

Commentary

Case Comment: *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*

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"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.



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1. Introduction

The recent Ontario Court of Appeal (OCA) decision, *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*¹ (*FTPC*) tackles and poses several unique problems. The case embodies a trend in Canadian law of taking an overly cautious approach to determining what qualifies as charity, and to downplaying common law considerations in making this determination. The mix of the legal forms of trusts and corporations within the world of Canadian charities and non-profit organizations has long given rise to challenges. *FTPC* further muddies these and other waters. Regrettably, the essence of why we have charity law is not canvassed in the case, and the decision turns on secondary questions.

This case comment will examine the *FTPC* decision, critique some aspects of the reasoning and discuss the wider implications for the charitable and non-profit sector of certain of the holdings.

2. Jurisdictional Issues

Jurisdiction over charity law matters in Canada is complicated. In most instances, the default regulator is the Canada Revenue Agency (CRA), which under the federal *Income Tax Act*² (*ITA*), has the authority to determine whether a corporation, trust or unincorporated association qualifies as a registered charity. Regardless of whether it enjoys this status and the accompanying exemption from tax on income and ability to issue tax receipts for donations a trust, corporation or unincorporated association may still be a charity at common law. This determination is a matter of provincial jurisdiction. In some cases, provinces have enacted legislation to codify or modify the common law for purposes of provincial statutes. Ontario's *Charities Accounting Act*³ (*CAA*), which was considered in *FTPC*, is one such statute.

Federally, under the *ITA*, an entity that is not a registered charity in the opinion of the Minister can potentially qualify as exempt from tax on its income under various other provisions. The most common of these is the s. 149 (1)(l) provision establishing the criteria to be a non-profit organization. If it does not satisfy the requirements of any of these provisions, an entity is subject to tax on its income.

In *FTPC* all these considerations are at play.

3. Applicability of the Decision

Because of the complexity of the legal framework in this context an overarching question is the scope of the applicability of the decision, particularly those aspects of *FTPC* dealing with the charitability of the

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¹ 2020 ONCA 282.

² R.S.C., 1985, c. 1 (5th Supp.), as amended.

³ R.S.O. 1990, Chapter C.10.

Mount Pleasant Group of Cemeteries (MPGC) and with respect to the potential for a statutory trust to also be a charity.

Cases that delve into the charitability of corporations, trusts and unincorporated associations occur at both the federal and provincial levels in Canada. Recently a successful Ontario Superior Court of Justice provincial proceeding⁴, brought based on an assertion that federal tax legislation governing registered charities was a violation of the *Canadian Charter of Rights and Freedoms*⁵, prompted a change in the *ITA* provisions⁶ in that area. However, federal regulatory authorities have not in practice routinely heeded provincial decisions concerning charitability.

The decision in *Re Laidlaw Foundation*⁷(*Laidlaw*), in which a provincial Divisional Court held an organization charitable for purposes of Ontario law, did not lead to recognition of the organization as a registered charity federally. The CRA takes the position that the *Laidlaw* case turned on the statutory provisions in the *CAA*, and therefore had no application at the federal level. There do not appear to be cases where federal application of provincial decisions on definition of charity has been tested.

Leaving aside the federal-provincial question, the *FTPC* was based on 1) a singular legal structure, entailing both a statutory trust and a provincial corporation; 2) the effect on the trust and the corporation of changes in Ontario legislation over time; and, 3) organizational purposes and activities that were driven by specific geographic and cultural circumstances. Consideration of charity law concerns in the case was in this distinctive context.

Accordingly, the better view is that the statements on charity law in the case were not part of the *ratio decidendi* and at most are brief and incomplete *obiter* comments. Even in Ontario, their application, if any, beyond *FTPC* should be very narrow.

4. Summary of the Facts of the Case

FTPC concerned the Mount Pleasant Group of Cemeteries (MPGC) in Toronto and examined certain governance issues with respect to MPGC and its predecessor bodies. These included a statutory trust established in 1826, which was modified by legislation at various times during the ensuing nearly two centuries. It was asserted that at certain points in time the process for selecting and installing successor members of the governing body of the organization was not lawful. The original trust was established to oversee and manage non-denominational cemetery services in and around what is now Toronto. The legislative modifications included a corporation being constituted as the governing structure for the trust. As well as the governance questions, the proceeding dealt with whether the MPGC was a charity, and whether it should be subject to an investigation by the province's Public Guardian and Trustee (PGT) under Ontario's *CAA*. The case was initiated by a neighbourhood community group and an individual concerned with allegedly flawed governance and decisions of the MPGC, and possible PGT jurisdiction with respect to MPGC under the *CAA* was raised in their application. The reasons given by the Court in finding that MPGC was not a charity are the primary focus of this case comment.

⁴ *Canada Without Poverty v. AG Canada*, 2018 ONSC 4147.

⁵ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁶ Bill C-86, *Budget Implementation Act, 2018*, No. 2.

⁷ 13 DLR (4th) 491.

5. Analysis

The observations below on the substantive issues in *FTPC* are organized in keeping with the structuring of the issues found in the case. Additional comments are made on the reasoning in the decision and broader charity law jurisprudence in Canada, and on the practical implications of the case.

Issue 1

Did the application judge err in his interpretation of the 1871 Act?

As described and decided, this issue does not have any effect on the charity law matters that are the focus of this comment.

Issue 2

Are the visitation centre funeral home outside of MPGC's legislative objects?

The OCA found that the visitation centre, funeral home and crematoria were within the legislative objects of the organization. In essence, they were ancillary services offered in keeping with contemporary practice and were in furtherance of the better management of the trust (wording rooted in the governing legislation).

This accords with the case law, which suggests that none of these initiatives would have precluded the organizational purposes being charitable. However, had the Court found that the additional activities were outside the objects of the trust or the corporation, this may have affected the charitable status of the organization under Ontario or federal law. Acting *ultra vires* its objects could disqualify an organization from being a charity either for *ITA* registered charity status or under the Ontario *CAA*. So, the organization acting within its authority would have been of concern to the Canada Revenue Agency Charities Directorate or the PGT.⁸

Issue 3

Is MPGC a charitable purpose trust?

Meaning of charity in Canada

Under this issue, the OCA examined whether MPGC, as a statutory purpose trust, can also be a charitable purpose trust (under the “other purposes beneficial to the community” head). As such it would fall within the scope of the *CAA* and an investigation under that legislation could potentially be triggered.

The legal concept of charity originates in common law as preferential treatment of certain purposes because advancement of those purposes results in public benefit. Embedded in this common law concept is a role for Attorneys General and the courts in determining what constitutes charity and in

⁸ The contrary view, sometimes expressed as “once a charity, always a charity”, holds that acting *ultra vires* does not necessarily taint an entity's ability to qualify as a charity. See M. Syge, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Bloomsbury, 2015).

overseeing charities.

Though often neglected in the jurisprudence this ought to be the starting point for analysis. Unfortunately, what often happens is that discussion focuses on what are, at best, secondary questions. It is argued here that is what happened in *FTPC*. In the OCA decision the questions at play were fiscal and tax consequences, compatibility of charity and statutory trusts and administrative determinations of *ITA* provisions, and they overshadowed the common law considerations in which charity law is grounded. The type of analysis seen in *FTPC* contributes to the glacial development of Canadian charity law and to much uncertainty in the law.

FTPC references *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*⁹ (*Vancouver Society*) as setting out the test for what qualifies as a charity in Canada. With respect, it is submitted that *FTPC* neither provides an adequately nuanced understanding of *Vancouver Society* nor properly applies the criteria set out in that case to determine whether an organization qualifies.

In his *FTPC* analysis of what is a charity in Canada, Pepall, J.A. cites Rothstein, J's explanation in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*¹⁰ (*A.Y.S.A.*) of the charitability test laid out by Iacobucci, J in *Vancouver Society*.¹¹ That test relies on the Preamble to the Statute of Elizabeth, *Commissioners for Special Purposes of the Income Tax v. Pemsel*¹² (*Pemsel*), and the trend of common law cases in recognizing analogous purposes to the purpose(s) of the organization under consideration. However, that test applies for fourth head purposes — the catchall *Pemsel* category for miscellaneous purposes that do not advance religion, advance education or relieve poverty. If the case were to be decided under advancement of religion, the test would be different. In his dissent in *Vancouver Society*, Gonthier, J. found the purpose in question in that case furthered one of the major *Pemsel* heads — advancement of education — and was, therefore, *prima facie*, charitable.¹³

In *FTPC* the purpose was described as “non-denominational”. It is argued here that this term is not intended to mean strictly secular, but rather is used to describe an organization that is not affiliated with a specific denomination. This is important because an organization that is open to all denominations (or to clients without a religious affiliation), could potentially be brought under the advancement of religion head identified in *Pemsel*. As such, the organization would be, based on Gonthier's position in *Vancouver Society*, *prima facie* a charity. It is well-established that purposes for cemeteries or burial, even when they entail fee-paying, are charitable at common law.¹⁴ This dates back to the *Preamble of the Statute of Elizabeth*, which referenced support for the repair of churches,¹⁵ a purpose that has since been extended by analogy. In the alternative, non-denominational cemeteries have also been held to be charitable.¹⁶

⁹ *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10.

¹⁰ 2007 SCC 42 (CanLII), [2007] 3 SCR 217.

¹¹ *Supra* note 9 at para. 172.

¹² [1891] A.C. 531.

¹³ *Ibid* at para. 79.

¹⁴ See *Re Oldfield Estate (No. 2)*, [1949] 2 D.L.R. 175 (Man. K.B.) and *Scottish Burial Reform and Cremation Society v. Glasgow Corp.*, [1967] 3 W.L.R. 1132 (H.L. Scotland). The Charity Commission for England and Wales registry lists hundreds of charities with “cemetery” or “burial” in their name. The Australian Charities and Not-for-profits Commission registry includes about 40.

¹⁵ *Charitable Uses Act, 1601* (Eng.), 43 Eliz. 1, c. 4 (*Statute of Elizabeth* or *Statute of Charitable Uses*), preamble.

¹⁶ The Canada Revenue Agency Charities Directorate Guidance on Cemeteries recognizes that to “maintain a cemetery or operate a crematory can qualify for registration as a charity” under the “other purposes beneficial to the community in a way the law regards as

As well, the decision conflates the number of cases, with the trend in the cases related to a purpose.¹⁷ The test requires that the Court look at the trajectory of common law cases, not merely quantify the number of cases. Quantification is in keeping with the conservatism of Canadian jurisprudence in this area discussed below. However, looking at the number of cases, rather than the substance of the cases, inadequate consideration is given to the cost of judicial proceedings and the role of regulatory bodies in administratively dealing with charity definitional issues.¹⁸

Fiscal consequences of charitable status

Pepall, J comments on the fiscal consequences of affording an organization charitable status. It is conceded that this factor has been a key influence on Canadian jurisprudence on the meaning of charity, especially at the federal level. However, as Professor Adam Parachin has pointed out this is an unfortunate development,¹⁹ and is at odds with the common law methodology that should be used to determine what qualifies as charity.

Statutory trusts

The decision delves into the question of the potential charitability of statutory trusts. The comments and approach set out raise problems. The seeming reluctance to allow these trusts to have attributes and functions beyond those embodied in their legislation is unnecessarily constraining and is bound to lead to uncertainty.

The question of the status of statutory trusts has also arisen in the context of insolvency law. Where such trusts are in issue in insolvency proceedings, the Ontario Court of Appeal has held that their status should be determined based on whether they meet common law criteria for a trust.²⁰ The fact that they are legislated is not the deciding factor. It is respectfully submitted that a similar approach could and should be brought to evaluation of statutory trusts as charitable or not. The test should be whether common law criteria is being met, not whether the body is established by legislation rather than a trust document.

This is particularly important because the federal government from time to time includes provisions in the *ITA* providing for groups meeting specific requirements to be treated as registered charities. (Since the charity regime in Quebec mirrors the federal one, similar provisions can also be found at the provincial level.) Federal measures in this regard include National Arts Service Organizations²¹, Registered Amateur Athletics Associations, and, most recently, Qualifying Journalism Organizations.²²

charitable” category; see: <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/summary-policy-r17-cemeteries.html> . Public amenities, of which cemeteries are an example, are routinely registered in Canada. The Charity Commission for England and Wales Guidance on Charitable Purposes also identifies provision of “a cemetery or crematorium” as an example of a charitable purpose. See Section 15 of that guidance at: <https://www.gov.uk/government/publications/charitable-purposes/charitable-purposes> .

¹⁷ *Supra* note 1 at para. 180.

¹⁸ In this context, the willingness of CRA to register cemeteries both as advancing religion and as public amenities beneficial to the community likely contributes to the small number of instances in which cemetery operation being a charitable purpose has been the subject of court cases in Canada. The current CRA register of charities contains more than 1,000 cemeteries.

¹⁹ A. Parachin, “The Role of Fiscal Considerations in the Judicial Interpretation of Charity”, in A. O’Connell, M. Harding and M. Stewart, eds., *Not-for-Profit Law: Theoretical and Comparative Perspectives* (New York, Cambridge University Press, 2014) 113 and A. Parachin, “Legal Privilege As a Defining Characteristic of Charity” (2009) 48:1 *Canadian Business Law Journal* 36-75.

²⁰ *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9 (CanLII).

²¹ Defined in *ITA* Section 149.1(6.4).

²² Both Registered Amateur Athletic Associations and Qualifying Journalism Organizations are defined in *ITA* Section 149.1(1).

Federal and provincial governments may also adopt statutory trusts or similar legislation for other reasons.

In England, in at least one instance, charitable registration and being constituted as a statutory trust are compatible.²³

Jurisprudence that casts doubt on whether a statutory provision providing for charity or charity-like status, or contemplating the creation of bodies qualifying for such status, gives rise to unnecessary uncertainty about the legal character of these groups. Further, the decision does not address whether the proposed charitable designation in circumstances such as those in this case is best left to the Legislature, rather than the Courts, heightening this uncertainty.

ITA Registered charity status and Ontario Charities Accounting Act jurisdiction

The decision put only limited weight on the CRA determination that the MPCG did not qualify as a registered charity. A key factor in the weight that is put on the CRA determination is the nature of the revenue generation done by the organization. However, while certain revenue generation activities can preclude an organization from being a federally registered charity, this criteria is not a consideration in determining common law charitable status.²⁴

Further, it should be noted that such CRA determination is made at a point in time (here in 1977), and that as charity law is a “moving subject” the determination may well have been different if done in 2020.

As well, *Re: Laidlaw Foundation*, a 1984 decision of the Ontario Divisional Court, stands for the proposition that an entity can be a charity for purposes of the *Charities Accounting Act* even when it is not a registered charity under the *ITA*.

Oversight available through other legislation or regulation is not among common law criteria for determining charitable status. Many institutions and organizations, including hospitals, universities and social service agencies are subject to extensive government oversight specific to their operations, and this has never meant they cannot be charities. The purpose of *ITA* charity provisions and the *CAA* statute is to regulate the charitable aspects of the work of, respectively, registered charities and s. 1(2) *CAA* corporations. Other legislation may not touch the requirements these bodies are subject to under the *ITA* and *CAA*.

Issue 4

[Grounds for] Cross-Appeal

Under this issue whether the application judge erred by not ordering an investigation of MPGC was discussed. As described and decided, this issue does not advance the arguments on charity law that are the focus of this comment.

²³ See The Church Schools Uniform Statutory Trust, which operates under the auspices of Diocesan Trustees (Oxford) Ltd. (<https://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/Subsidiaries.aspx?RegisteredCharityNumber=253575&SubsidiaryNumber=1>)

²⁴ As well, the possibility of distribution of assets to members at dissolution, referenced at para. 54 of the *FTPC* decision, does not prevent an organization from being a charity at common law. The remedy at common law for inappropriate use of charitable resources is an action for breach of trust, not denial of charity status. Regulatory enforcement under the *CAA* or similar legislation may also be possible.

6. Further Analysis

Charity jurisprudence in Canada

As noted above, fiscal considerations unfortunately often dominate decisions on granting of charitable status — particularly in federal jurisprudence. Indications of this are seen in two leading Supreme Court of Canada cases²⁵ in this area. But this deference is also seen in statistics on Federal Court of Appeal decisions, where in the sixty or so years in which appeals on registered charity status have been heard, well over 90% of these appeals have been lost.²⁶

There have been occasional successes in modernizing the meaning of charity at the provincial level, but as indicated above, a provincial decision does not necessarily lead to granting of federal registered charity status.

The reluctance seen in *FTPC*, but also found extensively in other Canadian jurisprudence on the meaning of charity, to rely on modest lines of cases to build on or endorse expansion of that meaning presents a major challenge to updating charity law in Canada. It is in keeping with neither the principle of charity being a “moving subject” nor with the benignant interpretation principle in dealing with the documents under which a putative charity is constituted.

In jurisdictions where tax expenditure considerations do not play as prominent a role in charity decisions, such as Australia, the law has advanced much more quickly. Similarly, in places where decisions on charitable status (and on following trends to extend the scope of what is charitable) are made by a body other than the tax authority, such as England and Wales, what qualifies as charity better reflects the approaches and priorities of 21st century society.

Implications of finding MPGC is not a charity

There are several practical implications stemming from the *FTPC* decision on the MPGC not being a charity that are distinctive from the matters argued in the case.

The first of these is that the members of the governing body of the organization may be subject to a lesser standard of care than would apply if MPGC is a charity. Determining this is difficult because the decision indicated that the corporation now holds the trust.²⁷

The addition of different components to the work undertaken under the auspices of the trust and corporation make it almost impossible to determine for what decisions or actions the corporate directors ought to be held to an objective corporate director standard and for what decisions and actions they ought to be held to a subjective trustee standard.

The ruling may also have an impact on the tax status of MPGC. To be exempt from tax on its income under *ITA* 149(1)(l), MPGC needs to 1) be a club, society or association; 2) not be a charity; 3) be organized and operated exclusively for purposes other than profit; and, 4) not have any part of its income payable or otherwise available for the personal benefit of any its members or shareholders. It is not apparent from the structures described and facts set out in the OCA decision that the third and, particularly, the fourth of these criteria are met. If not, there is no other *ITA* provision under which MPGC could claim exemption from tax on its income. It therefore may be, as a non-charity, taxable.

²⁵ *Vancouver Society*, *supra* note 8 and *A.Y.S.A.*, *supra* note 9. See also, *Parachin*, *supra* note 16.

²⁶ Other than *Native Communications Society of B.C. v. Minister of National Revenue* (1986), 67 N.R. 146 (FCA) and *Regional FreeNet Assn. v. M.N.R.*, 1996 CanLII 4076 (FCA) all the cases seeking to overturn a CRA decision on registration have been unsuccessful.

²⁷ Para. 89, *supra* note 1.

Of long-term concern, the decision further distances Canadian charity jurisprudence from that in the United Kingdom, Australia and the U.S. In all those jurisdictions, bodies with the same or similar purposes as MPGC would qualify as charities.

Closer to home, the decision being at odds with CRA routinely recognizing cemeteries as registered charities will likely create confusion among groups with purposes similar to MPGC that apply for charitable status.

Finally, as noted above, the analysis in this case creates uncertainty about the legal position of *ITA* quasi-charities like NASOs, and other trusts or bodies established or authorized by federal or provincial statute for a public policy purpose.

7. Conclusion

Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee continues a trend in Canadian law of the Courts taking a very cautious approach to determining what qualifies as charity in Canada. A better approach would focus more on the common law attributes of charity, and less on side issues.

The decision adds to the challenges in Canada around the interaction of trusts and corporations in the sphere of charity. Owing to the singular nature of the facts in the case, a preliminary question is whether the decision, especially those parts dealing with charity law, ought to have precedential value in or beyond Ontario. To the extent that the decision does have wider application, the charity law aspects are problematic — particularly comments on statutory trusts and charity and the test for what is a charity — and could have negative consequences for the organization that was the subject of the case and for Canadian charity law more broadly.



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