

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150817

Docket: A-75-13

Citation: 2015 FCA 178

**CORAM: GAUTHIER J.A.
RYER J.A.
NEAR J.A.**

BETWEEN:

**HUMANE SOCIETY OF CANADA FOR THE
PROTECTION OF ANIMALS AND THE
ENVIRONMENT**

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on May 14, 2015.

Judgment delivered at Ottawa, Ontario, on August 17, 2015.

REASONS FOR JUDGMENT BY:

RYER J.A.

CONCURRED IN BY:

**GAUTHIER J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal by the Humane Society of Canada for the Protection of Animals and the Environment (the “Appellant”), pursuant to paragraph 172(3)(a.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”), from a decision of the Minister of National Revenue (the “Minister”), dated January 22, 2013 (the “Confirmation Decision”), confirming the Minister’s proposal to revoke the Appellant’s registration as a charitable organization, as defined in

subsection 149.1(1) (a “charitable organization”). Unless otherwise indicated, all statutory references in these reasons shall be to the corresponding provisions of the Act that were in force at the applicable time.

[2] For the reasons that follow, I would dismiss the appeal.

I. BACKGROUND

[3] It is necessary to describe in some detail the background to this appeal, which includes two prior decisions from this Court – *Humane Society of Canada for the Protection of Animals and the Environment v. Minister of National Revenue*, 2013 FCA 154 [*Humane Society 2013*], rendered by Justice Sharlow, and *Humane Society of Canada for the Protection of Animals and the Environment v. Minister of National Revenue*, 2014 FCA 53 [*Humane Society 2014*], rendered by Justice Mainville.

[4] The Appellant was incorporated in 1993 under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32, and registered as a charitable organization in that year. At all times that are relevant to this appeal, Mr. Michael O’Sullivan has been a director, officer and member of the Appellant.

[5] In 2007, the Canada Revenue Agency (the “CRA”) undertook an audit of the Appellant’s 2006 taxation year. In the course of the audit, the CRA identified the following concerns:

- a) a large portion of the Appellant's resources did not seem to have been devoted to the charitable purposes for which it was registered;
- b) personal expenditures of Mr. O'Sullivan were being reimbursed by the Appellant; and
- c) the books and records of the Appellant did not separate Mr. O'Sullivan's personal expenditures from the Appellant's charitable expenditures, and they did not demonstrate a direct linkage between the Appellant's expenditures and its charitable activities.

[6] By correspondence dated March 11, 2009, and June 30, 2009, the CRA stated that the Appellant's books and records were deficient in that they failed to adequately link the Appellant's reported charitable expenditures to its charitable activities and they failed to separate the personal expenses of Mr. O'Sullivan from the Appellant's charitable expenditures.

[7] Those letters also expressed concerns about a large amount – over \$250,000 – of expense reimbursements made by the Appellant to Mr. O'Sullivan. While the CRA acknowledged that some of these reimbursements may have been the result of the apparent inability of the Appellant to obtain its own credit card, the CRA concluded that approximately \$70,000 of that amount related to personal expenses of Mr. O'Sullivan. Included in that amount were a large number of personal meal expenses, the cost of comic books purchased through Paypal, liquor purchases from the LCBO, grocery purchases, tickets to entertainment events in the UK and the USA, and expenses of Mr. O'Sullivan and his family at Disneyland.

[8] These concerns led CRA officials to advise the Appellant that the CRA was considering the issuance, pursuant to subsection 168(1), of a notice of intention to revoke (a "NIR") the Appellant's registration as a charitable organization.

[9] On August 31, 2009, the Appellant made submissions to the Minister in respect of the concerns that arose in the audit. These submissions, including numerous schedules, totalled 845 pages in length. While these submissions were fulsome and attempted to address the CRA's concerns, they nonetheless contained two important acknowledgements or admissions. First, the Appellant acknowledged that "approximately 5.64% of total expenses for 2006" were mischaracterized as expenses of the Appellant. The Appellant then asserted that these were personal expenses of Mr. O'Sullivan that "through inadvertence" were mischaracterized as proper expenses of the Appellant. Secondly, these submissions contained the following paragraph:

The following lists contain 42 major programs the Charity conducted in 2006. The lists do not include every activity in which the Charity was engaged in 2006. It does reflect the activities that consumed the majority of the Charities resources. Work product for all 42 programs can be found in the Charity's submission. Direct expenses from the Charity's accounting system have been identified in programs 1 through 12. There is not sufficient detail in the Charity's accounting system to assign direct costs to Items 13 through 42. [Emphasis added]

This paragraph acknowledges that the Appellant's accounting system was unable to directly assign its allegedly charitable expenditures in 30 of its 42 major programs

[10] Notwithstanding these acknowledged problems, the Appellant urged the CRA to enter into a compliance agreement rather than issue a NIR.

[11] After having reviewed the Appellant's submissions, the CRA considered whether it would be appropriate to assess a penalty, pursuant to subsection 188.1(4), on the basis that the Appellant had conferred an undue benefit, within the meaning of subsection 188.1(5) (an "undue benefit"), on Mr. O'Sullivan. In a Sanction Recommendation Report, dated in early November of

2009, (appeal book 0548) the CRA decided to proceed with revocation, rather than monetary penalization. The CRA stated that the amount of the undue benefit could not be readily ascertained because of the large number of receipts for the approximately \$251,500 of expense reimbursements that Mr. O'Sullivan had received.

[12] Unpersuaded by the Appellant's submissions, the CRA issued a NIR on February 17, 2010. In it, the CRA stated that the revocation was proposed for the following reasons:

- a) the Appellant had not devoted all of its resources to the charitable activities for which it was formed;
- b) the Appellant had conferred an undue benefit on a member of its governing board;
- c) the Appellant improperly completed an information return that was required to be filed with the Minister; and
- d) the Appellant failed to maintain adequate books and records to support its activities.

[13] On May 14, 2010, the Appellant filed a notice of objection (the "Objection") to the NIR with the CRA Appeals Directorate (the "Appeals Directorate"), as permitted by subsection 168(4). Accompanying the Objection was a book of documents that included the Appellant's submissions of August 31, 2009.

[14] By correspondence dated April 19, 2012, counsel for the Appellant confirmed that approximately \$22,000 of Mr. O'Sullivan's personal expenses had been "inadvertently" reimbursed by the Appellant and asserted that the comic books had been purchased by the

Appellant as “investment assets”. This submission also contained an acknowledgement that there had been bookkeeping errors and that these errors had resulted in the Appellant terminating its professional relationship with the accountant upon whom the Appellant had relied.

[15] By letter dated January 22, 2013, the Appeals Directorate confirmed the Minister’s decision to issue the NIR (the “Confirmation Decision”). The stated reasons for the Confirmation Decision were that the Appellant:

- a) failed to demonstrate that it devoted all of its resources to charitable activities;
- b) provided part of its income for the personal benefit of a member of the governing board;
and
- c) failed to comply with or contravened any of sections 230 to 231.5 of the Act.

[16] The Appeals Directorate acknowledged receipt of several bundles of documents that were apparently intended to demonstrate that the expenses reimbursed to Mr. O’Sullivan were not of a personal nature. However, after considering those documents, the Appeals Directorate remained of the view that at least \$69,343.81 of the reimbursements did not relate to charitable expenditures of the Appellant, and as such were personal expenses of Mr. O’Sullivan. The Appeals Directorate recognized that while many of the documents established that costs had been incurred, such documents contained no basis to establish that those costs had been incurred in furtherance of the Appellant’s charitable activities. Finally, the Appeals Directorate did not accept the assertion that the comic books were “investment assets” because there was no support for that assertion in the Appellant’s financial statements.

[17] The Appeals Directorate also indicated that the amounts disbursed by the Appellant for the personal benefit of Mr. O'Sullivan could not be said to be amounts used by the Appellant for its charitable activities.

[18] The Appeals Directorate determined that each of the three non-compliance issues specified in the Confirmation Decision was serious and justified the issuance of the NIR. The Confirmation Decision did not rely upon an alleged failure by the Appellant to provide an appropriately completed information return, as had been stated in the NIR.

[19] On February 21, 2013, the Appellant filed a notice of appeal (the "Notice of Appeal") to this Court seeking to have the Confirmation Decision overturned. In the Notice of Appeal, the Appellant requested that the Confirmation Decision be quashed or alternatively that the revocation of the Appellant's status as a charitable organization be declared not to have been made "for cause". The grounds of appeal were that:

- a) the Minister erred in concluding that the Appellant's registration should be revoked on the grounds that it failed to demonstrate that it devoted all of its resources to charitable activities such that it ceased to comply with the registration requirements of the Act;
- b) the Minister erred in concluding that the Appellant's registration should be revoked because part of its income provided to Mr. O'Sullivan was provided for personal benefit;
- c) if the funds were used for a personal benefit, this error was a mistake of the director and not a failure of the Appellant to devote its resources to charitable purposes;
- d) the definition of "undue benefit" in the Act and the consequences of a finding of such an undue benefit is an imposition of a fiscal penalty such that revocation is precluded; and

- e) the Minister erred in concluding that the registration of the Appellant should be revoked because of an alleged failure to maintain or provide adequate books and records to such an extent that revoking its registration is warranted.

[20] In the Notice of Appeal, the Appellant also made the following request of the Minister:

The appellant requests the Minister to send a certified copy of the following material that is not in the possession of the appellant but is in the position of the Minister to the appellant and to the Registry:

1. The audit of the books and records of the appellant conducted by the Canada Revenue Agency for the period 1 January 2006 to 31 December 2006;
2. Any material prepared or considered by the Minister or the [CRA] in relation to the decisions to issue to the [NIR] and to publish this notice in the Canada Gazette; and
3. Any other material prepared or considered by the Minister or the [CRA] in the course of the decision to revoke registration of the appellant as a charitable organization.

[21] Subsequent to the filing of the Notice of Appeal, the Appellant brought a motion before this Court for an order requiring the Minister to provide full particulars of the allegation in the Confirmation Decision that the Appellant failed to comply with or contravened any of sections 230 to 231.5, so that the Appellant could determine which documents should be included in the appeal book. In addition, the Appellant sought an order to compel the Minister to certify, pursuant to Rules 317(1) and 318(1)(a) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), all of the documents that were before the Appeals Directorate when it made the Confirmation Decision.

[22] In *Humane Society 2013*, Justice Sharlow denied the motion for particulars. In so doing, she concluded that Rules 317 and 318 did not require a specific certification as to what material had been before the Appeals Directorate when the Confirmation Decision was made. She also determined that although the Confirmation Decision referred to a failure of the Appellant to comply with “any of sections 230 to 231.5 of the Act”, only paragraph 230(2)(a) was in issue. Finally, she concluded that all documents provided by the Appellant to the CRA at the audit stage or during the revocation and confirmation process must be presumed to have been before the Minister at the relevant time. As such, any of those documents that were relevant to the issues in the appeal should be included in the Appeal Book, thereby addressing any potential concerns with respect to an underinclusive record before this Court.

[23] On October 19, 2013, the parties agreed to the contents of the appeal book, which comprised 18 volumes. Volumes 1 to 10 contain the materials that were certified by the Minister in accordance with Rule 318 (the “Certified Tribunal Record”). As noted in paragraph 20 of these reasons, the Appellant requested materials beyond those comprising the Certified Tribunal Record and as such, Volumes 10 to 15 contains additional materials that were provided by the Appeals Directorate in response to this request. Volumes 15 to 18 contain materials that were provided by the Appellant as permitted by *Humane Society 2013*.

[24] On January 23, 2014, the Appellant brought a motion for an order permitting it to amend its Notice of Appeal to add a number of new grounds, including that it had been denied a fair hearing before the Appeals Directorate because, *inter alia*, the Appeals Directorate failed to consider and address the Appellant’s submissions prior to making the Confirmation Decision.

[25] In *Humane Society 2014*, Justice Mainville granted this motion, in part, permitting the Appellant to file an amended Notice of Appeal (the “Amended Notice of Appeal”) containing only the following amendments:

a. the following relief may be added: “a declaration that paragraph 172(3)(a.1) of the *Income Tax Act*, R.S.C. 1985, c. 1(5th Supp.) violates paragraphs 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and is therefore of no force and effect”; and

b. the following ground of appeal may be added: “Paragraph 172(3)(a.1) of the *Income Tax Act* violates paragraph 2(e) of the *Canadian Bill of Rights* on the basis that it fails to require the Minister to provide the appellant (and the Federal Court of Appeal) with the record that was before the Minister when the decision concerning the revocation of the appellant’s registered charity status was made in this case, thereby denying the appellant a fair hearing on this appeal”.

[26] Justice Mainville also determined that the “revocation for cause” issue had been dealt with by this Court in *Prescient Foundation v. Canada National Revenue*, 2013 FCA 120, 358 D.L.R. (4th) 541 [*Prescient Foundation*], and that issue did not present itself in this appeal. In that case, the Court upheld, as reasonable, the revocation “for cause” of the registration of a charitable foundation, within the meaning of subsection 149.1(1) (a “charitable foundation”), on the basis that by entering into certain transactions and using its tax-exempt status to facilitate the obtaining of tax advantages by third parties, it failed to meet the requirement in subsection 149.1(1) that a charitable foundation must be operated exclusively for charitable purposes.

[27] In furtherance of the new ground of appeal in its Amended Notice of Appeal, the Appellant served a Notice of Constitutional Question on May 13, 2014.

II. ISSUES

A. *Formulation of issues*

[28] At the hearing, the Appellant asserted, for the first time and in reply, that the Certified Tribunal Record was deficient because it did not include a document that was part of the Appellant's submissions of August 31, 2009, described as Schedule 2 ("Schedule 2"). As this alleged deficiency was only noticed at the hearing, post-hearing written submissions were requested by the Court. In its submission, the Appellant argued that the only reasonable inference that could be drawn from the absence of Schedule 2 from the Certified Tribunal Record is that the Appeals Directorate did not consider that portion of the submissions that were made to it. Thus, the Appellant asserted, the Appeals Directorate committed a breach of procedural fairness that compels this Court to allow the Appeal.

[29] In my view, it is not appropriate for this Court to consider this new argument for a number of reasons. First, it was not raised in the Notice of Appeal or the Appellant's memorandum of fact and law. The Minister therefore had no opportunity to file evidence in reply, as she has the right to in relation to procedural fairness arguments. Secondly, as noted in paragraph 24 of these reasons, in *Humane Society 2014*, Justice Mainville rejected the Appellant's request to amend its Notice of Appeal to include essentially the same argument. Finally, the proposed inference is based upon an incorrect premise, namely, that Schedule 2 was required to be included in the Certified Tribunal Record. In *Humane Society 2013*, Justice Sharlow rejected the assertion that all of the documentation that was before the Appeals Directorate was required to be included in the Certified Tribunal Record. Rule 317 contemplates

that the tribunal in issue will provide relevant documentation that *is not in the possession of the requesting party*. It cannot be doubted that the Appellant possessed a copy of Schedule 2. The relevance of Schedule 2 in this appeal is in relation to the issue of the reasonableness of the Confirmation Decision.

[30] Thus, I would formulate the issues in this appeal as follows:

- (a) Does paragraph 172(3)(a.1) require the Minister to deliver the “complete record” to the Appellant and to this Court on an appeal under that provision?
- (b) If the Minister found or could have found that the Appellant conferred an undue benefit on Mr. O’Sullivan, would this preclude the Minister from revoking the Appellant’s status as a charitable organization?
- (c) Does the Appeals Directorate have the authority to vary the basis of revocation of the Appellant’s status as a charitable organization from that stipulated in the NIR?
- (d) Was the Confirmation Decision reasonable?

III. THE STANDARD OF REVIEW

[31] In *Prescient Foundation*, this Court determined that the standards of review in an appeal, pursuant to paragraph 172(3)(a.1), of the decision of the Minister to revoke the registration of a charitable organization are as follows:

- (a) questions of mixed fact and law are reviewable on the standard of reasonableness; and
- (b) questions of law, including such questions that may be readily extricable from questions of mixed fact and law, are reviewable on the standard of correctness.

[32] Issues (a), as noted below, arises for the first time on appeal. It along with issues (b) and (c) are questions of law, while issue (d) raises questions of mixed fact and law.

[33] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 S.C.R. 190, the Supreme Court posits reasonableness as a deferential standard requiring justification, transparency, and intelligibility in a decision-making process that leads to a possible, acceptable outcome, which is defensible in respect of the facts and law. As noted most recently by the Supreme Court, the Minister’s “decision must be considered reasonable if its conclusions fall within a ‘range of possible, acceptable outcomes which are defensible in respect of the facts and law’” (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para 50, [2015] S.C.J. 382 D.L.R. (4th) 385.

IV. DISCUSSION

A. *Legislative context*

[34] Subsection 168(1) sets out a number of grounds upon which the Minister may decide to revoke the registration of a charitable organization. Of relevance in this appeal are paragraphs 168(1)(b) and (e), which read as follows:

168. (1) The Minister may, by registered mail, give notice to a person described in any of paragraphs (a) to (c) of the definition “qualified donee” in subsection 149.1(1) that the Minister proposes to revoke its registration if the person

168. (1) Le ministre peut, par lettre recommandée, aviser une personne visée à l’un des alinéas a) à c) de la définition de « donataire reconnu » au paragraphe 149.1(1) de son intention de révoquer l’enregistrement si la personne, selon le cas :

...	[...]
(b) ceases to comply with the requirements of this Act for its registration;	b) cesse de se conformer aux exigences de la présente loi relatives à son enregistrement;
...	[...]
(e) fails to comply with or contravenes any of sections 230 to 231.5; or	e) omet de se conformer à l'un des articles 230 à 231.5 ou y contrevient;
...	[...]

[35] Under paragraph 168(1)(b), the Minister is empowered to revoke the registration of a charitable organization if it ceases to comply with its registration requirements. In that regard, certain portions of the definition of charitable organization in section 149.1 are relevant. Those provisions read as follows:

149.1. (1) In this section and section 149.2, ...	149.1. (1) Les définitions qui suivent s'appliquent au présent article et à l'article 149.2. [...]
“charitable organization”, at any particular time, means an organization, whether or not incorporated,	« oeuvre de bienfaisance » Est une oeuvre de bienfaisance à un moment donné l'oeuvre, constituée ou non en société :
(a) all the resources of which are devoted to charitable activities carried on by the organization itself,	a) dont la totalité des ressources est consacrée à des activités de bienfaisance qu'elle mène elle-même;
(b) no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof,	b) dont aucune partie du revenu n'est payable à l'un de ses propriétaires, membres, actionnaires, fiduciaires ou auteurs ni ne peut servir, de quelque façon, à leur profit personnel;
...	[...]

[36] Paragraph (a) of that definition requires, at any particular time, that all of the resources of the charitable organization must be devoted to charitable activities carried on by it. Paragraph (b) stipulates that no part of the organization's income can be payable to, or otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor of the organization.

[37] Under paragraph 168(1)(e), the Minister is empowered to revoke the registration of a charitable organization that fails to comply with or contravenes any of sections 230 to 231.5. In this appeal, as stipulated in paragraph 5 of *Humane Society 2013*, only the obligation of the Appellant under paragraph 230(2)(a) is in issue. That provision reads as follows:

230. ...

(2) Every qualified donee referred to in paragraphs (a) to (c) of the definition “qualified donee” in subsection 149.1(1) shall keep records and books of account — in the case of a qualified donee referred to in any of subparagraphs (a)(i) and (iii) and paragraphs (b) and (c) of that definition, at an address in Canada recorded with the Minister or designated by the Minister — containing

(a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;

230. ...

(2) Chaque donataire reconnu visé aux alinéas a) à c) de la définition de « donataire reconnu » au paragraphe 149.1(1) doit tenir des registres et des livres de comptes — à une adresse au Canada enregistrée auprès du ministre ou désignée par lui, s'il s'agit d'un donataire reconnu visé aux sous-alinéas a)(i) ou (iii) ou aux alinéas b) ou c) de cette définition — qui contiennent ce qui suit :

a) des renseignements sous une forme qui permet au ministre de déterminer s'il existe des motifs de révocation de l'enregistrement de l'organisme ou de l'association en vertu de la présente loi;

[38] This provision requires a charitable organization to keep records and books of account containing information that will enable the Minister to determine whether there are grounds upon which the Minister would be justified in revoking its registration. Such grounds include a failure

on the part of the charitable organization to fulfill the requirements contained in paragraphs (a) and (b) of the definition of charitable organization in subsection 149.1(1).

[39] Part V of the Act contains provisions under which certain taxes and penalties may be imposed upon a charitable organization. Subsection 188.1(4) permits the Minister to impose a penalty on a charitable organization for a taxation year in which it confers an undue benefit upon certain persons, including any member of the charitable organization.

[40] Relevant to this appeal is the definition of undue benefit that is contained in subsection 188.1(5), the pertinent portion of which is reproduced below.

188.1...

(5) For the purposes of this Part, an undue benefit conferred on a person (referred to in this Part as the “beneficiary”) by a registered charity includes a disbursement by way of a gift or the amount of any part of the income, rights, property or resources of the charity or association that is paid, payable, assigned or otherwise made available for the personal benefit of any person who is a proprietor, member, shareholder, trustee or settlor of the charity or association

...

188.1...

(5) Pour l’application de la présente partie, l’avantage injustifié conféré à une personne (appelée « bénéficiaire » dans la présente partie) par un organisme de bienfaisance enregistré comprend un versement effectué sous forme de don ou toute partie du revenu ou des droits, biens ou ressources de l’organisme ou de l’association qui est payée, payable ou cédée à toute personne, ou autrement mise à sa disposition pour son bénéfice personnel

[...]

In this regard, it is noted that the definition of registered charity in subsection 248(1) includes a charitable organization.

[41] Finally, the process for challenging a decision made by the Minister is contained in subsection 165(3), paragraph 168(4)(a), and paragraph 172(3)(a.1) of the Act, which read as follows:

165 ...

(3) On receipt of a notice of objection under this section, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess, and shall thereupon notify the taxpayer in writing of the Minister's action.

...

168 ...

(4) A person may, on or before the day that is 90 days after the day on which the notice was mailed, serve on the Minister a written notice of objection in the manner authorized by the Minister, setting out the reasons for the objection and all the relevant facts, and the provisions of subsections 165(1), (1.1) and (3) to (7) and sections 166, 166.1 and 166.2 apply, with any modifications that the circumstances require, as if the notice were a notice of assessment made under section 152, if

(a) in the case of a person that is or was registered as a registered charity or is an applicant for such registration, it objects to a notice under any of subsections (1) and 149.1(2) to (4.1), (6.3), (22) and (23); ...

165 [...]

(3) Sur réception de l'avis d'opposition, le ministre, avec diligence, examine de nouveau la cotisation et l'annule, la ratifie ou la modifie ou établit une nouvelle cotisation. Dès lors, il avise le contribuable de sa décision par écrit.

[...]

168 [...]

(4) Une personne peut, au plus tard le quatre-vingt-dixième jour suivant la date de mise à la poste de l'avis, signifier au ministre, par écrit et de la manière autorisée par celui-ci, un avis d'opposition exposant les motifs de l'opposition et tous les faits pertinents, et les paragraphes 165(1), (1.1) et (3) à (7) et les articles 166, 166.1 et 166.2 s'appliquent, avec les adaptations nécessaires, comme si l'avis était un avis de cotisation établi en vertu de l'article 152, si :

a) dans le cas d'une personne qui est ou était enregistrée à titre d'organisme de bienfaisance enregistré ou qui a présenté une demande d'enregistrement à ce titre, elle s'oppose à l'avis prévu au paragraphe (1) ou à l'un des paragraphes 149.1(2) à (4.1), (6.3),

...

172

(3) Where the Minister ...

(a.1) confirms a proposal, decision or designation in respect of which a notice was issued by the Minister to a person that is or was registered as a registered charity, or is an applicant for registration as a registered charity, under any of subsections 149.1(2) to (4.1), (6.3), (22) and (23) and 168(1), or does not confirm or vacate that proposal, decision or designation within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal, decision or designation,

...

the person described in paragraph (a), (a.1) or (a.2), the applicant in a case described in paragraph (b), (e) or (g), a trustee under the plan or an employer of employees who are beneficiaries under the plan, in a case described in paragraph (c), the promoter in a case described in paragraph (e.1), the administrator of the plan or an employer who participates in the plan, in a case described in paragraph (f) or (f.1), or the administrator of the plan in a case described in paragraph (h) or (i), may appeal from the Minister's decision, or from the giving of the notice by the Minister, to the Federal Court of Appeal.

(22) et (23); [...]

[...]

172

(3) Lorsque le ministre : [...]

a.1) soit confirme toute intention, décision ou désignation à l'égard de laquelle le ministre a délivré, en vertu de l'un des paragraphes 149.1(2) à (4.1), (6.3), (22) et (23) et 168(1), un avis à une personne qui est ou était enregistrée à titre d'organisme de bienfaisance enregistré ou qui a demandé l'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette intention, décision ou désignation dans les 90 jours suivant la signification, par la personne en vertu du paragraphe 168(4), d'un avis d'opposition concernant cette intention, décision ou désignation;; [...]

la personne, dans le cas visé aux alinéas a), a.1) ou a.2), le demandeur, dans le cas visé aux alinéas b), e) ou g), le fiduciaire du régime ou l'employeur dont les employés sont bénéficiaires du régime, dans le cas visé à l'alinéa c), le promoteur, dans le cas visé à l'alinéa e.1), l'administrateur du régime ou l'employeur qui participe au régime, dans le cas visé aux alinéas f) ou f.1), ou l'administrateur du régime, dans le cas visé aux alinéas h) ou i), peuvent interjeter appel à la Cour d'appel fédérale de cette décision ou de la signification de cet avis.

B. *Analysis of issues*

Issue (a) Does paragraph 172(3)(a.1) require the Minister to deliver the complete record to the Appellant and to this Court on an appeal under that provision?

[42] At the hearing, the Appellant abandoned its contention that paragraph 172(3)(a.1) of the Act was of no force and effect because it violates s. 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (the “Bill of Rights”). Instead, the Appellant urged the Court to interpret and apply subsection 172(3) as requiring the Minister to “deliver the complete record to the Appellant and to this Court on an appeal” made under that provision. According to the Appellant, the “complete record” consists of all documents and materials available to the Appeals Directorate and all documents and materials *actually considered* by the Appeals Directorate in making the Confirmation Decision under appeal. The objective of this interpretation, as I understand the Appellant’s argument, would be to ensure that only the record before the Appeals Directorate would be certified as the record upon which this Court would review the Confirmation Decision.

[43] It is to be recalled that the ground of appeal relating to the Bill of Rights was added by the Amended Notice of Appeal and stipulates that paragraph 172(3)(a.1) of the Act should be declared to be invalid because it *fails to require* the Minister to provide the Appellant with “the record” that was before the Appeals Directorate when it made the Confirmation Decision. The consequence of this failure, the Appellant asserts, is that it is unable to obtain a fair hearing in this appeal.

[44] After abandoning this argument, the Appellant then asserted that s. 2(e) of the Bill of Rights requires the Court to construe and apply paragraph 172(3)(a.1) on the basis that it *actually requires* the Minister to deliver “the complete record” to the Appellant and this Court on the appeal. Without such a construction and application, so the repackaged argument goes, the Appellant would be unable to have a fair hearing before this Court.

[45] The Appellant’s remarkable reversal of position was no doubt motivated by the realization that if it were to succeed in invalidating paragraph 172(3)(a.1), it would lose the appeal right that it was trying to exercise.

[46] Section 2 of the Bill of Rights stipulates that every law of Canada must be interpreted so as not to limit or infringe the rights and freedoms set out therein. Subsection 2(e) prohibits interpretations of “laws of Canada”, as defined in subsection 5(2) of the Bill of Rights, that deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his or her rights and obligations.

[47] In my view, paragraph 172(3)(a.1) cannot bear the interpretation that the Appellant asserts. This paragraph simply provides a right of appeal from the Confirmation Decision, which is a Ministerial confirmation of the NIR. It says nothing whatsoever about the procedure that must be followed in order to pursue the appeal right that it provides. However, this does not mean that there are no applicable laws of Canada dealing with such procedure.

[48] Procedural matters with respect to appeals to this Court that are permitted under the Act are stipulated in the Rules. The Appellant's argument essentially challenges the sufficiency of the Rules as construed by Justice Sharlow in *Humane Society 2013*. The Appellant did not appeal Justice Sharlow's decision or otherwise dispute its merits before us. Accepting the Appellant's argument would have the effect of construing paragraph 172(3)(a.1) so as to implicitly provide the procedural outcome that Justice Sharlow rejected when she considered Rules 317 and 318, the directly applicable procedural dispositions. In my view, it would not be appropriate for this Court to interfere with Justice Sharlow's decision under the guise of an interpretation of paragraph 172(3)(a.1), as asserted by the Appellant.

[49] The Appellant urges the Court to read into paragraph 172(3)(a.1) one procedural matter that relates to the content of the record that is to be put before this Court in an appeal under that paragraph. If that were appropriate, why stop there? Why not dispense with the Rules entirely and just imply or read in all procedures relating to an appeal under paragraph 172(3)(a.1)? Of course, this cannot be done and I reject the Appellant's urging to do so.

[50] While paragraph 172(3)(a.1) must, to the extent possible, be construed and applied so as not to deprive the Appellant of the right to a fair hearing in accordance with the principles of fundamental justice, the interpretation of paragraph 172(3)(a.1) as containing a bare right of appeal does not occasion or otherwise result in a deprivation of the aforementioned right.

[51] It cannot be said that, apart from the Appellant's assertions as to how paragraph 172(3)(a.1) ought to be interpreted, appeals to this Court under that provision would be lacking

in procedural protections. The right to a fair hearing before this Court is safeguarded in the Rules and, more generally, in the principles of procedural fairness. This conclusion is reinforced by the order of Justice Sharlow in *Humane Society 2013*, which required under Rule 343(3), that all of the relevant documents that were considered by the Minister during the entire process from the audit to the Confirmation Decision be placed in the Appeal Book.

[52] I therefore conclude that the proposed interpretation of paragraph 172(3)(a.1) that was urged upon the Court at the hearing of the appeal is incorrect and I reject it.

Issue (b) If the Minister found or could have found that the Appellant conferred an undue benefit on Mr. O'Sullivan, would this preclude the Minister from revoking the Appellant's status as a charitable organization?

[53] The Minister did not seek to penalize the Appellant under subsection 188.1(4) on the basis that the personal benefits it conferred on Mr. O'Sullivan constituted undue benefits.

[54] The Minister's factum contained references to both "personal benefits" and "undue benefits". At the hearing, counsel for the Minister confirmed that in the context of the related ground of revocation in the Confirmation Decision, the Minister was not alleging that Mr. O'Sullivan received an undue benefit.

[55] The Appellant asserts that these provisions must be interpreted such that if an amount can constitute an undue benefit, then the only avenue open to the Minister is to penalize the entity

that has conferred the undue benefit. In other words, the Minister is precluded from issuing a NIR in circumstances in which it is open to the Minister to assess a penalty under subsection 188.1(4).

[56] In the instant circumstances, the Appellant argues that it was open to the Minister to assess a penalty under subsection 188.1(4) in relation to the amounts of the Appellant's income that were paid to Mr. O'Sullivan as personal benefits. As a result, the Appellant argues that the Minister was required to proceed in that fashion and was precluded from pursuing the revocation of the Appellant's status as a charitable organization.

[57] In response, the Minister offers the following quote from a CRA document entitled "CRA Summary Policy CSP-U02, Undue Benefits":

A registered charity that contravenes or continues to contravene the Act could [in addition to the imposition of a penalty under subsection 188.1(4)] also have its registration revoked.

[58] This quotation does no more than summarize subsection 189(7), which neither party provided to the Court. That provision reads as follows:

189 (7) Without limiting the authority of the Minister to revoke the registration of a registered charity or registered Canadian amateur athletic association, the Minister may also at any time assess a taxpayer in respect of any amount that a taxpayer is liable to pay under this Part.

189 (7) Sans qu'il soit porté atteinte à son pouvoir de révoquer l'enregistrement d'un organisme de bienfaisance enregistré ou d'une association canadienne enregistrée de sport amateur, le ministre peut établir à l'égard d'un contribuable une cotisation concernant toute somme dont celui-ci est redevable en vertu de la présente partie.

[59] As previously noted, the definition of registered charity includes a charitable organization. Accordingly, it is my view that subsection 189(7) provides a complete answer to the Appellant's assertions, which I reject.

Issue (c) Does the Appeals Directorate have the authority to vary the basis of revocation of the Appellant's status as a charitable organization from that stipulated in the NIR?

[60] In its post-hearing submissions, the Appellant apparently abandons its argument with respect to this question of statutory interpretation.

[61] The answer to this question is apparent from the language of subsection 168(4), which provides the right of objection to a NIR. Under that provision, once a notice of objection has been served on the Minister, a number of other provisions, including subsection 165(3), become applicable, with any modifications that the circumstances require, as if the NIR were a notice of assessment made under section 152.

[62] In the context of an objection to a NIR, subsection 165(3) requires the Minister, with all due dispatch, to reconsider the NIR and vacate, confirm or vary it, and to thereafter notify the person to whom the NIR was issued.

Issue (d) Was the Confirmation Decision reasonable?

[63] As described earlier, the Confirmation Decision discloses three separate reasons for the Minister's decision to revoke the Appellant's status as a charitable organization – providing some of its income for the personal benefit of one of its members (paragraph 168(1)(b)), failing to devote all of its resources to its charitable activities (paragraph 168(1)(b)) and failing to keep appropriate books and records (paragraph 230(2)(a)).

[64] In order to succeed, the Appellant must establish that each of these three bases for the revocation of its status as a charitable organization falls outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

(1) Providing income for the personal benefit of Mr. O'Sullivan and failure to devote all of its resources to charitable activities

[65] As the first two grounds of revocation are linked factually and rely upon the same legal basis, paragraph 168(1)(b) and paragraph (b) of the definition of charitable organization in subsection 149.1(1), I will deal with them together.

[66] The Appellant argued that the Minister erred in law in concluding that she had the power to revoke the Appellant's registration for a failure to devote all of its resources to charitable activities. Furthermore, the Appellant submits that the Minister both made unreasonable findings of fact in concluding that the impugned expenditures were not for charitable purposes and considered irrelevant evidence.

[67] Throughout the process from the audit to the Confirmation Decision, the CRA maintained that the Appellant made payments for the personal benefit of Mr. O'Sullivan. Indeed,

the Appellant admitted that in fact *some* portion of the approximately \$251,500 of expense reimbursements provided to Mr. O’Sullivan was provided as personal benefits. While there was disagreement between the parties as to the actual amount of the personal benefits, there is no suggestion by the Appellant that the total of these personal benefits was *de minimis*.

[68] In my view, it was within a range of justifiable outcomes for the Appeals Directorate to conclude that the provision of personal benefits to Mr. O’Sullivan, of even the lower amount recognized by the Appellant, constituted serious non-compliance with the applicable provisions of the Act.

[69] The record shows a considerable number of instances in which Mr. O’Sullivan received personal benefits. Accordingly, in my view, it was open to the Appeals Directorate to reject the Appellant’s assertion that these were “inadvertent” occurrences such that revocation was too extreme a sanction.

[70] The Appellant also asserted that the failure of a charitable organization to devote all of its resources to the charitable activities for which it was formed, as required under section 149.1 cannot, as a matter of law, by itself constitute a ground for revocation of the status of the charitable organization.

[71] In my view, this assertion is invalid having regard to this Court’s decision in *Prescient Foundation*. In that case, the Minister proposed to revoke the taxpayer’s registration as a charitable foundation pursuant to paragraph 168(1)(b). The basis for the proposed revocation was

that by entering into certain “farm sale transactions” and using its tax-exempt status to facilitate the obtaining of tax advantages by third parties, the taxpayer ceased to operate exclusively for charitable purposes and no longer met the requirements of the definition of charitable foundation.

[72] In my view, a failure by the Appellant to devote all of its resources to its charitable activities would constitute a failure to meet the requirements of paragraph (a) of the definition of charitable organization. Such a failure is conceptually the same as the failure of the taxpayer to meet the definition of charitable foundation that was at issue in *Prescient Foundation*.

Accordingly, I conclude that a failure on the part of the Appellant to continually meet the requirements of paragraph (a) of the definition of charitable organization is a failure of the type stipulated in paragraph 168(1)(b) and constitutes a sufficient basis upon which the Minister could revoke the Appellant’s status as a charitable organization.

[73] Accordingly, it is my view that based upon these grounds of revocation, the Confirmation Decision is reasonable.

(1) Failure to keep books and records as required under paragraph 230(2)(a).

[74] The Appellant’s first assertion is essentially a procedural fairness argument to the effect that the Confirmation Decision was not limited in its focus to a contravention of only paragraph 230(2)(a), with the result that it did not know the case it had to meet in order to successfully challenge that decision in this Court.

[75] This assertion is unpersuasive. Paragraph 5 of the decision in *Humane Society 2013*, which was rendered before the Appellant prepared its memorandum of fact and law, contains a

stipulation to the effect that the Minister “has formally confirmed” that paragraph 230(2)(a) is the only provision addressed by the Confirmation Decision in relation to the books and records of the Appellant.

[76] The Appellant also asserts that the Minister’s finding of non-compliance with paragraph 230(2)(a) was unreasonable. Paragraph 230(2)(a) requires the Appellant to keep records and books of account containing information in a form that will enable the Minister to determine whether grounds for revocation exist. Since the completion of the audit, the CRA consistently maintained that the books and records of the Appellant were insufficient for it to determine whether the Appellant was in compliance with its obligations under the Act or whether there might be grounds for revocation of its status as a charitable organization. The admission of the Appellant that it could only directly link its expenditures to 12 of its 42 programs supports the Appeals Directorate’s conclusion that the Appellant was unable to establish that it was devoting all of its resources to the charitable purposes for which it was formed.

[77] Similarly, the intermingling of Mr. O’Sullivan’s personal expenses with the Appellant’s expenses in the accounting records indicates an inability on the Appellant’s part to demonstrate that no part of its income was provided to Mr. O’Sullivan as a personal benefit. These failures made it impossible for the Minister to verify that the Appellant was in ongoing compliance with its registration requirements, as stipulated in the definition of charitable organization in subsection 149.1(1).

[78] The Appellant's submissions give the impression of a general view that everything Mr. O'Sullivan did was on behalf of the Appellant, whether eating with others, eating alone, or purchasing items at the LCBO and other establishments (see, for example, purchases made at La Senza Girl, Usana Canada, Beaches Cinemas, HMV, Silver City, the Albery Theatre London, and Last Minute.com). The record before this Court included Paypal receipts for various forms of memorabilia, other types of receipts marked with a brief notation purporting to denote the alleged nature of the expense (e.g. "WM" for Working Meal), and various credit card statements. The Appellant submitted that this was sufficient evidence of the expenses' charitable nature and thus demonstrated that the Appellant kept adequate books and records.

[79] These submissions have not persuaded me that the Appellant's records and books of account met the requirements of paragraph 230(2)(a).

[80] Given the significant privileges that flow from registration under the Act as a charitable organization, the Minister must be able to monitor the continuing entitlement of the charitable organization to those privileges. In that regard, I agree with the Minister that the obligation of a charitable organization to maintain adequate books and records is foundational.

[81] Accordingly, it is my view that based upon this ground of revocation, the Confirmation Decision is reasonable.

V. DISPOSITION

[82] For the foregoing reasons, I would dismiss the appeal with costs.

"C. Michael Ryer"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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NEAR J.A.

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