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A-413-94

Vancouver Regional FreeNet Association (*Appellant*)

v.

Minister of National Revenue (*Respondent*)

Indexed as: Vancouver Regional FreeNet Assn.v. M.N.R. (C.A.)

Court of Appeal, Pratte, Hugessen and Décary, JJ.A."Vancouver, June 10; Ottawa, July 8, 1996.

Charities — Appeal from M.N.R.'s refusal to grant registered charity status to appellant — Appellant non-profit organization providing free public access to —information highway— — Appeal allowed (Décary J.A. dissenting) — Provision of free access to information within spirit, intendment of preamble to Statute of Elizabeth I, therefore charitable purpose — Control over content of messages to ensure consistent with charitable purpose not applicable since appellant merely providing access to messages, not messages themselves — That appellant's system limitless, can be used for private or commercial purposes, or misused for criminal, destructive purposes not disqualifying free provision of access thereto from obtaining charitable status.

Income tax — Registration as charitable organization — Appeal from M.N.R.'s refusal to grant registered charity status to appellant — Appellant non-profit organization, providing free public access to —information highway—, including InterNet — Appeal allowed (Décary J.A. dissenting) — Provision of free access to information purpose within spirit and intendment of preamble to Statute of Elizabeth I — That appellant's system, and InterNet, limitless, can be used for private or commercial purposes not disqualifying free provision of access thereto from obtaining charitable status under Income Tax Act.

This was an appeal from the Minister's refusal to grant the appellant registered charity status on the ground that it did not have sufficient control over how the facility was used. The appellant is a non-profit organization which provides free public access to the "information highway", including the Internet. Under its constitution, the Association endeavours to "develop, operate and own a free, publicly accessible community computer utility". The remaining purposes, which are collateral to the main objective of establishing and operating the facility, essentially encourage the proliferation of the service amongst computer users throughout Canada, and the development of resources accessible on the FreeNet. Users can, through the Association, access diverse information sources such as newsletters, community events calendars, government reports and environmental data. Registered users enjoy access to on-line discussion groups, "electronic mail", and a plethora of nationally and internationally sourced mailboxes. The appellant does not censor information stored in its system, but it does reserve the right to review and remove information should it be necessary to do so for legal reasons. The appellant maintained that the Association

was a general public utility in a manner analogous to public highways, public libraries and public halls.

The issue was whether the provision of free access to the information highway is a charitable activity so as to qualify the organization providing such access as a registered charity within the meaning of the *Income Tax Act*.

Held (Décary J.A. dissenting), the appeal should be allowed.

Per Hugessen J.A. (Pratte J.A. concurring): Purposes within the spirit and intendment of the preamble to the *Charitable Uses Act 1601* (Statute of Elizabeth I) may be charitable even though they are not specifically listed therein. The preamble to the Statute of Elizabeth I speaks of the repair of bridges, ports, causeways and highways. These were, at the time, the essential means of communication. The provision of free access to information and to a means by which citizens can communicate with one another on whatever subject they may please is a type of purpose similar to those which have been held to be charitable; it is within the spirit and intendment of the preamble to the Statute of Elizabeth I.

Where an organization which itself provides a message to the public seeks charitable status (e.g. a newspaper, a television station, etc.) the Minister must be concerned that it controls the messages to ensure that they are consistent with a charitable purpose and are not used for some other purpose. That type of control was not applicable herein since the appellant merely provides access to messages, not the messages themselves. Control over content has historically been imposed by providers of simple access by reason of physical limitations: i.e. a library cannot stock all the books that have ever been published and a meeting hall cannot accommodate all the persons and groups who might want to use it. But those limitations are not a condition of their charitable purpose: an infinite library or a boundless meeting hall would not lose their charitable character. The information highway is almost limitless in its scope and capacity, but that is no reason for failing to recognize its vast potential for public benefit. The appellant's purpose in providing access to it is one of general public utility. Nor should the fact that the appellant's system, and the InterNet itself, can be used for private or commercial purposes or misused for criminal or destructive purposes, disqualify the free provision of access thereto from obtaining charitable status under the Act. Provision of public access to the modern information highway is as much a charitable purpose as was the provision of access by more conventional highways in the time of Queen Elizabeth I.

Per Décary J.A. (*dissenting*): The mere provision of a benefit to the community is not tantamount to a charitable purpose. Use of analogy is unwarranted because old social needs may become obsolete or satisfied. The Court should consider the essential charitable nature of the organization on appeal. The Court must decide whether the community values underpinning a certain purpose are overshadowed by what is otherwise its essentially non-charitable character.

The Association is not a charity within the legal meaning of the word. Many of the information services provided by the appellant are of great public utility and may become essential services. Health information, news, weather bulletin boards, and other forms of information services constitute the core of the important community-oriented services provided by FreeNets. But the mere provision of a free service to the public does not provide the measure of public utility sufficient to qualify the service as charitable. The Association did not strive to limit its purposes exclusively to those which the law would regard as charitable in the nature of "general public utility". Nor did it appear that the Association would be in a position to exercise control or impose limits on the types of services to which users have access. The potential to provide a platform for

the expression and promotion of private interests brought the Association outside the purview of a purely charitable purpose.

statutes and regulations judicially considered

Charitable Uses Act 1601, (U.K.), 43 Eliz. I, c. 4.

Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, ss. 149.1(1) "charitable organization", 172(3) (as am. by S.C. 1994, c. 7, Sch. II, s. 141), 248(1) "registered charity".

Society Act, R.S.B.C. 1979, c. 390.

cases judicially considered

applied:

Commissioners of Income Tax v. Pemsel, [1891] A.C. 531 (H.L.); *Native Communications Society of B.C. v. Canada (M.N.R.)*, [1986] 3 F.C. 471; [1986] 4 C.N.L.R. 79; [1986] 2 C.T.C. 170; (1986), 86 DTC 6353; 23 E.T.R. 210; 67 N.R. 146 (C.A.).

considered:

Incorporated Council of Law Reporting for England and Wales v. Attorney-General, [1972] Ch. 73 (C.A.); *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corpn.*, [1968] A.C. 138 (H.L.); *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* (1996), 195 N.R. 235 (F.C.A.); *Briarpatch Inc. v. Minister of National Revenue* (1996), 197 N.R. 229 (F.C.A.); *Scowcroft, In re. Ormrod v. Wilkinson*, [1898] 2 Ch. 638 (Ch. D.).

referred to:

Guaranty Trust Company of Canada v. Minister of National Revenue, [1967] S.C.R. 133; [1966] C.T.C. 755; (1966), 67 DTC 5003; *Morice v. Durham (Bishop of)* (1804), 9 Ves. 399; 32 E.R. 656; *Barralet v. Attorney-General*, [1980] 3 All E.R. 918 (Ch. D.); *Everywoman's Health Centre Society (1988) v. M.N.R.*, [1992] 2 F.C. 52; [1991] 2 C.T.C. 320; (1991), 92 DTC 6001; 136 N.R. 380 (C.A.); *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340; (1988), 49 D.L.R. (4th) 74; [1988] 1 C.T.C. 232; 88 DTC 6186; 29 E.T.R. 92; 83 N.R. 214 (C.A.); *Strakosch, decd., In re. Temperley v. Attorney-General*, [1949] Ch. 529 (C.A.); *Macduff, In re. Macduff v. Macduff*, [1896] 2 Ch. 451 (C.A.); *Attorney-General v. National Provincial and Union Bank of England*, [1924] A.C. 262 (H.L.); *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447 (H.L.).

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(1987), 7 *The Philanthropist* 4.

APPEAL from the Minister's refusal of the appellant's application for registered charity status. Appeal allowed.

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Roger R. LeClaire for respondent.

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Rosenbloom & Aldridge, Vancouver, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

Hugessen J.A.: In this appeal we are called upon to decide whether the provision of free access to the information highway is a charitable activity so as to qualify the organization providing such access as a registered charity within the meaning of the *Income Tax Act* [R.S.C., 1985 (5th Supp.), c. 1]. The Minister and my brother Décary J.A. think that it is not. With respect, I have a different view.

Somewhat anomalously, the Act does not provide a useful definition of "charity" or "charitable" so that the courts of necessity are thrown back to an obscure and not always entirely consistent corner of the law of England. Judging from the number of times that this Court has been called upon in recent years to apply that ancient law to the circumstances of life on the eve of the third millennium, I may be forgiven for expressing the wish that this is an area where some creative legislative intervention would not be out of order.

The starting point is the *Charitable Uses Act 1601*,[1] sometimes called the Statute of Elizabeth I. The preamble to that statute contains a list of what were then considered by Parliament to be charitable purposes. Rendered into modern English spelling, it is as follows:

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

This list is not exhaustive; for many years now courts have considered that purposes within the spirit and intendment of the preamble may be charitable even though they are not specifically listed therein. The following categorization of charitable purposes, now considered to be classic, is taken from the speech of Lord Macnaghten in *Pemsel*'s case:[2]

"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts

last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. It seems to me that a person of education, at any rate, if he were speaking as the Act is speaking with reference to endowed charities, would include in the category educational and religious charities, as well as charities for the relief of the poor. Roughly speaking, I think he would exclude the fourth division. Even there it is difficult to draw the line. A layman would probably be amused if he were told that a gift to the Chancellor of the Exchequer for the benefit of the nation was a charity. Many people, I think, would consider a gift for the support of a lifeboat a charitable gift, though its object is not the advancement of religion, or the advancement of education, or the relief of the poor. And even a layman might take the same favourable view of a gratuitous supply of pure water for the benefit of a crowded neighbourhood.

As Lord Macnaghten's comments make clear, it is the fourth head which was then, and continues to be, the source of confusion and difficulty. *Tudor on Charities*[3] gives the following non-exhaustive list of the kinds of undertakings which have been held from time to time to be charitable:

(i) Public works, etc. Trusts falling under this sub-head include trusts for the provision of public works, services or facilities, which in modern times are not usually paid for out of trust funds provided by public spirited donors or testators, but by some public authority out of public funds which the authority is bound or entitled to apply for the purpose in question. Such trusts comprise trusts for purposes which have been held charitable under Lord Macnaghten's fourth head of charity but, in fact, also fall under Sir Samuel Romilly's fourth head. Examples of such trusts are trusts for the repair of highways; to build bridges; to provide a supply of pure water for the use of the inhabitants of a town; to provide a town with lighting; for the improvement of a town; to build a courthouse; to build a workhouse; to provide a cemetery; or a crematorium; or the support of the poor of the parish. [Footnotes omitted.]

The same authors, in an attempt to synthesize the decided cases, state their understanding of the law as follows [at page 92]:

Although it has been contended that Lord Macnaghten's fourth class, as distinguished from Sir Samuel Romilly's fourth class, is not exclusively represented in the preamble by the repair of bridges, etc., or the maintenance of houses of correction, it is considered that trusts for the provision of public works, services or facilities are for objects of general public utility, and that general public utility, with the strongest possible emphasis on the adjective "general," was the charitable characteristic possessed in common by the purposes recited in the preamble and by the other purposes, which, in the cases cited above, were held charitable. In none of those cases were the community at large or any of the inhabitants of the geographical area of the trust excluded from benefit because they lacked some personal qualification such as membership of a specified religious body or profession or because they were not engaged in a specified trade, business or calling. It is considered that the primary test to apply for the purpose of deciding whether the trust has the necessary public character is not whether the number of persons who may be able and willing to avail themselves of the benefits is large or small, but whether or not any inhabitant of the area of the trust is excluded because he lacks some personal qualification.

In Canada the leading authority on the subject is Stone J.A.'s masterful review of the law in *Native Communications Society of B.C. v. Canada (M.N.R.)*.[4] He lays down the principles to be applied as follows:

A review of decided cases suggests that at least the following propositions may be stated as

necessary preliminaries to a determination whether a particular purpose can be regarded as a charitable one falling under the fourth head found in Lord Macnaghten's classification:

(a) the purpose must be beneficial to the community in a way which the law regards as charitable by coming within the "spirit and intendment" of the preamble to the Statute of Elizabeth if not within its letter. (*National Anti-Vivisection Society v. Inland Revenue Commissioners,* [1948] A.C. 31 (H.L.) at pages 63-64; *In re Strakosch, decd. Temperley v. Attorney General*, [1949] Ch. 529 (C.A.), at pages 537-538), and

(b) whether a purpose would or may operate for the public benefit is to be answered by the Court on the basis of the record before it and in exercise of its equitable jurisdiction in matters of charity (*National Anti-Vivisection Society v. Inland Revenue Commissioners* (*supra*), at pages 44-45, 63).

Can it be said that the purposes of the appellant fall within "the spirit and intendment" of the preamble to the Statute of Elizabeth and, therefore, within the fourth head of Lord Macnaghten's definition of the word "charity"? In answering this question we must bear in mind what Lord Greene, M.R. had to say in *In re Strakosch* (*supra*), at page 537:

In *Williams' Trustees v. Inland Revenue Commissioners* ([1947] A.C. 447) the House of Lords has laid down very clearly that in order to come within Lord Macnaghten's fourth class, the gift must be not only for the benefit of the community but beneficial in a way which the law regards as charitable. In order to satisfy the latter it must be within the "spirit and intendment" of the preamble to the Statute of Elizabeth. That preamble set out what were then regarded as purposes which should be treated as charitable in law. It is obvious that as time passed and conditions changed common opinion as to what was properly covered by the word charitable also changed. This has been recognized by the courts as the most cursory examination of the cases shows. [Emphasis added.]

More recently, in *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corpn.*, [1968] A.C. 138 (H.L.), Lord Wilberforce reminds us that "the law of charity is a moving subject". I refer more fully to his opinion on the point as expressed at page 154 of the report:

On this subject, the law of England, though no doubt not very satisfactory and in need of rationalisation, is tolerably clear. The purposes in question, to be charitable, must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment of the preamble to the statute 43 Eliz. 1, c. 4. The latter requirement does not mean quite what it says; for it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied. Lord Macnaghten's grouping of the heads of recognised charity in *Pemsel's* case ([1891] A.C. 531, 583) is one that has proved to be of value and there are many problems which it solves. But three things may be said about it, which its author would surely not have denied: first that, since it is a classification of convenience, there may well be purposes which do not fit neatly into one or other of the headings; secondly, that the words used must not be given the force of a statute to be construed; and thirdly, that the law of charity is a moving subject which may well have evolved even since 1891. [Emphasis added.]

Nor should we ignore the advice of Lord Upjohn as expressed in the same case. In deciding whether the charity there in question fell within the spirit and intendment of the preamble to the Statute of Elizabeth, he said (at page 150):

This so-called fourth class is incapable of further definition and can to-day hardly be regarded as more than a portmanteau to receive those objects which enlightened opinion would regard as qualifying for consideration under the second heading.

Against this background, we may now look at the facts of the present appeal. The appellant, as its name indicates, is a "FreeNet" organization. That term is usefully defined by Gilster:[5]

Free-Net A community-based, volunteer-built network. Free-Nets are springing up in cities around the world, as citizens work to provide free access to selected network resources, and to make local information available on-line.

The appellant is incorporated under the *Society Act* of British Columbia.[6] Its constitution includes the following paragraphs:

PURPOSES

2. The purposes of the society are to:

(a) develop, operate and own a free, publicly accessible community computer utility in the Lower Mainland of British Columbia providing the broadest possible range of information and possibilities for the exchange of experience, ideas and wisdom;

(b) establish and operate a FreeNet community computer utility in the Lower Mainland of B.C.;

(c) encourage the development of a wide range of community electronic information resources;

(d) encourage the broadest possible participation of information providers in making their information available on FreeNet;

(e) work toward building a network of similar services in cities and towns internationally;

(f) work toward the widest possible public access to government and other information through FreeNet and other non-profit organizations such as libraries;

(g) work with other Canadian FreeNets to create a Canadian freenet network;

(h) educate and encourage the public in the use of computer telecommunications and information retrieval; and

(i) research ways to improve and expand public access to and use of electronic information resources and facilities.

WINDING-UP

3. In the event of winding-up or dissolution of the Society, funds and assets of the Society remaining after the satisfaction of its debts and liabilities, shall be given or transferred to such organization or organizations promoting the same purposes as this Society, as may be determined by the members of the Society at the time of winding up or dissolution, and if effect cannot be given to the aforesaid provisions, then such funds shall be given or transferred to some other organization or organizations, provided however that such organization referred to in this paragraph shall be a registered charity recognized by Revenue Canada Taxation as being qualified as such under the provisions of the *Income Tax Act* of Canada from time to time in

effect.

NON-PROFIT

4. The purposes of the Society shall be carried out without purpose of gain for its members and any profits or other accretions to the society shall be used for promoting its purposes.

UNALTERABLE

5. Paragraphs 3, 4 and 5 of the constitution are unalterable in accordance with the *Society Act*.

As the case material makes plain, the appellant provides free public access to all members of the community who wish such service in the Lower Mainland of British Columbia. It allows its users access to the Internet as well as to information stored in the appellant's own system by community organizations. Access to such information is available to FreeNet users whether or not they register with the appellant but those who do register gain the additional facility of being able to exchange information with one another either through on-line discussion groups or by individual communication through E-mail. While it is the appellant's policy not to censor information stored in its system, it does reserve the right to review and remove information should it be necessary to do so for legal reasons.

As I have previously indicated, the Minister took the view that the appellant does not qualify as a registered charity within the meaning of the *Income Tax Act*. The following paragraphs from the Minister's refusal letter fairly summarize his views:

You contest our opinion on the basis that the Association's role and function are analogous to corresponding physical facilities. In particular, you submit that the Association's "facility" has two distinct aspects:

1. electronic library; and

2. electronic community centre.

I have considered your argument, and while the library analogy is compelling, there is no clear judicial precedent to recognize networks, electronic or otherwise, and in particular computer networks, as charitable.

As explained in our letter of March 16 (copy attached), the provision of a community facility for public use for a variety of community events is charitable. This is so, insofar as the administration of such a facility retains sufficient control over the use to which the facility is applied.

In the case at hand, I am not satisfied that in its role as an "electronic" community centre, the Association serves the same purpose as a "physical" community facility. The Association's "electronic community centre" would appear to be a vehicle for the exchange of information. I am also concerned that a user of E-mail does not have to be a member, and that the messages transmitted can be either private or personal. In my view, this demonstrates that the Association does not have sufficient control over how the facility is used. [Case material, at page 7.]

It is from that decision that the appellant has appealed to this Court.

I may say at the outset that I find the Minister's decision to be revealing. He describes the analogy to a public library as "compelling" but refuses to accept it because of the absence of a "clear

judicial precedent". There could hardly be a clearer invitation to this Court to provide such a precedent. I shall have more to say shortly about the Minister's apparent concern over the appellant's absence of control of the information stored in its system.

As I understand the law stated in the authorities previously cited, this Court, in deciding whether the appellant falls within the fourth category of charities, is required to determine whether its purposes fall within the spirit and intendment of the Statute of Elizabeth I. That, in its turn, requires us to look at the appellant to see if it has the same type of purpose as those listed in the preamble to the statute. The detail of how those types of purposes will work themselves out in the real world will, of course, change as society changes but the types themselves will not.

Information is the currency of modern life. This has been properly called the information age. The free exchange of information amongst members of society has long been recognized as a public good. It is indeed essential to the maintenance of democracy, and modern experience demonstrates more and more frequently that it, more than any force of arms, has the power to destroy authoritarianism. The recognition of freedom of speech as a core value in society is but one aspect of the importance of freedom of information.

The preamble to the Statute of Elizabeth I speaks of the repair of bridges, ports, causeways and highways. These were, of course, at the time the essential means of communication. With the passage of time they have been considered so essential to the public welfare that they have been almost entirely taken over by public authorities. The same is true of the example given by Lord Macnaghten in *Pemsel'*s case, and the supply of pure water, though generally not "gratuitous", is now viewed as an essential public service. Likewise, the provision of electric light, one of the examples listed in the foregoing quotation from *Tudor on Charities* .

While I do not want to insist unduly on the analogy to the information highway, there is absolutely no doubt in my mind that the provision of free access to information and to a means by which citizens can communicate with one another on whatever subject they may please is a type of purpose similar to those which have been held to be charitable; it is within the spirit and intendment of the preamble to the Statute of Elizabeth I.

I wish to say a word about the Minister's evident concern with the question of control of content. In my view, and with respect for those of a contrary opinion, it misses the mark. A distinction must be made between the medium and the message. Where an organization which itself is providing a message to the public seeks charitable status (e.g. a newspaper, a television station, etc.) there must, of course, be concern that it controls the messages so as to ensure that they are consistent with a charitable purpose and are not used for some other purpose. That is the only type of control with which the Minister can be legitimately concerned and it is not applicable to the present case since the appellant provides access to messages but not the messages themselves. It is, of course, the case that control of content has historically been imposed by providers of simple access by reason of physical limitations: a library cannot stock all the books that have ever been published and a meeting hall cannot accommodate all the persons and groups who might conceivably want to use it. Those limitations, however, are not a condition of their charitable purpose: an infinite library or a boundless meeting hall would not lose their charitable character. The information highway is almost limitless in its scope and capacity but that is no reason for failing to recognize its vast potential for public benefit. The appellant's purpose in providing access to it is one of general public utility.

Nor should the fact that the appellant's system, and indeed the Internet itself, can be used for private or commercial purposes or misused for criminal or destructive purposes serve to disqualify

the free provision of access thereto from obtaining charitable status under the Act. Once again, we are dealing only with the medium and not with the content of the message. A real highway or bridge in the time of the first Elizabeth was recognized as a public good because it allowed the inhabitants of a town or village to communicate with the outside world and vice versa. It might be used by persons going to market as well as to church or school. It might also be used by highwaymen or by absconding debtors. The nature of the traffic, however, did not serve to dilute or diminish the great public good provided by the facility itself.

The appellant's purpose is to provide public access for the inhabitants of the Lower Mainland of British Columbia to the modern information highway. That is, in my view, as much a charitable purpose in the time of the second Elizabeth as was the provision of access by more conventional highways in the time of the first Queen of that name.

I would allow the appeal, set aside the decision of the Minister and refer the matter back to the Minister for reconsideration on the basis that the appellant is a charitable organization within the meaning of the *Income Tax Act*.

Pratte J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

Décary J.A. (*dissenting*): The appellant, the Vancouver Regional FreeNet Association (the Association) applied for charitable status pursuant to subsection 248(1) of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, hereinafter the Act. The Minister of National Revenue refused the application, and the appellant now appeals from that determination pursuant to subsection 172(3) [as am. by S.C. 1994, c. 7, Sch. II, s. 141] of the Act.

The Association is incorporated under the laws of British Columbia. It is a non-profit organization which offers free access to the "information highway," including the Internet. Individuals equipped with personal computers and modems can, through the Association, access diverse information sources such as newsletters, community events calendars, government reports and environmental data. Registered users enjoy access to on-line discussion groups, "electronic mail", and a plethora of nationally and internationally sourced mailboxes. The service offered by the Association is maintained by community volunteers and is funded by membership fees and donations.

The purposes of the Association are defined in its constitution as follows:

2. The purposes of the society are to:

(a) develop, operate and own a free, publicly accessible community computer utility in the Lower Mainland of British Columbia providing the broadest possible range of information and possibilities for the exchange of experience, ideas and wisdom;

(b) establish and operate a FreeNet community computer utility in the Lower Mainland of B.C.;

(c) encourage the development of a wide range of community electronic information resources;

(d) encourage the broadest possible participation of information providers in making their information available on FreeNet;

(e) work toward building a network of similar services in cities and towns internationally;

(f) work toward the widest possible public access to government and other information through FreeNet and other non-profit organizations such as libraries;

(g) work with other Canadian FreeNets to create a Canadian freenet network;

(h) educate and encourage the public in the use of computer telecommunications and information retrieval; and

(i) research ways to improve and expand public access to and use of electronic information resources and facilities. [Appeal Book, at page 65.]

The Association applied on July 29, 1993 for registration as a charity. Following a protracted exchange of correspondence, the Minister informed the Association by letter dated July 25, 1994, of its refusal to grant the application for charitable status. I have selected the following passages from the Minister's letters of March 16, 1994 and July 25, 1995 as summarizing the essence of his decision:

Your position is that the Association should be recognized as serving a function of "general public utility", that it provides a service that is the modern equivalent of a library, museum, public hall, reading room, or observatory.

We see important differences between these sorts of public facilities, and the function served by the Association.

Essentially, we see the Association as a telecommunication network, a transmitter of information, in much the same way as a newspaper, a magazine, or a radio or television network. In our view, these sorts of "networks" and "transmitters" are not charitable as fourth head purposes.

Moreover, it is our understanding that in providing a library, museum, and reading room, the administrators of these facilities determine the materials to be housed within for public use. These organizations select which materials they wish to provide to the public so that they may have access to books, scientific objects, works of art, etc.. In our view, the Association is more a provider of a "facility" for others to house whatever information or material they wish within that structure.

The provision of a public hall, a park , or a community centre facility (real property) for the general use of the public for a variety of community activities (including, among others, a meeting place for social gatherings and events, enjoyment of beauty and nature, healthy recreation and incidental sports activities) is charitable. The provision of a communications network for the public to transmit and receive information electronically, does not, in our view, provide an analogous function.

An observatory is more a facility which provides for the observation of natural phenomena (as in astronomy), and is devoted exclusively to the study and advancement of the sciences. The Association is not established for such purposes or activities.

We appreciate that some of these facilities might incidentally provide public space for advertising, similar to a computer bulletin board. Again, however, we believe that these sorts of organizations are responsible for ensuring that the materials placed on their public bulletin boards meet a standard for acceptable content. On the other hand, the Association's provision of a bulletin board

seems to have more prominence in its overall function, and it does not seem to regulate the content of messages, etc., carried on the network.

Request for Analogy

In general, the Department has not taken a restrictive view of the requirement for analogy to decided cases and has not felt constrained to deny registration where a reasonable analogy can be drawn between the purposes at hand and those previously held to be charitable.

However, the analogies you have drawn do not overcome our concern that the Association is not established to operate exclusively for charitable purposes. [March 16, 1994, letter, Appeal Book, at pages 20-21.]

and

You contest our opinion on the basis that the Association's role and function are analogous to corresponding physical facilities. In particular, you submit that the Association's "facility" has two distinct aspects:

1. electronic library; and

2. electronic community centre.

I have considered your argument, and while the library analogy is compelling, there is no clear judicial precedent to recognize networks, electronic or otherwise, and in particular computer networks, as charitable. [July 25, 1994, letter, Appeal Book, at page 7.]

The Court finds itself once again compelled to consider the purport of the legal definition of "charity" as expressed in the *Income Tax Act* . Subsection 248(1) defines "registered charity" as follows:

248. (1) . . . .

"registered charity" at any time means

(*a*) a charitable organization, private foundation or public foundation within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada . . .

. . .

that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation;

The definition of "charitable organization" is considered in subsection 149.1(1) of the Act:

149.1 (1) . . . .

"charitable organization" means an organization, whether or not incorporated,

(*a*) all the resources of which are devoted to charitable activities carried on by the organization itself, [My emphasis.]

It is well accepted in Canada[7] that "charity" is defined by reference to the four classifications elaborated by Lord Macnaghten in *Commissioners of Income Tax v. Pemsel* , [1891] A.C. 531 (H.L.), at page 583. An activity will be deemed charitable at law where its purpose is the relief of poverty, the advancement of education, the advancement of religion, or other purposes beneficial to the community not falling under any of the preceding heads.

The fourth head, with which we are now concerned, has proven the testbed for the "gradual extension" of the law of charities beyond those purposes which have been recognized at common law. This open class is limited only by the qualification that purposes which benefit the community must do so in a way the law regards as charitable in order to enjoy the special status of a charity. The test remains whether the purpose, and hence the benefit conferred, is within the spirit and intendment of the preamble to the *Charitable Uses Act 1601* .[8] This law, commonly referred to as the Statute of Elizabeth I, was drafted to curb abuses in the administration of trusts of a charitable nature, and listed in its preamble the following charitable purposes:

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

Tudor on Charities[9] identifies the two approaches that the English courts have taken when deciding whether or not a purpose is within the spirit and intendment of the preamble. The earlier, restrictive doctrine required that a purpose could only be brought within the spirit of the Act by analogy to an existing charitable purpose: *Morice v. Durham (Bishop of)* (1804), 9 Ves. 399; 32 E.R. 656, and more recently *Barralet v. Attorney-General*, [1980] 3 All E.R. 918 (Ch. D.), at page 926. The later doctrine adopts a much broader approach in determining whether or not a purpose is within the spirit and equity of the Preamble. In *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*, [1972] Ch. 73 (C.A.), Russell L.J. said, at page 88 of the report:

In a case such as the present, in which in my view the object cannot be thought otherwise than beneficial to the community and of general public utility, I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the Statute: and I think the answer to that is here in the negative.

In a prior decision, *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corpn.*, [1968] A.C. 138 (H.L.), Lord Wilberforce comments that the classes of charitable purposes are far from circumscribed:

The latter requirement [that purposes fall within the spirit and intendment of the preamble] does not mean quite what it says; for it is now accepted that what must be regarded is not the wording to the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied.[10]

To begin with, I am not prepared to accept in its entirety the approach adopted by the English courts in *Incorporated Council of Law Reporting for England and Wales*, *supra*. To my mind, there

is no Canadian authority for the principle that all purposes which in some way benefit the community are presumed to be charitable. There is no such presumption. To be recognized under the *Income Tax Act* as a "charitable organization" is a privilege that the Minister confers upon being satisfied that an organization meets the required conditions, an essential one being that all its resources "are devoted to charitable activities". The onus is therefore on the organization to convince the Minister, and eventually this Court, that on paper as well as in reality it is worthy of such recognition.

Canadian courts have acknowledged that the fourth category is not closed and that the law of charities is a "moving subject" as evinced by Lord Wilberforce: *Native Communications Society of B.C. v. Canada (M.N.R.)* , [1986] 3 F.C. 471 (C.A.); *Everywoman's Health Centre Society (1988) v. M.N.R.*, [1992] 2 F.C. 52 (C.A.); *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340 (C.A.); *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* (1996), 195 N.R. 235 (F.C.A.); *Briarpatch Inc. v. Minister of National Revenue* (1996), 197 N.R. 229 (F.C.A.). Nonetheless, the "gradual extension" of the fourth head has been allowed in only the most meritorious of circumstances. Justice Robertson of this Court adverted in *Briarpatch* ,[11] *supra*, that:

Although broadly worded as a residual "catch-all", the fourth category has been interpreted cautiously, if not narrowly, by the courts.

Notwithstanding that the Court is prepared to adopt an open-minded approach in characterizing purposes under the fourth head, it remains that the mere provision of a benefit to the community is not tantamount to a charitable purpose: *Strakosch, decd., In re. Temperly v. Attorney-General*, [1949] Ch. 529 (C.A.); *Macduff, In re. Macduff v. Macduff*, [1896] 2 Ch. 451 (C.A.); *Attorney-General v. National Provincial and Union Bank of England*, [1924] A.C. 262 (H.L.); *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447 (H.L.). In *Vancouver Society of Immigrant and Visible Minority Women*, *supra*, this Court observed as follows:

The provision of services and workshops to the community, while laudable, is not necessarily charitable at law and activities and objects of general public utility are not always charitable in the legal sense. Lord Wilberforce, in **D'Aguiar v. Guyana Inland Revenue Commissioner**, [1970] T.R. 31 (P.C.), cautioned the courts against granting charity status where the language used was "so vague as to permit the property to be used for non-charitable purposes" (at p. 34) and where the purpose was not "sufficiently definite and specific" to enable the court to be satisfied that the organization will be administered "in a manner recognized as charitable."[12] [My emphasis.]

The appellant relies on certain analogies which have been characterized as charitable under the rubric of "public works". In particular, counsel for the appellant proposes to include the Association within the fourth head of charity as being of "general public utility" in a manner analogous to public highways, public libraries and public halls. In my opinion, it would be useful at this point to dispense with the potentially misleading use of analogies in determining the charitable nature of the service offered by the Association. I would borrow the following suggestion of Stone J.A. as stated in *Native Communications* , *supra*:

. . . it would be a mistake to dispose of this appeal on the basis of how this purpose or that may or may not have been seen by the courts in the decided cases as being charitable or not.[13]

Use of analogies is particularly unwarranted because as observed by Lord Wilberforce in *Scottish Burial*, *supra*, old social needs may become obsolete or satisfied. What was charitable in the past is not necessarily charitable in the present age.

The "information highway" is a concept that is novel to our era and compares only marginally with the examples raised by the appellant. The Court should rise above the constraints of analogy and, rather than compare the extrinsic qualities of past charitable purposes with the subject before it, consider the essential charitable nature of the organization on appeal.

Public benefit is an interminably broad concept, which spills over from the pure altruism of community welfare at one end of the spectrum into the realm of collective self-interest at the other. It is the courts' role to decide in each case whether the community values underpinning a certain purpose are overshadowed by what is otherwise its essentially non-charitable character. I note that in *Scowcroft, In re. Ornrod v. Wilkinson*, [1898] 2 Ch. 638 (Ch. D.), in finding that the gift of a reading room was a devise for the public benefit, the Court did not disregard the objects of the bequest which stated that the room was "to be kept free from intoxicants and dancing."[14]

In the absence of a statutory definition of charity, the courts are bound to exercise their supervisory role in determining the *quantum* and quality of "public benefit" deserving of charitable status. While I do recognize the value of the service which the Association provides to the community, I do not believe that the Association is a charity within the legal meaning of the word. The FreeNet movement is a visionary community-based initiative which strives to fulfil a demand for affordable and universal access to the information highway. Many of the information services provided by the appellant are of great public utility and, with the proliferation of personal computers, may at some time become essential services. Health information, news, weather bulletin boards, and other forms of information services constitute the core of the important community-oriented services provided by FreeNets. Nonetheless, a survey of the record and close scrutiny of the appellant's constituting document does not permit me to conclude that the appellant would have restricted its activities exclusively to the aforementioned charitable purposes.

The appellant's constitution is drafted in general terms, with the primary purpose established in paragraph 2(a). The Association endeavours to "develop, operate and own a free, publicly accessible community computer utility". The remaining purposes, which are collateral to the main objective of establishing and operating the facility, constitute essentially in encouraging the proliferation of the service amongst computer users and throughout Canada, and in encouraging the development of resources accessible on the FreeNet. For reasons stated earlier, the mere provision of a free service to the public does not provide the measure of public utility sufficient to qualify the service as charitable. An analysis of the nature and content of the service is required.

The appellant raises in support of its submissions a government document entitled *Competition and Culture on Canada's Information Highway: Managing the Realities*[15] which advocates the development of public access to the information highway. This illustration is well taken, and had the record revealed that the Association was to operate solely as a "public access point" giving users access to a restricted range of public interest services, I may have concluded differently. However, the Association's constitution in no manner reflects what are in my view necessary limits to the services which the Association, as a charity, should be authorized to provide. Contrary to the apparently unlimited scope of the appellant's offerings, the service projected by the CRTC is in the nature of a community access point to a "public lane" offering only selected information highway services of exclusively community interest.

I have not been convinced that the Association strives to limit its purposes exclusively to those which the law would regard as charitable in the nature of "general public utility". Nor does it appear from the evidence that the Association would be in a position to exercise control or impose limits on the types of services to which users have access. Although I refrain from making a

finding with respect to the respondent's contention that political platforms and commercial interests might be advanced on the appellant's service, I have no doubt that this type of activity is well within the realm of possibility on the Internet. Despite the formidable capacity of this tool as an information provider and educator, it is also vested with the manifest capacity to provide a platform for the expression and promotion of private interests. This potential, in my view, brings the Association outside the purview of a purely charitable purpose.

In *Native Communications Society*, *supra*, Stone J.A. applied a benignant construction in adopting as charitable the objects of a similarly deficient constituting document. At issue was whether the Minister had erred in refusing to register the Society whose purposes included developing radio and television productions related to the native people of British Columbia and in publishing a non-profit newspaper devoted to the same. In allowing the appeal, Stone J.A. analyzed the content of the newspaper *Kahtou* which the organization proposed to publish. Ellen Zwiebel, in an article entitled "A Truly Canadian Definition of Charity and a Lesson in Drafting Charitable Purposes",[16] commented on the Court's approach which went beyond mere consideration of the Native Communications Society's purposes:

The modern trend to broad statements of corporate purposes developed for the most part because of the need for business corporations to avoid the doctrine of ultra vires. A different set of concerns operates for charitable organizations. Because an organization must have only charitable purposes to qualify for charitable status, it is important to have charitable purposes clearly expressed. The issue presented in subparagraphs 2a through c [of the Native Communications Society's Certificate of Incorporation] is whether the language is restrictive enough, or whether it is capable of including non-charitable subject matter. For instance, programs "of relevance to native people" could include programs with partisan political content or the simple broadcasting of hockey games which, although they might be appealing to the targeted audience, are devoid of charitable content. In general the courts have been willing to look to extrinsic evidence for confirmation that their purposes are restricted to charitable activities. [My emphasis.]

In this regard, Stone J.A. wrote, at pages 481-482 of the report:

Counsel for the respondent contends that the newspaper contains only "news" which cannot be seen as "educational". I have difficulty in following this argument for it seems to me that in the minds of its readers the newspaper could well be regarded as educational as well as informative. I need not decide the point. It is apparent that the newspaper is used more than as a mere vehicle for conveying news . An examination of its pages shows that through them the Indian readers are made aware of activities of a cultural nature going on elsewhere in the wider Indian community and of attempts being made to foster language and culture as, for example, through greater use of native languages and the revival of ancient crafts, music and story telling. All of this may well instill a degree of pride of ancestry in the readers of *Kahtou*, deepen an appreciation of Indian culture and language and thereby promote a measure of cohesion among Indian people of British Columbia that might otherwise be missing. The record indicates that radio and television programs are being designated along the same general lines. [My emphasis.]

The appellant does not undertake in its constitution to limit the provision of services to those displaying a clearly public, or charitable nature. Nor does the Court have before it any "extrinsic evidence" upon which to base a conclusion regarding the full sweep of the services which are or may become accessible on the rapidly evolving information highway. In my view, this is fatal to the appeal. The Court is prevented, upon analysis of the Association's stated purposes and activities, from satisfying itself as to the breadth of the subject-matter accessible on the

Vancouver FreeNet. In my opinion, FreeNet is a tool whose uses, unless specifically prescribed, fall well beyond the purview of activities which are exclusively charitable in the legal sense.

For the above reasons, I am of the opinion that the appeal should be dismissed.

[1] (U.K.), 43 Eliz. I, c. 4.

[2] *Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.), at pp. 583-584.

[3] Spencer G. Maurice and David B. Parker, 7th ed., London: Sweet & Maxwell, 1984, at pp. 90-91.

[4] [1986] 3 F.C. 471 (C.A.), at pp. 479-481.

[5] Paul Gilster. *The New Internet Navigator*. New York: Wiley, 1995, glossary.

[6] R.S.B.C. 1979, c. 390.

[7] *Guaranty Trust Company of Canada v. Minister of National Revenue*, [1967] S.C.R. 133.

[8] (U.K.), 43 Eliz. I, c. 4.

[9] Jean Warburton, *Tudor on Charities*, 8th ed. London: Sweet & Maxwell, 1995, at p. 86.

[10] At p. 154.

[11] At p. 231.

[12] At p. 238.

[13] At p. 482.

[14] At p. 642.

[15] Canadian Radio-television and Telecommunications Commission. *Competition and Culture on Canada's Information Highway: Managing the Realities*. May 19, 1995, at pp. 43-44.

[16] *The Philanthropist*, (Fall 1987) Vol. 7, No. 1, at p. 4.