GOWLINGS

Property Tax Exemptions for Charities
Recognition that their purpose is … tax exemption!

Historically, charities and not-for-profits have not been treated well when they seek exemptions from property taxes. Unlike many other forms of taxation, realty tax exemptions are not universally offered to all charities or not-for-profit organizations. Instead, provinces like Ontario have offered exemptions to specific charitable organizations and to specific types of organizations or activities. That is done in both public legislation like the *Assessment Act* and through private legislation. To further complicate the situation, in the last 10 to 15 years, there has been a move in Ontario towards permitting municipalities to choose when to grant an exemption and when not to grant an exemption.

It is when they seek to claim those exemptions that are available that charities and not-for-profits have been treated somewhat poorly by the law. If a charity is not named in an exemption, it must try and see if it can fit itself into one of the broad categories for which municipal property tax exemptions are available under the Ontario *Assessment Act*. For example, it is possible to obtain an exemption if the lands in question are those of a "charitable institution organized for the relief of the poor" or those of an "incorporated institution conducted on philanthropic principles and not for the purpose of profit or gain that is supported, in part at least by public funds, but only when the land is owned by the institution and occupied and used for the purposes of the institution."[1]

Interpretational Rule Used Against Charities

The primary problem that charities have faced over the last century is the very clear rule that "exemptions from [municipal or property] taxation must be strictly construed; immunity from taxation will not be recognized unless it is granted in terms too plain to be mistaken…. The general rule is that property is taxable and an exemption clause to fit any particular case must be found within the four corners of the statute in question."[2]

That concept has been restated many times, with the Ontario courts even calling it "trite law". For example, in the *Downtown Churchworkers Association of the Anglican Church of Canada, Diocese of Toronto v. Ontario (Regional Assessment Commissioner, Region No. 7)* case, the court said that "It is trite law that a person claiming the benefit of such an exemption in a taxing statute must bring himself clearly within the words of the exemption…. The onus, therefore, is on the applicant herein, on all matters in issue." This rule was further augmented by the idea that ambiguities should be resolved against the charity and in favour of the taxing authority.

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[1] Section 3, paragraph 12 of the *Assessment Act*, R.S.O. 1990, c. A.31

[2] *The City of Toronto* v. *The Governors of the University of Toronto et al.*[1946] O.R. 215-228, (Ont. Court of Appeal)

This rule not only hinders those charities trying to fit themselves into one of the generic pigeon-hole exemptions in the *Assessment Act*, it often is used to block those charities who are specifically named in a statutory exemption from getting the exemption. The rule is cited by the opposition whenever there is any ambiguity over whether the conditions of the exemption have been met. For example, many of the exemptions require occupation or use of the land by the charity. The words "occupy" and "use" are obviously capable of much interpretation and those opposing the exemption (the municipality which receives the money or the assessor (now the Municipal Property Assessment Corporation ("MPAC"))) have relied upon this rule for many years.

This article focuses on the elimination of that rule and its replacement. I would submit that it is now clear that consideration of a request by a charity for an exemption should begin with a purposive review of the statutory exemption provision and the understanding that the purpose of any exemption provision is to provide an exemption.

Quebéc (Communaté urbaine) v. Corp. Notre-Dame de Bon-Secours

We start with the Supreme Court of Canada case of *Quebéc (Communaté urbaine) v. Corp. Notre-Dame de Bon-Secours*[3] (the "Notre-Dame" case) which broke the back of the old interpretational maxim that ambiguities in tax exemption clauses should be interpreted in favour of the taxing authority. Instead, it was determined that interpretation of these provisions should be in accordance with the legislative intent, which would not necessarily require interpretation against the taxpayer. This was prompted by the realization that the purpose of tax legislation is no longer simply to raise funds, but that it also functions as a tool of economic and social policy.

The issue in the Notre Dame case was whether the appellant, which served elderly persons living under the poverty line, should benefit from the tax exemption set out in s. 204(14) of the Quebec *Act respecting Municipal Taxation*. The Corporation Notre-Dame de Bon Secours was a non-profit corporation created in 1964 for the purpose of providing low rental housing to indigent elderly persons. 450 people resided at its "La Champenoise" facility. Twenty of the residents lived in a portion of the facility known as the shelter section. Some of the costs of those residents were borne by the government, which paid a per diem allowance. The government also exercised a measure of control in the facility to ensure that those twenty places remained filled. The remainder of the facilities received no government grants and was managed entirely by appellant. Its administrators and managers worked as volunteers.

In 1982 an assessor from the Communaté urbaine de Québec visited La Champenoise and made a determination that 89 per cent of the property was used as a regular apartment building with the remaining 11 percent used for the shelter section and for other community services. The assessor concluded that only this 11 percent of the property could be classified as a "reception centre" for which the exemption was available.

The Supreme Court of Canada reviewed extensively the development of the rules for interpreting tax legislation in Canada. Traditionally, tax legislation has been interpreted to favour the

[3] [1994] 3 S.C.R. 3

taxpayer if the provisions being interpreted impose a tax obligation. Conversely, a taxpayer claiming to benefit from an exemption had "to establish that the competent legislative authority, in clear and unequivocal language, [had] unquestionably granted him the exemption claimed" (Fauteux C.J. in *Ville de Montreal v. ILGWU Center Inc.*, [1974] S.C.R. 59, at p. 65)[4]. Any doubt was resolved in favour of the tax department.

The Supreme Court noted that a shift from the rule of strict construction to interpretation according to ordinary rules began in *The Queen v. Golden*[5]. The court described the situation at that time thusly:

> In [*Stubart Investments Ltd. v. The Queen*[6]]...the Court recognized that in the construction of taxation statues the law is not confined to a literal and virtually meaningless interpretation of the Act where the words will support on a broader construction a conclusion which is workable and in harmony with the evident purposes of the Act in question. Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statues in an era such as the present, where taxation serves many purposes in addition to the old traditional object of raising the cost of government from a somewhat unenthusiastic public.

The Supreme Court then cited Vivien Morgan's article "Stubart: What the Courts Did Next"[7]:

> There has been one distinct change [after Stubart], however, in the resolution of ambiguities. In the past, resort was often made to the maxims that an ambiguity in a taxing provision is resolved in the taxpayer's favour and that an ambiguity in an exempting provision is resolved in the Crown's favour. Now an ambiguity is usually resolved openly by reference to legislative intent.

For the Supreme Court, Gonthier J. concluded that:

> In light of the foregoing, I should like to stress that it is no longer possible to apply automatically the rule that any tax exemption should be strictly construed. It is not incorrect to say that when the legislature make a general rule and lists certain exceptions, the latter must be regarded as exhaustive and so strictly construed. That does not mean, however, that this rule should be transposed to tax matters so as to make an absolute parallel between the concepts of exemption and exception. With respect, adhering to the principle that taxation is clearly the rule and exemption the exception no longer corresponds to the reality of present-day tax law. Such a way of looking at things was undoubtedly tenable at a time when the purpose of tax legislation was limited to raising finds to cover government expenses. In our time it has been recognized that such legislation serves other purposes and functions as a tool of economic and social policy. By submitting tax

[4] Fauteux C.J. in *Villle de Montreal v. ILGWU Centre Inc.*, [1974] S.C.R.59, at p. 65
[5] [1986] 1 S.C.R. 209, at pp 214-215
[6] [1984] 1 S.C.R. 536
[7] (1987), 35 Can. Tax J. 155, at pp.169-70

> legislation to a teleological interpretation it can be seen that there is nothing to prevent a general policy of raising funds from being subject to a secondary policy of exempting social works. Both are legitimate purposes which equally embody the legislative intent and it is thus hard to see why one should take precedence over the other.

The Court held on the facts that the facilities of La Champenoise could be classified in their entirety as a reception centre within the meaning of the Act.

Ottawa Salus Corporation v. Municipal Property Assessment et al.

In an appeal argued by my partner, Janet Bradley, for the Ottawa Salus Corporation,[8] the statutory exemption from property tax for charitable institutions contained in paragraph 12 of s. 3(1) of the *Assessment Act*, R.S.O. 1990, c. A.31 was the subject of the Ontario Court of Appeal's scrutiny.

The Ottawa Salus Corporation ("Salus") is a charitable corporation, providing housing and support services for people in Ottawa who are mentally ill and unemployed. A 1998 amendment to the *Assessment Act* changed the exemption conditions from "when land is owned by the institution and occupied and used for the purposes of the institution" to "land owned, used and occupied by" the charitable organization. MPAC took the position that this required the charitable institution to itself occupy the subject premises; occupation by others, such as the resident/tenants, was no longer sufficient. MPAC argued that because the residents of the units had leases with Salus that were subject to the *Tenant Protection Act* and physically occupied the premises, Salus was not in occupation; the residents were.

It was this tricky interpretation of the statutory exemption clause in unusual factual circumstances that the courts had to deal with. The Ontario Superior Court of Justice in the first instance found for MPAC. This was overturned on appeal at the Divisional Court.

MPAC, in its argument at the Court of Appeal, argued that exemptions in taxation statutes must be strictly interpreted and that the Divisional Court had misinterpreted the legislation by stating that the provision of an exemption, rather than assessment and taxation, was the overall intent and purpose of the "Assessment Act".

The Court of Appeal said:

> I disagree. The leading case dealing with the interpretation of taxation laws in the context of exemptions from property tax for charitable organizations is *Québec (Communaté urbaine) v. Corp. Notre-Dame de Bon-Secours* [1994] 3 S.C.R. 3. In that case, Gonthier J. speaking for a unanimous court, and relying on earlier decisions of the court in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 and *The Queen v. Golden*, [1984] 1 S.C.R. 536 specifically rejected the

[8] *Ottawa Salus Corporation v. Municipal Property Assessment Corporation et al.* (2004), 235 D.L.R. (4th) 743 (CA)

> proposition that taxation laws, including provisions creating exemptions should be strictly construed.

The Court of Appeal then cited extensively from the *Québec (Communaté urbaine) v. Corp. Notre-Dame de Bon-Secours* case, in particular those portions, which indicated that taxation legislation could be used for social policy purposes and that it could have more than one intent. The Court of Appeal then looked both at the general intent of the *Assessment Act* and the specific purposes of the exemption provision.

The Court began by citing the general principles for interpreting tax legislation as summarized by Gonthier J. in Notre Dame at 20:

> -The interpretation of tax legislation should follow the ordinary rules of interpretation;
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> -A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context if the statute, its objective and the legislative intent: this is the teleological approach;
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> -The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;
>
> -Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute;
>
> -Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

The Court of Appeal then determined that the general purpose of the *Assessment Act* was to raise funds so governments can meet their obligations.

Then, after noting the twenty-nine exemptions found in the *Assessment Act*, the Court of Appeal held that these exemptions do not have the same purpose:

> The clear implication of these exemptions is that while there is a substantial public interest in the generation of revenue through the taxation of real property, in the context of the real property covered by these exemptions, that public interest is outweighed by the public interest in giving relief from property taxation to certain organizations.

Salus was found to meet the conditions of the exemption.

Y.M.C.A. Properties Inc*. v. *Municipal Property Assessment et al

As someone who often acts for charities, I found comfort in the thought that the issue had now been clearly decided and that there should be less resistance from municipalities or MPAC to reasonable requests for exemption. However, municipalities continue to have monetary needs and property taxation revenue continues to form their primary source of income. So it was without too much surprise that I found myself appearing less than six months later before the Superior Court of Justice arguing that the exemption granted to Y.M.C.A. Properties Inc. by private legislation should apply to its lands[9].

My client, the Y.M.C.A., had operated the Geneva Park leadership training and conference center on the shores of Lake Couchiching since 1932. The Township and MPAC contended that the specific provisions of the exemption had not been met and that the land while "occupied by the Y.M.C.A. was not used for the purposes of the corporation". In argument, counsel for the Township lamented the passing of the "halcyon days" when the onus was clearly on the charity and any ambiguity in the interpretation of the exemption provision was always resolved in favour of the taxing authority. While recognizing that a change had occurred with the Notre Dame and Salus decisions, the municipality argued that the pendulum should not swing too far the other way and favour the charity. Instead, it was suggested that only normal legislative interpretation rules should apply and the exemption wording should be interpreted without any presumption of purpose or onus.

That argument was ultimately rejected. Mr. Justice Brennan found for the Y.M.C.A. based on the evidence filed indicating that the lands really were being used and occupied for the Y.M.C.A.'s purposes (the growth of all persons in spirit, mind and body and in a sense of responsibility to each other, the natural environment and the global community). He said that Geneva Park "is marketed and promoted as what it really is, a center for the growth of spirit, mind and body. The common good is served by attracting persons seeking such growth."

Fortunately for charities elsewhere, Brennan J. also chose to clarify the manner in which he interpreted the exemption clause and confirmed that the courts should approach the interpretation of statutory property tax exemptions in such a way as to benefit the charity. He agreed that "there is no doubt that an exemption provision should be interpreted with "the legislative purpose of the exemption in mind."

The decision has not been appealed.

[9] *Y.M.C.A. Properties Inc. v. Municipal Property Assessment Corporation and The Corporation of the Township of Ramara,.* [2004] Court File No. 03-CV-249012CM1

Conclusion

Charities seeking exemptions from property or municipal taxation, whether pursuant to an exemption contained in the *Assessment Act* or in other legislation, are no longer subject to the old rule that any ambiguity should always be resolved against the charity and that the onus is always on the charity to prove its case. That rule was abolished completely by the Supreme Court of Canada in the Notre Dame decision. The Salus decision from earlier this year clearly permitted consideration not only of the general intent and purpose of the taxing legislation but also that of the specific tax exemption provision. The Y.M.C.A. Properties decision has clarified that the courts have now accepted what many would hold to be self-evident: an exemption provision should be interpreted with the legislative purpose of the exemption in mind.

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