



## MEMORANDUM OF LAW

**Date:** July 19, 2004

**Re:** Registration of "Charity Bank" under Section 149 of the *Income Tax Act*

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### INTRODUCTION AND SUMMARY

This memorandum addresses the issue of whether a bank incorporated to carry on the business of banking in the charity sector qualifies for registration as a registered charity under subsection 149(1)(f) of the *Income Tax Act* (the "**Act**").

The bank ("**Charity Bank**") will carry on the business of banking by providing financial products and services (1) to registered charities and other qualified donees and (2) to select non-profit organizations resident in Canada which, although not qualified donees, are substantially or exclusively charitable in purpose and activities ("**Other Charities**"). In due course Charity Bank may also provide financial products and services (3) to projects, sponsored or led by for-profit and/or not-for-profit entities, which are exclusively charitable in nature and (4) to individuals and communities for the sole purpose of the relief of poverty, the advancement of education and religion, or other purposes considered at law to be charitable. The primary purpose of Charity Bank will be to carry on the business of banking for the purpose of enhancing the efficiency and effectiveness of the charity sector as a whole. The secondary purpose of Charity Bank will be to carry out other charitable activities directly by providing project financing to projects which are exclusively charitable in nature and which would not or might not be funded otherwise, either at all or on satisfactory terms, and by providing financial products and services to individuals and communities for the sole purpose of the relief of poverty, the advancement of education or religion, or other purposes considered at law to be charitable.

The memorandum concludes that such a bank is entitled to be registered as a registered charity under subsection 149(1)(f) of the Act on the basis that its primary and secondary purposes are exclusively charitable at common law. The exclusively charitable purposes are the enhancement of the efficiency and effectiveness of the charity sector as a whole and the provision of economic or financial support to inherently charitable activities.

The memorandum is divided into the following sections:

Facts and Assumptions;  
Issues;  
Summary Answers; and,  
Discussion and Analysis.

### I      **FACTS AND ASSUMPTIONS**

We rely on the following facts and assumptions:

1. Charity Bank will be incorporated or continued under the *Bank Act* (S.C. 1991, c. 45) as a Schedule I chartered bank. It may or may not have a formal objects

clause in its letters patent (as it would have if it were incorporated under a provincial or federal non-share capital corporation statute), but if it does not (either because the Minister of Finance will not permit it to do so or because it would prefer not to do so) such a formal objects clause will be provided for in its by-laws. If it does not have a formal objects clause in its letters patent legally restricting its activities to activities which are exclusively charitable in nature, Charity Bank will enter into a legally-binding agreement with the Canada Revenue Agency (“**CRA**”), at CRA’s request, which will require Charity Bank to restrict its activities to activities which are exclusively charitable in nature.

2. Charity Bank will be formed primarily to provide financial products and services to qualified donees and Other Charities (the “**charity sector**”) with the objective of enhancing the efficiency and effectiveness of the charity sector as a whole, and of the individual qualified donees and Other Charities to which such financial products and services are so provided (hereinafter referred to as the “**enhancement activities**”). Charity Bank will also conduct charitable activities directly by providing financial products and services to support projects which are exclusively charitable in nature (hereinafter referred to as the “**project financing activities**”) and by providing financial products and services to individuals and communities for the sole purpose of the relief of poverty, the enhancement of education or religion, or other purposes considered at law to be charitable (hereinafter referred to as the “**community development activities**”).
3. Charity Bank's formal objects clause, whether contained in its letters patent or by-laws or in any such legally-binding agreement with CRA, will provide as follows:

The objects of Charity Bank are to carry on the business of banking for the purpose of (1) enhancing the efficiency and effectiveness of qualified donees, of other select non-profit organizations resident in Canada which are substantially or exclusively charitable in purpose and activities, and of the charity sector as a whole, through the provision of financial products and services to them; (2) providing financial products or services or both in support of specific projects which are exclusively charitable in nature; and, (3) providing financial products and services to individuals and communities for the sole purpose of relieving poverty, or advancing education or religion, or any other purposes considered at law to be charitable .

4. Charity Bank will also be empowered or permitted in its letters patent or by-laws, and in any legally binding agreement with the CRA, to carry out or undertake all activities which are incidental and ancillary to its objects.
5. Charity Bank may deploy one or more subsidiaries to deliver some of the proposed financial products and services. For example, it is possible that Charity Bank may provide custodial or trustee services through a subsidiary or

subsidiaries. Such subsidiaries will be incorporated solely for functional and/or regulatory reasons and will be devoted, like Charity Bank, exclusively to enhancement activities, project financing activities and/or community development activities. Other examples of financial products and services that may be offered through a subsidiary of Charity Bank include payroll and employee benefits products and services, insurance products, asset management services, donation and other data processing services, and consulting and other advisory services.

6. Charity Bank will apply for registered charity status under the Act as a charitable organization.
7. Some, and perhaps all, of Charity Bank's subsidiaries will apply for registered charity status under the Act as charitable organizations.
8. Some of Charity Bank's financial products and services will be provided by Charity Bank to qualified donees and Other Charities on terms that are materially beneficial to them. Others will be provided to them on commercially competitive terms. Others may be provided to qualified donees and Other Charities on a premium-pricing basis in order to generate surplus funds to be used for other charitable activities of Charity Bank. Each of these is discussed in turn:
  - (i) Material benefits to qualified donees and Other Charities may take the form of discounts against commercial pricing of selected financial products and services and/or the provision of such products and services in circumstances where they would not be readily available or would not be available on acceptable terms to qualified donees and Other Charities from commercial providers. Examples include:
    - Providing bridge financing in situations where grant funding is pending or delayed;
    - Providing capital and/or operating financing against the security of fixed assets;
    - Providing operating lines of credit where donation funding is expected based on demonstrated fund raising capacity;
    - Underwriting bond and other securities issues;
    - Providing loans on beneficial terms;
    - Providing regulatory compliance services and legal and accounting information services;
    - Providing information on best practices nationwide;
    - Providing tailored financial products and services for individual clients;

- Providing higher rates of interest for deposits for certain clients; and
  - Providing ancillary fundraising products and services such as credit card processing capability and donation receipt processing capability.
- (ii) Products and services provided on commercially competitive terms may include deposit instruments.
- (iii) Premium-priced financial products and services, of a superior quality, may be provided to larger customers, with explicit recognition that any profit to Charity Bank from such products and services will be used to subsidize other charitable activities of Charity Bank.

The choice between the three modes of delivery – materially beneficial, competitively priced and premium priced – will be determined on a product-by-product and service-by-service basis as the charitable business plan of Charity Bank develops. It will be influenced by the degree to which Charity Bank is able to earn a profit from the investment of the capital donated to Charity Bank, the capital invested in Charity Bank on a non-yield basis, and deposit accounts opened with Charity Bank by members of the public on a financially advantageous basis to Charity Bank. To achieve its goal of enhancing the efficiency and effectiveness of the charity sector as a whole, Charity Bank will operate on a financially viable basis, while targeting the financial products and services needs of the charity sector which are not being met currently. Charity Bank will have a comparative economic advantage in regard to its operations in the charity sector because of, among other things, its lower cost structure, its specialized and deep knowledge of the charity sector as a whole and of the individual members and organizations therein, and its clear identification with the charity sector in the eyes of qualified donees and Other Charities.

9. Charity Bank will be empowered, by virtue of its letters patent issued under the *Bank Act* (Canada), to provide all of the products and services which can be provided by a Canadian Schedule I chartered bank. These will include the following types of financial products and services: deposit-taking, loans, guarantees and related financial assistance, social investments (i.e., investments in circumstances where loans are either not available in the commercial market or only available on normal commercial terms which are beyond the ability of charities prudently to finance without prejudicing charitable initiatives), lines of credit, letters of credit, banker's acceptances, money management, interest and currency swaps and other derivatives. Product and services lines will be designed and developed based, in general, on the identified needs of the charity sector or of the individual client, as opportunities present themselves and as circumstances permit. Charity Bank intends to develop innovative financial products, services and processes tailored to meet the needs of the Charity Bank's clientele, as a whole and on an individual basis.

10. Although the capitalization of Charity Bank is currently being raised and has yet to be finalized, certain elements of the capitalization of Charity Bank have been established:
  - (1) Charity Bank will have a class of fully participating common shares entitling its holders to vote and to participate fully in the profits of Charity Bank by way of dividend and upon dissolution or liquidation. This class of shares will be owned exclusively by another registered charity established solely for the purpose of holding such shares, and of deploying the assets received on the dissolution or liquidation of Charity Bank or by way of dividend from Charity Bank for exclusively charitable purposes. Charity Bank will use share ownership and transfer restrictions, and may in addition, enter into a shareholders' agreement with the registered charity that owns such shares, to ensure that such shares cannot be transferred to or owned by an entity which is not a qualified donee.
  - (2) There will be a class or classes of preference shares, with full voting rights and rights to preferential dividends and preferential return of capital on dissolution or liquidation. These shares will be owned exclusively by qualified donees and will constitute the principal vehicle of financial support from qualified donees for the capital of Charity Bank. The shares will be redeemable, and may be retractable, after a specified period of time and with the consent of the Superintendent of Financial Institutions. Charity Bank will use share ownership and transfer restrictions to ensure that such shares cannot be transferred to or owned by an entity which is not a qualified donee.
  - (3) There may be a class or classes of preference shares, with no voting rights and no right to dividends or to participate in distributions on dissolution or liquidation, but with a preferential right to a return of capital on dissolution or liquidation. These shares, if issued, will be owned by philanthropic individuals and entities who are interested in contributing to the establishment of Charity Bank.
  - (4) Charity Bank will also raise funds by obtaining loans, grants and outright gifts from individuals, corporations, the federal and provincial governments, government agencies and other qualified donees.
11. Charity Bank will raise deposits from qualified donees, government agencies and members of the public. Charity Bank's deposit-taking operations will generally be carried out on commercial terms. Some of Charity Bank's deposit-taking operations may be innovative in a way that materially benefits qualified donees. For example, some deposit relationships may provide for or facilitate an opportunity for the depositor to donate or forego a portion of the interest received by or due to them to Charity Bank.

12. The voting shares of Charity Bank will be owned exclusively by qualified donees, as previously described. There will be a board of directors of between 9 and 15 directors, selected based on their experience in the banking and charity sectors and on regional representation. In general terms, the governance model will be designed to ensure the success of Charity Bank as a bank for charities. This will include staggered terms of office and other devices based on or derived from current thinking on best practices on governance in the banking sector and in the charity sector.
13. Charity Bank intends to operate to ensure a prudent profit. It will deploy commercially competitive pricing where it is necessary to maintain its operations as an economically viable bank. Any profits or surplus realized will be retained as an additional source of capital or redeployed for the benefit of the charity sector, either by way of gift, by way of dividends on shares issued to and owned (legally and beneficially) only by qualified donees, by subsidizing the provision of financial products and services to the charity sector or by subsidizing its other charitable activities. Charity Bank will modulate its pricing so that its profits are kept to a prudent level and as a means of redeploying into the charity sector profits that could otherwise be earned.
14. The activities of Charity Bank may result incidentally in benefits to other members of the non-profit sector. The provision of incidental benefits to non-charitable non-profit organizations will occur only if Charity Bank determines that such incidental benefits also benefit the charity sector. Charity Bank will, as part of its compliance practices, identify such incidental benefits, quantify them and ensure that they remain incidental to Charity Bank's charitable purposes. Charity Bank will ensure that such incidental benefits are provided only to organizations which are substantially, but not exclusively, charitable in purpose (“quasi-charities”).

## II ISSUE

The principal issue is whether Charity Bank is entitled to be registered as a registered charity under subsection 149(1)(f) and, in particular, whether it meets the conditions for registration as a "charitable organization" within the meaning of subsection 149.1(1) of the Act.

Under the subsection 149.1(1) of the Act “charitable organization” is defined as an organization

(a) all of the resources of which are devoted to charitable activities carried on by the organization itself,

(b) no part of the income of which is payable to, or is otherwise available for the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof,

(c) more than 50% of the directors, trustees, officers or like officials of which deal with each other and with each of the other directors, trustee, officers or officials at arm’s length . . . .

Under subsection 149.1(2) a charitable organization's registration may be revoked when the organization:

- (a) carries on a business that is not related business of that charity;
- (b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the total of
  - (i) in the amount that would be the value of A for the year, and
  - (ii) the amount that would be value of A.1 for the year,

in the definition "disbursement quota" in subsection (1) in respect of the organization if it were a charitable foundation, or

- (c) makes a disbursement by way of a gift, other than a gift made
  - (i) in the course of charitable activities carried on by it, or
  - (ii) to a donee that is a qualified donee at the time of the gift.

A charitable organization is considered to be devoting its resources to charitable activities carried on by it "to the extent that it carries on a related business" (subsection 149.1(6)).

The February 27, 2004 draft legislation proposed by the Department of Finance contains a proposal to modify the definition of "charitable organization." It is proposed to amend the test in paragraph (c) by adding a requirement that more than 50% of the directors, trustees, officers or like officials deal at arm's length with any person or group of non-arm's length persons who have contributed more than 50% of the capital of the organization. It is also proposed that the organization not be controlled, directly or indirectly, by any person or group of non-arm's length persons who have contributed more than 50% of the capital of the organization. Neither of these proposed changes affects the issues under consideration in this memorandum.

The subsidiary issues can be stated as follows:

- (a) The concept "charity" in these legislative formulations takes its meaning from the common law meaning of charity. The first issue is whether the purposes and activities of Charity Bank, namely, the enhancement activities, the project financing activities and the community development activities, are exclusively charitable at common law.
- (b) The rule in paragraph 149.1(1)(b), "charitable organization", prohibits what are commonly referred to as "private benefits" or "personal benefits". The second issue is whether this condition is violated if Charity Bank makes financial

products and services available to Other Charities, in support of exclusively charitable projects, and to individuals and communities for the sole purpose of relieving poverty, and advancing education or religion, or other purposes considered at law to be charitable .

- (c) The third issue is whether the personal benefit condition is violated if Charity Bank is permitted to pay dividends, and to make distributions upon dissolution or liquidation in excess of that amount representing a return of capital, to shareholders who are qualified donees.
- (d) Paragraph 149.1(2)(a) of the Act prohibits a charitable organization from conducting an unrelated business. The fourth issue is whether the banking activities of Charity Bank are in violation of this condition.
- (e) The fifth issue is whether the provision of incidental benefits by Charity Bank to entities which are not qualified donees constitutes a violation of any of the provisions of the Act governing the registration of Charity Bank as a registered charity.

### III SUMMARY RESPONSES

- Issue (a) In our view, it is clear as a matter of law that the purpose and proposed activities of Charity Bank are exclusively charitable.
- Issue (b) The rule in paragraph 149.1(1)(b) “charitable organization” is not violated because Charity Bank’s activities are intrinsically charitable and therefore will not result in the flow of uncompensated value to any non-charitable entity.
- Issue (c) The rule in paragraph 149.1(1)(b) “charitable organization” is not violated since there is no "personal benefit" to any shareholder by virtue of a corporate distribution to a qualified donee. Alternatively, if CRA were to take the view that paragraph (b) would be violated if such a distribution were permitted, Charity Bank could substitute outright gifts or pledges of gifts to qualified donees which would be in full compliance with the Act.
- Issue (d) Once it has been concluded that Charity Bank's purposes and activities are charitable, any banking business conducted by Charity Bank would not be a business, related or otherwise, since such activity would be in furtherance of its central charitable purpose.
- Issue (e) It is permitted as a matter of law that a purpose that is charitable may result in incidental benefits to non-qualified

donees.

## IV DISCUSSION AND ANALYSIS

### A Are Charity Bank's Purposes and Activities Charitable at Common Law

#### 1. The Common Law Meaning of "Charity"

There are three main approaches to determining, in general terms, whether a purpose is charitable at law: (a) the *Statute of Elizabeth*<sup>1</sup> test; (b) the *Pemsel*<sup>2</sup> test; and, (c) Lord Russell's test in *Incorporated Council of Law Reporting for England and Wales*.<sup>3</sup> The Supreme Court of Canada's decision in (d) *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*<sup>4</sup> contains the definitive expression of these tests in Canada. Each of these approaches is discussed in turn.

##### (a) The Statute of Elizabeth Test

One source for the definition of "charitable purposes" is the preamble to the *Statute of Elizabeth*, (the "*Statute*"). The preamble to the *Statute* is a non-exhaustive list of projects classified by the law, at the time of its enactment, as "charitable":

Whereas lands ... goods ... chattels ... and money, have been ... given ... by Sundry ... well-disposed persons ... for... The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners; the maintenance of schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids. The supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoner or captives; the aid or care of any poor inhabitants...

The preamble to the *Statute* was not intended by Parliament to provide a comprehensive definition of "charity". The preamble was intended only to define the jurisdiction of a commission established under the statute to investigate and enforce "all and singular such gifts, allocations, assignments for any of the charitable and godly purposes before [in the preamble] rehearsed". The formal title of the *Statute* described its purpose as: "An Act to redress

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<sup>1</sup> *Statute of Charitable Uses*, 1601, 43 Eliz. 1, c. 4 (U.K.).

<sup>2</sup> *Commissioners for Special Purposes of the Income Tax and Pemsel*, [1891] A.C. 531, [1891-4] All E.R. Rep. 28 (H.C.) ("*Pemsel*").

<sup>3</sup> [1972] Ch. 73, [1971] 3 All E.R. 1029.

<sup>4</sup> [1999] 1 S.C.R. 10 ("*Vancouver Society*") cited to the web version of the decision at <http://www.droit.umontreal.ca>

misemployment of Lands, Goods and Stock of Money heretofore given to certain Charitable Uses". The charitable uses that were the target of the *Statute* were twofold: charitable uses in favour of the poor and charitable uses to support public works. These trusts were singled out for legislative action because they had become the object of "squandering and defalcation" "by reason of frauds, breaches of trust and negligence in those that should ... employ the same", at a time when government was interested in acting to help alleviate the social consequences of poverty and to improve the public infrastructure. There was much that was thought at the time of the statute's enactment to have been charitable – for example, religion – that was intentionally left off the list. In cases unrelated to the *Statute*, English courts *at the time* continued to use a more general and inclusive common law definition that had been developed by the Court of Chancery. That definition included the advancement of religion as a charitable object and equated "charity" with a broadly inclusive notion of "public benefit".

Generally, the approach of modern courts relying on the *Statute*, has been to ask whether an activity falls within the "spirit and intendment" of the statutory preamble, or whether it is analogous to one of the enumerated purposes or whether it falls within the "equity" of the *Statute*. If this first test is satisfied, a court must also enquire whether the purpose is "beneficial to the community".

This approach to defining charity dates back to the early nineteenth century case of *Morice v. Bishop of Durham* ("*Morice*")<sup>5</sup>, where it was held that the legal definition of charity is not coterminous with the common meaning of charity. The statutory preamble was selected as establishing a more restrictive and appropriate legal meaning. At first instance in that case, the Master of the Rolls, Sir William Grant, stated:

Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its signification is derived chiefly from the *Statute of Elizabeth* (stat. 43, *Eliz.* c. 4). Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied.

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

Initially, the central cases of a valid charitable purpose under the method of the preamble were the relief of poverty through alms-giving and the relief of the indigent through the provision of medical care, employment, and education, together with a restricted class of other objects of general public utility, such as the repair of bridges and canals. Sir Samuel Romilly, counsel for

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<sup>5</sup>(1804), 32 E.R. 656, 9 Ves J. 399, aff'd (1805), 32 E.R. 947, 10 Ves. J. 521.

one of the parties in *Morice*, usefully summarized the new definition by identifying four main objects, only slightly broader in scope than the two existing categories.

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

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

Over time the class of objects included as being within the spirit and intendment of the list of purposes in the preamble, or analogous thereto, grew.

An excerpt from Lord Reid's decision in *Scottish Burial Reform & Cremation Society v. Glasgow Corp.*<sup>6</sup> provides a useful summary of the approach under the statute and its current status in England:

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

(b) The *Pemsel* Test

The more common strategy in the English and Canadian case law is to start with the test laid down by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel* ("Pemsel").<sup>7</sup> In his speech in that case, Lord Macnaghten said<sup>8</sup>:

How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense

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<sup>6</sup> [1968] A.C. 138, at 147 [1967] 3 All E.R. 215 at 218 (H.L.).

<sup>7</sup> *Supra*, note 2.

<sup>8</sup> *Ibid.*, at 583.

comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

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

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

A statement from Lord Wilberforce's speech in *Scottish Burial Reform & Cremation Society v. Glasgow Corp.*<sup>9</sup> provides a useful summary of the *Pemsel* approach:

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

In general, therefore, it may be said that the method under a conservative interpretation of the *Pemsel* test is to start with the *Statute of Elizabeth* and/or the *Pemsel* test, preferably the latter, then look to the rich case law for analogies and for precedents both for and against. But there are many variations on this theme, and the approach overall is thought to be open and liberal.

The *Pemsel* test has been adopted and applied by the Supreme Court of Canada on several occasions.<sup>10</sup>

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<sup>9</sup> *Supra*, note 6, at 154.

(c) Lord Russell's test in *Incorporated Council of Law Reporting for England and Wales*

There is a tendency in some more recent English decision towards a third approach which may be characterized as a near-full retreat from the position set out in *Morice* and a near-complete dilution of the restrictiveness of *Pemsel's* fourth category. Whereas *Morice* posited a categorical distinction between charitable purposes and purposes merely beneficial to the public, the third approach comes very close to collapsing this distinction altogether. Lord Russell, in *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*,<sup>11</sup> described this new test in the following manner:

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

And in the same case Sachs L.J. said:

I do not propose to consider the instant case on the basis of analogies. The analogies or 'stepping stones' approach was rightly conceded on behalf of the Attorney-General not to be essential: its artificiality has been demonstrated in the course of the consideration of the numerous authorities put before us. On the other hand, the wider test – advancement of purposes beneficial to the community or objects of general public utility – has an admirable breadth and flexibility which enables it to be reasonably applied from generation to generation to meet changing circumstances.

These two formulations of the third approach use the *Statute* or the *Pemsel* list and the case law only as a final means of invalidating the trust. What counts according to this new formulation is whether the purpose under consideration is beneficial to the public, very broadly conceived. Only the traditionally excluded objects, such as political objects and objects contrary to public policy, would be excluded for certain. By this test many well-established exclusions would be eliminated. The logical possibility, however, of refusing to acknowledge some charitable purpose trusts when the reasons are otherwise thin would still be available to court.

This test has been rejected in Canada in the *Vancouver Society* decision discussed next.

(d) The Current Canadian Approach: *Vancouver Society*

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<sup>10</sup> *Dames du Bon Pasteur R.* [1952] 2 S.C.R. 76 (S.C.C.) and *Toule Estate v M.N.R.* (1966) [1967] S.C.R. 133 (S.C.C.).

<sup>11</sup> [1972] ch. 73, [1971] 3 All E.R. 1029.

*Vancouver Society* is the first decision of the Supreme Court of Canada on the definition of “charity” in 25 years. There are majority and dissenting opinions in this case in which the Justices disagree as to the appropriate application of the general test of charitable status. This disagreement is not of any present concern, however, as there is substantial agreement on the correct formulation of the general approach. Hence, it is useful for present purposes to examine the decision of both the minority (Gonthier J, McLachlin and L’Heureux Dubé JJ concurring) and the majority (Iacobucci J., Cory, Major and Bastarache JJ. concurring) Justices.

Gonthier J. first examined the nature of the tests he was required to apply. He observed that the list in the preamble was not intended and never has been taken, as exhaustive. Although the *Pemsel* classification was intended to be exhaustive, it left much room in the fourth residual category for development. The *Pemsel* test, he said, was a classification of convenience and as such was not meant to be read as a statute. Rather, it was sufficiently flexible to allow courts to “modernize” the definition of charity, to adapt it to changing social needs (para 36). Neither approach, he said, provides a definition, only a description. Neither approach states why the items identified are charitable - both merely assert that they are. He then went on to identify the twofold substance of charity “long embedded in the case law”: “voluntariness” or “altruism” and “public welfare in an objectively measurable sense” (para 37). To satisfy the traditional tests and the tests under the Act, an organization purporting to be charitable must be exclusively charitable in this sense (although incidental and ancillary purposes are permitted) and it must be for the benefit of an appreciably important class of the community. The latter requirement, in turn, means that there must be an objectively measurable and socially useful benefit and that benefit must be available to, a sufficiently large section of the public. That is, there must be a *public* benefit.

The first three heads of *Pemsel*, he said, provide three presumptively valid heads of charity, while the fourth is a residual category with recognized subcategories. Courts reason by analogy using the first three heads and look to the preamble as a source for analogies in the fourth. They ask whether the proposed object is within the spirit and intendment of the preamble or the decisions developed under it. With respect to the fourth, only some purposes beneficial to the public, i.e., only those within the spirit and intendment of the preamble, are charitable at law. The task is a difficult one but courts must attempt to conform to precedent – the decided cases – in a way that will allow the law of charity to develop in a principled way. Gonthier J., in this respect, specifically rejected the approach of Russell L.J. in *Incorporated Council of Law Reporting for England and Wales v. Attorney-General* who would have eliminated the distinction between public benefits that are charitable in the legal sense and public benefits which are not. Gonthier J. summarized the proper approach as follows:

Thus, in determining whether a particular purpose is charitable, the courts must look to both broad principles - altruism and public benefit – as well as the existing case law under the *Pemsel* classification. The courts should consider whether the purpose under consideration is analogous to one of the purposes enumerated in the preamble of the *Statute of Elizabeth*, or build analogy upon analogy. Yet the pursuit of analogy should not lead the courts astray. One’s eye must always be upon the broader principles I have identified, which are the Ariadne’s thread running through the *Pemsel* categories, and the individual purposes recognized as charitable under them. The courts should not shy

away from the recognition of new purposes which respond to pressing social needs (para 51).

Applying this approach to any case, one must examine whether an organization's purposes are charitable and whether its activities are sufficiently related to its purposes to be considered to be in furtherance of them. Activities which are political or commercial in purpose may be pursued only if they are merely a means to a charitable purpose. They must be merely ancillary or incidental to the sole permissible purpose – charity. The point at which they become an end in themselves is the point at which the organization loses its qualification as charitable. The connections between the activity and the purpose must be direct in the sense of coherent and not necessarily immediate. He summarized as follows:

Thus, in my view, the proper approach is to begin by: (a) identifying the primary purposes of the organization; and then (b) determining whether the purposes are charitable. If one concludes that the purposes are not charitable, then the organization is not charitable and the inquiry ends there. However, if the organization's primary purposes are charitable, we must then go a further step, and consider (c) whether the other purposes pursued by the organization are ancillary or incidental to its primary purposes; and (d) whether the activities engaged in by the organization are sufficiently related to its purposes to be considered to be furthering them. If positive responses are made to these two latter inquiries, then the organization should be registered as a charitable organization (para 63).

Iacobucci J. started with a discussion of the test in *Pemsel*, which he said had been adopted and applied many times in Canada. That test required that the purpose be for the benefit of the community or of an appreciably important class and that the purpose have the "genuine character" of charity. In applying the test, the focus must be on purposes, not activities. Thus, (a) the purpose of the organization must be charitable and must define the scope of the activities engaged in by the organization and (b) all of the organizations' resources must be devoted to these activities unless the organization falls within the specific exemptions. Within this framework, and in the absence of a legislative reform providing guidelines, "the best way to discern the quality of an organizations' purposes was to proceed by way of analogy to the purposes already found to be charitable by the common law" (para 159). To qualify under the Act, the organization must be exclusively charitable. However, where it devotes part of its resources to other (political or commercial purposes or activities that are merely ancillary and incidental to its charitable purpose), it will still qualify either at law or pursuant to specific provisions of the Act. In effect, the pursuit of ancillary and incidental objectives does not jeopardize the finding that the organization is charitable.

Iacobucci J.'s views are more fully expressed as follows:

In conclusion, on the basis of the Canadian jurisprudence, the requirements for registration under s. 248(1) come down to two:

(1) the purposes of the organization must be charitable , and must define the scope of the activities engaged in by the organization; and

(2) all of the organization's resources must be devoted to these activities unless the organization falls within the specific exemptions of s. 149.1(6.1) or (6.2).

In the absence of legislative reform providing guidelines, the best way in which to discern the charitable quality of an organization's purposes is to continue to proceed by way of analogy to those purposes already found to be charitable by the common law, and conveniently classified in Special Commissioners of Income Tax, subject always to the general requirement of providing a benefit to the community, and with an eye to society's current social, moral, and economic context. The task at hand, then, is to consider whether the Society, as presently constituted, has met these criteria (para 159).

With respect to the proper approach under the fourth head or *Pemsel*, Iacobucci stated as follows:

In *D'Aguiar*, it was recognized that the guidance provided by the common law in this area is not particularly clear. I agree. The requirement that the purposes benefit the community "in a way the law regards as charitable" is obviously circular, and the various examples enumerated in the preamble to the *Statute of Elizabeth* seem to lack a common character or thread on which to base any coherent argument from analogy. That notwithstanding, however, the Privy Council in that case set out what is in my view a useful approach to the assessment of an organization's purposes under the fourth head (para 177):

“[The Court] must first consider the trend of those decisions which have established certain objects as charitable under this heading, and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these. Secondly, it must examine certain accepted anomalies to see whether they fairly cover the objects under consideration. Thirdly and this is really a cross check upon the others it must ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity; if so, the argument for charity must fail.”

To this I would add the general requirement, outlined in *Verge v. Somerville*, supra, at p. 499, that the purpose must also be "for the benefit of the community or of an appreciably important class of the community" rather than for private advantage.

## 2. Whether Pursuing the Efficiency and Effectiveness of the Charity Sector is a Charitable Purpose

The first issue in the evaluation of Charity Bank's purposes and activities is whether Charity Bank's enhancement activities qualify as charitable under the fourth head of *Pemsel*, that is, whether pursuing the efficiency and effectiveness of the charity sector (qualified donees and

Other Charities) as a whole is a charitable purpose at common law. In our view, it is quite clear that pursuing the efficiency and effectiveness of the charity sector is a charitable purpose at common law. The authorities for this proposition can be broken down into direct authority and analogous authority.

(a) Direct Authority

There is limited direct authority on the question of whether a financial services provider which provides material benefits exclusively to qualified donees and Other Charities is charitable at common law. There is also limited direct authority on the more general question of whether a charity formed for the purpose of enhancing or contributing to the efficiency and effectiveness of the charity sector as a whole is charitable at common law. Nonetheless, it is well accepted by informed commentators and by CRA that the more general purpose – enhancing the efficiency and effectiveness of the charity sector as a whole - is charitable at common law. In our opinion, there is no reason why the specific means – providing financial services on beneficial terms - should not be considered to fall under it. There is persuasive authority for this latter proposition in England, but not in Canada.

On the charitable nature of both the general and specific purpose there are the following views:

- It is well-established that giving to or facilitating another charity is a charitable purpose at common law. The leading decision is *IRC v Slater (Helen) Charitable Trust Ltd.*<sup>12</sup>
- In *Tudor on Charities*<sup>13</sup>, the authors state categorically that both the general purpose and the specific means are charitable. Their views are based in part on the decision of the Charity Commissioners (cited further below) to the same effect:

It is well accepted that an organization established to further an accepted charitable purpose carried on by another is itself charitable. On this basis it can be said that the promotion of the efficiency and effectiveness of charities by the provision of support and services is charitable. By analogy, the Charity Commissioners have registered the Charity Bank Limited which is established to provide loans and guarantees on beneficial terms to charities by receiving donations and taking deposits on beneficial terms from the public and others in order to provide such loans and guarantees. The Charity Commissioners are of the view that it is also charitable to promote the effective use of resources for charitable purposes by charities and non-charitable bodies. By analogy with the promotion of industry and commerce and the promotion of the mental and welfare and improvement of the community, the Charity Commissioners regard the promotion of the voluntary sector for the benefit of the public as a charitable purpose.

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<sup>12</sup> *IRC v Slater (Helen) Charitable Trust Ltd* [1981] 3 A11ER98

<sup>13</sup> *Tudor on Charities* 9<sup>th</sup> ed., (Sweet & Maxwell, London: 2003) at p.103.

- The Ontario Law Reform Commission in its *Report on the Law of Charity*<sup>14</sup> expresses the principle underlying the proposition that facilitating charity is itself a charitable activity:

One might legitimately ask whether gifts to fund public works are charitable in the sense of being gifts to advance a common good, or, indeed, whether they are charitable in any other conventional sense. We think the answer to this question is yes: these projects advance common goods by providing the material infrastructure that makes it possible for others to pursue them more effectively. In this regard, interestingly, they are exactly like all other charitable projects. Knowledge, for example, is advanced for the good of others not by somehow giving it directly to others, but by giving someone the material means or material encouragement to pursue it. Even the best teachers do not “put” knowledge into the heads of their students. The distinction between public works projects and other more usual types of charitable projects lies at the level of the directedness and directness of the charity: the public works projects, because they are also public goods in the economist’s sense, make many pursuits of many goods possible to a multitude of people.

- CRA has explicitly recognized that facilitating the charitable activities of other charities is a charitable purpose in at least two public documents, one announcing its policy on the topic and the other announcing its decision to withdraw from litigation where that was the issue:

The policy document states in relevant part as follows:<sup>15</sup>

2. An applicant that provides some form of service or assistance that directly improves the charitable programs of other registered charities, or that improves the efficient administration of other charities, and realize economies of scale, which economies they could not access on their own, would likely be charitable. The mere fact that the assistance or service is provided on an individual basis, to one charity at a time, does not preclude an applicant from qualifying for registration so long as it is not assisting only one charity to the exclusion of all others. However, exclusively assisting one other specified charity to the exclusion of all others would be more akin to a private consulting group than to a charity and therefore could not be registered.

3. This policy applies to applicant organizations and registered charities, also known as facilitators, umbrella groups and intermediaries, that are established exclusively to assist other charities, directly improve the charitable activities of other charities, and/or improve the efficiency

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<sup>14</sup> *Report on the Law of Charities*, (Ontario Law Reform Commission: Toronto, 1996) at 211.

<sup>15</sup> *Policy Statement: Organization Established to Assist Other Charities CPS-008*, January 12, 1996

of other charities. One or more charities can be the beneficiaries of such assistance.

4. To qualify for registration as a charity, an applicant organization must meet all of the following conditions:

- (i) its principal charitable purpose must be to improve the efficiency and effectiveness of other charities to assist them in meeting their charitable objectives;
- (ii) the means of improving the efficiency and effectiveness of the other charities must be reasonable in order to achieve their purposes;
- (iii) at least 90% of the beneficiaries must be registered charities;
- (iv) any non-registered charity must be:
  - (1) potentially registerable, and/or
  - (2) federal/provincial agencies; and
- (v) the organization must advise and encourage the non-registered entities to seek registration as a charity within a reasonable length of time.

An organization must demonstrate that its purposes and activities will assist and improve the efficiency and effectiveness of other charities from providing direct funding, holding property for other registered charities, providing administrative services and helping realize economies of scale that charities could not obtain on their own, to advising and assisting in the field of information technology, or providing a facility or a service that is directly related to furthering the charitable purposes of another registered charity, for example, a rest home for nurses of a hospital.

The second document announces CRA's retreat from litigation involving an applicant for registration founded to promote volunteerism. The document in relevant part, states as follows<sup>16</sup>:

We received an application from the Grand Forks Volunteer Society to be registered as a charity. Our review of the organization's file showed that the beneficiaries of the organization's services could include organizations that were not registered charities or other qualified donees, as required

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<sup>16</sup> Registered Charities Newsletter, Spring 2003 ("*Grand Forks*")

under the Income Tax Act. As a result, we turned down the application, and the organization filed an appeal with the Federal Court of Appeal.

However, before the case was heard, we reconsidered the particular reasons why the Grand Forks Volunteer Society wanted to include beneficiaries who were not registered charities or other qualified donees. We concluded that in today's social and legal context, promoting volunteerism could be considered a charitable purpose in its own right. Because of this, the Charities Directorate decided to broaden its registration policy on volunteer centres. This resulted in the Grand Forks Volunteer Society's application being accepted.

Under our new policy, an organization formed to promote volunteerism in the community at large through broad-based activities may be eligible for registration. Such an organization is no longer required to limit its beneficiaries to only registered charities or other qualified donees.

However, to qualify, an applicant's purpose must be to promote volunteerism to the benefit of the community at large, and this is to be clearly stated in its governing documents. In addition, the organization's activities must be broad-based, meaning that its range of activities must be of interest generally to volunteers and the community at large. Also, it is acceptable for the organization's specific activities to include training as well as increasing public awareness and support for volunteerism.

It is important to emphasize that the organization must operate for the benefit of the community at large, rather than a specific group, such as a sports club. Further, all beneficiaries must be non-profit, community-based organizations. However, if the organization intends to provide direct financial support, the beneficiaries must be registered charities or qualified donees.

A document providing more details on this policy will soon be available on the Charities Directorate Web site.

- The Charity Commission for England and Wales has explicitly addressed the specific issue and has responded in clear positive terms that a charity bank qualifies as charitable at common law<sup>17</sup>:

In the case of Charity Bank it will make loans on the basis that the charity could not raise commercial finance elsewhere on affordable or otherwise acceptable terms. The Commissioners concluded that there is no reason in principle which prevents the making of soft loans from one charity to another for specific charitable purpose or purposes being a proper charitable activity or which prevents the funding of charitable

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<sup>17</sup> Charity Commission: Decision of the Charity Commissioners to Register The Charity Bank Limited as a Charity,

April 17, 2002

projects administered by non charitable bodies from being a proper charitable activity.

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The Commissioners considered that the Charity Bank's aim is to contribute to the building of a more robust charitable sector better resourced to meet modern needs and to the strengthening of charities to help them better serve their beneficiaries. Charity Bank will not simply be raising funds which it will then pass on to charity nor will it be promoting a particular form of fund-raising. Rather it aims to operate in such a way as to provide a pool of funds available to charity on a lasting basis. It will do this by operating as a bank, taking deposits cheaply so as to raise a capital base on which resources are made available to charity by way of soft loans and can continue to be made available to charity on an ongoing basis as loans are repaid and funds recycled.

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The Commissioners were satisfied that there was a sufficient analogy in relation to Charity Bank not only from the Association case but also to the established charitable purposes of promoting efficiency and effectiveness of charities and the efficient and effective use of charitable resources which would enable them to accept the purposes of Charity Bank as charitable (subject to satisfying the public benefit test and the other issues discussed below).

In relation to public benefit, the Commissioners were satisfied that tangible benefits would arise from Charity Bank's activities and in particular through the provision of finance of charitable purposes in circumstances where nothing comparable currently existed, and through the provision of targeted financial advice.

Charity Bank may also confer intangible benefits, (amongst others) through the promotion of the concept of charitable giving in the community, bringing relief and benefit to the objects of charity, encouraging altruism in society, fostering closer association between donors and charities and charitable beneficiaries and identifying and supporting the charity sector where it seeks, on its own or in partnership with Government, to relieve the disadvantaged in society.

The Commissioners were satisfied that the objects of Charity Bank did constitute a novel charitable purpose for the benefit of the public and that Charity Bank was acceptable for registration as a charity, subject to the following issues.

- The Charity Commission for England and Wales has also addressed the general question in its discussion Paper entitled "Promoting the Efficiency and Effectiveness of Charities

and the Effective Use of Charitable Resources<sup>18</sup>. In the main body of this text the Charity Commission lays out the general case that advancing the efficiency and effectiveness of the sector is charitable at law.

(b) Analogous Authority

The main analogy is to the public works category of charitable purposes. This is a broad and diverse category of charitable purposes which has been recognized as charitable from the very beginning of the common law jurisprudence on the definition of charity. Hubert Picarda<sup>19</sup>, summarizes the law as follows:

There are many examples in the books of public works and services which would otherwise be supplied at the expense of the taxpayer but which are valid objects of charitable gifts or trusts. Some of them are precisely within the language of the preamble of the Statute of Elizabeth I, others are charitable by analogy. Thus the courts have upheld trusts for repairing highways,<sup>20</sup> building bridges,<sup>21</sup> and protecting the sea coast against encroachment.<sup>22</sup> In *A-G v Shrewsbury Corpn*<sup>23</sup> the repair, improvement and fortification of the town's bridges, gates, towers and walls was held to be a charitable purpose. Non-profit-making canals and navigable waterways open to public navigation are capable of being charitable objects on the analogy of the maintenance of highways.<sup>24</sup>

Picarda cites numerous other examples of public works and public amenities as well:

Public Works

- the promotion of industry and commerce<sup>25</sup>
- a trust to put up lamp posts or for paving, lighting or cleaning streets or for providing homes for retired policemen,<sup>26</sup>

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<sup>18</sup> Review of the Register Promoting the Efficiency and Effective Use and Charitable Resources (Charity Commissioner for England and Wales, 2001) ("Review").

<sup>19</sup> *The Law and Practice Relating to Charities* (Butterworths: London, 1999)

<sup>20</sup> *A-G v. Harrow School Governors* (1754) 2 Ves Sen 551; *A-G v. Day* [1900] 1 Ch 31.

<sup>21</sup> *Forbes v Forbes* (1854) 18 Beav 552.

<sup>22</sup> *A-G v. Brown* (1818) 1 Swan 265; *Wilson v. Barnes* (1886) 38 Ch D 507, CA.

<sup>23</sup> (1843) 6 Beav 220.

<sup>24</sup> *Chesterfield Canal Co.* (Regn No 506925); *Dudley Canal Trust* (Regn No 240545); *Trent and Mersey Canal Society Ltd.* (Regn No 326498).

<sup>25</sup> *Crystal Palace Trustees v. Minister of Town and Country Planning* [1951] Ch 132; *IRC v. White* [1980] TR 155.

- to supply water to town;<sup>27</sup>
- supplying a fire brigade;<sup>28</sup>
- a lifeboat service;<sup>29</sup>
- a municipal market;<sup>30</sup>
- a cemetery;<sup>31</sup>
- a crematorium;<sup>32</sup>
- a public car park;<sup>33</sup>
- municipal improvement;<sup>34</sup>
- beautifying a township;<sup>35</sup>
- beautifying city streets;<sup>36</sup>
- provision of a court house;<sup>37</sup>

### Public Amenities

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<sup>26</sup> *A-G v. Brown* (1818) 1 Swan 265; *A-G v. Heelis* (1824) 2 Sim & St 67; *A-G v. Eastlake* (1853) 11 Hare 205; *Gort (Viscount) v. A-G* (1817) 6 Dow 136, HL.

<sup>27</sup> *Jones v. Williams* (1767); Amb 651; *A-G v. Heelis* (1824) 2Sim & St 67

<sup>28</sup> *Re Wokingham Fire Brigade Trusts* (1951) Ch 373; *Solicitor-General v. Wanganui Borough* (1919) NZLR 763, CA.

<sup>29</sup> *Johnston v Swann* (1818) 3 Madd 457.

<sup>30</sup> *Re Smith* (1967) VR 341.

<sup>31</sup> *A-G v Blizard*. (1855) 21 Beav 233.

<sup>32</sup> *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow City Corpn.* (1968) AC 138, HL.

<sup>33</sup> *Saffron Walden Pig Market Essex* (1980) Ch Com Rep 37-38, Paras 126-134.

<sup>34</sup> *Howse v Chapman* (1799) 4 Ves 542 (Bath); *Re Bones* (1930) VLR 346 (Ballart).

<sup>35</sup> *Schellenberger v Trustees Executors and Agency Co Ltd* (1953) 86 CLR 454 (township of Bunyip).

<sup>36</sup> *Re Knowles* (1938) 3 DLR 178.

<sup>37</sup> *Duke Law of Charitable Uses* (1676) 109; ed Bridgman 136.

- libraries;<sup>38</sup>
- museums;<sup>39</sup>
- galleries;<sup>40</sup>
- public halls;<sup>41</sup>
- public reading rooms;<sup>42</sup>
- botanical garden;<sup>43</sup> and
- observatory.<sup>44</sup>

3. Whether Providing Financial Products and Services in Support of Projects Which are Exclusively Charitable in Purpose is a Charitable Purpose.

A charity may partner with any entity, for profit, or non-profit in order to carry out its own charitable activities. Provided the projects which Charity Bank supports with its financial products and services are exclusively charitable, and provided Charity Bank's activities do not result in any uncompensated benefits to persons or entities who/which are non-qualified donees, CharityBank may engage directly in exclusively charitable projects by supporting them with financial products and services.

4. Whether Providing Financial Products and Services in Support of Individuals and Communities for the Relief of Poverty, or the Advancement of Education or Religion, or other purposes considered at law to be charitable is a Charitable Purpose.

Charity Bank may engage in community development projects as hereinbefore defined, as these projects are exclusively charitable. In pursuing community development projects, Charity Bank will restrict itself to exclusively charitable activities such as the relief of poverty or advancement of education or religion, or other purposes considered at common law to be charitable. There therefore is no legal issue to be addressed.

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<sup>38</sup> *Harrison v Southampton Corpn* (1854) 2 S m & G 387; *Abbott v Fraser* (1874) LR 6 PC 96.

<sup>39</sup> *British Museum Trustees v White* (1826) 2 Sim & St 594; *Re Allsop* (1884) 11r 4; *Re Holburne* (1885) 53 LT 212.

<sup>40</sup> *Tarver v Weaver* (1930) 130 So 209 (US); *Re Gwilym* (1952) VLR 282.

<sup>41</sup> *Re Spence* (1938) Ch 96; *Monds v Stackhouse* (1948) 77 CLR 232; *Re Vernon Estate* (1948) 2 WWR 46; *Re Cumming* (1951) NZLR 498; cf *Richmond-upon-Thames London Boough Council v A-G* (1982) 81 LGR 156.

<sup>42</sup> *Re Scowcroft* (1898) 2 Ch 638.

<sup>43</sup> *Townley v Bedwell* (1801) 6 Ves 194; *Harrison v Southampton Corpn* (1854) 2 S m & G 387.

<sup>44</sup> *Harrison v Southampton Corpn* (1854) 2 S m & G 387

**B Whether the Personal Benefit Condition is Violated if Charity Bank Makes Financial Products and Services Available to Other Charities, in support of exclusively charitable Projects, and to Individuals and Communities for the Purpose of Relieving Poverty and Advancing Education or Religion, or other purposes considered at law to be Charitable**

Provided Charity Bank's enhancement activities, project financial activities and community development activities are exclusively charitable as concluded in section A, no issue of personal benefit arises.

**C Whether the Personal Benefit Condition is violated if Charity Bank is Permitted to Return Profits to Qualified Donee Shareholders**

The issue is whether the payment of dividends and/or other distributions on the shares issued by Charity Bank and owned by persons who are qualified donees is subject to the prohibition against personal benefits in the definition of "charitable organization".

Our answer is that it clearly is not.

First, it is clear that no such dividend could be paid or distribution made to any person or entity other than a qualified donee and therefore, there could not be any "personal" benefit in the requisite sense.

Second, such a dividend distribution would not be contrary to the personal benefit prohibition because the statutory prohibition is clearly intended to sanction distributions to entities *other* than qualified donees. It is not intended to prohibit distributions to other qualified donees. This is clear from a reading of the provisions of the Act as a whole governing qualified donees. The Act's regulation of qualified donees is broadly based on the "exclusively charitable" standard and this prohibition is but one instance of that standard.

Third, if CRA or a court were to take the view that such dividends or distributions were in violation of the Act's prohibition, contrary to our opinion, then it would be a simple matter for Charity Bank, as a registered Charity, to effect direct gifts of an equivalent amount to its qualified donee shareholders.

**D Business Activities**

All of the business activities of Charity Bank will be directly related to the charitable objects of Charity Bank. There is no question that Charity Bank's business activities are permitted under the Act.

**E Incidental Benefits**

The issue is whether it is permitted as a matter of law for Charity Bank to make benefits available on an incidental basis to what were termed "quasi-charities" above.

Our view is that it is clear that it is permitted as a matter of law to make benefits available on an incidental basis to quasi-charities.

On this point, Iacobucci J. *Vancouver Society* stated:

C156 There is, however, one other exception to this rule. Though they concerned a provision of an Act other than our ITA, I believe the words of Denning L.J. in *British Launderers' Research Assn. v. Hendon Rating Authority (Borough)* (1948), [1949] 1 K.B. 462 (Eng. C.A.) at pp. 467-68, as adopted by this Court in *Towle Estate*, supra, at p. 143, are apposite in this instance as well:

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

157 In *Towle Estate*, Ritchie J., for the majority, relied on this statement to find that, although a particular purpose was not itself charitable, it was incidental to another, charitable purpose, and was therefore properly to be considered not as an end in itself, but as a "means of fulfilment" of another purpose, which had already been determined to be charitable. Viewed in this way, it did not vitiate the charitable character of the organization. (See also *Positive Action Against Pornography*, supra, at p. 355, where a similar argument was considered and rejected, but only on the facts.)

158 The chief proposition to be drawn from this holding is that even the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfilment of another, charitable, purpose and not as an end in itself. That is, where the purpose is better construed as an activity in direct furtherance of a charitable purpose, the organization will not fail to qualify as charitable because it described the activity as a purpose.

*Vancouver Society* is consistent with a long line of decisions on this point.

The Charity Commission for England and Wales stated its views in a similar vein as follows (emphasis added)<sup>45</sup>:

C7. Deciding on whether or not a private benefit is incidental is considered in our publication RR8: The Public Character of Charity.

C4. Based on the legal authorities set out in Annex A, our view is that it is charitable to promote or improve the efficiency and effectiveness of charities. The important element of these decisions is the connection between the activities of the particular organisation and the achievement of a charitable purpose. **If it is charitable to improve the efficiency and effectiveness of charities by carrying out service providing activities, there seems to be no reason why the promotion of the effective use of resources for charitable purposes by non charitable bodies should not also be charitable, providing certain criteria are satisfied.**

C5. **In the case of recipient non charitable organisations, our view is that there must be a link between the activities being carried out by the donor organisation and the achievement of the charitable purpose. The assistance provided to and through the non charitable agency must impact directly on its charitable activities.**

C6. There must also be a way of ensuring that any private benefits to those non-charitable bodies occurring as a result of the service provided to them are incidental. In order to be charitable, an organisation must be set up to provide a benefit to the community and must be able to show that any private benefit, is and will continue to be, incidental to and a necessary part of, carrying out its charitable purposes.

C8. Such incidental benefit seems to be almost inescapable with non charitable organisations receiving this service. For example, their administration might be improved resulting in increased profits. Provided however this result is an incidental benefit accruing alongside the ultimate purpose of helping use resources more effectively to meet the needs of the charitable beneficiaries, this would be charitable. The question is whether or not these benefits are acceptable as incidental to the achievement of the charitable purposes.

C9. In considering an application by an organisation providing services aimed at improving the effective use of resources for charitable purposes we have used the following criteria:

- The organisation must set out purposes that are wholly charitable and that indicate the means by which those charitable purposes are fulfilled. This is so that we can judge whether the organisation's activities have a direct effect on the achievement

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<sup>45</sup> *Review, supra*, note 18.

of those charitable purposes. (An example would be a charity set up to help people with cancer and their families. Its purposes might be set out as “To relieve sickness by liaising with institutions and agencies that assist those affected by cancer”);

- The activities of the organisation must be shown to lead directly to the fulfilment of the charitable purposes. There must be sufficient evidence supplied to demonstrate this in each case;
- Any benefits accruing to any non-charitable bodies receiving the services must be incidental to the achievement of the charitable purpose.

C10. It would not be acceptable, in our view, for purposes to be set out as being simply for the promotion or improvement in the effectiveness of organisations that carry out charitable purposes. This would allow the organisation seeking charitable status to improve or benefit non-charitable organisations, and this would not be a charitable purpose.

CRA, in the passage from the *Grand Forks* decision quoted above, has also recognized that incidental benefits to non-charitable entities does not detract from the exclusively charitable status of a charity<sup>46</sup>.

## **Goodman and Carr LLP**

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<sup>46</sup> *Grand Forks*, *supra*, note 16.