Case Review:
In the Matter of Laidlaw Foundation and In the Matter of The Charities Accounting Act

(in the Surrogate Court of the Judicial District of York before Judge Sidney Dymond, and in the Divisional Court of the Supreme Court of Ontario before Southey, Krever and Craig JJ.)

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Aside from some skirmishing on a few tangential issues, such as the jurisdiction of the Surrogate Court to hear and determine this case, there was only one issue in this litigation: whether the legal meaning of "charity" which applies, of course, both to corporate objects and trust purposes, includes amateur athletic organizations. Judge Sidney Dymond concluded[1] that it does, and on appeal the Divisional Court[2] had no doubt that she was right; it confirmed her conclusions and her reasons. It also added a reason of its own.

For those who are academically interested in the law of charity this is a landmark case, there is no doubt of that, but in practical terms, today in Canada, it has more limited importance. In terms of the *Income Tax Act* it has no immediate importance, because the *Act* already expressly confers upon amateur athletic organizations and their donors the same tax concessions as charities enjoy and Revenue Canada would hardly discriminate among amateur physical sports associations, for each requires athletic skills of a kind. It may prove to be very important, however, so far as exemption from liability to pay municipal property taxes is concerned because, assuming that other Canadian common law jurisdictions will follow this decision, so many provincial acts extend exemption to those landowners who are exclusively engaged in "charitable" activity.

So far as the law of charitable trusts is concerned, there is greater conceptual than practical importance. It means that no trust for the promotion of amateur athletics will fail for uncertainty of meaning as to what the settlor or testator intended, and that such trusts will benefit from the more relaxed application of the perpetuity rule to charitable trusts. However, in Canada, this extension of charity concessions to further trusts will only very occasionally be significant. Charitable corporations are much preferred over trusts, and discussions with Revenue Canada concerning registration will result in the clarification of that which is potentially uncertain.

As to the public review of the administration of charities, it would broaden

considerably the number of institutions subject to review by the public office charged with responsibility for the surveillance of charities—if we had such an office in Canadian jurisdictions. But, except in Ontario where the Public Trustee has jurisdiction under the *Charities Accounting Act*, the most that we have is an occasional provincial Public Trustee whose statute of creation includes an undefined jurisdiction over "charity". In Ontario the Public Trustee, as a result of this decision, now has clear jurisdiction to examine the accounts of a good many amateur sports groups.

On the other hand, if *Laidlaw Foundation* were a decision of the English courts, it would have a very considerable importance; large numbers of sporting trusts and institutions would become subject to the very extensive administrative jurisdiction of the Charity Commissioners. So it is a mixed bag; everything from a "landmark" to a "decision of peripheral interest". How, then, did the litigation arise, and what exactly did Judge Dymond, and Southey J., for the Divisional Court, decide?[3]

The Laidlaw Foundation is a non-profit corporation incorporated under Ontario law. It is both a well-known and a prestigious charity which is authorized by its letters patent to make payment of its income or capital for the benefit of such "charitable organizations" as it chooses, or in payment of the cost of carrying on such "charitable work or objects" as, again, it may choose. In his jurisdiction under the provincial *Charities Accounting Act* the Public Trustee of Ontario was carrying out an audit of the Foundation's annual accounts when he noticed that it had made payments totalling over $263,000 to six incorporated organizations concerned with the promotion of amateur athletics, i.e., bodies organizing and putting on sports meetings for their members or others who had both the skill and the desire to compete.

Since it has been axiomatic, at least since the 1895 decision of the English Court of Appeal in *Re Nottage*[4], that sport in itself is not charitable (a decision followed not only in England and Wales, but in Northern Ireland and New Zealand and throughout the states of Australia and the common law jurisdictions of Canada) the Public Trustee of Ontario understandably challenged these payments by the Foundation. Under the *Charities Accounting Act*[5], as amended by the *Charities Accounting Amendment Act*[6], the Public Trustee is responsible for overseeing the mode of charities' expenditure of their funds. For the purposes of that legislation he must know what is meant by "a charitable purpose".

Judge Sidney Dymond drew attention to the fact that, since the beginning of the seventeenth century, common law courts have taken the preamble to the now repealed *Statute of Charitable Uses, 1601*, as setting out the types of activities which Parliament then conceived of as coming within the meaning of "charitable". At first by applying this list of purposes, and later, more by analogy from decided cases, the courts developed a technical legal meaning for the word and the nature of the purposes or activities which fell within it. Indeed, it was important that they did this, and that they were not too ready to concede "charitable" status to any purpose or activity that was in any way for the benefit of society, because important concessionary advantages attached to gifts for

charitable purposes and to charitable institutions. As decade followed decade and the character of society and its needs changed, so the scope of what is "charitable" was moulded by the courts to reflect contemporary views. By 1891 the range of "charitable purposes" was very wide and the specific purposes set out in 1601 were long in the past. To counter the argument that the courts should adopt the more popular meaning for the word, essentially that "charity" involves the relief of poverty, Lord Macnaghten in *Income Tax Special Purposes Commissioners* v. *Pemsel*[7] analyzed the legal meaning that the courts had achieved, dividing the recognized purposes into four principal headings: the relief of poverty, the advancement of education, the advancement of religion, and "other purposes beneficial to the community not falling under any of the preceding heads".

This classification, which largely reflected an analysis made by Sir Samuel Romilly as counsel in the earlier years of the century,[8] provided the essential classes of "charity" for the years which followed. But what did the fourth head include? Did any purpose or activity which was simply "beneficial to the community" qualify, or was some restriction implied by Lord Macnaghten? Later English courts, looking back to Romilly's words, concluded that his Lordship intended purposes which were "beneficial to the community" *and* within "the spirit and intendment of the preamble to the Statute of Elizabeth". In that way the process of analogy to past decided cases continued, for the fourth head, as well as for the first three; the judiciary continued to reflect on the past when shaping the definition of "charity" in the present. It was possible, with the double test under the fourth head, for the courts to make the qualitative judgments which the exceptional treatment of "charitable purposes" seemed to require.

Their work was not made easier by the fact that, in the traditional view of the courts, a purpose, in order to qualify as "charitable", must not only have a charitable character but be for the benefit of the public at large, or at least a sufficiently sizeable section of the community. To require the character of a purpose to come within the spirit and intendment of the preamble, and the gain or potential gain to society to accrue to the public in general (rather than to a private group), was to prevent Lord Macnaghten's fourth head—purposes beneficial to the community—from being merely tautologous of the second attribute of charity, namely benefit.

However, the spirit and intendment of the Elizabethan preamble, with its now historic specific purposes, has not proved particularly helpful as a test. It leaves a good deal to the imagination of the judges as they work by analogy with that list of purposes and subsequent decided cases. Purposes concerned with the relief of pain and suffering, and those concerned with the enhancement of life in the armed services of the Crown, are well recognized subdivisions of this fourth head, but the variety of purposes approved under this head is very wide indeed. It is very hard to find an acceptable theme for this diversity. The author of the most recent work on the law of charities[9] isolates nine subdivisions and even then has a concluding ragbag of miscellaneous purposes simply "beneficial to the community".

Legislation was used in England—but is totally absent in Canada—to confirm the charitable status of social and recreational purposes, but "recreation" in this legislation does not extend to sport. And there has been no legislation anywhere dealing with purposes that promote sporting activity, or that are political in nature or effect. Traditionally neither has been regarded as charitable.[10] "Sport" is seen as amusement or entertainment; "political" as concerned with groups whose main object is to secure changes in the law and to influence government. Sport is charitable if it is ancillary as a purpose to the advancement of education, or the promotion of the fitness of the armed services to discharge their tasks, but in these instances the ancillary purpose is subsumed under the main charitable purpose. Sport for its own sake (as a main purpose) has not been accepted as charitable.

But suppose an organization (or the express purpose of a gift) is for the benefit of the public, or a sufficiently large section of the public, and its character is to promote and arrange competitive participation in amateur sport requiring fitness of body in the participating public. Is the promotion of physical fitness in the public within the spirit and intendment of the Statute of Elizabeth? That was the issue before her, as Judge Dymond saw it, and she decided that, today, it is.

Re Nottage concerned the provision of an annual cup for yachting, an activity which in the late nineteenth century was effectively restricted to the well-to-do. It had no true public benefit; it was an activity essentially concerned, as the judges then said, with amusement—the amusement of that well-to-do group. On the other hand the promotion of health in the public had been recognized in *Re McClennan's Will*,[11] and the English Court of Appeal itself in *I.R.C.* v. *McMullen*[12] had acknowledged in its remarks that the promotion of exercise and physical recreation was a purpose beneficial to the modern public, even though, given the width of the expressed purposes of the gift in that case, the Court had finally felt itself bound by *Re Nottage*. Noting the efforts of both levels of government in Canada to encourage regular exercise in today's largely sedentary society, and the willingness of the courts to see the advancement of education in wider terms than mere schooling so that to take part in organized competitive amateur sport might be said to be educational, Judge Dymond then took the next step.

Providing there is a sufficiently wide class of persons benefiting, she said, "it is my view that an organization the main object of which is the promotion of an amateur athletic sport which involves the pursuit of physical fitness is prima facie an organization beneficial to the community within the spirit and intendment of the Statute of Elizabeth".

Why prima facie only? Well, an organization which has a charitable object may still fail to qualify as a charity because it is not for the public benefit. But the judge may also have had in mind here an organization which has another, or other, main objects, construed as such, which are non-charitable under the existing case law. For instance, as Judge Dymond puts it, the object or purpose of promoting Canada's stature in the world community, or of effecting unity in Canada, is "political" because that object may be carried out through political

means. Only if such an express object is ancillary to the main object of the promotion of physical fitness can the organization in question be charitable.

At this point the Court turned to each of the organizations which had received payments from the Foundation. The Public Trustee having conceded that Canadian Special Olympics was a charitable corporation as being for the rehabilitation of the handicapped (the fourth head) and for the advancement of education, Judge Dymond applied her "amateur athletic sport test" (hereafter, the test) to each of the other five organizations in dispute. The Sports Fund for the Physically Disabled satisfied the test, as it was also for the relief of the sick (the fourth head). The Thunder Bay, Ontario, 1981 Jeux Canada Summer Games Society's main object met the test and, through the televising of the Games, was educational (cf. *Royal Choral Society* v. *C.I.R.*,[13]) and the Canadian Track and Field Association not only satisfied the test, it was also for the advancement of education and the advancement of health. The Commonwealth Games of Canada Inc., too, met the test: "the promotion of and participation in sports throughout Canada is both educational and health-providing, and . . . the unity of the country is promoted by non-political means". Finally, there was the Canadian Olympic Association. Its main object was to promote amateur athletic sports; all other purposes were incidental. Each of these organizations, each in its own way, was also found to be for the public benefit.

The Public Trustee appealed on a number of grounds, including the merits of the decision below, and the Foundation challenged both the right of the appellant to appeal and the jurisdiction of the Surrogate Court to determine what is charitable. The merits issue aside, all these grounds failed. It is interesting to note, however, that the Court concluded after some examination that the law is by no means clear as to the jurisdiction point. This ground of objection was essentially dismissed because both parties below had sought a hearing by the Surrogate Court and substantially assisted that court.

On the merits, as we have said, Southey J. for the Divisional Court agreed totally with Judge Dymond, and for the reasons she gave. However, he gave a further reason for the charitable status of all the organizations in question. The fourfold division of charity associated with Lord Macnaghten had been legislated in Ontario in 1909 as section 2(2) of the *Mortmain and Charitable Uses Act*.[14] The opening words and fourth head were: "The following shall be deemed to be charitable uses within the meaning of this Act: . . . (d) Any purpose beneficial to the community, not falling under the foregoing heads [(a), (b), and (c)]". In 1917 in *Re Orr*[15] Meredith C.J.O. had said that in his opinion any reference to the Statute of Elizabeth in Ontario was therefore out of the question. After the passing of the 1909 *Act*, the English decisions concerning the fourth head had no application in Ontario.

Southey J. then pointed to section 6a (a of the *Charities Accounting Amendment Act*[16], which was enacted on the day the *Mortmain and Charitable Uses Act* was repealed.[17] This subsection was in the same terms as the repealed section 2(2), and defined the meaning of "charitable purposes" for the whole of section 6 of that *Act*. So this "strange result" was still a part of the Ontario

legislation, said Southey J. It was true that when *Re Orr*, a case concerning charitable bequests, reached the Supreme Court of Canada in 1918[18], Sir Charles Fitzpatrick, C.J., had disagreed with Meredith C.J.O.'s interpretation of section 2(2); the Chief Justice of Canada considered there to be nothing in the *Act* otherwise to suggest that such an extensive change to the law concerning bequests in Ontario was intended. But, said Southey J., this was not part of the *ratio decidendi*, and no other member of the Supreme Court of Canada had addressed the matter.

This led to the rallentando: the Divisional Court agreed with Meredith C.J.O. "I think it is highly artificial", said Southey J., "and of no real value in deciding whether an object is charitable for courts in Ontario today to pay lip service to the preamble of a statute passed in the reign of Elizabeth the First". The Laidlaw Foundation had made the gifts now in question when section 2(2) was still in force, and "if the adoption of the reasons of Meredith C.J.O. results in any change in the law, it is to provide a more liberal definition of charity". If the gifts were within the spirit and intendment of that preamble, then it followed that they were within "the more liberal definition". And there the Divisional Court ended its judgment.

There seems little doubt that Judge Dymond's judgment will be hailed not only in Canada but throughout the common law world. It has one or two ragged edges which leave room for further litigation on the scope of this recognition of sport, but its main thrust—that a trust purpose or corporate object is charitable if it promotes amateur athletic sport involving the pursuit of physical fitness—constitutes a development in the courts for which many have been waiting. The Goodman Committee[19] in England, sponsored by the National Council of Social Service, reported in 1976, "We certainly think that schemes for training young people in sports should qualify for charitable status even if they are not connected with an educational establishment, and we reject the proposition in *Re Nottage* . . . that the encouragement of sport is not itself a charitable object always provided, of course, that a sufficient section of the community is benefited". The Committee was to be disappointed in *I.R.C.* v. *McMullen* where the House of Lords refused to overrule *Re Nottage*.

In Australia, in a recently published work[20], two distinguished authors write, concerning *Re Nottage*, "The opinion in that case was uttered, nearly one hundred years ago, in the context of a sport then reserved almost exclusively for the very rich; and it hardly reflects creditably on the law that such a decision should have been gradually broadened beyond its original context so as to govern the law of a country so ardently convinced of the public value of sport as Australia is. If the spiritual and moral well-being of the community at large is acceptable as charitable, as it is in a wide variety of forms, its physical well-being should likewise, although no doubt one should stop short of extending the benefits of charity to sporting clubs which are substantially places of social resort. 'Perhaps the law is in need of reform' is, at present, the only comment which the High Court of Australia[21] has made". Judge Dymond and the Divisional Court, one suspects, would have had no difficulty in endorsing both those comments.

That this precedent extends beyond athletics is obvious. There is no apparent reason why any sport which involves the pursuit of physical fitness is not included. Judge Dymond herself speaks at one point of "the promotion of sport" as being the issue. But equally it must be central to a purpose or object that it is concerned with the act of participation in sporting activity. Provided it is an ancillary purpose or object to assist persons to watch sport, and the main object is participation, that would be acceptable. But a main purpose or object which is to assist watching, whether live or on television, must surely be non-charitable, unless the watchers must be persons who are disabled or poor, when considerations such as the "relief of the sick" or of "poverty" enter into the picture. Judge Dymond acknowledges the significance of the watching of sport when discussing main and ancillary objects in connection with the Canadian Track and Field Association—"increased knowledge of proper performance"—and with the Canadian Olympic Association, "those whose pride in their country is increased by virtue of the knowledge of the success of Canadian athletes".

Another point of importance is Judge Dymond's stress on athletics that are amateur. A purpose like that found in the case of *Re Patten*[22], where the gift was for the training of young cricketers to enable them to become professionals, would seem to remain non-charitable. If it is the main object, or *a* main object, of an organization to train persons so that they may become professionals in the sport in question, and the organization makes the training available to all who have potential and seek the training, physical fitness of the trainees may result, but it is not an end in itself. The organization may even appear more concerned with supplying a business with its necessary human wherewithal. However, we may be in for some controversy here. Did Judge Dymond really require physical fitness to be an end in itself?

Tennis clubs, badminton clubs, golf clubs, and other institutions like them, will have difficulty showing that their main object or objects are solely concerned with the pursuit of fitness. It will be even more difficult for them to argue that they advance the education that we are now to see as flowing from organized competitive physical sports. But, again, we may see some neat legal arguments here. Certainly the attraction of being a "charity", and so of fitting within the *Income Tax Act* concessions, is considerable. No doubt the real stumbling block will be the membership fees such institutions levy, and the other charges they impose; they are, in fact, emporiums of self-help.

Nor can one say that *Re Nottage* is dead in Ontario. The High Court of Australia in the *Chester* case[23] was concerned with the purpose or object of improving the breeding and racing of homer pigeons. It is difficult to see the pursuit of physical fitness here, except in the pigeons, and one would expect the same result in Ontario that the High Court of Australia reached in that case. It would seem the promotion of sport is still not charitable in itself; rather, it is now recognized as a vehicle for the attainment of health and fitness, and the education that arises from participation in competitive physical activity.

The contribution of the Divisional Court to the *Laidlaw* saga is more questionable. Why the Court did not think it sufficient merely to support the judgment below is not apparent. And, having launched themselves upon a rejection of the

manner in which all other Commonwealth common law jurisdictions have proceeded since the seventeenth century in determining what is a fourth-head charity, why do the members of the Court think it enough to say, "Now we have given you 'a more liberal definition of charity' "?

How much more liberal is it? The Court itself leaves that question open. It thinks the rejection of the spirit and intendment measure of a would-be charitable purpose may make no change in the law, but it does not examine the matter. With all respect to the Court, in my opinion, although undoubtedly well meant, this is not a contribution to the law of charity in Ontario or Canada.

Since 1601 the courts of the common law system have recognized that, in the absence of a legislative definition of charity, the most they can usefully do with a concept having such an evolving and elusive content when applied to factual circumstances, is to maintain a theme from case to case, and age to age. And that, I believe, was all the courts were saying after 1891 when they said that "other purposes beneficial to the community" must have been meant by Lord Macnaghten to be read as meaning, "subject to the spirit and intendment of the Statute of Elizabeth". It is true, as Lord Upjohn once said,[24] that over the centuries that measure or test has been stretched almost to breaking point, but surely this only underlines the inevitable process of analogy, case by case. That is why its rejection now may make no difference to the determination by future courts of what is charitable. So one is bound to ask whether it was worthwhile to disturb things and reject the spirit and intendment test. In what way have things become more "liberal" by this rejection? (This is the point at which this writer's comment commenced.) For instance, does the fourth head now include an environmental protection association or a minority group organization one of whose main objects is the lobbying of government in order to secure policy and legislative change?

This is not to defend the way in which the courts have sometimes trotted out the spirit and intendment test, almost as a substitute for thought, a situation which unfortunately might be said to have occurred in the High Court of Australia's decision in the *Chester* case.[25] The practice of being content to see only the bath water is as extreme and regrettable as throwing out both bath water and baby. If this alternative ground for the Divisional Court's decision prevails in practice, what we now need to have in Ontario is some knowledge of how we are to assess the "charitability" of trusts of general public utility. This we have not got.

Such an outcome could not have happened if Canadian courts did, in fact, as do other jurisdictions, regularly determine what is charitable. With very rare exceptions, such as the *Laidlaw Foundation* case, they do not. Today, this determination is made by Revenue Canada as part of its administrative process, and applicants for registration as charitable organizations adjust their objects, if necessary, so as to conform with what the officials of that Department have determined is charitable. Canadians apparently prefer this process to litigation and so our case law on what is charitable is aging badly.

Maybe this situation also explains why, for some time, pressure has been mounting for a legislative definition of charity. It is axiomatic that the law must

be known to the citizen but, it is increasingly being felt that the law is *not* known if it is allowed to repose in the bosom of a government department, revealed primarily in private correspondence with each applicant for registration. Admittedly Revenue Canada has stated that it adheres to Lord Macnaghten's classification, however, "charity" is a concept with subtle shadings of content, as well as being in a constant process of evolution, and its application to each set of facts submitted to the Department should be as widely known as its broad classificatory formulation.

Is statutory definition the answer? I have yet to convince any lawyer from a non-Canadian jurisdiction that it is. They point to the "frozen" character of such a definition and wish us well with the new language as times change and litigation recommences (or administrative decisions take over once again).

Moreover, if we have a statutory definition, it will be in federal legislation, applicable only for the purposes of the *Income Tax Act*. Where does that leave the law of the provinces? Furthermore, before such a definition even arrives, we have Ontario going its own way, where other provinces and the territories have no reason to follow, because they do not have a statutory form of Lord Macnaghten's 1891 enumeration of the heads of charity. That enumeration remains, for them, what it has always been, a "convenient classification", as Judge Dymond described it.

In the light of *Laidlaw Foundation*, and its extension of "charity" in Ontario, perhaps the time has really and unavoidably come for a statutory definition. Ideally, the Uniform Law Conference should sit down with the federal authorities and work something out. The price of our drifting on as we are is balkanization, cost, delay and frustration.

FOOTNOTES

1. April 28 and September 8, 1983. Editor's note: Refer to "Recent Tax Developments", *The Philanthropist*, Summer (August) 1983 and Winter 1984.
2. November 15, 1984.
3. This case comment sets out what was decided by the two levels of court in rather greater detail than is usual because at the time of writing neither level of court has been reported. (Editor's Note: Both are now reported.)
4. [1895] 2 Ch. 649.
5. R.S.O. 1980, c.65.
6. S.O. 1982, c.11.
7. [1891] A.C.531.
8. *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522 at 531.
9. Hubert Picarda, *The Law and Practice Relating to Charities*, London: Butterworths, 1977.

10. This is reflected in Revenue Canada's Information Circular 80-10 (29 Aug. 1980), para 6(b): "Other purposes beneficial to the community as a whole in a way which the law regards as charitable" is described as "the most difficult [of the four categories] to interpret".

11. (1918), 46 N.B.R. 161 at 179 *et seq.*

12. [1979] 1 W.L.R. 130, reversed on other grounds by the House of Lords ([1981] A.C.1).

13. [1943] 2 All E.R. 101.

14. 9 Edw. 7, c.58. The Imperial act of the same name was enacted in 1888 (51 and 52 Vict., c.42), and made reference, under the fourth head, to "charities within the meaning, purview, and interpretation of the said preamble". *Pemsel* (footnote 7, *supra*), was reported in 1891. Ontario legislated in 1902 but did not adopt the Macnaghten-type language of s.2 (2) until 1909.

15. (1917), 40 O.L.R. 567 at 595.

16. S.O. 1982, c.11.

17. S.O. 1982, c.12.

18. *Sub nom. Cameron* v. *The Church of Christ Scientist* (1918), 57 S.C.R. 298 at 304.

19. *Report of the Goodman Committee on Charity, Law and Voluntary Organizations*, p. 30 at para. 71. See (1977), 40 M.L.R. 397 (N.P.Gravells).

20. H.A.J.Ford and W.A.Lee, *Principles of the Law of Trusts*, Sydney: 1983, at p. 861.

21. *Royal National Agricultural and Industrial Association* v. *Chester* (1974), 48 A.L.J.R. 304 at 306 (a gift of residue "for improving the breeding and racing of homer pigeons").

22. [1929] 2 Ch. 276.

23. Footnote 21, *supra*.

24. *Scottish Burial Reform and Cremation Society Ltd.* v. *Glasgow City Corporation*, [1968] A.C. 138 at 153. The fourth head is today "a portmanteau to receive those objects which enlightened opinion would regard as qualifying . . . [the spirit and intendment] is undoubtedly the accepted test, though only in a very wide and broad sense" (at pp. 150 and 151).

25. Footnote 21, *supra*.