

1-2012

Book Review

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Recommended Citation

(2012) "Book Review," *UBC Law Review*. Vol. 45: Iss. 1, Article 8.

Available at: <https://commons.allard.ubc.ca/ubclawreview/vol45/iss1/8>

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BOOK REVIEW

THE LAW AND PRACTICE RELATING TO CHARITIES, 4TH ED,
Hubert Picarda. West Sussex: Bloomsbury Professional, 2010.

The much anticipated fourth edition of Hubert Picarda's charity law text, *The Law and Practice Relating to Charities*, was published in 2010 by Bloomsbury Professional Ltd. The latest edition of Mr. Picarda's leading treatise fortifies the title's distinction as essential reading for anyone interested in the law of charity.

The true value of this title cannot be established without some initial reflections on charity law as a subject matter. Research in the field of charity law can often feel like an elusive search for a needle in a haystack. Resort to commonly used online databases does not readily reveal all relevant authorities. The cases considered authoritative in Canada span several centuries and foreign jurisdictions, including England, Australia, New Zealand, Ireland, Scotland, and beyond. In addition, the authorities once located are not easily comprehended, especially those dealing with the legal meaning of charity. The reader must be familiar with diverse and complex doctrines of law in order to track with the reasoning of charity judgments. The technical language of the cases, especially the older property and trust precedents, is inaccessible to readers lacking expertise in ancient rules of law, some of which are now only selectively taught in law schools, e.g., the law of mortmain and the rule against perpetuities.

Further complicating things is that the policy considerations courts juggle (not always transparently) when defining charity vary from context to context. As a result, the outcome of any given case may not be readily transferable to new circumstances. It could well be argued that there should be but one legal definition of charity applicable across all legal contexts, but the law would appear to have gone another route. As a result, authorities characterizing objects as charitable for purposes of, say, property tax concessions or the rule against perpetuities may, for example, be distinguished by courts defining charity in the context of income tax law.

Added to this is that, although the legal concept of charity has been developed over centuries of jurisprudence, the governing principles of this

area of law remain somewhat surprisingly unsettled. Charity law has for quite some time been the object of sustained and fierce criticism.¹ One leading analyst went so far as to describe the jurisprudence dealing with the meaning of charity as “the worst exhibition of the operation of the technique of judicial precedent which can be found in the law reports.”² Another condemned it as an “area riddled with arcane and archaic learning, hair-splitting distinctions, irreconcilable authorities and anomalies for which nobody ever dares offer any explanation other than their history.”³ Literally no one argues that the jurisprudence provides a felicitous account of the meaning of charity.

Needless to say, this is an area of law in which a quality secondary resource has tremendous value. Mr. Picarda’s treatise has admirably met this need since the first edition was published in 1977 followed by the second and third editions in 1995 and 1999, respectively. It was only recently that the value of the title began to erode due to substantial reform to English charity law in the years since the third edition was published. The enactment of the *Charities Act 2006*⁴ reflects the most extensive of these reforms. Under section 2 of the *Charities Act 2006* the four heads of charity traditionally recognized under English law—the relief of poverty, the advancement of religion, the advancement of education and other purposes beneficial to the community—were statutorily expanded to thirteen categories of charitable purposes. Section 3 of the *Charities Act 2006* abolished the presumption of public benefit developed at common law for select charitable purposes, e.g., the relief of poverty. The new rule is that public benefit must be established

¹ The criticisms are almost too numerable to mention. For an overview of the recurrent criticisms that have been made, see Neil Brooks, *Charities: The Legal Framework*, (Ottawa: Secretary of State, 1983) at 24–60 and Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1997) at ch 7–8.

² George Williams Keeton, *The Modern Law of Charities* (London, UK: Sir Isaac Pitman & Sons, 1962) at vi.

³ PC Hemphill, “The Civil-Law Foundation as a Model for the Reform of Charitable Trusts Law” (1990) 64:6 *Austl LJ* 404 at 405.

⁴ *Charities Act 2006* (UK), c 50.

on the facts as a condition of attaining and maintaining charitable status under English law. Even perpetuities and accumulations law (not typically known for rapid development) evolved since the third edition of Mr. Picarda's treatise via the *Perpetuities and Accumulations Act 2009*.⁵ Given these (and other) reforms to charity law, the third edition of the treatise could no longer be relied upon for a current statement of English law.

The fourth edition has been recast where appropriate to reflect these developments in English law. It continues the high standards set by previous editions. The hallmark of a well-written treatise is that it expresses complex ideas using accessible language. Meeting this standard requires a devoted author concerned as much with quality of expression as with substantive content. Mr. Picarda's treatise dutifully lives up to this exacting standard. He achieves the difficult goal of remaining comprehensible to a lay audience without sacrificing the detail, sophistication, or organization demanded by an expert readership.

The book is clearly organized into eight parts and sixty chapters. Part I is devoted to the meaning of charity. Its seventeen chapters set out in great detail the various purposes currently recognized as charitable under English law. An informative chapter is devoted to the controversial doctrine of political purposes, which limits the permissible advocacy activities of charities. Part II deals with the establishment of charities. The chapter devoted to the application of perpetuities and accumulations law to charities is commendable for clearly stating an area of charity law notorious for its excessive difficulty. Part III deals with schemes and the doctrine of *cy-près*. The chapters comprising this part do an admirable job of methodically explaining a poorly understood area of charity law. Part IV details the law governing the administration of charities, including a chapter devoted specifically to investments of charitable property. Part V deals with jurisdictional considerations, specifically, the jurisdiction of the Crown, courts, and Charity Commission over charities. Part VI is procedural in nature, detailing the rules of proceedings when charitable matters become contentious. Part VII provides a helpful primer on taxation and charities, a topic that is all too often mistakenly viewed as something best left to tax

⁵ *Perpetuities and Accumulations Act 2009* (UK), c 18.

treatises. Finally, Part VIII deals with remaining miscellany, including conflicts of laws, charity law developments in Europe, and topical statutes of relevance to charities.

On a constructive note, the treatise could perhaps benefit from a more pronounced critical component scrutinizing to a greater extent the reasoning and consistency of charity decisions. While the treatise assumes a critical posture from time to time, it has a tendency to accept judicial or regulatory authorities as a given. Since its primary goal is to state the law rather than to spearhead law reform or indulge in academic reflection, it might fairly be said that such an approach is utterly appropriate. Indeed, law books providing an orthodox statement of “the law” play an important and time-honoured role in legal literature that should not be dismissed out-of-hand on methodological grounds. What this means, though, is that readers interested in discovering the limitations of orthodox charity law doctrine, which is arguably necessary in order to gain a deeper understanding of the law and its nuances, will have to go beyond the confines of this title. For these readers, Mr. Picarda’s treatise will provide but the starting point of analysis, albeit an incredibly useful one.

Canadian charity lawyers will be interested to hear about the title’s relevance to a Canadian readership. Like earlier editions of the treatise, the fourth edition will enjoy broad appeal in Canada notwithstanding its English orientation. This is at least in part owing to the well-established tradition of Canadian charity law following English common law authorities. It also reflects Mr. Picarda’s continued practice of taking into account authorities from jurisdictions outside of England, including Australia and Canada. However, as is understandable for a treatise devoted predominantly to English law, the citation of Canadian authorities is not comprehensive.

Despite the appeal of this treatise to a broad Canadian readership, the need for a Canadian-specific treatise on the law of charity is becoming increasingly apparent. This is not due to any particular shortcoming of Mr. Picarda’s treatise but rather to the growing gulf between English and Canadian charity law. An English treatise may have been sufficient for Canadians when English and Canadian charity law generally shared a common legal framework. The differences between the Canadian and English regimes are, however, growing increasingly stark. Canadian lawmakers are clinging to traditional English precedents more securely than

even the English. Whereas the English have embraced significant statutory reforms to charity law, Canadian charity law continues for the time being to follow the historical English common law precedents.⁶ Some might argue that Canadian charity law has as a result become stagnant. Whether that overstates the point or not, it is certainly the case that English and Canadian charity law are now more than ever on separate trajectories. For the time being, the discrepancies between Canadian and English law in the fourth edition of Mr. Picarda's treatise 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.

Overall the fourth edition of *The Law and Practice Relating to Charities* maintains the title's distinction as an indispensable research tool for anyone studying the law of charity. It is a well-written and intuitively organized treatise authored by one of charity law's most esteemed and widely cited authors. It acquires itself admirably as a valuable resource well worth the purchase price.

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⁶ Property lawyers might sketch a parallel to the continued application in parts of Canada of antiquated property rules of English origin that the English long since abolished or reformed via the *Law of Property Act 1925* (UK), c 20.

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