

## **Need donations? You'll need to become a charity**

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"WHEREAS Landes Tenements Rentes Annuities Profittes Hereditamentes, Goodes Chattels Money and Stockes of Money, have bene heretofore given limitedd appointed and assigned, as well by the Queenes moste excellent Majestie and her moste noble Progenitors, as by sondrie other well disposed persons, some for Releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highewaies, some for Educacion and prefermente of Orphans, some for or towards Reliefe Stocke or Maintenance for Howses for Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge Tradesmen, Handicraftesmen and persons decayed, and others for reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitants concerninge paymente of Fifteenes, settinge out of Souldiers and other Taxes, Whiche Landes Tenements Rents Annuities Profitts Hereditaments Goodes Chattells Money and Stockes of Money nevertheless have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of Fraudes breaches of Truste and Negligence in those that shoulde pay delyver and imploy the same....."

-The Preamble to the Charitable Uses Act, 1601

### **Introduction**

Today, there are people in our country who don't earn enough to buy food for a month so depend on food banks. There are others who can't afford to live anywhere but in a free shelter. These are problems which our society, and in particular, our governments need to deal with. But governments are not restricted to just one way of approaching such problems.

Instead, governments can further their public policy objectives by various methods. They can spend money to further their objectives. The goal of distributing incomes and wealth is achieved by direct expenditures to qualified persons.

In addition, governments may wish to promote worthy social objectives by creating income tax deductions for taxpayers. In this way, private giving to the charitable sector is encouraged. Donors of goods and services are paid by a tax deduction. This is called a tax expenditure. The charity, once officially registered and able to give receipts for deductions, is entrusted with the power to spend this donated money.

**Advantages for a Registered Charity** Two main advantages are enjoyed by a registered charity. The first is the ability to provide receipts to donors, who, if they are individuals, are entitled under the Income Tax Act to claim a tax credit to a maximum of 75% of net income (see page 27 for details). Corporations may deduct from taxable income for all "charitable gifts". Thus the charity is able to reward those who give generously with some economic benefit in return.

Regular non-profit organizations without registered charitable status do not have this benefit. It is designed to encourage the funding of activities which are regarded as being of special benefit to society. The ability of a charity to carry out its activities often depends on its ability to attract donations from the public. Second, registered charities pay no tax on income. Charities have been accorded special status under federal income tax legislation since the beginning, under the Income Tax War Act, 1917.

The attraction of registered charitable status is obvious. Offering tax benefits to donors is a major determinant of success. It may impact public tax revenues as well as the development of the organization. The recent granting of official charitable status to the Church of Scientology in the United States, for example, is thought to have had a two-way impact of up to one billion dollars. It is not surprising that community groups, foundations, and not-for-profit organizations will zealously pursue formal and legal status of a charity under the federal Income Tax Act.

### Procedural Requirements

An organization must apply on the prescribed forms to the federal Department of National Revenue for registration as a charitable organization or foundation. The organization must be resident in Canada and either created or established in Canada. The Minister's authority to register a charity is delegated to the Director, Charities Division of the Department of National Revenue, Taxation. The Act and Regulations say almost nothing about how such applications are to be considered, the requirements for registration, or the materials to be submitted in support.

### What is a Charitable Organization?

Most people think they know a charity when they see one. It is similar to recognizing a business enterprise. Most people would not find charity a complicated idea. On the other hand, they would also likely find it hard to define a charity with legal precision.

A recent decision from the Supreme Court of Canada, *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*, 1999, unhappily demonstrated the numerous criteria, the fine distinctions to be drawn, and the different interpretations to be applied in any given case. In this case, the judges generally agreed on the law, but split down the middle on the application of the facts. They devoted lengthy written reasons to their opposite conclusions. Designation of organizations as registered charities will remain a contentious area for years, with outcomes difficult to predict in any case. It is by no means a simple classification exercise.

### Under the Income Tax Act

Only "charitable organizations" and foundations can be registered under this Act. They do not have to be incorporated under non-profit or societies legislation, although most are incorporated. No person, in the capacity of member, donor, or shareholder, can receive money from it. Most of the directors and senior managers must be at arm's length from each other and the organization. This means that they cannot be in a conflict of interest position where their personal interests get in the way of the interests of the organization.

The elements that a "charitable organization" must include for registration purposes are also so defined in the Income Tax Act. All of the resources of the organization must be devoted to charitable activities and the organization must carry them out itself. Therefore, to qualify as charitable, the organization's purposes must be exclusively charitable. If charities could engage in a mixture of charitable and non-charitable purposes, there could be no certainty that donations to them would be channeled to the charitable purposes. In this way, charitable registrations can also be revoked once granted.

The only exception is incidental political activity. If the organization "devotes substantially all of its resources to charitable activities" but also some incidental resources to political action (other than supporting or opposing a political party or candidate), it may still be characterized as a charitable organization for the substantial portion of charitable activities in which it is engaged.

Political purposes or objects are not charitable purposes. The rule that a charity cannot be established for political purposes does not mean that the charity cannot engage in "ancillary and incidental" political activities to further its charitable purposes. Just what ancillary political activities may be, and how much political activity may be carried out remains murky.

This is as far as the Income Tax Act goes in defining "charity". The substantive parameters are left to the common law, those principles developed by judges over the years.

#### Under the Common Law

Since the Income Tax Act does not define "charitable", Canadian courts apply the Pemsel classification. This is the preamble of the English Statute of Elizabeth, which gave examples of charitable purposes. Our registration of charities has proceeded by way of analogy to the purposes listed in this 400 year old document written in the style of Chaucer.

Actually, the Statute of Elizabeth itself was repealed in 1888, but this preamble list survived in the Mortmain and Charitable Uses Act, 1888. The 1888 Act, including the preamble, was itself later repealed by the Charities Act, 1960 so no statutory basis for the preamble exists now. Yet it is widely accepted that the preamble was absorbed into the common law and governs this area of the law.

Accordingly, today's definition of charity is the product of almost four centuries of common law development in England. The House of Lords categorized charity in Pemsel's Case, 1891 as follows: "How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

This classification was approved by the Supreme Court of Canada where it has been followed to date as in *Guaranty Trust Co. of Canada v. Minister of National Revenue*, 1967.

#### Obtaining Charitable Registration

Here is a list of other general factors derived from the law which will guide whether one's organization will be registrable as a charity under the Income Tax Act:

- \* the list of charitable purposes (objectives) in the old Preamble is a list of examples. Purposes not in this list may also be considered charitable;
- \* all of the organization's purposes should come within one or more of the four main Pemsel categories. Modern liberal social causes such as the promotion of equality, multiculturalism, and environmentalism may not be embraced yet;
- \* registration will be guided by principle when determining whether a particular purpose is charitable;
- \* the two main principles are (1) voluntariness (altruistic giving to third parties without receiving anything in return other than the pleasure of giving); and (2) public welfare or benefit. (The benefit conferred must be socially useful in an objectively measurable sense and it must be available to a sufficiently large section of the population to be considered a public benefit);
- \* education will be more broadly interpreted today than classroom-type schooling or training. Where information is delivered in a structured manner and for a genuinely educational purpose (not to promote a particular political viewpoint), it may accepted as charitable;
- \* the overall organizational purposes and objectives, which must all be charitable in nature, are more important than individual activities; and
- \* charitable purposes must not be vague and indeterminate.

## Conclusion

The digital age and long bull stock markets have given us perhaps the greatest wealth-generating decade in all of human history. Charitable giving is also on an unprecedented scale. The Canadian tax system offers economic incentives to people to support charitable, philanthropic, and other public service organizations that are beneficial to the community.

This private voluntary giving relieves government of financial burdens that might otherwise be met through direct public sector spending on, for example, hospitals and universities or, more controversially, on religion.

The 75,000 registered charities take in about \$90 billion each year and hold about \$109 billion in assets. That compares to the economy of the entire province of British Columbia. Given the central role that charities play in our society, the large sums of money devoted to charitable purposes, and the considerable privileges that attach to charitable status, Parliament has considered it essential to provide a legal framework to regulate charities and their activities. That legal framework, which aims to ensure that charities use the funds provided to them for charitable purposes, and pursue those purposes in an efficient manner, is of ancient origin.

More educational endeavours will be included today, and Revenue Canada will focus more on charitable purposes than the range of specific activities. This will mean that more organizations will qualify for registered status than has historically been the case. Nevertheless, while charitable purposes would seem to be simply understood by most Canadians, determination under the law of what is a charitable purpose remains a complicated task with an uncertain outcome.

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