
DETERMINATION OF "CHARITABLE STATUS" - COURT VERSUS TRIBUNAL

The question has arisen as to whether a tribunal or a court is the most appropriate for a first level of external appeal of CCRA decisions on registration or deregistration. This requires a brief analysis of the decision-making process currently undertaken by the court.

The Income Tax Act does not define "charitable", and the definition is therefore a common law definition that has evolved over time. There is a statutory requirement that in order to be charitable, the organization must devote substantially all its resources to charitable purposes.

The most recent examination by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women* (where charitable status was denied) gives a succinct statement of the analysis required for determining charitable status:

..... Since the Act does not define "charitable", Canadian courts have consistently applied the Pemsel test to determine that question. The Pemsel classification is generally understood to refer to the preamble of the Statute of Elizabeth, which gave examples of charitable purposes. While the courts have always had the jurisdiction to decide what is charitable and were never bound by the preamble, the law of charities has proceeded by way of analogy to the purposes enumerated in the preamble. The Pemsel classification is subject to the consideration that the purpose must also be "for the benefit of the community or of an appreciably important class of the community" rather than for private advantage.

To bring a purpose within the fourth head of Pemsel, more is required than simple "public benefit", in the ordinary sense of the term. It is incumbent upon the Society to explain just how its purposes are beneficial in a way the law regards as charitable. To assess whether an organization's purposes are charitable under that head, a court should: (1) consider the trend of those decisions which have established certain objects as charitable under this heading, and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these; (2) examine certain accepted anomalies to see whether they fairly cover the objects under consideration; and (3) ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity; if so, the argument for charity must fail. To this approach must be added the general requirement that the purpose also be "for the benefit of the community or of an appreciably important class of the community".

Even though some substantial change in the law of charity would be desirable and welcome at this time, it would not be appropriate for the Court, in the context of this case, to adopt an entirely new definition of charity. If this is to be done, especially for the purposes of the Income Tax Act, the specifics of the desired approach will be for Parliament to decide since a new and more expansive definition of charity, without warning, could have a substantial and serious effect on the taxation system.

The dissenting judgement also discussed the nature of the decision making process:

In determining whether a particular purpose may be placed within one or more of the Pemsel categories, the courts adhere to the analogical approach to legal reasoning familiar to the common law. Since the Pemsel classification does not itself provide any enumeration of purposes from which to analogize to putatively charitable purposes under consideration, the courts should consider whether the purpose is analogous to one of the purposes enumerated in the preamble of the Statute of Elizabeth or build analogy upon analogy. While the courts should not shy away from the recognition of new purposes which respond to pressing social needs, the pursuit of analogy should not lead the courts astray. To modernize the existing categories of charitable purposes, a court should adhere to the principles of altruism and public benefit in order to identify new charitable purposes and to ensure that existing ones continue to serve the public good. When considering a purpose under the fourth head of the Pemsel classification, the mere fact that a purpose is of public benefit does not, without more, render that purpose charitable. To qualify as charitable, a purpose must be beneficial to the public "in a way which the law regards as charitable". The best approach for making such a determination is one which marries adherence to principle with respect for the existing categories as established by the Pemsel scheme.

In the law of charity, the courts' primary concern is to determine whether the purposes being pursued are charitable. It is these purposes which are essential, not the activities engaged in, although the activities must bear a coherent relationship to the purposes sought to be achieved. Accordingly, in determining whether an organization should be registered as a charitable organization, the proper approach is to begin by: (a) identifying the primary purposes of the organization; and then (b) determining whether those 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, then it must be considered (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.

Conclusion

The Table has been advised that the definition of "charitable status" is not open to review. Since it is clear that codifying the definition of "charitable purposes" into statute is not an option, the decision to be made on an appeal of registration or de-registration will remain a common law test. It is uncommon for tribunals to make decisions on common law principles as its main activity. Where tribunals do make decisions under the common law, no deference is given to

their decision by the courts (in other words, the court will hold the tribunal to the very high standard of “correctness”).*

Given this high standard of review, it may be both redundant and time-consuming to create an additional layer of appeal in between the CCRA and the court (whatever court that happens to be).

Also, given the reluctance of the Supreme Court to expand the definition of “charity” without statutory change, it is unlikely that a tribunal would have any success in “pushing the envelope” on the definition of “charitable purposes”.

* *Wellington (County) v. Butler* (2001) 56 O.R. (3d) 271 (Divisional Court). In reviewing a decision of the Pay Equity Tribunal on whether contractors were considered as employees under the Act, the court concluded the standard of review was “correctness” as the determination of who is an employee was a common-law test. The tribunal did not have any expertise that should be given deference as this was solely a question of law.