Speech

Thoughts on Charity as a "Moving Subject" in Australia and Canada

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The Pemsel Case
FOUNDATION

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

About Us

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.

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The following text is from a speech by Susan Pascoe, the Commissioner of the Australian Charities and Not-for-profits Commission (ACNC), delivered to the Board of Directors of The Pemsel's Case Foundation in October 2016. Murray Baird, Assistant Commissioner and ACNC General Counsel, contributed to the drafting of the text.

1. Introduction

Thank you for the hospitality and fellowship of The Pemsel Case Foundation of Canada.

Australia and Canada share a common heritage and debt to Lord MacNaughten for defining that indefinable concept "charity", whilst leaving open the possibility of new examples of qualifying purposes to take into account contemporary needs. As Lord Wilberforce put it and as is reflected in your motto, "the law of charity is a moving subject".[1]

2. Is *Pemsel* good law in Australia?

Commissioners for Special Purposes of *Income Tax v. Pemsel* [2] (*Pemsel*) eventually took root in Australia in soil prepared by the *Australian Courts Act 1828*,[3] which provided that the Laws of England "shall be applied" to New South Wales and Van Dieman's Land (now the beautiful island of Tasmania). Other Australian colonies adopted other dates for reception of English Law.

The Australian Federation in 1901, opened the way for the common law of Australia to be declared by the High Court with appeals to the Privy Council (in England), which were progressively abolished in the 1970's and 1980's.

However this process of abolition of appeals to England was not completed before the Privy Council had its say on the application of *Pemsel* in Australia. The case, from the 1920's, was *Chesterman v. Federal Commissioner of Taxation*,[4] in which a majority of the High Court of Australia held that where a tax statute exempted charitable purposes from estate duty, that expression was not to be taken in a technical legal sense but in the popular sense meaning the relief of necessitous circumstances.

The Privy Council gave this view short shrift on appeal.

In approaching this question, Lord Wrenbury declared, that the starting-point is found in *Pemsel*'s case:

> In construing Acts of Parliament, it is a general rule … that words must be taken in their legal sense unless a contrary intention appears.[5]

Thus this potential revolt by the colonial judges in Australia was put down.

3. Testing the boundaries of Charity

The story is told in Australia of the bragging Texan boasting of the extent of his ranch. "I can get on a horse and ride for 3 days and still not get around my boundary fences". The Australian replies: "I know what you mean. I had a horse like that once". Charity – unlike ranches in the U.S. or Australia – has never been immeasurably expansive.

However, like you, we have had a few cases where appeal courts have had opportunity to test the theoretically porous boundaries of charity. Government, sport, commercial activities and advocacy have been some of the fences around the charity arena in the past. The first decade of this millennium was a golden age for Australian charity law, when each of these fences was tested and the boundaries were expanded from conventional or a least tax office understandings. In all cases, *Pemsel*'s approach was confirmed.

For instance, in 2006, in the case of *Central Bayside General Practice Association Limited v Commissioner of State Revenue*,[6] the question of Government involvement and control was tested. Justice Michael Kirby, somewhat of a maverick on our High Court, asked in a decision concurring with the majority whether it is permissible to question the assumption (made by the parties) that the word charitable as found in the legislation is to be given its technical or legal meaning by analogy to the Statute of Elizabeth, in accordance with *Pemsel*?

In tantalising and titillating exposition on that question, he said:

> If Judges do not question doubtful assumptions about the law, they will just go on sheep like repeating legal mistakes inherited from past generations.[7]

Later, he continues:

> …it defies commonsense and ordinary intuition to suggest that the understanding by the Victorian Parliament, in the context of a 1992 amendment inserting the phase "charitable body" in the law, would necessarily be the same as the understanding of that phrase in England when Pemsel was decided in 1891. Even more so, it seems unlikely that the phrase would have had identical meaning in the social circumstances of England in 1601 when the preamble to the Statute of Elizabeth was drawn up. There is no reference in *Pemsel* or in the Preamble to the many considerations that might be apt to embody the meaning of a "charitable body" in contemporary Australian society. For example, there is no mention of the defence of fundamental human rights and human dignity; the maintenance of the benefits of science and technology; the protection of refugees and other vulnerable persons; the need for specific assistance for indigenous peoples; the protection of the welfare of animals; the advancement of culture, arts and heritage; the defence of the environment and so forth. To impose rigid categories derived from an English statute of the early 17th century (re-endorsed in 1891 at an historical moment when unity of the common law throughout the British Empire was thought essential) seems arguably incompatible with this Court's duty to adopt a purposive interpretation of legislation enacted by and Australian legislature. [8]

You may be pleased to hear that he cited your courts with approval:

> In Canada the defects of the Pemsel categories were noted by the majority of the Supreme Court in the *Immigrant and Visible Minority Women* case.
>
> …they noted "repeated calls for the expansion or replacement of the test to reflect more completely the standards and values of modern Canadian society". They endorsed remarks of Strayer JA in *Human Life International in Canada Inc v MNR* to the effect that the definition of charity remains "an area crying out for clarification though Canadian legislation for the guidance of taxpayers, administrators, and the courts". The majority in the Supreme Court observed that "[i]n the absence of legislative reform, Canadian courts must contend with the difficulty of articulating how the law of charities is to keep 'moving' in a manner that is consistent with the nature of the common law.[9]

He further suggested:

> In light of the criticism that has been directed at *Pemsel*, both in Australia and in other common law countries, it is by no means self-evident that *Pemsel* provides the starting point for defining the word "charitable".[10]

He goes on to give 6 reasons why *Pemsel*'s case should, despite his misgivings, be followed and concludes: "I am content to follow past authority and to treat the reference to "charitable body" as a reference to such a body defined in the *Pemsel* sense".

But, he remarks,

> The result is odd and the consequential meaning of "charitable" is derived in such a very strange way that I venture to suggest that few citizens know of it and most lay persons, when told, would find it astonishing.[11]

4. Charities Act 2013

More recently any antipodean doubts about *Pemsel* in Australia were swept away by the Preamble to the *Charities Act 2013*, which states:

> The Parliament of Australia recognises the unique nature and diversity of charities and the distinctive and important role that they play in Australia.
>
> Until now, the meaning of charity in Commonwealth law has largely been that of the common law, based on the preamble to the Statute of Charitable Uses 1601.
>
> Modern, comprehensive, statutory definitions of charity and charitable purpose, applying for the purposes of all Commonwealth law and ensuring continuity by utilising familiar concepts from the common law, will provide clarity and certainty as to the meaning of those concepts in contemporary Australia.[12]

Lord MacNaughten's four categories have been exploded into 12 sub-types of charities. All taken, by analogy, from the Statute of Elizabeth. Human rights, reconciliation and advancing the natural environment being some of the sub types not fully articulated in *Pemsel.* Some familiar words from Lord MacNaughten appear towards the end of the list of charitable purposes:

any other purpose beneficial to the general public that may reasonably regarded as analogous to, or in the spirit of the preceding purposes. [13]

5. Conclusion

Thus the genius of the common law to adapt to evolving circumstances by analogy is preserved and with Lord Wilberforce we can continue to say, in Australia, as in Canada, "the law of charity is a moving subject".

Endnotes

[1] *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corporation*, [1968] A.C. 138 at p. 154.

[2] *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531

[3] *Australian Courts Act 1828*, 9 Geo 4 c 83.

[4] *Chesterman* v. *Federal Commissioner of Taxation*, (1923) 32 C.L.R. 362.

[5] *Chesterman* v. *Federal Commissioner of Taxation*, (1925) 37 C.L.R. 317 at p. 319.

[6] *Central Bayside General Practice Association Limited v Commissioner of State Revenue* [2006] HCA 43 .

[7] *Ibid*. at para. 80.

[8] *Ibid*. at para. 90.

[9] *Ibid*. at para. 100.

[10] *Ibid*. at para. 118.

[11] *Ibid*.

[12] Charities Act 2013, No. 100, 2013

[13] Lord MacNaughten: "trusts for other purposes beneficial to the community, not falling under any of the preceding heads" s*upra,* note 2 at p. 583.

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