

## Economic Development and Charitable Status: As Cold as Charity?

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This article considers the issue of whether economic and community development can be a charitable purpose under New Zealand law and debates whether authorities reflect too restrictive an approach, thus limiting the expansion of the law of charities.

The origin of the meaning of charity is to be found in the *Statute of Elizabeth*, or the *Charitable Uses Act 1601*. The preamble of this Act provides purposes that are deemed to be charitable, including the relief of the aged, impotent or poor people, maintenance of sick and maimed soldiers and mariners; the repair of bridges and churches; and the marriage of poor maids, to note but a few. This is not an exhaustive list, and other purposes may be charitable where “those purposes are charitable which that statute enumerates or which by analogies are deemed within its spirit and intendment.”<sup>1</sup>

The seminal case of *Commissioners for the Special Purposes of the Income Tax v Pemsel* (1891) AC 531 provided further clarity regarding charitable trusts, establishing four heads of charity under which all charitable trusts must fall; the four heads being:

- Relief of poverty;
- Advancement of education;
- Advancement of religion; and
- Other purposes beneficial to the community, not falling under any of the preceding heads.

An object may fall under one of these, but this does not automatically mean that the object will be charitable, for not only must an object fall under one of the *Pemsel* heads, it must, *inter alia*, also satisfy the public benefit test.<sup>2</sup> In other words, the purposes of the entity must benefit a sufficient section of the public as opposed to having private purposes. There is an argument that in cases where trusts are for the relief of poverty, and the advancement of religion or education, the benefit will be presumed, whereas all other cases the benefit will have to be proven.<sup>3</sup> However, where there may be a presumed benefit, there is evidence that the courts are more than willing to test that presumption fully.<sup>4</sup> The questions for the Charities Commission of New Zealand and the courts are whether community and economic development organisations are charitable and when and how such entities may satisfy the public benefit test. For such organisations, their charitable purposes are most likely to be determined under the *Pemsel* heads of relief of poverty, the advancement of education and other purposes beneficial to the community.<sup>5</sup> Such considerations have been brought sharply in to focus since the recent High Court decision of

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<sup>1</sup> *Morice v Bishop of Durham* (1805) 9 Ves 399 at 405, Sir William Grant MR.

<sup>2</sup> Dr N Richardson, *Nevill's Law of Trusts, Wills and Administration* (9<sup>th</sup> ed, LexisNexis, Wellington, 2004) at 119.

<sup>3</sup> *Ibid* at 123.

<sup>4</sup> Juliet Chevalier-Watts “Trusts for Religious Purposes” (2010) March New Zealand Law Journal at 56.

<sup>5</sup> Charities Commission “Charitable Purpose and Community and Economic Development” (2009) October at 2 <http://www.charities.govt.nz/LinkClick.aspx?fileticket=7yHN%2fGBtmO4%3d&tabid=218&mid=835>

*Canterbury Development Corporation v Charities Commission*.<sup>6</sup> Before delving into the issues surrounding this case, it is worthwhile a moment to consider the role of the Charities Commission.

The Charities Commission was established by the *Charities Act 2005* as an Autonomous Crown Entity. Such entities are established by or under Statute and are required to have regard to Government policy when directed by the relevant Minister.<sup>7</sup> The Commission has numerous functions, as set out in s10 of the *Act*, and include:

- Promotion of public confidence and trust in the charitable sector;
- Educate and assist charities in relation to good governance and management;
- Receive, review and process applications for consideration for registration as a charitable trust;
- Receive, review and process Annual Returns submitted by charitable trusts;
- Monitor and promote compliance with the *Charities Act 2005*.<sup>8</sup>

Existing charities that are registered under the *Charitable Trusts Act 1957* are required to apply for registration by the Commission under the *Charities Act 2005*, if, *inter alia*, the trust wishes to retain their tax exempt status.<sup>9</sup> The Commission began receiving applications for registration as charitable entities when the Register opened in February 2007. Since that time, the Commission has reviewed over 30,000 applications and registered over 25,000 charitable trusts.

In May 2008, Canterbury Development Corporation (CDC), the Canterbury Development Corporation Trust (CDCT) and the Canterbury Economic Development Fund (CEDF) applied for registration under the *Charities Act 2005*, and in September 2009, the Charities Commission rejected their application. The appellants appealed the decision to the High Court, which considered the three appeals separately, although it was clear from the judgments that there were many common factors across the appeals.<sup>10</sup> As a result of the commonality between the appeals, this paper will focus on the judgment delivered on CDC.

CDC's role is, *inter alia*, to stimulate economic growth through a number of objectives, including providing economic development leadership; providing business support to fast track companies; focusing on projects that will develop the economy, including securing Broadband; and supporting long-term infrastructure development.<sup>11</sup> The objects for which the Trust was established included: the relief of poverty; to support and assist people seeking employment; to encourage skill and industry; to expand employment; to encourage, promote and facilitate business; and to provide various services to businesses.<sup>12</sup>

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<sup>6</sup> *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010].

<sup>7</sup> Statement of Intent, Charities Commission, 2010-2013 at 4

[www.charities.govt.nz/LinkClick.aspx?fileticket=Z4zJIXwxZig%3d&tabid=160&mid=674](http://www.charities.govt.nz/LinkClick.aspx?fileticket=Z4zJIXwxZig%3d&tabid=160&mid=674)

<sup>8</sup> *Ibid*.

<sup>9</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [1].

<sup>10</sup> *Ibid* at [9].

<sup>11</sup> Canterbury Development Corporation, [http://www.cdc.org.nz/main/CDC\\_About](http://www.cdc.org.nz/main/CDC_About)

<sup>12</sup> Registration Decision: Canterbury Development Corporation, 30 September 2009, at [2] <http://www.charities.govt.nz/LinkClick.aspx?fileticket=opdPPLOcIS4%3d&tabid=250>

Section 5(1) of the *Charities Act 2005* codifies the heads of charity as set out in the case of *Pemsel*, and defines charitable purpose as including every charitable purpose whether “it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.” Additionally, to be charitable at law, the purpose must be for the public benefit.<sup>13</sup> Therefore the question for the Charities Commission, in the first instance, was whether the CDC objects set out in Clause 2 of its Constitution, that of community development, met the criteria under section 5 of the *Charities Act 2005*, and in particular whether economic and community development could fulfil the public benefit test.

The appellant’s arguments pertaining to charitable purpose were that its objectives:

- Relieved poverty;
- Advanced education; and
- Benefitted the community.

With respect to the relief of poverty, Justice Young noted that the relief of unemployment can be a charitable purpose under the head of relief of poverty,<sup>14</sup> as acknowledged in *IRC v Oldham Training and Enterprise Council*.<sup>15</sup> The appellant submitted that the work of CDC creates employment, therefore the unemployed are benefitted in two ways:

- The creation of new jobs encourages employees to move into new roles, thus creating new opportunities for unemployed people; and
- Creating skilled jobs creates a need for service jobs, therefore creating employment for the unemployed.<sup>16</sup>

The Charities Commission confirmed that in order to relieve poverty, the purpose must be directed at those suffering genuine hardship in some respect, although poverty itself is interpreted broadly and does not necessarily refer to those who are financially destitute. So to provide relief, the beneficiaries should have an identifiable need that arises from their condition, that the beneficiaries are unable to alleviate that suffering through their own resources, and further, the relief being provided by the entity should be direct.<sup>17</sup> In the case of *Re Tennant*,<sup>18</sup> the “settlor was attempting to achieve for a small new rural community what would then have been central to the life of that community: a cluster complex of a school, public hall, church and creamery.”<sup>19</sup> In Justice Hammond’s view, this would confer economic and social benefit on the community, so in effect, promoting economic development would be beneficial to a community that was in need of such an endeavour at that time. With regard to the issue of employment, his Honour touched on that notion that the enterprise would have had the effect of furthering employment, although that in itself

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<sup>13</sup> Section 5(2)(a) *Charities Act 2005*.

<sup>14</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [26].

<sup>15</sup> *IRC v Oldham Training and Enterprise Council* [1996] STC 1218, 69 TC 231 at [IV].

<sup>16</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [27].

<sup>17</sup> Registration Decision: *Canterbury Development Corporation*, 30 September 2009, above n.12 at [17].

<sup>18</sup> *Re Tennant* [1996] 2 NZLR 633.

<sup>19</sup> *Ibid* at 11.

was incidental and did not appear to be the purpose of the enterprise.<sup>20</sup> However, his Honour made no further comment on the relevance of alleviating unemployment in this context and the relief of poverty, therefore it may be presumed that the furthering of employment was merely incidental to the purposes of that trust. The case of *IRC v Oldham Training and Enterprise Council*<sup>21</sup> also considered the issue of unemployment falling under the head of relief of poverty and, as was noted earlier, confirmed that providing employment may relieve poverty, but the objects of the Oldham Training and Enterprise Council, although improving the employment prospects in Oldham, also provided private benefits, thus meaning that benefits to the community conferred by any activities were too remote. As a result, regardless of the motives of likely beneficial consequences for employment, the Oldham Training and Enterprise Council was disqualified from having charitable status.<sup>22</sup>

I respectfully submit that on the issue of employment, the cases of *Re Tennant* and *Oldham Training and Enterprise Council* offer little support to the admissions of CDC, and I concur fully with the view of Justice Young. His Honour notes that the purpose of CDC is not to further employment in its entirety, merely that the unemployed could be an ultimate beneficiary of its work. Indeed, the purpose of CDC is to improve the economic wellbeing of the area, not to relieve poverty, so the possibility of assisting a person who is unemployed is too remote to qualify under the charitable head of relief of poverty.<sup>23</sup> This view is consistent with approach taken in the cases of *Re Tennant* and *Oldham Training and Enterprise Council* and firmly entrenches the notion that the benefits to the community as a result of economic development must not be too remote and that the private benefits must not outweigh the public benefits.

With respect to the advancement of education head, the Court dealt swiftly with the matter. CDC submitted that the education aspect stemmed from providing business training, including financial, marketing and technical counselling. His Honour could not conceive that such services could come within the provision of the advancement of education as intended by the Act. His Honour confirmed that for a purpose to be charitable, then the opportunity must be available to a sufficient section of the community,<sup>24</sup> and based on the strict criteria set out by CDC themselves,<sup>25</sup> this would preclude eligibility under the requirements of public benefit. This reflects the Charities Commission earlier succinct approach on the same matter. In the Registration Decision, the Commission noted that “providing an educational course which is open to the public would be charitable under this head, however promoting Christchurch as a student destination would not amount to advancing education.”<sup>26</sup> This strict approach may appear to be in conflict with the notion that this head of charity has traditionally been accepted as being diverse in nature suggesting a “judicially-tolerant approach”<sup>27</sup> and indeed Brown suggests with the advent of

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<sup>20</sup> Ibid at 12.

<sup>21</sup> *IRC v Oldham Training and Enterprise Council*, above n.15.

<sup>22</sup> Ibid at [IV].

<sup>23</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [28]–[30].

<sup>24</sup> Ibid at [32]–[33].

<sup>25</sup> Ibid at [13].

<sup>26</sup> Registration Decision: *Canterbury Development Corporation*, above n.12 at [22].

<sup>27</sup> Juliet Chevalier-Watts “Under the Law of Charity, is the Principle of Public Benefit Being Hindered by the Doctrinal Rule of Precedent?” *Waikato Law Review* (2008) 16 at 198.

the Charities Commission, the Courts may adopt a more tolerant approach to the issue of educational diversity.<sup>28</sup> However, I would submit that the High Court's approach, and indeed that of the Charities Commission, in the case of *CDC* is not one of intolerance, rather it provides clarity in an area where the "case law has seen the scope of this head of charity extend far beyond the phrases in the Preamble".<sup>29</sup> Justice Young clearly comments that *CDC*'s criteria are too narrow to be construed as being of public benefit,<sup>30</sup> and the Charities Commission explicitly provides an option that would ensure qualification under the head of advancement of education.<sup>31</sup> So whilst both the High Court and the Commission dealt summarily with the matter of advancement of education, their approaches were entirely aligned with previous case law and provided clarity, should there be any question as to whether a purpose may fulfil the requirement of public benefit.

With respect to the third argument submitted by *CDC*, that of the purposes of *CDC* falling under the fourth charitable head of having purposes beneficial to the community, Justice Young took care to consider the relevant case law. There are two tests that an entity must pass in order to qualify under this head of charity. The first being that the actual activities fall within the spirit and intention of the Preamble of the Statute of Elizabeth, and the second being that the public benefit requirement is met.

The appellant's submission is that *CDC*'s constitution "comes within the fourth category of charitable purposes, given its promotion of economic development in Canterbury."<sup>32</sup> This economic development, *CDC* argues, is beneficial to the community because it enhances the economic well being of the community, as well as prohibiting any private benefit to individuals, although such benefits may be incidental to *CDC*'s charitable objects.<sup>33</sup> As such, *CDC* submits that "there is no ground to say that it is outside the "spirit and intendment" as being charitable."<sup>34</sup> It is to this question of "spirit and intention of the Preamble" that this paper now turns.

His Honour readily concurs that the objects and work of *CDC* are commendable, with their intention being to assist new businesses, but that in itself does not confirm that *CDC* has charitable intent. Essentially, *CDC* will assist businesses in a hope that they will flourish and not all businesses who request help will receive it as the assistance is only available to those businesses that fall within a narrow banding. Making profit and promotion are core to the purposes of *CDC*, not incidental, thus determining that *CDC*'s function is not within the spirit and intention of the Preamble.<sup>35</sup> In coming to this determination, his Honour noted that charitable purpose of benefit to the community must be assuaged,<sup>36</sup> and referred to the cases of *Re Tennant* and *Tasmanian Electronic Commerce Centre v Commissioner of*

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<sup>28</sup> David Brown "The Charities Act 2005 and the Definition of Charitable Purposes" *New Zealand Universities Law Review* (2005), December 21 at 624.

<sup>29</sup> Juliet Chevalier-Watts, above n.27 at 198.

<sup>30</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [33].

<sup>31</sup> Registration Decision: *Canterbury Development Corporation*, above n.12 at [22].

<sup>32</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [34].

<sup>33</sup> *Ibid* at [35]-[36].

<sup>34</sup> *Ibid* at [35].

<sup>35</sup> *Ibid* at [44].

<sup>36</sup> *Ibid* at [42].

*Taxation*.<sup>37</sup> In the former case, “there was a small deprived rural community where the capacity to develop important services such as a school and public hall was provided”<sup>38</sup> thus establishing the need in the community for such a charitable purpose. In the latter case, such a need was also established. In this case, the Federal Government established a Regional Telecommunications Infrastructure Fund Board (TRIF) whose objectives were to, *inter alia*, assist economic and social development of regional, rural and remote Australia by funding projects that enhance telecommunications infrastructure and increase access to telecommunications services in such areas.<sup>39</sup> Justice Heerey noted that “benefits to Tasmania’s economy resulting in a long-term economic advantage to Tasmania will be a benefit to the Tasmanian public, and indeed to the wider national public.”<sup>40</sup> This is of particular relevance to Tasmania because its small population and its great geographic distance from markets and raw materials meant that traditional methods of improving an economy such as conventional manufacturing, would not be of benefit to such places as Tasmania, especially as it had suffered net population decline, and its employment and income levels trailed that of the rest of Australia.<sup>41</sup> Therefore there was an established need for the community and potential for businesses to develop and ensure that Tasmania was no longer the “poor relation of the rest of the nation.”<sup>42</sup> Justice Young in the case of *CDC* noted that “no such claim of deprivation is made with respect to Canterbury or Christchurch” so the community benefit cannot be assuaged and the cases of *Re Tennant* and *Tasmanian Electronic Commerce Centre* can be distinguished. Such a narrow interpretation of whether a charitable purpose may fall within the spirit and intendment of the Preamble may appear unduly restrictive, especially when His Honour confirmed that case law on charitable purpose “has developed empirically and by analogy upon analogy.”<sup>43</sup> However, a useful case that considered this issue in some detail is the Canadian case of *Vancouver Regional FreeNet Assn v MNR* [1996] 3 FC 880.<sup>44</sup>

In this case Justice Hugessen reaffirmed that “whether an appellant falls within the fourth category of charities”<sup>45</sup> will be determined as to whether its purposes fall within the spirit and intendment of the Preamble, which requires the Court to consider if the appellant has the same type of purpose as laid out in the Preamble. His Honour also noted that the details of the types of purposes may change as society evolves, however, the actual types themselves will not change,<sup>46</sup> thus suggesting that the issue of whether a charitable purpose will fall within the spirit and intendment of the Preamble may still be construed narrowly. The question for the Court was whether free access to the information highway is a charitable activity. In its consideration, the Court acknowledged that “information is the currency of modern life” and any free exchange of such information can only be for the public good, thus reaffirming one of the core values of society as being freedom of speech,

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<sup>37</sup> *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* [2005] FCA 439.

<sup>38</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [43].

<sup>39</sup> *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* [2005] FCA 439 at [10].

<sup>40</sup> *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* [2005] FCA 439 at [58].

<sup>41</sup> *Ibid* at [60]-[61].

<sup>42</sup> *Ibid* at [61].

<sup>43</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [41].

<sup>44</sup> *Vancouver Regional FreeNet Assn v MNR* [1996] 3 FC 880.

<sup>45</sup> *Ibid* at 10.

<sup>46</sup> *Ibid*.

and that being just one aspect of freedom of information.<sup>47</sup> In assessing whether free access to the information highway may fall under the spirit and intendment of the Preamble, Justice Hugessen referred to the repair of bridges, ports, causeways and highways as recorded in the Preamble, which were, at the time, means of communication. It was therefore a straightforward step for the Court to recognise that a contemporary type of purpose similar to those detailed in the Preamble is within the intention of the Preamble.<sup>48</sup> However, the dissenting opinion of Justice Décarý provides further consideration regarding the issue of qualification of charitable under the fourth head, and indeed, his Honour offers a more cautionary approach. His Honour does acknowledge that “the fourth head...has proven the testbed for the “gradual extension” of the law of charities beyond those purposes which have been recognized at common law”<sup>49</sup> but the test itself remains that the purpose, and hence the benefit conferred, still falls within the spirit and intendment of the Preamble.<sup>50</sup> However, Justice Décarý identified two approaches taken by the English courts when deciding whether or not a purpose fulfils the criteria under the Preamble. The cases of *Morice v Bishop of Durham*<sup>51</sup> and *Barralet v Attorney-General*<sup>52</sup> demanded a restrictive approach, requiring that a purpose could only be brought within the spirit of the Act by analogy to an existing charitable purpose.<sup>53</sup> His Honour then noted that the second approach adopted a more broad doctrine in assessing whether a purpose falls within the constructs of the Preamble,<sup>54</sup> as determined by Russell LJ in the case of *Incorporated Council of Law Reporting for England and Wales v Attorney General*<sup>55</sup> where Justice Russell opined:

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

This broad approach reflects the submission by the appellant in the case of *CDC*, where it was noted that “the appellant submits in interpreting trust deeds...where there is ambiguity or uncertainty a benevolent interpretation favouring a presumption of charity should be used.”<sup>56</sup>

Such an extensive interpretation of the equity of the Preamble is not accepted by Justice Décarý in the case of *Vancouver Regional FreeNet*, and it is noted succinctly that “there is no Canadian authority for the principle that all purposes which in some way benefit the community are presumed to be charitable. There is no such presumption.”<sup>57</sup> His Honour

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid at 10-11.

<sup>49</sup> Ibid at 15.

<sup>50</sup> Ibid.

<sup>51</sup> *Morice v Bishop of Durham*, above n.1.

<sup>52</sup> *Barralet v Attorney-General* [1980] 3 All ER 918 (Ch D) at 926.

<sup>53</sup> *Vancouver Regional FreeNet Assn v MNR*, above n.44 at 15.

<sup>54</sup> Ibid.

<sup>55</sup> *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1972] Ch 73 (CA), at 88

<sup>56</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [21].

<sup>57</sup> *Vancouver Regional FreeNet Assn v MNR*, above n.44 at 16.

acknowledged that his learned colleagues have adopted an “open-minded approach characterizing purposes under the fourth head”<sup>58</sup> but not withstanding such matters, Justice Décaré is adamant that “mere provision of a benefit to the community is not tantamount to charitable trust.”<sup>59</sup> Although not specifically referring to the *Vancouver* case, Justice Young in the case of *CDC* did not depart from the stricter interpretation of the dissenting opinion in the case of *Vancouver Regional FreeNet*, although his Honour is less emphatic than his learned colleague in the *Vancouver* case. Justice Young recognised that the objects of *CDC* are laudable certainly, although being worthy will not itself establish *CDC* as having the necessary focus on charitable intent;<sup>60</sup> the spirit and intendment of the Preamble of the Statute of Elizabeth are still fundamental to the requirement of having charitable purpose. The case of *CDC* confirms therefore that there can be no presumption that a benefit to the community is charitable and that a narrow interpretation of the spirit and intendment of the Preamble is the favourable approach. This does not imply that the fourth *Pemsel* head of charity is failing to evolve, rather it confirms that any gradual extension of the fourth head “has been allowed in only the meritorious of circumstances.”<sup>61</sup>

This paper now turns to the thorny issue of public benefit and the High Court’s interpretation of this charitable requirement. Justice Young confirms that the public benefit must be expressly determined when the entity is claiming that the purpose falls under the fourth *Pemsel* head of charitable purpose, although the benefit does not necessarily have to apply to all the public, just a significant part.<sup>62</sup> What is interesting is that both counsel identified the same case to support their submissions in this regard, the case of *Oldham Training and Enterprise Council*. In this case, the Oldham Training and Enterprise Council was established to provide and promote vocational and educational training and re-training of the public in order to improve employability and promote the development of industry, commerce and enterprises for the benefit of the community.<sup>63</sup> The Court in the instant case noted that “the existence of these objects, in so far as they confer freedom to provide such private benefits, regardless of the motive or likely beneficial consequences for employment must disqualify Oldham TEC from having charitable status.”<sup>64</sup> What is noteworthy is that the Enterprise Council specifically targeted the unemployed in the context of business development; that training was targeted at assisting young people into work and retraining the unemployed; as well as providing cash allowances for those considering setting up businesses.<sup>65</sup> Regardless however of the laudable motives of the Enterprise Council, the Court still took a restrictive stance in applying the public benefit test. In the case of *CDC*, the appellants attempted to distinguish the activities of the Enterprise Council in the *Oldham* case with the activities of *CDC*. The appellants submitted that there was a key distinguishing feature in the *Oldham* case, that the objects stated by the Enterprise Council were not specifically expressed as being charitable, whereas their objects expressly determined their charitable nature.<sup>66</sup>

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [44].

<sup>61</sup> *Vancouver Regional FreeNet Assn v MNR*, above n.44 at 16.

<sup>62</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [45].

<sup>63</sup> *IRC v Oldham Training and Enterprise Council* at [3.1].

<sup>64</sup> *Ibid* at [IV].

<sup>65</sup> *Ibid* at [II].

<sup>66</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [55].

In response to this submission, Justice Young confirmed that “the mere fact that the constitution says that CDC’s objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are.”<sup>67</sup> Therefore his Honour concurred with the Charities Commission that whilst the appellant may undertake some charitable activities under certain of its clauses, the wording of the clauses allows the appellant to undertake non-charitable activities also. As a result, the objects will provide private benefits for business owners and any benefits conferred on the remainder of the community will be far too remote to be deemed to be charitable.<sup>68</sup> Justice Young correctly determined that an entity may state that its objects are charitable, but in addition to that, the ultimate test is that the “objects and operation of the organisation either support[s] a charitable purpose or they do not”,<sup>69</sup> as was identified in the *Oldham* case. Thus any reliance on the *Oldham* case by CDC was ultimately futile as the appellant’s own distinguishing submissions failed to distinguish entirely the two cases.

I respectfully submit that it was perhaps surprising that CDC should have attempted to distinguish the *Oldham* case from its own situation, when, as was so eloquently stated by Justice Young: “the Enterprise Council could be considered to have a considerable more powerful case in favour of a declaration as a charity than CDC as far as public benefit is concerned.”<sup>70</sup>

CDC also sought to challenge the notion that the mere fact that a company should make a profit as a result of its provision of business should not determine that its objects are not charitable. The appellant sought to rely on the approach advocated in the *Tasmanian Electronic Commerce Centre* case. In this case, Justice Heerey determined that:

Once it is accepted that assistance to business and industry can provide a public benefit of the kind which the law recognises as charitable...I do not see how the fact that individual businesses may benefit can be a disqualifying factor. On the contrary, if business in general is assisted, it seems inevitable that some firms at least will become profitable, or more profitable, as a result of that assistance. There would be no point in the exercise if this were not the case. It would be an odd result if an institution established to benefit business could only qualify as a charity if the recipients of its benefits made losses or did no more than break even.<sup>71</sup>

In reliance on this, the appellant submitted that the mere fact that companies assisted by the provision of business training may make a profit should not preclude their objects from being charitable.<sup>72</sup> However, CDC’s submission is not advantageous for two reasons. Firstly, this is because, as addressed already, the objects did not fall within the spirit and intent of the Preamble of the Statute of Elizabeth. The relevant issue in the CDC situation is that the assistance to business is central to its purposes, not ancillary, thus profit

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<sup>67</sup> Ibid at [56].

<sup>68</sup> Registration Decision: Canterbury Development Corporation, above n.12, at [39].

<sup>69</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [56].

<sup>70</sup> Ibid at [54].

<sup>71</sup> *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* above n.37 at [56].

<sup>72</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [59].

is the central focus and the public benefit is a mere hope, as opposed to an explicit object.<sup>73</sup> The second reason that CDC's reliance on the *Tasmanian* case is not of assistance is because the key issue in the instant case is that the Court recognised the public benefit requirement due to the fact that Tasmania was an economically deprived area, in comparison with the much of Australia, and the public benefit would encourage a boost in that poor economy. At no stage does CDC suggest that there is any such economic deprivation in Canterbury. Indeed, it is this very issue that is at the root of the considerations for the Court in the *Tasmanian* case. In that case, the Court noted explicitly that "the focus of TECC is in an area where there is potential for business to develop unhindered by the restraints which in the past have made Tasmania a poor relation of the rest of the nation."<sup>74</sup> I submit that it would have been very unlikely that this Australian case would have benefitted the submissions of CDC given the underlying issues on which the *Tasmanian* case turned. However, Justice Young in the case of *CDC* has left open the possibility that charitable purpose may be found in economic development should an "identifiably economically deprived area in New Zealand"<sup>75</sup> be identified. The effect of his Honour's opinion is two fold. Firstly, Justice Young has entrenched the notion that economic development may be construed as being charitable, but the reality being that there should be an identifiable economic need. Secondly his Honour confirmed that the fourth *Pemsel* head may evolve, but any extension of the purposes under that head will be constrained by the narrow interpretation of the test of public benefit.

The matter of narrowness of interpretation was considered once more in the case of *CDC* when the Court turned its attention to the case of *Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319,<sup>76</sup> and endeavoured to distinguish the purposes of the two bodies. The *Triton* case concerned a foundation set up to promote culture and entrepreneurship in Australia. It did this by assisting innovators to commercialise their ideas by providing free advice on marketing, business planning and intellectual property ideas. Justice Kenny determined that Triton's "principle object and activities can fairly be regarded as beneficial to the public as a whole."<sup>77</sup> This is even though Triton's objectives were to promote the commercial aspect of novel ideas and to encourage the commercialisation of innovation and to recognise commercial utility of novel ideas. Indeed, his Honour confirmed that the promotion of this type of commerce is capable of being charitable and falls within the spirit and intendment of the Preamble of the Statute of Elizabeth.<sup>78</sup> This however does appear to be contrary to the considerations elucidated in the case of *CDC*, where commercialisation and profit, which were central to its purposes, were deemed to fall outside of the Preamble.

It is perhaps for this reason that Justice Young in *CDC* attempted to distinguish the case of *Triton* from the case of *CDC*. His Honour noted that the Court in *Triton* was satisfied that the overarching objection of the Foundation was to develop and promote innovation and entrepreneurship in Australia generally, whereas in the case of *CDC*, its focus was the

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<sup>73</sup> Ibid at [60].

<sup>74</sup> *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* above n.37 at [61].

<sup>75</sup> *Canterbury Development Corporation v Charities Commission*, above n.6 at [61].

<sup>76</sup> *Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319.

<sup>77</sup> Ibid at [31].

<sup>78</sup> Ibid at [31]-[32].

development and promotion of individual businesses. The case of *Triton Foundation* appears to sit awkwardly with other cases of its genre. I respectfully submit however that I am unable to distinguish so easily between the objects of the two cases, as both the Triton Foundation and CDC have commercialisation and profit as core principles. However, Justice Young focuses decisively on the narrow criteria set out by CDC that determined how its funds would be allocated. This criteria allowed any member of the public to approach CDC for funding, but limited significantly those who would receive financial assistance as the funding would generally only be given to those projects that would be likely to be most successful. His Honour contrasted this with the criteria of the Triton Foundation, whose services could be available to anyone, but only those whose ideas were thought to be most likely to be most profitable were likely to receive funding.<sup>79</sup> In reality, I can see little to distinguish the objectives of CDC and the Triton Foundation, however, it is perhaps understandable that Justice Young has been so determined to differentiate between the two situations. The judgment of Justice Keeny in the case of *Triton Foundation* appears to extend the law of charities beyond that which has been recognised to date under the fourth head of *Pemsel*, therefore Justice Young in the case of *CDC* firmly reestablishes that such extensions should only be gradual and any interpretation of public benefit must be narrowly construed in order to “curb abuses in the administration of trusts of a charitable nature.”<sup>80</sup>

The jurisprudence of the law of charitable trusts and economic development has not been without issue, and the Courts have faced some challenges over the years in clarifying the law. The case of *CDC* is a timely response to any questions that may have been arising as to whether the law of charitable trusts has been extended to include economic development within the four heads of charity, that of other purposes beneficial to the community. It is clear that the authorities draw a distinction between the purpose of promoting industry, commerce and business and the purpose of promoting personal interests engaged in those elements of industry, commerce and business. However, as can be seen, drawing such distinctions is not always straightforward, although the case of *CDC* has gone some way to entrench the notion that any interpretation of public benefit in relation to economic development should be done so cautiously, as well as affirming the authority of the Charities Commission in its role as watchdog. This may be construed as a cold and conservative approach, both in relation to the decisions made by the Courts and by the Charities Commission, but it must be borne in mind that although charities operate for many different purposes, they all have one common feature: to provide the best possible outcome for their beneficiaries. Thus a successful charity is not only one that fulfils that purpose, but also one that enjoys high levels of public trust and confidence. Such decisions and judgments as delivered by the Charities Commission and Justice Young in the case of *CDC* respectively ensure that charitable purposes are subject to objective scrutiny, and so make certain that public may have the trust renewed in such processes and relevant bodies. So perhaps charity is not quite so cold as once thought?

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<sup>79</sup> Minter Ellison Rudd Watts, “Tax Update, Cases” (2010) April at 2, [www.minterellison.co.nz](http://www.minterellison.co.nz).

<sup>80</sup> *Vancouver Regional FreeNet Assn v MNR*, above n.44 at 15.