



Canadian Charities and Business Activities

By Mark Blumberg (January 20, 2009)

Recently the Canadian Federal Court of Appeal rejected the arguments of a youth hostel that it was a charity and entitled to maintain its registered charitable status. In the case of *Hostelling International Canada – Ontario East Region* the Federal Court of Appeal upheld the CRA decision to revoke the youth hostel's charitable registration because the youth hostel was in fact in the opinion of the court a commercial business.

Background

There are significant restrictions on the ability of a registered charity in Canada to carry on business activities. Under the Canadian *Income Tax Act*, charitable organizations and public foundations can carry on a "related business" that promotes their charitable objects. An example would be a hospital cafeteria - providing food to patients and visitors. They can also carry on other unrelated business activities, presumably to raise funds for the charity, if "substantially all" (CRA says at least 90%) of the people involved in these activities are volunteers. Private foundations cannot carry on any business activities whatsoever.

While the case will obviously be of interest to any youth hostels in Canada who have charitable status it will really be of interest to charities that conduct activities that could be considered "carrying on a business". The case may also be of interest to charities involved with education as it discusses the scope of what fits into the educational category of charity.

The former registered charity operates a hostel in Ottawa. It has had charitable status for 35 years. Its letter patent provides:

a. To promote the education of all, but especially young people, by encouraging in them a greater knowledge, love and care of the countryside and an appreciation of the cultural values of towns and cities in all parts of the world, and as ancillary thereto to provide hostels or other accommodation in which there shall be no discrimination based on race, nationality, colour, religion, class, political opinions, sex or age, and thereby, to develop a better understanding between persons - both home and abroad.

b. To promote the development, operation and use of hostels for recreational, cultural, and educational programmes, travel and exploration in co-operation with the Ontario Hostelling Association - Association Ontarienne de L'Ajisme and the Canadian Hostelling Association - Association Canadienne de L'Ajisme

It is interesting to note that in the T3010 filing for the hostel, which is not mentioned in the case and will shortly be removed from the CRA website, it has:

Ongoing programs:

1. Preservation of a heritage building (Ottawa Carleton County Jail) that is owned and operated as a hostel by the charity and making it available to the public. 2. Fostering international stewardship by promoting respect for other peoples, places, heritage, cultures and the environment through a multi-cultural international communal accommodation network. 3. Participated in "Doors Open Canada" (Heritage Canada Foundation) and offered the community free tours of our architecturally significant heritage building and historical landmark. 4. Taught the public about Canada's pre- and post-confederation life and penal system by way of historic tours, interactive websites, displays, posters, artefacts and information exhibits. 5. Provided youth and student groups, from all walks of life, affordable accommodation in a "living heritage museum" for field trips to the Nation's Capital. 6. Assisted students from Ottawa and Carleton Universities and provided them with access to our building and information in order to fulfill their criminology curriculum requirements. 7. Operated a program to fulfill girl guide badge requirements.

New programs:

1. Created a curriculum based educational interactive program and activity booklet for elementary school groups staying at our hostel on the early Canadian penal system, Confederation and the history of the Ottawa Carleton County Gaol (1862-1972 - site of Canada's last public hanging - re: James Patrick Whelan in 1868 for the assassination of one of Canada's fathers of Confederation, Thomas Darcy McGee). 2, Operated the Ottawa Carleton County Gaol Heritage Centre, making it available to both the public and hostels guests, so that they could visit and learn about Canada's Early penal system.

CRA raised concerns in 2001 and in 2008 sent a notice of intention to revoke.

Under section 149.1 the CRA can revoke a charities registration if the charity

"(a) carries on a business that is not a related business of that charity; ..."

CRA took the view that the charity had ceased to comply with the requirements of its registration; that it was not devoting all of its resources to charitable activities; that youth hostels by themselves are not a charitable activity and the business is not an allowable "related business". The CRA rejected the idea that offering low-cost accommodation to travellers is promoting the advancement of education.

The Court quoted the *Vancouver Society* case, in which Mr. Justice Iacobucci discussed the scope of the education category:

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.

The Federal Court of Appeal decided that "Simply providing an opportunity for people to educate themselves by making available tourist accommodation is insufficient for the activity to be regarded as charitable under the Act. Accordingly, we find that the Minister's decision to revoke the registration of the appellant was reasonable."

What is not discussed in the short case is the CRA's administrative position with respect to charities and carrying on business.

If you are interested in the CRA position their summary policy states:

Summary Policy

Date

October 25, 2002 (Revised June 14, 2007)

Reference Number

CSP - B02

Key Words

Business - Related business - Sanctions - Revocation

Policy Statement

Under the Income Tax Act, charitable organizations and public foundations can carry on related businesses that accomplish or promote their charitable objects. They can carry on any other business activities if substantially all (i.e., at least 90%) of the staff involved in these activities are volunteers. Private foundations cannot carry on any business activities.

A charitable organization or public foundation that carries on an unrelated business is liable to a penalty equal to 5% of its gross revenue for a taxation year from any unrelated business that it carries on in the taxation year. This penalty increases to 100% and the suspension of tax-receipting privileges for a repeat infraction within 5 years.

A private foundation that carries on business activities is liable to a penalty equal to 5% of its gross revenue for a taxation year from any business that it carries on in the taxation year. This penalty increases to 100% and the suspension of tax-receipting privileges for a repeat infraction within 5 years.

A registered charity that contravenes or continues to contravene the Act could also have its registration revoked.

For further information on CRA's view you can review CPS-019 "What is a Related Business" which is located at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-019-eng.html>

Another important document is RC4143 Registered Charities: Community Economic Development Programs which is located at <http://www.cra-arc.gc.ca/E/pub/tg/rc4143/>

As well if you want to read information letters from the CRA and other documents they can be accessed at <http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-r05-eng.html>

I have pasted the full decision below. It is a reminder that Canadian charities are not businesses and those conducting some "business" activities must be careful to ensure that they are either a "related business" or that more than 90% of the staff are volunteers. It also shows even if CRA registered a charity 35 years by mistake that does not preclude them from trying to fix the situation.

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HERE IS A COPY OF THE DECISION:

Date: 20081211

Docket: A-80-08

Citation: 2008 FCA 396

CORAM: RICHARD C.J.

DESJARDINS J.A.

NOËL J.A.

BETWEEN:

HOSTELLING INTERNATIONAL CANADA - ONTARIO EAST REGION

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on December 9, 2008.

Judgment delivered at Ottawa, Ontario, on December 11, 2008.

REASONS FOR JUDGMENT BY:

RICHARD C.J.

CONCURRED IN BY:

DESJARDINS J.A.

NOËL J.A.

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MINISTER OF NATIONAL REVENUE

REASONS FOR JUDGMENT

RICHARD C.J.

[1] This is a statutory appeal pursuant to subsections 172(3) and 180(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (the ‘Act’) from the notice of the Minister’s intent to revoke the charitable registration of the appellant, dated July 28, 2006.

[2] The Minister’s decision was made pursuant to paragraphs 149.1(2)(a) and 168(1)(a) of the Act:

149.1 (2) The Minister may, in the manner described in section 168, revoke the registration of a charitable organization for any reason described in subsection 168(1) or where the organization

149.1 (2) Le ministre peut, de la façon prévue à l’article 168, révoquer l’enregistrement d’une oeuvre de bienfaisance pour l’un ou l’autre des motifs énumérés au paragraphe 168(1), ou encore si l’oeuvre :

(a) carries on a business that is not a related business of that charity; ...

a) soit exerce une activité commerciale qui n’est pas une activité commerciale complémentaire de cet organisme de bienfaisance; [...]

168. (1) Where a registered charity or a registered Canadian amateur athletic association ...

168. (1) Le ministre peut, par lettre recommandée, aviser un organisme de bienfaisance enregistré ou une association canadienne enregistrée de sport amateur de son intention de révoquer l’enregistrement lorsque l’organisme de bienfaisance enregistré ou l’association

(b) ceases to comply with the requirements of this Act for its

registration as such, ...

canadienne enregistrée de sport
amateur, selon le cas : [...]

the Minister may, by registered
mail, give notice to the registered
charity or registered Canadian
amateur athletic association that
the Minister proposes to revoke its
registration.

b) cesse de se conformer aux
exigences de la présente loi
relatives à son enregistrement
comme telle; [...]

[3] The appellant operates a hostel located in the building which formerly housed the Carleton County Gaol in Ottawa. It first received registered charity status effective June 13, 1973 under the name “National Capital Hostelling Association”. The appellant’s status has been revoked twice in the past for failure to file its annual returns. In both instances, the appellant reapplied for charitable registration and it was granted by the CRA.

[4] The appellant’s Letters Patent state the following objects:

a. To promote the education of all, but especially young people, by encouraging in them a greater knowledge, love and care of the countryside and an appreciation of the cultural values of towns and cities in all parts of the world, and as ancillary thereto to provide hostels or other accommodation in which there shall be no discrimination based on race, nationality, colour, religion, class, political opinions, sex or age, and thereby, to develop a better understanding between persons – both home and abroad.

b. To promote the development, operation and use of hostels for recreational, cultural, and educational programmes, travel and exploration in co-operation with the Ontario Hostelling Association – Association Ontarienne de L’Ajisme and the Canadian Hostelling Association – Association Canadienne de L’Ajisme

c. For the objects aforesaid, to accept donations, gifts legacies and bequests.

[5] Subsequent to an audit of the appellant for its fiscal period ended March 31, 2001, the respondent raised various concerns about the appellant’s compliance with certain provisions of the Act. Following an exchange of correspondence between the appellant and the respondent,

on July 28, 2006, the Minister gave the appellant notice of its intent to revoke its charitable registration.

[6] After reviewing the objections made by the appellant, the Minister confirmed its intent to revoke the appellant's registration on January 30, 2008. The Minister found that the appellant had ceased to comply with the requirements of charitable registration as set out in subsection 149.1(1) of the Act. Specifically, the Minister found that the appellant failed to devote all of its resources to charitable activities since the provision of accommodation in the context of youth hostels is not a charitable activity. Furthermore, the Minister found that the appellant carries on a commercial business that does not meet the requirements of a 'related business' under 149.1(1) of the Act.

[7] The Minister's conclusion that the appellant ceased to qualify for registration is a conclusion of mixed fact and law reviewable on a standard of reasonableness, as per *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[8] The requirements for charitable registration under the Act were outlined by Justice Iacobucci in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, at paragraph 159:

(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).

[9] The Supreme Court of Canada has held that in order for the objects of an organization to be charitable at common law they must fall into one of the four categories set out by the House of Lords in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 (see e.g. *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42 at para. 26; *Vancouver Society*, at para. 144; *Guaranty Trust Co. of Canada v. Minister of National Revenue*, [1967] S.C.R. 133). The four categories include: the relief of poverty, the advancement of education, the advancement of religion, and 'other purposes beneficial to the community'. All of the organization's activities must be in furtherance of its charitable purposes in order for those activities to be considered charitable under the Act (*Vancouver Society*, at para. 152).

[10] The appellant claims that facilitating travel by providing low-cost accommodation is an activity that promotes the advancement of education. In *Vancouver Society*, Justice Iacobucci discussed the scope of this *Pemsel* category. At paragraph 171, he stated:

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.

[11] The record before us confirms the Minister's conclusion that the appellant did not carry out its activities in furtherance of the advancement of education or any other recognized charitable purpose. Simply providing an opportunity for people to educate themselves by making available tourist accommodation is insufficient for the activity to be regarded as charitable under the Act. Accordingly, we find that the Minister's decision to revoke the registration of the appellant was reasonable.

[12] The appellant submitted that the appropriate procedure for the Minister to have taken was to annul the charity's registered status pursuant to subsection 149.1(23), rather than to revoke it. The record indicates that the Minister was prepared to do so with the consent of the appellant, which was not given.

[13] Subsection 149.1(23) of the Act provides that annulment is a discretionary procedure that may be followed by the Minister in cases where the organization was registered by the Minister in error or where, solely due to a change in law, the organization has ceased to be a charity.

[14] The Minister did not proceed on the ground that the organization was registered in error but on the ground that the organization had ceased to comply with the requirements of subsection 149.1(1) of the Act in that it failed to devote all of its resources to charitable activities.

[15] Accordingly, the appeal will be dismissed with costs to the respondent.

"J. Richard"

Chief Justice

"I agree

Alice Desjardins J.A."

"I agree

Marc Noël J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-80-08

STYLE OF CAUSE:

HOSTELLING
INTERNATIONAL CANADA –
ONTARIO EAST REGION v.
MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING:

Ottawa

DATE OF HEARING:

December 9, 2008

REASONS FOR JUDGMENT BY:

RICHARD C.J.

CONCURRED IN BY:

DESJARDINS J.A. and
NOËL J.A.

**CONCURRING REASONS BY:
DISSENTING REASONS BY:**

DATED:

December 11, 2008

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