

THE ROLE OF THE ATTORNEY GENERAL IN CHARITY PROCEEDINGS IN CANADA AND IN ENGLAND AND WALES

Kathryn Chan*

Despite the Crown's recognized role as the protector of charities under the common law, the provincial attorneys general have had only limited involvement in charity proceedings in Canada, and have never participated in a proceeding between a purported charity and the federal tax ministers of the Crown. In this paper, the author describes the historical rationales for the Attorney General's parens patriae role in charity proceedings, and the manner in which the chief law officer of the Crown has contributed to the development of the legal meaning of charity in England and Wales. She then discusses how the limited participation of the Crown's Canadian law officers has affected Canada's charities jurisprudence, and examines the possible grounds for the participation of the provincial attorneys general in proceedings addressing the meaning of charity under the federal Income Tax Act.

Malgré le fait qu'il est reconnu que la Couronne joue le rôle de garant des organismes de bienfaisance sous le régime de la common law, les procureurs généraux des provinces participent peu dans le cadre d'instances mettant en cause des organisations caritatives au Canada. De plus, ces derniers n'ont jamais participé à des instances entre un prétendu organisme de bienfaisance et les ministres fédéraux responsables des impôts. Dans cet article, l'auteure décrit les raisons historiques à l'appui de la compétence parens patriae du procureur général dans le contexte des instances mettant en cause des organisations caritatives, ainsi que la façon dont le premier conseiller juridique de l'État a contribué au développement de la définition d'un organisme de bienfaisance selon la loi, en Angleterre et au Pays de Galles. Elle discute, par la suite, des répercussions de cette participation limitée de la part des conseillers juridiques de l'État au Canada sur la jurisprudence en matière de bienfaisance. Enfin, elle examine les motifs qui pourraient justifier la participation des procureurs généraux des provinces dans les instances mettant en jeu la

* D Phil candidate, University of Oxford Faculty of Law and member of the Law Society of British Columbia. The author thanks the Trudeau Foundation and the Social Sciences and Humanities Research Council for their generous support in the writing of this paper, and Mark Freedland, Kenneth Dibble, Blake Bromley, Paul Kennedy, and two anonymous reviewers for their helpful comments.

définition d'organisme de bienfaisance aux termes de la Loi de l'impôt sur le revenu fédérale.

1. Introduction

It has not been a happy decade for that little-known common law doctrine known as charitable spirit and intent. Since the Supreme Court of Canada handed down its seminal *Vancouver Society of Immigrant and Visible Minority Women v MNR* decision in 1999,¹ raising hopes that the common law definition of charity might begin to respond better to modern societal needs, there have been at least nineteen unsuccessful, and no successful, judicial appeals of decisions by the Canada Revenue Agency (CRA) to decline to register or to deregister a charity under the federal *Income Tax Act (ITA)*.² The broad effect of these decisions on the Canadian legal understanding of charity has been to narrow the meaning of “advancing religion,” to expand the prohibition on political activities, to remove the longstanding charitable status of hostels, and to suggest that the role of sport in Canadian society is little different than it was in England in 1895.³ Consistent with the law of diminishing returns, Federal Court of Appeal decisions that rely on analogical reasoning to develop the meaning of charity have not only become shorter and shorter, but fewer and far between.

One is at pains to identify another context in which charitable interests have so often been on the losing side. Indeed, the common law has always weighted the odds heavily in favour of charity in judicial proceedings, both through substantive rules such as the one requiring purported charitable trusts to be given a benignant construction, and through procedural rules such as the one exempting charities from strict pleadings requirements.⁴ Given the seeming impasse that the definition of charity has reached in the context of the registered charity scheme, the question bears asking: Is there anything that might be done to revive the common law tradition of developing charity law by analogy in Canada’s federal courts?

¹ [1999] 1 SCR 10, 169 DLR (4th) 34 [*Vancouver Society*].

² RSC 1985, c 1 (5th Supp).

³ See *Fuaran Foundation v CCRA*, 2004 FCA 181, [2004] 10 ETR (3d) 26; *Action by Christians for the Abolition of Torture v Canada*, 2002 FCA 499, (2002), 225 DLR (4th) 99 [*ACAT*]; *Hostelling International Canada Ontario East Region v MNR*, 2008 FCA 396, (2008), 384 NR 144 [*Hostelling International*]; *Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2006 FCA 136, (2006), 267 DLR (4th) 724 affirmed in 2007 SCC 42, 287 DLR (4th) 4 [*AYSA*].

⁴ *Attorney General v Jeanes* (1737) 1 Atk 355, 25 ER 898 (Ch).

This paper explores one possible answer, namely, to reinvigorate the historical role of the provincial attorneys general in representing charitable interests before the courts. This exploration will be carried out in four parts. In Part 2, I review the history of the English Crown's role as the *parens patriae* of charity, and the reasons why the Crown's chief law officer protected charity in judicial proceedings in England and Wales. In Part 3, I examine how the English Attorney General's role evolved after the definition of charity became a tax law issue in England and Wales, and the nature of the positions taken by the chief law officer in disputes between purported charities and the revenue ministers of the Crown. In Part 4, I turn to the Canadian context, exploring the transfer of the Crown's *parens patriae* powers to the provincial attorneys general and the limited extent to which they have carried out their role as the protectors of charity in the provinces. Finally, in Part 5, I explore the possibility of the provincial attorneys general participating in appeals from the charity registration decisions of the CRA, in order to protect charitable interests and ensure that important questions are fully argued in court.

2. The Role of the English Attorney General in Charity Proceedings

A) Historical Roots

The longstanding role of the English Attorney General as a participant in proceedings relating to charities is best understood as a surviving product of the historic, feudal relationship of liguance between the English people and the Crown. Just as the law of nature required that every subject obey and serve the King, so it also required that the King maintain and defend his subjects, particularly those who could not defend themselves. Charities, and the objects of charity, fell into this latter category, along with children and the infirm.⁵ As the King could not appear in his own courts,⁶ it fell to his law officers to carry out the advocacy aspects of this *parens patriae* prerogative. Thus it came to be accepted, "by long and immemorial custom," that it was the right and duty of the Attorney General, as the chief law officer of the Crown, to enforce rights of a charitable nature in the courts for the benefit of the persons interested therein.⁷

⁵ See *Calvin's Case* (1608), 7 Co Rep 1a, 77 ER 377 at 382; Jean Warburton assisted by Debra Morris and NF Riddle, *Tudor on Charities*, 9th ed (London: Sweet & Maxwell, 2003) at 367; see also *National Anti-Vivisection Society v IRC*, [1948] AC 31 at 63 (HL) [*National Anti-Vivisection Society*].

⁶ See e.g. *R v Austen* (1821), 9 Price 142n, 147 ER 48.

⁷ *AG v Magdalen College Oxford* (1854), 18 Beav 223 at 241, 52 ER 88 [*Magdalen College* cited to Beav]. See also *Wallis v Solicitor General for New Zealand*, [1903] AC 173 at 181-182 (HL) [*Wallis*].

The Attorney General's involvement in proceedings relating to charities took a variety of different forms. The first, and most archetypal, arose in situations where a trustee or other holder of charitable property was alleged not to be applying the property to its intended charitable use. In such a case, the Attorney General would act to protect the interests of charity by initiating proceedings to bring the trustees to account and ensure the charitable property was properly applied.⁸ The Attorney General was entitled to begin such proceedings in his own capacity, or at the request of an individual, called a relator, who believed that a charity had been the subject of abuse.⁹ The particular form of the action had little significance beyond the allocation of costs; in either event the chief law officer of the Crown represented what was variously described as the interest of "all persons beneficially interested in charity funds,"¹⁰ every object of a charity,¹¹ or charity in general.¹² Significantly, however, the common law did not generally allow an individual with an interest in the proper performance of a charity to bring a proceeding against its trustees in his or her own name,¹³ "it being a public privilege that the Crown should be entitled to intervene by its officer for the purpose of asserting that public interest on behalf of the public generally."¹⁴

As the designated protector of the interests of charity, the Attorney General was also considered to be a necessary party in many charity proceedings that he did not initiate.

These included proceedings to test the validity of an alleged charitable gift,¹⁵ proceedings involving claims to the benefit of a charity,¹⁶ and administration proceedings addressing a charity's internal governance or the application of its funds.¹⁷ Where the question was whether a particular gift or bequest was charitable, and the gift was not to a specified individual

⁸ See e.g. *AG v Compton* (1842) 1 Y & CCC 417, 62 ER 951 (Ch) [*Compton* cited to Y & CCC]. For earlier instances, see *AG v Newman* (1670), 1 Ch Ca 158, 22 ER 741; *AG v Herrick* (1772), Amb 712, 27 ER 461 (Ch).

⁹ Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd ed (London: Butterworths, 1999) at 705.

¹⁰ *Re Sekeford's Charity* (1861), 5 LT 488 (Ch) [*Sekeford's*].

¹¹ *AG v St Cross Hospital* (1854), 18 Beav 475, 51 ER 1103 [*St Cross Hospital*]; *AG v Bishop of Worcester* (1851), 9 Hare 328, 68 ER 530.

¹² *Ware v Cumberlege* (1855), 20 Beav 503, 52 ER 697 [*Cumberlege*].

¹³ See e.g. *AG v Green*, (1820) 1 Jac & W 303 at 305, 37 ER 391 [*Green*]. But see exceptions at notes 21-22.

¹⁴ *Compton*, *supra* note 8 at 427.

¹⁵ *Kirkbank v Hudson*, (1819) 7 Price 212, 146 ER 951 [*Kirkbank*].

¹⁶ *Re Magdalen Land Charity Hastings*, (1852) 9 Hare 624, 68 ER 663 (Ch).

¹⁷ *Cumberlege*, *supra* note 12 cited in Lord MacKay of Clashfern, ed, *Halsbury's Laws of England*, 5th ed (London, UK: Lexis Nexis, 2010) vol 8 at 515.

charity,¹⁸ the presence of the Attorney General was also required.¹⁹ Thus in *Cook v Duckenfield*, where the residuary heir of a testator challenged his charitable bequest to his poor relations and the “widows and orphans of dissenters,” Lord Chancellor Hardwicke held that the pleadings must be amended, and the Attorney General made a party on behalf of charity and the objects thereof.²⁰ In *Wellbeloved v Jones*, where the question was whether a bequest to a school for dissenting ministers was charitable, the Court similarly held that the Attorney General must be joined.²¹

It is important to emphasize that the Attorney General’s function in charity proceedings differed from his more general mandate, in that he was not charged with protecting the property or interests of the Crown.²² Occasionally, however, cases would arise where the Crown did have a potential beneficial interest in allegedly charitable property, creating a conflict between the Crown’s private rights and its role as the protector of charities. The solution, in such a case, lay in the fact that the English Crown had *two* law officers, the Attorney General and the Solicitor General, to represent it in the courts.²³ Thus, where the Crown wished to claim property beneficially in a charity proceeding, one of the law officers would appear on behalf of the Crown’s private interests while the other represented the charitable interest.²⁴

B) Rationale for Role

What led the Attorney General to represent charitable interests in the courts? While many of the early cases simply repeat that the Crown is the *parens patriae* of charities, others offer a closer look at the rationales for his role. A first rationale, which continues to hold sway, claimed that the Attorney General’s participation was necessary because a charitable purpose could not sue,²⁵ and there was no private person who could act to

¹⁸ *Ibid* at 511.

¹⁹ *Re Pardoe v AG*, [1906] 2 Ch 184; *Re Mann v AG*, [1903] 1 Ch 232.

²⁰ (1743), 2 Atk 562 at 564, 26 ER 737; *Kirkbank*, *supra* note 14.

²¹ (1822) 1 Sim & St 40, 57 ER 16 (Ch) [*Wellbeloved*].

²² *Magdalen College*, *supra* note 6 (Attorney General’s role in charity cases does not arise from “any estate or interest he has in the land” at 241); see also *Wallis*, *supra* note 6 at 182 where the Privy Council criticized the Crown’s law officer for attacking a charity that it was *prima facie* his duty to protect.

²³ John Ll J Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 2.

²⁴ See *AG v Mayor of Bristol* (1820), 2 Jac & W 294 at 312, 37 ER 640 (Ch) and *AG v Dean and Canons of Windsor* (1860), 8 HL Cas 369, cited in *Halsbury’s*, *supra* note 16 at 516.

²⁵ *Leahy v AG of New South Wales*, [1959] AC 457 at 479 (PC).

enforce rights under a charitable trust.²⁶ Notably, however, the courts did not always accept the latter part of this proposition. Early courts occasionally held that the Attorney General's presence was not necessary in charity proceedings because there were beneficiaries who could sue in their own names,²⁷ and in the mid-nineteenth century the House of Lords confirmed that the "parish poor" who were qualified to benefit from a charitable trust were beneficiaries with equitable rights in the trust property.²⁸ While subsequent courts have declined to follow this decision, the proposition that *no* charitable trust has beneficiaries with enforceable rights is certainly open to doubt.²⁹

There were other explanations of the Crown's *parens patriae* role. One line of thinking asserted that the Attorney General must participate in charity proceedings because the potential beneficiaries of charities, lacking education, money, and civil rights, represented a class in particular need of the Crown's assistance.³⁰ Another tied the Attorney General's participation in charity proceedings to the expertise of the Crown's chief law officer, and his ability to afford useful advice and assistance to the court.³¹ A fourth rationale emphasized that it was unlikely, in many cases, that any private individual would be willing to act on a charity's behalf.³² A fifth relied on the importance of protecting charity funds. If all of the persons with an interest in the administration of a charity were entitled to be represented in proceedings at the charity's expense, the Court pointed out in *Attorney General v St Cross Hospital*, the result would be the "destruction of... charity by costs." It was precisely to prevent such expense, the court continued, that the Attorney General was required to attend and protect the interests of all.³³

The various rationales that have been offered for the Attorney General's participation in charity proceedings can be seen as supporting a broader justification for his advocacy role: namely, that every member of the public has an interest in the use of charitable property, and the Attorney

²⁶ *AG v Brown* (1818), 1 Swanston 265 at 291, 36 ER 384 [*Brown* cited to Swanston]; *AG v Cocke*, [1988] Ch 414 [*Cocke*]; see also Warburton, *supra* note 5 at 384.

²⁷ *Monill v Lawson* (1719) 22 ER 143.

²⁸ See *The President and Scholars of the College of St. Mary Magdalen Oxford v AG* (1857), VI Clark's 189 at 210-12 (HL), 10 ER 1267, holding that the poor of two parishes were "mere cestui que trusts."

²⁹ *C.f. Cocke*, *supra* note 26, and *Oppenheim v Tobacco Securities Trust Co Ltd*, [1951] AC 297 at 308.

³⁰ *Magdalen College*, *supra* note 7.

³¹ *Wallis*, *supra* note 7 at 181-82.

³² *Compton*, *supra* note 8 at 427.

³³ *Supra* note 11.

General is the most appropriate figure to act on the public's behalf. The first part of this proposition, implicit in the old cases that described the Attorney General's powers in charity proceedings as powers "intended for the benefit of the public,"³⁴ was articulated most eloquently by Sir Samuel Romilly, appearing as counsel in a nineteenth century relator action concerning property devoted to protecting coastal residents from the encroachment of the sea:

All property in this kingdom belongs either to private individuals, including bodies corporate, or to the public; for injuries to the former the ordinary remedy is an action; for injuries to the latter, an information by the Attorney General. To one species of private property, however, the policy of the law extends a particular protection, and injuries to it are redressed neither by actio nor by mere information, but information at the relation of individuals, upon whom the assumption of that character imposes a liability to costs. *Property of this description, to a certain degree private, partakes the character of public property, as devoted to purposes in which, though more peculiarly beneficial to certain individuals, every subject is interested.*³⁵

The second part of the justification, implicit in the old rule that an individual could not bring a proceeding against charity trustees in his or her own name,³⁶ was affirmed in the seminal case of *Gouriet v Union of Post Office Workers*, where the House of Lords described the relator action for the protection of charitable property as "an action to assert a public right."³⁷ *Gouriet's* holding that public rights could *only* be asserted by the Attorney General, the constitutional representative of the public interest, must today be read in light of the significant statutory and jurisprudential changes to the law of standing.³⁸ Nevertheless, the decision continues to support Sir Samuel Romilly's argument from over a century before: the Attorney General appears in charity proceedings because rights in charitable property are to a certain degree public rights, whose enforcement properly lies with the Crown.

C) Right or Duty?

The case law is somewhat ambivalent about whether the involvement of the Attorney General in proceedings relating to charity is best

³⁴ *AG v Brettingham* (1840), 3 Beav 91 at 96, 49 ER 35 (Ch) [*Brettingham* cited to Beavan]; see also *Cocke*, *supra* note 26 at 419 (Attorney General brings charity proceedings for the benefit of the "public at large.")

³⁵ *Brown*, *supra* note 26 at 282-83 [emphasis added].

³⁶ See e.g. *Green*, *supra* note 13 at 305.

³⁷ [1978] AC 435 at 477 (HL) [*Gouriet*].

³⁸ See the discussion in Paul P. Craig, *Administrative Law* 6th ed (London: Sweet & Maxwell, 2008) 793-802.

characterized as a right or a duty of the Crown. The Chancery Court famously declined to pronounce a universal rule as to when the presence of the chief law officer was required,³⁹ and alternately used the language of duty,⁴⁰ entitlement⁴¹ and function⁴² to describe the Crown's *parens patriae* role. What, then, can be concluded about the nature of the obligations, if any, imposed on the Attorney General in charity proceedings?

In the first place, it is clear that the decision to initiate an action to enforce a charitable trust was solely the Attorney General's to make, and that no member of the public could compel the chief law officer to protect charitable interests in the courts. The Attorney General's decision to have charity proceedings brought in his name was based on his assessment of the public interest, and his refusal to do so was not subject to judicial review.⁴³ It is true that until the mid-nineteenth century, relator actions involving charities were consented to as a matter of course,⁴⁴ it being the apparent position of the Crown that the Attorney General could not "with propriety refuse the use of his name, if there be an arguable question to be submitted to a court."⁴⁵ However, if the relator action had not been effectively superseded in the nineteenth century by simpler and more accessible procedures,⁴⁶ it is likely that the Attorney General's consent would increasingly have been withheld.⁴⁷

Second, to the extent that the Attorney General did have a duty in proceedings relating to charity, that duty was not due exclusively to charity or the objects thereof. The monarch was the protector of *all* of his subjects, and thus the duty of his chief law officer was to ensure that justice was done to every one of those subjects.⁴⁸ In the context of charity proceedings, this meant that the Attorney General was to consider the interests of all persons affected by a charity claim and to exercise his *parens patriae* powers "with forbearance and without oppression to

³⁹ *Cumberlege*, *supra* note 12 at 510-11.

⁴⁰ *Wallis*, *supra* note 7 at 181-82.

⁴¹ *Compton*, *supra* note 8.

⁴² *Magdalen College*, *supra* note 7 at 241.

⁴³ *Gouriet*, *supra* note 37 at 478, citing *London County Council v AG*, [1902] AC 165 at 169 (HL).

⁴⁴ *Gouriet*, *ibid*.

⁴⁵ *Shore v Wilson* (1842), 9 Cl & F 355 at 407, cited in *Gouriet*, *ibid* at 479.

⁴⁶ See e.g. the *Charitable Trusts Act*, 1853 (UK), 16 & 17 Vict, c 137, s 43 [CTA], providing that applications under the Act could be made by anyone with an interest in a charity, including an inhabitant of the place where the charity applied.

⁴⁷ This was the trend in other areas: see *Gouriet*, *supra* note 37 at 488-89.

⁴⁸ *Magdalen College*, *supra* note 6 at 244.

individuals.”⁴⁹ In the exercise of this forbearance, the Attorney General could compromise the strict legal rights a charity might have in relation to misapplied charity property,⁵⁰ or authorize *ex gratia* payments out of charity funds on moral grounds.⁵¹ In this way, the *parens patriae* role of the Attorney General in charity proceedings must be understood as being to seek a just result, not only for the objects of a charity, but for all persons affected by the claim.⁵²

Despite the largely discretionary nature of the *parens patriae* prerogative,⁵³ however, it appears that the courts could compel the Attorney General to participate in charity proceedings initiated by another party. In *Ware v Cumberlege*, in response to a specific inquiry by the Attorney General as to whether his presence was necessary in a dispute over a charitable bequest, the Master of the Rolls held that in cases involving a gift for “charity generally,” “no one can represent it but the Attorney-General, and *he must be here* to represent such general charities.”⁵⁴ In cases involving gifts to specified individual charities, the presence of the Attorney General was not considered universally necessary, but the courts did sometimes require his attendance.⁵⁵ On a broader level, there is a strong argument that as the only proper representative of all the potential beneficiaries of charity, and of the public’s interest in charitable property, the Attorney General has a duty to at least consider whether it is in the public interest that he should appear in cases affecting the meaning of charity or the validity of a charitable gift.⁵⁶ As we shall see, this duty may have contemporary relevance in the context of disputes between alleged charities and the revenue officers of the Crown.

⁴⁹ *Brettingham*, *supra* note 34 at 96.

⁵⁰ *AG v The Corporation of Exeter* (1826), 2 Russ 362, 38 ER 252 (Ch).

⁵¹ *Re Snowden*, [1970] Ch 700, [1969] 3 All ER 208 (Ch); see also *Bougey v Minor*, [1893] P 181 (Attorney General agrees to compromise where testator’s niece has strong claim).

⁵² *Magdalen College*, *supra* note 7, citing *The Corporation of Ludlow v Greenhouse*, 1 Bli (NS) 46; see also *AG v Clapham* (1853), 10 Hare 540 and lxviii, 68 ER 1155 (Ch).

⁵³ See Donovan WM Waters, Mark R Gillen and Lionel D Smith, *Waters’ Law of Trusts in Canada* 3rd ed (Toronto: Thomson Carswell, 2005) at 789 (“That is the nature of the prerogative, power rather than duty, *parens* and not *mandatarius* of the charity”).

⁵⁴ *Cumberlege*, *supra* note 12 [emphasis added].

⁵⁵ *Ibid*; *Wellbeloved*, *supra* note 21 provides an example.

⁵⁶ It is an open question whether a lack of financial resources would provide a valid excuse for not fulfilling these duties: see HS Woolf et al, *De Smith’s Judicial Review* (London: Sweet & Maxwell, 2007) at 290.

3. *The English Attorney General's Parens Patriae Role in the Revenue Context*

A) *The Revenue Context*

The introduction of a statutory regime of charity regulation and the creation of the Charity Commissioners altered many structural aspects of the common law of charity in England and Wales, including the role of the Attorney General. The *Charitable Trusts Act 1853*, which emerged in large part from concerns about the ineffectiveness of the relator procedure, ended the Attorney General's status as the exclusive plaintiff in charity administration proceedings by providing that such proceedings could be started, with the Commissioners' permission, by anyone with an interest in a charity, including any two inhabitants of the place where the charity applied.⁵⁷ However, England's nineteenth-century charities legislation specifically excluded from its scope cases where there was a dispute over title to allegedly charitable property, or over the existence of a charitable trust.⁵⁸ In proceedings where the legal meaning of charity was in issue, therefore, the Attorney General maintained his central common law role.⁵⁹

As English charity law adjusted to the changes brought about by the creation of a statutory regulator, developments in the taxation and revenue fields complicated the context in which the Crown's *parens patriae* role was carried out. Historically, proceedings addressing the legal meaning of charity had arisen in one of two ways: as actions by the Attorney General against alleged charitable trustees; or as disputes between the trustees or executors of a purportedly charitable bequest, and the testator's residuary heirs. Within these contexts, the Attorney General faced no real conflict in protecting charity generally, or in representing the interests of persons beneficially interested in charity funds. Towards the end of the nineteenth century, however, questions regarding the legal meaning of charity began to arise in another category of cases: namely, contested claims for "charity status" exemptions from various taxes and duties. The parties involved in this new category of proceedings were inevitably a purportedly charitable institution, and the government revenue authority that had denied the institution's claim. What position was the Crown's chief law officer to take in these charity law disputes between private parties and a minister of the Crown?

⁵⁷ *Supra* note 46.

⁵⁸ *Ibid*, ss 17, 41, 43.

⁵⁹ *Hauxwell v Barton-Upon-Humber Urban District Council and Others*, [1974]

1 Ch 432 at 450 (only the Attorney General is entitled to maintain an action against supposed trustees to establish the existence of a charitable trust).

Until the mid-twentieth century, there appears to have been no consistent rule or practice governing the Attorney General's role in charitable exemption appeals. The *Income Tax Act 1918*, whose provisions on this point were applicable to other fiscal statutes,⁶⁰ provided a procedure for appealing legal decisions of the Inland Revenue Commissioners (IRC) to the High Court, but was silent on the role of the Attorney General.⁶¹ In practice, despite the historical precedent for the separate participation of two law officers in cases where the Crown had a beneficial interest, the Attorney General does not appear to have exercised his *parens patriae* role as the protector of charities in disputes over the meaning of charity for tax purposes.⁶²

This situation changed in 1953, in a high-profile case that raised the question of whether recreative purposes were to be considered charitable in England and Wales. *Inland Revenue Commissioners v Baddeley*⁶³ involved the conveyance of a parcel of land to trustees for the promotion of the "religious social and physical well-being" of persons who were members or likely to become members of the Methodist Church. The trustees alleged, and the IRC disputed, that the conveyance had been made to a charitable trust within the terms of the *Finance Act 1947*, and should therefore be assessed at a lower rate. At the trial between the two parties, Harman J denied the trustees' claims, and indicated that in his view, recreation was not a charitable object.⁶⁴ This expression of opinion sufficiently concerned the Attorney General in his capacity as the protector of charities that he appeared, in person, as *amicus curiae* on appeal to argue that gifts for community recreation could be charitable gifts.⁶⁵

The Attorney General's role in disputes over the meaning of charity for tax purposes was clarified in the 1960s, through two related statutory developments. First, the *Charities Act 1960* created a register of charities, inclusion on which provided conclusive evidence that an institution was charitable for all fiscal purposes.⁶⁶ The Charity Commissioners thereby

⁶⁰ See e.g. *Finance Act, 1937* (UK), 1 Edw VIII & 1 Geo VI, c 54, sch 5, pt 2 s 4.

⁶¹ *Income Tax Act, 1918* (UK), 8 & 9 Geo V, c 40) s 149(1)(a).

⁶² See e.g. *IRC v Yorkshire Agricultural Society*, [1928] 1 KB 611 (CA); *Williams Trustees v IRC*, [1947] AC 447.

⁶³ [1955] AC 572 (HL).

⁶⁴ *Baddeley and Others (Trustees of the Newton Trust) v IRC*, [1953] 1 WLR 84 (Ch).

⁶⁵ *Baddeley and Others (Trustees of the Newton Trust) v IRC*, [1953] 3 WLR 135 (CA); *IRC v Baddeley* [1955] AC 572 (HL). While the Attorney General's arguments in support of the trusts did not ultimately prevail, the House of Lords did affirm his submission on the potentially charitable nature of recreative objects; see *ibid* at 589.

⁶⁶ *Charities Act, 1960* (UK), 8 & 9 Eliz II, c 58, s 4(1), 5(1).

became the primary adjudicators of charitable status, and the Act provided that the Attorney General and any other person who might be affected by the institution's registration could appeal the Commissioners' registration decisions to the High Court.⁶⁷ Second, an addition to the *Rules of the Supreme Court* made in 1966 provided that the Attorney General must be made a party to any judicial appeal against a decision of the Charity Commissioners.⁶⁸ While the Rules did not require the Attorney-General to make submissions, they clearly contemplated his involvement as an independent party to charity disputes. In practice, it appears that the Attorney General made submissions in almost all of the revenue and trust law decisions concerning the legal definition of charity in England and Wales between 1966 and 2006.

B) Nature of Involvement

It would be impossible to measure, with any degree of precision, the extent to which the Attorney General has impacted the legal definition of charity in England and Wales through his submissions as a party or friend of the court. It does seem possible, however, to hazard some general observations about the nature of the chief law officer's contributions and the manner in which they reflect the Crown's *parens patriae* role. Briefly, it appears that while the English Attorney General has maintained his historic role as the protector of charities in both the trust law and tax law contexts, he has also emphasized the independence of the Crown's position in charity matters and its particular ability to assist the court with broad considerations of law and fact.

The Attorney General's historic role as the white knight of charities can best be appreciated by examining the long line of "charitable synonym" cases involving gifts to benevolent, liberal, public and patriotic purposes. The first of this line, the seminal case of *Morice v Durham*, involved a challenge by the next-of-kin of a wealthy testatrix to the validity of a bequest to "such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve."⁶⁹ The incumbent Attorney General, future Prime Minister Spencer Perceval, appeared in person on appeal, stating that he "appeared officially for those whose interests the Attorney General ought to support," and arguing that it was

⁶⁷ *Ibid* s 5(1): the interested parties were understood to include the revenue authorities.

⁶⁸ *Rules of the Supreme Court (Revision)* 1965/1776, Sch 1(10)(108) para 4 (commenced 1 October 1966); RSC Ord 108, rr 2 and 5(2). For the current version, see Practice Direction 64A, s 10 and Practice Direction 52, s 23.8A(2).

⁶⁹ (1804), 9 Ves Jr 399, 32 ER 656 (Ch); affirmed in *Morice v Durham* (1805), 10 Ves Jr 522, 32 ER 947, (Ch) [*Morice*].

not necessary to use the word “charity” in order to manifest a charitable intention.⁷⁰ His arguments were famously rejected by Lord Eldon, who held that the purposes of charitable trusts had to be such as the Court could ascertain, and that the courts had affixed to the word “charity” the meaning of “such charitable purposes as are expressed in the [*Statute of Elizabeth*], or...purposes having analogy to those.”⁷¹

In spite of the Lord Chancellor’s decisive ruling in *Morice*, the English Attorney General made a number of subsequent efforts to loosen charity’s tie to the *Statute of Elizabeth* and to expand the area of endeavour recognized as charitable by English law. These efforts were marked by valiant and often creative arguments, if not by successful results. Thus, where a contested bequest was for “charitable or philanthropic purposes,” the Attorney General argued that philanthropy was akin to charity, not benevolence;⁷² after this appeal failed, the Attorney General argued that patriotic purposes must at least be charitable, since they were “for the benefit of the country as a whole.”⁷³ However, the Attorney General saved its boldest argument for a 1944 court appearance in the House of Lords, following the Court of Appeal’s decision that a bequest for “charitable or benevolent objects” was void. Faced with a plethora of authorities that gifts for purposes synonymous to charity were not charitable, the Attorney General invited the House of Lords to exercise its discretion to apply Scots charity law in the construction of English wills.⁷⁴ The House of Lords, rather unsurprisingly, declined to accept the chief law officer’s invitation.

The English Attorney General continued to act as the protector of charities during the latter half of the twentieth century, notwithstanding the ever-increasing fiscal consequences of the parties’ charitable claims. However, it is clear from such submissions as are recorded that the Attorney General always understood his role as that of an independent party, whose mandate to protect the interests of charity at large was situated within his greater mandate to protect the public interest. In some cases, this independence was evidenced by the Attorney General’s nuanced position. In *Incorporated Council of Law Reporting v IRC*, for example, the Attorney General supported the Council’s argument that the publication of law reports was charitable under the fourth head, but maintained that such publication could not advance education, since judges

⁷⁰ *Ibid* at 525-26.

⁷¹ *Ibid* at 541.

⁷² *Re Macduff*, [1896] 2 Ch 451.

⁷³ *AG v National Provincial and Union Bank*, [1924] AC 262 at 263 (HL).

⁷⁴ *Chichester Diocesan Fund and Board of Finance v Simpson*, [1944] AC 341 (HL).

are deemed to have complete knowledge of the law.⁷⁵ Occasionally, and particularly where the political purposes doctrine was in issue, the Attorney General has even taken a position that undermined the claims of the purported charitable trustees.⁷⁶

In many of the more recent cases involving the legal meaning of charity, the Attorney General's efforts appear to have been more neutrally focused on directing the court's attention to broad considerations of law and fact.⁷⁷ In *Dingle v Turner*, the Attorney General went so far as to lay out the likely fiscal and administrative consequences for the national charities register if a trust for poor employees was not found to be charitable.⁷⁸ More typically, the Attorney General has made submissions regarding the scope and application of favourable charitable trust doctrines, such as the rule of benignant construction.⁷⁹ During the debates leading up to the enactment of the *Charities Act 2006*, government representatives confirmed their understanding that the Attorney General was "supposed to have a non-adversarial role, essentially as a friend of the court, in representing the interests of the beneficiary."⁸⁰

C) *The Impact of the Charities Act 2006*

The *Charities Act 2006* has modified the manner in which the Charities Commission's determinations of charitable status can be challenged in England and Wales, and produced certain related changes to the Attorney General's advocacy role. In particular, in addition to introducing a statutory definition of charity, the Act has put into place a "Charity Tribunal" with jurisdiction over a long list of matters, including appeals from the Charity Commission's registration decisions.⁸¹ Where a dispute arises over the meaning of charity in English law, therefore, the matter will now only exceptionally go before the superior courts.

⁷⁵ [1972] Ch 73 at 93 (CA); see also *Barralet v AG*, [1980] 3 All ER 918, (sub nom *Re South Place Ethical Society*) [1980] 1 WLR 1565 at 1570 (Ch) where the Attorney General stood neutral on the claim that the Society's objects advanced religion, but supported the claim that they were educational.

⁷⁶ See e.g. *Hanchett-Stamford v AG*, [2008] EWHC 330 (Ch), [2009] Ch 173.

⁷⁷ *McGovern v AG*, [1982] Ch 321 at 330 (CA).

⁷⁸ [1972] AC 601 (HL) [*Dingle*].

⁷⁹ See e.g. *IRC v McMullen*, [1981] AC 1 (HL); *Re Koeppler Will Trusts*, [1984] 2 WLR 973 (Ch).

⁸⁰ HC Standing Committee A, col 148 (6 July 2006), cited in Stephen Lloyd, ed, *Charities : The New Law 2006 : A Practical Guide to the Charities Acts*, (Bristol, UK: Jordans, 2007) at 110.

⁸¹ *Charities Act 2006* (UK), c 50, s 8 (2A)(1), (2A)(4).

Despite effecting changes to the structure of charity registration appeals, the creation of the Charity Tribunal has not really diminished the Attorney General's longstanding statutory powers to participate in proceedings related to the definition of charity under the Act. Under the new regime, the Attorney General may bring an appeal against a registration decision of the Charity Commission,⁸² or seek permission to appeal a registration decision of the Tribunal to the Upper Tribunal or Court of Appeal, whether or not he was party to the original proceedings.⁸³ The Attorney General may intervene in proceedings before the Tribunal "in such manner as he thinks necessary or expedient,"⁸⁴ and parties who desire the participation of the chief law officer may apply to have the necessary papers sent over for his consideration.⁸⁵ The Attorney General may also now refer any question regarding the operation or application of charity law to the Charity Tribunal if he considers it desirable.⁸⁶ Significantly, however, there is no longer any requirement that the Attorney General be made a party to all charity registration appeals.

It is likely too early to reach any conclusions on whether the *Charities Act 2006* has altered historical understandings of the English Attorney General's *parens patriae* role in charity proceedings. On the one hand, it is noteworthy that the Attorney General made no submissions in an important early charity registration appeal, the only one heard by the superior courts since the 2006 Act was passed.⁸⁷ On the other hand, the Attorney General has recently employed his new statutory reference power to refer two controversial issues – the charitable status of fee-charging independent schools, and of limited beneficiary poverty trusts – to the courts.⁸⁸ It will be interesting to observe how the Attorney General manifests his role as the protector of charity and the public interest in this new context.

⁸² *Ibid* at sch 1C, s 1(2)(a).

⁸³ *Tribunals, Courts and Enforcement Act 2007* (UK), c 15, s 11, 13; *Charities Act 2006*, *ibid* at s 8(2C)(5). The former provisions represent the only apparent diminution of the Attorney General's powers, as he did not previously need permission to appeal against orders of the Commissioners: *Charities Act 1993* s 16(11) (repealed).

⁸⁴ *Supra* note 81 at s 8(2D)(4)(a).

⁸⁵ *Ibid* s 8(2D)(2). Such direction may be made by the Tribunal or court of its own motion, or on the application of any party to the proceedings: s 8(2D)(3).

⁸⁶ *Ibid* at sch 1D, s 2(1). The Commission may also make such a reference, but only with the Attorney General's consent: sch 1D, s 1(2).

⁸⁷ *Catholic Care v Charity Commission for England and Wales and ECHR*, [2010] EWHC 520 (Ch), [2010] 4 All ER 1041.

⁸⁸ See online: <http://www.charity.tribunals.gov.uk/references.htm> (last accessed 9 March 2011).

4. *The Role of the Canadian Attorneys General in Charity Proceedings*

A) *Legal Position*

It is relatively clear that, both as a matter of constitutional principle and statutory dictate, the attorneys general of Canada's common law provinces have inherited the prerogative powers of the English Attorney General to protect charities and their objects in the courts. Pursuant to the common law rules of reception, English law and an English model of executive government arrived in the colonies of British North America with the English settlers,⁸⁹ and the appointment of an attorney general for her Majesty's colony was always one of the Governor's first tasks.⁹⁰ In 1867, when these colonies were united into the Dominion of Canada, the office of the Attorney General was continued in each of the newly constituted provinces, and the provinces were given the exclusive authority to make laws in relation to "charities in and for the province" and property and civil rights.⁹¹ The distribution of the Crown's prerogative powers followed this distribution of legislative authority, as the House of Lords confirmed in *Bonanza Creek Goldmining Company v Canada*.⁹² In 1885, the Supreme Court of Canada affirmed that the provincial Attorney General was the proper person to sue in respect of charitable property within the province.⁹³

The various statutes that define the functions of Canada's law officers confirm that in the common law provinces, at least, the provincial attorneys general continue to be entrusted with the English Attorney General's *parens patriae* role. Saskatchewan's *Department of Justice Act*, for example, provides that the Attorney General is "entrusted with the powers and charged with the duties which belong to the Attorney General and Solicitor General of England, by law or usage, so far as those powers and duties are applicable to Saskatchewan..." Statutes in the other common law provinces contain similar descriptions of the Attorney General's role.⁹⁴

⁸⁹ David W Mundell, "Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between them" (1960) 2 Osgoode Hall LJ 56 at 65.

⁹⁰ Philip C Stenning, *Appearing for the Crown: a legal and historical review of criminal prosecutorial authority in Canada* (Cowansville, Quebec: Brown Legal Publications Inc, 1986) at 38-55.

⁹¹ *Constitution Act*, 1867 (UK), (30 & 31 Vict c 3 ss 64, 135, and 92(7), (13).

⁹² [1916] 1 AC 566 at 579 (HL).

⁹³ *Nova Scotia (Attorney General) v Axford* (1885), 13 SCR 294, affirming (1882), RED 429.

⁹⁴ SS 1983, c D-18.2 s 10(b). See also *Attorney General Act*, RSBC 1996, c 22, s 2(e); *The Department of Justice Act*, CCSM 2010, c J35, s 2.1; *Government*

The situation is more complicated in Quebec, where the concept of charity, for private law purposes, has “nothing to do with technical charities under the English law and the statute of Elizabeth.”⁹⁵ While Quebec was initially subject to both English civil and criminal law following its conquest by England in 1763,⁹⁶ the *Quebec Act* of 1774 provided that from that time forward, matters of “property and civil rights” in Quebec would be determined according to the French civil law tradition.⁹⁷ In 1886, the newly constituted legislature of Quebec defined the functions of its Attorney General as including those belonging to the office of the English Attorney General, insofar as the same were applicable to Quebec.⁹⁸ In the seminal case of *Valois v de Boucherville*, the Supreme Court of Canada expressed doubts that this provision invested Quebec’s Attorney General with common law powers relating to charity.⁹⁹ The final resolution of this question was rendered unnecessary by the enactment of the 1965 *Justice Department Act*, which redefined the functions of the Quebec Attorney General without reference to the functions of its English predecessor.¹⁰⁰ It appears, therefore, that whether or not the Crown in right of Quebec ever enjoyed common law prerogative powers over charities, those powers no longer exist.

B) Historical Involvement

Despite the compelling evidence that the attorneys general of the common law provinces are rightful heirs of the English Attorney General’s role as the protector of charities, the relationship between the Crown’s Canadian law officers and the objects of Canadian charity has been far more ambivalent than that between its counterparts across the Atlantic. In several early Canadian cases concerning the administration of charitable funds and the validity of alleged charitable gifts, the courts held that the provincial attorney general was a necessary party.¹⁰¹ However, amidst the

Organization Act, RSA 2000, c G-10, Sch 9; *Ministry of the Attorney General Act*, RSO 1990, c M17, s 5(d); *Executive Council Act*, SNL 1995, c E-16.1, s 4(4)(a); *Public Service Act*, RSNS 1989, c 376, s 29(f); *An Act respecting the Office of the Attorney General*, SNB 2008, A-16.5, s 2(c).

⁹⁵ See *Ross v Ross* (1894), [1896] 25 SCR 307 at 330.

⁹⁶ Stenning, *supra* note 89 at 45. England also appointed Quebec’s first Attorney General at this time.

⁹⁷ *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 1774 (UK), 14 Geo. III, c 83.

⁹⁸ *An Act concerning the department of the Law Officers of the Crown* (49 & 50 Vict, c 99) (1886), s 4.

⁹⁹ [1929] SCR 234.

¹⁰⁰ SQ 1965, c 16, s 4, cited in Stenning, *supra* note 89 at 81.

¹⁰¹ *Long v Wilmotte* (1863), 2 Ch 87 (Upper Canada Court of Chancery); *Fernie District Fire Relief Committee v Bruce* (1911), 17 WLR 425 (BCCA).

litany of Canadian trust law cases addressing the meaning of charity, the presence of the chief law officers can only sporadically be ascertained. The most prominent exception to this rule is in Ontario, where the Attorney General's statutory representative in charitable matters, the Public Guardian and Trustee, has since 1921 consistently exercised its statutory right to intervene in proceedings "to set aside, vary or construe" a charitable gift.¹⁰² In most other provinces, however, the participation of the attorneys general has been relatively rare.

The effect of the law officers' absence on the representation of charitable interests has been varied but significant. In some cases, the objects of charity have received *ad hoc* protection, as where a Manitoba judge appointed counsel to represent the "needy aged persons" whose maintenance was the object of a bequest.¹⁰³ In other cases, the objects of charity have not been represented at all.¹⁰⁴ On occasion, it even appears that an attorney general has taken a position adverse to the interests of charity in general.¹⁰⁵ Finally, in a great number of cases, the interests of potential charitable beneficiaries have been partially represented through the submissions of actual or potential trustees.¹⁰⁶ However, these parties lacked the competence to represent the interests of "charity in general," or "all persons beneficially interested in charity funds."¹⁰⁷

The important case of *Cameron v Church of Christ, Scientist (sub nom Re Orr)*¹⁰⁸ seems to provide a fair summation of the ambivalent historic relationship between the objects of Canadian charity and the Crown. The issue in *Cameron* was whether a wealthy Christian Scientist, who had framed a bequest for religious purposes in "vague and chimerical"

¹⁰² See *An Act to amend the Ontario Public Trustee Act*, SO 1921, c 47, s 8. The Attorney General of New Brunswick also appears to have been quite active; see e.g. *Beaverbrook Trust v St John (City)* (1980), 30 NBR (2d) 427 (QBTD); *McIntosh Estate v McIntosh Estate* (1982), 40 NBR (2d) 201. My thanks to an anonymous reviewer for this observation.

¹⁰³ *Re Angell Estate* (1955), 16 WWR 342 (Man QB).

¹⁰⁴ See e.g. *Payne Estate v BC (Attorney General)* (1953), 11 WWR (NS) 424 (SC).

¹⁰⁵ See *Wood and Whitebread v Alberta*, [1977] 6 WWR 273 (Alta TD), [1977] AJ No 542 where counsel appeared "for Her Majesty the Queen in the Right of the Province of Alberta, representing the Ultimate Heir, and the Attorney General of Alberta."

¹⁰⁶ See e.g. *Cox v Hogan* (1925), 35 BCR 286 at 287 (CA), where the City of Victoria appeared to support the validity of a charitable bequest "for the citizens of Victoria British Columbia to have it for some good public purpose;" see also *Wilson v Toronto General Trust Corp*, [1954] 3 DLR 136 (Sask CA).

¹⁰⁷ *Sekeford's*, *supra* note 10 at 488.

¹⁰⁸ (1917) 40 OLR 567 (Sup Ct (AD))[*Cameron*], reversed by [1918] 57 SCR 298 [*Cameron SCC*].

language, had created a valid charitable trust. The Attorney General of Ontario, whose duties had not yet been assigned by statute to the Public Trustee, was not notified and did not participate in either the Superior Court or Appellate Division proceedings.¹⁰⁹ During oral argument, the Appellate Division suggested that the Crown's law officer should be represented,¹¹⁰ and so the Attorney General submitted a written memorandum arguing that the testator had a general charitable intention and that the funds could be subject to a *cy-près* scheme. When the Appellate Division's decision that a valid charity had been created was appealed to the Supreme Court of Canada, however, the Attorney General did not appear. The Court of Appeal's decision was overturned, and the funds held in trust were turned over to the next-of kin.¹¹¹

C) Causes and Effects of Limited Participation

There are many possible hypotheses for why the Canadian attorneys general have not displayed the same robust commitment as the English Attorney General to protecting rights of a charitable nature in the courts. The diversion may reflect the more political character of the Canadian office,¹¹² and the fact that Canada has combined into a single portfolio functions that in England are distributed between several different offices.¹¹³ It may relate to the early demise of the office of the Solicitor General in Canada's provinces,¹¹⁴ and the impact that had on the Crown's ability to represent two divergent interests in proceedings involving purported charitable trusts. Or it may simply be that somewhere in the complex process of transferring the laws of England to new colonies with limited legal resources,¹¹⁵ the ancient *parens patriae* tradition of protecting charitable interests became somewhat lost.

While both the causes and effects of the Crown's limited engagement in Canadian charity proceedings must to a certain extent remain

¹⁰⁹ The Official Guardian did appear, however, arguing that the property should go to the next of kin.

¹¹⁰ *Cameron*, *supra* note 108 at 585.

¹¹¹ *Cameron SCC*, *supra* note 108 at 308.

¹¹² In the UK, there is a longstanding political convention that the Attorney General is not a member of Cabinet; in Canada, the attorneys general are all Cabinet members: see e.g. *BC Attorney General Act*, *supra* note 94 s 2(a). See also Craig E Jones, "The Attorney general's Standing to Seek Relief in the Public Interest: the Evolving Doctrine of Parens Patriae" (2007) 86 *Can Bar Rev* 121 at 137-38.

¹¹³ Edwards, *supra* note 23 at 8 and Stenning, *supra* note 90 at 72.

¹¹⁴ Stenning, *ibid* at 89-97.

¹¹⁵ *Ibid* 52, 57-58, noting the dearth of trained lawyers in the early years of the British North American colonies.

speculative, however, it is possible to identify some of the jurisprudential consequences that this reticence has produced. First, in the absence of the attorneys general, executors applying for directions on a will have found themselves defending charitable interests, rather than properly taking a neutral stance.¹¹⁶ Second, in the absence of the attorneys general, decisions regarding the legal meaning of charity have been reached without full consideration of the applicable law. This appears to have occurred, for example, in *Kennebecasis Valley Recreation Centre v Minister of Municipal Affairs*, where a New Brunswick appeal court determined that a company founded to provide community recreation was not charitable at common law, without reference to *Baddeley* or any other fourth head case.¹¹⁷ Other charity cases involving important points of principle have been decided without *any* adversarial argument for the benefit of the court.¹¹⁸

Finally, in the absence of the provincial attorneys general, a whole new charities jurisprudence has taken shape in Canada, without any representation of the potential beneficiaries of charity or the public's interest in charity at large. This jurisprudence consists of appeals from the registration and revocation decisions of Canada's *de facto* charities regulator, the CRA, and addresses the proper interpretation of the registered charity provisions of the federal *ITA*. The *ITA* defines the recognized categories of registered charities primarily by reference to "charitable purposes" (*fins de bienfaisance*) and "charitable activities" (*activités de bienfaisance*),¹¹⁹ and these terms, in turn, have always been interpreted by reference to the common law.¹²⁰ Because of this, and because of the important fiscal consequences attached to charitable tax status, federal tax law decisions interpreting the registered charity provisions likely now constitute the most important context within which questions regarding the common law meaning of charity in Canada arise.

¹¹⁶ Compare *Quirico v Pepper Estate* [1999] BCJ No. 2229 at paras 15-16, and *Wilson v Toronto* [1954] 3 DLR 136 (Sask CA). In other cases, executors have argued that no valid charity was created: see *Re Vernon Estate*, [1948] 2 WWR 46 (BCSC).

¹¹⁷ (1975), 11 NBR (2d) 361 (CA).

¹¹⁸ See *University of Victoria v BC (AG)* (2000), 73 BCLR (3d) 375(SC), where the Attorney General appeared but took no position on whether the educational bequest was valid or contrary to public policy.

¹¹⁹ *ITA*, supra note 2, s 149.1(1).

¹²⁰ For an argument that this approach to the registered charity provisions is inconsistent with Canadian multijuralism and the *Interpretation Act*, RSC 1985, c I-21, see Kathryn Chan, "Taxing Charities / Imposer les Organismes de Bienfaisance: Harmonization and Dissonance in Canadian Charity Law" (2007) 55 Can Tax J 481.

Given the limited record of involvement of the provincial attorneys general in charity proceedings between private parties, it is not surprising that, to date, none of the Crown's provincial law officers has chosen to participate in a charity law proceeding involving a purported charity and the federal tax ministers of the Crown. As we have seen, however, the English Attorney General has taken a different approach, appearing as an independent party in disputes between alleged charities and the tax authorities in order to edify the court and represent the interests of charity at large. In the final section, therefore, the paper will examine the possible grounds for the participation of the provincial attorneys general in proceedings addressing the meaning of charity under the federal *ITA*.

5. *The Case for the Intervention of the Provincial Attorneys General in Charity Registration Proceedings under the Income Tax Act*

A) *Statutory Context*

Like England and Wales, Canada now has a national charities register, inclusion on which gives rise to a number of significant tax and other advantages. The gatekeeper of the Canadian register is the Minister of National Revenue, who, pursuant to sections 149.1 and 248(1) of the *ITA*, has the authority to register any entity that meets the statutory definition of a “charitable organization” (*oeuvre de bienfaisance*), “private foundation” (*fondation privée*), or “public foundation” (*fondation publique*).¹²¹ The Minister and his delegate, the CRA, also have the authority to revoke the registration of any registered charity that fails to devote all of its resources to charitable purposes and activities, or otherwise ceases to comply with the *ITA*.¹²² For present purposes, the upshot of these provisions is that where the CRA believes that an entity is not carrying out charitable purposes and activities within the meaning of the common law tradition, registered charity status may be withheld or removed.

Appeals from the registration decisions of the CRA are subject to a two-tier process. Pursuant to subsection 168(4) of the *ITA*, an unsuccessful applicant for registered charity status or a charity whose registration the Minister proposes to revoke may serve a written notice of objection on the Minister, setting out the reasons for the objection and all the relevant facts. Officials at the Tax and Charities Appeals Branch of the CRA consider these notices of objection and, under authority delegated by the Minister, vacate, confirm or vary the original decision.¹²³ Where the Minister

¹²¹ *ITA*, *supra* note 2 at s. 149.1(1).

¹²² *Ibid* at s 168(1)(b).

¹²³ *Ibid* at s 165(3).

confirms the original decision or fails to respond, the applicant or charity may appeal to the Federal Court of Appeal.¹²⁴ From this point forward, the *Federal Courts Act* and Rules govern the appeal process.

Given that the Federal Court of Appeal is not a court of inherent jurisdiction, there is an interesting question as to whether the attorneys general of the common law provinces should be entitled to appear before it in charity registration appeals on the sole basis of their *parens patriae* prerogative. Current trends towards a broadening understanding of both the Federal Courts' remedial jurisdiction and the Crown's *parens patriae* jurisdiction seem to point towards an affirmative response.¹²⁵ However, the *Federal Courts Rules* have rendered this issue (and the obstacles it might cause for Quebec) largely inconsequential by providing an additional, statutory basis for the intervention of all the chief law officers of the Crown. In particular, Rule 110 provides that where "a question of general importance" is raised in a proceeding:

- (a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;
- (b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and
- (c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.¹²⁶

In *Canada (Minister of Canadian Heritage) v Mikisew Cree First Nation*, the Federal Court of Appeal described Rule 110 as contemplating a "special role" for the Crown's law officers in assisting the court with difficult questions, and held that the attorneys general were entitled to intervene under this rule even where their interest in a proceeding was strictly "jurisprudential" and their government would not be directly affected by the result.¹²⁷

¹²⁴ *Ibid* at s 172(3)(a.1), s 180(1).

¹²⁵ On the former, see *Canada (HRC) v Canadian Liberty Net* [1998], 1 SCR 626; *Swiftsure Taxi v Canada (MNR)*, 2005 FCA 136, 332 NR 385 and Benjamin L Berger, "Our Evolving Judicature: Security Certificates, Detention Review and the Federal Court" (2006) 39 UBC LRev 101; on the latter, see *BC v Canadian Forest Products Ltd*, [2004] 2 SCR 74 at para 76.

¹²⁶ Federal Court Rule 110. See also *Federal Court Act*, s 57 (notice of constitutional question) and Federal Court Rule 109 (general rule of intervention).

¹²⁷ 2002 FCA 306, (2002), 293 NR 182 at paras 7-8.

B) *The Arguments for Attorney General Participation*

Between the prerogative powers inherited from the English Attorney General and the statutory powers established by Federal Court Rule 110, it is clear that the provincial attorneys general have the authority to become involved in appeals of the CRA's decisions to refuse or revoke the registration of an allegedly charitable institution. The question that remains, of course, is whether they should use this authority to represent and protect charitable interests in the courts. This question will have to be resolved on a case-by-case basis, based on each attorney general's view of the issues raised by the proceeding, the potential effects on provincial charitable property, and the public interest at stake. However, at least four general considerations point towards the attorneys general becoming involved in charity registration cases in appropriate circumstances.

A first general argument pointing towards the intervention of the provincial attorneys general is that charity registration appeals will often raise "questions of general importance" that are of interest to the provincial law officers of the Crown. Indeed, it is arguable that the legal meaning of charity is inherently a question of general importance, and that the provinces will always have at least a "jurisprudential" interest in this question because of their jurisdiction over charities, property and civil rights. It is true that in the context of charity registration appeals, the terms "charitable purposes" and "charitable activities" are federal statutory terms, and that the provincial legislatures are free to redefine these terms for their own purposes if they wish. Nevertheless, the meaning of the term "charitable" in the *ITA* and virtually every other Canadian statute in which it appears has consistently been held to derive from a common source, the English law of charitable trusts.¹²⁸ From a more practical standpoint, the attorneys general may consider the influence that federal court decisions defining charity for income tax purposes have had on provincial court decisions defining charity for purposes of the law of charitable trusts.¹²⁹

Even if one does not consider the legal meaning of charity to be itself a question of general importance, appeals from charitable registration decisions often raise important issues that extend beyond the boundaries of a particular case. Does the rule that charitable trusts should be benignly construed, for example, have any place in the context of a taxation statute? To what extent do provincial and federal court decisions on the meaning of charity represent a unified common law? And what exactly is the extent of the federal government's jurisdiction over charitable corporations and

¹²⁸ See e.g. *Cameron SCC*, *supra* note 108.

¹²⁹ See e.g. *Granfield Estate v Jackson*, [1999] BCJ No 711, 27 ETR (2d) 50 (SC).

trusts? These questions and others have been raised, either implicitly or explicitly, in recent appeals from the CRA's registration decisions. The attorneys general could make a meaningful contribution to the resolution of these questions by intervening to advise the court on the applicable law.

A second general consideration pointing towards the intervention of the provincial attorneys general is that in many appeals affecting charitable registration, the historic rationales for the Crown's *parens patriae* involvement continue to apply. One of the most central of these rationales, as we have seen, was that in the absence of the Crown's involvement, the interests of potential beneficiaries of charitable gifts could not, or would not, be represented. The objects of charity had no enforceable rights in trust property, and even if they did, they lacked the means and the education to put such rights to use. Individual third parties were not entitled to protect public charitable interests, and even if they were, they would not often be inclined to assert them.

With the expansion of the charitable sector into areas such as higher education and the arts, it can no longer be assumed that the potential beneficiaries of a charitable endeavour will inevitably fall among "the classes most in need of aid."¹³⁰ Nevertheless, as long as we believe that charitable objects are of "special benefit to society,"¹³¹ we should be concerned that charitable objects and those who may benefit from them are properly represented in court. This is not currently the case at the Federal Court of Appeal. The appellants are not in court to represent the interests of all persons who might benefit from their charity, but only to defend the charitable nature of their objects in relation to the specific activities they propose to carry out. The potential beneficiaries have no vested "rights" they may enforce, whether the appellant is a charitable corporation or trust. And while third parties may seek leave to intervene where they will assist in the determination of a factual or legal issue,¹³² the old dilemma of finding a party that is equipped and willing to assert the rights of the persons beneficially interested in a charity still applies.¹³³ The Attorney General must represent the objects of charity, on this account, because no one else will.

¹³⁰ This will, nonetheless, often be the case; see e.g. *AYSA*, *supra* note 3.

¹³¹ *Vancouver Society*, *supra* note 1 at para 128.

¹³² Federal Court Rule 109.

¹³³ To date, charity registration appeals at the Federal Court of Appeal level have only ever heard argument from two parties: the purported charity, and the Attorney General of Canada, acting in his capacity as the representative of the Revenue Minister of the Crown.

The old rationales that focused on the difficulty of finding an appropriate individual to protect charitable objects were mirrored, as we have seen, by a positive rationale for the Crown's *parens patriae* role: the public as a *whole* had an interest in the use of charitable property, and the Attorney General was the appropriate figure to act on the public's behalf. This rationale has gained in strength since the days of Sir Samuel Romilly, both through the entrenchment of the rule requiring that all charities benefit the public, and through the development of a tax regime that in Canada sees 44 cents of every dollar donated to registered charities being funded by Canadian taxpayers.¹³⁴ Given the extent to which the Canadian public financially supports the endeavours that the CRA recognizes as charitable, there is a strong argument that the attorneys general should represent the public interest in an appropriate definition of charity in court.

Beyond the historic rationales for the Crown's *parens patriae* involvement, a third set of arguments for the intervention of the attorneys general flow from the registered charity provisions themselves. As the Supreme Court of Canada affirmed in *AYSA*, any consideration of how the traditions of the common law relate to issues of charitable registration must not be undertaken in a vacuum, but in relation to the scheme of the *ITA*.¹³⁵ An examination of this statutory scheme, and the particular ways in which it differs from the UK *Charities Act*, provides several additional reasons to encourage the participation of the provincial attorneys general in appeals affecting charitable registration.

First, under the scheme of the *ITA*, no public person apart from the provincial attorneys general has a legal mandate to protect charitable interests. While the Charity Commission for England and Wales is required by statute to carry out its registration functions in a way that is compatible with the encouragement of charitable giving and innovation,¹³⁶ the CRA has no charity-related mandate beyond supporting the administration and enforcement of the Act.¹³⁷ And while the exact nature of the Federal Court of Appeal's jurisdiction over registered charities is open to debate, it certainly has not chosen to exercise that jurisdiction in a way that reflects the historically protective role of the Chancery courts.

Second, in an appeal against a registration or revocation decision of the Minister, it is the purported charity that bears the onus of demonstrating

¹³⁴ This characterization of the Canadian tax regime admittedly reflects a "subsidy theory" of charitable tax benefits. Other theories exist; see e.g. WD Andrews, "Personal Deductions in an Ideal Income Tax" (1972) 86 Harv LR 309.

¹³⁵ *AYSA*, *supra* note 3 at para 30.

¹³⁶ *Charities Act 2006*, *supra* note 81 at s 1D(2).

¹³⁷ *Canada Revenue Agency Act* (1999, c 17), s 5(1)(a).

that the Minister erred in his decision.¹³⁸ The difficulty of meeting that onus is increased by s 180(3) of the *ITA*, which provides that charity registration appeals shall be heard and determined “in a summary way,” without the benefit of any sworn evidence or findings of fact.¹³⁹ The modest factual record and the deference accorded to the decisions of the Minister stand in stark contrast to other contexts in which questions regarding the meaning of charity are decided, and strengthen the argument that charitable interests need a public advocate in the Federal Court of Appeal.

Third, the *ITA* provisions on the revocation of charitable registration create unique and adverse consequences for provincial charity property, which have no parallel in the common law or the English statutory regime. When the Minister decides that a registered charity has ceased to meet the statutory requirements for registration, whether for failure to carry out charitable purposes or any other cause, he may issue the charity a notice of intention to revoke.¹⁴⁰ On that date, the taxation year of the charity is deemed to end, and it becomes liable for a revocation tax equivalent to the fair market value of all its property, minus amounts expended during a one-year “winding-up period” on charitable activities and gifts to arms’-length charities.¹⁴¹ At the end of the one-year period, the charity must turn over any property that has not been so expended to the federal Receiver General.¹⁴² Charities that have received gifts from the revoked charity in the 120 days before the issuance of the notice also become jointly and severally liable for those amounts.¹⁴³

The *ITA* revocation provisions represent a striking derogation from the common law principle that property, once dedicated to charity, must be devoted to charity forever. As such, it is not surprising that the English regime remedies misapplications of property by registered charities in a very different way. First, unlike the CRA, the Charity Commission does not generally remove charities from the register for failing to carry out charitable activities or for failing to fulfil the administrative requirements of the *Charities Act*. Rather, it relies on its statutory powers to direct and replace charitable trustees, to ensure that in future, the institution operates

¹³⁸ *Canadian Committee for the Tel Aviv Foundation v Canada*, 2002 FCA 72, 287 NR 82 at paras 25-27; *Human Life International in Canada Inc v MNR*, [1998] 3 FC 202 at 215 [*Human Life International*].

¹³⁹ *Human Life International*, *ibid* at para 1.

¹⁴⁰ *ITA*, *supra* note 2 at s 172(3).

¹⁴¹ *Ibid* at s 188(1), (1.1), (1.2), 1.3).

¹⁴² *Ibid* at s 189(6.1)(c).

¹⁴³ *Ibid* at s 188(2).

consistently with its charitable objects.¹⁴⁴ Second, where an institution is exceptionally removed from the English register on the basis that its *objects* are no longer considered charitable, the Commission takes the position that the institution's property is irrevocably dedicated to charity and should be applied *cy-près*.¹⁴⁵ Property that has been devoted to charity may be directed to other charitable uses, in other words, but never transferred to the non-charitable sphere.

From the perspective of the provincial attorneys general, the primary significance of the *ITA* revocation scheme is that any time a charity's registration is revoked, the possibility arises that existing charitable property will be transferred to the federal revenue pool. As such, the scheme directly engages the law officers' duty to protect charitable property within the province, as well as their interest in ensuring that federal statutes do not unduly interfere with provincial law. Ultimately, the provincial law officers may decide that it is not in the public interest for them to intervene in revocation appeals where there is widespread evidence of fraud or the charity's assets are not tied to a particular province. However, in a case like *Hostelling International*, where a longstanding, provincially incorporated charity situated in Ontario had its registration revoked simply because CRA determined that hostels should no longer enjoy charitable tax benefits, there is a strong case for the attorneys general to intervene.¹⁴⁶

If there is a final argument in favour of provincial participation in charity registration appeals, it is simply that proceedings often assume a weightier character when the representatives of the Crown are at bar. As the English Court of Appeal once noted in the context of a relator proceeding, the Attorney General *is* in a better position than any other litigant, "for the Attorney General represents the community, which has a larger and wider interest in seeing that the laws are obeyed..."¹⁴⁷ The favorable position of the Attorney General in the courts has a long and complex history, but what has remained constant is the judiciary's respect for the judgment and experience of the chief law officer of the Crown.¹⁴⁸

¹⁴⁴ *RR6 – Maintenance of an Accurate Register of Charities* (November 2000), online: Charity Commission <http://www.charity-commission.gov.uk/Publications/rr6.aspx> at paras 12-14.

¹⁴⁵ *Ibid* at paras 25-37. This includes, somewhat controversially, property held by a charitable corporation: see Appendix E.

¹⁴⁶ *Hostelling International*, *supra* note 3. *C.f.* *Dingle*, *supra* note 78, where the English Attorney General took a strong position against previously charitable property being designated non-charitable.

¹⁴⁷ *AG v Harris*, [1961] 1 QB 74 (CA) at 95.

¹⁴⁸ *Tobin v R* (1863), 143 ER 543. In Canada, see *Toronto Aged Men's and Women's Homes v Loyal True Blue and Orange Home* (2003), 68 OR (3d) 777 at para 6,

The difficulty in the context of charity registration appeals is that all of this judgment and experience, present in the person of the Attorney General of Canada, works against the interests of charity and for the fiscal interests of the federal Crown. If the provincial attorneys general were also to appear to represent the interests of charity in general, charitable beneficiaries and the broader public might profit from a similar weight.

6. Conclusion

The Attorney General's historical role as the representative of charitable interests in the courts was never merely a procedural incident of the substantive law regarding charitable gifts. The function of the *parens patriae* was central to the charity law tradition; indeed, it became central to the definition of charity itself.¹⁴⁹ For this reason, the English Attorney General has continued to protect and enrich England's legal concept of charity, even as the fiscal consequences of that designation have increased.

I have argued that there are compelling reasons to reinvigorate the role of our own law officers in proceedings involving charities, and to initiate a role for the provincial attorneys general in appeals from the charity registration decisions of the Minister of Revenue under the federal *ITA*. Both the charitable beneficiaries' need to be represented and the courts' need to hear full and balanced argument on important charity law questions point towards this conclusion. Beyond this, our efforts to draw the provincial attorneys general into the battles over the shape of the Canadian charitable sector may lead us towards a recognition that rights in charitable property are *public* rights, which are intimately related to the public duties of the Crown. If this is indeed the case, a suggestion I intend to explore further, the Canadian public may in future find itself more able to assert its real interests in protecting charity, and in determining what charity means.

where Cullity J noted "the deference that the court will ordinarily show to the advice it receives from [the Attorney General]."

¹⁴⁹ *National Anti-Vivisection Society*, *supra* note 4 at 62-63.