PEMSEL CASE FOUNDATION LAUNCHED TO FOSTER CANADIAN CHARITY LAW

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Abstract

Canadian charity law has not developed with the clarity and certainty currently found in similar law in many other countries. A new organization, The Pemsel Case Foundation, has been constituted to undertake research about the law of registered and common law charities and qualified donees, conduct education pertaining to that research, and make *amicus curiae* submissions. Through scholarly research and dissemination of its research information, the Foundation seeks to create a better understanding of charity law among both the public and voluntary sector organizations. In interventions, the Foundation will focus on fostering clarity and certainty in the law, and use of the correct legal test or tests in determining eligibility for status as a charity or assessing aspects of charitability that may be in issue.

Keywords: Charity law; Pemsel; Research; Education; Intervention

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Introduction

One could do worse than to study charity law to understand some of the key elements in the Canadian legal system. There are the constitutional questions raised by overlapping federal and provincial jurisdiction with respect to the subject matter. There is the use of the common law – progressive development by judges of a legal framework through reliance on precedent and a commitment to treat like situations alike – to determine what is a charity. There is the power of superior courts to supervise charity matters, as a notable example of the doctrine of inherent jurisdiction. As well, there are a host of statutory and common law issues, arising from core concepts in areas such as trust, tax, corporate, and property law, which can come into play.

It might be expected that this mix would lead to lots of interesting Canadian jurisprudence and a fertile legal environment. But that has not proved the case. Instead the field is marked by countless narrow rulings – often taking their tenor from foreign and archaic cases (some of which have been superseded in the jurisdictions where they originated[1]) – and numerous situations where a compelling legal question has yet to be joined. Moreover, various factors – the high cost of litigation, limited resources of many charities and groups seeking to qualify as charities, and heavy reliance on volunteers in running and advising organizations – contribute to appellate cases being a rarity.

The Federal Court of Appeal has, by statute, jurisdiction over registration and revocation of status as a charity under the federal *Income Tax Act* (*I.T.A.*). The Federal Tax Court deals with all other *I.T.A.* charity matters. Superior Provincial Courts have inherent jurisdiction over charities and are empowered to deal with such things as *cy pres* applications[2] and misconduct in administration of a charity.[3]

The Courts have provided little guidance on the intersection of the *I.T.A.* provisions governing registered charities and provincial constitutional authority over the "Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province."[4] As well, notwithstanding the imperative set out in one leading case "to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied,"[5] the pace of change in the scope of the meaning of charity in Canada has been glacial. The application of the law of trusts to charities is inconsistent from province to province – something that is problematic for organizations with assets in multiple jurisdictions.[6] In another important area, liability of charity board members, there is a scant case law, leaving directors uncertain about their obligations and the conduct expected of them.

It is the nature of the law that, no matter the practice area, there are often needed reforms and frequently a desire for clearer, more coherent principles on which to base decision-making. That said, the pressure on charities and other voluntary sector organizations to keep administrative costs as low as can be makes developing a better legal framework a particular concern for this part of the law. One executive director succinctly captured the importance of the issue when she remarked wryly that she wanted to be able to do her work without "having to have a lawyer on one side of me and an accountant on the other side."

New organization

A new organization, The Pemsel Case Foundation, was recently established to spur further development of Canadian charity law. Named after the seminal 1891 House of Lords decision[7] that established the four principal heads of charity in the current legal classification, Pemsel will undertake research, education, and possibly interventions in existing litigation to help clarify and advance various aspects of Canadian charity law. It is incorporated under the Alberta *Societies Act*[8] and is a registered charity.

The organization's 11-person board includes significant representation from outside Canada, as Pemsel intends to closely follow charity law developments in other jurisdictions.

In Canada, during the last several years, we have been preoccupied with aggressive regulatory efforts against charitable donation tax shelter schemes and tightened tracking of spending on political activities and receipt of funding from non-Canadian sources.[9] Other aspects of charity law have been more in the fore elsewhere.

In Britain, enactment of a *Charities Act*[10] has affected the regulatory framework in which charities operate, confirming in statute some of the new charitable purposes that the Charity Commission had begun to recognize in recent years and requiring a closer examination of public benefit for some categories of charity than had previously been

the case. In Australia, court rulings have suggested there may be more scope for charities to undertake political and business activities than had previously been thought,[11] and the national *Charities Act 2013*[12] was passed recently. The new Act, which deals with – among other things – the meaning of charity and public benefit issues, came into force on January 1, 2014. In the U.S., appropriate tax treatment for charities and their donors, and the role that ought to be played by federal and state regulators to ensure proper use of charitable assets, continue to be debated. The Pemsel Case Foundation believes it would be useful for some of these developments in other jurisdictions to inform discussion of Canadian charity law.

Pemsel's role in potentially fostering Canadian charity law will, of course, depend on its ability to gain standing in key cases. Rules on public interest interventions vary depending on the court before which leave to intervene is being sought. A mandate to clarify or develop the law is not sufficient grounds for being granted intervener status in some proceedings. Gaining intervener status may also be tied to a demonstration of the potential impact of a decision on a particular constituency and sometimes to a representative role for, or membership in, that constituency. Pemsel anticipates partnering with sector organizations to meet this aspect of the requirements.

Given its mandate, Pemsel will not be underwriting organizations wishing to mount their own court challenges to adverse legal or regulatory rulings. Where there is a larger issue at play, as well as intervening in an existing proceeding, Pemsel will explore opportunities for reference or stated cases that might potentially clarify the law. The variety of rules in legislation and from court to court means this approach will have to be considered on an issue-by-issue basis. Research and education work may also be undertaken to foster a more coherent or nuanced understanding of an issue.

Past Canadian experience

The Supreme Court of Canada (SCC) rarely considers the law of charities. In the past 50 years, the SCC has dealt with only three cases where status as a charity was in issue:

- in 1966, *Guaranty Trust Co. v Minister of National Revenue;*[13]
- in 1999, *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue;*[14] and
- in 2007, *A.Y.S.A. Amateur Youth Soccer Assn. v Canada (Revenue Agency).*[15]

Prior to that, in 1955, the British Privy Council dealt with the validity of putative charitable trusts in *In re Cox*; *Baker v National Trust Co.*,[16] and upheld SCC judgments of their validity.

In 1998, when the SCC was hearing the *Vancouver Society* case, the Canadian Centre for Philanthropy (CCP) was granted intervener status. CCP's representations argued for recognition of the Society based on case law, but focused primarily on the proper test for determining what is considered a charity at common law. Justice Iacobucci, writing for the majority, did not concur that the case law supported the Society being granted charitable status, but adopted much of CCP's submission with respect to a suggested revision to the common law test in his judgment.

In 2007, CCP – then operating under the name Imagine Canada – mounted a similar intervention in the *A.Y.S.A.* case. (Note: the author was involved in organizing that intervention.) The submission was agnostic on the question of whether the organization seeking registration qualified or not, focusing instead on arguing that the method set out in the common law is the proper way to determine if an entity is a charity.[17] As in *Vancouver Society*, the intervener's representations were reflected in the majority judgment.

Pemsel intends to build on the approach taken in the *Vancouver Society* and *A.Y.S.A.* interventions, with a focus on clarification of the law and application of appropriate legal tests. This may mean that the Foundation will not take a position on issues such as the eligibility for charitable status of a particular organization. The commitment is more broadly to the development of clear and consistent law in this area. This approach will also be pursued in the Foundation's research and education work.

Current Canadian legal meaning of charity under the Income Tax Act

Of the three charitable status cases litigated at the SCC, only in *Guaranty Trust* did the Court hold that, notwithstanding significant expenditures on certain administrative activities, the organization at issue was constituted for exclusively charitable purposes. In the other two cases, the SCC took a less benevolent view. In those cases, it refused to update the scope of the Canadian meaning of charity to include certain employment support of immigrants or amateur sport.

The Foundation's namesake case, *Pemsel v Special Commissioners of Income Tax* (1891), set out four categories of charity: alleviation of poverty; advancement of religion; advancement of education; and "other purposes beneficial to the community." More broadly considered, endeavours such as employment support of immigrants or amateur sport could potentially fit within the fourth traditional category, although it is clear from *Vancouver Society* that certain aspects of immigrant support might qualify as poverty relief or education. It has also been found that sport undertaken in conjunction with academics can qualify under advancement of education.

Advancement of education was updated by the Supreme Court of Canada in its *Vancouver Society* decision. There it was said that a traditional view of education entailing formal teaching in a classroom was too limited, and that, if structured, less institutional methods of instruction should qualify as charitable.[18] Still, the Courts have yet to grapple with issues such as whether the multicultural nature of contemporary Canadian society has an impact on the interpretation of advancement of religion, or whether alleviation of poverty ought to be understood differently in light of the rise of social enterprise.

Canadian registered charities enjoy more generous tax treatment than similar organizations in many other countries.[19] Registered charities in Canada both receive an exemption from tax on their income and are granted the ability to issue tax receipts to their donors, allowing those donors to claim a credit or deduction against the tax they would otherwise pay. Status as a registered charity may also mean that an organization qualifies for preferential property, goods and services, sales, or other tax rates. This is perhaps one reason Canada has such a large and dynamic voluntary sector.[20]

Unfortunately, such generous tax treatment may also have influenced the SCC and the Federal Court of Appeal to find the scope of charity in Canada as narrow as they have. The case law contemplates courts making incremental changes to what is considered a charity based on analogy with objects or purposes that have previously been found to be charitable. Owing to potential tax consequences, Canadian courts are apt – implicitly or explicitly – to take the position that a change is not incremental and to defer to Parliament to amend the law if the purpose or object in issue ought to be recognized.[21]

In other Canadian jurisdictions where fiscal impact was not as significant a factor, courts have proved more willing to widen the ambit of what constitutes charity in light of changing social circumstances.[22] Pemsel intends to consider opportunities to intervene in judicial proceedings under provincial law involving questions of charity law, including both definitional questions and other matters. Further efforts to assist the FCA and the SCC in addressing discrepancies in the scope of what is considered a charity provincially (either statutorily or at common law) and the scope of the meaning of charity used for the *I.T.A.* may also be of value.

Constitutional issues

The Courts have paid very limited attention to constitutional concerns with respect to charity law. In the *Vancouver Society* case, the appellant made a section 15 *Charter of Rights and Freedoms* equality argument, suggesting that failure to grant status as a registered charity would deny the organization's immigrant stakeholders benefits available to others based on an "irrelevant personal characteristic." This was rejected on the basis that denial of charitable status was not based on the personal characteristics of the intended beneficiaries, but on the nature of the purposes and activities of the applicant organization. The court held that if the nature of those purposes and activities had been properly charitable, the intended beneficiaries could have enjoyed the benefits arising from charitable status.[23]

The SCC has not considered the implications of the *Charter* potentially entailed in the *I.T.A.* restrictions on the political activities of registered charities. It has also not undertaken an extended constitutional analysis of the jurisdictional issues applying to regulation of charities as it did when considering *Reference re Securities Act*.[24] Lower level courts have also not devoted extensive analysis to constitutional issues, although a jurisdictional question arose in *Dobie v The Board of Management of the Temporalities Fund of the Presbyterian Church of Canada*[25] and constitutionality was argued in *International Pentecostal Ministry Fellowship of Toronto v Canada (National Revenue)*.[26]

The Ineligible Individual provisions in the 2011 Budget[27] empower CRA to refuse registration or revoke registration, or impose other sanctions, based on the characteristics of a volunteer or employee exercising direction or control over a registered charity. This seems to give federal officials authority over operational aspects of charities that were previously understood to fall within provincial jurisdiction. Further exploration of the extent of federal powers in this area may be warranted.

Charities and politics

Another intractable problem in charity law – and one critical to the content of this special issue of *The Philanthropist* – is what is "political" and how engagement in that realm should be treated. The common law criteria for charity include rules that constrain or preclude charities' political engagement based on their purposes.[28] The *I.T.A.* features another set of rules that constrain or preclude charities' political engagement based on their activities.[29] The general approach in common law of characterizing activities in light of the purpose(s) they are undertaken to advance[30] suggests that there should be an unambiguous relationship between the common law and *I.T.A.* rules regarding political engagement. Yet there is very little case law on reconciling these two sets of rules, and that case law does not provide adequate clarity on what is and what is not permitted. In practice, this means that charities often do not engage in political work even though doing so might efficaciously advance their mandate.

The Pemsel Case Foundation asked Maurice Cullity, a retired Justice of the Ontario Superior Court of Justice and a former Osgoode Hall law professor, to try to sort through the complexities of this problem. His compelling analysis of the issue, *Charity and Politics in Canada – A Legal Analysis,* is the first of a series of occasional papers to be published by the Foundation.

Conclusion

The Foundation hopes that Justice Cullity's piece – which, along with other information about the Foundation and its work, can be found at www.pemselfoundation.org – will be the first of many contributions the Foundation can make, through research, education and potentially litigation, to clarifying Canadian charity law and fostering its development. By doing so, the Foundation aims to encourage a more consistent and dynamic legal environment for Canadian charities and other voluntary sector groups. We hope that our work will make some of these issues a little less abstract and that executive directors will have a little less need to be surrounded by lawyers and accountants as they strive to achieve their charitable goals.

Notes

1. For example, see the discussion in *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 SCR 217 [*A.Y.S.A.]* of *Re Nottage*, [1895] 2 Ch. 649 at para. 34-40. It should be noted that in England and Wales the *Charities Act 2011*, s. 3(1) (f), and its predecessor acts since 2006, have statutorily recognized "advancement of amateur sport" as qualifying as a charitable purpose.

2. In certain circumstances, if a charitable purpose becomes impossible to fulfill, the *cy-près* doctrine allows a court to alter the purpose to one as close as possible to the original intention.

3. Superior courts have the power to direct and control the administration of charities, which can be exercised when charities are not being properly administered, where

funds are mismanaged, or where trustees are breaching their fiduciary obligations with respect to the handling of charitable assets.

4. *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s. 92(7).

5. *Scottish Burial Reform and Cremation Society Ltd.* v *Glasgow Corporation*, [1968] A.C. 138 (H.L.), at p. 154.

6. *See Christian Brothers of Ireland in Canada (Re)*, 2004 CanLII 66324 (ON SC).

7. *Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] A.C. 531.

8. R.S.A. 2000, c. S-14.

9. See 60-61 ELIZABETH II, C.–19 , s. 7.

10. *Charities Act 2006*, c. 50, and its successor acts.

11. See *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia*, (2010) 241 CLR 539 and *Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55.

12. No. 100, 2013.

13. *Guaranty Trust Co. of Canada v Minister of National Revenue*, 1966 CanLII 40 (SCC), [1967] S.C.R. 133.

14. *Vancouver Society of Immigrant and Visible Minority Women v M.N.R.*, [1999] 1 S.C.R. 10 [*Vancouver Society*].

15. *Supra,* note 1.

16. [1955] A.C. 627.

17. This position argued against the holding in the Federal Court of Appeal judgment that the inclusion of the Registered Canadian Amateur Athletic Association (RCAAA) designation in the *I.T.A.* precluded amateur sports organizations being eligible for federal registration as charities.

18. *Vancouver Society*, para. 168 ff.

19. For example, Britain and Australia offer less generous tax treatment.

20. See Hall et al. (2005). *Canadian Nonprofit and Voluntary Sector in Comparative Perspective*. Toronto, ON: Imagine Canada.

21. See *Vancouver Society* at para. 203 and *A.Y.S.A.* at para. 44.

22. See, for example, *Re Laidlaw Foundation*, (1984), 13 D.L.R. (4th) 491.

23. *Vancouver Society* at para. 207-208.

24. [2011] 3 SCR 837.

25. (1882), 7 App. Cas. 136.

26. 2010 FCA 51 (CanLII).

27. *Income Tax Act*, (R.S.C. 1985, c. 1 (5th Supp.) as amended [*I.T.A.*], ss 149.1(4.1), 149.1(22) and 188.2(2).

28. See *McGovern v Attorney-General*, 1982 1 Ch. 321.

29. See *I.T.A.*, s. 149. 1 (6.1), (6.2) and (6.21).

30. *Vancouver Society* at para. 152.