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Date: 20021216

Docket: A-805-00

Ottawa, Ontario, December 16, 2002

CORAM: DÉCARY

LÉTOURNEAU

NADON JJ.A.

BETWEEN:

ACTION BY CHRISTIANS FOR THE ABOLITION

OF TORTURE (ACAT)

Appellant

and

HER MAJESTY THE QUEEN

and

MAUREEN KIDD, in her capacity as

Director General of the Charities Directorate

of the Canada Customs and Revenue Agency

Respondents

JUDGMENT

The appeal is dismissed with costs.

"Robert Décary"

Judge

Certified true translation

Suzanne M. Gauthier, C.Tr., LL.L.

Date: 20021216

Docket: A-805-00

Neutral Citation: 2002 FCA 499

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Hearing held at Montréal, Quebec, on December 4, 2002.

Judgment delivered at Ottawa, Ontario, on December 16, 2002.

REASONS FOR JUDGMENT: DÉCARY J.A.

CONCURRING: LÉTOURNEAU J.A.

NADON J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This appeal has to do with the revocation of the registration of Action by Christians for the Abolition of Torture (ACAT) as a charity within the meaning of subsection 149.1(1) of the *Income Tax Act*.

Facts

[2] The ACAT was incorporated under letters patent issued by the Quebec Inspector of Financial Institutions on January 28, 1985. The ACAT's purpose is described as follows:

[translation]

The ultimate purpose of the corporation is the abolition of torture throughout the world in accordance with the*Universal Declaration of Human Rights*:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The corporation believes such abolition is possible. It summons its members to concrete actions in defence of persons who are being tortured. Through the relaying of appeals from around the world it tirelessly broadcasts the message of human rights to the various Christian communities. Accordingly, the members of the Church are solicited from inside, on behalf of the Gospel. This consciousness raising leads to ever-increasing participation of all Christians, personally or in groups, in the parishes, Church associations, movements, in the fight for the defence of a tortured humanity.

The corporation calls for prayer, at the heart of our time and our society. In its view, prayer and action are indissociable. It initiates meetings that come together to cry out to God on behalf of the tortured and the torturers. It prompts thinking by Christians and non-Christians, who are confronted day by day with the phenomena of violence. That is why the ACAT conducts its own research, disseminates research carried out elsewhere, prompts initiatives within agencies and groups that are independent of it. Solidarity with the other associations is, in this area as in that of action, one of its characteristic features.

(A.B., vol. 1, p. 4)

[3] The articles of the ACAT then describe as follows the "objectives" it seeks and the "means of action" it intends to implement:

[translation]

ARTICLE 3 - OBJECTIVES

The purpose and objectives of this Association are:

(1) to raise awareness among Christians and churches in particular of the scandal of torture and capital punishment without distinction as to political regime or country;

(2) to encourage Christians to apply spiritual means such as prayer for the abolition of torture and capital punishment;

(3) to arouse any effective action, individual or collective, for the abolition of torture and capital punishment;

(4) to work in this campaign with men of good will.

ARTICLE 6 - MEANS OF ACTION

To fulfill its purpose and attain its objectives, the Association resorts to the following methods in particular:

- organizing all or any demonstrations, study circles, lectures and symposiums;

- compiling the greatest possible documentation, both written and audiovisual;

- disseminating these documents by every means, reproducing and publishing articles, pamphlets, bulletins, magazines, etc. and using these publications.

(A.B., vol. 1, pp. 5-6)

[4] The nature of the "[translation] ACAT activities for reaching its objectives" is described as follows:

[translation]

- Organizing all or any demonstrations, study circles, lectures and symposiums.

- Compiling the greatest possible documentation, both written and audiovisual.

- Disseminating this documentation; reproducing and publishing articles, pamphlets, bulletins, magazines, and using these publications.

- Organizing public awareness campaigns.

- Maintaining a network of active members participating in the Association's action.

- Promoting through the Association a dialogue between Christians of the various Churches.

- Collaborating with agencies having the same objectives as the Association.

(A.B., vol. 1, p. 12)

[5] This statement of activities is supplemented by a document describing as follows the initiatives taken by the ACAT:

[translation]

The ACAT (Action by Christians for the Abolition of Torture), an ecumenical association created in June 1974, seeks to be a "watchman" in the Church (Ezekiel, 33). It fights alongside all those who defend human rights.

The ACAT proposes:

1st step, to become informed in order to inform

- the "Courrier de l'ACAT"

- some "Dossiers supplémentaires au Courrier"

- various publications

- items of documentation

- posters and pamphlets

- audiovisual montages

2nd step, to participate in the International Campaign against torture

Sending letters and petitions on behalf of prisoners who are victims of torture, whose names are reported through Emergency Appeals of the ACAT

(A.B., vol. 1, p. 13)

[6] On February 6, 1985, the ACAT submitted to the Minister of National Revenue of Canada (the Minister) an application for registration as a charity.

[7] On April 23, 1985, a representative of the Minister refused the application for registration, essentially for the following reason:

[translation]

It is our belief that the purpose of the activities of Action by Christians is not only to educate people on human rights but also to convince the countries and groups that are suspected of practising torture to put an end to it.

We do not doubt the beneficial effects that your organization is attempting to contribute to humanity, but these activities, such as information through "contacts with the media, symposiums" and contacts with officials in countries or groups, lead us to believe that the organization is seeking to influence the persons involved in the acts of torture and humanity in general, which is not considered as being charitable. This kind of activities, in our opinion, is not charitable given that such activities entail and may gave rise to controversies of a social or political nature.

A.B., vol. 1, p. 17)

[8] The ACAT did not give up, however. On May 30, 1985, its president answered in part as follows:

[translation]

But how can we pursue such an "objective of a charitable nature that is beneficial to the community as a whole" other than by attempting to convince those who can act on the matter of the need to respect fundamental human rights and the requirements of international law, which, moreover, have often been adopted at the level of national law?

Not only do we believe that our activities are exclusively charitable, within the meaning of the legal definition of the word charity, but we also believe that it is absurd to acknowledge the charitable character of an activity and prohibit it from being carried out by depriving it of its "status as a charitable organization". How, indeed, can one "not doubt the beneficial effects that [our] organization is attempting to contribute to humanity" and at the same time deny us registration as a charity because we are attempting "to convince the countries and groups that are suspected of practising torture to put an end to it"? Asking us to "relieve the [radical] poverty" that is the consequence of torture without asking those who practice torture to put an end to it is tantamount to asking us to square the circle!

A.B., vol. 1, p. 23)

[9] On July 10, 1985, a representative of the Minister restated his refusal and suggested to the ACAT that it "[translation] maintain Action by Christians in order to attend to the political activities and create an organization distinct from it which would be devoted entirely to charitable activities and have its own financial resources" (A.B., vol. 1, p. 26).

[10] On December 10, 1985, resisting certain pressures, the Minister himself reminded the ACAT that

[translation] because of its intention to pursue activities of a political nature, however, the ACAT does not meet the criteria of the *Income Tax Act* for registration as a charitable organization. The courts have on many occasions ruled that political activities directed to influencing, embarrassing or pressuring a government, in Canada or elsewhere, must not be financed with funds intended for charity.

and invited it to "substantially alter its orientations and reformulate its objectives so as to limit the actions of the ACAT to activities that are exclusively charitable" (A.B., vol. 1, pp. 151-52).

[11] To remedy the deficiencies identified by the Minister, supplementary letters patent amending the objectives of the ACAT were issued on August 25, 1986. These new objectives were:

[translation]

(1) As an objective of evangelical commitment, to encourage the different Christian communities in Canada to bear together, through prayer, the sufferings of the victims of torture;

(2) As an educational objective, to increase awareness, particularly among these Christians, of the scandal of torture (through information and training in human rights);

(3) With the objective of relieving their misery, to provide material assistance to the victims of torture (sending letters of encouragement, food and clothing, and rehabilitation assistance).

(A.B., vol.1, p. 29)

[12] The Minister then expressed his satisfaction and, on September 16, 1986, he recognized the ACAT as a registered charity.

[13] On September 27, 1986, the ACAT adopted some General Bylaws which describe its "means of action" as follows:

[translation]

- ecumenical prayer meetings

- sending letters of encouragement to victims of torture

- assisting the rehabilitation of victims of torture

- possibly sending food and clothing

- study circles, lectures, publication and dissemination of information

- intercession with those responsible for torture.

(A.B., vol. 1, p. 36)

[14] On October 17, 1986, the ACAT sent the Minister the text of the aforesaid General Bylaws, asking him to inform it of any anomaly (A.B., vol. 1, p. 35).

[15] On December 15, 1996, "Consulting and Audit Canada" sent a report to the Charities Division of Revenue Canada (now the Canada Customs and Revenue Agency). This report reached the following conclusion:

[translation]

<u>Conclusion</u>

In our opinion, the activities of the organization are related in part to its objects: in part, since the objects do not refer to interventions with governments. The principal activity of the organization, the sending of letters to heads of government, is political in nature.

We leave it to Revenue Canada to determine the degree to which the organization's activities conform to the*Income Tax Act* and the regulations thereunder.

(A.B., vol. 1, p. 48)

[16] On November 21, 2000, following numerous exchanges and meetings with representatives of the ACAT, the Minister sent the ACAT a notice of intention to revoke its registration. It is this notice that is being appealed. I reproduce here some extensive excerpts:

[translation]

At the time of its initial application, we were concerned with the fact that the wording of the objects of the ACAT might enable it to pursue purposes of a political nature (see our letter dated April 23, 1985, enclosed). We refused to register the ACAT at that time. In order to be registered as a charity, therefore, the ACAT made some significant amendments to the objects contained in its letters patent. In amending its objects, the ACAT undertook not to pursue political purposes. For example, Object 3 in its supplementary letters patent limits the material assistance the ACAT may provide to:

(a) sending letters of encouragement to the victims of torture;

(b) sending food and clothing to the victims of torture; and

(c) assisting the victims of torture in their rehabilitation.

On the strength of the legal principle *inclusio unius est exclusio alterius*, i.e. the inclusion of one is the exclusion of all others, we agreed that this change in the objects of the ACAT prevented it from pursuing purposes of a political nature. It was within that perspective that we had agreed to register the ACAT as acharity.

...

We have concluded from the audit that the ACAT has been asking its members and the public to send letters or other written communications to governments for the avowed purpose (letter of March 30, 1998) of "pressuring the established authorities" to act in accordance with the opinions of the ACAT concerning questions of public or political interest. In light of the court rulings and the information circular, we must conclude that the ACAT has engaged in political activities. This principle remains true and applicable notwithstanding the fact that the pressures exerted on the authorities are based on the *Universal Declaration of Human Rights*.

...

As we discussed earlier, the purposes for which the ACAT was registered are very limited. They do not support the use of political methods to assist persons who are victims of violations of their fundamental rights. The political activities that the ACAT could conduct, therefore, had to be incidental to the achievement of the specific purposes for which it was

registered, including sending letters of encouragement to the victims of torture, sending food and clothing to the victims of torture and assisting the victims of torture in their rehabilitation. Pressuring governments and influencing public opinion do not appear on the list of the purposes for which the ACAT has been registered. Instead, these activities indicate that the ACAT has added some political objects to its mandate. As stated in our letter of January 16, 1998 (enclosed):

"The principal objective of the ACAT is therefore the abolition of torture throughout the world but also solidarity with tortured prisoners and their families. Along the way, the ACAT has incorporated in its initial mandate the fight against capital punishment, an ultimate torture that takes people back to the *lex talionis*, or an eye for an eye."

Clearly, following its registration as a charity, the ACAT has not hesitated to reincorporate some political purposes in its mandate. Furthermore, it has had no difficulty in availing itself of all the political means at its disposal in order to achieve its political purposes.

...

In *McGovern v. Attorney General, supra* [[1982] c. 321], Mr. Justice Slade more or less consolidated in the case law a non-exhaustive list of the "categories of political purposes". From the audit, it appears to us that of the five categories of political purposes listed by Mr. Justice Slade (at page 340 of the judgment), the activities conducted by the ACAT may be connected to the following four categories:

"ii. to procure changes in the laws of this country;

iii. to procure changes in the laws of a foreign country;

iv. to procure a reversal of government policy or of particular decisions of governmental authorities of this country;

v. to procure a reversal of government policy or of particular decisions of governmental authorities of a foreign country;"

The *McGovern* judgment has often been cited in the Canadian cases and the aforecited passage was explicitly incorporated in Canadian law in *Human Life International in Canada v. M.N.R.* [1998] 3 F.C. 202 (C.A.) (Application for leave to appeal to the Supreme Court of Canada dismissed, 21-9-99, [1998] S.C.C.A. No. 246 (QL) and also in *Alliance for Life v. M.N.R.* [1999] 3 F.C. 504 (C.A.). The latter two judgments have confirmed, moreover, that in Canadian charities law there is a sixth category of political activities, one that encompasses activities aimed at influencing public opinion on some social issues. It is our opinion that some activities of the ACAT can be linked to this category of political activities.

The audit showed that the ACAT has ceased to conform to the criteria in the Act by using political methods to achieve purposes of a political nature. The methods used, such as letter-writing and postcard campaigns, are activities considered to be political activities. This observation must necessarily lead to another: that the ACAT has breached the rule that the investment of its resources must be devoted exclusively to charitable purposes and activities. Accordingly, the ACAT's registration as a registered charity cannot be maintained.

...

Among other things, the political activities conducted by the ACAT included, entirely or in part:

- interventions with governments to support persons in prison;
- sending letters to governments;
- postcard campaigns;
- Intervention Commission;
- publications in newspapers;
- petitions
- media advertisements
- publication and distribution of leaflets; and
- information kiosks and public tables.

...

Having regard to the conclusion of the audit, in which "the principal activity of the ACAT, the sending of letters to heads of governments, is political in nature," it is not unreasonable in the circumstances to conclude that the proportion of resources devoted to the political activities accounts for about 50% of all the ACAT's available resources. In any event, it must be observed, on the basis of a pro rata attribution of the ACAT's expenditures, that more than 10% of the expenses and resources are definitely being invested in political activities, that is, much more than the 10% suggested in paragraph 15 of information circular 87-1.

...

Moreover, you have failed to demonstrate, in the letters of March 30, 1998, and September 5, 2000, or during our meeting of May 10, 2000, that the ACAT's information activities could be viewed as contributing to the advancement of education. The courts have not agreed that merely stimulating thinking suffices to advance education.

(A.B., vol. 3, pp. 419-24)

<u>Analysis</u>

[17] The painstaking review of the legislation and the cases undertaken by my colleague, Mr. Justice Stone, in *Alliance for Life v. M.N.R.*, [1999] 3 F.C. 504 (C.A.), allows me to substantially shorten my reasons and go directly to the point.

[18] Essentially, the ACAT submits (1) that its purposes are *prima facie* charitable, the material assistance given torture victims constituting a purpose specifically included in the preamble to the *Charitable Uses Act, 1601*, (U.K.) 43 Eliz. 1, c. 4 (the Statute of Elizabeth), "[...for the relief or redemption of Prisoners or Captives...]"; (2) that its activities, which include *inter alia* letter and postcard writing campaigns, constitute charitable activities since they are directly related to the material assistance to victims of torture; the fact that one of the means used is to communicate with certain political actors does not convert these activities into political activities; (3) that the Minister, in his opinion, confused the concepts of purposes and activities; and (4) that the Minister was mistaken on the appropriate meaning of the expression "political activities" since the abolition of torture promotes the public welfare, constitutes a value that is universally recognized in today's law, is not simply a controversial social issue and transcends the arena of political debate.

[19] As I understand these submissions, taken as a whole, the ACAT is urging this Court to decide that the nobility and national and international recognition of a cause defended by a charity justifies the use of pressure tactics which, in the context of a socially or politically controversial cause, would not be accepted because they would be comparable to political activities.

- <u>the Minister's procedure</u>

[20] The procedure the Minister must follow when he is asked to register a charity or revoke its registration was explained by Mr. Justice Iacobucci in paragraphs 152 to 159 and 194 of his reasons in*Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10 (*Vancouver Society*). I will summarize it in a few lines:

- The inquiry must focus not only on the activities of the organization but also on its purposes;

- In principle, the organization must be constituted exclusively for charitable purposes; however, it will not be disqualified solely because one of the purposes is non-charitable if that purpose, in reality, is only a means to carry out the charitable purposes; in other words, this purpose is not an end in itself, but is ancillary to the charitable purposes rather than a collateral purpose;

- It is necessary to consider the nature of the activities presently carried on by the organization as a potential indicator of whether it has since adopted other purposes;

- The organization may engage in political activities so long as they are ancillary to the charitable purposes and/or they do not account for more than a percentage, estimated at about 10% by the Minister, of the overall activities of the organization.

[21] That is the procedure that was followed by the Minister in the case at bar. He satisfied himself, before allowing registration, that the legal and jurisprudential requirements had been fulfilled, even going so far as to impose on the ACAT some substantial alterations in the statement of its objectives and warning it against the use of pressure tactics that he considered political.

[22] He then asked himself, at the time of the audit, whether the organization's activities had not taken on a political connotation at that point. He observed that some of the ACAT's activities constituted means of pressuring political authorities in Canada and abroad. He then concluded that the ACAT, in devoting itself to such pressure tactics, had become transformed into a pressure group, which, he said, constituted a political purpose in itself and warranted its disqualification. He further concluded that these pressure tactics constituted political activities, that these political activities constituted about 50% of the ACAT's activities, and that this consequently was an additional cause for disqualification.

- <u>standard of review</u>

[23] The Minister's conclusions to the effect that some of the ACAT's activities constituted means of pressuring the political authorities, that these activities represented some 50% of the ACAT's overall activities and that the ACAT, through these activities, had become, among other purposes, a pressure group, are essentially conclusions of fact. This Court, which is hearing an appeal from the Minister's decision, cannot intervene in regard to these conclusions unless there has been a clear or palpable error. No such error has been demonstrated. I note, moreover, that the ACAT has never denied that some of its activities constituted pressure tactics.

[24] However, the characterization of these pressure tactics as political activities within the meaning of the cases and the Act is a conclusion of law, and the standard of correctness is the appropriate one. The respective counsel agree on this standard of review. This is an appeal; there is no privative clause; the issue is one of law in regard to which the Minister has no particular expertise, and it has not yet been formally decided by the Canadian courts; and the applicable response to this question of law will have repercussions that go far beyond the context of this litigation (see *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, para. 148 to 150).

- <u>change of course in the activities carried on and the purposes pursued</u>

[25] It is obvious that in this case the ACAT, once registered, was not upfront with the Minister, in that it pursued purposes and engaged in activities - whether characterized as charitable or political activities - for which there was no prior indication in its supplementary letters patent or its bylaws at the time it was recognized as a charity.

[26] For example, the sending of letters and postcards to political figures and governments in relation not only to torture but also to the death penalty, excision, antipersonnel mines, etc., does not appear in any of the "objects" sought, the "means of action" proposed, or the "activities" listed at the time of the ACAT's registration, in August 1986. I note, for example, that the third objective stated in the supplementary letters

patent of August 25, 1986, mentions "sending letters of encouragement" to the victims. This "sending" of letters of encouragement becomes a "means of action" in the General Bylaws adopted in September 1986, once the registration had been authorized by the Minister, and these means of action refer, for the first time, to "intercession with those responsible for torture". I note as well that in amending its objectives to satisfy the Minister, the ACAT removed any reference to capital punishment. This mailing, the Minister has concluded, accounts for 50% of the ACAT's activities.

[27] The evidence of a change of course is overwhelming. For example, in a letter sent to Mr. Rock, a government minister, on November 29, 1995, the ACAT says its goal is "[translation] primarily to fight torture, the death penalty and murders by 'social cleansing' of street children", asks the minister to "[translation] introduce a provision in the *Criminal Code* clearly indicating that excision is a crime", and expresses the opinion that "[translation] Canada must send a very clear message to the nationals of countries practising excision" (A.B., vol. 2, p. 184).

[28] In a letter sent to Prime Minister Chrétien on February 7, 1996, which targeted "[translation] torture and the disappearance of street children" in Guatemala, the ACAT urged the prime minister to link the repayment of debts incurred by Guatemala and the evolution of trade relations between the two countries "[translation] to respect for human rights in general and children in particular" (A.B., vol. 2, p. 186).

[29] In a letter to the President of Honduras, February 29, 1996, the ACAT deplored the fact that children are jailed together with adults and urged the Honduran government "to open new centres for children and juveniles" (A.B., vol. 2, p. 187).

[30] In January 1996, the ACAT urged its members to ask Mr. Ouellet, a government minister, "[translation] (1) to prohibit throughout Canadian territory the production, stockpiling, sale, transfer and use of these [antipersonnel] mines and their components; (2) to exercise its leadership within the United Nations framework with a view to promoting such prohibition at the international level..." (A.B., vol. 2, p. 197).

[31] In December 1994, the ACAT suggested that its members write the President of Mexico asking him to intervene "[translation] promptly with the local authorities concerned to have a comprehensive inquiry conducted into the brutality displayed by the police forces during the demonstration of last November 16 in Palenque" (A.B., vol. 2, p. 199).

[32] I give these examples, not to criticize these positions or interventions, but as illustrations of the kind of activities the ACAT was warned against prior to its registration and that it has resolutely applied itself to carrying on once its registration was obtained. The Minister was very definitely justified in concluding that the activities announced prior to the registration were not the activities carried on after registration.

[33] That being said, the Minister based his decision to revoke the registration not on the fact that the ACAT has carried on activities other than those announced but on the fact that these other activities were political, so the question still remains: is this type of activities political in nature?

- <u>political purposes and activities</u>

[34] Two things must be taken as given in the law of charities. The first is that the best intentions in the world do not suffice:

However, the mere fact that an organization may have philanthropic purposes of an excellent character does not by itself entitle it to acceptance as a charity in law.

(*McGovern v. Attorney General*,

[1981] 3 All E.R. 493 (Div. Ch.), Slade J., p. 500)

The second is that charities and politics do not sit well together:

Although a "moving subject" the law of charity has not looked particularly kindly upon political purposes or activities being accepted as charitable.

(*Alliance for Life*, para. 35)

[35] The English and Canadian courts have consistently been aware of the fact that while, in general,charities and politics were not reconcilable, it was equally necessary, in practice, to acknowledge that in real life they are not mutually exclusive. The more omnipresent the state, the harder it is to overlook the political mechanisms when one is engaged in charitable work. Striving for political realism, the courts, followed by the Parliament of Canada, have developed these concepts of incidental or ancillary political objects and activities without which many if not most of the charities nowadays could not operate. It is apparent from the decisions that the adjective "political" has the same meaning, whether it is attached to "purposes" or to "activities". I will use "political purposes" and "political activities" interchangeably.

(a) jurisprudence

[36] The most complete analysis to date of the concept of "political purposes" is that made by Mr. Justice Slade in *McGovern* (*supra*, para. 35), in which he established the following non-exhaustive list of inadmissible "political purposes":

(2) Trusts for political purposes falling within the spirit of this pronouncement include (inter alia) trusts of which a direct and principal purpose is either- (i) to further the interests of a particular political party, or

(ii) to procure changes in the laws of this country, or

(iii) to procure changes in the laws of a foreign country, or

(iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country, or

(v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

This categorisation is not intended to be an exhaustive one, but I think it will suffice for the purposes of this judgment.

(pp. 508-509)

[37] This description of political purposes was expressly approved by this Court in *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340 (C.A.), (*per* Stone J.A.), p. 353; in *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 F.C. 202 (C.A.), (*per* Strayer J.A.), p. 217, and in *Alliance for Life, supra*, (*per*Stone J.A.), para. 36, 37, 61 to 66. I note that in *Alliance for Life*, Stone J.A. said:

I am not aware that the categorization of "political purposes" of Slade J. in *McGovern , supra*, has been seriously questioned.

(para. 61)

[38] To the five categories listed by Slade J., which, I recall, are not exhaustive, this Court added, in*Human Life International, supra*, activities designed primarily to sway public opinion on important social issues:

[12] With respect to the legal test employed by the Minister, it is stated in his decision which is under attack, as quoted above, that according to the jurisprudence activities designed essentially to sway public opinion on a controversial social issue are not charitable but are political. Counsel for the respondent agreed that there was no jurisprudence precisely saying that but he felt it to be a fair interpolation of the existing jurisprudence. I believe that the jurisprudence generally supports the proposition that activities primarily designed to sway public opinion on social issues are not charitable activities.

...

The same rationale leads me to conclude that this kind of advocacy of opinions on various important social issues can never be determined by a court to be for a purpose beneficial to the community. Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community?

(Strayer J.A., para. 12)

The purposes pursued in that case dealt with respect for and protection of human life, in particular through natural methods of reproduction.

[39] The courts have so far been concerned primarily with political purposes in cases where the purpose sought was socially or politically controversial and necessarily required changes of a statutory nature in regard to which the courts did not wish to intervene because it would force them to take a position and thereby compromise their impartiality. Accordingly, counsel for the appellant warned the Court against blindly applying these principles to the particular context of this case in which, they said, the ultimate objective - the abolition of torture - is uncontroversial and the pressure tactics used do not necessitate any statutory change since they are simply aimed at affirming principles that are recognized in Canadian and international law.

[40] I am not persuaded that the abolition of torture is an issue that is entirely uncontroversial today. While it is evident, on its face, that the abolition of torture is an objective that is itself eminently laudable and that an organization devoted to it is, *prima facie*, a charity, the issue does nevertheless raise certain questions of a factual and legal nature.

[41] In the facts of this case, I am not certain, when I see the kind of causes espoused by the ACAT, of the precise meaning it gives to the word "torture". If it understands this word to include such treatments as the death penalty and excision, these are definitely matters of controversy. In law, although the abolition of torture is a principle recognized in Canadian and international law (see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1), the Supreme Court of Canada itself accepts that there can be derogations, albeit not "easily", from this "emerging, if not established" peremptory norm of customary international law (*Suresh*, para. 65) and that, "in exceptional circumstances, deportation to face torture might be justified" (ibid., para. 78).

[42] Consequently, I doubt the appellant's assertion that the abolition of torture transcends the arena of political debates, but I prefer to base my decision on the following considerations.

[43] It is true, as the appellant's counsel note, that Slade J., in *McGovern*, did not hold that the abolition of torture was a political purpose. Among other purposes, he was considering the one described in a charitable foundation established by certain members of Amnesty International:

2C. Procuring the abolition of torture or inhuman or degrading treatment or punishment.

[44] One of the arguments raised by the foundation was the following:

The next question of construction which arises in relation to cl 2C of the trust deed concerns the meaning of the phrase 'procuring the abolition of'. On the footing that cl 2C had no application to capital punishment, counsel for the plaintiffs submitted that there was no evidence that 'torture or inhuman or degrading treatment or punishment' was lawful in any country and that it was highly unlikely that any country's legal system specifically permits

any such treatment or punishment. More customarily, he suggested, such treatment or punishment or torture would be administered in practice by the executive agencies of the government without any express authority conferred on them by the law of the country concerned. In these circumstances he suggested that the phrase 'procuring the abolition of' should not be construed as specifically referring to the procurement of changes in the law, either of this country or of any foreign state. In his submission it should be construed rather as referring to the elimination of these practices in a much more general sense, and thus as a trust of compassion, for the purpose of protecting human beings in any part of the world from the suffering and distress which would otherwise be inflicted on them by these practices.

(p
p. 516-517)

[45] Slade J. rejected the argument in these words:

I find myself unable to accept this suggested construction of cl 2C. If it had stopped with the word 'torture', there would have been much to be said for the view that the phrase 'procuring the abolition of' should not be construed as referring specifically to the procurement of changes in the law. However, I think the subsequent reference to the word 'punishment' really puts the matter beyond doubt. In its context, this word, to my mind, primarily connotes punishment by process of law and, as I have indicated, is wide enough to include capital and corporal punishment by such process. Correspondingly, the phrase 'procuring the abolition of' necessarily includes the procurement of appropriate reforming legislation, which is the first and most obvious way to put an end to such forms of punishment.

(p. 517)

(Empha
sis added)

[46] This comment is of course made only in *obiter* and Slade J. in any event confined himself to saying that the words "procuring the abolition of torture" could not be construed "as referring specifically to the procurement of changes in the law". He did not go so far as to say that these could not be construed as requiring changes in conduct or policy. But he had already held, as I will note in a moment, that a request for a change in conduct or policy is not compatible with a charitable purpose.

[47] I digress. In *McGovern*, something other than torture was found in the description of the purposes being pursued - and that was fatal. In the case at bar, the description of the activities being carried on includes, for example, the death penalty, excision, antipersonnel mines, the jailing of children together with adults, and police brutality. This could be just as fatal.

[48] Returning to *McGovern*, I am of the opinion that Slade J. decided, in a context other than that of torture, that the pursuit of a change in conduct or policy is no more

authorized in charity law than a change in legislation. Another purpose, in fact, that was in dispute was the following:

2B. Attempting to secure the release of Prisoners of Conscience.

Slade J. held that this purpose was inadmissible, in these words:

Even giving the wording of cl 2B the beneficent construction to which it is entitled, I cannot construe it in the manner suggested. If in construing the sub-clause one rejects, as I have done, the possibility that the activities of the trustees thereunder may be unlawful or may consist of attempts to procure changes in the local laws, it is obvious that the primary activity contemplated by cl 2B is the imposition of moral pressure on governments or governmental authorities. The crucial difference between the nature of the trust of cl 2B and the relevant trust in *Jackson v. Phillips* is that in the latter case the pressure was to be directed by the trustees against individual persons, rather than governments, with a view to obtaining the 'voluntary manumission' of the slaves belonging to such individuals. In the present case, the persons who are effecting the imprisonment or detention of prisoners of conscience in a foreign country will, ex hypothesi, normally be the governments or governmental authorities concerned exercising a judicial, penal or administrative function, or in some cases acting quite outside the law. I do not think that the trust can be construed as being one of which the main purpose is merely to influence public opinion in the country where the imprisonment is taking place. Its very terms suggest the direction of moral pressure or persuasion against governmental authorities.

(p
p. 513-514)

(Empha
sis added)

[49] I am not bound by Slade J.'s reasoning, of course, but it does seem extremely persuasive to me.

[50] The appellant also seeks support in the remarkable decision of Justice Gray of the Supreme Judicial Court of Massachusetts, rendered in 1867 in *Jackson v. Phillips* (1867), 96 Mass. 539. The case involved a testamentary trust which had as one of its objects

the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means as ... will create a public sentiment that will put an end to negro slavery in this country.

(p. 541)

[51] Justice Gray held that the emancipation of the slaves was very definitely a charitable purpose within the purview of the Statute of Elizabeth, more specifically within the meaning of the words "relief or redemption of prisoners and captives" and he ruled the trust valid because, " as between master and slave" (p. 564), it was established that the master had the right to emancipate his slave and that

The manner stated of putting an end to slavery is not by legislation or political action, but by creating a public sentiment, which rather points to moral influence and voluntary manumission. The means specified are the usual means of public instruction, by books and newspapers, speeches and lectures. Other means are left to the discretion of the trustees, but there is nothing to indicate that they are not designed to be of a kindred nature.

(p. 565)

(Empha
sis added)

[52] Justice Gray's decision, to be sure, supports the proposition that the abolition of torture of prisoners, like the emancipation of the slaves, is in itself a charitable purpose within the meaning of the Statute of Elizabeth, but it does not support - quite the contrary - the proposition that this purpose is one of charitywhen the means employed consist of pressuring governments. As Slade J. notes, in *McGovern*, at page 514,

... the pressure (in *Jackson v. Phillips*) was to be directed by the trustees against individual persons, rather than governments, with a view to obtaining the "voluntary manumission" of the slaves belonging to such individuals.

[53] I conclude that, in light of the case law, the exercise of moral pressure on governments is a political purpose or activity.

(b) the Parliament of Canada

[54] This conclusion is strengthened, in my opinion, by the very language of the Canadian income tax legislation. The parties' counsel drew attention to the relevant legislation only in passing. However, this legislation is highly significant, in my view.

[55] I ought to have begun with this legislation, for it is wiser, as a general rule, to examine the legislation before examining the ordinary law. I did not do so in this instance because the law of charity is perceived essentially as judge-made law, which it no doubt is in England, where Parliament does not seem to have intervened since 1601, but to a lesser degree in Canada since 1986.

[56] Indeed, in 1986, Parliament went to the trouble of adding a provision to the *Income Tax Act* that in my opinion codifies the ordinary law that I have just analyzed, and that helps to resolve in a much more certain and satisfying way the issue that is before us. As might be guessed, this is subsection 149.1(6.2), which made its appearance through the *Act to amend the Income Tax Act*, S.C. 1986, c. 6, s. 85:

149.1 (6.2) For the purposes of the definition "charitable organization" in subsection 149.1(1), where an organization

149.1 (6.2) Pour l'application de la définition de « oeuvre de bienfaisance » au paragraphe (1), l'oeuvre qui consacre presque toutes ses ressources à des

devotes substantially all of its resources to charitable activities carried on by it and

(*a*) it devotes part of its resources to political activities,

(*b*) those political activities are ancillary and incidental to its charitable activities, and

(*c*) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

activités de bienfaisance est considérée comme y consacrant la totalité si les conditions suivantes sont réunies :

a) elle consacre la partie restante de ses ressources à des activités politiques;

b) ces activités politiques sont accessoires à ses activités de bienfaisance;

c) ces activités politiques ne comprennent pas d'activités directes ou indirectes de soutien d'un parti politique ou d'un candidat à une charge publique ou d'opposition à l'un ou à l'autre.

[57] This provision was mentioned only in passing in *Positive Action* (at p. 355) and in a footnote in *Human Life* (at page 222, note 6). In *Alliance for Life*, it was the subject of the following two comments by Stone J.A.:

[35] Although a "moving subject" the law of charity has not looked particularly kindly upon political purposes or activities being accepted as charitable. The Act reflects this attitude in subsection 149.1(6.2) with respect to activities by laying down a requirement that political activities be "ancillary and incidental" to charitable activities and that the organization remain obliged to devote "substantially all" of its resources to those activities. "Substantially all" has been interpreted by Revenue Canada as meaning that no more than 10% of an organization's resources measured over a period of time is to be spent on permitted political activities. Revenue Canada interprets the words "political activities" as embracing a "wide range of activities that have in common the goal of bringing about changes in law and policy". There remains, as we shall see, some difficulty of determining what activities are "political" in this branch of the law.

...

[64] It seems to me that political activities may well be "ancillary and incidental" despite the fact they involve the advocacy of a particular point of view on controversial social issues. This surely must depend on the scope of the organization's objectives and the activities undertaken in pursuit thereof. It may well be that a charitable organization would want to adopt a relatively strong and controversial posture in order to effectively advance its charitable objectives even to the extent, if necessary, of advocating a change of law or policy or of administrative decisions, without incurring the risk of losing its status as a registered charity. The key consideration initially must be whether the activities actually engaged in, though apparently controversial, remain "ancillary and incidental" to the charitable activities.

(footnotes omitted)

(Emphasis added)

[58] The defects that Parliament sought to overcome in enacting subsection 149.1(6.2) are identified in the comments made by the parliamentary secretary to the Minister of Finance, Mr. Claude Lanthier, on September 19, 1985 (p. 6813):

There has been one issue in particular that was of some concern to the volunteer sector, namely the definition of "political activities", because it meant that certain charitable organizations were unable to be recognized as such for tax purposes, while others were concerned they might lose their status.

Members of the House will recall that this question was dealt with and quite clearly explained by the Minister of National Revenue last May 29 in Vancouver. The Income Tax Act provides that all the resources of a charitable organization must be used for the charities of the organization itself. Therefore any charitable organization getting involved in political activities may very well lose its acquired status. Charitable organizations then began to fear that the simple fact of telling Members of their choice their point of view on certain issues might be considered as a political activity likely to warrant the loss of their otherwise indispensable status.

In contemporary society it has become obvious that militancy, on the part of non-government organizations or individuals, is now a central element of our democratic organization.

Therefore it was a decisive step for charitable organizations when the Minister of National Revenue announced that he would allow non-partisan political activities and would consult with charitable organizations before going ahead with his current projects. In short, henceforth a charitable organization will be allowed to express its views to elected representatives of its choice inasmuch as the issue in question relates to the charitable activities of the organization. There is no question of condoning activities favourable to candidates or political parties....

and the comments made by the member for Cardigan, Mr. Pat Binns, on January 21, 1986, (p. 10008):

In addition to the benefits to social programs and economic activity, the Bill also provides new provisions forcharities. The legislation contains two measures of relevance to registered charities. The first measure permitscharities, in 1985 and subsequent taxation years, to engage in non-partisan political activities that are ancillary or incidental to their primary charitable purposes or activities. Currently, the Income Tax Act requires a charitable foundation to be constituted and operated exclusively for charitable purposes and requires all resources of a charitable organization to be devoted to charitable activities carried on by the organization itself. The difficulty is that the common law meaning of charitable purposes or activities has not included political activities. Therefore, a registered charity which engages in such activities could risk losing its tax exempt status.

However, the amendment recognizes that it is appropriate for a charity to use its resources within defined limits for ancillary and incidental political activities in support of its charitable goals. This means that non-partisan political activity in support of the charity's organizational goals is acceptable and recognized in the Bill.

[59] As these comments indicate, the objective contemplated by the addition of this subsection was, on the one hand, to ensure that charities could not devote themselves in any way to any partisan activity whatsoever, directly or indirectly, and, on the other hand, to allow a charity to devote a proportion of its activities ("substantially all of its resources", "presque toutes ses ressources"), a proportion established in practice at some 10% (this percentage is not prescribed by law and results from an administrative interpretation that is not disputed), to non-partisan ancillary and incidental activities of their choice. As Mr. Lanthier, the parliamentary secretary, explains, the charities had come to fear "that the simple fact of telling Members of their choice their point of view on certain issues" would warrant the loss of their status and it had become important, in our democratic system, to allow these organizations to engage in some degree of militancy. In short, there would be zero tolerance in regard to partisan activities. But in regard to simply militant, non-partisan ancillary activities there would be a 10% tolerance.

[60] Although Parliament did not deem it appropriate to define what it meant by "political activities" in subsection 149.1(6.2), I think it has used the expression within the usual and broad meaning attributed to it by the dictionaries.

[61] The *Grand Robert de la langue française*, 2nd ed., 2001, first defines the adjective "*politique*" as "*Relatif à la cité, à la chose publique, au gouvernement de l'État*" and secondly as "*Relatif à l'organisation et à l'exercice du pouvoir temporel dans une société organisée, au gouvernement d'un État et aux problèmes qui s'y rattachent*".

[62] The *Canadian Oxford Dictionary*, 2001, defines "political" as follows: "1a. of or concerning the state or its government, or public affairs generally. b. of, relating to, or engaged in politics. c. belonging to or forming part of a civil administration.[... 3. taking or belonging to a side in politics".

[63] The scope of the expression "political activities" is confirmed by Parliament's concern, in paragraph (*c*), to exclude "direct or indirect support of, or opposition to, any political party or candidate for public office". Since partisan activities are categorically and generally excluded from the expression "political activities", the latter necessarily covers non-partisan activities, which takes us back to the dictionary definition, "*relatif au gouvernement de l'État*", "of or concerning the state or its government".

[64] I note that in England, the Charity Commission, which was established to approve and overseecharities, publishes a manual for the purpose of explaining the rules applicable to political activities. In its September 1999 version, this manual, in chapter CC9, entitled Political Activities and Campaigning by Charities, defines "political activity" as

any activity which is directed at securing, or approving, any change in the law or in the policy or decision of central government or local authorities, whether in this country or abroad.

[65] I note as well that in a decision published in 1980, *Brewer v. Canada (Treasury Board)* (1980), 27 L.A.C. (2d) 201, at pages 205 and 206, an Appeal Board of the Public Service Commission of Canada, in determining whether an employee had engaged in political activities, defined "political activities" as follows:

In its broadest sense, politics is a process of infinite complexity the products of which are the authoritative decisions - laws, regulations, administrative actions - which are binding on a particular political community. Political activities are activities directed at influencing the outcomes of this process.

Conclusion

[66] I conclude, then, that the words "political purposes" or "political activities", in their ordinary meaning, cover much more than initiatives leading to legislative changes. In my opinion, they cover any attempt to sway a government or a member of the government or, where there is a democracy, a member of the parliament in such areas as these organizations or individuals are politically in a position to take action in response to the pressures to which they are subjected.

[67] It is the very nature of the initiative in relation to these organizations and individuals, the very identity of the interlocutor that one is seeking to influence, which gives the activity its political character, independently of the cause in question and its value, independently of the position this interlocutor has or has not taken or will take in relation to that cause and independently of the state of public opinion in relation to that cause. Whether it is support, flattery or criticism, the initiative is political. And it is no less political because the cause that is the object of the initiative is popular, or has unanimous support or is endorsed by the existing authorities.

[68] I have no difficulty in concluding that pressuring governments or government members through the sending of letters and postcards pertaining to current issues constitutes a political activity within the broad meaning signified by subsection 149.1(6.2). Such activity will be prohibited to a charity if it is partisan. It will be allowed if it is not partisan, provided of course that it has not become an end in itself and provided it is incidental or ancillary to the charitable purposes pursued and fulfills the 10% tolerance requirement.

[69] In the circumstances, the activities of the ACAT that it describes itself, in paragraph 34 of its memorandum, as "[translation] letters and postcards campaigns" and, in paragraph 35, as a means "[translation] of communicating with certain political actors", are political activities - non-partisan, to be sure, but political nevertheless.

[70] The Minister concluded that these activities were not ancillary or incidental to the charitable purposes pursued and had become an end in itself of a political nature. And the

Minister found in any case that the percentage of such activities exceeded the permitted tolerance threshold. For the reasons I have given, both of these conclusions of the Minister are unassailable and the notice of revocation of the ACAT's registration as a charity must proceed. Of course, there is no obstacle to the ACAT's pursuing the same activities as a non-profit agency.

[71] I would dismiss the appeal with costs.

"Robert Décary"

Judge

"I agree.

Gilles Létourneau, Judge

"I agree.

Marc Nadon, Judge

Certified true translation

Suzanne M. Gauthier, C.Tr., LL.L.

FEDERAL COURT OF CANADA

APPEAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO: A-805-00

STYLE: Action by Christians for the Abolition of Torture (ACAT)

and

Her Majesty the Queen and MAUREEN KIDD, in her capacity as Director General of the Charities Directorate of the Canada Customs and Revenue Agency

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 4, 2002

REASONS FOR JUDGMENT: Décary J.A.

CONCURRING: Létourneau J.A.

Nadon J.A.

DATE OF REASONS: December 16, 2002

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