
Taxing Charities/Imposer les Organismes de Bienfaisance: Harmonization and Dissonance in Canadian Charity Law

Kathryn Chan*

PRÉCIS

Pendant de nombreuses années, la détermination de l'admissibilité des organismes aux importants avantages fiscaux accordés aux organismes de bienfaisance enregistrés (« registered charities ») en vertu de la Loi de l'impôt sur le revenu (LIR) reposait, dans toutes les provinces, sur la notion de bienfaisance (« charity ») élaborée dans la common law britannique des fiducies de bienfaisance. Au Canada, cependant, la notion de bienfaisance (« charity ») tire également sa signification d'autres sources, incluant celles de l'ancien droit civil qui font toujours partie du droit fondamental au Québec. Ces diverses sources du droit posent un défi aux organismes de bienfaisance enregistrés et au projet continu d'assurer l'accessibilité des lois fédérales aux nombreux auditoires juridiques et linguistiques au Canada.

Cet article conteste la position générale selon laquelle il n'existe qu'une seule source d'interprétation pour les dispositions sur les organismes de bienfaisance enregistrés. L'auteur formule un certain nombre d'assertions qui contredisent l'approche unijuridique de longue date. Premièrement, l'interprétation actuelle de ces dispositions, en particulier la position selon laquelle la notion de bienfaisance retenue dans la LIR est une notion de droit fédérale uniforme, contredit les principes constitutionnels et réglementaires ainsi que les politiques canadiennes sur le bilinguisme législatif et le bijuralisme, et les termes explicites des articles 8.1 et 8.2 de la Loi d'interprétation. Deuxièmement, il existe au moins quatre sources juridiques de la signification des termes « bienfaisance » et « charity » au Canada : la common law des fiducies de bienfaisance, les règles du droit civil concernant le *legs pieux*, le droit romain sur les fondations et les dons, et les diverses lois provinciales régissant l'administration des organismes de bienfaisance. Troisièmement, même si l'on

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devait continuer à donner aux termes « charitable » et « de bienfaisance » une signification tirée de la common law dans les provinces régies par ce régime juridique, le terme « de bienfaisance » est une traduction problématique du terme « charitable » de la common law car cette notion est plus proche du terme « benevolent », qui a toujours été écarté de la notion juridique de bienfaisance. Quatrièmement, lorsqu'une législation provinciale valide donne une signification aux termes « charitable » ou « de bienfaisance », on devrait généralement en tenir compte quand on applique la LIR dans cette province.

Finalement, l'auteur fait valoir qu'au Québec, on ne peut interpréter le terme « de bienfaisance » (« charitable ») selon la common law des fiducies de bienfaisance, car il s'agit de règles de droit privé (bien qu'elles comportent des aspects publics) qui ne trouvent pas application dans cette province. Alors que la tradition du droit civil québécois n'a jamais élaboré une conception rigoureuse ou détaillée de la notion de bienfaisance, la réception de l'ancien droit français a permis qu'une grande variété de sources de droit coutumier fassent partie du droit québécois. Ces sources exigeront des études plus poussées, mais elles font néanmoins partie du droit civil et du droit des biens au Québec, et font donc partie du dictionnaire juridique par défaut applicable à des lois fédérales comme la LIR. L'auteur conclut avec certaines réflexions sur diverses possibilités de réforme du droit des organismes de bienfaisance enregistrés.

ABSTRACT

For many years, the determination of which organizations should qualify for the significant tax benefits accorded to registered charities (organismes de bienfaisance enregistrés) under the Canadian Income Tax Act (ITA) has been based, in all provinces, on the concept of charity developed by the English common law of charitable trusts. However, there are other sources of meaning for the concept of charity (bienfaisance) in Canada, including ancient civil-law sources that continue to form part of the basic law of Quebec. These diverse "charity-law" sources present a challenge for the registered charity scheme, and for the ongoing project of ensuring that federal laws are accessible to each of Canada's multiple legal and linguistic audiences.

This article challenges the prevailing view that there is only one source of meaning for the registered charity provisions. The author makes a number of assertions that contradict the longstanding unijural approach. First, the current interpretive approach to the registered charity provisions, and particularly the position that the ITA concept of charity is "uniform federal law," is at odds with statutory and constitutional principles, as well as Canada's policies on legislative bilingualism and bijuralism, and the explicit terms of sections 8.1 and 8.2 of the Interpretation Act. Second, there are at least four legal sources of meaning for the terms "charity" and "bienfaisance" in Canada: the common law of charitable trusts, the civil-law rules regarding *legs pieux*, the Roman laws on foundations and gifts, and the various provincial statutes governing the administration of charities. Third, although the ITA term "charitable" ("de bienfaisance") should likely continue to be given a common-law meaning in the common-law provinces, "de bienfaisance" is a problematic translation of the common-law term "charitable" because it is more consistent with another English term, "benevolent," which has consistently been held to fall outside the legal concept of charity. Fourth, where valid provincial legislation establishes a meaning for the term "charitable" or "de bienfaisance," that statutory meaning should generally be referred to in applying the ITA within that province.

Finally, the author asserts that in Quebec, there is no basis for interpreting the term "charitable" ("de bienfaisance") in accordance with the common law of charitable trusts, a body of private law (though admittedly one with public aspects) that has no application

in that province. While Quebec's civil-law tradition has never developed a stringent or detailed conception of charity, the reception of the ancien droit from France did ensure that a wide variety of customary law sources on transfers for charitable purposes came to form part of Quebec law. Although these sources will require further study, they form part of the law of property and civil rights in Quebec, and therefore part of the default legislative dictionary applicable to federal legislation such as the ITA. The article concludes with some thoughts on various options for reform of the registered charity scheme.

KEYWORDS: CHARITIES ■ INCOME TAX ACT ■ STATUTORY INTERPRETATION ■ BIJURALISM ■ BILINGUALISM ■ FEDERAL-PROVINCIAL

CONTENTS

Author's Note	484
Introduction	485
Charity (Bienfaisance) as a Unitary Notion: The Current Approach to the Registered Charity Provisions of the ITA	489
Tax Benefits for Registered Charities Under the ITA	489
The History of Tax Benefits for Charities in Canada	489
The Current Statutory Framework for Charitable Registration	490
Changes in Terminology in the French Version of the ITA	492
The Interpretation of "Charitable" ("de Bienfaisance") Under the ITA	493
The Historical Approach	493
The Current Judicial Approach	494
The Current Administrative Approach	497
Tension Created by the Current Unitary Approach	498
Provincial Jurisdiction over Charities	498
Changes in Terminology in the French Version of the ITA	501
Complementarity, Dissociation, and the Federal Harmonization Project	502
Charity (Bienfaisance) as a Plural Notion: Four Sources of Meaning for the Registered Charity Provisions of the ITA	507
Introduction	507
The Common Law of Charitable Trusts	508
Charity as a Product of Historical Circumstance and Legal Form	509
Purposes Encompassed by the Common-Law Meaning of Charity	513
The Customary Civil-Law Rules Regarding Legs Pieux	515
The Starting Point: CCLC Article 869 and the Ancien Droit	515
Legs Pieux in Roman and French Law	521
Purposes Encompassed by the Canonical Understanding of Charity	523
The Roman-Law Sources on Foundations and Gifts	524
A Wider Reading of CCLC Article 869—"Le Bien, le Vrai, le Beau"	524
Gifts for Public Purposes in Roman Law	526
Purposes Encompassed by the Roman Understanding of Charity	528
Statutory Meanings of "Charitable" ("de Bienfaisance")	531
What Does a Plural Notion of Charity (Bienfaisance) Mean for the Registered Charity Scheme?	533
The Bilingualism Question: How Should the Registered Charity Provisions Be Interpreted in the Common-Law Provinces?	534
The Principles of Bilingual Legislation	534
Applying the Principles	535

The Bijuralism Question: How Should the Registered Charity Provisions Be Interpreted in Quebec?	537
Complementarity, Dissociation, and the Federal Harmonization Act	537
Public Law or Private Law?	540
Implicit Dissociation	542
The Complementarity Question: How Should the Registered Charity Provisions Be Interpreted in Provinces That Have Enacted a Statutory Meaning for “Charitable” (“de Bienfaisance”)?	548
Conclusion	549
Postscript	555

AUTHOR'S NOTE. *Shortly before this journal went to press, the Supreme Court of Canada released its decision in AYSA Amateur Youth Soccer Association v. Canada (Revenue Agency) (2007 SCC 42), a decision that is highly relevant to the views expressed in this article. The majority of the court overturned the Federal Court of Appeal's ruling that the regime for the taxation of registered Canadian amateur athletic associations under the Income Tax Act constituted a complete code for amateur sporting activities, and held that the purposes of the appellant association, which focused on the promotion of soccer, were not charitable. More importantly, the majority dismissed the appellant's arguments based on section 8.1 of the Interpretation Act and the application of the Re Laidlaw decision, stating (at paragraph 39) that “specific statutory definitions of charity in provincial legislation and decisions dealing with that definition do not dictate the meaning of charity under the ITA.”*

While the AYSA decision thus bolsters the longstanding unijural approach to the registered charity provisions that is challenged in this article, it also brings to the fore a number of questions about the rationale and scope of the court's decision. Do specific provincial statutory definitions of charity not apply to the interpretation of the registered charity provisions because federal-provincial complementarity only requires a general respect for the concepts of the “common law” and “civil law”; or because those definitions, being “specific,” are not part of a province's basic law; or because the concept of a “charitable purpose” does not form part of the law of property and civil rights in the province, as the Federal Court of Appeal suggested in the Travel Just case (discussed in this article)?

The significance of this line of inquiry is highlighted when one considers the decision's implications for Quebec. If the AYSA had been a Quebec corporation, and that province had in place valid general legislation defining a charitable purpose (fin de bienfaisance) as including the promotion of amateur sport, would the court have rejected the association's appeal on the basis of a dated line of English common law? What if the concept of a charitable purpose was in fact part of the civil-law tradition of Quebec?

With AYSA, the Supreme Court of Canada has provided at least some indication of how it views the relationship between federal and provincial law in the context of the current registered charity scheme. It is to be hoped that the court's brief statement will mark, not the end, but the beginning of the debate on how we might fashion a

charitable regime that reflects both the shared values and the plural character of the Canadian state.

INTRODUCTION

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

Of all the words chosen by Parliament to describe the phenomena that give rise to fiscal consequences under Canada’s Income Tax Act,² few have the normative weight or the descriptive breadth of the words “charity” and, in the French version of the statute, “bienfaisance.” These terms, which together express the primary legal criteria for a class of fiscally privileged entities in Canada, have no well-defined popular meaning;³ rather, they encompass a wide range of moral, religious, and legal concepts whose meaning derives from particular contexts or particular groups. To the Christian theologian, “charity” may represent the biblical ideal of Christ-like love; to the man on the street, it may simply signify a moral duty to provide food for the hungry or alms for the poor. To the believer, “bienfaisance” may only refer to good works that glorify a supreme being; to the worldly philanthropist, it may encompass any act that enhances civic life. In other words, “charity” and “bienfaisance” are intrinsically plural expressions, in a way that goes to their normative core. For while charity may be, as John Gardner argues, a humanitarian rather than a civic virtue,⁴ it is also a virtue that is most often motivated and defined by the values of communities much smaller than the state.

Given the multiple meanings attached to the words “charity” and “bienfaisance,” one might imagine that a Canadian federal statute such as the ITA would provide an ideal environment in which to preserve at least some of the richness of these terms. Canada is, after all, a multijural state, within which the common-law tradition received from England and the civil-law tradition received from France have long co-existed and interacted, not only with each other, but also with the sources

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

2 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the ITA”). For convenience, this abbreviation is used for references to all versions of the statute, both English and French.

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

4 John Gardner, “The Virtue of Charity and Its Foils,” in Charles Mitchell and Susan R. Moody, eds., *Foundations of Charity* (Oxford: Hart Publishing, 2000), 1-27, at 15-16.

and traditions of aboriginal law.⁵ Canada is also a multilingual state that has long recognized the lack of equivalency between specific linguistic concepts in the legal sphere. Finally, Canada is a federal state, within which the 10 provinces have the exclusive authority to make their own laws regarding a number of subjects, including the management of charities, and property and civil rights. Thus, the Canadian legal system recognizes multiple sources of legal meaning, which have all functioned to provide “definitional content” to federal statutory concepts that cannot be fully understood on their own.⁶

Despite the many recognized sources of legal meaning for Canadian federal statutes, the undefined words “charity” and “bienfaisance” in the ITA have, to date, been given a singularly uniform construction. The courts have never looked to the civil law of Quebec or to any provincial statute to determine whether an organization qualified as a “charitable organization” (“oeuvre de bienfaisance”) or “charitable foundation” (“fondation de bienfaisance”) under the ITA; nor have they—except in a few early cases—considered the ordinary meaning of charity and bienfaisance, or their religious and moral dimensions. Rather, the determination of which organizations should qualify for the significant tax benefits accorded to registered charities in Canada has been based, in all provinces, on the common-law test for charitable purpose trusts that evolved in the English Chancery courts and was most famously articulated by the House of Lords in the *Pemsel* case.⁷

Historically, this uniform, common-law interpretation of the charitable tax provisions has not been entirely without justification. The early Canadian income tax acts were drafted exclusively in English (though subsequently translated into French) and were modelled closely on the tax legislation of the United Kingdom, which was itself construed in accordance with the common law. In this situation, it was not illogical for the courts and revenue authorities to attribute to Parliament an intention to rely on the common law as the default legislative dictionary for the ITA. Further, while the principle that federal legislation should be interpreted in a manner that respects the provinces’ exclusive jurisdiction over property and civil rights is as old as Canadian federalism itself, courts applying the ITA have often had to balance the “complementarity” principle against the competing legal principle that

5 See, for example, Ruth Sullivan, “The Challenges of Interpreting Multilingual, Multijural Legislation” (2004) vol. 29, no. 3 *Brooklyn Journal of International Law* 986-1066. While the present article (like the federal harmonization project discussed below) focuses on the common-law and civil-law traditions and the French and English languages, it is important to note that there may also be unique conceptions of charity in Canada’s aboriginal legal traditions and languages that would be relevant to the interpretation of federal law.

6 Roderick A. Macdonald and F.R. Scott, “Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law,” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of Studies* (Ottawa: Department of Justice, 1997) (herein referred to as *Harmonization Studies*), 29-69, at 46-51.

7 *Supra* note 3.

federal legislation should apply uniformly across the country.⁸ If the registered charity provisions have unfailingly been subject to judicial interpretations that favoured the uniformity principle over the complementarity principle, they have not been alone in suffering that fate.⁹

However, the historical justifications for a uniform, common-law interpretation of the registered charity provisions have waned dramatically since the original enactment of the Income War Tax Act in 1917. The Parliament of Canada can no longer be said to rely on the Parliament of the United Kingdom in formulating its tax policy or tax rules. Perhaps more importantly, since 1952 Canada's Parliament has made several amendments to the registered charity provisions that have improved their compatibility with the civil law of Quebec. A policy of co-drafting has been put in place,¹⁰ and all of Canada's federal statutes, including the French version of the Income Tax Act, have been reviewed and revised to ensure their legal and linguistic accuracy. The end result of these processes has been two, equally authoritative versions of the registered charity provisions, both of which are consistent with the *droit commun* of Quebec, but only one of which is consistent with the common law of charitable purpose trusts. In light of these developments, it can no longer be lightly assumed that Parliament's choice of the English term "charitable" and the French term "de bienfaisance" was mistaken, or that it intended that the registered charity provisions would continue to be construed solely in accordance with the common law.

The arguments in favour of a uniform, common-law interpretation of the registered charity provisions have also been weakened in recent years as a result of two developments: the enactment of the new Civil Code of Québec,¹¹ and the federal government's renewed efforts to promote bilingualism and bijuralism by making federal legislation accessible to Canada's four legal audiences (francophone civil law and common law, and anglophone civil law and common law). An important outcome of the federal harmonization project was the enactment in 2001 of two major amendments to the federal Interpretation Act,¹² affirming that unless otherwise provided by law, it is provincial law, in relation to property and civil rights, that

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

9 For a review of various ITA concepts that have historically been dissociated from provincial law, see David G. Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation, and Canadian Bijuralism" (2003) vol. 51, no. 1 *Canadian Tax Journal* 1-63.

10 Donald L. Revell, "Authoring Bilingual Laws: The Importance of Process" (2004) vol. 29, no. 3 *Brooklyn Journal of International Law* 1085-1105, at 1100.

11 SQ 1991, c. 64, as amended (herein referred to as "the CCQ").

12 RSC 1985, c. I-21, as amended, sections 8.1 and 8.2 (added by SC 2001, c. 4, section 8, proclaimed in force June 1, 2001).

completes federal legislation when applied in a province. In light of these amendments, it is no longer appropriate to assume that in interpreting federal statutes, the uniformity principle should take precedence over the principle of complementarity of federal and provincial law.

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

The theme underlying these arguments is that in blindly excluding provincial law from the construction of the registered charity provisions, we may be losing more than we think. The common law is not the only legal tradition that has explored notions of altruism, giving, and the types of activities that are of particular benefit to society. The civil law turned its attention to these questions long before the common law, and some of our provincial legislatures have done so as well. The great diversity of legal sources in Canada is often lauded as one of our greatest strengths.¹³ Therefore, before undertaking any reform that either confirms or alters existing interpretations of the registered charity provisions, we should explore what these diverse legal sources regarding the devotion of property to the public good might contribute to our modern charitable tax regime.

These ideas and arguments are developed further in the four sections that follow. The first section reviews the legislative history of the registered charity provisions and the significant changes in terminology that have been made to the French version of the ITA. It describes the current unijural approach to the interpretation and application of the registered charity provisions, and examines the tensions that this approach creates with basic principles of statutory construction and constitutional law and with the amended federal Interpretation Act. The second section focuses on four alternative sources of meaning for the undefined term "charitable" ("de bienfaisance") in

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

the ITA: the common law of charitable trusts, the customary civil-law rules regarding *legs pieux* (charitable legacies), the Roman-law sources on foundations and gifts, and various provincial statutes governing the administration of charities. The third section explores the impact that these various sources of “charity law” might have in our multijural, multilingual state, by analyzing how the registered charity provisions should be interpreted in the common-law provinces, in Quebec, and in provinces that have enacted valid legislation defining the notion of charity (bienfaïssance). The article concludes with some thoughts on the various options for reform.

CHARITY (BIENFAISANCE) AS A UNITARY NOTION: THE CURRENT APPROACH TO THE REGISTERED CHARITY PROVISIONS OF THE ITA

Tax Benefits for Registered Charities Under the ITA

The History of Tax Benefits for Charities in Canada

In Canada, as in the United Kingdom (the original model for the Canadian tax system), tax benefits for charities have existed as long as the income tax itself. Canada’s first income tax statute, the Income War Tax Act, 1917, followed the longstanding English practice of granting statutory tax relief to charities by exempting from taxation “the income of any religious, charitable, agricultural and educational institutions, Boards of Trade and Chambers of Commerce.”¹⁴ The Income War Tax Act of 1927 continued this exemption, adding only the requirement that no part of the income of any such institution “inure to the personal profit of, or be paid or payable to any proprietor thereof.”¹⁵ In 1930, Parliament added a provision that allowed any taxpayer to exempt up to 10 percent of his net taxable income that was “actually paid by way of donation within the taxation period to, and receipted for as such by, any charitable organization in Canada.”¹⁶ Beginning in 1972, this federal tax exemption for gifts made to Canadian charities was gradually made more significant and more complex.

Today, organizations and foundations that are registered as charities by the minister of national revenue continue to enjoy the two major fiscal benefits that have been in place since 1930. First, registered charities are included in a rather long list of legal entities that are exempted from paying income tax under the ITA.¹⁷ Second, registered charities are included in a shorter list of designated “qualified donees” that are entitled to issue tax receipts to corporate and individual donors.¹⁸ As the

14 The Income War Tax Act, 1917, SC 1917, c. 28, paragraph 5(d).

15 Income War Tax Act, RSC 1927, c. 97, paragraph 4(e).

16 Ibid., as amended by SC 1930, c. 24, section 3.

17 ITA paragraph 149(1)(f).

18 ITA subsection 149.1(1), the definition of “qualified donee”; subsection 110.1(1) in respect of a gift by a corporation; and subsection 118.1(1) in respect of a gift by an individual.

Supreme Court of Canada noted in the *Vancouver Society* decision, this latter benefit is “designed to encourage the funding of activities which are generally regarded as being of special benefit to society” and is often a “major determinant” of an organization’s success.¹⁹

The Current Statutory Framework for Charitable Registration

The practice of registering charities with the minister of national revenue dates back to 1966, when Parliament determined that a central registration system was required to address abuses relating to exaggerated donation receipts and charitable organizations that changed the nature of their activities after obtaining formal approval.²⁰ Originally, however, there were few statutory obstacles to obtaining charitable registration, and the minister granted registered charity status to organizations on a fairly “haphazard” basis.²¹ Moreover, until 1977, only those charities that wanted to issue tax receipts to donors were required to register under the ITA: the tax-free status of charitable entities “flowed from the nature of [their] operations, not from any government imprimatur.”²²

With the major amendments to the ITA that took effect in 1977,²³ the charitable registration process became both more complex and more crucial to the Canadian voluntary sector. The amended ITA created three categories of registered charities—charitable organizations, public foundations, and private foundations—which were subject to different statutory rules. Pursuant to the revised subsection 149(1), only these *registered* charities were exempt from income tax. Further, non-profit organizations, which had previously enjoyed unqualified tax-free status, were now exempt only if, in the opinion of the minister, they were not charities within the meaning of the ITA. Being an unregistered charitable entity—whatever this might mean—was suddenly a very unfavourable fiscal position to be in.

Today, the statutory framework for obtaining and preserving registered charity status is set out in section 149.1 and subsection 248(1) of the ITA. The minister’s authority to “register” qualified organizations flows from subsection 248(1), which defines a “registered charity” (“organisme de bienfaisance enregistré”) as

19 *Vancouver Society of Immigrant and Visible Minority Women v. MNR*, [1999] 1 SCR 10, at paragraph 128. This decision is discussed further below.

20 Patrick J. Monahan and Elie S. Roth, *Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform* (Toronto: York University, 2000), 13.

21 Arthur B.C. Drache, *Canadian Taxation of Charities and Donations* (Toronto: Thomson Carswell) (looseleaf), 1-31. Drache notes that in 1977, there were hundreds, if not thousands, of registered charities that probably would not be registered today.

22 *Ibid.*, at 1-30.

23 An Act To Amend the Statute Law Relating to Income Tax, SC 1976-77, c. 4, amending the Income Tax Act, RSC 1952, c. 148.

(a) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1) [or a branch thereof], that is resident in Canada and was either created or established in Canada . . .

that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation.

L'organisme suivant, qui a présenté au ministre une demande d'enregistrement sur formulaire prescrit et qui est enregistré, au moment considéré, comme oeuvre de bienfaisance, comme fondation privée ou comme fondation publique:

a) oeuvre de bienfaisance, fondation privée ou fondation publique, au sens du paragraphe 149.1(1), qui réside au Canada et qui y a été constituée ou y est établie.

Thus, subsection 149.1(1), which defines the three categories of charitable entities that may be registered by the minister, establishes the basic statutory criteria for charitable registration under the ITA. More specifically, for the purposes of section 149.1, a “charitable organization” (“oeuvre de bienfaisance”) is defined, in part, as an “organization, whether or not incorporated,” that devotes all of its resources “to charitable activities carried on by the organization itself” (“oeuvre, constituée ou non en société, dont la totalité des ressources est consacrée à des activités de bienfaisance qu’elle mène elle-même”). A private or public foundation is a “charitable foundation” (“fondation de bienfaisance”), which in turn is defined as “a corporation or trust that is constituted and operated exclusively for charitable purposes . . . and that is not a charitable organization” (“société ou fiducie constituée ou administrée exclusivement à des fins de bienfaisance . . . et qui n’est pas une oeuvre de bienfaisance”). Both definitions also contain the requirement that no part of the income of the entity be available for the personal benefit of any proprietor, member, shareholder, trustee, or settlor of the entity.²⁴

The upshot of these definitions is that the granting of registered charity status depends primarily on the minister’s determination of whether an organization is constituted exclusively for “charitable purposes” (“fins de bienfaisance”) or “charitable activities” (“activités de bienfaisance”) within the meaning of the ITA. While section 149.1 does designate certain activities and purposes as “charitable” (for example, with respect to the disbursement of funds to qualified donees), it does not comprehensively define either of these terms. As a result, it has always been necessary for officials charged with administering the registration of charities in Canada to refer to some external source in order to make sense of the statutory scheme.

24 See ITA subsection 149.1(1), the definition of “charitable organization” (“oeuvre de bienfaisance”), “charitable foundation” (“fondation de bienfaisance”), “private foundation” (“fondation privée”), and “public foundation” (“fondation publique”).

Changes in Terminology in the French Version of the ITA

In tracing the legislative history of the registered charity provisions, it is important to note the significant changes in terminology that the French version of the ITA has undergone. For the first 60 years of the life of Canada's charitable tax provisions, the current practice of co-drafting federal legislation in French and English did not exist. To fulfill the constitutional requirement that all statutes of the Parliament of Canada be printed and published in both official languages, successive versions of the ITA were drafted in English in Ottawa and then shipped to Hull for translation. Within this somewhat unsatisfactory system, the English term "charitable" was translated by the French term "charitable" (or "de charité"), while the English term "benevolent" was translated by the French term "de bienfaisance."²⁵

The single bilingual term "charitable" was used consistently throughout the ITA for many years. By the middle of the century, however, a significant shift toward the use of "de bienfaisance" for the English term "charitable" had started to take place. The ITA of 1952 granted exemption and receipting privileges to three categories of "charitable" entities: a charitable organization (organisation de charité), a non-profit corporation (corporation sans but lucratif), and a charitable trust (fiducie aux fins de charité). The English version of the statute described all of these entities in terms of their devotion to "charitable" purposes and activities. However, the French version alternated between the terms "charitable"/"de charité" and "de bienfaisance," defining the three entities, respectively, as "une oeuvre de charité . . . dont toutes les ressources étaient consacrées à des oeuvres de bienfaisance," "une corporation constituée exclusivement à des fins charitables," and "une fiducie dont tous les biens sont absolument détenus . . . exclusivement pour fins charitables."²⁶ The tax reform legislation enacted by Parliament in 1972 modified this terminology further by defining a charitable trust (fiducie aux fins de charité) as "une fiducie dont tous les biens sont détenus . . . exclusivement à des fins de bienfaisance."²⁷ The English term "benevolent society" continued to be translated as "société de bienfaisance."²⁸

These seemingly inexplicable inconsistencies in the French version of the registered charity provisions remained on the federal statute book until the general statutory revision of 1985, when a committee charged with revising federal acts for legal and linguistic accuracy expunged the French term "de charité"/"charitable" from the ITA. Unlike the 1952 and 1972 changes, this modification appears to have been

25 Loi de l'impôt de Guerre sur le Revenu, 1917, SC 1917, c. 28, paragraphs 5(d) and (e) exempted from taxation the income of "charitable institutions" ("institutions charitables") and "benevolent societies" ("sociétés de bienfaisance").

26 Loi de l'impôt sur le revenu, SRC 1952, c. 148, paragraphs 27(1)(a) and 62(1)(e) to (g).

27 An Act To Amend the Income Tax Act, SC 1970-71-72, c. 63, paragraph 149(1)(h). While the 1977 amendments changed the categories of charitable entities, the basic pattern of French terminological use remained the same: see SC 1976-77, c. 4, section 59.

28 SC 1970-71-72, c. 63, paragraph 149(1)(k).

made under the authority of the Statute Revision Act.²⁹ Section 6(f) of that statute authorizes employees of the Department of Justice to

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

The result of this change in terminology, which was included in the Revised Statutes of Canada 1985 but did not appear in French commercial editions of the ITA until 1994,³⁰ was the consistent use of the term “bienfaisance” in describing the primary criteria for charitable registration under the ITA. Thus, “fondation de bienfaisance,” which had previously been identified as “fondation de charité,” was defined as an entity devoted to “fins de bienfaisance,” and “oeuvre de charité” was renamed “oeuvre de bienfaisance.” As we have seen, this revised statutory language continues to be used in the current version of the ITA.

The Interpretation of “Charitable” (“de Bienfaisance”) Under the ITA

The Historical Approach

Contrary to what might be assumed, the Canadian courts have not always relied on common-law principles to interpret and apply tax exemptions for “charitable” institutions. For example, in a 1904 decision where a Nova Scotia court found that the Sisters of Mercy fell within a provincial property tax exemption for “educational and charitable institutions,” the court concluded only that the statutory provision should be interpreted broadly, “in such manner as to exempt all institutions of this nature that can fairly be brought within its language.”³¹ In 1925, the Supreme Court of Canada held that the term “charitable institution” in the Ontario Assessment Act took its meaning from the other institutions listed in the section.³² A leading income tax text published in 1939 asserted that while the phrase “charitable organizations” was to be construed in accordance with the English common-law test, the exemption from federal income tax for “charitable institutions” applied only to institutions whose purpose was the relief of poverty.³³

29 RSC 1985, c. S-20, as amended.

30 *La Loi de l'impôt sur le revenu du Canada et Règlement*, 23^e éd., 1994 (Farnham, QC : Les Publications CCH/FM, 1994).

31 *City of Halifax v. Sisters of Charity* (1904), 40 NSR 481, at 486 (SC), per Russell J.

32 *Canadian National Railways v. Town of Capetrol*, [1925] SCR 499.

33 Herbert A.W. Plaxton, *The Law Relating to Income Tax of the Dominion of Canada* (Toronto: Carswell, 1939).

However, in 1952, in a case arising under the New Brunswick Rates and Taxes Act, the Supreme Court of Canada followed the British courts in holding that the word “charitable” in a taxing statute was used in its technical, rather than its popular, sense.³⁴ In so doing, the court effectively signalled its intention to apply to Canadian tax legislation the common-law definition of charity that had evolved in the English Chancery courts, as the English House of Lords had done in *Pemsel* in 1891. In his judgment, Rand J articulated the essence of the test set out in the English case:

A charity or charitable society is, I should say, one whose purposes are those described in the preamble to the statute 43 Eliz. c. 4 or purposes analogous to them. They can be classified generally, as for the advancement of religion, for the relief of poverty, for the promotion of education, and for other purposes bearing a public interest: and the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare.³⁵

Fifteen years later, in a case considering whether a testamentary gift to an Ontario alumni association was subject to federal estate tax, the Supreme Court of Canada indicated that the common-law definition of charity had “received general acceptance” in Canada.³⁶ In the wake of this second major decision on the meaning of “charitable” in tax legislation, the institutions charged with interpreting and applying the registered charity provisions appear to have accepted without qualification that the ITA registered charity provisions should be interpreted, in all provinces, according to the principles and rules of the common law of charitable purpose trusts.

The Current Judicial Approach

Between 1967 and 1999, the judicial interpretation of the registered charity provisions in subsection 248(1) and section 149.1 of the ITA fell entirely to the Federal Court of Appeal. The court encountered little or no resistance to the view that the term “charitable” (“charitable”/“de bienfaisance”) should be interpreted according to English common-law principles, even when applied to organizations operating exclusively in Quebec.³⁷ In 1999, however, the Supreme Court of Canada was called upon to hear an appeal regarding registered charity status and to face arguments that directly challenged the traditional common-law approach. The *Vancouver Society* case³⁸ involved a British Columbia society that was denied registration as a “charitable organization” (“oeuvre de bienfaisance”) under subsection 248(1). The primary

34 *The King v. Assessors of the Town of Sunny Brae ex parte Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur*, [1952] 2 SCR 76, at 95-97.

35 *Ibid.*, at 88, per Rand J.

36 *Guaranty Trust Co. of Canada v. Minister of National Revenue*, [1967] SCR 133.

37 See *NDG Neighbourhood Assoc. v. MNR* (1988), 85 NR 73 (FCA), where MacGuigan J explicitly relied on the *Pemsel* test in determining that a Montreal community association was not charitable within the meaning of the ITA.

38 *Vancouver Society*, supra note 19.

purpose of the society was to “provide educational forums, classes, workshops and seminars” to immigrant women to help them find employment. The society challenged the minister’s decision, claiming that the organization was “charitable” within the traditional common-law framework, in that it advanced education and fell within the scope of various English cases upholding trusts for the assistance of immigrants and refugees. However, the society also argued that the court should adopt a new “contextual” approach to the registered charity provisions, which focused on whether an organization was providing a “public benefit” as commonly understood.³⁹

The Supreme Court split five to three in favour of the minister, with the majority ultimately holding that one of the society’s objects was too vague and indeterminate to qualify as exclusively charitable under the advancement of education head.⁴⁰ However, despite the narrow basis on which it was decided, *Vancouver Society* contains a number of broad pronouncements on the proper interpretation and application of subsection 248(1) and section 149.1. Given *Vancouver Society*’s current status as the only Supreme Court of Canada decision on the ITA registered charity scheme, it is important to examine these pronouncements in some detail.

First, the *Vancouver Society* decision signals beyond any doubt that the common law of charitable purpose trusts should continue to function as the suppletive law for the registered charity provisions of the ITA. While the court expressed sympathy for the parties’ arguments that a new approach to the ITA concept of charity should be adopted, it was unwavering in its view that the type of sweeping changes being suggested should be effected by Parliament rather than the courts.⁴¹ Thus, although *Vancouver Society* affirms that the definition of charity is “an area crying out for clarification,” it also affirms that in the absence of legislative intervention, the four *Pemsel* categories of the relief of poverty, the advancement of education, the advancement of religion, and “other purposes beneficial to the community” must remain the “starting point” for determining the charitable character of applicants for charitable registration.⁴² Accordingly, where an organization with novel objects applies for registration under subsection 248(1), the question continues to be not whether the organization “*should* be considered charitable but whether the common law recognizes it to be charitable.”⁴³

39 Ibid., at paragraph 196 ff. The intervenor, the Canadian Centre for Philanthropy, proposed a similar public-benefit-based broadening of the traditional common-law test.

40 Ibid., at paragraph 195.

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

42 Ibid., at paragraphs 144 and 149.

43 Ibid., at 179. However, Gonthier J noted in his dissenting judgment that this would not preclude the courts from revisiting the *Pemsel* classification in appropriate circumstances: *ibid.*, at paragraph 122.

Second, *Vancouver Society* affirms that, even though the ITA has defined a charitable organization (*oeuvre de bienfaisance*) in terms of charitable activities for over 50 years and through a series of major amendments, “it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature.”⁴⁴ Thus, to be registered as a charitable organization under subsection 248(1), an organization must be constituted for charitable purposes, which “define the scope of the activities engaged in by the organization.”⁴⁵ This loose interpretation of the registered charity provisions, which was clearly intended to bring the statutory definition into line with the common law of charitable trusts, appears to require only that the activities of charitable organizations bear a coherent relationship to the charitable purposes sought to be achieved.⁴⁶

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

Because the law of charity had its origin in the law of trusts, many of the leading authorities in this area arose in the context of determining the essential validity of a putative charitable trust. Since the introduction of the *ITA*, the tax dimension of charities law has assumed much greater practical importance. Most cases now concern a pre-existing organization . . . seeking registration under the *ITA*, rather than the evaluation of the essential validity of a trust. Parliament has, in effect, incorporated the common law definition of “charity” into the *ITA*, and in doing so, has implicitly accepted that the courts have a continuing role to rationalize and update that definition to keep it in tune with social and economic developments. *I note in passing that the definitions of “charity” and “charitable” under the ITA may not accord precisely with the way those terms are understood in the common law provinces, due to judicial decisions and provincial statutory incursions into the common law. The ITA’s conception of charity, by contrast, is uniform federal law across the country.*⁴⁷

By proclaiming the existence of a uniform federal law of charity, the dissenting judgment appears to be making one of two possible claims. The first is that the *ITA* pronounces its own concept of charity, which applies exclusively for purposes of

44 *Ibid.*, at paragraph 152.

45 In addition, all of the organization’s resources must be devoted to these activities unless the organization falls within the specific exemptions of subsection 149.1(6.1) or (6.2): see *ibid.*, at paragraph 159.

46 See *ibid.*, at paragraphs 52-56 and 144 and 152, where the majority notes that trust law has always focused on purposes rather than activities, and then identifies the statutory focus on charitable activities as a “major problem” with the legislation.

47 *Ibid.*, at paragraph 28, per Gonthier J (emphasis added).

federal taxation. The second is that there exists a body of unenacted federal law that provides definitional content to the undefined terms in the registered charity provisions in every Canadian province. However, the majority did not comment on Gonthier J's "note in passing" (which was not directed to the particular arguments made in the case).

The Current Administrative Approach

If the Supreme Court of Canada has not yet passed judgment on Gonthier J's suggestion that the definition of charity under the ITA is uniform federal law, there is no doubt that the Charities Division of the Canada Revenue Agency (CRA) has fully embraced that position. The CRA is not a law-making body. In the context of the regulation of the charitable sector, however, it does exercise a broad responsibility and discretion in adopting and administering policies that clarify the registered charity scheme. Because the CRA is the body that initially decides which organizations are granted charitable status under the ITA, and because an "extraordinarily small number of appeals" have been brought against decisions to refuse charitable registration,⁴⁸ the CRA plays a crucial role in determining what purposes and activities are recognized as charitable in Canada.

The practices and publications of the CRA provide ample evidence of its view that there is only one source of meaning for the term "charitable" ("de bienfaisance") under the ITA, which is made up of the common-law jurisprudence of the English and Canadian federal courts.⁴⁹ As confirmed by the companion publication to form T2050 "Application To Register a Charity Under the Income Tax Act," the CRA grants charitable registration only to organizations whose purposes fall within one of the four *Pemsel* categories and that meet the common-law public benefit test.⁵⁰ Historically, the CRA's views on what *specific* activities and purposes are charitable have been kept largely out of the public domain. Recently, however, the CRA has begun to post policy documents online that articulate its views on whether and in what circumstances specific purposes (such as the promotion of art or the promotion of holistic medicine) are charitable.⁵¹ For the most part, these policy documents appear to be very brief summaries of English and Federal Court of Appeal cases. None of the CRA's policy documents allow for the possibility of provincial variation in the application of the registered charity provisions, or cite any provincial law.

Finally, it is worth noting that, at present, even Quebec's legislation and administrative policies support the view that one uniform, federal, common-law concept

48 Monahan and Roth, *supra* note 20, at 12.

49 The CRA's views on this matter appear to predate the *Vancouver Society* decision, as evidenced by its longstanding refusal to register amateur athletic organizations as charities: see the discussion in the text below at note 202 and following.

50 See Canada Revenue Agency guide T4063, "Registering a Charity for Income Tax Purposes."

51 Canada Revenue Agency, "Summary Policies" (online: http://www.cra-arc.gc.ca/tax/charities/policy/csp/csp_menu-e.html).

of charity applies in Canada, at least with respect to the taxation of charitable organizations. The Quebec Taxation Act, like the ITA, establishes a central registration system to regulate the entities entitled to issue provincial tax receipts for charitable gifts.⁵² Pursuant to section 985.1 of that Act, Quebec's minister of revenue may approve for registration any charitable organization, private foundation, or public foundation that applies in prescribed form. As in the ITA, all three of these designations are defined in terms of "charitable purposes" ("fins de bienfaisance") and "charitable activities" ("activités de bienfaisance"), which terms are not defined in the Taxation Act. However, the application form prescribed by the Taxation Act requires applicants to prove that they have previously been registered as charities by the CRA.⁵³ The end result of this procedure is that the federal common-law concept dictates the range of organizations that can be registered as charities in Quebec.

Tension Created by the Current Unitary Approach

As the preceding paragraphs have shown, the current practice of applying a uniform, federal, common-law concept of charity to the registered charity provisions of the ITA is well entrenched at all levels of regulation of the charitable sector. At the judicial level, the Federal Court of Appeal follows the guidelines set out in *Vancouver Society* and updates the definition of charity by drawing analogies to its own decisions, as well as an increasingly dated body of English law. At the administrative level, both the CRA and the Quebec Revenue Agency administer and apply policies that are consistent with this uniform approach.

To date, this approach to the interpretation of subsection 248(1) and section 149.1 has not been considered problematic or controversial.⁵⁴ Despite its widespread acceptance, however, the current interpretive approach to the registered charity provisions fits uneasily with a number of fundamental principles relating to the constitutional division of powers, the federal government's policies on legislative bilingualism and bijuralism, and the interpretation of tax legislation under the federal Interpretation Act. Each of these areas of tension will be examined in turn.

Provincial Jurisdiction over Charities

The first major concern with the current interpretive approach relates to the constitutional division of authority over charities, and its implications for Gonthier J's

52 Taxation Act, RSQ, c. I-3, sections 752.0.10.3, 985, and 985.5.

53 The form prescribed pursuant to section 985.5 of the Taxation Act, TP-985.5-V, "Application for Registration as a Charity or as a Quebec or Canadian Amateur Athletic Association," requires that applicants for registered charity status include the business number assigned to them by the CRA.

54 While there have been repeated calls to replace the *Pensel* test with a test that better reflects modern Canadian society, the issue of whether the ITA conception of charity is uniform federal law has never been raised, to my knowledge, until the recent case of *AYSA Amateur Youth Soccer Association*: see *infra* note 249 and the accompanying text.

view that the undefined terms in section 149.1 of the ITA rely for definitional content on a body of unenacted *federal* law.

Under the Constitution Act, 1867,⁵⁵ jurisdiction over the charitable sector is divided between the federal and provincial levels of government. The federal Parliament exercises an incidental authority over charities by virtue of its subsection 91(3) taxation power. However, primary legislative authority over charities, trusts, and charitable gifts is vested in the provinces by virtue of two separate constitutional provisions. The first of these provisions, section 92(7) of the Constitution Act, specifically grants the provinces jurisdiction over the “establishment, maintenance and management of charities . . . in and for the provinces.” The second, section 92(13), gives the provinces exclusive authority over “property and civil rights in the province,” a phrase that has always been construed in its broadest sense. Historically, the provinces have not put their legislative authority over charities to much use, leaving it to the federal government to regulate the charitable sector through the scheme set out in the ITA.⁵⁶ Recently, however, a number of provinces have developed their own systems for the registration and regulation of charitable organizations that want to fundraise in the province.⁵⁷ As Monahan has pointed out, “the fact that the [other] provinces have chosen not to exercise a role in this field does not diminish their constitutional authority or add to the legislative authority of Parliament.”⁵⁸

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

The debate over the existence of a federal common law has taken place, to date, in the context of a series of cases dealing with the extent of the federal courts’ jurisdiction over the “Laws of Canada” pursuant to section 101 of the Constitution Act. Following the landmark decisions of *Quebec North Shore* and *McNamara Construction*,

55 Constitution Act, 1867, 30 & 31 Vict., c. 3, as amended (herein referred to as “the Constitution Act”).

56 Monahan and Roth, supra note 20, at 7.

57 See, for example, Alberta’s Charitable Fund-Raising Act, RSA 2000, c. C-9, and Saskatchewan’s Charitable Fund-Raising Businesses Act, RSS 2002, c. C-6.2.

58 Monahan and Roth, supra note 20, at 7.

it was generally accepted that there was no “body of federal common law that was co-extensive with the unexercised legislative competence of Parliament over matters assigned to it,”⁵⁹ and thus that the mere fact of Parliament’s legislative authority over a particular subject matter was insufficient to support proceedings before the Federal Court. In recent years, however, the Supreme Court of Canada has tempered the restrictive impact of *Quebec North Shore*, recognizing the federal courts’ authority over private-law disputes that are sufficiently linked to a federal statutory framework,⁶⁰ and acknowledging that a body of federal common law does exist in “some areas.”⁶¹ To date, the law of aboriginal title, the law of execution of a Federal Court judgment, and the torts of abuse of process, wrongful arrest, false imprisonment, and malicious prosecution have been recognized by the courts as areas of federal common law.⁶²

While both the existence and the content of a federal common law (*ius commune*) continue to be a matter of debate,⁶³ it seems highly unlikely that the body of unenacted rules received in Canada from the English law of charitable purpose trusts could fall within this concept. As Macdonald has explained, a federal common law can be said to exist because at the time of Confederation, all of the law in force in each of the colonies was continued, by virtue of section 129 of the Constitution Act, for all purposes in each province, but was placed under the authority of either Parliament or the provincial legislatures by virtue of sections 91 and 92.⁶⁴ In this sense, any unenacted pre-Confederation law that, since 1867, has only been subject to codification or amendment by competent provincial legislation may fairly be described as “provincial” common law, while unenacted pre-Confederation law that falls within

59 J.M. Evans, “Federal Jurisdiction—A Lamentable Situation” (1981) vol. 59, no. 1 *Canadian Bar Review* 124-53, at 125, citing *Quebec North Shore Paper v. CP Ltd.*, [1977] 2 SCR 1054 and *McNamara Construction et al. v. The Queen*, [1977] 2 SCR 654.

60 *Rhine v. The Queen*, [1980] 2 SCR 442.

61 *Roberts v. The Queen*, [1989] 1 SCR 322, at paragraph 29, per Wilson J.

62 *Roberts*, *ibid.*; *Kealey v. Canada*, [1992] 1 FC 195 (TD); and *British Columbia (Deputy Sheriff, Victoria)* (1992), 66 BCLR (2d) 371 (CA).

63 In particular, there is disagreement over whether, in addition to the provincial *ius communes* (or *jus communes*), there exists a federal *ius commune* that can act as the suppletive law for federal legislation. See, for example, Jean-Maurice Brisson, “L’impact du Code civil du Québec sur le droit fédéral : Une problématique” (1992) vol. 52, n° 1 *Revue du Barreau* 345-60, at 347-48; and André Morel, “Harmonizing Federal Legislation with the Civil Code of Québec: Why and Wherefore?” in *Harmonization Studies*, supra note 6, 1-28, at 3: “The consensus is that there is no federal *jus commune*.” As Macdonald explains, the term “*jus commune*” can be used to express the substantive concept of a general regime of law governing civil relations or the utilitarian concept of a “reservoir of legal concepts and rules that will implicitly be used to complete the regulatory scheme of any statute”: Roderick A. Macdonald, “Encoding Canadian Civil Law,” in *Harmonization Studies*, supra note 6, 135-212, at 151. In this article, the term is used in the second sense.

64 Macdonald, supra note 63, at 173-85.

the legislative authority of Parliament may be described as “federal” common law. The term “federal common law” thus encompasses any “pre-Confederation [unenacted] law in each colony that is insulated from direct supercession by provincial statutes.”⁶⁵

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

Changes in Terminology in the French Version of the ITA

The changes in terminology in the French language version of the ITA, which have resulted in the consistent use of the term “bienfaisance” to describe the primary legal criteria for charitable registration, pose yet another challenge to the view that the registered charity provisions embody a uniform, federal, common-law conception of charity. Because the changes to the French version of the registered charity provisions resulted from both statutory amendments and drafting revisions, it is difficult to say whether the gradual replacement of “charité” with “bienfaisance” was intended to alter the substance of the test for charitable registration.⁶⁶ However, it is clear that the changes did not improve the compatibility of the French and English versions of section 149.1 and subsection 248(1) of the ITA.

First, far from clarifying that Parliament intended the registered charity provisions to be interpreted in accordance with common-law trust principles, the changes placed the ITA at odds with the prevailing views on the proper French common-law terminology for charitable trusts. At the time of the general statutory revision in 1985, the leading Supreme Court of Canada decisions on the common law of charity referred, in their French versions, to “fiducies de charité,” “fins de charité,” and “oeuvres de charité.”⁶⁷ In addition, the University of Moncton’s bilingual dictionary of the common law, then the leading authority on French common-law terminology in Canada, translated the term “charitable purpose” as “fin charitable” and the term

65 Ibid., at 176.

66 See the discussion below at note 215 and following.

67 *Guaranty Trust*, supra note 36; and *Jones v. T. Eaton Co. Ltd.*, [1973] SCR 635.

“charitable activity” as “oeuvre de charité.”⁶⁸ More recently, the federally sponsored national program for the integration of both official languages in the administration of justice has recommended that the translation of the terms “charitable purpose” and “activity (‘charity’)” be standardized as “but caritatif” and “activité caritative.”⁶⁹ In light of all these authorities, the legislative choice of the word “bienfaisance” must be seen to have undermined the common-law interpretive approach, and to have impeded the access of francophones in Canada’s common-law provinces to the registered charity scheme.

Second, far from clarifying that Parliament did not intend the registered charity provisions to be interpreted according to the civil law of Quebec, the changes in terminology actually improved the conceptual coherence between the ITA and the Civil Code of Lower Canada⁷⁰ (the predecessor to the current CCQ). Unlike the bilingual authorities on common-law trusts, CCLC article 869 dealing with charitable legacies refers, in its two language versions, to “charitable purposes” and “fins de bienfaisance.”

Therefore, it appears that the revisions to the French versions of the ITA may have had an unforeseen result, for there are now two equally authoritative versions of the registered charity provisions, both of which reflect a concept recognized by the civil law of Quebec, but only one of which is consistent with the common law of charitable purpose trusts.

Complementarity, Dissociation, and the Federal Harmonization Project

A final concern raised by the current interpretive approach to the registered charity provisions relates to the “principles and presumptions governing the designation of [the] federal legislative default dictionary”⁷¹ in a federal statute such as the ITA, and their relevance to the view that the undefined terms in section 149.1 take their meaning, in all Canadian provinces, from the common law of charitable trusts. As Morel has pointed out, these principles and presumptions flow from our constitutional history and the logic of the legislative division of powers, and thus are “as old as Canada itself.”⁷² However, both their significance and the stringency of their application have arguably increased since 2001, when they were codified as rules of general application in sections 8.1 and 8.2 of the federal Interpretation Act (as discussed below).

68 Centre de traduction et de terminologie juridiques, *Vocabulaire anglais-français et lexique français-anglais de la common law*, t. 2, *Les fiducies* (Moncton : Université de Moncton, CTTJ, 1982).

69 Promotion de l'accès à la justice dans les deux langues officielles, “Normalisation du Vocabulaire du droit des trusts : Termes de base et fiducies expresses (généralités),” CTDJ-5E (online: <http://www.pajlo.org/fr/ressources/normalisation/ctdj-5e.pdf>).

70 LC 1865, c. 41 (herein referred to as “the CCLC”).

71 Macdonald and Scott, *supra* note 6, at 66. See also Macdonald, *supra* note 63, at 151.

72 Morel, *supra* note 63, at 6.

Over the last decade, a great deal of scholarly and judicial attention has been devoted to explaining the nature of the relationship between federal legislation and provincial private law.⁷³ While several points of controversy remain,⁷⁴ there seems to be broad agreement on the basic notions of complementarity and dissociation that are applicable to federal provisions such as those making up the registered charity scheme. The need for a rule of complementarity arises from the fact that “virtually all” federal statutes are implicitly dependent on some other law.⁷⁵ Far from constituting a self-contained legal system, federal statutes rely on undefined terms, concepts, and rules that require external conceptual support if the statutes are to be sensibly interpreted and applied. At least in cases where these undefined terms and concepts form part of the private law within provincial legislative authority, that conceptual support is presumed to be provided by the contemporary *ius commune* of the province in which the federal statute is being applied. Despite the frequent perception that “there is a sort of organic bond, an association inherent in the nature of things, between federal law and common law,” this general rule of complementarity is equally applicable in all of Canada’s provinces.⁷⁶

Of course, Parliament, having exclusive jurisdiction over the law it enacts, is entirely authorized to determine the relationship between any particular provision of a federal statute and an external source of law. It is clear, for example, that Parliament may dissociate federal legislation from provincial sources by comprehensively defining its statutory terms, or by designating a law of reference other than the law of the provinces to complement a federal rule. It may also enact rules or schemes that are incompatible with the law of any or all of the provinces, or adopt terms that are “constitutionally neutral and independent of provincial law.”⁷⁷ As Brisson and Morel have pointed out, “the federal Parliament . . . has the power to create in its statutes any concept or legal institution that it considers useful in achieving the objectives it has set for itself.”⁷⁸ The only question is how clearly Parliament must

73 See, for example, *Harmonization Studies*, supra note 6, and *Harmonization Studies: Second Publication*, supra note 13; Brisson, supra note 63; *St-Hilaire v. Canada*, [2001] 4 FC 289 (CA); and an earlier article by Roderick A. Macdonald, “Provincial Law and Federal Commercial Law: Is Atomic Slipper a New Beginning?” (1992) vol. 7 *Banking & Finance Law Review* 437-51. With regard to the relation between provincial private law and federal tax legislation, see *Collection of Studies in Canadian Tax Law*, supra note 8, and the articles on bijuralism in (2003) vol. 51, no. 1 *Canadian Tax Journal* 1-513.

74 See, for example, supra note 63.

75 Jean-Maurice Brisson and André Morel, “Federal Law and Civil Law: Complementarity and Dissociation,” in *Harmonization Studies*, supra note 6, 217-64, at 231.

76 See Morel, supra note 63, at 1-2 and 6; and Macdonald, supra note 6, at 46-49. See also Henry L. Molot, “Clause 8 of Bill S-4: Amending the Interpretation Act,” in *Harmonization Studies: Second Publication*, supra note 13, 1-19, at 4.

77 Molot, supra note 76, at 3.

78 Brisson and Morel, supra note 75, at 239.

speak before its intention to dissociate provincial private law from its statutes will be inferred.

Just as the principles of federal-provincial complementarity and dissociation date back to Confederation, so their application to federal income tax legislation must be seen to date back to the original enactment of the ITA.⁷⁹ Historically, however, tax law in particular has been influenced by another important principle, namely, that federal legislation should be interpreted so that it applies uniformly and equitably across all of the Canadian provinces.⁸⁰ In situations where federal legislation relies on a private-law concept whose meaning is not identical in every Canadian province, a judicial interpretation that favours either uniformity or complementarity will often produce directly opposite results. The relationship between these two competing principles has remained an ambiguous one, which has been resolved in particular contexts according to principles of interjurisdictional immunity or implicit dissociation, or sometimes no principle at all. In the absence of any specific direction as to which principle should prevail, the Canadian courts have not consistently favoured either uniformity or complementarity.⁸¹ In the interpretation of the registered charity provisions, however, uniformity has always prevailed over the application of provincial law.

As noted earlier, in the last decade, Parliament has renewed its commitment to bijuralism and bilingualism in the federal legal system, resulting in clarification of the relationship between the principles of complementarity and uniformity, and between federal statutes and provincial law. In 1995, spurred by the enactment of the new CCQ and the gulf it had created between the terminology of federal legislation and Quebec's civil law, the Department of Justice adopted a formal *Policy on Legislative Bijuralism*, which set out the following statement of principle:

It is imperative that the four Canadian legal audiences . . . may, on the one hand, read federal statutes and regulations in the official language of their choice and, on the other, be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system (civil law or common law) of their province or territory.⁸²

In 1999, the federal Cabinet replaced its existing directive on the preparation of legislation with a new directive that aims “to ensure that proposed laws are properly

79 *Perron v. MNR*, 60 DTC 554, at 556 (TAB): the ITA “must apply within the framework of the civil laws governing legal relationships between individuals.”

80 Duff, *supra* note 9, at 49.

81 See, generally, Duff, *supra* note 9. However, as Duff notes, the ITA has often been interpreted without regard to provincial private law, particularly in cases arising in Quebec: *ibid.*, at 20-21.

82 Canada, Department of Justice, *Policy on Legislative Bijuralism* (Ottawa: Department of Justice, June 1995), reproduced as appendix III to Louise Maguire Wellington, “Bijuralism in Canada: Harmonization Methodology and Terminology,” in *Harmonization Studies: Second Publication*, *supra* note 13, booklet 4, 1-25, at 23.

drafted in both official languages and that they respect both the common law and civil law legal systems.”⁸³ In 2001, the Federal Law—Civil Law Harmonization Act, No. 1⁸⁴ followed through on this commitment to bijural and bilingual drafting by amending several federal statutes that did not adequately address the four Canadian legal audiences.

While the federal government does ultimately intend to assess and review the entire federal statute book, it was clear from the beginning that it would take time to harmonize all 700 of Canada’s federal statutes with provincial private law. A second, more general strategy was needed to support the harmonization goal.⁸⁵ Therefore, in addition to amending several statutory provisions to reflect the bijural nature of the Canadian legal system, the Harmonization Act added two rules of general application to the federal Interpretation Act, confirming that it is “the provincial law, in relation to property and civil rights . . . that completes federal legislation when applied in a province, unless otherwise provided by law.”⁸⁶ Section 8.1 of the Interpretation Act states:

Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province’s rules, principles, or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles, or concepts in force in the province at the time the enactment is being applied.

Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s’il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d’assurer l’application d’un texte dans une province, il faut, sauf règle de droit s’y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l’application du texte.

Section 8.2 states:

Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the

83 Canada, Privy Council Office, “Cabinet Directive on Law-Making” (online: http://www.pco-bcp.gc.ca/default.asp?page=publications&Language=E&doc=legislation/directive_e.htm).

84 SC 2001, c. 4 (herein referred to as “the Harmonization Act”).

85 Marie-Noëlle Pourbaix, “S-4: A First Harmonization Bill,” in *Harmonization Studies: Second Publication*, supra note 13, booklet 6, 1-12, at 2; and Molot, supra note 76, at 1.

86 Harmonization Act, supra note 84, preamble. The preamble also affirms that “the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be.”

Province of Québec and the common law terminology or meaning is to be adopted in the other provinces.

Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

What is the significance of these new rules of interpretation, which apply to all federal statutes? First, by codifying the constitutional principles applicable to the construction of federal statutory schemes,⁸⁷ Parliament has confirmed that federal-provincial complementarity is the general rule applicable to the interpretation of federal legislation, and that the complementarity principle extends beyond respecting the broad concepts of “the common law” and “the civil law.” Section 8.1, for example, indicates that the common law and the civil law are equally authoritative, but not the only possible sources of the private-law elements of a federal act. In addition, both sections implicitly recognize that provincial rules, principles, and concepts may vary between common-law provinces, as well as between the common-law provinces and Quebec.⁸⁸

Second, the recent additions to the Interpretation Act must be seen to have decreased both the courts' ability to evade the principle of complementarity by focusing on the uniformity principle and Parliament's ability to evade complementarity through some vague indication of contrary intent. This is because pursuant to section 8.1, there are only two situations in which federal-provincial complementarity will not apply to a federal enactment: first, where it is not “necessary to refer to” provincial rules, principles, or concepts in interpreting the federal enactment;⁸⁹ and second, where it is “otherwise provided by law.”⁹⁰

87 Courts and commentators have noted that section 8.1 of the Interpretation Act does not create a new principle of law: see 9041-6868 *Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334, at paragraph 5. See also Pourbaix, supra note 85, at 7.

88 Duff, supra note 9, at 47; and Molot, supra note 76, at 18. See, in particular, the French version of section 8.2 of the Interpretation Act, which clarifies that the common-law meaning to be adopted is that “compatible avec le système juridique de la province d'application.”

89 The precise meaning of this phrase has not yet been judicially determined. According to Molot's analysis, the “necessity” envisaged by section 8.1 will arise only where federal legislation is being applied within a particular province, and where it expressly or impliedly relies on a *provincial* concept that relates to “property and civil rights.” However, Molot argues that it is not necessary for a statutory provision to contain civil-law or common-law terminology in order to engage section 8.1: see Molot, supra note 76, at 14-16.

90 With regard to this second condition, Molot argues that the appearance of a “contrary intention” is not sufficient to avoid the rule in section 8.1; there must in fact be a legislative provision to the contrary (“règle de droit opposant”): *ibid.*, at 18-19.

Therefore, unless it can be said that it is “unnecessary” to refer to provincial property-law rules in interpreting the registered charity provisions, or that Parliament has provided otherwise by law, it appears that section 149.1 and subsection 248(1) of the ITA must be interpreted by reference to the rules, principles, or concepts in force in the province where they are being applied.

CHARITY (BIENFAISANCE) AS A PLURAL NOTION: FOUR SOURCES OF MEANING FOR THE REGISTERED CHARITY PROVISIONS OF THE ITA

Introduction

Taken together, the statutory language of section 149.1, the constitutional division of authority over charities, and the new provisions of the Interpretation Act do much to destabilize the currently accepted view that the ITA’s conception of charity is uniform, federal common law. In weakening the prevailing view, they implicitly strengthen the opposite one: that there are multiple legal definitions of charity in Canada that operate to complete the ITA registered charity provisions when they are applied in the provinces. The merits of this claim will be examined closely in this section, through the exploration of four possible sources of meaning for the terms “charity” and “bienfaïssance.”⁹¹

As a starting point, there seem to be several intuitive reasons to expect that multiple, distinct legal notions of charity would exist in a federal, multijural state. First, legal concepts of what it means to be charitable or to do good are highly sensitive to the values and the traditions of the societies in which they arise. Therefore, while “charity” and “bienfaïssance” both mean something absolute in their purest etymological sense,⁹² their functional use as descriptors of purposes and activities that are “generally regarded as being of special benefit to society”⁹³ should be regarded as highly contextual.

Second, at least within Western legal traditions, legal concepts of charity generally reflect the *methods* whereby property is transferred for the accomplishment of charitable purposes. As Rickett explains,

91 There may, of course, be other sources than those discussed here: see, for example, Martin Boodman, *Les libéralités à des fins charitables au Québec et en France* (Montréal : Corporation Margo, 1980), 64 ff.

92 The word “charity” is derived from the ecclesiastical Latin “caritas,” which means “love in its perfect sense”: see Hubert Alistair Paul Picarda, *The Law and Practice Relating to Charities*, 3d ed. (London: Butterworths, 1999), 3. See also Nicholas Kasirer, “Agapé” (2001) vol. 3 *Revue internationale de droit comparé* 575-600, at 578 (“caritas” expresses “l’amour de l’homme pour son prochain, y compris son ennemi, comme manifestation de l’amour de Dieu”). “Bienfaïssance” is a word that was invented in the 17th century to convey the concept of doing good: see Disraeli, *supra* note 1, at 29.

93 *Vancouver Society*, *supra* note 19, at paragraph 95. There may, of course, be terms and concepts that describe the concept of “especially beneficial purposes” in other languages recognized by Canadian law.

[T]he legal definition of charity becomes a problem only in those legal systems which rely solely, or at the very least primarily, on . . . the transfer of property subject to a legal obligation. In this case only does the law have to face up to important questions. Should the law be used to enforce a gift for this or that purpose? Should it be permitted for property to be used for an alternative purpose if the original purpose is regarded as non-charitable, or becomes impossible for practical reasons to carry out? . . . These questions make it vital that the relevant lawmakers reach a definition of charity enforceable through a legal process.⁹⁴

Rickett's comments provide a compelling explanation of why the meaning of a term such as "charity" or "bienfaisance" might vary dramatically from one legal tradition to another. Where the designation of an organization or transfer of property as "charitable" imposes significant legal rights or obligations on private persons or the state, the boundaries of the concept will need to be precisely delineated; where the term merely describes a transfer that a party has the right to effect, a more fluid concept will suffice. In other words, the question of the legal definition of charity is a question of form begetting substance, and an illustration of "the counterpoint that exists in a legal system between the freedom of content of a legal institution and the remedies by which it is protected."⁹⁵

In light of these fundamental characteristics of the notion of charity, it seems highly unlikely that one uniform concept of charity would exist throughout the Canadian state. The common-law, civil-law, and provincial statutory traditions regarding charitable giving emerged in different societies and historical periods, each with its own social values and religious customs. In addition, while the civil-law tradition, for long periods of its history, accomplished the transfer of property to charitable purposes by simply allowing persons to make gifts with non-legal obligations attached,⁹⁶ the common law, almost from its inception, strictly enforced obligations to transfer property to charitable purposes and granted extensive supervisory powers over such transfers to representatives of the Crown. To test the hypothesis of a plural concept more fully, it is necessary to take a closer look at four possible sources of meaning for the registered charity provisions of the ITA: the common law of charitable trusts; the customary civil-law rules regarding *legs pieux*; the Roman-law sources on foundations and gifts; and the various statutes regulating charities in the provinces.

The Common Law of Charitable Trusts

As the courts have often affirmed, there is no precise or comprehensive common-law definition of charity. Rather, a purpose is said to be charitable if it benefits a sufficient segment of the community and if it can be linked to the relief of poverty, the

94 C.E.F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) vol. 38, no. 1 *The Cambridge Law Journal* 118-47, at 122.

95 David Johnston, *The Roman Law of Trusts* (Oxford: Clarendon Press, 1988), 221.

96 Rickett, *supra* note 94, at 134.

advancement of education, the advancement of religion, or other purposes beneficial to the community.

While the common-law concept of charity often seems to have acquired a quality of universality in Canada through the consistency of its application, it is in fact a highly particular notion whose meaning is far from self-evident to ordinary citizens. At common law, it is charitable to erect a private memorial inside a church, but not in the churchyard outside.⁹⁷ It is charitable to encourage good domestic servants, but not, in most jurisdictions, to encourage amateur sport. How did the common law come to adopt a notion of charity that is so far removed from its popular conception? The answer, it seems, relates to the particular historical context in which the law of charities developed, and the significant privileges attached to the designation of a charitable trust.

Charity as a Product of Historical Circumstance and Legal Form

It appears that during the medieval period, notions of what constituted charitable giving in England did not differ in essence from those prevailing in Italy or France. In the Church-dominated societies of medieval Europe, people generally gave of their wealth in order to secure their personal salvation, and to ensure that their families did not suffer the wrath of the Church during their remaining time on earth. The devotion of personal property to “pious causes” through the making of legacies *ad pias causas*, *legs pieux*, or charitable legacies was a matter of religious obligation for anyone under the divine command of the pope. The medieval concept of what purposes were of special benefit to society was thus defined in England, as elsewhere in Europe, by the Judeo-Christian tradition and the strictures of the canon law.⁹⁸

By the 19th century, however, England had a well-entrenched, unique legal meaning for the word “charity,” which was essentially secular and had no parallel on the Continent. Why did this divergence occur? Providing a comprehensive answer to this question is beyond the scope of this article; however, it is possible to isolate several factors that contributed to the move from a pan-European, religious conception of charity to the notion that prevails in Canada and other Commonwealth countries today.

The first factor that led to the development of a unique, common-law concept of charity was the development in England of a distinct scheme of equitable rules and equitable courts, and the emergence within this scheme of the unique institution of the charitable trust. The charitable legacy of the canon-law tradition was inherently limited as a method of philanthropic giving in England, because the common law

97 Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005), 707.

98 Gareth H. Jones, *History of the Law of Charity: 1532-1827* (Cambridge: Cambridge University Press, 1969), 3; and Boodman, *supra* note 91, at 11.

generally prohibited devising land by will. Beginning in the 13th century, therefore, English testators began transferring property to purposes by making inter vivos transfers of lands to persons (called “feoffees to uses”), who held the land “to the use” of the testator until his death, and thereafter unto such uses as were set out in his last will. While the concept of use had something in common with two civil-law concepts that preceded it—the usufruct and the fideicommissum—it was novel in that it recognized, for the first time, the complete and permanent ownership of land by persons who were obligated to use the land as directed by the transferor (“*cestui que use*”).⁹⁹

Originally, uses (like most of the civil-law instruments for devoting property to purposes) were entirely dependent on the good faith of the feoffee.¹⁰⁰ Had this remained the case, the common law of charity might not have veered so far off the course being followed on the Continent. However, the development of the concept of use in England was paralleled by the growing role of the English Chancellor, and the recognition of the equitable principles that he applied as an independent source of law. By the early 15th century, Chancery was an established court; it began to hear petitions brought by individuals to enforce the duties of feoffees and to recognize that the *cestui que use* had an *equitable* interest in the property being held for their use. As the use evolved into the modern charitable trust, the Chancellor continued to retain jurisdiction over these transfers and to protect the equitable interest of the *cestui que use*. Extensive privileges and protections were granted to the charitable trust to ensure that philanthropic efforts “were not frustrated by the formalism and rigidity of the common law.”¹⁰¹ The obligation to transfer property to charitable purposes was transformed into a highly enforceable legal obligation, making it “vital” (in Rickett’s words) that the common-law tradition develop a definition of charity that was ascertainable and enforceable through a legal process.

In addition to the unique contribution of the charitable trust, there are a number of specific historical events that can be said to have contributed to the development of the particular common-law definition of charity that exists today. One of these events was Henry VIII’s decision, in 1534, to abridge the influence of the Roman Catholic Church in England and declare himself the supreme head of the Church of England. In the ensuing decades of religious strife, the practice of Roman Catholicism was made illegal in England and the wealth of the Roman Catholic Church

99 See Jones, *supra* note 98, at 6-7; and Jill E. Martin, *Hanbury & Martin Modern Equity*, 14th ed. (London: Sweet & Maxwell, 1993), 8-9.

100 W.K. Jordan, *Philanthropy in England 1480-1660: A Study of the Changing Pattern of English Social Aspirations* (London: Allen & Unwin, 1959), 109.

101 Jones, *supra* note 98, at 8-9 and 59. For example, the *cy-près* rule provides that where a settlor has a paramount intention to devote property to charitable purposes, but devotes the property to a particular charitable purpose that becomes impossible to carry out, the court will direct the application of the property to a charitable purpose that falls within the general charitable intention of the settlor: *Picarda*, *supra* note 92, at 301. See *ibid.*, at 360, 496, and 552, for a description of the other privileges accorded to charitable trusts.

was appropriated to the use of the Crown. While gifts of property to “charitable” uses were still treated with favour, gifts supporting illegal or “superstitious” religious activities were forfeit to the Crown.¹⁰² The effect of the Reformation was thus to dissociate the notions of piety and charity that had so long been synonymous descriptors of a charitable gift.¹⁰³ Because gifts to the Catholic Church were no longer viewed by the English state as gifts that were beneficial to society, the canonical concept of a pious cause could no longer function as the standard for the legal definition of charity. A new conception of charity would have to be found.

A second historical event that contributed to the idiosyncratic character of the current common-law concept of charity was the enactment, in the 18th century, of legislation that prohibited testamentary gifts of land to charity and vested any land so transferred in the testator’s heirs. The purpose of the English Mortmain Act, 1736 was to respond to the growing popular distrust of charities, and particularly the church, by stemming the tide of charitable giving and safeguarding family wealth. However, because the judges of the day shared Parliament’s sympathies with the interests of wealthy heirs, the mortmain legislation also had the effect of encouraging a very generous judicial interpretation of “charity” in cases involving devises of land, and a much narrower one in cases involving gifts that fell outside the scope of the Act. This well-documented judicial bias produced some peculiar results: by the end of the 18th century, for example, a gift to establish a perpetual botanical garden was charitable, while a legacy aimed at improving the “degraded state” of society in Africa was not. Because most actions brought under the Mortmain Act involved gifts of realty, however, the overall effect of the legislation was to broaden the concept of charity embraced by the common law.¹⁰⁴

While the Reformation and the mortmain legislation both influenced the development of English charity law, the historical event that really gave meaning to the common-law term “charity” was the enactment of the Charitable Uses Act (“the Statute of Elizabeth”) in 1601. By the end of the 16th century, it had become apparent that the mechanisms in place in England to ensure that charitable gifts were in fact devoted to their intended charitable purposes were not succeeding in preventing abuses. During the reign of Elizabeth I, legislation was enacted that aimed to address these abuses through the establishment of a commission with extensive powers to inquire into and remedy breaches of charitable trusts.¹⁰⁵ The preamble to the Statute

102 See E. Blake Bromley, “Contemporary Philanthropy—Is the Legal Concept of ‘Charity’ Any Longer Adequate?” in Donovan W.M. Waters, ed., *Equity, Fiduciaries and Trusts 1993* (Scarborough, ON: Carswell, 1993), 59-98, at 62.

103 Jones, *supra* note 98, at 15. The Reformation also prompted the Crown to begin acting as the protector of charitable trusts, bringing petitions to ensure that Anglican ministers were supported and that the English were instructed in the tenets of the established church.

104 Jones, *ibid.*, at 117 and 128-33.

105 *Ibid.*, at 21. For a review of the broader social and legislative context within which the Statute of Elizabeth was enacted, see Blake Bromley, “1601 Preamble: The State’s Agenda for Charity” (2001) vol. 7, no. 3 *Charity Law & Practice Review* 177-211.

of Elizabeth listed the “good, godly and charitable” uses within the authority of the commissioners, which are generally expressed in their modern form as follows:

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.¹⁰⁶

The preamble was only meant to serve the purpose of delimiting the jurisdiction of the commissioners, and the enumerated charitable uses were not originally regarded as an exclusive list; rather, they were seen as instances of a more general conception of charity as anything that benefited the public.¹⁰⁷ However, in *Morice v. Durham*¹⁰⁸—an 1805 decision that has been followed ever since—the common-law meaning of charity was decisively affixed to the preamble, and just as decisively severed from the parallel notions of benevolence and liberality that were part of the broader understanding of charity embraced by the civil law.

The *Morice* case addressed the question of whether objects of benevolence and liberality could be the objects of a valid charitable trust. The decision marked a pivotal point in the evolution of the common-law concept of charity. The case arose when the next of kin of a wealthy testatrix challenged her bequest of all of her personal property to “such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve.” Counsel for the testatrix argued that her intention must be considered the same, whether expressed by the term “charitable,” “benevolent,” or “liberality,” and that “upon the authorities almost everything, from which the public derive benefit, may be considered a charity.”¹⁰⁹ The next of kin, for their part, relied on the work of Roman legal scholars and English theologians to highlight the various species of liberality that could not be considered charity “in any sense of the word.”¹¹⁰ In finding for the next of kin, both the Master of the Rolls and the Lord Chancellor held that the term “charity” was not synonymous with either benevolence or liberality, but included only those purposes that the Statute

106 *Vancouver Society*, supra note 19, at paragraph 145.

107 Sir Francis Moore, one of the first common-law scholars of the law of charity, expressed the view that the preamble should be generously construed to protect “uses whose endowments could be applied for the public benefit”: Jones, supra note 98, at 29. See also *Jones v. Williams* (1767), 27 ER 422, at 422 (Ch.), where “charity” is defined as a “general public use.”

108 *Morice v. Durham (The Bishop of)* (1804), 9 Ves. 399 (Ch. D.); aff’d. (1805), 10 Ves. 522 (Ch. D.).

109 *Ibid.* (1805), at 523.

110 *Ibid.*, at 530.

of Elizabeth enumerates, or “which by analogies are deemed within its spirit and intendment.”¹¹¹

Significantly, the decision in *Morice* had nothing to do with the intrinsic meaning of the word “charitable,” but was based on a perceived need to establish ascertainable principles upon which the Crown and the court could rely in carrying out their duties to reform and administer charitable trusts.¹¹² This rationale provides us with a potential common-law “definition” of a charitable purpose: it is one that “falls within the scope of those purposes which the courts consider sufficiently in the public interest to be upheld and enforced at the suit of the Attorney General.”¹¹³

The decision in *Morice* may have been motivated by a prevailing judicial bias against the disinheritance of natural heirs, or by a suspicion that objects of liberality might indeed include “the giving of liquor for the sake of popularity”¹¹⁴ as alleged by the next of kin. Regardless of its intended scope, however, *Morice* was soon accepted as authority “that there could be no synonym for ‘charitable’ and no substitute for the Preamble as the source of the definition of legal charity.”¹¹⁵ With the passage of time, the effects of this view came to be felt as gifts for philanthropic, benevolent, public, utilitarian, and even pious purposes were held to fall outside the common-law definition of charity, and thus were invalidated on grounds of uncertainty.¹¹⁶ The word “charitable” had, at common law, become a technical and exclusive legal term.

Purposes Encompassed by the Common-Law Meaning of Charity

What, then, are the purposes that the common law has come to recognize as having the character of charity as a result of the particular historical development of the charitable trust? According to the House of Lords’ decision in *Pemsel*, which was affirmed by the Supreme Court of Canada in *Vancouver Society* in 1999, the common-law concept of charity has four principal divisions:

1. *The relief of poverty.* This head, which lies “at the very heart” of the Judeo-Christian understanding of charity,¹¹⁷ is broadly construed and benefits from an exception to the general requirement that a charitable purpose benefit a substantial section of the community. Thus, a gift to relieve the poverty of

111 Ibid. (1804), at 405.

112 Ibid. (1805), at 539, per Eldon LC: “As it is a maxim, that the execution of a [charitable] trust shall be under the control of the Court, it must be of such a nature, that it can be under that control.”

113 Austin Wakeman Scott, “Trusts for Charitable and Benevolent Purposes” (1945) vol. 58, no. 4 *Harvard Law Review* 548-72, at 550.

114 *Morice*, supra note 108 (1805), at 530.

115 Jones, supra note 98, at 126.

116 Picarda, supra note 92, at 221.

117 Ibid., at 35.

- one's needy relations or employees is charitable, in the same way as a gift to support a public soup kitchen, orphanage, or low-rent housing facility.¹¹⁸
2. *The advancement of education.* In Canada, this category is understood to include the improvement of useful branches of human knowledge and the formal training of the mind, as well as "more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end."¹¹⁹ This division is a broad one, encompassing the provision of prizes and scholarships and the dissemination of research, as well as a wide range of extracurricular activities carried out by universities and colleges, and the promotion of various artistic and cultural pursuits. However, instruction that has no discernable structure or is aimed solely at promoting a particular point of view or political orientation is not a charitable activity at common law.¹²⁰
 3. *The advancement of religion.* Despite the conspicuous dearth of religious uses listed in the preamble to the Statute of Elizabeth (consisting, essentially, of "the repair of . . . churches"), this division has expanded gradually over time to include the upkeep of churches and burial sites, the training and support of clergy, and missionary activities. "[T]he promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it," is also considered a charitable purpose.¹²¹ However, the common-law understanding of religious charitable purposes is limited somewhat by a historically rooted definition of religion that requires faith in a supreme being and worship of that supreme being. The advancement of religion category also excludes religious purposes whose beneficial effects are not susceptible of proof, such as intercessory prayer.¹²²
 4. *Other beneficial purposes.* The fourth, residual division of purposes was described in *Pemsel* as comprising "purposes beneficial to the community, not falling under any of the preceding heads." This description is deceptively broad, however, since the only purposes that the common law recognizes as falling under this head are those whose "nature or quality . . . conforms to the notion of charity derived from the 1601 Act."¹²³ As Lord Wilberforce explained in *Scottish Burial Reform*,

118 Waters et al., supra note 97, at 689-94.

119 *Vancouver Society*, supra note 19, at paragraph 168.

120 *Ibid.*, at paragraph 171. See also Waters et al., supra note 97, at 694ff.

121 *Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners*, [1931] 2 KB 465, at 477 (CA).

122 Waters et al., supra note 97, at 704ff. For a detailed review of the common-law understanding of religion, see Kathryn Bromley (my former name), "The Definition of Religion in Charity Law in the Age of Fundamental Human Rights" (2000) vol. 7, no. 1 *Charity Law & Practice Review* 39-91, at 85-91.

123 Waters et al., supra note 97, at 721.

[t]he purposes in question, to be charitable, must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment of the preamble to the statute 43 Eliz. 1, c. 4. The latter requirement does not mean quite what it says; for it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied.¹²⁴

It is not possible to summarize all of the diverse purposes that have been found, throughout the ages, to benefit the public within the intendment of the Statute of Elizabeth in different common-law jurisdictions. However, some of the major groupings of purposes that fall under this residual division include the provision of public works or services, the protection of lives and property, the preservation of public order, the promotion of health, the preservation of the environment, and the care of children.¹²⁵ Of course, to be charitable, all of the purposes must benefit the community or a substantial segment of the community.

The Customary Civil-Law Rules Regarding Legs Pieux

The Starting Point: CCLC Article 869 and the Ancien Droit

The common law of charitable purpose trusts, which was born in the Chancery courts of Reformation England and confirmed as the suppletive law for Britain's charitable tax exemptions in 1891, constitutes one well-established source of meaning for the registered charity provisions of the ITA. As a detailed body of private law with a well-recorded history, it is a source that has historically added structure and definitional content to the indeterminate provisions of section 149.1. However, the common law of charitable purpose trusts is also a private-law source that has no application in at least one Canadian province, the civil- or mixed-law jurisdiction of Quebec. Therefore, in exploring whether other sources of meaning might exist for the term "charitable" ("de bienfaisance") in the ITA, it is logical to begin in Quebec, where the meaning of charity has "nothing to do with technical charities under the English law and the statute of Elizabeth."¹²⁶

The private law of Quebec is based on the civil-law tradition established by the French Crown in the colony of New France in 1663, and continued by the British Crown for matters of "property and civil rights" by virtue of the Quebec Act of 1774.¹²⁷ Since 1866, this civil-law tradition has found its chief expression in two

124 *Scottish Burial Reform and Cremation Society. v. Glasgow Corporation*, [1968] AC 138, at 154 (HL).

125 Spence G. Maurice and David P. Parker, *Tudor on Charities*, 7th ed. (London: Sweet & Maxwell, 1984), 90-134.

126 See *Ross v. Ross* (1894), 25 SCR 307, at 330-31, per Strong CJ.

127 Pursuant to a royal edict of Louis XIV, the private law of New France was established as that set out in the Coutume de Paris, the body of customary law recorded in writing in 1580 and

successive civil codes—the Civil Code of Lower Canada and the Civil Code of Québec—the first of which was explicitly modelled on the general plan, if not the substance, of the Napoleonic Code of 1804. Québec’s civilian tradition “differs fundamentally” from that of the common law, both in terms of its basic views on the nature of law and the proper scope of judicial power, and in terms of its more concrete characteristics such as its codified form of expression, its deductive mode of reasoning, and its absence of a doctrine of precedent.¹²⁸ A great deal has been written on the unique character of Québec’s private law and the features that distinguish it from the common-law tradition that governs the other nine Canadian provinces.

For present purposes, however, it is sufficient to note two features of Québec’s civil-law tradition that are fundamentally incompatible with the common law of charitable trusts. First, no distinct system of equitable rules or of equitable courts ever developed in the civil-law tradition of France or in New France. Thus, the whole institutional framework within which the Chancery courts of England were able to protect the interests of the beneficiaries of a trust, and were eventually recognized as the *parens patriae* of charities, was never instituted or replicated in Québec.¹²⁹ Second, since the abolition of the seigneurial system in Québec in 1854, the institutions and structures of Québec civil law have been based on a Romanist conception of property, according to which ownership is regarded as indivisible, absolute, and vested in a single individual.¹³⁰ This conception of exclusive and indivisible ownership is not compatible with the common law’s acceptance of multiple rights of ownership in a single piece of property, or with the division between legal title and equitable title that formed the basis of the common law of charitable trusts.¹³¹ Thus, while Québec’s civilian tradition has long recognized a form of trust, it has never been suggested that the entire body of English trust law, with its concept of dual ownership, could be incorporated into Québec law.¹³²

Given that the common law of charitable purpose trusts is both inapplicable in Québec and incompatible with Québec’s private-law tradition, where should one look in that province for the meaning of the ITA term “charitable” (“de bienfaisance”)? The present CCQ, which would provide the natural starting point for this inquiry,

governing the jurisdiction of Paris: see John E.C. Brierley and Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993), 7. This body of law was supplemented by royal ordinances, ordinances of Canadian administrative authorities, and judgments of the local courts: see Frederick Parker Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Toronto: Butterworths, 1980), 38.

128 Catherine Valcke, “Québec Civil Law and Canadian Federalism” (1996) vol. 21, no. 1 *Yale Journal of International Law* 67-121, at 73-88.

129 Michel Morin, “La compétence *parens patriae* et le droit privé québécois : un emprunt inutile, un affront à l’histoire” (1990) vol. 50, n° 5 *Revue du Barreau* 827-923, at 848-49.

130 Brierley and Macdonald, *supra* note 127, at 21; and *Royal Trust Co. v. Tucker*, [1982] 1 SCR 250, at 261.

131 Waters et al., *supra* note 97, at 14-17.

132 *Royal Trust Co.*, *supra* note 130, at 261.

contains only a passing reference to the term, naming a “charitable institution” (“organisme de bienfaisance”) as one destination for the disposal of perishable and found things.¹³³ However, the concept of a “charitable purpose” (“fin de bienfaisance”) was central to one of the articles contained in the predecessor CCLC. CCLC article 869, which was included in chapter III, “On Wills,” of the title “Of Gifts ‘inter vivos’ and by will,” stated:

Un testateur peut établir des légataires seulement fiduciaires ou simples ministres pour des fins de bienfaisance ou autres fin permises et dans les limites voulues par les lois; il peut aussi remettre les biens pour les mêmes fins à ses exécuteurs testamentaires, ou y donner effet comme charge imposé à ses héritiers et légataires.

A testator may name legatees who shall be merely fiduciary or simply trustees for *charitable or other lawful purposes* within the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees.

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

In order to generate at least a tentative answer to this question, it is necessary to examine briefly the provisions that replaced CCLC article 869 in the recodification of Quebec’s private law in 1994. The new Code contains no article precisely parallel to CCLC article 869; rather, the devotion of property to purposes is now regulated principally by a series of articles on “patrimony by appropriation,” located within title six, book four of the CCQ. Title six, which introduces the concepts of the foundation and the trust, is likely to serve in future as the primary legal framework for gratuitous dispositions to charitable purposes in Quebec. However, it is still possible to appropriate property to a purpose by way of a legacy with a charge, or by transferring property to a testamentary executor with an obligation to act.¹³⁴ Thus, all of the modes that were available for achieving the devotion of property to charitable purposes under CCLC article 869 continue to be available under the CCQ.

Of all the changes brought about by recodification with respect to the law of property in Quebec, the most far-reaching is likely the introduction of a general regime of trusts, based on a concept of trust property as an independent patrimony appropriated to a purpose, in which neither the settlor, the trustee, nor the beneficiary has any real right.¹³⁵ The trust is no longer a single, limited, and controversial mode

133 CCQ articles 644, 942, and 945.

134 John E.C. Brierley, “Certain Patrimonies by Appropriation,” in *Reform of the Civil Code*, vol. 1, trans. J. Daniel Phelan (Quebec: Quebec Bar Association, 1993), 1-24, at 2.

135 CCQ article 1261. There is a large body of literature explaining the legal framework of the new Quebec trust and assessing its merit as an answer to the longstanding doctrinal debate about who “owns” trust property in Quebec: see, for example, John E.C. Brierley, “The New Quebec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts,” in

of achieving gifts or legacies in Quebec, but a “general declarative and facilitative institution” of the civil law,¹³⁶ which results wherever “a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.”¹³⁷ CCQ article 1266 classifies trusts according to the various purposes for which they may be established: personal purposes, purposes of private utility, and purposes of social utility. While personal trusts are aimed at securing a benefit for a determinate or determinable person, private trusts and social trusts are constituted for an abstract purpose and do not name particular individuals as beneficiaries.¹³⁸

It is, in particular, the new social trust that has been described as “a restatement of the idea of article 869 CCLC.”¹³⁹ Pursuant to CCQ article 1270, a social trust is defined as “a trust constituted for a purpose of general interest (*but d'intérêt général*), such as a cultural, educational, philanthropic, religious or scientific purpose,” which does not have the making of profit or the operation of an enterprise as its main object. Like its predecessor in CCLC article 869, a social trust may be perpetual, and the ability of its trustees to appoint beneficiaries and determine their respective shares of the trust property is presumed.¹⁴⁰

There are, admittedly, several significant differences between the language and scope of CCLC article 869 and the social trust regime set out in the CCQ. For example, the CCQ uses the new broad term “purpose of general interest” (“*but d'intérêt général*”) to describe the scope of purposes encompassed by the social trust.¹⁴¹ The term “charitable” (“*de bienfaisance*”) is conspicuously absent from title six, appearing neither as a general descriptor of the social trust nor as one of the examples of a “general interest” purpose set out in article 1270. In addition, the CCQ, unlike CCLC article 869, assigns a prominent role to the courts and public authorities in the administration of social trusts.¹⁴² Nonetheless, as I will discuss below, it is arguable that CCLC article 869 continues to form part of Quebec’s unenacted civil law, either because of its continued application to transfers of property that do not constitute

H. Patrick Glenn, éd., *Droit québécois et droit français : communauté, autonomie, concordance* (Cowansville, QC : Yvon Blais, 1993), 383-97; Brierley, *supra* note 134; and Rainer Becker, “A Question of Trust—An Analysis and a Comparative Assessment of the New Quebec Trust” (LLM thesis, McGill University, 1995) [unpublished].

136 John B. Claxton, *Studies on the Quebec Law of Trust* (Toronto: Thomson Carswell, 2005), 102.

137 CCQ article 1260.

138 CCQ articles 1267 through 1270. See also Brierley, *supra* note 134, at 12.

139 Brierley, *supra* note 134, at 13.

140 CCQ articles 1273 and 1282.

141 While early proposals used the terms “purpose of public interest” and “purpose of charity or of general interest,” Parliament settled on the broad term “purpose of general interest” to set the bounds of the new institution: see Brierley, *supra* note 134, at 13.

142 CCQ articles 1277, 1287, 1294, and 1298.

a trust, or because the CCLC term “charitable purposes” (“fins de bienfaisance”) and the CCQ term “purpose of general interest” (“but d’intérêt général”) may rely for their meaning on the same legal sources.¹⁴³ For this reason, it seems justifiable to take CCLC article 869 as a starting point in attempting to decipher the meaning of “charitable” (“de bienfaisance”) in Quebec.

The codifiers of the CCLC described article 869 as “a summary of the [ancient] law relating to legacies for pious, charitable, or benevolent purposes.”¹⁴⁴ The basic purpose of the provision was to affirm the validity of certain legacies made to undefined beneficiaries, by allowing a testator to confide to another person the authority to direct his property to a charitable or lawful purpose.¹⁴⁵ Pursuant to article 869, this special power of appointment could be exercised in three different ways: “as a trust, by transferring the property to testamentary executors or by a legacy with a charge.”¹⁴⁶ However, while article 869 was used frequently throughout the 19th and 20th centuries to accomplish philanthropic goals in Quebec, the precise details of the juridical regime it encompassed remained somewhat obscure.¹⁴⁷ In particular, little attention was devoted to the nature of the obligations imposed on the intermediaries, or the remedies available to residuary heirs.

Consistent with its role as a compendium of “meaningful generalities,”¹⁴⁸ the CCLC also did not define the term “charitable purposes” (“fins de bienfaisance”) in article 869. Nevertheless, it is possible to draw some speculative conclusions about the nature and function of the designation “charitable” (“de bienfaisance”), based on certain features of the codal rule. First, within the context of article 869, the term “charitable” (“de bienfaisance”) did not function as an exclusive category; rather, a testator was permitted to deliver property to legatees or executors for “charitable or

143 Claxton, *supra* note 136, at 10 (the findings of *Valois v. de Boucherville*, *infra* note 154, were “the forerunner” of CCQ articles 1270 and 1262). Brierley expresses the opinion that CCQ article 1270 is broader in scope than CCLC article 869, but also seems to suggest that the cases on article 869 might be relevant to its interpretation: Brierley, *supra* note 134, at 13. See the discussion below under “The ‘Inconsistent Language’ Argument.”

144 Quebec, Commission for the Codification of the Laws of Lower Canada Relating to Civil Matters, 3 vols., *Fourth and Fifth Reports* (vol. 2) (Quebec: Desbarats, 1865) (herein referred to as *Fifth Report* (1865)), 181.

145 John E.C. Brierley, “Powers of Appointment in Quebec Civil Law (First Part)” (1992) vol. 95, n^{os} 3-4 *Revue du notariat* 131-67, at 131.

146 Brierley, *supra* note 134, at 2.

147 See Madeleine Cantin Cumyn, “L’origine de la fiducie québécoise,” in *Mélanges Paul-André Crépeau* (Cowansville, QC: Yvon Blais, 1997), 203-19; and Hervé Roch, *Traité de Droit Civil en Québec*, t. 5 (Montréal: Wilson et Lafleur, 1953), 388. See also Martin Boodman, “Fleury v. Trust Général du Canada,” Case Comment (1981), 9 *Estate and Trust Reports* 248-55, at 248, noting that the laws governing charitable liberalities in Quebec have only “infrequently” been the object of judicial scrutiny.

148 John E.C. Brierley, “The Renewal of Quebec’s Distinct Legal Culture: The New Civil Code of Québec” (1992) vol. 42, no. 4 *University of Toronto Law Journal* 484-503, at 492. See also Valcke, *supra* note 128, at 80.

other lawful purposes” (“fins de bienfaisance ou autres fins permises”), within the limits permitted by law. Presumably because a testator did not have to establish a “charitable” purpose to bring herself within the scope of article 869, the courts seldom considered the specific meaning of “charity” (“bienfaisance”), taking it for granted that any purpose broadly in the public interest was either “charitable or otherwise lawful” within the meaning of article 869.¹⁴⁹

A second noteworthy feature of article 869 relates to the different French terminology used to express the concept of charity in the CCLC and in the accompanying codifiers’ report. As we have seen, article 869 employed the term “charitable” (“de bienfaisance”) to express the primary category of purposes to which testators could devote their property. However, in the comments accompanying the draft version of article 869, the codifiers equated the English term “charitable” with the French term “de charité,” and the French term “de bienfaisance” with the English term “benevolent.”¹⁵⁰ While it may not be possible to draw any definitive conclusions from this linguistic discrepancy, it does seem to suggest that in contrast to the common-law tradition, in the ancient law the understanding of purposes and activities that were of special benefit to society was not definitively tied to a single word.

Finally, it is significant that CCLC article 869 provided no mechanism for the supervision of charitable legacies by either the courts or a representative of the Crown. Charitable legacies were not always without oversight in Quebec: under the ancient law, high legal functionaries known as procureurs du roi represented before the courts “personnes incertaines” (“undetermined persons”), such as the poor, whose interests would otherwise not have been protected.¹⁵¹ However, unlike the superior courts of the common-law provinces, the Superior Court of Quebec was never vested with the *parens patriae* jurisdiction of the Court of Chancery in England, and the attorney-general of Quebec no longer plays the supervisory role of the procureur du roi. Charitable legacies permitted under CCLC article 869 were therefore not subject to any degree of administrative control, either at the time of their creation or during their operation.¹⁵²

On the basis of the above-noted features of CCLC article 869, one might venture the following description of the nature and function of the term “charitable” (“de bienfaisance”) under the CCLC: it was a non-exclusive descriptor of a set of purposes for which property could be transferred, but which were subject to very limited legal protection. However, in order to get a better sense of the concept of charity that was incorporated into article 869, it is necessary to take a closer look at “the law relating

149 See, for example, *Freleigh v. Seymour*, [1855] 5 LCR 492; and *Abbott et al. v. Fraser et al.*, [1874] 20 LCJ 197 (PC), where the court concluded without reasons that a bequest for a public library was “a disposition for a lawful purpose” within the meaning of CCLC article 869.

150 *Fifth Report* (1865), *supra* note 144, at 181.

151 *Ibid.*

152 Brierley and Macdonald, *supra* note 127, at 371. See also Brierley, *supra* note 135, at 390 (the existence of “an unenforceable trust for public charitable purposes” is an anomaly of Quebec law).

to legacies for pious, charitable, or benevolent purposes” that was already in force in Lower Canada at the time the CCLC was enacted, and was therefore reduced to codal form in accordance with the codifiers’ legislative mandate.¹⁵³ This law, in basic terms, was “l’ancien droit en matière de charité,” which was made up of (among other things) the Coutume de Paris and the commentaries devoted to its interpretation, the royal ordinances of the French Crown, and the Roman-law sources that were an integral part of the French legal tradition received in New France in 1663.¹⁵⁴

Legs Pieux in Roman and French Law

What, then, was the content of the ancient law relating to legacies for pious, charitable, or benevolent purposes to which the codifiers referred? In the leading case on CCLC article 869, *Valois v. de Boucherville*, the Supreme Court of Canada relied on French scholarship from both before and after the British conquest of New France to link article 869 to the ancient rule that bequests left in furtherance of certain pious and charitable works were valid, despite the fact that they were made to undetermined persons.¹⁵⁵ This rule of exception in favour of *legs pieux* was summarized by the French scholar Planiol, in a passage adopted by the court:

2991. Importance des legs charitables.—Depuis l’avènement du christianisme les libéralités au profit des pauvres ont été de tout temps très nombreuses. Dès le Ve siècle, les empereurs Valentinien et Marcien décidaient qu’un legs fait aux pauvres était valable (Code. liv. 1 tit. 3, loi 23) et il est probable que depuis longtemps des libéralités charitables étaient faites aux églises, à qui Constantin avait permis d’adresser des legs par une constitution de l’an 321 (Code. liv. 1 tit. 2, loi 1). Au moyen âge, un testateur n’aurait pas voulu écrire ses dernières volontés sans y insérer quelques legs pieux, destinés à de bonnes œuvres et au soulagement des pauvres. De nos jours encore rien n’est plus fréquent que de voir des libéralités souvent considérables faites aux pauvres par testament.

2992. Capacité de recevoir reconnue aux pauvres.—Les pauvres sont-ils des personnes incertaines ? Le droit romain les considérait certainement comme tels, et s’il a permis de leur faire des legs, c’est en introduisant en leur faveur une véritable exception inspirée par l’influence chrétienne. Mais, comme on l’a vu plus haut . . . la prohibition ancienne de gratifier des personnes incertaines, au sens romain du mot, n’existe plus en droit français ; il ne subsiste qu’un obstacle de fait tenant à l’indétermination des bénéficiaires.¹⁵⁶

153 The mandate of the codification commission was to reduce into one code those laws of Lower Canada that were currently in force and of a general and permanent nature: see Brierley and Macdonald, *supra* note 127, at 26-30.

154 *Valois v. de Boucherville*, [1929] SCR 234, at 246; and Brierley and Macdonald, *supra* note 127, at 9.

155 *Valois*, *supra* note 154, at 263.

156 *Ibid.*, at 261-62, citing Marcel Planiol, *Traité élémentaire de droit civil*, 8^e éd., vol. 3. An English translation of this passage can be found in the Dominion Law Reports, [1929] 3 DLR 801.

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

As Planiol’s work explains, the rule of the ancien droit permitting pious bequests to uncertain charitable objects originated as a decreed exception to the rules of Roman private law, which sought to incorporate into Roman society the doctrines of the Christian religion that had been embraced by Constantine in the fourth century AD. Because Roman law considered that bequests, by their very nature, flowed from the testator’s feeling of goodwill toward the legatee, bequests to undetermined persons, who could not possibly have merited the affection of the testator, were presumed to be capricious and were considered null and void. However, following the adoption of Christianity, successive emperors qualified this rule by decreeing that such bequests were valid where there was a plausible motive for the bequest. Bequests to the poor, the sick, and captives were considered to fall within this exception because they flowed from a plausible motive, the motive of charity.¹⁵⁷ Accordingly, whenever a testator bequeathed property to a class of undetermined persons such as “the poor,” his estate passed to the person appointed by him, or alternatively a local bishop, steward, or hospital, to be employed for the benefit of the needy persons referred to in his will.¹⁵⁸

While the rule permitting pious bequests to uncertain objects began as a decree of the Roman emperors, it was not long before it fell under the aegis of the Catholic Church. By the 12th century, ancient testamentary practices had re-emerged in western Europe, spurred by the revival of Roman law and the Church’s practice of “encouraging” charitable gifts through spiritual coercion.¹⁵⁹ While civil courts generally dealt with testamentary dispositions on the Continent, *legs pieux* were under the jurisdiction of the canonical courts.¹⁶⁰ As creatures of canon law, these charitable bequests could be exempted from many of the strictures of the civil law. It is perhaps not surprising, then, to find *legs pieux* described by a leading French scholar as “non seulement autorisé . . . mais les plus favorables de toutes les dispositions.”¹⁶¹

The legal advantages that attached to the making of a pious bequest in medieval France were manifold and varied. *Legs pieux* could, for example, be given by persons who otherwise lacked the capacity to give because of a statutory prohibition, such as women with children. *Legs pieux* could be given to religious institutions that were otherwise considered incapable of receiving bequests because of their vows of poverty. *Legs pieux* were also generally considered exempt from the “Falcidian portion”

157 M. Bugnet, éd., *Oeuvres de Potbier*, 3^e éd., t. 8 (Paris : Marchal et Billard, 1890), 251.

158 Cod. 1.3.28 ; Cod. 1.3.37.

159 James A. Brundage, *Medieval Canon Law* (London: Longman, 1995), 71 and 88. See also Boodman, supra note 91, at 11: “c’est l’Église par le biais de sa pratique de « charité forcée » qui a ressuscité le testament en droit germanique pour les besoins de ses fondations charitables.”

160 Brundage, supra note 159, at 89.

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

rule, which appropriated one-fourth of every inheritance to the testamentary heir or executor.¹⁶²

In medieval France, as in ancient Rome, there were also a number of special rules enabling the administration or variation of *legs pieux*. If a pious bequest was made for the distribution of alms to the “poor” or the “sick” on a particular day, but no particular house or hospital was named, the officers of justice would be required to direct the distribution at the request of the procureurs du roi. If a pious bequest was directed to a purpose that was no longer necessary or useful, it could be redirected to other related works. If a testator failed to name a testamentary executor, and the integrity of the testamentary heir could not be trusted, “the ordinary judge would give directions [as to how the pious bequest was to be applied], at the instance of the persons whose duty it should be to see these legacies duly applied.”¹⁶³ As we have seen, however, these *cy-près*-like powers exercised by the canonical courts in France did not survive the reorganization of the judicial system of New France by the British Crown.

Purposes Encompassed by the Canonical Understanding of Charity

As the foregoing picture of the juridical treatment of *legs pieux* makes clear, the question of what privileges attached to pious gifts was of considerable interest to the doctrinal commentators of the ancien droit. However, in marked contrast to the common law’s focus on the definition of charity, the question of what purposes or works should be considered sufficiently “pious” or “charitable” to benefit from these privileges does not appear to have been of great concern. Discussion of the purposes that were considered to fall within the canonical rule of exception is rare among the major doctrinal writers of the ancien régime. The provisions of the Codex Justinianus, to which French scholars such as Domat and Ricard refer, speak only of bequests for the poor and the redemption of captives.¹⁶⁴ The Edict of 1749, which placed restrictions on the creation and property-holding capacity of charitable foundations in France, provides only a slightly more detailed indication of what objects were considered pious under the ancien droit, listing

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

as examples of pious works within the meaning of that instrument.¹⁶⁵

162 See C. de Ferrière, *Dictionnaire de droit et de pratique : contenant l’explication des termes de droit, d’ordonnances, de coutumes et de pratique; avec les juridictions de France* (Toulouse : Duplex, 1779), 132; *Oeuvres de Pothier*, supra note 157, at 265; and Jean Domat, *The Civil Law in Its Natural Order*, vol. 2, ed. Luther Cushing, trans. William Strahan (Colorado: Rothman, 1980), 585.

163 Domat, supra note 162, at 536-37 and 585.

164 Cod. 1.3.28. See generally Ricard, supra note 162, and Domat, *ibid*.

165 G. de Lapradelle, *Théorie et Pratique des Fondations Perpétuelles* (Paris : Girard & Brière, 1895), 67.

What we do know is that the rule permitting pious and charitable bequests to uncertain objects, which was directly correlated to the advent of Christianity in Rome, was based on the premise that such bequests were, effectively, gifts to God.¹⁶⁶ It therefore seems reasonable to assume that the concept of charitable or pious purposes underlying the rule to which the Supreme Court of Canada made reference in *Valois* was limited to purposes that glorified God in some direct or indirect way. This was certainly the view of de Ferrière, a leading French scholar whose work was well known in the colony of New France:

[L]egs pieux est celui qui est fait *ob piam causam*, c'est-à-dire, à un lieu consacré à Dieu, et destiné aux bonnes œuvres, comme pour une église, un monastère, un hôpital, etc., et qui est fait pour une fin bonne et pieuse. Ainsi, pour qu'un legs soit pieux, il ne suffit pas qu'il soit fait à une personne consacrée à Dieu ; il faut encore que la fin en soit pieuse.¹⁶⁷

Domat, another leading scholar of the ancien régime, echoed this view, writing that the concept of charity underlying the rules on *legs pieux* clearly did “not include all legacies destined for the public good.”¹⁶⁸ He even provided a few examples of this principle, stating that a legacy for a public ornament, or a prize to be awarded to a person who excelled in an art or science, would not qualify as a *legs pieux*. The views expressed by these scholars appear to be largely consistent with the views of modern canon law on pious purposes. As one American text explains, the essential criterion of a pious cause lies in the intention of the donor: Was he or she acting “to merit grace or glory with God or in satisfaction for [his or her] own or another’s sins”?¹⁶⁹ In accordance with this reasoning, a bequest for a theatre or recreational facility, or for a hospital, orphanage, or school founded for purely “philanthropic” reasons, would not qualify as a pious bequest.

The Roman-Law Sources on Foundations and Gifts

A Wider Reading of CCLC Article 869— “Le Bien, le Vrai, le Beau”

In light of the Supreme Court’s analysis in *Valois*, it seems fair to conclude that the ancient canon-law doctrine permitting pious bequests to uncertain objects constitutes the clearest customary source of meaning for the term “charitable purposes”

166 Ibid., at 53: “On sait que les dons et les legs pieux jouissaient des faveurs particulières. . . . Or, sur quelle principe reposaient ces faveurs? Sur quelles bases s’appuyaient-elles? Sur celles-ci que les dons et legs pieux étaient censés donnés à Dieu.”

167 De Ferrière, *supra* note 162, at 132. See also Domat, *ibid.*, at 535.

168 Domat, *ibid.*, at 535.

169 T. Lincoln Bouscaren, Adam C. Ellis, and Francis K. Korth, *Canon Law: A Text and Commentary*, 4th ed. (Milwaukee: Bruce Publishing, 1966), 821.

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

However, there is nothing in the codifiers’ report, or in the judicial or doctrinal commentary on article 869, to suggest that the notion of “charitable purposes” (“fins de bienfaisance”) embodied in the CCLC was limited to purposes for the glory of God. The codifiers themselves described article 869 as encompassing legacies for pious, charitable, and benevolent purposes. In *Valois*, the Supreme Court affirmed that article 869 should be interpreted as broadly as possible, and indicated that the expression “fins de bienfaisance” encompassed a broader set of purposes than would be denoted by the term “charité.”¹⁷⁰ Marcel Faribault, who himself saw no difference between the civil-law concepts of bienfaisance and charité, painted a similarly broad picture of article 869 in his treatise on the Quebec trust:

La bienfaisance n’étant rien autre chose que la charité, il faut entendre par l’expression « fins de bienfaisance ou autres fins permises » tout d’abord les dispositions en faveur des pauvres; mais on doit y inclure également tout ce qui rattache à la charité et notamment les œuvres de miséricorde spirituelle et corporelle. On arrive ainsi à toucher le rachat des captifs tant en honneur dans l’ancien droit, la disparition de l’esclavage, l’hospitalisation des malades, des infirmes et des vieillards, l’inhumation des morts, les messes pour le repos des âmes, l’instruction des ignorants.

Quant aux autres fins permises, nous croyons, en réponse à l’interrogation posée par la Cour Suprême, que l’on doit comprendre par la des œuvres *ejusdem generis*. S’il est besoin de plus de précision, nous dirons simplement que ces trois-là vont ensemble : le bien, le vrai, le beau. On voit suffisamment, sans plus d’explication, comment justifier ainsi, dans une interprétation la plus naturelle qu’il nous paraisse, les dispositions pour les instituts de recherche, les académies littéraires et autres, les musées, l’embellissement des villes, les universités, les missions religieuses, etc.¹⁷¹

In fact, the only clear limitation on article 869 that emerges from the judicial and scholarly commentaries is that it applied only to public, rather than private, charitable

170 *Valois*, supra note 154, at 263: “Les legs de Madame Valois sont des legs charitables. Ils sont donc couverts par l’expression « fins de bienfaisance », qui comprend la charité mais qui nous paraît avoir un sens plus étendu.” The translation of this passage in the Dominion Law Reports, supra note 156, equates “fins de bienfaisance” with “benevolent purposes,” raising interesting questions about the interpretation of bilingual judgments: see Robert Leckey and André Braën, “Bilingualism and Legislation,” in Michel Bastarache, ed., *Language Rights in Canada* (Cowansville, QC: Yvon Blais, 2004), 37-139, at 128-29.

171 Marcel Faribault, *Traité Théorique et Pratique de la Fiducie ou Trust du Droit Civil dans la Province de Québec* (Montréal : Wilson et Lafleur, 1936), 200. See also *Sabatier c. Royal Trust Co.*, [1978] CS 954, where the pursuit of a “humanitarian work,” such as a hospital or foundation, was found to be a charitable purpose within the meaning of article 869.

dispositions.¹⁷² Given these indications that the concept of charity contained in article 869 was broader than that underlying the ancient law on *legs pieux*, it seems important to consider whether there might have been *other* “law[s] relating to legacies for pious, charitable, or benevolent purposes” that were in force in Lower Canada at the time of codification and thus were incorporated into the CCLC.

Did the body of civil law that was received in the colony of New France contain laws on charitable legacies beyond those relating to *legs pieux*? While the question has never been the subject of a detailed historical analysis, there are good reasons to expect that such an analysis would yield a positive answer. Just as the idea of devoting one’s property in perpetuity to purposes beneficial to society did not begin with the advent of Christianity, the rules permitting *legs pieux* were not the first or only “law[s] relating to legacies for pious, charitable, or benevolent purposes” to form part of the civil-law tradition. In fact, the concept of giving to purposes (or “fonder,” as it is commonly referred to in France) can be traced back far before the birth of Christ, to the early societies of ancient Greece and Rome. The history of the civil-law charitable foundation is complex, and often dominated by debates about when the modern Continental concept of the foundation as a juridical person devoted to purposes actually came into existence.¹⁷³ What is clear, however, is that various “phenomena corresponding to modern foundations,” of which the *legs pieux* was arguably only one type, were recognized under both Roman law and the ancien droit of France.¹⁷⁴ An analysis of these phenomena and the laws that governed them may provide us with another potential source of meaning for the term “charitable purposes” (“fins de bienfaisance”) in the CCLC.

Gifts for Public Purposes in Roman Law

Ancient Rome, despite being a pre-Christian society, was a society in which the devotion of private wealth for public purposes was common. Wealthy Romans, concerned with securing political friendship and loyalty from the populus, made donations during their lifetime to attract the prestige and respect that flowed from the publicity of generous acts to the poor. Upon death, it was common for the wealthy to distribute their property widely, seeking in this way to achieve honour and immortality, and to repay their obligations to a society “in which during a lifetime much was achieved by friendship and patronage.”¹⁷⁵ Because of the important role that posthumous

172 *Valois*, supra note 154, at 259; and Roch, supra note 147, at 388. In fact, even this is a matter of some debate. As Brierley points out, at the time *Valois* was decided, the jurisprudence had already admitted the validity of a testamentary trust for a funeral headstone, and the validity of a legacy to pay for the celebration of masses in memory of a deceased was well established: see Brierley, supra note 134, at 23, note 26.

173 See, for example, de Lapradelle, supra note 165.

174 P.C. Hemphill, “The Civil-Law Foundation as a Model for the Reform of Charitable Trusts Law” (1990) vol. 64, no. 7 *Australian Law Journal* 404-22, at 409; and Paul Veyne, *Bread and Circuses: Historical Sociology and Political Pluralism*, trans. Brian Pearce (London: Penguin, 1990), 31.

175 Rickett, supra note 94, at 131. See also Johnston, supra note 95, at 5.

remembrance played in Roman philanthropy, Roman donors almost always specified the particular purpose that their money or land was to support.¹⁷⁶

In the early days of the Roman republic, despite the relatively high levels of philanthropic or beneficent activity, the standard methods of dedicating property to public purposes were all “non-legal” in nature. The conceptual structure of Roman law, which placed great emphasis on privity of relations, precluded the existence of any direct remedy for the breach of dispositions that aimed to benefit third parties or serve abstract purposes.¹⁷⁷ Thus, while Roman citizens could make both legacies and inter vivos gifts *sub modo* (with a direction that the property transferred be used in a particular way), there was no legal way of ensuring that this direction would be carried out. Similarly, while the *fideicommissum* allowed a testator to entrust property (*commissum*) to the good faith (*fides*) of the recipient for the benefit of another, this institution was originally “dependent on no legal bond but solely on the decency of those to whom [the property was] entrusted.”¹⁷⁸ Testators who wished to devote their property to public or charitable purposes were forced to rely on the honour and good faith of their heirs and legatees to carry out their instructions as to its use.

Over time, however, Roman jurists and statesmen who recognized the importance of having the wishes of donors honoured devised ways of ensuring that the obligations of recipients were carried out. In the first century AD, Augustus made *fideicommissa* actionable: consuls, and later a *fideicommissary praetor*, were empowered to compel trustees to act in accordance with their *fides*.¹⁷⁹ Roman jurists created methods for enforcing the obligations imposed by modal gifts and legacies, and gradually expanded the categories of legal persons entitled to receive and administer property to include towns and colleges, ecclesiastical establishments, and other charitable foundations.¹⁸⁰

The legal techniques developed by the Romans to facilitate and enforce the devotion of property to charitable purposes continued to be elaborated and theorized by jurists in pre-revolutionary France. Thus, the Roman concept of devoting property to a purpose by giving a recipient directions as to its application was carried on by the French device of the *libéralité avec charge*, and the Roman actions allowing the taking of guarantees from legatees and the revocation of gifts with unfulfilled charges continued to be available to French donors.¹⁸¹ Continental scholars began

176 David Johnston, “Munificence and Municipia: Bequests to Towns in Classical Roman Law” (1985) vol. 75 *The Journal of Roman Studies* 105-25, at 106.

177 Johnston, *supra* note 95, at 239.

178 *Ibid.*, at 12.

179 *Ibid.*, at 34.

180 See, generally, Patrick William Duff, *Personality in Roman Private Law* (Cambridge: Cambridge University Press, 1938); Rickett, *supra* note 94, at 134-35; and de Lapradelle, *supra* note 165, at 13.

181 F. Olivier-Martin, *Histoire de la coutume de la Prévôté et Vicomté de Paris*, t. 2 (Paris : Leroux, 1930), 490; M.A. Bouyssou, *Les libéralités avec charges en droit civil français* (Paris : Librairie du Recueil Sirey, 1947), at 34-39; and Boodman, *supra* note 91, at 12.

to further develop the Roman concept of the foundation as a “category of juristic person different from the corporation” that was made up of a mass of assets devoted to a purpose established by the founder.¹⁸² As Boodman points out, however, the principal juristic foundations of the civil-law regime that came to govern charitable giving in France were put into place by the Roman law.¹⁸³ On this basis, it seems reasonable to assume that the Roman-law sources relating to legacies for pious, charitable, or benevolent purposes were an integral part of the French legal tradition received in New France in 1663.

Purposes Encompassed by the Roman Understanding of Charity

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

The question is a difficult one, and it is complicated by both the length of the historical period over which these laws developed and the incomplete and uneven quality of the evidence that remains from the classical period.¹⁸⁴ Two issues in particular must be considered. First, because it appears that property that was the object of a modal legacy, fideicommissum, or foundation could, as matter of law, be devoted to any public or private purpose, the question of whether any particular concept of charity underlay these legal institutions must be considered primarily as a question of historical fact, rather than a question of law. Second, because of the decisive impact that the ascendance of Christianity had on attitudes toward charity and patterns of giving in the late Roman Empire and in medieval France,¹⁸⁵ any inquiry into what purposes were considered of special benefit to society in relation to these legal institutions must be taken from either a pre-Christian or a post-Christian perspective. For present purposes, it will be most instructive to adopt the former perspective, and to explore the very different attitudes toward giving and the public good that

182 Hemphill, *supra* note 174, at 410. The institution of the testamentary executor was also developed during this time: see Bouyssou, *supra* note 181, at 30-31.

183 Boodman, *supra* note 91, at 9: “En comparaison avec le droit romain, le droit français ne s’est guère développé dans le domaine des moyens techniques de disposer à des fins charitables. Cette mission avait été accomplie par les juriconsultes romains.”

184 Arthur Robinson Hands, *Charities and Social Aid in Greece and Rome* (New York: Cornell University Press, 1968), 15.

185 See Duff, *supra* note 180, at 173.

underpinned the early phenomena corresponding to the modern foundation in ancient Rome.

As the inscriptions that have survived from the classical period attest, the wealthy philanthropists of ancient Rome devoted property to a wide variety of public purposes, “erecting monuments and public buildings, ransoming captives, providing dowries and other forms of assistance to the poor, and sustaining festivals, banquets, votive offerings and religious sacrifices.”¹⁸⁶ In fact, gift giving was an integral part of Roman society, producing some level of benefit for every class of the population. However, although the early Romans’ acts of generosity might loosely be described as charitable, they were not, strictly speaking, acts of “charity” at all. Rather, until the Christian ethic became part of the culture of Rome, gifts by individuals to the community were understood as acts of benefaction or “euergetism”—a concept that differed from the Christian concept of charity “in ideology, in beneficiaries and in agents, in the motivations of agents and in their behaviour.”¹⁸⁷ As Veyne explains,

[t]he *euergetai* gave what they gave in order to acquire social standing, or out of patriotism and a sense of civic responsibility—in any case, from interest in the things of this world. Bequests to the Church, however, were intended to redeem the sins of the testator at the expense of the heirs: they were made for the sake of the other world.¹⁸⁸

To the extent that the diverse objects of Roman euergetism were linked by some unifying principle, that principle appears to have been one of benefit to the community¹⁸⁹ or public utility, which formed “the criterion for the acceptance of a bequest by a town.”¹⁹⁰

To be sure, many of the purposes to which private property was devoted in ancient Rome benefited the community in ways that would also have conformed to the social agenda of Elizabeth I in England, or even the pious standards of the Catholic Church. For example, Roman testators devoted private wealth to supporting higher education and improving public health and hygiene in crowded Roman cities (funding projects

186 Andreas Schluter, Volker Then, and Peter Walkenhorst, eds., *Foundations in Europe: Society, Management and Law* (London: Bertelsmann Foundation, 2001), 4-5.

187 Veyne, *supra* note 174, at 19. The term “euergetism” was derived by French historians from the wording of Hellenistic decrees that honoured people who, through money or public activity, “did good to the city” (*euergetein ten polin*). Veyne defines euergetism as “private liberality for the community benefit”: *ibid.*, at 10.

188 *Ibid.*, at 27-28.

189 Hubert Picarda, “Charity in Roman Law: Roots and Parallels” (1993) vol. 1, no. 1 *Charity Law & Practice Review* 9-14, at 13.

190 Johnston, *supra* note 176, at 114-15: a municipal authority could refuse to accept a legacy for a spectacle that it found immoral or otherwise subject to objection on the basis that it had no public utility. The test of public utility remains in use in parts of Europe. For example, while Italy places no legislative restrictions on the purposes that a foundation may pursue, Italian jurisprudence and doctrine require that foundations pursue “purposes of social or public utility”: Hemphill, *supra* note 174, at 416.

such as the cleansing of public latrines and sewage systems and the maintenance of municipal water supplies). Others left funds to cities for the construction of essential public works, such as bridges, markets, temples, and public baths. The evidence also documents a large number of private gifts of basic commodities, which were distributed to the *populus* on religious occasions and other special days.¹⁹¹

However, the evidence on Roman giving in the pre-Christian period also confirms several distinctions between the Roman understanding of *euergetism* and the later interpretations of charity embraced by the canonical and common-law courts. First, in addition to making practical gifts that contributed to the material or intellectual well-being of the *populus*, Roman testators commonly left money for games, sporting events, or annual dinners that commemorated their own generosity or honoured the date of their birth. It was also considered acceptable, and within the Roman concept of public utility, to devote testamentary property to a purpose that contributed to the esteem (*honus*) or embellishment (*ornatus*) of a town.¹⁹² Thus, ancient benefactors commonly left funds for the construction of municipal “embellishments” such as statues or stadiums, or for the gladiatorial shows, hunting expeditions, and circus performances that were said to contribute to a municipality’s esteem. It was perhaps the prevalence of these very public and visible endowments that led Cicero to observe in the first century BC that most Romans were “generous in their gifts not so much by natural inclination as by reason of the lure of honour—they simply want to be seen as beneficent.”¹⁹³

The other feature of Roman *euergetism*, which distinguishes it from later canonical and common-law conceptions of charity, relates to its views on the worthy and appropriate beneficiaries of private gifts. Within Christian societies such as medieval France, acts of charity were principally directed toward the relief of poverty. While the Christian concept of charity expanded under the common law to encompass objects that incidentally benefited the rich, the poor remained central to the common-law conception of a charitable gift. By contrast, the pagan societies of Greece and Rome did not even have a concept equivalent to the Judeo-Christian concept of “poverty.”¹⁹⁴ When Romans did refer to “the poor,” they did not mean the truly destitute but rather the general mass of working people, who lived frugally and enjoyed only minimal political rights. In practice, the lower classes were never singled out for favourable treatment, even in gifts of basic commodities; gifts that were limited to certain classes of citizens generally benefited officials and the wealthy, rather than “the starving, the old and the sick.”¹⁹⁵

191 Hands, *supra* note 184, at 89-92 and 135-45; and Schluter et al., *supra* note 186, at 5.

192 Johnston, *supra* note 176, at 106 and 113.

193 See Hands, *supra* note 184, at 49.

194 Veyne, *supra* note 174, at 30-31.

195 *Ibid.*, at 33: “Paganism had abandoned without much remorse the starving, the old and the sick. Old people’s homes, orphanages, hospitals and so on are institutions that appear only with the Christian epoch.” See also Hands, *supra* note 184, at 62 and 89.

Statutory Meanings of “Charitable” (“de Bienfaisance”)

As the foregoing review has shown, the common-law and civil-law traditions have embraced similar but distinct notions of the types of purposes that are of special benefit to society. To the extent that these notions are encompassed by the terms “charitable” and “de bienfaisance,” their existence signals that the question of how the registered charity provisions should be interpreted may be more complicated than has heretofore been assumed. This question will be reconsidered below in light of the principles of Canadian bilingualism and bijuralism. First, however, a final set of sources of legal meaning for the term “charitable” (“de bienfaisance”) needs to be considered: the various provincial statutes that regulate charitable giving. Because the provinces have historically chosen not to exercise a great deal of authority over charities, “provincial statutory incursions into the common [or civil] law”¹⁹⁶ have not so far been an area of broad concern. Nevertheless, it is instructive to examine the case of Ontario to consider the extent to which the exercise of provincial legislative authority over charities might reshape the meaning and foundations of these terms.

Owing to a series of peculiar developments that culminated in acceptance of the English Mortmain Act of 1736 as the law of Upper Canada in 1846,¹⁹⁷ Ontario was the first (and for a long time the only) common-law province to have specific legislation regulating the transfer of property to charitable purposes in the province. In 1902, Ontario passed the Mortmain and Charitable Uses Act, which restricted conveyances of land to charitable uses along the same lines as contemporary English legislation. The 1902 Act established a statutory definition for the term “charitable uses,” which included the objects listed in the Statute of Elizabeth and any other “similar” objects. In 1909, Ontario replaced the 1902 Act with another Mortmain and Charitable Uses Act, which imposed further restrictions on inter vivos transfers of land to charities. Section 2(2) of the 1909 Act also amended the earlier definition of a charitable use by deeming the relief of poverty, education, the advancement of religion, and “any purpose beneficial to the community, not falling under the foregoing heads” to be charitable uses within the meaning of the Act. This definition was incorporated into the Revised Statutes of 1914, and continues to form the basis of the definition of a “charitable purpose” in the successor to the Mortmain and Charitable Uses Act, the Charities Accounting Act.¹⁹⁸

Given the Ontario legislature’s decision to adopt verbatim the fourfold classification of charitable purposes articulated by the House of Lords in *Pemsel*, the 1909 Mortmain and Charitable Uses Act might easily have been interpreted as incorporating the English common law in the same way as its 1902 predecessor. However,

196 *Vancouver Society*, supra note 19, at paragraph 28.

197 For a review of these historical developments, see A.H. Oosterhoff, “The Law of Mortmain: A Historical and Comparative Review” (1977) vol. 27, no. 3 *University of Toronto Law Journal* 257-334.

198 RSO 1990, c. C-10, section 7. For a review of this legislative history, see *Re Laidlaw*, infra note 201, at 517.

in the 1917 case of *Re Orr*, a majority of the Appellate Division of the Supreme Court of Ontario held that this legislative change was intended to *prevent* the English doctrine from being applied in Ontario in determining whether “any purpose beneficial to the community” was charitable in the legal sense.¹⁹⁹ On appeal to the Supreme Court of Canada, Fitzpatrick CJ expressly disapproved of the view that Ontario’s mortmain legislation had replaced the Statute of Elizabeth as the reference point for the meaning of charity in the province.²⁰⁰ Nevertheless, the position expressed by the Appellate Court has prevailed in several subsequent decisions, affirming that the preamble to the Statute of Elizabeth no longer defines charitable trusts in Ontario.²⁰¹

The most troubling of these Ontario decisions from the perspective of the revenue authorities is *Re Laidlaw Foundation*, which suggests that in Canada’s most populous province, the promotion of sport is a charitable purpose.²⁰² *Re Laidlaw* arose when the Public Trustee of Ontario requested a judicial passing of accounts of the Laidlaw Foundation under section 3 of the Charities Accounting Act, to determine whether gifts made by the foundation to various amateur athletic organizations, including the Special Olympics and a national track and field association, were gifts to “charitable organizations” as required by the foundation’s objects. The Surrogate Court judge upheld all of the foundation’s gifts and held that “the promotion of an amateur athletic sport which involves the pursuit of physical fitness” was *prima facie* within the spirit and intendment of the Statute of Elizabeth.²⁰³ The Public Trustee appealed the decision to the Ontario Divisional Court.

The Divisional Court explicitly agreed with the Surrogate Court judge’s analysis of the English authorities, and with her conclusion that the promotion of an amateur sport that involved the pursuit of physical fitness was a charitable purpose within the traditional common-law approach. However, Southey J went on to hold that it was no longer necessary—indeed, it was “highly artificial”—for the Ontario courts to continue to rely on the Statute of Elizabeth in determining whether a given purpose was charitable. He concluded that since the athletic organizations were “charitable” under the restrictive English definition of charity, it followed that they

199 *Re Orr* (1917), 40 OLR 567 (CA); rev’d. (sub nom. *Cameron v. Church of Christ, Scientist*) (1918), 57 SCR 298, leave to appeal refused (1919), 57 SCR vii (SCC). Notably, the Appellate Division also held that the definition of a charitable use in the 1909 Act extended beyond the statute to transfers of personal property: *Re Orr*, at 597 (Ont. CA).

200 *Re Orr*, at 304 (SCC).

201 *Re Laidlaw Foundation* (1984), 13 DLR (4th) 491 (Ont. Surr. Ct.); aff’d. (1984), 13 DLR (4th) 491 (Ont. Div. Ct.); and *Re Levy Estate* (1989), 58 DLR (4th) 375 (CA). In *Re Laidlaw*, at 528, Southey J noted that Fitzpatrick CJ was the only member of the Supreme Court of Canada to comment on the effect of the Ontario statute. He concluded that the chief justice’s comments were therefore not binding and adopted the reasons of the Appellate Court in *Re Orr*.

202 *Re Laidlaw* is also the decision most likely to have prompted Gonthier J’s comments in *Vancouver Society* on the different provincial definitions of charity.

203 *Re Laidlaw*, supra note 201, at 506.

were also charitable under the “more liberal definition of charity” embodied by the Charities Accounting Act.²⁰⁴ The clear implication was that in the event of a conflict, the latter definition would prevail.

At present, the decision in *Re Laidlaw* is somewhat anomalous in Canadian charity law: there are not many provincial court decisions that offer alternative conceptions of charity based on a statutory regime. Because of this, and because of the huge fiscal consequences that would flow from recognizing the promotion of sport as a “charitable purpose” (“fin de bienfaisance”) under the ITA, *Re Laidlaw* has been resolutely ignored by the CRA for 20 years, and its potential implications have been largely unexplored. However, this may change as a result of the recent enactment of a number of provincial statutes that define the meaning of charity in a manner that diverges sharply from common-law norms. For example, Manitoba’s Charities Endorsement Act, which regulates the solicitation practices of charities, defines a “charitable purpose” (“oeuvre de charité”) to include any “charitable, benevolent, philanthropic, patriotic, athletic, artistic, or civic purpose and any purpose that has as its object the promotion of a civic improvement or the provision of a public service.”²⁰⁵ As the provinces continue to increase their supervision over the activities of charities, it is likely that the number and significance of these legislative sources of meaning for the concept of a charitable purpose will increase.

WHAT DOES A PLURAL NOTION OF CHARITY (BIENFAISANCE) MEAN FOR THE REGISTERED CHARITY SCHEME?

Between the Statute of Elizabeth, the Roman foundations, the canonical rules on *legs pieux*, and the various statutes of the provincial legislatures, it is clear that there are multiple sources of legal meaning in Canada for the term “charitable” (“de bienfaisance”). These sources offer a valuable picture of the purposes and activities that have been considered “of special benefit to society”²⁰⁶ in different communities and at different times. However, these sources also seem to demand that we challenge the current uniform interpretation of the registered charity provisions and re-examine how federal and provincial law interact within the context of section 149.1 of the ITA. In particular, three questions must be addressed:

1. Assuming that, from a common-law perspective, the French term “de bienfaisance” is not an accurate translation of the English term “charitable,” how

204 *Ibid.*, at 523-28.

205 Charities Endorsement Act, CCSM, c. 60, section 1(1). See also Alberta’s Charitable Fund-Raising Act, *supra* note 57, section 1(1)(c), which defines a “charitable purpose” to include “a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose,” provided that the purpose is not part of a business.

206 *Vancouver Society*, *supra* note 19, at paragraph 128.

should the registered charity provisions be interpreted in the common-law provinces?

2. How should the registered charity provisions be interpreted in Quebec?
3. How should the registered charity provisions be interpreted in provinces that have enacted legislation that establishes a statutory meaning for the term “charitable” or “de bienfaisance”?

The Bilingualism Question: How Should the Registered Charity Provisions Be Interpreted in the Common-Law Provinces?

As we have seen, none of the judicial, academic, or administrative authorities on French common-law terminology in Canada support the view that the English common-law term “charitable” should be translated as “de bienfaisance.” In light of this apparent consensus, there is a strong argument that at common law, the better translation of “bienfaisance” is “benevolence,” a term that has specifically been found to fall outside charity’s privileged scope.²⁰⁷ But if “charitable” and “de bienfaisance” do not mean the same thing within the common-law tradition, what does this mean for the application of the registered charity provisions within the common-law provinces? This question must be answered by reference to the particular principles of statutory interpretation that apply to bilingual legislation.

The Principles of Bilingual Legislation

The starting point for the interpretation of all federal legislation in Canada is that both language versions, being enactments of Parliament, are equally authoritative, and therefore neither version can be assigned paramountcy over the other.²⁰⁸ However, while the French and English versions of Canadian statutes have equal authority, it has long been recognized that they do not always say exactly the same thing, and that both versions must be examined to determine legislative intent. Where the French and English versions of a law diverge, the interpretation of bilingual legislation is carried out in accordance with the “shared meaning” rule, which Côté formulates in the following terms:

Unless otherwise provided, differences between two official versions of the same enactment are reconciled by deducing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.²⁰⁹

207 See the discussion above at note 115 and following.

208 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002), 76 (noting that the equal authenticity rule applies even where one language version is actually a translation of the other); and *Re Manitoba Language Rights*, [1985] 1 SCR 721.

209 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough, ON: Carswell, 2000), 324.

Where one language version of a statutory provision is ambiguous and the other is clear, the clearer meaning of the two versions is generally preferred. Preference has also often been granted to the more restricted of two divergent meanings, although whether this tendency qualifies as a general principle is open to doubt.²¹⁰

As Côté's description makes clear, however, the shared meaning rule is by no means absolute and does not automatically override all other canons of construction. Where the discrepancies between the language versions are such that no common meaning can be found, a court must rely on other interpretive techniques. A shared meaning may also be rejected where it is contrary to the intent or purpose of a statute, or where one language version is the result of a drafting mistake.²¹¹ In reconciling or choosing between different language versions of a legislative provision, courts will sometimes use the technique of tracing the provision back to its origin. If it can be shown that the provision was meant "to incorporate a solution or concept from another jurisdiction or to codify a pre-existing rule," the language version that best expresses that solution, concept, or rule will generally be adopted.²¹²

Applying the Principles

Given the multiple circumstances in which the shared meaning rule may be rejected, and the preference for respecting the legislative origin of longstanding statutory rules, it is unlikely that even a court persuaded of the different meanings of the terms "charitable" and "de bienfaisance" would devote much energy to applying the shared meaning rule to the definitions set out in section 149.1. As we have seen, Canada's first income tax act was modelled on the tax statutes of the English Parliament, whose own references to "charitable" institutions had long been interpreted according to common-law rules. The English roots of the registered charity provisions, combined with the unilingual drafting of the early Canadian statutes and the translators' initial choice of the term "de charité," make it difficult to deny that at their origin, the provisions establishing charitable tax benefits were meant to take their meaning from the common law of charitable trusts. This factor would likely be sufficient to override the application of the shared meaning rule in the common-law provinces, particularly in light of the supporting presumption that common-law

210 See Sullivan, *supra* note 208, at 83; Côté, *supra* note 209, at 328; and Leckey and Braën, *supra* note 170. For two important discussions of the phenomenon of legal bilingualism in Canada, see Roderick A. Macdonald, "Legal Bilingualism" (1997) vol. 42, no. 1 *McGill Law Journal* 119-67; and Nicholas Kasirer, "L'outre-loi," in Lynne Castonguay and Nicholas Kasirer, eds., *Étudier et enseigner le droit : hier, aujourd'hui et demain* (Cowansville, QC : Yvon Blais, 2006), 331-57.

211 See Sullivan, *supra* note 208, at 92; and Michael Beaupré, *Interpreting Bilingual Legislation*, 2d ed. (Toronto: Carswell, 1986), 110-12.

212 Sullivan, *supra* note 208, at 93. This technique appears to be related to the "original meaning" rule, which posits that statutory terms "must be construed as they would have been the day after the statute was passed": *Perka v. The Queen*, [1984] 2 SCR 232, at 265, citing *Sharpe v. Wakefield* (1888), 22 QBD 239, at 242 (CA), per Lord Esher MR.

terms used in statutes keep their common-law meaning, and the principle that “courts should hesitate to depart from interpretations that have become well established . . . through a long line of cases . . . or through customary reliance on a particular interpretation.”²¹³ If a court did apply the shared meaning rule, it is likely that the English term “charitable” would be preferred on the basis that it is less ambiguous and narrower than the French term “de bienfaisance.”²¹⁴

It is more debatable whether the changes made to the French version of the registered charity provisions should be sufficient to override the principle that the language version reflecting a provision’s legislative origin should be preferred. Certainly, the gradual terminology change from “de charité” to “de bienfaisance” brings into play one form of the presumption against tautology, namely, that “amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, to change the law.”²¹⁵ In *Klippert*,²¹⁶ this presumption led a majority of the Supreme Court of Canada to favour the English Criminal Code definition of a “dangerous sexual offender,” which had recently been amended by Parliament, over the French definition, which had undergone no change. However, legislative changes that are intended only to improve the language or style of a statute are presumed not to change the meaning or substance of a provision.²¹⁷ More importantly, there is authority that even changes that do modify the substantive meaning of legislative provisions may be ignored if they amount to a mistake or were made without statutory authority.²¹⁸ Presumably, then, changes made by the Statute Revision Committee in 1985 would not be found to have changed the meaning of the French version of section 149.1. The more difficult question is whether the earlier tax amendments, which commenced the shift in terminology, should be taken to have had a substantive effect.

Overall, it appears that despite the highly significant legal discordance between the terms “charity” and “bienfaisance” at common law, the bilingual registered charity provisions will likely continue to be interpreted in accordance with the common law of charitable trusts within Canada’s common-law provinces. Nonetheless, the two language versions are clearly an uncomfortable fit, particularly from the point of view of a francophone common-law audience. Three factors make the discrepancy in language between the two versions of section 149.1 particularly egregious. First, since 1985, when the Statute Revision Committee made the use of the term

213 Sullivan, *supra* note 208, at 109.

214 The use of the term “bienfaisance” in the French version of at least one provincial statute, Ontario’s Charities Accounting Act (*supra* note 198), might be seen to provide further support for the view that charity and bienfaisance have a shared meaning.

215 Sullivan, *supra* note 208, at 472. For a criticism of this presumption, see Leckey and Braën, *supra* note 170, at 127.

216 *Klippert v. The Queen*, [1967] SCR 822.

217 Sullivan, *supra* note 208, at 476.

218 See *Beotbuk Data Systems Ltd. v. Dean*, [1998] 1 FC 433, at paragraph 44 (CA).

“bienfaisance” consistent throughout the ITA, Parliament has made several amendments to section 149.1 that incorporate the revised terminology.²¹⁹ To the extent that it can be said that, in so doing, Parliament has implicitly approved the use of the term “bienfaisance,” it is arguable that the revised language should be accorded greater weight. Second, the official languages bureau sponsored by the federal government has specifically recommended that the translation of the common-law term “charitable” be standardized as “caritatif.”²²⁰ Given how frequently the ITA is modified and amended, this should not be a difficult recommendation to implement. Finally, it is noteworthy that the Canada Corporations Act, part II of which regulates the incorporation of federal not-for-profit organizations that are the primary applicants for registered charity status under the ITA, equates the English term “charitable” with the French term “charitable” and the English term “benevolent” with the French term “de bienfaisance.”²²¹ The inconsistency between these two statutes, both integral parts of the registered charity scheme, constitutes a notable infringement of the principle that the entire federal statute book be consistent and coherent, particularly with regard to statutes that deal with the same subject matter or form part of a single scheme.²²²

The Bijuralism Question: How Should the Registered Charity Provisions Be Interpreted in Quebec?

Complementarity, Dissociation, and the Federal Harmonization Act

If the common-law sources on the concept of charity raise questions about the interpretation of section 149.1 from the perspective of legislative bilingualism, the civil-law sources raise the even more complex “legislative bijuralism” question of how the registered charity provisions should be interpreted in Quebec. Should the ITA term “charitable” (“de bienfaisance”) be interpreted and applied in Quebec in accordance with the customary civil-law sources that were summarized by the codifiers in CCLC article 869? Given the significant progress already made on the harmonization of the ITA with Quebec civil law, and the potentially broader scope of the concept of charity in Quebec, one might assume that civilian lawyers would be actively engaged in a debate about the application of these sources to Quebec applicants for charitable

219 See, for example, An Act To Revise Certain Income Tax Law Amendments in Terms of the Revised Income Tax Act and Income Tax Application Rules, SC 1994, c. 7, section 123; and An Act To Amend the Income Tax Act, the Income Tax Application Rules, the Canada Pension Plan, the Canada Business Corporations Act, the Excise Tax Act, the Unemployment Insurance Act and Certain Related Acts, SC 1994, c. 21, section 74.

220 See supra note 69 and the accompanying text.

221 See, in particular, sections 16(1)(e), 154(1), and 158 of the Canada Corporations Act, RSC 1970, c. C-32.

222 Sullivan, supra note 208, at 324. Sullivan notes that in this regard, previously enacted legislation carries the same weight as subsequently enacted legislation.

registration. To date, however, no such debate has occurred. The few who have raised the possibility of a bijural concept of charity have quickly dismissed it, relying on either the purportedly public nature of charitable organizations, the presumed intent of the legislature, or the “dissociative” effect of the new social trust provisions of the CCQ.²²³ But do any of these factors preclude the application of civil-law sources to the registered charity provisions in Quebec?

In order to answer this question, it is necessary to set aside for a moment our deeply entrenched views about the “common-law meaning” of the registered charity provisions, and to re-examine this federal law in light of the constitutional principles established early on in Canada’s history, and reaffirmed by Parliament throughout the harmonization process. The essence of these principles of bijural interpretation can be summarized briefly. First, since the enactment of the Quebec Act in 1774, the law of Quebec has been composed of

the French civil law as it existed prior to 1760 with its subsequent alterations in Quebec in regard to anything affecting property and civil rights, and the common law as it existed in England at the same time with its subsequent alterations in Quebec and in Canada in regard to anything affecting the public law.²²⁴

The federal public law in Quebec is thus composed of federal public-law legislation and the public common law, while the federal private law is composed of federal private-law legislation and the civil law. Second, as section 8.1 of the federal Interpretation Act has confirmed, complementarity is the general rule governing the relationship between federal statutes and the private law of Quebec. However, it is still possible for Parliament to derogate from the law of any province when it legislates on subjects within its constitutional authority. The limits of permissible derogation have now been codified by section 8.2 of the Interpretation Act, which provides that the civil-law meaning of terminology must be adopted in Quebec, and section 8.1, which states that

unless otherwise provided by law, if in interpreting an enactment it is *necessary to refer to a province’s rules, principles, or concepts forming part of the law of property and civil rights*, reference must be made to the rules, principles, or concepts *in force in the province at the time the enactment is being applied* [emphasis added].

While the general principles governing the bijural interpretation of federal legislation may be clear and uncontroversial, determining whether a *particular* provincial rule or concept is applicable to a *particular* federal law can be somewhat more complex. For this reason, it seems wise to approach the question of a bijural interpretation of the registered charity provisions by considering each of the bases upon which the

223 See the discussion below under the headings “Public Law or Private Law?” and “The ‘Inconsistent Language’ Argument.” But also see Bromley, *supra* note 106, at 207.

224 *St-Hilaire*, *supra* note 73, at paragraph 40.

civil-law sources on charity could be *excluded* from section 149.1. As Lamoureux explains in his article on dissociation in fiscal laws,²²⁵ there are five such “exceptions” to the general rule of complementarity established by the case law and section 8.1. First, the principle of federal-provincial complementarity does not apply to federal areas of competence that are entirely autonomous of provincial private law. Second, complementarity does not apply to terms or concepts that either are not part of the law of property and civil rights, or are interpreted within a statutory context according to their ordinary, non-technical meaning.²²⁶ Third, within Quebec, the civil law does not complement public-law concepts or rules in federal legislation.²²⁷ Fourth, complementarity does not apply where Parliament explicitly dissociates provincial private law from a federal statute. Finally, complementarity does not apply where Parliament *implicitly* dissociates provincial private law from a federal statute by, for example, using constitutionally neutral terms or devising a detailed statutory scheme that makes reference to provincial concepts unnecessary.²²⁸

Considered in relation to the registered charity provisions, it seems very unlikely that three of the five exceptions to the general rule of complementarity would function to exclude Quebec civil law from the interpretation of section 149.1. With regard to the first, while the courts have held that certain areas of federal jurisdiction, including “Navigation and Shipping” and “Indians, and Lands reserved for the Indians,” are protected even from provincial laws of general application through the doctrine of interjurisdictional immunity,²²⁹ federal tax law has always been regarded as an “accessory system” that imposes fiscal consequences on legal concepts governed by provincial private law.²³⁰ There is, accordingly, no authority for the suggestion that the federal taxation and regulation of charities is entirely autonomous of provincial law. With regard to the second exception, the term “charitable purposes” (“fins de bienfaisance”) was used in the CCLC and represents (at least in its English version) a key concept under the common law of charitable trusts. While it would therefore be possible to argue that “charity” should be given its “ordinary meaning” within the context of the ITA, it seems unlikely that the courts would adopt this position after relying for so many years on a private, suppletive law source. Finally, there is no textual support for the view that Parliament has *explicitly* dissociated the civil law of Quebec from the registered charity provisions. Unlike certain sections of the ITA,

225 Martin Lamoureux, “Harmonisation des lois fiscales—La dissociation : un mécanisme d’exception” (2002) vol. 23, n° 4 *Revue de planification fiscale et successorale* 735-48.

226 The concept of “residence,” for example, has a technical meaning in both the common law and the civil law, but has been interpreted within the ITA by reference to the ordinary meaning of the word and dictionary definitions: see Lamoureux, *supra* note 225, at 743; and Duff, *supra* note 9, at 36.

227 *St-Hilaire*, *supra* note 73, at paragraphs 56-58 and 65.

228 *Ibid.* See also Molot, *supra* note 76, at 18.

229 *Ordon Estate v. Grail*, [1998] 3 SCR 437.

230 *The Queen v. Lagueux & Frères Inc.*, [1974] 2 FC 97, at 103 (TD).

which openly exclude provincial law by providing that a rule applies “notwithstanding any enactment of a province,”²³¹ the registered charity provisions contain no clear indication of their relationship with any other source of law. And while section 149.1 does define the terms “charitable foundation” (“fondation de bienfaisance”), “charitable organization” (“oeuvre de bienfaisance”), and “charitable purposes” (“fins de bienfaisance”), none of these definitions can be considered complete or intelligible without reference to some external source.

Public Law or Private Law?

The two remaining exceptions listed by Lamoureux merit greater attention, since they raise legitimate issues regarding the interpretation of the registered charity provisions in Quebec. The first of these—the lack of complementarity between the civil law and public-law concepts or rules in federal legislation—is a product of the fact that “common law rules that are public in nature apply in the province [of Quebec].”²³² With this rule presumably in mind, a number of recent articles and one recent case on the harmonization of the ITA have proposed, though with little supporting analysis, that the concept of a “charitable organization” (“oeuvre de bienfaisance”) could be considered a *public-law* concept at common law. If, as these sources suggest, the common-law rules that complete the registered charity scheme are public in nature, the section 149.1 definitions would not be subject to a bijural interpretation.²³³

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

Charitable trusts used to be primarily known as “public trusts,” and contrasted as such with what we still call “private trusts.” Quite a lot of the pre-history and early history of what we now regard as public law is to be found in cases concerned with the judicial control of the actions and decisions of trustees of charitable trusts, or of the corporations of charitable corporations—such as charity hospitals, or Oxford or Cambridge colleges. This incidentally reminds us that the law of charity does not consist entirely in the regulation of charitable *trusts*, for it also consists in part of the regulation of charitable *corporations*.²³⁴

231 See, for example, ITA subsection 227(4.1).

232 *Prud'homme v. Prud'homme*, [2002] 4 SCR 663, at paragraph 46.

233 See, for example, Lamoureux, *supra* note 225, at 742 (“[l’organisme de bienfaisance] pourrait vraisemblablement être considéré comme un concept de droit public”); and *Travel Just v. Canada (Canada Revenue Agency)*, 2006 FCA 343, at paragraph 16.

234 Mark Freedland, “Charity Law and the Public/Private Distinction,” in *Foundations of Charity*, *supra* note 4, 111-23, at 113. Freedland also notes that the judicial control exercised over the powers and discretion of charitable trustees and corporations is similar to “the techniques and reasoning of public law.”

For Freedland, the existence of these “creatures of private law . . . defined in terms of public benefit” calls into question the very adequacy of the public/private distinction as commonly understood. This leads him to call for a more nuanced, multidimensional analysis of social relations and activities, one that recognizes that activities such as those described in the common law as “charitable” cannot easily be assigned to the public or private sphere.²³⁵

Freedland’s decision to focus on reformulating the criteria of the public/private distinction is of some interest to our analysis of the registered charity provisions, for it underlines an important point—that the difficulty of classifying the common law of charity as public or private arises as much from the ambiguity surrounding the concepts of “public law” and “private law” as from the ambiguous character of charity law itself. Unlike the Continental legal tradition, which has long treated the distinction between the concepts of public law and private law as being of fundamental importance to both legal theory and practice, the common law developed “without reference to the public-private cleavage” and does not, generally speaking, distinguish between public law and private law at all.²³⁶ In the common-law world, therefore, public law tends to be defined in very general terms, as simply that branch of law that deals with relationships between the citizen and the state, rather than between private individuals. On those occasions when the public/private dichotomy receives more detailed attention from the courts, it is usually because a specific circumstance, or a statute such as the Quebec Act or the Canadian Charter, demands it. It is thus not surprising that the common-law authorities continue to evidence a “deep lack of agreement about what constitutes a coherent set of criteria” for distinguishing between the public and private spheres.²³⁷

Given the admittedly public aspects of charity law, and the current ambiguity surrounding the public/private distinction within the common-law tradition, it may in future be desirable to consider, from a policy perspective, whether certain charitable entities should be regarded as public or quasi-public institutions in Canada. Nonetheless, there seem to be strong reasons to resist the view that the body of common-law rules that has completed the registered charity provisions for many years is a body of public law. First, while the federal government grants significant support to registered charities and sets the outer limits of the purposes they are permitted to pursue, Canadian charities are created, primarily funded, and entirely directed by private actors. Accordingly, it would not be accurate to describe them as

235 Ibid., at 114.

236 Sue Arrowsmith, “Government Liability in Quebec and the Public Law-Private Law Distinction” (1990) vol. 4, no. 1 *Canadian Journal of Administrative Law and Practice* 1-22, at 1; and John Henry Merryman, “The Public Law-Private Law Distinction in European and American Law” (1968) vol. 17, no. 1 *Journal of Public Law* 3-19.

237 Freedland, *supra* note 234, at 115.

“arms of the state.”²³⁸ Second, while a determination that charities *are* public bodies might resolve the thorny issue of how section 149.1 should be interpreted in Quebec, it would almost certainly raise a number of even thornier issues by making registered charities subject to the Canadian Charter.

Finally, the specific statutory term in section 149.1 that is currently interpreted by reference to the common law, and whose public or private nature must therefore be the focus of the inquiry, is not “charitable organization” (“oeuvre de bienfaisance”) or “charitable foundation” (“fondation de bienfaisance”), but “charitable purposes” (“fins de bienfaisance”).²³⁹ And at common law, the concept of what purposes are charitable has always raised not only the somewhat “public” issue of what purposes the courts should use their resources to enforce, but also the very “private” issue of the circumstances in which individuals should be able to devote their personal property to unascertainable beneficiaries for an unlimited amount of time. Therefore, until such time as a clear consensus or authority emerges that the law of charity in Canada is a matter of public law, Quebec taxpayers should be entitled to rely on the longstanding view that the common-law rules that complete the registered charity provisions are a subset of the private, common law of trusts.²⁴⁰

Implicit Dissociation

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

GENERAL PRINCIPLES

There are a number of circumstances in which it may be concluded that the dissociation of provincial private law from a federal statute is “implicit in the language or purposes of the statutory text.”²⁴¹ Such an implication may be raised where

238 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* (Montreal: McGill-Queen’s University Press, 2001), 251-315.

239 Although the meaning of the undefined ITA term “charitable activities” (“activités de bienfaisance”) must also be addressed, the focus is currently on “charitable purposes” (“fins de bienfaisance”) as a result of the *Vancouver Society* decision, *supra* note 19.

240 See *Doe Anderson v. Todd et al.* (1845), 2 UCQB 82.

241 Duff, *supra* note 9, at 49.

Parliament employs a statutory term that is “constitutionally neutral” or part of the vocabulary of only one legal tradition.²⁴² Parliament may also implicitly dissociate provincial law from a federal sphere by devising a detailed statutory scheme that makes reference to provincial concepts inappropriate or unnecessary. Where federal legislation leaves “no room . . . for the operation of the provincial legislation,” or where its “clearly intended objectives” would be thwarted by the application of an external source, it is generally held to constitute a “complete code,” which is insulated from the suppletive application of provincial law.²⁴³

The difficulty is in knowing how clearly Parliament must speak before the dissociation of private law may be regarded as being implicit in the statutory text. In the context of the ITA, the courts have often imposed only a low burden of clarity on Parliament, in this way favouring the principle of uniform application of fiscal burdens and benefits. The decision of the Federal Court of Appeal in *Construction Bérou*, for example, suggests that the explicit dissociation of one private-law concept from an ITA provision may be sufficient indication that Parliament intended to dissociate a related private-law concept from a separate provision.²⁴⁴ However, most commentators appear to favour a much higher standard that would make provincial private law subject to displacement by federal law only where this intention is “necessarily implied by the language of the statutory text.”²⁴⁵ This higher standard is far more consistent with the new provisions of the Interpretation Act, which, as we have seen, demand that relevant provincial private-law concepts be applied “unless otherwise provided” by another valid federal law.

While the “necessary implication” standard is certainly still flexible enough to accommodate a variety of opinions on when Parliament has displaced provincial law, it can be seen to lay down certain guidelines for the interpretation of a federal statute such as the ITA. First, it is evident that a necessary implication can only arise where no other reasonable alternative exists. Therefore, if a statute can be reasonably

242 Molot, *supra* note 76, at 18.

243 *Bank of Montreal v. Hall*, [1990] 1 SCR 121, at 155; and *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 SCR 453, at paragraph 85. See also *St-Hilaire*, *supra* note 73, at paragraph 43 (a complete code exists where there is “no need to resort to an external source”).

244 In *Ministre du Revenu nationale v. Construction Bérou Inc.* (1999), 251 NR 115 (FCA), the court addressed the issue of whether the ITA concept of “property acquired by the taxpayer” should be interpreted in Quebec, as in the common-law provinces, to include property beneficially but not legally owned. While the ITA at the relevant time did not define the concept of acquisition, it did define a “disposition” to include a transaction in which there was a transfer of beneficial ownership but the seller retained legal ownership. In addition, subsection 248(3) deemed rights under the civil-law concepts of usufruct, right of use, and habitation to be beneficial interests for purposes of the ITA. A majority of the court found that these two provisions were sufficient indication of Parliament’s intent to incorporate a common-law concept of acquisition into the ITA. Noël J disagreed with this conclusion, finding that there was no indication that the ITA “cast aside” the applicable private law: *ibid.*, at paragraph 116.

245 Duff, *supra* note 9, at 49; and Macdonald, *supra* note 73, at 447 (provincial private law should be subject to displacement by federal law only “explicitly” or “by absolutely necessary implication”).

interpreted so that it is complemented by the private law of the province in which it is being applied, this interpretation should be preferred over one that dissociates provincial law. Second, as Duff points out, a necessary implication of dissociation can only arise from the language of a statutory text.²⁴⁶ While this should not prevent a court from reading statutory language “in [its] entire context . . . harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament,”²⁴⁷ it does mean that an intent to dissociate provincial law should not be inferred simply from the general presumption that Parliament intends the ITA to apply uniformly,²⁴⁸ or from the statute’s legislative origins. With these guidelines in mind, we can turn to examining the specific ways in which Parliament might be said to have dissociated provincial-law sources from section 149.1 of the ITA.

THE “COMPLETE CODE” ARGUMENT

Until very recently, it had never been suggested that the registered charity provisions could in any way be considered a “complete code.” On the contrary, the courts have always relied heavily on an external source, the common law, for both the definition of charity and the principles to be followed in applying that definition. However, in *AYSA v. CRA*,²⁴⁹ a recent decision involving an amateur sports association, the Federal Court of Appeal took the view that Parliament *bas* “occupied the field” and created a complete code with regard to the charitable status of at least one class of applicants, through its creation of a similar tax benefit for a subset of that class. The decision therefore requires us to reconsider whether the dissociation of external sources from at least part of the registered charity scheme is implicit in the provisions of the ITA.

The *AYSA* case arose when a society established to promote amateur youth soccer in Ontario appealed the minister’s decision not to register it as a charitable organization under subsection 248(1) of the ITA. The appellant argued that pursuant to section 8.1 of the Interpretation Act, the undefined terms “charitable purposes” (“fins de bienfaisance”) and “charitable activities” (“activités de bienfaisance”) in section 149.1 should be interpreted in Ontario by reference to the common law of Ontario, which recognizes the promotion of amateur sport involving the pursuit of physical fitness as a charitable purpose. However, the Federal Court of Appeal concluded that section 8.1 was of no assistance to the appellant because the legislative scheme precluded the possibility that an amateur sport association may be treated as a charity under the Act. The court relied on the fact that in 1972, at a time when it was clear that the promotion of amateur sport was not charitable at common law, Parliament had accorded “charity-like status” to certain amateur sports clubs that

246 Duff, *supra* note 9, at 49.

247 Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), 87, cited in (among others) *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27, at paragraph 21.

248 Duff, *supra* note 9, at 55.

249 *AYSA Amateur Youth Soccer Association v. Canada (Canada Revenue Agency)*, 2006 FCA 136.

operated on a nationwide basis by conferring tax benefits on a category of registered Canadian amateur athletic associations (RCAAs) as defined in subsection 248(1). In light of this apparently “clearly expressed intent to limit the federal funding of amateur sports associations to those which operate nationally,” the court concluded that Parliament had “occupied the field respecting the tax treatment of amateur sports associations, regardless of their status in the law of charity.”²⁵⁰

The *AYSA* decision does not go so far as to suggest that the registered charity provisions leave no room for the operation of provincial law or any other external source. What it does suggest is that Parliament may be regarded as having dissociated *specific aspects* of a provincial-law concept from a provision of the ITA, to the extent that these aspects are incompatible with the language or intent of a related provision. In the common-law provinces, this phenomenon of what we might call “selective dissociation” could mean that because low-cost housing facilities for seniors have charity-like status under sections 110.1 and 118.1 of the ITA, providing shelter to the elderly is not a “charitable purpose” within the meaning of section 149.1. In Quebec, it could mean that the permissive civilian attitude to “political” activities, which are specifically regulated under subsection 149(6.1), has also been cast aside. However, there are clearly other reasonable interpretations of the joint effect of the RCAA and registered charity schemes. Most obviously, it is quite plausible that Parliament intended to fund nationally operating amateur sports associations (whether charitable or not), as well as any sports organizations that carry out “charitable purposes” (“fins de bienfaisance”) within the meaning of section 149.1. While Parliament may have intended its tax treatment of sports organizations to apply uniformly across Canada, this would not be enough to displace provincial law under section 8.1 of the Interpretation Act. Therefore, it must be concluded that the *AYSA* decision does not meet the “necessary implication” standard for the dissociation of provincial law.

THE “INCONSISTENT LANGUAGE” ARGUMENT

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

As we have seen, since the repeal of the CCLC in 1994, Quebec’s Civil Code no longer makes express reference to the concept of charitable purposes (fins de bienfaisance) in the provisions relating to testamentary legacies or inter vivos gifts. Rather, the CCQ introduces several new concepts dealing with the appropriation of property to purposes, which define the classes of permitted purposes in similar but distinct terms. The foundation, for example, encompasses all appropriations of property made to the lasting fulfillment of a “socially beneficial purpose” (“fin d’utilité sociale”). The social trust, for its part, encompasses transfers of property to

250 Ibid., at paragraph 22.

any “purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose” (“but d’intérêt général, notamment à caractère culturel, éducatif, philanthropique, religieux ou scientifique”). In light of the notable divergence between the language used in the CCQ and that of the ITA, at least one scholar has argued that the interpretation of the term “charitable” (“de bienfaisance”) in the ITA must necessarily be dissociated from Quebec’s private law.²⁵¹

However, there seem to be at least two plausible views of the current status of the concept of charitable purposes (fins de bienfaisance) in Quebec that are not necessarily inconsistent with a relationship of complementarity between the civil law and the ITA. The first is that the rule expressed in CCLC article 869 remains part of Quebec’s unenacted civil law, as a result of its continued application to situations where a testator seeks to effect a particular purpose by means other than the constitution of a trust. This argument is based on the premise that the CCQ, being a law of “replacement,” did not implicitly repeal the provisions of the CCLC that were not inconsistent with the new Code.²⁵² Given the presumption in favour of the continuance of prior law through codal enactments,²⁵³ it cannot automatically be assumed that CCLC article 869 was entirely abrogated with the coming into force of the CCQ.

To what extent can the rule expressed in CCLC article 869 be considered to be still in effect, notwithstanding the new CCQ regime of foundations and trusts? Clearly, the CCQ definitions of social, private, and personal trusts now govern all transfers of property to purposes that meet the criteria set out in CCQ article 1260. Therefore, where a person devotes property to a public purpose by constituting an autonomous patrimony that a trustee agrees to hold and administer, the relevant question is not whether the purpose is “charitable or otherwise lawful,” but whether it is “of general interest” (“d’intérêt général”) within the meaning of CCQ article 1270. However, as we have seen, the new trust provisions do not apply to alternative methods of dedicating property to purposes, which are available but not explicitly regulated under the CCQ.²⁵⁴ It seems, then, that where a person devotes property to a public purpose by imposing a charge or other obligation on a legatee or testamentary executor, the standard of a “charitable or otherwise lawful” purpose may continue to apply. To the extent that this is the case, it may be said that CCLC article 869 continues to be part of the private law of Quebec, which is available to provide meaning and content to undefined federal statutory terms.

The second argument that would support a relationship of complementarity between the registered charity provisions and Quebec’s private law is that within the civil-law tradition of Quebec, the terms “charitable purpose” (“fin de bienfaisance”),

251 Duff, *supra* note 9, at 55. This also appears to have been the view of the Federal Court of Appeal in *Travel Just*, *supra* note 233, although the point was not considered in detail and the court had already found that section 8.1 did not apply.

252 Maurice Tancelin, “Les silences du Code civil du Québec” (1994) vol. 39, no. 4 *McGill Law Journal* 747-60, at 756-57.

253 Claxton, *supra* note 136, at 304, note 14-102.

254 See the discussion above at note 134 and following.

“purpose of general interest” (“but d’intérêt général”), and “socially beneficial purpose” (“fin d’utilité sociale”) all mean essentially the same thing. This interpretation of three closely related statutory terms would not be convincing in the context of a technical fiscal statute such as the ITA, where great emphasis would be placed on the specific statutory text and the effect of linguistic changes.²⁵⁵ It would also be difficult to support in a common-law jurisdiction, where the word “charitable” has an exclusive, technical meaning. However, within the context of civilian interpretation, which is typically functional and purposive in nature,²⁵⁶ it is quite plausible that the spirit, if not the letter, of the three terms could be viewed as similar in nature. As Brierley has noted, the CCQ concept of a general interest purpose, while “extremely wide,” is also a very fluid concept, the parameters of which will have to be clarified by the courts in the context of particular fact situations.²⁵⁷ In interpreting the concept, the courts will likely look to civilian sources on the purposes that have been considered to be of particular benefit to society, including the sources that were incorporated into CCLC article 869.²⁵⁸

The social trust provisions of the new CCQ have not, so far, received enough judicial or scholarly attention to confirm how the resolution of this question will take shape. At present, however, there is nothing to suggest that the CCQ concepts of a general interest purpose and a social utility purpose differ in any significant sense from the concept of a charitable purpose articulated in CCLC article 869. The *Commentaires* of the Ministry of Justice describe the new definition of a social trust as “[g]énéralement conforme au droit antérieur.”²⁵⁹ The enumerated examples of a general interest purpose in CCQ article 1270 all seem to be consistent with the broad conception of charitable giving that existed in Roman times. And the courts so far seem willing to conclude that charitable legacies established under CCLC article 869 “identify equally” with the new definition of a social trust.²⁶⁰

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

255 Sullivan, *supra* note 208, at 447.

256 *Ibid.*, at 40-41.

257 Brierley, *supra* note 134, at 13.

258 It may be that Brierley’s statement that CCQ article 1270 is “broader in scope” than CCLC article 869 should be read in light of the fact that only the civil-law sources on *legs pieux* were ever discussed by the Quebec courts. If the Roman-law sources considered in this article are also considered, the breadth of CCLC article 869 can be viewed in a quite different light: see Brierley, *supra* note 134, at 13.

259 *Commentaires du ministère de la Justice*, t. 1 (Québec : Publications du Québec, 1993), 756.

260 *Speirs Dufty Estate c. Raymond Chabot Inc.* (2001), 45 ETR (2d) 311 (Que. CS).

Act, “it is not strictly necessary for the operation of section 8.1 that a federal enactment contain either or both civil law and common law terminology”; the “necessity” to refer to provincial rules or concepts may be generated by either an express or an *implicit* reference in the federal enactment.²⁶¹

In conclusion, then, it appears that within Quebec, where the meaning of the term “charitable” (“de bienfaisance”) has “nothing to do” with the common law of charitable trusts,²⁶² the registered charity provisions of the ITA should be interpreted, to the extent possible, in accordance with the civil law. The relevant provincial “rules, principles, or concepts” are to be gleaned from the customary sources that inspired the codification of CCLC article 869, that continue to govern certain testamentary legacies, and that appear, at present, to provide the primary source of meaning for the new trust provisions of the CCQ. If Parliament wishes to prevent the application of this body of law to the undefined terms in section 149.1 of the ITA, it will have to speak clearly enough that no other reasonable interpretation can be inferred.

The Complementarity Question: How Should the Registered Charity Provisions Be Interpreted in Provinces That Have Enacted a Statutory Meaning for “Charitable” (“de Bienfaisance”)?

A final question relating to the interpretation of the registered charity provisions in the provinces concerns the relationship between the ITA and provincial legislation that establishes a statutory meaning for the term “charitable” or “de bienfaisance.” While the role of ordinary provincial legislation has not figured prominently in the harmonization project, it represents an important aspect of the principles of complementarity and provincial autonomy and should not be passed over. It is beyond the scope of this study to analyze the particular relationship of the registered charity provisions with all of the various enactments regulating charitable activity in the provinces. A few general comments on the impact of these enactments, however, are not out of place.

As we have seen, every jurisdiction in Canada has its own reservoir of legal concepts and rules that functions as the suppletive law for legislation that cannot be fully understood on its own. While the *ius communes* of the civil-law and common-law provinces are principally constituted, respectively, by the CCQ and the common-law jurisprudence, they also include ordinary statutes that modify basic laws of property and civil rights.²⁶³ Thus, even before the enactment of the Harmonization Act, valid provincial enactments other than a civil code could “indirectly modify the meaning of terms used in federal legislation, subject to limitations flowing from doctrines of paramountcy, interjurisdictional immunity or intergovernmental immunity.”²⁶⁴ This suppletive function of provincial private-law legislation has been recognized

261 Molot, *supra* note 76, at 16.

262 Ross, *supra* note 126, at 330.

263 Macdonald, *supra* note 63, at 155 and 165.

264 *Ibid.*, at 200.

in cases such as *Continental Bank Leasing*, where the Supreme Court of Canada considered both the common law and the Ontario Partnerships Act in applying the ITA concept of a “partnership” to a taxpayer resident in Ontario.²⁶⁵

The Harmonization Act affirms in its preamble that “the harmonious interaction of federal legislation and provincial legislation is essential,”²⁶⁶ and provides further confirmation of the general relationship of complementarity between federal and provincial statutes. While the harmonization legislation is generally seen to be focused primarily on reconciling federal legislation with the civil law, amended section 8.1 of the Interpretation Act in fact makes no reference to the civil law or the common law, but requires that federal legislation be interpreted, where necessary, by reference to “a province’s rules, principles, or concepts forming part of the law of property and civil rights.” As Molot points out, section 8.1 implicitly recognizes that “even among common law provinces, the [rules, principles, and concepts] may well differ from one province to the other.”²⁶⁷

Given the Interpretation Act’s confirmation of the general applicability of provincial statutory law, it seems that the primary question that will have to be addressed with regard to the effect of particular provincial charity statutes is whether they are sufficiently general or sufficiently important to act as part of the default legislative dictionary for the ITA. Prior to the amendment of the Interpretation Act, this inquiry would have focused on whether the provincial legislation could reasonably be considered part of the province’s “implicit, general, residual, suppletive law.”²⁶⁸ It remains to be seen whether the threshold for being “part of the law of property and civil rights” within the meaning of section 8.1 is as high. In any event, it seems likely that provincial legislation that defines the notion of charity or bienfaisance for a narrow purpose, such as an exemption from municipal property tax, would not have the effect of modifying the *ius commune*. On the other hand, a statute such as the Ontario Charities Accounting Act, which has been interpreted as establishing the scope of the term “charity” for gifts of both land and personalty in the province,²⁶⁹ would likely be sufficiently fundamental to function as the suppletive law for a statute such as the ITA.

CONCLUSION

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

265 *Continental Bank Leasing Corp. v. Canada*, [1998] 2 SCR 298.

266 Harmonization Act, *supra* note 84, preamble.

267 Molot, *supra* note 76, at 16.

268 Macdonald, *supra* note 63, at 138.

269 *Re Orr*, *supra* note 199, at 597.

the multiple legal audiences in Canada. The primary conclusions of the study may be summarized as follows:

- The current interpretative approach to the registered charity provisions, and particularly the position that the ITA concept of charity is “uniform federal law,” is at odds with fundamental principles of statutory construction and constitutional law, as well as the federal government’s policies on legislative bilingualism and bijuralism, and the explicit terms of sections 8.1 and 8.2 of the Interpretation Act.
- There are at least four legal sources of meaning for the terms “charity” and “bienfaisance” in Canada: the common law of charitable trusts, the customary civil-law rules regarding *legs pieux*, the Roman laws on foundations and gifts, and the various provincial statutes governing the administration of charities.
- While on balance the canons of construction may favour interpreting the ITA term “charitable” (“de bienfaisance”) in accordance with its common-law meaning in the common-law provinces, “de bienfaisance” is a problematic translation of the common-law term “charitable” because it is more consistent with another English term, “benevolent,” which has consistently been held to fall outside charity’s legal scope.
- Where valid provincial legislation establishes a meaning for the term “charitable” or “de bienfaisance” that can be said to have modified the province’s basic law of property and civil rights, that statutory meaning must be referred to in applying the ITA within that province.
- Within Quebec, there is no basis for interpreting the term “charitable” (“de bienfaisance”) in accordance with the common law of charitable trusts, a body of private law (although admittedly one with public aspects) that has no application in the province. While Quebec’s civil-law tradition never developed a stringent or detailed conception of charity, largely owing to the historical lack of administrative control over charitable legacies and trusts, the reception of the ancien droit from France did ensure that a wide variety of customary civil-law sources on transfers to charitable purposes came to form part of Quebec law. These sources were expressly incorporated into CCLC article 869 and continue to be relevant to the new CCQ. Although these sources will require further study, they form part of the law of property and civil rights in Quebec, and therefore part of the default legislative dictionary applicable to federal legislation such as the ITA.

In light of these conclusions, it is clear that the registered charity provisions of the ITA, as currently drafted and interpreted, present a major obstacle to the federal government’s declared goal of “facilitat[ing] access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions.”²⁷⁰ Undoubtedly the current approach to the federal registration of charities

270 Harmonization Act, *supra* note 84, preamble.

will have to be changed if the principles and objectives underlying the harmonization project are to be extended to Canada's charitable sector. The difficult question is what shape this reform should take and what particular branch of government—judicial, legislative, or bureaucratic—should carry it out.

While a detailed examination of the reform question is beyond the scope of the present work, some general comments on the options and applicable principles can be offered. First, while the bijuralism and bilingualism issues that have been raised by this study are highly interconnected (because the statutory terms “charitable” and “de bienfaisance” express two legal concepts in one tradition and one in another), it is important to remember that they are separate issues that must be addressed separately. Second, in part *because* of the interconnectedness of the bijuralism and bilingualism issues, any change to the language used to describe the primary criteria for charitable registration under the ITA will result in a substantive change in the meaning of the statute.²⁷¹ It would not seem appropriate, therefore, for the revision of section 149.1 to be carried out under the authority of the Statute Revision Act. Finally, because of Quebec's status as the only province that collects and administers all of its own provincial income taxes, the reform options that are open to the federal government could also be applied to the provincial tax scheme. In other words, because Quebec is free to create its own tax base, it has the authority and ability to determine which entities are of special benefit to society for provincial fiscal purposes.

There are a number of different ways in which reform of the current registered charity scheme could be achieved. The first would be for the judiciary to interpret section 149.1, as currently drafted, in strict accordance with section 8.1 of the Interpretation Act. As we have seen, the likely result would be that a different test of charitable registration would apply to applicants in different common-law provinces, as well as in Quebec.²⁷² “Judicial harmonization” of the registered charity provisions would have the advantage of affirming the clearly expressed intent in section 8.1 of the Interpretation Act that provincial private law shall constitute the default legislative dictionary for undefined terms in federal statutes “unless otherwise provided by law.” It would also provide a powerful confirmation of the basic allocation of responsibility mandated by the Act: Parliament bears the burden of ensuring that its legislation applies with a sufficient degree of uniformity across Canada, while the courts must interpret federal legislation in a way that safeguards provincial private law. However, judicial harmonization of section 149.1 would also undermine the goal of the uniform application of tax benefits and would entail a major, judicially led shift in the federal government's tax policy, something the courts have historically been loath to do. Judicial harmonization would also do little to address the concerns

271 For the suggestion that altering one linguistic version of an enactment always alters the substantive meaning of a law, see Nicholas Kasirer, “Dire ou définir le droit?” (1994) vol. 28, n° 1 *Revue juridique thémis* 141-73, at 162.

272 This raises an interesting issue regarding federally incorporated charities that operate in more than one province: Would they be allowed to engage in different activities from coast to coast?

of Canada's French common-law minority, who are entitled to clarification of the criteria for charitable registration in the French version of the ITA.

The second possible way of reforming the current registered charity scheme would be for Parliament to modify the language of section 149.1 to better take into account its several legal audiences—francophone and anglophone, civil-law and common-law. Given the interconnectedness of the bilingualism and bijuralism issues, there seem to be two general avenues of harmonization that Parliament could take. The first option would be for Parliament to *embrace* the common-law and civil-law sources on charity by integrating into section 149.1 an asymmetrical simple double—"charitable" ("caritatif") and "charitable" ("de bienfaisance")—that expresses the legal rule applicable to each system. For example, the definition of a "charitable foundation" ("fondation de bienfaisance") could be amended to read:

a corporation or trust that is constituted and operated exclusively for charitable purposes . . . and that is not a charitable organization (*société ou fiducie constituée ou administrée exclusivement à des fins de bienfaisance ou fins caritatives . . . et qui n'est pas une oeuvre de bienfaisance ou oeuvre caritative*).

Alternatively, Parliament could choose to explicitly *dissociate* the civil-law sources from the registered charity provisions by providing that the terms "charitable purpose" ("fin de bienfaisance") and "charitable activity" ("activité de bienfaisance") are to be construed, in all provinces, according to the common law of charitable trusts.²⁷³

In assessing the merits of a "legislative harmonization" reform of the registered charity scheme, it is important to keep in mind that *any* legislative revision that clarified the relationship between section 149.1 and the private law of the provinces would go a long way in affirming the government's respect for the principles of federal-provincial complementarity, and of bijuralism and bilingualism in Canadian law.²⁷⁴ An explicit decision by Parliament to either dissociate or incorporate the civil-law sources on charity into the ITA would amount to an implicit acknowledgment that a unique civilian concept of charity does exist. Legislative harmonization of the registered charity provisions would also relieve the courts and the CRA of the unenviable task of deciphering the present meaning of section 149.1, and reduce the likelihood of litigation regarding Parliament's intent.²⁷⁵

273 There are other ways to clearly dissociate the civil law from the registered charity provisions. See, for example, the solutions proposed by Lamoureux to harmonize the ITA concept of a "real right" ("droit réel"): Martin Lamoureux, "The Income Tax Act, the Excise Tax Act and the Term Interest: An Interesting Case for Harmonization," in *Collection of Studies in Canadian Tax Law*, supra note 8, 7:1-38, at 7:30-33.

274 Macdonald, supra note 73, at 450: "[F]orcing Parliament itself to make its choices explicitly is the best guarantee that the distinctive civil law and common law traditions in Canada will be respected in any legislative reordering."

275 The reduction of the caseload of litigation has been identified as one of the principal objectives of the harmonization project: see Marc Cuerrier, Sandra Hassan, and Louise L'Heureux,

However, a legislative revision of the registered charity provisions that is focused solely on meeting the basic requirements of bijuralism and bilingualism may not succeed in furthering the other important objectives of the registered charity scheme. The use of a simple double, for example, would work against the objective of uniformity in fiscal laws, owing to the significant impact it would have on the consideration of Quebec applicants for charitable registration. Litigation arising under section 149.1 and subsection 248(1) of the ITA would likely *increase*, given the current lack of clarity regarding the notion of charity in Quebec. On the other hand, if Parliament chose to dissociate the civil-law and provincial statutory-law sources from the registered charity provisions, it would lose a valuable set of perspectives on the types of purposes and activities that have been found, by legal communities that continue to exist in Canada, to be of special benefit to society. In light of the widespread dissatisfaction with the current common-law approach to the definition of charity, such a legislative choice might well be seen as an opportunity passed by.

The final alternative in terms of reforming the current registered charity scheme would be for Parliament to include within the ITA a statutory definition of charity, or of a closely related term such as “philanthropy,” which does not have such a strong presence in the provincial-law lexicons. Such a definition could obviously take many forms: Parliament could, like the UK Parliament, attempt to catalogue the categories of purposes or activities that are considered to be of special benefit to Canadian society;²⁷⁶ or it could articulate a more general test based on a concept of public utility or public benefit. However, the basic function of any statutory definition of charity would be to articulate the basic qualitative criteria for charitable registration in the ITA, thereby reducing the current reliance on extrinsic legal sources, and promoting the goal of uniformity in the application of fiscal law. In contrast to the legislative harmonization option, a statutory definition of charity would also allow for the “cross-fertilization and sharing of solutions” derived from Canada’s multiple legal traditions and institutions.²⁷⁷

The idea of defining the meaning of charity in federal tax legislation is not new. In fact, since 1952, it has been considered by a variety of law reform commissions and government bodies in Canada and other Commonwealth countries (England, Scotland, Australia, New Zealand, Barbados, and South Africa),²⁷⁸ which have generally been motivated by an interest in replacing the common-law test. Historically, many of the proposals to enact a statutory definition of charity in these countries

“Harmonisation des lois fiscales fédérales avec le droit québécois et le bijuridisme canadien,” in *Congrès 2000* (Montréal : Association de planification fiscale et financière, 2001), 16:1-57, at 16:25.

276 Charities Act 2006 (UK), 2006, c. 50.

277 Leckey and Braën, *supra* note 170, at 121.

278 For a review of the various initiatives to reform the legal definition of charity, see Peter Broder, *The Legal Definition of Charity and Canada Customs and Revenue Agency’s Charitable Registration Process* (Toronto: Canadian Centre for Philanthropy, August 2001).

have been rejected.²⁷⁹ The reason, it seems, is that the difficulty of drafting a satisfactory definition and the potential drawbacks of creating an entrenched standard have always been seen to outweigh the potential benefits of codifying a definition that reflects contemporary social values and needs. As the Ontario Law Reform Commission concluded following its extensive review of Canada's registered charity scheme in the 1990s, "[since] the range of objects that can be charitable is so incredibly diverse, any statutory definition more specific than the *Pemsel* test would, in all probability, just confuse matters."²⁸⁰

However, the debate over the desirability of enacting a statutory definition of charity in Canada has never been conducted from the perspective of Canadian multijuralism and multilingualism, nor has it accounted for the multiplicity of "charity-law" sources that exist in Canadian law. Clearly, these factors must distinguish Canada's consideration of the issue from that of the other countries engaged in this debate. In Canada, in other words, it is not just a question of improving the clarity of our tax legislation, or of modernizing an outdated body of case law that continues to rely on antiquated social attitudes and beliefs. It is not just a question of resolving the legal void created by the paucity of recent case law on the purposes that the common law deems charitable, or of curbing the hefty discretion currently exercised by an administrative agency with an interest in conserving the fisc. In Canada, the question of whether the concept of charity should be defined in federal legislation is a question of recognizing the multijural nature and constitutional structure of our federal state, and the consequential co-existence of different legal concepts of purposes and activities that are of special benefit to society. It is a question of acknowledging Canada's diverse legal and linguistic communities, and the federal government's commitment to ensuring that these communities can recognize themselves in federal law.²⁸¹ Until these elements of the Canadian legal system are properly addressed, the debate over whether a statutory definition of charity should be enacted in Canada cannot be said to be closed.

Finally, just as the multilingual and multijural nature of Canada must serve to refocus the debate over the enactment of a statutory definition of charity, it should also change the shape of any definition of charity that is ultimately devised. While the common law may well be unique in terms of the detailed attention it has devoted to the question of the legal definition of charity, there are other Canadian legal

279 See *ibid.*, at 7-15. However, this trend may be changing: see the UK Charities Act 2006, *supra* note 276, and the Charities and Trustee Investment (Scotland) Act 2005, ASP 2005, c. 10 (herein referred to as "the Scottish Act").

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

281 Canada, Department of Justice, "Notes for an Address by the Honourable Stéphane Dion, President of the Queen's Privy Council for Canada and Minister of Intergovernmental Affairs," November 24, 1997 (online: http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1d.html): "[T]he harmonization project is designed first and foremost to allow Quebecers to recognize themselves better in federal legislation."

traditions and institutions that have addressed the question of what public purposes are especially deserving of protection and support. In the modern world, where charities face growing demands on their services, and debates over the entitlement of sports clubs, missionary organizations, or advocacy groups to charitable tax support have only grown more intense, there is no reason why we should not be drawing on *all* of these legal sources, and seeking to construct a charitable regime that reflects both the shared values and the plural character of the Canadian state.

Postscript

The locus classicus of the common law of charity, the *Pemsel* decision of the House of Lords, is usually cited as an authority on the four heads of charity, or on the general applicability to income tax legislation of the law of charitable trusts. In fact, it may also be the earliest authority on the harmonization of charity-law sources in a multi-jural state. In *Pemsel*, the taxpayer, a Scottish church, challenged the commissioners' denial of a refund of tax paid under the Income Tax Act, 1842 (which applied throughout the United Kingdom) in respect of income devoted in trust to missionary activities. In the commissioners' view, the purpose of supporting missionary establishments among heathen nations was not, in Scotland, a "charitable purpose" within the meaning of the Act. The basis of their argument was that the Statute of Elizabeth had been enacted for England only, and that a narrower concept of charity had historically been articulated in the Scottish courts.²⁸²

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

Where there are two countries with different systems of jurisprudence under one legislature, the expressions in statutes applying to both are almost always taken from the language or style of one, and do not always harmonize equally with the genius or terms of both systems of law. . . .

[Y]ou must take the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries. Thus you get what Lord Hardwicke calls "a consistent, sensible construction." A simpler plan is now recommended. Though the words have a definite legal meaning in England, you must not, it is now said, look at that meaning unless it be in vogue north of the Tweed. You must put out the light you have, unless it penetrates to the furthest part of the room. That was not Lord Hardwicke's view. He seems to have thought reflected light better than none.²⁸³

282 *Pemsel*, supra note 3, at 534-36.

283 *Ibid.*, at 579-80.

These sentiments are certain to resurface, in the event that the harmonization of Canada's registered charity scheme is ever given serious attention or thought. Those who believe, like Lord Macnaghten, that the concept of charity "properly belongs" to the English common-law tradition might consider that Scotland now has its own statutory definition of charity, which differs from the common law and the English statutory definition in several respects.²⁸⁴ The multiplicity of legal sources on the meaning of charity in Canada may well serve to complicate the task of Parliament as it considers the future of Canada's charitable sector, and of section 149.1 and subsection 248(1) of the ITA. But surely, if the unique Canadian project of harmonizing our federal legislation is based on any underlying conviction, it is that several reflected lights are better than one.

284 The Scottish Act, *supra* note 279, section 7. This statute, for example, introduces a concept of "disbenefit," which is now being considered by the English Charities Commission in relation to the English concept of "public benefit."