Vancouver Immigrant Women:[1] The First Judicial Interpretation

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When all is said and done, the views of lawyers, academics and other bystanders about the "meaning" of a Supreme Court decision become secondary to the understanding of members of the judiciary. The Supreme Court often speaks in apparent parables but it is up to the reader or listener to interpret what those words actually mean as a practical matter.

A few weeks after the Supreme Court's decision in *Vancouver Immigrant Women,* a group of lawyers, from private practice, law schools and government met together informally in Toronto to discuss the meaning of the case. It was striking how many interpretations were given to the same words and there seemed to be a consensus at the end of the session that, while this was a great and noble decision which changed the legal meaning of "education" vis à vis charities in Canada, nobody could identify with absolute certainty and clarity what it all meant.

As it happened, we received almost instant (by judicial standards) interpretation of the decision from the Federal Court of Appeal. Whether that helps remains to be seen.

Alliance For Life[3]

The quick interpretation came about through a strange piece of timing. Alliance For Life, a prolife umbrella organization, was stripped of its charitable status some years ago and appealed the decision to the Federal Court of Appeal. The case was argued in late November 1998 after the Supreme Court had heard arguments in the *Vancouver Society* case but a couple of months before the decision was rendered.

The case involved a melange of issues including technical ones (allocation of costs for shared space between Alliance and a sister nonprofit organization and the propriety of joint appeals for funds by both organizations), as well as substantive procedural issues (estoppel based on Revenue Canada undertakings in writing, the fact that Revenue Canada kept adding new accusations as the basis for the deregistration, and freedom of expression under the *Charter*).

But the central issue was whether Alliance's main activities were "educational". The factual core was that Alliance produced and disseminated "library

packages" to schools and had a catalogue of materials which it sold. While much of the material was "pro life", a substantial amount was "neutral", in that is was drawn from learned journals and other unbiased sources. The tone of the material disseminated was low-key compared to the material produced by Human Life International (Canada) which had lost an earlier deregistration case.[4]

After *Vancouver Society* was decided, the Court of Appeal invited the lawyers for both sides in *Alliance* to make additional submissions in light of the Supreme Court's reasoning.[5] This was done and a decision was rendered in the first week of May, 1999.

In the event, the Court of Appeal, after finding that Alliance's objects were charitable,[6] also found in favour of the organization on all the peripheral technical issues and found against it on all the procedural issues. But the key finding, which led the Court to its decision to deny the appeal, was that the dissemination of the "library packages" and the material offered through sale in its catalogue did not meet the test of "education".

Stone J., who wrote the judgment for a unanimous bench, offered the Court's interpretation of what Iacobucci J. said in the Supreme Court majority judgment. We produce this section at some length because it stands out as the authoritative interpretation of *Vancouver Society.*[7]

> I shall now attempt to distil some of the specific guidance found in *Vancouver Society, supra*:
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> (a) As the *Act* does not define what is "charitable", the courts are to be guided by the meaning of that term at common law.
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> (b) The starting point in this process continues to be Lord Macnaghten's classification in *Pemsel*, which is generally understood to refer to the Preamble of the *Statute of Elizabeth.*[8] While it is for the courts to decide what is "charitable", as stated by Iacobucci J. at paragraph 146, "the preamble proved to be a rich source of examples and the law of charities has proceeded by way of analogy to the purposes enumerated in the preamble".
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> (c) As was made clear in *Guaranty Trust Co. of Canada* v. *Minister of National Revenue*[9] and again emphasized in *Vancouver Society*, to be viewed as charitable, a purpose must also be for the benefit of the community or of an appreciably important class of the community. At paragraph 148, Iacobucci J. characterized this requirement as "necessary, but not a sufficient, condition for a finding of charity at common law. If it is not present, then the purpose cannot be charitable". This particular requirement is not the same as that referred to by Lord Macnaghten under the fourth head of his classification. It seeks the welfare of the public rather than the conferment of private advantage. As Iacobucci J. stated at paragraph 147: "This public character is a requirement that attaches to all the heads of charity, although sometimes the requirement is attenuated under the head of poverty".

(d) Despite the focus in subsection 149.1(1) of the Act on "charitable activity" rather than purposes, Iacobucci J. makes clear at paragraph 152 that although the activities of an organization need to be examined "it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature".

(e) As pointed out by Iacobucci J. at paragraph 154, in view of the language in the definitions of "charitable foundation" and "charitable organization" in subsection 149.1(1), there is a clear requirement that "all of the purposes and activities of the foundation or organization be charitable". As he put it: "exclusively charitable activities would be those that directly further the charitable purposes and not other, non-charitable, purposes".

(f) The requirement in subsection 149.1(1) that a charitable foundation or charitable organization devote its resources exclusively to charitable purposes is subject to the exceptions in subsection 149.1(6.1) and (6.2) of the *Act*, which permit such a foundation or organization to devote part of its resources to "political activities" provided the requirements of those subsections are met. As Iacobucci J. pointed out at paragraph 155, where the requirements of subsection 149.1(6.2) are not met, then "an organization that devotes substantially all of its resources, rather than all, to charitable activities would run afoul of the general requirement of exclusive charitability found in the definitions of 'charitable foundation' and 'charitable organization' in s. 149.1(1)".

(g) Iacobucci J. made clear, at paragraph 157, that a purpose that cannot be viewed as charitable in itself may nevertheless be a valid charitable purpose if it be incidental to a charitable purpose. In this same connection, Iacobucci J. added the following at paragraph 158:

> The chief proposition to be drawn from this holding is that even the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfilment of another, charitable, purpose and not as an end in itself. That is, where the purpose is better construed as an activity in direct furtherance of a charitable purpose, the organization will not fail to qualify as charitable because it described the activity as a purpose.

(h) The Canadian case law developed under the second head of *Pemsel* limiting the definition of "education" to the "formal training of the mind" or "the improvement of a useful branch of human knowledge" is unduly restrictive and should be modified for reasons explained by Iacobucci J.

At pararaph 168:

> There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view.

At paragraph 169:

> As I said earlier, the purpose of offering certain benefits to charitable organizations is to promote activities which are seen as being of 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.

And at paragraph 170:

> Moreover, it [knowledge] can be sought in many different ways, and for many different reasons, whether for its own sake or as a means to an end. Viewed in this way, there is no good reason why non-traditional activities such as workshops, seminars, self-study, and the like should not be included alongside traditional, classroom-type instruction in a modern definition of "education". Similarly, there is no reason to exclude education aimed at advancing a specific, practical end. In terms of encouraging activities which are of special benefit to the community, which is the ultimate policy reason for offering tax benefits to charitable organizations, there is nothing to be gained, and much to be lost, by arbitrarily denying benefits to organizations devoted to advancing various types of useful knowledge.

Iacobucci J. added the following caution at parargraph 171:

> To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise. Simply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished but need not be, is not enough. Neither is "educating" people about a particular point of view in a manner that might more aptly be described as persuasion or indoctrination. On the other hand, formal or traditional classroom instruction should not be a prerequisite, either. The point to be emphasized is that, in appropriate circumstances, an informal workshop or seminar on a certain practical topic or skill can be just as informative and educational as a course of classroom instruction in a traditional academic subject. The law ought to accommodate any legitimate form of education.

In practical terms, the foregoing interpretation is the operative framework within which lawyers arguing such cases in the future will have to operate. Once Stone J. had set the stage for the Court's decision with this interpretation, the *coup de grâce* came comparatively quickly.

In *Vancouver Society, supra*, Iacobucci J. expressed the view, at paragraph 168, that the advancement of education should be interpreted to include "informal

training initiatives, aimed at teaching necessary life skills or providing information toward a practical end". To that end, the provision of "educational forums, classes, workshops and seminars" to enable the organization's constituents "to find and obtain employment" was held to be charitable as coming within the expanded definition of education in that its purpose, as was stated by Iacobucci J. at paragraph 173, was "to train the minds of immigrant women in certain important life skills, with a specific end in mind: equipping them to find and secure employment in Canada". He cautioned, however, at paragraph 171 that: *"[s]imply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished but need not be, is not enough". It seems to me that the library packages in question must be viewed in this light.* [Emphasis added]

Some of the articles in the library packages do not appear to be polemical or strident in language or to call explicitly for social or political change. Indeed, these seem to bear some relationship to the appellant's stated objectives. Several articles are drawn from the mainstream press, while a few have the appearance of being scientific in nature as, for example, an article concerning the safety of RU-483. On the other hand, much of the materials in question, like that listed in the catalogue, seem clearly aimed at promoting the appellant's avowed viewpoints on such issues as abortion and euthanasia.(63) Nor is the information provided in a structured manner that would genuinely advance education. *While students accessing school or public libraries would be afforded the opportunity of drawing on these particular materials, there is no evidence that they would be required or be likely to do so.*[10] [Emphasis added] Neither is there evidence that such students would be in a position to weigh the viewpoints so advanced against opposing viewpoints in making up their minds one way or the other. Viewed in this light, I am unable to see that the dissemination of the library packages genuinely advanced education in the sense explained in *Vancouver Society*, *supra*. If that view be correct it must follow that the appellant would not satisfy the requirements of subsection 149.1(6.2) of the *Act* that a charitable organization devote all its resources to charitable activities. I leave aside for the moment whether dissemination of the materials is "political" activity to which subsection 149.1(6.2) applies and, if so, whether it is ancillary and incidental to the appellant's stated purposes. In the meantime I shall canvass the remaining arguments in the event that I am wrong in viewing the dissemination of the library packages as not furthering those purposes.

The long and the short of it appears to be that even if material is more or less acceptable and nothwithstanding the fact that education does not have to be severely structured, according to *Vancouver Society*, simply making material available to the public, which may or may not want to use it, falls short of the educational test for charitable purposes.

The *Alliance* decision is an important step in helping to determine what the Supreme Court meant, at least in the eyes of those who count, the ones who have the power to interpret the case. But we have a never-ending circle. Shortly after the decision came out in *Alliance*, I had occasion to speak with two

lawyers, both of whom have argued charity cases in the senior courts. One told me that he thought that Stone J.'s judgment was a model of clarity and good writing; the other told me that he thought the thinking was "muddled" and that the decision would be difficult to apply in other cases.

We will just have to wait to see how the case law continues to evolve before we can make a definitive judgment on the ultimate importance of the *Vancouver Society* judgment.

FOOTNOTES

1. *Vancouver Society of Immigrant and Visible Minority Women* v. *Minister of National Revenue.* [1999] 1 S.C.R. 10.
2. Arthur B.C. Drache, Q.C. was lead counsel in the *Alliance For Life* appeal and appeared as counsel for one of the intervenors in the *Vancouver Society* appeal in the Supreme Court of Canada.
3. *Alliance For Life* v. *M.N.R.*, [1999] 3 F.C.R.
4. *Human Life International* v. *Minister of National Revenue*, [1998] 3 F.C. (C.A.); 3 C.T.C. 126; 98 DTC 6196. HLI's request for a hearing by the Supreme Court was turned down just a few days before the *Vancouver Society* decision was released, clearly linking the two cases in the minds of most observers.
5. As a matter of interest, the "invitation" came the very day the decision was released.
6. The objects were as follows:
   1. To educate Canadians on human development, human experimentation, reproductive technologies, adoption, abortion, chastity, euthanasia and similar issues affecting human life;
   2. To provide counselling and referral services to the public with respect to unforeseen pregnancies and post-abortion trauma;
   3. To provide educational services and materials for member groups.
7. This is because in the real world, what matters is what the Court of Appeal thinks until the Supreme Court tells it to think something else!
8. *Pemsel* v. *Special Commissioners of Income Tax*, [1897] A.C. 531; *Preamble* to the *Statute of Elizabeth* (1601), 43 Eliz. I, c.4 (U.K.).
9. *Guaranty Trust Company of Canada* v. *Minister of National Revenue*, [1967] S.C.R. 133; (1966), 60 D.L.R. (2nd) 481; [1966] C.T.C. 755.
10. It seems that leading the horse to water is not enough; to be charitable you have to be able to make it drink.