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Hand Delivered and Faxed

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Dear Mr. Racine:

Re: Jewish National Fund of Canada Inc. / Fonds National Juif du Canada (the "Charity")

We are writing in response to your letter dated July 26, 2023 (the "**July Letter**") in which you communicated your agreement with the Charities Directorate's decision to issue a notice of intention to revoke the charitable status of the Charity for the following three reasons: (1) failure to be constituted for exclusively charitable purposes; (2) conducting non-charitable activities; and (3) failing to maintain adequate books and records. We respectfully disagree with your decision and your reasons. In reviewing this letter and the additional submissions of our co-counsel, KPMG Law LLP, it will become clear to the Appeals Directorate (and any court of competent jurisdiction, if necessary) that the decision to revoke the charitable status of the Charity should be reversed.

The Charity has existed in Canada since the late 1960s and is an important institution in the Canadian Jewish community. Throughout its historical dealings with the Canada Revenue Agency ("**CRA**") and the Minister of National Revenue ("**MNR**"), the Charity was led to believe that its purposes and activities were charitable. The Charity maintains that its purpose and activities have always been exclusively charitable. Since it first received notice to the contrary, on May 12, 2016, the Charity has taken steps to improve its operations to better adhere to the current administrative guidance of the CRA. The Charity also has different directors, officers, and employees than it did in the 2011 and 2012 audit years. The new leadership is committed to implementing the new direction of the Charity. It is clear that the Charity's conduct does not fit within the definition of "aggravated non-compliance" in the CRA's sanctions guidance, which would justify the CRA's departure from its general approach to "start with educational methods to obtain compliance, and then move progressively through compliance agreements, sanctions and the ultimate sanction of revocation, if necessary." We therefore ask, as we have in our previous correspondence, that the Charities Directorate meet with the Charity's new management team to discuss a compliance agreement.

Furthermore, our review of the case law cited in the July Letter revealed that other charities have benefitted from an opportunity to provide an undertaking or to enter into a compliance agreement with

the CRA in circumstances involving greater degrees of non-compliance than the alleged non-compliance of the Charity. The facts in the case law align with our experience working with numerous other charities that have had the opportunity to improve their operations prior to facing the threat of revocation.

We believe that the CRA did not apply a more appropriate standard and approach to the Charity because it was influenced by the negative and misleading views and pressure encompassed in the campaigns and complaints against the Charity. Those campaigns and complaints made their way into the records of the CRA for the Charity and, in the words a CRA representative, Pat Skinner in 2013 were thought to provide “excellent background about the Charity…and a view of potential areas of concern for the current audit.”[1] It was with this tainted viewpoint of the Charity that the CRA planned and conducted its most recent audit. For example, the CRA alleged, among other things, that certain of the Charity’s activities were “contrary to Canada’s public policy and international law”. This allegation mirrored the allegations in the campaigns and complaints against the Charity. It was also incorrect as a matter of law. The CRA backpedaled after the Charity explained that, for the CRA to take such a position, there must first be a definite, officially declared and implemented policy that proscribes the Charity’s activities. The CRA nevertheless continued to reference its initial position in subsequent internal materials, thereby tainting the remainder of the audit process.

The impact of the outside pressure on the CRA resulted in a review process that lacked fairness, rigour, and impartiality. For example, the CRA alleged that the Charity’s objects are broad and vague and, as a result, cannot support the proposition that the Charity was constituted exclusively for charitable purposes. In this, the CRA seemed to disregard the critical fact that the Charity had applied for registration with those very objects, and had not changed them since its inception, likely because the CRA never raised them as a concern in previous audits. It is clear that the acceptable level of specificity in charitable objects is subject to interpretation (and in any event, as we argue below, the Charity’s objects are as a matter of law exclusively charitable). What the CRA currently views as broad and vague objects were acceptable to the MNR at the time of registration and in subsequent years. A simple solution would be for the Charity to amend its purposes to better comply with the CRA’s current preference. Unfortunately, the CRA has been unreceptive to the Charity’s repeated offers to amend its charitable purposes.

The CRA also alleged (in our submission, as argued below, incorrectly) that the employment of indigent workers through an intermediary is not a charitable activity and, as a result, the Charity failed to devote all of its resources to charitable activities. The CRA has been aware of the Charity’s activities with respect to indigent workers since 1967, and did not raise them as a concern until the most recent audit. In response to our concerns about its sudden change in position, the CRA indicated in its July Letter that it is not bound by its historical errors of law. The CRA nevertheless seeks to impose the punitive sanction of revocation on the Charity without providing any opportunity for improvement or correction, despite the CRA’s role in creating this situation. In the absence of outside pressure and bias, we believe that the CRA would have followed its own sanctions guidelines and provided the Charity with the opportunity to enter into a compliance agreement.

The case law on books and records also suggests that the CRA should take less drastic administrative corrective measures prior to invoking revocation to enable the Charity to address the CRA’s concerns.

[1] These comments were in a document dated July 26, 2013.

Despite the CRA's statements to the contrary, its decision to pursue the extreme sanction of revocation instead of corrective measures also appears to be based on the cumulative effect of the alleged non-compliance by the Charity. The CRA seems to have taken the position that the sum is greater than the parts because, in our experience, each of the alleged grounds advanced by the CRA would not ordinarily lead to a revocation decision. Furthermore, the individual and cumulative grounds have been weakened by the CRA's unfair and biased audit process, as well as its errors of law and fact. The CRA's decision has become untenable as the Charity rebutted each of the grounds in its previous submissions and in this letter, either altogether or to a sufficient degree to demonstrate the absence of aggravated or intentional non-compliance. However, for reasons that are not clear to us, the CRA appears to have doubled-down and attempted to find new reasons to justify its previous decisions. Both the audit and the appeals processes to-date reveal an institution that will not change its mind when faced with contrary facts and evidence, thereby amplifying the Charity's concerns regarding a lack of procedural fairness and impartiality.

In elaborating on the points above, we have structured this letter as follows:

- Part I of this letter describes how outside pressure on the CRA resulted in bias and a lack of fairness, impartiality and rigour in the audit process.
- Part II of the letter identifies factual errors made by CRA in its letters.
- Part III describes CRA errors of law.
- Part IV responds to arguments in the July Letter and contains our concluding remarks.

There are a number of exhibits included in a separate collection of documents submitted with this letter. The list of exhibits is appended to this letter and is also included as an index in the collection.

I. OUTSIDE PRESSURE ON CRA'S REVIEW OF THE CHARITY

A. Review of ATIP Materials

On October 10, 2019, the Charity submitted two access to information requests regarding the Charity under the *Access to Information Act*. On July 22, 2021, nearly two years later, the CRA responded to the Charity's requests with heavily redacted materials (the "**ATIP Materials**"). The ATIP Materials include a document entitled "Screener Comments", drafted by Pat Skinner on July 26, 2013. In that document, Mr. Skinner states that previous audits and reviews of the Charity generated a lot of material concerning the Charity, including media reports.[2] Mr. Skinner stated that, "[a]ll of the information is very interesting and provides excellent background about the Charity, and provides a view of potential areas of concern for the current audit". These comments suggest that the media reports, almost all of which portrayed the Charity negatively, were viewed as credible and accurate sources of information. This tainted the audit process from the beginning, and additional external materials gathered by the CRA continued to influence the direction of the audit process thereafter.

[2] Exhibit A – Screener Comments, excerpted from ATIP Materials.

For example, the CRA's Case Info Sheet[3] for the Charity, under the heading "Media, Public Interest and Leads History" includes the following commentary:

- Independent Jewish Voices Canada ("**IJV**") is a vocal opponent of the Charity and is behind a public petition/complaint to the MNR, which alleges that the Charity is a conduit for KKL, and practices institutional racial discrimination. (The CRA later alleged that the Charity was a conduit for KKL.)

- The IJV's postcard campaign addressed to the MNR, requesting the revocation of the Charity's charitable status. (The CRA subsequently initiated a process to revoke the Charity's status without adhering to its usual approach to begin with administrative corrective measures.)

- An e-petition was sponsored by NDP MP Pierre-Luc Dusseault, which was supported by NDP MP Niki Ashton, endorsed by MPPs Joel Harden and Rima Berns-McGown, and was presented to the House of Commons on May 15, 2019.

- The Green Party prepared a resolution to revoke the Charity's status, which stated that the Charity contravened Canada's public policy for its failure to comply with international human rights law. (The CRA later alleged that certain of the Charity's operations were contrary to Canada's public policy and international law.)

The ATIP Materials provide a rationale for the CRA's aggressive position on revocation: it was influenced by outside pressure. The Charity, and its counsel, noted the unusual refusal by the CRA to meet with the Charity despite several attempts. The CRA's published guidelines for applying sanctions highlights the irregularity with respect to the treatment afforded to the Charity. As a general rule, the CRA starts with educational methods to obtain compliance, and then moves progressively through compliance agreements, sanctions, and the ultimate sanction of revocation. There were no educational methods presented to the Charity nor was there any effort to develop a compliance agreement.

In the July Letter, the CRA responded to the Charity's general concerns about procedural fairness, namely that:

- the CRA was being influenced by outside pressure, and

- revocation was unwarranted in the absence of intermediate steps, such as a compliance agreement, because the Charity's conduct did not constitute "aggravated non-compliance" as described in the CRA's sanctions guidance.

The CRA stated that it found no documentation within its audit file to support a conclusion that outside pressure influenced the CRA's decision-making. After reviewing the ATIP Materials and the voluminous redactions therein, the Charity questions the credibility of that statement and the lack of transparency regarding the CRA's decision to move directly to revocation. It must be noted that the CRA has never described why it considers the Charity's conduct to be a serious case of non-compliance, nor why education or other intermediate steps would be inappropriate.

[3] Exhibit B – Several versions of CRA draft Case Info Sheets, excerpted from the ATIP Materials.

The ATIP Materials revealed an internal CRA email dated May 9, 2019. That email contains speaking points drafted by the Charities Directorate for Geoff Trueman, Assistant Commissioner. Those speaking points misrepresent the process employed by the CRA in the Charity's evaluation.[4] The document includes the following speaking point on why the CRA chose a 90-day revocation rather than a 30-day revocation:

> "CRA has made efforts to bring [the Charity] back into compliance", comprising "[s]ignificant communication between the CRA and [the Charity,] including two AFLs[,] several responses and provid[ing the Charity] with an opportunity to meet with CRA representatives to discuss non-compliance issues".

The Charity strongly rejects the assertion that the CRA made any effort to bring the Charity into compliance or that it provided the Charity with the opportunity to meet with CRA representatives to discuss non-compliance issues. In fact, the CRA has ignored the Charity's multiple requests to meet with CRA representatives to discuss the issue of compliance.

The recent terrorist attacks by Hamas in Southern Israel have amplified the Charity's concerns regarding outside pressure on the CRA. The Charity and Canada's Jewish community in general are shocked by the responses to such brutality. Many anti-Israel and anti-Zionist individuals and organizations in Canada have expressed their support for Hamas' actions in the name of legitimate resistance, or have simply placed the blame on Israel for creating the circumstance in which its civilians were attacked so brutally. The CRA should not ignore the fact that individuals and organizations that so vehemently complained and campaigned against the Charity to the CRA (as reflected in the ATIP Materials) have condoned, justified or supported Hamas' attacks, which resulted in the killing and kidnapping of at least 1,400 and 199 civilians, respectively. For example:

- IJV published the following statements: "[t]he civilian deaths caused by the Hamas offensive are an unacceptable consequence of 75 years of unacceptable conditions"; the attack was provoked by Israel; Israel needs to be held accountable for its decades of crimes against humanity, which have left Palestinians feeling that violent retribution is justifiable; and that Palestinians have the right, by international law, to resort to armed violence to resist occupation.[5]

- Corey Balsam, National Coordinator of IJV reposted tweets that justify Hamas' attack in Israel; blame Israel for the attack; refer to the Israel Defence Forces ("**IDF**") as the largest terrorist group in the region; characterize the kidnapping of dozens of Israelis as a rare opportunity to release Palestinian prisoners; and characterize the kidnapping of an Israeli General as an unprecedented achievement for Hamas; and include a video of a former Secretary-General of the Palestinian National Initiative, Mustafa Barghouti, who blames Israel for Hamas' attack and claims that Hamas did not target civilians.[6]

The terrorist attacks highlight anti-Israel and anti-Zionist views in the CRA's collection of media reports. The ATIP Materials and publicly available information reveals that IJV and its members, in particular, were one of the main groups that exerted pressure on the CRA to revoke the Charity's status. Because

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[4] Exhibit C – Email re speaking points, excerpted from ATIP Materials.
[5] "IJV Calls for a Ceasefire and Systemic Change in Palestine-Israel", Independent Jewish Voices (website) online: https://www.ijvcanada.org/ijv-calls-for-a-ceasefire-and-systemic-change-in-palestine-israel/.
[6] Corey Balsam Twitter Feed, Online: https://twitter.com/BalsamCorey.

IJV features repeatedly in the ATIP Materials, it is reasonable to conclude that the CRA has considered IJV's views during the audit process. This is extremely troubling. Imagine if an audit file included references to articles or campaigns by organizations and individuals that were later found to have voiced support for the Air India Bombing, the worst terrorist attack in Canadian history? These are not perspectives that the CRA should have been taking into account. Further, of course, once biased perspectives are introduced, they are difficult and perhaps impossible to counter.

B. Impact of Outside Pressure on the CRA's Review of the Charity

We believe that the CRA did not apply a more appropriate standard and approach to the Charity because it was influenced by the negative and misleading views encompassed in the campaigns and complaints against the Charity. Those campaigns and complaints made their way into the records of the CRA for the Charity. This tainted the audit and resulted in a process that lacked fairness, rigour and impartiality.

For example, in its letter dated April 19, 2018, the CRA took the position that the Charity's activities supported "establishing and maintaining physical and social infrastructure elements and providing assistance to Israeli settlements in the Occupied Territories" which served "to encourage and enhance the permanency of the infrastructure and settlements" and appeared "to be contrary to Canada's public policy and international law". These allegations were incorrect as a matter of law. For the CRA to consider the Charity's activities to be contrary to Canada's public policy, Canada must first have a definite, officially declared and implemented policy that proscribes such activities. Canada's public policy regarding Israeli settlements falls short of the requirement to proscribe Canadian charities from operating in the Territories. The CRA accepted the Charity's position and, in its letter dated August 20, 2019, confirmed that the "nature of the [Charity]'s activities during the audit period in Israeli settlements was not a factor in [its] decision to propose revocation of the [Charity]'s charitable status." Although the CRA changed its initial position, the ATIP Materials reveal that it continued to consider that position in its internal materials.[7] The initial position must have remained present in the minds of those reviewing the Charity, and ultimately influenced their decision-making, thus leading them to take a more aggressive stance against the Charity in comparison to other charities with similar or greater instances of alleged non-compliance. This discrete example, of course, illustrates our broader concerns about how negative comments about the Charity can continue to influence decision-making long after the comments are first considered.

Another example is the CRA's approach to auditing the Charity. Pierre Thibodeau, an auditor appointed to the Charity's file, contacted Fred Schacter, who was then a Director of Finance with the Charity. Mr. Thibodeau wished to interview Mr. Schacter and request certain information and materials. The CRA acknowledged in an internal CRA email, dated May 9, 2019, that the Charity "ha[d] many directors able to potentially provide insight".[8] Indeed, during the audit years, the Charity had a forty-two member Board of Directors, ten Officers, and an Executive Committee. However, rather than seek answers from the

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[7] See Exhibit B; Exhibit D – Several versions of CRA draft Media Lines, excerpted from the ATIP Materials; Exhibit E – July 11, 2019 internal email chain that includes discussion of including Charity's activities in the Territories in the Case Info Sheet and Appendix A (which we assume is Appendix A of the CRA's August 20, 2019 letter), excerpted from the ATIP Materials. While these emails are dated before the date of the August 20, 2019 letter, they clearly show that it was the CRA's intention to continue including the Charity's activities in the Territories in internal documentation after August 20, 2019.

[8] See Exhibit C.

dozens of other senior people at the Charity, Mr. Thibodeau relied primarily on conversations with Mr. Schacter to derive a number of his conclusions.

The Charity is concerned about the following five statements made by Mr. Schacter to Mr. Thibodeau, evidenced by notes in the ATIP Materials, that led the CRA to draw inaccurate conclusions:

1. On September 11, 2014 (the "**Initial Meeting**"), Mr. Schacter stated that he did not know if the Agent had selection criteria to determine who qualified as an indigent worker.[9] In the July Letter, the CRA took this to mean that that "the [Charity] was unaware if [the Agent] had any selection criteria when hiring indigent workers, which indicates the [Charity] had no direction and control" over selecting indigent workers. To conflate Mr. Schacter's lack of knowledge about a particular process with the Charity's lack of direction and control is an irresponsible conclusion. In fact, the Agent (i.e., KKL) had a six-point criteria to determine if a worker was indigent.[10]

2. On September 16, 2014, Mr. Schacter stated that the Agent had historically purchased land in Israel, but now, the Agent develops the lands, including by building infrastructure, with funds that the Charity sends to the Agent.[11] He noted that 98% of the Agent's activities are new construction. Those statements are inaccurate and incomplete. The Charity's funds were never used to purchase land. Furthermore, while the Agent historically purchased land, its focus changed to environmental conservation, preservation of historical sites, education, and community economic development.

3. On October 8, 2014, as proof that the Agent used the Charity's funds for its intended purpose, Mr. Schacter stated that the Agent sends a monthly payroll of indigent workers, which includes the worker's name, employee number, weeks worked, gross pay, and net pay.[12] On June 19, 2015, Mr. Schacter stated that he has never actually requested any of this documentation in the past.[13] Mr. Thibodeau notified Mr. Schacter that this statement conflicted with his October 8, 2014 statement that these documents are provided to the Charity as proof that funds were used properly.[14] At the time of the audit, the Charity had been in operation for decades, and Mr. Schacter was in no position to state that the Charity had never requested these documents prior to requesting them on behalf of the CRA. The Charity maintains that before releasing the funds to pay an indigent worker employed on a project, the Agent was required to provide a progress report to the Charity, unless the Charity had confirmed progress of the project in person during a visit to Israel.[15] Furthermore, the Agent was only authorized to release the funds after receiving authorization from the Charity.[16] The Agent then used the funds to pay the salaries of the indigent workers.

4. On October 14, 2014, Mr. Schacter stated that he was not certain whether he could get the Agent's bank statements to show that it had received the funds transferred to it by the Charity

[9] Exhibit F – Pierre Thibodeau's Memo for File.
[10] Refer to Exhibit H(3) of September 12, 2016 Submission.
[11] See Exhibit F.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] Refer to Exhibit E(1) of September 12, 2016 Submission.
[16] Refer to Exhibit E(3) of September 12, 2016 Submission.

for charitable projects.[17] This was not accurate. Of course the Charity could have obtained those statements. In any event, the Charity has restructured its relationship with the Agent to better comply with the applicable administrative guidance.

5. On May 7, 2015, Mr. Schacter stated that, when the Charity has funds available it sends them to the Agent.[18] From this, the CRA concluded in its June 26, 2015 letter, that "the funds are not transferred to [the Agent] in Israel resulting from the evaluation by the [Charity] regarding the need of funds for a project and they are not based on invoices or cost related to the activities." As well, the CRA concluded in its May 12, 2016 letter, from the same statement, that the Charity "does not inquire about the progress of work done or provide any instructions with respect to how the funds should be used prior to making those transfers." While Mr. Schacter's statement may be vague and clumsy, his statement cannot be understood to imply that the Charity does not evaluate the Agent's need for funds. In fact, the amount of funds that the Charity committed to paying indigent workers in a particular project were set out in a commitment letter from the Charity to the Agent, and this amount was based on proposed budgets provided by the Agent.[19] As well, before releasing the funds for use to pay an indigent worker employed on a project, the Agent was required to provide a progress report to the Charity, unless the Charity had confirmed project progress in person during a visit to Israel.[20]

Mr. Thibodeau's audit report indicates that Mr. Schacter, who did not benefit from the Charity's legal counsel, was not qualified to answer many of the questions asked of him. Mr. Thibodeau mistook Mr. Schacter to be the voice of the Charity, and conflated his understanding of the Charity's purpose, activities, and operation with the official position of the Charity. The Charity is concerned that Mr. Thibodeau was satisfied with the information Mr. Schacter provided because it validated preconceived notions that he and other CRA personnel may have held about the Charity. Had Mr. Thibodeau and the CRA directed questions and inquiries to other senior officers and directors the Charity, or the Charity's legal counsel, then those individuals could have provided the CRA with more accurate answers. As this example reveals, views can become ingrained quickly and be difficult to rebut.

II. FACTUAL ERRORS IN THE CRA'S LETTERS

In reviewing the correspondence from the CRA to the Charity, the Charity identified the following factual errors made by the CRA, which may have negatively influenced its decision-making:

1. In its letter dated May 12, 2016, the CRA stated that:

   a. "[T]he [Charity] appears to be furthering unstated non-charitable purposes", citing the Charity's previous mission statement, as provided by Mr. Schacter at the Initial Meeting, as evidence. The CRA then concluded that "the [Charity] is no longer devoting its resources to activities in support of charitable purposes, but is rather furthering unstated non-charitable purposes."

[17] See Exhibit F.
[18] *Ibid.*
[19] Refer to Exhibit F(11) of September 12, 2016 Submission.
[20] Refer to Exhibit E(1) of September 12, 2016 Submission.

The mission statement has no official status in the Charity, and was never passed by a resolution of the Board of Directors. It served as an informal statement of the Charity's mission to guide the reflection and the actions of the Charity's supporters. Our co-counsel, KPMG Law LLP have commented on this issue. We endorse the position expressed in their letter.

b. "The information provided to the CRA during the audit [by Mr. Schacter] indicates that [the Agent] acts as a general contractor responsible for the construction of infrastructure."

   Although some of the Agent's activities do involve building infrastructure, it is not accurate to describe it as a general contractor. Rather, a more accurate description is that the Agent engages is environmental conservation, preservation of historical sites, education, and community economic development.

c. In respect of the volunteers serving as members of CANISCOM, "[i]t seems that the [Charity] is using these volunteers as a second board of directors".

   This is false; CANISCOM is a committee of volunteers nominated by the Charity's Board of Directors in Canada, whose role it is to supervise the work done on behalf of the Charity by the Agent in Israel.[21] The Charity also hired an individual in Israel to liaise with current and potential agents of the Charity.

2. In its letter dated April 19, 2018, the CRA included inaccurate and incomplete descriptions of alleged projects in the Territories that were outside the scope of the audit period. For example:

   a. The CRA referred to a project in the Naftali Mountain Forest and alleged that the project site was in the Golan Heights when, in fact, it was in Israel, inside the Green Line.[22] Similarly, the CRA referred to a project in Mount Scopus, which appears to be in East Jerusalem, but in fact took place in an Israeli enclave of West Jerusalem and was thus located in Israel, inside the Green Line.[23]

   b. The CRA referred to the Alexander River Restoration Project by only stating that the Alexander River flows from Nablus, in the Territories, through Israel, and that the project included recycling sewage water for agricultural purposes, building of wetlands, and restoring a waterway. However, the letter excluded several important facts:

      i. the central purpose of the initiative was to eliminate pollutants from the river;

      ii. 70 sources of pollution are discharged into the Nablus Stream in the Territories (most of such sources are from areas under Palestinian control);

[21] Refer to Exhibit C(4) and (6) of September 12, 2016 Submission.
[22] Exhibit H – Screenshot of Google Maps showing the Harei Naftali Forest are located outside the Golan Heights. Note: "Harei" is the Hebrew word for mountains.
[23] Exhibit I – Screenshot of Google Maps showing that Mount Scopus is located within an Israeli enclave of West Jerusalem, with the Green Line identified.

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iii. 20 sources of pollution are from Israeli sources inside the Green Line; and

iv. many of these projects occurred with cooperation and support between local Israeli and Palestinian officials, including an agreement with the Palestinian Governor of the District of Tul Karem;[24]

c. The CRA referred to a project entitled "Jerusalem, the Western Wall Tunnels, Upgrade and Improve the Great Hall Area". The CRA states that the Western Wall is located close to the Bethlehem, a city in the West Bank. A simple Google Maps search demonstrates that the Western Wall is located in the Old City of Jerusalem and is considered by the Jewish people to be the holiest place on Earth. Furthermore, the Old City of Jerusalem is approximately 9.5 kilometers away from Bethlehem, which is designated as part of "Area A" under the *Oslo Accords*, meaning that is under full Palestinian control, and forbidden for Israelis to enter.[25]

3. The July Letter refers to the Joint Venture Agreement between the Charity and Agent. The CRA expressed the following concerns about the Agreement:

a. How "the board, who is only set to meet bi-annually, demonstrate that it has direction and control over the funds provided for a project?"

The CRA misunderstood the Charity's governance structure. The Board that the CRA is referring to in this letter is the Joint Venture's board that consisted of three representatives from the Charity and three representatives from the Agent that had to meet at least bi-annually, but could have met more frequently.[26] The Charity notes that it was in frequent contact with KKL – the joint venture Board was only one point of contact between the organizations. Further, the Charity's Board of Directors is made up of more than forty people, who meet at least three times each year.[27] As well, the CANISCOM is made up of four to six volunteers in Israel who play an active role in assisting the Charity in providing direction and control in Israel. CANISCOM reviews the Charity's projects during its quarterly meetings and visits project sites.

b. Why the joint venture does not hire employees or buy the required material for a project.

Quite simply, a joint venture is a contractual relationship. It is not a separate legal entity capable of entering into contracts.

As previously communicated to the CRA and enclosed in our letter to the CRA dated October 28, 2020,[28] the Charity replaced the Joint Venture Agreement with a General Agency Agreement

[24] "Italy Park – Alexander River: Rehabilitation for Coexistence", KKL (website), online: https://www.kkl-jnf.org/tourism-and-recreation/forests-and-parks/italy-park/; "Israel: Alexander River Restoration Project", Society for Ecological Restoration (website), online: https://ser-rrc.org/project/israel-alexander-river-restoration-project/.

[25] Exhibit J – Screenshot of Google Maps showing the distance between the Old City of Jerusalem and Bethlehem, with the Green Line identified.

[26] Refer to Section 3 of Exhibit A (Joint Venture Agreement) of November 18, 2019 Submission.

[27] The Charity was governed by a forty-two member Board of Directors. Refer to Exhibit C(2) and (3) of September 12, 2016 Submission.

[28] Exhibit G – October 28, 2020 Submission.

dated as of January 1, 2020 (the "**GAA**") in order to provide for more control over its charitable activities in Israel, and to be more in line with the applicable guidance. Section 1.3 of the GAA clearly provides that it is intended to replace the Joint Venture Agreement. In the July Letter, the CRA seems to have failed to acknowledge that the Joint Venture Agreement was replaced by the GAA as evidenced by its concerns about the Joint Venture Agreement. The Charity does not understand why the CRA continued to refer to an agreement and processes that are no longer in place. The Charity is concerned that the CRA has been making decisions based on a misunderstanding of the Charity's operations.

4. In the July Letter, the CRA indicated that it is "not aware if the MOU drafted November 15, 2019 and signed October 26, 2020 has been finalized between the [Charity] and KKL". As acknowledged by the CRA, the memorandum of understanding (the aforementioned MOU) was signed by both parties. It would be highly unusual for two entities to sign an agreement that is not in force. Furthermore, the Charity provided the CRA with documentation referenced in the MOU, including corporate documents showing that the Charity is a separate legal and operational entity from the Agent and a signed copy of the GAA. The Charity's website was also updated in accordance with the MOU. The fact that the CRA is still not aware whether the MOU was finalized raises concerns that the CRA has not reviewed the relevant materials submitted by the Charity or does not sufficiently comprehend them.

5. The July Letter indicates that indigent workers were not employed "for a limited period of time (9 months) as stated within its criteria" and were instead "paid for a period of 12 months".

   The Charity contends that this statement is inaccurate. Not all indigent workers were employed for longer periods of time and each continuation of employment was considered on a case-by-case basis. It is also important to note that indigent workers were paid hourly and independently for each project. This explains the fluctuation in monthly wages for indigent workers during this period and why some workers were employed for 12 months while others were employed for shorter periods of time.

6. A material portion of the July Letter is concerned with the amount of the stipends paid to indigent workers. The CRA argues that these payments were above the poverty line.

   The Charity notes that a number of the indigent workers employed during the audit years also had dependents. The poverty line (in terms of wages) for a household with multiple dependents would obviously be higher than for an individual. While the Charity does not have documentation that now allows us to determine the proportion of indigent workers who had dependents (the audit years are now more than 10 years ago), the CRA's analysis is clearly flawed by assuming that all of the indigent workers **<u>were single and without dependents</u>**. Israel's Central Bureau of Statistics maintains that in 2010 and 2012, less than 20% of the population were made up of one-person households.[29] A 2019 article indicates that "[f]ertility in Israel stands at 3.1 children per woman – the highest fertility rate in the OECD".[30] Another OECD study on international family

[29] Central Bureau of Statistics (Israel), "1. Households, by Size of Household and Population Group" in *Households and Families: Demographic Characteristics, 2020, Based on Labour Force Survey* (May 2022), online: https://www.cbs.gov.il/en/publications/Pages/2022/households20-e.aspx.
[30] Taub Centre for Policy Social Studies in Israel, "Why are there so many children in Israel?" (Bulletin Article: February 2019), online: https://www.taubcenter.org.il/en/research/why-are-there-so-many-children-in-israel/.

sizes and household types in 2015 found that nearly 70% of couple households in Israel (i.e., households with two married or cohabitating adults) included children.[31] It follows that the majority of households in Israel included several dependents. We can assume similar demographics during the audit years. Therefore, we can also assume that a material proportion of the indigent workers had dependents. The assumptions underpinning the figures presented by the CRA in this portion of the July Letter are clearly flawed by failing to account for the applicable demographics. The CRA's whole analysis of these purported salary issues, which it never raised before in any of the preceding audit letters or during this audit process, is without merit.

In any event, the Charity notes that, as in Canada, individuals living on the poverty line still often need to rely on food banks and cannot purchase prescription medications after paying rent. In other words, they are still poor. If the Charity's payments to a worker exceeded the poverty line, the Charity is confident that the worker in question was still indigent and that the Charity was still furthering its charitable purpose.

The Charity concludes that it is likely that the CRA was biased in its approach to conducting its audit. The ATIP Materials reveal that (1) the CRA's initial position regarding the Charity's activities in the Territories continued to be a factor in its evaluation; (2) outside pressure motivated by anti-Israel or anti-Zionist sentiments, such as media reports, campaigns, and complaints, directed at the CRA with respect to the Charity, influenced the CRA's decision-making; (3) Mr. Thibodeau erroneously took Mr. Schacter to be the official voice of the Charity, and conflated Mr. Schacter's understanding of the Charity's official purpose, activities, and operation with the official position of the Charity, which he then relied on in his audit report; and (4) the CRA made certain factual errors, which may have negatively influenced the CRA's decision-making. Again, the Charity notes the ATIP Materials were heavily redacted, and it is the Charity's expectation that, if unredacted, these portions of the ATIP Materials would only further support the preceding conclusions.

We suspect that what we have seen in the file is the tip of the iceberg and that significant evidence of pressure and biases has been redacted or refused. Take note that if the CRA proceeds with any attempt at revocation, the Charity will consider appealing the matter pursuant to subsection 172(3) of the *Income Tax Act* (the "**Act**") and, in that context, we would rely upon Rule 350 of the Federal Courts Rules, which incorporates Rules 317 to 319 into an appeal context. Rule 317 provides that "a party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested." Inasmuch as the CRA's entire file, including redacted and refused materials, must form the basis for any CRA decision on revocation, we would take the position that the entire file is producible including any evidence of external pressures and biases.

[31] OECD – Social Policy Division, "SF1.1: Family size and household composition", online: https://www.oecd.org/els/family/SF_1_1_Family_size_and_composition.pdf.

III. CRA ERRORS OF LAW

A. Charitable Purposes Error

The July Letter states that the Charity is not constituted for exclusively charitable purposes. We respectfully disagree.

The purposes of the Charity from the date of its creation to the present have always been as follows:

> To create, provide, enlarge and administer a fund to be made up of voluntary contributions from the Jewish Community and others to be used for charitable purposes.

In 1967, the Charity engaged in extensive discussions with the predecessor of the CRA, the Department of National Revenue, regarding its objects and the manner in which it would pursue these objects. During this exchange of letters (the "**1967 Letters**"), the CRA accepted the Charity's position that its activities would be charitable as long as its funds were used exclusively to relieve poverty by paying the salaries of indigent workers: the Charity informed the CRA that "[the] entire balance is sent to our Israel Committee who use it for the employment of indigent labourers – recent immigrants in the main – on various work projects, for which they receive daily stipends". The CRA accepted this, replying in a letter dated August 25, 1967 that "[on] the basis of the information now supplied, we consider that the Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc. qualifies as a charitable organization".

As an aside, in our view, the 1967 Letters should not be read as constituting legally binding conditions of continued registration. Our view is that they were not intended to serve such a function and that it is not reasonable to read them in this way, particularly in light of the Charity's evolution over the past nearly 60 years and the fact that CRA or its predecessors have been regularly, repeatedly and fully apprised of that evolution, both in annual filings and in correspondence, and multiple audits.

The Charity takes issue with a number of the statements made in the first few paragraphs of the July Letter (from the last full paragraph on the first page to the last full paragraph on the third page) to the effect that purposes and activities of the Charity described in the 1967 Letters are not exclusively charitable.

First, the July Letter suggests that the purposes are not charitable because they are broad and vague. Respectfully, this is incorrect. Broad and vague purposes are purposes that can be interpreted to permit activities that are not charitable. The Charity's purposes are not broad and vague in this sense. The formulation of the Charity's purpose deploys a legal term of art, "charitable purposes," and restricts the purposes and activities accordingly. The July Letter is incorrect as a matter of law, therefore, in stating that the purposes are broad and vague in a legally material way.

Second, the main concern of the July Letter on this point, rather, appears to be that it is not possible to determine with any specificity what the Charity actually intended and intends to do, since under the rubric "charitable purposes" it is possible to do millions of things, all of which would be, we emphasize, legally "charitable". The CRA and its predecessor were rightly concerned, as administrators, to request more information from the Charity as to what the Charity actually proposed to do. The Charity's response is quoted above – employment to indigent workers, mainly immigrants. The July Letter argues (for the first time) that this type of activity is not charitable mainly because it aims to prevent poverty rather than relieve poverty and because providing employment opportunities that do not focus on training or skills

acquisition (i.e., that do not have an educational component) is not charitable. In our submission, this position is incorrect as a matter of law.

As the July Letter recognizes, the Charity's actual activities in the early years and in the audit years, involved the employment of individuals who were not, due to difficult circumstances, otherwise readily employable. The employment of "indigent labour" or of recent "immigrants" was not aimed at employment skills training but at integrating individuals who, due to lack of social, cultural, linguistic or economic integration, did not have the means to provide for themselves or their families. Because they were employed in public works – tree planting is the main example - the benefit of their labour resulted in the creation of public goods. The registration of the Charity was based on these premises, which we submit were and remain charitable.

One aspect of the Charity's work was immigrant aid. Ample authority exists to support the proposition that immigrant aid is a valid charitable purpose. In *Vancouver Society of Immigrant and Visible Minority Women* v. *Minister of National Revenue*[32] ("***Vancouver Society***") Gonthier J. canvassed extensive case law concerning immigrant aid, as follows:

> "82 The intervener Canadian Centre for Philanthropy showed the way forward by bringing to our attention that assisting the settlement of migrants, immigrants and refugees, and their integration into national life, is a charitable purpose already recognized under the fourth head of the *Special Commissioners of Income Tax* classification. In my view, the Society's purpose is subsumed within this subcategory. Although my colleague Iacobucci J. is not persuaded, there appears to me to be considerable authority in support of this position.
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> 83 An early Australian decision, *Wallace, Re*, [1908] V.L.R. 636 (Australia S.C.), upheld the validity of a trust to pay passage money to immigrants from an English town to Melbourne under the relief of poverty head. However, Hood J. also ventured the proposition, at p. 640, that in view of Australian immigration legislation, "a bequest in aid of immigration might probably be for the direct benefit of this community", although we would now shrink from endorsing his view that "such a bequest would ... have to be much more guarded than the present one is in point of both mental and physical qualification of the immigrants". I find my colleague's explanation of Hood J.'s obiter dictum to be unpersuasive. Hood J.'s suggestion, at p. 640, that "there are divergent opinions on the subject" as to whether assistance to immigrants is a charitable purpose was merely an acknowledgement that others might disagree with his decision. My colleague rightly emphasizes that the existence of a public benefit is a necessary but not sufficient condition to finding a charitable purpose, but nothing in Wallace, or indeed, in the manner in which I rely on that case here, denies that well-established proposition.
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> 84 I agree with my colleague that the mere existence of legislation in a field is not conclusive evidence that an organization pursuing a purpose in accordance with that legislation is pursuing a public benefit as that latter term is understood in the law of charity. However, I see no evidence that Hood J. relied upon the mere existence of Australian immigration legislation as conclusive on the issue of public benefit. Rather, Hood J. viewed the immigration laws as persuasive, though not conclusive, evidence favouring the recognition of assistance to immigrants as a charitable purpose. In so doing, he treated the existence of legislation in the same field as a relevant, though not a decisive, consideration. I see no problem with that: it is precisely what the Federal Court of Appeal did in Everywoman's Health Centre Society, supra, at pp. 67-68.

[32] [1999] 1 S.C.R. 10, 169 D.L.R. (4th) 34.

85 In *Stone, Re* (1970), 91 W.N. Covers (N.S.W.) 704 (New South Wales S.C.), a trust to assist migration was held to be charitable. Helsham J. observed, at p. 718, that "[a] trust to further the purposes of a body whose objects and activities are the encouragement and settlement of migrants generally in pursuance of a policy of the community and in co-operation with government instrumentalities would in this country be given the stamp of legal charity." In making this statement, Helsham J. relied (as Iacobucci J. notes) upon *Verge v. Somerville*, *supra*, where the resettlement of demobilized members of the armed forces who had returned home from abroad — or more specifically, "restoring them to their native land and there giving them a fresh start in life" — was upheld as charitable. That case concerned citizens in the armed forces, but an obvious analogy may be made with immigrants. In each case, individuals need assistance in integrating into national life. Iacobucci J. draws a much narrower interpretation of the holding in Stone than the passage just cited would warrant. He does not accept that the passage applies to immigration in general because there is no religious dimension to immigration in general, nor are immigrants returning to their native country. I am not convinced that Stone can be distinguished on this basis. Certainly, Helsham J. did not predicate his decision to uphold the trust at issue in Stone upon any of three narrow considerations invoked by Iacobucci J.

86 In *Verge* v. *Somerville*, the Judicial Committee of the Privy Council did not predicate its decision upon the unique hardships endured by soldiers. In any event, Iacobucci J.'s suggestion ignores the reality that many immigrants have themselves suffered serious hardship. Let me pursue the analogy between returned soldiers and immigrants directly. Soldiers return home after a lengthy period of time spent abroad. They may require assistance in integrating back into national life: employment and training opportunities, counseling, support groups, and the like. The same is true with many immigrants. In fact, soldiers may have an easier time of it, as they are unlikely to face language or cultural barriers, and are also likely to have friends and family already in Canada to assist them in the task of reintegration. Nonetheless, the life that the soldier left behind before going abroad may well be gone forever, and he or she may require assistance to making the transition to a new life upon his or her return.

87 Similarly, the relief and assistance of refugees was recognized as a charitable purpose in *Cohen, Re*, [1954] N.Z.L.R. 1097 (New Zealand S.C.), where a bequest to a society whose principal objects were to assist Jewish refugees to establish themselves in New Zealand was upheld under both the first and fourth heads of the *Special Commissioners of Income Tax* classification. Again, in *Morrison, Re* (1967), 111 Sol. Jo. 758, 117 New L.J. 757 (Eng. Ch. Div.), the assistance of refugees was recognized as a charitable purpose. Obviously, not all immigrants are refugees, but the two groups often share the same needs. Distinctions may, of course, be drawn between immigrants and refugees. The process of analogical reasoning, however, requires us to focus upon whether there are any relevant differences between the two. I can see none that are germane to the present discussion.

88 In *Cohen*, Hay J. expressly acknowledged that although no previous case had determined that assistance to refugees was recognized as a charitable purpose, an analogy could be made with the demobilized soldiers under consideration in *Verge* v. *Somerville*. Hay J. appears to have premised his analogy upon the proposition that both refugees and soldiers are uprooted and are in need of being settled. This is also an apt description of the circumstances of many immigrants, who may have come to Canada to leave economic and social deprivation behind them. In any case, the reason that an individual has left his or her home to come to Canada may have little to do with the difficulties that the individual faces here. Some refugees, and some immigrants, may have little difficulty integrating into the job market. But many immigrants and refugees do not find the transition to their new home to be a seamless one. They may need assistance to meet the challenges of an unfamiliar society.

89 Canadian authority recognizes assisting immigrants to obtain employment as a charitable purpose. In *Re Fitzgibbon* (1916), 27 O.W.R. 207, a bequest to an organization known as the "Women's Welcome Hostel" was upheld. The bequest created an annual prize to be given to a girl who had spent time at the hostel, which was an institution for the assistance of immigrant girls, and who had subsequently joined and remained with a single employer for three years or more. Middleton J. observed at p. 210 that "[t]his institution is undoubtedly a charitable institution, for the laudable purpose of aiding and assisting emigrant girls coming to Canada with a view of obtaining employment." Because the object of the bequest was to further the aims of the institution, which was itself charitable, it was upheld. I might add that no suggestion was made in the case that this purpose fit under the relief of poverty head of the Special Commissioners of Income Tax classification, and I do not read the decision as not following the Special Commissioners of Income Tax approach. Middleton J. did rely on *Mariette, Re*, [1915] 2 Ch. 284 (Eng. Ch. Div.), which admittedly had an educational dimension. However, the charitable status of the hostel was not directly at issue in Fitzgibbon. Mariette was cited only in support of the proposition that a gift to a charitable institution is itself a charitable gift, even if the gift might not be valid if given to a non-charitable organization. It is uncontroversial that the institution at issue in Fitzgibbon had an educational element, very much like Society under consideration in this appeal, but that does not refute Middleton J.'s characterization of the institution's purpose.

90 Directly on point, the Internal Revenue Service in the United States has ruled (U.S. Rev. Rul. 76-205 in Internal Revenue Cumulative Bulletin 1976-1 at p. 154) that a non-profit organization whose objects are to assist immigrants to that country "in overcoming social, cultural and economic problems by either personal counseling or referral to the appropriate public or private agencies" is charitable under the applicable section (s. 501(c)(3)) of the Internal Revenue Code. The ruling held that:

'The organization was formed to aid immigrants to the United States in overcoming social, cultural, and economic problems by either personal counseling or referral to the appropriate public or private agencies. The organization has found that immigrants may be subject to discrimination and prejudice, often arrive without friends or relatives, possess a limited knowledge of English, and lack an awareness of employment opportunities. To help overcome these handicaps, the organization offers instruction in English by its multilingual staff, job counseling, and social and recreational functions that permit a mingling of immigrants with each other and with United States citizens.

By counseling immigrants, the organization is instructing the public on subjects useful to the individual and beneficial to the community, and is, therefore, furthering an educational purpose. Personal counseling has been recognized as a valid method of instruction for educational organizations.... In addition, by offering instruction in English, by assisting immigrants in finding helpful agencies, by aiding immigrants to attain full citizenship, and by providing opportunities for immigrants to meet and discuss problems with each other and United States citizens, the organization is also eliminating prejudice and discrimination.' [Citation omitted.]

91 The organization was upheld as pursuing a mixture of purposes, some of which were grounded in the advancement of education head, and some of which were grounded in the elimination of discrimination and prejudice. Yet it cannot be denied that the purpose of the organization itself was to aid immigrants in integrating into national life, and it is that purpose to which I draw the analogy here. I fully agree that not all of the difficulties faced by immigrant women in obtaining employment stem from prejudice and discrimination: but it is undoubted that some of them do. Indeed, the greatest barrier to the integration of immigrant and visible minority women into the workforce is probably not racial or other animus: rather, it is the unintended exclusionary

effects of facially neutral practices. My colleague recognizes that "making contacts and obtaining information pose difficulties with respect to gaining employment" (para. 187). Such difficulties, and others, are inherent in moving to a new country. That is why assisting immigrants in overcoming those particular difficulties is charitable.

92 Likewise, the Charity Commissioners for England and Wales have registered an organization (Ethnic Minority Training and Employment Project, Reg. No. 1050917, registered November 22, 1995) whose objects are:

> **to assist refugees, asylum seekers, migrants and others who recently arrived in the United Kingdom**, in particular those from the Horn of Africa, who through their social and economic circumstances are in need and unable to further their education or gain employment, and who may be at risk or [sic] permanent exclusion from the labour market; to educate and train such refugees, asylum seekers, migrants and others by providing information, guidance, learning opportunities, and work experience which will enable them to acquire and develop vocational skills and secure employment, or further their education [sic].'

93 My colleague suggests that that organization's purpose is better conceived as being for the relief of poverty. I concede that there is a certain degree of overlap: but for assistance in obtaining employment, it would not be surprising if many immigrants fell into poverty, or remained there, as the case may be. However, I see no reason why assisting immigrant women to obtain employment could be considered a charitable purpose only to extent that it relieves poverty. Poverty, as my colleague rightly suggests, is a relative term. In any case, the suggestion that a charitable purpose must be related to the relief of poverty was rejected in Special Commissioners of Income Tax. The reality is that immigrants may face a number of obstacles to their integration into Canadian society, social, vocational, cultural, linguistic, or economic. It would be futile to focus on one obstacle to the exclusion of the others. Like the English organization, the Society provides assistance, guidance, and learning opportunities. It assists immigrants in developing and acquiring vocational skills, so that they may obtain employment.

94 My colleague argues that none of the cases I discuss above support my finding that assisting immigrant women to integrate into Canadian society by helping them to obtain employment is a charitable purpose under the fourth head of the Special Commissioners of Income Tax classification and rejects the suggestion that that purpose is charitable and may be analogized to other recognized charitable purposes. In each case, he either denies its authority or would interpret it very narrowly. My colleague implicitly suggests that the approach I adopt to the evolution of the law of charity represents "a fundamental turning in direction" (para. 179). I respectfully disagree. My approach, as I have endeavoured to demonstrate, is rooted in the existing jurisprudence. It is consonant with the broader principles I have set out, and indeed, with the analogical approach which I share with my colleague, "with an eye to society's current social, moral, and economic context" (para. 159).

95 The unifying theme to these cases, in my view, is the recognition that immigrants are often in special need of assistance in their efforts to integrate into their new home. Lack of familiarity with the social customs, language, economy, job market, educational system, and other aspects of daily life that existing inhabitants of Canada take for granted may seriously impede the ability of immigrants to this country to make a full contribution to our national life. In addition, immigrants may face discriminatory practices which too often flow from ethnic, language, and cultural differences. An organization, such as the Society, which assists immigrants through this difficult

transition is directed, in my view, towards a charitable purpose. Clearly, a direct benefit redounds to the individuals receiving assistance from the Society. Yet the nation as a whole gains from the integration of those individuals into its fabric. That is the public benefit at issue here. I have no hesitation in concluding that the Society's purpose is charitable under the second or fourth heads of the Special Commissioners of Income Tax classification.

96 Accordingly, in my view, this appeal does not require us to consider the applicability of the Native Communications Society of British Columbia case. The present appeal may be disposed of without having to determine whether or not immigrant women are in any way analogous to native people, because the Society's purpose fits within a recognized subcategory of the fourth head of the Special Commissioners of Income Tax classification.

97 Immigrants make up a broad class of people. Some immigrants, my colleague suggests, will have gained admission to this country on the basis of their education, experience, training, and skills. Their applications for entry will have been evaluated, in large measure, on the basis of their perceived ability to integrate into Canadian society. Presumably, immigrants in this category will have little or no need of assistance in integration into Canadian society. Given the existence of this category of immigrants, my colleague states that an organization that provides assistance to immigrants in general could not be exclusively charitable. With respect, I disagree. Reduced to its essentials, the contention is that an organization which seeks to assist a class of people cannot be charitable where some members of that class do not require the assistance that the organization seeks to provide. With respect, the proposition is unsustainable. Few charities could meet such a stringent test. Some immigrants will have no need for the Society's services: some immigrants will have need of some of the Society's services, but not others. Yet that recognition provides no basis upon which to argue that the Society is not charitable. Those who have no need of the Society's services will presumably not seek them out."[33]

The reasons for judgment of Gonthier J. in *Vancouver Society,* were, of course, dissenting reasons with which L'Heureux Dubé J. and McLachlin J. (as she then was) concurred. The majority judgment dismissing the taxpayer's appeal was written by Iacobucci J. The basis of Mr. Justice Iacobucci's decision was that the purposes of the applicant were too vague and indeterminate because they accommodated activities – the provision of a job skills directory and the establishment of support groups for professionals – aimed at helping immigrant women to find employment, which he held was not a charitable purpose. Although Mr. Justice Iacobucci's reasons for judgment argue against immigrant aid in general constituting a charitable purpose, the actual decision is based on a much narrower proposition and therefore the argument against immigrant aid in general was in obiter. Further, Iacobucci J.'s reasons provide explicit support for the proposition that supporting immigration of <u>Jews to Israel</u> is a charitable purpose.

Beginning at paragraph 181 of his reasons for judgment, Iacobucci J. attempts to distinguish some of the authorities relied upon by Gonthier J., as follows:

"181 In *Stone, Re* (1970), 91 W.N. Covers (N.S.W.) 704 (New South Wales S.C.), the Supreme Court of New South Wales held that the promotion of Jewish settlement in Israel was charitable under the fourth head of charity. In finding the trust charitable under this head, Helsham J. referred to the case of *Verge v. Somerville*, supra, which held that a trust to help resettle ex-servicemen in their native land and give them a "fresh start" was for a charitable purpose. He does not discuss why the resettlement of soldiers is analogous to Jewish settlement in Israel, but I find the context for this analogy to be provided by Helsham J.'s earlier discussion of the argument that this was

> also a trust for the advancement of religion. Although Helsham J. rejected this argument, following a previous House of Lords decision, he did discuss at length the religious duty of the Jewish people to return to the Promised Land. To my mind, it is this aspect of return, combined with the persecution of the Jewish people that culminated in the establishment of the State of Israel, that makes this trust analogous to that in *Verge v. Somerville*, supra. However, I do not think that the analogy embraces the more general case of helping any immigrants to settle in a new land. Immigrants, considered generally, are not returning either to their native country or their spiritual home. Nor have they necessarily been subjected to the hardships of soldiers or the persecution of members of the Jewish faith. I note that Helsham J. does make a broader claim, at p. 718, referring to" the encouragement and settlement of migrants". However, I am struck by the lack of reasoning to support this statement, and would therefore confine the decision to the context of Jewish settlement in Israel.
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> …
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> 184 I would also distinguish the case at bar from *Cohen, Re*, [1954] N.Z.L.R. 1097 (New Zealand S.C.). There the court found that a trust for the assistance of refugees was charitable under both the first and fourth heads. It held, at p. 1101, that "the establishment in a new country of persons uprooted from and compelled to flee their own homes" was analogous to the repatriation of returned soldiers at issue in *Verge v. Somerville*, supra. The relief of refugees was also upheld as charitable in *Morrison, Re* (1967), 111 Sol. Jo. 758, 117 New L.J. 757 (Eng. Ch. Div.). While it is true that refugees and immigrants may share many interests and needs, it is the fact that refugees are "compelled to flee their own homes" in the face of persecution that makes their situation analogous to that of soldiers returning from war."

Thus, although Iacobucci J.'s view was that the cases relied upon by Gonthier J. were distinguishable, Iacobucci J. carved out a specific exception in relation to the Jews' return to the Israel, being their spiritual home. Iacobucci J. also justified as charitable the support Jewish immigration to Israel in light of the treatment of Jewish people as "persecution". He described people fleeing persecution as "refugees" and then analogized refugees to soldiers returning home after war, as was the case in *Verge v. Somerville*.

Iacobucci J.'s reasons for judgment also place some emphasis on Canadian immigration law. At paragraph 180, Iacobucci J. observes that Canadian immigration law purposely identifies prospective immigrants by applying a point system which evaluates an applicant's ability to integrate socially and economically into Canadian life. The situation in Israel since the founding of the State of Israel, as Iacobucci J. explicitly points out, is completely different.

A second characterization of the Charity's work is and was the provision of employment to indigent labourers. The July Letter cites a short 2016 decision of the Federal Court of Appeal ("**FCA**") in *Credit Counselling Services of Atlantic Canada Inc v Canada* ("***Credit Counselling***") to the effect that the prevention of poverty is not a charitable purpose. The court in that case stated, in relevant part, as follows:

> "[16] The Appellant did not refer to any cases that have held that the relief of poverty will include the prevention of poverty. To satisfy the requirement that a purpose is for the relief of poverty, the person receiving the assistance must be a person who is then in poverty. Poverty is a relative term. Therefore, it is possible that in some situations providing assistance through counselling or by other means to individuals in serious financial trouble may be considered to be relieving poverty, even if the individuals are not then destitute (*Vancouver Society of Immigrant and Visible*

Minority Women v. *Minister of National Revenue,* [1999] 1 S.C.R. 10, 169 D.L.R. (4th) 34, at paragraph 185) (*Vancouver Society*).

[17] However, it is clear that the Appellant is assisting many consumers who are employed and who have assets and therefore would not necessarily, as of the time of receiving the assistance, be considered to be in poverty. In 2010 the Appellant assisted consumers in paying over $10 million to their creditors under the debt management program. There is no indication that the Appellant screened these clients and only offered its services to those individuals who would be considered to be "poor" as determined for the recognized charitable purpose of the relief of poverty. The activities of the Appellant can best be described as related to the prevention of poverty.

[18] In the United Kingdom, Parliament adopted the *Charities Act 2011*, 2011, c. 25 and in so doing included the prevention of poverty (in addition to the relief of poverty) as a charitable purpose. In effect, the Appellant is asking this Court to do that which required an act of the UK Parliament to do. In my view, just as in the United Kingdom, it will require an act of Parliament to add the prevention of poverty as a charitable purpose.

[19] As a result, in my view, the prevention of poverty is not a charitable purpose and hence the Appellant cannot succeed on this ground.

[10] …The Minister focused on the primary objective of the Appellant – the prevention of poverty – and concluded that this was not a recognized charitable purpose. The Minister noted that credit counselling may, in certain situations, "contribute to the charitable purpose of relieving poverty". However, since the Appellant's services were not limited to individuals who were poor, its services were more properly classified as relating to the prevention of poverty rather than the relief of poverty."

This decision may or may not stand for the proposition that the prevention of poverty is a charitable purpose. However, the decision clearly holds that providing support – including employment - to individuals who are suffering from poverty is charitable. The issue with the applicant charity in *Credit Counselling* was that it acknowledged in its own application that it would be providing support to individuals who were not suffering from poverty. That is not at all the case with the Charity.

In addition, *Credit Counselling* is not a clear authority for the simple proposition that 'the prevention of poverty is not a charitable purpose.' The Court in *Credit Counselling* first concluded as a matter of fact that the target clients of applicant charity were not all suffering from poverty nor were they on the verge of poverty. The Court stated that it would be permissible to provide assistance to individuals in "serious financial trouble" who were not then "destitute". The Court thereby accepted that some activities aimed at prevention of "destitution" are charitable. The Court's reference to the need for legislation in this area should not be read to suggest that activities intended to address poverty – "a relative term" – by preventing individuals and families in "serious financial trouble" from falling into "destitution" are not charitable. The Court in fact states the opposite. Any interpretation of the decision to the contrary would be a serious misreading of the Court's decision.

The following passages from a publication of the Charity Commissioners, *The Prevention or Relief of Poverty for the Public Benefit* [34] is a more apt description of the meaning of prevention of poverty and its relation to poverty relief:

> "When is the prevention of poverty distinct from the relief of poverty? We think it would be unhelpful to regard preventing poverty as necessarily separate from relieving poverty; they are just different points along a continuum of financial need. In our Commentary on the Descriptions of Charitable Purposes in the Charities Act we recognise that the prevention of poverty includes preventing those who are poor from becoming poorer, and preventing people who are not poor from becoming poor. There is a fine distinction between helping someone who is already in poverty and assisting someone so that they do not become poor. Therefore, in general, we consider that the prevention of poverty includes the relief of poverty, and that the relief of poverty includes the prevention of poverty. However, the Charities Act recognises the prevention of poverty as a freestanding purpose and so charities may be set up solely for the prevention of poverty. Charities set up only for the prevention of poverty tend to take a very specific approach to poverty, which usually involves tackling its root causes. The relief of poverty has long been recognised as a charitable purpose and many charities set up prior to the Charities Act will have aims for the relief of poverty, with no mention of the prevention of poverty. However, we have long accepted that charities concerned with the relief of poverty can also prevent poverty. It is not therefore necessary for charities for the relief of poverty to extend their objects to refer specifically to the prevention of poverty, but it is open to them to do so if that is appropriate."

Further, on in these submissions we address the actual operation of the Charity's work to address poverty by providing employment to indigent labourers and immigrants. At this juncture, our submission in summary is that the Charity's purposes were not broad and vague in a legally material way, and the Charity's activities, as described to CRA and as carried out were charitable as immigrant aid and/or as employment to indigent labourers to keep them from falling into "destitution" or simply, poverty. The assistance provided to these individuals and their families was not aimed at economic development and therefore did not require, to be charitable, an educational component.

The MNR was correct in in its decision in 1967 to grant registration on the basis that the Charity submitted in the 1967 Letters. The only error, with respect, is the CRA's current position.

B. Occupied Territories Error

The decision of the FCA in *Canadian Magen David Adom for Israel v Canada* (Minister of National Revenue) [35] ("***CMDA***") is cited variously in the correspondence from the CRA to the Charity over the course of this matter for two propositions. In the CRA's letter dated May 12, 2016 at page 5, the CRA states:

> "66 It is not enough for a charity to fund an agent that carries on certain activities. The Act requires that the agent actually conduct those activities on the organization's behalf.

[34] Charity Commissioners, *Prevention of Relief of Poverty for the Public Benefit*, available online: https://assets.publishing.service.gov.uk/media/652541b02548ca000dddf055/prevention-or-relief-of-poverty-for-the-public-benefit1.pdf.

[35] 2002 FCA 323.

> ...A charity that chooses to carry out its activities in a foreign country through an agent or otherwise must be in a position to establish that any acts that purport to be those of the charity are effectively authorized, controlled and monitored by the charity."

And, in the CRA's letter of April 19, 2018 at page 3:

> "Additionally, the courts have held that an organization is not charitable in law if its activities are illegal or contrary to Canadian public policy."

So, it is clear from the correspondence that CRA was aware of the FCA's decision in *CMDA*. An important component of the decision in *CMDA*, in both the majority and the dissent, is that charitable work in the "Occupied Territories" does not lose its quality as charitable work just because it takes place in the Occupied Territories.

For the majority, Sharlow JA stated:

> "[59] The Minister's public policy argument in this case is based on an interpretation of a number of United Nations resolutions and conventions, which have consistently been supported by Canada. However, it is far from clear that these resolutions support the proposition, as the Minister seems to believe, that a Canadian charitable organization cannot operate in the Occupied Territories without offending Canadian public policy. I perceive no logic in the proposition that the provision of emergency medical assistance can be a charitable activity in downtown Tel Aviv, but not in the Occupied Territories. I would also note that it is difficult to reconcile the existence of such a policy with the Canada-Israel Free Trade Agreement (Canada-Israel Free Trade Agreement Implementations Act, S.C. 1996, c. 33) and related legislation which, taken together, appear to permit preferential tariff treatment for goods imported to Canada from the Occupied Territories.
>
> [60] The record in this appeal falls far short of establishing, to paraphrase Decary J.A., that there is a "definite and somehow officially declared and implemented policy" that a Canadian charitable organization cannot operate in the Occupied Territories. Certainly no such policy has found expression in any Act of Parliament, in any regulation, or in any publicly available government document of any kind. I have no doubt that it is open to Parliament, if it sees fit, to amend the Income Tax Act to preclude Canadian charities from operating in the Occupied Territories or any other part of the world, or to empower the Governor in Council to make regulations to that effect. In the absence of such legislation or some equally compelling public pronouncement, it seems to me that the Minister cannot justify the revocation of the registration of the appellant solely on the basis that it or MDA operates in the Occupied Territories.
>
> The government of Canadas position on the issue of the Occupied Territories has not changes since the date of the decision in CMDA"

The CRA's letter dated April 19, 2018 nonetheless relies on the fact that some of the Charity's charitable activities were carried out in the Occupied Territories and alleges that such activities were contrary to Canadian public policy and therefore not charitable. This statement was clearly incorrect. In its letter dated August 20, 2019, the CRA resiles from this position, in the eleventh hour, and states that the nature of the Charity's activities in the Occupied Territories was not a factor in the CRA's decision to propose the revocation of the Charity's charitable status.

In the same letter, the CRA quotes Global Affairs Canada as stating the Canadian public policy on the issue:[36]

> "Occupied Territories and Settlements
>
> Canada does not recognize permanent Israeli control over territories occupied in 1967 (the Golan Heights, the West Bank, East Jerusalem and the Gaza Strip). The Fourth Geneva Convention applies in the Occupied Territories and establishes Israel's obligations as an occupying power, in particular with respect to the humane treatment of the inhabitants of the occupied territories. As referred to in UN Security Council Resolutions 446 and 465, Israeli settlements in the Occupied Territories are a violation of the Fourth Geneva Convention. The settlements also constitute a serious obstacle to achieving a comprehensive, just and lasting peace.
>
> Canada believes that both Israel and the Palestinian Authority must fully respect international human rights and humanitarian law which is key to ensuring the protection of civilians, and can contribute to the creation of a climate conducive to achieving a just, lasting and comprehensive peace settlement."

These statements are correct, but totally irrelevant for the reasons stated by Sharlow JA in *CMDA*.

Remarkably, in its letter dated April 19, 2018, the CRA's erroneous position on the Charity's activities in the Occupied Territories being contrary to Canadian public policy and related reasons comprised more than one-quarter of the CRA's 26-page letter. The CRA's reasons contained summaries of controversial issues related to Israel that have no connection to the Charity and were irrelevant for the purposes of the audit. For example, the letter speaks to:

(1) The United Nations General Assembly and the United Nations Human Rights Council's resolutions against Israel. Of note, in any given year, the UN passes more resolutions about Israel than any other country – often more resolutions than all other countries combined;

(2) Canada's opposition to the parts of Israel's West Bank Barrier which crosses over the "Green Line"[1] into the Territories, expropriations, and demolition of houses and economic infrastructure carried out in relation to the West Bank Barrier. Canada considers these acts contrary to international law;

(3) The International Court of Justice's advisory opinion on the West Bank Barrier, which concluded that its construction breached international humanitarian law and human rights instruments; and

(4) The CRA's opinion that Israel confiscates land, water, and other resources, for the benefit of settlements in violation of the Hague Convention on the Laws and Customs of War on Land, signed by Canada in 1907.

The inclusion of these issues in the letter appears to be a deliberate attempt to malign Israel, and the Charity by association, and suggests that the individuals involved in this part of the evaluation were

[36] (https://www.international.gc.ca/world-monde/international_relations-relations_internationales/mena-moan/israeli-palestinian_policy-politique_israelo-palestinien.aspx?lang=eng)

biased against Israel and the Charity because these statements had nothing to do with the *issue* of whether the Charity's activities beyond the Green Line were charitable. Our investigation of the ATIP Materials confirms that this misadventure into the politics of the Middle East goes back to the very beginning of the file. We surmise, perhaps incorrectly, that the reason for this is that this particular Charity is explicitly Zionist, which also has nothing to do with the charitable nature of its purpose or activities.

C. Procedural Fairness Errors

The July Letter cites the FCA's 2002 decision in *The Canadian Committee for the Tel Aviv Foundation v Canada* ("***Tel Aviv***") and the FCA's 2004 decision in *The Lord's Evangelical Church of Deliverance and Prayer of Toronto v Canada* ("***Lord's***") for the proposition that a Canadian charity that works with an agent must maintain direction and control over the activities of the agent. The following is a excerpt from the decision in *Tel Aviv* that describes the actual course of dealings between CRA and the charity in that decision:

> "[8] The Minister had audited the Committee on two earlier occasions before the 1997 Audit. An audit for its 1990 fiscal year ("the 1990 Audit") revealed several instances of non-compliance with the Act, including the lack of documents to support its overseas expenditures, irregularities surrounding preparation and issue of a proper T4 for its president, and improper payroll deductions for its employees. The Minister gave the Committee a written explanation of the instances of non-compliance as well as directions as to how to comply with the Act and its regulations. The 1990 Audit did not lead to any indication by the Minister that the Committee's status as a registered charity was in question.
>
> [9] The Committee was again audited in 1995 for its fiscal year ending December 31, 1993 ("the 1993 Audit"). The Minister advised the Committee in writing on March 26, 1996 that it was contravening the provisions of the Act in eleven instances, several of which are germane to the present appeal. They are listed in paragraph [11], infra. In his letter, the Minister warned that he could give notice of his intention to revoke the Committee's registration, pursuant to paragraph 168(1)(c) of the Act, if the Committee failed to comply with the requirements of the Act and its regulations. The Minister gave the Committee 30 days to make representations as to why revocation should not occur, subsequent to which the Director of Charities would decide whether or not to proceed with the issuance of a notice of intention to revoke.
>
> [10] The Committee responded to the Minister by letter of July 19, 1996, explaining that its agent had undergone a complete change in management since the Agency Agreement had been signed and was not aware of the reporting requirements in that agreement. Further, the Committee made the following undertakings to the Minister:
>
>> Both the Canadian charity [the Committee] and the agent have committed to conform strictly to the requirements of Revenue Canada, including the specific provisions of the Agency Agreement, which is still in force and effect ("1996 Undertaking").
>>
>> On the basis of the 1996 Undertaking, the Minister informed the Committee, by letter dated February 10, 1997, that the charitable organization status of the Committee would remain unchanged.

[11] The 1997 Audit took place in 1999. The Minister advised the Committee in writing on December 15, 1999, that he continued to have serious concerns about the repeat of deficiencies noted in the 1993 Audit. The Minister identified the seven deficiencies, namely:

a. the Committee had again violated clauses 7 - 10 of the Agency Agreement in that it maintained little control over the funds disbursed to and by its agent;

b. details were not provided regarding $20,000 expended by the agent on scholarships;

c. the Committee was unable to demonstrate adherence to a system of continuous and comprehensive reporting as required by the Agency Agreement;

d. the Committee's funds did not remain apart from those of its representative and the Committee's role in any project or endeavour was not separately identifiable as its own charitable activity;

e. donation receipts issued by the Committee did not comply with the Regulation 3501 and IT-110R3 as follows:

i. the receipts did not show the full address of the Committee as recorded with Revenue Canada;

ii. spoiled receipts were neither marked cancelled nor retained by the Committee; and

iii. donation receipts could not be reconciled with T3010 information returns and financial statements;

f. the Committee improperly completed its T3010 information return in that many of the items reported were incorrectly identified or omitted; and

g. the Committee paid fees to an entertainer, but no T4A slip was issued and no invoice was provided.

[12] Because of these deficiencies and the Minister's perception that the Committee has failed to observe its 1996 Undertaking, the Minister advised the Committee that there were grounds for revoking its charitable status. The Minister also advised of the consequences of de-registration, and gave the Committee 30 days to make representations as to why its status should not be revoked. The Committee was similarly advised that subsequent to that date, the Director of Charities Division would decide whether or not to proceed with the issuance of a notice of intention to revoke its charitable registration. The deadline was later extended to February 28, 2000 and the Committee responded by letter of February 25, 2000 .

[13] The Committee attempted to explain its situation and address the Minister's concerns. It also asked the Minister to clarify its concerns about the spoiled receipts and the Information Return. The Minister was not satisfied with the Committee's response and, by registered letter dated April 27, 2000, issued a notice of intention to revoke the charitable status of the Committee. In his letter of notification, the Minister advised the Committee that it had carefully reviewed the representations, including the Committee's letter, and concluded that the representations did not provide sufficient reason why the Committee's charitable status should

The Minister gave extensive reasons for revocation in his written notice of intention to revoke dated April 27, 2000, and may be summarized as follows:

> 1. the agent did not demonstrate that it maintained detailed records of all amounts received from or for the account of the Committee and all expenditures incurred on behalf of the Committee in accordance with paragraph 8 of the Agency Agreement;
>
> 2. the separate bank account kept by the agent appeared to be a transfer account, i.e., money was not paid directly to suppliers, but was funnelled to the agent for disbursement such that the Committee did not exercise direction and control over the agent's expenditures;
>
> 3. the agent failed to provide unaudited quarterly statements and annual reports as required by paragraph 9 of the Agency Agreement;
>
> 4. the Committee's statement that its agent kept it currently and fully informed of its activities, pursuant to paragraph 10 of the Agency Agreement, was not supported by any documentary evidence;
>
> 5. the report in support of the Committee's assertion that the agent had no discretion whatsoever as to the expenditure of funds, and that the Charity hade direction and control over use of the funds, was not available at the time of the audit, contrary to paragraph 9 of the Agency Agreement;
>
> 6. the Committee failed to demonstrate that it authorized the projects and the amounts for the projects for which it claimed to have provided funds, contrary to paragraphs 5 and 6 of the Agency Agreement;
>
> 7. the agent's brochure mentioned specific Canadian donors for projects claimed as Committee projects, which reinforced the Minister's view that the Committee was acting as a conduit by which Canadian donors may funnel funds to overseas donees, i.e., that the donor or agent, but not the Committee, was in control of where and how funds were disbursed and contributions recognized;
>
> 8. the $20,000 grant to the Air Force Museum in the city of Beer Sheva was reported in the Committee's records as `scholarships,' which was misleading, and concealed the fact that the agent's activities occurred outside the city of Tel Aviv;
>
> 9. the Committee failed to take corrective measures to ensure that that spoiled donation receipts were not marked as cancelled or retained by the Committee, and further that donation receipts could not be reconciled with the Committee's T3010 information return and financial statements;
>
> 11. the Committee failed to address the discrepancies noted by the Minister with regards to its T3010 information return; and
>
> 12. salary paid to an employee was not reported on a T4 slip, similar to what had occurred in the previous audit.”

The July Letter cites the *Tel Aviv* decision on the issue of direction and control. This is remarkable. The history of the relationship between CRA and the charity in issue in the *Tel Aviv* decision, as recited in the passages quoted above, demonstrates that on the sole issue of direction and control the CRA is willing to show great patience and remarkable latitude to charities that are apparently non-compliant. This is in keeping with the educational mandate of CRA and the discretionary nature of the MNR's decision to revoke. That mandate and that discretion must be exercised in good faith. The fact the CRA has denied any opportunity to the Charity to meet or to improve its direction and control is a substantial departure from its usual response, as illustrated in *Tel Aviv* that calls for a response and an explanation.

The correct approach is summarized in the following passage from the *Lord's* decision:

> "[11] It has been held that the rules of natural justice and the duty of fairness are "variable standards" the contents of which will depend "on the circumstances of the case, the statutory provisions and the nature of the matter to be decided": *Syndicat des employes de production du Quebec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 819 at 895-896. See also, *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at 1191-1192; *Congregation des temoins de Jehovah de St. Jerome - Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, 2004 SCC 48. The test for determining the existence of a general duty of fairness in a decision to terminate an employment relationship was articulated in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 669, where L'Heureux-Dube J. stated for the majority:
>
> > The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in Cardinal v. Director of Kent Institution, supra, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the Court at p. 653).
>
> [12] It is axiomatic that procedural fairness be accorded to a person in the position of the appellant before a decision is made to revoke a charitable registration. The respondent agrees that such fairness is required. The impact of revocation is palpable. The appellant's income would be subject to tax and the appellant would no longer be able to issue donation receipts. In addition, the appellant could be subject to a revocation tax under section 188 of the Act. Obviously, therefore, revocation would severely impact the appellant in pursuing its objects. Both sides accept the views articulated by Pratte J.A. in a similar case, *Renaissance International v. Minister of National Revenue*, [1983] 1 F.C. 860 (C.A.) at 866, where he stated:
>
> > It follows, in my view, that the decision of the Minister to send a notice of revocation under subsection 168(1) must be arrived at in a manner enabling the Minister to create a record sufficiently complete to be used by this Court in deciding the appeal. This presupposes, in my view, that the Minister must follow a procedure enabling him to constitute a record reflecting not only his point of view but also that of the organization concerned."

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IV. CHARITY'S RESPONSE TO THE JULY LETTER

A. Conducting Non-charitable Activities

1. Salaries Paid to Indigent Workers

In the July Letter, the review focused on a small sampling of salaries paid to indigent workers in 2011 and 2012. The conclusion drawn from this sampling was that indigent workers were paid above the poverty line in 2011 and 2012; therefore, this activity was not related to the relief of poverty. The Charity maintains that: (1) "poverty" is a relative term that is not limited to the definition of the poverty line and should be afforded a more expansive interpretation; and (2) that the Charity continuously performed this activity in accordance with its charitable purpose and in the manner authorized by the CRA since 1967.

The relief of poverty can be realized, quantified, and qualified in many different ways. The July Letter relies on the Federal Court of Appeal's decision in *Credit Counselling* to maintain that the prevention of poverty is not a charitable purpose. However, this decision also states at paragraph 16 that "[t]o satisfy the requirement that a purpose is for the relief of poverty, the person receiving the assistance must be a person who is then in poverty. Poverty is a relative term" [emphasis added]. This case does not provide a definition of poverty and uses quotation marks to describe "individuals who would be considered 'poor' as determined for […] the relief of poverty" [emphasis added]. It follows that poverty can be qualified in many different ways. For instance, the National Insurance Institute of Israel defines the poverty line as half of the median income.[37] In Canada, the official poverty line is based on the "Market Basket Measure", which is based on "is based on the cost of a basket of goods and services that individuals and families require to meet their basic needs and achieve a modest standard of living in communities across the country."[38] These two approaches to defining the poverty line demonstrate the relativity that the term "poverty" elicits and the expansive lens that needs to be applied.

The measure of applying the poverty line to the Charity's operations has not previously been raised by the CRA until the July Letter. The Charity further contends that the CRA was aware of, and deemed in agreement with, the salary payments above the applicable poverty line since 1967. In a letter from the Charity to the MNR dated July 21, 1967, the Charity noted that indigent workers received a daily stipend "in the neighbourhood of $5.00 per diem." The 1967 letter also specified the conversion rate at that time as being $1.00 = IL 2.77. Although the National Insurance Institute did not issue a report in 1967, we found other sources which support the finding that the Charity's stipends could have been in excess of the poverty line (applicable to individuals) at the time. Our findings are summarized below:

- In the Social Security Bulletin[39], the poverty cut-off in 1966 for a family of four was IL 3,163 per year (or $1,141 per year), noting that this income value would be significantly lower for a single individual. This is further broken down to $95 per month or $3.8 per day[40].

[37] National Insurance Institute of Israel, 2011 Poverty and Social Gaps Annual Report (Jerusalem: National Insurance Institute, 2012) at 37.
[38] Employment and Social Development Canada, Building Understanding: The First Report of the National Advisory Council on Poverty (Government of Canada, 2021) at 15.
[39] Doris K Lewis, "Poverty in Israel", Social Security Bulletin (November 1969).
[40] The number of working days per week in Israel varies from 5 to 6 days. We have used 25 working days per month in our calculations, based on the number of possible working days in September 2023 set out by the

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- In the Statistical Abstract of Israel[41], the median annual income for an urban Jewish family in 1967 was IL 7,700 per year. The poverty line would be half of the median income, being IL 3,850 per year (or $1,390 per year), noting that this income value would be lower for a single individual. This is further broken down to $115 per month or $4.6 per day.

- The Bank of Israel Annual Report[42] sets the average monthly in 1967 as IL 570 (or $205) per person, noting that the average is typically higher than the median value. Based on this value, the poverty line would be IL 285 per month (or $102 per month) and the daily rate would be $4.11 per day.

- In reviewing the annual Poverty and Social Gaps reported prepared by the National Insurance Institute of Israel for the covered years, the poverty line per standard person in 2011 was 2,000 NIS per month[43] and 2,256 NIS per month in 2012[44].

These findings support the position that the CRA was aware of, or at least expressed no opposition to, wages paid "above" the respective poverty rates. If the poverty line was a measure that the CRA wished to apply to ensure compliance with charitable purposes involving the relief of poverty, this should have been identified prior to the July Letter (indeed, it should have been identified at the time of registration).

2. Direction and Control over the Use of Resources / Resourcing Non-qualified Donees

The July Letter asserts that the Charity did not exercise adequate direction and control over the activities of its primary intermediary, KKL, during the audit years.

In addition to the errors described in the previous sections of this letter, we note several difficulties in responding to the direction and control portion of the July Letter.

First, the CRA drew several conclusions in the letter without providing any rationale or reasoning. For example, the CRA reiterated two statements made by the Charity: (1) that its activities were mainly conducted through an intermediary, KKL; and (2) that the Charity devoted resources to the relief of poverty by ensuring the employment of indigent workers. The CRA then stated that "the information and documentation provided by the Charity did not substantiate this position", however it did not indicate which position was not substantiated, what documentation was insufficient, or provide any reasoning or rationale for its finding.

Second, the CRA reiterated a statement made by the Charity, that it directed funds to indigent workers who were employed to plant trees, build water reservoirs, preserve nature habitats and build parks and bicycle trails. The CRA stated that it did not agree with this statement, because it concluded that these

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National Insurance Institute; National Insurance Institute of Israel, "Possible working days per month" (2023), online: <btl.gov.il/English%20Homepage/Benefits/Unemployment%20Insurance/Pages/PossibleWorkDaysPerMonth.aspx>.

[41] "Statistical Abstract of Israel 1970", (Jerusalem: Central Bureau of Statistics, 1970).

[42] "Wages" in Bank of Israel Annual Report – 1967, (Jerusalem: Bank of Israel, 1968).

[43] *Ibid.*

[44] National Insurance Institute of Israel, 2011 Poverty and Social Gaps Annual Report (Jerusalem: National Insurance Institute, 2012) at 9.

were not the projects of the Charity, but rather the projects of the Agent, in which the Charity only paid for labour through the Agent, and the Agent paid for all other costs. The CRA concluded that meant that the Charity was a fundraising arm and conduit for the Agent and, as a result, these were the activities of the Agent. The CRA did not provide any rationale or reasons regarding how each statement links to the next, and how it drew its conclusions. This has hampered the Charity's ability to respond to the CRA's findings to a certain extent.

Third, in the July Letter, the CRA excerpted a part of the Charity's letter dated September 16, 2016 to the CRA to assert that the activities were not the activities of the Charity, but rather the activities of KKL. In the excerpt, the CRA emphasized the following statement: "[The Charity] ensured that the work done by the Indigent Workers was legitimate and real, but at no point took ownership of the Selected Projects." The CRA correctly emphasized that the Charity ensured that the work done by the indigent workers was real and legitimate. However, the CRA's emphasis on the Charity's lack of "ownership of the Selected Projects" is not relevant as to whether or not the activities were the Charity's activities. Like many charities, the Charity is not always in a position to own foreign property; and ownership or title of the work product of a charity's activities is not a requirement to prove direction and control under Canadian charities law or the CRA's guidance.

Finally, the CRA took the Charity's statement in the excerpt out of context. It excerpted an entire paragraph on page 6 of the July Letter **<u>but excluded the last two sentences of that paragraph</u>** from the Charity's 2016 letter, which stated that the primary purpose of the charitable activity was the relief of poverty of indigent workers, and the charitable benefit of the Selected Projects was incidental and ancillary. During the audit years, the Charity's primary activity in Israel was ensuring the employment of the indigent workers. To meet the primary purpose, the Charity provided the Agent with hiring criteria to qualify a worker as indigent, found charitable projects that required labour that was suitable for the indigent workers, committed to paying the salaries of the indigent workers on these projects, ensured that the work was being completed by the indigent workers, monitored the progress of the charitable projects, transferred the funds to the Agent, and ensured that the funds were properly paid to indigent workers. This served a dual function. First, by committing to paying their salaries, the indigent workers were employed when they otherwise would not have been, thus gaining income and important work experience in Israel. Second, by committing to pay the salaries of indigent workers who worked on charitable projects, the Charity helped benefit all of the residents of Israel. The Charity's contributions to these charitable activities were essential for their completion. The Charity's activities were exclusively charitable because they only furthered charitable purposes, and any non-charitable purposes furthered by the activity were strictly incidental or ancillary.

The Charity is concerned and disappointed by the CRA's above-noted "selective" quoting from the Charity's 2016 letter. The context of the original text is clearly relevant to explaining the charitable purpose of the Charity's activities. The CRA appears to be attempting to deliberately misconstrue the Charity's words in order to manipulate them to fit its own predetermined narrative about the Charity. The Charity is concerned that the Appeals Directorate reviewed the Charity's submissions selectively in order to support the Charities Directorate's positions.

The Charity submits that the fundamental elements of direction and control were present in its activities during the audit years and thereafter.

3. Charity's Historic and Current Approach to Direction and Control

a. Charity's Historic Approach to Direction and Control

In 2010, KKL and the Charity entered into a formal written contract where KKL was required to provide work for indigent workers (the "**Agency Contract**"). Although unsophisticated, the Agency Contract was the written representation of the agency agreement between the Agent and the Charity, whereby KKL assisted the Charity by providing work to indigent workers in support of the Charity's relief of poverty. After the Charity selected a project, the Charity's Chief Executive Officer wrote a commitment letter to KKL identifying the project and the amount the Charity was providing to KKL pay Indigent workers. Under the Agency Contract, the Charity supervised the Agent initially through CANISCOM (and later the Charity's employee) in Israel.

b. Charity's Current Approach to Direction and Control

After the audit, the Charity took concrete steps to improve its direction and control over KKL. On June 1, 2018, consistent with *Guidance GC-002: Canadian registered charities carrying out activities outside of Canada* (the "**Guidance**"), the Charity and the Agent entered into a Joint Venture Agreement.[45] Under the Joint Venture Agreement the Charity and Agent signed Governance Documents, which acted as statements of work, for each project. In addition, as previously submitted, the Charity does not work exclusively with KKL and has increased its number of projects with other intermediaries. The Charity has entered into agreements with qualified donees and other agents.[46] The Charity works with several other charities with whom it uses agency agreements. Moreover, as described above, the Charity entered into the GAA with KKL on January 1, 2020 to replace the Joint Venture Agreement. The Charity determined that it could better direct and control its charitable activities under this form of agreement.[47]

The GAA details how the Charity will maintain direction and control over projects that KKL is engaged to implement, or supervise, its implementation. For example, the GAA requires a project description for each project, which must include how the project connects to and furthers one or more of the Charity's charitable purposes, the roles and responsibilities of the parties, ownership and use of the charitable project, and reporting requirements. KKL is required to keep adequate books and records, including records of funds received from or for the Charity's account and expenditures incurred by KKL. Under the GAA, KKL is required to regularly keep the Charity informed of its activities. The Charity is also entitled to inspect or monitor the projects and its books. The GAA provides for the reimbursement of expenses incurred by KKL.

On October 26, 2020, the Charity entered into an MOU with KKL.[48] The MOU sets out the Charity's expectations and the scope of its working relationship with KKL. The MOU clarifies that the Charity and Agent are legally and operationally separate; and, while they share a common general purpose in strengthening the land and people of Israel for all of its citizens, the Charity's commitment to such purpose is restricted to those aspects that are exclusively charitable under Canadian law. The MOU

[45] Refer to Exhibit A of November 18, 2019 Submission.
[46] Refer to Exhibit G of November 18, 2019 Submission.
[47] Refer to Appendix B of the May 25, 2023 Submission.
[48] Refer to Appendix C of the May 25, 2023 Submission.

emphasizes the Charity's intention to comply with Canadian charities law and explains that the Charity entered into the GAA to align with the Guidance on structuring a relationship with an intermediary.

More recently, as communicated to the CRA in the Charity's May 25, 2023 letter, the Charity adopted a Charitable Activities Protocol that is intended to assist the Charity's personnel to select and carry-out charitable projects in a manner that complies with the applicable laws and guidance.

Lastly, the Charity notes recent changes to the ITA relating to qualifying disbursements. In the draft guidance relating thereto, the CRA indicates: "A charity is not required to provide ongoing instructions to the grantee. A charity does not need to otherwise 'direct and control' the grantee as if it would if there were the charity's own activities"[49]. The Charity submits that this is a more "accommodating" approach to engaging with non-qualified donees and warrants a lighter weighting of any past direction and control issues (should the CRA disagree with the Charity's submissions) in making a decision to revoke.

The Charity and Agent are, and always have been, separate legal and operational entities. However, the Charity and the Agent have enjoyed a long-standing, working relationship, and the Agent had a good sense of projects that the Charity may wish to advance. While the Agent sometimes brings options for projects to the Charity's attention, the Charity has always selected its own projects. There is no agreement or understanding between the Charity and the Agent that the Charity must engage in any project that the Agent provides as an option. Any statement that Mr. Schacter made that implies or expresses, that the Charity was required to engage with a project, or simply provide funds and let the Agent direct and control a project, is patently false.

c. <u>Misrepresentations by Fred Schacter</u>

As noted earlier in this letter, CRA asserted that the Charity's charitable activities were actually those of the Agent by referencing Mr. Schacter's statements to the CRA. In the July Letter, the CRA conflates Mr. Schacter's statements with the official position of the Charity, that the Charity's activities only included collecting funds in Canada and sending them to the Agent to hire indigent workers in order to build public infrastructure in Israel. As stated above, Mr. Schacter was not qualified to answer many of the questions asked of him, and he was incorrect in making this statement. The Guidance provides that Canadian charities may provide funds to an intermediary for charitable activities as long as they retain direction and control of the activities. As outlined elsewhere in this letter, the Charity selected charitable projects, provided the Agent with criteria to hire indigent workers, ensured funds that it sent the Agent were used for the payment of the indigent workers, ensured that the work was being completed by the indigent workers, and monitored the progress of the charitable projects.

Based on the mistaken assertion that the Charity only paid the Agent's labour costs (as opposed to the Charity relieving poverty), and consequently only acted as the fundraising arm and conduit of the Agent for donations received in Canada, the CRA seems to have arrived at a conclusion that the activities were not the activities of the Charity, but rather the activities of the Agent. This is a fundamentally flawed and illogical conclusion as the Charity has provided ample evidence to support the fact that the Charity did much more than simply pay the Agent's labour costs. As well, reference to the Charity as a fundraising arm of the Agent is notable because this term was used in the IJV Petition, which is regularly mentioned

[49] See https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html.

in the ATIP Materials, including in the in the Case Info Sheet[50] and Media Lines.[51] This could be further evidence that outside pressure may have influenced the CRA's decision-making.

4. The Charity's Website

In the July Letter, the CRA concluded that the information on the Charity's website was not representative of what the Charity "said during the audit." The CRA also took the position that the Charity does not differentiate its projects from those of the Agent and the Charity is sells the Agent's projects to its donors. Historically, as the Charity noted in its letter dated November 18, 2019, that this project-focused approach to fundraising was a "gimmick", as experience has shown that donors are more likely to donate for charitable projects rather than relieving poverty. This was explained to the MNR as demonstrated in a letter from the Charity to the Department dated July 21, 1967, and the MNR did not see any issue with this approach to fundraising.[52] More recently, the Charity has been more explicit about what the donors will be funding.

The CRA provided an example of the Charity's webpage for the "Bicycle Track Along Carmel Coast," which is identified as a project of the Agent. However, the Charity has dozens of projects on its website, and the Charity has corrected the vast majority to accurately explain what funds will be used for. Respectfully, the fact that the CRA was able to produce one example, in which the Charity has not updated its language from its historical practices, cannot reasonably be understood as evidence of the CRA's allegation above, nor any form of serious non-compliance.

Additionally, the CRA provided an example of the webpage for the Beit Shulamit Cancer Center Therapeutics Spaces, noting that the Agent is matching 25% of the donations received. The CRA did not make clear why the Agent's pledge to match funds would be an issue, particularly because the Guidance provides that a charity and an intermediary may pool their resources to accomplish an agreed-upon goal.

5. Conduct of Non-charitable Activities / Support for the Armed Forces of Another Country

The Charity wishes to make clear, and the CRA must concede, that the performance of a charitable project on the base of a foreign army can be charitable at law. The Charity's historic involvement in the construction of parks and playgrounds on IDF bases did not amount to "[s]upport for the armed forces of another country". The Charity is discouraged by the title of this section of the July Letter because it appears to the Charity as if its previous submissions on this issue have been ignored.

In any case, the Charity is pleased to enclose letters from its solicitor in Israel (Jonathan Schiff)[53], the auditors of KKL (EY)[54], and its own auditors (BakerTilly)[55] which confirm that the Charity has not been involved in any projects involving the IDF for some time.

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[50] See Exhibit B.
[51] See Exhibit D.
[52] Refer to Exhibit D(2.2) in the September 16, 2016 Submission.
[53] Exhibit K – Letter from Charity's counsel in Israel, Jonathan Shiff, dated August 14, 2023.
[54] Exhibit L – Letter from the auditors of KKL, Ernst & Young, dated August 15, 2023.
[55] Exhibit M – Letter from the auditors of the Charity, Baker Tilley, dated October 18, 2023.

6. New Activity Identified in the Notice of Objection

The Charity is disappointed that a material portion of the CRA is dedicated to the analysis of payments to indigent workers. Not only is the analysis flawed by failing to account for the fact that a proportion of the indigent workers had dependents, but these issues were never previously raised by the CRA. If there was an issue with the amount of the payments or the payments themselves, the CRA should have identified it in one of the **four audits** that took place before the most recent audit. Alternatively, the CRA could have raised it at the outset when the Charity applied for charitable status and the amount of the payments to indigent workers was communicated to the predecessor of the CRA. Failing to do so on so many occasions amounts to more than a tacit approval of the Charity's former modus operandi.

More fundamentally, the Charity questions why the CRA sought to raise new justifications to revoke the charitable status of the Charity in the July Letter. The Charity understood that the purpose of the review by the Appeals Directorate was to engage in an independent assessment of the Charity's previous submissions and the CRA's previous findings, and not to manufacture new reasons to revoke the Charity's registration. A plausible explanation for this behaviour is that the CRA's previous findings did not support the overly harsh treatment of the Charity with respect to the application of the sanctions guidelines. Therefore, new reasons were necessary to buttress a weak case. This appears to be evidence of a biased process or one that is substandard.

7. Adequacy of the Charity's Books and Records

In the July Letter, the CRA stated that:

> "Under the Act, all registered charities must maintain proper books and records to enable the Canada Revenue Agency (CRA) to determine whether all its resources are devoted to charitable activities as required by the Act. Furthermore, these books and records have to be kept at an address in Canada"

The relevant provision on a charity's books and records is subsection 230(2), which provides that:

> "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), (b.1) 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**;
>
> (b) a duplicate of each receipt containing prescribed information for a donation received by it; and
>
> (c) other information in such form as will enable the Minister to verify the donations to it for which a dedication or tax credit is available under this Act."
>
> [Emphasis added]

Subsection 230(2) does not provide that a Charity's books and records must enable the CRA to identify all potential grounds for revocation. Nor does the provision require charities to meet a standard of

perfection in their recordkeeping. The standard is quite clear: whether the MNR has information in such form as will enable the MNR to determine whether there are *any* grounds for revocation under the ITA. The CRA's own correspondence in this matter makes it clear that this standard was met. The CRA has repeatedly communicated that it seeks to revoke the Charity's status on the basis that the Charity was allegedly not constituted for exclusively charitable purposes and because it allegedly failed to devote all of its resources to charitable activities. These allegations, if true, would constitute grounds for revocation under paragraph 168(1)(b) of the ITA. To support these two, alleged grounds for revocation, the CRA considered and cited the the Charity's constating documents, webpage, promotional materials, and documents relating to the employment of indigent labourers. The CRA cannot therefore rely on paragraph 230(2)(a) and claim that it had insufficient information to determine whether there were any grounds for revocation.

The CRA also stated in the July Letter that the requirement relating to the maintenance of books and records and books of account has been considered in several judicial determinations, and that "[t]he Courts have clearly indicated that the absence of proper books and records constituted serious non-compliance and would justify the sanction of revocation." The July Letter cites the following cases to support its position:

- *Jaamiah Al Uloom Al Islamiyyah Ontario v Canada (National Revenue)*
- *College Rabbinique de Montreal Oir Hachaim D'Tash v Canada (Minister of Customs and Revenue Agency)*, 2004 FCA 101
- *Opportunities for the Disabled Foundation v Minister of National Revenue*, 2016 FCA 94
- *Humane Society of Canada for the Protection of Animals and the Environment v Minister of National Revenue*, 2015 FCA 178
- *Canadian Committee for the Tel Aviv Foundation v R*, 2002 FCA 72
- *The Lord's Evangelical Church of Deliverance & Prayer of Toronto v R*, 2004 FCA 397

We considered each of the above cases and found that they either do not support the statement for which they were proffered or are distinguishable on the facts.

In the July Letter, the CRA cited the FCA's decision *Jaamiah Al Uloom Al Islamiyyah Ontario v Canada (National Revenue)*. In that case, the MNR had insufficient information from the books and records of the charity to determine whether there were any grounds for revocation. In particular, the charity had failed to provide the MNR with books and records to enable the MNR to determine if the appropriate amount of income tax relief was being provided by the charity to its donors. As a result, the MNR was unable to verify the accuracy and validity of charitable donation receipts that the Charity had issued. Pursuant to subsection 230(2) and paragraph 168(1)(e), the FCA held that the MNR was entitled to revoke the charity's status on the basis of inadequate books and records. This case is therefore distinguishable on the facts.

There is no background or legal analysis in the FCA's decision in *College Rabbinique de Montreal Oir Hachaim D'Tash v Canada (Minister of Customs and Revenue Agency*. It does not support the statement

for which it was proffered, namely that "[t]he Courts have clearly indicated that the absence of proper books and records constituted serious non-compliance and would justify the sanction of revocation."

Canadian Committee for the Tel Aviv Foundation (cited above, "**Tel Aviv**") involved a registered charity called the Canadian Committee for the Tel Aviv Foundation (the "**Foundation**"). The Foundation operated overseas through its agent pursuant to a written agency agreement. The MNR had audited the Foundation in 1995, advising the Foundation that it was contravening the provisions of the ITA, and that it was considering revoking the Foundation's charitable status. The Foundation explained that its agent had undergone a change in management since the agency agreement was signed and was not aware of the reporting requirements under such agreement. The CRA accepted the Foundation's undertaking to conform strictly to the requirements of the CRA (then Revenue Canada) and specific provisions of the agency agreement. A subsequent audit revealed that, among other deficiencies, the Foundation did not adhere to the undertaking nor to the terms of the agency agreement. The MNR therefore proceeded to issue a notice of intention to revoke the Foundation's status.

The FCA's decision in Tel Aviv is distinguishable on the facts. The MNR imposed the sanction of revocation in this case because the Foundation had not adhered to its undertaking with the CRA. In contrast, the CRA has not provided the Charity with the option to provide an undertaking or to enter into a compliance agreement. The decision also does not contain any substantive statutory analysis of subsection 230(2). The FCA's decision appears to conflate the CRA's position with a proper reading of the statutory provision.

In *Opportunities for the Disabled Foundation v Minister of National Revenue*, the appellant charity took a legally incorrect position that subsection 230(2) could not be used as grounds for revocation. In so doing, it failed to contest the MNR's conclusion that it had failed to maintain adequate books and records. As a result, the FCA had no reason to analyze subsection 230(2) in any detail. It therefore does not support the statement for which it was proffered. Notably, this is a case where the MNR also alleged that the charity had failed to devote all of its resources to charitable activities, made gifts to non-qualified donees, provided undue benefits to fundraisers, and failed to file information returns. And, even in that case, where the CRA alleged greater instances of alleged non-compliance than it did with the Charity, the appellant was afforded the opportunity to enter into a compliance agreement with the CRA.

The Lord's Evangelical Church of Deliverance & Prayer of Toronto v R (cited above, "**Lord's**") is distinguishable on the facts. The case involved the misappropriation of funds of a charity by its member, director and president. Furthermore, the case does not specify which paragraph in subsection 230(2) the CRA relied on to claim that the church had inadequate books and records. The CRA was likely relying on paragraph 230(2)(b), which requires a charity's to have a duplicate of donation receipts in prescribed form, because the decision notes that the church's donation receipts did not conform with regulatory requirements. This case is distinguishable on the facts because paragraph 230(2)(b) was never raised as an issue by the CRA vis à vis the Charity.

Humane Society of Canada for the Protection of Animals and the Environment v Minister of National Revenue appears to support the statement for which it was proffered. However, the FCA interpreted paragraph 230(2)(a) to mean that a charity's books and records should enable the MNR to determine

whether the charity is in compliance with its obligations under the Act.[56] Respectfully, that interpretation is not supported by the unambiguous language in the provision.

Furthermore, the CRA cannot apply the expansive interpretation of the provision in this case because it did not meet requirements to invoke paragraph 230(2)(a) as grounds for revocation as set out in the FCA's decision in *Prescient Foundation v Minister of National Revenue*. In that case, the FCA held as follows:

> "46 Paragraph 230(2)(a), on which the Minister principally relies to justify the revocation of Prescient's registration, is vague. This has important consequences for the purpose of determining the reasonableness of the Minister's decision to revoke Prescient's registration on the ground that it has not complied with that paragraph, as the Minister is allowed to do under paragraph 168(1)(e) of the Act.
>
> 47 For the revocation of a registration to be reasonable under this ground, the Minister must (a) clearly identify the information which the registered charity has failed to keep, and (b) explain why this breach justifies the revocation of the charity's registration. It is not sufficient to simply state that the charity has failed to keep proper records. Rather, the Minister must clearly set out the particulars of the alleged breach.
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> 48 This is so for two principal reasons: (a) natural justice requires that the registered charity be properly and adequately informed of the particulars of the allegations so as to allow it to respond in a meaningful way to those allegations; and (b) this Court must be in a position to clearly understand why the Minister is revoking the registration on this basis so as to allow it to determine whether that sanction was reasonable in the circumstances.
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> 49 As stated in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." In the context of the revocation of the registration of a charity on the basis of paragraphs 230(2)(a) and 168(1)(e) of the Act, this usually requires the Minister's representative to transparently and intelligibly explain in the notice of intention to revoke which records and information the charity failed to keep and to make available, and why this failure should result in the revocation of its registration. This does not, however, preclude the Minister from later referring in this Court to prior correspondence in which the issue of inadequate records was raised with the concerned registered charity, insofar as such prior correspondence is relevant to the particulars of the alleged breach as set out in the notice of intention to revoke.
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> 50 Regardless of who bears the initial burden of proof, as part of the reasonableness inquiry, the Court must be satisfied that it was reasonable, in the circumstances, for the Minister to require the records or information at issue, and that the revocation of the charity's registration was a reasonable response to a failure to maintain or provide them.
>
> 51 Indeed, the Minister has less drastic administrative corrective measures or intermediate sanctions available to him, such as formal notices, compliance agreements, or the suspension of a charity's tax receiving privileges for one year under paragraph 188.2(2)(a) of the Act. The registration of a charity that fails to maintain proper records should, therefore, only be revoked on

[56] *Humane Society of Canada for the Protection of Animals and the Environment v Minister of National Revenue*, 2015 FCA 178 at para 76.

> this ground in case of material or repeated non-compliance. The CRA itself takes this approach in its "Guidelines for applying the new sanctions", available on its web site."[57]

Accordingly, natural justice required the CRA to properly and adequately inform the Charity of the particulars of its allegation pertaining to books and records so as to allow it to respond in a meaningful way to those allegation. There was a breach of natural justice because the Charity was not allowed to respond to the CRA's allegations in any meaningful way. The July Letter indicates that the CRA either did not carefully review or understand the Charity's efforts to improve its books and records in response to the CRA's allegations in its previous correspondence with the CRA. Furthermore, the FCA's decision in *Prescient Foundation v Minister of National Revenue* also indicates that the CRA should only revoke a charity's status pursuant to paragraph 230(2)(a) in cases of material or repeated non-compliance. In the case at hand, the CRA should have provided the Charity with a meaningful opportunity to improve its books and records by using the "less drastic administrative corrective measures" available to it, such as a compliance agreement, before resorting to the extreme sanction of revocation.

8. Location of the Charity's Books and Records

In the July Letter, the CRA alleged that not all source documents were maintained in Canada for activities undertaken in Israel. Respectfully, much of the Charity's books and records are in electronic form. We understand that electronic records are acceptable as a general matter pursuant to subsection 230(4.1). Because the Charity operates overseas, some of its electronic records are stored in servers in Canada while others are stored in servers in Israel. In *eBay Canada Ltd v Minister of National Revenue*, the FCA held that information stored electronically outside Canada but available in Canada "cannot truly be said to 'reside' only in one place" or owned by only one person. In that case, the FCA determined that, because eBay Canada used information stored in a server in California for its purposes in Canada and could access that information from its Canadian offices, the information was within Canada for the purposes of the material sections in the ITA. Based on the same logic, the Charity submits that its records are also within Canada for the purposes of subsection 230(2).

9. Language of the Charity's Books and Records

In the July Letter, the CRA raised the issue that certain of the Charity's records were not translated into English or French. The Charity is not legally required to keep its books and records in an official language. We understand that the CRA recommends that books and records be kept in English, but an administrative recommendation is not legally binding. Furthermore, the CRA in its own publications has recognized that maintaining or translating books and records in an official language can be administrative burden for some charities, and communicated its willingness to consider the language of books and records on a case-by-case basis.

The Charity carries on the majority of its charitable activities in Israel, where the official language is Hebrew. Many of the Charity's records are, by necessity, in Hebrew. It would be administratively burdensome and costly for the Charity to convert all of its communications and documents pertaining to its work in Israel into English. If the CRA wished for certain or all of the Charity's documents or communication to be translated or maintained in an official language then it could have communicated

[57] *Prescient Foundation v Minister of National Revenue*, 2013 FCA 120 at paras 46-51.

that to the Charity at any time throughout this process, either pursuant to subsection 230(3) of the ITA or by calling or emailing the Charity's counsel.

10. Activities Undertaken in Israel

In the July Letter, the Appeals Directorate indicated that:

> …when the Organization transfers resources to its intermediary, it must direct and control the use of those resources. This means that the Organization must make decisions and set parameters on significant issues related to the activity, on an ongoing basis, such as:
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> a) how the activity will be carried on;
>
> b) the overall goals of the activity;
>
> c) the area or region where the activity will be carried on;
>
> d) who will benefit from the activity;
>
> e) what goods and services the charity's money will buy; and
>
> f) when the activity will begin and end.

The July Letter goes on to list various purported "deficiencies" that were found in the audit without identifying the particular projects to which the deficiencies relate. In the course of its exchanges with the CRA, the Charity submitted documentation relating to a number of its projects. Accordingly, it is difficult and probably impossible for the Charity to respond to the listed deficiencies without a clearer sense of the projects to which they relate. In any event, as the Charity has previously submitted, its primary charitable activity no longer consists of paying salaries to indigent workers to relieve poverty.

The July Letter then identifies various issues with the "Joint Venture Agreements". As previously indicated (in this letter and clearly in past submissions), the Joint Venture Agreement was replaced by the GAA. Further, we note that there was only one Joint Venture Agreement – there was no "Joint Venture Agreements". We do not understand why the July Letter continues to refer to the Joint Venture Agreement. It seems to indicate a misunderstanding of the materials that the Charity submitted.

As discussed in our letter to the CRA dated May 25, 2023, the Charity has adopted a Charitable Activities Protocol ("**Protocol**") to ensure compliance with applicable charities laws. The Protocol now guides its activities and there are plans to update the Protocol to provide for the new qualifying disbursement regime if the charitable status of the Charity is not revoked. All of the supporting documentation that the Charity previously provided and that it is providing as part of this submission pre-dates the Protocol. Although the Charity concedes that there was room for improvement, it is clear that the Charity exercised sufficient direction and control over its projects.

In this submission, we have provided additional explanations for documentation relating to the Eitanim Psychiatric Hospital Project (i.e., presented as "Protocol Option 3: Intermediary with KKL Involvement" in our letter of May 25, 2023) and the Kiryat Malachi Accessible Playground Project (i.e., presented as "Protocol Option 4: KKL is the Intermediary" in our letter of May 25, 2023).

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a. Eitanim Psychiatric Hospital Project

The Eitanim Psychiatric Hospital Project is an example of an arrangement where the Charity exercised direction and control over a project through KKL (i.e., as the supervising intermediary) and the Eitanim Psychiatric Hospital (i.e., as the performing intermediary). Accordingly, the Charity entered into a project agreement with the Hospital and a governing document under the GAA with KKL. The project agreement[58] entered into between the Charity and the Hospital sets out the roles, responsibilities and deliverables for the Hospital to carry out and operate the landscaping development of three courtyards on the Hospital's premises. The governing document, together with the GAA,[59] sets out the obligations and requirements for KKL to supervise the implementation of the project as the Charity's agent.

As per the agreements, the overall goal of the activity was to create safe, green and pleasant spaces conducive to the well-being and health of patient's at the Hospital. This charitable activity involved transforming the landscaping of previously unusable areas to provide patients with the places to experience nature and the environment. The Charity, through its intermediaries, supported the project by providing funding toward the landscaping development of three spaces, namely the "Men's Courtyard", the "Women's Courtyard" and the "Autism Courtyard". This project aligned with the Charity's charitable purposes and provided a benefit to patients and their families. The Charity submits that the content of its contracts satisfied the requirements identified by the CRA above.

In addition to the documents previously submitted, we have enclosed a legal opinion provided by counsel in Israel which indicates that the land on which the Hospital resides is government-owned and therefore it is unlikely that the Hospital would be able to sell, lease or transfer the land in the courtyards to a third party.[60] Construction work was already underway prior to the Charity's involvement. Once the Charity decided to begin this project, it drafted the appropriate agreements to govern its oversight and control over the use of its funds. The Charity's contribution was a one-time payment towards the total cost of the courtyard landscaping project after it was satisfied that the work had been completed. The Charity did not reimburse any intermediaries for specific invoices. Rather, the Charity provided a one-time payment after it had requested and reviewed the invoices for labour and materials expended on the project[61] and conducted its own due-diligence.[62] Part of the Charity's contribution, while not attributed to specific invoices, was allocated to each of the three courtyards under development.[63]

b. Kiryat Malachi Accessible Playground Project

The Kiryat Malachi Accessible Playground Project is an example of an arrangement where the Charity exercised direction and control over a project through KKL (i.e., as the intermediary). Accordingly, the

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[58] The project agreement was set out in Appendix G of our letter to the CRA dated May 25, 2023.
[59] The GAA and the governing document were set out in Appendix G of our letter to the CRA dated May 25, 2023.

[60] See Exhibit N – Letter from Charity's counsel in Israel, Jonathan Shiff, dated December 17, 2020.
[61] See Exhibit O – Invoices for Labour and Materials Expended (Eitanim Psychiatric Hospital Project), which sets out series of invoices setting out the amounts paid toward the project prior to the Charity's involvement.
[62] Note that the Charity provided a one-time payment of $300,000 CAD toward the project, which had a total estimated cost of $1,000,000 CAD. The Charity was not responsible for covering the entire cost of the project or reimbursing specific expenses or deliverables.
[63] See Exhibit P – Allocation of Funds (Eitanim Psychiatric Hospital Project), which sets out the allocated funds for each of the "Men's Courtyard", the "Women's Courtyard" and the "Autism Courtyard."

Charity entered into a governing document with KKL in respect of the project under the GAA. The governing document dated December 6, 2022, together with the GAA,[64] set out roles and responsibilities of KKL and its personnel, including overseeing the performance of the project and providing the Charity with regular updates.

The overall goal of the activity was to create a playground specifically designed for children with special needs in Kiryat Malachi, Israel. This charitable activity involved creating a playground that is wheelchair accessible and safe, and that has injury protected surfaces, shade structures and surrounding tables, benches, fountains, fencing and lighting. The Charity, through its intermediary, supported the project by providing funding toward the development of the playground. KKL also contributed funding and resources to support the development of this project. The project aligned with the Charity's charitable purposes by providing a public amenity to disabled children. The playground is located in the city of Kiryat Malachi. The city's low socio-economic status is attributed to its isolated location and limited resources. As a result, there were no accessible playgrounds for children with disabilities. The Charity submits that the content of its contracts satisfied the requirements identified by the CRA above.

Construction and building work were already underway prior to the Charity's involvement. In advance of selecting this project and executing the agreements to govern its direction and control over the project, the Charity reviewed various materials pertaining to this initiative, including a proposal of the project and design structure[65] and invoices already expended on the project prior to its involvement.[66] The intent of this review and the Charity's contribution was to provide a one-time payment towards the total cost, rather than reimbursing specific invoices.[67] The Charity received regular updates from KKL, including photos of the construction and equipment installation.[68]

11. Other Matters

As stated in previous letters, the Charity does not believe its conduct warrants moving directly to revocation without first being given the opportunity to engage with the CRA and enter into a compliance agreement. None of the Charity's historical non-compliance was flagrant or intentional, and cannot be said to meet the definition of aggravated non-compliance. Indeed, the Charity's practices in the audit years were essentially the same practices that were in place during the previous four audits for the 1977, 1981, 1985, and 1995 fiscal years. Any issue that the CRA raised with the Charity in previous audits was not of sufficient concern to the CRA to pursue revocation, or even require the Charity to enter into a compliance agreement. For example, in a letter from the CRA, dated August 21, 1989, the CRA raised concerns about the Charity's direction and control, and maintenance of books and records, however the audit was closed without sanction.[69] If any of these issues that are now being raised in this audit are sufficient to exercise revocation, it raises the obvious question of why revocation, or any intermediate steps, did not occur when the CRA previously brought them to light. This led the Charity into a false

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[64] The GAA and the governing document were set out in Appendix H of our letter to the CRA dated May 25, 2023.
[65] See Exhibit Q – Proposal (Kiryat Malachi Accessible Playground Project).
[66] See Exhibit R – Invoices (Kiryat Malachi Accessible Playground Project).
[67] Note that the Charity provided a one-time payment of $255,000 CAD toward the project, which had a total estimated cost of 1,400,000 NIS (approximately $480,000 CAD). The Charity was not responsible for covering the entire cost of the project or reimbursing specific expenses or deliverables.
[68] See Exhibit S - Photos of Construction and Equipment Installation (Kiryat Malachi Accessible Playground Project).
[69] Exhibit T – August 21, 1989 Letter from the CRA to the Charity.

sense of security. The Charity therefore believes that the CRA should take this into account in considering the Charity's historic compliance issues. This warrants a lighter touch to sanctions that is consistent with its own guidance on these issues.

While the CRA has alleged non-compliance issues in which it has determined the Charity was in breach of the Act, the Charity has thoroughly responded to each issue. In our experience dealing with other audit proceedings, no one issue raised by the CRA warrants moving directly to revocation. Instead, it appears in its July Letter that the CRA is considering the cumulative effect of the CRA's claims of non-compliance that led the CRA to determine that revocation was suitable in this circumstance. The Charity has comprehensively rebutted each claim to the degree that such claims, either individually or cumulatively, cannot reasonably be considered to constitute serious non-compliance that justifies revocation.

Each turn of the CRA's audit of the Charity has been marked with procedural unfairness, which has prejudiced the Charity. The Charity notes the following instances of procedural unfairness that have tainted the CRA's decision to revoke the Charity's charitable status:

1. While the CRA communicated its findings, with respect to non-compliance, to the Charity for it to provide a response, the CRA failed to provide the Charity with the sources that the CRA relied on. The Charity is familiar with the individuals and organizations that wrote articles, campaigned and complained about the Charity, and it was entitled to an opportunity to rebut their claims and present evidence that these sources were highly biased and unreliable. It is evident from the Charity's review of the ATIP Materials that the CRA used articles, campaigns and complaints against the Charity to form its positions. These extraneous considerations appear to have formed part of the CRA's initial planning of the audit and continued to inform its decision making throughout the process. For example:

    a. In an internal CRA document titled "Screener Comments", the author explicitly states that previous audits and reviews have generated a lot of material concerning the Charity, which includes information collected from sources, such as media, and that it "is very interesting and provides excellent background about the Charity, and provides a view of potential areas of concern for the current audit";[70]

    b. As is evident in the many versions of the Case Info Sheet: [71]

        i. IJV made allegations that the Charity practices institutional racial discrimination against Israel's non-Jewish population;

        ii. The Green Party of Canada passed a resolution to add as its policy "the revocation of charitable status from organizations complicit in international rights violations", which the CRA clearly understood as directed at the Charity; and

        iii. An individual whose name was redacted from the ATIP Materials wrote to all Parliamentarians and all MPPs alleging that the CRA was aware of the "racist nature of the [Charity's] bylaws and operations", which "have been deemed to

[70] See Exhibit A.
[71] See Exhibit B.

constitute racial discrimination by the United Nations Committee on Economic Social and Cultural Rights (1998)".

It was fundamentally unfair not to allow the Charity to, at minimum, comment on the accuracy and reliability of the claims made against the Charity in these materials – assuming that there is a viable way to rebut biases once they have been formed. As well, the language used in these materials was derogatory and dysphemistic, and creates an immediate negative association with the Charity. The Charity should have been given the opportunity to address the prejudicial language used in the materials that the CRA considered. The Charity was only able to review these materials because the Charity made the ATIP request, and by that point the Charity had already been prejudiced by such materials. Furthermore, the ATIP Materials were heavily redacted, and the Charity is of the opinion that they likely contain additional evidence of prejudice.

2. The CRA relied on Mr. Schacter's misrepresentations, conflated them with the official position of the Charity, and failed to engage the Charity's Board, senior management or legal counsel for further clarification or supplemental information.

3. The CRA improperly considered the Charity's activities and took an erroneous position that they were against Canadian public policy. Even after the CRA reversed its opinion of the Charity's activities in the Territories, the CRA continued to include its initial position in internal materials, including several versions of the Case Info Sheet, Media Lines, and emails, which indicates that the CRA's initial position continued to be present in the mind of the CRA.

4. The CRA refused to enter into, or even to meet with the Charity to discuss, a compliance agreement. While the Charity acknowledges that the CRA is not required to enter into a compliance agreement, the practice of such, or at minimum entering into discussions of such, has become a standard custom to the degree that it is procedurally unfair not to entertain this option.

5. The CRA appears to have either disregarded or not comprehended the Charity's documentation provided in the Charity's November 18, 2019, October, 28, 2020, and May 25, 2023 letters. The CRA continued to refer to agreements between the Charity and KKL that were no longer in place (e.g., the Joint Venture Agreement), when they had been replaced by newer agreements (e.g., the GAA).

In the July Letter, the CRA cited the FCA's decision in *Christ Apostolic Church of God Mission International v MNR*,[72] as confirmation that in serious cases of non-compliance the CRA can move directly to sanction or revocation. The Charity's historical non-compliance cannot reasonably be compared to that of the Christ Apostolic Church of God Mission. The Christ Apostolic Church of God Mission's non-compliance included falsifying invoices and shipping documents to account for tax-receipted donations that were not documented in its books and records. Even in such a case of aggravated non-compliance the CRA provided the Christ Apostolic Church of God Mission with an opportunity to meet and did enter into a compliance agreement. Despite numerous requests, the Charity was not afforded even a discussion of entering into a compliance agreement. In every case that we, as legal counsel, have acted for charities in revocation proceedings, we have always been afforded a

[72] 2009 FCA 162, 2009 DTC 5102.

meeting with the CRA. The Charity understands that with a compliance agreement comes greater scrutiny and a smaller margin of error. The Charity asks that it be allowed to enter into a compliance agreement, with the full expectation that the CRA will audit the Charity again, with heightened scrutiny. Should the Charity fail to comply with the compliance agreement, it would have no further recourse.

Although the CRA is not obligated to engage with a charity to enter into a compliance agreement, our experience tells us that, at least, it is an accepted practice to meet with a charity to discuss compliance before moving to revocation. Furthermore, we have seen more serious instances of non-compliance result in lesser sanctions. It is the Charity's view that this irregular treatment has been prejudicial and fundamentally unfair. It is the Charity's contention that it received such treatment due to a bias that was present early on in the audit process and led to the unwarranted decision to move directly to revocation, which the CRA now is determined to rationalize.

The Charity's view of the proceedings is that the CRA was under enormous pressure from anti-Israel and anti-Zionist groups to revoke the Charity's charitable status. This outside pressure led to bias against the Charity, and the CRA formed a predetermined conclusion about the charitable nature of the Charity's activities. The auditors began their evaluation with preconceived notions, and obtained unreliable information from a member of the Charity's management and conflated this with representations of the Charity itself. The CRA accepted these findings because it confirmed its bias and preconceived notions. Based on these findings, the CRA then took the unusual step of refusing to engage with the Charity and moving directly to revoking charitable status. Even after the Charity presented the CRA with ample evidence that its historical conduct did not rise to the level of aggravated non-compliance, and demonstrated its willingness and intention to comply with the Act by investing substantial resources to revise its processes, the CRA continued to assert that the Charity's conduct was sufficiently egregious to warrant immediate revocation. While the Charity continues to answer all of the CRA's questions and provides abundant evidence of its historical practices and revised processes, the CRA remains steadfast in its decision not to meet with the Charity. Rather than meet with the Charity and enter into a compliance agreement, the CRA chooses to bolster its flawed and fundamentally unfair decision. The CRA has retrospectively combed through the Charity's materials and communications, and examined public information, to garner the pretext for its decision. As a result, the CRA's later assertions about the Charity, and its historical and current conduct were often vague, haphazard, and erroneous.

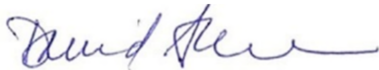
For example, the CRA's July Letter contains that are difficult to comprehend, as they seem to be based on misunderstandings of the Charity's submissions. Furthermore, the July Letter contained logical jumps without providing any reasoning or rationale, and conclusions without presenting its findings. As noted above, the CRA referenced an agreement between the Charity and the Agent that is no longer in place and seems to disregard newer arrangements. These characteristics make it difficult to provide an adequate response and ultimately serves to prejudice the Charity by hampering its ability to mount a thorough defence.

While the CRA is certainly entitled to exercise its statutory powers to ensure compliance with Canada's fiscal laws, the CRA does not enjoy complete license to do as it pleases, nor immunity from civil actions for damages. Thus, the Charity is contemplating whether there is a basis to assert a claim for misfeasance in public office, because the way this matter has unfolded may, at least *prima facie*, suggest possible improper purposes and intent. We trust that the CRA appreciates both that civil disputes unfold in the public's view, and that the scope of documentary disclosure in civil actions is comprehensive and substantial. The Charity hopes that this will not be necessary given these additional submissions and the submissions of its co-counsel.

Section 168(1) of the Act gives the MNR the ability to revoke charitable status where a charity ceases to comply with any of the requirements of the Act. However, in practice the MNR rarely moves directly to revocation as evidenced by the guidance. The MNR has the power not to order revocation and to instead engage in intermediate step to obtain compliance. Even in cases where the MNR was of the opinion that a charity failed to comply with the requirements of the Act, the MNR routinely exercised their broad discretion to not revoke charitable status. As described in this letter, the CRA has made its decision to revoke without first entering into a compliance agreement based on outside influences, unreliable information, and irrelevant considerations to the ultimate prejudice of the Charity. If outside influences, unreliable information, errors in facts and laws, and irrelevant considerations are removed from the CRA's findings, it is clear that the arguments to revoke the Charity's status are quite weak. The Charity requests that the MNR remedy this fundamentally unfair treatment of the Charity by allowing it to enter into a compliance agreement with the CRA.

Yours truly,

Gowling WLG (Canada) LLP



David Stevens

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GOWLING WLG

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A. Screener Comments, excerpted from ATIP Materials

B. Several versions of CRA draft Case Info Sheets, excerpted from the ATIP Materials

C. Email re speaking points, excerpted from ATIP Materials

D. Several versions of CRA draft Media Lines, excerpted from the ATIP Materials

E. July 11, 2019 internal email chain that includes discussion of including Charity's activities in the Territories in the Case Info Sheet and Appendix A

F. Pierre Thibodeau's Memo for File

G. October 28, 2020 Submission

H. Screenshot of Google Maps showing the Harei Naftali Forest are located outside the Golan Heights

I. Screenshot of Google Maps showing that Mount Scopus is located within an Israeli enclave of West Jerusalem, with the Green Line identified

J. Screenshot of Google Maps showing the distance between the Old City of Jerusalem and Bethlehem, with the Green Line identified

K. Letter from Charity's counsel in Israel, Jonathan Shiff, dated August 14, 2023

L. Letter from the auditors of KKL, Ernst & Young, dated August 15, 2023

M. Letter from the auditors of the Charity, Baker Tilley, dated October 18, 2023

N. Letter from Charity's counsel in Israel, Jonathan Shiff, dated December 17, 2020

O. Invoices for Labour and Materials Expended (Eitanim Psychiatric Hospital Project)

P. Allocation of Funds (Eitanim Psychiatric Hospital Project)

Q. Proposal (Kiryat Malachi Accessible Playground Project)

R. Invoices (Kiryat Malachi Accessible Playground Project)

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T. August 21, 1989 Letter from the CRA to the Charity