

Date: 20021216

Docket: A-260-01

Neutral citation: 2002 FCA 498

CORAM: DÉCARY J.A.

SHARLOW J.A.

PELLETIER J.A.

BETWEEN:

EARTH FUND/FOND POUR LA TERRE

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario on October 8, 2002.

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

REASONS FOR JUDGMENT
BY:

SHARLOW J.A.

CONCURRED IN
BY:

DÉCARY J.A.

PELLETIER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal under paragraph 172(3)(a) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, from the decision of the Minister, as set out in a letter to the appellant dated March 27, 2001, not to register the appellant as a charitable foundation.

Statutory framework

[2] The provisions of the *Income Tax Act* that are most relevant to this case are the following parts of subsection 149.1(1):

149.1 (1) In this section,

"charitable foundation" (« *fondation de bienfaisance* ») means a corporation or trust that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, and that is not a charitable organization;

"charitable organization" (« *oeuvre de bienfaisance* ») means an organization, whether or not incorporated,

149.1 (1) Les définitions qui suivent s'appliquent au présent article.

« activité commerciale complémentaire » ("related business"). Relativement à un organisme de bienfaisance, est assimilée à une activité commerciale complémentaire une activité étrangère aux fins de l'organisme de bienfaisance si, de toutes les personnes employées par l'organisme de bienfaisance pour exercer cette activité, il n'en est presque aucune qui soit rémunérée à ce titre. ...

« donataire reconnu » ("qualified donee"). Donataire visé aux alinéas 110.1(1)a) et b) et dans les définitions de « total des dons à l'État » et « total des dons de bienfaisance » , au paragraphe 118.1(1) ...

(a) all the resources of which are devoted to « fins de bienfaisance » ("charitable purposes"). Sont compris parmi les versements à des fins de bienfaisance les versements de fonds à des donataires reconnus.

(b) no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof ...

"charitable purposes" (« fins de bienfaisance ») includes the disbursement of funds to qualified donees;

"charity" (« organisme de bienfaisance ») means a charitable organization or charitable foundation;

"qualified donee" (« donataire reconnu ») means a donee described in any of paragraphs 110.1(1)(a) and (b) and the definitions "total charitable gifts" and "total Crown gifts" in subsection 118.1(1);

"related business" (« activité commerciale complémentaire »), in relation to a charity, includes a business that is unrelated to the objects of the charity if substantially all persons employed by the charity in the carrying on of that business are not remunerated for that employment ...

« fondation to bienfaisance » ("charitable foundation"). Société ou fiducie constituée et administrée exclusivement à des fins de bienfaisance, dont aucun revenu n'est payable à un propriétaire, membre, actionnaire, fiduciaire ou auteur de la fiducie ou de la société ou ne peut par ailleurs être disponible pour servir au profit personnel de ceux-ci, et qui n'est pas une oeuvre de bienfaisance.

« oeuvre de bienfaisance » ("charitable organization"). oeuvre, constituée ou non en société :

- a) dont la totalité des ressources et consacrée à des activités de bienfaisance qu'elle mène elle-même;
- b) dont aucune partie de revenu n'est payable à l'un de ses propriétaires, fiduciaires ou auteurs ni ne peut servir, de quelque façon, à leur profit personnelle; ...

« organisme de bienfaisance » ("charity"). oeuvre de bienfaisance ou fondation de bienfaisance.

Facts

[3] The appellant was incorporated in 1976 as a corporation without share capital under Part II of the *Canadian Corporations Act*, R.S.C. 1970, c. C-32. The appellant was dormant until 1995, when its head office was moved to Toronto. The corporate objects of the appellant, as set out in its Letters Patent as amended on May 18, 1999, read as follows:

1. To promote the preservation and enhancement of the environment for human life and well-being on Earth.
2. To promote, encourage, and support programs and activities for the creation of greater public awareness of environmental issues and to mobilize the resources of private citizens and organizations to contribution to the resolution of such issues.

3. To provide for the holding of educational lectures, exhibitions, public meetings, classes and conferences for the discussion of and exchange of views and dissemination of knowledge concerning matters relating to the environment.
4. To assist and support other organizations, citizens groups and individuals with objects similar to and/or activities comparable with those of the Corporation.
5. To purchase, acquire or take by gift, bequest, or donation for the purposes of the Corporation and its objects, but for no other purposes, and to sell, lease or otherwise dispose of and, subject to the provisions of section 65 of the *Canada Corporation Act*, to mortgage any real or personal property. Provided that if at any time the Corporation shall dissolve or cease to exist the remaining funds and property of the Corporation, after the payment of all its debts and liabilities, shall be distributed or disposed of to one or more charitable organizations in Canada, the objects of which are as nearly as may be similar to those set forth herein.
6. To enter into any arrangements with any authorities, public or academic or otherwise, that may seem conducive to the Corporation's objects or any of them and to obtain from any such authority, any rights, privileges, and concessions which the Corporation may think it desirable to obtain and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions.
7. To use, apply, give, donate, accumulate or distribute from time to time all or part of the income of the Corporation to or for any Canadian charitable organization.
8. To raise funds by any means including an on-going global or other lottery, and to directly or indirectly fund projects relating to the objects of the Corporation and the global environment, ecology and humanitarian activities relating to health, habitat, migration of refugees or other population groups, natural or non-natural catastrophes, health and welfare of children and environmentally sustainable development, on its own behalf or through its charitable agents or beneficiaries.

[4] In or about 1999, a plan was devised to use the appellant as a vehicle to raise funds for environmental charities through lotteries. It was proposed that the lotteries would be operated through an office in Prince Edward Island but the lottery tickets would be marketed world-wide through the Internet.

[5] The proposed lottery operation would be facilitated by contractual arrangements with three corporations. One of those corporations, called Lottery Management (PEI) Inc., would operate the lottery. A Swiss corporation called EF Marketing SA would be the international marketing and sales representative. A Bermuda corporation called EF Investments Ltd., would own all of the trademarks and other intellectual property associated with the proposed lottery, including the trade mark Earth Future Lottery which was registered in the Canadian Intellectual Property Office as No. 891564 (September 30, 1998).

[6] EF Marketing SA was to be engaged to act as the appellant's agent and to provide a number of services relating to sales and to the operation of the lottery. For its services, EF Marketing SA would be entitled to a fee equal to 7.6% of the gross revenues from lottery ticket sales, plus a bonus if certain efficiencies were achieved. Start-up funding was to be provided by EF Marketing SA, subject to repayment by the appellant out of the

proceeds of the sale of lottery tickets, with the risk of any deficiency being borne by EF Marketing SA.

[7] The intellectual property rights relating to the proposed lottery were to be the property of EF Investments Ltd. and would be licensed to EF Marketing SA, which would in turn license them to the appellant subject to the payment of a royalty.

[8] The record does not disclose the full details of the relationships or proposed relationships between those three corporations, except that it appears to have been contemplated that the Bermuda corporation, EF Investments Ltd., would control the Swiss corporation, EF Marketing SA, through the ownership of a majority of the voting shares.

[9] It was proposed that the start-up funds would be raised through an offering of non-voting shares of EF Marketing SA. However, that financing arrangement failed. In the view of the appellant, that was a result of the reluctance of the Minister to register the appellant as a charitable foundation. If this appeal were to succeed, it is not clear how the operations of the appellant would be financed.

[10] The intention of the appellant was that the net proceeds from the lottery operations (that is, the proceeds of lottery ticket sales, net of prizes and operating costs, including fees payable to EF Marketing SA and, I assume, Lottery Management (PEI) Inc.) would be donated to a number of environmental charities, some of them international organizations. The record in various places names a number of proposed donees, some of which are entities that do not meet the definition of "qualified donee" in the *Income Tax Act*.

[11] The appellant, in its application for registration as a charitable foundation, represented to the Minister that it intended to restrict itself to fundraising in accordance with section 8 of its objects, and to the distribution of funds to charitable organizations in accordance with section 7 of its objects. It also represented that its support of other organizations would be limited to "qualified donees" as defined in the *Income Tax Act*.

[12] The Minister refused the appellant's application for registration as a charitable foundation. The reasons for the Minister's decision are set out in a letter dated March 27, 2001, which refers in turn to letters of June 8, 2000 and October 18, 2000. These letters discuss a number of points and state many reasons for the Minister's decision. Before discussing the Minister's decision, however, it is necessary to consider the effect of certain proceedings in the Prince Edward Island Supreme Court - Appeal Division and the Supreme Court of Canada relating to the appellant.

Legality of the appellant's proposed lottery

[13] Generally, lotteries are prohibited in Canada unless they are permitted under section 207 of the *Criminal Code*, R.S.C. 1985, c. C-46. Paragraph 207(1)(b) of the *Criminal Code* provides as follows:

207(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful for ...

207. (1) Par dérogation aux autres dispositions de la présente partie en matière de jeux et de paris, les règles qui suivent s'appliquent aux personnes et organismes mentionnés ci-après :

(b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province ... to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose

b) un organisme de charité ou un organisme religieux peut, en vertu d'une licence délivrée par le lieutenant-gouverneur en conseil d'une province ... mettre sur pied et exploiter une loterie dans la province si le produit de la loterie est utilisé à des fins charitables ou religieuses;

[14] On February 8, 2000, the Lieutenant Governor in Council of Prince Edward Island granted a lottery license to the appellant. There apparently were concerns about the legality of the licence, and a reference was commenced under section 19 of the *Supreme Court Act*, R.S.P.E.I. 1988, Cap S-10.

[15] On April 24, 2002, in a decision now reported as *Reference Re: Earth Future Lottery* (2002), 211 Nfld. & P.E.I.R. 311, the Appeal Division of the Prince Edward Island Supreme Court determined that the Lieutenant Governor in Council did not have the authority to grant a lottery licence to the appellant, and that in any case certain aspects of the proposed lottery operation would breach the *Criminal Code*.

[16] This Court has said that no organization will be recognized as charitable in law if its activities are illegal: *Everywoman's Health Care Society* (1988) v. *Canada (Minister of National Revenue - M.N.R.)* (C.A.), [1992] 2 F.C. 52 (C.A.), (1991), 136 N.R. 380, [1991] 2 C.T.C. 320, (1991) 92 D.T.C. 6001. It would appear that as long as the decision of the Prince Edward Island Supreme Court remains in force, the appellant cannot carry on its proposed lottery operation without breaching the gaming provisions of the *Criminal Code*. That would be a sufficient ground upon which to dismiss this appeal.

[17] The decision of the Prince Edward Island Supreme Court is the subject of an appeal to the Supreme Court of Canada, [2002] S.C.C.A. No. 223, but the hearing has not yet been scheduled. I propose to deal with the issues raised in this appeal, on the understanding that even if it is determined that the appeal is well founded, the Minister will not be required to register the appellant as a charitable foundation unless the decision of the Prince Edward Island Supreme Court is set aside or the Minister is otherwise satisfied that the proposed operations of the appellant do not breach the gaming provisions of the *Criminal Code*.

Review of the Minister's decision

[18] In my view, it is not necessary to deal with all of the grounds upon which the Minister relied in refusing to register the appellant as a charitable foundation. I will discuss only two issues: whether the appellant's corporate objects are too broad, and whether the appellant is disqualified as a charitable foundation because the lottery operation is a business that is its only activity.

Are the appellant's corporate objects too broad?

[19] The first ground relied upon by the Minister is that the appellant is not constituted and operated exclusively for charitable purposes. The appellant argues that the Minister approached this question incorrectly. That argument is based in part on the premise that, because the proposed lottery operation relates only to some of the appellant's corporate objects, namely the objects that refer to the raising of funds to aid environmental causes, the remaining corporate objects can be disregarded.

[20] In my view, the appellant's argument rests on an invalid premise. As a matter of law, the appellant is not entitled to registration as a charity unless all of the appellant's corporate objects and activities are exclusively charitable. That is clear from the definition of "charitable foundation" from subsection 149.1(1), quoted above, which requires a charitable foundation to be "constituted and operated exclusively for charitable purposes".

[21] The appellant relies on paragraph 159 of *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10, (1999), 234 N.R. 249, [1999] 2 C.T.C. 1, (1999) 99 D.T.C. 5034 in which Justice Iacobucci, writing for the majority, said this:

... the requirements for registration ... come down to two:

- (1) the purposes of the organization must be charitable, and must define the scope of the activities engaged in by the organization; and
- (2) all of the organization's resources must be devoted to these activities unless the organization falls within the specific exemptions of s. 149.1(6.1) or (6.2).

[22] I see nothing in the *Vancouver Society* case that is inconsistent with the conclusion that the appellant cannot qualify for registration unless all of its corporate objects are charitable. Justice Iacobucci was certainly not saying that a particular corporate object can be ignored if the organization has no current plans to undertake an activity in furtherance of that object.

[23] In any event, even the corporate objects upon which the appellant specifically relies are too broad to permit a conclusion that the appellant's proposed activities are exclusively charitable. The language in question, from sections 7 and 8 of its corporate objects, is as follows:

7. To use, apply, give, donate, accumulate or distribute from time to time all or part of the income of the Corporation to or for any Canadian charitable organization.

8. To raise funds by any means including an on-going global or other lottery, and to directly or indirectly fund projects relating to the objects of the Corporation and the global environment, ecology and humanitarian activities relating to health, habitat, migration of refugees or other population groups, natural or non-natural catastrophes, health and welfare of children and environmentally sustainable development, on its own behalf or through its charitable agents or beneficiaries.

[24] Section 8 on its face is broad enough to authorize the appellant to fund environmental and humanitarian projects undertaken by organizations that are not "qualified donees". It is also broad enough to permit the appellant to fund a commercial venture aimed at exploiting a renewable source of energy, which presumably would benefit the environment, with or without sharing in any potential profits from the venture. Indeed, section 8 is so broad that it would permit the appellant to carry on such a commercial enterprise itself, and section 7 would permit the appellant to accumulate its profits without making any distributions at all, even to qualified donees.

[25] It does not matter that the appellant claims to have no present intention of doing any of these things. The problem is that its objects are so broad that it could do them, and therefore it is impossible to conclude that the appellant is constituted exclusively for charitable purposes.

Whether the appellant is entitled to carry on the lottery business as a charitable foundation

[26] The appellant argues that there is no statutory bar to its carrying on a lottery operation to raise funds for its charitable objects, because there is no statutory limitation on the manner in which a charitable foundation raises the funds that it disburses to "qualified donees". This is said to follow from the provisions of the *Income Tax Act* relating to charities which provide, broadly speaking, that "charitable organizations" are charities that actually engage in charitable work, and "charitable foundations" simply raise money for charitable purposes. The appellant argues that this was Parliament's objective in defining "charitable purposes" (« *fins de bienfaisance* ») to include "the disbursement of funds to qualified donees".

[27] According to the appellant's argument, it should not matter whether funds are raised in the traditional way, by soliciting gifts, or by a lottery operation. Indeed, under this argument, a corporation could be registered as a charitable foundation even if it raised money by carrying on a completely commercial enterprise, like a department store or a bank. In support of this argument, the appellant relies on *Alberta Institute on Mental Retardation v. Canada*, [1987] 3 F.C. 286, (1987) 76 N.R. 366, [1987] 2 C.T.C. 70, (1987) 87 D.T.C. 5306 (F.C.A.), leave to appeal dismissed, [1988] S.C.C.A. No. 32.

[28] Alberta Institute was a corporation established to promote the welfare of persons suffering from mental retardation and other developmental handicaps. Its objects also permitted it to "raise funds for the purpose of carrying out the objects of company in a manner not inconsistent with the objects of the company". Alberta Institute raised funds by collecting used goods from donors and providing them to a commercial enterprise called Value Village, which paid Alberta Institute a fee and its expenses, and then sold the goods

for profit. Alberta Institute donated the money it raised by this activity to a number of charities for the mentally disabled. It was undisputed that the corporate objects of Alberta Institute were exclusively charitable, but the Minister argued that, because of the involvement of Alberta Institute with Value Village, Alberta Institute was not being operated exclusively for charitable purposes.

[29] Justice Heald, writing for the majority, rejected the Minister's argument. He held that the charitable objects of Alberta Institute were being fulfilled because all of the proceeds from the collection of used goods were given to appropriate charities. He also held that even if the collection of used goods could be said to be a business, it would be a "related business" because of the close connection between the activity and the charitable objects of Alberta Institute, and because the funds raised by the activity were entirely dedicated to those charitable objects.

[30] I do not accept the argument of counsel for the appellant that the *Alberta Institute* case is authority for the proposition that any business is a "related business" of a charitable foundation if all of the profits of the business are dedicated to the foundation's charitable objects. The Minister in that case was arguing that Alberta Institute was "a wholesaler of goods", but in fact Alberta Institute was simply soliciting donations of goods which it converted to money. This is somewhat different from the traditional fundraising activities of a foundation, but the difference is only a matter of degree.

[31] By contrast, the appellant proposes to do nothing except market and sell lottery tickets in a manifestly commercial arrangement that will, if all goes as planned, result in a profit that will be donated, I assume, to qualified donees. The appellant is in exactly the same position as any commercial enterprise that commits itself to apply its profits to charitable causes. Such a commitment, by itself, does not derogate from the commercial nature of the activity that generates the profit. Given the particular facts of this case, the Minister was justified in concluding that the appellant's proposed lottery operation would be a business of the appellant that is not a "related business", and thus would not qualify as a charitable activity.

Conclusion

[32] For these reasons, this appeal will be dismissed with costs.

"K. Sharlow"

J.A.

"I agree

Robert Décaray J.A."

"I agree

J.D.Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-260-01

STYLE OF CAUSE:

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AND

MINISTER OF NATIONAL REVENUE

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DATED: DECEMBER 16, 2002

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