

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150722

Docket: A-406-13

Citation: 2015 FCA 170

CORAM: **PELLETIER J.A.**
 GAUTHIER J.A.
 SCOTT J.A.

BETWEEN:

**PUBLIC TELEVISION ASSOCIATION OF
QUEBEC**

Appellant

And

MINISTER OF NATIONAL REVENUE

Respondent

And

IMAGINE CANADA

Intervener

Heard at Montréal, Quebec, on May 26, 2015.

Judgment delivered at Ottawa, Ontario, on July, 22 2015.

REASONS FOR JUDGMENT BY:

SCOTT J.A.

CONCURRED IN BY:

PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

SCOTT J.A.

I. Introduction

[1] This is an appeal brought by Public Television Association of Quebec (PTAQ) pursuant to subsection 172(3) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c.1 (Act), from the confirmation by the Minister of National Revenue (Minister) dated October 31, 2013 of a proposal under subsection 168(1) of the Act to revoke its registration as a charity.

[2] The Minister's basis for revoking PTAQ's registration pursuant to paragraph 168(1)(b) of the Act was that it had ceased to comply with the requirements of the definition of a charitable organization as prescribed in subsection 149.1(1) since it failed to devote all of its resources to its own charitable activities.

[3] The Minister's second ground for rescinding PTAQ's registration under subparagraph 149.1(2)(c)(ii) was that it made gifts to Vermont Public Television(VPT) which is not a qualified donee and asserted the position taken by the Canada Revenue Agency (CRA) that paragraph 7 of article XXI of the *United-States-Canada Income Tax Convention* (the Convention) does not operate to render a US charity a qualified donee.

[4] For the reasons that follow, I would dismiss the appeal on the ground that PTAQ has failed to show that the Minister's conclusion that it was not devoting all its resources to its own charitable activities is unreasonable. In view of the fact that each of the grounds put forward by the Minister is a sufficient ground of revocation, it is not necessary for me to deal with the second ground advanced by the Minister.

II. Statutory framework

[5] The Act in its subsection 248(1) defines a registered charity as either: “(a) a charitable organization, private foundation or public foundation, within the meaning assigned by subsection 149.1(1), that is a resident of Canada and was either created in Canada or established in Canada, or (b) a branch, section, parish congregation or other division of an organization or foundation described in paragraph (a), that is a resident in Canada and was either created or established in Canada and that receives donations on its own behalf”. In either case, the organization must have applied to the Minister in prescribed form for registration and must be at that time registered as a charitable organization, private or public foundation.

[6] Subsection 149.1(1) defines a “charitable organization” as follows: “at any particular time, means an organization, whether or not incorporated, (a) all the resources of which are devoted to charitable activities carried on by the organization itself”.

[7] The Act also defines a “qualified donee” in subsection 149.1(1). It states that a qualified donee is: “at any time means a person that is (a) registered by the Minister and that is … (b) a registered charity”.

[8] The first ground for the revocation of PTAQ’s registration raised by the Minister can be found in paragraph 168(1)(b) of the Act which specifies that the Minister may, by registered mail, give notice to a person described in any of paragraphs (a) to (c) of the definition “qualified

donee" found in subsection 149.1(1) that the Minister proposes to revoke its registration if the person ceases to comply with the requirements of this Act for its registration.

[9] Whereas the second ground for revocation advanced by the Minister rests on paragraph 149.1(2)(c)(ii) which states that: "The Minister may, in the manner described in section 168, revoke the registration of a charitable organization for any reason described in subsection 168(1) or where the organization ...c) makes a disbursement by way of gift, other than a gift made ... (ii) to a donee that is qualified donee at the time of the gift".

III. Facts

[10] PTAQ was granted charitable status on November 15, 1990, with an effective date of September 21, 1990, its date of incorporation.

[11] The objects of PTAQ, as stated in its Letters Patent, are amongst others:

1. To advance education through the production, distribution and promotion of non-commercial television programs and films that are educational in nature;
2. To produce, distribute, sell and promote educational television programs and films;
3. To acquire and sell the rights to educational television programs and films;
4. To engage in joint ventures or other arrangements for production, distribution and promotion of educational programming for broadcast or carriage of non-commercial television;
5. ...;
6. ...;

7.;

8.;

9.;

10. To solicit, collect, accept, receive, hold, invest, reinvest and administer gifts, legacies, bequests, devises, funds, benefits or trusts and profits of any sort or nature, without limitation as to amount or value, and to use, apply, employ, expend, disburse, or donate the income or principal thereof and generally to devote the same to any purpose of the corporation.

(Appeal Book, Vol. 1 pp.10-11)

[12] On July 1, 1991, PTAQ entered into a Fund-Raising Agreement (the Fundraising Agreement) and a Broadcasting Agreement with Vermont ETV Incorporated (VPT), a public television station located in the state of Vermont and a registered charity in the United States.

[13] The Broadcasting agreement entered into by PTAQ as principal with the agent VPT specifies in article 1:

1. Appointment

a) The Principal hereby appoints the Agent its agent to produce or procure and to broadcast the non-commercial television programs and films identified by the Principal in its annual list of educational programs for television distribution (the "Programs") copy of which, for the 1991-1992 program year, is annexed hereto.

b) The Agent hereby accepts the aforesaid appointment.

(Appeal Book, Vol. 7 p. 1417)

[14] Furthermore, in article 4 of the Broadcasting agreement, the relationship between PTAQ and its agent VPT with respect to Production, Procurement and Broadcasting is delineated as follows:

b) The Principal shall prepare or have prepared and shall submit to the Agent, not more than one hundred and twenty (120) days and not less than ninety (90) days prior to the commencement of each Program Year, a proposed list of Programs. The proposed list of Programs may be based, in whole or in part, on recommendations made by the Agent to the Principal. Within thirty (30) days of the receipt thereof, the Agent shall furnish to the Principal a statement of the estimated costs of producing or procuring, as the case may be, and of broadcasting each Program on the list submitted by the Principal. The statement shall indicate, in addition to the itemized estimated costs of producing or procuring the Programs and of broadcasting them, the estimated total costs of delivering the Programs to the public during the Program Year, including overhead costs which shall not exceed 15% of all other costs of delivering the Programs to the public, and shall be accompanied by a proposed broadcasting schedule and a notice of any Program which the Agent is unable to produce, to procure or to broadcast in the Program Year. The Principal may, not less than sixty (60) days prior to the commencement of the Program Year, amend the list of programs submitted to the Agent, failing which it shall be deemed to have irrevocably directed the Agent to produce or to procure, as the case may be, and to broadcast the Programs on the most recent list submitted by the Principal, and such list shall constitute the Principal's annual list for the relevant Program Year of programs for television distribution (the "Annual List").

(Appeal Book, Vol. 7 pp. 1417-1418)

[15] Article 5 of the Broadcasting Agreement defines the obligations of PTAQ, the principal, for the payment of the programs broadcasted by its agent VPT on its behalf.

- a) Not more than thirty (30) days and not less than ten (10) days prior to the commencement of each month of the Program Year, the Agent shall submit to the Principal a statement listing the Programs to be broadcast during the month as established by the Agent from the Annual List and the estimated costs of producing or of procuring, as the case may be, and of broadcasting each Program. The statement shall also indicate the total estimated production, procurement and broadcast costs for the month and shall be certified accurate by an officer of the Agent having knowledge of the contents thereof.
- b) Within then (10) days of its receipt of the aforesaid statement, the Principal shall pay the Agent an amount equal to the total estimated costs indicated in the statement.
- c) Adjustments shall be made in the following manner to ensure that the sum of the procurement, production and broadcast costs paid by the Principal during the Program Year is equal to the sum of the actual production, procurement and broadcast costs incurred by the Agent hereunder.

...

(iii) The obligations of the parties to make any adjustment pursuant to this paragraph 5 c) shall survive the expiration of the term of this Agreement.

(Appeal Book, Vol. 7 pp. 1418-1420)

[16] The Fundraising agreement entered into by PTAQ, the principal, with the agent VPT defines the parties' obligations with respect to the direction and control of fund raising activities undertaken by the agent (VPT) on behalf of PTAQ in articles 2 b), 3, and 5:

2. Fund-raising activities

...

2 b) The Agent agrees to promote the Principal and, in particular, the non-commercial television programs and films made available by the Principal and to inform prospective donors and donors of its relationship with the Principal.

3. Direction by Principal

a) The Agent shall prepare and submit to the Principal for approval a summary of proposed fund-raising activities. The summary shall set forth:

(i) a schedule of fund-raising activities;

(ii) a description of fund-raising activities, including the medium and manner of such fund-raising activities and any accompanying programs or films as well as the participation of any celebrities or public officials;

(iii) a proposed budget for the fund-raising activities.

...

5. Records and Accounts

a) The Agent shall record the date and amount of each donation received by it on behalf of the Principal and the name of each donor. Such records shall be submitted to the Principal on request. A statement of total donations certified accurate by an officer of the Agent having knowledge thereof, shall be submitted quarterly by the Agent to the Principal.

b) All donations received by the Agent on behalf of the Principal shall be for the account of the Principal and shall be deposited daily in a bank account

established by the Agent and approved by the Principal and in the name of the Principal.

c) No monies received by the Agent on behalf of the Principal shall be applied for the benefit of the Agent unless the Agent has first received a written authorization from or entered into a separate contract with the Principal authorizing the transfer of monies to the Agent.

d) All donations received by the Agent from persons resident in Canada shall be deemed to be donations received on behalf of the principal.

(Appeal Book, Vol. 7 pp. 1429-1432)

[17] On October 4, 2007, PTAQ received a Notice to Audit from the CRA, applicable to the fiscal periods that ended on June 30, 2005 and 2006.

[18] Following the audit, on March 23, 2009, PTAQ was advised of the auditor's position that it was non-compliant with the provisions of the Act, as it failed to devote all its resources to charitable activities. More specifically: "The audit findings revealed that the Charity's only activity for the fiscal period ending June 30 2006, was simply the purchase of a program package from Vermont ETV for airing on certain television stations. The programs identified by the Principal were Caillou, Arthur, The News Hour and the Nightly Business Report" (Appeal Book, Vol. 1 p. 53).

[19] PTAQ filed written submissions in response on June 22, 2009 arguing that The News Hour and the Nightly Business Report were educational. PTAQ also asserted that: "VPT is a commercial-free broadcaster that operates on funds from government grant, donor support and through relationships like the one it has with PTAQ. PTAQ, at all times, retains a high degree of control over its activities and it is actively involved in choosing the programs that it sponsors.

PTAQ's Board of Directors determines the programming choices that it purchases and has control over the funds received from its donors" (Appeal Book, Vol. 1 p. 59) [Emphasis added].

[20] The Charities Directorate of the CRA issued, on August 23, 2011, a Notice of Intention to Revoke pursuant to paragraph 168.1(b) of the Act. In that letter it is specified that: "It is our position that the activities of the Organization cannot be reasonably interpreted as "advancing education through the use, creation, publication and distribution" of educational materials, particularly since the Organization does not create or publish television programs but rather serves to facilitate broadcasting of programming developed outside its control and direction" (Appeal Book Vol. 4 p. 690).

[21] On November 21, 2011, PTAQ filed a Notice of Objection under subsection 168(4) of the Act in which it reiterated that "PTAQ, at all times, retains a high degree of control over its activities and it is actively involved in choosing the programs that it sponsors. PTAQ's Board of Directors determines the programming choices that it purchases and has control over the funds received from its donors" (Appeal Book, Vol. 4 p.713) [Emphasis added].

[22] On April 4 2013 the Tax and Charities Appeals Directorate responded to the Notice of Objection filed by PTAQ. The CRA reaffirmed its position that the funding of The News Hour and the Nightly Business Report on business programs were not appropriate educational programming and also raised a more important concern:

However, before we continue our review of the above issue, we decided to inform you of another serious concern that we identified when we reviewed the file. Even if it was not the principal issue discussed by the CD in its correspondence, we are of the opinion that it is a fundamental issue that has to be raised.

In order to comply with the provisions of the Act, a charity must maintain ongoing direction and control over its resources and its charitable activities. This means that the charity must take decisions concerning significant issues related to its ongoing activities and maintain a record of the steps taken, as part of its books and records, to allow the Minister to verify that the charity's resources have been used for its own activities. Where the charity conducts activities through an intermediary, it should be in a position to establish by credible evidence that the activities are, in fact and in law, carried on by the charity itself. We refer you to the CRA's Guidance "Using an Intermediary to Carry out a Charity's Activities within Canada" (document attached).

...

In your representations, you indicate that the Organization maintains direction and control over activities and the funds received from its donors. In our view, this has not been demonstrated.

Our understanding of how the Organization operates is as follows:

- The Organization's only activity was the purchasing of a program package from Vermont Public Television (VPT) located in the US. VPT's broadcast signal reached, among others, into bordering regions of Southern Quebec, including Montreal.
- ...
- The Agreement (copy attached) mentions at 1, that the Organization appoints VPT to produce or procure and to broadcast the non-commercial television programs and films identified by the Organization in its annual list of educational programs for the television distribution for the 1991-1992 program year. The information on file does not correspond to this procedure. In fact, the Organization selects a program package at a predetermined price that is part of a program package opportunities list presented by VPT, its agent (document attached).
- Also at 4b) of the Agreement, it is said that the proposed list of programs that the Organization shall prepare and submit to its agent may be based, in whole or in part, on recommendations made by its agent. We are of the view that the evidence does not demonstrate that the Organization has control over the selection of the programs...
- In the program packages opportunities list presented by VPT, there are only total cost of the packages while the Agreement stipulates at 5c) that adjustments shall be made to ensure that the sum of the procurement, production and broadcast costs paid by the Organization is equal to the sum of the actual production, procurement and broadcast costs incurred by the agent. There is no detailed calculation or any documentary evidence in

compliance with paragraph 5 of the Agreement. Therefore, there is no evidence that the Organization ensures that it is paying fair market value for the services rendered.

- ...
- Although an agency agreement called “Fund-raising agreement” was signed in 1991 between the Organization and VPT, all fundraising is done under VPT’s name. There is no indication VPT is doing fundraising for the Organization.
- In VPT’s publicity, there is no specific mention that VPT acts on behalf of the Organization when broadcasting the selected programs or when doing fundraising.
- The Organization is informed by VPT on how much money is raised. There is no indication that the Organization maintained direction and control over its resources and that the steps identified in the Fund-raising agreement were followed. There is no indication that the Organization paid the fair market value for the services rendered by VPT for fundraising.

In light of all of this, we are of the view that the Organization did not demonstrate that it meets the requirements of maintaining direction and control over its resources and its activities...

...It seems that the Organization is used to issue donations receipts for donations received by VPT from Canadian donors. This is not acceptable. The “Fund-raising agreement”, at paragraph 5d), even provides that “All donations received by the Agent from persons resident in Canada shall be deemed to be donations received on behalf of the Principal.” This is not acceptable especially when there is no evidence that VPT does any fundraising on behalf of the Organization.

(Appeal Book, Vol. 7 pp. 1307-1310) [Emphasis added]

[23] PTAQ responded on June 14 2013 and addressed the issue of control of resources, specifying that: “Pursuant to clause 3 of the Agency Agreement, and in fact, PTAQ retains complete direction and control over the production, procurement and broadcasting activities that VPT does on its behalf. Each year in conformity with the agency Agreement, VPT prepares a list of programs that it believes are educational and that support PTAQ’s mission. The list is

submitted to PTAQ's Board who extensively review the list. While all discussions are not reflected in the minutes of meetings, the PTAQ Board retains complete control over the type of programming that PTAQ supports, as appears from the affidavits of Mr. King, Ms. Ivory and Mr. Wyant, as well as from the minutes of meetings submitted in support of the affidavits" (Appeal Book, Vol.7 p.1348) [Emphasis added].

[24] Further to a July 22, 2013 request from the CRA for additional information, PTAQ forwarded a letter on August 30, 2013 addressing three issues: "(1) Control of educational programming that PTAQ supports; (2) Control of the funds raised by PTAQ and that are used to pay for the broadcasting of educational programming; and (3) Control of fundraising activities undertaken by PTAQ's agent, VPT" (Appeal Book, Vol. 8 p. 1476).

[25] The decision on that objection to revoke was reached on October 21, 2013, when the CRA upheld the Minister's proposal to revoke the registration of PTAQ and issued a Notice of Confirmation. In its letter the CRA concluded that:

While a broadcasting agreement and a fundraising agreement exist between PTAQ and Vermont Public Television (VPT), it has not been demonstrated that the provisions of the two agreements were followed and respected. No documentary evidence has been provided to demonstrate that PTAQ is monitoring the cost of the broadcasting activities, the donations received and the fundraising, and that it is ensuring that all of this is, in fact, its own activities. VPT is only informing PTAQ on how much donations were received, what is the cost of the broadcasting and the fundraising. PTAQ does not exercise direction and control over any of these activities. We maintain that all the activities are carried on by VPT and that PTAQ is only used to issue receipts for donations received by VPT from Canadian donors.

(Appeal Book, Vol. 1 p. 7) [Emphasis added]

IV. Program Selection and monitoring costs of programs

[26] The minutes of the Board of Director's meeting and accompanying correspondence reveal that programming selection originated with VPT. The minutes of a meeting held on October 12, 2004, state:

The Annual Fundraising Agreement between VPT and PTAQ was reviewed and discussed by the Board. Information and background materials along with a proposed 2005 agreement were presented to the Board for their consideration. John King reviewed the proposal with the Board. The summary of the proposal:

FY 2005	Estimated Funds Raised in Canada	\$768,865
	-Estimated Fundraising cost	141,135
FY2005	Estimated cost of programs	\$617,660

Three program packages have been proposed for the Board from which to choose. All packages are consistent in providing educational, children's, public affairs and business programs. The choice of packages includes:

Package A
BBC World News
The News Hour with Jim Lehrer
Sesame Street
Package B
BBC World News
Sesame Street
Arthur
Package C
Caillou
Arthur
The News Hour with Jim Lehrer
Nightly Business Report

(Appeal Book Vol. 8 pp. 1583-1584)

[27] For the 2006 broadcasting year, the minutes of the Board of Director's meeting held on June 13, 2005, state:

... Lee Ann presented the proposed programming packages (attached) for the Board to consider. After discussion of all three packages, it was agreed that Package C would be the preferred package to select. A motion was made by Joan Ivory, seconded by Jim Wyant to approve Programming Package C for the Fundraising Agreement. At the September meeting, Lee Ann will provide proposed fundraising targets and a confirmation of the programming packages for the Board to consider.

...

PROGRAM PACKAGE OPPORTUNITIES
 Educational/Informational Programs@ 698 cdn/hr

Package A	Package B	Package C
BBC World News (5hrs)	BBC World News (5hrs)	Caillou (2.5 hrs)
The News Hour (5hrs)	Sesame Street (5hrs)	Arthur (5.5 hrs)
Sesame Street (5hrs)	Arthur (5.5 hrs)	The News Hour (5hrs)
		Nightly Business Report (2.5 hrs)

Package cost of either A, B, or C	537,000
15% overhead	80,550
BROADCAST TOTAL	617,550

(Appeal Book, Vol. 8 pp. 1575-1576)

[28] In her letter dated July 15, 2005 the Vice-President for marketing of VPT states:

... This is a follow up to our June 13th board meeting when the listing of the program packages available for PTAQ's support in fiscal 2006 was presented. I was careful to choose only those that will meet your mandate of non-commercial television that are educational in nature ... Since the board decision was to go with package C, which includes Caillou, Arthur, the News Hour and Nightly Business Report, this letter confirms this decision. Please note that all these packages have an individual broadcast cost of \$617,550\$ CDN.

...

PROGRAM PACKAGE OPPORTUNITIES
Educational/Informational Programs@698 cdn/hr

Package A	Package B	Package C
BBC World News (5hrs)	BBC World News (5hrs)	Caillou (2.5 hrs)
The News Hour (5hrs)	Sesame Street (5hrs)	Arthur (5.5 hrs)
Sesame Street (5hrs)	Arthur (5.5 hrs)	The News Hour (5hrs)
		Nightly Business Report (2.5 hrs)

Package cost of either A, B, or C	537,000
15% overhead	80,550
BROADCAST TOTAL	617,550

(Appeal Book Vol. 11 pp. 2202-2203)

[29] In its forecast for the programming year 2007, on June 26, 2006 a letter sent from VPT to James A. Wyant (PTAQ) indicates the following:

As we near the end of fiscal 2006, I feel I can make a prediction of how much VPT can raise for PTAQ in FY 2007.

In view of this I feel we can predict that VPT will be able to raise \$711,204 CDN at a cost of \$142,241 CDN. Please feel free to call me with any questions or I will be ready to discuss any of this during the next PTAQ meeting.

I will soon be sending you a proposal for various program packages that will meet the PTAQ mandate. We can discuss the individual packages at the next PTAQ board meeting on July 11th.

(Appeal Book Vol. 8 p. 1564)

[30] In a second letter sent on June 29, 2006, VPT indicated:

As promised, I am sending you a listing of the program packages available for your support in fiscal 2007. I was careful to choose only those that will meet your mandate of non-commercial television programs that are educational in nature.

...

Please note that all of these packages have an individual broadcast cost of \$568,963 CDN. This amount added to the cost for fundraising for PTAQ (\$142,241 CDN) will equal the amount VPT feels they can raise for PTAQ in the coming year...and as previously stated in my letter of June 26, 2006.

PROGRAM PACKAGE OPPORTUNITIES
Educational/Informational Programs@698 cdn/hr

Package A	Package B	Package C
BBC World News (5hrs)	BBC World News (5hrs)	Caillou (3hrs)
The News Hour (5hrs)	Sesame Street (5hrs)	Arthur (5.5 hrs)
Sesame Street (5hrs)	Arthur (5.5 hrs)	The News Hour (5 hrs)
		Nightly Business Report (2.5 hrs)

Package cost of either A, B, or C	494,750
15% overhead	74,213
BROADCAST TOTAL	568,963

(Appeal Book, Vol. 8 pp. 1565-1566)

[31] For the year 2007 programming, the minutes of a meeting of the Board of Directors of PTAQ held on July 11, 2006, disclose the following:

Lee Ann Lee presented the proposed Fundraising Agreement for FY2007 between PTAQ and VPT as well as the proposed programming packages for the Board's consideration. (See attached materials). Based on the FY2006 results, it is projected that VPT will raise approximately \$711,204 in Canadian dollars at a cost of \$142,241.

The proposed underwriting packages included Package A, B and C for the Board to choose from. The Board reviewed the packages and after a discussion agreed

that Package C would be the most appropriate, but that The News Hour with Jim Lehrer should be replaced with Sesame Street. The rationale was that PTAQ had an educational emphasis and that Sesame Street would be a more appropriate program than a U.S. News program.

(Appeal Book vol. 8 p. 1560)

[32] For the selection of programming for 2008, a letter from Lee Ann Lee, vice-president marketing for VPT, dated June 6, 2007 specifies that:

...Please note that all of these packages have an individual broadcast cost of \$576,275 CDN. This amount added to the cost for fundraising for PTAQ (\$144,069 CDN) will equal the amount VPT feels they can raise for PTAQ in the coming year... and as previously stated in my letter of May 30, 2007.

...

PROGRAM PACKAGE OPPORTUNITIES
Educational/Informational Programs@698 cdn/hr

Package A	Package B	Package C
BBC World News (5hrs)	Foreign Exchange (.5)	Foreign Exchange (.5)
Nightly Business Report (2.5hrs)	The News Hour (5hrs)	Nightly Business Report (2.5 hrs)
Arthur (5.5hrs)	Sesame Street (5 hrs)	Sesame Street (5 hrs)
Dragonfly TV (.5)	Caillou (2.5 hrs)	Arthur (5.5 hrs)
	Dragonfly TV (.5) cancelled	

Package cost of either A, B, or C	501,109
15% overhead	75,166
BROADCAST TOTAL	576,275

(Appeal Book, Vol. 8 pp. 1550-1551)

[33] This manner of selecting programs and setting fundraising targets continued on over the years. Over the ten year period covered by the minutes, PTAQ modified one of the packages selected on three occasions for broadcast years 2007, 2011, and 2013 by replacing one of the programs in a package selected with another (see letter dated August 30, 2013 from PTAQ to Tax Charities Appeals Directorate in Appeal Book, Vol. 8 pp. 1478-1479).

V. Fundraising Target

[34] The records with respect to fundraising such as the Share Group Fundraising Script for Vermont Public Television, (Appeal Book, Vol. 11, p. 2200) and Vermont Public Television sample fundraising letter, (Appeal Book, Vol. 11, p. 2206) indicate that VPT was conducting its own fundraising and merely assigning Canadian donations to PTAQ.

[35] There is no evidence in the record that fundraising events conducted by VPT were approved or directed by PTAQ. Nor is there any evidence that PTAQ was setting specific fundraising targets for its agent. Rather the extracts from the July 2005, June 26, 2006, June 29, 2006, July 11, 2006 and June 6, 2007 letters reproduced above confirm that the fundraising targets were determined by VPT who informed PTAQ's board of the amount it estimated could be raised yearly from Canadian donors.

[36] The 2005-2006 Expense Summaries found in Appeal Book, Vol. 11 at pp. 2198-99 indicates that VPT assigned PTAQ a 24.41% share of its fundraising and administrative costs. The 2005 Estimate of 25.2% in the Fundraising Cost Breakdown, (Appeal Book, Vol. 8, p. 1579) is nearly equivalent to the average percentage of VPT's Canadian membership.

[37] A complete review of the minutes of thirty Board of Directors meetings of PTAQ held between September 23, 2003 and March 13, 2013 reveals that a detailed fundraising costs breakdown was only provided on one occasion on June 13, 2005 (Appeal Book, Vol. 8 p. 1594). Quarterly fundraising updates were presented to the Board on some occasions, see for example: September 23, 2009, December 9, 2010, April 19, 2011 (Appeal Book, Vol. 8 pp. 1503, 1516, 1518) but there is no evidence that certified quarterly statements of donations received were ever presented or that detailed reports on fundraising activities were presented.

VI. Issues

[38] The issue in this appeal can be described as follows:

1. Was PTAQ carrying on its own charitable activities through an agent or was it merely a conduit for VPT?

VII. Standard of Review

[39] As determined by this Court in *Prescient Foundation v. Canada (National Revenue)* 2013 FCA 120, [2013] 5 C.T.C. 25 [*Prescient*] at paragraph 12, in an appeal from a decision of the Minister confirming a proposal to revoke the registration of a charity brought pursuant to subsection 172(3) of the Act, extricable questions of law, including the interpretation of the Act, are to be determined on a standard of correctness while questions of fact or mixed fact and law including the Minister's exercise of discretion based on those facts warrant a review based on a standard of reasonableness.

[40] As the issue in this appeal is a question of mixed fact and law, consequently the standard of reasonableness applies.

VIII. Analysis

[41] In *Canadian Committee for the Tel Aviv Foundation v Canada* 2002 FCA 72, [2002] 2 C.T.C. 93 [Tel-Aviv] the Court recognized that a charity can conduct its charitable activities through an agent, the Court stated at paragraph 40: “Pursuant to subsection 149.1(1) of the Act, a charity must devote all its resources to charitable activities carried on by the organization itself. While a charity may carry on its charitable activities through an agent, the charity must be prepared to satisfy the Minister that it is at all times both in control of the agent and in a position to report on that agent’s activities” [Emphasis added].

[42] The Court in *Tel Aviv* also established at paragraphs 27 and 28 that the *onus* lies on the charity to establish that its charitable organization status should not be revoked.

[43] In the case of *Bayit Lepletot v Canada (Minister of National Revenue)* 2006 FCA 128, [2006] 3 C.T.C. 252, at paragraphs 5 and 6, the Court reaffirmed the principle that not only is it incumbent on the charitable organization who uses an agent to show that the agent is carrying on the work on its behalf but that proof of control over the activities of the agent is necessary to establish that the charitable works are those of the charity and not those of the agent.

[44] The jurisprudence is clear, the *onus* lies on the charitable organization to overturn the Minister's assumption and in order to do so; it must adduce evidence that it is carrying on the charitable works on its own behalf and not merely acting as a conduit. The control over the agent's activities is a key element to establish that it maintained direction and control over its resources.

[45] In the present case the Minister decided to revoke PTAQ's status as a charity based on the evidence that PTAQ was not exercising direction and control over VPT.

[46] Clause 1 of the Broadcasting agreement appointed VPT as PTAQ's agent for the production or procurement of non-commercial programs. The extracts from the minutes of the Board of Directors reproduced above do not indicate any form of control over the choice of programs offered to PTAQ by its agent. Rather, they reveal that VPT presented "predetermined packages" to PTAQ every year. The record establishes that PTAQ modified the packages offered on only three occasions over the years. PTAQ always selected the option it would fund from the program selection initiated by VPT.

[47] With respect to the cost of the programs the Minister took the position that PTAQ failed to exercise proper control over the cost of the broadcasting activities. The extract from the minutes and the exchange of letters reproduced above (see paragraphs 26 to 37 above) indicate that notwithstanding variations in the number of hours in different packages, the cost remained the same. PTAQ was presented with a single total cost estimate applicable to all the packages offered which always corresponded to the amount VPT forecasted it would receive from

Canadian viewer's donations. More importantly the minutes above show that VPT never supplied detailed breakdowns of its broadcasting costs nor did PTAQ raise any questions or monitor these as called for clause 4b) of the Broadcasting agreement.

[48] In light of clause 5 of the Broadcasting Agreement, the Minister concluded that PTAQ failed to adduce evidence establishing that it exercised monthly financial monitoring and control of expenditures or adjustments to account for the final costs of broadcasts that it funded. The minutes of the Board of Directors are silent in that respect.

[49] The Minister equally concluded that the terms of the Fundraising Agreement were not followed as PTAQ didn't provide evidence showing how it directed or controlled any of the fundraising activities or that VPT conducted separate fundraising on PTAQ's behalf. Moreover, in the 2005 and 2006 fiscal years, VPT assigned PTAQ a 24 % share of its fundraising and administrative costs and this amount coincided with VPT's Canadian membership during those years.

[50] Clause 2 b) of the Fundraising Agreement specifies that VPT should promote PTAQ to viewers and prospective donors. No evidence was adduced to establish that VPT did in fact promote PTAQ to prospective donors moreover the fundraising documents in the record indicated that VPT was conducting the fundraising activities on its own behalf (see paragraph 34 above).

[51] Contrary to clause 3 of the Fundraising Agreement, VPT only provided PTAQ with estimates of how much money would be raised in a fiscal period. The extract from the minutes of the Board of Directors of PTAQ do not reveal repeated monthly or quarterly monitoring of fundraising activities against an approved schedule or that a description of fundraising activities was ever presented. The board of PTAQ was informed each year of the amount VPT believed it could raise which became the annual budget. But there is little evidence of quarterly reporting by VPT or monitoring by PTAQ except for the instances mentioned in paragraph 37 above.

[52] Under clause 5 of the Fundraising agreement, PTAQ should have been receiving records quarterly statements regarding the amount of donations received. The minutes indicate reporting on amounts year to date from Canadian sources on some occasions but no systematic monitoring against pre-approved budgets. The minutes do not reveal the production of certified quarterly statements of donations or that PTAQ requested same or that it was exercising any form of control over the donations received or on the allocation of fundraising expenses as called for by the Agreement.

[53] Both the fundraising and broadcasting agreements called for the production of reports and a monitoring of activities that if followed would have established direction and control over VPT.

[54] In order to succeed in this appeal, PTAQ needed to show either that the Minister's factual conclusions with respect to the lack of control and monitoring of its agent are unreasonable or that the conclusions he has drawn that PTAQ is acting as a conduit for VPT is not reasonable.

[55] Based on the evidence outlined above, I conclude that it was reasonable for the Minister to determine that PTAQ failed to maintain direction and control over its resources as it did not devote all its resources to its own charitable activities. The provisions of the broadcasting and fundraising agreements were not followed or respected. PTAQ has not adduced evidence that it exercised proper control over the activities of its agent by demonstrating how it monitored the cost of the broadcasting activities, the donations received and the fundraising. It has not established how the Minister erred in coming to the conclusion that PTAQ is only used to issue receipts for donations received by VPT from Canadian donors, as the documentation contained in the record does not overturn the factual findings noted above with respect to the broadcasting and fundraising agreements.

[56] For these reasons, I would dismiss the appeal, with costs.

"A.F. Scott"

J.A.

"I agree.

J.D. Denis Pelletier J.A."

"I agree.

Johanne Gauthier J.A."

ANNEX

Relevant legislative provisions:

**Income Tax Act, R.S.C. 1985, c.1
(5th Supp.)**

149.1(1) In this section and section 149.2

...

“charitable organization”, at any particular time, means an organization, whether or not incorporated,

(a) all the resources of which are devoted to charitable activities carried on by the organization itself,

...

“qualified donee”, at any time, means a person that is

(a) registered by the Minister and that is

(i) a housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i) that has applied for registration,

(ii) a municipality in Canada,

(iii) a municipal or public body performing a function of government in Canada that has applied for registration,

(iv) a university outside Canada

**Loi de l'impôt sur le revenu,
L.R.C. 1985, ch.1 (5ième suppl.)**

149.1(1) Les définitions qui suivent s'appliquent au présent article et à l'article 149.2

[...]

« oeuvre de bienfaisance » Est une oeuvre de bienfaisance à un moment donné l'oeuvre, constituée ou non en société :

a) dont la totalité des ressources est consacrée à des activités de bienfaisance qu'elle mène elle-même;

[...]

« donataire reconnu » Sont des donataires reconnus à un moment donné :

a) toute personne enregistrée à ce titre par le ministre qui est :

(i) une société d'habitation résidant au Canada et exonérée de l'impôt prévu à la présente partie par l'effet de l'alinéa 149(1)i) qui a présenté une demande d'enregistrement,

(ii) une municipalité du Canada,

(iii) un organisme municipal ou public remplissant une fonction gouvernementale au Canada qui a présenté une demande d'enregistrement,

(iv) une université située à

that is prescribed to be a university the student body of which ordinarily includes students from Canada, or

(v) a foreign organization that has applied to the Minister for registration under subsection (26),

(b) a registered charity,

(c) a registered Canadian amateur athletic association, or

(d) Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations;

149.1(2) The Minister may, in the manner described in section 168, revoke the registration of a charitable organization for any reason described in subsection 168(1) or where the organization;

(a) carries on a business that is not a related business of that charity;

(b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the organization's disbursement quota for that year; or

(c) makes a disbursement by way of a gift, other than a gift made

(i) in the course of charitable

l'étranger, visée par règlement, qui compte d'ordinaire parmi ses étudiants des étudiants venant du Canada,

(v) une organisation étrangère qui a présenté au ministre une demande d'enregistrement en vertu du paragraphe (26);

b) tout organisme de bienfaisance enregistré;

c) toute association canadienne enregistrée de sport amateur;

d) Sa Majesté du chef du Canada ou d'une province, l'Organisation des Nations Unies ou une institution reliée à cette dernière.

149.1(2) Le ministre peut, de la façon prévue à l'article 168, révoquer l'enregistrement d'une œuvre de bienfaisance pour l'un ou l'autre des motifs énumérés au paragraphe 168(1), ou encore si l'œuvre :

a) soit exerce une activité commerciale qui n'est pas une activité commerciale complémentaire de cet organisme de bienfaisance;

b) soit ne dépense pas au cours d'une année d'imposition, pour les activités de bienfaisance qu'elle mène elle-même ou par des dons à des donataires reconnus, des sommes dont le total est au moins égal à son contingent des versements pour l'année;

c) soit fait un versement sous forme de don, sauf s'il s'agit d'un don fait, selon le cas :

(i) dans le cadre de ses activités de

activities carried on by it, or

(ii) to a donee that is a qualified donee at the time of the gift.

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

(a) applies to the Minister in writing for revocation of its registration;

(b) ceases to comply with the requirements of this Act for its registration;

168(4) A person may, on or before the day that is 90 days after the day on which the notice was mailed, serve on the Minister a written notice of objection in the manner authorized by the Minister, setting out the reasons for the objection and all the relevant facts, and the provisions of subsections 165(1), (1.1) and (3) to (7) and sections 166, 166.1 and 166.2 apply, with any modifications that the circumstances require, as if the notice were a notice of assessment made under section 152, if

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

bienfaisance,

(ii) à un donataire qui est un donataire reconnu au moment du don.

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

a) s'adresse par écrit au ministre, en vue de faire révoquer son enregistrement;

b) cesse de se conformer aux exigences de la présente loi relatives à son enregistrement;

168(4) Une personne peut, au plus tard le quatre-vingt-dixième jour suivant la date de mise à la poste de l'avis, signifier au ministre, par écrit et de la manière autorisée par celui-ci, un avis d'opposition exposant les motifs de l'opposition et tous les faits pertinents, et les paragraphes 165(1), (1.1) et (3) à (7) et les articles 166, 166.1 et 166.2 s'appliquent, avec les adaptations nécessaires, comme si l'avis était un avis de cotisation établi en vertu de l'article 152, si :

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

(b) in the case of a person that is or was registered as a registered Canadian amateur athletic association or is an applicant for such registration, it objects to a notice under any of subsections (1) and 149.1(4.2) and (22); or

(c) in the case of a person described in any of subparagraphs (a)(i) to (v) of the definition “qualified donee” in subsection 149.1(1), that is or was registered by the Minister as a qualified donee or is an applicant for such registration, it objects to a notice under any of subsections (1) and 149.1(4.3) and (22).

172(3) Where the Minister

(a) confirms a proposal or decision in respect of which a notice was issued under any of subsections 149.1(4.2) and (22) and 168(1) by the Minister, to a person that is or was registered as a registered Canadian amateur athletic association or is an applicant for registration as a registered Canadian amateur athletic association, or does not confirm or vacate that proposal or decision within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal or decision,

(a.1) confirms a proposal, decision or designation in respect of which a notice was issued by the Minister to a person that is or was registered as a registered charity, or is an applicant for registration as a

(22) et (23);

b) dans le cas d'une personne qui est ou était enregistrée à titre d'association canadienne enregistrée de sport amateur ou qui a présenté une demande d'enregistrement à ce titre, elle s'oppose à l'avis prévu aux paragraphes (1) ou 149.1(4.2) ou (22);

c) dans le cas d'une personne visée à l'un des sous-alinéas a)(i) à (v) de la définition de « donataire reconnu » au paragraphe 149.1(1) qui est ou a été enregistrée par le ministre à titre de donataire reconnu ou qui a présenté une demande d'enregistrement à ce titre, elle s'oppose à l'avis prévu aux paragraphes (1) ou 149.1(4.3) ou (22).

172(3) Lorsque le ministre :

a) soit confirme une proposition ou une décision à l'égard de laquelle le ministre a délivré, en vertu des paragraphes 149.1(4.2) ou (22) ou 168(1), un avis à une personne qui est ou a été enregistrée à titre d'association canadienne enregistrée de sport amateur ou qui a présenté une demande d'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette proposition ou décision dans les quatre-vingt-dix jours suivant la signification par la personne, en vertu du paragraphe 168(4), d'un avis d'opposition à cette proposition ou décision;

a.1) soit confirme toute intention, décision ou désignation à l'égard de laquelle le ministre a délivré, en vertu de l'un des paragraphes 149.1(2) à (4.1), (6.3), (22) et (23) et 168(1), un avis à une personne qui

registered charity, under any of subsections 149.1(2) to (4.1), (6.3), (22) and (23) and 168(1), or does not confirm or vacate that proposal, decision or designation within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal, decision or designation,

(a.2) confirms a proposal or decision in respect of which a notice was issued under any of subsections 149.1(4.3), (22) and 168(1) by the Minister, to a person that is a person described in any of subparagraphs (a)(i) to (v) of the definition “qualified donee” in subsection 149.1(1) that is or was registered by the Minister as a qualified donee or is an applicant for such registration, or does not confirm or vacate that proposal or decision within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal or decision,

(b) refuses to accept for registration for the purposes of this Act any retirement savings plan,

(c) refuses to accept for registration for the purposes of this Act any profit sharing plan or revokes the registration of such a plan,

(d) [Repealed, 2011, c. 24, s. 54]

(e) refuses to accept for registration for the purposes of this Act an

est ou était enregistrée à titre d'organisme de bienfaisance enregistré ou qui a demandé l'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette intention, décision ou désignation dans les 90 jours suivant la signification, par la personne en vertu du paragraphe 168(4), d'un avis d'opposition concernant cette intention, décision ou désignation;

a.2) soit confirme une proposition ou une décision à l'égard de laquelle le ministre a délivré, en vertu des paragraphes 149.1(4.3) ou (22) ou 168(1), un avis à une personne visée à l'un des sous-alinéas a)(i) à (v) de la définition de « donataire reconnu » au paragraphe 149.1(1) qui est ou a été enregistrée par le ministre à titre de donataire reconnu ou qui a présenté une demande d'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette proposition ou décision dans les quatre-vingt-dix jours suivant la signification par la personne, en vertu du paragraphe 168(4), d'un avis d'opposition à cette proposition ou décision;

b) refuse de procéder à l'enregistrement, en vertu de la présente loi, d'un régime d'épargne-retraite;

c) refuse de procéder à l'agrément, en vertu de la présente loi, d'un régime de participation aux bénéfices ou retire l'agrément d'un tel régime;

d) [Abrogé, 2011, ch. 24, art. 54]

e) refuse de procéder à l'enregistrement pour l'application

education savings plan,

(e.1) sends notice under subsection 146.1(12.1) to a promoter that the Minister proposes to revoke the registration of an education savings plan,

(f) refuses to register for the purposes of this Act any pension plan or gives notice under subsection 147.1(11) to the administrator of a registered pension plan that the Minister proposes to revoke its registration,

(f.1) refuses to accept an amendment to a registered pension plan,

(g) refuses to accept for registration for the purposes of this Act any retirement income fund,

(h) refuses to accept for registration for the purposes of this Act any pooled pension plan or gives notice under subsection 147.5(24) to the administrator of a pooled registered pension plan that the Minister proposes to revoke its registration, or

(i) refuses to accept an amendment to a pooled registered pension plan,

the person described in paragraph (a), (a.1) or (a.2), the applicant in a case described in paragraph (b), (e) or (g), a trustee under the plan or an employer of employees who are beneficiaries under the plan, in a case described in paragraph (c), the

de la présente loi d'un régime d'épargne-études;

e.1) envoie à un promoteur, en application du paragraphe 146.1(12.1), un avis selon lequel il entend révoquer l'enregistrement d'un régime d'épargne-études;

f) refuse d'agréer un régime de pension, pour l'application de la présente loi, ou envoie à l'administrateur d'un régime de pension agréé l'avis d'intention prévu au paragraphe 147.1(11), selon lequel il entend retirer l'agrément du régime;

f.1) refuse d'accepter une modification à un régime de pension agréé;

g) refuse de procéder à l'enregistrement d'un fonds de revenu de retraite, pour l'application de la présente loi;

h) refuse de procéder à l'agrément d'un régime de pension collectif pour l'application de la présente loi ou informe l'administrateur d'un régime de pension agréé collectif, selon le paragraphe 147.5(24), de son intention de retirer l'agrément du régime;

i) refuse d'accepter une modification à un régime de pension agréé collectif,

la personne, dans le cas visé aux alinéas a), a.1) ou a.2), le demandeur, dans le cas visé aux alinéas b), e) ou g), le fiduciaire du régime ou l'employeur dont les employés sont bénéficiaires du régime, dans le cas visé à l'alinéa c),

promoter in a case described in paragraph (e.1), the administrator of the plan or an employer who participates in the plan, in a case described in paragraph (f) or (f.1), or the administrator of the plan in a case described in paragraph (h) or (i), may appeal from the Minister's decision, or from the giving of the notice by the Minister, to the Federal Court of Appeal.

248.1(1) In this Act,

...

“registered charity” at any time means

- (a) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada, or
- (b) a branch, section, parish, congregation or other division of an organization or foundation described in paragraph (a), that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf,

that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation;

le promoteur, dans le cas visé à l'alinéa e.1), l'administrateur du régime ou l'employeur qui participe au régime, dans le cas visé aux alinéas f) ou f.1), ou l'administrateur du régime, dans le cas visé aux alinéas h) ou i), peuvent interjeter appel à la Cour d'appel fédérale de cette décision ou de la signification de cet avis.

248.1(1) Les définitions qui suivent s'appliquent à la présente loi.

[...]

« organisme de bienfaisance enregistré » L'organisme suivant,

- a) œuvre de bienfaisance, fondation privée ou fondation publique, au sens du paragraphe 149.1(1), qui réside au Canada et qui y a été constituée ou y est établie;
- b) division — annexe, section, paroisse, congrégation ou autre — d'une œuvre de bienfaisance, fondation privée ou fondation publique, au sens du paragraphe 149.1(1), qui réside au Canada, qui y a été constituée ou y est établie et qui reçoit des dons en son nom propre.

qui a présenté au ministre une demande d'enregistrement sur formulaire prescrit et qui est enregistré, au moment considéré, comme œuvre de bienfaisance, comme fondation privée ou comme fondation publique;

FEDERAL COURT OF APPEAL

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GAUTHIER J.A.

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