Bookshelf

HEATHER HISEY, *Editor*
Torys, Barristers and Solicitors LLP, Toronto, Ontario

Civic Literacy: How Informed Citizens Make Democracy Work

By Henry Milner

Published by University Press of New England, 2002, 293 pp. US $45. cloth; US $19.95 paper.

REVIEWED BY A. PAUL PROSS
Professor Emeritus, School of Public Administration, Dalhousie University

---

This book is an enquiry into the factors that contribute to informed voter choice during elections.

Henry Milner's central question is: What produces and sustains civic literacy? (p. 2) As Milner defines it, civic literacy encompasses not only political knowledge, but also a willingness to apply that knowledge through political participation.

In the first part of the book, Milner emphasizes the participatory aspect of civic literacy, particularly "the role of political and especially electoral institutions to provide voters with a clear and meaningful 'map' of political alternatives." Participation, he argues, is closely related to the distribution of intellectual resources and, in turn, of material resources.

> ...[D]emocratic societies that more equally distribute intellectual resources also more equally distribute material resources... [and] democratic societies that more equally distribute intellectual resources attain higher levels of political participation. (p. 13)

Milner reaches this position through comparative analysis of socio-economic and voting data from a number of advanced industrialized countries, including Canada, the United States, Australia, New Zealand, and various European countries. (The number varies because truly comparative data on such diverse characteristics as voter turnout, television viewing, income distribution, adult education, and so on, is not always available. In general, however, Milner is able to make useful comparisons between 14 or more countries.) The analysis is complex, and Milner makes few concessions to the lay reader.

This is unfortunate because, quite apart from the important central argument, quoted above, Milner's observations on subsidiary issues are penetrating and highly pertinent to several public policy debates currently in progress in this country.

Consider, for example, his comparison of the effects of proportional representation (PR) and the first-past-the-post electoral system (FPTP):

> In comparison to FPTP, under PR there is less incentive for political leaders, who may very well need their opponents' support after the election, to inhibit the awareness of the electorate of alternative positions on the issues of the day. In contrast, (the) FPTP-based ... governing party is expected to implement its program as if a majority of the population was behind it, and not seek broad-based multipartisan support for needed, but controversial, reforms. It knows, moreover, that such support is rarely forthcoming... With politics as a ruthless zero-sum game... distorting the opponent's position... while keeping one's policies vague, pays off... The result, whatever the intentions of the individuals involved, is a public less informed than it needs to be. (p. 85)

His review of studies examining the impact of television viewing on civic literacy is equally pertinent, buttressed as it is by comparative analysis of the correlation between TV dependency, political knowledge, and voter turnout.

Informing this sortie into what many will consider one of the drier reaches of political science is a concern for equitable socio-economic outcomes.

> Institutions and policies promoting civic literacy, we shall show, can produce a virtuous circle by themselves fostering informed political participation. These, in their turn, can lead to more equitable socio-economic outcomes. Such outcomes encourage citizens to keep well informed of governmental decisions – beginning the cycle once again. Civic literacy is thus both end and means. (p. 2)

This normative concern leads Milner, in the latter part of the book, to investigate the policy choices that affect civic literacy. Newspaper subsidies, regulation of political advertising, adult education and, of course, electoral reform are examined. There is a somewhat tentative case study of New Zealand that suggests that adoption of a form of PR will moderate the effects of a radical, neo-conservative, transformation of social and economic policies introduced by that country's last majoritarian government.

The Nordic countries, however, are those that Milner considers best illustrate his contention that expanded civic literacy is associated with more equitable income distribution and ultimately with PR.

> The Scandinavian countries are in a high-civic-literacy category, along with the Netherlands and German-speaking countries. The low-civic-literacy category is dominated by the English-speaking countries plus Italy and perhaps France. (p. 104)

Scandinavia has experienced the same globalizing pressures that have affected Canada, but has been more successful in adapting to them without relinquishing key elements of the social welfare state.

For most of the book Canada is included statistically, but receives scant analytical attention. In his conclusion Milner redresses this imbalance, presenting Canada as a country at the crossroads...

> Conditions in Canada are not untypical of most industrial democracies that find themselves at a fork in the road: one leads down the well-paved low-civic literacy highway the United States has laid out, the other the more difficult high-civic literacy path of the Scandinavian sustainable welfare state. (p. 185)

In some respects Canadians share Scandinavian attitudes to the role of the state and social welfare policies, but the possessive individualism of the United States is enticing, and "there is good reason to believe that civic literacy in Canada is low and going lower" (p. 187). Milner consequently ends his study with a passionate plea for raising civic literacy in this country, particularly through policies of cultural protectionism and electoral reform.

Despite a formidable analytical approach, this is a book well worth reading. The lay reader does not have to be numerate to appreciate Milner's fundamental message or his policy recommendations. The specialist can quarrel with his decision to focus on participation as represented by voter turnout at local elections and to virtually ignore the role of membership in organized groups. The specialist can also question the extent to which literacy-inducing policies, rather than basic conditions of political culture, affect both civic literacy and welfare policies.

One can also question his thesis that civic literacy is "a condition for attaining certain social outcomes." Is civic literacy always benign, as Milner suggests? Does it invariably lead to socially equitable outcomes? Is he overly influenced by his preference for such outcomes and by his intimate knowledge of Swedish politics and policies? His suggestion that newspaper subsidies have promoted both civic literacy and the sustainable welfare state is a case in point. Canada's subsidization of newspapers has been confined to preferential postal rates, but Canada has substantially subsidized magazines. Has that support been translated into a more informed electorate?

Despite the fact that Milner does not entirely satisfy on these points, both the specialist and the lay reader will find his argument cogent, well researched and often compelling.

Unforeseen Legacies: Rueben Wells Leonard and the Leonard Foundation Trust

By Bruce Zive

Published byThe Osgoode Society for Canadian Legal History, University of Toronto Press, 2000, pp. 280. Cdn. $75.

REVIEWED BY MALCOLM D. BURROWS
Scotia Trust

Rueben Wells Leonard was an early Canadian tycoon straight out of central casting. Born in 1861 and trained as a civil engineer, Leonard struck it rich in Cobalt with a silver deposit in 1904. This discovery, which came out of a willingness to pay a rival's court fees in a disputed claim, led to the creation of Coniagas Mines Limited and, soon after, a life devoted to public service.

From Springbank, his seven-acre estate in St. Catharine's, Ontario, he and his wife served on college and university boards, as well as countless other social and religious enterprises. Prime Minister Borden appointed Leonard chairman of the National Transcontinental Railway Commission, an entity that was responsible for completing the Canadian railway system. Leonard did so on time and on budget.

As Leonard's wealth and influence grew, he gradually turned his attention to philanthropy. It was through his philanthropy that R.W. Leonard became a notable figure in the development of the charitable trust in Canada – inadvertently, after death.

Unforeseen Legacies: Rueben Wells Leonard and the Leonard Foundation Trust, by University of Alberta law scholar Bruce Zive, revisits Leonard's life, times, and legal legacy in an exceptionally readable scholarly account. The litigation surrounding the trust in the late 1980s influenced Canadian jurisprudence relating to equality and the limits of charitable trusts. Happily, it also provided Zive with the opportunity to recover a period of early Canadian philanthropy.

Equal parts biography, social and intellectual history, legal history, and contemporary legal analysis, *Unforeseen Legacies* provides a fair, engrossing portrait of a decent, albeit narrow and dogmatic, man whose views went out of style. The Leonard Foundation was created in 1923 to provide scholarships, but applicants, in keeping with Leonard's imperialist views, were limited to members of the "White Race." In 1990, after five years of legal proceedings, the Ontario Court of Appeal made a landmark decision that amended and broadened the terms of the trust to eliminate discriminatory provisions.

At the heart of this very Canadian story is how our society's values and legal underpinnings evolved over the 20th century. Leonard was of a world that

privileged private property rights over equality. His property became the servant of his views and values. But time passed; attitudes changed. Equality and multiculturalism emerged as cherished Canadian values, tempering private property rights. Zive neatly and engrossingly captures this transition in our society and its legal instruments.

The Leonard Foundation Trust preamble baldly states that "the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the world along the best lines." The preamble asserts the triumph of Protestant Christianity and the British Empire. It is easy to label Leonard's values as heinous, as many did in the public debate surrounding the Trust beginning in the 1950s and leading up to the start of litigation in 1986. Zive's measured narrative explores the man in his context, without ever making the easy assumption that he was entirely representative of his world.

Leonard was one of about 60 Canadian millionaires of his age. He was a social Darwinist and unbridled capitalist. He was patriotic, controlling, full of high-minded *noblesse oblige*, Anglican by religion, and committed to Canada as a branch of the British Empire. Zive's analysis of the values and experiences that informed the Trust demonstrates how Leonard differed from his contemporaries, as well as how he was similar. For example, unlike Cecil Rhodes, the noted imperialist philanthropist who also endowed scholarships, Leonard funded the education of women. Rhodes, however, was more open-minded on issues of race and religion. The chapter on Leonard's intellectual and social context is subtle and thorough, and he is not presented as a cartoon racist.

Unforeseen Legacies is published by The Osgoode Society for Canadian Legal History through the University of Toronto Press, but can be enjoyed by readers who are not trust lawyers or legal historians. I suspect each reader will be drawn to different aspects of the narrative. While the final section has an excellent analysis on the implications of Leonard for current law and policy, for me, a gift planner who has worked at large charities, the accounts of Leonard's various attempts of give away money hold the greatest fascination.

In 1913, on the cusp of World War I, Leonard made his first serious foray into "major gift" philanthropy when he offered Queen's University a student residence for 200 men. At that time Queen's had no student residence, hence it was a project at the top of the university's "priority list" (to use contemporary terminology). Leonard bought the land and was willing to donate up to $600,000 for the construction, a fortune in contemporary terms. There was even an offer from the federal government to invest in facilities on the site (which would be spun as matching funding in the current context). Leonard also wanted a hand in directing the operations of the residence from its board. But he had a particular vision for the residence: it would house military trainees to prepare Canada to assist the Empire in times of need.

The campus was divided by Leonard's offer, as campuses tend to be, and newspapers from across the country weighed into the debate. On campus it wasn't just the military agenda that was controversial. It was the issue of control over the residence and setting a precedent. Leonard and the university's Board of Trustees came to blows on the issue of the composition of the board of the residence, specifically the inclusion of the Commandant of the Royal Military College. The Board of Trustees turned down the gift, and Leonard withdrew his offer in a huff, despite repeated attempts by sympathetic deans to try to mediate. The campus dissolved into name-calling. I can imagine such a situation happening today.

The residence was a classic first gift by a brash mid-life tycoon exercising his wealth and power. Leonard's grand vision and desire to be involved with execution is reminiscent of the current crop of "venture philanthropists." In the arc of his philanthropic career, Leonard first became an active volunteer, then he began to give modest but important donations, and finally he made major donations. It wasn't until the 1920s that Leonard really began to mature as a philanthropist. He made a $290,000 gift to purchase and restore Chatman House in London, England to house the Royal Institute of International Affairs. Then he established the Foundation. These gifts were the catalyst for his philanthropic years, 1923 to his death in 1930, which were characterized by a long string of large gifts to diverse organizations. During this period Leonard was declining with Parkinson's disease, which increased his generosity significantly. Interestingly, in 1923 he gave Queen's the property he had purchased for the residence with no strings attached. He had moved on.

Foundations of Charity

Edited by Charles Mitchell and Susan Moody

Published by Hart Publishing Ltd., 2000, 275 pp. US $58.

REVIEWED BY RICHARD JANDA
Faculty of Law, McGill University; Visiting Fulbright Scholar, Michigan State University

---

Like bubbles in a lava lamp, contemporary public and private spheres seem to be in motion and capable of inverting into each other. Charity might be understood as the medium through which these bubbles move, since it is, after all, about private acts for public benefit. If there is truth to this image, charity has arguably taken on renewed significance in maintaining the balance and proportion of our public spiritedness. One notes that this is a time in which the President of the United States can launch an "Office of Faith-Based and Community Initiatives" as the *governmental* action plan to help those in need.

A book entitled *Foundations of Charity* must, thus, be greeted with keen anticipation in the hope that it provides clues and insights into the mysterious forces at work in our modern-day communal lives.

Although one does not come away from this book with an epiphany about the meaning of charity, it certainly does meet many of the expectations that its title evokes. This book emerged from a colloquium held at King's College in London in 1998, and there is some of the inevitable eclecticism one finds in the publication of conference proceedings. But there is more coherence and sustained inquiry than in most such collections. The book contains nine fine and largely complementary essays, four of which seek to unearth the theoretical foundations of charity. The other five essays cast light on these foundations by exploring a set of doctrinal problems arising in English, Australian, American, and Scots law.

These latter, more technical, essays reach toward the ambition of the title by bringing to bear challenging perspectives on their subjects. Thus, in her essay "Charity as a Political Option for the Poor," Alison Dunn reconsiders the traditional doctrinal restriction against political purpose charities in light of liberation theology, which would link faith and politics inextricably at least for some purposes. This enables her to sketch out a role for charity law in empowering disadvantaged and dispossessed minorities.

Rob Atkinson's essay "Problems with Presbyterians: Prolegomena to a Theory of Voluntary Associations and the Liberal State," explores state intervention in the internal affairs of voluntary association through an interesting excursus on the history of disputes within self-governing Protestant sects in the United Kingdom and America. He tracks judicial intervention into these disputes against a spectrum of views about the nature of the liberal state.

In "Reviewing the Register," Charles Mitchell considers the review of the Register of Charities by the Charity Commission for England and Wales, undertaken since 1998, concluding that it is a "new departure for the way in which charitable status is determined under English Law" (p. 176). He is left musing, however, about the degree to which the democratic impulse toward consultation and transparency, to which the Commission seeks to subject their review process, can really channel the virtues integral to charity.

Patrick Ford's essay, "Public Benefit Versus Charity: A Scottish Perspective," seeks to shed light on the four heads of charity at the heart of the English law by outlining the parallel but broader concept of public benefit under Scots law. In suggesting that the English definition of charity could be modified along Scots law lines (a charitable purpose would become a lawful and useful purpose intended for the benefit of a section of the public), the essay dovetails interestingly with Mitchell's. In the end, Ford notes that his proposal might entail even greater recourse to public consultation by the Charity Commission in the review of the Register.

Finally, in "Foundations of Charity Law in the New Welfare State," Michael Chesterman reviews the evolution of two creaky principles of the law of charities, which he argues impede the use of charity to narrow the gap between rich and poor. The first is the principle that all duly recognized charities benefit equally from tax relief. The second is the principle that organizations seeking to change the law or governmental policy must be deemed "political" and thus non-charitable. He argues cogently that neither of these principles withstands scrutiny, particularly at a time when an increasing proportion of social welfare is provided through government contracts with charitable organizations.

The bulk of this book review, however, should be devoted to a consideration of the four essays that explicitly address the theoretical foundations of charity. What emerges from these essays is a challenging cross-section of secular and religious arguments justifying the place of charity within contemporary law. In different ways, each of these essays prompts a reconsideration of where charity fits within public and private spheres.

David Stevens' essay, "Rescuing Charity," is the bravest and most radical of the set. His claim is that charity is at root a religious concept. While it is in his view possible to construct a secular simulacrum of charity, "seeing that we ought to be moved for the sake of the good of another is essentially a realization that comes with faith" (p. 42). Secular conceptions of altruism will tend to instrumentalize it and strip it of meaning, even relegating it to the realm of irrational personal preferences. In Stevens' view, it is a sign of the world turned upside down that worship itself is not a legally recognized form of charity, although material support for worship is (p. 49).

Can altruism be understood authentically only in religious terms? Can we only understand love of the unknown other and a common sense of humanity as manifestations of religious faith? Undoubtedly the world's great religions provide powerful accounts of how each of us is sacred as made in the image of God. Love of God thus has a logical connection to love of the unknown other. Yet to have faith in a religion, as opposed to having faith in God, is also a powerful dividing force in humanity. It separates true faith from heresy, binds us to our co-religionists, and at worst can spur the most powerful forms of hatred and intolerance.

One of the origins of secularism and its injunction in favour of separating church and state can be found in the story of the Good Samaritan. The story is remarkable not simply because it recounts a very good deed. Rather, it teaches that the highest forms of altruism traverse the lines of religion. Showing charity to a co-religionist reinforces bonds of social solidarity from which one also benefits. Showing charity where one cannot expect reciprocation – not even in the form of conversion to one's faith – displays a bond to all of humanity. Secular altruism, though unalloyed by the allegiances of faith, need not be godless.

This latter point sets up a principled defence of cases in which the state will not accord the benefit of charitable tax status to gifts promoting a particular form of worship. To deem such gifts a "public benefit" – a benefit for all humanity – is, for the state, to underwrite the exclusive truth claims inherent in forms of worship. Whereas co-religionists are not prohibited from being charitable among themselves by giving for worship, the state should preserve a conception of public charity that traverses religious lines. This is not simply moral neutrality or agnosticism. It fosters wider bonds of humanity. Indeed, U.S. faith-based initiatives alluded to earlier might prove problematic on this score. If federal monies for the provision of social services channeled through qualified religious groups end up being deployed disproportionately to the benefit of co-religionists or those more open to a religious message, equal protection of the laws may be in jeopardy.

John Gardner's contribution on "The Virtue of Charity and its Foils" also casts the parable of the Good Samaritan in a secular light by seeing in it the basis for a "right to charity" (p. 13). His essay provides an insightful classification of and set of distinctions among related virtues he dubs the "humanitarian class": charity, justice, public-spiritedness, trustworthiness, loyalty, solidarity, and patriotism. By considering an ideal type of "charitable person," "just person," "public-spirited person," and so on, he is able to highlight tensions among the virtues and ways in which behaviour according to one virtue can be transformed into behaviour according to another. This analysis cuts ice in Gardner's conclusions concerning the justiciability of charity – that is, the extent to which the law can be deployed formally to adjudicate on whether individuals are performing other-regarding duties of charity. Gardner's conclusion is that although imposing a duty of rescue, say as under Quebec Civil Law, is entirely legitimate, the duty of charity is in the process transformed into a duty of justice. This is so because on Gardner's account, adjudication necessarily has to do with determining what is due to whom by whom. The charitable person's impulse to do whatever can be done for those in need is inconsistent with the adjudicator's role of measuring proportion and countervailing duty. Thus, Gardner envisages a set of judgments about when duties of charity ought to be transformed into duties of justice, noting that a shortage of charitable people might incline us in this direction.

This conclusion is problematic. To begin with, it is far from clear that justiciable acts are only those that are subject to contestable, adversarial claims that oblige the judge to measure proportion and countervailing duties. If one must meet a standard of conduct to be granted a certain legal status, can an adjudicator not be empowered to determine whether the standard is being met? Imagine a religious order that requires true displays of charity on the part of candidates seeking admission to it. Thus, for example, if a candidate is denied access for failure to display sufficient charity, is not "adjudication" involved? The order's judgment of a candidate's charity might be unjust – it might, for

example, fail to take proper note of the candidate's charitable works. But in rendering this judgment it would not be transforming the charitable quality of the candidate's works into duties of justice.

Gardner's point may be that private law adjudication is not typically about assessing the quality of virtue of a litigant. Where such an assessment arises, it is ancillary to resolving claims of corrective or distributive justice. Yet he acknowledges that trustworthiness and prudence and "most other virtues" can "be made subject to the constraints of justice without entirely selling out their distinctiveness" (p. 26). A trustee can be adjudged in breach of trust for failure of trustworthiness or prudence. What is owed for breach of trust as a matter of law is notoriously difficult to assess, perhaps because of the entangling of multiple moral rubrics of measurement. Sometimes, not only must the delinquent trustee indemnify for loss, but profit or gain is to be disgorged in an apparent windfall to the beneficiary. This is because the trustee's gain is inconsistent with the virtue of trustworthiness the trustee is to display. So the adjudication can concatenate – albeit awkwardly – assessments of duties of justice and of other kinds of duties.

So why not charity – can't we adjudicate the charitable quality of a person owing a duty of charity in conjunction with private law assessments of what is due as a matter of justice? The obvious answer would seem to be that we can and we do when we determine what qualifies as an appropriate object of charity. Gardner points out that this only takes us as far as policing the legal powers to do charitable things and does not extend to a duty to be charitable. But one might respond that the qualified charity must continue to meet a duty of charity in order to maintain its status. This is just like the example of being admitted into a religious order. And it would seem to be entirely parallel to the status of a trustee. You have no duty to be a trustee, but if you are one you have an enforceable duty to be trustworthy. You have no duty to be a charity. But if you are one you have an enforceable duty to be charitable.

The problem may go deeper, however. Gardner asserts that what the law is really doing in the case of charity is giving charitable people the legal power "to impose legal duties on others to perform moral duties that are *not* duties of charity, and yet to do so for charitable ends" (p. 27). In other words, the law says to the charitable person: "if you are charitable by giving to a good cause, the law will back you up in ensuring that the organization to which you give fulfills its promises." The duty to fulfill one's promises is not a duty of charity.

Whereas Gardner's proposition is true of, say, the legal relationship between the charitable person who has given money to build a school and the contractors on the construction site, it is not true of the relationship between the donor and the charitable organization. In the latter case, the law assesses the charitable quality of the organization by ensuring that its purposes and practices are consistent with charitable purposes. One might object that the law can never

truly see into the souls of legal subjects and that it can never command their other-regarding motivation. But as Gardner himself points out, following in the footsteps of Kant, the law "can't make anyone exhibit any moral virtue" (p. 25). It can only concern itself with a moral duty by requiring outward behaviour consistent with it – what he calls the emulation of the inner motivation.

Thus, the legal duty of those administering and fulfilling the purposes of a charitable organization is, indeed, to be charitable. The law can only concern itself with this duty by requiring that the organization have the outward signs of charitable purposes and fulfill its promises to perform them according to standards of administration consistent with other-regarding behaviour.

Indeed, Susan Moody's essay, "Self-Giving in 'Charity': The Role of Law," is a sustained defence of the idea that self-giving is at the core of charity, and that although the law can only enable and not coerce self-giving, it should seek to foster it by requiring charitable organizations to display its hallmarks. This translates, for example, into a firm position that charitable trustees should be non-remunerated.

To acknowledge that the law can indeed concern itself with duties of charity is not to deny Gardner's point that duties of justice can be substituted for duties of charity. Indeed, it is perhaps to put that point into sharper relief. There is an important question of justice about when the community as a whole ought to rely upon the benevolence of some to accomplish the ends of charity, when it ought to gather and distribute its common resources so as to achieve those ends collectively, when it ought to rely on markets to meet private needs, when it ought to rely on families or inter-personal solidarity, and when it ought to pursue some combination of the four.

The combination of approaches can create something of a moral quagmire. For example, the goals of higher education are today being met through charity, public funding and private purchase of education services. A single institution may be dependent upon all three sources of funds. As the recipient of a charitable donation, it ought to pursue the goal of education for its own sake. As the recipient of public monies, it ought to justify its contribution to collective welfare. As the recipient of private monies, it ought to fulfill its contract to provide the service sought by the "user." This set of potentially conflicting obligations is often encapsulated in tensions respecting the governance of charitable organizations. Moody notes that contemporary charities find themselves pressed to respond to a "contract culture" in which the users of charitable services demand an "ownership" stake in the organization (p. 107–109). She cites a study on the involvement of users in the governance of charities that paints a "confused picture" of charities both wanting and mistrusting user involvement.

Purists may say, "let charities be driven by charity alone, public services by public finance alone, and markets by supply and demand alone." But this is not

only to put one's head in the sand about the existing overlap of funding sources, it is also to miss the inevitability of overlap where markets, civil society, and democratic government co-exist. The real question is not how to draw neat dividing lines marking off duties (and vices) of charity, public-spiritedness, and justice. Rather, it is how to allow for the co-existence of these virtues, which co-exist within us all, according to some principle of balance and priority so as to ensure that they do not conflict and undermine each other.

An example drawn from my recent experience may serve to illustrate the point and perhaps indicate that there can be a happy co-existence of virtues of the "humanitarian class." The Faculty of Law of McGill University is a public institution maintained by government grants, tuition fees, and charitable donations. Whereas outside Quebec, tuition fees for professional schools have been "deregulated" as a matter of government policy, Quebec to date has maintained a tuition freeze. Tuition fee increases outside of Quebec have, nevertheless, begun to exert pressure on McGill's Law Faculty because, among other reasons, recruitment and retention of faculty members becomes more difficult where resources are comparatively more restrained.

Maintaining the accessibility of legal education has remained a concern of students and faculty alike, and ensuring adequate resources to seek excellence in education has also proven to be a common concern. Against this backdrop, students and faculty members have worked together to devise a funding proposal that has come to be known as the "social contract." It is meant to combine elements of charity, reciprocity, and public-spiritedness. Students would be asked to pledge to make a future, income-dependent gift to the Faculty once they had an income. The Faculty would seek to have these pledges matched by a major gifts designed to provide immediate improvements to its program. Students and alumni would be involved in the oversight of the fund created through their gifts. If a pre-determined high proportion of students agreed to make pledges and ultimately followed through on their promises, the Faculty would undertake to cap any tuition increases within its discretion.

There are many interesting and important technical problems to be resolved with this proposal. But the fact that it emerged from a mixed set of motivations need not vitiate its integrity. In an effort to preserve integrity, attention has been focused on matters such as how to ensure that when students are asked to give, they are not implicitly coerced to do so, how to foster goals of diversity and accessibility through the program, how to ensure that new resources redound to the benefit of the university community as a whole, and how to represent various constituencies in fund oversight without prejudicing academic independence.

It is true that the social contract initiative would be rendered unnecessary if public financing for university education were adequate and if academics were somehow not susceptible to competition over salary and working conditions.

But if it serves to build bonds of solidarity with and among students, and if it promotes charitable giving as part of citizenship, it may prove valuable not simply as a substitute for other forms of financing but as a self-standing funding model.

It is also true that this initiative can be situated as part of what Mark Freedland, echoing Susan Moody, calls the "contractualisation of a significant proportion of 'charitable' activity" (p. 120). Freedland argues that when charities enter into contracts to perform services, this can threaten their charitable ethos and substitute a "value-for-money" ethos. That is, the charity is instrumentalized and is no longer pursuing its purposes simply for their own sake. This is so not only in the case of performance contracts entered into with government, upon which Freedland focuses, but also in the case of contracts entered into with other funding parties, including students and alumni.

For Freedland, the contractualisation phenomenon prompts nothing less than a re-thinking of the boundaries between public and private spheres – the theme alluded to at the outset of this book review. He imagines a broad inquiry into how what he calls the "law of civil society," of which the law of charities forms a part, suffuses contemporary public and private law. Public goods, like education, can be provided through charity, public finance, or contract, and will thus remain at the cross-roads of public law, private law and the law of civil society. *Foundations of Charity* certainly alerts the reader to the fact that as we rely increasingly on charity to provide public goods, those goods and charity itself are both transformed in the process.

Between State And Market: Essays on Charities Law and Policy in Canada

Edited by Jim Phillips, Bruce Chapman, and David Stevens

Published by Kahanoff Foundation–McGill-Queen's University Press, 2001, pp. 712. Cdn. $34.95.

REVIEWED BY JOHN D. GREGORY
General Counsel, Policy Branch, Ministry of the Attorney General, Ontario

---

This stimulating book collects a number of papers on legal, philosophical and policy questions about charities, given at a conference at the University of Toronto in 1999. Despite delays in publishing and reviewing, the collection remains a valuable contribution to thinking about charities in Canada.

The book starts out with a statistical look at Canadian charities by David Sharpe – where they are located, what they do, and who supports them. Because the figures come largely from the Canadian Customs and Revenue Agency (CCRA), they apply to registered rather than unregistered charities. After

reviewing some problems with all the sources of data, the author concludes that more could be known and better research on the charitable sector would be possible if statistics were collected differently. He proposes an outline that does not follow the traditional legal classes of charities, but that would not be used primarily for legal purposes.

The next several papers offer what the editors call "Empirical and Ethical Perspectives." First up is a study by Jen-Chieh Ting and Jane Allyn Piliavin of cultural patterns and assumptions about charity that compare Western European attitudes to altruism and volunteering (which are not the same in every country) to those in other countries, notably in Asia, where one finds much variety. What the authors call "prosocial behaviour" arises in all societies, but some types are valued more in some cultures than in others. Unfortunately, the authors do not discuss the implications of their findings for a multicultural society like Canada: Are the values of different parts of Canadian society in conflict or merely independent from one another, and are they coming together, either inevitably or through focused efforts by charities to be "inclusive"?

Philosopher Will Kymlicka asks how, in principle, one can justify charitable actions and the benefits accorded to charities. He restricts his notion of "charity" to relief of poverty, and so excludes the arts and innovations in education and health, among other things. He looks at charity from a modern sociological point of view and finds the notion odd. In Kymlicka's opinion, the pursuit of justice is more important than the practice of charity; if people were treated justly, they would not need charity. As such, charity must be a supplemental value at best. If inequality of circumstance is an issue, then a "left-liberal" view pushes for more radical equality than charity offers, while a "right-wing" view may consider all inequalities as inevitable, and thus not a political problem, leaving more room for charitable activity.

Kymlicka then looks at the religious tradition, in which charity is "intended" more for the benefit of the giver than of the recipient. He argues that most religious traditions do not have a strong notion of social justice, and that those that do run up against the moral problem of justifying charity where justice is wanted. Perhaps a view of humanity as it is, imperfect and probably undeserving, may justify charity to help relieve suffering, while a focus on humanity as deserving would invoke the notion of justice and displace the virtue of charity.

In his paper, Bruce Chapman, one of the editors of the collection, seeks a principled justification for altruistic acts, what he calls "rational voluntarism." Pure economic motivations of self-interested giving are no more satisfactory than purely sociological explanations of charitable activity – doing what everybody else does. Chapman calls for a socioeconomic explanation, based on a human value of cooperation. He pursues this idea fairly persuasively through an examination of the tax credit system and the rules against commercial activity for charity. Nevertheless, his theoretical starting point is always

rooted in pure principle. It might be more fruitful, if less neat, to postulate a start in the real imperfect world, where the dynamics of leadership and malleable patterns of conduct play more of a role than theoretical motivations.

Neil Brooks concludes this section by examining and exploding the commonly held theory that charitable activity may properly replace governmental or other organized collective action. He deals logical and historical blows to the notion that private social concern can replace the welfare state, or that civil society is to be put on some kind of pedestal as the source of justice and comfort. "The arguments for relying more on the voluntary sector and less on government are conceptually flawed, morally reprehensible, and devoid of empirical support. Moreover, downloading will weaken and distort the voluntary sector." He backs up each of these assertions with example and argument. He argues that government is more likely than the private sector to deliver programs that a majority of the people want, while upholding such values as transparency, accountability, continuity, and due process of law. Furthermore, he argues, groups in the voluntary sector do not necessarily share the same interests or values; rather, the commonality of a society is expressed through its public institutions.

The next section of the book turns to the legal meaning of charity, and concludes with a chapter devoted to the Supreme Court of Canada's disappointing decision on the *Vancouver Society of Immigrant and Visible Minority Women* case (which had not been handed down at the time of the conference). Jim Phillips, another of the editors, points to the general conservatism and lack of imagination of the Canadian courts, despite both statutory text and some judicial precedent that would allow a more subtle view of the law. The article avoids saying what purposes should be taken as charitable, while considering what has been deemed charitable. The author does not hold out much hope for legislative guidance to improve what he considers a lamentable picture.

In her paper, Mayo Moran argues that the values of the Charter of Rights and Freedoms should inspire the courts in deciding what is charitable. She makes both a technical argument that the courts must function as public institutions in interpreting the common law consistently with Charter rules, and a principled argument about the values of our society as reflected in the Charter. She submits that the "fourth head" of the *Pemsel* test of charity, "other purposes of benefit to the public," must be taken to refer to what the Constitution, in the Charter, now officially decrees to be beneficial. Promoting certain kinds of social or political behaviour seems to her to have a constitutional approbation that would justify charitable status. However, the article offers little guidance as to what a Charter-friendly definition of charitable might look like.

Abraham Drassinower examines the old explanation of the rule that charities must not engage in political activity, namely that the courts have no means to judge whether any political option is for the public benefit. He says that one

cannot clearly distinguish between charitable and political purposes or determine public benefit without a political judgment. In any event, judges decline to decide the question because they think it is not fitting to do so, not because of an inability. According to Drassinower, charitable status cannot simply rest on the proposition that the law is deemed to be right for purposes of determining what is charitable, and that any movement to change the law must, therefore, not be charitable. Sometimes the law is not right because it violates principles of human dignity. In such cases, seeking to promote these principles must be charitable because the public benefit is clear, even if the purpose is political. But where the law does respect the principles of human dignity, one can refuse to grant charitable status to "political" activities that seek to change the law. In effect, Drassinower echoes Professor Moran's Charter thesis. According to the author, this is not a modification but a logical clarification of the law on political activity. What is the content of these "principles of human dignity"? What political activity would be acceptable for Drassinower? His discussion of a political activity case is of little help in answering these questions. The reader is left feeling that the argument is essentially logical, not empirical, and has to be satisfied with that level of analysis.

Jim Phillips rounds out the discussion of specific legal doctrines with an examination of religion as a charitable purpose. Traditional law has generally required a "charitable" religion to involve a belief in a deity and to be more than just teaching of morals or ethics. But what is the public benefit in religion? The benefit seems to be assumed for historical cultural reasons. Moreover, not all religious practices (e.g., purely private purposes, such as contemplation) are considered of public benefit, and some have been held to be not charitable.

Phillips speculates on how the Charter may affect the definition and even the acceptability of religion as charitable. If freedom of religion includes freedom from coercion in favour of any particular religion, why should a religion with a god be favoured over one that has none? For that matter, why should the state offer tax benefits to religious beliefs but not to other forms of belief? The author deals with section 1 arguments, i.e., that support of religion is compatible with values of a free and democratic society, and with practical arguments, i.e., that a more open definition will lead to a proliferation of claims to charitable status by sham religions. He concludes that some long-standing principles of the law on religion and charities are "at the very least, constitutionally suspect." However, the prospect causes the author little anxiety.

The third section of the collection reviews tax practice and policy, a key element of the Canadian law of charities and the source of the main regulatory policies relating to the charitable sector ("tax officials keep the charitable ship afloat"). Lorne Sossin leads off with a description of who does what in the tax administration of charities, then turns to principles. How can the governing structure promote consistency, coherency, and adaptability of regulation? How can one make it fair? The author submits that these values can best be achieved

if one knows clearly why one wants to promote and regulate charities. He says that the chances of the courts producing a framework that is adequate to manage regulation, especially on the basis of the Income Tax Act, are not high. Sossin would like to see a statutory definition of charity. This would help make the government more accountable for how it governs the sector. The author does not examine any competing interests that the provinces might have in a definition developed by the federal government, but harmonization would be consistent with his goal of improving tax administration.

Most of us feel the principal impact of charitable tax policy as donors, through the tax credit for donations. Dennis Duff reviews why donors should get this kind of benefit. The author looks at the traditional explanations and finds many of them wanting. In particular, he doubts that a tax benefit is needed to make the system fair, to define "real" taxable income better, or to reward altruism. In any event, given the way our system is designed, it does not serve those purposes. Duff has more sympathy with tax credits as a way of promoting pluralism by encouraging donations. However, recent changes to the tax credit system work against the legitimate purposes of the benefit. Before one can design meaningful tax incentives, one has to know what kinds of organizations the incentives are intended to encourage, and why one wishes to encourage them.

A more radical critique of the tax credit system comes from Neil Brooks. The key to his criticism is that the tax benefit for donations "allows high-income individuals to direct the spending of hundreds of millions of dollars of government money in a way over which neither government nor anyone else has any control." In addition, it allows them "to buy monuments and recognition for themselves and to give legitimacy to social indifference." Brooks denies, as does Duff, that the tax credit serves many of the goals it is said to help. He says the tax credit system often directs public funds to the wrong causes, while leaving important needs under-financed. It would be better, he submits, to fund voluntary organizations by direct government spending. This would better promote real priorities, efficiency, accountability, and social cohesion. Finally, society would be better of by making "the rich" pay their "fair share" of taxes.

One wonders if Brooks overstates the virtues, or the restraint, of governments, though at least governments are subject in principle to certain criteria of validity and control that do not apply in the private sector. He suggests that government control of the substance of voluntary activity be mediated through "semi-autonomous" agencies. Ultimately, the use of the tax system is "about who will exercise power in Canadian society." The author does not want it to be those who happen to be able to give the most to charity.

The final part the collection turns to other questions of regulation. Kevin Davis leads off by exploring the rules about commercial activities of charities, sometimes referred to as "social enterprise." He reviews some of the arguments

in favour of and against such business activities. Among the benefits: some commercial activity may itself be charitable, such as psychiatric counseling for the poor. Commercial activity may also be efficient, although the author then launches into a discussion of just what that may mean that is so technical as to discourage a casual argument in this vein. On the downside, charitable enterprise is criticized as unfair competition for businesses that have to pay taxes and other expenses that charities do not, although the author marshals theoretical arguments against such claims. Further, charities may be as inefficient as private sector organizations sometimes claim them to be. However, Davis suggests that this claim should be carefully considered, not just accepted at face value. One of the most potent arguments against social enterprise is that it distracts attention from the charitable purpose itself, diverting the attention of management and possibly applying donations to activities not contemplated by the donors. Davis concludes that the appropriate response may be to tax the income of such activities.

Another frequent focus for regulators is charitable fundraising. Several provinces now have legislation on the topic. A team from Montreal sounds a "cautionary note" about how fundraising pressures can change the character of the charity itself. The regulation of fundraising should ensure that charities continue to pursue their charitable goals. The authors consider the nature of the gift relationship and its transformation when the recipient actively solicits the gift. They analyze different ways in which the donation "bargain" can play itself out today, with reference to McGill University fundraising programs, and note that the law tends to protect the interests of the donor in the gift (the "supply side"), rather than those of the charity.

They propose instead regulatory principles aimed at maintaining the charitable purpose in as pure a form as possible. They call attention to "the neglected aspect of regulation – 'demand side' concern with avoiding mission drift." Gifts must be voluntary, intended to be charitable, to benefit another, not made for profit, without demands on the recipient, whose activities should be carried out for their own sake, not to "earn" the "gift." One wonders if the only true charitable relationship is between the alms giver and the beggar at the gate. On the practical side, however, the authors propose certain methods of analysis to track these principles and then apply them to different kinds of program run by McGill. They conclude with a favourable view of the funding that applied to their own study, but worry about the temptations to fit the program to the donation.

The closing essay is by David Stevens, the third editor of the collection. He deals with the law of charitable corporations, since many charities are corporations. The key challenge is to decide just what makes a not-for-profit or charitable purpose distinctive, for the purpose of organizational law. Because politicians have not seen any political advantage in dealing with the issue, and the question can be hard for the non-lawyer to grasp, Stevens calls on lawyers

to make the case for appropriate reforms. The law – that is, the state – should facilitate the operations of charities, he says, providing the basic rules so that an unsophisticated charity can find the answers to its organizational questions in them, while providing flexibility for more subtle demands. Not all nonprofit, or even charitable, purposes are the same, and they may require different structures. He proposes some "elements of an appropriate design" of a corporate law for charities. His offering is, according to Stevens, more of an agenda for change than a prescription.

Where does this collection leave us? Certainly with an understanding of Kymlicka's quotation that "the virtue of charity may be alive among private individuals; it is moribund among theoreticians." Neither the philosophers nor the tax policy writers can find much positive to say about their topic – which is not to say they find it uninteresting or unimportant. Likewise, the legal analysts tend to find trends in the law unsatisfactory for similar reasons. One finds a number of contributors taking what Kymlicka describes as the "left-liberal view of justice."

A parallel impression is that the discussions operate at a very high level of abstraction. This is not surprising when one is trying to understand underlying principles – and goodness knows the current legal and administrative pictures are fuzzy enough. Nevertheless, the reader may feel that the authors insist too much on the theoretical purity of their models. If one starts with the assumption that society and the economy are not perfect, and that even people trying to do good through charity do not act from pure or unambiguous motives, one might get further, or be more practical.

That said, the quality of the analysis is high enough, and sometimes the advocacy so potent, that one feels properly challenged and that it would be hard to carry on in the sector without trying to answer the questions and criticisms raised in this book. The contributors who stay most deeply rooted in administrative reality, like Sossin or Stevens, provide ample challenges to anyone who wants a rational and effective charitable sector.

Overall this collection is a valuable examination of what has until recently been an under-examined field of Canadian law. The editors and the authors have done us all a service.