

## Constitutional Jurisdiction Over Charities

*An excerpt from the forthcoming Halsbury's Laws of Canada charities title by Donald J. Bourgeois.*

What level of government has jurisdiction over charities? That question, on the surface, is a simple one. Most individuals would probably expect that the answer would also be a simple one. But, as with much in the law of charities, the answer is far from simple. The following excerpt from *Halsbury's Laws of Canada's* title on charities and not-for-profit organizations, to be published in September 2008, illustrates some of the complexity around this simple question.

**Provincial jurisdiction.** The *Constitution Act, 1867*<sup>1</sup> distributes to the Parliament of Canada and the provincial legislatures powers to “make Laws in relation to Matters coming within the Classes of Subject” enumerated, primarily in sections 91 and 92. These enumerated or heads of powers have been the subject of substantial litigation over what level of government (federal or provincial) has authority to legislate, either on an exclusive or shared basis.

***Constitution Act, 1867.*** The *Constitution Act, 1867*, on its face, would appear to support a conclusion that the provincial legislatures have exclusive jurisdiction over charities. The Act states that a legislature may exclusively make law in relation to the establishment, maintenance, and management of hospitals, asylums, charities and eleemosynary institutions in and for the Province, other than marine hospitals.<sup>2</sup>

**Inherent limitation.** This head of power, although appearing to cover the constitutional jurisdiction, has an inherent restriction - “in and for the Province.” Presumably, if the charity is

not “in and for the Province,” constitutional jurisdiction does not rest (solely) with the provincial legislatures but elsewhere. The only other location under the *Constitution Act, 1867* is the federal Parliament.

**Administration of justice.** The provincial jurisdiction over the administration of justice provides another basis on which provincial legislation or activity could be based. The administration of justice is allocated to the provincial level by 92(14), including “the constitution, maintenance, and organization of provincial courts, both civil and criminal jurisdiction.” 92(14) also allows for the provinces to establish provincial offices, or “inferior courts.” Given that much of the law of charity is “common law” and enforcement of legislative initiatives is often left to the courts, this provincial jurisdiction is an important one. The authority, though, is not without its limits. For example, the federal government appoints, under section 96, justices to the superior courts. Under section 101, Parliament may also establish federal courts “for the better administration of the laws of Canada.” At times, these federal courts have had exclusive jurisdiction over federal matters. Parliament may also assign responsibilities to provincial courts, established under 92(14)

**Extent of provincial jurisdiction.** The limits of provincial jurisdiction are difficult to identify with any certainty. It is not clear the extent of provincial constitutional jurisdiction for activities that occur outside the provincial boundaries but which have an impact on residents within the province. It is not certain what the provincial jurisdiction is to regulate behaviour within the province where, for example, a deceptive practice occurs beyond or to people located outside the provincial boundaries.

**Limited constitutional interpretation.** Constitutional litigation is extensive with respect to many of the heads of powers. There is, however, very little case law interpreting or applying the constitutional heads of power for charities.<sup>3</sup>

#### Notes

1. U.K., 30 & 31 Victoria, c. 3.
2. *Constitution Act, 1867*, *ibid*, subsection 92(7)
3. By way of analogy, it was concluded in *Reference re Earth Future Lottery* (2002), 215 D.L.R. (4<sup>th</sup>) 656 (P.E.I. C.A.), affirmed [2003] 1 S.C.R. 123, that the Lieutenant Governor in Council did not have the authority to issue a licence for the conduct, management and operation of a lottery scheme through the internet, which would permit worldwide sales. While the ruling dealt with the geographic limit of provincial authority, it did so with respect to an authority provided under the *Criminal Code of Canada* and not provincial constitutional jurisdiction. Likewise, in *Reference re: British North America Act, 1867*, (also referred to as *Dobie v. The Board for the Management of The Temporalities Fund of the Presbyterian Church of Canada in connection with The Church of Scotland*), [1882], 7 App. Cas. 136, the Privy Council appears to have commented that provincial jurisdiction is limited to charities that are established, maintained, or managed “in or for” the province of Quebec. This case was decided, though, based on the provision of the *Constitution Act, 1867* that applied to corporations incorporated under the laws of the former pre-Confederation province of Canada. The Court concluded that only Parliament, and not the provincial legislatures, could repeal or modify the corporate rights

of those corporations in any material manner.

**Sources of federal jurisdiction.** Parliament and the Government of Canada have had and continue to have substantial public policy interests in the charitable sector. This interest has been articulated both in statute and in public policy statements.<sup>1</sup> The traditional view of federal jurisdiction is that, because Parliament is constitutionally constrained and federal regulation of charities is limited, Parliament obtains its jurisdiction through the *Income Tax Act*<sup>2</sup> which establishes a registration scheme for charities<sup>3</sup> to protect the tax base from frauds by charities or purported charities.

**Regulation under *Income Tax Act*.** Charities that are registered are not only exempt from the payment of income tax on their revenues<sup>4</sup> but may also issue a receipt for income tax purposes.<sup>5</sup> That receipt may be used by an individual to obtain a credit on taxes paid on income or by a business as a deduction. Parliament and the Government of Canada regulate charities, therefore, through the Canada Revenue Agency and its application of the regime established under the *Income Tax Act*.<sup>6</sup>

**Criminal law.** The criminal law head of power under subsection 91(27) of the *Constitution Act, 1867*<sup>7</sup> has very broad application. While provinces have jurisdiction over the administration of justice (which includes policing and administration of the courts), the criminal law power of Parliament is extensive. It has been used by Parliament to address public issues such as prevention of deceptive practices, protection of health with respect to controlled substances, tobacco and liquor.

**Trade and commerce.** Subsection 91(2) of the *Constitution Act, 1867* permits Parliament to enact legislation in relation to “the regulation of trade and commerce.” While the case law has generally limited the federal jurisdiction to matters that are not solely within the geographic area of a province, which would have authority under subsection 91(13) dealing with “property and civil rights,” the trade and commerce power is potentially significant. Provisions in the *Competition Act*<sup>8</sup> dealing with deceptive practices clearly apply to charities, associations and not-for-profit organizations.

**Security.** The *Charities Registration (Security Information) Act*<sup>9</sup> sets out another approach to the exercise of federal jurisdiction over charities. That *Act*<sup>10</sup> provides that the purposes of the *Act* are:

- a) to demonstrate Canada's commitment to participating in concerted international efforts;
- b) to deny support to those who engage in terrorist activities;
- c) to protect the integrity of the registration system for charities under the *Income Tax Act*;
- d) to maintain the confidence of Canadian taxpayers that the benefits of charitable registration are made available only to organizations that operate exclusively for charitable purposes.

The principles of the *Act* are:

a) maintaining the confidence of taxpayers may require reliance on information that, if disclosed, would injure national security or endanger the safety of persons; and

(b) that the process for relying on the information referred to in paragraph (a) in determining eligibility to become or remain a registered charity must be as fair and transparent as possible having regard to national security and the safety of persons.

This statute is connected to the *Anti-Terrorism Act*<sup>11</sup> in 2001 and concerns about terrorism and its financing through money laundering. It is apparent that the purposes of these statutes are broader than just the integrity of the tax base.

**Telecommunications.** The *Telecommunications Act*<sup>12</sup> establishes rules for the use of telecommunications equipment and making contact with the public. While the “do not call list” may not apply to registered charities, it would appear to apply to those charities that are not registered under the *Income Tax Act*. In addition, other aspects of that legislation would appear to continue to apply regardless of registration.

**Personal Information.** The *Personal Information Protection and Electronic Documents Act*<sup>13</sup> expressly applies to charities that are carrying on commercial activities, including the selling, bartering or leasing of donor, membership or fundraising lists.

**Intellectual Property.** Parliament has enacted a number of statutes that are intended to protect

intellectual property and to regulate its use by others. The *Copyright Act*<sup>14</sup> and *Trade-Marks Act*<sup>15</sup> both apply to charities, associations and not-for-profit organizations. They may avail themselves of those statutes to protect their intellectual property and others may enforce their rights against charities, associations and not-for-profit organizations.

Notes:

1. The special treatment afforded charities under the *Excise Tax Act*, R.S.C. 1985, c. E-15 with respect to the application of goods and services taxation is one example.
2. R.S.C. 1985, c.1 (5<sup>th</sup> Supp.).
3. *Ibid.*, subs. 248(1).
4. *Ibid.*, s. 149.1.
5. *Ibid.*, subs. 248(1)
6. This approach would appear to be the one adopted by CRA's predecessor, Revenue Canada in the Charities Division's *Employee Handbook*, May 1997, at 44 to 45.
7. U.K., 30 & 31 Victoria, c. 3.
8. R.S.C. 1985, c. C-34, as amended by S.C. 1999, c. 2, s. 12.
9. S.C. 2001, c. 41, Part 6.
10. *Ibid.*, s. 2
11. S.C. 2001, c. 41.
12. S.C. 1993, c. 38, as amended. See, for example, sections 41.1 to 41.7, enacted pursuant to S.C. 2005, c. 50.
13. S.C. 2000, c. 5.

14. R.S.C. 1985, c. C-42.
15. R.S.C. 1985, c. T-13.