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WEEKLY COMMENT: FRIDAY 16 AUGUST 2013

1. Last week I looked at *Clarifying the tax consequences for deregistered charities – An officials' issues paper* ("the Charities Deregistration IP") released in July 2013. This week I follow that by looking at an important case concerning the deregistration of a charity: the Court of Appeal decision in *Re Greenpeace of New Zealand Incorporated* [2012] NZCA 533; (2012) 25 NZTC 20-153. The case concerns the acceptability of political objects as part of an organisation's charitable purpose, and whether the courts have the jurisdiction to widen the definition of "charitable purpose".

2. Greenpeace's appeal was allowed, and the Court of Appeal directed the Chief Executive of the Department of Internal Affairs and the Board to review Greenpeace's application for charitable status. However, the Supreme Court has granted Greenpeace leave to appeal to the Supreme Court (*Re Greenpeace of New Zealand Inc* [2013] NZSC 12) on two aspects of the Court of Appeal's decision, which are the views expressed by the Court of Appeal relating to:

   (a) The nature and scope of the expression "charitable purpose" in New Zealand; and

   (b) The question of whether involvement by Greenpeace in an illegal or unlawful activity would be sufficiently material to preclude registration or justify deregistration.

3. Since 1976 Greenpeace has been incorporated in New Zealand under the *Incorporated Societies Act 1908*. Before the *Charities Act 2005* required registration by the Charities Commission, Greenpeace had enjoyed charitable status under the regime administered by the Commissioner of Inland Revenue.

4. Greenpeace, like other organisations that had previously held charitable status, was obliged to apply to the Charities Commission for registration by July 2008. The Charities Commission declined Greenpeace's application because:

   (a) The promotion of "disarmament and peace" was a political purpose, and the applicable authorities, including the Court of Appeal's decision in *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (which concerned the Society for the Protection of the Unborn Child), had held that political purposes, which were more than ancillary purposes, could not be charitable; and

   (b) Information sourced from Greenpeace's website showed that non-violent direct action was central to Greenpeace's work, so Greenpeace's work might involve illegal activities such as trespassing, and it was established by case law that an entity which had a primary purpose which was illegal or contrary to public policy could not be charitable because an illegal purpose could not be for the benefit of the public.

5. Greenpeace appealed to the High Court: *Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011], (2011) 25 NZTC 20-045. The High Court agreed with the Charities Commission on the point relating to political purposes: the purpose of promoting disarmament (generally – not just "nuclear disarmament") was non-charitable. However, the High Court expressed some reservations about whether there was sufficient evidence for the Commission to draw the inference that Greenpeace's activities might have involved illegal activities.

6. Greenpeace's objects are generally charitable: promoting the philosophy that humanity is part of the planet, promoting the protection and preservation of nature and the environment, research and monitor issues affecting these objects, promoting education on environmental issues, and cooperating with other organisations with similar objects. However, object 2.2, which included promoting "disarmament and peace" and object 2.7, which concerned promoting the adoption of legislation and rules and supporting implementation through political or judicial processes, gave rise to the dispute.

7. Following the hearing in the Court of Appeal, Greenpeace agreed to amend object 2.2 so that it refers to promoting "peace, *nuclear* disarmament and the *elimination of all weapons of mass destruction*", and amend object 2.7 so that it clearly refers to promoting legislation etc. "where such promotion or support is *ancillary* to those objects".

Greenpeace's position

8. Greenpeace submitted that the Court of Appeal decision in *Molloy* is "stale" and should be departed from. Greenpeace's "disarmament and peace" activities meet the public benefit test. Political advocacy is acceptable, only contentious political advocacy is non-charitable.

9. The exemption of "political" activities is no longer a relevant or useful touchstone for what is a charitable purpose in New Zealand's modern democratic environment. New Zealand law should be brought into line with the Australian High Court decision in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539, where Keifel J stated at paragraph 68:

   "It could scarcely be denied, these days, that it may be necessary for organisations, whose purposes are directed to the relief of poverty or the advancement of education, to agitate for change in the policies of government or in legislation in order to best advance their charitable purposes. No-one would suggest that charitable and political purposes are mutually exclusive. A charitable institution may have charitable and political purposes, provided that the political purpose is not the main or predominant purpose of the organisation. Here, the appellant's main purposes are to agitate for change in the programmes and policies of the Government or its agencies, by putting forward the views of its members.

   I agree that there is no reason, in principle, that the political nature of an organisation's main purpose should mean its outright disqualification from charitable status."

10. In any case, Greenpeace argued that its promotion of legislation and rules through political or judicial processes complies with the requirements for an ancillary purpose.

Meaning of 'charitable purpose' in the Charities Act

11. The meaning of 'charitable purpose' is discussed in section 5 of the *Charities Act 2005*. Section 5(1) states that:

"... charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community."

12. An ancillary purpose that is non-charitable will not prevent an organisation from qualifying for registration as a charitable entity. An ancillary non-charitable purpose, under s. 5(4) of the *Charities Act 2005*, is one that is not an independent purpose of the organisation.

13. The Court of Appeal's initial comments on this definition may be summarised as follows:

    (a) First, Parliament has retained the established fourfold classification of "charitable purpose" and has implicitly rejected the adoption of a new definition that might have recognised a number of new purposes as legitimate charitable purposes;

    (b) Secondly, the retention of the fourth category – "any other matter beneficial to the community" – confirms that previous Court of Appeal decisions relating to the interpretation of the fourth category remain applicable:

        (i) The purpose must be for the public benefit; and

        (ii) The purpose must be charitable in the sense of coming within the spirit and intendment of the preamble to the *Statute of Charitable Uses Act 1601* (for a good discussion of what is involved in the preamble, refer to Blake Bromley's article *1601 Preamble: The State's agenda for charity*);

    (c) Third, the enactment of an inclusive definition makes it clear the definition remains a broad definition which in its terms is not exhaustive;

    (d) Fourth, "advocacy" may be ancillary, but not a primary, independent purpose: a similar distinction is drawn in Canada, but not in Australia, as noted by the High Court of Australia in *Aid/Watch Inc*;

    (e) Fifth, the specific terms clarify that an ancillary non-charitable purpose that is not an independent purpose of a society does not prevent the society from qualifying for registration.

Greenpeace's Supreme Court appeal: changing the law on charitable purpose

14. The first of two issues on which Greenpeace has appealed to the Supreme Court is the Court of Appeal's view that any significant change to the law relating to the nature and scope of the expression "charitable purpose" in New Zealand should be made by Parliament and not the Court. The Court of Appeal stated four reasons for their view:

    (a) First, Parliament endorsed the well-established prohibition on purposes that are primarily political and the Court of Appeal's decision in *Molloy* by drawing a distinction between a non-independent ancillary purpose, and a prohibited primary purpose.

    (b) Secondly, no steps were taken by Parliament to amend the definition as part of the 2012 reforms: in particular, Parliament did not amend the definition to reverse the decisions of the Commission and the High Court in Greenpeace's case.

    (c) Third, the fiscal consequences involved in amending the definition to enlarge its scope mean that it is a policy matter that constitutionally should be left to Parliament. The

decision of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 was cited in support.

(d) Fourth, while there have been significant developments in the law since the prohibition on political purposes was adopted, the rationale for the prohibition has not necessarily been undermined. The Court of Appeal quoted the Canadian Federal Court of Appeal in *Human Life International in Canada Inc v Minister of National Revenue* [1988] 3 FC 202 at [18] as follows:

"(The appellant's) argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression ... it would be equally arguable that anyone who wishes the psychic satisfaction of having his personal views pressed on his fellow citizens is constitutionally entitled to a tax credit for the money he contributed for this purpose ... The guarantee of freedom of expression ... is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or sincerely held."

15. The Court of Appeal noted, however, that the law of charity is not static and agreed with the views of Hammond J in *DV Bryant Trust Board v Hamilton City Council [*1997] 3 NZLR 342 (HC) at 348:

"It would be unfortunate if charities law were to stand still: this body of law must keep abreast of changing institutions and societal values. And, it is to New Zealand institutions and values that regard should be had. This is not, of course, to say that "new" heads of charity will be allowed to spring up overnight without close scrutiny; rather ... Courts should, in appropriate cases be prepared to entertain adjustments "to things once advisedly established". That philosophy of necessity mandates a cautious approach, and one which will usually proceed by analogy; but neither does it set its face against change to what is considered to be charitable, in law."

'Disarmament' vs 'nuclear disarmament'

16. The Court of Appeal accepted that the promotion of peace itself is for the public benefit and therefore capable of being a charitable purpose. However, the Court of Appeal agreed with the High Court that promoting peace through disarmament was pursuing one view in a contentious debate and, therefore, was a non-charitable political purpose. The Court of Appeal referred to *Southwood v Attorney General* [2000] EWCA Civ 204 at [29]:

"There are differing views as to how best to secure peace and avoid war. To give two obvious examples: on the one hand it can be contended that war is best avoided by "bargaining through strength"; on the other hand it can be argued, with equal passion, that peace is best secured by disarmament – if necessary, by unilateral disarmament."

17. The Court of Appeal stated that if Greenpeace, as it proposed, replaced 'disarmament' with 'nuclear disarmament' then the element of political contention and controversy would be removed. The pursuit of 'nuclear disarmament' would constitute in New Zealand today "an uncontroversial public benefit purpose" for the following reasons:

(a) First, the promotion of nuclear disarmament is in accordance with New Zealand's international obligations as a signatory to the Nuclear Non-Proliferation Treaty, which has been signed by 190 countries. The Court of Appeal noted that:

(i) It is well established that domestic Courts should recognise New Zealand's international treaty obligations and so far as its wording allows legislation should be read in a way which is consistent with those obligations.

(ii) A similar approach should be adopted in considering whether the promotion of nuclear disarmament is for the public benefit and therefore capable of constituting a charitable purpose.

(b) Second, the promotion of nuclear disarmament is in accordance with New Zealand's domestic law as enacted in the *New Zealand Nuclear Free Zone Disarmament, and Arms Control Act 1987*.

(c) Third, reflecting overwhelming public opinion in New Zealand, successive New Zealand Governments have confirmed their intentions to support the Treaty and retain the legislation.

(d) Fourth, for similar reasons the Court of Appeal accepted that "the elimination of all weapons of mass destruction" is for the public benefit.

18. Having accepted the public benefit purpose, the Court then considered that nuclear disarmament and the elimination of all weapons of mass destruction is a purpose within the spirit and intendment to the *preamble* both on the basis of analogy and the presumption of charitable status. In the view of the Court "it is ... analogous to the promotion of peace".

Greenpeace's Supreme Court appeal: illegal activities?

19. The Court of Appeal noted the absence of any finding of illegality in the High Court, so referred the question of whether Greenpeace was involved in illegal activities back to the chief executive and the Board.

20. Greenpeace has taken issue with the Court of Appeal's comments concerning the circumstances in which involvement by Greenpeace or its representatives or agents in illegal or unlawful activity will be sufficiently material or significant to preclude registration or justify deregistration.

21. The Court of Appeal noted that there is no dispute that a society that pursues illegal or unlawful purposes or activities is not entitled to registration as a charitable entity, and that a registered society with lawful charitable purposes which pursues them through illegal or unlawful activities should lose its registration.

22. The Court of Appeal noted that it will be a question of fact and degree in each case, and the factors which might influence the decision would include:

(a) The nature and seriousness of the illegal activity;

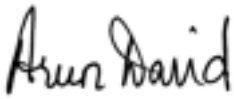
(b) Whether the activity is attributable to the society because it was expressly or impliedly authorised, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it;

(c) Whether the society had processes in place to prevent the illegal activity or has since put processes in place to prevent the activity occurring again;

(d) Whether the activity was inadvertent or intentional; and

(e) Whether the activity was a single occurrence or part of a pattern of behavior.

23. The Court of Appeal noted that in Greenpeace's case, "where there is some evidence of illegal activities, particularly trespass, by its members, endorsed by Greenpeace through inclusion of reports of those activities on its website, it will be necessary for Greenpeace to explain its involvement in those activities when its application is reconsidered by the chief executive and the Board."



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