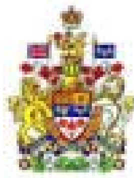
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110607

Docket: A-75-10

Citation: 2011 FCA 192

CORAM: **NADON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

NEWS TO YOU CANADA

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

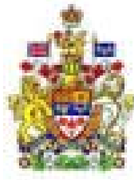
Heard at Vancouver, British Columbia, on May 4, 2011.

Judgment delivered at Ottawa, Ontario, on June 7, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NADON J.A.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The appellant appeals to this Court pursuant to paragraph 172(3)(*a.1*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA") from the refusal of the Minister of National Revenue to register it as a charitable organization under subsection 248(1) of the ITA.

Background

[2] The appellant was incorporated on September 19, 2006 as a corporation without share capital under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32. Its corporate objects, as identified in its Letters Patent, are as follows:

> a) to fund, develop and carry on activities to research and produce in-depth news and public affairs programs designed to provide unbiased and objective information concerning significant issues and current events that are relevant to a large sector of the general public and to disseminate these programs by publishing, broadcasting, cable, satellite, Internet and any other distribution method available now or developed in the future in order to encourage a well-informed general public for the benefit of society;
>
> b) to receive gifts, bequests, trusts, funds and property and beneficially, or as a trustee or agent, to hold, invest, develop, manage, administer and distribute funds and property for the objects of the Corporation, for and to such other organizations as are "qualified donees" under the provisions of the *Income Tax Act* and for such other purposes and activities as are authorized for registered charities under the provisions of the *Income Tax Act*; and
>
> c) to conduct any and all activities and exercise any and all such powers as are necessary for the achievement and furtherance of the objects of the Corporation.

[3] Shortly after its incorporation, the appellant applied to the Minister in order to be registered under the ITA as a charitable organization, taking the position that its purposes fell within two heads of charity, namely (a) the advancement of education and (b) other purposes beneficial to the community as a whole in a way which the law regards as charitable.

[4] After various exchanges, the Minister denied this application. The Minister found that the appellant's purposes lacked the necessary element of structured, targeted instruction that characterize the definition of advancing education. The Minister was also of the view that while the courts may expand the law by reasonable extension or analogy to the purposes judicially established to be charitable, there were no cases supporting the position that current event news and public affairs programming, broadcasting or publishing were charitable purposes.

[5] The appellant filed a notice of objection, but the decision on this objection confirmed the Minister's refusal, hence this appeal.

The position of the parties

[6] The appellant's main contention is that it has charitable purposes beneficial to the community under the fourth head of the classification first set out in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 (UKHL) ("*Pemsel")*, and it largely relies on the decisions of this Court in *Native Communications Society of B.C. v. Canada (M.N.R.)*, [1986] 3 F.C. 471 ("*Native Communications*") and *Vancouver Regional FreeNet Association v. M.N.R.*, [1996] 3 F.C. 880 ("*Vancouver FreeNet*") for the proposition that endeavours similar to its own are charitable.

[7] The appellant's second contention is that its purposes fall under the second head of the *Pemsel* classification since they promote the advancement of education within the meaning of the common law of charity. The appellant submits that the production of in-depth news and public affairs programs improves the sum of communicable knowledge in areas which education covers. Objectively informing the public concerning significant issues and current events are said to be purposes related to education. Again, the appellant relies on *Native Communications* to support its contention on the second head.

[8] The respondent, on the other hand, notes that newspapers and other news publications have been around since the invention of the printing press. The respondent adds that there is no

jurisprudential authority standing for the proposition that the mere provision of news information is charitable, no evidence that it is included in contemporary society's conception of charity, and no compelling reason to so find. To accept the appellant's contentions would, in the respondent's view, considerably expand the fourth head of charity. The respondent also adds that *Native Communications* is of no assistance to the appellant and must be understood within the context of the special position occupied by aboriginals in Canadian society; *Vancouver FreeNet* is equally of no assistance since it dealt with a communications infrastructure, the Internet, and not with news and public affairs programming and publication.

[9] The respondent further asserts that in order to qualify under the head related to the advancement of education, the information or training must be provided in a structured manner and for a genuinely educational purpose. Simply providing the public with news and public affairs programming, whether in depth or otherwise, does not constitute education or educational research as defined in law for purposes of charity.

Analysis

Introduction

[10] The ITA describes in section 149 persons who are exempt from income tax, notably non-profit organizations and registered charities. The ITA maintains a clear distinction between non-profit organizations, which are operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, and charities. Consequently, not all non-profit endeavours are entitled to be registered as charities. This distinction is important, since it suggests

the limited purposes for which a charity can be recognized for registration purposes. As noted in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10 ("*Vancouver Society*") at para. 151, it is imperative not to undermine the distinction that the ITA makes between non-profit and charitable organizations.

[11] A registered charity is in a more advantageous tax position than a non-profit corporation since, in addition to being exempt from tax, contributors to such charities are eligible to receive tax benefits in respect of the contributions made. The public purse can thus be brought to contribute in order to facilitate the financing of the activities of a registered charity insofar as the charity secures donations from Canadian taxpayers. Consequently, the ultimate policy reason for offering such tax benefits to charitable organizations is to encourage activities which are of a "special benefit to the community" (*Vancouver Society* at para. 170). It is this special benefit which distinguishes organizations which are charitable from those that are simply non-profit.

[12] The ITA requires in subsection 149.1(1) that in order to be registered as a charity, the charitable organization must devote all its resources to "charitable activities carried out by the organization itself." However, no definition of "charitable activities" is included in the ITA, the meaning of this expression being determined by reference to the common law.

[13] Though the ITA refers to "charitable activities", in *Vancouver Society* at paras. 142 to 153, Iacobucci J., for the majority, noted that the common law definition of charity developed in the context of trust law focussed on "charitable purposes" rather than "charitable activities", and he

concluded that it is 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 charitable; see also *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217 (“*A.Y.S.A.*”) at para. 24. The requirements for registration as a charity under the ITA were thus summarized as follows in *Vancouver Society* at para. 159:

> [159] In conclusion, on the basis of the Canadian jurisprudence, the requirements for registration under s. 248(1) come down to two:
>
> > (1) the purposes of the organization must be charitable, and must define the scope of the activities engaged in by the organization; and
> >
> > (2) all of the organization’s resources must be devoted to these activities unless the organization falls within the specific exemptions of s. 149.1(6.1) or (6.2).
>
> In the absence of legislative reform providing guidelines, the best way in which to discern the charitable quality of an organization’s purposes is to continue to proceed by way of analogy to those purposes already found to be charitable by the common law, and conveniently classified in *Pemsel*, subject always to the general requirement of providing a benefit to the community, and with an eye to society’s current social, moral, and economic context. The task at hand, then, is to consider whether the Society, as presently constituted, has met these criteria.

[14] The *Charitable Uses Act, 1601* (Eng.), 43 Eliz. 1, c. 4 listed various activities which were categorized in *Pemsel* into a scheme of four heads under which recognized charitable purposes must fall: (1) the relief of poverty; (2) the advancement of education; (3) the advancement of religion; and (4) certain other purposes beneficial to the community, not falling under the preceding heads. This scheme has been adopted in Canada: *Vancouver Society* at para. 147; *A.Y.S.A.* at para. 26.

[15] In this case, the appellant submits that it may be registered as a charity under the second head of *Pemsel*, the advancement of education, or alternatively the fourth head, certain other purposes beneficial to the community. However, for the reasons that follow, I cannot accede to these submissions.

The advancement of education

[16] *Vancouver Society* is the seminal Canadian authority on the second *Pemsel* head of charity. Prior to that decision, the "advancement of education" had been given a fairly restrictive meaning limited to formal training or the improvement of a useful branch of human knowledge. This approach was modified and broadened in *Vancouver Society* to include information or training provided in a structured manner and for genuinely educational purposes:

> [169] To limit the notion of "training of the mind" to structured, systematic instruction or traditional academic subjects reflects an outmoded and under inclusive 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 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.
>
> [171] That is not to say that education should be broadened beyond recognition, however. Even while advocating a more inclusive approach to education, the Ontario Law Reform Commission also cautioned against treating as educational those activities which, although they advance legitimate goods, do not include any actual teaching or learning component. The concern is that, in certain cases, activities which fit awkwardly with the concept of education -- such as, for example, a trust to assist the publication of unknown authors -- seem to have been accorded charitable status under that category nonetheless, mainly because they did not fall within any of the other categories. I would agree with

> that caution. 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.
>
> [Emphasis added]

[17] Applying these principles to the purposes of the appellant, I cannot conclude that they meet the expanded notion of the advancement of education as set out in *Vancouver Society*. Though I agree that the production and dissemination of in-depth news and public affairs programs may improve the sum of communicable knowledge about current affairs, such activities are not sufficiently structured for educational purposes. The appellant's audience is merely being offered news and public affairs content. This may provide an opportunity for that audience to improve its knowledge of current affairs, but this offering is, at best, nothing more than the provision of an opportunity for individuals to educate themselves through the availability of materials with which this might be accomplished, but need not be. In *Vancouver Society* such an opportunity was found not to meet the requisite threshold for acceptance as a charitable purpose related to the advancement of education.

[18] The appellant's contentions that news production and dissemination have been recognized in *Native Communications* as charitable purposes for the advancement of education are also misplaced. I shall discuss this decision at greater length, but here it suffices to note that the newspaper at issue in that case was more than a mere vehicle for conveying news. Rather it was meant to foster the development of aboriginal language and culture. As noted by Stone J. at pp. 481-82:

> It is apparent that the newspaper is used more than as a mere vehicle for conveying news. An examination of its pages shows that through them its Indian readers are made aware of activities of a cultural nature going on elsewhere in the wider Indian community and of attempts being made to foster language and culture as, for example, through greater use of native languages and the revival of ancient crafts, music and story telling. All of this may well instill a degree of pride of ancestry in the readers of "Kahtou", deepen an 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. The record indicates that radio and television programs are being designed along the same general lines.

Other purposes beneficial to the community

[19] The appellant also contends that its purposes fall under the fourth head of charity under *Pemsel*, in that they are other charitable purposes beneficial to the community. At the hearing before this Court, the appellant noted, through its counsel, that it is not seeking to expand the common law definition of charity under the fourth head, its position being that current jurisprudence already recognizes the production and dissemination of news and public affairs programs as charitable purposes. However, whether applying current jurisprudence, or considering the issue from the perspective of an incremental change in the definition of charity, I cannot conclude that the appellant's purposes are charitable.

[20] In determining if an organization is charitable, under the fourth head of *Pemsel*, for successful registration under the ITA, it is necessary to consider the trend of the cases addressing whether purposes are for a public benefit which the law regards as charitable: *A.Y.S.A.* at para. 31. I shall therefore review the most pertinent cases referred to by the parties in this matter, in chronological order: *Native Communications*; *N. D. G. Neighbourhood Association v. Minister of National Revenue* (1988), 85 N.R. 73, 88 D.T.C. 6279 (F.C.A.) ("*N.D.G. Neighbourhood*"); *Vancouver FreeNet*; *Vancouver Society*; and *Aid/Watch Incorporated v. Commissioner of Taxation*, [2010] HCA 42 (Aust. H.C.) ("*Aid/Watch*").

[21] *Native Communications* concerned an organization which had as its principal purposes (i) the organization and development of comprehensive non-profit communications programs, namely radio and television productions that are of relevance to the native people of British Columbia; (ii) to train native people as communications workers; (iii) to publish a non-profit newspaper on subjects relevant to the native people of British Columbia; and (iv) to procure and deliver information on subjects facing native people of British Columbia. Taking into account the special legal position in Canadian society occupied by aboriginal peoples, their recognized special needs, and the fiduciary relationship binding the state and aboriginals, Stone J. A. concluded that these purposes were beneficial to the aboriginal community of British Columbia and fell within the spirit and intent of the *Charitable Uses Act, 1601* as good charitable purposes, emphasizing their relevance to aboriginal peoples: *Native Communications* at pp. 481 to 484.

[22] This decision must of course be understood within the context of the special position occupied in Canada by aboriginal peoples, which has often been reiterated by the Supreme Court of Canada. However, *Native Communications* also recognizes that a charitable purpose may be more readily found to exist where the recipients of the activities sustaining this purpose comprise individuals from groups or communities commonly recognized as in need of special charitable assistance.

[23] In *N.D.G. Neighbourhood*, the concerned organization's purposes included (i) to provide a forum for group education of interested community members and help animate people in dealing with social issues that affect them and the community; (ii) through community media and door to door contact, to expand the accessibility to community resources to individuals otherwise lacking the necessary information about community activities, services and issues; (iii) to develop, encourage and maintain programs of adult education, free of charge to the public in the member community; (iv) to direct services to any individual who is disadvantaged.

[24] In that case, MacGuigan J. A. did not recognize these purposes as charitable under the fourth head of *Pemsel* on the basis that the scope of the activities sustaining them was "universalist, within the geographical area of Notre Dame de Grâce"; the concerned organization maintained an ambivalence "between being a general neighbourhood association with a universal orientation and one dedicated to the cause of the urban poor" (*N.D.G. Neighbourhood* at p. 77). Though the thrust of the decision to deny charitable status was founded on the political activities of the organization, it nevertheless again emphasized the idea stated in *Native Communications* that a charitable purpose

may more easily be found where the recipients of the activities sustaining that purpose are individuals from groups or communities in need of charitable assistance.

[25] In *Vancouver FreeNet* the issue was whether the provision of free access to the "information highway" was a charitable activity for the purposes of registration under the ITA. The organization's main purposes in that case included (i) to develop, operate and own a free, publicly accessible community computer utility in the Lower Mainland of British Columbia ("FreeNet") providing the broadest possible range of information and possibilities of experience, ideas and wisdom; (ii) to encourage the development of a wide range of community electronic information resources; (iii) to encourage the broadest possible participation of information providers in making their information available on FreeNet; (iv) to work towards the widest possible public access to government and other information through FreeNet; and (v) to educate and encourage the public in the use of computer telecommunications and information retrieval.

[26] Though the purposes of the organization contemplated in *Vancouver FreeNet* were clearly not limited to activities addressing individuals from groups or communities in need of charitable assistance, Hugessen J. A. and Pratte J. A. (Décary J. A. dissenting) nevertheless recognized these purposes as charitable on the basis that the "information highway" was an essential public service similar to repairs to bridges, ports, causeways and highways which have historically been regarded as charitable and which were referred to in the *Charitable Uses Act, 1601*.

[27] The repairs to bridges, ports, causeways and highways are beneficial to the community as a whole and are therefore not targeted to a specific group or community in need of assistance. Nevertheless, these types of public infrastructures have been considered charitable, as have other similar public infrastructure works such as libraries and aqueducts. As noted by Lord MacNaughten in *Pemsel*, "[e]ven a layman might take the same favourable view of a gratuitous supply of pure water for the benefit of a crowded neighbourhood." In a modern context, the "information highway" was thus assimilated to such public infrastructure works. However, in order to qualify as a charitable purpose in such circumstances, a public infrastructure must be contemplated. Thus, in *Vancouver FreeNet* the majority, paraphrasing the philosopher and scholar Marshall McLuhan, was careful to distinguish "between the medium and the message" (*Vancouver FreeNet* at para. 18), noting that the concerned organization was providing access to messages but not the messages themselves.

[28] *Aid/Watch* is a recent decision from the High Court of Australia on which the appellant relies in order to advance the argument that the generation of public debate has been recognized as a charitable purpose. The organization contemplated by that decision was promoting the effectiveness of Australian and multinational aid provided in foreign countries. In the course of its activities, the organization was attempting to persuade government of its point of view through criticism and by seeking change in government activities and policies. As a result, the charitable status of the organization had been denied because its immediate and prevailing aim was to influence government. A majority of the High Court overruled the denial of charitable status, finding instead that purposes directed to the "generation by lawful means of public debate, in the sense described

earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head of *Pemsel*" (*Aid/Watch* at para. 47). The majority of that Court added that in Australia there is no general doctrine which excludes from charitable purposes "political objects" (*Aid/Watch* at para. 48).

[29] The High Court of Australia recognized that the law was substantially different in Canada (*Aid/Watch* at para. 26) since the ITA sets out express limits in subsections 149.1(6.1) and (6.2) regarding the conduct of political activities by a charity, which are permitted in Canada only if they are ancillary and incidental to its charitable purposes and do not include support or opposition to any political party or candidate. Moreover, even if the principles enunciated by the majority in *Aid/Watch* were applicable in Canada, they would be of little assistance to the appellant since under these principles, the public debate carried out by a charity must itself be targeted to a charitable purpose, in that case the relief of poverty in the developing world. The appellant's purposes in this case are directed to the production and dissemination of in-depth news and public affairs programs to the general public, without any emphasis or focus on public debate concerning a genuinely charitable issue.

[30] To conclude, in order to be charitable, the appellant's purposes must be of special benefit to the community, with an eye to society's current social, moral, and economic context. The appellant's purposes do not meet this requirement. Though I agree that the production and dissemination of in-depth news and public affairs programs may improve awareness of current

affairs, I do not consider these purposes alone to be in the nature of the “special” benefit required of a charitable organization.

[31] The appellant identifies its audience as the general public; its purposes are therefore not targeted to any group or community in need of charitable assistance. The appellant’s purposes are equally applicable to many news and public affairs publications and broadcasting endeavours in Canada, including those carried out on a commercial basis. The appellant’s contention that its news and public affairs programs shall be “designed to provide unbiased and objective information” could conceivably constitute the avowed mission statement of most major publishers and broadcasters in Canada.

[32] The appellant does not purport to provide a public infrastructure of benefit to the community at large since its purposes are principally concerned with disseminating information concerning significant issues and current events. In other words, the appellant’s purposes are focussed on the message rather than the medium. There is no analogy to be drawn between these purposes and the types of public infrastructures which have been considered charitable at common law.

[33] Simply put, there is little which can be found to be “charitable” in the appellant’s purposes. I would consequently dismiss this appeal, with costs in favour of the respondent.

"Robert M. Mainville"
J.A.

“I agree
M. Nadon J.A.”

“I agree
Carolyn Layden-Stevenson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-75-10
STYLE OF CAUSE:	**NEWS TO YOU CANADA v. MINISTER OF NATIONAL REVENUE**
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 4, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NADON J.A. LAYDEN-STEVENSON J.A.
DATED:	June 7 2011

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