The Ontario Law Reform Commission and the Legal Meaning Of Charity

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Introduction

As noted elsewhere in this issue (see "Legal Developments", at p. 41) the Ontario Law Reform Commission's *Report on the Law of Charities* has recently been published. It is the intention of *The Philanthropist* to review most of the *Report*, but a document so voluminous and containing so much useful information and so many thoughtful recommendations cannot properly be reviewed in one article. This is, therefore, the first of a series of separate articles dealing with the *Report*; this one deals with what the Commission has to say on the subject of the legal meaning of charity.

The *Report*'s arguments and conclusions on this subject are contained in three chapters, six through eight, in part 2 of the *Report*. Sensibly, it does not seek to lay out in any detail the current definition of charity; indeed it assumes that readers know more or less what that is. Rather, it adopts a two-stage approach to analyzing the question of what the legal meaning of charity should incorporate. First, in chapter 6 it seeks to define what it calls the "real meaning" of charity. Second, in chapter 6 generally, and in chapters 7 and 8 more specifically, it asks whether the current law reflects that real meaning and, to the extent that it does not, what changes should be made to the law. This review follows the same organization. It will first discuss the Commission's analysis of what charity is and then look at its analysis of, and prescriptions for, the legal meaning. Where appropriate, critiques of the Commission's ideas will be woven into the explication of what the *Report* says.

A "Real Definition" of Charity

The *Report* begins by drawing a distinction between two kinds of activity now subsumed under the legal definition of charity, and then collapsing that distinction into the phenomenon of what it terms "altruism". That is, it first demonstrates that legal charity currently consists of "charity" and "philanthropy". The former represents "acts of kindness and consideration that demonstrate concern for the poor and needy", is motivated by "empathy for people in emotional, economic or physical distress", and strives to improve human "economic and social capacity". The latter "signifies acts of generosity that demonstrate regard for the achievements of humankind in

general", "is moved by respect for the higher endeavours of humanity, such as the sciences, philosophy, the arts, and sports", and pursues improvement in "aesthetic and intellectual capacity" (pp. 145–146). To use a simple example, the difference between "charity" and "philanthropy" is the difference between providing food and shelter for the homeless and supporting The National Ballet of Canada. (To distinguish the two uses of the word charity, this review will place it within quotation marks when referring to the meaning just elucidated, as distinct from "philanthropy". It will appear without quotation marks when used to mean legal charity, or the combination of "charity" and "philanthropy".)

Having noted this distinction, and having accepted it as real, the *Report* rejects the idea of a reform in the law that would draw a sharp line between "charity" and "philanthropy" at the level of defining what is legally charitable, although it does acknowledge that tax or other policies might want to treat the two forms of legal charity differently. Its reason for rejecting such a distinction at this definitional stage is, principally, that both what it terms "charity" and "philanthropy" are forms of altruism. That is, while different in nature, they are both captured by the concept of altruism, which the *Report* defines as "doing good for others" (p. 146). The *Report* is not as explicit as it might be about why, at this definitional stage, the law should include all altruistic purposes as charitable; presumably the answer is not that just because altruism *can* encompass and explain both "charity" and "philanthropy" it *should* do so. Rather, judging from what follows, the answer seems to be that altruism is a social good that should be recognized in the law, even if we think that some forms of it are more important and respond to more pressing social needs, than other forms. The Commission effectively says this later in its analysis, when it insists that the difference between "charity" and "philanthropy" is not a difference of kind, but one of degree (p. 149).

Having defined altruism as "doing good for others", the Commission's next task is to expand on what that phrase means. To understand the meaning of "doing good"—that is, to know what pursuits are contemplated—the report draws on the work of the natural law philosopher John Finnis.[1] Finnis argues that a certain set of "human goods" represents "basic forms of human flourishing to be pursued and realized". The list includes life, knowledge, play, aesthetic experience, friendship, religion, and practical reasonableness (pp. 147–148). The *Report* would add only "work" to Finnis' list (p. 148).

There is not space here to delineate fully what each of these entails but it should be noted that each supports a wide range of particular purposes. "Life", for example, means, quoting Finnis, "every aspect of vitality which puts a human being in good shape for self-determination" and therefore includes,

citing the *Report*, "hospitals, medical schools, the work of surgeons and nurses, famine relief, soup kitchens, ... etc" (p. 148). Similarly, friendship "can range from a minimum of peace and harmony among persons, to acting for the sake of one's friend" (p. 148). Probably the basic human good whose content is least obvious to many people is "practical reasonableness" which is defined as the ability "to bring one's own intelligence to bear effectively...on the problems of choosing one's actions and life-style and shaping one's own character". It means "a measure of effective freedom" and that "one seeks to bring an intelligent and reasonable order into one's own action and habits and practical attitudes" (citing Finnis at pp. 148–149). Although there is no attempt to provide a list of what purposes come under "practical reasonableness", one example given is that of "support for a primary school", which "provides the means for others to pursue not only the good of knowledge but, especially among children, the good of practical reasonableness, that is, the ability to live a balanced, well-ordered, life (p. 149).

As this last example suggests, the *Report*'s references to "basic human goods" is not supposed to substitute for a list of legally charitable purposes, for the purpose of providing schools responds to more than one of the basic goods. The law's list of charitable purposes does not define what charity means in any conceptual sense; it simply says what purposes are charitable, not *why* they are so. The *Report* is seeking to do precisely what the law does not do—to define legal charity conceptually. It does this, as noted above, by defining altruism as "doing good for others". The link to "charitable purposes" comes with the further definition of acts of altruism as "the provision of the material, social, or emotional means to pursue these basic human goods—these common or universal goods—to others so that they may flourish" (p. 149).

While some might argue about the inclusion of religion in the list of basic human goods, a point to which I will return later, the attempt to define what is meant by "doing good" is a laudable and, in the Canadian writing at least, much overdue one. And as noted above, if one accepts that these are the basic human goods, then the fact that some instances of providing them are different to others (the "charity"/"philanthropy" distinction discussed above) is certainly understandable as a difference of degree, not a difference of kind. The difference is one of what the *Report* calls the "degree of deprivation" of access to these goods: "charity in the narrow sense identifies the most wanting end of the continuum, philanthropy the least. ... The economically destitute are bereft of any means [of flourishing]; the young dancer's chances of perfecting his art are merely diminished by his lack of resources" (p. 149).

The other part of the definition of altruism—"doing good for others"—is "others". This presents many fewer definitional challenges. It means that one

excludes from altruism good done to oneself, and to those to whom one has a moral or legal obligation—friends, family etc. Thus the *Report* states that there should be "emotional and obligational distance" between the person doing the good and the recipient (p. 150). While all this is straightforward, the *Report* also includes in its discussion of "for others" an interesting discussion of motive. That is, the pursuit of a charitable purpose may well have the effect of doing good to others, but that may not always be the intention, certainly not the principal intention, of the donor. Although it is very difficult to imagine "charity" emanating from such motives, some forms of philanthropy can be done for reasons of "self-aggrandizement, social status or personal gratification" (p. 151). While the law as it stands is indifferent to this, the *Report* suggests that "the distinction is an important one which ought to be borne in mind in any discussion of the law of charity aimed at its reform" (p. 152). This discussion of motive is stimulating, for both practical and conceptual reasons. Some of the practical conclusions the *Report* draws from it are discussed below. Conceptually,it seems to me that it necessarily follows from the *Report*'s attempt to find a non-legal definition of charity, or altruism, that that definition refer to motive. In its usually understood form, altruism surely connotes an altruistic motive as well as the practical effect of "doing good for others".

To summarize, as the *Report* puts it in recommendation 17 on p. 627, the concept of charity "has a central intelligible meaning". It is "an act whose form, effect and motive are the provision of the means of pursuing a common good—life, knowledge, play, religion, work, friendship, aesthetic experience, and practical reasonableness—to persons who are remote in affection and to whom no moral or legal obligation is owed". From this definition the *Report* advocates a test to evaluate any given project (p. 152):

> We might proceed, first, by identifying the goods or intended goods; second, by asking whether the project is really a determination of one or more of the goods; third, by asking whether the project benefits only strangers; and fourth, rarely, by questioning whether the project is also motivated by the desire to be charitable.

While this test flows naturally and intelligibly from the definition that precedes it, the inconsistent treatment of motive should be noted. In the definition it is said to be necessary that an act's "form, effect *and* motive" are "the provision of the means of pursuing a common good", but in the test all that generally appears to be necessary is that the form and effect are present—motive is relegated to the last part of the test and said to be only rarely relevant.

Consequences for the Law on the Meaning of Charity

Having established its view of the "real meaning" of charity—all forms of altruism, which is doing good to others—the *Report* devotes the final part of chapter 6, and two other chapters (7 and 8) to an assessment of the current law, based on that understanding. It is not possible in a relatively short review to do full justice to all that is said there, but a number of points are worth highlighting. I will divide this part of the review into two, dealing first with what might be termed general issues of approach and interpretation, and then with what the *Report* has to say about reform of the law of specific charitable purposes. In organizing the review in this way I am departing quite radically from the order in which the various points are made in the *Report* itself; the material which follows is drawn from all three of the chapters under review.

General Recommendations on Policy and Approach

The first general point to make is that, at the end of the day, the process of providing a conceptual definition of charity has produced a list of goods remarkably similar to the list of purposes which the law currently recognizes as charitable. The *Report* notes and accepts this,[2] and implicitly seems to see it as a vindication of its "real meaning" definition. That is, the practical wisdom of the community, as expressed through the decisions of common law judges over the years, has more or less got it right. It has not completely done so, as later parts of this review illustrate, but the common law is largely vindicated.

Second, and to a large extent this point flows from the previous one, the *Report* does not suggest that there should be any attempt to provide a new statutory definition of charity based on its own definition of its real meaning.[3] Not only is this unnecessary, it is also, we are told, unlikely to succeed in capturing the "real meaning".

Third, the logic of the *Report*'s unwillingness to draw a formal legal distinction between "charity" and "philanthropy" means that it does not advocate particular statutory regimes doing so at the point of definition. Thus it suggests that taxing statutes, trusts law, etc. all continue with a common definition. It acknowledges that some regulatory regimes might wish to treat particular forms of charity differently from other forms (and later sections, not reviewed here, of the *Report* have some specific suggestions on that). But they should not do so by defining some purposes as charitable in one context and not in another. The reasons given for this are regulatory simplicity, the fact that charity is an "intelligible concept" and its real meaning should not diverge from its legal meaning, and the fact that there is no reason to think that

different statutory definitions would make judicial decisions on what is included and what is not any easier (p. 165).

At the conceptual level this makes much sense, but the fact remains that there are very different considerations in play when the law is trying to determine the validity of a purpose trust, for example, versus the appropriateness of a tax subsidy. One might well wish to be much more liberal in the definition of charity in the former case than the latter.[4] And one wonders about the political difficulties of constantly passing particular legislation which treats different forms of "charity" less favourably than others. Might it not be easier to do this in one fell swoop?

Fourth, having argued against a new statutory definition, the *Report* would nonetheless like to see changes in the substantive law brought about by the courts (some of these are discussed below). How are these to be brought about, if not by legislation? By a kind of law reform through judicial activism. The courts are urged to make detailed evaluations of all claims against the criteria laid down above, and they are reminded that the assessment of whether a purpose is charitable is "a very context-specific question", one that in the past has brought into play "the community's collective wisdom about the content of the good, under the circumstances" (p. 154). Thus the purpose of the *Report* is to "suggest lines of development that will permit over time an improved legal understanding of the meaning of charity" (p. 185). While I have no difficult in agreeing that the current scope of legal charity is to a large extent the product of historical contingency, I have some trouble in seeing precisely how the somewhat vaguely-worded invocations for a changed approach will influence the judiciary. The tendency is for the courts to ignore Law Reform Commission suggestions that have not been put into legislation. Perhaps this *Report*, precisely because it argues against legislative change to the definition of charity and in favour of judicial activism, will suffer a different fate. I think it likely, however, that without some sign of governmental or legislative approval of its prescriptions the *Report* will have little influence.

Fifth, the Commission has strong words for the judiciary in its application of the ancillary purposes doctrine. Both in the chapter devoted to the "real meaning" of charity, and in that dealing with specific policy prescriptions, it reminds the reader not only that apparently political or commercial acts are still charitable if they are "purely instrumental to the altruistic purposes and activities of the organization", and that all charitable organizations in fact carry out a host of such noncharitable acts (pp. 153–154). What matters about these activities is whether "they are activities intended to further, and which in fact further, the primary or principal [charitable] ends", and they cannot be looked at in isolation from those principal purposes. One certainly hopes that

the Federal Court of Appeal and Revenue Canada, which at times refer to "non-charitable activities" in refusing registration, take heed.

Specific Policy Recommendations

Having looked at some general ideas and recommendations I turn to examining some of the specific suggestions made about the content of the law of charitable purposes. As noted in the Introduction to this review, the *Report* does not purport to be a survey of the law, but rather fixes on what it sees as the more important problems with it. I deal with some, but by no means all, of those problems here.[5] It should be noted that some of the general points already made are applied by the Commission to some of the specific areas discussed below.

First, the *Report* discusses how the law should treat the fourth head of legal charity, "other purposes beneficial to the community". Following a very useful review of the tests applied in the past (pp. 167–173), perhaps not surprisingly the Commission argues that its own definition should form the basis of understanding of what is beneficial to the community, or to the public, as it puts it. Its own definition, argues the *Report*, both explains what has been put into the fourth category over time, and how that category should continue to be expanded (and not expanded). Indeed its recommendation on this, number 22 on p. 628, suggests that the currently "emerging general definition" under the fourth head, "that the purpose must be beneficial to the public", is "essentially correct" provided that it is "understood as meaning that the purpose must advance a common good, in a practically useful way, for the benefit of strangers".

A second specific recommendation is that judges think more carefully about the meaning of "public benefit". Most important here is the discussion of "practical utility". The *Report* correctly notes that it is only in rare cases that the courts will explicitly discuss the practical utility of a project. It argues, rightly I think, that this is nonetheless an important implicit criterion, and should be, and should therefore be more explicitly considered in future jurisprudence (pp. 182–183).

Third, the *Report* is critical of some of the decisions in the area of religion, particularly those cases which purport to deny charitable status to contemplative orders on the ground that no public benefit is being advanced (pp. 197–202), and argues that assessment of the validity of any religious practices must be made from an internal point of view—is the good of that religion being advanced? It also assesses the law as it relates to defining a religion for the purpose of charities law, arguing correctly that whether or not they are explicit about it, courts have always employed criteria defining what qualifies

as a religion. The Commission therefore recommends that there be a more direct and explicit recognition of this fact (p.195). The Commission shies away from offering its definition of religion, but does "suggest" an "outline" of one: "the worship and knowledge of God, the pastoral and missionary propagation of an established theology, and observances or practices" (p. 195). This is an area also where the general invocation, noted above, to detailed and contextual appraisals of claims, is important, to weed out what the *Report* describes as "bogus" religions.

Despite these useful recommendations, a flaw in the *Report* is the short shrift given to those who question the inclusion of religion in the list of legally charitable purposes at all, although it notes that it received submissions suggesting that "religion is a case apart altogether" (p. 147). It is in Finnis' list of basic human goods—"the establishing and maintenance of a proper relationship between oneself and the divine"—and the *Report* accepts that it should be there. But it does so despite apparently acknowledging that religion does not fit into *its* definition of the real meaning of charity. That is, it meets neither the "doing good" branch of the definition, because a belief in, and worship of, a God is not a good in itself, nor the "to others" branch, because whatever religion provides it provides for its adherents, the donors (p. 148). As a result the *Report* concedes that "religion does not involve charity...as clearly as does, for example, the relief of poverty".

But, as noted, the *Report* does not advocate radically different treatment for religion, for reasons that this reviewer does not think are wholly satisfactory. It states, first, that religion is a "traditional well-spring of charitable activity" (p. 156), an argument that surely asks us to judge religious organizations by what they do, not by what they are. That is, if religious organizations are to be charitable because they pursue otherwise charitable purposes, there would be no need for "the advancement of religion" to be a separate charitable purpose. Second, it simply asserts that "practising a religion *is* good" (p. 156, emphasis in original) and "although not other-regarding in the same sense as other types of charity, religion is nonetheless other-regarding in its worship of God, obeying His law, and constructing and maintaining a sanctuary for His worship" (p. 156). This argument for religion being something not done for personal benefit is quite persuasive, especially if one defines benefit as in some sense a "material" benefit. Unfortunately before we care about whether the "for others" branch of the test is met, we presumably have to be sure that the first stage is satisfied—is practising religion "doing good".

Fourth, the *Report* has an extensive discussion of education, which also implicates its inclusion of knowledge, play, friendship, practical reasonableness, and aesthetic appreciation among the list of human goods. This is in

many ways the best section of the chapter dealing with specific problems with the current definition and with proposals for reform. It argues convincingly that education is much more than formal instruction and that there are many forms of useful knowledge. Most importantly, it makes a very good case both for the inclusion within education, where appropriate, of purposes that seek to achieve the attainment of the goods listed immediately above, and for their independent recognition where they are not tied to formal education (pp. 202–208).

The fifth recommendation I wish to highlight is that the law should deal with potentially discriminatory purposes by assessing the motivation behind the purpose. As noted elsewhere in this issue,[6] while there is now authority for the proposition that charitable gifts that discriminate can be found to be contrary to public policy, the courts have not really sorted out when distinctions are valid and when they may be found offensive. In *Re Canada Trust and Ontario Human Rights Commission*[7] there is some suggestion that this can be done according to the interpretive principles found in *Human Rights Codes*, but while this may provide an answer in some cases it fails to distinguish adequately between unacceptable "discrimination" and nondiscriminatory "choice". The answer, according to the Commission and with which I agree, is that motive is the key; courts should "investigate the motives behind the discriminatory provisions, and in cases where the discriminatory provisions are motivated predominantly by antipathy or malevolence towards another group identified by race, religion or gender, ... strike them out" (p. 217). Here the Commission brings together, in a particular case, two of its earlier general suggestions—that motive can matter, and that courts need to pay attention to the specific context of a gift for charity.

A sixth policy recommendation to flow from the *Report*'s definition of charity is approval of the political purposes doctrine. This is because the definition proffered assumes that a charitable act—doing good for others—is good, while politics—the process of making law—is a way of determining what a society thinks is a social good. The *Report* acknowledges that this is formal distinction, and that a person who wishes to see good done may, for example, either give to a food bank or lobby to have government support food banks. Both acts have the same motive, but they are not the same act—only the act of giving to the food bank is an act of charity. Interestingly, the *Report* acknowledges that it is essentially relying here on the rationale for the doctrine, oft-criticised by writers,[8] that the court cannot say whether a proposed change in the law is for the public benefit (pp. 220–221).

Whether one agrees with this or not, the fact is that this *Report* does provide a coherent defence of the political purposes doctrine, if it were left at this point.

But the *Report* makes some exceptions. First, it argues that the purpose of promoting international friendship is a valid one, because "friendship" is one of the common human goods (pp. 221–222). One can see some difficulty in line-drawing here, but perhaps again this is where close reference to specific context and motive will help the courts. Second, it agrees that the *McGovern*[9] case, which denied charitable status to Amnesty International, is wrong, because political efforts "aimed at overturning an unjust law" are "essentially altruistic" (p. 153, note 20). The question, of course, is how do we know which laws are sufficiently unjust to merit political activity regarding them to be charitable? If one is prepared to state that the answer to that question is that we (or rather the judiciary) will sort that out on a case-by-case basis one restores coherence to the exception, but perhaps at the risk of granting too much leeway to judges to decide cases on the basis of what they think are "unjust" laws. Third, the report also, in line with its vigourous advocacy of the ancillary purposes doctrine discussed above, would make an exception of political activity which is "purely instrumental to a charitable purpose" (p. 153, note 20). Here too there might be problems; I cannot advocate for the government funding of food banks as a charitable purpose, but the food bank presumably can.

Finally, there is a surprisingly and regrettably brief discussion of "work". Given that this is a category that the *Report* would add to Finnis' list of human goods, and given its perceptive observation that "[p]rojects that advance the goods of life and work for the benefit of others may play a more prominent role in the future, given the contemporary concern with the environment and current high levels of unemployment", one would like to have seen a more sustained analysis of this issue. Under "work" the *Report* refers to purposes such as "social councils, micro-development projects, and community foundations" because "they are all involved in pursuing creative and effective ways of getting people back to work" even though "they do not easily fit under the traditional categories of relief of poverty and/or the advancement of education". It is easy to agree that they do promote human flourishing; perhaps the Supreme Court of Canada will take up this suggestion in its assessment of the *Vancouver Society of Immigrant and Visible Minority Women* case, discussed elsewhere in this issue.[10] Perhaps, however, the Court will be wary of this kind of a judicial extension of charity absent legislative approval of the Commission's ideas.

A brief review of this type cannot hope to do full justice to a report as comprehensive and closely-argued as this one. While the reader who wishes to learn about the current law of charity in a systematic way will not really be able to do so from the *Report*, there is a great deal of food for thought here, more than I have

discussed. The Commission should be particularly praised for chapter 6, its attempt to formulate a conceptual basis for a "real meaning" of charity.

FOOTNOTES

1. The *Report* draws principally on chapter 4 of Finnis' *Natural Law and Natural Rights* (Oxford, 1980).
2. "[T]here is no true divergence between the common-law definition and the real meaning of charity, and therefore there is no case to be made for a general or basic reform" (p. 227).
3. While it provides an Appendix listing various possible codifications, the *Report* does not recommend the adoption of any of them.
4. The *Report* acknowledges these arguments at pp. 162–163, but rejects them in favour of its one-definition-only approach.
5. I have chosen not to review the *Report*'s discussion of the meaning of "relief of poverty", of aspects of the "public benefit" test, the relationship between public policy and public works, international charity, friendship, and sports.
6. See "Legal Developments", the discussion of *Re Ramsden*, p. 37 of this issue.
7. (1990), 69 D.L.R. (4th) 321 (Ont. C.A.).
8. See most recently P. Michell, "The Political Purposes Doctrine in Canadian Charities Law" (1995), 12 *Philanthrop.* No. 4, pp. 3–32.
9. *McGovern* v. *Attorney-General*, [1982] Ch. 321.
10. *Supra*, footnote 6, at p. 41.