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**ENVIRONMENTAL ISSUES UNDER THE
4TH HEAD OF CHARITY**

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A. INTRODUCTION

Environmental organizations have been playing an increasingly important role in society as the impact of the environment on human health and the economy has become clearer. Environment Canada's website notes that "[i]ssues such as asthma, cardiovascular disease and waterborne illnesses underline linkages between the environment and human health. Environmental changes such as low water levels, pest infestations and intense storms also have economic impacts in such sectors as agriculture, forestry and tourism."¹ Governments have recognized the importance of environmental protection by implementing legislation aimed at protecting the environment. For example, Canada has extensive federal legislation focused on pollution prevention and conservation, such as the *Canadian Environmental Protection Act*,² the *Species at Risk Act*³ and the *Canada Wildlife Act*⁴.

The international community has also shown increasing concern for the environment. The preamble to the United Nations Framework Convention on Climate Change, which was adopted in 1992 and entered into force in 1994, acknowledges "that change in the Earth's climate and its adverse effects are a common concern of humankind." Further, article 1 of the 2009 Copenhagen Accord states that "We underline that climate change is one of the greatest challenges of our

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¹ Environment Canada, "Canadian Environmental Sustainability Indicators", online at: <http://www.ec.gc.ca/indicateurs-indicators/default.asp?lang=En>.

² *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

³ *Species at Risk Act*, S.C. 2002, c. 29.

⁴ *Canada Wildlife Act*, R.S.C. 1985, c. W-9.

time...”⁵ In response to these challenges, environmental non-governmental organizations are becoming increasingly involved in an ever-expanding scope of activities aimed at reducing climate change and protecting the environment.

In the National Survey of Non-profit and Voluntary Organizations, Imagine Canada reported that there were 4,424 non-profit environmental organizations operating in Canada in 2003. Included in this number are “organizations promoting and providing services in environmental conservation, pollution control and prevention, environmental education and health and animal protection.” Forty-one percent of these environmental organizations are registered charities.⁶ However, the law related to what activities may be considered charitable in the context of environmental protection is not clear and the Canada Revenue Agency (“CRA”) has a history of a restrictive understanding of what activities would be considered charitable in this context. This paper presents a review of the common law and statutory context of the protection of the environment as a charitable purpose in order to suggest that a modern understanding of the law in this area would permit a much broader range of activities, which may in turn assist in meeting the increasing challenges facing our environment today.

B. COMMON LAW

To obtain charitable status and the associated tax benefits, an environmental non-governmental organization’s purposes must fall within the common law definition of charity. The term “charity” is not statutorily defined. Therefore, the meaning of the term must be derived from the common law. The common law definition of charity is derived from the Preamble to *The Statute of Charitable Uses, 1601* (Statute of Elizabeth), which provides a list of purposes that were considered charitable at the time the statute was enacted in 1601:

The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or

⁵ Copenhagen Accord, United Nations Climate Change Conference 2009 in Copenhagen, available online at: http://www.denmark.dk/NR/rdonlyres/C41B62AB-4688-4ACE-BB7B-F6D2C8AAEC20/0/copenhagen_accord.pdf.

⁶ Statistics Canada, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (September 2004), available online at: <http://www.statcan.gc.ca/pub/61-533-x/2004001/4200353-eng.pdf>.

maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid of ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.⁷

The charitable purposes enumerated in the Preamble were distilled into four heads of charity by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, known as *Pemsel's case*. The four charitable purposes outlined in *Pemsel's case* are as follows:

1. The relief of poverty;
2. The advancement of education;
3. The advancement of religion; and
4. Other purposes beneficial to the community.⁸

To be considered charitable, a charity's objects must fit within the four accepted categories. As the fourth head of charity is very broadly defined, many different purposes could potentially come within this category. However, not all purposes that are beneficial to the community are charitable. To qualify as charitable, the purpose must also come within the "spirit and intendment" of the Preamble.⁹ In 1601, when the Preamble was drafted, protection of the environment had not yet become a major societal concern, nor was it at the time of *Pemsel's case*, and neither make any reference to the environment.

While the *Income Tax Act*¹⁰ does not define the meaning of charity or charitable, it should be noted that it does explicitly recognize an environmental purpose in the provisions regarding ecological gifts. The *Income Tax Act* provides several tax benefits to encourage donations of ecologically sensitive land and interests in ecologically sensitive land, such as servitudes, covenants or easements. To qualify for favourable tax treatment, the donation must be made to an eligible recipient, including a municipality, a territorial, provincial or federal department or

⁷ 43 Eliz I, c. 4.

⁸ *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] AC 531.

⁹ Peter Luxton, *The Law of Charities* (Oxford University Press: Oxford: 2001) at 135.

¹⁰ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

agency, or an approved registered charity “one of the main purposes of which is ... the conservation and protection of Canada’s environmental heritage.”¹¹

Aside from this limited statutory reference, environmental purposes must fall within the above mentioned common law definition to be considered charitable. Generally, environmental non-governmental organizations have been recognized under two heads of charity, other purposes beneficial to the community and the advancement of education.

1. Other Purposes Beneficial to the Community

Although protection of the environment is not mentioned in the Preamble to the Statute of Elizabeth or included as one of the heads of charity enumerated in *Pemsel’s Case*, an increasing number of charities have been registered for environmental purposes. Many such charities have objects which fall under the fourth head of charity – other purposes beneficial to the community. For example, the Charity Commissioners have registered charities for the conservation of the rainforest and their flora and fauna; charities concerned with the conservation of particular species such as elephants and the rhinoceros, or of wildlife in general; a charity for the conservation of broad-leaved woods and trees; and charities for the conservation, protection, rehabilitation and improvement of rivers, streams and watercourses and their river corridors for the benefit of the public.¹² CRA’s position is that organizations established to protect the environment, including its flora and fauna, can qualify for registration as a charity under the category of other purposes beneficial to the community in a way the law regards as charitable.¹³ Further, the pre-approved charitable objects published by the Ontario Office of the Public Guardian and Trustee include objects relating to the protection and preservation of the environment.¹⁴

¹¹ Definition of “total ecological gifts” in subsection 118.1(1). The ITA also provides for “qualifying environmental trusts”, which allow businesses that damage the environment, such as mining operations, to set up a trust to fund future environmental clean-up. However, the inclusion these provisions in the ITA does not mean that qualifying environmental trusts qualify as charitable.

¹² Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) at 164-166.

¹³ Canada Revenue Agency, *Summary Policy CSP – E08* (September 3, 2003), online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-e08-eng.html>.

¹⁴ Ministry of the Attorney General, *Not-for-Profit Incorporator’s Handbook*, Appendix C, available online at: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/nfpinc/appendixc.asp>.

The preservation of human life and health is a long recognized charitable purpose, considered analogous to several purposes mentioned in the Preamble. For example, the promotion of public health has been considered charitable by analogy with the ‘the maintenance of sick and maimed soldiers and mariners.’¹⁵ Likewise, the protection of human life has been considered charitable by analogy with the repair of sea banks.¹⁶ As noted above, the environment is very important to human life and health, and damage to the environment affects human health in many negative ways. For instance, poor air quality has a known impact on human health causing “throat irritation, coughing, and breathing difficulties, as well as more serious respiratory and cardiovascular problems.”¹⁷ Rising temperatures caused by greenhouse gas emissions also have a significant impact on human life and health by increasing “the severity of heat waves, the migration of insects and infectious diseases, water availability, glacier and sea ice cover, and crop yields.”¹⁸ Therefore, the protection of the environment is often viewed as charitable as a means of preserving human life and health. Several cases have alluded to the health benefits derived from environmental purposes, although none have dealt with the issue directly. However, modern scientific evidence clearly demonstrates the connection between the protection of the environment and the preservation of human life and health.

Although there are not many cases on point, there are several twentieth century cases from England, Australia, New Zealand and Canada in which environment-related purposes were found to be charitable. These cases illustrate how changing attitudes toward the environment have influenced the development of protection of the environment as a charitable purpose:

One of the earliest decisions, *In re Verrall*,¹⁹ concerned The National Trust for Places of Historic Interest or Natural Beauty. The Chancery Division considered whether the objects and purposes of the National Trust were charitable. The National Trust was incorporated by private act, *The National Trust Act, 1907*, which provided that the trust “shall be established for the purposes of promoting the permanent preservation for the benefit of the nation of lands and

¹⁵ Luxton, *supra* note 9 at 142.

¹⁶ *Ibid.* at 146.

¹⁷ Environment Canada, “Air Quality: National Perspective”, online at: <http://www.ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=4B5631F9-1>.

¹⁸ Environment Canada, “Greenhouse Gas Emissions: National Perspective”, online at: <http://www.ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=FBF8455E-1>.

¹⁹ [1916] 1 Ch 100.

tenements (including buildings) of beauty or historic interest, and as regards lands for preservation (so far as practicable) of their natural aspect features and animal and plant life.” The Court found that the objects of the National Trust were charitable within the legal meaning of that term, stating that the “objects of this society were plainly within the judgments of the House of Lords in *Pensel’s Case*.”²⁰ The Court noted that the trust’s objects were plainly public purposes, expressly stated to be for the benefit of the nation.

Soon thereafter, the New Zealand Court of Appeal, in *In Re Bruce*,²¹ found that a gift in a will “for the purpose of afforestation or the making of domains or national parks in New Zealand” was a valid charitable gift. The Chief Justice noted that afforestation had been a pressing concern in New Zealand for forty years and that the State had been engaged in afforestation efforts.²² The Court of Appeal found that afforestation was a recognized public purpose, “just as well known as roadmaking or other purposes which have been held proper objects of charitable gifts.”²³ The Court of Appeal also found that afforestation was a sufficiently definite purpose, as “was plain from what has taken place in New Zealand for the last forty years.”²⁴

In both *Verrall* and *Bruce* the trusts at issue were regarded by the courts as clearly providing a public benefit. In *Verrall*, the Court noted that “the trustees are strictly limited to the specific objects and purposes referred to in the Act, which are plainly public purposes, expressly stated to be for the benefit of the nation, and have no choice of applying them to any other purposes.”²⁵ In *Bruce*, the Chief Justice stated that “the object here is purely for general purposes – for the benefit of the State – and is a well-defined public purpose.”²⁶ However, as illustrated in *Re Grove-Grady*,²⁷ the courts were not prepared to assume that all environmental purposes provided a benefit to the community.

²⁰ *Ibid.* at 110.

²¹ [1918] N.Z.L.R. 16.

²² *Ibid.* at para. 22.

²³ *Ibid.* at para. 26.

²⁴ *Ibid.*

²⁵ *In re Verrall*, *supra* note 19.

²⁶ *In re Bruce*, *supra* note 21.

²⁷ [1929] All ER Rep 158.

In *Re Grove-Grady*, the English Court of Appeal found that a trust created to establish an animal refuge was not a valid charitable trust. The refuge was to be established “... so that all such animals birds or other creatures not human shall there be safe from molestation or destruction by man.” The majority found that the trust did not come within the fourth head of charity because no benefit to the community was established. Lord Hanworth stated as follows:

The once characteristic of the refuge is that it is free from the molestation of man, while all the fauna within it are to be free to molest and harrÿ each other. Such a purpose does not, in my opinion, afford any advantage to animals that are useful to mankind in particular, or any protection from cruelty to animals generally. It does not denote any elevating lesson to mankind.

Of particular significance to the Court of Appeal’s decision was the fact that there was no provision for access to the refuge by visitors. In *The Law of Charities*, Peter Luxton points out that *Grove-Grady* is somewhat dated in its approach to environmental protection and it is now recognized that the survival of other species provides a benefit to the public, which sometimes requires that public access be denied.²⁸

*Kaikoura County v. Boyd*²⁹ provides an example of how environmental purposes can be analogized to established charitable purposes. In *Kaikoura County*, the New Zealand Court of Appeal found that a trust holding land for “the improvement and protection of the Waimanarara River” constituted a charitable trust for a public purpose. The Court of Appeal stated that there was little doubt that the purpose was charitable within the fourth head of charity. The Court likened the trust at issue to the repairing of bridges and highways and the protection of land from inroads of the sea. The Court also noted that the trust would fall within the class of gifts for the benefit of the inhabitants of certain localities.³⁰ The Court further found that the main purpose of the trust was to preserve the well-defined and existing river banks.³¹

In *Royal Society for the Prevention of Cruelty to Animals v. Benevolent Society of NSW*,³² the High Court of Australia found that a trust establishing a bird sanctuary was not a valid

²⁸ Luxton, *supra* note 9 at 158.

²⁹ [1949] N.Z.L.R. 233.

³⁰ *Ibid.* at 261-262.

³¹ *Ibid.* at 263.

³² [1960] HCA 4.

charitable trust. The settlor owned two cottages in suburban Sydney on a half an acre of land. The settlor had established a bird bath on the property and fed the visiting birds with grain. Under the terms of the trust indenture, the cottages and the property were to be kept up in perpetuity as a bird sanctuary by the Royal Society for the Prevention of Cruelty to Animals. The Court stated that “[T]he place, the climate and the nature of the cottage sites, makes the idea absurdly fanciful but in any event it has none of those tendencies which nowadays are demanded as a justification for treating trusts directed to the benefit of animals as valid.” The High Court’s decision indicates that there must be some practical utility to the proposed charity. Dixon C.J. noted that “[t]he high sounding description Sellar Sanctuary for Birds and the references to a manager and staff cannot be allowed to distract attention from the fact that after all the provision in favour of birds does no more than require that a relatively small area of suburban land near the sea coast shall remain accessible to birds and that there shall be food and water for them.”³³ The High Court was not prepared to stretch the definition of charity far enough to cover the proposed bird sanctuary. However, as noted by Windeyer J., the *R.S.P.C.A.* decision does not suggest that a proper bird sanctuary could not be a good charitable trust. The Court did not need to decide whether a real sanctuary for birds would be a charity.³⁴

In one of the few Canadian cases, *In Re Cotton Trust for Rural Beautification*, the Prince Edward Island Supreme Court recognized the following purpose as charitable:

to encourage the improving and beautifying of properties in the rural areas of Prince Edward Island and more particularly the properties adjacent to and within view of the public highways, by the planting of ornamental trees, shrubs and flowers.

The charitable status of the trust was not directly at issue in the case. However, in deciding that the *cy-près* doctrine would be applicable to the trust at issue, McQuaid J. states that “[t]here can be no doubt that what Mr. Cotton established constituted a charitable trust.”³⁵

The case of *Attorney-General (New South Wales) v. Sawtell*³⁶ illustrates how changing social and economic conditions have impacted the way courts view environmental purposes. In

³³ *Ibid.* at para. 8.

³⁴ *Ibid.* at paras. 2-3 (concurring judgment of Windeyer J.).

³⁵ [1980] P.E.I.J. No. 128, 118 D.L.R. (3d) 542 (S.C.).

³⁶ [1978] 2 NSWLR 200.

Sawtell, the Supreme Court (New South Wales) considered whether the preservation of native wild life, flora and fauna, was a purpose both beneficial to the community and within the spirit and intendment of the Preamble to the Statute of Elizabeth. The Court noted that “over the years since the case of *Re Grove-Grady* was decided, there has been a radical change of circumstances affecting the question of benefit to the community from the preservation of native wild life.”³⁷ The Court heard evidence from many experts about the increasing need to establish nature reserves and the important of such reserves to research and education. The evidence also showed the development of a greatly intensified public interest in wild life, its preservation and the opportunity to observe it in the wild. Therefore, the Court found that there was a real and substantial benefit to the community in the preservation of Australian wildlife both flora and fauna. The Court then went on to find that the purposes of the trust at issue came within the spirit and intendment of the preamble.

Similarly, in Canada in *Grandfield Estate v. Jackson*,³⁸ decided in 1999, the British Columbia Supreme Court found that a trust directing the trustee to manage a farm property “for the purpose of providing a game and bird sanctuary” was a valid charitable trust. The Court determined that the reasoning in *Grove-Grady* was not appropriate in 1999 and discussed the different context existing in 1929, when *Grove-Grady* was decided. The Court stated:

In 1929 England, there were likely no restrictions on hunting fox, there was probably little if any environmental law in place dealing with oil spills and responsibility therefore. England had not witnessed the effects of oil spills from huge oil tankers on sea life and birds. Rain forests in the Amazon were theoretically there forever. Urban sprawl in North America was not displacing game and birds from their natural habitat.”³⁹

In stark contrast to the holding in *Grove-Grady*, the Court stated “[t]he existence of a game and bird sanctuary in a developing suburban area such as exists near Duncan, B.C., would, in my view, denote an elevating lesson to mankind in the year 1999.”⁴⁰ The Court went on to explicitly recognize the need for the law to modernize with respect to determining what is charitable:

³⁷ *Ibid.* at 207.

³⁸ [1999] B.C.J. No. 711 (S.C.).

³⁹ *Ibid.* at paras. 43-44.

⁴⁰ *Ibid.* at para. 45.

“The ability of our children, grandchildren and great-grandchildren to observe game and birds in their natural environment without having to resort to prohibitively expensive expeditions to National Parks and Provincial Parks nestled, regretfully, far away from the emerging centres of population can only be viewed as charitable in that ultimately there is an elevating lesson to mankind in being able to observe game and birds in this natural habitat. In coming to this conclusion, I adopt the view stated in *Native Communication Society*, supra, that the law of charity is indeed a moving subject and must be viewed in terms of present day exigencies.”⁴¹

In *Re Centrepoint Community Growth Trust*,⁴² the High Court of New Zealand considered whether an environmental objective can be classified in contemporary terms as charitable. The Court noted that although there have been few decisions on point, the importance of preserving and protecting the environment is a widely held public view. The Court found that a majority of New Zealanders would likely support the use of charitable funds for such purposes.⁴³

Finally, *Earth Fund v. Canada*⁴⁴ serves as a reminder that environmental organizations will not be considered charitable unless they meet the general legal requirements for charities. Earth Fund was an organization established to raise funds for environmental charities through the conduct of a lottery, known as the Earth Future Lottery. The Federal Court of appeal upheld the Minister of National Revenue’s decision not to register Earth Fund as a charity. The FCA found that Earth Fund’s objects were too broad to permit a conclusion that its proposed activities were exclusively charitable.⁴⁵ The proposed objects were broad enough to permit Earth Fund to fund projects undertaken by organizations that are not qualified donees or commercial ventures.⁴⁶ In addition, the FCA found that the proposed lottery scheme was a commercial activity and did not constitute a related business.⁴⁷ The Court did not otherwise comment on the environmental purposes.

⁴¹ *Ibid.* at paras. 46-47.

⁴² [2000] 2 NZLR 325.

⁴³ *Ibid.* at paras. 39-40.

⁴⁴ 2002 FCA 498, [2002] F.C.J. No. 1769.

⁴⁵ *Ibid.* at para. 23.

⁴⁶ *Ibid.* at para. 24.

⁴⁷ *Ibid.* at para. 31.

2. Advancement of Education

Many environmental organizations have objects that are charitable under the advancement of education. In *Re Lopes*,⁴⁸ decided in 1930, the English Chancery Division held that the objects of the Zoological Society of London were for the advancement of education and therefore charitable. The Zoological society had two objects: “[T]he advancement of zoology and animal physiology” and “[T]he introduction of new and curious subjects of the animal kingdom.” The Court found that the first object was clearly educational, being for the advancement of scientific knowledge. After determining that the second object must be read in conjunction with the first, the Court found that the second object was also educational. In addition, the Court reasoned that:

“the introduction of non-indigenous animals, exhibited under proper conditions, is distinctly and educational object. It must widen the mind and outlook of everyone to see in the flesh animals, now becoming scarce in many parts of the world, which otherwise people might not see at all.”⁴⁹

In *Sawtell*, the Court found that the aspects of public benefit flowing from the preservation of native wildlife have characteristics which match in spirit purposes stated in the preamble, including the advancement of learning.⁵⁰ When determining the benefit to the community of the preservation of native wild life, flora and fauna, the Court gave weight to the evidence presented about the value of education in the field. Therefore, the objects of a similar trust could potentially be framed as for the advancement of education.

Peter Luxton, in *The Law of Charities*, notes that the Charity Commissioners will recognize as charitable purposes “for the advancement of public education in the protection and improvement of the natural environment and for the promotion of research in that field only if the objects aren’t too vague to be capable of being charitable objects.”⁵¹ For example, the Charity Commission has registered charities “to educate the public in the ecological importance of trees and their planting, care and protection; to advance education and research in the field of energy and energy related subjects, including forms of renewable energy; and to educate the

⁴⁸ [1930] All ER Rep 45 (Ch.).

⁴⁹ *Ibid.* at para. 2.

⁵⁰ *Attorney-General (New South Wales) v. Sawtell*, *supra* note 36.

⁵¹ Luxton, *supra* note 9 at 124.

public in the value of clean air and the methods and consequences of air pollution.”⁵² Other charities have been registered for the advancement of education in connection with “salmon and other freshwater fish populations and their habitats, ecology and environment and the conservation and improvement thereof.”⁵³ In 1991 the Charity Commission registered The Wilderness Trust for the following objects: “to advance the education of the public by increasing knowledge and understanding of wilderness and the conservation thereof and the interrelationship between wilderness and the environment generally by the provision of instruction and of opportunities for direct experience of wilderness.”⁵⁴

Notably, the CRA has expressed concerns about the purpose “to educate the public regarding [the value of clean air and the methods and consequences of air pollution],” although the Charity Commission has recognized this purpose as charitable, as noted above. In an Information Letter dated April 21, 1998, the Charities Division considered this proposed objects and explained “it seems to us that its wording – “value” of clean air – suggests that the applicant would present a pre-determined point of view on the issue of pollution. By contrast, a more neutral or balanced view would be implied if an organization were established to educate the public on “air quality.”⁵⁵ The same Information Letter also notes that any research into pollution must be objective and not conducted to conform to a pre-existing agenda.⁵⁶ The Information Letter further notes that “an applicant will still have to convince us that providing the public with information about steps they can take to reduce pollution is a practical way of achieving a charitable purpose.” While this letter was issued in 1998, it hardly presents a modern understanding of the importance of clean air to human health.

⁵² Picarda, *supra* note 12 at 165, citing [1989] Ch Com Rep 10 at para. 29.

⁵³ *Ibid.*

⁵⁴ Charity Commission, *Register of Charities*, “The Wilderness Foundation” (formerly The Wilderness Trust), available online at: <http://www.charity-commission.gov.uk/SHOWCHARITY/RegisterOfCharities/RemovedCharityMain.aspx?RegisteredCharityNumber=1005826&SubsidiaryNumber=0> (the Wilderness Foundation was removed from the Register on November 27, 2009).

⁵⁵ Canada Revenue Agency, Information Letter, CIP-1998-023, para. C. The Information Letter has since been removed from CRA’s website, and therefore may not represent CRA’s current position.

⁵⁶ *Ibid.* at para. B.

C. OTHER REQUIREMENTS

Environmental charities are subject to the same general requirements and limitations imposed on all charities. Therefore, to qualify as charitable and maintain their charitable status, environmental organizations must also comply with the rules regarding political activities, private benefit and related businesses.

1. Advocacy

Environmental organizations must be careful of the fine line that exists between education and advocacy. If an organization's purpose is to influence public opinion by promoting a particular point of view, "the purpose is one of propaganda not education."⁵⁷ The Charity Commissioners' decision regarding the application for registration of The Wolf Trust illustrates this point.⁵⁸ The Wolf Trust was established to "[p]romote the conservation, rights and welfare particularly of wolves but also of other predators and related wildlife."⁵⁹ After considering all the materials submitted by The Wolf Trust, including the information on the organization's website, the Charity Commissioners determined that the primary purpose of the organization was to promote the reintroduction of the wolf into Scotland as an end in itself, which would require a change to the *Wildlife and Countryside Act, 1981*. The Charity Commissioners concluded that this purpose was not charitable because it was designed to influence public opinion and government decision-making.⁶⁰

In an Information Letter dated April 21, 1998, the Canada Revenue Agency provided its opinion on the proposed objects of an environmental organization that planned to disseminate information about environmental pollution.⁶¹ The relevant proposed objects were as follows:

1. To promote a better understanding by the public about dangers of environmental pollution and sources of environmental pollution and to disseminate information about steps which individuals and corporations can take to reduce or eliminate such pollution; and

⁵⁷ Luxton, *supra* note 9 at 227.

⁵⁸ Charity Commission, *Decision of the Charity Commissioners for England and Wales, Application for Registration of the Wolf Trust (Formerly Known as Wild Bite)* (30 January 2003), online at: <http://www.charitycommission.gov.uk/Library/start/wolfftrustdecision.pdf>.

⁵⁹ *Ibid.* at para. 3.1.

⁶⁰ *Ibid.* at para. 8.

⁶¹ Canada Revenue Agency, Information letter, CIL-1998-023, April 21, 1998. The Information Letter has since been removed from CRA's website, and therefore may not represent CRA's current position.

2. To disseminate amongst interested organizations information about pollution as a threat to the environment, the identification of sources of pollution and techniques for combating pollution.

CRA explained that it would not accept the above objects as charitable under the advancement of education, because the objects allow for activities that are informative rather than educational in the charitable sense. CRA's point of view was that "propagating a particular point of view on a social issue does not constitute the advancement of education."⁶² CRA also explains that the above objects are unlikely to qualify as charitable under the fourth head either, because disseminating information on environmental pollution is not an activity "whose tangible outcome can be predicted with any certainty, nor can it be assumed that a public benefit will necessarily follow."⁶³

However, a charity may engage in public awareness campaigns as long as that activity is connected and subordinate to the charity's purpose. The charity's position must be well reasoned and not based on false, inaccurate or misleading information. In addition, a charity cannot undertake an activity using primarily emotive material.⁶⁴ According to CRA's *Policy Statement on Political Activities*, an educational activity must be reasonably objective and based on a well-reasoned position. The charity's position must be factually based and methodically, objectively, fully, and fairly analyzed. Of particular concern to environmental charities, CRA's position is that a well-reasoned position should address serious arguments and relevant facts to the contrary.⁶⁵

An Australian case decided by the Victorian Civil and Administrative Tribunal, *Australian Conservation Foundation Inc. v. Commissioner of State Revenue*,⁶⁶ provides an example of the balance between environmental and political activities. After finding that the protection of the environment comes within the spirit and intendment of the preamble, the Tribunal went on to consider whether the Australian Conservation Foundation was nevertheless not charitable because it engaged in impermissible political activities. In the decision under

⁶² *Ibid.* at para. A(b).

⁶³ *Ibid.* at para. A(a).

⁶⁴ Canada Revenue Agency, *Policy Statement CPS-022, Political Activities* (September 2, 2003), online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html>, section 7.1.

⁶⁵ *Ibid.* at section 8.

⁶⁶ [2002] VCAT 1491.

review, the Commissioner of State Revenue had determined that the advocacy and public awareness activities of the Foundation were all finally directed towards environmental protection through influencing the political process, law making and state regulation of the environment.⁶⁷ The Australian Conservation Foundation described its activities as “campaigns,” “designed to achieve environmental action across the three main parts of society: community, business and government.” However, the Tribunal found that any political activities by the Foundation were only ancillary and incidental to the organization’s purposes and, therefore, permissible

2. Private Benefit

Like other charities, environmental charities cannot be established to provide a private benefit. Some minor private benefit is acceptable if it arises directly through the pursuit of the charity’s purposes, or is incidental to the pursuit of those purposes. However, the public benefit provided by the charity must not be outweighed by any ensuing private benefit.⁶⁸ For example, if a conservation charity pays a landowner for a conservation easement, the landowner has received a private benefit. However, this benefit will be acceptable because it arises directly through the pursuit of the charity’s conservation purposes.

3. Related Business

Charities are permitted to carry on a “related business.” A related business is either a business run substantially by volunteers, or a business that is linked to a charity’s purpose and subordinate to that purpose.⁶⁹ Charities are not permitted to carry on an unrelated business. CRA has identified four categories of businesses which will be considered linked to a charity’s purpose: (1) a usual and necessary concomitant of charitable programs; (2) an off-shoot of a charitable program; (3) a use of excess capacity; and the sale of items that promote the charity or its objects.⁷⁰

There are several examples of situations where an environmental charity may carry on a related business that is linked to its charitable purpose. For instance, a recycling charity may run

⁶⁷ *Ibid.* at para. 18.

⁶⁸ Canada Revenue Agency, *Policy Statement CPS-024, Guidelines for Registering a Charity: Meeting the Public Benefit Test* (March 10, 2006), online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-024-eng.html>.

⁶⁹ Canada Revenue Agency, *Policy Statement CPS-019, What is a Related Business?* (March 31, 2003), online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-019-eng.html>.

⁷⁰ *Ibid.*

a shop selling salvaged and renovated items as an off-shoot of its recycling program. The Charity Commissioners for England and Wales have found that renovation in its own right is not charitable, but it could be ancillary to the charitable purpose of recycling.⁷¹ A park could run a concession stand as a usual and necessary concomitant of its charitable programs. In *Lopes*, Farwell J. commented that it was necessary for the Zoological Society to provide food for persons who attended the zoo for educational purposes and the sale of refreshments did not affect the society's charitable status.⁷²

In the modern context, new types of related businesses carried on by environmental organizations are emerging. For example, an environmental charity may wish to generate green power which it then feeds into the main power grid and sells to a utility provider. Similarly, an environmental charity may wish to carry out a carbon reducing project in relation to which it then sells carbon offsets. However, any related business carried on by an environmental charity must remain subordinate to its charitable purposes and cannot become an uncharitable purpose in its own right.⁷³ The difficulty will surely arise of determining whether a particular project has an uncharitable purpose but constitutes a related business or has a charitable purpose and does not constitute a related business notwithstanding many characteristics that suggest a business activity.

D. MOVING FORWARD

1. New Charitable Purposes

As noted in *Luxton*, charitable objects containing terms such as “green, sustainable development, ecologically friendly and ecological principles” have been considered too vague to be charitable.⁷⁴ However, in recent years new charitable purposes have developed.

a) Conservation:

In 2001, the Charity Commission for England and Wales conducted a review of the Register of Charities. The purpose of the review was to update the Register by considering

⁷¹ Charity Commission, *Decision of the Charity Commissioners for England and Wales, Application for Registration of Recycling in Ottery*, online at: <http://www.charitycommission.gov.uk/Library/start/rio.pdf>.

⁷² *Re Lopes*, *supra* note 48.

⁷³ Canada Revenue Agency, *Policy Statement CPS-019, What is a Related Business?*, *supra* note 69

⁷⁴ *Luxton*, *supra* note 9 at 124.

whether currently registered organizations can still legally be regarded as charitable and whether there was scope for legal recognition of organizations as charitable which were not currently registered.⁷⁵ Following its review of the Register, the Charity Commission produced a series of reports designed to help clarify the meaning of “charitable.” One of these reports, released in February 2001, is “RR9 – Preservation and Conservation.”⁷⁶ RR9 summarizes the Charity Commission’s views on the scope of organizations set up for the charitable purposes of preservation and/or conservation. The report deals with three types of charities: (1) the preservation of buildings or sites of historic or architectural importance; (2) Conservation of animal and plant species; and (3) Conservation of the environment generally.

Prior to 2001, the Charity Commission had not recognized conservation of the environment as a charitable purpose in its own right. Charities associated with conservation had previously been registered, but the Charity Commission had not accepted objects which included the term “conservation of the environment.” The Charity Commission concluded that the term now had a well-established meaning enabling the commission to recognize it as a purpose beneficial to the community.⁷⁷

The report on Preservation and Conservation sets out general criteria that must be met by preservation and conservation charities, in addition to the essential characteristics applicable to all charities. Preservation and conservation charities must satisfy a criterion of merit. For example, species conservation charities must show independent expert evidence that the species is worthy of conservation.⁷⁸ The second criterion is that the charity must be set up for the benefit of the public. The Charity Commission’s policy as expressed in RR9 is that there should be a presumption of physical access to a site when deciding if the public benefit requirement has been satisfied. However, the report recognizes that the reasoning in *Grove-Grady* is now out of date, so the Charity Commission has adopted a more flexible approach: “[A]ccess needs to be consistent with the aims of the charity so that visitors should not be allowed access at the

⁷⁵ The Charity Commission for England and Wales, *RR1-The Review of the Register of Charities* (October 2001), online at: <http://www.charity-commission.gov.uk/Publications/rr1.aspx#1>.

⁷⁶ The Charity Commission for England and Wales, *RR9-Preservation and Conservation* (February 2001), online at: <http://www.charity-commission.gov.uk/Publications/rr9.aspx>.

⁷⁷ The Charity Commission for England and Wales, *RR1a-Recognizing New Charitable Purposes* (October 2001), online at: <http://www.charity-commission.gov.uk/publications/rr1a.aspx>.

⁷⁸ *Ibid.* at para. 4.

expense of deterioration of a fragile property or environment.”⁷⁹ The report outlines several situations where physical access may be restricted, or alternatives to physical access employed. However, these charities must show that they are able to meet the public benefit requirement. The Charity Commission recommends that preservation and conservation charities which are responsible for sites include the following information in their annual report: the number of people who visit the property and, where appropriate, the number who have enquired but been unable to visit; the arrangements to publicize opening hours either nationally or locally, depending on the importance of the property; and where access is limited or not available, the justification for continuing such a policy, with details of alternative methods used to inform the public of progress.⁸⁰

The report states that “[c]onservation of the environment now has a well-established meaning and we recognize it as a charitable purpose beneficial to the community. Therefore, the Charity Commission will register such charities if they satisfy the criteria set out in the annex to the report.”⁸¹ Independent expert evidence is required to show that an organization’s land or habitat is worthy of conservation. The report notes that organizations with objects to promote conservation generally will need to provide examples of particular projects. Acceptable objects for organizations concerned with the general conservation of the environment include:

To promote the conservation, protection and improvement of the physical and natural environment⁷⁹; and
To promote the conservation of the physical and natural environment by promoting biological diversity[or biodiversity].⁸²

b) Sustainable development:

In 2003, the Charity Commission considered the application of the Environment Foundation for registration as a charity.⁸³ The Environment Foundation’s proposed objects included the promotion of sustainable development and the advancement of education in subjects related to sustainable development. The Commission’s view was that “the promotion of

⁷⁹ *Ibid.* at paras. 18-19.

⁸⁰ *Ibid.* at para. 29.

⁸¹ *Ibid.* at para. 8.

⁸² *Ibid.* at paras. A14-A15.

⁸³ Charity Commission, *Decision of the Charity Commissioners for England and Wales, Application for Registration of Environment Foundation* (24 January 2003), online at: <http://www.charitycommission.gov.uk/Library/start/environmentdecision.pdf>.

sustainable development cannot be accepted as a charitable purpose in its own right, without any further limitation, because it lacks that clarity and certainty required for charitable objects and it appears to go beyond what is exclusively charitable.”⁸⁴ The Commission went on to consider whether the promotion of sustainable development for the benefit of the public should be recognized as a new charitable purpose. The Commission concluded that the charitable aspects of sustainable development could be expressed in the following purpose:

Promoting sustainable development for the benefit of the public by
the preservation, conservation and the protection of the
environment and the prudent use of natural resources;
the relief of poverty and the improvement of the conditions
of life in socially and economically disadvantaged communities;
the promotion of sustainable means of achieving economic
growth and regeneration.
Sustainable development means “development that meets the
needs of the present without compromising the ability of future
generations to meet their own needs.”⁸⁵

The Charity Commission then determined that the elements of the above purpose were charitable by way of analogy with existing purposes, namely preservation and conservation, the relief of poverty and the promotion of urban and rural regeneration for the public benefit in areas of social and economic deprivation.⁸⁶ The Charity Commission concluded that the advancement of the education of the public in subjects relating to sustainable development and the protection of the environment was also a charitable purpose, provided that activities carried out in furtherance of that object comply with the political activity guidelines.⁸⁷

c) Recycling:

The Charity Commission has also considered whether the promotion of recycling furthers a charitable purpose. In its decision regarding the registration of Recycling in Ottery (RiO), the Charity Commission stated that public policy recognition of the environmental benefits derived from recycling could be regarded as evidence of a public benefit.⁸⁸ In so concluding, the

⁸⁴ *Ibid.* at para. 4.

⁸⁵ *Ibid.* at para. 6.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at para. 7.

⁸⁸ Charity Commission, *Decision of the Charity Commissioners for England and Wales, Application for Registration of Recycling in Ottery*, *supra* note 71 at 5.3.

Commissioners took note of the Waste Strategy for England and Wales, which acknowledged re-use and recycle as having the least negative impact on the physical and natural environment when compared to other waste disposal methods. Therefore, the Charity Commission concluded that RiO was established for charitable purposes. But the objects of the recycling organization must make clear that the recycling will not take place in ways that might generate a private profit.⁸⁹

2. A Statutory Definition of Charity

a) Australia – Charities Definition Inquiry

In September 2000, the Prime Minister of Australia announced the establishment of an independent Inquiry into definitional issues relating to charitable, religious and community service not-for-profit organizations.⁹⁰ The Inquiry's report was released in June 2001.⁹¹ Chapter 22 of the report dealt with the advancement of the natural environment as a charitable purpose. The Inquiry noted that gifts for the protection of the environment have been held to be charitable. The report references the *Sawtell* case and quotes where the Court concluded that there has been a radical change since the time of *Grove-Grady*. The Inquiry outlines several factors that indicate the growing importance of the environment in today's society, including the impact of the environment on economic performance, human health and social well being. The Inquiry Committee concluded that "these factors make the advancement of the natural environment a charitable purpose significant enough to warrant its own head of charity."⁹²

Australia has since passed the *Extension of Charitable Purposes Act 2004*. The Act statutorily extends the common law meaning of charity for the purposes of all Australian legislation. The Act provides that the provision of non-profit child care is a charitable purpose. The Act also provides that self-help groups and closed or contemplative religious orders are for the public benefit.⁹³ However, the Act does not codify the advancement of the natural environment as its own head of charity as recommended by the Inquiry. The Australian Taxation Office does recognize non-profit entities that operate for the public benefit to protect, preserve,

⁸⁹ *Ibid.* at 3.3.

⁹⁰ Charities Definition Inquiry, online at: <http://www.cdi.gov.au/>.

⁹¹ Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (June 2001), online at: <http://www.cdi.gov.au/html/report.htm>.

⁹² *Ibid.* at c. 22.

⁹³ *Extension of Charitable Purpose Act, 2004*, No. 107, 2004.

care for, and educate the community about the environment as charities. The ATO specifically notes that lobbying and political bodies are not charitable.⁹⁴

b) *Charities Act, 2006* – U.K. Statutory definition of charitable purposes

The *Charities Act, 2006*⁹⁵ received Royal Assent on November 8, 2006. The Act contains an expanded list of thirteen charitable purposes. Under subsection 2(2)(i), “the advancement of environmental protection or improvement” is a charitable purpose for the purposes of the law of England and Wales. According to the Charity Commission, “the advancement of environmental protection or improvement” includes preservation and conservation of the natural environment and the promotion of sustainable development.⁹⁶ The Charity Commission has provided the following examples of the types of charities that fall under this charitable purpose:

- charities concerned with conservation of flora, fauna or the environment generally;
- charities concerned with conservation of a particular geographical area;
- charities concerned with conservation of a particular species;
- zoos;
- the promotion of sustainable development and biodiversity;
- the promotion of recycling and sustainable waste management;
- research projects into the use of renewable energy sources.⁹⁷

3. New CRA Guidance

It appears that CRA is considering withdrawing Information Letter CIL-1998-023 and releasing detailed guidance with respect to the conservation and protection of the environment as a charitable purpose.

E. CONCLUSION

While a definition of charity which explicitly recognizes a broad range of activities in support of the protection of the environment may be a preferred option for many, it is unlikely in Canada at this time. In any event, a modern understanding of the law in this area as exemplified

⁹⁴ Australian Taxation Office, *Income Tax Guide for Non-profit Organizations*, online at: <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/29074.htm>.

⁹⁵ *Charities Act, 2006*, 2006, c. 50.

⁹⁶ Charity Commission, “The advancement of environmental protection or improvement”, online at: http://www.charitycommission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_environmental_protection.aspx.

⁹⁷ *Ibid.*

by some of the decisions discussed above would permit a much broader range of activities by registered charities, which would enhance the effect of existing public support for activities aimed at meeting the increasing challenges facing our environment today.

The Ecological Gift Program is part of the federal government's broader commitment to ensure the protection of species at risk and biodiversity by, among other things, supporting the protection of ecologically sensitive land which is often the habitat for rare and threatened species. More recently, as noted above, the government has expressed a commitment to reduce greenhouse gas emissions and address climate change. Environmental non-governmental organizations can play an important role in mitigating against climate change beyond the land protection and land use management functions provided by eligible recipients of ecological gifts, although ecological gifts in and of themselves can be part of an effective greenhouse gas emissions and climate change strategy. Forests, grasslands, and wetlands function as carbon sinks by removing carbon dioxide from the atmosphere. As well, the degree of natural vegetative cover in and around agricultural land can impact natural carbon storage and release.⁹⁸

There is an increasing movement by environmental non-governmental organizations beyond the protection and preservation of habitat or research and education activities in support of the protection of the environment. With the coming into force of the Kyoto Protocol in 2005, and the mixed results of the Copenhagen Conference, environmental non-governmental organizations are looking to enhance the effect of required reductions in carbon dioxide emission by participating in the cap and trade system by buying up emission allowances and carbon offsets (thereby potentially limiting their availability to polluters) or by offering carbon offsets for sale as a means of supporting their other activities. Ontario Power Authority's recently announced Feed-In Tariff ("FIT") Program,⁹⁹ directed at encouraging the development of increased sources of renewable energy, may provide an attractive source of funding for organizations increasingly seeking alternative sources of support. It remains unclear whether

⁹⁸ Sara J. Wilson and Richard J. Hebda, *Mitigating and Adapting to Climate Change through the Conservation of Nature* (British Columbia: The Land Trust Alliance of British Columbia, 2008), online at: http://landtrustalliance.bc.ca/docs/LTA_ClimateChangePrint.pdf. See also Steven A. Kennett, Arlene J. Kwasniak, Alastair R. Lucas, "Property Rights and the Legal Framework for Carbon Sequestration on Agricultural Land" (2005-2006) 37:2 Ottawa L. Rev. 171 at 173-174, noting that carbon sequestration achieved through land management is a recognized climate change strategy.

⁹⁹ *Green Energy and Green Economy Act, 2009*, S.O. 2009, c. 12. See details available on the Ontario Power Authority website at: <http://fit.powerauthority.on.ca/>.

participation in such projects would be permitted under the current interpretation by CRA of the common law related to the protection of the environment as a charitable purpose, but increased participation by the charitable sector in such projects may be justified by the pressing nature of the environmental goals sought.