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PROMOTION OF ETHICAL TOURISM NOT CONSIDERED CHARITABLE

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A. INTRODUCTION

The recent decision of the Federal Court of Appeal (the "Court") in *Travel Just v. Canada Revenue Agency*[2] ("*Travel Just*") represents an important decision concerning the definition of what is considered to be charitable at common law.[3] *Travel Just* involved the refusal by Canada Revenue Agency ("CRA") to register a charity with the object "to create and develop model tourism development projects that contribute to the realization of international human rights and environmental norms."[4] The Court concluded that the organization's objects were "vague and subjective"[5] and were not sufficiently analogous to purposes already recognised by the Courts under the fourth category of charity: other purposes beneficial to the community. In addition, the language left open the possibility of the organization financing and operating luxury holiday resorts, activities with a strong commercial and/or private benefit aspect. In finding that the law of Québec did not apply to the determination of whether the organization's activities are charitable, the Court indicated that there was no evidence of a connection with Québec and that "there is considerable force in the submission of the Minister"[6] that the issue of whether an organization is charitable for the purposes of the

[1] The authors would like to thank Paula J. Thomas, student-at-law, for her assistance in the preparation of this Bulletin.
[2] [2006] F.C.J. No. 1599, 2006 FCA 343.
[3] In the November 2006 edition of Charity Law Update, a brief reference was made to *Travel Just v. Canada Revenue Agency*.
[4] *Supra* note 2 at para. 4.
[5] *Supra* note 2 at para. 8.
[6] *Supra* note 2 at para. 16.

Income Tax Act ("ITA")[7] is a public law concept, rendering the private law of Quebec irrelevant.

B. BACKGROUND

Travel Just, which was incorporated under the *Canada Corporations Act* ("CCA"),[8] submitted an application to be registered as a charitable organization to the Minister of National Revenue (the "Minister") in March 2004. Its main corporate objects were as follows:

a) to work with key governmental authorities and grassroots communities of various tourism destination markets to create and develop model tourism development projects that contribute to the realization of international human rights and environmental norms and that achieve social and conservation aims that are in harmony with economic development aims for the particular region;

b) to develop, fund, administer, operate and carry on activities, programs and facilities to produce and disseminate materials on a regular basis that will provide travellers and tourists with information on socially and environmentally responsible tourism in order to establish normative discourse around travelling with a social conscience.[9]

Travel Just included in the application a description of the activities which it was proposing to pursue. Because Travel Just did not receive a response from the Minister within 180 days , the Minister was deemed to have refused the application.[10] Accordingly, Travel Just appealed the Minister's deemed refusal to the Federal Court of Appeal by virtue of subsection 172(3) of the ITA.

Justice Evans, writing for the unanimous Federal Court of Appeal, stated that the appeal centred on whether Travel Just's corporate objects, as set out in its Letters Patent, were exclusively charitable in nature, as required by the ITA. In that regard, he made reference to Justice Iacobucci's majority decision in *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue)* ("*Vancouver Society*")[11] and agreed that "it is the purpose, in furtherance of which an activity is carried out, that determines if the activity is charitable."[12]

[7] R.S.C. 1985, c. 1 (5th Supp.).
[8] R.S.C. 1970, c. C-32.
[9] *Supra* note 2 at para. 4.
[10] Subsection 172(4) of the ITA.
[11] [1999] 1 S.C.R. 10 at para. 152.
[12] *Supra* note 2 at para. 2.

Travel Just would be prohibited from registration as a charitable organization if the Court decided that its corporate objects allowed for the expenditure of funds on activities not considered charitable at law.[13] Justice Evans noted that this rule is subject to a limited statutory exception under subsections 149.1(6.1) and (6.2) in the ITA, which state that charitable foundations and charitable organizations may pursue political activities, provided that those activities are ancillary to their charitable activities. He also made reference to the common law doctrine of incidental purposes, which was surveyed by Justice Iacobucci in *Vancouver Society*.[14]

C. THE APPELLANT'S POSITION

The appellant took the position that it should be granted charitable registration because its corporate objects fit under the fourth head of charity: "other purposes beneficial to the community" as defined in the seminal English House of Lords decision, *Pemsel v. Special Commissioners of Income Tax* ("*Pemsel*").[15] Furthermore, the appellant referred to *Commissioners of Inland Revenue v. Yorkshire Agricultural Society*[16] and similar court decisions which supported the argument "that the general promotion of an industry or trade constitutes a public benefit for the purpose of the *Pemsel* test."[17] Accordingly, the appellant contended that promoting "ethical tourism" in developing countries, as authorised by object (a) of Travel Just's corporate objects, fits within the fourth category of charitable purposes .

In the alternative, Travel Just argued that because it was incorporated pursuant to a federal statute (the CCA, the legislation which governs the incorporation of federal non-share capital corporations),[18] and because its Letters Patent permitted it to carry on business throughout Canada, the Court was required to review Québec's civil law legal concept of charity to see whether it was more expansive that the common law definition. The appellant proposed that the law governing the province of Québec gave charity a wider definition, and as such, "Travel Just should be registered as a charitable organization to the extent that it operates in Québec."[19]

[13] *Supra* note 2 at para. 3, referring to *Earth Fund/Fond pour la Terre v. Canada (Minister of National Revenue)*, [2002] F.C.J. No. 1769, 2002 FCA 498 at para. 20.
[14] *Supra* note 11 at para. 156–158.
[15] [1891] A.C. 531 (Eng. H.L.).
[16] [1927] 1 K.B. 611 (Eng. C.A.).
[17] *Supra* note 2 at para. 6.
[18] *Supra* note 8.
[19] *Supra* note 2 at para. 12.

D. THE COURT'S RESPONSE

With respect to the appellant's first argument, the Court disagreed, finding that the promotion of tourism was not charitable. The Court further stated that even if the promotion of tourism was considered charitable, Travel Just did not promote tourism in general but only tourism which met vague and undefined criteria related to human rights and environmental protection. The Court found that the appellant had not satisfactorily demonstrated that its "object, which [was] limited to a particular, but vague and subjective, view of what kinds of tourism are beneficial to the community was sufficiently analogous to a purpose already recognized as charitable to qualify under the fourth *Pemsel* head of charity."[20]

In addition, the Court noted that Travel Just's description of "model tourism development projects" could be interpreted to involve funding and operating expensive vacation resorts in developing countries. In the Court's view, such commercial activity not only had the potential for substantial private benefit, but it was also not a purpose beneficial to the community. The Court further noted that the information which Travel Just was disseminating under its second object would qualify neither as a publication of research nor as having an educational purpose.

Finally, the Court also disagreed with the appellant with respect to the alternative argument concerned with an examination of the law of Québec. As the Court found that Travel Just did not operate in that province, much less have future plans to do so, it declined to survey the law of Québec. In this regard, Justice Evans went on to state that:

> There is considerable force in the submission of the Minister that whether an organization is charitable for the purpose of the ITA is a question of public law, and not one of property and civil rights to which the private law of Québec is relevant. In this context, it is significant that Revenu Québec registers an organization as a charity only after confirmation of its registration by the Canada Revenue Agency.[21]

E. COMMENTARY

This Federal Court of Appeal decision demonstrates a number of important points with regard to what is considered charitable at law. The Court considered Travel Just's corporate objects to be "laudable" but "too broad and vague,"[22] which could be problematic for any organization applying for registered charitable status. Corporate objects which permit activities that extend beyond what is considered to be charitable at common

[20] *Supra* note 2 at para. 8.
[21] *Supra* note 2 at para. 16.

law will lead CRA and the courts to say that they are too broad and vague. As well, the decision demonstrates the reluctance of Canadian courts to expand the fourth head of charity of "other purposes beneficial to the community," particularly where the proposed benefit is unclear and there is a potential private benefit.

Clearly, the attempt by the appellant to import the definition of what is charitable at Québec law was not accepted by the Court as relevant because there was no nexus between Travel Just and the province of Québec. Of greater potential interest is the suggestion that, in any event, the Québec legal concept of charity may never be relevant if, as was submitted by the Minister and is believed by many commentators, the question of whether an organization is charitable is a public law determination to which provincial private law does not apply.

Finally, practitioners should take note of the strategy employed by appellant's counsel to move consideration of the issue straight to the Federal Court of Appeal by invoking the deemed refusal provision. It would seem that a determination was made that they would not likely be successful in convincing CRA of their arguments and that the Federal Court of Appeal might be more sympathetic. Because of amendments made to the Act as a result of the 2004 Budget, there is no longer a deemed refusal of registration after 180 days have elapsed from the date of application and an appeal of the refusal must now go through the CRA internal appeals process before going to the Federal Court of Appeal.

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