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SUPREME COURT OF CANADA CONFIRMS THE COMMON LAW WITH RESPECT TO CHARITY AND SPORTS ORGANIZATIONS

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A. INTRODUCTION

The Supreme Court of Canada has unanimously upheld the Federal Court of Appeal's decision that an Ontario amateur youth soccer association does not qualify as a registered charity within the meaning of subsection 248(1) of the *Income Tax Act* ("ITA"). Writing for the majority, Justice Marshall Rothstein concluded that although some sports organizations, other than registered Canadian amateur athletic associations ("RCAAAs"), might be found to be charities under the common law, the appellant did not qualify for charitable registration because its purposes and activities were not charitable. The majority judgment confirms the existing common law with respect to the determination of what is charitable in the context of sports organizations, indicating that recognition of an organization, such as the appellant, would result in a significant change to the common law beyond the incremental changes mandated by the jurisprudence and would be best left to Parliament.

B. BACKGROUND

A.Y.S.A. Amateur Youth Soccer Association (the "Corporation") is a federally incorporated not-for-profit corporation, the purpose of which is to promote the sport of soccer in Ontario. The Letters Patent of the Corporation specifically provide as follows:

(a) to fund and develop activities and programs to promote, organize and carry on the sport of amateur youth soccer;
(b) to fund, promote and develop local amateur youth soccer programs and coaching appropriate to different age groups and different levels of ability to increase participation in the sport of soccer;
(c) to raise funds for facilities and equipment necessary to achieve the foregoing objects in ways the law regards as charitable;
(d) to receive gifts, bequests, funds and property and to hold, invest, manage, administer and distribute funds and property for the objects of the Corporation; and
(e) to conduct activities and exercise such powers as are necessary for the achievement and furtherance of the objects of the Corporation.

The Corporation applied to be a registered charity as defined in subsection 248(1) of the ITA. In its application for charitable status, the Corporation identified that the activities it would undertake to further its objects would include soccer practice, competition, and skills development camps for both youth and coaches. CRA rejected the application for charitable registration on the basis that the promotion of sport is not recognized as a charitable purpose at common law and that since the Corporation's overall purpose is to promote the sport of soccer it did not qualify for registration.

The Corporation appealed CRA's decision to the Federal Court of Appeal. The Corporation's main argument focused on language in an Ontario court decision, *Re Laidlaw Foundation*,[1] ("Re *Laidlaw*") which held that the promotion of amateur sport involving the pursuit of physical fitness is a charitable purpose. The Corporation argued that since the common law in Ontario recognizes the promotion of amateur sport as a charitable purpose and the proposed activities are confined to Ontario, the law of Ontario should apply to the determination of its charitable status.

The Federal Court of Appeal[2] did not deal with the issue of whether or not amateur sport could be considered charitable. Instead, it focused on the provisions of the ITA which provide specific tax exemptions for registered Canadian amateur athletic associations ("RCAAAs"). The definition of a RCAAA found in subsection 248(1) of the ITA requires that the association promote amateur athletics on a national level and that the association qualify as a non-profit corporation in accordance with paragraph 149(1)(l) of the ITA. The Federal Court of Appeal held that there was no need to have recourse to the common law of Ontario, since the ITA provides for the tax status of the Corporation and this particular tax status precludes the

[1] (1984), 13 D.L.R. (4th) 491 at 506 and 523-24 (Ont. H.C.J.). [*Re Laidlaw]*
[2] *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency* (2006), 267 D.L.R. (4th) 724 (F.C.A.).

possibility of its being registered as a charitable organization.[3] The Court found that in providing for the status of a RCAAA in 1972, "Parliament must be taken to have been aware that no association which has, as its main purpose, the pursuit of amateur sport could qualify as a charity under the common law, and hence, under the Act."[4] The Court concluded that the scheme of the ITA precludes the possibility of an amateur sport organization being registered as a charity.[5] Based on the analysis of the Federal Court of Appeal, because the Corporation is an amateur athletic association which operates exclusively in Ontario, it is not only precluded from the tax-exempt status conferred on RCAAAs, but it is also precluded from becoming a registered charity pursuant to subsection 248(1) of the ITA.

The Corporation appealed to the Supreme Court of Canada, which appeal was heard on May 16, 2007. The decision of the Supreme Court of Canada was rendered on October 5, 2007.[6]

C. SUMMARY OF DECISION

The appellant claimed that its purposes and activities were charitable on the basis of the fourth head of charity established in *Pemsel*[7] and most recently commented upon by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women,*[8] ("*Vancouver Society*"): other purposes beneficial to the community in a way the law regards as charitable. While much of the English case law supports the contention that "mere sport" is not charitable, the appellant's main argument focused on language in *Re Laidlaw*,[9] which supports a view that the promotion of amateur sport involving the pursuit of physical fitness could be considered a charitable purpose. The appellant argued that "the time is ripe for Canadian courts to recognize that the promotion of amateur sports involving the pursuit of physical fitness fits under the final *Pemsel* category … the time has come for sport to stand on its own."[10] Since the common law in Ontario recognizes the promotion of amateur sport as a charitable purpose and the proposed activities are confined to Ontario, the appellant argued that the law of Ontario should apply to the determination of its charitable status. Further, on the basis of section 8.1 of the *Interpretation Act*,[11] provincial law must be applied to the

[3] *Ibid.* at para. 13.
[4] *Ibid.* at para. 20.
[5] *Ibid.* at paras. 22-23.
[6] *A.Y.S.A. Amateur Youth Soccer Association* v. *Canada (Revenue Agency)*, 2007 SCC 42.
[7] *Commissioners for Special Purposes of the Income Tax* v. *Pemsel*, [1891] A.C. 531 (H.L.).
[8] *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R.*, [1999] 1 S.C.R. 10 at para. 176.
[9] *Supra* note 1.
[10] *Supra*, note 6 at p. 23.
[11] R.S.C. 1985, c. I-21

determination of what is charitable under the ITA and that the relevant provincial law was established in *Re Laidlaw*.

The government's submissions focused on maintaining the Federal Court of Appeal decision, arguing that there was no need to have recourse to the common law of Ontario, since the RCAAA provisions of the ITA occupy the field for amateur sports associations and expressly preclude the possibility of such an organization being registered as a charitable organization. In support of this submission, the government cited various passages from *Hansard*, which it claimed suggests that Parliament's intent when it amended the ITA in 1971 was to exclude sports associations other than RCAAAs from the tax benefits of charitable status. The respondent argued that any interpretation of the ITA provisions related to charity must recognize Parliament's express intention not to include the promotion of sport as charitable.

Justice Marshall Rothstein, writing for a majority of eight of the nine judges, chose to first deal with the issue of whether the existence of the RCAAA provisions of the ITA preclude amateur sports organizations from being registered as charities and concluded that they do not. Justice Rothstein did not accept the government's arguments that Parliament's intention in this regard was evident from the cited passages of *Hansard* and states that the passages do not

> … evince a parliamentary intent to freeze the development of the common law on charitable status or to occupy the field for all amateur sports. Neither does the fact that RCAAAs can channel funds to their regional member organizations necessarily support the view that any other non-affiliated sports organizations were intended to be absolutely excluded from charitable status. The ITA continued to leave the definition of what is "charitable" to be determined by reference to the common law.[12]

The majority decision of the Court then examined the text of the ITA provisions related to RCAAAs and charities and cautioned against interpretations which rely on implied meaning, concluding that:

> Neither the text nor scheme of the Act, nor the legislative purpose in establishing the RCAAA regime suggest that the RCAAA provisions preclude charitable status for non-nationwide sports organizations of all sorts or all descriptions. Rather, Parliament created a clear position for RCAAAs, and left the rest to be determined in accordance with the long-standing practice under the common law.[13]

[12] *Supra* note 6 at p. 14.
[13] *Ibid.* at p. 16.

It is with respect to this issue of whether the existence of the RCAAA provisions expressly precludes the possibility of the appellant in this instance becoming a registered charity that the ninth judge, Justice Rosalie Abella, differed from her colleagues. In concurring reasons, Justice Abella found that the RCAAA provisions clearly excluded non-national sports organizations from receiving the tax benefits of charitable status:

> The concept of "charity" may be a unique beast in the *Income Tax Act*, but it is nevertheless a caged one. The cage in this case is the RCAAA statutory scheme. Those provisions explicitly confer charity-like benefits only on amateur athletic associations with a national focus. Parliament's intention to exclude all other amateur athletic associations could hardly be clearer. In view of this explicit statutory directive, there is no need to seek clarification from the common law.[14]

However, since majority decision determined otherwise, Justice Rothstein then proceeded with an analysis of the law with respect to the determination of whether a sports organization may be considered charitable at common law. The Court restated a number of principles with respect to this determination established in *Vancouver Society*, highlighting Justice Iacobucci's comments with respect to the movement of the common law with respect to charities and agreeing that, when considering an expansion of the definition of charity, the Courts must consider whether what is being proposed is an incremental change or one with such complex ramifications it should be left to Parliament.[15] The majority decision then aptly summarized the analysis to be undertaken:

> To summarize, in determining if an organization is charitable under the fourth head of *Pemsel* for purposes of registration under the *ITA*, it will be necessary to consider the trend of cases to decide if the purposes are for a public benefit which the law regards as charitable. It will also be necessary to consider the scheme of the *ITA*. Finally, it is necessary to determine whether what is sought is an incremental change or a reform best left to Parliament.[16]

Considering the specific argument of the appellant that sport should stand on its own as a specific category of charitable activity within the fourth head of charity, Justice Rothstein examined various relevant English decisions and *Re Laidlaw*. The majority decision distinguished the *Re Laidlaw* decision on the basis that the Court in that case was considering the meaning of charitable in a particular statutory context, section 6 of the Ontario *Charities Accounting Act*,[17] which did not include the common law restriction with respect to the

[14] *Ibid.* at p. 32.
[15] *Ibid.* at p. 21.
[16] *Ibid.* at p. 22.
[17] R.S.O. 1990, c C.10

fourth head that the purpose of the organization must be recognized by the common law as charitable. This is contrary to the interpretation mandated with respect to the application of the ITA in *Vancouver Society,* which clearly establishes that public benefit alone is not sufficient to qualify under the fourth head and that the Courts must look to the jurisprudence to determine whether the particular purposes fit within the established categories of charity or a category analogous thereto.[18] In that regard, Justice Rothstein confirmed that "[t]he case law supports the proposition that sport, if ancillary to another recognized charitable purpose, such as education, can be charitable, but not sport in itself."[19]

With respect to consideration of the scheme of the Act, Justice Rothstein reaffirmed the distinction in the ITA identified by Justice Iacobucci in *Vancouver Society* between registered charities and non-profit organizations and the principle derived therefrom that the scheme of the ITA clearly anticipates that not all non-profit social welfare activities should be considered charitable.[20]

Finally, the Court notes that, with respect to the question of whether what is being proposed by the appellant is an incremental change, the government submitted that 21% of all non-profit organizations in the country are sports and recreation organizations and that acceding to the appellant's argument would have a significant impact on the income tax system. Justice Rothstein agrees with the government stating that "this would seem to be closer to wholesale reform than incremental change, and is best left to Parliament… substantial change in the definition of charity must come from the legislature rather than the courts"[21]

D. COMMENTARY

The Supreme Court of Canada's decision in *A.Y.S.A.* does not establish any new principles of law. Instead, it merely confirms the existing common law as it relates to the question of whether particular sports organizations may be recognized as registered charities. Unlike the Federal Court of Appeal decision, the majority decision leaves open the possibility that a sports organization may become registered as a charity, provided that sport is ancillary to another recognized charitable purpose. However, this possibility is nothing more than a statement of what is already clearly recognized in practice, since any activity by a charity will be acceptable if it is a means of achieving a recognized charitable purpose. For instance, developing skills in swimming that assist disabled children will be acceptable for a registered charity to undertake, not because

[18] *Supra* note 6 at pp. 25-26.
[19] *Ibid.* at p. 3.
[20] *Ibid.* at p. 28.
[21] *Ibid.* at pp. 28-29.

swimming as a sport is charitable at common law, but because the objective of assisting disabled children is an acceptable charitable purpose. The real issue is whether sports in and of itself can be seen as a charitable purpose at common law under the fourth head.

In this regard, it is noteworthy that the Court indicates that it is "sympathetic to the proposition that organizations promoting fitness should be considered charitable"[22] but that the facts of the case before it did not even establish that the purpose of the organization was the promotion of physical fitness. This suggests that with better facts and perhaps a less drastic impact on the tax system, the Court might be persuaded that an incremental expansion of the law which recognizes limited sports activities might be possible. Undoubtedly, CRA will continue to interpret the law strictly in the meantime and only recognize organizations whose sports activities are ancillary to other recognized charitable purposes at common law, such as advancement of education or relief of poverty.

The Court also reaffirms the view that any significant changes to the definition of charity will need to come from Parliament, a clear indication that the Supreme Court of Canada has no interest, particularly in light of the facts before it this case, to be interventionist in this regard. As such, the issue of reform to the definition of charity will need to change forum from the courts to Parliament given the limitations of what the Supreme Court of Canada is prepared to do.

[22] *Ibid.* at p. 27.

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