Occasional Paper

‘Ancillary’, ‘Incidental’ and Canadian registered charities – Concepts and Meanings

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The Pemsel Case
FOUNDATION

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– Lord Wilberforce

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1. Introduction

The courts in common law jurisdictions have long recognized that a charity may validly pursue purposes and activities that, on their own, would not be considered charitable, but only if those purposes and activities are ancillary, incidental, ancillary and incidental, ancillary or incidental, subsidiary, subservient, or concomitant to a valid charitable purpose.[1] This idea is reflected in the Canadian federal *Income Tax Act* ("the ITA" or "the Act"), which uses the phrase 'ancillary and incidental' to describe the types of political activities that may be permissible for charitable organizations and foundations.[2] The terms used in this paper reflect the current use of regulators and the judiciary but the text also analyzes discrepancies between current and historical uses of the words 'ancillary' and 'incidental'.

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[1] For cases that use the word ancillary alone, see *Re Camp Wakonda of the Kiwanis Club of Lakeshore and Regional Assessment of Commissioner Region #31 et al*, 1979 CanLII 1923 (ONSC), 24 OR (2d) 807, 100 DLR (3d) 172 [*Camp Wakonda*]; *The North of England Zoological Society v Chester Rural District Council*, [1959] 3 All ER [*Zoological Society*]; *Ronald McDonald House TM Society of BC v Assessor of Area 9*, 1984 CanLII 274 (BCCA), 7 DLR (4th) 367, 57 BCLR 60 [*Ronald MacDonald House*];
For cases that use the word incidental alone, see *Alberta Institute on Mental Retardation v R*, [1987] 3 FC 286, 2 CTC 70, 76 NR 366 [*Alberta Institute*]; *Centre Culturel de Saint-Quentin Inc v New Brunswick*, [1987] NBJ 625, NBR (2d) 139, 5 ACWS (3d) 328 [*Saint-Quentin*]; *The Commissioners of Inland Revenue v James Forrest (Secretary of the Institution of Civil Engineers)*, (1890) 15 AC 334, 1890 WL 9872 (HL) [*Forrest*]; *Inland Revenue Commissioners v Yorkshire Agricultural Society*, [1928] 1 KB 611, WL 21942 *[Yorkshire Agricultural]; Institution of Civil Engineers v Inland Revenue Commissioners*, [1932] 1 KB 149 [*Civil Engineers*]; *Towle Estate v Minister of National Revenue*, [1967] SCR 133, CTC 755, 67 DTC 5003 [*Guaranty Trust*]; *West End Cultural Centre Inc v Winnipeg (City)*, [1993] MJ 349, 2 DMPL 236, 41 ACWS (3d) 13 [*West End Cultural Centre*];
For cases that use the phrase 'ancillary and incidental' or the phrase 'incidental and ancillary', see *Re Centenary Hospital Assn*, 1989 33 ETR 270, 69 OR (2d) 1, 59 DLR (4th) 449 [*Centenary Hospital*]; *Congregational Union of NSW v Thistlethwayte*, [1952] HCA 48, 87 CLR 375 [*Thistlethwayte*]; *Re Public Trustee and Toronto Humane Society et al*, [1987] OJ 534, 60 OR (2d) 236, 40 DLR (4th) 111 [*Toronto Humane Society*]; *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue*, [1999] 1 SCR 10, 169 DLR (4th) 3, 99 DTC 5034 [*Vancouver Society*];
For cases that use the phrase 'ancillary or incidental' or 'incidental or ancillary', see *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*, [2008] HCA 55 [*Word Investments*]; *Re Laidlaw Foundation* (1984), 48 OR (2d) 549, 13 DLR (4th) 491, 18 ETR 77, 6 OAC 181 [*Laidlaw*]; *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*, [2008] FCA 983 [*Women Lawyers' Association*];
For cases that uses the words subsidiary or subservient, see *Attorney General for NSW v the NSW Henry George Foundation Ltd*, [2002] NSWSC 1128 *[Henry George Foundation*]; *In Re Hood*, [1931] 1 Ch 240, 73 ALR 1354, 1930 WL 7873 [*Hood*]; *Re Centenary Hospital Assn*, 1989 33 ETR 270, 69 OR (2d) 1, 59 DLR (4th) 449;
For a case that uses the word concomitant, see *The Commissioner of Taxation v The Triton Foundation*, [2005] FCA 1319 [*Triton Foundation*]; *Congregational Union of NSW v Thistlethwayte*, [1952] HCA 48, 87 CLR 375 [*Thistlethwayte*].

It is worth noting here that a narrower reading of the incidental component of the doctrine is asserted by some commentators. On that view, being incidental can only save activities, rather than either purposes or activities, from violating the exclusively charitable character required to qualify for status as a charity. This position suggests that charitable status is not vitiated simply because (1) an activity carried out for a charitable purpose might incidentally yield a seemingly non-charitable consequence (the dual character problem) or (2) a seemingly suspect activity is being carried out for a charitable purpose. Thus the incidental doctrine is concerned with activities. Provided an activity is being carried on for a charitable purpose, that activity will be permissible for a charity notwithstanding that that activity might generate seemingly non-charitable consequences and/or not appear to be intrinsically charitable. This position understands the incidental doctrine as providing an interpretive tool for assessing the link between activities and charitable purposes. Understood this way, it cannot be used as authority to depart from the principle that charities must be established for exclusively charitable purposes. Rather, it refines our understanding of the range of activities charities may undertake in their pursuit of charitable purposes. This paper argues for a broader interpretation on the basis that the distinction between incidental purposes and actives is not definitively settled in the Canadian case law; see especially p. 11 ff.

[2] *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss. 149.1 (6.1) and (6.2) [ITA]; The phrase also appears elsewhere in s.149.1 in a provision describing allowable activities of amateur athletic associations involving professional athletes.

The interaction of the ITA and the common law on the issue of the 'incidental purposes doctrine' adds a layer of complexity to any analysis of charities' non-charitable pursuits. The paucity of case law that applies 'ancillary and incidental' and the lack of clarity and consistency in the existing jurisprudence makes it difficult for charities and the Canada Revenue Agency ("the CRA") alike to understand when charities' pursuits which are not *prima facie* charitable might still be appropriate. This difficulty does not, however, give cause to ignore or narrow the exception to the common law and statutory rules of exclusive charitability that this branch of the law contemplates.

In some revocation letters sent to charities by the CRA, the CRA has supported its revocation of charitable status by claiming that the activities or purposes of the involved charities were not exclusively charitable, but with no mention of whether any non-charitable activities could be characterized as ancillary or incidental.[3] While the activities may not have been incidental to charitable purposes, an acknowledgment of that possibility would be appropriate considering the broad application of the 'incidental purposes doctrine' in Canadian and international jurisprudence.[4]

Canadian courts, and counsel representing charities should also, it is argued here, be sure to consider whether an organization's non-charitable pursuits could be considered ancillary or incidental to charitable purposes. In a recent case, the Federal Court of Appeal ruled that the Credit Counselling Services of Atlantic Canada Inc. was not a charitable organization because its activities intended to *prevent* poverty (rather than to alleviate it) were not charitable.[5] The case turned on the finding that the prevention of poverty is not a charitable purpose, but regrettably there was no discussion of whether certain of the organization's services available to individuals who had not passed a means test (i.e., poverty-prevention activities) were ancillary and incidental to some other charitable purpose.

The CRA does appear to consider the incidental purposes doctrine in certain circumstances: the phrase 'ancillary and incidental' appears in much of the guidance and several of the policy statements published by the CRA.[6] Groups that pursue non-charitable purposes or activities that the CRA does not consider 'ancillary and incidental' to a valid charitable purpose risk losing or

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[3] See for example, Letter from Neil Barclay, Director, Charities Division, Canada Revenue Agency to R Abdel-Majid, Chairman, Jerusalem Fund for Human Services (nd) in Arthur Drache, Robert Hayhoe & David Stevens, eds, *Charities Taxation, Policy and Practice: Government Publications* (Toronto: Thomson Reuters Canada Limited 2015) vol 2 at 4A-1155 to 1176; Letter from Senior Audit Advisor, Charities Directorate, Canada Revenue Agency to Ayman al-Taher, President, The World Assembly of Muslim Youth (23 August 2011) in Arthur Drache, Robert Hayhoe & David Stevens, eds, *Charities Taxation, Policy and Practice: Government Publications* (Toronto: Thomson Reuters Canada Limited 2015) vol 3 at 4A-1795 to 1828, quote from 1798; Letter from Audit Division, Kitchener/Waterloo Tax Services Office to Albert Morrison, Childhope Foundation Canada (15 June 2012) in Arthur Drache, Robert Hayhoe & David Stevens, eds, *Charities Taxation, Policy and Practice: Government Publications* (Toronto: Thomson Reuters Canada Limited 2015) vol 1 at 4A-694 to 694.25; Letter from Ashley Thompson, Audit Division, Vancouver Island Tax Services Office to Yoshinori Tanabe, Executive Director, The Voice of the Cerebral Palsied of Greater Vancouver (8 January 2009) in Arthur Drache, Robert Hayhoe & David Stevens, eds, *Charities Taxation, Policy and Practice: Government Publications* (Toronto: Thomson Reuters Canada Limited 2015) vol 1 at 4A-694.30 to 694.41, quote at 694.38.

[4] The phrase 'incidental purposes doctrine' appears in the Canadian context in *Travel Just v Canada (Revenue Agency)*, 2006 FCA 343, [2007] 1 CTC 294 [*Travel Just*] at para 3, citing *Vancouver Society*, *supra* note 1 at paras 156-158.

[5] *Credit Counselling Services of Atlantic Canada Inc v Canada (National Revenue)* 2016 FCA 193 [*Credit Counselling Services*].

[6] See for example, Canada, Festivals and the Promotion of Tourism, CPS-005, September 2011 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-005-eng.html) [Festivals and Tourism]; Canada, Fundraising by Registered Charities, CG-013, June 2014 updated (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/fndrsng-eng.html) [Fundraising]; Canada, Guidelines for Registering a Charity: Meeting the Public Benefit Test, CPS-024, May 2014 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-024-eng.html) [Public Benefit Test]; Canada, Housing and charitable registration, CG-022, February 2014 updated (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hsng-eng.html) [Housing]; Canada, Promotion of Health and Charitable Registration, CG-021, August 2013 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hlth-eng.html) [Promotion of Health]; Canada, Registration of Arts Festivals, CPS-010, January 2015 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-010-eng.html) [Arts Festivals].

being denied charitable status. It is therefore very important for groups to understand how this concept is being applied so that they do not jeopardise the tax exemptions to which they may be entitled.[7]

It is also important that the CRA does not apply the concept of 'ancillary and incidental' in a way that is more restrictive than is warranted by the common law and the ITA. This paper will address three ways that characterizations in CRA publications could lead to undue restriction of the types of non-charitable pursuits that the CRA considers 'ancillary and incidental': 1) the publications refer almost exclusively to incidental and ancillary activities, while the common law also allows for ancillary and incidental purposes; 2) they define ancillary and incidental as two different requirements rather than one; 3) they reference the use of a proportionality test to determine whether an activity is ancillary and incidental to a charitable purpose.

2. Purposes and Activities

An awareness of the history of charity law in Canada is helpful in understanding the application of 'ancillary and incidental'. The ITA does not define what is charitable, relying instead on common law methodology to determine charitability for the purposes of registration.[8] Included in this approach is the common law rule that says an entity's charitability will not be defeated because it has some non-charitable purposes that are incidental to its charitable ones.[9] Because of the terminology used by the ITA, Canadian courts have applied this exception to activities in the same way the common law historically applied it to purposes.[10] The ITA refers to two types of groups that may be registered as charities: 1) charitable foundations, which must be "constituted and operated exclusively for charitable *purposes*" and; 2) charitable organizations, which must dedicate all their resources to "charitable activities carried on by the organization itself." These definitions add an element of complexity to the analysis which must be applied.

In 1986, s.149.1 of the ITA was amended to include provisions in ss. (6.1) and (6.2) describing certain types of ancillary and incidental political *activities*, adding further to the confused distinction between purposes and activities.[11] Nearly all the Canadian cases that refer to the phrase 'ancillary and incidental' do so in applying s. 149.1(6.1) and (6.2). Despite this, these cases use the same analysis that was developed as part of the 'incidental purposes doctrine' that the English House of Lords first referred to in 1890 or earlier.[12] Much of the historical charity law jurisprudence in common law countries resulted from the litigation of gifts and estates giving rise to charitable trusts.[13] Since these trusts were usually litigated before any funds were used to carry out activities, they were, as a practical matter, evaluated on their stated objects and on the powers conferred to trustees. This history means that the non-Canadian jurisprudence focused on non-charitable *purposes* ancillary and/or incidental to charitable purposes. In contrast, Canadian

[7] Donald J Bourgeois, *The Law of Charitable and Not-for-profit Organizations*, 3rd ed (Markham, ON: LexisNexis, 2002) at 307.

[8] *Vancouver Society, supra* note 1, at paras 142-143.

[9] *Guaranty Trust, supra* note 1, at paras 9-10.

[10] For example, in *Action des Chrétiens pour l'Abolition de la Torture (ACAT)* c R, 2003 FCA 499, [2003] 3 CTC 121, the Court applied a similar analysis to political activities as was applied to incidental purposes *in Guaranty Trust, supra* note 1.

[11] While the ITA was changed in 1986, the changes were made retroactive to 1985. *Positive Action Against Pornography v Ministry of National Revenue*, [1988] 2 FC 340, 49 DLR (4th) 74, [1988] 1 CTC 232 [*Positive Action*] at para 17.

[12] The earliest reference to potentially permissible incidental non-charitable purposes, uncovered by research for this paper, was in *Forrest, supra* note 1.

[13] Anne-Marie Piper, *ed, Charity Law: Jurisdictional Comparisons*, 1st ed (London: Thomson Reuters, 2012) at 161.

jurisprudence has focused more on activities because the concept of activities is embedded in the Canadian ITA.

Despite the willingness of Canadian courts to apply ancillary and incidental to both activities and occasionally purposes, the dominant common law approach to 'ancillary and incidental' has led to confusion over whether non-charitable *purposes*, not just activities, may be ancillary and incidental to charitable purposes. The dominant interpretative approach will be discussed later in this paper, but briefly, it states that a non-charitable purpose or activity will be ancillary and incidental to a charitable purpose if it is merely a means of achieving that charitable purpose rather than an end in itself.[14] This approach has been applied to various types of purposes and activities, including political activities.[15]

There is some suggestion in its recent publications that the CRA takes this to mean that only non-charitable activities may be ancillary and incidental and that all pursuits rising to the level of a purpose will not be permitted. CRA publications use the language "collateral purposes" when referring to unallowable non-charitable pursuits, but almost never acknowledge the possibility of ancillary and incidental purposes.[16] Out of the fifteen CRA publications (guidance and policy statements) containing the words ancillary and incidental, only one explicitly states that non-charitable purposes may be ancillary and incidental to charitable ones.[17] Many cases in the common law treat purposes as ancillary and incidental, but there is some ambiguity in where to draw the line between incidental purposes and unacceptable purposes. The difference between unacceptable dominant and collateral purposes, and allowable incidental purposes is not always obvious.

Because of the lack of judicial clarity on the subject and the framing of some provisions of the ITA, it is understandable that the CRA might take the position that only activities may be ancillary and incidental and not purposes. The confusion over purposes and activities has been furthered, as Justice Iacobucci pointed out in *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* [*Vancouver Society*], as a result of trusts and charities' constitutions stating as purposes or objects pursuits that would more accurately be described as powers or activities.[18] In 1949 an English Court of Appeal acknowledged a similar problem in *The Oxford Group v Commissioners of Inland Revenue* [*Oxford Group*].[19] In that case, Tucker L. J. found that powers misstated as objects need not be charitable so long as they were purely ancillary to a group's charitable main objects.[20] It could be argued that these cases require characterizing charities' stated pursuits as activities in order for those pursuits to be ancillary and incidental to a charitable purpose.

On a narrow analysis of these two authorities, one might conclude that only activities or powers can be ancillary and incidental to charitable purposes and that any ancillary and incidental

[14] *Vancouver Society, supra* note 1 at paras 156-157.

[15] *In Guaranty Trust, supra* note 1, this approach was applied to purposes generally; in *Alberta Institute, supra* note 1, it was applied to fundraising activities; in *Vancouver Society, supra* note 1, it was applied to political activities and the organization's stated purposes; finally, in *ACAT*, *supra* note 10, this approach was applied to political activities as well as some other on-their-face non-charitable activities.

[16] See for example Fundraising, Public Benefit Test, *supra* note 6.

[17] The Festivals and Tourism policy statement, *supra* note 6, states: "A dominant charitable purpose combined with other non-charitable purposes and activities, might be acceptable, provided they are ancillary and incidental to the dominant purpose."

[18] *Vancouver Society*, *supra* note 1, at para 158.

[19] *The Oxford Group v Commissioners of Inland Revenue*, (1946-1950) 31 TC, [1949] 2 All ER [*Oxford Group*].

[20] *Ibid*, at 248.

purposes are not true purposes. This conclusion, however, would be at odds with the incidental purposes doctrine established by a long line of English and international jurisprudence. It would also contradict the findings of Canadian courts, like the Supreme Court of Canada in *Towle Estate v. Minister of National Revenue* [*Guaranty Trust*], that have ruled non-charitable purposes to be potentially incidental to charitable ones.[21]

Drawing a clear distinction between purposes and activities in Canada, which does not exist elsewhere, is not supported by the case law. Canadian courts have, in some instances, disregarded the purposes/activities distinction completely, using the two words interchangeably within the same decision.[22] In his decision in *Actions des Chrêtiens pour l'Abolition de la Torture (L'ACAT)* c. R. [*ACAT*], Justice Décary specifically stated that he would be using "political purposes" and "political activities" interchangeably because "the adjective 'political' has the same meaning whether it is attached to 'purposes' or to 'activities'."[23] The terms 'purpose' and 'activity' are often conflated in this way in the common law. It is therefore unclear if, or how, the characterization of a pursuit as a purpose or activity should impact an analysis of whether that pursuit is 'ancillary and incidental'.

The Supreme Court commented on the distinction between purposes and activities in *Vancouver Society*, stating that activities are not inherently charitable and that their charitability depends on the purposes they support.[24] Research for this paper has identified only four Canadian cases since *Vancouver Society* in which the concept of 'ancillary and incidental' has formed part of the analysis. The continuing application of the incidental purposes doctrine in the context of a statutory regime that refers to charitable activities remains unsettled.

That being said, the willingness of Canadian courts to overlook the distinction between purposes and activities supports the argument that the characterization of a charity's pursuits as purposes should not be definitive in determining whether those pursuits are ancillary and incidental. Research for this paper uncovered no Canadian case that has explicitly overturned the international and Canadian cases that have ruled non-charitable purposes to be ancillary and incidental to other, charitable, purposes.

3. One Meaning or Two: Ancillary and incidental are synonyms, not two different requirements

There is further confusion in the case law and in CRA publications as to whether, in law, the words ancillary and incidental have two different meanings or whether they are synonyms for one another. In some instances, the words are used in a way that would suggest that ancillary and incidental set two different and separate standards that must be met. For example, in *Alliance for Life v. Minister of National Revenue* [*Alliance for Life*], Justice Stone states in his decision that the ITA requires charitable organizations' political activities to be "both ancillary and incidental" to charitable activities.[25] However, a number of English and Canadian cases suggest that *Alliance for Life* could be confined to its facts and that the terms are better understood as synonymous. In

[21] *Guaranty Trust*, *supra* note 1.

[22] This occurs in both *ACAT*, *supra* note 10, and *Scarborough Community Legal Services v Minister of National Revenue*, [1985] 2 FC 555, 1 CTC 98, 17 DLR (4th) 308 [*SCLS*].

[23] *ACAT*, *supra* note 10 at para 35.

[24] *Vancouver Society*, *supra* note 1, at para 199.

[25] *Alliance for Life v Minister of National Revenue*, [1999] 3 FC 504 [*Alliance for Life*] at para 10.

much of the jurisprudence, the words 'ancillary' and 'incidental' appear alone and are often applied interchangeably in similar contexts.[26]

Imposing a two part test on existing and would-be charities could be problematic if the test is used to unduly restrict organizations from being registered as charities under the ITA. It is possible that there would be no practical difference between applying a single standard or a two part test, but the CRA should be cautious to only impose standards as authorized by the ITA (and elements of the common law that have been incorporated into the ITA).

TEXTUAL ANALYSIS OF "ANCILLARY AND INCIDENTAL" IN THE ITA

Since the phrase 'ancillary and incidental' is used in the political activities provisions of the ITA, principles of statutory interpretation are helpful when attempting to discern whether the words create two different standards in this context.[27] This is particularly relevant because research for this paper revealed no Canadian cases, other than *Vancouver Society* that used the exact phrase 'ancillary and incidental' (or 'incidental and ancillary') to refer to anything other than political activities. It should be noted, however, that none of the cases referred to above addressed the issue of whether 'ancillary and incidental' sets two different standards. Further, none of the decisions reviewed in research for this paper have turned to principles of statutory interpretation to determine the meaning of 'ancillary and incidental'.

That being said, there are several principles of statutory interpretation that could help to interpret the phrase 'ancillary and incidental' as it appears in the ITA. One such principle is a presumption against tautology in legislative drafting. It is assumed that every word in a statute has its own meaning and role to play.[28] The words of a statute, chosen by legislators, should not be made superfluous by a court's interpretation.[29] This principle, combined with the fact that Parliament inserted both 'ancillary' and 'incidental' into the ITA would suggest that the two words must have separate roles or meanings.

This presumption against tautology is, however, rebuttable if it can be shown that the redundant word or words are or are not meaningless, or if there is some reason that legislators may have chosen to include the redundancy.[30] There is a possible explanation as to why both 'ancillary' and 'incidental' needed to be written into the political activities provisions, even if they do not establish two different standards. Both words have multiple definitions or common uses, but by using the words together, legislators clarified that they were using a definition that is shared by both 'ancillary' and 'incidental'. This interpretation of the ITA is not definitive, however it is supported by the fact that the words 'ancillary' and 'incidental' are used in a specific way in the common law of charity, as will be seen below. By choosing the words 'ancillary' and 'incidental', there is a strong argument to be made that the legislature incorporated the common law into the ITA in the same way that it did with regard to determining charitability.[31]

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[26] For example, the following decisions all employ a similar mean/ends analysis, despite the fact that they use either the word incidental or the word ancillary alone: *National Anti-Vivisection Society v Inland Revenue Commissioners*, 1947 WL 10569 (HL), [1948] AC 31, [1947] 2 All ER 217 [*Anti-Vivisection*], *British Launderers' Research Assn v Hendon Rating Authority (Borough)* (1948), [1949] 1 KB 462, [1949] 1 All ER 21 [*British Launderers'*], *Institution of Mechanical Engineers v Cane* [1961] AC 696, [1960] 3 WLR 978 [*Mechanical Engineers], Guaranty Trust, supra* note 1, and *Alberta Institute, supra* note 1.

[27] ITA, *supra* note 2, at 149.1 (6.1) and (6.2).

[28] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis Canada Inc, 2014) at 211.

[29] *R. v. Proulx* [2000] SCJ No. 6, [2000] 1 SCR 61, [*Proulx*] at para 28.

[30] Sullivan, *supra* note 28 at 214-215.

[31] *Vancouver Regional FreeNet Assn v MNR*, [1996] 3 FCR 880, 1996 CanLII 4076 (FCA) [*FreeNet*] at 1.

It might be argued that ancillary and incidental must have separate meanings because the legislators who drafted the relevant ITA provisions chose to separate 'ancillary' and 'incidental' by the word 'and' rather than the word 'or'. Generally, the word 'and' is understood to be conjunctive, as opposed to the disjunctive 'or'.[32] The use of 'and' can introduce ambiguity into statutory analysis when it is unclear whether it means 'jointly', or 'jointly and severally'. Canadian courts have acknowledged the possibility that the word 'and' might be used disjunctively in certain contexts.[33] However, because of the context in which 'ancillary and incidental' is used in the ITA (as part of a list of characteristics applying to certain political activities), there is a strong argument to be made that the word 'and' separates two different requirements (like the other uses of the word 'and' in the provisions).

It should, however, be noted that the ITA is a bilingual statute and both the French and English versions of the statute must be considered with equal authority.[34] In the French version of the ITA, the phrase 'ancillary and incidental' is replaced by a single word, 'accessoire', which translated literally, means accessory.[35] Apparent discrepancies, like this one, between the French and English versions of statutes are resolved using the shared meaning rule.[36] If there is a meaning that can be reasonably attributed to both versions of a statute, then that is the meaning that should be adopted.[37]

The Supreme Court laid out the steps to be taken to find the shared meaning of the two versions of a bilingual statute in *R. v. Daoust*.[38] If the two versions of a statute are in "discordance" but are reconcilable, and one of the versions is ambiguous, then the non-ambiguous version is taken to be the shared meaning of both versions.[39] Applied to s.149.1 (6.1) and (6.2) of the ITA, the English phrase 'ancillary and incidental' could be said to be ambiguous because it is unclear whether the two words were included to provide context for one another, or whether they set two separate standards for the types of allowable political activities. In order to be reconcilable with the French version of that section, the phrase 'ancillary and incidental' must be interpreted together to have a single meaning, which it shares with the French word '*accessoire*'.

There are two ways that 'ancillary and incidental' can be interpreted to reconcile the French and English versions of the ITA in this way. First, it is possible that 'ancillary' and 'incidental' do mean two different things but both meanings are encapsulated in the single French word, '*accessoire*'. This interpretation is not supported by the way the word '*accessoire*' is used in other provisions of the ITA. While the phrase 'ancillary and incidental' only appears in s.149.1, the word '*accessoire*' is used in several other sections of the ITA to replace the word 'ancillary' or the phrase 'incident to'.[40] This supports the second possibility which is that 'ancillary' and 'incidental' describe the same approach or standard and that their single, shared meaning translates to '*accessoire*'. The

[32] Sullivan, *supra* note 28 at 100.

[33] *Ibid* at 102.

[34] *Ibid* at 115-116.

[35] *Ibid*.

[36] *Ibid* at 119.

[37] *Ibid*.

[38] *R v Daoust*, 2004 6, 1 SCR 217, 235 DLR (4th) 216 [*Daoust*].

[39] *Ibid* at paras 26-27.

[40] See ITA, *supra* note 2 at ss. 95(1) and 2, 122.1(1), 127, 181.1(3)(f), 149.1 (6.01)(b), 118.5(3), 136(2) and 32.

second interpretation is supported not only by the use of '*accessoire*' elsewhere in the ITA but also by the common law.

'ANCILLARY' AND 'INCIDENTAL' SET ONE STANDARD IN THE COMMON LAW

The limited use of the phrase 'ancillary and incidental' in the ITA restricts the application of any argument based solely on statutory interpretation. Outside the context of applying the political activities provisions of the ITA, references to the common law are more persuasive than rules of statutory interpretation in determining whether 'ancillary and incidental' imposes two different standards.

Historically, the words 'ancillary' and 'incidental' have been used interchangeably or separately in similar contexts in the English, Canadian, and international case law that developed the incidental purposes doctrine.[41] As was mentioned in the introduction of this paper, the two words have also been used with, or replaced by subsidiary, subservient, and concomitant.[42] The phrase 'ancillary *or* incidental' is also relatively common in the jurisprudence, especially in international cases.[43] The phrase 'ancillary *and* incidental' is used quite rarely in comparison to uses of each of the words alone or with one of the words mentioned above. The use of 'ancillary and incidental' only gained popularity in the Canadian common law after 1986 when the phrase was added to the ITA.[44] This linguistic history suggests that the test to determine whether a non-charitable activity has an acceptable relationship to a charitable one does not depend specifically on the words ancillary and incidental or on their individual meanings.

This argument is further supported in the Canadian context by the judgment of Iacobucci J. in *Vancouver Society*. Citing *Guaranty Trust*, the decision accepted a definition of 'ancillary and incidental' purposes that had previously only been used in the Canadian context to define 'incidental' purposes.[45] This, along with the historical use of the word ancillary in the development of the incidental purposes doctrine, supports the argument that 'incidental' and 'ancillary and incidental' share one meaning.

This argument is also supported by an analysis of bilingual case law. Many of the Canadian judgments that interpret the phrase 'ancillary and incidental' are, like the ITA, published in both English and French.[46] Since one version of each bilingual judgment is usually presented as a translation, not an original, the statutory interpretation rules of equal authenticity and shared

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[41] See note 26.

[42] *Hood, supra* note 1, uses the words 'subsidiary' and 'subservient' exclusively. *Laing v Commissioner of Stamp Duties*, [1948] NZLR 154 [*Laing*] uses both the phrases 'incidental and ancillary' and 'subsidiary or ancillary' as part of the analysis. *D'Aguiar v The Commissioner of Inland Revenue*, 1968 JCPC 19 [*D'Aguiar*] and *Henry George Foundation, supra* note 1, also use the phrase 'subsidiary or ancillary'. The decision in *Inland Revenue Commissioners v City of Glasgow Police Athletic Association*, [1953} AC 380, [1953] 2 WLR 625 [*Glasgow Police*] uses both the word 'incidental' and the phrase 'subsidiary and incidental'. In *Stratton v Simpson*, [1970] HCA 45, (1970) 125 CLR 138 [*Stratton*] the analysis uses the phrases 'incidental or ancillary' and 'concomitant and incidental' as well as the word ancillary alone. Similarly, *Women Lawyers' Assn, supra* note 1, uses the phrase 'incidental or concomitant and ancillary', among others. *Thistlethwayte, supra* note 1, is an Australian case that uses several words and phrases as part of its analysis, including 'incidental and ancillary', 'concomitant and incidental', 'ancillary', and, most notably, 'conducive' which was ruled not to be synonymous with the word incidental in *Vancouver Society, supra* note 1, at para 193. In *SCLS*, *supra*, note 22, a pre-1986 Canadian decision, the Court used the phrase 'incidental or subservient' to describe allowable political activities. In *Centenary Hospital, supra* note 1, the Court used the phrases 'incidental and ancillary' and 'subsidiary or incidental', as well as the word 'ancillary' on its own.

[43] See for example *ACAT*, *supra* note 10, Laidlaw, *supra* note 1*, Stratton, supra* note 42, and *Word Investments, supra* note 1.

[44] See note 11.

[45] *Vancouver Society, supra* note 1, at paras 156-158, 190.

[46] *The Federal Courts Act*, RSC 1985, c F-7, s 58(4) requires that decisions of the Federal Court of Appeal and the Supreme Court of Canada to be published in both official languages.

meaning do not apply as strictly to judgments on a word-by word-basis.[47] However, translations of judgments can be persuasive, since both versions are intended to advance the law in the same way.[48]

Consider then, the most recent charity law decisions from the Federal Court of Appeal and the Supreme Court of Canada that use both 'incidental' and 'ancillary':

– In *Vancouver Society*, Iacobucci J. made important findings regarding 'ancillary and incidental' and the incidental purposes doctrine. It is therefore significant, that in the French translation of his judgment, the word *accessoire* replaces both the phrase 'ancillary and incidental' as well as the word incidental when used alone.[49]

– In *Alliance for Life* the French version of the judgment not only replaces 'incidental' with 'accessoire' but also uses accessoire as a translation of the phrase 'ancillary and incidental' and 'both ancillary and incidental'.[50]

– In *ACAT*, the English version of the judgment uses 'ancillary' and the phrases 'ancillary and incidental' and 'ancillary or incidental' interchangeably in the place of 'accessoire' which is used consistently in the French version of the decision.[51]

– Finally, in *Travel Just v Canada (Revenue Agency)* [*Travel Just*] '*accessoire*' is used to replace 'incidental' in the phrase 'incidental purposes doctrine' as well as 'ancillary' in the phrase 'ancillary political activities'.[52]

It is accepted that the linguistic discrepancies between the French and English versions of these decisions does not carry as much weight as a statutory discrepancy. However it would be difficult to argue that these decisions have developed the law in this area so as to suggest that the phrase 'ancillary and incidental' creates two distinct requirements for charities' compliance.

It should be noted, however, that all of the above cases were decided, and translated, well after the phrase 'ancillary and incidental' was added to the ITA in 1986. It is possible that the use of the word 'accessoire' as a translation for 'ancillary and incidental' in Canadian jurisprudence is simply a reflection of the way that the ITA was translated. This theory is difficult to substantiate, however, because research for this paper uncovered no Canadian charity law jurisprudence that uses the phrase 'ancillary and incidental' prior to the changes to the ITA in 1986.

[47] Michel Bastarache, "Bilingual Interpretation Rules as a Component of Language Rights in Canada" in Lawrence M Solan & Peter M Tiersma, eds, *The Oxford Handbook of Language and Law* (New York: Oxford University Press, 2012) chapter 11 at 11.5.

[48] *Ibid*.

[49] *Vancouver Society, supra* note 1, at paras 157, 189, 190.

[50] *Alliance for Life, supra* note 25, at paras 10, 17, 32.

[51] *ACAT, supra* note 10, at paras 20, 35, 59, 70.

[52] *Travel Just, supra* note 4, at para 3.

4. Proportionality Approach: Common law and the ITA support a qualitative application of "ancillary and incidental" over the quantitative approach favoured by the CRA

If it is accepted that ancillary and incidental have one meaning, the next question to be answered is what that meaning is and how the courts have applied it to determine whether certain non-charitable pursuits are permissible. It is not always obvious the approach a court is using to determine what is ancillary and incidental. One thing that is clear is that something ancillary or incidental is certainly not a main or primary object of a charity and cannot be collateral to a charity's charitable pursuits.[53] Beyond that, the courts have taken several approaches to defining the relationship non-charitable work must have to a charitable purpose in order to be ancillary and incidental to that charitable purpose.

There are three main overlapping approaches that courts have taken in determining whether a charity's non-charitable purposes and activities are permissible. These approaches will be stated here and discussed in greater detail below. According to the first approach something is ancillary and incidental if it is only a means of achieving a charitable undertaking and not an end in itself.[54] The second approach is similar to the first, requiring that non-charitable purposes or activities be subsidiary or subordinate to a charitable undertaking.[55] Finally, the third approach, which is used exclusively in international case law, states that a non-charitable purpose will be incidental if it is merely a consequence or result of pursuing the charitable purpose.[56] It should be noted that international cases typically apply these approaches to purposes and powers, while Canadian cases more often refer to activities.[57]

There is also what some might consider a fourth approach to defining ancillary and incidental in Canadian jurisprudence. This approach would require that ancillary and incidental activities make up only a small proportion of a charity's total activities. This approach does not usually stand on its own, but adds this requirement to one of the three approaches described above. The proportion of a charity's resources dedicated to non-charitable purposes and activities rarely plays a role in courts' analysis of whether those purposes and activities are ancillary and incidental. Despite this, the requirement that charities dedicate only a modest amount of their time and resources to ancillary and incidental purposes and activities is emphasized in several CRA publications.[58]

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[53] See *Royal College of Surgeons of England v National Provincial Bank Limited and Others*, 1952 WL 12439 (HL), [1952] AC 631 [*Royal College of England*]; *Zoological Society*, *supra* note 1; *Keren Kayemeth Le Jisroel, Ltd v Commissioners of Inland Revenue*, [1932] AC 650 [*Keren Kayemeth*]; *AYSA Amateur Youth Soccer Assn v Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 SCR 217 [*AYSA*]; *Positive Action*, *supra* note 11.

[54] See *British Launderers'*, *supra* note 26, cited in *Vancouver Society*, *supra* note 1 at para 156 and *Guaranty Trust*, *supra* note 1 at para 9.

[55] For decisions that use this approach, see *Oxford Group, supra* note 19, *Glasgow Police, supra* note 42, or *D'Aguiar, supra* note 42.

[56] For a decision that uses this approach, see *Forrest, supra* note 1.

[57] Most Canadian cases are applying ss. 149.1 (6.1), (6.2) of the ITA, or the definition of a charitable organization from 149.1 (1), which all refer exclusively to activities.

[58] See, for example: Canada, Charitable Purposes and Activities that Benefit Youth, CG-020, June 2013 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/yth-eng.html) [Activities that Benefit Youth]; Fundraising, *supra* note 6; Canada, Other Acceptable Activities Permitted within Certain Limits, March 2016 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/ctvts/thr-eng.html) [Other Acceptable Activities]; Canada, Publishing a Magazine, CPC-027, February 2006 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cpc/cpc-027-eng.html) [Publishing a Magazine]; Canada, Sports and Charitable Registration, CPS-027, March 2011 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-027-eng.html) [Sports].

INTRODUCTION TO PROPORTIONALITY

An expense or charge that is incidental, could be defined as being 'incurred apart from the main sum disbursed'.[59] While this might imply that some kind of calculation is appropriate, this is not the definition of incidental that is supported by the ITA or the common law.

Returning briefly to the bilingual statutory analysis of the ITA, the word '*accessoire*', which replaces 'ancillary and incidental' in the French version of s. 149.1, also replaces 'ancillary' and 'incident to' in other ITA provisions.[60] It is not used in reference to incidental expenses in a way that would suggest the application of a proportionality test. According to the shared meaning rule and the presumption that language is used consistently within the same statute, this should mean that the phrase 'ancillary and incidental' in s.149.1 has the same meaning as 'ancillary' and 'incident to' in other provisions.[61]

In the jurisprudence, Canadian courts rarely use a proportionality analysis to determine whether a purpose or activity is ancillary and incidental to a charitable purpose. One of the reasons courts are mistakenly seen as using a proportionality analysis is that, in cases involving ancillary and incidental political activities, they are actually applying the 'substantially all' test from 149.1(6.1) or (6.2) (which does involve a proportionality analysis).[62] However, 'ancillary and incidental' stems from a separate concept in the common law.

Notionally, charitable organizations that devote substantially all, but not all, of their resources to charitable activities or charitable *foundations* whose purposes are substantially all, but not all, charitable will not be considered charitable.[63] The requirement of the ITA, and of the common law, is that all resources be dedicated to charitable activities or that purposes be *exclusively* charitable. Therefore, finding that a charity devotes only a small portion of its resources to non-charitable purposes or activities would not save its charitable nature unless those purposes or activities were also ancillary and incidental to a charitable purpose. Using only a small proportion of resources on non-charitable purposes is not sufficient to make those purposes ancillary and incidental. ITA 149.1(6.1) or (6.2) provide an exception to this general analysis with respect to certain non-partisan political activities. The common law imposes restrictions on the nature of permissible non-charitable purposes and activities. In contrast, the political activities provisions of the ITA contemplate a measure that goes to the quantity of such activities in addition to their nature. The CRA, and Canadian courts, should be careful not to import the "substantially all" test from ss. 6.1 and 6.2 of the ITA to cases that do not involve political activities.

There is another reason that courts might give the impression that they are relying on a proportionality test to determine the nature of non-charitable activities. Courts will sometimes consider the proportion of resources expended on non-charitable activities as one of several factors in one of the three main approaches set out above. It could be argued that the 'ancillary and incidental' analysis is made up of two steps, the first one being qualitative and the second being quantitative. According to this argument, the reason that courts might not engage in a quantitative analysis of charities' purposes and activities is that the 'ancillary and incidental' issue

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[59] *Canadian Oxford Paperback Dictionary*, 2000, sub verbo incidental.

[60] See ITA, *supra* note 2 at ss. 95(1) and 2, 122.1(1), 127, 181.1(3)(f), 149.1 (6.01)(b), 118.5(3), 136(2) and 32.

[61] Sullivan, *supra* note 28 at 217.

[62] Alicia Grant, "Political Activities and the Meaning of "Substantially All" – An Analysis for Registered Charities" (Edmonton, AB: The Pemsel Case Foundation, 2015) at 2.

[63] *Vancouver Society*, *supra* note 1, at para 155.

is disposed of based on qualitative arguments at the first step of the analysis. This seems unlikely, however, because there are several Canadian cases in which Courts found activities to be ancillary or incidental based on a qualitative analysis with no reference to a second, quantitative, analysis.[64]

Below it will be argued, by referencing leading and historical case law, that limiting the quantity of resources put toward non-charitable purposes and activities is not strictly necessary for a finding that those purposes and activities are ancillary and incidental. The main approaches to applying 'ancillary and incidental' require a qualitative approach, separate from any potential 'substantially all' analysis.

MEANS/ENDS

The leading approach in Canada permits ancillary and incidental purposes and activities that are a means of achieving charitable ends but not an end themselves.[65] This approach arises from a history in English case law, and was first introduced into Canadian jurisprudence by *Guaranty Trust* in 1967.[66] Historically, the means/ends approach has rarely, if ever, taken into account the proportion of activities that are non-charitable. This is, perhaps, in part because the incidental purposes doctrine arose in the context of charitable trusts which usually had no existing activities to evaluate. Even when there were activities to be evaluated, there was uncertainty in the early English case law as to whether courts should consider an institution's present activities in determining the purposes for which that institution is established.[67]

Charities' activities are obviously relevant to a modern Canadian discussion of 'ancillary and incidental', in part because of the ITA, but also because the case law has changed to reflect changing circumstances in charity law. In addition to applying the incidental purposes doctrine to non-charitable activities, courts have now acknowledged that an organization's activities might indicate that the main purpose of the organization has changed from its stated purpose. In *ACAT*, the organization's political activities were found not to be ancillary and incidental because the activities indicated an impermissible primary political purpose.[68] There are several cases in the Canadian and international jurisprudence in which courts have found that a charity's activities have indicated a non-charitable, unstated main or collateral purpose.[69]

As part of the means/ends approach it is possible that a significant expenditure on certain non-charitable activities could be one indicator that there is an unstated non-charitable purpose being pursued by the charity. What is important in this approach, however, is the relationship between the impugned purpose or activity and the organization's charitable purposes and activities.

In many cases that use a means/ends approach there is no discussion of the amount of resources allocated to ancillary and incidental purposes and activities. An example of this is in *Vancouver Society*, the leading case for this approach. The court applied the incidental purposes doctrine from *Guaranty Trust* to find that the Society's political activities were ancillary and incidental to its

[64] See, for example *Alberta Institute*, *supra* note 1, *Ronald McDonald House*, *supra* note 1, and *Laidlaw*, *supra* note 1.

[65] See note 54.

[66] *Guaranty Trust*, *supra* note 1.

[67] For example, in *Mechanical Engineers, supra* note 26, the House of Lords was divided on whether present activities should be considered at all when determining whether an organization is established for charitable purposes only.

[68] *ACAT*, *supra* note 10.

[69] See for example, *Positive Action*, *supra* note 11, *Vancouver Society*, *supra* note 1, and *Salvation Army (Vic) Property Trust v Fern Tree Gully Corporation*, [1952] HCA 4, (1952) 85 CLR 159 [*Fern Tree Gully*].

charitable purposes.[70] In coming to this conclusion, the court made no reference to the proportion of the Society's activities that were political. The only relevant question was whether the activities were carried out in furtherance of one of the Society's charitable purposes. This is the approach taken in most of the recent cases in Canadian and international "ancillary and incidental" jurisprudence.[71]

Despite the popularity of the means to an end approach in Canadian and international jurisprudence the approach is rarely referenced in CRA guidance and policy statements. Only a few CRA publications refer to activities that further a charity's charitable purposes.[72] Not only are the instances of a means/ends approach in CRA publications rare, they exclusively reference ancillary and incidental activities, suggesting that the CRA only applies this approach to ancillary and incidental activities, not purposes.[73] This will be problematic if it affects the practice of the CRA or the perception of charities. As discussed in an earlier section of this paper, the case law has frequently acknowledged that something could rise to the level of a purpose or be a stated purpose but continue to be ancillary and incidental.

SUBORDINATE/SUBSIDIARY

Another relatively common approach to applying 'ancillary and incidental' requires that non-charitable purposes or activities are subordinate or subsidiary to charitable ones. This approach is most often associated with the word ancillary, rather than incidental; international courts have often used subsidiary as a synonym or part of the definition for ancillary.[74] *The Canadian Oxford Paperback Dictionary* defines subsidiary as "auxiliary", "subordinate, secondary;", or "serving to assist or supplement."[75] Subordinate is then defined as "secondary, minor;" or "dependent upon or subservient to a chief or principal thing of the same kind."[76] It is sometimes unclear which of these definitions courts are using, as 'ancillary', 'subsidiary' and 'subordinate' are often only contrasted with 'dominant' or 'primary' with no further explanation.[77] However, courts do occasionally provide insight into the application of this approach.

Several cases that fall into this category require only that the subsidiary or subordinate purpose or activity be related to, but less important than, a dominant charitable purpose. In *D'Aguiar v. The Commissioner of Inland Revenue* [*D'Aguiar*], the Privy Council held that the Citizens' Advice and Aid Service was not a charity because its constitution put forward "no single dominant purpose of a manifestly charitable character."[78] None of the organization's non-charitable purposes could be considered ancillary or subsidiary because there was no indication of how

[70] *Vancouver Society, supra* note 1 at paras 156-159.

[71] See for example, *Travel Just*, *supra* note 4, *ACAT*, *supra* note 10, *Triton Foundation*, *supra* note 1 and *Word Investments*, *supra* note 1.

[72] See Fundraising, *supra* note 6, Housing, *supra* note 6, Canada, Upholding Human Rights and Charitable Registration, CG-001, August 2011 update (retrieved from http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hmn-rghts-eng.html) [Upholding Human Rights].

[73] *Ibid*.

[74] See for example, *Bowman and Others v Secular Society*, [1917] AC 406, 1917 WL 18005 (HL) [*Bowman*], *D'Aguiar*, *supra* note 42, *Incorporated Council of Law Reporting for England and Wales v AG*, [1972] Ch 73 [*Incorporated Council*], *Laing*, *supra* note 42, *Oxford Group, supra* note 20, *Royal College of England*, *supra* note 53.

[75] *Canadian Oxford Paperback Dictionary*, 2000, *sub verbo* "subsidiary".

[76] *Ibid, sub verbo* "subordinate".

[77] See for example, *Royal College of England*, *supra* note 53, *Zoological Society*, *supra* note 1, *Positive Action*, *supra* note 11.

[78] *D'Aguiar, supra* note 42 at 3.

important those purposes were compared to the charitable purposes set out by the Service's constitution. A similar approach was taken in *Royal College of Surgeons of England v. National Provincial Bank Limited* [*Royal College of England*], but with a different outcome. The House of Lords found that the College had only one main purpose, not two, and that the professional benefit and disciplinary functions of the college were merely subsidiary to the promotion of science and education.[79]

Some cases requiring subsidiary or subservient non-charitable purposes specify more precisely the type of relationship that must exist between dominant and subsidiary purposes. In *Re Hood [Hood]*, a decision that used the language 'subsidiary' and 'subservient' (but not 'ancillary' or 'incidental'), the court found that the trust in question was charitable even though one of its purposes was non-charitable.[80] This was because the non-charitable purpose was subsidiary or subservient to, or only a *means of achieving* the primary charitable purpose.[81] The court used a means/ends distinction to determine that the non-charitable purpose was only a subsidiary purpose of the trust. While the use of the means/ends distinction is perhaps clearest in *Hood*, other courts have used a similar analysis to determine whether non-charitable purposes and activities are subsidiary, subordinate, or subservient to charitable purposes.[82]

CRA publications often use the word subordinate to define 'ancillary and incidental', using it most often as a synonym for incidental.[83] This is in contrast to the common law courts which use the words 'ancillary', 'incidental', and 'subsidiary' in very similar contexts, but most often use 'subsidiary' to replace or define 'ancillary', not 'incidental'. Given the above examples of how domestic and international courts have used the word subsidiary – a synonym for 'subordinate', which is used more often by the CRA – a qualitative application of the word subordinate seems appropriate in this context.

As part of that application, it is possible that the amount of time and resources spent on certain purposes and activities could help to indicate their importance. There is some merit in the view that a quantitative measure could be persuasive in certain circumstances, but given the lack of evidence in the case law for a strict proportionality requirement, any quantitative measure should not be determinative. Further, the overlap between the "subsidiary" approach and the "means/ends" approach suggests that the first consideration in determining whether a purpose or activity is subordinate should be whether it is merely furthering a charitable purpose.

INCIDENT TO

The final approach to be discussed requires that an incidental non-charitable purpose or activity be the result or unsought consequence of pursuing a charitable purpose.[84] This likely stems from the definition of incidental that states something incidental "liable to happen."[85] Since this definition applies specifically to the word incidental, it is understandable that the "incident to"

[79] *Royal College of England, supra* note 53, Lord Morton of Henryton at 10.

[80] *Hood*, *supra* note 1.

[81] *Ibid*.

[82] See for example, *SCLS*, *supra* note 22, *Oxford Group*, *supra* note 20, *Women Lawyers' Association*, *supra* note 1.

[83] See for example in, Activities that Benefit Youth, *supra* note 56, Fundraising, *supra* note 6, and Political Activities, *supra* note 58.

[84] This approach is used in both *Forrest*, *supra* note 1 and *Glasgow Police, supra* note 42.

[85] *Canadian Oxford Paperback Dictionary*, 2000, *sub verbo* "incidental".

approach is used almost exclusively in judicial decisions that use the word incidental alone.[86] It is most common to see this approach in the historical English jurisprudence, especially in cases involving private or professional benefit.[87] The "incident to" approach is extremely rare in Canadian jurisprudence, perhaps because the ITA popularized using 'ancillary and incidental' rather than 'incidental' alone. CRA publications occasionally use language similar to that of an "incident to" approach, requiring in some contexts that non-charitable activities "arise directly from" or are "ancillary and incidental by-products" of charitable pursuits.[88]

Like the two approaches outlined above, the "incident to" approach is concerned with a qualitative question: was the non-charitable outcome the end goal, or merely a by-product of pursuing some other, charitable purpose? In some cases, a quantitative analysis of activities and resources could help answer this question, but in others it may be impractical or inappropriate. For example, in cases that involve professional benefit it could be extremely difficult to quantify the private benefit received if it is something intangible like an improved professional reputation.

Although an "incident to" approach is not explored Canadian case law, the ITA could be said to import this approach into Canadian charity law because of the way '*accessoire*' is used as a translation for 'incident to' in some ITA provisions.[89] This approach is useful because of the background it provides for the leading "means/ends" approach. It demonstrates that the incidental purposes doctrine arose from the application of a qualitative definition of incidental. It also overlaps significantly with the "means/ends" approach in that many purposes and activities that are characterized as resulting from charitable pursuits could also be characterized as means of achieving charitable pursuits.[90]

CASES THAT REFER TO PROPORTIONALITY

Research for this paper identified three judicial decisions in the Canadian case law that explicitly refer to a proportionality analysis in their application of 'ancillary and incidental'. Only one of these decisions directly applies the ITA, but the other two decisions, which apply Ontario statutes, use the same common law approach to charitability.

In *Re Public Trustee and Toronto Humane Society [Toronto Humane Society]* the court ruled that the society's non-charitable activities were ancillary and incidental to charitable purposes despite the society's substantial expenditure on political activities. Even though the case involves the application of a provincial statute, the Court took note of Canada Revenue's formulae used to determine the proportion of resources applied to political purposes.[91] The court rejected a strict proportionality analysis in favour of resolving the issue "on general principles and on a case-by-case basis".[92]

In the end, the court found that the Humane Society's substantial expenditure on political activities was only a "danger signal" indicating that the activities came close to being primary

[86] The exception to this rule is the decision in *Henry George Foundation, supra* note 1.

[87] See for example, *Forrest*, *supra* note 1, *Glasgow Police*, *supra* note 42, and *Incorporated Council*, *supra* note 74.

[88] See Arts Festivals, *supra* note 6, and Public Benefit, *supra* note 6.

[89] ITA, *supra* note 2, ss. 32, 95(1) and (2), 136(2), 181.1(3)(f).

[90] For example, in cases involving groups that provide incidental benefit to their members, that benefit could be seen as a result of the group's charitable purpose, or it could be seen as a means of inducing membership so that it is possible to achieve the group's charitable purposes.

[91] *Toronto Humane Society*, *supra* note 1, at para 44.

[92] *Ibid.*

rather than ancillary and incidental.[93] This was also only one of two danger signals, the other being the Society's general attitude. *Toronto Humane Society* is a good example of a case where a court used the proportion of resources spent on non-charitable activities as a factor in the 'ancillary and incidental' analysis but where that factor was not definitive.

Another 'ancillary and incidental' case that refers to a proportionality test is *NDG*.[94] That case is a good example of a court applying s.149.1 (6.2) and seemingly implying that 'ancillary and incidental' is the source of the proportionality requirement rather than 'substantially all'. The court reasons that, in order for political purposes to be ancillary and incidental to charitable purposes, the part of the organization's resources dedicated to political activities must be "a small and subordinate part."[95] It is true that registered charities may only dedicate a small portion of their resources to political activities, but that is because substantially all of their resources must be devoted to charitable activities (not because the political activities would otherwise cease to be ancillary and incidental).

The Court in *NDG* mentions 'ancillary and incidental' briefly before citing *Positive Action against Pornography v. Minister of National Revenue* [*Positive Action*] to support the proposition that the amount of resources devoted to political activities must be a small and subordinate part.[96] The portion of *Positive Action* cited in *NDG* states that the organization in that case could not take advantage of s. (6.2) "as the appellant's purposes and activities are not 'ancillary and incidental' but, rather, are primarily of a political nature and therefore non-charitable."[97] Neither the quoted passage, nor the rest of the judgment in *Positive Action* makes any reference to the amount of resources dedicated to political activities. One possible explanation for the Court's reasoning in *NDG* is that the Court relied on the large amount of resources dedicated to political activities as grounds that the political activities were primary rather than ancillary and incidental. However, this was not explicitly stated.

The most recent Canadian case that used a "proportionality test" to determine whether non-charitable activities were ancillary and incidental *is Re Centenary Hospital Assn* [*Centenary Hospital*].[98] This case, like *Toronto Humane Society*, concerns the application of a provincial statute, not the ITA. The decision turned on the provincial *Charities Accounting Act* not being applicable to a public hospital's general corporate property.[99] Therefore, the Court's observations on s. 6b of the *Charities Accounting Act* and of the phrase 'ancillary and incidental' is obiter and holds less weight than decisions that turn on an application of 'ancillary and incidental'.

Section 6b of the *Charities Accounting Act* required that a person who holds land for a charitable purpose only hold the land for *actual* use or occupation for the charitable purpose.[100] The court in *Centenary Hospital* found that if s. 6b had been applicable to the subject hospital, the hospital's proposed non-charitable use of property would not have infringed s. 6b. The court cites *Humane Society* for the proposition that a proportionality test is relevant to determining the nature of

[93] *Ibid* at para 45.

[94] *Notre Dame de Grâce Neighbourhood Assn v Minister of National Revenue* (1988), 85 NR 73, [1988] 2 CTC 14 (Fed CA) [*NDG*].

[95] *Ibid* at para 16.

[96] *NDG*, *supra* note 94, at para 16.

[97] *Positive Action, supra* note 11, at para 17.

[98] *Centenary Hospital*, *supra* note 1.

[99] *Ibid.*

[100] *Ibid* at para 25.

non-charitable activities.[101] The court then goes on to state that the non-charitable use of property was permissible because the capital cost of that use would not represent a large proportion of the hospital's assets.[102]

This application of *Humane Society*, it may be argued, places undue emphasis on the proportion of expenditure dedicated to non-charitable activities; however, the court in *Centenary* does consider other factors. The decision mentions that the proposed use of the property would be to the "benefit of patients" and "essential" to the provision of the highest level of care.[103] It is unclear based on the decision how important these other factors were compared to the proportionality test.

The three cases above do not provide strong support for a proportionality approach to applying the incidental purposes doctrine. *NDG* can be confined to its facts (political activities) and the other two decisions were applications of provincial legislation which used proportionality as only one part of their analysis. Further, more recent decisions have used the three main approaches without referencing proportionality.[104]

CONCLUSION ON PROPORTIONALITY

The application of the phrase 'ancillary and incidental' has a complicated relationship with proportionality analyses of charities' activities. A proportionality analysis can help to inform the qualitative application of 'ancillary and incidental' in certain situations, but in some cases it is conceptually implausible, or, as a practical matter, unfeasible. It should therefore not be determinative of an organization's charitability, which could be the case if the CRA is imposing the requirement that charities dedicate only "modest" amount of resources on non-charitable activities.[105] It is unfair to organizations that might otherwise be charitable to impose a strict proportionality requirement.

5. Conclusion

Because of the impact that registration has on Canadian charities, it is submitted that courts and the CRA should remember to discuss the incidental purposes doctrine in their decisions whenever appropriate. It is also important that 'ancillary and incidental' not be construed too narrowly, by imposing unjustified restrictions on when the concept may be applied.

Since the ITA shifted the focus of discussions about charitability to activities rather than purposes (which were traditionally more important to the analysis) there has been a tendency by the CRA to look at very specific aspects of charities' activities. This is demonstrated by the support in CRA publications for a proportionality analysis, which would require an in depth review of charities' day-to-day activities and the resources they require. While the ITA makes reference to charities' activities, the case law tells us that the nature of these activities is determined by their relationship to charitable purposes.

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[101] *Ibid* at paras 71- 72.

[102] *Ibid* at paras 72-73.

[103] *Ibid* at para 69.

[104] See for example, *Vancouver Society, supra* note 1, ACAT, *supra* note 10, *Travel Just, supra* note 4, *AYSA*, *supra* note 53.

[105] Activities that Benefit Youth, *supra* note 58; Fundraising, *supra* note 6.

According to *Vancouver Society*, charitable activities are charitable because of the purposes they serve.[106] Also according to *Vancouver Society* (and a long line of cases in the common law), ancillary and incidental purposes and activities take their character from the fact that they support a main charitable purpose. The guiding principle behind the incidental purposes doctrine is that it is impossible for charities to achieve their charitable purposes without engaging in some pursuits that would not, on their face, be considered charitable.[107] The doctrine was intended to allow charities to pursue charitable goals without their purposes and activities being so restricted as to impair functionality. If the application of 'ancillary and incidental' is narrowed too much by focussing on individual activities and resources, it will no longer fulfill its intended purpose.

It should be noted that the stated purposes of a charity do need to be specific. Charities with purposes stated too vaguely have been found non-charitable because their governing documents allowed for non-charitable pursuits.[108] However, Courts (and the CRA) should, when possible, resolve ambiguities in the stated purposes of charities or charitable trusts in favour of those charities or charitable trusts.[109] While not stated explicitly, this approach was followed in *Vancouver Society* when Justice Iacobucci characterized the stated political purposes of the society as ancillary and incidental political activities so that they would not offend the rule against political purposes.[110] The courts' longstanding benevolent view of charity is something to consider when determining whether a charity's stated purposes or activities might be ancillary and incidental.[111]

Unlike in Canada, where the incidental purpose doctrine is sometimes applied narrowly or ignored, international courts have begun to apply the doctrine more broadly. In New Zealand and Australia, it is now possible for non-partisan political *purposes* to be ancillary and incidental to charitable purposes.[112] The reason for this change from the well-accepted English rule from *McGovern v. Attorney General*,[113] is that a rule against political advocacy by charities is not in line with the Constitutions in those countries.[114] As Canadian courts and policymakers continue to develop and clarify the application of 'ancillary and incidental', it is important to consider the current Canadian legal context.

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[106] *Vancouver Society*, *supra* note 1, at para 152.

[107] Maurice C Cullity, "Charities – The Incidental Question" (1967) 6 Melb U l Rev 35 at 36.

[108] *Vancouver Society*, *supra* note 1, at para 195.

[109] *Hadaway v Hadaway,* [1955] 1 WLR 16, 1955 WL 16576 (Privy Council) Viscount Simonds.

[110] *Vancouver Society, supra* note 1, at paras 190-192.

[111] The benevolence of the courts toward charities was noted by Lord MacNaghten in *The Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531 [*Pemsel*]when he stated: "The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derive from the piety of early times, are considered to be charitable."

[112] See *Re Greenpeace of New Zealand*, [2014] NZSC 105; *Commissioner of Taxation v Aid/Watch Incorporated*, [2009] FCAFC 128.

[113] *McGovern v Attorney General*, [1981] 3 All ER 493 (Ch D).

[114] *Supra* note 112.

Any changes to the law surrounding 'ancillary and incidental' should take into account this current Canadian context, with a focus on what will help valid charities to achieve their goals in ways beneficial to the public. Courts and the CRA must strike a balance between applying 'ancillary and incidental' broadly enough to include all worthy charities and keeping the exception narrow enough that it does not render meaningless the rule of exclusive charitability. All of this should be accomplished while keeping in mind the longstanding benevolent view of the courts toward charities.[115]

[115] *Pemsel*, *supra* note 111.

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