PUBLIC FOUNDATION OR PRIVATE FOUNDATION? *THE SHELDON INWENTASH AND LYNN FACTOR CHARITABLE FOUNDATION V. THE QUEEN*

BY JESSE BRODLIEB

On February 29, 2012, the Federal Court of Appeal ("FCA") heard oral argument in *The Sheldon Inwentash and Lynn Factor Charitable Foundation v. Her Majesty the Queen* (FCA Court File No. A-235-11). Pursuant to subsection 172(3) *of Income Tax Act* (Canada) (the "Act"), an appeal of the Minister of National Revenue's decision to refuse charitable registration is made directly to the FCA.

The Appellant trust is appealing the Canada Revenue Agency's (the "CRA") decision to refuse to register the Appellant as a "public foundation" within the meaning of subsection 149.1(1) of the Act. The Appellant was instead registered as a "private foundation" (For an excellent, if slightly out-of-date, discussion on the difference between private and public foundations, see Cindy Radu, "Public/Private Foundations – Issues and Planning Opportunities" in "Personal Tax Planning," (2009), vol. 57, no. 1 Canadian Tax Journal, 119-142).

The definition of "public foundation", as currently enacted, reads in part (underline added):

> "public foundation" means a charitable foundation of which,
>
> (a) where the foundation has been registered after February 15, 1984 or designated as a charitable organization or private foundation pursuant to subsection (6.3) or to subsection 110(8.1) or (8.2) of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952,
>
> (i) more than 50% of the directors, trustees, officers or like officials deal with each other and with each of the other directors, trustees, officers or officials at arm's length, and
>
> (ii) not more than 50% of the capital contributed or otherwise paid in to the foundation has been so contributed or otherwise paid in by one person or members of a group of such persons who do not deal with each other at arm's length
>
> […]

Main Issue

The main issue on appeal is whether a trust with a single trustee can meet the "more the 50%" test in paragraph (a)(i). The basis for the CRA rejecting the Appellant's application to register as a private foundation was that as there is only one trustee (being a registered trust company), which does not satisfy the requirement in subsection 149.1(1) of the Act that more than 50% of the directors, trustees officers or officials deal at arm's length with each other.

The Appellant takes the position that the CRA has incorrectly interpreted the definition of public foundation. In short, the Appellant contends that the CRA is in error with respect to its position that a trust with a single trustee can never meet test in subparagraph (a)(i) of the definition.

The Appellant notes that the *Interpretation Act*, R.S.C. 1985, c I-21, as amended, provides that words in the plural include the singular (and words in the singular include the plural) and that Parliament could have easily drafted the legislation governing public foundations to provide for

a minimum number of trustees, not dissimilar to the specified investment business and personal service business definitions which require a corporation to employ "more than five full time employees". In the Appellant's view, where a single, professional and arm's length trust company is the sole trustee of a trust, the trust can still be public foundation pursuant to the definition in subsection 149.1(1), especially in light of the policy behind subparagraph (a)(ii), which the Appellant submits is to prevent the use of tax-exempt charitable donations for private gain.

The Appellant also contends that the CRA has not taken a consistent position on the application of this provision. Published CRA statements indicate that a trust requires at least three trustees in order to meet the test in subparagraph (a)(i). However, the Appellant points out that the CRA has approved as public foundations trusts with only two trustees. This position, according to the Appellant, cannot be reconciled with the CRA's position on the "more than 50%" threshold, as two trustees by definition cannot satisfy such a requirement any more than can a trust with a single trustee.

The Crown's position is that the definition of public foundation is clear and unequivocal, and should therefore be interpreted strictly in accordance with the Supreme Court of Canada's decision in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*[2006] SCR 715. A purposive approach, as suggested by the Appellant, cannot be used to supplant clear statutory language where there is no ambiguity.

Other Issues

The rule in subparagraph (ii) is commonly referred to as the "Contribution Test". Pursuant to draft legislation released on July 16, 2010, the Contribution Test will be replaced by a rule whereby a foundation cannot be controlled by a person (or a group of arm's length persons) who contributed more than 50% of the capital to the foundation (the "Control Test"). This legislation, once enacted, will have retroactive application to years after 1999.

According to the Crown's Memorandum of Fact and Law, the CRA also refused to register the Appellant as a public foundation because, in the Crown's view, both the Contribution Test and Control Test are not met. Interestingly, the Crown did not advance any argument on this final point in its written submissions, except to say that given the uncertainty that the proposed legislation will become law, the Appellant cannot seek registration on the grounds that it satisfies the Control Test. It is also interesting to note that the position taken by the Crown is contrary to the public position announced by the CRA by way of news release dated July 11, 2007 that it would administer the Act as though the Control Test applied.

The appeal was heard by a three-member panel of the FCA comprised of Madame Justice Eleanor Dawson, Madame Justice Johanne Trudel, and Mr. Justice David Stratas.