Vancouver Society of Immigrant and Visible Minority Woman v. *M.N.R.*[1]

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[Rarely does the Supreme Court of Canada take up the perennial question: What does "charity" mean?[2] Even rarer is the case where it does so with the benefit of extensive legal and scholarly debate. The Supreme Court of Canada's decision in *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R.* is an important decision that deserves wide recognition and close study. In this edition of *The Philanthropist*, we have invited two distinguished experts in the law of charity to provide their reactions to, and reflections on, the Court's decision. We start with the Editor's summary of the facts and holding in the case. This is followed by comments by Wolfe Goodman, Goodman & Carr, Toronto; and Arthur Drache, Burke-Robertson & Buchmayer, Ottawa. In his regular feature "Legal Developments", Legal Editor James Phillips also discusses this landmark case.]

Facts

The Vancouver Society of Immigrant and Visible Minority Women first applied in 1992 to the Minister of National Revenue to be registered as a charity under s. 149.1 of the *Income Tax Act* (the *Act*).[3] The clientele of the Society, as its name suggests, was largely, but not exclusively, immigrant and visible minority women. The Society described itself in its correspondence with Revenue Canada as having a membership of some 300 most of whom were seeking employment opportunities and general support in integrating into Canadian life. In addition to its members, there were another 300 people listed in the Society's directory of women seeking employment in Canada. The Society's principal role in the job search process was to make the existence of the directory known to prospective employers. The Society also provided a number of services including counselling on such matters as resume drafting, interview skills, and where to apply for jobs; helping its clientele in the accreditation recognition process by talking to professional associations and institutions and by informing its clientele of courses and programs available to upgrade their foreign qualifications and holding seminars and information sessions on human rights, employment equity, and violence against women.

Section 149.1 of the *Act* requires, as two of several conditions of registration, that (a) all of an organization's resources be devoted to charitable activities carried on by it, and (b) no part of an organization's income be payable or available for the use or personal benefit of any proprietor, member, share-

holder, trustee or settlor. In effect, according to the usual interpretation of these conditions, a charitable organization's purposes must be exclusively charitable and a charitable organization must devote substantially all of its resources to those charitable purposes. The significance of the Supreme Court of Canada's decision in the case is its contribution to the meaning of "charity" in both these requirements.

There are two main sources for the meaning of "charity" at law: The *Preamble* to the *Statute of Elizabeth*[4] and the test set out in the reasons of Lord Macnaghten in the House of Lords decision in *Commissioner for Special Purposes of the Income Tax* v. *Pemsel*.[5] The *Preamble*, rendered from archaic form to modern language by Slade J. in *McGovern* v. *Attorney General*,[6] provided as follows:

> ... relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars and universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handcraftsmen, and persons decayed; relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

Although the statute was repealed long ago,[7] as Gonthier J. observed in his dissenting judgment, the *Preamble* has been "absorbed" into the common law, hence its continued influence on the Commonwealth jurisprudence on the definition of charity.

In *Pemsel*, Lord Macnaghten laid out the following classifications of charity:

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for purposes beneficial to the community not falling under any of the preceding heads (at 583).

These two tests, and the substantial jurisprudence which interprets and applies them, have been most important in the law of trusts where qualifying as "charitable" is essential to the validity of a purpose trust. The modern relevance, however, as the case under comment demonstrates, is in income tax law. The issue in *Vancouver Women*, was whether the Society's purposes and activities were exclusively charitable within the meaning of these two tests and the jurisprudence developed under them.

Revenue Canada's initial correspondence with the Society took exception to the claim that its activities were charitable. In part, Revenue Canada's objection was based on its view that the objects clauses of the Society contained political and other objects that are not charitable. In response to these objec-

tions, the Society amended its objects clauses and applied a second time. The new objects clauses read as follows:

> The purposes of the Society are:
>
> (a) To educate members of the community at large, including immigrant and visible minority women, on the needs and concerns of immigrant and visible minority women in Canada.
>
> (b) To foster and promote social awareness and community involvement in civic education, volunteer and membership development and preventive social services.
>
> (c) To facilitate immigrant and visible minority women in achieving economic and social independence and their full potential in Canadian society.
>
> (d) To co-operate and build a network in British Columbia, especially among immigrant and visible minority women and concerned individuals.
>
> (e) To provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.

There followed correspondence and telephone conversations leading to a preliminary indication on the part of Revenue Canada that the application would be rejected. The Society responded by proposing to further modify its objects as follows:

> The purposes of the Society are:
>
> (a) To provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self-employment.
>
> (b) To carry on political activities provided such activities are incidental and ancillary to the above purposes and provided such activities do not include direct or indirect support of, or opposition to, any political party or candidate for public office.
>
> (c) To raise funds in order to carry out the above purposes by means of solicitation of funds from governments, corporations and individuals.

Revenue Canada still had concerns. In particular, it felt that immigrant women and visible minority women were not traditional objects of charity, that the information sessions were not educational (and therefore not charitable) in nature because they were not structured and because they were merely informational, that the networking services offered by the Society were not charitable because they were likely to provide only private benefits, and that the Society's proposed objects listed political activities. Revenue Canada's letter stated, in part:

> Turning to activities undertaken by the Society which might have been considered educational, it appears from our further examination of the material on file that these are primarily information sessions. I cite, for example, discussions sponsored by the Society on such subjects as human rights, employment equity, violence and abuse against women, and how to start a small business. While these sessions are indeed informative and helpful to interested persons, they do not appear to be educational in the charitable sense. Additionally, activities such as networking, liaising for accreditation of credentials and the compilation and circulation of a Job Skills Directory are neither educational nor charitable activities and are more apt to provide a private rather than a public benefit.

Perhaps surprisingly, in view of this cool response, the Society went ahead with its proposed amendment to its objects clauses. It replaced old clauses (a), (b), and (c) with the new ones, deleted clause (d) and retained clause (e). Revenue Canada declined to register the Society again maintaining that women were not, "simply by virtue of their gender or racial origin" in special need of charitable relief, that the Society's programs were not educational in the common law sense, that the Society's purposes included political purposes and, most fundamentally:

> ... that although some of the activities carried on by the Society may appear to be charitable, the submission has not demonstrated that the organization devotes substantially all its resources to charitable activities. Activities such as networking, referral services, liaising for accreditation of credentials, soliciting job opportunities and maintaining a job skills directory as described in the Society's May 1993 Report are not charitable activities.

It was this decision that was subject to the appeal, first to the Federal Court of Appeal, then to the Supreme Court of Canada.

The Federal Court of Appeal rejected the Society's appeal.[8] With respect to the education argument, it held that the Society's activities as described "are not sufficiently structured and articulated so as to respond to the requirements set out by the jurisprudence". It also stated that the Society's purposes did not fit into the fourth category and rejected, in that regard, any analogy to *Native Communications Society of British Columbia* v. *Canada (M.N.R.)*[9] as not relevant. It concluded that the "basic difficulty" was that the "Society's purposes and activities are so indefinite and vague as to prevent the Minister, and this Court, from determining with some degree of certainty what the activities are, who are the true beneficiaries of the activities and whether these beneficiaries are persons in need of charity as opposed to merely being in need of help" (at 6233).

Gonthier J. writing for L'Heureux-Dube and McLachlin JJ. held, in dissent, in favour of registration. Iacobucci J. writing for Cory, Major and Bastarache JJ. in the majority held against registration. Gonthier J.'s reasons are reported first.

Holding – Gonthier J. In Dissent

Gonthier J. first examined the nature of the tests he was required to apply. He observed that the list in the *Preamble* was not intended and never has been taken, as exhaustive. Although the *Pemsel* classification was intended to be exhaustive, it left much room in the fourth residual category for argument. The *Pemsel* test, he said, was a classification of convenience and as such was not meant to be read as a statute. Rather, it was sufficiently flexible to allow courts to "modernize" the definition of charity, to adapt it to changing social needs (para 36). Neither approach, he said, provides a definition, only a description. Neither approach states why the items identified are charitable – both merely assert that they are. He then went on to identify the twofold substance of charity "long embedded in the case law": "voluntariness" or "altruism" and "public welfare in an objectively measurable sense" (para 37). To satisfy the traditional tests and the tests under the *Act*, an organization purporting to be charitable must be exclusively charitable in this sense (although incidental and ancillary purposes are permitted) and it must be for the benefit of an appreciably important class of the community. The latter requirement, in turn, means that there must be an objectively measurable and socially useful benefit and that benefit must be available to a sufficiently large section of the public. That is, there must be a *public* benefit.

The first three heads of *Pemsel*, he said, provide three presumptively valid heads of charity, while the fourth is a residual category with recognized subcategories. Courts reason by analogy using the first three heads and look to the *Preamble* as a source for analogies in the fourth. They ask whether the proposed object is within the spirit and intendment of the *Preamble* or the decisions developed under it. With respect to the fourth, only some purposes beneficial to the public, i.e., only those within the spirit and intendment of the *Preamble*, are charitable at law. The task is a difficult one but courts must attempt to conform to precedent – the decided cases – in a way that will allow the law of charity to develop in a principled way. Gonthier J., in this respect, specifically rejected the approach of Russell L.J. in *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General*[10] who would have eliminated the distinction between public benefits that are charitable in the legal sense and public benefits which are not. Gonthier J. summarized the proper approach as follows:

> Thus, in determining whether a particular purpose is charitable, the courts must look to both broad principles – altruism and public benefit – as well as the existing case law under the *Pemsel* classification. The courts should consider whether the purpose under consideration is analogous to one of the purposes enumerated in the preamble of the *Statute of Elizabeth*, or build analogy upon analogy. Yet the pursuit of analogy should not lead the courts astray. One's eye must always be upon the broader principles I have identified, which are the Ariadne's thread running through the *Pemsel* categories, and

> the individual purposes recognized as charitable under them. The courts should not shy away from the recognition of new purposes which respond to pressing social needs.

Applying this approach to any case, one must examine whether an organization's purposes are charitable and whether its activities are sufficiently related to its purposes to be considered to be in furtherance of them. Activities which are political or commercial in purpose may be pursued only if they are merely a means to a charitable purpose. They must be merely ancillary or incidental to the sole permissible purpose – charity. The point at which they become an end in themselves is the point at which the organization loses its qualification as charitable. The connections between the activity and the purpose must be direct in the sense of coherent and not necessarily immediate.

> Thus, in my view, the proper approach is to begin by: (a) identifying the primary purposes of the organization; and then (b) determining whether the purposes are charitable. If one concludes that the purposes are not charitable, then the organization is not charitable and the inquiry ends there. However, if the organization's primary purposes are charitable, we must then go a further step, and consider (c) whether the other purposes pursued by the organization are ancillary or incidental to its primary purposes; and (d) whether the activities engaged in by the organization are sufficiently related to its purposes to be considered to be furthering them. If positive responses are made to these two latter inquiries, then the organization should be registered as a charitable organization (para 63).

Gonthier J. held that the Society's primary purpose was set out in clause (a) of its constitution and that the remaining clauses were merely subsidiary.

The Society argued that it was charitable under the second head – education – and the fourth head – public benefit. With respect to the first, Gonthier J. held that the narrow view of education adopted by Revenue Canada – to the effect that education is limited to formal training and the improvement of a useful branch of human knowledge and does not include workshops and information sessions – was no longer tenable. That this was so was evident from the trend of the cases, starting with a 1942 English decision, *Re Central Employment Bureau for Women and Students' Careers Associations Inc.*,[11] which upheld as an advancement of education a fund to help educated women to become self supporting. Gonthier J. saw no meaningful difference between that case and the one before him where the Society's essential object was, similarly, to help women put their vocational skills into practice in the Canadian workplace. In sum and in agreement with the majority, he held that the advancement of education was best defined in the following passage from *Inland Revenue Commissioners* v. *McMullen*:[12]

> Thus, so long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the

> recipients – and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.

It was clear that the Society met this test and that its primary purpose was charitable.

With respect to the fourth head, there was sufficient jurisprudence to the effect that the assistance of immigrants or "immigrant aid" was a recognized subcategory of the fourth head. Gonthier J. carefully reviewed the substantial jurisprudence in favour of this suggestion and stated that the connection did not require that there be an element of poverty, although he noted that for many immigrants the lack of economic and social integration might lead to poverty. It did not matter, therefore, that some members of the Society's clientele might be well off. These conclusions did not entail, as the majority suggested, a "fundamental turning in direction" in the law of charity. The public benefit in this type of activity lay in the successful social and economic integration of immigrants.

The only remaining question was whether the Society's activities were sufficiently related to, and in furtherance of, these purposes. This evaluation was a simple matter of logic combined with an appreciation of context. It was clear in his Lordship's view that the Society's activities were related to its charitable purpose. They were also available to a sufficiently large section of the public.

On the question of political purposes, it was clear from the Society's activities that its political engagements were purely ancillary to its main purpose and this fact was not affected by the fact that the Society listed political purposes in its objects clauses. On the question of the vagueness of the Society's purposes, objects clauses by their very nature were bound to be general and the ones at issue in this case did not suffer from excessive generality. The objection that the two words "or conducive" in clause (e) rendered the activities too vague was simply without legal foundation.

His Lordship therefore concluded that the Society ought to have been registered since it was exclusively charitable within the meaning of that term as developed in the law. There was no need, he concluded, to revise the legal meaning of the term.

Holding – Iacobucci J. for the Majority

Iacobucci J. started with a discussion of the test in *Pemsel*, which he said had been adopted and applied many times in Canada. That test required that the purpose be for the benefit of the community or of an appreciably important class and that the purpose have the "genuine character" of charity. In applying the test, the focus must be on purposes, not activities. Thus, (a) the purpose of the organization must be charitable and must define the scope of the activities engaged in by the organization and (b) all of the organizations' resources must

be devoted to these activities unless the organization falls within the specific exemptions. Within this framework, and in the absence of a legislative reform providing guidelines, "the best way to discern the quality of an organization's purposes was to proceed by way of analogy to the purposes already found to be charitable by the common law" (para 159). To qualify under the *Act*, the organization must be exclusively charitable. However, where it devotes part of its resources to other (political or commercial) purposes or activities that are merely ancillary and incidental to its charitable purpose, it will still qualify either at law or pursuant to specific provisions of the *Act*. In effect, the pursuit of ancillary and incidental objectives does not jeopardize the finding that the organization is charitable.

Applying this test, the only possibilities under the *Pemsel* test were the second category, education, and fourth, public benefit. Iacobucci J. said he was prepared to construe the second category more widely than it had been in the past. The test applied by the Federal Court of Appeal required a "formal training of the mind" or the improvement of a "useful branch of human knowledge". Applying this test, the Federal Court of Appeal was correct: the goal of the Society's programs was "immediately utilitarian" and not the preparation for life in general or for a particular profession or trade. There was no systematic instruction. However, Iacobucci J. held that this test was too narrow. He preferred the slightly more expansive test developed by the House of Lords in *Inland Commissioners* v. *McMullen*.[13]

> The legal conception of charity and within it the educated man's ideas about education are not static, but moving and changing. Both change with changes and ideas about social values. Both evolve with the years. In particular and applying the law to contemporary circumstances, it is extremely dangerous to forget that thoughts concerning the scope and work of education differed in the past greatly from those which are now generally accepted (at 15).

He favoured a much more inclusive approach stating that education should include "more informal training initiatives, aimed at teaching the necessary life skills or providing information toward a practical end, so long as these are truly geared to the training of the mind and not just the promotion of a particular point of view" (para 168). He continued:

> To limit the notion of "training of the mind" to structured, systematic instruction or traditional academic subjects reflects an outmoded and underinclusive understanding of education which is of little use in modern Canadian society. As I said earlier, the purpose of offering certain benefits to charitable organizations is to promote activities which are seen as being a special benefit to the community, or advancing a common good. In the case of education, the good advanced is knowledge or training. Thus, so long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the recipients – and not solely to promote a particular

point of view or political orientation, it may properly be viewed as falling within the advancement of education (para 169).

Based on this more inclusive approach, Iacobucci J. found that the Society's purposes as contained in clause (a) of its objects clauses were indeed charitable. He also held that the Society's extension of this benefit to immigrant women satisfied the requirement that it be of public benefit.

With respect to the fourth head, Iacobucci J. held that the Society failed to show that the assistance of immigrants was a charitable object in accordance with the trend of the jurisprudence. The target "all immigrants" would include independent immigrants who would not require assistance and therefore could not be the object of charity. Iacobucci J. reviewed some of the relevant case law and concluded on the basis of it, that contrary to the opinion of Gonthier J., there was no support for the notion that immigrant aid *per se* was a charitable object under the fourth head in *Pemsel.*

Iacobucci J. then went on to examine the other clauses in the Society's objects. He held that clauses (b) and (c), even though they identified noncharitable purposes, such as politics, identified purposes that were intended to be only ancillary and incidental to the valid educational objective. However, clause (e) because it contained the phrase "or conducive" was far too broad since it would allow the Society to pursue a noncharitable purpose which might be conducive to its charitable purposes, but not ancillary and incidental (only collateral) to them. Finally, when one did regard the sort of activities the Society was engaged in, there were a number of them, such as the job skills directory, which were neither educational nor incidental to the education goal. As a matter of corporate law these would, of course, fall under clause (e) of the objects as legitimate pursuits of the Society, but this only proved that that clause was too wide and that the Society was not exclusively charitable.

Iacobucci J. concluded by declining the Society's invitation to reform the law of charity by adopting a "modern" definition.

FOOTNOTES

1. [1999] 1 S.C.R. 10. All references are to the version of the decision at the Court's web site maintained by the University of Montreal (http://www.droit.umontreal.ca).
2. The last occasion was 25 years ago: *Jones* v. *T. Eaton Co.*, [1973]S.C.R. 635.
3. R.S.C. 1985, c.1 (5th Supp.) hereinafter "the *Act*".
4. (1601), 43 Eliz. I, c. 4. (U.K.).
5. [1891] AC 531 (HL).
6. [1982] Ch. 321, at p. 332.
7. The statute was repealed in 1888 by the *Mortmain and Charitable Uses Act, 1888* (U.K.) 51 & 52 Vict., ch. 42, s. 13(1) but survived the repeal (in England) in

legislative form until 1960, when it was finally removed from the statute books with the enactment of the *Charities Act, 1960* (U.K.), 8 & 9 Eliz. 2 c. 58, s. 38.

8. 96 D.T.C. 6232 Décary, J.A. wrote the decision. Strayer and Linden JJ. concurred.
9. [1986] 3 F.C. 471 (C.A.).
10. [1972] Ch. 73 (C.A.).
11. [1942] All E.R. 232 (Ch.D.).
12. [1981] A.C. 1 (H.L.), at 15.
13. *Supra*, footnote 11.