

## **ASSESSMENT ISSUES AFFECTING CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS IN ONTARIO**

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*By D. Ann Walters, B.A., LL.B. and Nancy E. Claridge, B.A., M.A., LL.B.*

### **A. INTRODUCTION**

Charities and not-for-profit organizations are not always exempt from property tax, despite being exempt from income tax under the *Income Tax Act* (Canada) (“ITA”). As such, the applicability of property taxes is an important issue for charities and not-for-profit organizations to consider. In Ontario, the property assessment and taxation system is comprised of four interrelated components: the legislative framework,<sup>1</sup> municipalities, the Municipal and Property Assessment Corporation (“MPAC”),<sup>2</sup> and the Assessment Review Board (“ARB”), each playing a pivotal role in how real property is assessed and taxed in Ontario. The *Assessment Act*<sup>3</sup> (the “Act”) is the enabling statute by which municipalities, MPAC and the ARB carry out their municipal property assessment functions. The premise of the Act is that all real property in Ontario is liable to assessment and taxation,<sup>4</sup> and the municipality in which a property is located will assess and value all real property and tax the owner on its current value. To facilitate this underlying principle, MPAC conducts

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<sup>1</sup> In addition to the *Assessment Act*, MPAC conducts its activities in accordance with the *Assessment Review Act*, *Municipal Freedom of Information and Protection of Privacy Act*, *Municipal Act*, *Education Act*, *Municipal Elections Act*, *Municipal Property Assessment Corporation Act*, *Provincial Land Tax Act*, *Local Savings Board Act*, *Payment-in-lieu of Taxes Act*, *Municipal Tax Assistance Act*.

<sup>2</sup> MPAC was established by the *Municipal Property Assessment Corporation Act*, 1997. MPAC started operating on December 31, 1998, when the Government of Ontario transferred responsibility for property assessment to the Corporation. Originally named the Ontario Property Assessment Corporation, the Corporation was renamed MPAC as a result of amendments included in the 2001 Ontario Budget.

<sup>3</sup> *Assessment Act*, R.S.O. 1990, c. A.31.

<sup>4</sup> Jack Walker & Jerry Grad, *Ontario Property Tax Assessment Handbook*, 2<sup>nd</sup> ed. (Aurora: Canada Law Books Inc) at 2-1

valuations and then classifies<sup>5</sup> and assesses the combined tax on all real property<sup>6</sup> in accordance with the statutes. While MPAC is responsible for determining the classifications and current value assessments, municipalities are responsible for setting the tax rates, calculating and issuing tax bills and collecting the taxes from property owners. To enhance the efficiency of the system, the ARB, an independent adjudicative tribunal provides property owners with the opportunity to have their property classification or assessment concerns independently reviewed. Property owners may also make an application to the Ontario Superior Court of Justice.

This *Charity Law Bulletin* outlines the types of property uses by charities and not-for-profit organizations which are exempt from taxation under the Act, the conditions attached to these exemptions, the general scope of these exemptions as interpreted by the caselaw, the rebate programs available to charities under the *Municipal Act, 2001* in Ontario,<sup>7</sup> and the assessment complaint process available to property owners through MPAC and the ARB.

## **B. PROPERTY TAX EXEMPTIONS UNDER SECTION 3(1) OF THE ACT**

Under the Act, all properties in Ontario are assessed, but pursuant to subsection 3(1) some properties are exempt from property taxation,<sup>8</sup> including public educational institutions, public hospitals, houses of refuge and charitable institutions. Although some of these exemptions have conditions associated with them,<sup>9</sup> in general, the exemptions are available if the party seeking the exemption can show the primary or dominant purpose for which the property is being used is exempted under the Act. Regardless of whether the property is owned by a registered charity, a non-profit organization, or other institution, the property in question must fall under one of the exemptions contained in s. 3(1) of the Act in order to be exempt from property tax.

Some examples of exempt property uses discussed below include:

- (a) Cemeteries or burial sites;
- (b) Land owned by a church or religious organization;

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<sup>5</sup> O. Reg. 282/98, sections 2 & 3

<sup>6</sup> Section 1 of the Act defines real property as including land, buildings and structures placed upon, in, over, under or affixed to land

<sup>7</sup> S.O. 2001, c. 25.

<sup>8</sup> Twenty nine exemptions are available to various institutions under section 3(1) of the Act

<sup>9</sup> *Supra* note 3, s.3.

- (c) Land a church or religious organization leases from another church or religious organization;
- (d) Land owned, used and occupied solely by public educational institutions;
- (e) Land owned, used and occupied solely by a non-profit philanthropic organization;
- (f) Land owned, used and occupied by charitable institutions;
- (g) Land owned, used and occupied by a non-profit philanthropic corporation ... for the care of children.

1. Conditions attached to the exemptions

Two main conditions must be satisfied in order to qualify for tax exempt status under s. 3(1) of the Act: (1) ownership and (2) occupation of the property being assessed. However, each of the exempt categories have additional distinct requirements regarding how the property is used, which must also be satisfied in order to qualify for tax exempt status. For some categories, ownership alone suffices, while in other instances more than ownership and occupation of the property are required in order to qualify.

Courts have applied the objective “primary purpose” or “predominant use”<sup>10</sup> tests in order to determine whether these conditions have been met. As the courts define different threshold requirements for the more contentious exempt categories, a number of issues are raised, some of which are discussed below.

2. Church lands include lands “connected with places of worship”

Under paragraph 3(1)3, land owned or leased<sup>11</sup> by a church or religious organization that is a “place of worship and the land used in connection with it,” is exempt from property tax. One of the challenges posed in trying to qualify under this category is determining the meaning of “lands connected with places of worship” and the scope of this exempt category. In this regard, the prevailing principle the courts have applied in determining whether a location is a place of worship is the “predominant use” or “primary purpose” test. In order to qualify for tax exempt status under this category, there must be some connection between the use of the connected location and the spiritual nature and purposes of the

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<sup>10</sup> *Jacob’s Well Ministries Inc. v. Wilmot*, [1991] O.J. No. 732.

<sup>11</sup> The land must be leased from another church or religious organization.

church. An example of this includes an apartment in the church's basement where the caretaker resided.<sup>12</sup>

It is also important to note that a church may claim an exemption under this category for church buildings even if they remain vacant and unoccupied.<sup>13</sup> It is not necessary that the owner occupy the land to qualify for this exemption. A church may also claim an exemption under this category for church property that is used and assessed as a business, as long as the property is predominantly used to educate students.<sup>14</sup>

The continuing application of the primary purpose test was recently confirmed in the Ontario Superior Court of Justice's decision in *Holy Theotokos Convent v. Whitchurch-Stouffville (Town)*,<sup>15</sup> in which the court held that for public policy reasons, the exemption from property taxation afforded under section 3(1) of the Act for "places of worship" should be strictly construed. In its decision, the court refused to exempt a convent from payment of property taxes, holding that the "places of worship" exemption does not apply to worship activities solely confined to the devotional life of members of a religious order, whether that includes group or individual worship or prayers for the convent members. Rather, the court held that the exemption will apply to places of worship inside the convent grounds open to members of the public for some formal worship services, thus focusing on "public worship" as the criteria for exemption.

The convent, home to five sisters of a cloistered order, attempted to establish the primary use of the entire property as a place of worship pursuant to the Act, submitting evidence that the Sisters share a communal existence with an emphasis on a contemplative prayer life. For example, one prayer is repeated 6,000 times during the day in virtually every corner of the property. Although the MPAC conceded the two chapels and the baptistery fell within the exemption, the ultimate question was whether the remainder of the property was also entitled to be exempt from property taxes. In affirming

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<sup>12</sup> *Trustees of Centenary United Church v. Regional Assessment Commissioner Regions No. 19 (Re)* (1979), 27 O.R. (2d) 790.

<sup>13</sup> *Regional Assessment Commissioner of Region 31 and Corporation of Synod of Toronto and Kingston – the Presbyterian of Canada* (1974), 4 O.R. (2d) 773 (H.C.J.).

<sup>14</sup> *Oshawa Missionary College v. City of Oshawa (Re)*, [1964] 1 O.R. 307 (H.C.J.).

<sup>15</sup> [2007] O.J. No. 542 (Sup. C.J.).

the Ontario Court of Appeal's decision in *Soeurs de la Visitation d'Ottawa v. City of Ottawa*,<sup>16</sup> the court held that "the distinction between the worship activities of the cloistered members of the religious order as a part of their devotional life and worship by members of the public has been decided by the court and should in my view be maintained." In the *Soeurs de la Visitation d'Ottawa* decision, the court determined that "public worship" required "laity or congregation as well as a minister or preacher."

3. Philanthropic organizations<sup>17</sup>

In order to qualify for tax-exempt status under this category, a philanthropic organization must satisfy more stringent criteria than those required of churches and religious organizations. In this regard, the organization must not only be not-for-profit, but the land must be occupied, the applicants must have intended to use the land for education or as a seminary, the inhabitants must dedicate themselves to that purpose, and the entire property must be used for that purpose.<sup>18</sup>

In interpreting the scope of paragraph 3(1)5 of the Act, the courts have applied the "primary purpose" test. Based on this test, if the primary and *bona fide* use of a property is for religious or educational purposes, the tax-exempt status of the property is preserved. However, places of residence, such as convents, monasteries, and retreat houses, though part of a laudable charitable and religious purpose, may not be exempted if educational or religious purposes play only an incidental role to the main purpose of providing a residence.<sup>19</sup> In *Keewaydin Camps Corp. Canada v. Temagami (Municipality)*,<sup>20</sup> the court dismissed an application for an exemption under this paragraph by a non-profit organization that operated an educational wilderness and canoe tripping summer camp in northern Ontario, saying that while recreation and learning were not mutually exclusive, the fact that there is learning is not sufficient. Instead, the primary purpose must be educational in order to qualify for the exemption.

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<sup>16</sup> [1952] O.R. 61 (Sup. Ct.), aff'd by [1952] O.W.N. 280 (C.A.).

<sup>17</sup> *Supra* note 3, paragraph 5, s. 3(1).

<sup>18</sup> *Augustinian Fathers (Ontario) Inc. (Re)* (1985), 52 O.R. (2d) 536 (H.C.J.) [Augustinian Fathers].

<sup>19</sup> *Augustinian Fathers, ibid.*

<sup>20</sup> [2007] O.J. No. 1795 (Sup. C.J.).

#### 4. Cemeteries and burial sites

Cemeteries and burial grounds automatically qualify for tax-exempt status as long as they are consented to under the *Cemeteries Act*<sup>21</sup> and are used for interment of the dead.<sup>22</sup> If the cemetery owner can establish the premises require fairly constant superintending to maintain and landscape the premises, the section of the premises occupied by a superintendent and gardener's house as well as green houses will also be exempt from taxation.<sup>23</sup> A cemetery owner can also apply to the municipality to have taxes levied against any eligible or non-exempt portions of the property reduced, cancelled or refunded if they have insufficient funds available for care and maintenance of the premises.<sup>24</sup>

#### 5. Charitable institutions established for the relief of poverty

The *Assessment Act* requires a more comprehensive criteria than ownership and occupation be satisfied in order to qualify for exemption under this category.<sup>25</sup> Some institutions like the Canadian Red Cross and the St. John's Ambulance Association, automatically qualify for tax exempt status under this section. In order for other charitable institutions to qualify for this exemption, they must be a "charitable, non-profit philanthropic corporation" and:

- (i) own the land;
- (i) be supported in part by public funds; and
- (ii) use the land for the purposes of relief of the poor or any similar purpose but not a profit-making purpose.<sup>26</sup>

There is no strict requirement in the Act that the land must be owner-occupied. However, it is worth noting the following principles expressed in the caselaw regarding qualifying for exempt status under this category: the land will be considered "occupied" for the purposes of this category if it was being used for the organization's charitable purposes. In order to show support through "public funds" for the

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<sup>21</sup> R.S.O. 1990, c. C.4.

<sup>22</sup> *Supra* note 3, paragraph 2, s. 3 (1).

<sup>23</sup> *Trustees of Toronto General Burying Grounds v Township of Scarborough*, [1959] 1 O.R. 514 (H.C.J.).

<sup>24</sup> *Supra* note 7, at s. 357.1(2).

<sup>25</sup> *Supra* note 3, para. 12 of section 3(1).

<sup>26</sup> *Columbus Boy's Camp v. OPAC Region No. 16*, [2001] O.J. No. 4984.

purposes of this exemption the funds must be received directly from a government source, not from members of the public.<sup>27</sup> If the property is used incidentally for other purposes,<sup>28</sup> this will not necessarily detract from its exempt status as long as the controlling purpose remains the alleviation of the economic hardship suffered by the poor. Caselaw also confirms that to increase the likelihood of qualifying under this category, it is important the organization has a specific mission statement which directly specifies its purpose as “relief of the poor” as opposed to a vague or general one. An organization is more likely to bring itself within the scope of this exemption if it includes a means test as one of the criteria to disbursing its benefits.<sup>29</sup>

The Ontario Court of Appeal addressed the relevance of using land for the relief of poverty in determining whether the charity “occupies” the land and therefore qualifies for tax exemption. In *Ottawa Salus Corporation v. Municipality Property Assessment Corporation et al*,<sup>30</sup> a charitable corporation was seeking tax-exempt status for two of its apartment buildings, which were used to provide housing to mentally ill and unemployed persons in the city of Ottawa. The application judge held that the properties were not tax exempt because they were occupied by third party individuals, and not the charity itself. This was overturned by the Divisional Court, which decision was appealed to the Ontario Court of Appeal.

At issue before the appeal court was whether the Divisional Court judge erred in purposively interpreting the word “occupied” in paragraph 3(1)12 of the Act. The Appellant (MPAC) argued the 1998 amendments to paragraph 3(1)12 narrowed the scope of the exemption and therefore the property must be strictly owner-occupied in order to maintain its tax exempt status.

Justice MacPherson interpreted the word “occupied” against the backdrop of the organization’s purpose to relieve poverty, and held that since the tenants, though third parties, had a connection to the charity and were the recipients of the charity’s work to relieve poverty, “occupation” for the purposes of the exemption does not require actual or exclusive occupation by the charitable institution. If the

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<sup>27</sup> *Causeway Foundation v Ontario Property Assessment Corporation*, [2004] O.J. No. 214, at 22.

<sup>28</sup> *Cencourse Project Inc v. Ontario Regional Assessment Commissioner, Region 27*, [1992] O.J. No. 524.

<sup>29</sup> *Canadian Mental Health Association v. OPAC*, [2002] O.J. No. 2199.

<sup>30</sup> *Ottawa Salus Corporation v. Municipality Property Assessment Corporation*, [2004] O.J. No. 213.

property is being used directly by the charity to further its objective of relieving poverty, this is sufficient to satisfy the requirements under this category and qualify for tax exempt status.

6. Land used for the care of children

Paragraph 3(1)11 of the Act exempts land owned, used and occupied by a “non-profit philanthropic corporation” for the care of children but excluding land used for the purpose of a day care centre.<sup>31</sup> The scope of this exempt category was explored in *Diocese of Toronto Camps*.<sup>32</sup> In this case, MPAC appealed a Divisional Court decision in favour of the Diocese of Toronto Camps, a not-for-profit philanthropic corporation operating a summer camp for children. Applying the primary purpose test, the application judge decided that while some of the children required special care, the land was owned, used and occupied for recreational purposes. This decision was reversed, on appeal, by the divisional court.

In reinstating the application judge’s decision, the Court of Appeal confirmed that this exemption can be triggered even where the care provided to children is temporary. However, “brief preset” stays, i.e. three- or four-day regular programs, combined with the fact that “campers were not in need of care, and had permanent homes” supported the inference that the primary purpose for which the land is being used is recreational, not to provide care, and therefore does not qualify for tax exempt status.

### **C. TAX REBATE FOR CHARITIES UNDER THE *MUNICIPAL ACT, 2001***

In addition to the realty tax exemptions charities may qualify for, municipalities<sup>33</sup> provide a special rebate to “eligible” charities on the “eligible” or commercial/industrial property they occupy.<sup>34</sup> Generally, a charity is eligible if it is a registered charity under the ITA,<sup>35</sup> as evidenced by a registration number by Canada Revenue Agency (“CRA”). In this regard, charities are entitled to at least a 40 percent rebate and some municipalities have the option to expand this rebate.<sup>36</sup>

<sup>31</sup> Paragraph 3(1)(11) also exempts land used for a “house of refuge” and the “reformation of offenders”.

<sup>32</sup> *Diocese of Toronto Camps (Anglican Church of Canada) v. MPAC*, [2004] O.J. No. 4443.

<sup>33</sup> This does not include a lower-tier municipality – which does not operate this tax rebate program. See section 361(1).

<sup>34</sup> *Municipal Act, 2001*, *supra* note 7 at s. 361(1)

<sup>35</sup> R.S.C. 1985, c. 1 (5th Supp.)

<sup>36</sup> *Municipal Act, 2001*, *supra* note 7 at s. 361(3)2.



The application process typically involves the municipality passing a by-law entitling registered charities to an exemption of at least 40 percent on their property taxes. Applications for rebate must be made between January 1 of a particular year and the last day of February of the following year. Municipalities are required to issue half of the rebate payment to a charity within 60 days after the receipt of the charity's application. The balance of the rebate is payable within 120 days of the receipt of the application, with adjustments (if any) being made after the issuance of the final tax bill(s) for the year.

#### **D. ASSESSMENT COMPLAINT PROCESS**

Under the Act, after property classifications have been assigned and current value assessments have been determined, and MPAC issues the Property Assessment Notice, charitable and not-for-profit real property owners may have their property classification and assessment concerns resolved by:

- Making a Request for Reconsideration from MPAC. This request must be submitted anytime before December 31 in the taxation year for which the reconsideration is being requested; and/or
- Filing a Notice of Complaint with the ARB. There are special forms and fees that apply when filing a complaint. Unless otherwise indicated on the Supplementary Assessment Notice, complaints with the ARB can be filed up to March 31 of the taxation year for which the assessment applies.

## E. CONCLUSION

Directors, senior staff and legal counsel for registered charities and not-for-profit organizations that own real property in Ontario should consider whether their organization qualifies for property tax exemption under one of the twenty nine exempt categories outlined in section 3(1) of the *Assessment Act*, some of which have been discussed above, as well as the annual property tax rebates to registered charities offered by municipalities.<sup>37</sup> These property tax concessions can provide a significant financial reprieve for qualified charities and not-for-profit organizations.

Directors should also be mindful that the case law interpreting the scope of these exempt categories is often unsettled regarding the type of entity that must own and or use the property and for what purposes in order to qualify for tax exempt status. In that regard, it is quite possible to have a portion of a multi-use property assessed as property tax exempt while the remainder is assessed as non-exempt. Given the possibility of having dual assessment on multi-use properties, directors of charities and not-for-profit organizations should inform themselves of the scope of the various exempt categories under the Act. They may also find it necessary to diligently structure and manage the use of their properties if they wish to acquire or maintain these special concessions, lest they risk the possibility of having to appeal large assessments rendered by MPAC against their properties.

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<sup>37</sup> *Municipal Act, 2001*, *supra* note 7 at s. 361(1).