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October 23, 2023

Daniel Racine
Tax Appeals Case Specialist
Charities Section / Tax and Charities Appeals Directorate / Appeals Branch
112 Kent St. 18th Floor
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Dear Mr. Racine:

Re: Jewish National Fund of Canada Inc. (the "Charity")

We have been retained as co-counsel along with Gowling WLG (Canada) to provide you with responses to your letter of July 26, 2023. Our letter below is to be taken as additional submissions to the ones being made by Mr. Stevens. We will restrict our comments only to certain issues. If you require an additional authorization please let us know.

Threshold Issue

We understand that Mr. Stevens has, for some time, been advocating that the Charity's case is an appropriate one for a compliance agreement. He has also observed that the Charity has been working hard to be in compliance since the audit. We agree with Mr. Stevens' position and note that, in our experience, the Charities Directorate has been quite prepared to issue compliance agreements in situations similar to this one.

However, our understanding is that the CRA Charities Directorate (the "Directorate") will not provide a compliance agreement where it believes there are instances of serious non-compliance. In this case, the Directorate is - in our view, incorrectly – alleging the existence of an unstated non-charitable purpose. The Directorate's stated position in its *Guidelines for applying sanctions*[1] is that an unstated purpose constitutes "serious non-compliance", and hence it is seemingly blocking the issuance of a compliance agreement. It is to this issue, specifically, that we address our letter. We believe that the "evidence" of the alleged unstated purpose has been cherrypicked, and misunderstood by the Charities Directorate, resulting in an unwarranted conclusion. Once all of the facts are considered in context, it will become clear that the finding of an unstated purpose is wholly groundless and therefore does not

[1]As accessed online at <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidelines-applying-sanctions.html> in October 2023.

act to exclude a compliance agreement.

We understand that the mandate of the Tax and Charities Appeals Directorate is to review the positions taken by the Directorate and determine, among other things, whether an audit legally and logically supports the proposed sanctions. Below, we parse the logic of the Directorate and review the entirety of the file to show that the proposed sanctions in this case are entirely unsupported by the audit findings.

Facts

Beginning in 2016, the Directorate took the position that the Charity has an unstated non-charitable purpose. The initial logic for this position, as taken from the 2016 letter, is as follows:

> *"The Organization was registered as a charitable organization effective January 1, 1967. According to its Letters Patent the objects of the Organization are:*
>
> - *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.*
>
> - *The operations on* [sic] *the Corporation may be carried on through Canada and elsewhere.*
>
> *Notwithstanding that they were broad and vague, the Organization's purposes were accepted when it was originally granted registration under the understanding that it would restrict itself to charitable activities. The Organization was cautioned at the time in regards to what constitutes charitable activities and the requirements of the Act to maintain its registration.*
>
> *The audit revealed that the only activity the Organization is currently engaged in is paying the salaries of the workers in Israel. It is our view that this activity does not further the Organization's formal purposes (or a charitable purpose per se as contemplated by the first object) and it appears the Organization is not undertaking any other activities that would further charitable purposes. Rather, the Organization appears to be furthering unstated non-charitable purposes. In fact, according to the information obtained in the interview questionnaire received from Mr. Fred Schacter, former director of finance of the Organization, on September 11, 2014, the mission statement of the Organization is:*
>
> *-To provide funds to Keren Kayameth Le'Israel (KKL) to redeem the land of Israel.*
> *-To connect Canadian Jewry to their national homeland and to their partnership in its development.*
> *- To emphasize the centrality of Israel to Jewish life*
>
> *It is therefore our understanding that the Organization is no longer devoting its resources to activities in support of charitable purposes but is rather furthering unstated non-charitable purposes."*

Responses to 2016 Comments

It is not entirely clear whether the CRA proposes to revoke on the basis that the charitable purpose is overly broad and vague as the assertion is part of broader statements in each of the 2016 and 2018

letters regarding the Charity's objects. We begin by taking this opportunity to point out that the CRA cannot simply assert its position without some explanation of why that assertion is true. The Charity can not properly defend itself if it does not understand the CRA's position. This is an example of procedural unfairness, and it is the first of several examples we will cite in this letter of a seemingly pre-determined conclusion inadequately supported in the file.

Broadness

As you know, a charitable object is considered overly broad when it would allow a charity to undertake activities in furtherance of non-charitable purposes. Here, the object is explicitly worded to restrict the use of the Charity's assets to the furtherance of charitable purposes – and only charitable purposes. As the object does not allow the Charity to undertake non-charitable purposes it is not overly broad.

Vagueness

As vagueness is a matter of interpretation, in that the object must be capable of a non-charitable interpretation[2], we would point out that the CRA has not explained its position nor provided any proof of its position and so we cannot presume to understand their position (which, on the face of it, would seem to be incorrect). But, without some explanation of the position it is a breach of the CRA's duties of procedural fairness to alert the Charity of the case against it. And the CRA's conclusion in this regard therefore cannot stand.

The Directorate's letter goes on to state that:

> ***The audit revealed that the only activity the Organization is currently engaged in is paying the salaries of the workers in Israel****. It is our view that this activity does not further the Organization's formal purposes (or a charitable purpose per se as contemplated by the first object).*
>
> [Emphasis Added]

Respectfully, this is a bald assertion that was not explained any further in the 2018 letter. But we would point out that this particular finding is deliberately worded to only partially explain the Charity's perspective. In fact, the CRA contradicted this statement in its 2018 letter when it stated as follows[3]:

> *"The Organization stated that the work product of the Indigent Workers (the Selected JNF Projects) is incidental and ancillary to the Organization's purpose to relieve the workers' poverty. The Organization stated that even if the Selected JNF Projects were not themselves charitable in nature, this would not diminish employing indigent workers to relieve poverty as a charitable purpose.*
>
> ***While we agree this activity can further a charitable purpose*** .... "[the rest deleted as it

[2] Waters' the Law of Trusts, 4th ed.. DWM Waters page 684 states as follows: no trust can or will be executed by the court if the objects are so vague and indefinite that the court cannot ascertain what those objects intend, and as they stand those objects do or could embrace the non-charitable". As the Charity is limited to charitable purposes it is hard to see how the purposes could be vague.

[3] See page 7 of the 2018 Letter.

deals with another issue].

[Emphasis Added]

Where a charity's activities are vague one must refer to the activities of the Charity for clarity. This is known as the doctrine of benign construction. Taking the statements above together it is clear that the CRA recognized that the Charity is engaged in furthering a charitable purpose. So even if the CRA had presented evidence of vagueness, it's review of the activities would have resolved the issue of vagueness in favour of a charitable construction.

Mission Statement

As stated in the 2016 letter, the Charity's mission statement during the audit years was as follows:

> *-To provide funds to Keren Kayameth Le'Israel (KKL) to redeem the land of Israel.*
> *-To connect Canadian Jewry to their national homeland and to their partnership in its development.*
> *- To emphasize the centrality of Israel to Jewish life*

Like many other charities, the Charity has a mission statement that is different from its specific charitable purposes. The legal requirements of charitable purposes often make them unintelligible or confusing to the public, commonly leading charities to reframe their work to be more relatable as a "mission statement". Mission statements are fundamentally an exercise in public relations, and not the adoption of a new charitable purpose.

That is certainly the case here, as is made obvious by the wording of the Charity's mission statement. For example, the term 'redeeming the land of Israel' is a strictly religious concept. The "Land of Israel" is distinct from the current political state of Israel and refers to the historic Biblical description of the land that was promised to the Jewish people by G-d. We trust that this is common Biblical knowledge and does not require a citation. 'Redemption' is also a religious concept, that refers to the sanctification of the Land for holy purposes.

More specifically, the Charity's relationship with KKL is historical, but at any rate funds were not "provided" to KKL. Rather, they flowed under an appropriate contractual relationship, as mentioned later in the Directorate's 2018 letter. The CRA interpret the mission statement as true without regard to the evidence as to how funds flow to Israel. One can interpret the mission statement in a way that is consistent to both the facts and the law (i.e. KKL is the agent of the charity and funds are provided to it to do work on behalf of the Charity) – but the CRA, for reasons we surmise, sought to justify a conclusion by interpreting the statement contrary to the facts.

The two latter parts of the mission statement are both critical to the Charity's fundraising philosophy, but do not relate to the spending of any funds or to the pursuit of any non-charitable purposes.

We would further point out that the CRA itself uses a mission statement that does not correspond directly to its legal purposes. The mandate of the CRA is as follows:

> **5 (1)** The Agency is responsible for
>
> > **(a)** supporting the administration and enforcement of the program legislation;

> **(b)** implementing agreements between the Government of Canada or the Agency and the government of a province or other public body performing a function of government in Canada to carry out an activity or administer a tax or program;
>
> **(c)** implementing agreements or arrangements between the Agency and departments or agencies of the Government of Canada to carry out an activity or administer a program; and
>
> **(d)** implementing agreements between the Government of Canada and an aboriginal government to administer a tax.[4]

The Mission Statement of the CRA during the audit period is as follows:

> To administer tax, benefits, and related programs and to ensure compliance on behalf of governments across Canada, thereby contributing to the ongoing economic and social well-being of Canadians.[5]

Quite appropriately, the mission statement puts the CRA's mission into language that is more readily understood by the lay reader. It even refers to items that are not part of its mandate at all, such as "contributing to the ongoing economic and social well-being of Canadians." Taking the logic applied by the Directorate to the Charity, the CRA's mission statement means that it actually has a different purpose than the one to which it is legally restricted to by law. Likewise, the Charity's mission statement cannot be taken as proof that it has an unstated purpose. Both mission statements were composed for public relations reasons, and that is where the inquiry ends.

The CRA concludes its analysis in its 2016 letter with the statement that:

> *It is therefore our understanding that the Organization is no longer devoting its resources to activities in support of charitable purposes, but is rather furthering unstated non-charitable purposes."*

As we have pointed out above, the auditor in 2016 misstated the Charity's actual operations (although corrected in later years), and so the entirety of the Directorate's position in 2016 was based on an assertion that the Charity's mission statement somehow took precedence over or recharacterized the Charity's corporate objects. This assertion was made without evidence and is contrary to the usual understanding of a mission statement – even as understood by the CRA itself.

Response to 2018 Comments

Broad and Vague Purpose

In its 2018 Administrative Fairness Letter, the CRA again glibly stated that it had found the Charity's objects to be both broad and vague, but again provided neither evidence nor explanation for its position. Seemingly, because the Charity had proposed more specific objects, the Directorate took that as a concession of the point by the Charity. To be clear, the Charity does not concede a point that was not explained – even if it did offer to amend its objects.

The CRA audit finding in this regard takes a small excerpt from the Supreme Court of Canada

[4] Ss. 5(1) of the Canada Revenue Agency Act SC 1999 c17
[5] Summary of the Corporate Business Plan https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/gncy/bsnss_plns/2012/rc4422-12-eng.pdf pg. 2

decision in *Vancouver Society of Immigrant Women*.[6] We have no opposition to the citation itself, but it neglects to consider the context provided elsewhere in the judgment for the majority's position on this issue. In this case, contextual analysis provides greater guidance for the evaluation of the Charity's objects. The excerpt below is long but necessary to fully understand the Court's discussion:

> *I. Is the Society's Purpose Too Vague or Uncertain to Be Charitable?*
>
> *110 One of Revenue Canada's grounds for refusing to register the Society, a ground subsequently upheld by the Federal Court of Appeal, was that the Society's purpose was too vague or uncertain to qualify as charitable in law. My colleague Iacobucci J. takes the same view, and ultimately decides the present appeal on a particular application of this ground. I cannot agree.*
>
> *111 An allegation of vagueness often arises with regard to organizations that seek to fit their purposes or activities within the fourth head of the Pemsel test. The Federal Court of Appeal recently emphasized, in Stop the Violence . . . Face the Music Society, supra, at p. 5026, that an applicant for charitable status must define its purposes ("objects") with a sufficient degree of precision "to enable the Minister to be satisfied that the organization will be engaged in and will direct all of its resources to charitable activities". In most cases, then, an allegation of vagueness stems from a concern that if the purposes of the organization are not specified with sufficient clarity, the charitable organization could make expenditures on non-charitable purposes. A charity's purposes, as we have seen, must be exclusively charitable. A second, and related, reason underlying the requirement that a charitable organization's purposes not be too vague or uncertain was clarified by Slade L.J. in Re Koeppler Will Trusts, [1986] Ch. 423 (C.A.), at p. 432. The courts exercise an equitable supervisory role over charities, and consequently, must be able to control the application of a charity's assets and its activities by reference to its purposes. However, this task would be impossible if the charity's purposes were too vague or uncertain: Baddeley, supra, at p. 586 (Viscount Simonds) and pp. 598-99 (Lord Reid).*
>
> *112 Turning to the present appeal, is the Society's purpose too vague or uncertain to permit it to be registered as a charitable organization? In my view it is not. The purposes of an organization will almost invariably be phrased in broad, general terms. That cannot, of itself, render those words "ambiguous", as Lord Radcliffe indicated in Institution of Mechanical Engineers v. Cane,* [1961] A.C. 696 (H.L.), at pp. 718-19. *One should not aspire to an unrealistic degree of precision in such matters. In Native Communications Society, supra, at p. 484, Stone J.A. observed of the applicant's purposes that "[i]t is true that they are not drawn with exceptional precision but it is of the nature of corporate objects clauses to be rather broadly phrased". Revenue Canada has long encouraged organizations seeking charitable status to specify their purposes and activities with as much precision as possible. Yet at the same time, the continuing application of the ultra vires doctrine to non-business corporations, which Iacobucci J. acknowledged for this Court in Communities Economic Development Fund v. Canadian Pickles Corp.,* 1991 CanLII 48 (SCC)*, [1991] 3 S.C.R. 388, at p. 402, impels non-profit organizations such as the Society to draft their objects clauses as broadly as possible to avoid incurring liability for ultra vires acts. The Society, incorporated as it is under the B.C. Society Act (along with other organizations incorporated under analogous provincial legislation, or the* Canada Corporations Act, R.S.C. 1970, c. C-32*, Part II), is thus placed in an extremely awkward position.*
>
> *113 Vagueness and uncertainty are, to a certain degree, in the eye of the beholder. Nonetheless, some objective criteria may be identified. Useful in this regard is a comparison with D'Aguiar, supra, a leading decision of the Privy Council on appeal from Guyana. At issue was the tax status of a payment made to an organization known as "The Citizens' Advice and Aid Service". The Service's purposes were extremely broad, as is clear from its constitution:*
>
> > *2. The aims, functions and objects of the Service are:*
> > *(a) To provide advice, aid and services on or relating to medical, dental, optical, health, legal, matrimonial, domestic or other social matters;*
> > *(b) To establish and operate a fund for the assistance of those in need on such terms and conditions as the Central Committee may determine;*
> > *(c) To encourage thrift and provide savings facilities;*

[6] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.,* [1999] 1 SCR 10 – cited para. 194 is cited on page 4 of the 2018 AFL.

> *(d) To make available to the individual in confidence accurate information and skilled advice on personal problems of daily life;*
> *(e) To establish, organize, sponsor or otherwise promote adult education, and technical training of every kind including the explanation of legislation and Government notices and publications;*
> *(f) To help the citizen to benefit from and to use wisely the services provided for him by the State;*
> *(g) In general to advise the citizen in the many complexities which may beset him; and*
> *(h) Generally to do anything to assist the citizen, whether financial or otherwise who makes inquiry of the Service and in any way as may be determined by the Central Committee.*
>
> *3. The Service shall be independent and free from any political or other bias. It shall endeavour to give advice, instruction and aid to any member of the community who seeks or applies for it.*

114 Lord Wilberforce observed that the Service possessed no single dominant purpose which could be classified as charitable in law, and to which the other objects could be viewed as subsidiary or ancillary. He also held, at p. 33, that the overall object of the Service, the provision of advice to citizens, was "too indefinite and vague to support a finding of charitable purpose". However, as the purposes set out in paragraphs (a), (d) and (g) of clause 2 of the Service's constitution were not charitable, the appeal was dismissed on the ground that the Service's purposes were not exclusively charitable.

115 I consider D'Aguiar to be easily distinguishable from the facts of the present appeal. In D'Aguiar, paragraphs (a), (d) and (g) of clause 2 outline purposes that are phrased so broadly that they could encompass almost anything. No such problem bedevils the purpose of the Society in the present appeal. As I understand it, Iacobucci J.'s position (though he might not phrase it this way himself) is that although the Society's purpose is charitable, the Society's activities are too vague. Thus, as I see it, the fundamental objection raised by Iacobucci J. is not that the Society's purpose is vague, but rather that it is unclear how its activities relate to its purpose. That is a very different objection than that which rendered the organization at issue in D'Aguiar non-charitable. Critically, D'Aguiar says nothing whatsoever about the vagueness (or put another way, the lack of "connectedness") of activities.

116 Ultimately, the basis upon which Iacobucci J. dismisses the Society's appeal on this ground is that it has improperly included two words in a paragraph of its purposes section. My colleague contends that by inserting the words "or conducive" into clause 2(e), the Society places itself outside the scope of legal charity. He says that those two words render the language of (e) so broad as to make it "difficult to discern whether it is a means of fulfilment or an end in itself" (para. 193). I find this argument unconvincing. Some light is shed on the matter by A. B. C. Drache, Canadian Taxation of Charities and Donations (loose-leaf), at pp. 1-26 to 1-27, where the author suggests, on the basis of an anecdotal account, that Revenue Canada has recently taken the position that the term "conducive" is too broad. If that is so, I must say that the legal authority for Revenue Canada's position is obscure. I also note that this particular objection was not raised in either oral or written argument before us.

117 That said, I am not persuaded that the argument can succeed even on its merits. To see why, it is useful to reproduce clause 2(e) in full:

> *e. To provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.*

118 The plain language of the clause indicates the obvious intent of the drafter to enable the Society to carry out certain activities in furtherance of its purpose. The clause merely provides, as the Society argues, a mechanism by which the Society's main purpose may be achieved. It is self-evident that, despite the status of clause 2(e) as a "purpose" clause, to engage in the activities set out in clause 2(e) is not to pursue an end or purpose in itself. Clause 2(e) merely specifies a means "to the attainment of the above stated objects". My colleague takes the position that "incidental" and "conducive" have very different meanings, and that while the former implies a subordinate relationship ("having a minor role in relation to"), the latter does not ("contributing or helping [towards]") (Concise Oxford Dictionary (9th ed. 1995), at pp. 686 and 278). Thus, my colleague argues, at para. 193, that "while doing things that are "incidental" to the attainment of charitable purposes might safely be treated as a means of fulfilment of the purposes, the same cannot be said of doing things that are merely "conducive" to those ends". On this view, an activity might be conducive to the Society's main purpose without necessarily being incidental to it.

119 Although I acknowledge the distinction drawn by my colleague, I do not view it as a meaningful one on the facts of the present appeal. First, the argument simply assumes that the "or" is disjunctive rather than conjunctive. This Court demonstrated the futility of such an argument the last time it heard an appeal on the law

> *of charity. In Jones v. T. Eaton Co., supra, at p. 641, it was contended that the words "or deserving" in the phrase "needy or deserving" were "so broad and indefinite that they deprive the bequest of its charitable characteristic". The argument did not fare well. The Court interpreted the word "deserving" in its proper context. The result was that the trust at issue was held to be charitable, even if the word "deserving" might, interpreted abstractly, be amenable to an alternative gloss.*
>
> *120 Second, my colleague's argument is answered by this Court's decision in Guaranty Trust, supra. In that case, one of the purposes of the association at issue, as set out in its Letters Patent, was (at p. 141):*
>
> *(g) To do all such other things as are incidental or conducive to the attainment of the above objects. [Emphasis added.]*
>
> *This language is identical to (and if anything, the full clause itself is broader than) the language contained in clause 2(e) in the present appeal. Yet the phrase "incidental or conducive" did not arouse the attention of either Ritchie J., writing for the majority, or Cartwright J. in dissent, nor indeed, of the Exchequer Court below (*1965 CanLII 1115 (CA EXC)*, [1965] 2 Ex. C.R. 69). One can only speculate as to the reason for the Court's silence, but I am left to conclude that this Court did not address that language in Guaranty Trust for the simple reason that the Court considered it to raise no concerns.*
>
> *121 Again, though notionally a purpose clause, it must be recalled that what is contemplated by clause 2(e) is the ability to conduct activities, not purposes. As I indicated above, the precise boundary between an activity and a purpose is rather protean, and so one should not expect a bright line to separate them. The key observation is that an organization whose purpose is charitable does not surrender that status merely because it engages in some activities which are not in themselves charitable, so long as those activities are subordinate to, and in furtherance of, the exclusively charitable purpose of the organization. That is the case here. Accordingly, I am not persuaded by my colleague's argument to the contrary.*

[Bolded emphasis added]

This analysis is directly relevant to the object at issue. The Charity's objects restricts the organization to specifically charitable activities. That may be broad, but it is not 'overly' so. Similarly, any alleged vagueness is located not in the objects, but only in the activities. This is not sufficient to revoke the Charity's registration.

We submit that the Court's analysis above is perfectly applicable to the case at hand. Under such analysis, the Charity's objects are neither overly broad nor vague, as those terms are used in law. But beyond that, the Directorate did not even conduct the necessary analysis before coming to its conclusion. The lack of proper analysis alone is fatal to its position in this respect and cannot be used as a basis to justify revocation of the Charity's status.

Unstated Non-Charitable Purpose

Control and direction to support an unstated purpose argument.

Page six of the 2018 AFL states the following under the heading "Failure to be constituted for exclusively charitable purposes":

> *However, based on our review, the Organization has not demonstrated that activities carried out on its behalf furthered its charitable purposes, and that it maintained continued direction and control over activities, and over the use of the resources it provided to its intermediary: Keren Kayemeth Le'Israel's [sic] (the KKL-JNF or JNF).*
>
> *Our review identified that the Organization's resources appear to have been applied to JNF's non-charitable projects in the Occupied Territories, and to supporting the Israeli armed forces, and not to activities furthering its charitable purposes. It is our position that the Organization has operated as a conduit for JNF, a non-qualified donee, in contravention of the Act.*

We understand that the Directorate claims that it is *not* revoking on the basis outlined in the second paragraph. As Mr. Stevens has effectively dealt with this point already, we will make no further submissions on it. However, with respect to the first paragraph, we would point out that the control and direction requirements and the requirement for charitable objects are two distinct and mutually exclusive tests. Lack of control and direction cannot logically be used to support an argument that it operates for an unstated non-charitable purpose. For example, even if the control and direction test were satisfied, a charity could be found to have an unstated object. So, it does not follow that failing the control and direction test necessarily means there is an unstated purpose and vice versa. The CRA's point in this regard is not clear, but as we attempt to understand the auditor's work on this file, we felt it best to clarify the thinking on this point.

Furthermore, the CRA itself does not take the position that a charity failing the control and direction test necessarily means that it has an unstated purpose. We believe the source for this can be found in the Charities Directorate's audit manual. We bring this to your attention because, in our informed opinion, it is clear that the Directorate is acting contrary to its normal procedure in this case. Such deviation from the audit norm should be a matter of significant concern for the Appeals branch.

CRA Letter

The Bulk of the Directorate's 'findings' with respect to an unstated non-charitable purpose in the 2018 AFL are as follows:

> *According to the Organization's representations, it devoted all its resources to the relief of poverty by ensuring the employment of indigent workers in Israel who are hard-to-hire or unemployable by paying their salaries to work on projects selected by the Organization.*
>
> *The Organization stated that the work product of the Indigent Workers (the Selected JNF Projects) is incidental and ancillary to the Organization's purpose to relieve the workers' poverty. The Organization stated that even if the Selected JNF Projects were not themselves charitable in nature, this would not diminish employing indigent workers to relieve poverty as a charitable purpose.*
>
> *While we agree this activity can further a charitable purpose, we disagree that in the Organization's case, the selected projects are irrelevant insofar as these indicate unstated non – charitable purposes. Based on our review of the Organization's promotional and marketing materials, and its website, it is our position that the projects are its main focus, and the employment of indigent workers serves as a means to an unstated end of broadly supporting the work of JNF. The Organization's website mainly describes the projects of JNF as well as the Organization's fundraising events, rather than focusing on the relief of indigent workers' poverty. For example, the Organization's website states as follows:*
>
> > *"Since its inception in 1901, the Jewish National Fund has been the sole agency responsible for the development and infrastructure of land in Israel. Our many programs include land reclamation, reforestation, and road building. The goal is to increase support and awareness for JNF's initiatives, and ultimately to raise funds for these projects in order to enhance the lives of the citizens of Israel.*
> >
> > *The JNF directs 100% of its charitable dollars to support the Land of Israel. Therefore, you can be assured that your donation is going directly to fulfill the needs of one of our many development areas such as water, forestry and environment, education, community development, security, tourism and recreation*

> *and research and development"*
>
> *We also note page 75 of the Organization's representations states "The (Organization) made the final decisions over which projects were suitable for support, and the selected projects were a result of its own rigorous process of vetting, designing, supervising, and fundraising." The Organization's selection of projects for its support indicates the projects are not unrelated to its support of indigent workers.*
>
> *Finally, the Organization's focus on supporting JNF's projects in its fundraising and marketing activities can also be identified throughout the Organization's internal communications. For example, an email from Toby York, the Organization's Events Co-Ordinator to Jessica of the Canada Desk, responsible for the management and operation of the Organization's presence in Israel, dated July 1, 2011 (Exhibit E-5) states as follows: "we are looking for projects between $500,000 and $1,000,000 Canadian to present to our Honouree to choose as a Negev Dinner Project. Can you suggest anything for us that might have to do with children or water within that price range that may interest him? I checked on the Marketing website and came up with a few projects, but can use more ideas".*
>
> *Consequently, it is our position that the Organization's primary focus is not the aiding of beneficiaries but the accomplishment of the projects to which it supplies workers. As described in detail below, it appears that not all projects selected for support are charitable at law.*

Putting together the various statements from the CRA letters it seems that the Directorate agrees that a) the Charity is funding indigent workers, and b) funding indigent workers is a charitable activity[7], but that (in the Directorate's opinion) the Charity's main focus is its fundraising projects, and that the employment of indigent workers merely serves the unstated purpose of supporting the JNF's work.

The Directorate's evidence and logic to support this finding are so incredibly specious we find it amazing that it has made it to the cusp of the Federal Court of Appeal.

Examining Activities

Footnote 8 of the Guidance on Applying Sanctions cited above refers to the paragraphs 154 – 159 of the majority decision in *Vancouver Society.*[8] We cite a portion of those paragraphs below:

> *156 There is, however, one other exception to this rule. Though they concerned a provision of an Act other than our ITA, I believe the words of Denning L.J. in British Launderers' Research Association v. Borough of Hendon Rating Authority, [1949] 1 K.B. 462 (C.A.), at pp. 467-68, as adopted by this Court in Guaranty Trust, supra, at p. 143, are apposite in this instance as well:*
>
> > *It is not sufficient that the society should be instituted "mainly" or "primarily" or "chiefly" for the purposes of science, literature or the fine arts. It must be instituted "exclusively" for those purposes. The only qualification -- which, indeed, is not really a qualification at all -- is that other purposes which are*

[7] Supra n. 2.
[8] *Supra* n. 4

> *merely incidental to the purposes of science and literature or the fine arts, that is, merely a means to the fulfilment of those purposes, do not deprive a society of the exemption. Once however, the other purposes cease to be merely incidental but become collateral; that is, cease to be a means to an end, but become an end in themselves; that is, become additional purposes of the society; then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption. [Emphasis added by Ritchie J. in Guaranty Trust.]*
>
> *157 In Guaranty Trust, Ritchie J., for the majority, relied on this statement to find that, although a particular purpose was not itself charitable, it was incidental to another, charitable purpose, and was therefore properly to be considered not as an end in itself, but as a "means of fulfilment" of another purpose, which had already been determined to be charitable. Viewed in this way, it did not vitiate the charitable character of the organization. (See also Positive Action Against Pornography, supra, at p. 355, where a similar argument was considered and rejected, but only on the facts.)*
>
> ***158 The chief proposition to be drawn from this holding is that even the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfilment of another, charitable, purpose and not as an end in itself. That is, where the purpose is better construed as an activity in direct furtherance of a charitable purpose, the organization will not fail to qualify as charitable because it described the activity as a purpose.***
>
> [Emphasis added]

The Directorate takes as its starting position the requirement to review the activities of the Charity in order to determine whether the Charity is presently constituted for charitable purposes. This proposition is taken from *Vancouver Society* and that decision cites the Supreme Court's previous judgment in *Guaranty Trust.*[9]

The logic behind determining whether an organization is presently constituted for charitable purposes is that an organization's purposes can be changed or altered. This is clear from *Guaranty Trust*. In this case, there has been no formal change to the objects. And so, the CRA's inquiry logically turns to examining the operations of the Charity for evidence that it has an unstated object.

The question therefore must be asked as to what type of evidence is appropriate in reviewing the activities of an organization. For example, are the statements of volunteers good evidence? Are the statements of its opponents/enemies? What about third-party impressions? Fundraising statements? Is hearsay admissible? How flimsy can a piece of evidence actually be? Do the legal rules of evidence apply at all?

Vancouver Society speaks to the requirement to examine the evidence but does not suggest what type of evidence should be used. That case was an appeal from the Federal Court of Appeal and evidence is not typically weighed in that forum. On the other hand, *Guaranty Trust,* the source for the Court's

[9] *Guaranty Trust Co. of Canada (Towle Estate) v. Minister of National Revenue*, [1965] CTC 74

pronouncement in *Vancouver Society*, was originally heard in the Exchequer Court [10,11] which did hear evidence, and so there is court guidance on the type of evidence that the CRA must examine in determining whether there is an unstated non-charitable purpose.

While not exhaustive, clearly an organization's actual activities must be part of the consideration. The Exchequer Court, in looking at the organization at issue in *Guaranty Trust*, clearly referred to the actual activities of the group:

> *A great deal of evidence was adduced at the trial concerning the actual operation of the Medical Alumni Association during recent years.*
>
> *It is sufficient to summarize such evidence in general terms. The Association had a small salaried staff which worked in premises put at the disposal of the Association by the University of Toronto without charge. The Association held its annual meeting in conjunction with an annual dinner. The staff published a magazine for the members and supplied services to the members of the various graduating years to encourage them to have reunion meetings. The staff carried on the usual activities designed to induce members to pay their annual fees and to subscribe to the funds administered by the Association. It was manifest, however, that by far the greatest part of the Association's effort, during recent years in any event, was the operation of scholarship, bursary and loan funds for medical students at the University of Toronto, making of gifts to be spent by the Dean of the Faculty of Medicine and the President of the University to be expended in their official capacities and other activities designed to supplement the work of the Faculty of Medicine at the University of Toronto. However, there is no evidence upon which I can make a finding that the carrying on of activities such as those referred to in the immediately preceding sentence constitutes the exclusive object of the Association and that the other activities of the Association are merely subsidiary and incidental thereto. While such activities may have tended to overshadow, at times, in the minds of the officers of the Association, the activities that were designed, for example, "to encourage and cultivate good-fellowship among the members of the Association", these latter activities, and probably others, in my view, never ceased to have their place as principal reasons for the existence of the Association.*[12]

We would remind you that the Supreme Court's decision in *Guaranty Trust* did not disagree with the trial judge's review of the evidence. Thus, it must be concluded that, amongst the other requirements of procedural fairness, a review of the evidence must be fulsome and take into account all of the relevant information. Furthermore, the Directorate is compelled to ignore irrelevant evidence.

Evidence – Specific to the Charity

We now turn our attention to the evidence that the Directorate has cited. We have reviewed the CRA's file obtained under Access to Information to confirm that the only three pieces reviewed by the CRA are those discussed in the 2018 AFL.

First, the Directorate cites the Charity's website. Based on the analysis from Guaranty Trust, a website cannot provide evidence of an unstated purpose. The law requires that a purpose be inferred from actual activities. Verbiage on a website is not an activity so it cannot be evidence.

Moreover, if the statement is a characterization intended for a particular audience, then the inference drawn from it is unreliable for the CRA's purposes. Consider the example of a charity dedicated to the construction of a hospital, which states on its website that its activities further the health care ideals of the governing political party, but only uses its funds to support the hospital's construction. In this case, the organization's purposes as understood from its activities are the construction of a hospital. The ancillary and nebulous characterization for public consumption is irrelevant.

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[10] The Exchequer Court is the predecessor to the Federal Court of Canada.

[11] The decision of the Exchequer Court can be found here - 1965 CanLII 1115 (CA EXC), [1965] 2 Ex. C.R. 69, [1965] C.T.C. 74, 65 D.T.C. 5042.

[12] *Supra* n. 10, pages 73-74.

Second, the Charity submits that it was required to review the projects on which the funded workers would labour. Yet, the Directorate asserts that the review itself is evidence that Charity had an unstated purpose to support those projects. The implication of the Directorate's position on this is that that the Charity's diligence is an example of an unstated purpose.

If the Charity did not vet the projects with which it was associated, and the Charity's resources were used to provide aid to an invalid end (such as work on a military base), the Charity would presumably be in breach of the law (i.e., using its resources to operate contrary to public policy). It seems eminently prudent, reasonable, and in compliance with the law for the Charity to review any project with which it is connected. Indeed, the auditor holds the Charity's own diligence against it, and then takes the further position that the projects the Charity supported (which it did not, in fact, support) are not all charitable at law. The Directorate cannot insist the Charity be less diligent in one sentence, and then punish it for not being diligent enough in the next. **We think it conspicuous in the extreme that the Directorate would use the Charity's diligence in compliance as evidence against it.**

Third, the Directorate's letter states that "*…the Organization's focus on supporting JNF's projects in its fundraising and marketing activities can also be identified throughout the Organization's internal communications*." This misconstrues the situation in two ways. First, all charities look for new initiatives to further their objects. Indeed, foundations seek grant applications, sophisticated charities accept budget proposals for new projects, and groups operating overseas rely on their agents to present new projects for potential funding. The fact that the Charity's employee, Ms. York, was inquiring with the Charity's agent about possible projects is a sign of a charity diligently seeking new opportunities. This is a commonplace occurrence for any responsible charity.

Moreover, the 'projects' were often simply a way of rallying to a specific item in order to raise funds for the Charity. It is well known in the charity world that people like giving money to specific projects. The Charity did not hide the fact that the money raised from one of their dinners could raise funds well in excess of what was required for a project, and, if asked, would answer honestly about the use of the funds. Every charity raises funds, so unless the contention is that the organization exists only to raise funds, that act alone cannot speak to an unstated purpose. The real question is for what purpose were those funds spent. As stated earlier the CRA found that the funds went to pay for indigent labour. But, that evidence was completely avoided by the CRA in its analysis here. That evidence is of vital importance and is fatal to the argument that there was an unstated purpose.

Further, it seems that the bulk, if not the entirety, of the Directorate's case that the Charity has an unstated non-charitable purpose of supporting KKL relies on this 'fundraising' evidence. But the absence of other evidence is just as telling. Where is the evidence that the Charity pays for JNF's staff, computers, rent, professionals, marketing, fundraising, or projects? The fact that the Charity associates its fundraising efforts with those of another organization cannot be enough proof – and indeed on what authority is the CRA relying that this is even evidence at all? The so-called evidence relied upon by the Directorate consists of internal emails taken out of context to arrive at absurd results.

Finally, the CRA's own "Fundraising by registered charities" guidance, CG-013, discusses the jurisdiction of the CRA in enforcing rules regarding fundraising. In particular, the CRA states that:

> *14. However, the CRA recognizes that registered charities in Canada often depend on donations to carry out their charitable activities and that reasonable fundraising expenditures are often necessary to sustain charities. At the same time, all fundraising must be conducted within legal parameters. Fundraising that exceeds these boundaries or parameters is not acceptable.*

> *15. An organization carrying out unacceptable fundraising will not be considered by the CRA to be constituted and operated exclusively for charitable purposes and devoting its resources to charitable activities. This may result in denial of charitable registration or compliance measures – including sanctions or the revocation of registered charitable status.*[13]

The Guidance refers to fundraising within legal parameters. The CRA has not identified any infractions by the Charity in its fundraising, and if it has what statutory provisions has it contravened? None are named because the CRA has no jurisdiction to regulate fundraising approaches and is limited only to what is in the Income Tax Act.

There is no authority to simply deregister an organization because the Directorate does not like its fundraising methods. Indeed, that is expressly unconstitutional as the authority to regulate charities in that regard is a provincial authority.[14] The CRA's entire review of the Charity's fundraising is limited by its lack of jurisdiction to do so. We reject the analysis entirely as being unconstitutional, and designed to reach a pre-determined conclusion.

The Further Problem with the CRA's Review

We would emphasize the CRA's conduct of an audit intended to justify a pre-determined conclusion with a deeper look at the 2018 AFL which words the first, and major, part of the Directorate's decision as follows:

> *While we agree this activity can further a charitable purpose, we disagree that in the Organization's case, the selected projects are irrelevant insofar as these indicate unstated non – charitable purposes. Based on our review of the Organization's promotional and marketing materials, and its website, it is our position that the projects are its main focus, and the employment of indigent workers serves as a means to an unstated end of broadly supporting the work of JNF. The Organization's website mainly describes the projects of JNF as well as the Organization's fundraising events, rather than focusing on the relief of indigent workers' poverty. For example, the Organization's website states as follows:*
>
> > *"Since its inception in 1901, the Jewish National Fund has been the sole agency responsible for the development and infrastructure of land in Israel. Our many programs include land reclamation, reforestation, and road building. The goal is to increase support and awareness for JNF's initiatives, and ultimately to raise funds for these projects in order to enhance the lives of the citizens of Israel.*
> >
> > *The JNF directs 100% of its charitable dollars to support the Land of Israel. Therefore, you can be assured that your donation is going directly to fulfill the needs of one of our many development areas such as water, forestry and environment, education, community development, security, tourism and recreation and research and development"*

Respectfully, a 'main focus' can only be determined by looking at all of the evidence. Here, the Directorate specifically says that it looked at promotional and marketing materials, and the Charity's website. But how can the main focus of the Charity be determined if that is all that is taken into consideration? Why did the Directorate not take into account the Charity's spending activities? Or the literal thousands of pages of documents submitted to the Directorate (and disclosed via an Access to Information Request) showing spending on indigent workers? Or the fact that there are no funds going to actually support KKL? How can the focus of the organization be determined without reference to all of the pertinent information? Or, to put it another way, of course the auditor found the focus to be as the Directorate described – she deliberately picked evidence and excluded others, so

[13] Taken from https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/fundraising-registered-charities-guidance.html paras. 14 and 15.
[14] Constitution Act, 1867 30 & 31 Victoria, c. 3 (U.K.) section 92.

she could arrive at that conclusion.

Thus, there is not only a problem with the fact that the Directorate took evidence out of context, and gave it too much weight, but it ignored evidence which would contradict its decision. This is not only fatal to the decision here, but it also supports the contention that the decision was pre-determined and that the Directorate sought evidence to justify that conclusion, rather than seeking a decision based on a fair evaluation of the evidence.

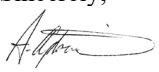
Appeal of this Matter

Finally, we think it is important to point out that appeals from the Charities Redress Section go straight to the Federal Court of Appeal. The logic behind this is that the Directorate (ostensibly) has a particular level of specialized expertise in dealing with charities. As a result, the evidence collected by the Directorate is never tested in a court of law; the Federal Court of Appeal simply hears matters based on the record decided by the Directorate. This presumably means that the Directorate should be held to a very high standard as to the quality of the evidence they used to support its positions. In this case, the Directorate has fallen well below the standard that would be expected of a specialized tribunal. It has used hearsay evidence on third-party websites, it has taken out of context actions that would be otherwise acceptable, it has cherry picked evidence, and it has taken the Charity's due diligence (which would be, in other contexts, insisted upon by the Directorate) and used it against the Charity in service of justifying a pre-determined conclusion amongst other failings.

The matters cited above are, in and of themselves, errors in judgment. Taken together, however, they suggest that the Directorate has intentionally distorted the evidence in order to arrive at a predetermined result. Should this matter proceed to the Federal Court of Appeal, we will be alleging not only procedural unfairness, but that no deference should be granted to decisions of the Directorate at all. The weighing of evidence is not a specialized function, but rather one to which judges are much better suited than individual auditors. We believe that, from a constitutional perspective, the Charity is well within its rights to assert that it did not receive a fair review and is suffering the attendant consequences.

We trust that the above adequately expresses the Charity’s concerns, and we remain available to answer any questions you have.

Sincerely,



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