

Date: 20041125

Docket: A-300-03

Citation: 2004 FCA 397

CORAM: STONE J.A.

SEXTON J.A.

MALONE J.A.

BETWEEN:

LORD'S EVANGELICAL CHURCH
OF DELIVERANCE AND PRAYER OF TORONTO

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, November 3, 2004.

Judgment delivered at Ottawa, Ontario, on November 25, 2004.

REASONS FOR JUDGMENT BY:

STONE J.A.

CONCURRED IN BY:

SEXTON J.A.

MALONE J.A.

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REASONS FOR JUDGMENT

STONE J.A.

[1] This is an appeal from a decision of the Minister of National Revenue dated May 28, 2003, pursuant to subsection 168(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) revoking the registration of the appellant as a charitable organization.

BACKGROUND

[2] The appellant, which was registered as a charitable organization in 1991, was incorporated as a corporation without share capital under the *Corporations Act*, R.S.O. 1990, c. C.38 on April 25, 1991 with a principal object to "preach, promote and advance the spiritual teachings of the Evangelical Faith". Reverend Jean Tracey, the Church's Pastor, was a director, member and President of the organization. In 2001, the Charities Directorate carried out an audit of the appellant's operations for the fiscal year ended December 31, 1999. There was concern in the Charities Directorate as early as November 2000 that the Pastor was "misappropriating funds and not advancing religion". The Charities Directorate decided to investigate this aspect as well as payment of personal expenses of the Pastor or other person, and down payments made on homes for each of the Pastor's three children. There was also concern with the adequacy of the Church's books and records. Moreover, there was a suspicion that personal expenses reimbursed to the Pastor and one of her children were not included on T4 slips, although such payments were in the nature of taxable benefits.

[3] The results of the audit were made known to the appellant in the Charities Directorate's letter dated March 15, 2002. As those results had suggested "serious contraventions of the *Income Tax Act*", the letter stated that "we are considering whether we should revoke the registration of the Church". Among the concerns raised by the Charities Directorate were the adequacy of the appellant's books and records, conformity of official donation receipts with regulatory requirements, payments made by the appellant on behalf of employees and other benefits (personal telephone charges, rent, car lease payments, vehicle operating expenses, monthly mortgage payments) that were not included on T4 slips in 1999 and 2000, the gifting of approximately \$150,000 to Reverend Jean Tracey and the further gifting of that amount by her to her children as down payments on family homes. In particular, the \$150,000 gifted to the children was from funds raised by the appellant on a second mortgage loan secured on the appellant's Church building. This figure represented approximately 47% of all gifts received by the appellant in 1999. The letter of March 15, 2002 also expressed concern that Reverend

Tracey had "received personal amounts from congregants" which should have been Church property and that these amounts were not recorded. The letter ended with an invitation that the appellant submit representations within 30 days if the appellant did not agree with the facts stated in that letter or if it wished "to present any reasons why the Minister should not revoke the registration" pursuant to subsection 168(2) of the Act.

[4] The appellant referred the March 15, 2002 letter to its then solicitors on April 4, 2002. The solicitors, who wrote to the Charities Directorate on the same day, indicated that they would be further communicating "by the end of May" 2002. However, nothing further was heard from the appellant or from the solicitors for more than ten months prior to the Charities Directorate contacting the solicitors by telephone on February 10, 2003, only to be informed that "the whole matter was completely forgotten". The solicitors promised further contact before February 27, 2003, but did not do so. The Charities Directorate contacted the solicitors by telephone on March 10, 2003 and again on March 14, 2003, when it was promised a letter "before the end of next week". The letter was not received. The Charities Directorate then contacted Reverend Tracey by telephone on March 24, 2003 urging a response to the March 15, 2002 letter "right away".

[5] The solicitors finally responded to the Charities Directorate's letter of March 15, 2002 by letter dated March 24, 2003. This letter opened with a request for "a further one (1) year period in which to satisfy the Minister" that the appellant was "in substantial compliance with the Act". The letter went on to state that as the appellant was a small organization it could not afford the services of a professional bookkeeper and that the appellant's accountant would assist the volunteers "as far as possible to correct their previous mistakes". The solicitors "anticipated compliance" with respect to donation receipts, and indicated the "proper identification of salaries, honorariums and other taxable benefits will be properly stated on the upcoming 2002 filing". The letter also outlined the extent of remedial action being considered with respect to the \$150,000 gift and indicated, in particular, that the down payments on the children's houses "will be set up as a loan receivable for the Church with the ultimate obligation [that of] Rev. Jean Tracey".

[6] The Charities Directorate initiated a telephone conversation with Reverend Tracey on March 28, 2003, at which time she expressed a preference that the gifts to the children be converted to a loan. The Charities Directorate obviously had difficulty with this idea for it was concerned whether such action, even with proper repayment conditions and interest rates, would be "a proper use of resources". It also took note of Reverend Tracey's admission "that she might not be able to repay the loan" because she had recently bought a new place of her own. The Charities Directorate agreed to fax a request for further information to the appellant's solicitors. This was done on March 31, 2003, when the Charities Directorate described the solicitors' letter of March 24, 2003 letter as "short on specifics" and requested further information with respect to several outstanding items including the adequacy of the books and records, a summary of donations received in 2001, a breakdown of benefits other than wages, and the down payments made on behalf of the Tracey children. With respect to this last item the Charities

Directorate wrote: "If we are to accept a loan, there would need to be a mortgage in place and reasonable conditions of repayments".

[7] The solicitors responded by letter of April 17, 2003 in which they stated that "new record-keeping patterns " would be commenced "which will, hopefully, properly document the various transactions". The solicitors also noted that one of the three houses belonging to the children had been sold and the net proceeds turned over to the Church, and that they would be documenting the balance of the gifts to the Tracey children as "loans payable entered into by the three children and their wives and guaranteed by Reverend Tracey" with mortgages on the two unsold homes "to secure this debt for the benefit of the Church". The solicitors promised to keep the Charities Directorate "appraised as progress is being made". However, there was no further contact between the parties prior to May 28, 2003.

[8] The Charities Directorate's letter to the appellant of May 28, 2003 was expressly written in response to the solicitors' letter of April 17, 2003 and "to telephone conversations held with you". The letter stated that representations received had been "carefully reviewed" and that they "do not provide specific reasons why the Church's status as a registered charity should not be revoked". The Charities Directorate was of the view that the letter of April 17, 2003 "did not address our concerns in a satisfactory manner" and that, overall, that there had been failure "to address our concerns with tangible action within a reasonable timeframe". The letter of May 28, 2003 went on to enumerate four discrete reasons for revoking the appellant's charitable registration, all of which had been previously outlined in the initial letter of March 15, 2002. The appellant had failed to make the changes necessary to maintain adequate books and records; had failed to provide a listing of donations for its 2001 year end; had not responded to queries regarding personable benefits not included on T4 slips; and, finally, the \$150,000 gifts to the children had not been reimbursed and only immediate reimbursement would be acceptable.

ARGUMENT

[9] The appellant submits that the Minister denied it natural justice and procedural fairness. It argues that while it advised the Charities Directorate of the remedial action proposed with respect to the stated concern with the gifts to the children, the decision of May 28, 2003 was made without first notifying the appellant that its proposal as outlined in the March 24, 2003 and April 17, 2003 letters was not acceptable. The specific complaint is that the Minister had "advised" the appellant that the gifts "must be recorded as loans with reasonable terms for repayment" and that the revocation decision was made while arrangements were in train for repayment. The appellant therefore argues that no consideration was given by the Minister to the proposed remedial steps before the revocation decision was made.

RELEVANT LEGAL PRINCIPLES

[10] In Canada, enjoyment of the advantages of tax exempt income and of issuing receipts to donors for income tax purposes depends on the continued registration of the charity under the *Act*. These advantages may be lost where, under paragraph 168(1)(b), the registered charity "ceases to comply with the requirements of this Act for its registration". As Sharlow J.A. stated in *Canadian Magen David Adom for Israel v. The Queen*, [2002] D.T.C. 7353 (F.C.A.) at paragraph 7: "Any charity that ceases to meet the statutory requirements for registration may have its registration revoked, in which event the charity must be shut down". The severity of such a step has lead this Court to require that the Minister afford the registrant a full opportunity to meet the case made against it before a registration is revoked.

[11] It has been held that the rules of natural justice and the duty of fairness are "variable standards" the contents of which will depend "on the circumstances of the case, the statutory provisions and the nature of the matter to be decided": *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 819 at 895-896. See also, *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at 1191-1192; *Congrégation des témoins de Jéhovah de St. Jérôme - Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, 2004 SCC 48.. The test for determining the existence of a general duty of fairness in a decision to terminate an employment relationship was articulated in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 669, where L'Heureux-Dubé J. stated for the majority:

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in *Cardinal v. Director of Kent Institution, supra*, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the Court at p. 653).

[12] It is axiomatic that procedural fairness be accorded to a person in the position of the appellant before a decision is made to revoke a charitable registration. The respondent agrees that such fairness is required. The impact of revocation is palpable. The appellant's income would be subject to tax and the appellant would no longer be able to issue donation receipts. In addition, the appellant could be subject to a revocation tax under section 188 of the *Act*. Obviously, therefore, revocation would severely impact the appellant in pursuing its objects. Both sides accept the views articulated by Pratte J.A. in a similar case, *Renaissance International v. Minister of National Revenue*, [1983] 1 F.C. 860 (C.A.) at 866, where he stated:

It follows, in my view, that the decision of the Minister to send a notice of revocation under subsection 168(1) must be arrived at in a manner enabling the Minister to create a record sufficiently complete to be used by this Court in deciding the appeal. This presupposes, in my view, that the Minister must follow a procedure enabling him to constitute a record reflecting not only his point of view but also that of the organization concerned.

[13] Paragraph 149(1)(b) of the *Act* clearly proscribes payment of any part of a charitable organization's income to or for "the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof". Subsection 230(2) of the *Act* requires every registered charity to "keep records and books of account" so as to enable the Minister "to determine whether there are any grounds for revocation" of a registration and to allow verification of donations that are eligible for deduction or tax credit under the *Act*. In addition, all donation receipts must comply with the requirements of Section 3501 of the *Income Tax Regulations*. Such receipts must also comply with the requirements of paragraph 168(1)(d) of the *Act*.

ANALYSIS

[14] The gift of the \$150,000 amount by the Church to Reverend Tracey was clearly in contravention of the paragraph 149(1)(b) prohibition and therefore constituted a basis to revoke registration of the Church for ceasing "to comply with the requirements of this Act for its registration as such" under paragraph 168(1)(b). The record in this Court does not support the appellant's assertion that the Minister had agreed that the gifts by Reverend Tracey to her children out of Church funds could be recorded "as loans with reasonable terms for repayment". The Charities Directorate's letter of March 15, 2002, was clearly not to that effect. That letter merely stated the undeniable fact that "the funds disbursed on behalf of the Pastor's children

were not recorded as loans" and that there was "no evidence that those amounts would have to be reimbursed". These gifts were a matter of high concern to the Charities Directorate, a point which was repeatedly impressed upon the appellant in correspondence and in telephone conversations.

[15] Nothing contained in the Charities Directorate's message of March 31, 2003 materially modified the Minister's concern in this regard. That message did not amount to acceptance of the "loan" concept that had been advanced in the solicitors' letter of March 24, 2003. While it is clear that this proposal was being considered by the Charities Directorate, it is also clear that the Minister had not accepted the proposal as meeting his concern that the gifts were made in contravention of the Act. The statement in the March 31, 2003 message, "If we are to accept a loan" (emphasis added), clearly supports this conclusion. The solicitors' letter of April 17, 2003 appears to have proceeded on the unjustified assumption that the conversion of the gifts to loans receivable was acceptable and particularly so if the loans were guaranteed by the Pastor and supported by mortgages. The record suggests some reluctance to accept the solution perhaps in part because the Pastor had recently purchased a new place and, accordingly, was not considered a reliable guarantor because, by her own admission, she might not be able to repay the loans. Even if the solicitors' assumption was justified, they took no further steps prior to May 28, 2003 to execute the plan of action proposed in the April 17, 2003 letter despite their acknowledgement that the "ball is in my court, and I will be attending to that as soon as possible".

[16] Concern over the gifts to the children as a possible basis for revocation was raised at the very outset in the letter of March 15, 2002. No attempt was made by the appellant to address this or other concerns for more than 10 months. Moreover, the response of March 24, 2003 was clearly prompted by the Charities Directorate's telephone calls and not by the appellant, which had "completely forgotten" the letter of March 15, 2002. Nor can it be concluded that the Minister failed to consider the solution suggested by the appellant. The letter of May 28, 2003 addressed to the appellant explicitly stated that prior representations had been "carefully reviewed" and then went on to state, "Your representative's letter dated April 17, 2003 (over a year after our letter) did not address our concerns in a satisfactory manner: your actions have not demonstrated a willingness to rectify the problems observed during the audit". The letter also stated that no "tangible actions within a reasonable timeframe" had been taken to address the Charities Directorate's concerns. In the circumstances, the Minister was justified in determining that the appellant had "ceased" to comply with the registration requirements of the *Act*. Accordingly, procedural fairness was not denied in arriving at that decision.

[17] It is also to be noted that the concerns reiterated in the May 28, 2003 letter were not limited to the \$150,000 gifts to the Pastor's children. As we have seen, the adequacy of the appellant's books and records, the listing of 2001 charitable donations and the failure to respond to queries respecting personal benefits conferred by the appellant on various members were repeated in the Charities Directorate's message of March 31, 2003. Even acknowledging the relatively small size of the appellant's operations and its need to rely heavily on volunteers for proper books and record keeping, the evidence does not show that these concerns of the Minister were met in any meaningful way. Thus, for example, there was no compliance with the Minister's request for a breakdown of benefits other than wages in respect of two T4 slips issued in February 2002.

[18] Moreover, it was made plain in the letter of May 28, 2003 that the appellant did not meet the requirements of a charitable organization for "each of the reasons listed above" and that the decision to revoke the registration was based on "each" of those reasons. The appellant has not argued that it was denied procedural fairness in these other aspects. The record shows that, like the concern with the gifts to the children, these other concerns were squarely raised in the letter of March 15, 2002, that some attempt was made by the appellant to answer these concerns in the solicitors' letters of March 24, 2003 and April 17, 2003, but that such attempt was not acceptable to the Minister. Thus, even if procedural fairness was denied by the Minister's treatment of the "gifts" issue, this would not necessarily require the setting aside of the May 28, 2003 decision. As has been indicated, the Minister's decision was based on other grounds as well, each of which indicated non-compliance with the requirements of the *Act* and *Regulations*. In the circumstances, even if the Minister's decision to revoke registration on the basis of the unlawful gifts to the children was flawed, this does not inexorably lead to a setting aside of the decision. Three other grounds for revocation existed, none of which was seriously attacked by the appellant as denying procedural fairness. When a result is inevitable, a particular breach of

procedural fairness may not require a decision to be set aside: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228.

[19] For the foregoing reasons, the appeal should be dismissed with costs.

"A.J. STONE"

J.A.

"I agree

"J. Edgar Sexton J.A."

"I agree

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-300-03

Appeal from a decision of the Minister of National Revenue dated May 28, 2003.

STYLE OF CAUSE: LORD'S EVANGELICAL CHURCH OF DELIVERANCE AND PRAYER OF TORONTO

v.

HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa

DATE OF HEARING: November 3, 2004

REASONS FOR JUDGMENT: STONE J.A.

CONCURRED IN BY: SEXTON J.A.

MALONE J.A.

DATED: NOVEMBER 25, 2004

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