A Truly Canadian Definition of Charity and a Lesson in Drafting Charitable Purposes

(*Native Communications Society of B.C.* v. *M.N.R.**)

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In *Native Communications Society of B.C.* v. *M.N.R.*,[1] the Federal Court of Appeal has placed the common law definition of charity within a twentieth century Canadian context. Stone, J.'s approach to the issue is undoubtedly a major step towards modernizing the judicial process of determining what are charitable purposes. However, in the spirit of "benign construction" the decision glosses over some rather difficult problems with the language in the Society's Certificate of Incorporation; language which, despite the actual charitable nature of the Society's activities, brought it dangerously close to failing to qualify as charity. Both of these aspects will be examined in this paper, which will also include some general comments on the drafting of organizational documents for charities.

The Native Communications Society was primarily engaged in two types of activity: it ran training programs in communications technology for native people and it also published a bi-weekly newspaper, *Kahtou*, containing news items and reports of cultural events of interest to native people in British Columbia. There was an emphasis on the revival of ancient crafts, music, story-telling and the greater use of native language. The newspaper was distributed without charge to all native people and groups. After initially concentrating on print journalism, the Society planned to expand its training programs to include broadcast communications, and to produce radio and television programs with content similar to that of its newspaper.

The Society was incorporated as a non-profit corporation in British Columbia. The Certificate of Incorporation contained the following statement of purposes:

> 2. The purposes of the Society are:
>
> (a) to organize and develop comprehensive non-profit communications programs, namely radio and television productions that are of relevance to the native people of British Columbia.

* For a brief summary of the judgment in this case see also, "Recent Tax Developments", *The Philanthropist,* Vol. VI, No.3, Fall 1986, p.61.

(b) To train native people as communication workers; and to publish a non-profit newspaper on subjects relevant to the native people of British Columbia;

(c) To procure and deliver information on subjects facing native people of British Columbia;

(d) As subsidiary to the above dominant purposes and as a means to carry out the said purposes

(i) to promote by communications, the image of native people in the national scene and to create incentives for development of mutual understanding.

(ii) to provide suitable quarters for the purposes of the Society.

(iii) to procure and deliver information on subjects relating to the social, educational, political and economic issues facing native people of British Columbia.

(iv) to cooperate with other persons.

(v) to communicate with and to broaden social interactions among other native groups from various parts of the world.

(e) To do all of the above on an objective basis;

(f) To do all such other things which are conducive to the attainment of the purposes stated above.

The Certificate of Incorporation also contained fairly standard clauses dedicating the Society's assets, upon dissolution, to a charity registered with the Department of National Revenue and requiring all the Society's purposes to be carried out on an exclusively charitable basis.

The Society applied for registration as a charitable organization under the *Income Tax Act*, Subsection 149.1(1). A successful application would result in both tax exemption for the organization and the deduction from income tax of donations to it under the *Income Tax Act*, paragraph 110(1)(b). After some lengthy correspondence, the Minister of National Revenue denied the registration application on the grounds that the Society's purposes did not qualify as charitable. In particular the Minister viewed the organization's primary activity to be news-oriented, rather than for the pure advancement of education in the charitable sense which involves a "training of the mind". Further, some of the Society's purposes were so broad and vaguely stated that they could encompass non-charitable activities. The Society appealed the Minister's refusal directly to the Federal Court of Appeal under the *Income Tax Act*, Subsection 172(3).

The Federal Court of Appeal held that the Society was a charity in law. Stone, J. applied Lord Macnaghten's famous classification in *The Commissioner for Special Purposes of the Income Tax* v. *Pemsel*,[2] which divided charitable purposes into four basic categories: trusts for the relief of poverty; trusts for the

advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding headings. Stone, J. found the Society's purposes and activities to be within the fourth category. The Society had also argued it was within both the first and second categories, i.e., the relief of poverty and the advancement of education. Although Stone, J. did not find these arguments convincing, he was careful not to express a final opinion, particularly with respect to the category of advancement of education.

Lord Macnaghten's fourth classification is superficially broad and all-encompassing. However, to be "beneficial to the community in a way which the law regards as charitable", case law requires that the organization's purposes must come within the "spirit and intendment"[3] of the preamble to the *Statute of Elizabeth*.[4] Two approaches to the interpretation of this requirement have developed. The traditional approach uses analogy to link the purpose being reviewed to another purpose already approved in a previous case so that a chain of analogies is forged, linking the current purpose to a purpose specifically mentioned in the *Statute of Elizabeth*. Thus, for instance, providing cremation facilities by analogy relates to the provision of burial grounds which by analogy relates to the upkeep of churchyards which by analogy is an extension of repair of churches, a purpose set forth in the *Statute of Elizabeth*. In this way, providing cremation facilities becomes a charitable purpose.[5]

The second, more recent approach, evaluates directly whether the purpose at issue is "beneficial to the community or of general public utility",[6] applying contemporary ideas and social values. The approach recognizes that the definition of charity must keep pace with new social needs.[7] For example, using this more "vague and undefined approach" the English Court of Appeal in *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General*,[8] held that the preparation and dissemination of law reports was a charitable purpose because it made a significant contribution to the advancement of the law. In that case, Russell, L.J. suggested that analogy and precedent could serve as an aid, or "hand-maiden"[9] in determining charitable purposes. In the same case, Sachs, L.J. went on to characterize the analogy approach as "artificial".[10]

In line with this recent trend, Stone, J. emphasized the need for a contemporary definition of charity and in essence rejected the traditional analogy approach:

> In my judgment it would be a mistake to dispose of this appeal on the basis of how this purpose or that may or may not have been seen by the courts in the decided cases as being charitable or not. This is especially so of the English decisions relied upon, none of which is concerned with activities directed towards aboriginal people.[11]

There are two interesting and perhaps innovative aspects to Stone, J.'s decision. First, he expressly rejects English authorities because they are thematically

irrelevant to a truly Canadian matter, i.e., charitable activities directed towards Canada's native people. Second, he uses the *Constitution Act, 1982* and the *Indian Act* as potential aids for determining the appropriate subject matter for a charitable purpose.[12] In this way the parameters of the definition of charity are defined within a Canadian perspective.

By rejecting the English cases, Stone, J. avoided the need to distinguish such cases as *Williams' Trustees* v. *Inland Revenue*[13] which held that the promotion of the moral, social and spiritual welfare of Welsh people living in London was not a charitable purpose. Instead, given the parallel between Australia's and Canada's treatment of their respective native peoples, he was able to seek assistance from the Australian decision *In Re Matthew*,[14] which held that a trust for the benefit of Australian aborigines was a valid charitable trust under Lord Macnaghten's fourth category.

Stone, J.'s references to the *Constitution Act* and the *Indian Act* did not automatically assume a charitable status. It was Canada's clear assumption of "a special responsibility for the welfare of the Indian people"[15] in both its Constitution and domestic legislation that created the charitable overtones.

Nor did Stone, J. suggest that any organization which targeted or involved native people would necessarily be charitable. He was careful to elaborate exactly how the Society, in particular, served the native people in B.C. First, there was the direct educational benefit of specific training programs. Second, the subject matter of the Society's publication went beyond mere news and information. The publication "may well instill a degree of pride of ancestry in the readers of *Kahtou*, deepen appreciation of Indian culture and language and thereby promote a measure of cohesion among the Indian people of British Columbia that might otherwise be missing."[16] Stone, J. utilized essentially the same approach as Sachs, L.J. in *Incorporated Council of Law Reporting*[17] which was first, to identify whether the purpose was beneficial in a modern context and second, to determine whether the purpose contributed significantly to, and benefited, a sufficiently wide section of the community.

Defining charity within a specifically Canadian context suggests some interesting extensions. For example, the *Constitution Act, 1982* also seeks to protect the multi-cultural aspects of Canadian society.[18] Although English law and society in general are concerned with protecting minority rights, there is no strong parallel to the promotion of multi-culturalism. If Stone, J.'s lead is followed, a non-profit organization concerned with preserving ethnic or national cultural traditions may find a more receptive hearing in Canada than in England.

Wholly and Exclusively Charitable

Even if its subject matter fits within the parameters of "charity", an organization may still fail to qualify as charitable if it is not wholly and exclusively devoted to charitable purposes. Where there is more than one designated purpose, *all* of the purposes must be charitable or this requirement will not be met.

This rule is modified by the concept of incidental purposes. Where all the predominant purposes are charitable, other purposes which are merely incidental to the predominant purposes will not vitiate the charitable status of the organization. Where some of the organization's purposes are non-charitable, the key determination turns on whether the non-charitable purposes are incidental, i.e., a means of fulfilling the predominant purpose, or are collateral, i.e., additional ends in themselves.[19]

The Certificate of Incorporation of the Native Communications Society of B.C. illustrates two potential ways to run afoul of the basic requirement that the organization be wholly and exclusively devoted to charitable purposes. First, there is the problem of vague and uncertain purposes. The courts exercise a supervisory function with respect to charitable organizations.[20] As a result, the charitable purposes must be sufficiently clear to enable the court to control and reform the charity's activities and to determine that the assets are not being misapplied. Further, vaguely stated purposes may be interpreted to include expenditures which are plainly not charitable. Therefore, since the courts cannot discriminate between assets intended for charitable purposes and those intended for non-charitable purposes, the organization will not be considered a charity.[21]

Second, certain designated purposes may specifically be non-charitable for long-standing reasons of public policy. The most common of these are political purposes. This notion of "political" goes beyond the narrow sense of partisan action; it also includes attempts to seek legislative or administrative reforms. Judges consider themselves without "the means of judging whether a proposed change in the law will be for the public benefit".[22] Further they must assume that the law is right as it stands, otherwise they would be usurping the function of the legislature.[23] For these reasons, political purposes which are not incidental means to achieving a dominant charitable purpose will cause an organization to fail to meet the requirement that, to be considered charitable, it must be devoted exclusively to the public benefit.

Subparagraphs 2a, b and c of the Native Communications Society's Certificate of Incorporation contain its two main purposes: conducting training programs in communications technology and producing a newspaper and radio and television programs for an audience of native people. Subparagraph 2d contains "subordinate" purposes, intended to designate the "means" by which the Society would carry out its two main purposes. Thus the Certificate of Incorporation purports to make the crucial distinction between incidental and collateral purposes.

Stone, J. acknowledges that the purposes were "not drawn with exceptional precision"[24] but this does not concern him for four reasons: it is the nature of corporate object clauses to be "rather broadly phrased"; the media productions were restricted to "subjects facing native people" or of "relevance to native people"; the broad and vague language in subparagraph 2d is expressly subordinate to the society's main purposes and, finally, the Certificate of

Incorporation contains the overall requirement that the purposes be carried out on an exclusively charitable basis.

The modern trend to broad statements of corporate purposes developed for the most part because of the need for business corporations to avoid the doctrine of *ultra vires*.[25] A different set of concerns operates for charitable organizations. Because an organization must have only charitable purposes to qualify for charitable status, it is important to have the charitable purposes clearly expressed. The issue presented in subparagraphs 2a through c is whether the language is restrictive enough, or whether it is capable of including non-charitable subject matter. For instance, programs "of relevance to native people" could include programs with partisan political content or the simple broadcasting of hockey games which, although they might be appealing to the targeted audience, are devoid of charitable content. In general the courts have been willing to place a benign construction on charitable objects and to look to extrinsic evidence for confirmation that their purposes are restricted to charitable activities.[26] With this in mind, Stone, J.'s ultimate conclusion with respect to subparagraphs 2a, b and c is undoubtedly correct, particularly given his careful examination of the content of the organization's one publication, *Kahtou*. It would, however, be a mistake for the drafters of organizational documents for charitable corporations to take Stone, J.'s words too literally and therefore fail to be as precise as possible.

The language in clauses 2(d)(i) through (iv) is more problematic. Much of the language is broad, and some of the specific purposes may be non-charitable collateral purposes. For instance "to communicate with and to broaden social interactions among other native groups from various parts of the world" sounds more like the purposes of a social club than the purposes of a charitable corporation. Also, the language in clause (i) "promoting the image of native people" and "creating incentives for development of mutual understanding" is vague and probably unenforceable. Similar language, namely "contribution to the formation of an informed international public opinion" and "the promotion of greater cooperation in Europe and the West in general", was considered non-charitable by Slade, L.J. in *Re Koeppler's Will Trusts*.[27]

As noted earlier, non-charitable purposes will not necessarily destroy charitable status if they are merely incidental rather than collateral. In a Supreme Court of Canada decision, *Guaranty Trust Company* v. *M.N.R.*,[28] Ritchie, J. approached this problem by systematically examining each of the non-charitable purposes and linking them together logically or through extrinsic evidence to the furtherance of one of the dominant charitable purposes. In contrast, Stone, J. accepts the organization's own characterization that the purposes in clause 2(d) are subsidiary means to carry out the dominant purposes. However, a close examination may have caused substantial problems. For instance, "to promote by communication the image of native people in the national scene" and "to create the incentives for development of mutual understanding", appear to be ends unto themselves. In fact, logically, they are

"ends" which are achieved through the organization's main purpose of publishing newspapers and producing radio and television programs rather than the "means" of achieving that main purpose.

Two observations can be made here. Given Stone, J.'s analysis of the state's special responsibility for the welfare of native people, he might very well have been willing to find these purposes to be charitable within Lord Macnaghten's fourth category. However, given the clause's susceptibility to interpretation as a non-charitable collateral purpose, it seems its inclusion unnecessarily clouds the corporation's charitable status. There is an unfortunate tendency for charitable organizations to include in their organizational papers statements of aspiration expressed in terms of purposes. The goals expressed may be laudable, but may nevertheless fail as charitable purposes. On the other hand, these aspirations will often be only incidental consequences of the organization's activities. They are best left unstated.

The Minister of National Revenue was particularly concerned with the use of the word "political" in clause 2(d)(iii). Stone, J. looked at the word "political" in the context of the clause as a whole, and in the context of the Society's activities. He found that the Society was neither authorized to engage in political activities nor was it engaging in any political activities. This is the correct approach.[29] Further, in the spirit of "benign construction", the theoretical possibility that the Society might have engaged in political activity should not render the corporation uncharitable.

Stone, J.'s decision in *Native Communications Society of B.C.* v. *M.N.R.* is important for its contemporary interpretation of the concept of charity. It does not, however, reflect a precise application of the basic principle that a charity must be wholly and exclusively organized for charitable purposes. It is nevertheless more than likely that the ultimate conclusion that the Society was a charity could have been reached by a strict application of this principle and this strict application would have given a clear message to the drafters of organizational documents that they should not take the legal "charitableness" of their group's goals and aspirations for granted.

FOOTNOTES

1. *Native Communications Society of B.C.* v. *M.N.R.*, 86 D.T.C. 6353 (F.C.A.).
2. *The Commissioner for Special Purposes of the Income Tax Act* v. *Pemsel*, [1891] A.C. 531.
3. *Scottish Burial Reform and Cremation Society Ltd.* v. *Glasgow Corporation*, [1968] A.C. 138, 154.
4. 1601, 43 Eliz. I, c. 4.
5. Footnote 3, *supra*, 156, and 146, 147 and *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General*, [1971] 3 All E.R. 1029, 1035.
6. *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General, ibid.*, but see *Brisbane City Council* v. *Attorney-General for Queensland*, [1978] 3 All

E.R. 30, 33 and *Barralet* v. *Attorney-General*, [1980] 3 All E.R. 918, 926.

7. A contemporary interpretation of "advancement of education" was applied in *Inland Revenue Commissioners* v. *McMullen*, [1980] 1 All E.R. 884.
8. Footnote 5, *supra*.
9. *Ibid.*, at 36.
10. *Ibid.*, at 41.
11. Footnote 1, *supra*, at 6358.
12. *Ibid.*, at 6357, 6358.
13. *Williams' Trustees* v. *Inland Revenue Comrs.*, [1947] 1 All E.R. 513, [1947] A.C. 447.
14. *In Re Matthew* (1951), V.L.R. 226.
15. Footnote 1, *supra*, at 6357.
16. *Ibid.*, at 6358.
17. Footnote 5, *supra*, at 41.
18. *Constitution Act, 1982*, Section 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."
19. *McGovern* v. *Attorney-General*, [1982] 1 Ch. 321, 341; *British Launderers' Research Association* v. *Hendon Rating Authority*, [1949] 1 K.B. 462, 467; *Guaranty Trust Company of Canada* v. *M.N.R.*, 67 D.T.C. 5003, (S.C.C.).
20. *McGovern* v. *Attorney-General*, *ibid.*, at 339 and *National Anti-Vivisection Society* v. *Inland Revenue*, [1948] A.C. 31, 62.
21. Footnote 19, *supra*, *McGovern* v. *Attorney General*, at 340.
22. *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406, 442.
23. Footnote 20, *supra*, *National Anti-Vivisection Society* v. *Inland Revenue*.
24. Footnote 1, *supra*, at 6359.
25. See generally, Iacobucci, Pilkington, and Prichard, *Canadian Business Corporations, (Canada Law Book Limited, 1977), pp. 95-100.*
26. Footnote 7, *supra*, *Inland Revenue Commissioners* v. *McMullen*, at 890; see also footnote 19, *supra*, *Guaranty Trust Company of Canada*, and *Re Koeppler's Will Trusts*, [1985] 2 All E.R. 869.
27. *Re Koeppler's Will Trusts*, *ibid*, at 878.
28. *Footnote 19, supra*.Guaranty Trust Company of Canada.
29. Footnote 26, *supra*, *Re Koeppler's Will Trusts*, at 878.