

BETWEEN:

Calgary
1968

DR. BARNARDO'S APPELLANT;

Apr. 30

AND

Ottawa
May 15

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

Revenue—Estate Tax Act, R.S.C. 1958, c. 29, s. 7(1)(d)(i)—Appellant not an “organization in Canada”.

In 1964, a decedent by his will directed the payment of the residue of his estate valued at \$521,670.02 to the appellant “Dr. Barnardo’s”.

The respondent assessed a tax of \$123,943.24 on this decedent’s estate on the basis that this estate was not entitled to any deduction under section 7(1)(d)(i) of the *Estate Tax Act* because the appellant was not an “organization in Canada”.

Held: 1. that the appellant, an incorporated association, was not such an “organization in Canada” to qualify a gift to it for a deduction

under section 7(1)(d)(i) of the *Estate Tax Act* because (1) it did not have an office or place of business with any employees or even an attorney or an agent in Canada; and (2) it did not actually carry on in Canada any operation devoted to its particular charitable purpose "at the time ... of the death of the deceased".

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2. That the appeal is dismissed without costs.

ESTATE TAX APPEAL.

D. O. Sabey for appellant.

D. G. H. Bowman for respondent.

GIBSON J.:—The decision on this appeal under the *Estate Tax Act* is dependent on whether or not the appellant on April 9, 1964 was an "organization in Canada" within the meaning of those words in section 7(1)(d)(i)¹ of that Act.

On April 9, 1964, David A. Oliver, merchant, Drumheller, Alberta died and by his will which was probated he directed the payment of the residue of his estate valued at \$521,670.02 to the appellant "Dr. Barnardo's".

By Notice of Assessment dated April 1, 1965, the respondent assessed a tax of \$123,943.24 against this estate on the

17. (1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:

...

(d) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute and indefeasible, to

(i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada, all or substantially all of the resources of which were so devoted, or to any donee described in subparagraph (ii), and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or

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basis that this estate was not entitled to any deduction under section 7(1)(d)(i) of the *Estate Tax Act* for the purpose of computing the aggregate taxable value of property passing on the death of the deceased, because the appellant was not an "organization in Canada". (But it is common ground between the parties that the appellant was at the material time and is a charity, and otherwise (except for the words "organization in Canada") the gift to the appellant qualifies as a deduction under that subsection of the Act).

The meaning of the words "organization in Canada" in section 7(1)(d)(i) of the *Estate Tax Act* in relation to the facts of this case is the issue for decision.

Much expense, time, and otherwise unnecessary things would have been expended and done, for the purpose of this adjudication were it not for the fact that counsel for the parties reached an agreement on most facts, and reduced them to writing, which such agreement was filed as Exhibit A-1 at this trial.

All other evidence was adduced through Mr. Frederick James Potter, General Secretary of Dr. Barnardo's, England.

The Agreed Statement of Facts is as follows:

1. Dr. Barnardo's Homes: National Incorporated Association (hereinafter called "Dr. Barnardo's") was incorporated in Great Britain on April 20, 1899 under the English *Companies Act, 1862, 25 & 26, Ch. 89*, under the name of "The National Incorporated Association for the Reclamation of Destitute Waif Children, otherwise known as Dr. Barnardo's Homes". On May 25, 1906 it changed its name to Dr. Barnardo's Homes: National Incorporated Association. On December 31, 1965 it again changed its name to Dr. Barnardo's.

2. David A. Oliver died testate in the Province of Alberta on April 9, 1964 and left the residue of his estate to the Appellant. Clause 6 of his Last Will and Testament was as follows:

"6. I direct my Executor and Trustee to pay the residue of my estate to charity, the sole beneficiary being Dr. Barnardo's Homes, 18 Stepney Causeway, London, England."

3. On assessing pursuant to the *Estate Tax Act*, the Respondent did not allow pursuant to section 7(1)(d) of the *Estate Tax Act* as a deduction from the aggregate net value of the property passing on the death of the deceased the value of the residue of the estate so left to the Appellant.

4. The Appellant is the successor to property passing on the death of the deceased within the meaning of sections 22 and 58(1)(r) of the *Estate Tax Act*.

5. At the time of the making of the gift to the Appellant and of the death of the deceased the Appellant was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which were devoted to charitable activities carried on by it. The Respondent specifically does not admit that the Appellant was an organization in Canada within the meaning of section 7(1)(d) of the *Estate Tax Act*.

6. The governing body of Dr. Barnardo's consists of a council of not more than twenty-five persons, who from themselves appoint two major committees, the Finance Committee and the Committee of Management. None of these persons on the council have at any material time been residents of Canada and all have been residents of the United Kingdom. All meetings of the council and of the committees have at all material times been held in England and have never been held in Canada.

7. At all material times there were between two and three hundred members of Dr. Barnardo's. At the date of death of the deceased no officer and no member of Dr. Barnardo's was resident in Canada.

8. At all material times Dr. Barnardo's was resident in England and its head office and central management and control was located in London, England. It has never been resident in Canada. The Canadian operations records were in Canada until 1960 when all records were moved to London, England. Prior to 1960 the London office received annual statements from the Canadian manager and from the auditors and received quarterly bank statements. The corporate books and records of Dr. Barnardo's have always been kept in London, England.

9. Prior to 1925 a portion of the activities of Dr. Barnardo's consisted in emigrating children from Great Britain to Canada as summarized in Exhibit ASF-1. A number of Homes and a Farm School were established in Canada for the reception of these children. After July 1, 1925 the activities of Dr. Barnardo's were greatly curtailed when the Government of Canada prohibited the admission to Canada of children under the age of 14 years unless accompanied by a parent. All emigration of children to Canada was stopped by 1939. Two of the Homes and the Farm School were sold by the end of the 1920's; two more were sold in 1941 and 1942 respectively and the last Home was sold in 1948.

10. Dr. Barnardo's continued to operate and maintain offices in the City of Toronto in the Province of Ontario until 1960. Since that time The Canadian Imperial Bank of Commerce which carries the account of Dr. Barnardo's has paid the pensions to Dr. Barnardo's retired staff in Canada, has received and acknowledged contributions to Dr. Barnardo's and has transmitted correspondence to London.

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11. Up until 1960 or 1961 Dr. Barnardo's had two bank accounts in Canada. One was a trust account containing a small amount of money consisting of amounts saved by Dr. Barnardo's boys and girls that had not been withdrawn by them. In 1960 the amounts in this account (totalling \$131.24) were transferred to the general account of Dr. Barnardo's at the Avenue Rd. and Eglinton Branch of The Canadian Imperial Bank of Commerce. This account still exists. Except for the payment by the Bank of the specific pensions referred to in paragraph 14, at the date of death of the deceased no person in Canada had the authority to draw on the general account and authorization for any payments out of the account had to be made by letter from an authorized person at Dr. Barnardo's in London, England.

12. The last time that a separate audited report of the financial affairs of Dr. Barnardo's in Canada was done was in 1960 when an audited report for the year ended December, 1959 was done by Clarkson, Gordon & Company. Neither Clarkson, Gordon & Company nor any other accounting firm in Canada did any accounting work for Dr. Barnardo's after that date and no separate account relating to Canada was made by any person in Canada though a separate account was kept in London.

13. At the date of death of the deceased Dr. Barnardo's held securities such as shares or bonds in Canada and the share certificates were physically in the possession of The Canadian Imperial Bank of Commerce in Toronto. Shares or other securities were purchased in Canada by Dr. Barnardo's on the advice of and through brokers in London, England and on the direction of officers of Dr. Barnardo's in England. The moneys used to purchase such securities were obtained from funds derived from donations in Canada to Dr. Barnardo's or funds previously remitted to Canada by Dr. Barnardo's. No funds have been remitted by Dr. Barnardo's to Canada for any purpose since 1939. At no time have Dr. Barnardo's had a safety deposit box in Canada. Dr. Barnardo's has not withdrawn from Canada any of the gifts made to it in Canada and continues to hold its investments and funds in Canada.

14. Dr. Barnardo's paid pensions to two former employees in Canada in 1964. Apart from pensions no amounts were paid in Canada to any person for any purpose by Dr. Barnardo's from 1960 until the end of 1964.

15. After 1953 no public appeals to any person in Canada were made by Dr. Barnardo's either from England or from Canada.

16. In 1964 Dr. Barnardo's did no charitable work of any kind in Canada nor did it contribute any funds toward charitable work in Canada. Dr. Barnardo's continues to communicate and correspond from London with Old Boys and Girls providing assistance to them in dealings with various federal agencies including the Department of Veterans' Affairs and a number of social welfare agencies. All

these matters are handled from Dr. Barnardo's head office in London, England for purposes of economy and centralization. The various enquiries are summarized in Exhibit ASF-2.

17. From 1960 until the present the only property owned in Canada by Dr. Barnardo's consisted of the securities and bank account referred to above.

18. At the date of death of the deceased there was no person in Canada who had a power of attorney, either general or restricted, to execute any document or do anything on behalf of Dr. Barnardo's in Canada.

19. Attached as Exhibit ASF-3 are the returns of Information filed by Dr. Barnardo's with the Provincial Secretary of Ontario under *The Corporations Information Act* (Ontario) for the period 1959-1965 inclusive.

20. All persons shown as officers and directors of Dr. Barnardo's on the said returns were residents of England and not of Canada.

21. In 1960 all of the records of Dr. Barnardo's that had formerly been held in Canada were transferred to England and since that time Dr. Barnardo's had no telephone listing, no address, no office and no employees in Canada.

22. At no time has Dr. Barnardo's carried on in Canada the work of admitting children to care in homes similar to the work carried on by it in the United Kingdom.

23. Since 1950 no payments have been made in Canada by Dr. Barnardo's to any charitable organization other than payments made by Dr. Barnardo's to the Commission on Emotional and Learning Disorders in Children of \$30,000 in 1966 and \$20,000 in 1967.

24. The parties agree that the sole issue in this appeal is whether Dr. Barnardo's was an organization in Canada at the date of death of the deceased within the meaning of section 7(1)(d) of the *Estate Tax Act*.

This evidence established, among other things, the following facts:

On April 9, 1964, the appellant, a United Kingdom charity had these connections with Canada:

1. It had a relatively small bank account in a branch of the Canadian Imperial Bank of Commerce, Toronto, Ontario, and a portfolio of investments, the share and bond certificates representing which were physically in Canada, amounting to about \$250,000.
2. From this said bank account, on specific directions from the executive officers of the appellant in England, it paid pensions to two former employees, a Mrs. Black and a Mr. Jenkins.

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3. Most letters to the appellant posted in Canada (making enquiries of age for example, of former Barnardo persons, which was the predominant type of letter sent to it,) were addressed to the appellant's office in London, England; but any that were not, were sent on by the said bank to that office.
4. It bought securities in Canada through Wood, Gundy, & Co., brokers, on specific instructions from time to time of the London, England, brokers of this appellant.

But also, as of April 9, 1964, the appellant:

1. Was not resident in Canada, in the sense that there was any management or control in Canada; (see *Swedish Central Railway Company, Limited v. Thompson*²; *Egyptian Delta Land and Investment Company, Limited v. Todd*³; *De Beers Consolidated Mines, Limited v. Howe*⁴);
2. Was not carrying on its business in Canada, although authorized to do so in the Province of Ontario, holding in good standing an extra-provincial license under Part IX of *The Corporations Act of Ontario*, R.S.O. 1960, c. 71, as amended, and having filed up to date returns under *The Corporations Information Act*, R.S.O. 1960, c. 72;
3. Did not own any real estate in Canada;
4. Had no office or telephone number in Canada;
5. Had no employees in Canada;
6. Had no representative or attorney or agent in Canada;
7. Did no charitable work pursuant to its powers in Canada;
8. Was not domiciled here;

² [1925] A.C. 495.

³ [1929] A.C. 1.

⁴ [1906] A.C. 455.

9. Was not subject to any Canadian legislation except as to the Province of Ontario Extra-Provincial License authorizing it to do business in Canada;
10. In its formal annual reports made in England, from 1960 to 1964 made no reference to any operation carried on by it in Canada, but made reference to operations carried on by it in the United Kingdom, Australia, New Zealand, Kenya, and so forth.

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In effect, by April 9, 1964, the appellant had accomplished what was its intention in 1954, as evidenced by part of a letter written on August 6, 1954 by the General Superintendent of the Appellant in London, England to Mr. G. Black, Toronto, its last agent in Canada, (died 1960), *viz.*,
 ...Council regards itself as winding up its affairs in Canada

Counsel agree that there is no test prescribed in the *Estate Tax Act*, and no jurisprudence as to the meaning of the words "organization in Canada" in section 7(1)(d)(i) thereof.

An "organization in Canada" to qualify a gift to it for a deduction under section 7(1)(d)(i) of the *Estate Tax Act* may be an unincorporated as well as an incorporated association.

It is relatively easy to determine whether or not the individuals of an unincorporated organization who carry on its charitable work are "in Canada", in a natural sense, but when it is sought to determine whether or not an incorporated organization is "in Canada" it is not as easy to determine, because in a natural sense a corporation cannot be "in Canada" or anywhere else. Some artificial test, in the case of the latter, must therefore be applied.

In applying such a test, it is a pure question of fact, to be determined upon a scrutiny of the charitable activities of such an organization at the material time "in Canada".

Adopting such an approach, I am of the view that the following are relevant criteria to be considered in such a test. Any organization is not "in Canada" for the purposes of section 7(1)(d)(i) of the *Estate Tax Act*, (1) unless the

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organization has in Canada an office or place of business with some or at least one employee, or failing that, an attorney or agent in Canada, and (2) unless also such organization actually carries on in Canada in some material way an operation devoted to the particular charitable purpose of the organization "at the time . . . of the death of the deceased".

In this case, the critical time is the date of death of the deceased, David A. Oliver, *viz.*, April 9, 1964.

Predicated on the findings of facts above recited, it is patent that the appellant on April 9, 1964 did not meet the test above stated.

It follows, therefore, that the appellant was not an:

. . . organization in Canada that, at the time . . . of the death of the deceased, (i.e. of the donor by will of the gift to the appellant) was . . . constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada, all or substantially all of the resources of which were so devoted, . . .⁵

(Underlining and words in brackets are mine.)

The appeal is therefore dismissed, but without costs.

⁵ Section 7(1)(d)(i) of the *Estate Tax Act*.