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UNIFORM LAW CONFERENCE OF CANADA

CHARITIES PROJECT - INTERIM REPORT
AND
ISSUE SPOTTING DOCUMENTS

Presented by
Peter J. M. Lown, QC
ULCC

Edmonton, Alberta
Presented to the Civil Section
August, 2022

Charities Project - Interim Report
Yvonne Chenier Q.C. - Peter Lown Q.C.
June 2022

[1] I am pleased to provide this interim report on behalf of myself and my colleague, Yvonne Chenier, on this important project.

[2] This brief report will situate the reader in the accompanying documents, and provide a context for our oral presentation in Edmonton in August.

[3] This project was adopted by the Advisory Committee, and by the Conference, at the second time of a request from the Canadian Bar Association National Section on Charities and Not for Profit Law. At the first request, amply described and supported, there were questions about whether the goal of reform was achievable in the climate of the time – 5 to 6 years ago. The request was later updated and resubmitted. At that time, it was concluded that the climate was more conducive to the project. The topic was approved as a joint project between the CBA and ULCC. Yvonne Chenier was named by the CBA Charities and Not for Profit Law Section as their project lead and, by default, I took on the role for ULCC.

[4] This is a large project comprising a large number of subtopics, all of which have a common thread, but which are not homogeneous. The challenge for the Co-chairs was to bring structure to the development of the topics, their description and their priority.

[5] Attached to this report are 11 “issue spotting” documents, Appendix B, developed by members of sub-groups of the CBA National Working Group and a template for how the sub-groups responsible for them might describe the topic and the issues, Appendix A.

[6] Based on these documents the CBA National Section and the ULCC Working Group agreed on the first three topics to be addressed. There are two large topics (redefinition of charity, and the appropriate place and method for regulating the charitable sector) which will dominate any harmonized reform activity in this area. They are the linchpins and it is best to deal with them early rather than late. The third is an emerging area (hybrid organizations).

[7] With so many different subgroups it is essential to have consistent methodology, and the Co-chairs are developing a draft template (order of operations) for each subgroup to follow. Without the template it will be impossible to coordinate and synthesize the finished product. Managing such a complex process over a multi-year period will demand discipline both from the working groups and our management team.

[8] As can be seen from the authors of the issue spotting documents and members of the subgroups, and from the membership of the ULCC committee, the project is plugged into the charitable sector. However, it is important to the project receive general information from Conference delegates about the charitable sector in their jurisdiction. What follows is a series of questions which the Co-chairs would like delegates to consider, so that your views can be incorporated into our discussion in August.

1. The Definition of Charity.

[9] The four heads of charity are old and specific, and have been updated, for example, in the United Kingdom. In Canada, there is no definition of charity in the fiscal statute that grants tax exempt status, the ability to issue tax deductible receipts and regulates them i.e., the Income Tax Act.

[10] Has there been discussion in your jurisdiction about whether the definition excludes activities that ought to be included – is the definition too restricted or in some areas over inclusive? Are you aware of examples where charitable activities have been impacted by the definition? Are you aware of activities which purportedly meet the definition but have been questioned? How does the not-for-profit sector in your jurisdiction view the definition?

2. The locus for regulation of the Charitable Sector

[11] Many jurisdictions default to the Canada Revenue Agency's determination of whether a body should be granted charitable status. Some Jurisdictions regulate fundraising activities or the ability of organizations to participate in a lottery or similar activity.

[12] Does your jurisdiction regulate any aspect of the charitable sector, and if so, who is responsible? If greater regulation were in order, who would or should take on that role? To what extent do charitable activities contribute to the provision of regular services by other government departments such as health or education?

3. Hybrid Organizations.

[13] The phenomenon of mixed charitable and commercial activities is new – as distinguished from administrative and financial support for the running of the charity. These organizations are sometimes referred to as "social enterprises" but there is no commonly accepted definition and they are not referred to at all in the fiscal framework in the Income Tax Act

[14] Are you aware of any hybrid organizations or activities, and if so, has the hybrid nature caused any issues or difficulties? Does the definition of charity provide any lines of demarcation?

[15] Your input on these questions is crucial in setting out the landscape for harmonized reform across the country. It is important to identify any "hot issues" or "sleeper issues" so that the sub groups can be comprehensive and cogent in their recommendations.

[16] Thank you for your attention and for your research and inquiries on the three issues set out above. Of course, by August we may have some updated information to report. We hope that our oral presentation will be an interactive and informative session.

[17] The ULCC Working Group consists of:

Peter Lown Q.C Chair
Maya Cachecho Université de Montréal
Mark Gillen University of Victoria
Kelly Hazlett Government of British Columbia
Scott Hood Government of Alberta
Sointula Kirkpatrick Government of British Columbia
Cynthia Spencer Government of Ontario
Darren Thomas Government of Alberta

Clark Dalton QC ULCC

Respectfully submitted,

Peter J. M. Lown Q.C.

APPENDIX A

CBA/ULCC Charities Project

Issues Template

The co-chairs have developed a chart consisting of three categories and various sub topics under each category. In order to assess the relevance and priority of the various sub topics, it is essential to have relatively even and uniform understanding and descriptions of the topics.

At this stage, a thumbnail sketch of the issue and area is all that is required. Further research and analysis comes later.

The following five headings are all required fields, so that we can carry out a full assessment.

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

None of this requires a treatise. Follow the order of the headings, a two-page document should more than suffice. If you feel there is relevant information outside the four headings, add it as a postscript.

APPENDIX B

CBA/ULCC Charities Project
Issue Spotting Documents

CBA/ULCC Charities Project

ASSIGNED SUBTOPIC: The Definition of Charity
CBA committee MEMBER: Susan Manwaring

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

As indicated in the example above, many activities currently pursued by public benefit organizations are charitable and being pursued for public good but it is not obvious that they fit within the common law definition of charity. The nature of the common law definition is that, it is supposed to expand and change as society changes. The difficulty is that the common law often takes time to catch up.

Canadian common law jurisdictions have either enacted no legislation in the charity area or, as in Ontario, have enacted legislation that fails to modernize the law and reflect a range of current issues. By contrast, the four jurisdictions of the United Kingdom, Australia and the New Zealand have adopted modern and contemporary charity legislation. England and Wales, for example, passed overhauling legislation in 1960, 1992 and 2006, culminating in the *Charities Act*, 2011, dealing with the subject-matter. The consequence of not having adopted a modern legislative definition in Canada is that it may take even longer to modernize the definition of charity because we continue to rely on the development of the common law. New cases in other jurisdictions which decide issues related to the definition will now do so in the context of the new legislation and thus these decisions can be distinguished when dealing with the issue in the Canadian courts. This means the evolution of the common law in Canada will be very slow because there are very few cases that ever make it to a Court to assist with the advancement of the common law in Canada. This is partially because of the nature of the judicial review at the federal level and also because, as noted below, most provinces take a very hands-off approach to charity issues.

The other major problem is that *Constitution Act, 1867* gives legislative authority over charitable property to the provinces but, in the main, the provinces historically have left the regulation of the charitable sector to the federal authority. The federal authority possesses jurisdiction solely under its taxing power. It has no mandate or power to preserve or protect property devoted to charity. This power belongs to the provincial Crown as *parens patriae*, which may or may not be exercised in a particular province and, if exercised, may not be on a formal basis.

The result is that the problem of what is considered charitable is relevant in all jurisdictions but for different reasons. And the different jurisdictions in Canada have been known to apply different definitions in the case decisions.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

The response to this problem needs to be a legal one. It cannot be resolved with education. Arguably the Courts could modernize the definition through case law but the reality is that there are very few cases that ever make it to a Court to assist with the advancement of the common law. And these cases are primarily charitable registration cases which are decided by the Federal Court of Appeal on a judicial review basis. This makes it even more difficult to advance the law because of both the standard of review in these cases and the fact the Federal Court of Appeal has stated on more than one occasion that it is its view that Parliament should address the need for change, not the Courts.

And that is just the federal level; defining charity at the provincial level uniformly does not mean it will be accepted as changed at the Federal level and vice versa. A legal change is needed and a uniform approach will be required to make it work. Most provinces take a very hands-off approach to charity issues. Arguably the law could be expanded at the provincial level but that is not going to happen any time soon.

Who is impacted by the problem?

Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

If the definition was modernized and more certain, the sector as a whole would benefit. The primary direct beneficiary of proposed uniform legislation or advancement of the common law would be the charities themselves; an indirect benefit would be proffered on the entire charitable giving community in common law Canada, as well as to those who decide court applications and advise charities and the public. That said it is likely that few existing organizations will see the development as relevant to them but a change could have broad impact over time.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

Finding a way to take cases to the Courts on a more regular basis (which happens in Australia for example) could help if the cases were decided at a level that would bind the provinces. Otherwise, the adoption of a statutory definition in Canada should be the subject of debate and consideration. In defining ‘charity’, whether public benefit is an essential component, and whether a charitable purpose or object that falls within the concept of ‘charity’ can in fact be contrary to the interests of the public, are issues not yet considered in Canadian case law.

As stated above, finding a way to modernize whether through case law or legislation needs to grapple with the issue of how it can be done because of the constitutional jurisdictional problems. This is no small issue.

Benefits of solving the problem.

This is a bookend to the description of the problem. What benefit would the solution of the problem bring - *more certainty, less litigation, more satisfied participants?*

The constitutional question creates some difficulty. That said, it is clear today that a modernized more current definition would be helpful. A legislative solution would have to be adopted by the provinces and the federal government to avoid it creating further confusion and difficulty for charities and their professional advisors.

CBA/ULCC Charities Project

ASSIGNED SUBTOPIC:	**The body responsible for overall supervision of charities - the courts or a customized provincial agency**
CBA committee MEMBER:	**Florence Carey**

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER: There is no single body which is responsible for the overall supervision of charities. The primary regulator is the Charities Directorate of the Canada Revenue Agency (the "CRA"), which works to enforce the terms of the federal *Income Tax Act* (the "Act").

Although the regulation of charities is jurisdictionally a provincial concern, the federal regulators have occupied the field. They adjudicate applications for charitable status and determine what is charitable, require the provision of information through the filing of the T3010 information return, perform an audit function and, where breaches of the rules or deficiencies are other found, impose sanctions prescribed in the Act up to and including revocation of charitable status. Because there is minimal regulation or supervision of charities at the provincial level, the federal regulators' reach extends beyond income tax measures. The federal regulators have rules prohibiting certain individuals from being directors of charities, regarding fundraising and other revenue-generating activities, and regarding how a charity can carry on its activities (the "direction and control" rules). The CRA also publishes guidance documents and provides education to the sector on these and a whole range of issues.

A central regulator such as the CRA may be advantageous from a consistency standpoint, particularly as many charities engage in activities all across the country. However, any federal regulator's ability to regulate charities is subject to constitutional challenge. In addition, with a focus on the Act, the CRA has no overarching mandate to govern holistically and with a view to the best interests of the sector as a whole, nor to ensure consistency and harmony between the various federal and provincial rules. As noted in Report #1 from the Advisory Committee on the Charitable Sector, "…the sector is not "seen" outside of the CRA and Charities Directorate.

There is no central federal policy unit or cross-cutting ministerial mandate for the charitable and nonprofit sector."

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

ANSWER: These issues are foundational, and must be solved by a legal response, and new legislation is necessary.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

ANSWER: All charities, and all groups who are applying for charitable status in order to do charitable work. All professionals who help charities fulfil their purposes while complying with the rules by creating multiple corporate structures and burdensome written agreements to allow them to do so.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

ANSWER: Given the magnitude of the charitable sector and the need for integrated reform, a "home in government" (the "Federal Department") which has a broader mandate than regulating tax-related matters should be an imperative. One of the ACCS's first three recommendations was for a "home in government" which will "provide a place within government for comprehensive policy development" and "advocate on behalf of this sector when broader government policies and programs are being considered, acting as a connector and communicator with other government departments."

The charity law, from the definition of "charity" through how charities are registered, how they can generate revenue, and how they can fulfil their purposes, is ripe for legislative reform. This full-scale reform could not be accomplished solely through amendments to the Act, and would be best accomplished through the development and adoption of standardized legislation in all jurisdictions across Canada. In the absence of a Federal Department or, ideally, working with a Federal Department, the ULCC could play a very significant and impactful role in recommending standardized legislation for adoption throughout the country that would dovetail the legitimate laws of the federal regulator as regards tax-related matters.

The enactment of provincial legislation in the provinces and territories could also lead to the development, as there is in the case of Ontario's Public Guardian and Trustee, of customized provincial agencies which would have supervision over charities in each province. In that event, it would be desirable for any provincial agencies to coordinate with the Federal Department and each other to reduce red tape and the compliance burden on charities, particularly those that operate in more than one province.

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

ANSWER: Covid-19 has brought into sharp focus the importance of the charitable sector, and at the same time made greater demands on charities and the whole volunteer sector. It is time to "rebuild better". A significant overhaul of the law involving charities and the establishment of a "home in government" would demonstrate the importance of this sector, and provide at the same time better and more integrated support and oversight. Anything which helps this vital and resilient sector to better succeed will generate significant returns for those who need it most.

CBA/ULCC
Charities Project
Issues

ASSIGNED SUBTOPIC: Hybrid Organizations

CBA committee MEMBER: Sarah Fitzpatrick

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER: A hybrid organization is an organization that combines social impact and profit generation. Under the *Income Tax Act* (Canada), registered charities have restrictions on the types of businesses they can carry out and non-profit organizations cannot have a for profit purpose. Accordingly, if an organization wishes to carry out a profit generation activity with a social impact purpose, the vehicle that is often used is a 'standard' for-profit company. The problem with using a company is that, even if the original shareholders wish it to have a social impact, there is no requirement for it to be operated with a social impact in the long-term, and the social impact purpose can be lost over time.

Only a handful of Canadian jurisdictions have enacted legislation that allows for the incorporation of a hybrid organization. These are:

1. British Columbia, which introduced the community contribution company ("C3") in 2013 and the benefit company in 2020; and
2. Nova Scotia, which introduced the community interest company ("CIC") in 2016. A private member's bill on benefit companies has also been introduced in the National Assembly of Quebec.

Of these, the BC C3 has been around for the longest period. Only a handful of the C3s that were incorporated are still active. They are not attractive options, with additional reporting requirements and subject to restrictions on their assets, but are treated the same as for-profit corporations for tax purposes. The Nova Scotia CIC is similar in concept, and both the C3 and the CIC are modeled on UK community interest companies.

The BC benefit company and the proposed Quebec benefit company are modeled on the US benefit company. The US benefit company was originally designed to address concerns under American jurisprudence that directors were duty bound to maximize profit for shareholders and prohibited from taking into account other interests. However, Canadian case law on directors' duties has evolved differently, permitting directors to take into account stakeholder interests.

The issues for hybrid organizations include: (i) a lack of legal structures specifically designed to combine social impact and profit generation; and (ii) inconsistency in the legal structures that are available; and (iii) their treatment for income tax purposes. Further, careful consideration needs to be given to what lessons we have learned from the existing Canadian hybrid organizations and whether changes need to be made to make them more suitable (for e.g. preferential income tax treatment or changing certain restrictions) or whether another model would be more appropriate for Canadian hybrid organizations. Lastly, we need to consider whether preferential income tax treatment is necessary for hybrid organizations to be sustainable or develop in any kind of meaningful way.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

The response would be to create legislation on hybrid organizations. For the jurisdictions that have already adopted existing legislation, this may require amendment to that legislation. Preferably, there would be development and adoption of standardization of legislation across Canada, which facilitates the availability of hybrid organizations in all jurisdictions but also consistency between jurisdictions. Further, if there is consistency in hybrid organizations across Canada, this would facilitate the development of any preferential tax legislation for these organizations, if such legislation is part of the response.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

Organizations that wish to carry out business with a social impact are impacted by the problem. Those who should be consulted include (i) for-profit business who are interested in their social impact; (ii) non-profit organizations and charities; (iii) the Canadian legal community; and (iv) legal professionals in other jurisdictions which have experience with hybrid organizations.

When the BC benefit company was introduced, there was opposition from some members of the legal community. The primary concern was that the benefit company was based on the US model, which was designed to respond to particular concerns from American jurisprudence on director duties. According to these advocates, Canadian jurisprudence already permitted directors to take into consideration the interests of stakeholders when carrying out their duties (*BCE v. 1976 Debenture Holders*, 2008 SCC 69). It is important to consider the concerns that have been raised.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and

after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

The existing Canadian hybrid organizations should be analyzed to determine whether any lessons can be learned. There is a lot of interest in hybrid organizations, however the existing structures (at least the C3s and CICs) have had only minimal impact. This area would benefit from uniform legislation for all Canadian jurisdictions. In addition, consideration should also be given to whether any legislative amendments should be proposed to existing corporate legislation regarding director duties, either to clarify the duties of directors generally or to ensure that the introduction of hybrid organizations, which have additional director duties, do not result in the duties for directors of 'standard' corporations being re-interpreted in a restrictive manner.

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

The benefit of solving the problem include clarity and consistency in the types of available hybrid organizations (which reduces jurisdiction shopping but also creates consistency across Canada). In addition, proper consideration needs to be given to what type of hybrid organization(s) are best suited to the Canadian context and meet the need.

CBA/ULCC Charities Project

ASSIGNED SUBTOPIC: The Doctrine of *Cy-Près*

CBA Committee Member: Anna Naud

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity _ both regulators and participants suffer from the uncertainty and the resulting inefficiency.

1. Use of the Doctrine to Vary Trust Objects

Unless a donor restricted charitable gift includes a power to vary, a gift recipient is unable to vary the use of the gift without either applying to the courts for a *cy-près* order or invoking any other limited option available (for example in Ontario, proceeding on the basis of a consent order from the Ontario Public Guardian and Trustee under Section 13 of the *Charities Accounting Act)*. The *cy-près* doctrine involves the ability of the court to exercise its inherent jurisdiction to supervise charities and trusts by imposing trust purposes in place of those that were originally chosen by the donor or testator. The purpose of the doctrine is to ensure that the objects of a trust are not frustrated by the trust's administrative provisions. Generally, the *cy-près* jurisdiction is only exercisable if: (i) a general charitable intention of the donor can be found; and (ii) the charitable objects set out by the settlor are either impossible to carry out or are impracticable (i.e. inconvenience is not enough of a reason to trigger the doctrine). The difficulty of determining a general charitable intent (for example, as part of a generic public appeal fundraising campaign), or in proving impossibility or impracticability, has the potential to stifle the courts from being able to vary trust purposes, thereby leaving trust funds inaccessible.

2. Use of the Doctrine to Award Class Action Settlements

In addition to being used by courts to vary the use of trust funds, the *cy-près* doctrine has been invoked by way of analogy by the Canadian courts as a class action settlement distribution plan in situations where it has not been possible to give the money directly to class members or where funds have been left unclaimed. Various courts have opined that settlement payments should be directed towards organizations that are linked in some way to the plaintiffs or to the issue at hand or to organizations that would use the funds to provide a general benefit. At present, certain provincial *Class Proceedings Acts* provide little or no guidance on when the *cy-près* doctrine should be invoked, and if invoked, to whom a settlement payment should be distributed, thereby allowing for the potential lack of use, or self-serving misuse, of the doctrine.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

1. Use of the Doctrine to Vary Trust Objects

The court's *cy-près* jurisdiction has largely been derived from common law. However, in 2012, the Uniform Law Conference of Canada adopted and recommended the *Uniform Trustee Act* as a sample statute for provincial enactment that extends a court's inherent *cy-près* jurisdiction. As a result, common law jurisdictions across Canada currently have the option to enact or make amendments to existing legislation modelled on the *Act;* New Brunswick, for example, enacted its *Trustee Act* in 2015. Due to the existence of the *Uniform Trustee Act,* no further actions are recommended at this time to uniformly regulate the application of the *cy-près* doctrine to donor restricted charitable gifts.

2. Use of the Doctrine to Award Class Action Settlements

The various *Class Proceedings Acts* in existence across Canada are already being updated, on a piecemeal basis, to provide clarification on the application of the *cy-près* doctrine. For example, in 2018, the British Columbia *Class Proceedings Act* was updated to reflect that courts must order that, if all or any part of an award or settlement funds have not been distributed within a time set by the court, 50% of the undistributed amount be distributed to the Law Foundation of British Columbia, and 50% of the undistributed amount be applied in any manner that may reasonably be expected to benefit class or subclass members, including, if appropriate, distribution to the Law Foundation of British Columbia. As a result of the report released by the Law Commission of Ontario on July 17, 2019 entitled "Class Actions: Objectives, Experiences, and Reforms", in which the Commission recommended that the Ontario *Class Proceedings Act* be amended to provide clarity relating to the application of the *cy-près* doctrine, the Ontario *Act* was amended in 2020 to permit the courts to distribute an award to a registered charity or non-profit organization agreed on by the parties if doing so would reasonably be expected to directly or indirectly benefit the class or subclass members or, to Legal Aid Ontario, in any other case.

Given the fact that the courts are already applying the *cy-près* doctrine to class actions and opining on the factors to be considered when invoking such doctrine, and legislation is being gradually updated by different jurisdictions to provide comparable statutory guidance, no further actions are recommended at this time relating to uniformly regulating the application of the *cy-près* doctrine to class action settlements.

Who is impacted by the problem?

Any organization holding a donor restricted charitable gift that is unable to strictly comply with the trust purposes, and has no power to vary, can only use such funds (i) if it applies for a court order to vary the trust purposes and (ii) if the court is able, based on the facts of the particular situation, to exercise its *cy- près* jurisdiction. In many Canadian common law jurisdictions, the courts can only invoke the *cy- près* doctrine in limited circumstances, resulting in many donor restricted

charitable gifts being static. This inability to use funds negatively impacts both the organizations and the potential beneficiaries of the funds.

Without guidance on when and how the *cy-près* doctrine should be applied to class action settlements, the possibility exists that awards may be distributed to individuals or organizations not linked to the plaintiffs or to the issue at hand or may be distributed in a manner that would not be of general benefit, thereby negatively impacting both the plaintiffs and the community at large.

Potential solutions.

Model uniform legislation relating to the application of the *cy-près* doctrine to donor restricted charitable gifts already exists (i.e. the *Uniform Trustee Act*). In addition, the Canadian courts have demonstrated awareness and application of the *cy-près* doctrine to class action settlement awards, and the provincial *Class Proceedings Act* are being updated on an individual basis to incorporate language relating to the doctrine. Therefore, potential solutions have already been implemented or are in the process of being implemented; no additional solutions are required at this time.

Benefits of solving the problem.

The flexibility provided by the *Uniform Trustee Act*, if incorporated within the various provincial *Trustee Acts*, will enable the Canadian common law courts to vary the terms of donor restricted charitable gifts in additional circumstances, thereby allowing charities to apply trust funds that are currently blocked from usage to charitable purposes.

Guidance, through court decisions and statute, on when the *cy-près* doctrine should be invoked in class action settlement awards, and to whom such awards should be distributed, will reduce the time (and money) spent on disputes relating to the distribution of settlements, minimize the opportunity for legal counsel and/or the courts to choose settlement beneficiaries based on factors other than community benefit, and allow for class actions to have a positive outcome with broad impact.

CBA/ULCC Charities Project

ASSIGNED SUBTOPIC: Charitable Purpose Trusts

CBA COMMITTEE MEMBER: Terrance Carter

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER: The law of charitable purposes trusts is the source of most of the common law dealing with charity across Canada. Charitable purpose trusts are assisted or facilitated by trust law doctrines, such as the scheme-making powers of the court, including the doctrine of *cy-près*, exemptions from the beneficiary principle, and exemptions from the rule against perpetuities. The charitable purpose trust is subject to the regulation of fiduciary obligations provided under the general law of trusts, and it benefits from the provisions of the provincial Trustee Acts, such as the possibility of applying to the court for advice and direction.

The law of charitable purpose trusts has not been the subject of legislative revision to any significant degree. The doctrines mentioned above have been developed at common law over centuries to assist and facilitate charitable purpose trusts and their fiduciaries in order to fulfill the charitable intentions of their founders. The law involving charitable purpose trusts requires updating. In addition, some of the underlying ideas or policies need to be migrated to charitable purpose non-share capital corporations, the now-dominant form of organization in the charitable sector. In some cases, the facilitative relief available under the law of charitable purpose trusts should be more readily accessible or made available regardless of the form of organization. In other cases, doctrines may need to be expanded or made more flexible.

The *Christian Brothers* litigation, culminating in the decision of the Ontario Court of Appeal that permitted the exigibility of restricted charitable purpose trusts turns largely on the relationship of corporate purposes and corporately-administered trust purposes. British Columbia statutorily reversed any authority that the Ontario Court of Appeal decision had, or might have had, in B.C. The impact of the decision concerning the fundamental characteristics of charitable purpose trusts and whether a charitable corporation is a trustee remains unclear, causing considerable confusion for charities that needs to be resolved.

In addition, the differences between restrictive charitable purpose trusts, conditional gifts (both condition precedent and condition subsequent), precatory trusts, unrestrictive gifts, as well as grants and contributions are not well understood by the charitable sector. In fact there is significant confusion even among experts as to how to address these topics and what rules apply. In addition,

related topics, such as are endowments a type of charitable purpose trust and whether capital gains and/or original capital from the endowment can be expended in order to meet charitable purposes or fulfill statutory obligations, such as the disbursement quota under the *Income Tax Act,* need to be addressed.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

ANSWER: In general terms, the issue is that common law doctrines involving charitable purpose trusts require an overhaul and a restatement that the courts on their own are simply not equipped to provide. The urgency here is that the common law has failed to evolve at the pace of the world today and as such charities are burdened with outdated concepts as they try to do their work. The overhaul should be inspired by the facilitative trust law doctrines but should be broadened in their scope and made applicable to charities regardless of their form of organization. This can best be accomplished through the development and adoption of standardized legislation in all common law jurisdictions across Canada.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

ANSWER: All charities, both large and small that are the recipient of restricted gifts are impacted by charitable purpose trusts, as are donors, senior managers, officers, directors and professional advisers who have a vested interest in knowing that a charitable purpose trust has been properly established and complied with.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

ANSWER: Developing solutions to the problem requires a clear understanding of the historical context that gave rise to the need for charitable purpose trusts in the first place along with the development of accompanying facilitative doctrines that followed, and then see if there might be a better and more efficient way to achieve the "purpose" of charitable purpose trusts that can be used with any organizational form, whether it be corporate, unincorporated associations, joint ventures or trusts. organizational form, whether it be corporate, unincorporated associations, joint ventures, or trusts.

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring
- more certainty, less litigation, more satisfied participants?

ANSWER: A restatement of the law involving charitable purpose trusts would provide clarity in a confused area of the law, as well as provide certainty in drafting charitable purpose trusts and in understanding the consequences of failing to comply or in misapplying or in misdescribing such trusts.

CBA/ULCC Charities Project

ASSIGNED SUBTOPIC: Extra-provincial Registration

CBA committee MEMBER: Nicole D'Aoust and Kim Cunnington-Taylor*

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER: The extra-provincial registration rules differ immensely by province. Charities and not-for-profits often do not comply with the rules because it is too complicated to do so (i.e., they are unable to research and/or understand the rules), or they incur significant legal fees to help them comply. Many organizations do not know these rules exist. Below we have provided a brief example that illustrates how the rules differ between provinces. Note that the example only illustrates the differences between the regimes; it does not demonstrate how difficult it is for organizations to find information about registration and determine whether or not it applies to them.

Some of the provincial regimes require registration where the organization is operating in the province. Many organizations with virtual activities or that maintain websites struggle to determine whether they are "operating" in a province.

Organizations are also concerned about the wide range of consequences of non-compliance, which include fines and inadvertently making false statements to creditors or stakeholders that the organization is in compliance with all laws, rules, and regulations that apply to it. Many commercial landlords, funders, and insurers require charities to certify compliance or provide evidence of compliance. Organizations do not know how, or are afraid to approach governments to rectify past non-compliance.

EXAMPLE OF DIFFERENCES IN PROVINCIAL REGIMES

Nova Scotia

There is an extra-provincial registration regime in place in Nova Scotia, however, charities and not-for-profits are not required to register. Nova Scotia's *Corporations Registration Act* only applies to corporations with a profit purpose.

Ontario

In Ontario, federally and provincially incorporated not-for-profits and charities are exempt from registration under the *Extra-Provincial Corporations Act*. However, foreign corporations that carry on business in Ontario, including some not-for-profit organizations, must register under the Ontario *Extra-Provincial Corporations Act*; however, some foreign not-for-profit corporations are not required to register under the Ontario *Extra-Provincial Corporations Act*, which causes confusion. That said, federal and provincial charities and not-for-profits are required to register under the *Corporations Information Act* within 60 days of operating in Ontario.

Saskatchewan

In Saskatchewan, a not-for-profit corporation or charitable organization is required to register as an extra-provincial corporation if it: (1) holds any title, estate or interest in land registered in the name of the corporation under the *Land Titles Act*; (2) has a resident agent or representative or maintains an office, warehouse or place of business in Saskatchewan; (3) is licensed or registered or required to be licensed or registered under any statute of Saskatchewan entitling it to do business or to sell securities of its own issue; or (4) otherwise carries on business in Saskatchewan.

British Columbia

An extra-provincial corporation is deemed to "carry on activities" in British Columbia if: (1) its name is listed in a telephone directory, for any part of BC, in which an address or telephone number in BC is given for the extra-provincial non-share corporation; (2) its name appears or is announced in an advertisement in which an address or telephone number in BC is given for the extra-provincial non-share corporation; or (3) it has, in BC: (i) a resident agent or employee, or
(ii) an office or similar place from which it carries on activities.

Legal response.
We want to encourage compliance with extra-provincial registration requirements. Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

ANSWER: Organizations need to understand why these rules are in place and why governments want to encourage compliance with them. It is our understanding that the original purpose of the business registration regime was to tax and regulate for-profit businesses. Any reform of the not-for-profit and charity registration regime should include a clear purpose for registration.

It is our view that compliance would improve significantly if uniform legislation was adopted. Uniform statutory definitions would be easier for organizations to understand than judicial interpretations. Alternatively, detailed educational policies in conjunction with less detailed uniform legislation could also work.

Who is impacted by the problem?

Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

ANSWER: A large disparate group of organizations is affected. We suspect that if all provinces are able to collect the same or a similar licence fee, they are not likely to oppose addressing the problem. If governments have different purposes for requiring registration (i.e., they use the information gathered from the registration process in other programs, for example) they may oppose changes. That being said, we suspect that any such issues can be addressed administratively.

Potential solutions.

How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

ANSWER: The solution, in our view, is for the provinces and territories to work together to clarify the purpose of the legislation and make it uniform.

Benefits of solving the problem.

This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

ANSWER: The benefit is that organizations will be able to save time and money. They are spending a lot of resources currently on compliance. Charities often discover at the last minute that they are not in compliance and this can cause significant funding and program delays.

*This document was prepared with the assistance of Katrina Kairys (associate) and Caitlin Lee (articling student), Miller Thomson LLP.

CBA/ULCC
Charities Project

ASSIGNED SUBTOPIC: Mixed Purposes and Charitable

Purposes CBA committee MEMBER: Kathy Hawkesworth

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

A) Updating the definition of charitable purposes:
What is included in charitable purposes, by common law, must fall within 4 categories and must be for public benefit. Those heads were specifically enumerated over a century ago. With society rapidly changing, it is the fourth head of charity that must do the heavy lifting – requiring either developments in common law or reliance on administrative interpretation to determine if purposes are charitable.

That is, of
1) relief of poverty,
2) advancement of education,
3) advancement of religion, and
4) other purposes beneficial to the community in a way the law regards as charitable

much potentially charitable work must fall within "other purposes beneficial to the community in a way the law regards as charitable" while other very useful work/purposes may fall closely outside administrative interpretations and case law, so as to be deemed to be other than charitable. As charities are required to operate exclusively for charitable purpose these other "ancillary" purposes fall outside the charitable scope. Many such "ancillary" activities purposes can be identified, one of which would be social enterprise activities.

Charity cases that make their way for court determination are few. Requiring charities to rely on administrative interpretations of court decisions makes them potentially vulnerable to political motivations (such as was illustrated by review of environmental organizations).

B) Broadening Relief of Poverty
Relief of poverty has suffered from having been interpreted narrowly such that actions that would prevent or mitigate poverty have been found not to fall within the concept of "relief". Expanding

from such a narrow interpretation has the potential beneficial effect of assisting with current society's push towards addressing DEI, as marginalized groups are over represented in the groups that experience poverty.

C) Resolving uncertainties in the concept of "Public Benefit".

The concept of "public benefit" is not an easy one. Even CRA's publication CPS-024 acknowledges the challenge and would benefit from greater clarity.

Added to this the difficulty in determining if a sufficient section of the public benefits. For example, with an event such as the Humboldt bus crash or the downing of PS752, are the families of victims in those cases a sufficient section of the public to be benefited to make financial assistance to those families "charitable"?

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

All three points noted above definitely identify a problem that lends itself to a legal as opposed to an educational solution. All involve legal frameworks and interpretations.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

The definition of charitable purpose and the extent to which charities can include purposes that support the charitable purpose but are not themselves charitable purposes are fundamental and therefore of exceptionally broad application. Purposefully expanding the "list" of charitable purposes expands the sector and its response to evolving community issues.

That said, whether a particular purpose is charitable will affect particular charities (e.g. environmental) that in turn have significant broad based societal impact.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

These are matters of fundamental charity guidance. Not a small fix by any means.

A) Given the issues affecting Canada today, adding additional specifically enumerated heads of charity may assist with addressing climate change, DEI, and assist charities to transition from solely grant based funding to other forms of financial assistance. (e.g social enterprise).

   It would be important to maintain the fourth head of "other" to allow responses to additional changes that currently cannot be foreseen.

   Identifying approved fundamental requirements for ancillary (but important) purposes that serve to support charitable purposes (but are not themselves charitable purposes) would enhance the effectiveness of charities. Perhaps identifying a percentage of such activities that would be permitted (rather than requiring exclusively charitable purposes) and/or specifically contemplating changes to the financing of charities that reflect the changing financial environment,

B) Specifically expanding what is to be included in relief of poverty to capture activities that prevent or mitigate poverty will assist in addressing systemic problems proactively (and potentially less expensively) than limiting charities to handling the consequences of poverty.
C) Clear identification of activities or groupings that do NOT meet the public benefit test may assist charities in determining what does fulfill those requirements. Similarly better enumerating activities that do meet the public benefit requirements would be helpful.

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

In all cases dealing with the topic in a manner that does not require court intervention to develop interpretations and common law eliminates a barrier to development of good law. Charities do not embrace litigation, nor should they be required to. Their resources are best applied to further their charitable purposes.

A) Bringing charitable purposes into this century and having a mechanism for the inevitable societal changes that occur over long periods of time enhance the ability to address issues as they develop.

   Avoiding litigation for charities is a goal to allow more resources to be put to benefiting our communities. Clarity and flexibility are key to this. Allowing charities to find the most effective way to benefit the public, in ways that may include combining charitable purposes with ancillary but closely related non-charitable purposes may expand the impact of the sector.

B) Better results and impacts in addressing poverty issues if relief of poverty can clearly encompass elements that prevent and/or mitigate the creation of poverty.

C) Clarity in terms of public benefit allows charities to act (or not act, as the case may be) effectively and quickly in the face of a particular fact situation. Not having clear answers causes delay and vulnerability for charities and donors.

CBA/ULCC
Charities Project

ASSIGNED SUBTOPIC: Unincorporated Associations

CBA committee MEMBERS: Ryan Prendergast

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER
Unincorporated associations, sometimes referred to as voluntary associations, are a group of individuals acting collectively established by a constitution or written agreement among the members. These can be fairly simple documents or may be sophisticated and complex agreements, and may also include by-laws or other memoranda of association. Given the lack of legal requirements associated with an unincorporated association as an organizational structure, these are a common vehicle for registered charities, non-profit organizations and other tax-exempt entities. Unincorporated associations encompass many groups ranging from clubs, sports leagues, and local neighborhood groups to provincial and national organizations. Many religious organizations may operate as an unincorporated association. However, unincorporated associations are not legal persons at law and have no separate existence from their members unlike a corporation.

As a consequence, unincorporated associations typically cannot enter into legal agreements, cannot hold title to real property, are dependent upon individuals as either trustees or members to maintain their ability to operate, and cannot maintain or defend legal actions without exposing their members or leadership to litigation. As such, everyone involved in unincorporated associations as volunteers may have contract or tort liability. In addition, there is also uncertainty concerning whether an unincorporated association can indemnify those volunteers who take on a director or trustee role within the organization. Some provinces such as Ontario enacted the *Religious Organizations Lands' Act* which permits certain unincorporated associations to hold title to real property through trustees, but these legislative workarounds are limited, anachronistic and not uniform across Canada.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

ANSWER
This issue can be resolved if the provinces enact uniform legislation for unincorporated associations as distinct from partnerships or other associations lacking legal personhood or capacity. In different provinces, there has been lengthy litigation dealing with title to property, distribution of assets on winding-up, or disputes within religious organizations requiring judicial review. This has led to different jurisdictional responses to these issues and uncertainty as to how decisions from other provinces might be applied elsewhere. Uniform legislation might assist in these issues by providing statutory definitions and legal capacity to unincorporated associations.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

ANSWER
It is unclear how many charities or non-profit organizations operate as unincorporated associations as there is no registry for such groups in Canada. The Charities Directorate may be able to determine how many registered charities are structured as unincorporated associations, but this would not account for the full breadth of entities operating as unincorporated associations in Canada that are not registered charities. However, consultations should be undertaken with the charitable and not-for-profit sector across Canada, as many Canadians volunteer or participate in an unincorporated association. There are no groups that should oppose some standardization of the law concerning unincorporated associations across the provinces.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

ANSWER
This problem needs the provinces to enact uniform legislation to address some of these uncertainties, similar to legislation in relation to partnerships. Model legislation could address issues related to capacity and limited liability for members/volunteers. A review of approaches in other jurisdictions would assist. For example, various states in the US have adopted model legislation concerning unincorporated associations such as the *Revised Uniform Unincorporated Nonprofit Association Act.*

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

ANSWER

Uniform provincial legislation that is consistent would provide some certainty in relation to many of the issues described above that are limitations when operating as an unincorporated association. An unincorporated association is often the vehicle of necessity for groups in order to avoid legal fees, and a legal framework would provide some certainty in relation to these issues.

CBA/ULCC
Charities Project

ASSIGNED SUBTOPIC: Non-share corporations

CBA COMMITTEE MEMBER: Theresa Man

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER
Non-share capital corporations can be incorporated federally under the *Canada Not-for-profit Corporations Act* (CNCA) or provincially/territorially under their respective provincial/territorial corporate statutes. However, there is no consistency in the corporate framework set out in the federal and the provincial/territorial corporate legislation.

Some legislation is badly outdated and needed to be updated to reflect how the sector operates in the modern environment. Recent corporate reform after Saskatchewan's *The Non-profit Corporations Act, 1995*, include the federal CNCA that came into force on October 17, 2011, BC's new *Societies Act* that came into force on November 28, 2016, Yukon's *Societies Act* that came into force on April 1, 2021, and most recently the Ontario *Non-for-Profit Corporations Act, 2010* (ONCA) that came into force on October 19, 2021, more than ten years after it was enacted. Although Alberta undertook reform consultations in 2015 to propose the creation a new act to replace its current *Societies Act* and *Companies Act*, it did not result in enacting new legalization for the sector.

Some have modelled heavily after the for-profit corporate legislation. For example, the CNCA is modeled significantly on the CBCA, adapting rules intended for publicly-listed companies to the non-share sector in an awkward and unfitting manner. It is questionable whether it is appropriate to model legislation for the non-profit sector after legislation for for-profit businesses. Examples include giving members the similar rights as shareholders, not permitting ex officio directors, allowing non-voting members mandatory veto voting rights on certain matters, forcing corporations into arbitrary soliciting vs non- soliciting status, to name a few. The result of a legislation that does not reflect the reality of how the non-share capital sector operates led to difficulty and administrative burden on the sector in developing workarounds to overcome the mechanisms in the legislation, rather than embracing legislation that empowers them to operate.

Although the new ONCA was also heavily modelled after the OBCA and the CNCA, it is

welcome news that many of the areas concerning to the sector were amended as a result of consultation with the sector, thereby resulting in the legislation being more reflective, empowering and friendlier to the sector.

As well, the various corporate platforms lack consistency in relation to a number of corporate governance processes, such as audit requirements, timing and method to elect directors, absentee voting mechanisms, etc.

Furthermore, the federal and provincial/territorial corporate statutes lack consistency in relation to the rules governing continuance of corporations from one jurisdiction to another, as well as amalgamation of corporations from different jurisdictions.

In modern society with high mobility, frequent mergers between organizations, and increasing centralization of national organizations, it is important that non-share corporations be able to continue out and into other similar jurisdictions. Consistency between Canadian jurisdictions with respect to the legislation for non-share corporations will assist in providing comfort that appropriate protections are in place for the purposes/objects of the corporation and its assets. For example, the new B.C. *Societies Act* does not permit societies to continue out of B.C., forcing the unfortunate cumbersome workaround of having to incorporate a new entity in the desired jurisdiction, transfer the assets and operations to the new corporation, followed by winding up the B.C. society involved.

Similarly on the issue of amalgamation, the CNCA limits amalgamation to corporations under the CNCA, while some provincial/territorial corporate statutes do not contain this restriction. For example, the B.C. *Societies Act* provides that a B.C. society may be amalgamated with one or more societies under the B.C. *Societies Act* or with extra-provincial non-share corporations to form a new society under the B.C. *Societies Act*.

There is also a lack of coordination of corporate legislation with not-for-profit status under the *Income Tax Act* and recent developments in social enterprise initiatives.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

ANSWER
This issue can be resolved if the provinces enact uniform legislation for non-share capital corporations. The approach can be similar to the development of *Model Nonprofit Corporation Act* in the US, which can be utilized or modeled after by the federal, provincial and territorial jurisdictions.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

ANSWER
All non-share capital corporations in Canada would be impacted. Broad-based consultation should involve the non-profit/charitable sector as key stakeholders, including representations of their members, directors, officers, advisors, etc. It is also essential for the consultation to involve non-profit/charities coming from a wide spectrum of organizations, including religious organizations, community organizations, large umbrella organizations with constituents from different segments of the public, small local neighborhood organizations, organizations that operate at different levels including locally, provincially/ territorially, nationally, and internationally.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

ANSWER
This problem can be addressed by developing uniform legislation for non-share capital corporations as explained above.

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring
- more certainty, less litigation, more satisfied participants?

ANSWER
Uniform provincial/territorial corporate legislation that reflects and empowers how the non-profit and charitable sector operate would provide a clear modern corporate governance framework for the sector, and coordination with not-for-profit status under the *Income Tax Act* and recent developments in social enterprise initiatives.

CBA/ULCC
Charities Project

ASSIGNED SUBTOPIC: Investment principles for charitable organizations

CBA committee MEMBERS: Kate Lazier, Terry Carter and Elena Hoffstein

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The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity_ both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER

The statutory laws on investment of charitable funds lack clarity and consistency across Canada. The Trustee Acts in most provinces govern a charity'sinvestments. Most provinces have a standard of either the "prudent man" or "prudent investor". However, these standards are not consistently interpreted across Canada. The ability for directors to delegate investment authority differs among the various provincial legislation. While many provinces list criteria to consider in making investments, these criteria are not the same across the provinces. In many provinces, it is also possible to override these rules in the incorporating documents of a charity.

There is also a growing trend toward impact investments where charities are encouraged to use investment funds for positive social outcomes, rather than a solely financial return. Ontario introduced amendments in the *Charities Accounting Act* to address social investments. In Ontario, social investments have a dual goal of a financial return and a social purpose. This legislation is not replicated in the other provinces. Further, the legislation is not consistent with the Canada Revenue Agency (CRA) policy on program related investments (PRI). The lack of legislation on social investments in most provinces and the two different social investments regimes in Ontario and federally are a significant obstacle to a charity making social investments.

Many charities operate across Canada. For charities that operate in more than one province it can be difficult to know which provincial laws take precedence. Do the rules apply based on where the funds are raised, where the funds are held or the location of the head office? Clear guidelines on this jurisdiction issue would also be helpful.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as

opposed to an educational solution?

ANSWER
This issue can be resolved if the provinces enact uniform legislation on investments, including social investments. The social investment rules should be consistent with the Canada Revenue Agency policies. Ideally the policy on program related investments (PRIs) in the CRA's policy
CG-014 "Community economic development activities and charitable registration" should be amended to align with the model legislation.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

ANSWER
Canada's 86,000 charities are impacted by the laws related to investment by charities. The provincial investment rules also apply to organizations that hold funds raised for a charitable purpose. While the rules do not apply to non-profits, legislative changes could consider whether non-profits can be included or be able to opt-in to these rules.

Consultations should be undertaken with charities, charitable sector industry groups and investment advisors and investment firms. Consultation with CRA would be key to developing a model of social investments rules that are consistent with CRA policies. Consultations should also be considered with provincial Attorney Generals or Public Guardian and Trustees, as applicable.

We are not aware of any groups that would oppose the standardization of the rules across the provinces.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

ANSWER
This problem needs the provinces to enact the same legislation. This model legislation would include an investment standard, investment powers, and recognizing social investments. To the extent the model is not adopted by all of the provinces, it would still be useful to have clarity on determining provincial jurisdiction.

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

Uniform provincial legislation that is consistent with federal policies would provide a clear set of guidelines to charities in making investment decision. This is particularly helpful to charities operating in more than one province and charities operating with limited resources to comply with the complex and contradictory investment rules.

CBA/ULCC
Charities Project

ASSIGNED SUBTOPIC: Liability for volunteers

CBA committee MEMBER: Yvonne Chenier

The problem.
What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity both regulators and participants suffer from the uncertainty and the resulting inefficiency.

ANSWER: Generally, non-profit organizations can be held vicariously liable for the actions of their volunteers acting within the course of their duties to the organization. In theory, an organization would have a right of recovery against these volunteers. However, only two provinces - Nova Scotia (2002) and Alberta (2021) have enacted legislation providing that a volunteer of a non-profit organization generally will not be liable for damage caused by the act or omission of the volunteer so long as the volunteer was acting within the scope of the volunteer's duties and was properly licensed, certified or authorized as required by law.

Volunteers include directors, officers or trustees of the organization. This legislation does not affect the liability of any non profit organization itself however with respect to damage caused to any person, including damage caused by an act or omission of a volunteer of the organization, for which the volunteer is not liable.

Accordingly in some jurisdictions, the organization bears the full burden of loss whereas in others it may have a right of recourse. Furthermore, the need for and existence of insurance coverage for volunteers not responsible for their actions may be different form jurisdiction to jurisdiction.

Legal response.
Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

ANSWER: Uniformity of legislation across jurisdictions including a common definition of volunteers and coverage of organizations that qualify should be explored. Until legislation exists uniformly across jurisdictions, the law will remain uncertain from jurisdiction to jurisdiction and the courts will respond by necessity.

Who is impacted by the problem?
Is this a large disparate group, or a small group that can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

ANSWER: Volunteers in general are a large group, accounting for a majority of Canadians. According to the 2013 General Social Survey (GSS), at some point in their lives, about six in ten Canadians (59%) aged 15 years and older or 17 million Canadians had volunteered their time for a charitable or non-profit organization or group.
https://www150.statcan.gc.ca/n1/pub/89- 652-x/89-652-x2015003-eng.htm

The volunteer sector itself and organizations that direct resources to them such as https://volunteer.ca should be consulted. The general insurance industry that writes underwrites insurance policies for organizations and may cover volunteer activities on some personal policies should also be asked about for their experience with coverage for volunteer liability.

Potential solutions.
How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

ANSWER: Uniform legislation for all Canadian jurisdictions with common definitions of organizations and volunteers covering the same exemption for volunteer liability

Benefits of solving the problem.
This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

The volunteer sector deserves certainty in matters that may affect their often-limited resources. A non-profit organization should be able to do its work seamlessly across all boundaries where it operates without spending its resources on potentially different insurance policies, legal advice and volunteer management system