Written Submission to the Senate Special Committee on the Charitable Sector
Submitted by Kathryn Chan on 22 October 2018

I. Introductory Comments

Thank you for the invitation to appear before the Senate Special Committee on the Charitable Sector. I am an Assistant Professor at the University of Victoria Faculty of Law and a practicing member of the Law Society of British Columbia. I have spent about 15 years practicing, researching and teaching the law of charities. I have written extensively on the regulation of nonprofit activity, including a book on charity regulation that compares Canada’s “tax-based” regulatory system to the “civil” charity law regime in place in England and Wales.¹ I am pleased that this Committee is taking a broad look at the federal and provincial laws and policies governing charities and other nonprofit organizations in Canada, and I am honoured to contribute to the process.

The Committee has asked me to comment on a paper I published in 2016 entitled: “The Function (or Malfunction) of Equity in the Charity Law of Canada’s Federal Courts”. I have inferred from that request that the Committee is interested in addressing the following question: Why has the legal definition of charity failed to develop in the Federal Court of Appeal? I have written three scholarly papers that respond, in different ways, to that question.² I have provided the Committee staff with these papers, and will draw from all three in my oral comments before the Committee.

II. The Federal Court of Appeal record on registered charity appeals

Where an organization objects to a decision of the Minister of National Revenue to refuse to register that organizations as a charity or to revoke its registered charity status, it can challenge the Minister’s decision by filing a written Notice of Objection. If the Minister subsequently confirms her view that the entity is not charitable, the decision may be appealed to the Federal Court of Appeal. In theory, this procedure provides an opportunity for a superior court of record to incrementally develop the meaning of the statutory terms ‘charitable purpose’ and ‘charitable activity’ by reference to the common law. For historically, within the common law tradition, it

was the courts that kept the law of charities “moving” by declaring new projects to be charitable on the basis that their purposes were a reasonable extension of, or analogous to, existing charitable purposes.

However, parties that have sought to rely on this common law methodology at the Federal Court of Appeal have had very little success. According to a report of the Voluntary Sector Initiative, the Federal Court of Appeal heard 28 appeals of Charities Directorate registration decisions between 1980 and 2002. Of these, only five were successful, and “nearly half...produced judgments that were brief, dealt with procedural issues, or otherwise did not produce precedents in charity law.” Since VSI concluded, the situation has only become bleaker: indeed, no not-for-profit organization has won a charitable registration appeal in over twenty years. The not-for-profit sector has lost some significant battles in court: the Federal Court of Appeal has held that the prevention of poverty is not a charitable purpose, and neither is the production of in-depth news and public affairs programming on a not-for-profit basis. The long list of losses appears to be wearing down the not-for-profit sector and the charity law bar; in the last few years, a dwindling number of charitable registration decisions have been appealed. The cumulative result of the dramatic record of losses at the Federal Court of Appeal has arguably been the near eradication, in Canada, of the common law method of developing the legal definition of charity by judicial analogy.

III. Why has the legal definition of charity failed to develop in the Federal Court of Appeal?

a. Failure to incorporate the “favourable” principles of equity

A first reason why the legal definition of charity has failed to develop within the registered charity jurisprudence is that the Federal Court of Appeal has not incorporated into its decisions the equitable principles that historically oriented the common law courts towards the effectuation of charitable gifts.

The common law of charities evolved in the English Court of Chancery. A central feature
of this tradition was that it recognized and protected the public interest in charity property. In recognition of this public interest, the Court of Chancery subjected charitable trusts and corporations to a standard of control and scrutiny even more rigorous than that applicable to private trusts. The Court also developed a number of curative principles that oriented the court towards the effectuation of charitable gifts. The equitable rule of widest application is that the court “leans in favour of charity”. For example, where a gift is capable of two constructions, one of which would make the gift void and the other of which would constitute an effectual charity, equity directs the court to prefer the “benignant” construction. Where the terms of an otherwise charitable trust allow for the possibility of improper action on the part of trustees, equity allows the court to presume that the trustees will act in a lawful and appropriate way.

The Federal Court of Appeal has not adopted a practice of applying the equitable doctrines of the law of charities to charitable registration appeals under the Income Tax Act. This, in my view, has contributed to the long record of losses by not-for-profit appellants and the stultification of the legal concept of charity. However, the Court does have the authority to take a more ‘curative’ approach. The Federal Court of Appeal is constituted as a court of equity under the Federal Courts Act and may, subject to any specific statutory provision to the contrary, exercise equitable powers and remedies in determining an issue properly before it. There is no indication in the Income Tax Act that Parliament intended to curtail the Court’s application of this equitable jurisdiction in registered charity appeals. To the contrary, the Supreme Court of Canada found in Vancouver Society v MNR that the Act “appears clearly to envisage a resort to the common law for a definition of ‘charity’ in its legal sense as well as for the principles that should guide us in applying that definition.” However, if Parliament were to revise the registered charity provisions, it might consider more clearly signaling its intention that equitable principles be applied by the courts in registered charity appeals.

The Tax Court of Canada is not constituted as a court of equity, but it does recognize and apply equitable principles when considering appeals of income tax assessments. Therefore, shifting jurisdiction over registered charity appeals from the Federal Court of Appeal to the Tax Court would not necessarily preclude the operation of the curative principles of the law of charities in registered charity appeals.

b. The “judicial review” features of registered charity appeals: deference & the paucity of the evidentiary record

A second reason why the definition of charity has failed to develop in the Federal Court of Appeal relates to the “judicial review” character of registered charity appeals. Like many other statutory

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8 This argument is explored at greater length in Chan, “Structural Obstacles” (n2).
appeals from the decisions of administrative decision-makers, registered charity appeals are governed by administrative law review, not (judicial) appellate review principles. These principles require the courts to accord a significant amount of deference to the charitable registration decisions of the Minister of National Revenue. They also limit the evidentiary record upon which the Federal Court of Appeal decides charitable registration appeals.

Canadian administrative law establishes two different standards for the judicial review of administrative decisions: correctness and reasonableness. In the context of the registered charity regime, the Federal Court of Appeal has held that “extricable questions of law, including the interpretation of the Act, are to be determined on a standard of correctness”, while “questions of fact or of mixed fact and law, including the exercise of the Minister’s discretion based on those facts and the law as correctly interpreted, are to be determined on a standard of reasonableness.”\(^9\) The Federal Court of Appeal has held that reasonableness is the appropriate standard when the question is “whether activities are charitable”\(^10\), whether a registered charity has made a gift to a non-qualified donee,\(^11\) and whether a registered charity has failed to devote its resources to its own charitable activities.\(^12\) Where an organization’s charitable registration has been refused or revoked for multiple reasons (the usual situation), the Federal Court of Appeal has consistently held that the appellant must demonstrate that the Minister acted unreasonably in respect of each ground.\(^13\) The deference accorded to the Minister creates a major disincentive for non-profit organizations to appeal charitable registration decisions, and contributes in this way to the ongoing stultification of Canadian charity law.

The “judicial review” character of registered charity appeals also affects what evidence is heard and considered by the Federal Court of Appeal. Ordinarily, in the appeal of an income tax assessment, the Tax Court determines the correctness of the assessment on the basis of a trial at which both parties have the opportunity to present documentary and oral evidence.\(^14\) However, the Income Tax Act stipulates that the Federal Court of Appeal must hear and determine charitable registration appeals “in a summary way”.\(^15\) Unlike most tax appeals,

\(^9\) Prescient Foundation v Canada (MNR), 2013 FCA 120; add cases that have followed it.

\(^{10}\) Fuaran Foundation v Canada (Customs & Revenue Agency), 2004 FCA 181, 2004 CarswellNat 1367, para 10.

\(^{11}\) Opportunities for the Disabled Foundation v Minister of National Revenue, 2016 FCA 94, 2016 CarswellNat 844 [“Opportunities”].

\(^{12}\) Public Television Association of Quebec v Minister of National Revenue, 2015 FCA 170, 2015 CarswellNat 3184 [“PTAQ”]. But see Action des Chrétiens pour l’Abolition de la Torture c R, 2002 FCA 499, 2002 CarswellNat 3598 [“ACAT”] at paras 23-24, where the FCA held that the characterization of a registered charity’s activities as “political” was a conclusion of law that was subject to a correctness standard.


\(^{15}\) ITA, ss 172(3), 180(2), 180(3).
therefore, charitable registration appeals are decided on the sole basis of the evidentiary record that was before the decision maker.16

Like the Canadian law of standard of review, the rules governing the evidentiary record in charitable registration appeals have had a stifling effect on the judicial development of the law of charities. As the Canadian Bar Association has previously noted in a submission to the Minister of Justice, the inability of parties to adduce *viva voce* or affidavit evidence tested by cross-examination in charitable registration appeals significantly limits their ability to present a complete record on which all relevant factual and legal issues may be argued.17 This limitation has a particularly severe impact on non-profit organizations seeking to obtain registered charity status, since many non-profit organizations lack the knowledge and financial resources to anticipate and plan for the evidentiary record that will support their position on appeal.

c. The absence of any public officer representing the public interest in charity.

A third reason why the definition of charity has failed to develop in the Federal Court of Appeal relates to the absence of any public officer representing the public interest in charity property.18 Historically, in the English common law tradition, it was common for the Attorney General to intervene in legal proceedings concerning the legal definition of charity. The Crown’s chief legal officer did not advocate for either party to the dispute. Rather, he appeared because the common law recognized that every member of the public has an interest in the use of charitable property, and the Attorney General is the most appropriate figure to act on the public’s behalf.

The broad public mandate of the English Attorney General in matters affecting charity is not carried out by any of her Canadian counterparts under the registered charity regime. Because the management of charities is a matter of exclusive provincial jurisdiction under the Constitution of Canada, the Crown in right of Canada did not inherit the English Crown’s protective, prerogative powers with respect to charities. The Crowns in right of the provinces *do* enjoy the prerogative powers associated with the common law of charities, but have not adopted the practice of instructing their chief legal officers to appear in charity proceedings.19 In practice, therefore, the Attorney General of Canada acts as advocate for the Minister of National Revenue in appeals of her charitable registration decisions, while the provincial Attorneys General do not

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16 *Humane Society v MNR*, 2013 FCA 154 (interlocutory order of Sharlow JA) at para 17.
18 This argument is explored at greater length in Chan, “The Role of the Attorney General” (n 2).
19 *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566 (HL) 579.
appear at all. The result is that no public official acts as a protector of charity in general, or a representative of the public interest in charity property, in any federal proceeding affecting the scope of the legal definition of charity.

The impact of omitting this public interest representative from charities litigation in Canada becomes clearer when one considers some of the positions taken by the federal Crown in charitable registration appeals. In Canadian Magen David Adom for Israel, for example, the Crown took the position that a Canadian charitable organization could not provide emergency medical assistance in the Occupied Palestinian Territories without offending Canadian public policy.\(^\text{20}\) In a subsequent appeal involving online religious programming that was abandoned before trial, the Crown intimated that the Charter guarantee of freedom of religion was not relevant to the scope of the “advancement of religion” category at common law.\(^\text{21}\) During the AYSA litigation, the Crown argued that the common law definition of charity should not be expanded to encompass amateur sport on the basis that injuries to participants involved in “dangerous” sports activities could cost Canadian taxpayers money.\(^\text{22}\) Finally, in Travel Just, the Crown argued that charity is a public law concept, and therefore a broader, civilian concept of charity could not possibly apply in the province of Quebec.\(^\text{23}\)

Given its role as the advocate for our federal tax authority, it is not surprising that the Crown in right of Canada often takes aggressively anti-charity positions in registered charity appeals. However, we should not underestimate the impact that this advocacy has had on the shape of Canada’s charitable sector, given the judiciary’s respect for the judgment and experience of the chief law officer of the Crown.\(^\text{24}\) If we are going to keep relying on the judiciary to develop the legal meaning of charity in Canada, we may need to institutionalize the participation of another public actor in registered charity appeals, who can represent the broader public interest in effective and properly administered charity property.

\(^{20}\) Canadian Magen David Adom, supra note at para 59. Sharlow J.A. rejected this argument, stating that there was “no logic in the proposition that the provision of emergency medical assistance can be a charitable activity in downtown Tel Aviv, but not in the Occupied Territories.

\(^{21}\) Netaccountability v. CRA (Factum of the Appellant at paras. 64-68 and Factum of the Respondent at paras. 87-89).

\(^{22}\) AYSA, (Court of Appeal) supra note 5 (Factum of the Respondent at para. 49).

\(^{23}\) Travel Just, supra note 5 (Factum of the Respondent at paras. 26-28).

\(^{24}\) See Toronto Aged Men’s and Women’s Homes v Loyal True Blue and Orange Home (2003), 68 OR (3d) 777 at para 6, where Cullity J noted “the deference that the court will ordinarily show to the advice it receives from [the Attorney General].”