Commentary

Charity and Legal Publishing – The Relevance of Current Learning Resources

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The Pemsel Case
FOUNDATION

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"The law of charity is a moving subject"
– Lord Wilberforce

About Us

Named after the 1891 House of Lords decision, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, which established the four principal common law heads of charity used in Canada and elsewhere, The Pemsel Case Foundation is mandated to undertake research, education and litigation interventions to help clarify and develop the law related to Canadian charities. The Pemsel Case Foundation is incorporated under the Alberta *Societies Act* and is a registered charity.

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1. Introduction

The Ontario Law Reform Commission published its influential Report on the Law of Charities in 1997. David Stevens was the lead author of the report. In a bold article entitled "Rescuing Charity", Stevens described his experiences with the charity law literature as it stood at the time (the mid 1990's) that the Commission's report was researched.[1] He observed as follows:[2]

> Of the writing available to inform our thinking, the strongest secular tradition was and remains economics. [Stevens later went on to criticize the economic literature as a "monolithic theory… casting about menacingly for applications".[3]] There was some political theory on nonprofits, charities, and civil society, a bit of business and tax literature, and a large body of mostly English writing on the legal regime governing charities in England…None of this writing helped very much in identifying the basic policy perspective of government…

Stevens' remarks resonate with my own experiences of that (approximate) era as a practicing lawyer. It is not as though there was an absence of high quality published works in the field. To the contrary, the area had by that time long since been defined by a few leading English treatises that today would remain familiar to anyone with an interest in the charity law. But it was nonetheless surprising at the time that the topic of charity law, given its social significance and rich common law history, had not attracted more writing. There was a continual sense at the time that we, as lawyers and law reformers, were far more reliant upon primary sources of law than any particular secondary sources. And, as Stevens notes, the economic literature was at that time (and still is) misdirecting analysts.

The state of charity law writing has since changed dramatically. Published works on the topic of charity law have significantly increased in both quantity and quality. Nonetheless, the current supply of literature in this field does not perfectly match the demand. This brief essay considers some of the challenges that future writing in the field of charity law will have to take up. I raise three points for discussion.

First, I suggest that charities might be a forgotten readership in the charity law literature. The growing literature in this field is primarily directed at lawyers, academics and policymakers. Do charity law scholars have a role to play in making charity law accessible to charity managers? I suggest that they might.

Second, I suggest that growing jurisdictional differences in charity law across the commonwealth highlight the potential need for more jurisdiction specific legal writing. As jurisdictions have become more particularized through jurisdiction specific legislative codifications of charity law, generic treatises on the common law of charity have become less and less relevant in specific jurisdictions. Ironically, my own jurisdiction – Canada – remains more wed to the English common law of charity than the UK itself. Future writing in charity law will need to confront the implications of legislative codifications of charity law throughout the commonwealth.

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[1] D. Stevens, "Rescuing Charity" in C. Mitchell & S. Moody, eds. *Foundations of Charity* (Oxford: Hart, 2000).

[2] *Ibid.* at 33.

[3] *Ibid.* at 34.

Third, I consider some continuing barriers to legal writing in the field of charity law. Drawing on my experiences in Canada, I suggest that the tendency of law schools to ignore charity law in law school curricula limits the amount of writing on charity law relative to what might otherwise be the case.

2. Charities – A Forgotten Readership?

Generally speaking, charity law writing tends to fall into two camps: (1) writing by lawyers for lawyers, and (2) writing by academics for academics. It is proper that academic lawyers and charity law scholars have produced (and will continue to produce) scholarship of this nature. This growing body of scholarship has enriched our understanding of the doctrinal, theoretical and philosophical dimensions of charity law. Given the intellectual richness of charity law, the mystery is not that charity law writers have produced works along the lines described above but rather that they have not produced more of them. Charity law, one would have thought, should be especially attractive to scholars given that it meets criteria that academic institutions typically value. For example, scholarship is this field is interdisciplinary, comparative, doctrinally and philosophically challenging, socially relevant, progressive and amenable to grant funding.

It is arguable, however, that there is a forgotten readership in the charity law field. Relatively little writing is being prepared for charities themselves – the readership most impacted by charity law. I wonder whether charity law scholars, as public intellectuals, have a crucial role to play in doing more to make charity law accessible to the ultimate end users – charities – of their knowledge.

a) Why can't charity managers simply consult existing publications in the field of charity law?

Motivated charity managers are of course free to self-educate by consulting existing works on charity law. That said, existing works, however well-written, are not always accessible to those lacking legal training. These works typically organize the subject matter via a taxonomy only familiar to lawyers. This means organizing accounts of charity law around such sub-topics as (among other things) the four heads of charity, the public benefit requirement, political advocacy, business activities, the doctrine of cy-pres, *etc*. All of these are, of course, essential features of charity law that must be addressed in written materials intended to impart understanding of this area of law. However, charity managers, at least those not already familiar with the traditional structure of charity law, do not necessarily conceive of charity law in these terms. The answers that charity managers seek are often buried in charity law doctrine and thus do not explicitly appear in traditional tables of contents.

Rather than ask about the four heads of charity, charity managers ask "what can we do?". Rather than ask about public benefit, charity managers ask "who can we help?". Rather than ask about the charity – politics distinction, charity managers ask "what ideals can we espouse?". Rather than ask about the regulation of business activities, charity managers ask "how can we get money in the door?". The answers to all of these questions are addressed in existing resources. However, these resources tend to follow a traditional taxonomy of charity law that is not accessible to lay readers. For example, a reader not already familiar with the public component of the public benefit test is not going to intuit that this is charity law's doctrinal instrument for regulating to whom charities may target their goods and services.

There are also dialectical barriers to lay readers. Existing works tend to be very well written. However, there are expressed in a dialect – a form of legalese specific to charity law – lacking intuitive meaning to lay readers. In my experience, charity managers do not think of charity law in the same terms as charity lawyers / scholars. Even something as fundamental to charity lawyers as the purposes – activities distinction is foreign to lay readers. Likewise, the phrase "public benefit" is a loaded phrase for lay readers, as this phrase conjures meaning that is discordant with its actual legal meaning. So, yes, determined lay readers can consult existing resources. However, more can be done to make the same information more accessible to these readers. Law teachers are uniquely positioned, given their experience teaching students who arrive at law schools without pre-existing legal knowledge, to make charity law accessible to charity managers who are not legally trained.

b) What constitutes impactful academic writing?

Educating charities offers scholars a unique opportunity to be impactful. While all scholars aspire to be impactful, there are competing conceptions of what this means in the academic world. Scholarly impact is sometimes measured by considering, among other things, the pedigree of a scholar's publishing outlets (academic journals and book publishers), a scholar's success at attracting grant funding and/or academic and judicial citations to a scholar's published works. All of these are worthy measurements of the scholarly integrity of an academic's body of published work. But there are some additional criteria for charity law scholars to at least consider.

Charity law scholars possess knowledge of immediate relevance to a large audience – charities. Importantly, this audience is by definition established to bring about the conditions of human flourishing via the provision of charitable goods and services. Producing educational materials for this audience provides scholars with an unusual opportunity to be impactful in the sense of being widely read and socially useful.

This is not to suggest that academic institutions generally and charity law scholars specifically necessarily need to be supportive of the institution of charity. Scholars are properly free to exercise academic freedom by questioning or even denying the worthiness of charity. (Of course, the irony is that in so doing they would be carrying out a charitable purpose – the advancement of education.) My only point is that producing educational materials for charities is one of the largely unexploited ways for charity law scholars to be impactful through the dissemination of knowledge to a potentially vast and transformative readership.

c) Is it scholarly to provide plain language accounts of charity law?

Law scholars seem to continuously debate what qualifies as a "scholarly" work product. One view is that scholars should produce scholarship for the consumption of other scholars. I subscribe to this view. Charity law scholars should be participating in debates about charity law through publications primarily directed at other academics. That said, not all scholarly works necessarily need to fit this mold. While scholarly work products will often, if not usually, entail the production and dissemination of new knowledge, sometimes bringing simplicity and clarity to existing knowledge is itself a scholarly achievement. I think this is particularly true of the law of charity. Charity law is not an inherently difficult subject matter. But the common law authorities in this area offer lessons on how to mystify simple ideas through ponderous and confusing expression. Imposing simplicity on this body of law through disciplined and clear expression is a

worthy scholarly task even if the end result is "merely" that the law is made more accessible to those to whom it would otherwise be inaccessible.

This is why producing educational materials for charities is not necessarily a departure from but rather a potential fulfillment of a charity law scholar's academic mission. A plain language and accessible statement of charity law might not be the only type of scholarly work produced by charity law scholars but it can be a part of that body of scholarly work. Charity law scholars have a role to play in speaking to charity law's forgotten readership – charities.

3. Growing Jurisdictional Differences in Charity Law

Time was when charity law regimes in commonwealth jurisdictions were almost entirely based upon the common law unassisted by meaningful statutory clarifications and/or overrides of common law principles. This meant that the common law of charity functioned in practice as something of a uniform body of law across commonwealth jurisdictions. In Canada, foreign commonwealth decisions, although not strictly speaking binding precedent, have long since been liberally drawn upon, almost as if the jurisdictional point was completely moot. I am not aware of another area of law in which foreign precedents have enjoyed so little resistance being imported at the Canadian border. Charity law is one area in which Canada has experienced a significant trade deficit, having surely imported far more precedents than it has exported.

This has probably impacted the state of charity law writing, at least in Canada. There is less of a need for jurisdiction specific writing in an environment in which the law is so heavily based on foreign precedents. Why explicate the law of charity in Canada if it is essentially the same as the English law of charity already reflected in English treatises? There are, of course, *always* jurisdictional differences. But in Canada those differences have perhaps historically been perceived as too slight to warrant a uniquely Canadian body of literature dealing with the law of charity. It is not as though Canadian writing has been absent on the topic. But the area has been able to "get by" relying on English secondary sources moreso than what might ordinarily be the case.

In recent years, however, charity law has become more statute based in several common law jurisdictions (not Canada) due to the enactment of statutory codifications of common law principles. On those topics where statutory codifications of charity law reflect jurisdiction specific approaches to particular charity law doctrines, they put the law of charity in various common law jurisdictions on separate trajectories. This means that jurisdictional differences have the potential to become increasingly stark. Whereas the English (and several others) have embraced significant statutory reforms to charity law, Canada continues for the time being to follow the historical English common law precedents. In a sense, Canada remains more committed to the traditional English precedents than even the English.

This bodes implications for secondary source materials. For the time being, the discrepancies between, say, Canadian and English law are fairly evident, even to readers with only a passing familiarity with Canadian charity law. However, as the differences between the regimes mount, it will become increasingly difficult to disentangle the uniquely English principles from those of relevance to Canadians. A treatise devoted to Canadian charity law will eventually become a necessity, perhaps sooner than later.

4. Remaining Barriers to Charity Law Writing

In Canada, there is an almost total absence of elective courses in charity law offered by law schools. As a result, most law students have little to no exposure to this body of law during their tenure at law school. To the limited extent charity law is discussed in the typical law school curriculum, it tends to be on a perfunctory and piecemeal basis. Anecdotally, this consists of brief encounters with charity doctrines in such courses as property, trusts, corporate and income tax law. In all such instances, charity is but a short-lived digression from the courses' focus.

In property law, students might be taught that the rule against remoteness of vesting is not applied with its usual strictness vis-à-vis charities. In trust law, students discover that, although trusts must be for the benefit of persons, there is a limited exception for charitable purpose trusts. In corporate law, students are taught that corporations have shareholders but they can instead have members in the case of charitable and not-for-profit corporations. In income tax law, tax concessions for charities are briefly encountered.

Absent from law curricula is a sustained focus on the legal conception of charity, the regulatory framework for charities, the myriad of legal issues faced by charity and not-for-profit boards and a systematic consideration of precisely how and why the law promotes the institution of charity.

All of this leads to a certain irony. Although Canadian law schools are heavily invested in teaching law students about social justice and community engagement, they almost entirely ignore the legal infrastructure – charity and not-for-profit law – through which social justice is pursued. This is a significant curricular gap. Practically all law graduates will encounter charities and not-for-profits in their professional lives. Many will work as community activists. Others will be asked to sit on boards of charities and not-for-profits. Others yet will advise charities and not-for-profits on either a *pro bono* or compensated basis. All of these are among the things law schools aspire for graduates to do as engaged members of their communities, dutiful members of the legal profession and social entrepreneurs. In order to better equip and encourage graduates for this kind of community engagement, law schools should do more to provide dedicated instruction in this area of law.

The effective absence of charity law from law school curricula bodes implications for legal writing in this area. Given that law students have so little exposure to charity law, they do not typically seek out writing opportunities in this area. Likewise, they are unlikely to be inspired to pursue graduate training (and the accompanying thesis writing opportunities) in this area. Scholarship does not spontaneously erupt. Intellectual curiosity is the driver of quality scholarly writing. The relative absence of charity law from law school curricula means that intellectual curiosity in this body of law is not being piqued. This might account, in part, for why the anecdotal evidence reveals that there is little to no graduate work done in this area of law in Canada. All of this means there is less charity law writing than what might otherwise be the case.

For these reasons, the future of charity law writing will be impacted by curricular decisions made by law schools. Enriching course offerings in the area of charity law is one way that schools can better foster scholarly writing in the field. This would also better equip law graduates to have social impact through meaningful work with charities (as advisers, board members, volunteers or managers).

5. Conclusion

Charity law has tended to fall between the cracks of legal scholarship. To some extent this is understandable. Scholars of trust, income tax and property law – the main areas of relevance to charities – are understandably predisposed to conceive of charities as mere exceptions to the usual rules. In trust law, this means charities are primarily understood from the vantage that they enjoy an exemption from the usual requirement that trusts must have beneficiaries who can enforce the terms of trusts. In income tax law, this means charities are understood as institutions benefitting from tax concessions exempting them from the usual rules of income tax law. In property law, charities are understood as institutions enjoying preferential treatment under the infamous rule against remoteness of vesting. Historically, I suspect this view of charities as "mere exceptions to the status quo" has contributed to a perception among scholars that charity law is less a discrete body of law than a random collection of limited exemptions and concessions through which the law promotes the institution of charity. In recent years there has been a greater willingness to not only recognize charity law as a discrete phenomenon worthy of study but to also bring greater rigour to this area of law through enhanced systemization and theoretical reflection.

Moving forward, I see a role for future writing in this field to make charity law more accessible to its ultimate end users (charities themselves). Bringing simplicity to the complex through plain language legal writing is one way for charity law academics to be impactful. Future writing in this field will also have to be attentive to the growing jurisdictional differences throughout the commonwealth. Offering undergraduate law students more learning opportunities in charity law is one way to inspire future writing in this area.

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