

# The Philanthropist Award

## Artistic Endeavours in Charity Law\*

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### Introduction

The voluntary sector makes up a substantial portion of the Canadian economy, yet is oft-neglected, especially by the law. Canadian charity law is certainly one of the most chaotic and muddled areas of the law. In its *Report on the Law of Charities*, the Ontario Law Reform Commission made an ambitious attempt to review the state of charity law and made a number of recommendations for reform. It also briefly examined the charitable status of artistic or aesthetic purposes. This paper is intended to explore more fully the major issues concerning the charitable status of such purposes.

Part I provides a review of the case law. In allowing artistic endeavours as a charitable purpose, the courts have traditionally placed them under the head “advancement of education”. Thus, the focus of most decisions has been whether an artistic purpose fits into the class of “aesthetic education”. In this paper I argue that by stressing “education”, the courts have strayed from the real reason the law should protect artistic purposes, i.e., that “aesthetic experience” is a fundamental and universal human “good” in itself. Education, like pleasure, may be a significant byproduct of participating in an “aesthetic experience”, but it is not the primary reason. Part II develops this thesis and argues that an independent category of “aesthetic experience” should be recognized for artistic endeavours.

As a result of the courts’ stress on “education”, problems have emerged in determining whether a particular endeavour is sufficiently beneficial to the public. Most often, the courts have denied the public benefit of an artistic endeavour because of “poor quality”. Yet, it is submitted, that courts have been much too focused on the educational utility of certain endeavours and

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that once the real purpose of “aesthetic experience” has been substituted for that of “education”, such an inquiry into benefit/quality becomes redundant.

One important issue that may arise when applying this independent category to the realm of the arts – since artistic endeavours are simply a facet of this larger category of “aesthetic experience” – is whether the proposed endeavour is in fact “art”. Part III examines the question “what is art?” and proposes a multi-criteria approach to aid courts in determining when something is art.

## **Part I: Purpose, Public Benefit, and Aesthetic Education in the Case Law**

### *I. The Common Law Test*

The common law definition of a charitable purpose consists of two parts: 1) is the purpose charitable, and 2) will advancing the purpose result in a public benefit? There are numerous areas of confusion in the application of this definition.<sup>1</sup> For our purposes, however, we need only concentrate on the areas of greatest concern to the definition of artistic endeavours as charity, and here there are two major problems.

The first problem relates to the first part of the test. The starting point for the “charitable purposes” test is the *Preamble* to the *Statute of Charitable Uses*.<sup>2</sup> Most modern courts briefly mention this highly influential document in any review of the sources of the legal definition of “charitable purposes”, but it is now well-established that the *Preamble* was never meant to provide a comprehensive list of all purposes deemed charitable.<sup>3</sup> Modern courts are satisfied as long as the purpose of the trust in question is either analogous to one of the provisions enumerated or within the “spirit and intendment” of the *Statute of Elizabeth*.

The most common approach in the case law is to begin with the categorization stated by Lord Macnaghten in *Pemsel v. Special Commissioners of Income Tax*:<sup>4</sup>

How far then, it may be asked, does the popular meaning of the word “charity” correspond with its legal meaning? “Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.<sup>5</sup>

Most of the case law puts artistic endeavours into the category of “the advancement of education”.<sup>6</sup> As we shall see, this emphasis on “education” gives rise to problems. There are easy cases dealing with instruction in academic institutions which also happens to include instruction in the arts, yet the term “education” has been stretched beyond its traditional meaning to also

include the arts *per se*. In fact, courts appear to be championing the arts for their own sake when they allow artistic endeavours to be designated as charitable.

One point should be clarified. In a number of cases, the courts have made reference to the fact that even if the artistic pursuit in question were not held to be valid under the rubric of “education” it would be found charitable under the fourth head of “beneficial purposes”. Alas, this idea is not developed at all in the case law. In fact, it seems to be mentioned only to buttress a decision made on other grounds. As a result, we will not deal in detail with this fourth head, but will focus on cases referred to as “aesthetic education”.<sup>7</sup>

The second problem is that the case law is inconsistent when dealing with the question of whether certain artistic purposes are of sufficient practical utility to be deemed charitable. Even if a trust is found to have a valid charitable purpose, the common law test also requires that the trust be for the public, as opposed to private, benefit. There is considerable debate over the precise meaning of this “public benefit” test<sup>8</sup> largely due to judicial pre-suppositions about what should count as “good” and what is “poor” quality. These judgments may have been appropriate when artistic endeavours were considered to be “educational”, but once they are freed from this category, “quality” should no longer be a consideration. Hence, in my view, the “benefit” aspect of the public benefit test should essentially be assumed if the purpose is the promotion of “aesthetic experience”.

## II. *Aesthetic Education Cases*

Analysis of the case law concerning artistic endeavours as “educational” should begin with two older cases: *Re Allsop*<sup>9</sup> and *Re Ogden*.<sup>10</sup> Many courts and commentators have held that these, and other earlier authorities, suggest that the fine arts are not objects of charity.<sup>11</sup> An analysis of these two cases, however, demonstrates that such a general proposition can certainly not be grounded in them.

*Re Allsop* concerned whether the Nottingham Harmonic Society, the Nottingham School of Art and the Castle Museum could be deemed charitable. While holding that the museum and the art school were charitable, Chitty J. stated that the Harmonic Society “could in no sense be called a charity”. Apparently, Chitty J. was concerned that the society “while no doubt having for one of its objects the laudable one of promoting among the public music as an art, yet [it] was at the same time formed and kept up for its members for their own amusement”.

The first problem with using this case as an authority is the fact that it is very briefly reported. In *Royal Choral Society*, Lord Greene, M.R. heavily criti-

cized any use of this case as authority for the proposition that the fine arts are not a charity. He stated: "That is what [Chitty J.] finds on the facts of the case. What those facts were we do not know ... I find no assistance from *Re Allsop*; still less do I find any authority in it on which to found the proposition set forth in *Tudor on Charities*."<sup>12</sup> The second, and more significant, problem with this case is the fact that it seems to have been decided on the basis of "public benefit" as Chitty J. appears to have decided that the choral society only provided benefit to its members and not to the public.

*Re Ogden*, concerned a testator who asked that his executors "expend the said residue in any manner they may think desirable to encourage artistic pursuits or assist needy students in art".<sup>13</sup> The Vice-Chancellor argued that the trustees were bound to spend the money to encourage education in art. Lord Cozens-Hardy M.R. held that the decision of the Vice-Chancellor could not be supported. The Master of the Rolls "did not see how it was possible to get that meaning out of the words. There were two alternative modes of expending the money, one of which was charitable and one was not charitable."<sup>14</sup>

Again, the report of the case is very meagre. Yet, even from the limited reasoning available, it is still possible to see that Lord Cozens-Hardy was not necessarily concerned with the fact that this was an artistic pursuit. Rather, he was troubled by the vagueness of the terms of the will and the probable consequence that the money could be spent in a noncharitable way. For instance, as Lord Greene M.R. pointed out in *Royal Choral Society* a gift merely to encourage artistic pursuits could be expended in a way that nobody would deem charitable, e.g., providing paint and paintbrushes for amateur dabblers, or a grand piano on which the beneficiaries could play in their drawing-rooms.<sup>15</sup> Thus, neither *Re Ogden* nor *Re Allsop* should be seen as support for a view that older case law suggests that artistic endeavours are not valid charitable purposes.

Other more recent cases demonstrate that favour has often been shown by the courts to the advancement of "aesthetic education". The provision of a concert hall (*Re Henry Wood National Memorial Trust*),<sup>16</sup> choral singing (*Royal Choral Society*),<sup>17</sup> the advancement of the works of a particular composer (*Re Delius*),<sup>18</sup> and the performance of the plays of an eminent playwright (*Re Shakespeare Memorial Trust*),<sup>19</sup> have all been upheld as valid charitable purposes. They have been seen as educational by not restricting "teaching" to the traditional sense of merely providing instruction. Education was held to include not only the training of performers or executants, but also the improvement of the appreciation of those arts by the general public and the encouragement of additional contributions to the performing or fine arts. As we examine the modern case law, we can see how this radical expansion of the

second head of the *Pemsel* test stretches “education” to its limit and see also a concomitant need for a new conception of charity in the area of artistic endeavours.

One of the most influential cases is *Re Shakespeare Memorial Trust*. Lawrence J. held charitable a trust for a national theatre as a memorial to Shakespeare. The theatre was to perform his plays, revive English classical drama, prevent recent plays of great merit from falling into oblivion, produce new plays, further the development of modern drama, produce translations of foreign dramas and stimulate the art of acting. It was Lawrence J.’s opinion that the trust fell into either the educational class or that it came under the fourth head of the *Pemsel* test. He reasoned that: “ ... [t]he main object of the scheme is not only to raise the tone of the drama, but also to instruct in the art of producing plays, which will benefit the community. The scheme is clearly designed to spread the influence of Shakespeare and to make known more widely the beauty of his works”.<sup>20</sup>

This was a very important case, which certainly set the tone for cases involving artistic endeavours. The Court rejected submissions to the effect that the objects of the trust were in reality no different than those of any other high quality theatre group except that this national theatre would not be carried on for profit. Furthermore, it was argued, many institutions benefit the community and may be philanthropic, but that does not necessarily make them charitable. Still, the case makes it very clear that the courts were willing to expand the concept of education to include certain artistic endeavours in the realm of charity.

Yet, it was not until the decision of Lord Greene M.R. in *Royal Choral Society* that a detailed rationale for *why* the promotion of “aesthetic education” is a valid charitable object was developed. In that case, the objects of the Royal Choral Society were to provide choral concerts in Albert Hall and generally to encourage and advance choral singing in London. Lord Greene M.R. held that the objects were educational and in so far as they might not be regarded as educational, they would fall within the fourth class outlined by Lord Macnaghten in *Pemsel*.<sup>21</sup>

The judgment dealt specifically with two arguments objecting to the Society’s charitable status which were raised by the Crown. First, it was argued that the real purposes for which the body was established were not educational, but purely for entertainment, i.e., the public attended performances to be entertained; the singers sang for the pleasure of singing; the 10 gentlemen who constituted the Society had the pleasure of running the choir and listening to the performances. Lord Greene M.R. rejected this argument as a complete “travesty of the facts”. He stated:

Curiously enough, some people find pleasure in being educated: but the element of pleasure in those processes is not the purpose of them, but what may be called a by-product, which is necessarily there. It seems to me to be turning the facts of this case upside down to suggest that the real object is to provide pleasure and nothing else.<sup>22</sup>

The Crown had relied on *Re Allsop* as authority by claiming that the Royal Choral Society was analogous to the Nottingham Harmonic Society which Chitty J. had deemed to be noncharitable because it was “kept up by its members for their own amusement”.<sup>23</sup> As noted earlier, Lord Greene M.R. rejected this case as authority for such a position because the report was inadequate, making it impossible to know what the facts were in that case. In the opinion of Lord Greene M.R., the element of pleasure in educating or being educated did not destroy the charitable nature of an enterprise.

In my view, the Court’s conception of pleasure seems right. Despite the fact that Lord Greene M.R. does not appear to rely on any outside authority in coming to his conclusion, we have the benefit of one writer who supports such a view – natural law philosopher John Finnis. Finnis has examined the element of pleasure in relation to activities which he argues are fundamental human goods (which include what he terms “aesthetic experience”). He observes that the pursuit and “realization of any of the basic values” very often results in physical pleasure and mental satisfaction. Yet, pleasure is not “the point of it all” but as the courts have held, a byproduct of participation in a human “good”, i.e., the arts. Finnis continues, “If these [experiences] give pleasure, this experience is one aspect of their reality as human goods.”<sup>24</sup>

The second argument of the Crown attempted to limit the educational category to those activities which involve teaching, specifically teaching in the sense of teaching a master class. This is a valid argument and such a narrow conception of education is not particularly outrageous. Lord Greene M.R., however, forever expanded the educational class in his decision. He stated:

I protest against such a narrow conception of education when one is dealing with aesthetic education ... In my opinion, a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilized human being.<sup>25</sup>

Lord Greene M.R. argued that one of the best ways to improve artistic taste “is by presenting works of high class and gradually training people to like them in preference to works of an inferior class.” As for the education of the performers, “you cannot train people satisfactorily if they do nothing but

rehearse – they must perform”. This decision, then, laid the foundation for the expansive view of education taken by future courts, including the view that pleasure is an irrelevant consideration and that the term “education” is not restricted merely to teaching.

The cases that follow *Royal Choral Society* uphold Lord Greene’s reasoning concerning artistic endeavours. In *Re Shaw’s Will Trusts*,<sup>26</sup> Vaisey J. had no trouble upholding a bequest to bring “the masterpieces of fine art within the reach of the people of Ireland of all classes”. In the will, the term “masterpieces of fine art” was defined as “works of the highest class in the fields of orchestral and classical music, painting, sculpture”. Vaisey J. quoted extensively from the judgment of Lord Greene M.R. in *Royal Choral Society* in upholding this aspect of the disposition and reiterated the broad interpretation of the educational category as follows:

I strongly dissent, as did Lord Greene M.R. in *Royal Choral Society v. Inland Revenue Commissioners*, from the statement that the only education worth having is the education given by a master or mistress in class. I think “education” includes ... not only teaching, but the promotion or encouragement of these arts and graces of life which are, after all, perhaps the finest and best part of human character.

As a result, Vaisey J. held that the terms of the will were wholly educational in nature and thus constituted a valid charitable purpose.

The decision of Upjohn J. in *Associated Artists v. I.R.C.* involved a not-for-profit theatrical association which had included the following objects in its memorandum of association:

- (a) To present classical, artistic, cultural and educational dramatic works ...
- (b) To foster, promote and increase the interest of the public in the dramatic art and in the co-related arts ...
- (c) To encourage and promote the creation of, and to arrange for the presentation of new dramatic works and to foster and enhance the art of affording advanced student facilities for training, and for gaining practical stage experience ...<sup>27</sup>

The judge held that subclause (b) was charitable as it would be “an excellent way of increasing the artistic taste of the public in the way Lord Greene mentioned.”<sup>28</sup> He also regarded subclause (c) as being valid according to the decision in *Shakespeare Memorial Trust*.

Of primary concern in the case was subclause (a). Upjohn J. read the adjectives disjunctively so that the company could put on a classical play, an artistic

play, a cultural play, or an educational play. The real problem was the term “artistic”. Upjohn J. concluded that:

... presenting an artistic dramatic work is so wide and vague a phrase that one could put on almost any type of play, and certainly a play which would not in any ordinary concept of the word be charitable in the sense that it would improve the public’s taste in the theatre and advance the dramatic art in the theatre. I have the greatest difficulty in this context in understanding exactly what is meant by “artistic” ... this memorandum does not state that the object is to promote artistic taste; it is to present artistic plays. As I have said, I find it difficult to attach any charitable concept to an artistic dramatic work; it is too wide and too vague, and therefore is not charitable.<sup>29</sup>

This case reveals the inherent tension in attempting to include artistic endeavours in the realm of education. Essentially, Upjohn J. is saying that artistic plays should not be encouraged in their own right. It seems that unless the endeavour is sufficiently “educational”, the courts will not deem it to be charitable. The crucial question therefore is: what do judges deem to be sufficiently educational? Here, the idea of public benefit is intertwined with purpose. The traditional view would appear to regard only the so-called “higher” forms of art such as ballet, Shakespearean theatre, and opera as valid purposes for the benefit of the public. Upjohn J. demonstrates the bias prevalent in some of the earlier case law. For example, he worried that “artistic” plays would not necessarily include the goal of raising artistic *taste*. This emphasis on taste illustrates that the judges were more concerned about the aristocratic goal of civilizing the savage commons than in promoting artistic endeavours for their own sake.

In *Re Delius*,<sup>30</sup> the wife of the composer Frederick Delius set up a trust for the advancement of knowledge and appreciation of Delius’ works by the world public. Roxburgh J. addressed the suggestion that the purpose of music is limited to giving pleasure. He cited Lord Greene M.R. from *Royal Choral Society* as support for his view that “pleasure is a circumstance intimately connected with music. But that in itself does not operate to destroy the charitable character of a bequest for the advancement of the art of music”. He further adopted the reasoning of Lord Greene M.R. concerning the broad view of education, especially with regard to raising the artistic taste of the country.

What about the fact that this trust was not designed to promote music in general but the music of a particular composer? Roxburgh J. referred to the decision in *Re Shakespeare Memorial Trust* as an example of a valid trust to promote the works of a single individual. He based his decision on the fact that an aesthetic appreciation of music can only be derived from exposure to the works of a large number of composers and since it is charitable to promote



music in general it must be charitable to promote the music of a particular composer in order to create the necessary aggregate of works. He did make an important qualification, however, when he stated that this presupposes that the composer is “one whose music is worth appreciating”. It was not contested that Delius’ works were of sufficiently high quality and Roxburgh J. left open the question of a case where a trust might attempt to promote an “inadequate composer”. Of course, this again raises the question of public benefit and practical utility, which will be more fully examined in the next section. Roxburgh J. stated: “What is quite clear to me is that these purposes would plainly be charitable if for the name ‘Delius’ the name ‘Beethoven’ were substituted and, in my judgment, they do not cease to be charitable because in this context the name is ‘Delius’ and not ‘Beethoven’”.

A further case, which illustrates the enlarged scope of “education”, is *Re Litchfield*.<sup>31</sup> Joske J. held charitable a trust fund which provided for the “Litchfield Award for Literature”. The testatrix stated:

In this award, preference shall be given to any works dealing with aspects of Northern Territory [of Australia] life; but under no circumstances may any award be given for writings which glorify the sordid, ugly, vulgar under-world types; nor which advocate disloyalty or communism. This award is to encourage the development of a healthy, happy Australian spirit, and to advance the simple virtues of loyalty, courage and patriotism. Every effort shall be made in the award to encourage new and unknown writers, and to assist in the publication of such works as are definitely beneficial to the literary development of the country, but which otherwise would have difficulty in obtaining the necessary publicity ... the intention of the Litchfield Award is to help and encourage new and unknown Australian writers, and to make their work better known.

Joske J. determined that the testatrix’s main object was to encourage the development of Australian literature. The judge deemed this to be a valid charitable purpose as either for the advancement of education or for a purpose beneficial to the community. He stated: “Education is not to be given a narrow meaning. The encouragement of the humanities can be just as much a part of the advancement of education as the advancement of scientific research which ... is a good charitable purpose”.

The major Canadian case in the area of artistic endeavours as a valid charitable purpose is *Re Shapiro*,<sup>32</sup> where Montgomery J. held charitable, as being for the advancement of education, a bequest “for the purpose of assisting in publishing the work of an unknown Canadian author”. The decision does not provide a very detailed analysis of the issue. In fact, Montgomery J. simply cited the judgments of Justice Vaisey in *Re Shaw’s Will Trusts* and Justice

Joske in *Re Litchfield* as support for his decision “that this is a charitable trust for educational purposes”.

### III. *Limits On “The Advancement Of Education” – The “Public Benefit” Aspect*

Most limits on the designation of artistic or aesthetic endeavours as charity concern the “public benefit” aspect of the common law test. In its *Report on the Law of Charities*, the O.L.R.C. examined the jurisprudence in this area and made some helpful recommendations.<sup>33</sup> It made, for example, an important distinction between the “public” aspect of the test and the “benefit” aspect. The public aspect simply concerns whether there is a benefit to the public as opposed to one, or several, private persons. It is the second part of the test that is more relevant to a discussion of artistic endeavours as a benefit. The O.L.R.C. noted that “[t]here is only limited explicit recognition in the case law and commentary that the practical utility of the project is a formally relevant consideration”. In fact, all of the examples it provided are from “aesthetic education” cases where the courts have attempted to place some limits on the educational class by questioning the “educative value” or “practical utility” of certain artistic endeavours.<sup>34</sup>

The O.L.R.C., however, while recognizing the formal relevance of the practical utility test, suggested that “projects ... are simple to design and, therefore, almost never fail the practical utility test ...”. The Commission then adopted a formulation of “public benefit” by Professor G.H.L. Fridman, which stated:

- (a) A charitable trust is one which benefits an identifiable group of people, however small or great in number, but with a common interest, so long as the group is not identified by some blood relationship or family or purely contractual tie.
- (b) The benefit involved may be physical, spiritual, measurable or intangible, direct or indirect.
- (c) But it must be recognizable, that is, capable of intellectual and definite recognition, and it must be of reasonable expectation. It must not be a putative or hoped-for benefit.<sup>35</sup>

The O.L.R.C. stated that a charitable act is “an act that (1) advances a common or universal good (2) in a practical or useful way (3) for the benefit of strangers.”<sup>36</sup> As the cases reveal, there are real problems. Who decides whether an endeavour advances its purpose in a “practical or useful way”? What criteria should be used? Should we be making such judgments in relation to artistic endeavours and is it necessary to do so? My submission is that, as long as the purpose is the promotion of “aesthetic experience”, an analysis of the “public benefit” should be very cursory. The “benefit” aspect should be assumed and

only in very unusual circumstances should the “public” part of the test not be met – for example, if the art is not intended to be publicly shown. For now, it is important to review the cases to see where the current law stands.

One such case is *Re Pinion*<sup>37</sup> where the English Court of Appeal rejected a collection of proposed exhibits as worthless as a means of education and thus held that a proposed museum did not constitute a valid charitable trust. The testator, Arthur Watson Hyde Pinion, appointed the Westminster Bank and his sister, Edith May Pinion, trustees of his will. He directed that almost the whole of his estate be used to endow his studio as a museum for display, to the public without cost, the contents of the studio which were categorized by Wilberforce J. as follows:

(a) paintings by the testator himself. There were over 50 of these, the majority being portraits, but there were some small landscapes and two nude sketches; (b) other paintings, including some originals of the Stuart period, and a number of portraits or copy portraits of the Hyde family ... ascribed by the testator in his will to Lely; (c) furniture ... A number of pieces were described as “Louis XIV style,” “Stuart style,” “Chippendale style” and “Hepplewhite style.” ... (d) bric-à-brac, miniatures and curios, including objects of Chinese, Japanese, Burmese, Indian and other origin and some rugs; (e) china and glass ... Also there was [a] silver tea and coffee service and [a] silver cream jug and cup.<sup>38</sup>

The bank, as trustees, offered the studio and its contents to the National Trust as directed by the will, but the Trust did not accept the bequest. The bank took out a summons for determination of the question whether the bequest set up a valid charitable trust. Wilberforce J. held that although some of the objects had only slight historical or artistic interest, the gift might be of public benefit and was, therefore, a valid charitable bequest.

The testator’s sister and sole next-of-kin, Edith May Pinion, appealed the decision. As at the trial level, the Attorney General sought to uphold the gift as one for educational purposes. The bank did not appear to make submissions in support of either position. During oral submissions on appeal, counsel for the sister conceded that cultivation or improvement in taste in the cultural field is an educational object. However, counsel objected to the “bad quality” of the works. It was argued that “the works exhibited or performed must be of a certain quality, one cannot educate by exhibiting works of bad quality ... Benefit to the public is indeed an overriding consideration in each of the four categories”.<sup>39</sup> The Attorney-General responded by claiming that the case law demonstrated that “[o]nce it is shown that there is a scintilla of educational merit in the gift it is charitable”. Furthermore, he submitted: “Here the evidence shows that there is a minimum of educational value to be derived and no evidence to the contrary. Even a display of ‘junk’ cannot be said to have a

deleterious effect”.<sup>40</sup> As well, he warned the Court that it should not set itself up as a judge of aesthetic or educational qualities. He gave the example of Vincent Van Gogh; if he had wished to set up a museum of his works in his time, people would have regarded them as “trash” – a view that would seem ridiculous today.<sup>41</sup>

Harman L.J. decided that a gift to found a museum may be assumed to have the requisite public utility aspect as long as no one questions it.<sup>42</sup> If, however, the utility of the gift is challenged, then the Court must know something of the quality of the proposed exhibits.<sup>43</sup> He readily admitted that in the sphere of art or aesthetics, quality is a matter of taste and that tastes differ. But, he said, “there is an accepted canon of taste on which the Court must rely” and the Court could hear expert evidence to establish what it was. He concluded from his review of the evidence: “I can conceive of no useful object to be served in foisting upon the public this mass of junk. It has neither public utility nor educative value.”<sup>44</sup>

Russell L.J. came to a similar finding:

For my part I would not admit to the favoured ranks of charity, bearing the banner of education, a disposition with such negligible qualifications to bear it. Where the evidence leaves me with the virtual certainty on balance of probabilities that no member of the public will ever extract one iota of education from the disposition, I am prepared to march it in another direction, pressing into its hands a banner lettered “De minimis non curat lex.”<sup>45</sup>

In a short opinion, Davies L.J. fully concurred with both Russell L.J. and Harman L.J. and stated: “The evidence in the present case was overwhelmingly that the objects comprised in this gift were to all intents and purposes worthless and that this exhibition could do nothing to advance education in aesthetics or history.”<sup>46</sup>

In a similar case, a testator wished to have his writings published. In *Re Elmore*,<sup>47</sup> Gowans J. cited *Pinion* and heard an expert conduct an assessment of the merits of the writings. In the opinion of the expert, the works of the testator had no literary merit and had no significant educational value. From this, the Court concluded that “there is insufficient in this to make the publication of this material a purpose tending to the advancement of learning or the public benefit in the sense which is necessary to make it a charitable object”.

Both decisions directly confronted the issue of practical utility and definitively claimed that works of poor quality do not meet the threshold for effecting the purpose of “aesthetic education”. In *Pinion*, no expert could disagree with the assertion that there was very little in the collection worthy of being in a museum.<sup>48</sup> But does this necessarily lead to the conclusion that it

would not achieve its charitable purpose in a practical or useful way? Furthermore, how can we reconcile this decision with *Re Shapiro* or *Re Litchfield*? In *Shapiro*, an unknown author will receive publication when the Court knows absolutely nothing about the quality of the work. As well, how can we say with any certainty that the author in *Re Litchfield* will provide any great advancement in aesthetics or literature? The answer is, we can't.

However, in *Pinion* and *Elmore*, it is my view that the courts were asking the wrong question. Education should not be the real determining factor in these cases. The real question is whether the purpose of "aesthetic experience" is being advanced in a practical and useful way. Education, like pleasure, is merely a byproduct of aesthetic experience. This is where the courts have gone astray and this is how the decisions in *Shapiro* and *Litchfield* can be understood. As I will argue below, works of poor quality or unknown quality are a fundamental part of the advancement of the aesthetic experience and should be protected as such.

A relatively recent Canadian case seems to embody both the purpose and public benefit problems, which have been revealed in our examination of the case law. In *Re Millen*<sup>49</sup> the British Columbia Supreme Court examined a bequest for:

... the establishment of an annual award for one or both of the following; to be known as the Millen award:

1. A lyric, beautiful in form and in content.
2. A prose original, fact or fiction, which in some way portrays the beautiful.

Two cases were relied upon to support what Campbell J. referred to a "the beauty trust": *Re Litchfield* and *Re Shapiro*. He rejected the submission that the trust was educational in character, relying on *Associated Artists*<sup>50</sup> as support for his decision that the term "beauty" is too vague a term. He stated:

As has been said on innumerable occasions, "beauty lies in the eye of the beholder". While the testatrix undoubtedly knew what she meant by the words "beauty" and "beautiful" no guidance is given for a trustee or the court sufficient to establish certainty of her objective.

The second reason for holding the trust to be noncharitable concerned the public benefit of the "beauty trust". The judge concluded that since there was no publication requirement or a requirement that the recipient be connected with an educational institution or some segment of the public, the only person who would benefit would be the recipient of the award. In his opinion, this was not sufficient.

As a result, Campbell J. concluded that he had “no doubt that the testatrix intended to create a trust but in the circumstances here conclude that she failed to do so”. This decision has been justifiably criticized<sup>51</sup> for focusing on the belief that the term “beauty” is too vague. As we shall see, beauty is a fundamental characteristic of art and has even been called the one overarching criterion of all art. Thus, in my view, there is absolutely no problem with the purpose of the clause being the pursuit of beauty *per se*. The O.L.R.C. suggests that the clause is simply too imprecise to know exactly what the testatrix is trying to achieve. The problem is not necessarily that a beautiful singer is to be awarded a prize. The problem is the lack of a precise scheme for doing so. How is the recipient to be selected? Is the award intended to aid in the development of the skills of the writer or performer? Yet there is a general principle in the law of charitable trusts that if a purpose is certainly charitable, the fact that there is uncertainty about how to carry it out will not defeat it. In fact, the court has the power to devise a “scheme” to remedy the uncertainty.<sup>52</sup>

### *Conclusion to Part I*

Our analysis of the case law demonstrates the difficulty of trying to fit artistic or aesthetic endeavours into the class of “education” although the cases show a definite tendency to take a broad view of the educational class and education is not limited solely to “teaching” in its pure sense of master and student. Yet, no matter how broad the category is, it still does not capture fully the essence of an aesthetic experience. The second problem concerns the so-called “practical utility” of certain gifts. Some may ask: Can we really say that the publication of an unknown author is of sufficient utility to the public to be judged charitable? Can we say that *any* artistic or aesthetic endeavour really serves some element of practical utility to the public? This is a very confusing and difficult area and this confusion is acknowledged by most commentators. Yet, in the following sections, we will see that once the charitable purpose is “aesthetic experience”, the issue of quality becomes irrelevant to a large extent. As long as the purpose is advanced in a “practical or useful way”, the quality of the work does not really matter.

## **Part II: Aesthetic Experience as a Charitable Purpose**

As we have seen, the purpose of advancing “aesthetic experience” has not been given independent recognition as legally charitable. In its recent *Report*, the Ontario Law Reform Commission argued that it should be granted independent status.<sup>53</sup> The O.L.R.C. stated at p. 206:

In our submission, courts should resist the temptation to fictionalize “education” to accommodate [aesthetic experience] in cases where the donor’s project implicating them has no teaching – that is, no educational component.

In the United Kingdom, the Charity Commissioners have stated that in their opinion the promotion of the arts (remember that the arts are simply an element of aesthetic experience) is charitable in and of itself and that there is no need to refer to education.<sup>54</sup> As early as 1976 in the United Kingdom, the Goodman Committee stated that “a strain has been placed upon the interpretation of education which is greater than it can properly bear ... We regard the promotion of the arts as undoubtedly for the benefit of the community and believe that it should be made clear that this is itself a proper charitable object.”<sup>55</sup> As the O.L.R.C. has stated, education in its precise sense involves teaching, training and instruction. Yet it is certainly difficult to view many aesthetic experiences as involving any strictly educational purpose. By including them in the ever-widening category of education, we are confusing the legal understanding of both categories.<sup>56</sup>

This particular reform was part of a larger scheme developed by the O.L.R.C. to reform the definition of charitable purposes.<sup>57</sup> It asked: “[w]hat purposes or what uses are altruistic?”<sup>58</sup> In answering this question, the *Report* referred to the work of natural law philosopher John Finnis and his identification of seven basic human goods that should be “pursued and realized” because they contribute to “human flourishing”.<sup>59</sup> Finnis lists life, knowledge, play, aesthetic experience, friendship, religion, and practical reasonableness as self-evident and fundamental human goods. In the end, the O.L.R.C. recommended the creation of independent categories for all of these Finnis categories and added the category of “work” to the list. The idea was to try to identify the basic human goods which charity law has attempted to promote and to create categories accordingly. In my view, this is certainly a sounder approach than the current state of the law where charitable purposes such as the arts are squeezed into the traditional heads in a rather artificial fashion. This traditional approach is simply a classic case of pigeonholing and should be abandoned. In the view of the O.L.R.C. then, charity is “the provision of the material, social, or emotional means to pursue these basic human goods to others so they may flourish”.<sup>60</sup>

At this point, it is important to emphasize that we should use this approach for both practical and theoretical reasons. First of all, it is much easier to piggy-back on the exhaustive work of the O.L.R.C. in formulating this approach. As well, the *Report* appears to have been influential. For example, the Canadian Bar Association of Ontario’s Charity and Non-Profit Law section is poised to approve the approach of the Commission. Thus, it is arguably more productive and practical to use this framework. Yet the crucial reason for taking this approach is that it seems to be philosophically sound. The real purpose which is being advanced in these endeavours is “aesthetic experience” which is,

indeed, a universal human good that should be recognized as an independent category.

Unfortunately, the O.L.R.C. did not fully explore the proposed “aesthetic experience” category. What is its precise definition? What are the implications of an independent category of “aesthetic experience”? The *Report* gave an extremely brief discussion of *Re Shapiro* and *Re Litchfield* and then concluded that an independent category is necessary. Obviously, a more comprehensive analysis is also necessary if we are to adopt such an approach.

Before proceeding to our analysis, however, one important qualification should be made. It is crucial to remember that artistic endeavours are only a part of this proposed “aesthetic experience” category. Both the O.L.R.C. and Finnis view the “aesthetic experience” as encompassing a broad range of activities from admiring the beauty of the sun in its meridian brightness to being overcome with emotion by a gripping dramatic performance. For example, the O.L.R.C. appears to envision such projects as wilderness and nature reserves as also falling into this category.<sup>61</sup> This paper, however, will focus on the artistic element of this experience. In fact, most of the analysis will be drawn from criticism in the visual arts realm. It would be possible to run the same type of analysis through aesthetic activities such as music, drama, or literary works. The results may slightly vary, but at the core of each pursuit is the “aesthetic experience”.

In *Natural Law and Natural Rights*, Finnis attempts to formulate a complex theory of natural law which is rooted in the “basic forms of human flourishing that [are] to be grasped and pursued as intrinsic good”.<sup>62</sup> Finnis believes that these basic goods are: life – including bodily health, procreation and freedom from pain; knowledge – pursued for its own sake; play – engaging in performances without any particular instrumental purpose; aesthetic experience – particularly the admiration of beauty “outside” oneself and the “inner experience of its appreciation”; sociability – which ranges from social groups to full-fledged friendship; practicable reasonableness – using one’s intelligence to choose one’s actions and shape one’s character; religion – all metaphysical reflection regarding the relationship between humans and the “transcendent origin of the universal order-of-things and of human freedom and reason.”<sup>63</sup>

It is important to stress that Finnis did not use the term “good” to mean “moral good” as in “right” or “wrong”. By “good”, he simply meant that X is “good, in itself, don’t you think?”<sup>64</sup> Furthermore, Finnis uses the term “basic” because he believed that none of these values could be reduced to being merely a facet of one of the other values.<sup>65</sup> Finnis also argued that none of the goods could be deemed to be more important than any of the others.<sup>66</sup>



At first blush, such a list of human values may appear arbitrary and many may question its usefulness, let alone the feasibility of creating a concrete list of the fundamental values of all humans. Finnis openly addressed this question in his Introduction, stating that “it is obvious that investigation of the basic aspects of human well-being (real or supposed) is not easy”.<sup>67</sup> Yet, Finnis concluded that his surveys of anthropological literature led him to some “rather confident assertions” concerning values that are universal to human societies.<sup>68</sup> Obviously, the view that “aesthetic experience” is a basic human good must be examined. Two questions arise: Why do humans participate in the aesthetic and, is this so-called “aesthetic experience” truly universal as Finnis claims?

There are three major theories for the existence of visual art: first, works of art are “imitations of nature” or “representations of reality”; second, art is a vehicle for the expression or communication of feeling; and finally, art concerns an “aesthetic experience”.<sup>69</sup> Both feeling and representation are useful ideas in many types of art but there are certain problems with applying them to all forms of art. Is art always trying to help humans understand the nature of the world around them? What about the “art for art’s sake” movement? What about postmodern theorists who question any attempt to resolve interpretive questions about the world’s relation to art? The notion of art as feeling seems to lead us to the conclusion that: “[w]orks that do not please us may be discarded; works that fail to arouse our passions are weak and empty.”<sup>70</sup>

The third theory – “aesthetic experience” – has been the most influential in the past 200 years. Oswald Hanfling has stated:

The approach of aesthetic experience might seem more plausible than any other. What, after all, are the arts for? Why do we spend money on them, and take time and trouble to experience them? To these questions two main answers may be given, one social and the other personal. The arts, it may be said, contribute, or are capable of contributing to society, to the welfare of society, and should be promoted for that reason... But few would claim that social benefit is the main reason or justification for artistic activity. The personal answer, on the other hand, will be in terms of an individual’s experience - the pleasure, delight, thrills or whatever, that we experience when we listen to music, read a poem or contemplate a painting.<sup>71</sup>

This view holds that art is a unique and singular form of human spirituality. The most famous and influential theory of the singularity and uniqueness of art is Kant’s and his influence has been remarkable.<sup>72</sup> In *Critique of Judgment*, Kant removed the aesthetic from being either a form of knowledge or strictly emotion. From his complex theory of the judgment of taste, the view has developed that “to experience something aesthetically is to experience the

perceived properties of the object and to do so for the sake of that perception rather than for the sake of any other relation in which one may stand to the object.”<sup>73</sup>

A complex body of literature has been developed in fields such as philosophical aesthetics surrounding the term “aesthetic experience”, and the fact that the O.L.R.C. chooses to use the term “aesthetic experience” could cause some confusion. At the outset, the best way to give an idea of what the O.L.R.C. probably meant by “aesthetic experience” is to simply provide some examples of our own. An aesthetic experience can attach to the immediate enjoyment we receive when we sing or dance; watch other humans perform in a concert or a movie; react to the beauty of a painting or a sculpture; listen to the song of a bird or the sound of a stream; or arrange a vase of flowers simply because it gives us pleasure.<sup>74</sup> For his categorization of basic human goods, Finnis drew extensively upon Grisez and Shaw who defined “aesthetic experience” as follows:

[Aesthetic experience] includes not only such things as enjoying works of art – music and paintings, for example, but other, superficially very different experiences. The pleasure one takes from contemplating a beautiful scene in nature can be an aesthetic experience. So can the pleasure one takes from watching a football game on television. Obviously, there are specific differences between a football game and a ballet, and yet watching either can involve a genuine aesthetic experience. An aesthetic experience is one which a person seeks because he values the experience itself, not because it leads to anything beyond itself.<sup>75</sup>

The crucial point is that whatever the precise definition of “aesthetic experience”, one point of agreement is that it is one of the major achievements of the human spirit. This is why humans participate in artistic endeavours and this is why such a purpose should be deemed charitable. As Ross states, “the question of the importance of art is inseparable from ... the question of the nature of being human”.<sup>76</sup> The O.L.R.C. defined altruism as the provision of the means to pursue basic human goods to others so they may flourish. Since “aesthetic experience” is an independent human good, it should certainly be recognized as an independent charitable purpose.

The universality of “aesthetic experience” adds more strength to the assertion of its value to human beings and Finnis’ view that it is a universal human good. Archaeology, anthropology, and philosophy and, indeed, common sense and everyday experience all support this view.

Most of the available archaeological evidence suggests that the life of early human beings was richer and more developed than modern humans believe. The earliest evidence we have of humans making stone tools is deposits found

in Ethiopia from approximately 2.5 million years ago.<sup>77</sup> Yet, the earliest evidence of anything we can deem to be of “aesthetic value” is the cave paintings created by Cro-Magnon hunters about 40,000 years ago. Why is there such a discrepancy? One writer has suggested that “[I]t seems quite inconceivable that something so complex and abstract simply sprang forth some forty thousand years ago without having roots and origins reaching back much earlier in the deep recesses of human evolution”. Of course, regardless of how long the “aesthetic value” has been part of human culture, the crucial point is that we have concrete evidence of this value from thousands of years ago. Whether it has been part of human evolution since the beginning is an argument best settled by archaeologists.<sup>78</sup>

Three kinds of archaeological objects clearly show the aesthetic qualities of shape, design and texture – the practical (such as tools, weapons, and utensils); the religious (such as amulets, talismans, or witch doctors’ paraphernalia); and others which can only be explained as independently aesthetic (such as necklaces and plaques).<sup>79</sup> The cave paintings at Altamira and Lascaux (10,000 to 25,000 years old) are perhaps the most famous example of aesthetic work by ancient humans. According to Andreas Lommel:

It may come as a surprise that early men – the hunters of the Early Stone Age – must have been thoughtful individuals, and not at all the “primitive savages” that they were once thought to have been. They were backward only in the sense that they stood at the beginning of human development. No one disputes the fact that the rock paintings are great and unique works of art, yet some people still seem reluctant to admit that those who produced these works must also have been men of unique intellectual accomplishment, in a word, great artists who are comparable with the dominating figures of historical times.<sup>80</sup>

The later art of the New Stone Age shifted from the animal representations of cave paintings to geometrical design in pottery and other utensils.<sup>81</sup>

Indeed, every archaeological dig turns up objects that have aesthetic qualities. Of course, it is impossible to determine whether or not these objects were produced with a “conscious aesthetic motive”. According to some writers, however, it is enough to know “that earliest known man could and did draw, carve, chisel, and model; that he was able to satisfy an interest, whether independent or subservient, in qualities of form, design, and colour; and that the things he fashioned come to us with aesthetic appeal through 25,000 or more intervening years.”<sup>82</sup> For our purposes, such archaeological evidence is clearly sufficient to establish that for early man the aesthetic was not rare, but universal.

Anthropological evidence leads us to a similar conclusion regarding what one writer has termed “the esthetic universal”.<sup>83</sup> Artistic objects can be found in virtually every society,<sup>84</sup> including Indian, Chinese, Japanese Greek, Roman, African, Amerindian, and of course, European. For example, the most complete historical record of early Chinese painting was completed in A.D. 847. In his *Record of All Famous Painters*, Chang Yen-yüan insisted that the best artists try to detach themselves from the conscious realm in order that “the hand does not stiffen, the mind does not freeze up, and the painting becomes what it becomes without one’s realizing how it becomes so.”<sup>85</sup> In India, the first reference to a sculptor appears to date back to the second century B.C. where an inscription praises Devadinna who was “excellent among youths and skilled among sculptors”.<sup>86</sup>

Perhaps the most striking examples stem from what was historically referred to as the “primitive” tradition. The Australian aborigines were extremely impoverished in a material sense. In fact, they never made pottery, their shelters were made of grass or bark, and most of them wore no clothing. However, they had an incredibly rich memorized literature as well as very complex and exact ceremonial dancing.<sup>87</sup> Pablo Picasso was so impressed with one aboriginal Australian painter that he sent him a letter stating that he envied the ability he showed in his bark paintings.<sup>88</sup>

It is unnecessary to pile example upon example. As one writer has stated: “Even the poorest tribes have produced work that gives to them aesthetic pleasure, and those whom a bountiful nature or a greater wealth of inventions has granted freedom from care, devote much of their energy to the creation of works of beauty.”<sup>89</sup> The fact that such a wealth of anthropological evidence reveals the aesthetic impulse clearly lends strong support to the idea that “aesthetic experience” is a basic human need.

Art predates any philosophical investigation of “the aesthetic”, yet the philosophy of art has emerged as one of the most fertile branches of western philosophy, especially in the late twentieth century.<sup>90</sup> Both Plato and Aristotle were fascinated by the influence of the arts on human beings and society as a whole. For example, Plato considered artists to be so powerful and influential that they should be outlawed unless they served the state.<sup>91</sup> He feared that if the philosopher-kings did not control art, society would become a “psychological anarchy, an orgy of misrule”.<sup>92</sup> At the heart of this fear was the belief that “the aesthetic” is an intimate part of the human soul, but that it belonged to the realm of emotion and passion rather than rationality. In Plato’s eyes, of course, this made it dangerous.

Among other well-known philosophers who wrote about the arts were Aquinas, Hume, Kant, Schopenhauer, Nietzsche, Tolstoy, Croce, Hegel and

Marx, as well as more recent writers such as Collingwood and Wittgenstein.<sup>93</sup> The basic premise underlying all of this work in aesthetic theory is that art is intimately related to human beings, and thus society. Most of the work in aesthetic theory focuses on specific questions such as “what is good art?” or “what is the social and moral role of art?” The starting point of the discussion, however, seems to be assumed – “the aesthetic” is a universal and fundamental quality of human beings.

Perhaps the most obvious evidence for the proposition that the aesthetic is universal is its omnipresence in everyday life. The ordinary person may think that the aesthetic refers to activities which take place solely in the rarefied world of art museums or ballet studios. However, as one writer has stated:

He could not be more wrong than if he thought he had nothing to do with economics, medicine, or science. For the aesthetic, no less than these, is first and last an all-human concern and therefore everybody’s. Everyone every day has aesthetic experience, just as everyone every day has economic experience, or cognitive (knowledge) experience... Everyone has knowledge of aesthetic value in its daily occurrence – even if not by name.<sup>94</sup>

We rationalize the experiences as something other than the aesthetic by attributing “practical” significance to them. We believe that a good movie is relaxing, that a thoughtful novel or play enlarges our sympathies and our understanding of life and people, that a lofty mountain peak may bring a sense of spiritual elevation, and that a great poem may express profound truth, but what we are really experiencing is what we have called “the aesthetic experience”. Instead of attempting to justify someone’s penchant for watching a particular television drama or waking up early to enjoy the sunrise according to some set of “rational” reasons, we should simply admit that we like it because it is a basic human good in itself.

### *Conclusion to Part II*

We have adopted the O.L.R.C. definition of a charitable act as “an act that (1) advances a common or universal good (2) in a practical or useful way (3) for the benefit of strangers”. The O.L.R.C. relied on the work of philosopher John Finnis to conclude that “aesthetic experience” is a common or universal good. This article has moved beyond Finnis to include a brief survey of archaeological, anthropological and philosophical literature as well as references to “common sense”. It could be argued that there are more categories of human “goods” but even the more limited approach supports the Finnis/O.L.R.C. conclusion – that “aesthetic experience” is a basic and universal human good.<sup>95</sup> Since “aesthetic experience” is thus a “common” or “universal” good,

it should be given independent legal recognition in the definition of charitable purposes. Rader and Jessup state:

The conclusion is inescapable that art in its widest sense is pervasive in human living because the aesthetic is one of the root interests of human nature as we find it everywhere. Art is not a late and luxury development in civilization, unknown when life is rude and primitive, and dispensable when the other needs of life become pressing. It is there from the beginning and it is there always... Without it life is not whole.<sup>96</sup>

### **Part III: What is Art?**

We should now narrow our focus from the broad category of “aesthetic experience” to artistic pursuits. One of the greatest problems that must be confronted in bringing artistic pursuits within the charitable category is the question of quality.

The real problem that courts may have to face under a broader definition arises from artifacts or endeavours that may not appear to be “art”. (For example, “works” such as *Invisible Sculpture*, which consisted of a hole that was dug in New York’s Central Park and then filled up again or John Cage’s musical work entitled “433”, which consists of four minutes and 33 seconds of silence. In a humorous example, one artist was banned from a gallery for having devoured fellow artist Robert Gober’s latest creation – a bag of doughnuts on a pedestal!)<sup>97</sup>

In *What is Art?* novelist Leo Tolstoy drew attention to the enormous amounts of energy and human resources devoted to the production, performance and enjoyment of art.<sup>98</sup> As taxpayers, we want to ensure that the charity law system recognizes art, not something “pretending” to be art. Thus, the development of a proper definition of art is of immediate concern for the proper functioning of an “aesthetic experience” category.

The quest for a definition of art has a very rich and complicated history in the field of aesthetic theory. There has been much debate over what qualities an object or performance must have in order to qualify as art.<sup>99</sup> This paper can only explore briefly the different theories and evaluate their relative claims. After such an analysis, it will become evident that it would be sheer folly to import one singular claim as the basis for a legal test of valid art. Yet, an overview does give a strong indication of what attributes are deemed to be important in any evaluation of an alleged art and may form the foundation of a very general test which could determine its legal validity.

## I. *Art and Aesthetic Theory*

The first characteristic that comes to mind is beauty. The O.L.R.C. does not make any attempt to address the question of a definition for art but does mention “the ‘to-be-pursuedness’ of beauty” as a self-evident good.<sup>100</sup> A great deal has been written concerning beauty as a fundamental characteristic of art but ultimately, beauty seems to be a matter of taste, it inheres “in the eye of the beholder”. It is extremely difficult to find a common element amongst all of the things that people consider to be beautiful and beauty may, as a result, be just as hard to define as finding an element common to all art.<sup>101</sup>

The ancient view, which has persisted, defines beauty in terms of symmetry and proportion. In the 17th century, the Earl of Shaftesbury expressed the Aristotelian ideal of proportion when he wrote: “True features make the beauty of a face; and true proportions the beauty of architecture; as true measures that of harmony and music.”<sup>102</sup> Many subsequent authors have attempted to define the requisite qualities such as size, smoothness and lightness that contribute to “beauty”. In the 18th century, one school of thought stressed the inner feelings of human beings in its analysis of beauty. David Hume was a pioneer of this type of analysis. Hume believed that beauty is dependent on a subjective occurrence, a feeling or “sentiment”, in the observer. This view can help to explain the widespread disagreement over the relative beauty of certain objects.

In modern times, writers have acknowledged a decline in the use of beauty as the determining feature of art. The first problem is that simply because something is universally recognized as “beautiful” does not necessarily make it art. For example, bridges and windmills may be described as beautiful without being works of art.<sup>103</sup> We often speak of the beauty of certain actions or moral qualities that are completely unrelated to art. In sports, we speak of a “beautiful shot” or “beautiful stroke”. If the weather is clear and sunny outside, we deem it to be a “beautiful day”. This lack of specificity causes very real problems in using “beauty” as the sole quality of art.

The second problem is that many works of art are not “beautiful” in the conventional sense at all. This is illustrated by the rise of “the sublime” in aesthetic theory. In an essay written in 1757, Edmund Burke described the sublime as “that which inspires terror, the fear of pain or death, in a person who is not in danger and knows it.” In *Critique of Judgement*, Immanuel Kant provided a very detailed analysis of both the beautiful and sublime and even suggested that there were two different types of sublimity – mathematical and dynamical.<sup>104</sup> One writer has stated: “we wouldn’t feel quite comfortable if we called the etchings of Goya or the engravings of Hogarth beautiful.”<sup>105</sup> Another theorist, Herbert Read, believed that it was merely “verbal distortion”

to force the word beauty into describing every work of art because an object may possess qualities other than beauty and still qualify as a valid work of art.<sup>106</sup>

Some writers have claimed that beauty does not play any role at all in the realm of art. John Passmore claimed that it was calendar-makers and not artists who concerned themselves with questions of beauty.<sup>107</sup> Wittgenstein claimed that beauty played virtually no role at all in discussions about art:

You say: "look at this transition", or ... "The passage here is incoherent". Or ... "His use of images is precise". The words you use are more akin to "right" and "correct" ... than to "beautiful" ...<sup>108</sup>

What role, then, should beauty play in determining the validity of a characterization of something as "a work of art"? The most tenable position appears to be a compromise between the extremes. It would not reflect the traditional or current view of art to completely disregard beauty as an important element of art. It may not always be *the* most important element, as Finnis and the O.L.R.C. seem to suggest, but people clearly look for beauty in many works of art. Although people disagree about its precise definition, the fact remains that "people who visit galleries, read poetry and so on, do, after all, look for beauty and may be disappointed if they don't find it or enough of it".<sup>109</sup> Thus, beauty should be seen as an important quality of art even if it is not a necessary or sufficient condition of art.

Another proposed criterion, which challenges the dominance of the concept of beauty in art, is "form". The rise of modern formalism recognized "form" as the definitive criterion of art. The heart of the theory concerns the distinction between intrinsic and extrinsic qualities. In a painting of a beautiful landscape, for example, the actual beauty of the landscape is considered to be extrinsic to the painting, whereas the intrinsic qualities such as form constitute the painting itself. Once this distinction has been made, the formalists argued that the intrinsic qualities were most important to art. If we merely wished to appreciate the extrinsic beauty of the landscape, we could simply visit the landscape itself. The formalists concluded that there must be another reason, distinct from the actual landscape, that drives someone to appreciate the painting. They argued that this special quality was the formal properties of the work.

The emergence of nonrepresentative painting at the turn of the century seemed to validate the formalist approach. With the extrinsic qualities of representation removed in these paintings, only the intrinsic qualities remained. As a result, critics such as Roger Fry and Clive Bell argued that the essence of aesthetic value could be found in formal properties rather than any representa-



tive function.<sup>110</sup> Form was called “the one constant quality of all works of art”.<sup>111</sup>

Of course, the new formalism dealt mainly with the visual arts. Formalists would probably view music as the classic example of “form” as the definitive criterion of art considering there is generally no reference to anything outside the work itself.<sup>112</sup> In certain situations, however, the formalist view collapses.<sup>113</sup> Many paintings are carefully balanced between their formal and representative functions. As well, in the case of literature, is the meaning of the words to be regarded as extrinsic? A pure formalist would be forced to answer “yes”. Yet, it seems outrageous to claim that a reader only cares about the metre of the words or the phrasing of a speech. Why, then, do we bother to discuss plots and subplots? Obviously, the audience places a great deal of emphasis on meaning in most works of literature.

Thus, just as beauty seems to fail as a single, universal quality of art, similar problems arise in any attempt to encompass all aspects of art in the category of form. As Oswald Hanfling has stated:

It is, however, mere prejudice to suppose that aesthetic satisfaction must be attributable to a single kind of quality; and while it is true that formal qualities are important – sometimes most important – in the creation and appreciation of a work of art, this does not entail that it must be so in all cases. A rambling, episodic novel may be described correctly as formless, but admired none the less for its other qualities – its beauty or originality of language, insight into human nature, and so on. And a painting, similarly, may be admired for these and other qualities, rather than for any formal merits it may possess.<sup>114</sup>

Some thinkers have shifted their attention away from an examination of the essential qualities of art in an attempt to create a new kind of definition. One example of such an approach is the “institutional theory”.<sup>115</sup> George Dickie claimed that what makes something a work of art has nothing to do with any qualities within the work itself. Rather, what makes something a work of art is the status conferred upon it by the institution he referred to as “the artworld”. Dickie defined this vague term as “a loosely organized, but nevertheless related set of persons including artists (understood to refer to painters, writers, composers), producers, museum directors, museum-goers, theatre-goers, reporters for newspapers, critics ... art historians, art theorists, philosophers of art, and others”. Dickie argued that this group of persons comprised an informal “social institution”.<sup>116</sup> He claimed that a central feature of this institution was “the *presenting* of particular works of art” and as a result of this “conferral of status” upon something, it becomes a work of art.

However, one of the major criticisms of the institutional theory is its emphasis on “conferral of status”. Hanfling has stated:

The clause about conferring the status of candidate for appreciation will probably suggest a work that is exhibited in an art gallery, performed in a concert hall, or published in print. But may there not be a work of art that has had no such treatment? Suppose someone paints a picture, composes a piece of music, or writes a poem, and these are never exhibited or published. Would it follow that they are not works of art? Do they become works of art only when they are offered for appreciation?<sup>117</sup>

One of the possible responses to such a claim is that the conferral of status is “hypothetical rather than actual”.<sup>118</sup> Thus, instead of saying that something becomes a work of art only when “the artworld” has deemed it so, it suffices to say that something *would* become a work of art if presented to or by the artworld. However, it seems just as questionable to claim that simply because something is exhibited or presented, it becomes a work of art.<sup>119</sup> Many people still question whether modern art which challenges the traditional framework of art, is really art at all. Hanfling asks whether a gallery-goer must “accept that [such objects] are art, just because they are exhibited in a gallery belonging to the artworld?”

Another related theory claims that the crucial criterion for an object to become art is the intention of the artist. Thomas Binkley wrote that the concept of a work of art:

... does not isolate a class of peculiar aesthetic [objects]. The concept marks an indexical function of the artworld. To be a piece of art, an item need only be indexed as an artwork by an artist. Simply recategorizing an unsuspecting entity will suffice.<sup>120</sup>

Unfortunately, in the end, this test is unsatisfactory. It is too broad, simplistic and unprincipled. Neither the institutional theory nor the artist’s intention theory say anything about the reasons *why* something is deemed to be a work of art. The art world does not (we hope) simply randomly decide that something is a work of art. The art world looks to certain qualities of the proposed work and decides whether or not to confer the status of “art” upon it. This examination of qualities is precisely what we need to address and both of these theories fail to provide any assistance.

Perhaps the answer is to admit defeat in the quest for a definition of art and accept a recent school of thought which believes that any attempt to search for a definition is itself misguided. Morris Weitz has stated: “the very expansive, adventurous character of art, its ever-present changes and novel creations,

makes it logically impossible to ensure any set of defining properties.”<sup>121</sup> The idea that there should not be any boundaries to art is very popular among many artists as well.

In many ways, it seems pointless to create a definition of art when so much energy is expended by artists who desire to challenge and break down any definitions. There are countless examples of artists who deliberately seek out the conventions in order to flout them: the first painters of abstract art; the stream-of-consciousness writers such as James Joyce; the exhibition of “ready-mades” (ordinary objects that can be found anywhere) as works of art.

## II. *Construction of a Legal Test for Art*

Is a definition of art impossible to attain? Oswald Hanfling has rightly concluded that simply because there are difficulties in finding a definition which can satisfy all aspects of art, it does not follow “that in the case of art ‘anything goes’, or that we must blindly accept whatever is put out for us by the artworld”. Hanfling continued:

We are entitled, on the basis of our knowledge of the concept, to put forward reasons, appealing to established qualities of art, for or against the recognition of an object as art ...<sup>122</sup>

This seems to provide the best solution to the legal dilemma. In general, the law is replete with uncertainty. Most judgments are simply that – judgments. They are educated choices made by judges based on the reasons “put forward” which are “for or against” a certain position. If the law were to shy away from the difficulty of crafting appropriate tests or definitions every time it encountered a problem, there would be no tests in any area of the law. It may not be possible to achieve perfection, but a test that addresses the major strains of art philosophy is certainly an excellent starting point. As the Goodman Committee states: “Problems of determining what falls within the description of art should not be used as an excuse for avoiding the issue.”<sup>123</sup>

One such test was proposed by Tatarkiewicz in *A History of Six Ideas* and seems to be a sound approach for the courts to use in determining the validity of a proposed work of art. Tatarkiewicz suggested that six main conditions of art have been identified throughout history: the production of beauty, the representation or reproduction of reality, the creation of forms, expression on the part of the artist, the production of aesthetic experience, and the production of shock.<sup>124</sup> According to Tatarkiewicz, none of these conditions is definitive of art by itself, but it is possible to bring all of them together into a general definition. In fashioning his definition, he also attempted to take into account both the artist’s intention and the effect of art on the audience.

Tatarkiewicz put forth the following definition in an attempt to capture all six characteristics in a disjunctive formula:

A work of art is either a reproduction of things, or a construction of forms, or an expression of experiences such that it is capable of evoking delight or emotion or shock.

Tatarkiewicz claimed that this definition was “immune from attack on the part of those who are against defining art at all” due to the inclusion of a number of different functions instead of attempting to adopt one function as the sole criterion of art.<sup>125</sup>

Is this formula satisfactory? It may not be the most specific definition but, by taking into account most of the characteristics associated with art, it is the broadest test possible. This seems to be the best model for the courts in charity law. Aesthetic theory will probably never solve the so-called “problem of definition”<sup>126</sup> and it certainly should not be the role of the courts to enter such a philosophical thicket. By adopting a definition that allows the possibility of several alternatives, the courts will be much better equipped to accommodate the difficulties which will inevitably arise.

### *Art of “Poor Quality”*

The most pertinent criticism of the Tatarkiewicz test is that it does not seem to deal with the problem of poor quality. The test seems to demand a response from the audience which a work of poor quality may fail to evoke. For example, exhibitions of amateur paintings are exhibitions of works of art despite the fact that they may not evoke a “proper” response from their audiences due to their poor quality.<sup>127</sup> Hanfling suggested that a “promising solution” to this dilemma would be to add another disjunctive to the Tatarkiewicz test: “... capable *or* intended to be capable ...”.<sup>128</sup>

Of course, this brings us back to the underlying presumption regarding art of poor quality in cases such as *Pinion*. If the courts were to adopt such a test Mr. Pinion’s museum would have to be allowed. Why? Mr. Pinion intended and, indeed, undoubtedly believed that his artifacts would be capable of evoking the appropriate response. Thus, a fundamental choice has to be made in formulating a definition of “art”.

Several points must be made concerning this observation. The first and most important point in my view is that whether art is of “poor” quality or of the “highest” quality, it is still art and should be entitled to the full support of the law. Earlier sections discussed the proposition that *all* art should be protected. The charity law system is designed to protect charitable *purposes*, but it cannot guarantee *results*. For example, the courts accept the charitability of all

types of religious purposes without knowing anything about their results. Why should the system be different for artistic pursuits? As well, the courts are fully willing to accept the charitability of prizes for unknown authors without their having any knowledge of the works to be produced.

As long as the human good is advanced in a “practical or useful way”, it is an acceptable charitable act. We have seen that the threshold for this “practical or useful way” clause is very low indeed. The rationale is that by providing the means to pursue an aesthetic experience through charity law, a social “good” is being advanced.

Secondly, how is the court going to determine whether something is of poor quality or high quality? There is a respected body of expert evidence that may be relied upon to determine quality, but we have seen how difficult it is to even come to a preliminary understanding of what art is, let alone try to answer the question, “what is good art?” The practical difficulties of determining what is art are already nightmarish. The courts would be asking for more trouble by insisting that only “good works” of art be deemed worthy of charitable status. Of course, this seems to be using the same argument in reverse, i.e., the law should not shy away from something simply because it is difficult. However, it is my opinion that it may prove to be an incredibly difficult task to deal with both of these problems, especially when it appears to me that the “good vs. bad art” question need not be asked.

Thirdly, it is my view that society is not as concerned with the “poor quality” of works as it is about subsidizing works which it does not conceive to be “art”. The central question for the courts should be: is it actually art? For example, a recent article in *The Globe & Mail* entitled “you call that art?” states that “[t]he general public has a big problem with the innovative edges of the art of today – and has had, it seems, for hundreds of years.”<sup>129</sup> It simply does not seem that the everyday citizen is very worried about allowing the use of public funds to support a charity that allows senior citizens to create arguably “inferior” works of art. What angers the public, it seems, is the use of tax dollars for works which they do not deem to be “art”.

Furthermore, it may be possible that so-called “bad quality art” may be at some level practical or useful to promote aesthetic experience. There appears to be three possible parts to this argument: a) in many ways, there is a need for bad works of art, in order for people to truly appreciate the good works;<sup>130</sup> b) it seems simply realistic to expect that for every good work of art produced, there will be a piece of “mediocre” art; c) it will be very difficult to know today if the “bad” art is truly “bad”<sup>131</sup> – it may simply be a revolutionary form at the forefront of change in the art world.

A fifth point regarding poor quality is that, under our current system, the art community already appears to decide the issue of quality. That is, assume that a nonprofit gallery applies for charitable status. It intends to exhibit contemporary Canadian work. The gallery could get charitable status for the institution without Revenue Canada ever asking any questions about the quality of the art which will be displayed.

Finally, it is worth remembering the underlying legal issues at stake in any complaints about “support” for poor quality works. If the legal issue is a trust for charitable purposes, then the law is being asked to give effect to a person’s wishes. Hence, at least one person has indicated a clear desire to give money to the purpose. Generally, the law should carry out such wishes. In the alternative, the issue is taxation, but not direct subsidy. Thus, charitable status brings an exemption from tax on income. Only if you make enough income to pay tax do you get the exemption. So a display of bad art which nobody goes to see loses money and, as a result, no tax exemption is available. Or, the tax issue is receipts for donations. Again, someone has to give the donation in the first place and by doing so, support the art. In the end, this is a market-type argument; the market will decide and unsupported art will have to be paid for solely by the artist.

### *Conclusion to Part III*

Thus, even if the courts do not necessarily wish to adopt the Tatarkiewicz formula itself, the test that is chosen must be broad, flexible and accommodating to the mercurial nature of art. As we have seen, any definition that focuses exclusively on one criterion is too flawed to be effective in all instances. Many features have been identified as being “definitive” of art. The court should not try to decide which is the most persuasive, but should fashion a test that allows for the greatest chance of success. A Tatarkiewicz-type of test will best allow the court to achieve its goal of allowing the basic human good of aesthetic experience to flourish.

### **Conclusion**

“Aesthetic experience” should be an independent category of charitable purpose. Both the Goodman Committee, and more importantly for Canadian law, the O.L.R.C., have advocated such a position. It is an important step that, if applied by the courts, would remove the confusion surrounding the inclusion of aesthetic pursuits within the “education” class. It is not only practical, however, but is also strong theoretically. As the analysis in Part II demonstrated, “aesthetic experience” is a fundamental human good that should be pursued and realized in its own right.

Some may argue that the real difficulty in recognizing aesthetic purposes as charitable is the problem of defining “good” and “bad”. This is especially true with regard to artistic pursuits. We may not be able to achieve the perfect legal test, but the difficulty of the task should not suggest that a well-crafted test is impossible. In Part III, the Tatkiewicz test was proposed as a possible practical legal test.

The charitable sector plays a large role in the Canadian economy and provincial governments should be re-examining the outdated state of their laws governing charities. The debate has increased somewhat in Ontario with the release of the O.L.R.C. *Report*. Yet, there are so many issues left unresolved that the *Report* could not possibly have dealt with all of them in any real depth. The status of artistic purposes as charitable is one of these issues. This article is presented with the hope that it will prove useful in resolving such issues.

#### FOOTNOTES

1. See Ontario Law Reform Commission, *Report on the Law of Charities*, vol. 1 (Toronto: Ministry of the Attorney General, 1996), p. 166. (hereinafter O.L.R.C.).
2. (1601), 43 Eliz.1, c.4 (U.K.) (hereinafter *Statute of Elizabeth*).
3. See O.L.R.C., *supra*, footnote 1, p. 167; *Perpetual Trustee Co. Ltd. v. Groth*, [1985] 2 N.S.W.L.R. 278, at 285 (NSW).
4. [1891] A.C.531.
5. *Ibid.*, at 583. For more analysis of the development of the *Pensel* test, see O.L.R.C., *supra*, footnote 1, pp. 171–173.
6. It is important to note that the following overview of case law does not consider U.S. law, mainly because Canadian courts have never paid very close, if any, attention to it in the context of charity law cases.
7. This is an expression used by Lord Greene M.R. in *Royal Choral Society v. Inland Revenue Commissioners*, [1943] 2 All E.R. 101, at 105.
8. See O.L.R.C., *supra*, footnote 1, pp. 175–184.
9. (1884), 1 T.L.R. 4.
10. (1909), 25 T.L.R. 382.
11. See *Tudor on Charities*, 7th edition, at 47; *Groth*, at 286; *Royal Choral Society*, *supra*, footnote 7, at 106–7.
12. *Ibid.*, *Royal Choral Society*. This is a reference to a passage in *Tudor on Charities*, 5th edition, at p. 39, which states: “The fine arts, however, are probably not regarded as objects of charity; and a gift to encourage artistic pursuits was held not charitable. But it is otherwise if the element of instruction is introduced: a gift for an art school is good”.
13. *Re Ogden*, *supra*, footnote 10, at 382.
14. *Ibid.*, at 383.
15. *Royal Choral Society*, *supra*, footnote 7, at 107.
16. *Re Henry Wood National Memorial Trust*, [1966] 1 W.L.R. 1601.
17. *Royal Choral Society*, *supra*, footnote 7, at 101.

18. *Re Delius*, [1957] Ch. 299.
19. *Re Shakespeare Memorial Trust*, [1923] 2 Ch. 398.
20. *Ibid.*, at 401–402.
21. *Royal Choral Society*, *supra*, footnote 7, at 104.
22. *Ibid.*, at 104.
23. *Re Allsop*, *supra*, footnote 9, at 4; *Royal Choral Society*, *supra*, footnote 7, at 106–107.
24. *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 96–97.
25. *Royal Choral Society*, *supra*, footnote 7, at 105.
26. [1952] Ch. 163; quotations at 171–172.
27. [1956] 1 W.L.R. at 752.
28. *Ibid.*, at 759.
29. *Ibid.*, at 758.
30. *Supra*, footnote 18; quotations at 305–6 and 307–308.
31. [1961] A.L.R. 750 (Aus.); quotations at 751 and 754.
32. (1979), 107 D.L.R. (3d) 133; quotation at 134.
33. O.L.R.C., *supra*, footnote 1, pp. 175–184.
34. *Ibid.*, p. 182.
35. *Ibid.*, p. 184; G.H.L.Fridman, “Charities and Public Benefit” (1953), 31 *Can. B. Rev.* 537, at 551–52.
36. *Ibid.*, p. 176.
37. [1965] Ch. 85.
38. *Ibid.*, at 88.
39. *Ibid.*, at 100.
40. *Ibid.*, at 103.
41. *Ibid.*, at 102.
42. *Ibid.*, at 105.
43. *Ibid.*, at 106.
44. *Ibid.*, at 107.
45. *Ibid.*, at 111.
46. *Ibid.*, at 107.
47. [1968] V.R. 390; quotation at 394.
48. In his decision, Harman L.J. states: “Indeed one of the experts expresses his surprise that so voracious a collector should not by hazard have picked up even one meritorious object”. *Re Pinion*, *supra*, footnote 37, at 107.
49. (1986), 30 D.L.R. (4th) 116 (B.C.S.C.); quotations at 117, 120 and 121.
50. *Supra*, footnote 27.
51. See O.L.R.C., *supra*, footnote 1, at ln 94, p. 182.
52. See Philip Pettit, *Equity and the Law of Trusts*, 7th ed. (London: Butterworths, 1993), pp. 216, 290; O.L.R.C., *supra*, footnote 1, pp. 398–400.
53. O.L.R.C., *supra*, footnote 1, at 224.



54. Pettit, *supra*, footnote 52, at 234.
55. National Council of Social Service, *Charity Law and Voluntary Organisations: Report of the Goodman Committee*, (London: Bedford Square Press, 1976), at 26.
56. O.L.R.C., *supra*, footnote 1, at 206.
57. *Ibid.*, at 145–185.
58. *Ibid.*, at 147.
59. *Ibid.*, at 148.
60. *Ibid.*, at 149.
61. *Ibid.*, at 224.
62. Finnis, *supra*, footnote 24, Ch 4.
63. *Ibid.*, pp. 86–90.
64. *Ibid.*, p. 86.
65. *Ibid.*, p. 92.
66. This equality argument has been hotly debated in the literature. For example, see John Finnis, Joseph Boyle and Germain Grisez, “Practical Principles, Moral Truth and Ultimate Ends” (1987), 32 *American Journal of Jurisprudence* 99. This may have implications for the charitable status of the “aesthetic experience”. In *Natural Law and Natural Rights*, *supra*, footnote 24, Finnis admits that people often prioritize their “goods” (at 93). Could a society choose to emphasize the good of relief of poverty over arts and culture by giving a larger tax subsidy for such purposes? See O.L.R.C., *supra*, footnote 1, at 155.
67. Finnis, *supra*, footnote 24, p. 81.
68. *Ibid.*, p. 83.
69. Oswald Hanfling, ed., *Philosophical Aesthetics*, (Oxford: Blackwell Publishers, 1995), p. vii.
70. Stephen David Ross, ed., *Art and Its Significance: An Anthology of Aesthetic Theory* (Albany, NY: State University Press, 1987), p. 2.
71. Hanfling, *supra*, footnote 69, p. xi.
72. Ross, *supra*, footnote 70, p. 2.
73. Hanfling, *supra*, footnote 69, p. 144.
74. See Melvin Rader and Bertram Jessup, *Art and Human Values* (Englewood Cliffs, NJ: Prentice-Hall, 1976), p. 7.
75. Germain Grisez and Russell Shaw, *Beyond the New Morality: The Responsibilities of Freedom* (Notre Dame, IN: University of Notre Dame Press, 1974), pp. 64–75.
76. Ross, *supra*, footnote 70, p. 4.
77. Tsion Avital, “The complementarity of art and design”, *Emerging Visions of the Aesthetic Process: Psychology, Semiology and Philosophy*, eds., Gerald C. Cupchik and János László (Cambridge: Cambridge University Press, 1992), at 72.
78. *Ibid.*, at 73. Tsion Avital stated that to investigate such a question, a new field called “cognitive archaeology” might have to be developed.
79. Rader and Jessup, *supra*, footnote 74, at 97.

80. Andreas Lommel, *Landmarks of the World's Art: Prehistoric and Primitive Man* (New York: McGraw-Hill Book Co., 1966), p. 17, quoted in Rader and Jessup, *supra*, footnote 74, at 97.
81. Rader and Jessup, *supra*, footnote 74, at 98.
82. *Ibid.*, at 97.
83. Ben-Ami Scharfstein, *Of Birds, Beasts, and Other Artists: An Essay on the Universality of Art* (New York: New York University Press, 1988), at 185–230.
84. Oswald Hanfling, ed., *supra*, footnote 69, at vii.
85. Scharfstein, *supra*, footnote 83, at 170.
86. *Ibid.*, at 177.
87. *Ibid.*, at 116.
88. *Ibid.*, at 27.
89. Franz Boas, *Primitive Art* (Cambridge, MA: Harvard University Press, 1927), p. 9, quoted in Rader and Jessup, *supra*, footnote 74, at 98.
90. Ross, *supra*, footnote 70, at ix.
91. Plato, *The Republic* [Stephanus \*392–398] in Ross, *supra*, footnote 70, at 23–29.
92. Plato, *The Republic* [\*598–601] quoted in Sheldon H. Nahmod, “Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime and the First Amendment” (1987), *Wisconsin Law Review* 221 at 227.
93. For a basic overview of aesthetic theory, including consideration of these philosophers and work from other fields such as semeiotics, phenomenology, and psychology, see: Hanfling, *supra*, footnote 69; Ross, *supra*, footnote 70.
94. Rader and Jessup, *supra*, footnote 74, at 5–8.
95. Although, in the end, the Finnis/O.L.R.C. approach supports the position adopted in this paper, it is apparent that my research would have led me to this conclusion regardless of the existence of this framework.
96. Rader and Jessup, *supra*, footnote 74, at 119.
97. Hanfling, *supra*, footnote 69, p. 4.
98. *Ibid.*, p. 2.
99. *Ibid.*, p. 16.
100. O.L.R.C., *supra*, footnote 1, p. 148.
101. Hanfling, *supra*, footnote 69, p. 41.
102. Shaftesbury, “Characteristics of Men, Manners, Opinions, Times” in Hofstadter, A. (ed.) (1964), pp. 241–245 quoted in Hanfling, *supra*, footnote 69, p. 41.
103. Hanfling, *supra*, footnote 69, p. 53.
104. Sheldon Nahmod, *supra*, footnote 92, at 233.
105. John Passmore, “The Dreariness of Aesthetics”, in W. Elton (ed.) *Aesthetics and Language*, p. 50 (1954), quoted in Hanfling, *supra*, footnote 69, p. 55.
106. Hanfling, *supra*, footnote 69, p. 55.
107. *Ibid.*
108. Wittgenstein, *Lectures and Conversations*, C. Barrett (ed.) (1966), p. 3, quoted in Hanfling, *supra*, footnote 69, p. 55.

109. Hanfling, *supra*, footnote 69, p. 56.
110. *Ibid.*, p. 59.
111. *Ibid.*, p. 60.
112. This is not to say that music does not convey ideas or expression (see John Finnis, "Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity" (1967), 116 U. Pa. L. Rev. 222, at 232–237) or that there are no examples of representation in music (for example, Camille Saint-Saëns' *Carnival of the animals*) but these cannot be considered as representative in the same sense as a painting.
113. Hanfling, *supra*, footnote 69, p. 60.
114. *Ibid.*, at 62–63.
115. *Ibid.*, at 19–32.
116. *Ibid.*, at 20.
117. *Ibid.*, at p. 25.
118. *Ibid.*, at p. 27.
119. *Ibid.*, at p. 29.
120. Binkley, "Piece: Contra Aesthetics", quoted in Hanfling, *supra*, footnote 69, p. 28.
121. Morris Weitz, "The Role of Theory in Aesthetics", *Journal of Aesthetics and Art Criticism* (1956), quoted in Hanfling, *supra*, footnote 69, p. 17.
122. Hanfling, *supra*, footnote 69, p. 38.
123. National Council of Social Service, *supra*, footnote 55, at 26.
124. Hanfling, *supra*, footnote 69, p. 11.
125. *Ibid.*, p. 12.
126. *Ibid.*, p. 1–40.
127. *Ibid.*, p. 13.
128. *Ibid.*, p. 14.
129. "You call that art?", *The Globe and Mail* (Toronto), 5 September 1998: C1.
130. Although it was not developed in the judgment in *Pinion*, Justice Harman asked counsel for the next-of-kin this very question. "Cannot you educate people what not to like as well as what to like?" See *Pinion*, *supra*, footnote 37, at 100.
131. Recall our Van Gogh example, *supra*, footnote 41.