Policy Brief

Political Activities and the Meaning of "Substantially All" – An Analysis for Registered Charities

Alicia Grant

The Pemsel Case
FOUNDATION

ISBN: 978-0-9940392-2-4

"The law of charity is a moving subject"
– Lord Wilberforce

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Named after the 1891 House of Lords decision, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, which established the four principal common law heads of charity used in Canada and elsewhere, The Pemsel Case Foundation is mandated to undertake research, education and litigation interventions to help clarify and develop the law related to Canadian charities. The Pemsel Case Foundation is incorporated under the Alberta *Societies Act* and is a registered charity.

The Pemsel Case
FOUNDATION

Suite 1150, 10060 Jasper Avenue,
Edmonton, Alberta, T5J 3R8

www.pemselfoundation.org

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Introduction

Under the Canadian *Income Tax Act* ("ITA" or "the Act"), registered charities are exempt from paying tax on income and may issue tax receipts to donors. To be registered as a charity, a corporation, trust or unincorporated association must be constituted and operated exclusively for charitable purposes.[1] This requirement is, notably, subject to certain exceptions, including those found in sections 149.1 (6.1) and (6.2) of the Act, which read as follows[2]:

> 149.1 (6.1). For the purposes of the definition of "charitable foundation" in subsection 149.1(1), where a corporation or trust *devotes substantially all of its resources* to charitable purposes and
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> (a) it devotes part of its resources to political activities,
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> (b) those political activities are ancillary and incidental to its charitable purposes, and
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> (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 corporation or trust will be considered to be constituted and operated for charitable purposes to the extent of that part of its resources so devoted.
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> 149.1 (6.2). For the purposes of the definition "charitable organization" in subsection 149.1 (1), where an organization *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.

This paper examines the meaning accorded to the phrase "substantially all" in sections 149.1 (6.1) and (6.2) and elsewhere in the ITA. It will begin by outlining the current interpretation by the Canada Revenue Agency ("CRA") of the phrase. The CRA's position on "substantially all", with respect to these provisions, is not extensively discussed in federal

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[1] *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s. 149.1(1).

[2] *Ibid.* s. 149.1(6.1) and (6.2)

case law relating to registered charities. However, cases concerning other sections of the ITA, as well as sections in the *Excise Tax Act* ("ETA") and the *Canada Business Corporations Act* ("CBCA") that use the phrase "substantially all," have questioned the value of a strict quantitative rule.

The presumption of consistent expression is a principle of statutory interpretation under which the reader assumes that, within a legislative text, the same words have the same meaning.[3] This presumption applies not only within statutes, but across statutes as well.[4]

Thus, the interpretation of the phrase "substantially all" as it is used in other sections of the ITA, the ETA and the CBCA is relevant in determining the meaning that should be attributed to the phrase as it appears in sections 149.1 (6.1) and (6.2). This paper will outline the jurisprudence and argue that a more flexible, contextual approach to the interpretation of the phrase "substantially all" is needed.

Income Tax Act Case Law

(a) Current CRA Interpretation of "Substantially All" with regard to registered charities

It is well established that CRA guidance is not determinative of the law. Rather, it should be read as an expression of the CRA's understanding of the law and an indication of how it anticipates administering the relevant provisions. The CRA interprets the phrase "substantially all" in the ITA to mean 90 percent or more.[5] In the context of sections 149.1 (6.1) and (6.2), this means that a charity must devote at least 90 percent of its total resources to charitable activities, and it may devote no more than 10 percent of its resources to political activities.[6] This rule is somewhat relaxed for smaller charities.[7] For charities with annual income less than $50,000, up to 20 percent of their resources may be devoted to political activities. For charities with annual income between $50,000 and $100,000, 15 percent of their resources may be devoted to political activities. Those charities with annual income between $100,000 and $200,000 may devote up to 12% of their resources to political activities.

Limited comment has been made on CRA's 90 percent threshold in charity law jurisprudence, as cases concerning the permissibility of political activity often focus on other issues. For example, in *Action by Christians for the Abolition of Torture v. Canada*, the court explained that the 10 percent limit on incidental and ancillary non-partisan political activities is not prescribed by law, but that the CRA's interpretation was not

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[3] *Halsbury's Laws of Canada, vol 2, Legislation* (Markham, Ont: LexisNexis Canada, 2008) at HLG-82 "Same words, same meaning, different words, different meaning."

[4] *Ibid.*

[5] See, for example: Canada Revenue Agency, Summary Policy CSP-S16, "Substantially All" (3 September 2003); Canada Revenue Agency, Income Tax Folio S1-F1-C2, "Disability Tax Credit" at para. 2.6 (12 September 2014); Canada Revenue Agency, SR&ED Glossary (15 July 2015); Canada Revenue Agency, GST/HST Policy Statement P-053, "Application of all or Substantially all to Residential Complexes" (2 November 1992); Canada Revenue Agency, Interpretation Bulletin IT-497R4 "Overseas Employment Tax Credit" 14 May 2004.

[6] Canada Revenue Agency, Policy Statement CPS-022, "Political Activities" (2 September 2003).

[7] *Ibid.*

disputed in the case at bar.[8] In several other cases, such as *Positive Action Against Pornography v. MNR, Human Life International in Canada Inc. v. MNR,* and *Alliance for Life v. MNR*, the court concluded that the organization engaged in political activity that was not ancillary and incidental to a charitable purpose. The judgments therefore did not need to discuss the meaning of "substantially all", because the political activities of the charities in question were determined to be so prominent as to be purposes in their own right.[9]

While the 10 percent test has not been debated in the charity law context, much has been written about the CRA's interpretation of "substantially all" in case law concerning other sections of the ITA that use the phrase. The following sections of the paper will provide an overview of that jurisprudence.

(b) Automobile Standby Charges: *Income Tax Act* s. 6(2) and s. 248(1)(e)(ii)

When an employer makes an automobile available to an employee for personal use, the employee is considered to have received a taxable benefit under section 6(2) of the ITA. The standby charge benefit may be reduced if the automobile is driven 'primarily' (interpreted by the CRA as more than 50 percent) for business purposes. Prior to 2003, the standby charge could be reduced if the automobile was used "all or substantially all" (interpreted by the CRA as 90 percent or more) for business purposes. A van or pick-up truck used all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income is not considered an automobile under the ITA, and therefore is not subject to the standby charge.[10]

There is a substantial body of jurisprudence concerning these sections of the ITA in which the courts have considered the meaning of the phrase "all or substantially all." They consistently comment on the arbitrariness of the 90 percent interpretation and emphasize the need for a flexible, contextual approach. For example, in *Ilott v. Canada*, Justice Margeson stated:

> The Court is satisfied that even though the departmental assessing policy may be the "90 per cent rule" the cases make it clear that something less than that might be sufficient to meet the Appellants' needs here. Further, the Court is satisfied that no specific quantitative figure can be used in the determination. The Court must look at the use of the trucks in the context of the facts of each individual case and the Court accepts … that clearly the term "all or substantially all" does not lend itself to a simple mathematical formula. Further, it would seem to the Court that any particular definition of "substantially" would be only valid with reference to the specific context in which it is found.[11]

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[8] *Action by Christians for the Abolition of Torture v. Canada*, 2002 FCJ 1768 at para 59, 225 DLR (4th) 99 Decary JA [*ACAT*].

[9] *Positive Action Against Pornography v. Minister of National Revenue*, 1988 FCJ 134, 2 FC 340 Stone J [*Positive Action*]; *Human Life International in Canada Inc. v. Minister of National Revenue*, 1998 FCJ 365, FC 202 Strayer JA [*Human Life International*]; *Alliance for Life v. Minister of National Revenue*, 1999 FCJ 658, FC 504 Stone JA [*Alliance for Life*].

[10] *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s. 248(1).

[11] *Ilott v. Canada*, 2002 TCJ 675 at para 88, DTC 123 Margeson TCJ [*Ilott*].

This view was echoed by Justice Bowman in *Ruhl v. Canada*, where he stated:

> The terms "substantial" or "substantially all" are expressions of some elasticity. It has been said that they are an unsatisfactory medium for carrying the idea of some ascertainable proportion of the whole. They do not require a strictly proportional or quantitative determination.[12]

In *McDonald v. Canada*, Justice Rip accepted this statement by Justice Bowman and concluded that "the words 'substantially all' in the context of paragraph 6(2)(d) need not be interpreted as 90% or more but may be a lesser proportion of the whole depending on the facts."[13] In *547931 Alberta Ltd. v. Canada*, Justice Bowie expressed the view that "if Parliament had intended that 90%, or any other fixed percentage, should govern, then it would have expressed that in the statute, rather than using what is obviously … an expression of some elasticity."[14] In *Keith v. Canada*, Justice Miller stated "the administrative rule of thumb that 90% business use constitutes substantially all must be an elastic not formulaic application."[15] In *Keefe v. Canada*, Justice Sheridan described the CRA's 90 percent interpretation as a "departmental rule of thumb" that does not appear in the legislation itself.[16] He emphasized that "the case law is very clear that what constitutes 'all or substantially all' is a question of fact depending on the circumstances of each case."[17] Similarly, in *Fournier v. R*, Justice Archambault stated "it is important to point out that the Act does not state that 'all or substantially all' corresponds to 90%. The administrative interpretation that establishes this number does not bind the courts, who have mentioned several times that there is no magic number."[18] In *Guignard v. Canada*, Justice Hershfield accepted that "the arbitrary line of 90% should not be cast in stone … and that higher percentages of personal use might be considered as still permitting pro-ration of the standby benefit."[19] In *Pronovost v. Canada*, Justice Bowman stated "the 90% rule used by the CCRA [Canada Customs and Revenue Agency, as it was then called] has no statutory basis although it may be necessary that some sort of rigid criterion be applied administratively. That does not mean that the court must follow it."[20]

This body of case law suggests that the phrase "substantially all" does not connote a specific percentage, but rather must be interpreted based on the particular facts of each case. As a result, the courts in several cases have allowed a reduction in the standby charge where more than 10 percent of the distance travelled in the automobile was for personal purposes. For example, in *Keith v. Canada*, the business travel represented 80.5, 88, and 89 percent of the total kilometres travelled in each of the three years in question.

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[12] *Ruhl v. Canada*, 1997 TCJ 1365 at para 9, GSTC 4 Bowman TCJ [*Ruhl*].

[13] *McDonald v. Canada*, 1998 TCJ 621 at para 22, 98 DTC 2151 Rip TCJ [McDonald].

[14] *547931 Alberta Ltd. v. Canada*, 2003 TCJ 176 at para 7, GSTC 68 Bowie TCJ [*547931 Alberta*].

[15] *Keith v. Canada*, 2004 TCJ 607 at para 14, 1 CTC 2607 Miller TCJ [*Keith*].

[16] *Keefe v. Canada*, 2003 TCJ 654 at para 20, DTC 1526 Sheridan TCJ [*Keefe*].

[17] *Ibid.*

[18] *Fournier v. Canada*, 2004 TCC 786 at para 34, GSTC 159 Archambault TCJ [*Fournier*].

[19] *Guignard v. Canada*, 2002 TCJ 506 at para 21, CTC 2478 Hershfield TCJ [*Guignard*].

[20] *Pronovost v. Canada*, 2003 TCJ 317 at para 20, DTC 720 Bowman TCJ [*Pronovost*].

The court found that this satisfied the "substantially all" requirement.[21] In *Ruhl v. Canada*, the court held that 80 percent business use constituted substantially all of the use of the vehicle.[22] In *Keefe v. Canada*, the court ruled that 81 percent business use qualified under the definition of "substantially all."[23] In *Myrdan Investments Inc. v. Canada*, *Amberhill Collection Inc. v. Canada* and *McDonald v. Canada*, the courts held that 85 percent business use satisfied the substantially all requirement.[24] Finally, in *Seto v. Canada*, the proportion of personal use was 31 percent, yet the court found that, in the circumstances of the case, substantially all of the distance travelled was the result of employment-related activities.[25]

(c) Non-Residents' Taxable Income Earned in Canada: *Income Tax Act* s. 115 and s. 118.94

Section 115 of the ITA contains rules that determine a non-resident person's taxable income earned in Canada. Paragraphs (d), (e) and (f) of subsection 115(1) provide for deductions from the income of non-residents. Paragraph (f) reads:

> (f) where all or substantially all of the non-resident person's income for the year is included in computing his taxable income earned in Canada for the year, such of the other deductions permitted for the purpose of computing taxable income as may reasonably be considered wholly applicable.

In *Wood v. Minister of National Revenue*, the taxpayer, a non-resident of Canada, worked in both Canada and the U.S.[26] In the 1984 taxation year his Canadian income was $30,000 and his U.S. income was $12,500. Pursuant to paragraph 115(1)(f) of the ITA the Minister disallowed the personal exemption claimed by the taxpayer on the ground that not all or substantially all of his income was included in computing his taxable income earned in Canada. On appeal, the court agreed with the Minister that not all or substantially all of the taxpayer's income had been included. In the course of his judgment, Justice Taylor made the following comments about the Minister's interpretation of "substantially all":

> The Minister's rule … is that the Canadian income should be at least 90 per cent of total income — the "90 per cent rule". Obviously that is just a departmental assessing policy, and while arbitrary is undoubtedly a useful and functional mechanism in dealing with a difficult section of the Act. I would think the Minister might be hard-pressed to refuse a claim where the percentage was 89 per cent, maybe even 85 per cent or 80 per cent or lower. … Clearly the term "substantially all" does not lend itself to a simple mathematical formula. Further it would seem to me that any particular definition of "substantially" would be only valid with reference to the specific context in which it is found.[27]

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[21] *Keith*, *supra* note 15.

[22] *Ruhl*, *supra* note 12.

[23] *Keefe*, *supra* note 16.

[24] *Myrdan Investments Inc. v. Canada*, 2013 TCJ 27, DTC 1058 Hogan TCJ [*Myrdan*]; *Amberhill Collection Inc. v. Canada*, 2009 TCJ 37, GSTC 14 Sheridan TCJ [*Amberhill*]; *McDonald*, *supra* note 13.

[25] *Seto v. Canada*, 2007 TCJ 336, DTC 1647 Campbell TCJ [*Seto*].

[26] *Wood v. Minister of National Revenue*, 1987 DTC 312 Taylor TCJ [*Wood*].

[27] *Ibid.* at para 5.

Similarly, in *Watts v. Canada*, the court had to decide whether substantially all of the appellant's income had been included in computing his taxable income earned in Canada in accordance with section 118.94 of the ITA, which reads as follows[28]:

> Sections 118 and 118.2, subsections 118.3(2) and (3) and sections 118.6, 118.8 and 118.9 do not apply for the purpose of computing the tax payable under this Part for a taxation year by an individual who at no time in the year is resident in Canada unless all or substantially all of the individual's income for the year is included in computing the individual's taxable income earned in Canada for the year.[29]

The appellant was receiving disability benefits from two sources – the Canada Pension Plan (CPP) and the Public Service Management Insurance Plan (PSMIP). The court concluded that the CPP benefits were not taxable benefits under the ITA, and therefore had to decide whether the PSMIP benefits constituted substantially all of the appellant's income. The benefits received from PSMIP made up 81, 77 and 76 percent of the appellant's income for the years 1992, 1993, and 1994 respectively. The court concluded that the difference between 81, 77 and 76 percent was not significant enough to warrant a different treatment in the three years, and that, in the circumstances, these amounts represented substantially all of the appellant's income. In the course of his judgment, Justice Bowman stated:

> I think it would be absurd to conclude that the appellant's rights under the Income Tax Act should depend on the assignment of an arbitrary percentage to the words "all or substantially all". This mechanical exercise runs counter to common sense … There are many cases in this Court that have considered the meaning of "all or substantially all". They consistently comment on the elasticity and ambiguity of the expression and on the inadvisability of using an arbitrary percentage, such as 90%.[30]

(d) Other *Income Tax Act* Case Law

In *Manac Inc. v. Canada*, the court discussed the phrase "substantially all" in the context of section 111(5)(a)(ii), which reads[31]:

> … if properties were sold, leased, rented or developed or services rendered in the course of carrying on that business before that time, any other business substantially all the income of which was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the rendering of similar services…[32]

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[28] *Watts v. Canada*, 2004 TCJ 423, DTC 3111 Bowman TCJ [*Watts*].

[29] *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s. 118.94.

[30] *Watts*, *supra* note 28 at paras 30-33.

[31] *Manac Inc. v. Canada*, 1995 TCJ 1563, 96 DTC 1714 St-Onge TCJ [*Manac*].

[32] *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s. 111(5)(a)(ii).

The court described the CRA's 90 percent test as "arbitrary" and stated that the meaning of "substantially all" may vary depending on the particular circumstances of the case.[33]

In *Sarkar v. Canada*, the Minister had denied the appellant's claim for disability tax credits.[34] Section 118.4(1)(b) of the ITA reads:

> an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living[35]

Justice Sarchuk, in attempting to add clarity to the phrase "all or substantially all," stated:

> "All or substantially all" is not defined. However, "all" means everything. And when you say "all", without modification, it simply means everything ... "Substantially", which is used in that phrase as a modifier means, in substance, or substantially, or in the main. There is no mathematical formula by which one can determine what "substantially all" might be, but in my view it means almost all or essentially all of the time.[36]

In *Noseworthy v. Canada,* another case concerning section 118.4(1)(b) of the ITA, Justice Bowman agreed with Justice Sarchuk that "substantially all" is a term of some elasticity that generally means "almost all of the time."[37]

In *Imapro Corporation v. Canada*, the court considered the phrase "all or substantially all" in the context of section 37(7)(c)(ii)(A).[38] Sections 37(1) (a) and (b) of the ITA permit a taxpayer carrying on business in Canada to deduct current and capital expenditures on scientific research and experimental development (SR&ED) activities in certain circumstances.[39] Section 37(7)(c)(ii)(A) defines SR&ED expenditures as:

> expenditures incurred all or substantially all of which are attributable or directly attributable to the prosecution or the provision of premises, facilities or equipment for the prosecution of SR&ED[40]....

The court accepted that the phrase "all or substantially all" does not lend itself to any mathematical formula, and that some leeway is therefore permitted in the 90 percent rule.[41] However, in the particular circumstances of the case, the expenditures did not qualify, even using a flexible approach, because less than 50 percent of the costs were incurred in relation to SR&ED.

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[33] *Manac*, *supra* note 31 at para 61.

[34] *Sarkar v. Canada*, 1995 TCJ 669 Sarchuk TCJ [*Sarkar*].

[35] *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s. 118.4(1)(b).

[36] *Sarkar*, supra note 34 at paras 19-20.

[37] *Noseworthy v. Canada*, 1996 TCJ 59 at para 3, 2 CTC 2006 Bowman TCJ [*Noseworthy*].

[38] *Imapro Corp v. Canada*, 1992 FCJ 873, DTC 6487 McGillis J [*Imapro*].

[39] *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s. 37(1)(a) and (b).

[40] *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s. 37(7)(c)(ii)(A).

[41] *Imapro*, *supra* note 38 at para 36.

In sum, there is a substantial body of case law concerning various sections of the ITA that has considered the phrase "all or substantially all." The judgments consistently comment on the arbitrariness of the CRA's 90 percent rule and the inadvisability of using a mathematical formula. Rather, the cases emphasize the importance of considering the particular context of the case and highlight the need for a flexible approach. In practice, this has meant that amounts constituting much less than 90 percent have been accepted as being "substantially all."

The following two sections examine judicial consideration of the phrase "substantially all" as it appears in various sections of the *Excise Tax Act* (ETA) and the *Canada Business Corporations Act* (CBCA).

Other Case Law

(a) *Excise Tax Act* Case Law

Under section 218 of the ETA, the recipient of an imported taxable supply is required to pay tax on the value of the consideration for the supply.[42] An imported taxable supply is defined in section 217 of the ETA as the taxable supply of a service or intangible personal property made outside Canada to a person who is resident in Canada, other than a supply of a service or property that is acquired for consumption, use or supply exclusively in the course of commercial activities of the person residing in Canada.[43] The term "exclusive" is defined in section 123 of the ETA as meaning all or substantially all of the consumption, use or supply of a property or a service.[44]

In *Reluxicorp Inc. v. Canada*, the taxpayer was the owner of a Montreal hotel operating under the name "Residence Inn by Marriott."[45] Pursuant to a franchise agreement with Marriott Worldwide Corporation, Reluxicorp made various payments to Marriott for the right to use the "Residence Inn by Marriott" banner; for Marriott's marketing services; and for the use of Marriott's reservation and invoicing systems, other software and hardware, customer loyalty rewards program, and travel agency services. The primary issue in the case was whether GST was payable under section 218 of the ETA on these payments. Marriott was a non-resident of Canada that was not registered for GST. Reluxicorp earned both GST-taxable revenues from short-term stays less than 30 days and exempt revenues from long-term accommodation for a period of at least one month. Reluxicorp felt that the franchise agreement had no connection to its supply of long-term accommodation, but rather only facilitated its supply of short-term accommodation. In 2007, 74.83 percent of reservations for long-term stays were made by the hotel's central management in Montreal, with no involvement from Marriott.

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[42] *Excise Tax Act*, RSC 1985, c. E-15, s. 218.

[43] *Ibid.* s. 217

[44] *Ibid.* s. 123.

[45] *Reluxicorp Inc. v. Canada*, 2011 TCJ 265, GSTC 105 Lamarre TCJ [*Reluxicorp*].

The court concluded that the payments to Marriott constituted consideration for an imported taxable supply, as the rights to use the "Residence Inn by Marriott" banner and associated services were not acquired for consumption, use or supply exclusively (i.e., all or substantially all) in the course of Reluxicorp's commercial activities. The court considered the fact that 25.17 percent of the imported taxable supplies related to exempt activities and held that 74.83 percent does not constitute "all or substantially all." In reaching this conclusion, the court emphasized that the meaning accorded to the phrase must depend on the particular facts of the case, but that the threshold cannot be less than 75 percent:

> … the meaning to be given to the expression "all or substantially all" must be left to the discretion of the trier of fact, to decide as best he or she can according to the circumstances of each case. In this case, internal management in Montréal made 74.83% of the reservations for long-term stays for 2007. We do not have the figures for the preceding years, which would certainly have helped. In *Watts*, above, Justice Bowman knew the percentages for each of the three years and took care to say that the difference between 81% and 76% was not large enough to warrant a different treatment. Would his decision have been the same if the cap of 80% had not been reached in any of the years? In my opinion, there is a limit to be observed. Parliament used the expression "all or substantially all", which means, in my view, that the figure must be closer to the totality than half-way between the majority and the totality.[46]

In *Lim v. Canada*, the Minister had denied the taxpayer's application for a housing rebate under section 256 of the ETA on the grounds that the application was made too late.[47] Under section 256(3), the application for the rebate must be filed on or before the day that is two years after the earliest of:

> (i) the day that is two years after the day on which the complex is first occupied…
>
> (ii) the day on which ownership is transferred…
>
> (iii) the day on which construction or substantial renovation of the complex is substantially completed[48]….

The Minister maintained that Lim had substantially completed the house in April 1995, more than two years before the application was filed, whereas Lim argued that the house was not substantially completed until December 1995. In reaching its decision, the court engaged in a discussion of the meaning of "substantially":

> The words "substantial" or "substantially" appear in a number of statutes, including the Income Tax Act and mechanics' lien statutes of the provinces. They have been the subject of a certain amount of judicial commentary. Their meaning in a particular statute has often occasioned some difficulty. The terms are somewhat flexible and relative, and their meaning is derived from the context in which they are used and the facts of the particular case. … The Department of National Revenue uses the percentage of 90% as a test to determine substantial completion. As an administrative rule of thumb it may well

[46] *Ibid.* at para 29.

[47] *Lim v. Canada*, 2000 TCJ 4, GSTC 1 Bowman TCJ [*Lim*].

[48] *Excise Tax Act*, RSC 1985, c. E-15, s. 256.

> be a commendable attempt to add some precision to an imprecise concept, but it is difficult to apply in practice.[49]

These cases again highlight that the meaning of "substantially all" can vary and should be determined on a case-by-case basis.

(b) *Canada Business Corporations Act* Case Law

Section 189(3) of the *Canada Business Corporations Act* (CBCA) states:

> A sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (4) to (8).[50]

A number of cases have considered the meaning of the phrase "substantially all" in the context of section 189(3) of the CBCA. The judgments consistently emphasize the importance of taking into consideration the particular circumstances of the case and caution against using a strict quantitative test. For example, *in GATX Corp. v. Hawker Siddeley Canada Inc*., Justice Blair stated:

> In determining whether a sale involves "substantially all" of the assets of a corporation, the Courts have tended to look beyond a mere quantitative test. That is, the exercise requires more than simply comparing the value of the asset in question with the total value of the corporation's assets and deciding where the resultant percentage crosses the line and becomes "substantially all" of the assets. Rather, the Courts will look at the relationship between the asset in question and the nature of the company's operations as a whole, taking into account the quantitative aspects of the case in the process but trying to determine on an overall basis whether the sale will have the effect of fundamentally changing or destroying the nature of the corporation's business because "it is a sale of a part of the business so integral as to be essential for the transaction of its ordinary day-to-day business."[51]

In *Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd.*, the court highlighted the importance of using both a quantitative and qualitative test.[52] Justice Cronk described the qualitative test as follows:

> A qualitative analysis seeks to determine the nature of a transferor's core business activities, and the property involved in carrying out such activities. The purpose of the inquiry is to assess whether the transferred property is integral to the transferor's traditional business, such that its disposition or transfer strikes at the heart of the transferor's existence and primary corporate purpose.[53]

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[49] *Lim*, *supra* note 47 at paras 11-13.

[50] *Canada Business Corporations Act,* RSC 1985, c. C-44, s. 189(3).

[51] *GATX Corp. v. Hawker Siddeley Canada Inc.*, 1996 OJ 1462 at para 81, 27 BLR (2d) 251 Blair J [*GATX*].

[52] *Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd*, 2002 OJ 2125, 214 DLR (4th) 121 Cronk JA [*CBC*].

[53] *Ibid.* at para 46.

He went on to stress that "the meaning of 'all or substantially all' is context-dependent, and does not lend itself to simple arithmetic calculations."[54]

In *85956 Holdings Ltd. v. Fayerman Brothers Ltd*., the appellant company sold 64 percent of its assets.[55] The court noted that if it were to examine the sale from a purely quantitative perspective, this would not constitute 'substantially all' of the company's assets. However, the court rejected a quantitative test in favour of a qualitative test. Justice Vancise concluded that, because the sale had the effect of fundamentally changing the nature of the business, it was a sale of substantially all the assets.

Similarly, in *Cogeco Cable Inc. v. CFCF Inc*., the court emphasized the need for a qualitative analysis in determining whether substantially all of a corporation's assets have been sold.[56] Justice Halperin made three important observations about the "substantially all" test:

> 1) Statutory language notwithstanding, the literal interpretation of the expression yields if not entirely, at least to a very considerable degree to the qualitative test. This approach derives from the generally understood legislative intention underlying this provision.
>
> 2) The "substantially all" test is met when the assets which remain are essentially trivial in importance and value, most especially when operating assets have been disposed of.
>
> 3) Whatever the test, the issue is whether the proposed sale strikes at the heart of the corporate existence and purpose of the company, whether it effectively destroys the corporate business or whether it produces a fundamental change in the corporation.[57]

These cases suggest that the phrase "substantially all" should not be defined on the basis of any fixed percentage. Rather, something is substantial if it is fundamental to the core of an organization. To determine this, the particular facts of the case must be taken into consideration.

(c) International Case Law

Courts in other jurisdictions have also highlighted the need for a contextual, flexible approach in determining the meaning of "substantial." For example, in the British House of Lords case *Palser v. Grinling*, Viscount Simon engaged in a discussion of the phrase "substantial portion," which appeared in the *Rent and Mortgage Interest Restrictions Act*, 1923:

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[54] *Ibid.* at para 48.

[55] *85956 Holdings Ltd. v. Fayerman Brothers Ltd,* 1986 SJ 15, 25 DLR (4th) 119 Vancise JA [*Fayerman Brothers*].

[56] *Cogeco Cable Inc. v. CFCF Inc.*, 1996 QJ 7 Halperin J [*Cogeco*].

[57] *Ibid.* at para 40.

> …it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case … If Parliament thinks fit to amend the statute by fixing percentages, Parliament will do so. Aristotle long ago pointed out that the degree of precision that is attainable depends on the subject matter. There is no reason for the House to differ from the conclusion reached in these two cases that the portion was not substantial, but this conclusion is justified by the view taken on the facts, not by laying down percentages of general application.[58]

Similarly, in the Australian case *A.E. Terry's Motors Ltd. v. Rinder*, the court emphasized that the meaning of the word "substantial" will vary according to the circumstances:

> "Substantial" is not a word with a fixed meaning in all contexts. … Used in a comparative setting, "a substantial part" as against "the remaining part", it suggests a dichotomy into the substantial part, and the not-substantial, a contrast, according to cubic contents, or area, between the greater and the less, as between the essential and the subordinate or incidental. In his satiric view of the modern use of language entitled What a Word, A P Herbert treats "substantial" in a quantitative sense, as the modern colloquial equivalent of "much" or even "some". It is an unsatisfactory medium for carrying the idea of some ascertainable proportion of the whole.[59]

Like the Canadian jurisprudence, these international cases reject a quantitative interpretation of "substantial" in favour of a qualitative approach that takes into account the context in each case.

Conclusions & Issues for Further Considerations

While it is important for the CRA to disclose its view on the meaning of "all or substantially all" in order to provide charities and the public with guidance, its current assertion of an interpretation of this provision as connoting 90 percent or more is not in keeping with the case law. In discussing the phrase "substantially all" as it appears in various sections of the ITA, ETA, CBCA and statutes in foreign jurisdictions, the courts have consistently stated that a flexible approach is needed, and that the meaning will vary depending on the context. Rather than assigning an arbitrary percentage to the phrase, the courts have taken a more qualitative approach by looking at the particular facts of the case. In practice, this has meant that much less than 90 percent has frequently been held to be "substantially all."

In addition to being inconsistent with the case law, the CRA's 90 percent test is difficult to apply in practice and may be misleading in its portrayal of the relative importance of the various activities undertaken by the charity. Sections 149.1 (6.1) and (6.2) of the ITA are framed with respect to "resources." While the term "resources" is not defined in the Act, the CRA considers it to include "the total of a charity's financial assets, as well as everything the charity can use to further its purposes, such as its staff, volunteers, directors, and its premises and equipment."[60]

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[58] *Palser v. Grinling*, 1948 AC 291 at pages 316-317.

[59] *A.E. Terry's Motors Ltd. v. Rinder*, 1948 SASR 167.

[60] Canada Revenue Agency, Policy Statement CPS-022, "Political Activities" (2 September 2003).

Taking this broad interpretation for purposes of determining compliance with the ITA political activities provisions distorts assessment of the charity's other work. Typically, when resources are allocated to areas other than "political activities," non-pecuniary transactions are ignored or at least unreported on financial statements. So employing the broader definition used for political activities will generally understate the charity's work in other areas.

Moreover, the use of some resources may be virtually unquantifiable or quantifiable in a variety of different ways. For example, how does one put a value on the executive director of a charity calling for action on a government policy in passing while giving a speech on other matters? Is that activity quantified against the executive director's other speaking activity (i.e., is it less than 10 percent of his or her speaking time and resource allocation to speaking), measured against all speeches given by representatives of the charity or is it assessed against all the charity's other activities? If it is assessed against speeches, how are factors like rank within the charity of the speaker, size of audience and the percentage of the speech devoted to the criticism to be accounted for? If it is against all other activities, how are the non-pecuniary aspects of those activities to be quantified?

Political activity by volunteers raises even more quantification issues. Should we value all volunteers at the same rate? If not, at what rate and why? Should the rate be calculated depending on the kind of activity? What if volunteers participate in a demonstration of their own will, but have gained a public profile through being associated with the charity or are prominently associated with the charity's work?

The better view may be that, given that the ITA's purpose is fiscal, the CRA should not concern itself with non-partisan political activities unless they involve expenditure of funds or involve the devotion of resources (e.g., providing a meeting space) in regard to which the charity incurs costs. The amounts in issue could then be determined based on records of actual expenditure or accounting attributions of incurred or imputed resource costs. Adopting such an approach would entail a change in CRA's current interpretation of the term "resources," but would provide more clarity for both charities and the regulator.

Further, it should be open to a registered charity to choose how it calculates its expenditures on political activities, as long as the method is reasonable and consistent. This would provide some certainty to charities while still allowing a flexible, contextual approach to be taken.

Additionally, in order to better bring its policy in line with the case law, one option for the CRA is to introduce in its guidance and administration of the provisions a 'safe harbour' approach whereby a charity is considered 'safe' if it spends a set amount (as now, 10, 12.5 or 15 percent based on the charity's annual income) of its resources or less on non-partisan political activities. If a charity spent more than the specified percent of its resources on such activities, it could still make an argument that, in the circumstances, it is spending substantially all its resources on charitable work, that its political activities are non-partisan and do not constitute a purpose of the organization.

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