

So Whose Business Is It, Anyway?

Everywhere charities are facing financial pressure. As a result, a common question raised by charities is the extent of business activity permitted to them. Here, as in so much else affecting charities, the answer is far from clear. While the *Income Tax Act* has rules about what is permissible business for charities, the language was all but ignored in the only case which deals directly with the subject. The bedeviling words are *related business* being allowed and *unrelated business* being prohibited. Related business is not defined in the *Act*. But the *Act* does say that a related business includes a business unrelated to the objects of the charity if “substantially all” the employees in the business are unpaid. The common sense meaning would therefore seem to be that a business is related if it directly furthers the charity’s goals. An unrelated business is one that does not.

The *Income Tax Act* doesn’t prohibit a public foundation from carrying on a related business. In a roundabout fashion related business activity is permitted for charitable organizations because the charitable organization is deemed to be devoting its resources to its charitable activities. Private foundations, however, are explicitly prohibited from carrying on any business.

In 1987 the Federal Court of Appeal in *Alberta Institute on Mental Retardation v. Canada* found that the charity, the Alberta Institute on Mental Retardation, collected and sold used household goods to a retailer, under a contract which provided for monthly advances of \$2,000 and a fifty percent share of profits from retail sales. The Alberta Institute, in turn, transferred all its profits to its associated charity, the Alberta Association for the Mentally Handicapped. The Court identified four factors to bear in mind in determining whether the activity in question was permissible:

- The degree of relationship of the activity to the charity;
- Profit motive;
- The extent to which the business operation competes with other businessmen;
- The length of time the operation has been carried on by the charity.

But then, without a detailed analysis, the majority of the Court found that applying these criteria, a business like the one operated by the *Alberta Institute* is a related business because all the profits from that business are used to advance the charitable purpose. This has since come to be called the *destination test*. All transactions can have profit. It is just a question of definition. But profitability doesn’t have anything really to do with the notion of related or unrelated as far as objects are concerned. What sense does it make to say that a gas station owned by a daycare is related because the profits are all devoted to furthering the purposes of the daycare?

As the minority judgment observed, the mere fact that the whole of the income derived from a business operated by a charity is used for the charitable purpose of the charity is not sufficient to make that business a related business.

“And this is so because the necessary relationship must exist between the charitable objects and the commercial activity or business itself. If it were sufficient, in order to create the necessary relationship, that the income of the business be entirely used for charitable purposes, paragraph 149.1(3)(a) [of the *Income Tax Act*] [which permits revocation of registered status for carrying on an unrelated business] would be devoid of effect.”

Neither judgment examined the four factors which were identified. The minority reasoning points in the right direction. As that judgment notes, the *Income Tax Act* does distinguish between “related” and “unrelated” business activities of charities. The core idea is clear: a business is related if it directly advances the goals of the charity. An unrelated business, conversely, is one that does not *directly advance* the charitable purpose.

The preferable concept is commercial activities, not the business activities of charities. Commercial identifies the concept that is of concern. It captures all transactions that are relevant, since it includes isolated commercial transactions and events in a way business does not; it captures only the relevant activities which are those involving an element of commerce in a way that business (as in the business of charities is charity) does not. The use of the concept *commercial* provides one way to make the distinction that lies at the heart of the legal regulation in this area. Commercial activities are and should be permitted to be carried on by charities up to the point where the charity conducting them becomes, in whole or in part, a commercial business. The issue is the proper classification of the permissible and impermissible commercial activities of charities. Related commercial activity is activity that directly advances the objects of the charity, for example, the sale of merchandise made by the disabled in training and employment workshops, or, a literacy organization holding a book fair.

One alternative way to deal with the question of whether charity can undertake a business venture is to classify what is to be done in the following way.

- Are they mission-implementing commercial activities; those activities which are directly related to the charity’s objects.
- Are they are mission-related commercial activities; those which are subordinate to the charity’s objects as being either incidental or ancillary.
- Are they commercial business activities; those which are unrelated to mission of the charity.

While this approach has not been adopted by a court, activities which fall in the first two categories would clearly have to be seen to be related to a charity’s purposes and the destination of any profits would meet the test in the *Alberta Institute* case. Those activities in the third group might meet the destination test but a future court might be more persuaded by the minority judgment in *Alberta Institute* that some relationship to purpose should exist. And maybe that’s a good thing, too.

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