, the body to which the Commission's registration decisions are appealable in the first instance is the First-Tier Tribunal (Charities), an independent judicial body with the power to quash the Commission's registration decisions;[784] as we have seen, the Commission's policies on the interpretation of the statutory definition may also be subject to judicial review.[785] All of these measures serve to limit the ambit of official discretion attaching to the definition of charitable purposes in EW, to direct its exercise towards particular ends, and to reduce the risk of it coming under influence by the executive branch.

[782] CA 2011, s 13(4)

[783] CA 2011, ss 14 and 16(1).

[784] CA 2011, sch 6.

[785] See *Independent Schools Council* (n 358).

c. Government influence over the definition of charity in Canada

How does the definition of charity that is operative under the Canadian registered charity regime compare to English law in this regard? As we saw in chapter two, the Parliament of Canada has never exercised its power to determine the substantive purposes that registered charities may carry out. The ambit of the Canadian charitable sector is effectively set by subsections 248(1) and 149.1(1) of the Income Tax Act, which together define the three categories of charities that the Minister of National Revenue may register under the Act.[786] Subsection 149.1(1) defines charitable organizations and foundations by reference to the 'charitable purposes' for which they are constituted and the 'charitable activities' they carry out.[787] However, the Income Tax Act does not specify the meaning of a 'charitable purpose', save to state that it includes the disbursement of funds to defined 'qualified donees'.[788] Similarly, the Act does not define 'charitable activities', although it does clarify that certain business and investment activities are considered to fall within the term.[789] In this absence of substantive legislative content, the meaning of the terms 'charitable purpose' and 'charitable activity' in the Income Tax Act has always been determined exclusively by reference to the common law.[790]

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[786] ITA, ss 149.1(1) and 248(1), 'registered charity' (*organisme de bienfaisance enregistré*).

[787] ITA, s 149.1(1), 'charitable organization' (*oeuvre de bienfaisance*) ; 'charitable foundation' (*fondation de bienfaisance*).

[788] ITA, s 149.1(1), "charitable purpose" (*fin de bienfaisance*).

[789] The ITA specifies, for example, 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: ITA, ss 149.1(1), (6) and (6.2).

[790] For a criticism of this position, see Chan, 'Taxing Charities' (n 52).

Based on the open-ended nature of the Income Tax Act provisions, it could be argued that the Canadian government is more 'hands-off' with respect to its shaping of the charitable sector than is its English counterpart. Unlike the English Parliament, after all, the Canadian Parliament has so far chosen not to articulate the purposes that are charitable at law. The result is that the operative definition of charity in Canada is, in theory at least, almost surreally dislocated from the country's public policy goals; an institution is charitable in Canada if its purposes fall within the spirit and intendment of an ancient statute enacted in a far-off land. Furthermore, unlike the Charity Commission, the CRA does *not* claim to have the same powers as the courts to recognize new charitable purposes, instead taking the position that it must apply the law of charities as it stands.[791] These factors point towards a conclusion that in Canada, the definition of charitable purposes has never reflected the public welfare policy of the Canadian government, and that the development of the concept remains squarely within the purview of the independent courts.

While Parliament has exerted minimal influence over the legal definition of charity in Canada, however, the operative definition is constantly being adjusted and evolved by the regulatory body with primary responsibility for determining the charitable status of institutions. Like the Charity Commission in EW, the CRA is in Canada the main source of decisions, policies and guidance documents on what the term 'charitable' means. Despite its purported lack of power to recognize new charitable purposes, there is little question that the CRA approaches its task broadly, and exercises a broad institutional

[791] Conversation with Blake Bromley, practising charity lawyer (3 March 2013).

discretion in determining the outer bounds of the charitable sphere.[792] The breadth of this discretion is evidenced by the fact that CRA and the Charity Commission often interpret the same common law authorities in a different way; a comparison of each regulator's political purposes policy, for example, reveals that CRA takes a significantly stricter view of the advocacy that the common law prohibits.[793] CRA has extensive policy documents on purposes whose charitable nature has never been addressed in any substance by the courts. It also periodically publishes bulletins with specific examples of 'charitable', and prohibited 'political' activities, which are often perceived by charities as reflecting the particular ideology of the incumbent government.[794]

Against this background, it is significant that the provisions of the Income Tax Act do far less than the Charities Act 2011 to protect the CRA's discretion from becoming subject to political influence. First, compared to the Charities Act 2011 definition of a charitable purpose, the open-ended Income Tax Act definitions provide the CRA with a broad zone of autonomy to determine the parameters of the charitable sphere. Second, the Act does not lay down any charity-specific objectives or duties to guide CRA's application of the statutory terms; the regulator's mandate is simply to support the

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[792] The Agency has developed an extensive collection of policy and guidance documents, which articulate its views on whether and in what circumstances specific purposes are charitable: see Canada Revenue Agency, *Alphabetic index of all policies and guidance*, available online at: http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp_mnn-eng.html accessed Nov 2013.

[793] Cf Charity Commission, *CC9 – Speaking out guidance on campaigning and political activity by charities* (March 2008) and CRA, *CPS-022, Political Activities* (September 2003).

[794] For example, a recent CRA publication entitled 'Distinguishing between charitable and political activities', in illustrating impermissible 'political activity', uses the example of a refugee settlement charity that calls for the government to make application forms for government social programs available in various languages: http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/chrtblpltcl-eng.html.
The author has had conversations with members of the refugee community who interpreted this as evidence of the current government's anti-refugee ideology.

administration and enforcement of the *Income Tax Act*, and it has extensive discretion in that regard.[795] Third, the body to which the Directorate's registration decisions are appealed in the first instance is the Charities Redress Section of the Tax and Charities Appeals Directorate; this is an internal division of the CRA whose decisions and policies are not generally available to the public. Finally, unlike the Charity Commission, the CRA is a *ministerial* government department, which is subject to the direction and control of the Minister of National Revenue. All of these characteristics of the registered charity regime serve to expand the ambit of official discretion respecting the definition of charitable purposes in Canada, and to increase the risk of it coming under executive influence.

4. Mechanisms of co-optation: the creation of statutory charities

A second modern phenomenon that tends towards the definitional or existential co-optation of charitable resources by government is the proliferation of statutory charities. It is the legislative branch of government that constitutes statutory charities, and that defines their purposes and their domestic rules. As such, a government that establishes statutory charities increases its potential to align the resources of the charitable sector with its own policies, and to subject charities to its influence and control.

[795] *Canada Revenue Agency Act*, SC 1999, c 17, s 5(1).

a. Historical roots

It has long been settled that the constituting instrument created by a charity's settlor or founder is the primary source of rules for the administration of property dedicated to charity.[796] A charity's constituting legal instrument (often called a charitable instrument) enshrines the particular charitable objects the charity is bound to pursue. It also sets down the charity's fundamental rules of governance, and may include detailed directions about how charity property is to be held and managed, how the property's managers are to be selected, how disputes over the charity's governance are to be resolved, and how the property should be distributed if the charity is wound up.[797] Whether the charitable instrument takes the form of articles of association, a trust deed, a constitution, a Royal Charter, or an Act of Parliament, the principle of the document's primacy remains the same. When we are considering the extent to which the law of charities enables government to subject charities to its influence and control, therefore, it is important to consider the role that the executive and legislative branches of government play in the creation of these instruments.

Looking back at the history of this matter, we must draw a distinction between the role that government played in the creation of charitable corporations and charitable trusts. Maitland points out that as unincorporated creatures, charitable trusts 'asked nothing and obtained nothing from the State.'[798] Their existence was the automatic consequence of a

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[796] See, for example, Luxton, *The Law of Charities* (n 389) 256.

[797] As we saw in chapter two, in the case of a charitable corporation, the charitable instrument may also appoint a 'visitor' to interpret and apply these directions.

[798] FW Maitland, 'Trust and Corporation' in David Runciman and Magnus Ryan (eds), *State, trust, and corporation* (Cambridge University Press 2003) 118.

settlor communicating his intention that certain ascertainable property be held on trust for charitable purposes.[799] The common law required only that the courts be competent to control and reform the charitable trusts that were created.[800] While government was presumably always competent to create charitable trusts for its own purposes, provided they remained within the jurisdiction of the courts, this does not appear to have been a common practice in either EW or Canada. In general, therefore, it seems fair to say that *individuals* settled charitable trusts within the common law tradition, and that government had little scope for influencing the particular objects or rules of governance that settlors chose. It is perhaps for this reason that the Chancery court sometimes referred to charitable trusts as 'private charities' when comparing them to charitable corporations.[801]

Government historically played a far greater role in the creation of charitable *corporations*, which depended for their very existence on the Crown. As we noted in chapter two, the granting of corporate status was historically a royal prerogative in English law. The incorporation of an English corporation could therefore technically only be accomplished by the consent of the sovereign, and was in practice accomplished by a grant of letters patent, a Royal Charter, or the enactment of a special Parliamentary Act.[802] A significant effect of this government involvement, as we saw in chapter two, was to insulate charitable corporations from judicial supervision by replacing it with visitatorial

[799] Waters and others, *Waters' Law of Trusts in Canada* (n 493) 140.

[800] *Anti-Vivisection* (n 126) 232 (Lord Simonds) ('One of the tests, and a crucial test, whether a trust is charitable, lies in the competence of the court to control and reform it.')

[801] *A-G v Smart* (n 190).

[802] See n 195 and accompanying text.

supervision. The rule that a charitable trust must be subject to the controlling power of the court did not apply to charitable corporations at common law, and the court could not alter or inconsistently with any trust established by government. By creating charitable corporations, in other words, the government could effectively control both the objects towards which charitable resources were devoted, and the manner in which they were administered.

Today, the English and Canadian governments only rarely establish charities by Royal Charter.[803] The practice of establishing charities by statute, however, has continued apace. Museums, libraries, art galleries, hospitals, universities and colleges are among the charitable institutions that are commonly established or continued by statutory instrument in the present day.[804] These statutory instruments vary widely, and a comprehensive study of their contents is far beyond the scope of this chapter.[805] It seems fair to assume, however, that as creatures of the legislature, statutory charities are particularly likely to act in furtherance of specific government policies and programs, and to be subject to government control. The question addressed in this part is whether the modern law of charities in either EW or Canada does anything to limit this co-optative potential.

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[803] Privy Council Office, 'Applying for a Royal Charter' http://privycouncil.independent.gov.uk/royal-charters/applying-for-a-royal-charter/ (accessed December 2012).

[804] See, for example, the British Library Act 1972 and the Museums and Galleries Act 1992. In Canada, see An Act respecting the National Sanitarium Association, SC 1896, c 52; National Arts Centre Act, RSC 1985 c N-3. Some, although not all, of the more recent Canadian statutes 'deem' these institutions to be registered charities.

[805] Cliff Goldfarb has recently written a useful overview of statutory corporations in Canada: see C Goldfarb, 'Special Challenges of Special Act Corporations' (CBA National Charity Law Symposium, Toronto 2013).

b. The treatment of statutory charities in EW

There are two major ways in which English charity law limits the ability of the English government to constitute statutory charities as instruments of its own welfare policy; both stem from the definition of charity set out in the Charities Act 2011. First, by preserving the pre-enactment case law on the meaning of charity, the Act's list of charitable purposes implicitly incorporates *Re Hopkinson* and the related case law on 'pro-government' political purposes. While the modern reach of these decisions is not beyond debate, the Charity Commission has made it clear that it interprets them broadly, and that it identifies a link between political purposes and government control. Publication RR7, *The Independence of Charities from the State,* summarizes the Commission's views in this regard. In order to be a charity, the publication states, a body must exist in order to carry out its charitable purposes, and not for the purpose of carrying out the policies or directions of a governmental authority.[806] If a body with a stated charitable purpose is constituted in terms that enable a government authority to make political determinations about what services the body will provide and who will benefit from those services, the Commission is likely to conclude that the body is not a charity at all.[807] Factors that may indicate an unstated, non-charitable purpose include restraints on the trustees' ability to reject funding on the terms proposed, restraints on the trustees' ability to discuss business in confidence, the existence of trustees with a conflict of interest, and a lack of discretion on the part of the trustees to select beneficiaries for the services provided.[808]

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[806] Charity Commission, *RR 7 - The Independence of Charities from the State* [5].

[807] ibid [6-7].

[808] ibid [8].

The second way in which the Charities Act 2011's definition of a charity limits the ability of government to construct statutory charities as instruments of public welfare policy is by requiring that all charities be subject to the controlling power of the courts. At common law, as we have seen, charitable corporations could be constituted so as to avert this jurisdiction, and this remained the case under the Charitable Trusts Act 1853.[809] In 1960, however, the English Parliament expressly extended the stricter trust law rule to charitable corporations that wanted to register, incorporating the requirement of subjection to the control of the courts into the general definition of charity under the Act.[810] This extension continues in the Charities Act 2011, which provides in section one that in order to qualify as a charity, an institution must not only be established for purely charitable purposes, but must also 'be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities'.[811]

The meaning and significance of this definitional provision have only been closely considered in one case. In *Construction Industry Training Board v A-G,* a corporation that had been established by ministerial order under the Industrial Training Act 1964 for the purpose of providing training to persons in the construction industry applied to be entered on the register of charities. The regulator refused the Training Board's application, on the ground that institutions set up under the statutory instrument in question were not subject

[809] The CTA 1853 did not define charity, in other words, by reference to the supervisory jurisdiction of the courts: see CTA 1853, s 43.

[810] Charities Act 1960, s 45(1).

[811] Charities Act 2011 s 1(1)(b).

to the High Court's control. On an appeal by the Attorney General, the Court of Appeal agreed that the effect of the definitional provision was to exclude from the statutory definition of charity any institution that by its terms 'substantially ousted the jurisdiction of the court', for example by leaving control of the institution in the hands of the executive branch of government.[812] The Court split in the result, however, with the majority holding that the relevant provisions of the Industrial Training Act 1964 did not oust the court's charitable jurisdiction over the Training Board.[813]

The *Construction Industry* case arguably sets the bar fairly high for the ousting of the court's charities jurisdiction by statutory instrument. As Russell LJ noted in dissent, the statute at issue in that case required the Board to submit proposals as to the functions it would carry out for the approval of the Minister of Labour. It also empowered the Minister to appoint the board's directors, to approve the remuneration of its chairman, and to remove directors in specified circumstances.[814] However, as the majority noted in concluding that the statute did not oust the court's jurisdiction, the Industrial Training Act 1964 did not give the Minister any means of controlling how the board *performed* its functions once they were approved.[815] The *Construction Industry* decision may therefore be taken as authority for the proposition that where an institution's constituting statute gives the executive branch of government broad authority to control the institution's trustees or directors in the exercise of their functions, that institution will not qualify as a

[812] *Construction Industry* (n 136) 181-2, 188.

[813] ibid 187-8.

[814] ibid 182-183.

[815] ibid 188.

charity under the Charities Act 2011.[816] In this way, the statutory definition of charity acts as a limit on government influence and control.

c. The treatment of statutory charities under the registered charity regime

Turning to the Canadian context, it is arguable that the first definitional element that serves to limit government control of statutory charities in EW is also applicable under the registered charity regime. The Income Tax Act, as we have seen, defines registered charities primarily in terms of the 'charitable purposes' and 'charitable activities' they must carry out.[817] The courts and the CRA interpret these terms by reference to the common law tradition in every Canadian province, and rely heavily on English law in doing so. If a Canadian court was faced with an argument that an applicant for registered charity status was *not* a charity because it was constituted for the purpose of carrying out or maintaining the policies or directions of the government that established it, therefore, it would need to address the effect of *Re Hopkinson* and *Re Co-operative College of Canada*. However, the only party that would generally be in a position to *make* such an argument would be the Charities Directorate itself,[818] and, rather unsurprisingly, this

[816] The case also suggests that certain grants of visitatorial authority may also place an institution outside the statutory definition of charity: ibid 188.

[817] *ITA,* s 149.1(1), "charitable organization" (*oeuvre de bienfaisance*) ; "charitable foundation" (*fondation de bienfaisance*).

[818] This is because the applicant for registered charity status would be arguing that it *was* a charity. It is possible that a third party could intervene to make such an argument, but such intervention is very rare in registered charity appeals.

delegate of the Minister of National Revenue has never take a public position on the independence of charities from the state.

With regard to the Charities Act 2011 requirement that all charities be subject to the controlling power of the courts, the parallels between the Canadian and English regimes cease. Neither section 149.1 nor any other provision of the Income Tax Act requires that registered charities be subject to the charities jurisdiction of the superior courts. It is of course arguable that to the extent the common law is the proper source of meaning for undefined terms in the Act, a trust will not be 'constituted and operated exclusively for charitable purposes' within the meaning of the statute unless the courts remain competent to control and reform it. As we have seen, however, the common law provides far less support for the argument that a *corporation* constituted for charitable purposes must be subject to the charities jurisdiction of the superior courts. In the absence of any statutory extension of the trust law rule, it must be concluded that the Canadian registered charity regime permits the creation of statutory charities that are substantially controlled in the exercise of their functions by the executive branch of government, provided they do not have an unstated, non-charitable purpose.

What are the implications of this seldom-noted distinction between the English and Canadian regimes of charities regulation? To answer this question thoroughly, one would need to undertake a detailed study of the instruments constituting the statutory charities in each jurisdiction, and assess the level of governmental control built into each. For a taste of where such research might lead, however, it is instructive to consider the status of one

Canadian educational institution that has been found to meet one of the tests of publicness described in part two. Douglas College is a post-secondary college in British Columbia falling within the purview of the province's College and Institute Act. In the early 1990s, in the context of a constitutional challenge to the college's mandatory retirement policy, the Supreme Court of Canada considered the question of whether the college was subject to the Canadian Charter of Rights and Freedoms. Having considered the college's constituting statute, a unanimous court held that this issue could be 'quickly disposed of':

> … As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact.[819]

The important point for our purposes is that despite this high-profile, Supreme Court of Canada ruling that Douglas College was established to implement government policy and was controlled by the government to the point of being its agent, the college at all times maintained its registered charity status under the federal Income Tax Act.[820] While a variety of explanations might be offered for this situation, including mere inadvertence on the part of the regulator, a perusal of the Canadian charities register, suggests that Douglas College is not the only government-directed institution with registered charity status. The more likely explanation, therefore, is that already adverted to: the only limitation that the ITA places on the creation of government-controlled statutory charities stems from the

[819] *Douglas/Kwantlen Faculty Assn. v. Douglas College* [1990] 3 SCR 570.

[820] See Canada Revenue Agency, 'Charities Listing' <http://www.cra-arc.gc.ca/chrts-gvng/lstngs/menu-eng.html> ('Douglas College').

incorporated common law rule that charities may not carry out pro-government political purposes, and the registered charity regime gives this rule little force or effect.

5. Mechanisms of co-optation: charities and the contract culture[821]

A final modern phenomenon that tends towards the co-optation of charitable resources by government is the exertion of government influence over the administration of charities through the negotiation and implementation of service delivery agreements, and through the appointment of government authority trustees. Working within the frameworks of their charitable instruments, trustees and other charity officers must continually make decisions about what activities their charity should carry out, who should benefit from those activities, and how those activities should be organized and administered. A government that can influence these decisions through the imposition of contractual terms or the influence of its officers has considerable potential to align charitable resources with its own policies, and to bring even non-statutory charities under its effective control.

We have already seen that in 'post-welfare or 'threatened-welfare' states such as EW and Canada, the practice of contracting out important welfare services to charities and other non-governmental organizations has become increasingly prevalent. The English charitable sector derives well over a third of its income from government sources, with much of this income being made up of payments for the delivery of welfare services that

[821] This is the term used by Debra Morris: see Morris, 'Paying the Piper' (n 702). I arguably use it to describe a broader range of trends.

were formerly the responsibility of the state.[822] In Canada, the number is significantly higher.[823] Historically, much of this government income took the form of block funding grants with few strings attached. Today, however, it is more common for charities to deliver public services on the basis of legally binding service agreements, which often include detailed provisions as to performance targets, financial and reporting requirements, and permissible and impermissible 'advocacy'. [824]

Within this evolving 'contract culture', the co-optation of charitable resources by government is increasingly a source of concern. In an early and important article, Debra Morris noted that the increasing reliance of charities on contracts has meant 'increased intrusion into [their] general management and goal-setting processes.'[825] The more dependent that charities are on contract funding, the more pressure they will feel to direct their charity's resources in ways that reflect the agenda and priorities of the purchaser of their services. Studies have found that charities routinely undervalue their services in order to win government contracts, 'topping up' the contractual payment with other charitable income, and thereby subsidizing core welfare services with charitable funds.[826] Some charities claim that government has bullied them into accepting unfair contract

[822] Dunn (n 702) 251.

[823] Government funding constitutes over half of the revenue of Canada's community nonprofit sector: Satellite Account of Nonprofit Institutions and Volunteering Statistics Canada (2004).

[824] Morris,'Paying the Piper' (n 702) 125. In Canada, see the submission of Imagine Canada to the Blue Ribbon Panel on Grants and Contributions (2006), available online at http://www.imaginecanada.ca/files/www/en/publicaffairs/final_blue_ribbon_panel_aug_2006.pdf. (accessed Nov 2013).

[825] Morris,'Paying the Piper' (n 702) 128.

[826] ibid 136, and the empirical studies reviewed therein.

provisions.[827] Charities that carry out work under contract with government also complain of restrictive or inappropriate performance measures, limitations on their advocacy ability, and excessive prescription of their organizational practices. [828] All of this suggests that the greatest threat to charity independence in the modern age may not be *imperium,* but *dominium*: the use of the government's economic power to achieve its aims.[829].

The pressures that have been placed on charities by the trend towards contract-based, limited-term funding have only been exacerbated by the practice of appointing government authorities and their representatives as charity trustees. The latter practice, though little discussed in Canada, appears to be relatively common in the present day.[830] In a statutory charity, where the method of appointment of trustees or directors is generally established by the legislature, provision is often made for trustees to be appointed by government authorities. Individual charity founders may also choose to appoint a government authority as the sole trustee of their charity because the authority knows the local beneficiary population, has the power to rezone the charity's land, or represents a potential source of additional funds for the charity's operations.[831] A charity founder may choose to give a government authority the power to appoint one or more

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[827] ibid 126.

[828] Cairns (n 710) 38-41.

[829] For a classic discussion on the government's use of *dominium,* see T Daintith, 'Regulation by Contract: the New Prerogative' (1979) 32 Current Legal Problems 41.

[830] Charity Commission, *OG 56 A1 - Local Authorities and Trustees: an Overview* (March 2012) [2]; Goldfarb (n 805) 5-6.

[831] Charity Commission, *OG 56 C1 - Local Authorities and Trustees: Advantages and Disadvantages of a Local Authority acting as Sole Trustee* (March 2012) [2].

nominees to the charity's board for the same reasons, or because such appointment will ensure the representation of a broad-based political view.

While the appointment of government authority trustees may produce advantages for charities, it also increases the likelihood that those charities will become subject to government influence and control. Where a government authority acts as the trustee of a charity in its area, the authority will always face potential conflicts between its duties to the charity, and its general democratic duty to serve the interests of its constituents. Where a local authority is authorized to appoint one or more nominee trustees to a charity, similar conflicts will arise. A party that appoints a nominee trustee to the board of a charity generally expects that trustee to act as its voice on the board,[832] particularly if it is also the nominee's employer. This expectation creates the risk that trustees nominated by a government authority will act in the interests of the officer or body that appointed them, rather than the interests of the charity.[833] These fundamental conflicts came to a head in the recent *Maidment* decision, where a local English council that was the sole trustee of charity land was found to be in breach of trust for selling the land to an investment company, as part of a larger scheme for the redevelopment of the town centre.[834]

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[832] PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 54.

[833] P Luxton, 'Conflicts of Interest in Charity Law' in A Dunn (ed), *The Voluntary Sector, the State and the Law* (Hart Publishing 2000) 285. See also Charity Commission, *OG 56 C2 - Local Authorities and Trustees: Potential Conflicts of Interest which Trustees Nominated by the Local Authority may Face* (July 2000) [1].

[834] *Maidment v Charity Commission,* CA/2009/0001 & 0002 (First Tier Tribunal (Charity)).

Decisions like these were of 'vital importance', the Charity Tribunal emphasized, and could not be taken by those affected by the obvious conflict of interest at play.[835]

a. Historical Roots

The common law of charities does not specifically address the issue of government influence in the administration of charity property. The issue has emerged as a modern issue, which reflects the ways in which the roles of government and charities have become increasingly intertwined. Nevertheless, the common law contains a number of rules that may serve to protect charities from third party influence over the direction of their funds. First, charity trustees are obliged to adhere to the terms of their charitable instrument.[836] Where a trust instrument stipulates that the object of the charitable trust is to provide housing to the elderly, therefore, it will be a breach of trust to apply the fund providing housing to youth, even if the latter project has government funding attached or is supported by the government nominee on the board.[837] Strict liability follows a trustee's failure to adhere to the trust instrument,[838] and the Attorney General may seek an injunction to restrain a trustee from carrying out an act that falls outside the terms of a charitable trust.[839] Where there is no trust, as in the case of some corporate charities, the

[835] ibid.

[836] Warburton and others, *Tudor on Charities* (n 126) 263.

[837] For support of this general principle, see *A-G v The Earl of Mansfield* (1827) 2 Russ 501, 38 ER 423 (Ch). Morris gives a similar example in her piece: see Morris, 'Paying the Piper' (n 702) 129.

[838] Lionel Smith, 'The Motive, Not the Deed' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts : essays in honour of Edward Burn* (1st edn, LexisNexis UK 2003) 65.

[839] *A-G v Ross* [1985] 3 All ER 334.

common law's *ultra vires* doctrine may provide an alternative tool.[840] Depending on the form of the charity and the specificity of the charitable instrument, therefore, the 'duty of adherence' may protect charities against the pressures that mark the contract culture.

The second way in which the common law protects charities from becoming subject to outside influences in the administration of their property is by imposing a duty of loyalty on trustees and other fiduciary officers. The precise scope and function of the so-called duty of loyalty have long been a matter of debate in Anglo-Commonwealth law, with jurists on either side of the Atlantic taking somewhat different views of the duty's parameters.[841] It is agreed, however, that the trustees and directors of charities, like other fiduciary officers, are required to act (or not act) in what they perceive to be the 'best interests' of the charity they serve, and to avoid various situations that might prevent them from acting in that best interest.[842] This general duty is bolstered by a variety of more particularized rules; the best known of these are the 'no-conflict' rule, which requires fiduciaries to avoid all conflicts of interest and duty or duty and duty, and the 'no-profit' rule, which requires fiduciaries to avoid profiting from the fiduciary relationship.[843]

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[840] Modern corporate statutes in Canada and the UK have largely abandoned *ultra vires,* but the doctrine still has a residual application to many companies that are charities: see the Companies Act 2006 (UK), ss 39 and 42. In Canada, the *ultra vires* doctrine arguably still applies to certain provincially constituted charities: see, for example, *Society Act*, RSBC 1996, c 433, s 4(1)(d).

[841] For a overview of this debate and an argument about the true function of the fiduciary duty of loyalty, see Matthew Conaglen, *Fiduciary Loyalty : protecting the due performance of non-fiduciary duties* (Hart Publishing 2010).

[842] Smith (n 838) 73.

[843] Smith (n 838) 55.

In principle, there are at least three offshoots of the fiduciary duty of loyalty that should function to protect charities from experiencing government influence over the actions of their trustees. The first is that a fiduciary may not generally delegate his discretion to determine how the interests of his beneficiaries (or charity) will be best served, nor in purporting to exercise it act under the dictation of another person.[844] As the House of Lords stated in *White v Baugh*, equity does not permit a fiduciary to '[relieve] himself from the fetters imposed upon his own custody and management of the fund, by sharing that management with another, and giving that other as much power over it as himself.'[845] In *Re Partanen Estate,* an Ontario court had occasion to apply this 'no delegation principle' to a charity, refusing an application by the charity's trustees to delegate their discretion to establish scholarships for mining and agricultural students to a university.[846] While the courts have not yet had occasion to address the no delegation principle in a circumstance where government was seeking to influence the expenditure of a charity fund, the strict limitations placed on the delegation of a fiduciary's authority would seem to provide a bulwark against such influence.

A second equitable principle that is potentially relevant to contractual agreements between charities and government is that a fiduciary cannot fetter his discretion by binding himself 'as to the manner in which he will exercise [that] discretion in the future.'[847] Such a fetter does mischief, the Chancery Court has explained, because it prevents a trustee or

[844] Finn (n 832) 21.

[845] *White v Baugh* (1835) 3 Cl & F 44, 6 ER 1354 (HL) 57, 61.

[846] *Re Partanen Estate* [1944] 2 DLR 473 (OHCJ).

[847] Finn (n 832) 25. See also McGhee (ed) (n 146) 10-016.

other fiduciary from exercising his discretion solely according to 'his own conscientious judgment *at the time* as to what is best in the interests of those for whom he is trustee.'[848] Based on this rule, the courts have refused to enforce lease agreements entered into by trustees that gave the lessee the exclusive option to purchase the trust property at a fixed price within a set number of years.[849] While the precise parameters of the principle are unclear, the general prohibition on the fettering of a trustee's discretion might well render unenforceable a contract entered into by charity trustees, which committed the charity to carrying out various government programs for an extended future time.

A final equitable principle, this one highly relevant to the appointment of government authority trustees, is that a fiduciary must avoid situations where his duty to one person conflicts with his duty to another. This 'duty-duty principle' is of more recent provenance than the classic rule regarding conflicts of duty and interest, but it developed by analogy with the earlier doctrine, and thus relies on similar reasoning.[850] In *Bristol & West Building Society v Mothew,* the English Court of Appeal clarified that it has three constituent parts. First, the principle prevents a fiduciary from acting for two principals with *potentially* conflicting interests without the informed consent of both, whether or not there is an actual conflict.[851] Second, the principle requires a fiduciary to avoid situations where there is an *actual conflict* of duty so that he cannot fulfill his obligations to one

[848] Finn (n 832) 25, citing *Osborne v Amalgamated Society of Railway Servants* [1909] 1 Ch 163, 187.

[849] *Clay v Rufford* (1852) 5 De G & Sm 768, 64 ER 1337.

[850] Conaglen, *Fiduciary Loyalty* (n 841) 143.

[851] *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA).

principal without failing in his obligations to the other.[852] Finally, according to *Mothew,* the duty-duty principle encompasses a 'no inhibition principle', which requires a fiduciary to '*not* allow the performance of his obligations to one principal to be influenced by his relationship with the other.[853] By prohibiting charity trustees from seeking to serve both a government and a charity master where such duties conflict, the duty-duty principle would seem to provide charities with a strong protection against having their trustees becoming subject to government influence and control.

However, the seeming robustness of these fiduciary protections is significantly undermined by the difficulties related to their enforcement. There are in practice major obstacles to the application of the no-delegation, no-fettering, and duty-duty principles, which include the evidentiary difficulties of proving that a fiduciary did not exercise independent discretion,[854] and the 'weak and unclear' nature of the remedies available for breaches of the duty-duty rule.[855] The general difficulties involved in enforcing fiduciary principles are exacerbated in the charitable sector, where, as we have seen in chapter four, there is generally no ascertainable beneficiary to enforce them, and the attorneys general are not prone to act. These factors help to explain why, despite the increasing use of government authority trustees and the economic pressure on charity trustees to submit to

[852] ibid 19.

[853] ibid, noting also that 'the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer.

[854] Finn (n 832) 21.

[855] See Conaglen, *Fiduciary Loyalty* (n 841) 158, noting that the remedies for breach of the duty-duty principle are somewhat weak and unclear.

contractual terms put forward by government, there is very little case law in EW or Canada considering the application of the duty of loyalty to charity trustees.[856] In what follows, I will consider whether contemporary English and Canadian law contain any additional tools to protect charities from these pressures.

b. Charities and the contract culture in EW

Before the rise and subsequent retrenchment of the English welfare state, charity law did not devote much attention to the potential difficulties associated with the contractual delivery of welfare services by charities. However, the issues raised by the appointment of government authority trustees for charities were on the radar by the mid-nineteenth century. As a former head of the Charity Commission recounts, the settled policy of Parliament during this period was 'to discourage the appointment of local authorities as trustees because of the risk of confusion between their duties as trustees and as organs of government.'[857] Thus, a series of nineteenth century acts removed municipal corporations from their existing positions as the trustees of charities vested in them, and empowered them to appoint individuals as trustees instead. The Local Government Acts of the period did not authorize local councils to accept charitable trusts.[858]

[856] Luxton suggests that in EW, the dearth of case law on conflicts of interests involving charities is due to the fact that such issues are usually dealt with by the Charity Commission: see Luxton, 'Conflicts of Interests' (n 833) 228. However, there appears to be a similar dearth of case law in Canada: see Clifford Goldfarb, 'Dual Loyalties on Non-Profit Boards: Serving Two Masters' (CBA-OBA National Symposium on Charity Law, Toronto, May 2011) 8.

[857] CP Hill, *A Guide for Charity Trustees* (New and revised edn, Faber 1974) 32.

[858] ibid.

The current legislative position is significantly more permissive, but nonetheless evidences a policy to limit the use of local authority trustees. Pursuant to section 139 of the Local Government Act 1972, a local authority may accept, hold and administer gifts of property for the purpose of discharging any of its functions, or for the purpose of benefiting the inhabitants of its area or of some part of it. However, no local government can act as the trustee of an ecclesiastical charity or a charity for the relief of poverty.[859] In respect of these trusts, Francesca Quint notes, the conflict between the authority's duties to the charity and its democratic duties is considered to be particularly severe.[860] Special provision is made under the Open Spaces Act 1906 and the Charities Act 2011 for the transfer to local authorities of land held in trust for certain charitable purposes of the community.[861] The legislation specifies that such transfers can only be made on terms consented to by the Charity Commission, however, and the policy of the Commission is to consent only where it is satisfied the transfer is 'the most beneficial arrangement for the charity having regard to the need to avoid conflicts of interest to safeguard the charity's property and the beneficiaries' interests.'[862]

Indeed, the Charity Commission seeks, in the exercise of its regulatory authority, to serve as an additional barrier against the threats posed to charities by the trusteeship of local authorities and their nominees. The Commission cannot rightly refuse to register a

[859] Local Government Act 1972, s 139.

[860] Francesca Quint, 'Local Authorities and Charities I: Trusteeship' [1991] 155 LGR 922, 922. See also Commission, *OG 56 A1 - Local Authorities and Trustees: an Overview* (March 2012).

[861] Open Spaces Act 1906, s 3; Charities Act 2011, s 298.

[862] Charity Commission, *OG 56 C1 - Local Authorities and Trustees: Advantages and Disadvantages of a Local Authority acting as Sole Trustee* (March 2012) [4].

charity on the basis that it names a local authority or local authority nominee to its board, unless the evidence indicates that the true purpose of the institution is some 'ulterior non-charitable purpose of the local authority.'[863] Where the Commission exercises its own statutory power to appoint charity trustees, however, it will not appoint a local authority in the absence of some compelling reason for doing so.[864] Charity Commission schemes sometimes provide that the boards of local charities shall include trustees appointed by local authorities. However, the Commission's stated preference in making schemes is 'not to confer a power on local authorities to nominate all or a majority of trustees.'[865]

The Charity Commission also provides significant online resources for local authority and nominee trustees.[866] These resources aim to draw attention to, and ultimately prevent, situations where charity trustees may act in the interests of their government instead of their charity. Thus, the Commission's operational guidance, *Local Authorities as Trustees,* stipulates that unless charitable funds are held for charitable purposes that 'necessarily involve applying them for the statutory functions of the local authority', a local authority cannot, as charity trustee, use charity funds to pay for staff or services required for the discharge of its statutory functions.[867] A related guidance

[863] Charity Commission, *OG 56 B1 - Local Authorities and Trustees: Local Authorities as Trustee* (August 2012) [1].

[864] Charity Commission, *OG 56 A1* (n 860) [2]. In cases of concern the Commission may also ask a local authority trustee to voluntarily stand down: ibid.

[865] Charity Commission, *OG 56 B2 - Local Authorities and Trustees: Issues Conected with the Independence of Trustees, particularly when the Trustees are nominated by Local Authorities* (March 2012) [2.2].

[866] See, for example, the Charity Commission's online 'toolkit' < http://www.charity-commission.gov.uk/Charity_requirements_guidance/Specialist_guidance/Local_authorities/default.aspx#2> (accessed June 2013).

[867] Charity Commission, *OG 56 B1* (n 863) [71].

clarifies that where a local authority officer appoints a trustee to a charity, he or she 'must not expect its appointee to represent its interests. He or she must appoint the individual best fitted to carry out the trusteeship of the charity in question.'[868] And where a nominee trustee has a conflict in relation to any matter, including a conflict arising from his or her employment by or membership of a local authority,'[869] the guidance confirms that he or she should withdraw from any meetings in which the matter is discussed.'[870]

A final set of rules, which protect against the occurrence of breaches of loyalty in *corporate* English charities with local authority trustees, are set out in secondary legislation under the Companies Act 2006. The Local Authorities (Companies) Order 1995 imposes additional regulatory requirements on companies (including charitable companies) that are controlled or influenced by local authorities.[871] Where a local authority has the power to appoint or remove a majority of a corporate charity's board, or where 20% or more of a charity's directors are persons associated with a local authority and more than half of the charity's income or capital is derived from the local authority, the charity will be considered a 'regulated company' under the Order. Among other things, regulated companies are required to give the public notice of the fact that they are controlled or influenced by a local authority.[872] They are not permitted to remunerate their

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[868] Charity Commission, *OG 56 B2* (n 865) [2.1].

[869] Charity Commission, *OG 56 C2 - Local Authorities and Trustees: Potential Conflicts of Interest which Trustees Nominated by the Local Authority may Face* (July 2000) [1].

[870] ibid [2].

[871] Local Authorities (Companies) Order 1995, SI 1995/849.

[872] ibid, art 4.

directors in excess of local authority rates, and they must make all minutes of their general meetings available for public inspection.[873] All of these measures increase the accountability and transparency of corporate charities with local authority trustees, and thus reduce the temptation for their boards to act in the interests of government rather than the charity itself.

In terms of the growing potential for the contractual co-optation of charitable resources by government, the Charity Commission has been attentive to this issue for over fifteen years. In 1998, the Commission published its first guidance on 'charities and contracts', taking the position that while charities could use their resources to supplement government activities, they could not pay for services that the government was legally required to provide at the public expense.[874] The Commission reversed its position on this issue in the *Trafford and Wigan* decision, and held that there was 'no rule of law which prevented trustees entering into a contract with a government authority to carry out a function or service of that authority', whether the authority had a mandatory duty or a discretionary power to provide that service.[875] In entering such a contract, however, the trustees had to consider certain 'guiding principles', including whether the service fell within the objects and powers of the charity, whether the undertaking of the function served the needs of the charity's beneficiaries, and whether the trustees were able to secure proper consideration for the service from the government.[876] Where the service to

[873] ibid, arts 5, 10.

[874] Charity Commission, *CC 37 - Charities and Contracts* (1998). See also Dunn (n 702) 253.

[875] *Trafford and Wigan* (n 770) [6.1.7].

[876] ibid [6.1.7].

be subsidized was a legal responsibility of the government authority, the Commission suggested that the trustees should question 'why such responsibilities are not being carried out', and carefully consider whether the expenditure of the charity's funds to provide the service was the most effective use of the charity's resources.[877]

In March 2012, the principles articulated in *Wigan and Trafford* were confirmed and expanded upon in a rewritten Commission guidance with the revised title, *Charities and Public Service Delivery.* As that document indicates, the Commission does not consider it to be its role to either 'encourage or discourage the delivery of public services by charities.'[878] Nevertheless, the Charity Commission has emerged, on paper at least, as a staunch defender of the independence of charities from government within the prevailing contract culture. *Charities and Public Service Delivery* makes it very clear that charity trustees must not enter into any contract or funding agreement with government unless they are satisfied that its terms are in their charity's best interests. It also addresses the contentious issue of contractual restrictions on advocacy, stating that charities that deliver public services should not feel inhibited from engaging in political activity or campaigning.[879] The thirty-eight page long document closes with a long list of sources of further information and advice, suggesting that this issue is here to stay.

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[877] ibid [6.1.10].

[878] Charity Commission, *Charities and Public Service Delivery – An Introduction and Overview* (March 2012) 2.

[879] ibid 21.

c. Charities and the contract culture in Canada

Unlike in EW, it is difficult in Canada to identify any cognizable policy on either the negotiation of contracts between charities and government, or the appointment of government authority trustees. At the federal level, the negotiation of service delivery agreements between charities and government falls within the scope of the far broader Treasury Board Policy on Transfer Payments. In 2006, a federally appointed 'Blue Ribbon Panel on Grants and Contributions' made a variety of recommendations on how the government could reduce 'the current morass of rules and general red tape' enveloping grants and contributions programs, and the federal government amended its Treasury Board Policy in response. However, neither the report nor the policy distinguishes charities from other recipient organizations, nor does either document place any limit on the substantive 'performance conditions' that the government in entitled to impose.[880] Neither the CRA nor the Ontario PGT has any discernable policy on this issue.

With regard to the issue of local authority trustees, the regulation of municipal institutions is a matter of exclusive provincial jurisdiction in Canada,[881] and thus the wide range of matters that English law addresses under the Local Government Acts are governed, in Canada, by a multiplicity of provincial statutory instruments. An extensive study of these instruments is beyond the scope of this work. For the most part, however, it appears that while Canada's municipal statutes do require elected officials to declare any conflicts or divided loyalties that might arise as a result of their trusteeship of a charity

[880] It is quite possible that there are provincial policies that address this issue in more detail. However, these will have to be the subject of a subsequent work.

[881] Constitution Act 1867, s 92(8).

when voting on matters in council,[882] the statutes do *not* place any limitations on the appointment of local authorities as charity trustees. Indeed, Nova Scotia's Municipal Government Act expressly provides that a local authority may acquire and own property granted or conveyed to the municipality in trust for a public or charitable purpose.[883] British Columbia's Local Government Act similarly allows the board of directors of a regional district to accept property in trust, and specifically authorizes the board to apply for judicial variation of such a trust if the board considers that the trust is 'no longer in the best interests of the regional district.'[884] These enabling provisions seem likely to exacerbate, rather than reduce, the natural conflicts between the democratic and fiduciary duties of government authority trustees.

More significantly, for purposes of this work, the registered charity regime evidences no policy to protect charities from becoming subject to government influence and control, either by virtue of a service delivery contract or by virtue of the appointment or participation of government authority trustees. It is, of course, arguable that any such policy would fall outside federal legislative authority and that the omission is explainable on this basis. However, the federal Parliament has a long track record of 'federalizing' provincial law subjects for purposes of the registered charity regime where such federalization suits its aims. Recent amendments to the Income Tax Act, for example, have introduced several categories of 'ineligible directors', whose appointment to the

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[882] See, in particular, the recent decision of the British Columbia Court of Appeal in *Schlenker v Torgrimson* 2013 BCCA 9.

[883] *Municipal Government Act*, RSNS 1998, c 18, s 50 (1).

[884] *Local Government Act*, RSBC 1996, c 323, s 341.

board of a registered charity constitutes grounds for revocation of its charitable status.[885] Had Parliament so desired, it could presumably have extended the statutory definition of an 'ineligible director' to include local government authorities.

The argument that the registered charity regime evidences little concern to protect charities from government influence in the exercise of their functions receives further support from recent amendments to the Income Tax Act definition of a charitable organization. Pursuant to these amendments, the definition of a charitable organization now excludes any organization that is 'controlled directly or indirectly in any manner whatever' by a person who has contributed over 50% of the capital of the organization.[886] At first glance, this provision would appear to protect charities that receive most of their funding from government from also being controlled by that government, by contractual or administrative means. However, the amendment specifies that the prohibition on donor control does *not* apply to Her Majesty in right of Canada or a province, nor to any Canadian municipality.[887] In light of this specific exemption, one might say that at best, the registered charity regime does nothing to discourage the appointment of government authority trustees for registered charities, nor to prevent other forms of government influence and control.

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[885] ITA s 149.1 (1) 'ineligible individual' (*particulier non admissible*); s 149.1(4.1)(e).

[886] ITA, s 149.1(1) 'charitable organization' (*oeuvre de bienfaisance*) .

[887] ibid.

6. The co-optation of charitable resources by threatened welfare states: a concluding assessment

I began this chapter by acknowledging that this thesis' claims about the hybridity of the charity law tradition – about its alleged ability to maintain a broad, functional equilibrium between individual project pursuit and collective project pursuit in the charitable sphere – face a major challenge in the present day. This challenge stems from a growing consensus that charities are increasingly experiencing regulatory and other government activity that strongly tends towards compelling them to conform to or carry out the public welfare agenda of the state. These *co-optative* pressures and processes, as I have termed them, have always existed in the charitable sphere, but become particularly acute in times like the present, when governments struggle with extensive welfare commitments that they can no longer sustain. They are important to this work because a significant level of governmental co-optation has the potential to disrupt charity law's hybrid equilibrium and to tip charities decisively into the public law sphere.

In light of these concerns, this chapter has sought to advance a theoretical contrast between independent and co-opted charities, and to explore a number of phenomena that may be seen to be contributing to the co-optation of charitable resources by English and Canadian governments in the present day. I have identified two indicia of a co-opted charity: first, that the charity *furthers a specific government policy or program* in carrying out its purposes and activities, and second, that in carrying out its purposes and activities, the charity is *subject to government influence and control*. These indicia of a co-opted charity, as I noted in part two, are indicia that figure prominently in a growing body of Anglo-Commonwealth law concerned with controlling functions of governance by non-governmental institutions. While the extent of this parallel has not been fully explored, the very fact of the parallel implies that there is a relationship between the public-welfare-compliance of charitable projects, and the amenability to human rights liability and judicial review of the charities that carry them out. The more that charitable resources in EW and Canada are co-opted to government welfare agendas, in other words, the more likely it is that charities will be held to public law standards and norms.

The balance of this chapter has been concerned to explore several modern phenomena that tend towards the co-optation of charitable resources, and to consider how, in addressing these phenomena, English and Canadian law either enable government to, or prevent government from, compelling charities to carry out particular public welfare goals. The first modern phenomenon involves the exertion of government influence over the legal definition of charity, and thus over the outer bounds of the purposes and activities that charities are authorized to pursue. In this regard, we have seen that the modern English and Canadian regimes of charities regulation have both continued to base their demarcation of the charitable sector, to a large extent, on the common law concept of charity, a concept that is rooted in a seventeenth century government's public welfare agenda but has been largely shaped by the courts.

Despite this similar starting point, each regime has incorporated and built on the common law tradition in strikingly different ways. The Charities Act 2011 modifies the common law definition of a charitable purpose in several material respects, thereby reasserting the legislature's perennial power to direct charitable resources towards the objects of its choosing. However, the English legislation simultaneously limits the ambit of the discretion that may legitimately be exercised by the Charity Commission in applying this statutory definition, both through the definition's own specificity, and through the statute's articulation of the Commission's objects and functions. The Charities Act 2011 also protects the independence of the Commission itself, thereby reducing the risk of it coming under political influence. In Canada, by contrast, the boundaries of the charitable sector continue in theory to be set exclusively by reference to the Preamble and the decisions of the independent courts. However, the regulator that applies those judicial decisions is a ministerial government agency with no articulated 'charity law' function, whose decisions are appealable at first instance to another division of the same agency. The effect of these structural characteristics of the registered charity regime is to expand the official discretion that is exercised in the application of the legal definition of charity, to increase the potential for political influence, and to make it more likely that the definition will be used as a tool to align charitable projects with the welfare agenda of the state.

If we turn to the phenomenon of governments creating statutory charities, the contrast between the English and Canadian regimes is even starker. At common law, as we have seen, the sovereign's approval was required for the creation of charitable corporations, but such charities could be placed outside the controlling power of the courts. This meant that in respect of this limited but important class of charities, the legislative and executive branches of government could effectively mold the purposes towards which charitable resources were directed, or craft governance rules that left control of the charity in the hands of the state. The Charities Act 2011 limits the government's ability to construct statutory charities in this way, by requiring that *all* charities be subject to the controlling power of the courts. The Charity Commission has also developed policies on identifying charities with an unstated, non-charitable purpose of carrying out government policies. The Canadian registered charity regime, by contrast, is silent on these matters, and has not extended the rule regarding the controlling power of the courts to charities that are not trusts. While it conceivable that a Canadian court might prevent the co-optation of a statutory charity by reading the common law authorities on pro-government political purposes into the registered charity regime, it is difficult to imagine a judicial context in which such an argument might arise.

Finally, the different approaches that English and Canadian law take to the issue of contractual co-optation and the appointment of government authority trustees evidence the different levels of public-welfare-compliance towards which English and Canadian charities are oriented, and the different levels of government influence and control that each regime is willing to countenance. The common law tradition, as we have seen, imposes a number of duties on charity officers, requiring them to adhere strictly to the terms of their charitable instrument and to act always in what they perceive to be the best interests of their charity. However, in light of the significant obstacles to enforcing these rules in the emerging contract culture, the English Parliament and the Charity Commission have supplemented and operationalized these rules, increasing their impact by associating them with regulatory remedies and publicizing them in language that charity trustees can understand. The Canadian registered charity regime, by contrast, is largely silent on this matter, and to the extent it speaks it is to allow government bodies that contribute the majority of a registered charity's capital to also control them. All of these trends are consistent with the CRA's position on the public benefit doctrine, which, as we saw in chapter three, is that the public benefit of an applicant for registered charity status is measurable, in part, by its consistency with the incumbent government's policy agenda. They allow us to conclude, at the very least, that Canadian law does far less than English law to prevent charitable resources from being co-opted by the state. While the degree of actual co-optation in each jurisdiction is a question for further empirical study, the legal landscape suggests that in Canada in particular, the equilibrium between individual project pursuit and collective project pursuit in the charitable sphere is vulnerable to being upset.

VI. Social Enterprise as a Post-Charitable Legal Form

1. Introduction

The previous four chapters have been concerned with mapping some of the ways and dimensions in which the law of charities partakes of public law and private law. The basic argument has been that the common law of charities was historically a true public-private hybrid, in the sense that it accorded equal or near equal importance to the 'private law' goal of enabling property-owning individuals to improve the world according to their own particular vision, and the 'public law' goal of protecting the public interest in the proper and effective administration of charity property. The English and Canadian regimes of charities regulation have repeatedly adjusted the balance between these competing legal objects, and have added new public interests into the mix. However, this thesis has sought to demonstrate that certain modern trends, including the development of human rights standards and the use of charities to carry out the government's public welfare agenda, are shifting the hybrid composition of charity law towards a significantly more 'public' composition, in which an individual's interest in pursuing his or her vision of the good through a charity is subject to an increasing number of public law constraints.

Modern charity law limits individual project pursuit in additional ways, which have not been addressed by this work. In particular, the restrictions that Canadian and UK tax laws place on revenue generation by charities are increasingly seen as a major constraint on the autonomy of individuals to pursue benevolent projects in the charitable sphere. English charities are entitled to engage in 'non-primary purpose' trading activities to raise funds for their charity's objects, but are not permitted to do so where such trading would involve a 'significant risk' to their assets.[888] Canadian registered charities are significantly more restricted in their revenue-generating ability: charitable organizations and public foundations may have their registration revoked for carrying on business activities that are not 'related' to their charitable purposes, and private foundations may not carry on any business activities at all.[889]

It is in the context of these cumulating constraints on individual project pursuit in the charitable sphere that the thesis turns, in its penultimate chapter, to the growing phenomenon of social enterprise,[890] and its associated legal forms and regimes. If it is indeed true, as this thesis has posited, that the law of charities is increasingly creeping out of the public law-private law border zone and towards the public law pole, one would expect the search to be on for *new* hybrid forms, which strike a finer balance between individual and collective project pursuit in the benevolent sphere. This search, from all appearances, is already in full swing. The United Kingdom, British Columbia, California and New York are on a growing list of jurisdictions that have recently introduced new 'hybrid' vehicles in order to accommodate and encourage economic activity that is concerned, at some level, with improving human society or the welfare of human beings. Governments appear keen to harness a perceived swelling of goodwill within the business

[888] Charity Commission, *CC 35 - Trustees trading and tax: how charities may lawfully trade* (April 2007) [C8].

[889] ITA, ss 149.1(2)(a), 149.1(3)(a), 149.1(4)(a).

[890] There are many competing definitions of social enterprise: see, for example, the range of national definitions set out in Doeringer (n 215) 294. For purposes of this chapter, it will suffice to define social enterprise as economic activity that is concerned with improving human society or the welfare of human beings.

sector, at times casting their new vehicles as adroit legislative responses to a growing demand for ethical entrepreneurship and 'socially focused' investment options.[891]

Whether or not it is plausible to argue that the present generation of business leaders is more altruistic than the last, the findings of this thesis suggest that it is at least equally plausible to characterize the new hybrids as legislative responses to a growing demand for greater individual autonomy in the benevolent sphere.[892] Viewed in this light, social enterprise vehicles may be characterized as a sort of 'post-charitable' legal form, the regulation of which forms a natural postscript to the descriptive focus of this work. Like charities, I claim in this chapter, social enterprise vehicles are legal hybrids. They are hybrids not only in the commonly understood sense that they occupy a place in-between the charitable and the commercial, but also in the sense that they, like charities, occupy a place in-between the public law and private law spheres. From the perspective of the law of charities, social enterprise vehicles represent alternative hybrid compositions of public law and private law elements. A study of these elements is both useful in its own right, and in bringing into sharper focus the particular mix of public law and private law that is embodied in the law of charities.

In addition to the conceptual affinities between charities and social enterprise vehicles, there are a number of practical reasons for rounding out this study of charity law

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[891] British Columbia, Official Report of Debates of the Legislative Assembly, Hansard, 39th Parl, 4th Sess, No 34:2 (16 Apr 2012) 10654-55.

[892] See the Explanatory Notes to the Companies (AICE) Act 2004 [190], describing the CIC as a suitable vehicle for 'those that wish to work for community benefit within the relative freedom of the non-charitable company form'.

with a look at the admittedly early stages of development of the law of social enterprise. First, the proliferation of new social enterprise vehicles is very likely to heighten the already substantial level of public confusion regarding the differences between charities, not-for-profits, and other socially minded organizations. Such confusion is likely to disadvantage charities in particular, since they are the institutions that risk losing existing goodwill and other privileges if they become indistinguishable from other legal forms. In June 2012, Dame Suzi Leather used her final official speech as chair of the Charity Commission to voice precisely this concern about the potential 'blurring of the boundaries' between charities and other legal vehicles with social objectives. If charities become indistinguishable from other types of organizations in the eyes of the public, she suggested, the trust the public places in charities and the privileges they enjoy might well disappear.[893]

The emergence of new social enterprise vehicles, and the blurring of boundaries that this development has already produced, is arguably already having an impact on how charities themselves are regulated. In June 2013, for example, the Parliament of Canada amended a federal law prohibiting the bribery and corruption of foreign public officials, deleting the term 'for-profit' from the statute's definition of a business.[894] A significant effect of this amendment has been to extend the offence of bribing a foreign public official to Canadian charities and other not-for-profits, a move that charities claim will impede

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[893] D Ainsworth, 'Suzi Leather asks in final speech if charities will remain special' *Third Sector Online* (13 June 2012) http://www.thirdsector.co.uk/news/1136346/Suzi-Leather-asks-final-speech-charities-will-remain-special/ accessed 13 November 2012.

[894] *Corruption of Foreign Public Officials Act*, SC 1998, c 34, s 2 (as amended).

their ability to deliver humanitarian aid in foreign jurisdictions.[895] It seems likely that as the border zone between 'for-profit' and 'not-for-profit' institutions broadens, charities will increasingly forego their traditional exemptions from a variety of regulatory regimes.

A final reason why the development of social enterprise vehicles should be of interest or concern to charity lawyers is that these vehicles threaten to divert resources away from the charitable sector. While non-charitable social enterprises do not presently benefit from the significant tax concessions granted to charities, some do have access to special pools of capital, such as the UK government's social enterprise investment fund.[896] The regulatory infrastructure supporting the new vehicles also creates a public expense.[897] The dynamic social enterprise sector is pressing, and will continue to press, for further preferential measures such as social enterprise investment tax credits, and privileged status for social enterprises in government-sponsored business development.[898] Most significantly, the social enterprise sector represents to charities a competing destination for the property of benevolent individuals. If the new social enterprise vehicles succeed in attracting capital to their projects, it will almost certainly be at the charitable sector's expense.

[895] Conversation with Peter Broder, General Counsel, The Muttart Foundation (Vancouver, August 2013). I am grateful to Mr. Broder for bringing this statute to my attention.

[896] Doeringer (n 215) 313.

[897] The most recent annual report of the CIC Regulator indicates that its annual budget is approximately 300,000 pounds sterling: CIC Regulator, Annual Report 2011/12, 17.

[898] BC Social Innovation Council, *Action Plan Recommendations to Maximize Social Innovation in British Columbia* (March 2012) 6-9.

Given the conceptual similarities between charities and social enterprise vehicles, and the likelihood that financial and regulatory resources are to some degree being redirected from the former to the latter, it seems crucial that we better understand how these hybrid phenomena interrelate. This chapter aims to begin that task by examining the regulatory regimes associated with two presumptively *non-charitable* vehicles[899] that have recently been developed specifically for social enterprise purposes: the UK community interest company (or 'CIC') and the British Columbia community contribution company (or 'C3'). Each of these regulatory regimes, I claim, represents an alternative vision of where the equilibrium should be set between protecting the autonomy of property-owning individuals to direct and control their own wealth, and furthering competing public interests. This chapter aims to draw attention to these competing visions, and to begin the project of considering how they compare to charity law's vision of the proper balance between individual and collective project pursuit.

The chapter proceeds in the following way. In part two, I review the legislative history of the CIC and the C3, and summarize the key features of each corporate vehicle and its associated regulatory regime. Following this general review, I examine how specific features of these post-charitable legal regimes compare to the law of charities in terms of their balancing of public law and private law elements. The examination is structured to reflect the inquiries undertaken of charity law in chapters three and four. Accordingly, part three compares the 'community benefit' standards that are built into the CIC and the C3 regimes with charity law's public benefit doctrine. Part four considers

[899] Social enterprise *activity* may take place within both charitable and non-charitable vehicles, but purpose-built social enterprise vehicles are generally not charities.

who is entitled to seek what sort of relief for the misapplication of property held by a CIC or C3. The chapter closes by drawing some initial conclusions about the various hybrid compositions that have been created for social enterprise activity in EW and in Canada, and by considering how each of these compositions reflects a competing vision of the 'public' or 'private' nature of benevolent projects.

2. The Emergence of Social Enterprise Vehicles in EW and Canada

a. The CIC: Legislative History and Key Features

The creation of a new legal form for social enterprise in the UK took place within the broader context of not-for-profit law reform that was described in chapter two. The Strategy Unit's *Private Action, Public Benefit* report, whose recommendations on charity law reform paved the way for the enactment of the Charities Act 2006, also recommended a series of corporate law reforms to 'enable not-for-profit organizations to thrive'.[900] Social enterprises, the report claimed, were a diverse and growing group: some were registered as charities, others were societies with non-distribution constraints, while still others took the form of mainstream businesses.[901] What they shared was a desire to trade in order to build long-term sustainability, and a commitment to 'operate for a social purpose and use their profits to this end.'[902] What they lacked were legal forms of incorporation that would reflect their distinctive ethos, and ensure that their assets were

[900] Private Action, Public Benefit, 49.

[901] ibid 50-51.

[902] ibid 50.

devoted to a public use.[903] *Private Action, Public Benefit* recommended a number of changes to the regulatory regime governing charitable social enterprises, including the relaxation of charity law's trading rules and the introduction of a new corporate vehicle, the Charitable Incorporated Organization.[904] For *non-charitable* social enterprises, however, the report recommended the establishment of a distinct corporate vehicle, which would 'protect assets against distribution to members or shareholders, and create a strong new not-for-profit brand for small-scale, community-based social entrepreneurs.[905] Less than two years later, the government followed through on the Strategy Unit's recommendation, establishing the Community Interest Company (or 'CIC') in the Companies (Audit, Investigations and Community Enterprise) Act 2004.[906]

The CIC is a special breed of limited liability company. Subject to the general regime of English companies law,[907] the CIC is also governed by additional provisions that are designed to ensure that the company will serve a social purpose.[908] Most of these provisions relate in one way or another to the two key features of the CIC form: its mandate to carry out activities that are in the 'community interest', and the restrictions on the distribution of its corporate assets.

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[903] ibid 52

[904] ibid 44.

[905] ibid 49, 53.

[906] Companies (AICE) Act 2004, pt 2.

[907] Companies Act 2006 (UK), ss 1(1), 6(2).

[908] Private Action, Public Benefit, 50.

A CIC may take the form of a company limited by guarantee or a company limited by shares.[909] CIC status is sought upon incorporation; an existing company may also apply to convert to a CIC, provided it makes the required alterations to its name and articles by special resolution.[910] Applications for registration of a company as a CIC are made to the Registrar of Companies, but eligibility for CIC status is determined by the Regulator of Community Interest Companies (the 'CIC Regulator'), an official appointed under the Companies (AICE) Act 2004 by the Secretary of State.[911] In order to be eligible for registration as a CIC, a company must be able to satisfy the CIC Regulator that it meets the community interest test, in that 'a reasonable person might consider that its activities are being carried on for the benefit of the community'.[912] It must not be owned or controlled by a political party or campaigning organization, and its corporate name must include a designation indicating its CIC status.[913] Finally, the company's articles must comply with a number of regulations restricting the distribution of corporate assets.[914]

Despite the fact that many English charities would meet the stipulated requirements for CIC status, a charity cannot also be a CIC. The Companies (AICE) Act 2004 provides that a charitable company may *become* a CIC, with the written consent of

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[909] Companies (AICE) Act 2004, s 26(2)(a). An existing company limited by guarantee with a share capital may also apply for CIC status: s 26(2)(b).

[910] Companies (AICE) Act 2004, s 37(1).

[911] ibid ss 27(2), 36A(1), 38(1).

[912] ibid s 35(2).

[913] ibid ss 33, 36A(2)(b) and (c), 38(2)(b) and (c). Political parties, political campaigning organizations and their subsidiaries are 'excluded companies': Community Interest Company Regulations 2005, SI 2005/1788 (CIC Regulations 2005) reg 6.

[914] Companies (AICE) Act 2004, ss 32, 36A(2)(a), 38(2)(a); CIC Regulations 2005, pts 2 and 3.

the Charity Commission.[915] A CIC may also convert to a charity, provided the shareholders, the Charity Commission and the CIC Regulator agree.[916] However, a company may not simultaneously have the status of a CIC and a charity in the UK, whether or not its purposes are exclusively charitable.[917] This rule was criticized during the legislative debates as confusing, and as inconsistent with the longstanding principle that charitable status is a function of substance rather than form.[918] However, it serves the purpose of clarifying that CICs are in no circumstances 'subject to the benefits or obligations of charitable status, nor…subject to regulation by the Charity Commission or the charitable jurisdiction of the High Court.'[919]

Once a company is registered as a CIC, its directors assume regulatory burdens that are additional to those imposed on all British companies. In particular, CICs are required to prepare an annual 'CIC Report', which is delivered to the Registrar of Companies and placed on the public record.[920] Among other things, the CIC Report must contain a fair and accurate description of the manner in which the company's activities during the financial year have benefited the community.[921] The CIC Report must also

[915] Companies (AICE) Act 2004, s 39. However, a Northern Ireland charity may not become a CIC: s 40A.

[916] Companies (AICE) Act 2004, s 54, 54A-C, 55A-B.

[917] Companies (AICE) Act 2004, s 26(3) ('A CIC established for charitable purposes is to be treated as not being so established, and accordingly is not a charity.')

[918] HL Deb 8 Jan 2004, vol 657, col 277.

[919] Explanatory Notes to the Companies (AICE) Act 2004 [196].

[920] Companies (AICE) Act 2004, s 34(1).

[921] CIC Regulations 2005, reg 26(1).

contain specified financial information regarding the company's asset distribution activities.[922]

Apart from the community interest test, the regulatory restrictions on the distribution of a CIC's assets constitute the most characteristic feature of the UK's new social enterprise regime. The starting point of the regime, and the position that is generally promoted, is that CICs are subject to an 'asset-lock': while a CIC may use its assets for normal trading and business activities, it can not generally transfer any assets out of the company other than for full consideration.[923] The end-of-life provisions applicable to CICs reinforce this general asset-lock rule. Section 53 of the Act provides that a CIC may not cease to be a CIC except by dissolution, or by following the statutory procedure to become a charity or a (not-for-profit) Industrial and Provident Society.[924] Section 23 of the CIC Regulations 2005 provides that where a CIC that is not insolvent is dissolved, its remaining residual assets are to be transferred to another asset-locked body - a CIC, charity, or permitted industrial and provident society - 'in such proportions or amounts as the CIC Regulator shall direct.'[925]

However, the legislation contains significant exceptions to this general asset-lock rule. The first and best known of these exceptions allows a CIC with share capital to pay

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[922] ibid, regs 26-28.

[923] Companies (AICE) Act 2004, s 30(1); CIC Regulations 2005, para 1(1) of schs 1-3.

[924] Companies (AICE) Act 2004, s 53, 54; Community Interest Company (Amendment) Regulations 2009, SI 2009/1942, reg 5.

[925] CIC Regulations 2005, regs 2 ('asset-locked body'), 23. The definition of asset-locked body also includes equivalent bodies established outside the UK.

dividends to its members and pay interest on performance-based debentures issued by the company within the limits set by the CIC Regulator under the Act.[926] The debt interest and share dividend caps are currently set at 10% of the value of a loan and 20% of the paid up value of a share, having been raised after criticism that they were too low to stimulate investment.[927] The aggregate dividend cap is 35 per cent of a company's distributable profits.[928] A CIC may also transfer assets out of the company for less than full consideration where the transfer is to another asset-locked body,[929] or the transfer is 'for the benefit of the community.'[930] A CIC with share capital is entitled to return paid-up capital to its members on dissolution, after satisfaction of the company's liabilities.[931] Finally, while the CIC Regulator takes the position that the 'full consideration' principle applies equally to payments for services,[932] the legislation itself does not place any direct limits on the remuneration of staff or directors. During second reading debates, Lord Phillips of Sudbury argued that this absence of control over remuneration would 'drive a

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[926] Companies (AICE) Act 2004, s 30; CIC Regulations 2005, sch 3, paras 1(2) and 1(3). There are also rules regarding the distribution of assets on winding up, the redemption of shares, and the reduction of share capital: see ibid, regs 23-25.

[927] D Ainsworth, 'Payment cap lifted for community interest companies' (*Third Sector*, 6 January 2010) <www.thirdsector.co.uk/news/975996/> accessed 3 January 2012. The fact that the Bank's lending rate dropped from 4.5% to 0.5% between 2005 and 2009 likely contributed to these criticisms.

[928] CIC Regulations 2005, reg 22(1). Unlike most companies, a CIC may only declare a dividend by ordinary or special resolution of the members: CIC Regulations 2005, regs 10, 17(1).

[929] ibid, schs 1-3, para 1(2)(a).

[930] ibid, schs 1-3, para 1(2)(b) of schs 1-3. The CIC Regulator's guidance document on the asset lock does not specify what type of transfers would be considered for the benefit of the community: CIC Regulator, *Chapter 6: the Asset Lock* (September 2012).

[931] CIC Regulations 2005, reg 23.

[932] CIC Regulator, *Chapter 6: the Asset Lock* (September 2012) s 6.1.5. ('payments to staff and directors must not be disproportionately high in relation to their abilities and the services they perform').

coach and horses through [the] attempt at controlling the distribution of the assets of a CIC.'[933]

b. The C3: Legislative History and Key Features

The move towards a new 'social enterprise era' in British Columbia began in October 2010, when the Ministry of Finance announced that it was considering the creation of a new 'hybrid' company, which would be modeled on the UK's CIC.[934] In the weeks and months that followed, the government announced the creation of Canada's first Parliamentary Secretary for Social Entrepreneurship, a 'Social Innovation Council' drawn from all sectors of the province, and an associated governmental committee.[935] Consultations were carried out on the proposed CIC model, and in March 2012 the Social Innovation Council published its final report, setting out a series of recommendations 'on how best to maximize social innovation in British Columbia.'[936]

The legislature had set the wheels in motion for the establishment of a new social enterprise vehicle even before the publication of the Council's report. On March 5, 2012, the government introduced a series of amendments to the British Columbia Business Corporations Act (BCBCA), which, like the Companies (AICE) Act 2004, would establish

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933 HL Deb 8 Jan 2004, vol 657, col 277 (Lord Phillips of Sudbury).

934 BC Deputy Minister of Finance, 'Community Interest Company (CIC) Consultation' (20 Oct 2010) http://www.fin.gov.bc.ca/prs/cicc/CIC_Consultation_letter.pdf (accessed March 2012).

935 BC Deputy Minister of Finance, 'Province Welcomes Report on Social Enterprise ' (2 Dec 2010), available online at http://www2.news.gov.bc.ca/news_releases_2009-2013/2010FIN0065-001522.html; <http://www.aletmanski.com/al-etmanski/2011/01/bc-government-establishes-advisory-council-on-social-entrepreneurship.html. (accessed March 2012) The office of the Parliamentary Secretary for Social Entrepreneurship has since been 'disestablished'.

936 BC Social Innovation Council, 'Action Plan Recommendations to Maximize Social Innovation in British Columbia' (March 2012).

a new type of corporation to carry out social enterprise activities. 'CIC' was already a moniker used by the government of BC, so the government named the new corporate vehicle the community contribution company (or 'C3'). Bill 23, which contained the relevant amendments, was supported by both sides of the Legislative Assembly, and passed third reading on April 25, 2012 with very little substantive debate.[937] In February 2013, an associated regulation was signed into law, fleshing out further details of the C3 regime.[938] The C3 has been available as a corporate vehicle in BC since July 29, 2013, the date the legislation came into effect.

On the surface, British Columbia's new social enterprise model is very similar to the British model on which it is based. Like the CIC, the C3 is subject to the general regime of corporate law in its jurisdiction, but is distinguished from other companies by its obligation to carry out community purposes.[939] Like the CIC, the C3 is required to publicize its social enterprise status in its corporate name,[940] and to produce a supplemental annual report, containing a fair and accurate description of the manner in which the company's activities benefited society.[941] Finally, like the CIC, the C3 is subject to regulatory restrictions on the distribution of its assets. The BCBCA prohibits a C3 from transferring assets out of the company for less than fair market value, unless the

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937 British Columbia, Official Report of Debates of the Legislative Assembly, Hansard, 39th Parl, 4th Sess, No 34:2 (16 Apr 2012) 10656.

938 *Community Contribution Company Regulation* (BC), Reg 63/2013 (C3 Regulation).

939 BCBCA, s 51.92.

940 BCBCA, s 51.921.

941 BCBCA, s 51.96

transfer is to a charity or other 'qualified entity', is in furtherance of the company's community purposes, or is in accordance with the regulations.[942] At present, those regulations set an aggregate dividend cap of 40% of the C3's profit for a financial year.[943] They also provide that where a C3 is dissolved, 60% of the company's distributable assets must go to another asset-locked entity.[944]

However, the touted similarities between the CIC and C3 models may be less significant than the differences between them. These differences will become apparent in the ensuing sections, as we consider how important doctrinal and procedural features of each model measure up against comparable features of the law of charities. A crucial distinction between the CIC and C3 regimes should nonetheless be flagged at the outset. This distinction is that unlike the Companies (AICE) Act 2004, the BCBCA does not establish a C3 regulator, nor assign to an existing regulator special responsibility for the supervision of C3s. We shall see in part four how this regulatory void affects the remedies that are available for a misuse of social enterprise property, and the range of persons with standing to invoke them. First, however, we shall examine the particular 'community benefit' standards that are incorporated into the CIC and C3 regimes, and consider what the differences between these standards tell us about the public law-private law equilibrium set by each jurisdiction's social enterprise law.

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942 BCBCA, s 51.931.

943 C3 Regulation, s 4(1)(a). A C3 may also bring forward any unused divident amount for any previous financial year: s 4(1)(b).

944 C3 Regulation, s 8.

3. Public Benefit, Community Benefit, and the Substantive public law-Private Law Divide

Charities, CICs and C3s are all subject to a general requirement that they benefit a section of the community. However, the parameters of each regime's requirement differ in significant ways. We have already seen that in order to be eligible for registration as a CIC in the UK, a company must satisfy the CIC Regulator that it will satisfy the community interest test set out in the Companies (AICE) Act 2004. A company satisfies the statutory test if 'a reasonable person might consider that its activities are being carried on for the benefit of the community or a section of the community.'[945] However, the Secretary of State is authorized to adjust this broad test by making regulations that treat certain activities as falling or not falling within its parameters.[946] To date, two rules have emerged from the exercise of this rule-making authority. First, political activities are not to be treated as activities carried on for the benefit of the community, unless they can reasonably be regarded as incidental to activities that otherwise meet the community interest test.[947] Second, activities are not to be treated as activities carried on for the benefit of the community if a reasonable person might consider the activities to benefit 'only the members of a particular body or the employees of a particular employer.'[948]

British Columbia's social enterprise regime imposes a different community benefit standard on companies that wish to be C3s. Pursuant to the amended BCBCA, at least one

[945] Companies (AICE) Act 2004, s 35(2), (5).

[946] ibid s 35(4). Regulations relating to CICs must be approved by resolution of each House of Parliament: s 62(4).

[947] CIC Regulations 2005, reg 3.

[948] ibid reg 4.

of the primary purposes of a C3 must be ‘a community purpose.’[949] The Act defines a community purpose as ‘a purpose beneficial to (a) society at large, or (b) a segment of society that is broader than the group of persons who are related to the C3’, and specifies that the term ‘includes, without limitation, a purpose of providing health, social, environmental, cultural, education or other services.’[950] The persons who are ‘related’ to a C3 are defined as its directors, officers, shareholders, associates, and affiliates.[951] Like the Companies (AICE) Act 2004, the BCBCA also authorizes the Lieutenant Governor in Council to exclude identified purposes from the definition of community purpose by regulation.[952] To date, this regulatory authority has not been exercised.

How are we to evaluate these differing community benefit standards? Given that the standards have been incorporated into two allegedly related social enterprise vehicles, and that both bear a resemblance to charity law’s public benefit doctrine, they would seem to be appropriate subjects for this thesis’ comparative mapping methodology. The particular public law-private law composition of a hybrid legal rule, I have already suggested, is sometimes best discerned by comparing it to another legal rule, whose public or private nature is more readily identifiable. In chapter three, I applied this methodology to the public benefit doctrine, contrasting the rule that charities must act for the public benefit with the quintessentially public law principle that governments must act in the public interest. I argued in that chapter that the two concepts could be compared

[949] BCBCA, s 51.92.

[950] BCBCA, s 51.91(1) ‘community purpose’.

[951] BCBCA, s 51.91(2).

[952] BCBCA, s 51.91(1) ‘community purpose’; s 432(9.1).

according to three criteria: the parameters of the community each rule required its subject to benefit, the identity of each rule's arbiter, and the nature of the interests that each concept allowed its subject to have and pursue. Applying these criteria to the CIC community interest test and the C3 community purpose standard is somewhat more difficult, both because the standards are in an early stage of development, and because the public benefit doctrine to which they are being compared is itself a hybrid rule. Nevertheless, by attempting to analyze the emerging community benefit standards according to these criteria, we may gain some preliminary insights into where each concept might 'sit' on a map oriented around the public law-private law divide.

a. The parameters of the benefiting community

A first way of comparing the particular 'community benefit' rules that apply to charities, CICs and C3s is to consider the parameters of the community that each rule requires its subject to take into account. Unlike government, we saw in chapter three, charities are not generally required to consider the interests or needs of the whole political community; the 'public' that they must benefit is an amorphous group of persons, bounded by a number of negative criteria or rules. These rules stipulate, in the main, that the benefiting community must be a human community, and that it must not be defined by a relational nexus with any particular person or employer. They also stipulate that the benefiting community must not be defined in a manner inconsistent with modern equality norms, and that it must not categorically exclude the poor.

The CIC community interest test is very similar to the public benefit doctrine in this respect. The Companies (AICE) Act 2004 broadly tracks the language of the common law of charities in providing that a CIC must benefit 'the community or a section of the community', while the regulations specify that the benefiting community must not be defined according to a relational nexus with a particular body or employer.[953] Given that 'community benefit' is a statutory concept that is subject to the ECHR, it is also safe to assume that charities and CICs are subject to like restrictions with regards to defining their benefiting communities according to a protected personal characteristic.[954] Unlike charities, CICs are not required to ensure that persons of few means have adequate access to their benefits. Apart from the absence of any reference to the poor, however, the 'community' that CICs must benefit looks very much like the 'public' that charities must benefit; each doctrine limits the autonomy of individuals to define their benevolent projects in a substantially similar way.

If the CIC community interest rule substantially mirrors the public benefit doctrine in its definition of the benefiting community, British Columbia's community purpose standard heads in quite a different direction. The BCBCA does not invoke the language of the law of charities in defining the community that C3s must benefit; instead, it specifies that a community purpose may benefit *any* segment of society 'that is broader than the

[953] CIC Regulations 2005, reg 4.

[954] This view is supported by the CIC Regulator's guidance documents, which indicate that she will take into account possible detriments to the community arising from a CIC's activities, whether or not the affected community is the same community which the CIC aims to benefit: see CIC Regulator, *Chapter 4: Creating a CIC* (August 2012) 23.

group of persons who are related to the C3.'[955] Based on this definition and the broader statutory environment in which C3s will operate, there appear to be only two limitations on the ability of a C3 to define its own benefiting community. First, under the BC Human Rights Code, it will be impermissible in most cases for a C3 to define its community of beneficiaries according to their race, sex or creed.[956] Second, C3s, like charities and CICs, are subject to a 'relational nexus' prohibition. However, the ambit of British Columbia's relational nexus prohibition is far narrower than that of its counterparts: its only effect is to prohibit a C3 from providing benefits *solely* to its directors, officers, shareholders, associates, and affiliates.

Unlike a charity or a CIC, then, a C3 *may* benefit the employees of a particular employer, or the family members of its directors and officers. It may also benefit its own officers and associates without breaching the community purpose rule. The community purpose concept, in sum, places great value on the autonomy of individuals to define what type of benefit their social enterprise will provide and what community will benefit from their project. By contrast, it displays little normative commitment *either* to ensuring that social enterprise meets the needs of the whole community *or* to protecting the social enterprise sector from self-regarding acts. In relation to both the continuum between altruistic and self-regarding projects, and the continuum between public-welfare-compliant and public-welfare-deviant projects, the C3 community purpose standard feels the far greater weight of private law thought.

[955] BCBCA, s 51.91(1) ('community purpose').

[956] *Human Rights Code*, RSBC 1996, c 210, s 8.

b. The nature of the arbiter

The CIC and C3 community benefit concepts can also be compared to the public benefit doctrine in terms of the identity of each concept's arbiter. We have already seen that the issue of 'who decides' what is in the interests of a community is an important issue, which has ramifications for the substance of the concept itself. The fact that the courts, rather than the political authorities, determine what is 'for the public benefit' within the law of charities, for example, means that the public benefit concept is more stable and less tied to public consensus than the concept of the public interest that government must pursue.

Who, then, are the arbiters of community benefit under the CIC and C3 regimes, and what kinds of concepts are they likely to produce? Under the Companies (AICE) Act 2004, the CIC Regulator is the primary arbiter of the statutory 'community interest' test. The CIC Regulator assesses community benefit at the registration stage on the basis of a company's objects[957] and a prescribed community interest statement, which declares that the activities of the company will benefit the community, and explains how they will do so.[958] According to the regulator's published guidance, it is not necessary that each activity carried on by a CIC be directly beneficial to the community, but 'everything that a CIC does should in some sense contribute towards achieving a purpose that is beneficial to the community.'[959] If the CIC Regulator decides a company does not meet the community interest test (and the office has, to date, rejected a number of applications for

[957] An object stated in a company's articles is a community interest object if 'a reasonable person might consider that the carrying on of activities by the company in furtherance of the object is for the benefit of the community': Companies (AICE) Act 2004, s 35(3).

[958] CIC Regulations 2005, regs 11, 12, and 2 ('community interest statement').

[959] CIC Regulator, *Chapter 4: Creating a CIC* (August 2012) 22.

CIC status[960]) the company may appeal that decision to an Appeal Officer also appointed by the Secretary of State.[961] As of November 2012, however, no company had exercised that right.[962]

Like the Charity Commission, the CIC Regulator is developing an institutional approach to the community interest test by applying articulated legal standards to the individual cases before her. Given the similarities between this standard and the public benefit doctrine, it seems likely that the manner in which the CIC Regulator adjudicates applications for CIC status is, and will remain, broadly similar to the manner in which the Charity Commission adjudicates applications for charitable status. Certain procedural features of the CIC regime are nonetheless likely to make the CIC community interest concept both less transparent and less predictable than its English public benefit cousin. First, unlike the Charity Commission, which has a policy of publishing its decisions to accept or reject an application for charitable status where the decision is novel or significant,[963] the CIC Regulator does not publish its reasons for granting or refusing to grant a company CIC status.[964] This makes it impossible for the public to discern exactly how the community interest test is being applied. Second, unlike the Charities Act 2011, the Companies (AICE) Act 2004 does not provide for an appeal from the decisions of the

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[960] Email from cicregulator@companieshouse.gov.uk to author (9 November 2012).

[961] Companies (AICE) Act 2004, s 36B(3), 38A(5).

[962] Email from cicregulator@companieshouse.gov.uk to author (9 November 2012).

[963] Charity Commission, Charity Commission Publication Scheme (May 2010), http://www.charitycommission.gov.uk/About_us/About_the_Commission/pubscheme.aspx (accessed 12 December 2013).

[964] Email from cicregulator@companieshouse.gov.uk to author (9 November 2012)

CIC Appeal Officer to the courts. It seems inevitable, in these circumstances, that the CIC community interest concept (much like the Canadian public benefit doctrine) will be both less predictable and less transparent than its English charity law counterpart.

While the distinctions between the designated community benefit arbiters under English charity law and social enterprise law are significant, they pale in the face of the very different adjudication mechanism envisioned for British Columbia's C3 regime. We have seen that the BCBCA does not establish a C3 Regulator, nor assign to any statutory officer the responsibility of determining whether a company's objects meets the community purpose test. Instead, the BCBCA allows C3s to 'self-select', defining a C3 as any company that declares in its notice of articles that it 'is a community contribution company and, as such, has purposes beneficial to society.' [965] The significant effect of this provision is to make companies *themselves* the primary arbiters of what purposes and activities are beneficial to the community within the meaning of the statute. We shall examine who can contest or seek a remedy of such a decision in the next part. On its face, however, the policy of making applicant companies the sole arbiters of the community purpose concept supports the view the C3 regime maximizes the individual autonomy of property owners, but does little to protect competing public interests in the use of social enterprise property.

[965] BCBCA, s 51.911. The Act also anticipates that future regulations may authorize a C3 to delete its declaration of C3 status under certain conditions: see BCBCA, s 51.911(2).

c. The nature of the institution's interests

A final way in which the CIC and C3 community benefit concepts can be compared to the public benefit doctrine is by considering the kinds of interests that each concept allows its subject to have and pursue. In chapter three, we identified three kinds of interests that may be distinguished in discussions of the public law duties of government: the public interest, individual self-regarding interests, and individual other-regarding interests. The rule that government must act in the public interest, the chapter concluded, precludes government from having or pursuing any individual interests. The public benefit doctrine, on the other hand, only precludes charities from having individual self-regarding interests; charities can and do have individual other-regarding interests, although the public benefit rule imposes certain constraints on their ability to define and pursue them.

It has always been a premise of the CIC regime that CICs should be allowed to pursue certain 'self-regarding' activities, to the extent of issuing shares and debt instruments to investors with a limited nominal return.[966] However, the Companies (AICE) Act 2004 requires CICs to carry out these activities within a generally other-regarding frame. As applied by the CIC Regulator, the community interest test requires that *all* of a CIC's activities contribute 'in some sense' towards achieving a purpose that is beneficial to the community.[967] While the standard may be less stringent than that applicable to charities, it would appear, at the least, to preclude CICs from having individual self-regarding objects. British Columbia's social enterprise regime, on the other

[966] Private Action, Public Benefit, 54.

[967] CIC Regulator, *Chapter 4: Creating a CIC* (August 2012) 22.

hand, permits C3s to have and pursue a wide range of self-regarding objects. The BCBCA requires only that *one* of the principal purposes of a C3 be a community purpose, and that community purpose may benefit the company's directors, officers and shareholders, provided it does not benefit them *exclusively*.[968] The shift away from the protection of altruism in British Columbia's social enterprise legislation is striking, and distinguishes the C3 sharply from its counterpart in the UK. It allows us to conclude that while the CIC community interest rule is only a slightly less public-leaning hybrid than the public benefit doctrine, the C3 community purpose standard is primarily a manifestation of the values and impulses of private law.

4. Social Enterprise Law's Rules of Standing and the Procedural Public Law-Private Law Divide

A second point of comparison between the law of charities and the emergent social enterprise regimes arises from a consideration of the remedies available for the misuse of property held by a CIC or C3, and the standing rules limiting entitlement to those remedies. As we saw in chapter four, the common law's historical approach to the issue of standing to invoke the charities jurisdiction of the superior courts strongly aligned charity law with the procedural, public law sphere, and suggested that misuses of charity property were first and foremost a matter of collective concern. This alignment has decreased somewhat over time; the contemporary English and Canadian charity law regimes have generally shifted towards a focus on personal and associational standing, while the core disciplines of public law have shifted towards the expansion of rights to sue

[968] BCBCA, s 51.92.

in the public interest. The result, as chapter four argued, is that the standing rules governing relief for misuses of charity property represent a sort of procedural *hybrid*, which communicates mixed messages about whether the proper administration of charity property is a matter of collective or individual concern. The purpose of the present inquiry is to consider whether the CIC and C3 regimes approach the issue of who should be entitled to sue for a misuse of social enterprise property in the same way.

a. Remedies and Standing under the CIC regime

There are three principal categories of remedial procedures available to address misuses of CIC property in the UK. The first of these categories consists of corporate remedies of general application. The Companies Act 2006 (UK), which sets out the general corporate law regime to which CICs are subject, establishes two principal procedures through which persons can seek relief for a misuse of corporate property. The first, the derivative action, entitles an authorized complainant to bring a claim on behalf of a company, seeking relief in respect of a cause of action involving negligence, default, breach of duty or breach of trust by a director of the company.[969] The second, the unfair prejudice action, entitles an authorized complainant to seek a remedial order from the court on the ground that a company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members.[970] Together, these corporate actions would seem to open

[969] Companies Act 2006 (UK) s 260.

[970] ibid s 994.

the door to a wide range of judicial remedies for the misuse of property by a CIC.[971] However, each action is limited by its rules of standing: only a member or shareholder of a CIC (or, in special cases, the Secretary of State[972]) may seek relief for a misuse of corporate property under the relevant provisions of the Companies Act 2006.

In addition to these general corporate remedies, the Companies (AICE) Act 2004 establishes both regulatory and judicial remedies that are specific to the CIC. With regard to the former category, the Act authorizes the CIC Regulator to exercise a variety of supervisory and remedial powers in cases where the 'company default condition' is met. This condition is met, according to section 41, where the CIC Regulator believes it is necessary to exercise a power because there has been 'misconduct or mismanagement in the administration of a CIC', or there is a need to 'secure the proper application of [CIC] property'.[973] In such circumstances, the CIC Regulator may investigate the affairs of a CIC, or appoint a third party to carry out the investigation on her behalf.[974] She may order the audit of a CIC's annual accounts,[975] appoint, suspend or remove CIC directors,[976] or appoint a manager to take temporary control of a CIC's property and affairs.[977] Where the

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[971] See, for example, Companies Act 2006, s 996 ('If the court believes the petition is well founded, it may make such order as it thinks fit, including an order regulating the conduct of the companies affairs in the future).

[972] Companies Act 2006, s 995.

[973] Companies (AICE) Act 2004, s 41(3)

[974] ibid, s 42.

[975] ibid, s 43(1).

[976] ibid, s 45, 46.

[977] ibid s 47.

company default condition is met, the CIC Regulator is also authorized to vest CIC property in an Official Property Holder that she has appointed, and to restrict the transactions and payments that a CIC may complete.[978] Arguably, these powers are only slightly less extensive than the Charity Commission's powers to act for the protection of charities.[979]

Two points distinguish the CIC regime of regulatory remedies from that of the Charities Act 2011, however. First, despite the extensive remedial powers that the officer enjoys, the CIC Regulator was always intended to be a 'lighter-touch' regulator than the Charity Commission.[980] This intention is manifested in section 41(1) of the Companies (AICE) Act 2004, which provides that in deciding whether and how to exercise her supervisory powers, the CIC Regulator 'must adopt an approach which is based on the principle that those powers should be exercised only to the extent necessary to maintain confidence in CICs.'[981] The two CIC Regulators that have been appointed to date appear to have taken this 'light-touch' mandate seriously: as of November 2012, the office of the CIC Regulator had not exercised any of its supervisory powers.[982]

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[978] ibid ss 29, 48.

[979] Charities Act 2011, ss 69-87. While the CIC Regulator does not officially have 'scheme-making' powers, she is authorized to 'give directions' in circumstances where CIC property has been vested in the Official Property Holder: see Companies (AICE) Act 2004, s 48(7).

[980] HL Deb 8 Jan 2004, vol 657, col 262 (Lord Sainsbury of Turnville).

[981] Companies (AICE) Act 2004, s 41(1). See also s 27(4), stating that the CIC Regulator must adopt an approach to its functions that has regard to, among other things, the outcome of consultations with CICs.

[982] Email from cicregulator@companieshouse.gov.uk to author (9 November 2012).

The second distinction between the regulatory remedies applicable to CICs and English charities lies in the standing rules applicable to each. Under the Charities Act 2011, as we have seen, either the Attorney General, a majority of a charity's trustees, or (in the case of a small charity) 'any person interested in a charity' may apply for an exercise of the Commission's jurisdiction to establish a scheme, appoint or remove trustees, or transfer charity property. A broader range of persons can apply in the case of a charity whose gross income is less that 500 pounds a year.[983] Under the Companies (AICE) Act 2004, however, no person other than the CIC Regulator herself has a legal entitlement to request that she address misconduct or mismanagement in the administration of a CIC. If the CIC Regulator continues to take her 'light-touch' mandate seriously, therefore, not even the Attorney General will have the capacity to intervene.

The Companies (AICE) Act 2004 establishes a final, CIC-specific judicial remedy for the misuse of CIC property by authorizing the CIC Regulator to bring civil proceedings 'in the name and on behalf of a CIC'.[984] According to the Explanatory Notes to this provision, Parliament intended that the CIC Regulator would exercise this power to bring a 'derivative action' on behalf of a CIC in situations where it would be 'in the interests of the CIC or the community' to do so.[985] To date, the CIC Regulator has not invoked this power.[986] Nevertheless, it is evident that the designation of a public official with responsibility for initiating litigation on behalf of the community in respect of the

[983] CA 2011, s 70(2), (3).

[984] Companies (AICE) Act 2004, s 44.

[985] Explanatory Notes to the Companies (AICE) Act 2004, 244.

[986] Email from cicregulator@companieshouse.gov.uk to author (9 November 2012).

misuse of CIC property aligns the CIC regime to some extent with the regime for the protection of charity property by the Attorney General. Moreover, like the common law charities tradition, the CIC regime also applies special rules to proceedings by its representative officer. Unlike an ordinary litigant in a derivative action, the CIC Regulator is not required to establish a *prima facie* case in order to continue its claim against a CIC's directors.[987] And unlike an ordinary litigant, the CIC Regulator must accept both the risks and rewards of proceeding: the CIC Regulator must indemnify a CIC against any expenses it incurs as a result of a section 44 action, but in return any costs awarded to the company are to be paid to the CIC Regulator.[988] Section 44 does more than simply extend the standing rules generally applicable to derivative actions, in other words; it creates a procedure for the protection of CIC property in which the CIC Regulator is the unique and privileged litigant. In so doing, it suggests that the proper administration of social enterprise property is at least partly an issue of collective concern.

b. Remedies and Standing under the C3 regime

We have seen that in contrast to the Companies (AICE) Act 2004, the BCBCA does not establish a C3 Regulator. The Act also does not create any specific judicial remedies for the misuse of property held by a C3. Where a person wishes to seek relief for a misuse of non-charitable social enterprise property in British Columbia, therefore, he or she will

[987] Cf Companies Act 2006 (UK) s 261. Instead, section 44 places the onus on the directors to apply for an order that the proceedings be discontinued: Companies (AICE) Act 2004, s 44(3)

[988] Companies (AICE) Act 2004, s 44(6), (7).

need to have resort to the general remedial procedures available to all corporations in the province.

The substance of the two most common of these procedures – the derivative action[989] and the oppression action[990] – largely parallels the substance of the derivative action and the unfair prejudice action established under the Companies Act 2006 (UK). However, the rules of standing applicable to the British Columbia actions are notably broader. Under the BCBCA, the 'complainants' that have standing to bring a derivative action include any one of a company's directors, and any other person whom the court considers an 'appropriate person' to make the application.[991] The BCBCA also authorizes a court to grant discretionary standing in the context of an oppression action, extending a right of *locus standi* to 'any…person whom the court considers to be an appropriate person to [bring an oppression claim]'.[992] It is therefore at least theoretically possible that an 'unrelated' person could seek relief for the misuse of property held by a C3 on the basis of a public interest in the proper use of that property.

The short list of remedies available to address the misuse of C3 property, together with the lack of jurisprudence applying those remedies in a social enterprise context, provide a rather thin foundation for assessing the relationship between the C3 rules of

[989] BCBCA, s 232(2).

[990] BCBCA, s 227(2). Unlike the Saskatchewan Non-Profit Corporations Act that was discussed in chapter four, the BCBCA's oppression remedy is not specifically designed to address acts 'that are oppressive to or unfairly disregard the interests of the public generally.'

[991] BCBCA, s 232(1).

[992] BCBCA, s 227(1).

locus standi, and the procedural public law-private law divide. Two observations may nonetheless be made. The first is that a wide range of persons might *potentially* be granted personal, associational or public interest standing to seek relief for misuses of social enterprise property in British Columbia, were a compelling argument made for the creative use of the court's discretion to grant standing to appropriate persons under the province's general corporate law regime. The second is that the C3 regime itself creates no specific remedies for the misuse of social enterprise property. Each of these observations admittedly communicates a somewhat different message about the 'public law-leaning' or 'private law-leaning' tendency of the C3's procedural regime. Both observations make clear, however, that the BCBCA regime treats the property of C3s in precisely the same way as other corporate property in British Columbia. To this extent, at least, the standing rules applicable to actions for the misuse of C3 property suggest that British Columbia does not consider the protection of non-charitable social enterprise property to be an issue of collective concern.

5. Conclusion

In light of the increasing number of public law pressures that have come to bear on the charitable sector in EW and Canada, and the effect they have had on constraining the autonomy of benevolent property owners, it is unsurprising to find that both jurisdictions are witnessing a search for *new* hybrid vehicles, which place somewhat more value on the ability of individuals to change the world in accordance with their own particular vision. To the extent that benevolent property owners view the law of charities as providing insufficient protection to their interests in autonomy and creativity and independence, it is likely that they will continue to shift their focus and their resources from charities to post-charitable legal forms that strike a different balance between individual and collective project pursuit.

The social enterprise vehicles that I have examined in this chapter represent but two of these post-charitable forms. I have argued that the CIC and the C3, together with their associated regulatory regimes, can be understood as alternative hybrid compositions of public law and private law elements for the pursuit of benevolent projects. I have also sought to highlight that each of these hybrid compositions departs to a very different extent from the particular public law-private law equilibrium established by the law of charities. Part two of the Companies (AICE) Act 2004 reflects the basic structure and commitments of English charity law, altering the balance between its various public and private elements only in degree. While the regime is premised on CICs being allowed to distribute a limited percentage of their assets to investors, the statute's community interest test requires CICs to have other-regarding objects, and grants them only slightly more autonomy than charities to define what benefit they will provide, and what community will receive that benefit. And while the demonstrated impulse of the CIC Regulator is to operationalize a much lighter-touch regulatory regime than the Charity Commission, the remedies available for a misuse of CIC property, and the standing rights that are attached to those remedies, suggest that the British public does have an interest in non-charitable social enterprise property.

Considered from this standpoint, British Columbia's new C3 regime reflects a strikingly different vision of how the equilibrium between individual and collective project pursuit should be set in the social enterprise sphere. Like CICs and charities, C3s are being marketed as institutions that will benefit the community, and at some level they are required to do so. However, the BCBCA only requires a C3 to be altruistic in regards to *one* of its primary purposes, and even in respect of this 'community purpose' the C3 is only required to benefit a group that is broader than its own constituency. What types of purposes are beneficial to society under the C3 regime? That is for the companies themselves to decide. The BCBCA neither establishes a social enterprise regulator, nor assigns to an existing officer the function of monitoring the creation or administration of C3s. The absence of any specific remedies for the misapplication of C3 property only reinforces the message that the British Columbia public has no special interest in 'social enterprise' property. If the CIC regime has made 'adjustments' to the functional equilibrium set by the law of charities, the C3 regime is situated rather firmly at the private law pole.

The principal object of this chapter has been to bring my central claims regarding the public law-private law hybridity of the law of charities into sharper focus by comparing and contrasting key features of two newly emergent social enterprise regimes with 'parallel' features of charity law. The main conclusion from that comparison has been that there are indeed significant (if varying) contrasts between the legal regulation of charities and that of social enterprise with regard to the various public law-private law continuums that have been envisaged in the course of this work. This conclusion places us in a favourable position to resume the thesis' central arguments, and to draw together some concluding reflections on this work as a whole.

VII. Conclusion: The Law of Charities and the Public Law-Private Law Divide

The project of this thesis has been to describe and analyze various aspects of English and Canadian charity law in terms of their relationship with the public law-private law divide. The primary goal has been to improve our doctrinal 'map' of the law of charities by plotting the particular ways in which the common law of charities, and the modern English and Canadian regimes of charities regulation, partake of the contested spheres of public law and private law. In constructing this doctrinal map, the thesis has also sought to contribute to the development of a useful normative discourse about the proper function of the law of charities, and the merit of specific charity law rules.

This project has presented a number of challenges, which were addressed in the early chapters of the work. One major challenge is that despite their common rootedness in the English common law tradition, the modern English and Canadian regimes of charities regulation differ widely in focus, function and scope. Another major challenge is that people mean different things when they talk about the distinction between public law and private law. The public law-private law divide is not a concept that is prone to proof or empirical measurement, and competing theoretical accounts of the divide can and do co-exist. However, I have argued that from the perspective of the law of charities, the most developed and useful account of the public law-private law divide is an account framed in terms of the law's relationship to the respective spheres of individual project pursuit and collective project pursuit. This thesis has sought to communicate this project-based account, to expand upon it in certain specific respects, and to apply it in service of the thesis' mapping and evaluative goals.

The principal tenets of this project-based account, which were set out in the introductory chapter, may be briefly restated as follows. The account begins from the premise that there is an operational distinction between public law and private law, which, despite its limited descriptive capacity, is integral to law's self-understanding in both Canada and EW. This operational distinction is underlain by a *normative* public law-private law divide, which is based on the value that private law and public law respectively accord to the pursuit of individual and collective projects. Private law is the law of individual, or private, project pursuit; it is concerned to protect the autonomy of individuals to formulate their own projects without regard to the value or disvalue that others place on those projects. Public law is the law of collective, or public, project pursuit; it is concerned to protect the ability of the political community to determine the overall character of our society. The respective concerns of public law and private law are either equally valuable or incommensurable, so there is a constant tension between them.

The question of where private law ends and where public law begins may therefore be reframed as a question about which projects the law treats as individual projects and which projects the law treats as collective ones. Generally speaking, the law treats individual and collective projects in a manner that reflects the respective normative commitments of private law and public law. The law's impulse is to regulate individual projects minimally, so as to maximize the individual project pursuer's autonomy and his or her capacity for creativity and innovation. The law's impulse is to regulate collective projects more intensively, with a dual view to protecting whatever *specific* public interest the collective project is understood to raise, and to protecting a perceived *general* public interest in having certain entities model 'public virtues' for the benefit of the collectivity. This spectrum of public law and private law responses exists along multiple axes, and can be explored in (at least) institutional, functional, procedural, and substantive terms. The true public law-private law hybrid occurs at a point on any of these spectrums where the two sets of regulatory impulses bear down with equal or near equal force on a set of institutional arrangements.

In applying this project-based account of the public law-private law divide to the common law charities tradition and the modern English and Canadian regimes of charities regulation, the thesis has made a number of analytical claims. The first is that despite the common association of the law of charitable trusts with the private law sphere, it is appropriate to regard the common law charities tradition, in a general or categorical sense, as a true *hybrid* of public law and private law. The charitable trust is a public law-private law hybrid in the general sense that it represents the adaptation of a primarily private law institution to a variant that is more of a public law nature. While the trust was specifically designed to enhance the autonomy of property-owning individuals to formulate and carry out their own projects, the *charitable* trust was an adaptation of this institution, whose development reflected the perceived public interest in the devotion of property to charitable purposes. The charitable corporation, an entity whose role in the common law tradition has historically been underplayed, was a very different type of hybrid, whose public element stemmed in large part from the use of the Royal Prerogative to constitute such corporations. Nevertheless, each of these charitable forms partook in significant ways of the traditions of private law and public law. The common law of charities thus became infused with a number of public law characteristics, chief among which was the 'constitutional' role that the Crown and the Chancery Court played in ensuring the proper administration of these institutions. The Crown and the courts took their responsibility as the public guardians of charity seriously, while also seeking to protect the interests of donors in controlling and directing their own wealth. In this sense, the common law of charities can be seen to have accorded equal or near equal importance to the autonomy interests of benevolent property owners, and to the public interest in the proper and effective administration of charity property.

The second analytical claim that I have pursued in this thesis is that within this framework of general hybridity, charities also function and are regulated as public law-private law hybrids in the *context-specific* or *functional* sense that both the conditions for obtaining charitable status, and the regulation of the conduct of charities and their trustees, are continually being adjusted in such a way as to maintain in a broad sense a functional equilibrium between these two interests, and other public interests besides. These equilibrium adjustments occur both within the law's substantive dimension, and within the very regulatory institutions and procedures that carry the substantive equilibrium adjustments out. I have argued that in making these adjustments to its substantive doctrines, charity law notionally situates (and resituates) charitable projects along two principal continuums. The first extends between projects that are understood to be wholly *altruistic*, in the sense of benefiting persons who are remote from our affections, and projects that are understood to be *self-regarding*, in the sense of benefiting the persons who pursue them. The second extends between projects that are fully aligned to the public welfare goals of the state or polity in question, and projects that, although altruistic, are nevertheless at variance with those public welfare goals. I have referred to these latter two poles as public-welfare-compliance and public-welfare-deviance.

The balance of the thesis has been concerned to map some of the context-specific ways in which the English Charity Commission regime and the Canadian registered charity regime have made these equilibrium adjustments between individual and collective project pursuit. I have sought to identify both the particular public interests that each regulatory regime seeks to promote, and the context-specific 'equilibrium' that each has achieved. Recognizing that it would be impossible, in the context of this thesis, to comprehensively analyze both regulatory regimes, I have pursued these goals by applying the public law-private law 'lens' to an eclectic set of charity law issues, which (it is hoped) have shed some light on the analytical and comparative hypotheses that have been set out.

The principal conclusions of this exercise are these. In developing a statutory regime for the regulation of charities in the nineteenth century, English law maintained the common law's duality of focus on the autonomy interests of benevolent property owners, and the public interest in the proper and effective administration of charity property. These interests were in constant tension: the charity law reformers sought to protect the public's interest better than the Chancery courts had done, while powerful charitable institutions and philanthropists pushed back. The contemporary Charity Commission regime continues to balance these two values. However, successive iterations of the Charities Act have increasingly oriented the Charity Commission towards intervening to protect the public interest in charity property, even if the funding of the public body has not kept pace. As a result, the English model of charities regulation that is enshrined in the Charities Act 2011 may broadly be characterized as a 'public-leaning hybrid', which seeks to protect the public's interest in properly administered charity property more effectively than the common law charities tradition, but nonetheless remains modeled in the image of the common law.

The primary Canadian regime of charities regulation is quite a different beast. Rooted in the federal government's constitutional jurisdiction over taxation, and limited by the fact that primary legislative authority over charities lies with the provinces, the registered charity regime that is housed within the federal Income Tax Act incorporates some of the doctrines of the common law tradition, but none of its procedures or institutions. Unlike the Charity Commission regime, which was designed to improve the mechanisms through which charity property could be protected, the registered charity regime was designed to prevent charities and donors from abusing the fiscal privileges of charitable status to the detriment of other Canadian taxpayers. While Canada's registered charity regime may also be characterized as a public-leaning hybrid, therefore, it does not weigh the value of individual project pursuit against a public interest in the proper and effective administration of charity property, but rather against a public interest in the integrity of the tax base.

Turning from this high-level picture of the English and Canadian regulatory regimes to a detailed study of the public benefit doctrine, we have examined one of the central hinges upon which turns the whole notion of charity law's public law-private law hybridity. The common law rule that a charity must be 'for the public benefit' is a prime example of a hybrid legal doctrine, I argued in chapter three, in the sense that it does not have a single or even primary site of belonging within either the public law or private law sphere. The common law public benefit doctrine has always required charities to be mostly other-regarding, and embodies public law thinking to this extent. However, it provides benevolent property owners with considerable autonomy to define what type of benefit their project will provide, and what public will receive that benefit. It treats charitable projects as *altruistic* but largely *public-welfare-neutral* projects, and is a public law-private law hybrid in that sense.

The well-known conflict that has surrounded the operation of the English public benefit doctrine since the enactment of the Charities Act 2006 has provided us with a unique opportunity to study the tensions inherent in a legal doctrine that occupies the border zone between public law and private law. Parliament introduced somewhat ambiguous public benefit provisions into the Charities Act 2006, and then assigned to the Charity Commission the task of elucidating and operationalizing these provisions. The Commission responded to this challenge by shifting the functional equilibrium of the public benefit doctrine, restricting the autonomy of benevolent property owners to define the terms of their charitable projects in two significant ways. The first shift, which limited the autonomy of charities whose projects were targeted at persons sharing a protected personal characteristic under human rights law, has been affirmed by Parliament and by the courts. However, the second shift, which limited the autonomy of charities whose projects were targeted at the 'well-off', met a more equivocal judicial response. *Independent Schools Council* can itself be regarded as a hybrid legal decision, which seeks, somewhat unsuccessfully, to reconcile competing public law and private law values that are not entirely reciprocal. In operation, however, *Independent Schools Council* has led to a significant pulling back of the Commission's public-law-oriented position, and a readjustment of the public benefit doctrine's functional equilibrium towards the private law pole. In Canada, while the public benefit doctrine is less heavily relied on, the CRA can be seen to broadly follow these trends. However, the CRA has made its own public law-leaning adjustment to public benefit's functional equilibrium by suggesting that the public benefit of a Canadian registered charity can be measured by reference to its degree of alignment with the policies and programs of the incumbent government.

The substantive doctrines of the law of charities are of little value without attendant remedies, and competent persons to enforce them. Thus, chapter four has sought to apply the thesis' public law-private law lens to a *procedural* element of the law of charities in EW and Canada: the rules of *locus standi* that determine who can seek relief for a misapplication of charity property. The quintessential 'private law' and 'public law' approaches to the question of who can sue, I have claimed, can be distinguished on two grounds: private law integrates the question into its causes of action and grants standing on the basis of the plaintiff's rights and interests, while public law considers the question separately and grants standing as a matter of discretion on the basis of a variety of factors.

The common law's historical approach to the issue of who can seek relief for the misapplication of charity property substantially aligned charity law with the public law sphere in both of these senses, although the Attorney General was the principal holder of the discretion. While the courts did occasionally permit individuals to bring charity proceedings where they had a direct personal interest in charity property, it was the chief law officer of the Crown who was ordinarily entitled and expected to initiate charity proceedings on behalf of the public, either of his own motion or at the request of a relator. The practical effect of this procedure was that the notionally 'unlimited' charities jurisdiction of the superior court was actually quite restricted in its scope. However, the symbolic implication of the procedure was that rights in charity property were *valuable* rights, and rights in which every member of the public was interested.

The Crown's effective monopoly over charity proceedings in EW has long since been put to rest. The Charities Act 2011 establishes a number of different remedies for the misapplication of charity property, some of which the Charity Commission can invoke of its own motion, and some of which can be invoked by persons with a 'greater-than-public' interest in the charity. The picture in Canada is somewhat more complex, with a range of remedies and standing rules applying in different provinces, and a tendency to look to English law. What is clear is that Canada's primary regime of charities regulation contains no procedure for any person other than the Minister of National Revenue to seek relief for a misapplication of charity property, and that the provincial Attorneys General, though authorized to bring charity proceedings, in fact do not.

Stepping back from this picture, we can identify both public law-leaning and private law-leaning adjustments being made to the common law approach. On the one hand, the Charity Commission regime (and, to a less clear extent, the Canadian common law) have continued to address the question of who can sue a charity separately from the merits of the claim, and have treated the standing issue as a 'practical rule of justice' affording the court a measure of discretion in each case. On the other hand, by expanding the categories of personal and associational standing, the modern regimes have moved away from the historical common law view that the protection of charity property is primarily a collective project, and towards the view that it is the project of interested individuals or groups. Moreover, in contrast to the general public law trend, neither jurisdiction has recognized the entitlement of an individual to seek relief for the misapplication of charity property on the public's behalf. Given this combination of public law-leaning and private law-leaning tendencies, we have concluded that the rules of *locus standi* in English and Canadian charity law are also broadly of a context-specific hybrid character.

We have seen, then, that the general nature of the English Charity Commission and Canadian registered charity regimes, their public benefit doctrines, and their rules of *locus standi,* are all consistent with the claim that charity law has achieved a long-term, functional equilibrium between the protection of the autonomy of property-owning individuals to control and direct their own wealth, and the furtherance of competing public interests. However, this characterization of the law of charities as a 'hybrid' legal discipline, perfectly suspended between the competing domains of public and private law, is jarringly discordant with the current swell of opinion lamenting the increasing use of charities as instruments of government welfare policy, and warning of the dangers associated with this trend. In response to this growing consensus, I have sought in chapter five to advance a theoretical contrast between ‘independent’ and ‘co-opted’ charities, and to identify certain legal and institutional mechanisms in EW and Canada that may either encourage or limit the governmental co-optation of charitable resources.

This exploration of modern mechanisms of co-optation in the charitable sector has yielded a number of interesting comparative conclusions. With regard to the first identified co-optative mechanism, the exertion of government influence over the legal definition of charity, we have seen that the common law definition was anchored to a specific legislative agenda at a very early stage, assuring that there would always be a good deal of alignment between charitable and governmental visions of the good. The precise degree of this alignment has vacillated over time, with courts, then charities regulators, continually adjusting the precise level of separation between charitable and government functions. With the enactment of a statutory definition of charity in the Charities Act 2006, the English Parliament has reasserted its perennial power to direct charitable resources to objects of its own choosing. However, it is the Canadian government that has the greatest capacity for ongoing political influence over the definition of charity, since its charities regulator, a ministerial government agency, interprets and applies the common law concept of charity with very little oversight, guidelines or constraints.

There are other mechanisms through which government can bring charitable resources under its effective direction and control. One of these is the creation of statutory charities, with legislated charitable objects and governance rules. Historically, the sovereign could effectively place these charities outside of the supervisory authority of the courts, and thus maintain a high level of control over their charitable resources. While statutory charities still play an important role in the modern charitable sector, the Charity Commission regime limits the English government's ability to control them, both by operationalizing the common's law prohibition of pro-government political purposes, and requiring that *all* charities be subject to the controlling power of the courts. The Canadian registered charity regime is silent on this issue, by contrast, and includes on its roster institutions that the Supreme Court of Canada has described as 'part of the apparatus of the government both in form and in fact'.

This thesis has explored a final mechanism of government co-optation of charitable resources, which is particularly relevant in the present day. Charities, I have suggested, are today experiencing unprecedented levels of government influence through the negotiation and implementation of service delivery agreements, and the appointment of government authority trustees. The considerable pressures that charities face within this 'contract culture' to align themselves with the policies and preferences of the incumbent government are, in theory, largely addressed by the duty of adherence to the charitable instrument, and the fiduciary duties of charity trustees. However, the virtual absence of case law in this area suggests that these legal protections against third party influence are less robust than the co-optative trends. Against this background of government *dominium,* the Charity Commission has emerged as a champion of an independent charitable sector, publicizing guidance on government contracts, and warning against the use of government authority trustees. However, Canadian charity law is once again virtually silent on these important issues, and to the extent it speaks it is to affirm the entitlement of government to control registered charities that it funds.

The law of charities has always sought to balance the interests of property owners in formulating their own benevolent projects, with competing public interests in projects that promote a collective vision of the good. While the law of charities has, by and large, historically achieved this functional equilibrium, the story that has emerged from this thesis is a story of increasing public law pressures coming to bear on English and Canadian charity law, and altering this delicate balance. The Canadian registered charity regime, with its political character and its singular concern to protect the public interest in the integrity of the tax base, evidences a far greater tendency than the English Charity Commission regime to require charitable projects to be *both* altruistic and public-welfare-compliant. In both jurisdictions, however, we have witnessed the ascendance of this hybrid legal discipline's public elements, and a corresponding reduction in the autonomy of individuals to pursue benevolent projects in the charitable sphere.

This thesis has not, by and large, taken a normative position on this shifting equilibrium; that debate, while crucially important, is better left for another day. Nevertheless, in casting the emerging social enterprise movement as a quest for alternative hybrid legal vehicles for benevolent action, I have sought to demonstrate that shifts in the balance between charity law's public and private elements are not without effects. As Lord Beveridge so acutely noted back in 1948, the philanthropic motive is in practice almost always a *specialist* motive. Unless and until our conceptions of private property change, therefore, property-owning individuals (and particularly the very wealthy) are likely to feel that they are entitled to dictate how, to whom, and for what purpose they will give their property away. If the law of charities fails to accord sufficient value to that interest in individual project pursuit, it is likely that benevolent individuals will increasingly turn their energies and resources towards CICs, C3s, and other post-charitable forms, which will allow them to 'improve the world' with a greater degree of autonomy.

The strength of these competing pressures is unlikely to decrease over time. The recent economic crisis, and the austerity climate that it has ushered in, have heightened the concern of governments that charities not be used as mechanisms for the wealthy to avoid the payment of tax. Austerity measures have shrunk the pool of public capital that is available to fund charitable projects, and made it likely that condition-heavy, performance-based contracts will continue to be the chosen instruments for the transfer of public funds to the sector. Tough economic times have also shrunk the public's appetite for charitable projects that are overly idiosyncratic, or do not reflect prevailing public views. As in all times of economic downturn, however, the economic crisis has also increased the reliance of governments on private philanthropy, and increased the desire of governments to direct the energies and resources of charities to pressing social needs. The quest for equilibrium is therefore likely to continue with increased urgency. This thesis has not sought to resolve this quest. If it has improved our understanding of the doctrinal background against which the discussion takes place, and contributed to the creation of a useful normative discourse about the function of charity law in EW and in Canada, it will have accomplished its goals.

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