
**NON-PROFIT COMMERCIAL ACTIVITY:
A CASE COMMENT ON THE
BBM CANADA DECISION**

*By Karen J. Cooper**

A. INTRODUCTION

CRA recently released a brief discussion of the difference between registered charities and non-profits on the Applying for registration section of its website,¹ highlighting that while both types of organizations function on a non-profit basis, they are defined very differently under the *Income Tax Act* (the “ITA”)² and they can also operate very differently. In the Tax Court of Canada decision of *BBM Canada v. Canada (Minister of National Revenue)* (the “BBM Case”)³ the Court discusses the requirements for non-profit organizations. While this decision specifically relates to the criteria for an organization to be recognized as “non-profit” under the Act, the Court makes a number of general statements regarding acceptable commercial/business activity, statutory interpretation and the practices of the Canada Revenue Agency (“CRA”). This *Charity Law Bulletin* reviews the Court’s decision in the BBM Case and discusses how it may be of interest to non-profit organizations.

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¹ Released April 24, 2009 and available at <http://www.cra-arc.gc.ca/tx/chrts/pplyng/rgstrtn/rght-eng.html>.

² R.S.C. 1985, c. 1 (5th Supp.), s. 149(1)(l).

³ 2008 TCC 341.

B. BACKGROUND TO THE DECISION

BBM is a non-share capital corporation that was founded as “a research organization that would provide impartial, high quality and trusted audience estimates to its members.”⁴ The Letters Patent of BBM state that “the business of the Corporation shall be carried on without pecuniary gain to its members and that any profits or other accretions to the Corporation shall be used in promoting its objects.”⁵ BBM’s products are only available to its members, who include various government agencies and departments, as well as broadcasters that use the data to account to government regulators, such as the Canadian Radio-television and Telecommunications Commission. BBM also started to do custom research work for both members and non-members in 1992, but this division of its activities was transferred to a taxable subsidiary corporation by the end of 1996.

BBM considered itself a non-profit organization as described in paragraph 149(1)(l) of the ITA, which states:

149(1) No tax is payable under this Part on the taxable income of a person for a period when that person was [...]

(l) a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was **organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit**, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada; [emphasis added].

CRA concluded that BBM did not meet the requirements of a non-profit organization after conducting an audit of BBM’s 1996 taxation year and CRA’s reassessment was appealed by BBM to the Tax Court of Canada.

While the parties agreed that none of BBM’s income was available for distribution to its members, it was CRA’s position that BBM was not operated “for any other purpose except profit.” In advancing CRA’s position, it was the Crown’s submission that “an organization cannot be considered to be organized and operated exclusively for a purpose other than profit if the establishment or operations of the entity are related to the commercial or business activity of its members or of others.” Based on this interpretation of “profit”,

⁴ BBM Case at para. 9.

BBM could not be a non-profit organization because the data provided by BBM was used for the commercial activities of some of its members.

C. THE DECISION

In its decision, the Court considered the meaning of the term “profit” in a variety of contexts. The Court examined its ordinary commercial meaning according to various dictionaries and found that those definitions do not make express reference to an activity related to commerce or business. Moreover, the Court considered “profit” as used in subsection 9(1) of the ITA, which states that “a taxpayer’s income for a taxation year from a business or property is the taxpayer’s profit from that business or property for the year.” Although the term is not defined within the statute, the Court explains that the term has been “consistently interpreted by the courts to mean the difference between the receipts in a period and the expenditures laid out to earn those receipts,”⁶ and that the commercial and accounting definition of “profit” is to the same effect.

The Court also considered the legal precedent established in two similar cases⁷ which involved “no suggestion that in order for the ‘any other purpose except profit’ requirement to be met, the entity cannot be engaged in an activity that is for the purpose that is related to a commercial or business activity of its members.”⁸ In one case, the organization was engaged in providing insurance products to its members at cost, and it was expressly stated in that case that a high level of commercial activity alone did not prove that the organization operated for profit.

Two other textual considerations supplemented the Court’s finding that the Crown’s interpretation of the non-profit requirement was untenable. Firstly, the acceptance of the Crown’s assertion that only non-commercial or non-business purposes can be acceptable for a non-profit organization would run contrary to the meaning of “business” as clearly defined in the ITA as including “a profession, calling, trade, manufacture or undertaking of any kind whatever.”⁹ Given this broad statutory definition of “business”, the Court stressed that many tax-exempt organizations would be engaged in a business.

⁵ *Ibid.* at para. 11.

⁶ BBM Case at para. 24.

⁷ *The Canadian Bar Insurance Association v. Her Majesty the Queen* (1999), 99 DTC 653; and *Gulf Log Salvage Co-operative Association v. Minister of National Revenue* (1960), 60 DTC 239.

⁸ *Ibid.* at para. 34.

⁹ ITA, s. 248(1).

Secondly, the Court addressed the Crown's argument that previously-decided cases could be reconciled with its current interpretation because those cases all involved organizations whose activities had some public benefit. As cited above, the ITA requires that a non-profit organization must be organized and operated *exclusively* for social welfare, civic improvement, pleasure or recreation *or for any other purpose except profit*. Despite agreeing that the requirement of being "for any other purpose except profit" was to be read disjunctively from the preceding requirements (i.e. it was not to be limited by the enumerated purposes), the Crown made the submission that the BBM circumstances could be distinguished from previously-decided cases on the basis of its position that BBM did not provide any public benefit. The Court rejected this argument, stating that this "would require an odd interpretation of the word 'exclusively'... which clearly qualifies the purpose for which the entity is established and operated."¹⁰ The Court affirmed that a public benefit or purpose is not a prerequisite to non-profit status.

In reaching the conclusion that non-profit organizations can engage in commercial or business activity, the Court underscored existing principles of statutory interpretation regarding the ITA. The Court explained that "[t]he Supreme Court of Canada consistently cautions against courts, under the guise of statutory interpretation, relying on or developing unexpressed notions of policy or principle when called upon to apply provisions of the *Income Tax Act*. To do so would lead to intolerable uncertainty in the application of the *Act* and should be left to Parliament."¹¹ There was no ambiguity in the wording of paragraph 149(1)(l) defining the requirements of a non-profit organization and the Court held that it could not create a non-existent public purpose requirement. In sum, the Court stated that "[t]he words used in the provision, especially 'profit', are clear, have well-accepted meanings and the Courts have been able to apply them in similar cases."¹²

D. COMMENTARY

The decision in the BBM Case suggests that the Court was sensitive to the importance of non-profit organizations, recognizing that a reinterpretation of the legal requirements for non-profit status would have significant repercussions on the non-profit sector at large. On this matter, the Court stated very clearly its opinion that from the perspective of public policy, any revision "should be left to a possible legislative change which would only be done after a review of the need for such a change was done by persons responsible for tax policy, aware of the depth and breadth of the sector beyond just a snapshot of [BBM Canada's] 1996

¹⁰ BBM Case at para. 27.

¹¹ *Ibid.* at para. 37.

¹² *Ibid.* at para. 38.

taxation year, aware of all of the fiscal impacts beyond the application of paragraph 149(1)(l) of the *Income Tax Act*, and which would allow for the possibility of consultation. Canadians, Canadian society, the provinces and the non-profit sector deserve as much.”¹³

Furthermore, in applying the relevant law to the specific facts of BBM’s activities, the Court made several statements of general application to non-profit organizations. Firstly, if an organization’s reserves are reasonable and it operates on a cost-recovery basis, it would be hard to say that the organization realizes significant profits.¹⁴ Secondly, it would be difficult to impute a profit purpose to an organization that only sells to its members on a cost-recovery basis.¹⁵ Thirdly, whether or not an organization operates in a normal commercial or business-like manner is not necessarily relevant to deciding whether or not the organization has a for-profit purpose.¹⁶ The Crown had argued that BBM’s internal documents stressed the need to create a business environment within the organization, and that this was indicia of an unstated profit purpose. The Court dismissed this argument, explaining that this type of language is not unique to business or commerce, and if anything, it is the public and non-profit sector, rather than the private sector, that needs to be reminded to be more business-like in their operations.

In *obiter*, the Court also made statements that are generally applicable to the practice and procedure of the CRA. Justice Boyle noted that the CRA continued to unfavourably reassess a number of BBM’s taxation years after the 1996 reassessment. BBM had objected to those reassessments and, although there was no evidence to suggest anything had subsequently changed about BBM’s operations, the CRA allowed those objections and continued to recognize BBM’s non-profit status. The Court indicated that “at least as a practical matter, this can significantly shift the burden of persuasion of explanation on the Crown.”¹⁷

¹³ *Ibid.* at para. 41.

¹⁴ *Ibid.* at para. 49.

¹⁵ *Ibid.* at para. 50.

¹⁶ *Ibid.* at para. 52.

¹⁷ *Ibid.* at para. 56.

E. CONCLUDING COMMENTS

The BBM Case reaffirms the fact that non-profit organizations may engage in business or commercial activity and that such activity alone does not indicate that the organization has a for-profit purpose. The decision also provides some general principles guidelines that might be helpful to non-profit organizations when examining whether or not their operations are acceptable. Finally, the BBM Case also provides both substantive and procedural guidance to the CRA in its administration of the income tax system.