# Case Comment: *Everywoman's Health Centre Society* v. *Minister of National Revenue*

JAMES PHILLIPS
*Assistant Professor, Faculty of Law, University of Toronto*

## Introduction

In its recent decision in *Everywoman's Health Centre Society* v. *Minister of National Revenue* the Federal Court of Appeal decided that a free-standing abortion clinic can qualify as a registered charity under the *Income Tax Act*.[1] To the layperson this might seem remarkable given the still controversial nature of the subject matter, and to the lawyer it might appear to herald a change in the attitude of a Court that in recent years has taken a hard line on purposes that stray into the political arena.[2] Yet the decision, while noteworthy in some respects, is not as significant as it might seem. The Court reached its conclusion through a straightforward application of long-established jurisprudence on the charitable nature of the provision of medical services, and the political purposes doctrine was clearly inapplicable in the circumstances of the case. The decision is nonetheless of some interest for what it has to say about the links between charity, public policy and political controversy. Each of these issues will be addressed in this comment, following a review of the case.

### *Everywoman's Health Centre Society* v. *M.N.R.*

The Everywoman's Health Centre Society was incorporated in 1988 as a nonprofit organization with two stated purposes:[3]

(1) to provide necessary medical services for women for the benefit of the community as a whole; and

(2) to carry on educational activities incidental to the above.

From its inception the Society has operated a free-standing abortion clinic for women in the first trimester of pregnancy. Abortions are performed by three doctors, one the clinic's medical director, none of whom works full time at the clinic. The clinic also provides pre- and post-abortion counselling as well as pregnancy testing and contraception advice. The provincial Medical Services Plan covers the physician's fee and the costs of necessary testing but does not provide any other financial support; the clinic therefore relies on user fees and on contributions from supporters for its general running expenses and for specialized services such as counselling. User fees are waived for women who cannot afford them, an option apparently taken up by about 15 per cent of the

clients and one which must obviously have increased the clinic's reliance on its supporters' generosity.

According to a report by an officer of Revenue Canada,[4] the clinic was not able to meet the demands on it for abortions at least in part because some Vancouver hospitals have placed a cap on the number of abortions they will perform; by the fact that at least five rural British Columbia hospitals do not provide abortion services; and by women coming to the clinic from the Yukon and Alberta, where abortion services were difficult to obtain. Both the 1989 report prepared for Revenue Canada and the Federal Court of Appeal decision stressed the fact that the clinic met a need and did so in exemplary fashion.[5]

On incorporation the Society applied for registered charity status but following a departmental investigation registration was refused.[6] The Federal Court of Appeal, in a judgment written by Decary J.A. and concurred in by Pratte J.A. and Desjardins J.A., allowed the Society's appeal. The Court's reasons can be divided into two parts: it first reviewed the cases relating to whether or not the provision of medical care was charitable and, having decided that such provision has generally (though not always) been so viewed, dealt with Ministry's arguments as to why this particular form of medical care should not be accorded that status.

Decary J.A. began his consideration of the threshold issue of whether the Society's purpose came within the fourth head of charity—"other purposes beneficial to the community"—with the now familiar review of the principles adopted by the Federal Court of Appeal in *Native Communications Society of B.C.* v. *M.N.R.*[7], i.e., to be "beneficial to the community" in the sense that legal charity knows that term, a purpose must come within the "spirit and intendment", although not within the letter, of the *Statute of Charitable Uses*.[8] He then quoted at length from one of the leading English cases, *In Re Resch's Will Trusts*,[9] which he said stood "beyond question" for the proposition that "private, fee-charging hospitals *prima facie* qualify as charities at common law on the basis that 'the provision of medical care for the sick' is accepted as conferring a public benefit".[10] He attached no particular meaning in this case to the phrase "for the sick", which he said should "not be taken too literally" and thereby give rise to arguments about "whether or not ... [a] health condition can be properly characterized as a sickness". Rather, he held that in Canada the better phrase was provision of "health care" and there was no doubt that "abortion, when performed by a physician, constitutes some form of health care".[11] This conclusion was bolstered by other facts, notably that "abortions are performed in some public hospitals which qualify as charitable organizations, that the Province of British Columbia funds abortion as an insured medical benefit under the Medical Services Plan, and that the funding of abortion is not prohibited by the *Canada Health Act*".[12]

Having fitted the clinic's case into the existing doctrine, Decary J.A. considered why the government sought to make an exception of it. The Minister had argued that "absent clear statements of public policy and absent public consensus on the abortion issue, it cannot be said that the activities are beneficial to the community in a way the law regards as charitable".[13] While the Minister apparently conceded the obvious point that there were now no criminal or civil law impediments to abortion,[14] he argued that "it cannot be concluded that first trimester abortion by choice of the patient, while clearly legal, reflects public policy on abortion".[15] While this argument is a little difficult to grasp, Decary J.A., correctly I think, summarized it thus: "The Minister's contention is that there can be no benefit for the public, and therefore no charity, where, all other conditions being fulfilled, the object of the charity is controversial".[16]

This argument received short shrift. While the Court acknowledged that it is possible for a charitable purpose to be held to be contrary to public policy, for that to happen "there must be a definite and somehow officially declared and implemented policy". Here there is no public policy against abortion; all the evidence, in fact, shows that "the performance of abortions at these clinics does not offend any public policy". In any event "[i]t would impose an unbearable burden on those who apply for charity registration to require that there be a clear public policy *approving of* their activities".[17] Decary J.A. also found no support in law for the implicit suggestion that there must be some kind of "public consensus" about a purpose before it can be considered charitable. Finally, he rejected the Crown's attempts to invoke recent cases in which the Federal Court of Appeal had refused registration on the basis of the political purposes doctrine, for here the purpose was "dispensation of health care to women who want or need an abortion", not "alteration of the law with respect to abortion" or "promoting the pro-choice view."[18] He concluded by again drawing a distinction between a controversial political question and the clinic's activities: "The controversy that surrounds abortion should not deter us from seeking the true purpose of the clinic, which is to benefit women receiving a legally recognized health care service in a legally constituted clinic".[19]

## Purpose Beneficial to the Community: The Provision of Medical Services

There can be no question that on the threshold issue of whether the Society's purposes are *prima facie* charitable the Court's decision is the correct one. Whether derived directly or by analogy from the references in the *Statute of Charitable Uses* to "the relief of...impotent...people" and the "the maintenance of sick and maimed soldiers and mariners",[20] or whether "more broadly...derived from the conception of benefit to the community",[21] trusts for the provision of medical services, those which "promote health and medicine",[22] have long been considered generally charitable. Within this general category under the fourth head of charity there are a large number of English,

Canadian, and Commonwealth cases which have held gifts to hospitals to be charitable.[23] There are few explicit judicial statements about why this is so, presumably because they would be otiose. It should be noted that while most of these cases deal with what might be termed "general hospitals", some involve smaller, specialized facilities or specific forms of medical care or research.[24] In these circumstances it was very easy for Decary J.A. to find the purpose of operating a medical clinic to be *prima facie* a charitable one.

This is not to say that any and all "clinics" are necessarily considered to be devoted to charitable purposes. In the first place the definitions noted above clearly imply that the services provided be accepted as medically useful. In fact the courts have tended to be liberal in the past on this threshold issue, validating, *inter alia*, gifts for "the purchase of radium which I believe humanity is in great need of today",[25] and for "the furtherance of psychological healing in accordance with the teaching of Jesus Christ".[26] Despite this, and also despite the fact that the task of deciding this question is probably made much easier by Canada's publicly funded health system, it would presumably be open to a court in an unusual case to hear medical evidence on this point. Given the legality of abortion and the fact that those performed in hospitals are generally publicly funded,[27] this threshold issue of medical acceptability is surely not raised in this case.

If abortions are indeed an aspect of health care, there are no other impediments to the Everywoman's Health Society Centre being registered as a charity. In particular, the fact that the clinic charges fees for its services does not of itself detract from its charitable nature. In the leading English case, *Re Resch*, Lord Wilberforce acknowledged that "there may be certain hospitals ... which are not charitable institutions". There were two "disqualifying indicia": either "the hospital is carried on commercially, i.e., with a view to making profits for private individuals", or "the benefits it provides are not for the public, or a sufficiently large class of the public".[28] This appears to establish only two further criteria (in addition to that already discussed of not advancing health) that will render an otherwise charitable hospital non-charitable—exclusivity and profitability. Charging fees to some, or indeed most, users is not a "disqualifying indicium" because, as stated by Upjohn L.J. in *Re Smith*, the hospital's funds are still "exclusively applied to the relief of the sick".[29] Canadian courts have taken the same position as the English ones on this issue,[30] and thus the clinic in *Everywoman's Health Centre Society* was not a rare example of a non-charitable facility dispensing medical care. While it charged fees, it was not run for commercial profit, and the second of the two "disqualifying indicia"—exclusivity—was not relevant for there were no restrictions other than medical ones on who could avail themselves of the service. The Court had no option but to find the clinic's purpose to be charitable.

## Abortion Services and Public Policy

I turn now to the second issue raised in the case, that of whether or not the provision of abortion services through a free-standing clinic contravenes public policy. It is trite law that a trust, charitable or otherwise, which pursues ends considered to be illegal or contrary to public policy will not be enforced by the courts.[31] Yet this doctrine has a very limited application in trusts law generally,[32] and is even more circumscribed in the area of charitable purpose trusts, for it is difficult to imagine that the illegal or undesirable purpose would qualify generally as charitable given the threshold requirement of public benefit.[33] Although it is not true as a statement of doctrine, it is probably accurate to say that as a practical matter charities law largely deals with the "public policy" issue through the public benefit and political purposes doctrines.[34]

The examples offered in cases of charitable purpose that would contravene public policy are usually of the absurd variety. Typical is the statement by Harman L.J. in *Re Pinion*[35] that a "school for prostitutes or pickpockets", while apparently educational, would be considered contrary to public policy![36] It is true that the public policy doctrine has a larger role to play in the field of conditions attaching to otherwise valid charitable purposes; indeed the doctrine that these must not be contrary to public policy has received new life since the Ontario Court of Appeal's decision in *Re Canada Trust Co. and Ontario Human Rights Commission*, which struck down conditions attached to an educational trust which mandated racial and gender discrimination.[37] But the conditions problem is obviously not raised in this case.

All of this helps to account for Decary J.A.'s difficulties when confronted with an argument that, while the Society's purposes were legal and apparently charitable, they were somehow contrary to public policy because they were controversial. The difficulty in responding to this argument is precisely that it is so totally without foundation in law. Decary J.A. was driven to say so, noting at one point that there was "no support for such an approach in the case law", and at another that "counsel for the respondent was unable to direct the Court to any supporting authority".[38] In the end he was left simply asserting, correctly, that in order for a purpose to be contrary to public policy, there "must be a definite and somehow officially declared and implemented policy" against the activity, and this could hardly be the case when it was legal and publicly-funded.[39] The Minister's argument in the principal case did indeed amount to a suggestion that controversy should be a disabling factor, and the Court would have had to make a major change in the law to give effect to it.

While the case law provided no support for the Minister's position, one previous case supported that of the Society and was apparently "relied heavily on" by the Society in argument.[40] *Auckland Medical Aid Trust* v. *Commissioner of Inland Revenue*[41] involved a New Zealand trust whose general stated purposes were to "establish and maintain a comprehensive health and welfare

service related to the human reproductive process ... [and] to establish, provide and maintain hospitals and clinics ... [and] to educate the public in the facts of human reproduction and the human reproductive process".[42] In fact during the period in issue in the case, the 1975 and 1976 tax years, the trust's principal activity was the provision of what was effectively an "abortion on demand" service for women in the first trimester at a time when the availability of abortions was formally restricted. This created a storm of controversy, but the Trust was able to continue because the law on abortion was "undefined and lacking in certainty".[43] The government offered a number of arguments as to why the Trust was not charitable, including one that the abortion services provided "had created so much public controversy and the degree of it was harmful to the community". Put another way, the Trust "had not discharged the onus of proving that their activities had been beneficial and that they had not been harmful [to the public]."[44]

Chilwell J. decisively rejected this argument. He reviewed the findings of a 1977 Royal Commission, which concluded, *inter alia*, that "[t]he vagueness of the law on abortion has been exploited to the fullest extent" by the Trust. But, according to Chilwell J., "the Royal Commission stopped short of finding unlawful conduct", and its report "contained no express findings of illegality".[45] He also noted that an attempted prosecution of its chief medical officer had resulted in an acquittal.[46] The problem therefore was that the government's argument was not that the trustees had acted illegally, but that their activities were "harmful ... because they created public controversy and because they took advantage of an uncertain law". But, Chilwell J. stated, "there are no degrees of legality known to our law", the trustee's activities were "either illegal or ... not".[47]

As to whether the controversial aspect of the abortion debate should make the Trust's activities harmful, or at least not beneficial, to the public, Chilwell J. argued that historically "the law of charities is strewn with the great controversies of the past",[48] and he offered an impassioned plea for the values inherent in public debate. Decided cases on what is charitable demonstrated "that the advocates of causes involving intense moral issues ought not per se to be considered to be acting in a manner harmful to the public". He saw value in having public debate about divisive social issues, and thought that "when the Courts take sides [by finding some purpose not to be charitable] injustice may be the result". Chilwell J. had no doubt that "[t]he controversy which has raged over the abortion and related issues in this country during periods relevant to this case was not in my judgment harmful to the public viewed objectively."[49]

Chilwell J.'s views are provocative because they seem to suggest dissatisfaction with the political purposes doctrine. He probably did not mean to go so far, and certainly on the facts that issue was not raised because the activities complained of did not involve direct campaigning for legislative action. For

our purposes the point is that even where the law was unclear, and one could argue that the Trust was effectively engaging in a political purpose by testing the limits of the law, its activities were not considered to be contrary to public policy. The position of the Society is far stronger, for in Canada the law clearly permits the activities at issue here.

In the *Everywoman's Health Centre Society* case Decary J.A. said that *Auckland Medical Aid Trust* was "helpful" but not of much importance, and he dealt with it in one short paragraph.[50] Yet the principle underlying this part of the decision in *Auckland Medical Aid Trust* may be more significant than Decary J.A. was prepared to concede. Chilwell J. expressed a general sentiment that is not only correct in law but desirable in theory. Charities law has never required a "public consensus" approving of a purpose before it can be considered charitable in the legal sense. The simple example of trusts for the advancement of religion, which are invariably considered charitable, suffices to make the point. Given that, with a few minor apparent exceptions,[51] all religions will qualify, for "as between different religions, the law stands neutral",[52] it is hardly likely that one could get a public consensus on the value of each variety of belief. It may be that there would be such a consensus on the value of religion *per se*, that society agrees with the law that "any religion is at least likely to be better than none"[53] but the analogy there is with the equivalent public consensus on the value of health care generally, not with abortion in particular. Decary J.A. did state at one point that "[c]harity and public opinion do not always go hand in hand",[54] and he might have developed the argument, given the Minister's apparent desire to make popularity a prerequisite for charitability. Nonetheless, the Federal Court of Appeal was right to reject the Minister's attempt. It was right in law, and, it is submitted, right as a matter of good policy.

I am not suggesting that decisions on what constitutes a sufficient public benefit should be left to the personal whims of the judiciary without reference to prevailing social values, for the law of charity is built on a legal, not a popular or transitory, conception of public benefit. It may indeed be that a thoroughgoing reform of charities law is required and some purposes traditionally considered charitable should be eliminated from the doctrine. Rather I am arguing that, given the current state of the doctrine, to require purposes otherwise charitable to necessarily be popular purposes would impoverish the law governing the charitable sector and impair unreasonably the activities of its practitioners.[55]

## Postscript: Provincial Differences in What is Charitable

One final point is worth making. *Everywoman's Health Centre Society* raises the possibility of a particular purpose—providing one special medical service in a free-standing clinic—being charitable in the context of the *Income Tax Act*

in some provinces and not in others.[56] This is possible for one of two reasons. First, it may be that the Federal Court will take a different view of a situation where the provincial health insurance plan does not provide any funding for abortions carried out in free-standing clinics. At the moment there is no uniformity on funding for abortion services. While all provinces but one, and the territories, provide funding under health insurance plans for hospital abortions carried out in the province or territory,[57] the tendency is not to fund those carried out in clinics.[58] The fact that British Columbia does so was obviously relevant to the decision in this case, and it is possible that a future decision would put greater weight on this one factor either in deciding whether the service came under the rubric of "provision of medical care" or in dealing with a public policy argument. That is, it could be argued that in a socialized medical system only medical services that are publicly funded should qualify as charitable, or that even though services are *prima facie* charitable the lack of funding is an indication of their being contrary to public policy. This is a plausible though unlikely argument, particularly if abortion continues to be legal in its current guise.[59]

The other route to a differential provincial approach to this question is that currently being pursued by the Nova Scotia Government. In 1989 Nova Scotia passed the *Medical Services Act*,[60] the essential point of which was "to keep free-standing abortion clinics ... out of Nova Scotia".[61] It made the operation of a free-standing abortion clinic in the Province an offence. When charges were laid under this *Act*, however, it was declared unconstitutional as being in pith and substance legislation related to criminal law and therefore within the Federal Government's jurisdiction. The Province, which lost at trial and on appeal,[62] has received leave to appeal the issue to the Supreme Court of Canada. It is unlikely to be successful there, but if it were, or if Nova Scotia or another like-minded province were able to find some other way of achieving this purpose, the consequence for charities law would be that an activity—performing abortions in free-standing clinics—could be charitable for income tax purposes in one province and not only non-charitable but illegal in another! While provincial differences in what should be considered charitable are generally not a great problem,[63] a distinction of this magnitude would be of some concern, particularly for donors to the charitable purposes affected.

**FOOTNOTES**

1. Unreported Decision, 26 November 1991, Court File No. A-129-90 (hereafter Appeal Decision).
2. See *Scarborough Community Legal Services* v. *M.N.R.* (1985), 17 D.L.R. (4th) 308 (F.C.A.); *Toronto Volgograd Committee* v. *M.N.R.* (1988), 29 E.T.R. 159 (F.C.A.); *Positive Action Against Pornography* v. *M.N.R.* (1988), 49 D.L.R. (4th) 74 (F.C.A.); *N.D.G. Neighbourhood Association* v. *M.N.R.*, (1988), 30 E.T.R. 99 (F.C.A.).
3. Appeal Decision, p. 1.

4. *Ibid.*, Substantial parts of this report are reproduced pp. 2-5.
5. In his judgment, Decary J.A. stated that the Revenue Canada report "gives a very detailed description of what goes on at the clinic and does so in most flattering terms". (*Ibid.*, p. 16) The clinic has apparently won an award from the provincial Public Health Nurses' Association for its contribution to community health services.
6. A registered charity is, of course, "an organisation, whether or not incorporated, all the resources of which are devoted to charitable activities carried on by the organisation itself". (*Income Tax Act*, s. 149.1(1)(b)(i))
7. (1986), 23 E.T.R. 210 (F.C.A.).
8. (1601), 43 Eliz. 1, c. 4.
9. [1969] 1 A.C. 514 (P.C.).
10. Appeal Decision, p. 9.
11. *Ibid.*, pp. 10-11. Here Decary J.A. drew on the language of the *Canada Health Act*, R.S.C. 1985, c. C-6, the preamble of which talks about the "prevention of disease and health promotion", not just curing illness.
12. *Ibid.*, p. 11.
13. *Ibid.* This is a quotation from the Minister's factum.
14. See *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30; *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530.
15. Again, quoting from the Minister's factum: Appeal Decision, p. 12.
16. *Ibid.*, p. 11.
17. *Ibid.*, pp. 12-13; emphasis added.
18. *Ibid.*, p. 15. The Court of Appeal's "political purposes" cases from recent years are cited *supra*, footnote 2. Note, however, that Decary J.A. also discussed the possibility that with a change in the law (presumably the law regarding abortion generally or that of free-standing abortion clinics in particular) registration could be revoked.
19. *Ibid.*, p. 15.
20. See *In re Smith's Will Trusts*, [1962] 2 All E.R. 563, at 566 (C.A.).
21. *Resch*, *supra*, footnote 9, p. 542.
22. The phrase is from A. Oosterhoof and E. Gillese, *Text, Commentary and Cases on Trusts*, (3rd edn., Toronto: Carswell 1987), p. 876.
23. See *Smith* and *Resch*,, *supra*, footnotes 9 and 20 respectively; *Re Frere*, [1951] Ch. 27; *Charlotte County Hospital* v. *St. Andrews* (1980), 7 E.T.R. 79 (N.B.Q.B.); *Re Armour* (1963), 38 D.L.R. (2d) 204 (Sask. Q.B.); *Cox* v. *Hogan* (1925), 35 B.C.R. 286 (C.A.); *Moorcroft* v. *Simpson* (1921), 64 D.L.R. 231 (Ont. S.C.); *Re McLellan's Will* (1918), 46 N.B.R. 161 (Q.B.); *Taylor* v. *Taylor* (1910), 10 C.L.R. 217 (H.C. Aust.); *Kytherian Association of Queensland* v. *Sklavos* (1958), 101 C.L.R. 56 (H.C. Aust); *Congregational Union of New South Wales* v. *Thistlethwayte* (1952), 87 C.L.R. 375 (Tas.).
24. See, *inter alia*, *Whitman* v. *Eastern Trust Co.*, [1951] 2 D.L.R. 30 (N.S.S.C.); *Re Galbraith*, [1938] 4 D.L.R. 337 (Man. Q.B.); *Auckland Medical Aid Trust* v. *Commissioner of Inland Revenue*, [1979] 1 N.Z.L.R. 382 (S.C. Auckland); *Re Harrison's Estate* (1978), 22 N.B.R. (2d) 1 (Q.B.); *Re Clarke*, [1923] 2 Ch. 407; *Re Pearse*, [1955] 1 D.L.R. 801 (B.C.S.C.).
25. *Re Stephens*, [1934] O.W.N. 24 (C.A.).

26. *Re Osmund*, [1944] Ch. 206.
27. The funding issue is discussed below in more detail.
28. *Resch*, *supra*, footnote 9, p. 540.
29. *Supra*, footnote 20, p. 566.
30. See *Re Galbraith*, *supra*, footnote 24. This position was implicitly accepted by Decary J.A. in the present case for he cited a very long passage from *Resch* on this point, although without comment. At first sight it might appear that *Re Windsor Medical Inc.* (1971), 17 D.L.R. (3d) 233 (Ont. H.C.) adopts a different approach, for it held that in the case of a non-profit medical corporation whose services were available to any member of the public who subscribed, the fees were not charitable. However, in this case the corporation was merely an agent for the doctors who were its sole members. It collected prepayments from subscribers and, when a doctor/member was called upon, paid him or her for the services provided. It was therefore "entirely a contractual undertaking".
31. See Oosterhoff and Gillese, *supra*, footnote 22, p. 211.
32. See the discussion of "Trusts Contrary to Public Policy" in D. Waters, *Law of Trusts in Canada*, ch. 8. He deals primarily with conditions attached to persons trusts but discusses also the now defunct rule against trusts for illegitimate children and prohibitions on trusts such as those created to defraud creditors.
33. One possible example of the kind of unusual circumstance required is provided by *Tai Kien Luing* v. *Tye Poh Sun* (1961), 27 M.L.J. 78. A charitable trust had been established in Malaya to support certain schools, some of which were in the People's Republic of China. It was argued that the fact that Malaya had no diplomatic relations with China, and would probably not permit the transfer of funds there, made the trust impossible to perform. In holding that this did not constitute an impossibility until such time as the government actually refused an attempt to transfer funds, Rigby J. noted in passing his surprise that an argument had not been made that the otherwise charitable purpose was, in the unusual political circumstances, contrary to public policy.
34. See one of the leading cases on political purposes, *National Anti-Vivisection Society* v. *I.R.C.*, [1948] A.C. 31 (H.L.), in which Lord Simonds talks about a trust for political purposes being contrary to public policy.
35. [1965] Ch. 85 at p. 105.
36. One of the very few cases in this area shows truth almost as strange as fiction. *Thrupp* v. *Collett* (1858), 26 Beav. 125, 53 E.R. 844 involved a testamentary trust to pay the fines of convicted poachers who had been sent to prison for non-payment of fines. While acknowledging that the purpose might fall under the "relief or redemption of prisoners or captives" category within the fourth head of charity, Romilly J. not surprisingly held it to be nonetheless contrary to public policy.
37. (1990), 69 D.L.R. (4th) 321 (Ont. C.A.). For an analysis of this case and for the law generally on conditions contrary to public policy see J. Phillips, "Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on *Re Canada Trust Company and Ontario Human Rights Commission*" (1990), 9 *Philanthrop.* 3 No. 3, pp. 3-42.
38. Appeal Decision, pp. 12 and 13.
39. *Ibid.*
40. *Ibid.*, p. 15.

41. *Supra*, footnote 24.
42. *Ibid.*, p. 386.
43. *Ibid.*, p. 394, citing a 1977 New Zealand Royal Commission on abortion.
44. *Auckland Medical Aid, supra*, footnote 24, p. 393.
45. *Ibid.*, p. 395.
46. See *R.* v. *Woolnough*, [1977] 2 N.Z.L.R. 508 (C.A.).
47. *Auckland Medical Aid, supra*, footnote 24, p. 396.
48. He noted the changing legal opinion regarding whether the advancement of securalism was charitable, over the saying of masses for the dead, and over vivisection. One should perhaps excuse the hyperbole involved in calling these "the great controversies of the past".
49. *Ibid.*, p. 397.
50. Appeal Decision, p. 15.
51. I say this because there are English cases that state that to be charitable a "religion" must "promote some form of 'monotheistic theism'": Oosterhoff and Gillese, *supra*, footnote 22, p. 861. I think it highly unlikely that either of these limiting criteria would be upheld by the Canadian courts under our current regime of public policy relative to equality and to freedom of religion and conscience.
52. *Neville Estates* v. *Madden*, [1961] Ch. 832 at p. 853, per Cross J.
53. *Ibid.*
54. Appeal Decision, p. 13.
55. Indeed the Minister's position was so obviously wrong in law that it is worth speculating that the initial refusal of registered charity status was simply a political gesture to appease outright opponents of abortion. Cynicism about the motives and actions of the Department is also invoked by the fact that the case was argued by two female counsel from the Department, a practice that one doubts is common!
56. I say "charitable in the context of the *Income Tax Act*" because this case did not decide whether the clinic pursues purposes charitable under the laws of British Columbia, only that it pursues purposes that are "charitable" as that word is used in the *Income Tax Act*. British Columbia can change the definition of "charitable" within the province at any time under its constitutional power to legislate with regard to matters of property and civil rights, just as the Ontario courts have done by judicial pronouncement. (See *Re Laidlaw Foundation* (1984), 13 D.L.R. (4th) 491 (Div. Ct.)) Note, however, that even if a province does this it would be most unlikely to affect the meaning of the term for the purposes of the *Income Tax Act*. (For a case raising this issue in the context of the federal *Bankruptcy Act*, see *Queen in Right of British Columbia* v. *Henfry Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.).
57. I am aware that this general statement conceals a large number of differences among provinces over the requirements that must be met before funding is made available and, indeed over the availability of the procedure in any event. No hospital in Prince Edward Island, for example, will perform the procedure. My point is merely that, even with restrictions, all provinces and the territories (except Prince Edward Island) concede the principle that abortion is an aspect of health care. (I am grateful to the Childbirth By Choice Trust for this information.)

58. Alberta, Nova Scotia, Manitoba, and Newfoundland will not fund abortions carried out in the Morgentaler clinics in their provinces. Ontario and British Columbia partially fund abortions in clinics; only Quebec provides full funding. In the other provinces and territories there are no clinics.

59. Of course if it were used successfully it would add an ironic touch to the decision in *Everywoman's Health Centre Society*, for the British Columbia government attempted in 1988 to cut off all funding of abortion services. It was prevented from doing so because in making the decision it acted *ultra vires*. See *Re British Columbia Civil Liberties Association and Attorney-General for British Columbia* (1988), 49 D.L.R. (4th) 493.

60. S.N.S. 1989, c. 9.

61. *R.* v. *Morgentaler* (1990), 99 N.S.R. (2d) 293, at p. 302, per Kennedy Prov.Ct. J.

62. *R.* v. *Morgentaler* (1991). 83 D.L.R. (4th) 8 (N.S.C.A.).

63. See *Re Laidlaw, supra*, footnote 56, for the definition of charity in Ontario. This, however, is unlikely to have anything like the impact in practice that is does in theory.