Court File Number: A – 20 – 13

FEDERAL COURT OF APPEAL

B E T W E E N:

INTERNATIONAL RELIEF FUND FOR THE AFFLICTED AND NEEDY (Canada)

Appellant

-and-

MINISTER OF NATIONAL REVENUE

Respondent

WRITTEN REPRESENTATIONS OF THE APPELLANT

Part I: Overview and Nature of Issues under Appeal

1. The present appeal of the Appellant, International Relief Fund for the Afflicted and Needy (Canada) ("IRFAN"), is in respect of a decision of the Minister dated December 11, 2012 made pursuant to subsection 165(3) of the *Income Tax Act*, RSC 1985 (" **the ITA**" or "**the Act**") confirming the Revocation of charitable registration of the Appellant. The Appellant submits that the Minister's decision must be vacated on the grounds that it was: (a) unreasonable and erred in law, (b) rendered in an administratively unfair manner, (c) demonstrates a closed mind or reasonable apprehension of bias and (d) was made in bad faith and constitutes an improper exercise of discretion contrary to sections 15 and 2(d)of *the Charter of Rights and Freedoms* **("the Charter")**.

2. The Minister has based confirmation of revocation upon conclusions relating to the Appellant's alleged failure to comply with sections 168(1)(a)(c)(d) or (e) and/or section 230 of *the Act*. However, the decision and reasons for same adopt an incorrect and untenable interpretation of "direction and control" relative to the evaluation of the Appellant's overseas humanitarian work. They also fail to clearly identify outstanding compliance violations in response to detailed, thorough and reasonable explanations of the Appellant's activities, which clearly demonstrate the exercise of control and direction of resources by the Appellant for its "own activities".

3. The Appellant was targeted by the Respondent for revocation of its status based on unsubstantiated allegations of links to a terrorist organization, Hamas. Irregularities with respect to the Appellant's books

and records, which were found to be unproblematic in a previous audit report in 2004 were resuscitated in a 2008 audit by the Charities Directorate **("CD")** of the Canada Revenue Agency ("**CRA**"). The Respondent in exercising its discretion to confirm the revocation of the Appellant's charitable status has acted in a manner inconsistent with the CRA's historical practice and monitoring of charities and has unfairly, unlawfully and abusively investigated the Appellant's activities analyzed in hundreds of pages internal working papers that were never disclosed to the Appellant during the audit or appeal of same to the CRA Appeals Branch **("Appeals Branch").** Accordingly, as a matter of procedural fairness, the Respondent's decision must be vacated in light of the Minister's failure to disclose documents that informed the audit, and to which the Appellant was entitled to respond. Moreover, the conclusions of the Minister are based on unreliable, false and/or misleading source material much of which was not disclosed to the Appellant during the audit or the appeal of same.

4. The Minister's decision also constitutes an arbitrary exercise of discretion that is contrary to the values enshrined within sections 15 and 2(d) of the *Charter*. By making speculative and non-evidence based inferences about the Appellant's links to Hamas, the Minister has stigmatized the Appellant and has chilled its ability to maintain associations with lawful partners and overseas agents. In a post 9/11 context, no allegation can be more harmful to the well being of a Canadian-based international humanitarian relief organization than casting aspersions suggesting links to terrorism. The CD commenced its second audit of the Appellant motivated by concerns of terrorist association; however, it sought revocation pursuant to subsection165(3) of *the ITA* focusing upon common technical non-compliance issues, which in the vast majority of cases do not lead to revocation. The Minister's decision accordingly represents an abusive and legally prohibited exercise of discretion seeking to target or punish the Appellant for unsubstantiated links to terrorism under the pretext of non-compliance issues.

Part II: Facts

The Appellant Charity

5. The Appellant is a not-for-profit organization that has for more than a decade served the needs of orphans and other persons living in extreme poverty throughout the world by providing funding and goods to individuals and organizations in order to foster nutritional, health care, psychological and other basic human needs support. A large component of the Appellant's work has focused on humanitarian relief in the conflict ridden areas of the West Bank and Gaza. The Appellant has historically derived the vast majority of its support from donations through individual Muslims and Muslim organizations in Canada. Until April 9, 2011, when its charitable registration under the *Income Tax Act* was revoked, the Appellant enjoyed the status of a federally registered charity in Canada.

IRFAN Project Description Charts 2005-2010, Appendices to October 1, 2012 submission of Appellant to Appeals Branch, Book of Materials Reference by the Appellant (hereinafter APPELLANT'S COMPENDIUM or "AC"), Vol. 7, Tabs J6-10, pp. 1780-1795.

Letters from IRFAN beneficiaries and partners [Appendices to April 6, 2011 Appeal Submissions] AC, Vol. 6, TAB I-10 to 34, pages 1608-1668.

Letter from Palestinian National Authority re: Good Conduct, [Appendix to April 6, 2011 Appeal Submissions] AC, Vol. 6, TAB I-7, page 1594.

Affidavit of Sami A. Kaoud sworn September 24, 2012, Appendix to October 1, 2012 Appeal Submissions, AC, Vol. 7, Tab J-12, pp. 1823-25.

Background of Appellant and the JFHS in Canada and Israel

6. On or about October 1, 1997, the Appellant was incorporated by Industry Canada Letters Patent as a not-for-profit corporation. On November 26, 1999, the Respondent granted the Appellant charitable status effective as of November 18, 1999.

2002 Audit Correspondence, [page 6, 41 from Electronic Record "ER"], AC, Vol. 10, TAB 1, pp. 2433-34.

7. Six years prior to the federal incorporation of the Appellant, Povrel Jerusalem Fund for Human Services ("PJFHS") was incorporated by Ontario Letters Patent as a not-for-profit corporation in September 1991. On or about July 3, 1995, the Jerusalem office of PJFHS registered with the Government of Israel as "Jerusalem Fund for Human Services" (JFHS). At no time did PJFHS legally amalgamate with the Appellant.

2002 Audit Correspondence, [pp. 478-79 from "ER"], AC Vol. 10, TAB K-2, pp. 2435-39.

8. On or about February 24, 2001, the PJFHS Board formally passed a resolution requiring *inter alia* that it wind up its activities, and transfer residual monies to the Appellant and cease all operations as of March 31, 2001. The Appellant's Board of Directors passed a contemporaneous resolution confirming *inter alia* that the Appellant would enter into an agreement with PJFHS to "assume and carry out all the current pursuits and activities of Povrel…" and to carry on fund-raising under the name of Jerusalem Fund for Human Services. On or about April 2001, General Manager, Office Manager in Canada, and Office Manager in Jerusalem left JFHS for employment with the Appellant.

2002 Audit Correspondence, [pp. 478, 479, 1423, 1424 from ER], AC Vol. K-3, pp. 2449, 2474-75.

9. On or about June 1, 2001, Directors of PJFHS passed a resolution assigning the rights to register and use the names "PJFHS" and "Jerusalem Fund" to the Appellant as the latter wished to acquire the goodwill associated with these names. Thereafter, in or about September 2001, Israeli-registered JFHS changed its

name to IRFAN and filed notice with the Israeli Ministry of Interior.

2002 Audit Correspondence, [pp. 478, 479, 1423, 1424 from ER], AC Vol. K-3, pp. 2449, 2474-75.

10. In or about June 2003, the Appellant applied for a separate license under the Palestinian Authority to be registered as a foreign charity. On or about December 2003, the Palestinian Authority issued a license to the Appellant to operate in its jurisdiction as a foreign charity. On or about February 2004 the Jerusalem office moved to Ar-Ram (Palestinian suburb of Jerusalem). The office moved again to Ramallah in the the West Bank on or about January 2008.

2002 Audit Correspondence, AC Vol. K-3, page 2456.

11. Between September 2001 and January 18, 2010, the Appellant administered humanitarian relief projects in the West Bank through its Jerusalem, Ar-Ram and Ramallah-based offices and projects in Gaza through Ard El Insaan, a respected local partner affiliated with the Swiss aid organization Terres des Hommes, without notice or indication from Israeli or Palestinian authorities of any issue or interruption of its lawful status.

12. However, on or about January 18, 2010, the Appellant was informed for the first time by CRA that Israel had purportedly listed it as an unlawful organization in 2004, had issued a seizure order against it on October 25, 2007 and that Israel had issued a confiscation order against it on April 15, 2008. These purported orders were issued without notice to the Appellant or any published news reports that would bring these facts to the attention of the Appellant.

Letter from CRA to the Appellant, January 18, 2010, [2008 Audit Correspondence; page 340 ER], AC, Vol. 10, TAB L, page 2476 -2501.

13. The designation of an organization as being "unlawful" is customarily done by way of declaration by the Israeli Minister of Defense based on confidential source information. Such declaration renders the subject organization lawfully ineligible to carry on activities or use banking facilities in Israel. However, in the case of the Appellant, Israeli authorities, which were fully apprised of the Appellant's activities, at no time made any intervention to shut it down.

Letter of K. Mann, Israeli Advocate, February 20, 2010, [Tab 32 to March 16, 2011 Appeal Submissions], AC, Vol. 4, TAB H-32, pp. 1145-47.

14. Once an organization is designated to be unlawful, such status is presumed and the organization must prove, without access to any evidence or specific allegation by petition to Israel why its activities should be

considered lawful.

> **Letter of K. Mann, Israeli Advocate, February 20, 2010, [Tab 32 to March 16, 2011 Appeal Submissions], AC Vol. 4, TAB H-32, pp. 1145-47.**

2002 Audit

15. In or about October 2003, the CRA commenced the first audit of the Appellant **("2002 Audit").** Apparently, the Appellant had been under prior monitoring for at least two years even before the commencement of the Audit.

> **Access to Information Act (*ATIA*) Record pp. 2074 and 2078, Appendix to October 1, 2012 Appeal Submissions, AC, Vol. 8, Tab J-28, J-29, pp. 1951-52.**

16. The audit was instigated by allegations raised in the House of Commons by then opposition member of Parliament, Stockwell Day, while challenging the policies of the government of the day. The extensive audit was conducted over a year and concluded in December 2004 but not before Stockwell Day and the Canadian Coalition for Democracy ("CCD") repeated allegations and introduced new ones which called on the government to shut down the Appellant based on allegations of links to Hamas, including bald statements that two of IRFAN's key managerial staff were affiliated with Hamas. These allegations led the Appellant to commence an ultimately successful action for defamation against CCD in September 2005 for slandering its name by raising false accusations of links to Hamas.

> **ATIA, pp. 1852 to 1857 and 1862 to 1867, Appendix to October 1, 2012 Appeal Submissions, AC, Vol. 7 Tabs J-24, J-25, pp. 1935-1946.**
>
> **Minutes of Settlement signed April 8, 2010 in the matter of IRFAN-Canada v. Stockwell Day et al., [Appendix to October 1, 2012 Appeal Submissions], AC, Vol. 8, Tab J-47, pp. 2132-37.**
>
> **"A Terrifying Limbo" *Western Standard*, June 19, 2006, Appendix to Oct. 1, 2012 Appeal Submissions, AC, Vol. 9, Tab J-66, pp. 2431-2432.**

17. Despite some deficiencies, which the Appellant subsequently improved upon, the 2002 Audit did not result in any serious adverse consequences for the Appellant and its charitable status was kept intact.

> **Affidavit of Judy Torrance , [Tab 53 to March 16, 2011 Appeal Submissions], AC, Vol 5, TAB H-53, pp.1465-71.**
>
> **Letter from CRA to Appellant dated December 21, 2004, [2002 Audit Correspondence PDF, p. 397], AC, Vol. 4, TAB H-10, pp. 971-74.**

18. During the 2002 Audit, CD prepared an analysis of the organizations using or distributing IRFAN's resources. The main sources of allegations come from the Intelligence Terrorism and Information Centre ("**ITIC**") administered by the Center for Special Studies, ("**CSS**"), the Government of Israel either directly, or via the CSS or via the U.S. Federal Bureau of Investigation ("**FBI**"), including an FBI evidentiary package

on the Holy Land Foundation 2001. The ITIC is "an Israeli governmental agency for propaganda", which uses selective and biased sources as opposed to professional intelligence in order to promote Israeli policies adopting an approach that characterizes the Palestinian Authority as a terrorist entity. However, when the CRA analysis was made available to IRFAN during the audit as Appendix D to CRA letter of July 23, 2004, most of these specific sources of the allegations were not disclosed.

CRA Letter July 23, 2004, Appendix "D", [Appendix to Oct. 1, 2012 Appeal Submissions], Vol. 7, TAB J-15, pp. 1890-1899.

***ATIA* pp. 1667 to 1682, [Appendix to Oct. 1, 2012 Appeal Submissions], AC, Vol. 7, Tab J-17, pp. 1901-1916.**

Memorandum of Menachem Klein, [Tab 9 to Appellant's March 16, 2011 Appeal Submissions], AC, Vol. 4, TAB H-10, page 962.

19. On or about December 21, 2004, the CD issued its final report regarding the 2002 Audit of the Appellant advising that it accepted the Appellant's explanations that it never knowingly associated with entities credibly alleged to be associated with terrorism.

Letter from CRA to Appellant dated December 21, 2004, [2002 Audit Correspondence PDF, p. 397], AC, Vol. 4, TAB H-10, pp. 971-74.

2008 Audit

20. On or about April 24, 2006, the Minister's Office asked CRA about the Appellant purportedly as a result of a CSS report from Israel. CRA subsequently prepared a draft report including a limited chronology of events focusing upon the question of governance and financial control issues of the Appellant.

ATIA Documents 1759, 1760, 1763, and 1801-1805 [Appendices to Oct. 1 2012 appeal submissions] AC, Vol. 7, TABS J-19, 20 and 22 pp. 1921-23, 1925-29.

21. On or about May 29, 2007, the US government filed a pleading entitled "Trial Brief" in the Holy Land Foundation prosecution which included an attached list of almost 250 other individuals and organizations, including IRFAN, as unindicated co-conspirators ("UCC"). On or about July 12, 2007, another CRA memorandum was prepared as an update. CRA was interested in what was to be presented at trial in relation to the Appellant and undertook to monitor and update the situation further.

Oct. 1, 2012 Appeal Submissions (page 11), AC, Vol. 7, Tab J-1, page 1715.

22. On or about December 20, 2007, an internal CRA memorandum was prepared as a further update on the Holy Land Foundation for Relief and Development **("HLF")** case which resulted in a mistrial being declared October 22, 2007. The memorandum states, in part, "Review and Analysis Division (RAD) will continue to monitor and assess the situation, to determine whether the information available is sufficient to

act on and will advise you if further action is taken."

Oct. 1, 2012 Appeal Submissions (page 13), AC, Vol. 7 Tab J-1, page 1717.

23. In 2008, the CRA commenced another extensive audit of the Appellant (the "**2008 Audit**"). This audit coincided with the public identification of the Appellant as an unindicted co-conspirator in the HLF trial in the United States. The first trial ended in a mistrial in October 2007. The second trial of the HLF commenced in August 2008 and concluded in November 2008 with several convictions. None of the evidence or convictions touched upon the Appellant.

Affidavit of Nancy Hollander, [Tab 54 to Oct. 1, 2012 Appeal Submissions], AC, Vol. 9, TAB J-54, pp. 2254-59.

24. In a memorandum dated in 2009 not disclosed to the Appellant as part of the audit or appeal process, a CRA official, while proposing the suspension of IRFAN's receipting privileges, referenced the conviction in November 2008 of officials in the U.S. Holy Land Foundation. The memo erroneously claims that "evidence" submitted by federal prosecutors in the trial named IRFAN as a UCC. The Appellant's name never appears anywhere else in any pleading or in any testimony during the two trials of the Holy Land Foundation and its co-defendants. The US government held no legally cognizable justification for publicly naming IRFAN as an unindicted co-conspirator in the HLF terrorism prosecution.

Affidavit of Nancy Hollander, [Tab 54 to Oct. 1, 2012 Appeal Submissions], AC, Vol. 9, TAB J-54, pp. 2254-59.

Oct. 1, 2012 Appeal Submissions, AC, Vol. 7, Tab J-1, p. 1719.

CRA Administrative Fairness Letter

25. On or about December 14, 2010, the CRA sent the Appellant an administrative fairness letter (the "**AFL**") alleging that the Appellant had *inter alia* certain deficiencies in its books and records. The AFL further alleged that the Appellant had provided financial support directly or indirectly to Hamas, which is listed as a terrorist organization (the "**Terrorist Allegations**").

AFL letter dated December 14, 2010, plus appendices, AC, Vols. 1-2, TABS G 1-10, pp. 104-582.

CRA Revocation Notice

26. On or about March 9, 2011, the CD sent to the Appellant a Notice of Intention to Revoke the Appellant's charitable status, based in part on the Terrorist Allegations. On or about March 16, 2011, the Appellant submitted a Notice of Objection to the Appeals Branch in response to the impending Revocation, and filed additional documents pursuant to the Notice of Objection on or about April 6, 2011. The Appellant clearly requested in its March 16, 2011 appeal submissions "…a complete copy of the audit file…including

but not limited to all T2020s, all audit working papers and any other records in the Charity Directorates." Despite this clear request, the Respondent failed to disclose hundreds of pages of audit documents, analyses and working papers.

Notice of Intention to Revoke, March 9, 2011, AC, Vol. 10 TAB M, pages 2597-2648.

Appeal Submissions, March 16, 2011, AC, Vols. 3 and 4 TAB H. [see: Vol. 3, pp.583-84 for request]

Appeal Submissions, April 6, 2011, AC, Vol. 5.

27. The Appellant's revocation under the *Income Tax Act* became effective on April 9, 2011 with the publication of the revocation notice in the Canada Gazette (the "**Revocation Notice**").

Revocation Notice, April 11, 2011, [2008 Audit Correspondence], AC, Vol. 10 TAB L-2, pages 2502-2509.

28. On or about August 28, 2012, more than a year after the internal appeal was made, the CRA Appeals Branch provided a brief reply to the extensive submissions made by the Appellant pursuant to the Notice of Objection indicating they would confirm CRA's audit findings but provided a last opportunity with a deadline for the Appellant to submit any additional representations prior to a final decision.

CRA letter to Appellant August 28, 2012 [2008 Audit Correspondence], AC, Vol. 10, TAB L-3, pp. 2510-12.

29. With no clear or fair indication received from Appeals Branch as to why the Appellant's initial submissions were not accepted, the Appellant filed its additional submissions on or about October 1, 2012 in conformity with the CRA Appeals Branch imposed deadline for receipt of all submissions relative to the appeal.

October 1, 2012 Appeal Submissions, plus attachments, AC, Vols. 7-9, TABS J1-66, pp. 1705- 2432.

Letter from Carters to Appeals Branch dated October 1, 2012, [2008 Audit Correspondence], AC, Vol. 10, TAB L-4, pp. 2513-17.

Minister's Confirmation of Revocation

30. The Minister, through the CRA Appeals Branch, confirmed the revocation of the Appellant's charitable status on or about December 11, 2012 (the "**Minister's Decision**"). The Minister's decision is based upon the following four conclusions, namely that the Appellant:

- Ceased to comply with the requirements of the ITA for its continued registration **[paragraph 168(1)(b)]** as it did not maintain direction and control over the use of its resources and failed to implement due diligence procedures.
- Failed to file an information return as required in the ITA or a Regulation, **[paragraph 168(1)(c)]**, based on a number of discrepancies related to the information reported on the T3010 Information Returns from 2005 to 2008.
- Issued a receipt for a gift or donation otherwise than in accordance with the ITA and the regulations that contains false information **[paragraph 168(1)(d)]** and;

- Failed to comply with or contravened any of sections 230 to 231.5 of the ITA **[paragraph 168(1)(e)]**, as it did not maintain and provide proper books and records to demonstrate fully its compliance with the Act.

Confirmation of Revocation dated December 11, 2012, AC, Vol. 10, TAB L-5, pp. 2518-19.

31. On or about January 9, 2013, the Appellant appealed the Minister's Decision to this Court. The grounds of appeal are that the:

a. Minister's Decision erred in law and was unreasonable;
b. Minister's Decision was rendered in a procedurally unfair manner;
c. Minister has demonstrated a closed-mind or a reasonable apprehension of bias, and;
d. Minister's Decision violates the Charter of Rights and Freedoms.

Notice of Appeal, January 9, 2012, AC, Vol. 1, TAB B, pp. 12-22.

Part III: Issues

Issue 1: Did the Minister err in law or render an unreasonable decision in deciding to confirm the revocation of the Appellant's charitable status pursuant to section 165(3) of *the ITA*?

Issue 2: Do the Minister's actions in administering section 168 of *the ITA* constitute a violation of procedural fairness?

Issue 3: Does the Minister's decision demonstrate a closed-mind or a reasonable apprehension of bias?

Issue 4: Did the Minister's exercise of discretion in deciding to revoke the Appellant's charitable status violate sections 2 and 15 of the *Charter of Rights and Freedoms*?

Part IV: Law and Argument

Issue 1: Minister erred in law in confirming the revocation of the Appellant's charitable status

32. Each of the four reasons advanced by the Minister in support of the confirmation of the Notice of Revocation pursuant to section 165(3) of *the ITA* is inconsistent with and/or grossly misapprehends the record of information before the Minister and/or ignores evidence filed by the Appellant such that the confirmation of revocation must be vacated. While the Minister's decision of December 11, 2012 on its face states only the bare reasons for revocation, these reflect a wholesale adoption of the explanatory notice letter of August 28, 2012 from the Appeals Branch.

33. The Minister's decision to revoke the Appellant's status was based upon its conclusions relative to allegations of non-compliance pursuant to section 168(1)(b)(c)(d) and (e) of the ITA. The relevant scheme

reads as follows:

> **Notice of intention to revoke registration**
>
> **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; (*c*) in the case of a registered charity or registered Canadian amateur athletic association, fails to file an information return as and when required under this Act or a regulation;(*d*) issues a receipt for a gift otherwise than in accordance with this Act and the regulations or that contains false information;(*e*) fails to comply with or contravenes any of sections 230 to 231.5; or (*f*) in the case of a registered Canadian amateur athletic association, accepts a gift the granting of which was expressly or implicitly conditional on the association making a gift to another person, club, society or association.
>
> **Section 168(1), *Income Tax Act*, RSC 1985, C. 1.**

34. Significantly, the nature of irregularities identified by the Minister are routinely condoned by the CRA such that discretion to revoke registration pursuant to section 165(3) is seldom utilized as an administrative penalty. In this regard, the reasons fail to explain why revocation was exercised in the Appellant's case in distinction to the historical practice in 94% of cases of audited charities that demonstrate the same categories of compliance violations.

> ***"CRA: Major Non-Compliance Issues" to the Ontario Bar Association in February 2011*, Appendix to Oct. 1, 2012 Submissions, AC, Vol. 8, Tab J-38, page 2015.**
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> ***"Compliance Overview –Major Non-Compliance Issues" to International Committee on Fundraising Organizations Annual General Meeting, May 14, 2010,* Appendix to Oct. 1, 2012 submissions, AC, Vol. 8, Tab J-39, page 2056.**

35. According to information collected in 2005 from annual return information forms that appears in the CRA document "Assessment, Determinations & Monitoring (ADM) Division" 13,326 charities reported charitable activities outside Canada (17 per cent of all charities). Among the top reporting "flags" – cases where charities had not provided all the requested information –28,640 charities (36%) did not provide a Basic Information Sheet as part of their annual return.

> **Chapter 6 of Volume 5 of Justice Major's Report, see page 213 for revocation history, Appendix to Oct. 1, 2012 Submissions, AC, Vol. 8, Tab J-13, page 1856.**

36. The conclusions of the Minister and rationale of Appeals Branch lack the justification, intelligibility and transparency to reasonably explain the basis of revocation. In respect of books and records violations alleged, the Minister failed to, in several instances, specifically identify which records were deficient and where specific records were identified, the Minister failed to explain why the failure to produce should result

in revocation.

***Prescient Foundation v. MNR* 2013 FCA 120 at paras. 47-48.**

37. Within this exercise of discretion, moreover, the Minister failed to act in a manner that considers both the procedural rights of the Appellant as well as the challenges of the Appellant's delivery of humanitarian assistance in the Middle East. The non-compliance issues raised by the audit are unremarkable and, in the circumstances, do not constitute a procedurally fair or lawful basis of revocation of status.

Prescient Foundation, supra

<u>Revocation Conclusion No. 1:</u> IRFAN ceased to comply with the requirements of the ITA for its continued registration [paragraph 168(1)(b)] as it did not maintain direction and control over the use of its resources and failed to implement due diligence procedures.

The rationale as contained in the August 28, 2012 letter from Appeals Branch is as follows:

> We agree with the CD position that IRFAN did not maintain direction and control over the use of its resource which is a fundamental requirement that all organizations must meet to maintain their charitable status. For example, signing authority requirements are standard and prudent control measures that are necessary for any charity to maintain direction and control over its assets yet there is evidence that IRFAN failed to implement them. As well, the exercise of obtaining documentation and agreements after the fact does not establish acceptable direction and control.
>
> Furthermore, despite its undertakings to "avoid future dealings and misapplication of resources to unlawful organizations", IRFAN failed to implement due diligence procedures to ensure future dealings with partner organizations did not include those listed as unlawful organizations. In fact, the CD established that $13 million was transferred as gifts in kind to organizations which were documented as having ties to Hamas. In addition, IRFAN deposited in excess of $1 million into foreign bank accounts yet exercised no control over these funds.
>
> **Letter from Appeals Branch, August 28, 2012, [2008 Audit Correspondence], AC, Vol. 10, TAB L-3, pp. 2510-11.**

38. Other than one instance of a long-time trusted employee's misappropriation of monies which the Appellant disclosed in detail, CD did not find or allege that money or resources went to recipients for purposes other than as intended. In this regard, the reasoning of the Appeals Branch and conclusion of the Minister was wrong in both fact and law as *de facto* direction and control was maintained by the Appellant at all times. In this sense, records which describe control exercised do not determine the existence of direction or control. The Appellant maintains that the evidence establishes that there was no loss of direction and control in terms of the Appellant pursuing its "own activities".

Memo to IRFAN-Canada by K. Mann dated March 15, 2011, [Tab 9 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB I-9, pp.1598-1603.

39. With respect to the allegation of obtaining documentation and agreements after the fact, this issue

demonstrates the ability and willingness of the Appellant to comply with concerns raised by the Respondent, but is not determinative of the factual question of direction and control exercised by the Appellant and does not form a reasonable basis for revocation.

40. The reasons of the Minister also suggest that the Appellant created and/or has maintained ties with listed unlawful organizations. In this regard, the Minister's position is false. The fact is that the Appellant does not and has not held ties to listed terrorist or unlawful organizations as defined by Canada or the United Nations. No organization with which the Appellant is or has been directly linked to is an unlawful organization by these measures.

41. The Respondent has impugned the Appellant's links to lawful organizations as a basis for suspecting that the Appellant may have links to other organizations directly or indirectly linked with listed terrorist organizations. Such an approach is a vague and all encompassing allegation that defies reasonable precision or scope and is inconsistent with basic fairness and the *Rule of Law* as it improperly and overbroadly casts the net of regulatory scrutiny over lawful activities of the Appellant.

> ***Roncarelli v Duplessis,*** **1959 CanLII 50 (SCC), [1959] SCR 121, at page 140**
>
> ***Prescient Foundation,*** **supra at 48.**
>
> ***Re Renaissance International,*** **[1983] 83 D.T.C. 5024.**

42. Based on the materials referenced in the 2008 Audit by the CD, the designation as "unlawful association" and "unlawful organization" by Appeals Branch originate exclusively from Israel through a process that is neither transparent nor fair. Moreover, Appeals Branch ignored and failed to address the well documented concerns of the Appellant that Israel routinely relies on information derived from unlawful and procedurally unfair means contrary to International Law and Canadian standards. Moreover, the Minister has failed to consider or to provide any clear or cogent explanation as to why the source material from Israel is reliable; to the contrary, it confidentially flagged the listing by Israel as an indicator that should have triggered "concern" for the Appellant – accepting all information at face value without question and in spite of serious issues of reliability.

> **Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, page 2658.**
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> **Letter from K. Mann dated February 20, 2010, [Tab 32, March 16, 2011 Appeal Submissions], AC, Vol. 4, TAB H-32, pp. 1145-47.**
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> **Memo to IRFAN-Canada by K. Mann dated March 15, 2011, [Tab 9 to April 6, 2011 Appeal Submissions],**

AC Vol. 5, TAB I-9, pp.1598-1603.

Breaking the Silence (Intro), Appendix to Oct. 1, 2012 Appeal Submissions, AC, Vol. 8, Tab J-30, pp. 1953-74.

Breaking the Silence (Prevention), Appendix to Oct 1, 2012 Appeal Submissions, AC, Vol. 8, Tab J-31, pp. 1975-1980.

UN Resolution 799 (1992), Tab 36, March 16, 2011 Appeal Submissions, AC, Vol. 9, Tab J-61, pp. 2340-61.

UN Report (August 17, 2007), Appendix to Oct. 1, 2012 Appeal Submissions , AC, Vol. 9, Tab J-61, pp. 2340-61.

UN Report (May 17, 2012), "Economic and Social Repercussions of the Israeli Occupation on the Palestinian Peoples" Appendix to Oct. 1, 2012 Appeal Submissions, AC, Vol. 9, TAB J-62, pp. 2362-2382.

MIFTAH Update on Rights of Palestinians, [Tab 37, March 16, 2011 Appeal Submissions], AC, Vol. 4, TAB H-37, pages 1161-65.

B'Tsalem – Criticism on Administrative Detention, [Tab 38, March 16, 2011 Appeal Submissions], AC, Vol. 4, TAB H-38, page 1166-94.

Adalah, "New Discriminatory Laws and Bills in Israel" (updated June 2012), [Appendix to Oct. 1, 2012 submissions], AC Vol. 8, TAB J-49, pages 2139-54.

Memorandum on IICC and ITIC by Menachem Klein, [Tab 9 to Appellant's March 16, 2011 Appeal Submissions], AC Vol. 4, TAB H-9, pages 962-70.

43. The $13 million of gifts in kind consisted of medical supplies that were transferred over several years to two highly reputable Lebanese organizations registered with the Lebanese government, at least one of which received support of Western governments.

Administrative Fairness Letter (AFL), Appendix G, AC, Vol. 2, TAB G-7, pages 366-75.

March 16, 2011 Appeal Submissions, page 55, AC, Vol. 3, TAB H, page 637.

Dar-al Fatwa, Zakat Fund Lebanon, [Tab 47 to March 16, 2011 Appeal Submissions], AC, Vol. 5, Tab 47, page 1344.

44. With respect to the $1 million dollars purportedly transferred to accounts in which the Appellant is alleged not to have exercised control, details of the arrangements were provided to CD which IRFAN believed were reasonable in the prevailing circumstances and for which no explanation has been provided regarding the inadequacy of same.

AFL dated December 14, 2010, [page 10 of 27], Vol. 1, TAB G, page 113.

Letter from Carters to CRA February 22, 2011, [page 31- section 7], Vol. 10, TAB L-6, page 2520.

Appellant Response to Questionnaire (May 27, 2010),Vol. 10,TAB L-7, pp. 2557-59.

45. During the relevant period, the organization was transitioning offices, staff and volunteers while still

attempting to maintain important projects without disruption and faced with a difficult and onerous process to change signing authorities. There is no legal or factual basis to conclude that the Appellant had acted in a negligent fashion or that it could have preempted this occurrence through different record keeping practices.

Letter from Carters to CRA February 22, 2011, [page 31- section 7], Vol. 10, Tab L-6, page 2520.

Appellant Response to Questionnaire (May 27, 2010),Vol. 10,TAB L-7, pp. 2557-59.

46. The Appellant took reasonable steps to mitigate the loss that resulted from this sole source of breach of trust and misappropriation. It could not have known *a priori* that an otherwise law abiding and trusted employee would misappropriate funds. This is not an example of loss of direction and control.

47. Accordingly, the individual and cumulative concerns raised by Appeals Branch relative to section 168(1)(b) of *the Act* do not at law or in fact justify the revocation of the Appellant's charitable status.

<u>Revocation Reasons No. 2:</u> Failed to file an information return as required under the ITA or a Regulation, [paragraph 168(1)(c)], based on a number of discrepancies related to the information reported on the T3010 Information Returns from 2005 to 2008.

The rationale as contained in August 28, 2012 letter from Appeals Branch is as follows:

> A number of discrepancies were uncovered related to the information reported on the T3010 Information Returns from 2005 to 2008. Although some of the issues were accepted as being on account of error or misunderstanding, the remaining problems have not been addressed in a satisfactory manner.
>
> **Letter from Appeals Branch, August 28, 2012, [2008 Audit Correspondence], AC, Vol. 10, TAB L-3, pp. 2510-12.**

48. While the Appellant had filed a partially inaccurate annual return, at law this does not constitute a failure to file or the basis for revocation of status. Moreover, errors identified were not prejudicial and were in fact mostly corrected. Those problems raised by CD have been reasonably explained by the Appellant and in view of CRA's past practice of revocation in exceptional circumstances should not reasonably have led to revocation of the Appellant's charitable status.

49. Moreover, the Appeals Branch through its August 28, 2012 letter did not specifically identify or provide particulars of the ostensible problems it was citing in order to allow the Appellant to respond to same in its further submissions of October 1, 2012. This is a violation of fairness and transparency in the audit process and review as the Respondent failed to identify examples of "fatal" problems and did not provide a fair opportunity for the Appellant to respond to non-compliance issues that ultimately formed the basis of confirming revocation of the Appellant's status.

***Prescient Foundation,* supra at 48.**

<u>Revocation Reason No. 3:</u> Issued a receipt for a gift or donation otherwise than in accordance with the ITA and the regulations that contains false information [paragraph 168(1)(d)]

Rationale as contained in August 28, 2012 letter from Appeals Branch:

> IRFAN's receipting practices are not fully compliant with Regulations 3500 and 3501 of the ITA. The audit evidence revealed improper procedures with duplicate receipting, missing donor information and a lack of description for in-kind donations. In addition, IRFAN abused its authority to issue tax receipts by issuing receipts to individual taxpayers for donations from a commercial entity and processing receipts on behalf of an unregistered organization.

Letter from Appeals Branch, August 28, 2012, [2008 Audit Correspondence], AC, Vol. 10, TAB L-3, pp. 2510-11.

50. Detailed explanations for each instance of inaccurate information was provided to the Charities Directorate by the Appellant. The deficiencies were very few in number, minor in significance, and in most cases corrected without prejudice.

March 16, 2011 Appeal Submissions (page 26 and 27), AC, Vol. 3, Tab H, pp.608-09.

51. With respect to the citation of improper tax receipts being issued to individual tax-payers for donation from commercial entities, this was at worst a limited, isolated mistake by the Appellant's staff involving one instance of a commercial donor (Medical Mart Supplies Limited) comprising the $96,329.95 in gifts cited. Considering the tens of millions of dollars in otherwise correctly attributed gifts-in-kind by the same IRFAN staff, there are no findings to suggest a pattern of improper receipting and as such does not constitute an abuse.

March 16, 2011, Appeal Submissions [page 38], AC, Vol. 3, Tab H, page 620.

52. With respect to the allegation of processing receipts on behalf of an unregistered organization, again this was a single, isolated instance. Details of the relationship and projects with the entity in question, namely Guyana Islamic Relief Organization, were provided to CD that clearly rebutted this allegation. This series of joint fund-raising events were undertaken for the Appellant's own programs in Guyana with a reputable international partner, well recognized in Canadian-Guyanese constituencies, who carried out those programs as agent for the Appellant.

March 16, 2011 Appeal Submissions [page 38 and 39], AC Vol. 3, Tab H, pp. 620-621.

53. The Respondent erred in law by failing to provide a clear indication of how the explanations provided were incomplete or insufficient.

***Prescient Foundation,* supra at 48.**

<u>Revocation Reason No. 4:</u> Failed to comply with or contravened any of sections 230 to 231.5 of the ITA [paragraph 168(1)(e)], as it did not maintain and provide proper books and records to demonstrate fully its compliance with the Act.

Rationale as contained in August 28, 2012 letter from Appeals Branch:

> Paragraph 230(2)(a) requires that every registered charity shall keep records and books of account at an address in Canada containing information that will enable the Minister to determine whether there are grounds for revocation. The books and records requested from IRFAN were standard books and records that CRA would require in most audits and the requirement is applicable to all registered charities.
>
> The failure to maintain and make available books and records seriously inhibits the CRA's ability to determine whether the organization is in compliance with the ITA for its continued registration as a charity.
>
> **Letter from Appeals Branch, August 28, 2012, [2008 Audit Correspondence], AC, Vol. 10, TAB L-3, pp. 2510-11.**

54. As the CRA has noted on its own website and has plainly instructed charities, CRA should be satisfied with "control and direction" where the Charity itself is using resources "for its own activities".

> **"CRA Website, Activities Outside Canada – February 2011" Appendix to Oct. 1, 2012 Appeal Submissions, AC Vol. 8, TAB J-37, page 2006.**

This standard has been met by the Appellant as its resources were not at any time used for activities other than its own, nor is there evidence to support such an allegation. To this end, there has also been no allegation that the Appellant was not using its resources for its own activities. Moreover, as a matter of fairness, the Appellant should have been informed why the CRA was departing from its stated threshold for assessing direction and control.

55. Contrary to the Minister's conclusion, it is apparent from CRA's own practice that most Charities are deficient in this requirement for various reasons. Not all of these deficient charities, nor most, are revoked. There is thus clearly discretionary scope whether or not to revoke charitable status even in the face of such deficiency. The inconsistency in the Minister's approach means that the mere existence of the deficiency in certain records as noted in the 2008 Audit is not sufficient to trigger a revocation of charitable status.

56. While there were delays in obtaining certain books and records, these were produced as soon as they were made available by third parties.

> **Appellant's letter to CRA May 26, 2009, AC Vol. 10, TAB L-8, pp. 2580-91.**

Appellant's letter to CRA July 23, 2009, AC Vol. 10, TAB L-10, pp. 2594-96.

57. For some other missing items which could not be located or duplicates obtained, such as certain foreign phone bills for which CD purportedly wished to inspect telephone numbers called by IRFAN's staff, IRFAN provided a substitute in the form of electronic phone records obtained from the telephone company. However, the Minister's decision must precisely identify those books and records not produced, which have resulted in the revocation of the Appellant's status. The failure of the Minister to identify the gap in the specific records that triggered the revocation is a fatal error for which the rationale pursuant to section 168(1)(e) must fail and the Minister's decision must be vacated.

***Prescient Foundation,* supra at 48.**

Issue 2: Minister's actions in administering section 168 of *the ITA* constitute a violation of procedural fairness.

58. Confirmation of revocation of charitable status pursuant to section 165(3) of *the ITA* must comply with the rules of natural justice and procedural fairness. The content of procedural fairness in this context is also informed by a requirement that the process be compliant with administrative fairness guarantees enshrined within the *Canadian Bill of Rights*.

***Re Renaissance International,* [1983] 83 D.T.C. 5024.**

***Canadian Bill of Rights,* sections 1 and 2**

59. In this regard, upon appeal, the Court must assess "whether the [charity] was fully informed of the case to be met and was given a full opportunity to respond." Where records generated and that form part of the record of the audit or analysis for the Minister were not provided to the Appellant this may constitute a violation of procedural fairness.

***Canadian Committee for the Tel Aviv Foundation v. Canada*, 2002 FCA 72 (CanLII) at paras. 22-24.**

60. Moreover an investigation process which is used as a basis for the Minister's decision must be a fair and rigorous process that does not fail to consider key evidence. In this regard, the omission of key evidence by the CRA may constitute a violation of procedural fairness by denying the Appellant an opportunity to provide a full and fair response.

***Sketchley v. Canada (Attorney General)* [2005] FCA 404 at para. 120**

61. Significantly, the record disclosed as part of the present appeal to this Court contains, among other documents, approximately 93 working papers on all issues investigated by the CD and Appeals Branch,

which were never previously disclosed to the Appellant. It is submitted that there is no lawful excuse for the Respondent to have failed to disclose these reports in the face of a clear request for same by the Appellant. This constitutes a flagrant violation of procedural fairness in depriving the Appellant of material that informed by the analysis and investigation of CRA.

Agreement on Contents of Appeal Book, Volume 1, TAB E, pp. 39-102.

Appeal Submissions, March 16, 2011, AC, Vol. 3 TAB H, pp.583-84.

62. A detailed report on the Appellant's objection was prepared by the Appeals Officer and provided *ex parte* to the Minister's delegate on November 30, 2012, without disclosure to the Appellant (and surprisingly it appeared no similar report was prepared prior to the August 28, 2012 letter). The report responds to the information raised by the Appellant in its submission of October 1, 2012 to the Appeals Branch and provided no opportunity for further submission or response by the Appellant.

Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, pp. 2649-59.

63. Where a report is provided to a decision-maker *ex parte*, the significance of the procedural duty of candour and full disclosure to the decision-maker is elevated.

***Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 SCR 3 (CanLII) at paras. 27, 47.**

64. The Report on Objection states false, misleading and/or procedurally unfair guidance to the Minister's delegate that is directly contradictory to the stated policies of CRA. In particular, the report states that direction and control means that the charity must demonstrate "…the same degree of administrative control over the use of its use of resources outside Canada as at is would if its activities were conducted in Caanada".

Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, page 2657.

This standard is not consistent with the statutory requirement that the charity perform its "own activities". Moreover, the "same degree of control" test ignores the fact that more rigorous control in Canada does not obviate or determine whether lesser control for overseas work means that a charity is incapable of demonstrating the performance of its own activities abroad.

"CRA Website, Activities Outside Canada – February 2011" Appendix to Oct. 1, 2012 Appeal Submissions, AC Vol. 8, TAB J-37, page 2006.

"Canadian Registered Charities Carrying Out Activities Outside Canada", (July 8, 2010) [see: Issue 2A NQD and Control and Direction, Electronic Record, pp. 78-103].

65. Indeed, were the relevant standard of direction and control to be exercised over charitable activities by Canadian charities working abroad synonymous with that to be exercised by charities working in Canada, this would undermine the CRA's statement of specific policy approach to "activities outside Canada", which considers the use of agents, intermediaries and contemplates the challenges of working in a foreign environment. The Appellant held a legitimate expectation to be treated in conformity with the CRA's *de facto* control test relating to "Activities Outside Canada".

> ***Sketchley v. Canada (Attorney General)*** **[2005] FCA 404 at para. 119.**
>
> **"Canadian Registered Charities Carrying Out Activities Outside Canada", (July 8, 2010) [see: Issue 2A NQD and Control and Direction, Electronic Record, pp. 78-103].**

66. While the doctrine of legitimate expectation does not create substantive rights, where, as in the present case, the government makes authorized and unqualified representations about the administrative process "… the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty".

> ***Canada (Attorney General) v. Mavi, 2011 SCC 30, [2011] 2 SCR 504 (CanLII) at para. 68; see also: Mount Sinai Hospital Center,*** **at paras. 29-30;** ***Moreau-Bérubé v. New Brunswick (Judicial Council),*** **2002 SCC 11 (CanLII), at para. 78;**
>
> ***C.U.P.E. v. Ontario (Minister of Labour),*** **2003 SCC 29 (CanLII), at para. 131.**

67. It is the role of the Minister's delegate to make a decision pursuant to subsection 165(3) of *the ITA* regarding confirmation of revocation. By virtue of adopting, the conclusion and rationale provided by the Appeals Officers (AO) *ex parte*, the Minister's delegate has "rubber stamped" the analysis of the AO, circumventing due process and proper exercise of discretion. In this regard, the Minister's delegate appears to have improperly subdelegated decision-making authority to the AO in contravention of subsection 165(3) of *the ITA* and procedural fairness.

68. The AO does not explicitly contradict the Appellant's conclusion that its resources were in fact used for its own charitable activities; however, the Report on Objection errs in limiting the purview of analysis under section 168(1)(b) of *the ITA* to an assessment of whether all steps have been recorded to allow the CRA's verification of whether the charity's funds have been spent on its own activities, but is not required to "demonstrate that money was used for non-charitable purposes…".

> **Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, page 2658.**

Here, the erroneous position of the AO, as adopted by the Minister, rejects the *de facto* control test in favour of a subjective evaluation of the sufficiency of the steps being recorded by the charity. That ultimately the

Appellant established (based on the very facts referenced by the AO and adduced by the Appellant through the 2008 audit) that its resources were in fact allocated to its "own activities" and no other purpose is a full answer to the question of direction and control.

69. The Report on Objection also errs in conflating the use of agency agreements and direction and control. The suggestion of the AO in this regard is directly at odds with the policy of the CRA in its policy on "Activities Outside Canada", which emphasizes the importance of the Charity establishing that resources are used for "its own activities" independently of the use or not of written agency agreements.

Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, page 2658.

"CRA Website, Activities Outside Canada – February 2011", Appendix to Oct. 1, 2012 Appeal Submissions, AC Vol. 8, TAB J-37, page 2006.

70. Accordingly, agency agreements are not required and in any event their existence or non-existence does not determine whether direction and control have effectively been exercised by the charity. From a pragmatic perspective, despite the existence of agency agreements it is completely possible that control may not be exercised such that it is not the agreement that produces direction and control. The assessment of record keeping of a charity is simply an indicator that may suggest the exercise of greater *de facto* control in particular circumstances, although the converse is not true.

71. With respect to due diligence procedures, the Report on Objection states that listing by another country should constitute "a cause for concern and inquiry" even in the absence of due process, notice or evidence. This conclusion of the Report on Objection demonstrates that the Respondent has accepted dubious and unreliable information from Israel at face value. It has done no due diligence and has not sought to explore the references and information provided by the Appellant in its appeal submissions regarding the provenance of information from Israel. Tellingly, there did not appear to be any independent review or analysis of the political, security and humanitarian situation in the West Bank and Gaza, nor any review or analysis of the background and contextual submissions and materials provided by the Appellant. Cumulatively, this constitutes a fettering of discretion, failure to consider evidence and perfunctory analysis and investigation by the CRA indicative of a closed mind.

Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, page 2658.

72. The Minister has relied on multiple sources from Israel without exploring their provenance and despite their bias, including the following: (i) Various CSS Reports from Israel; **see: AC, Vol. 8, TABS J-26, 27 and 50, pp. 1947-49 and 2155; (ii)** Article from the Washington Institute [**see Issue 2BI, pp. 256-58 of**

ER]; **AC Vol. 10, Tab O-1, pp. 2660-62.; (iii)** Publication on the Palestinian Legislative Council by the Washington Institute **[see: Issue 2BI, page 295 of ER]**; **AC Vol. 10, TAB O-2, page 2663; (iv)** Article on "the New Hamas government and its political platform" **[see: Issue 2BI, page 466 of ER]; AC Vol. 10 TAB O-3, page 2664; and (v)** Excerpts from book by Matthew Levitt, that is currently the subject of a libel notice [see: **Issue 2BI, page 588**], **AC Vol. 10, Tab O-4, page 2709-11.**

73. The Respondent prepared detailed analytical charts regarding the alleged involvement of the Appellant's principal, Rasem Abdul-Majid, with alleged supporters of Hamas through a review of the Holy Land Foundation (HLF) trial transcript. Neither the trial transcript nor the detailed analysis was provided to the Appellant. While the Appellant was put on notice of the allegation of links to Hamas, it was not provided with the particulars of how the alleged association was being justified through the HLF proceedings.

Excerpts from Issue 2BII, Connections to HLF, [from ER], AC Vol. 10, Tab P, pp. 2712-21.

74. The 2008 Audit of the Appellant and the resulting Administrative Fairness Letter (AFL) also raised allegations of the Appellant's ties to an unlawful organization, Union of Good. However, the Respondent failed to provide the Appellant at any time during the audit or the appeal the detailed analysis relied upon by CRA to base its conclusions. Significantly, despite the finding of the first audit that the Appellant did not knowingly associate with any unlawful organizations, the 2008 Audit reopened an investigation into the independent and non-charitable organization, Jerusalem Fund for Human Services (JFHS) which predated the Appellant, to build a matrix of associations with the objective of "validating" the CRA hypothesis that the Appellant was a continuation of JFHS as well as a member of Union of Good without consideration of any alternative hypotheses.

Excerpts from Issue, 2BIII, Connection to Union of Good, [from ER], AC Vol. 10, Tab Q, pp. 2722-39.

Affidavit of Judy Torrance , [Tab 53 to March 16, 2011 Appeal Submissions], AC, Vol 5, Tab H-53, pp.1465-71.

AFL Letter , page 15 and Appendix G, AC Vol. 1, Tab G, page 118; Vol. 2, Tab G-7, page 354.

Letter from CRA December 21, 2004 [Appendix to March 16, 2011 Appeal Submissions], AC Vol. 4, TAB H-10, pp. 971-73.

ATIA pp. 1852-1857, Appendix to October 1, 2012 Appeal Submissions, AC Vol. 8, TAB 24, pp. 1935-40.

Excerpts from Issue 2B IV, JFHS Links to Hamas and IRFAN, [see: ER] (analysis was never provided to Appellant), AC Vol. 10, Tab R, pp. 2740-43.

75. To support its investigation in the 2008 Audit, the Charities Directorate relied upon archived web print outs circa 2002 regarding Union of Good which lists various organizations including JFHS, which has

only been disclosed to the Appellant in the present appeal record. Notably, JFHS was wound up in 2000 and accordingly did not exist at the time of the website was accessed by CRA, while there is no evidence that the website exists today. The website information was translated by CRA in July 2010; however, the Appellant was never asked or consulted about this piece of information.

Excerpt from Issue, 2BIII, Connection to Union of Good, [see: ER], AC Vol. 10 TAB Q, pp. 2722-39.

76. The Respondent was not engaged in a process of assessing, in a balanced fashion, whether the Appellant had ties to Hamas, but rather was tasked with finding any and all information that may "validate" its operating investigatory premise and to stigmatize both JFHS and the Appellant through guilt by association.

Excerpt from Issue, 2BIV, JFHS Links to Hamas and IRFAN, [see: ER], AC Vol. 10 TAB R, pp. 2740-43.

77. During the course of its audit, CRA took it upon itself to analyze the substantive content of promotional videos of the Appellant to assess whether it was consistent with that used in jihadi internet propaganda. The Appellant was never informed that such substantive analysis was taking place, nor was it apprised of the tools being used by the CRA, including the "Islamic Imagery Project". The Appellant was accordingly afforded no opportunity to challenge this methodology or analysis, which represents a speculative and religiously offensive tool to stigmatize the Appellant.

Excerpt from Issue, 2BVI, IRFAN Links to Hamas, [from ER], AC Vol. 10, TAB S, pp. 2744-46.

78. Audit material not previously disclosed to the Appellant reveals the CRA's biased approach and use of unreliable sources. In particular, the CRA made sweeping statements regarding the International Humanitarian Relief Organization (IHH) which was involved in the 2010 Gaza Flotilla. The CRA notes on the subject of the flotilla do not indicate how Israel's boarding of a vessel in international waters was contrary to International Law, but rather, proceeds to analyze the fruits of Israel's unlawful search and to impugn IHH, which is not considered to be an unlawful organization by any country of the world, except Israel, which illegally intercepted and boarded its ship.

Issue, 2BIX, IEU to Zakat, pp. 84-87, AC Vol. 10, TAB T, page 2747.

79. Accordingly, the consistent failure of the Respondent to provide disclosure of its internal analysis seriously prejudiced the ability of the Appellant to respond to the case against it. Secondly, the failure of the Respondent to list specific records not produced that remained problematic for Appeals Branch and led to confirmation of revocation violates the Appellant's right to procedural fairness. And thirdly, the

Respondent's deliberate decision to avoid review of the political, security and humanitarian environment in the West Bank and Gaza and consideration of the Appellant's arguments regarding the provenance and probity of information from the ITIC and the HLF trial also constitutes an irremediable violation of procedural fairness.

Issue 3: Minister's decision to revoke the Appellant's charitable status was done in bad faith and demonstrates an abuse of discretion, closed-mind or a reasonable apprehension of bias

80. The Appellant submits that the Minister's decision represents a one-sided, closed-minded view of the evidence on the record indicative of bias or reasonable apprehension of bias. In particular, the decision to pursue the 2008 Audit was tainted by improper political considerations that prejudiced the administrative fairness and objectivity of the audit, the ensuing investigation and the treatment of the file both before the Appeals Branch and before the Charities Directorate.

81. The opportunistic 2008 Audit was initiated, after a steady flow of internal and external queries and monitoring, on an erroneous and politically motivated reliance upon the naming of the Appellant as an un-indicted co-conspirator (UCC) in the HLF trial in the United States. The Appellant states that CRA was monitoring the HLF trial in 2006 and 2007 to determine whether the context was "sufficient" to warrant an audit. However, the goal of the Respondent has been to guarantee revocation of the Appellant's status on technical non-compliance grounds without relying upon the very allegations that gave rise to the audit and motivated the decision to revoke the Appellant's status.

October 1, 2012 Appeal Submissions [page 11, para. 10] AC Vol. 7, TAB J, page 1715.

Affidavit of Nancy Hollander, [Tab 54 to Oct. 1, 2012 Appeal Submissions], AC, Vol. 9, TAB J-54, pp. 2254-59.

"A Terrifying Limbo" *Western Standard*, June 19, 2006, Appendix to Oct. 1, 2012 submissions, AC Vol. 9, TAB J-66, page 2431.

Minutes of Settlement signed April 8, 2010 in the matter of IRFAN-Canada v. Stockwell Day et al., Appendix to the October 1, 2012 Appeal Submissions, AC, Vol. 8, TAB J-47, pp. 2132-37.

82. Pre-2008 audit internal correspondence within the CRA obtained through the *Access to Information Act* and not disclosed by the Respondent at any stage during or post-audit reveals that in December 2007, the HLF trial was being followed and updated internally in relation to the Appellant. In particular, it was stated that the Review and Analysis Division will "…continue to monitor and assess the situation, to determine whether the information available is sufficient to act on and will advise … if further action is taken."

October 1, 2012 Appeal Submission [page 13 para cc] AC, Vol. 7, TAB J, page 1717.

83. The choice to pursue and maintain revocation pursuant to section 165(3) of *the ITA* represents an abuse of discretion given the decision to revoke the Appellant's charitable registration status on the basis of errors committed by 94% of charities facing non-compliance issues. It is clear that the Minister was concerned about the possibility of the Appellant's links to Hamas, but avoided directly raising this as the primary basis of revocation pursuant to the *Charities Registration (Security Information) Act*, such that the Appellant's defense of the terrorism allegation were ignored by the Minister.

> **"CRA: Major Non-Compliance Issues" to the Ontario Bar Association *in February 2011*, Appendix to October 1, 2012 Appeal Submissions, AC Vol. 8, TAB J-38, page 2015.**
>
> **"Compliance Overview –Major Non-Compliance Issues" to International Committee on Fundraising Organizations Annual General Meeting, May 14, 2010), Appendix to October 1, 2012 Appeal Submissions, AC Vol. 8, TAB J-39, page 2056.**
>
> **Air India Inquiry Report Excerpt, "The Links Between the Charitable Sector and Terrorist Financing" [Chapter 5, App 6], Appendix to October 1, 2012 Appeal Submissions, AC Vol. 7, TAB J-13, pp. 1856, 1862, 1863,.**

84. The Appeals Officer deliberately chose to concentrate her review on "non-compliance issues" rather than the other substantive and procedural arguments and information raised by the Appellant before the Appeals Branch. As stated in the November 30, 2012 Report on Objection:

> Considering the complexity of the file, the AO concentrated her review on the non-compliance issues as outlined in the CD'S Appendix Materials. The additional materials provided (OBJ2-REP) relate to the overlying issues that although considered by the CD were not necessary to issue the NIR.
>
> **Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, page 2653.**

85. Accordingly, there is no evidence that the AO considered as part of the appeal the other materials filed by the Appellant relating to the political and humanitarian context in the West Bank and Gaza and the biased and unreliable source information in the audit and its lack of fairness. That the AO considered this material to be unnecessary, absent evidence to the contrary and an explicit indication that the other material was reviewed, suggests that the information was ignored. This represents an improper fettering of discretion designed to achieve a particular result or outcome while revealing a reasonable apprehension of bias or closed mind towards the consideration of sources filed by the Appellant and a lack of rigour towards the consideration of the deficiencies in the sources, evidence and fairness of the audit and its results. Whether characterized as a particular strain of bias or more generally as a violation of procedural fairness, the resulting procedural error is irremediable.

86. Neither the Appeals Branch letter of August 28, 2012, the Report on Objection dated November 30,

2012 nor the Minister's decision of December 11, 2012 establish that the contextual information provided by the Appellant was considered at all. Quite apart from the question of whether indeed the source material was biased at law, the Minister failed to turn her mind to its reliability. Specifically, the Minister deliberately ignored and/or the revealed a closed mind to a consideration of all matters not specifically related to ITA non-compliance as set out in the letter filed by the Appellant and its attachments dated October 1, 2012 including the following: (i) Bias of sources from CSS and Israel; (ii) Timeline and chronology of events demonstrating improper political influence upon CRA in initiating the 2008 audit; (iii) Bias or reasonable apprehension of bias in respect of the 2008 audit being used as a tool to enchance ties between Canada and Israel; (iv) Selective reliance upon information by the CD and improper weight given to HLF trial and naming of Appellant as UCC; and (iv) *Ex parte* and secret orders for purported listing of IRFAN as an unlawful organization, seizure and confiscation orders by Israel relied upon by CD;

October 1, 2012 Appeal Submissions, AC Vol. 7, TABS J 1-66.

87. It is submitted that the failure to consider evidence, relating to what the AO refers to as the "overlying issues", represents a fundamental procedural error in that the information and arguments raised by the Appellant on appeal touch upon the fairness of the audit and its results. In this regard it is wholly improper and insufficient for the AO to disregard matters of fairness as "unnecessary". Moreover, the approach of the Report on Objection (a document submitted *ex parte* to the Minister's delegate) belies an administrative bias in that the function of the Appeals Branch is not simply to determine what is necessary to issue a NIR, but it must consider the fairness of the process.

88. Effectively, the AO rubber stamped the 2008 Audit, its results and the findings of the CD without considering the submissions of the Appellant relating to fundamental problems of procedural fairness. This constitutes a serious violation of procedural fairness for which the Minister's decision must be vacated.

89. It is submitted, moreover, that the policy choice of the Minister was adopted and implemented in a manner so as to exclude arguments that would seek to attack the fairness of the process and the reasonableness of the CRA's belief that the Appellant was linked to Hamas. This approach demonstrates a spectrum of procedural fairness violations including: evidence of a closed mind, institutional bias in the policy strategy adopted by the CRA and confirmed by the Appeals Branch and a reasonable apprehension of bias in ignoring serious allegations of improper political considerations animating the approach and outcome of the Minister's audit of the Appellant.

***Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (CanLII) at para. 90.**

Issue 4: Minister's Decision constitutes an abuse of discretion contrary to *the Charter*.

90. *The ITA* does not prescribe that an organization's charitable status must be revoked on the basis of non-compliance issues as outlined in sections 168(1)(a)(c)(d) or (e) and/or section 230 of *the Act*. Rather, the Minister is responsible for the enforcement of *the Act* and to this end has developed policies that elaborate its interpretation of *the Act.* Accordingly, the matter of enforcement generally and the decision of revocation specifically for those non-compliance issues identified in respect of the Appellant are not necessary outcomes mandated by *the Act*, but rather, they exist as discretionary tools to be appropriately administered and implemented by the Minister in a manner consistent with the statute.

91. All of the categories of non-compliance issues raised in the audit of the Appellant are common errors historically found in 87% of all audits by CRA. Moreover, approximately 94% of charities audited that exhibit these types of non-compliance problems are not the subject of revocation by the Minister pursuant to section 168(1) of *the Act*.

***"CRA: Major Non-Compliance Issues" to the Ontario Bar Association in February 2011*, Appendix to Oct. 1, 2012 Submissions, AC, Vol. 8, Tab J-38, page 2015.**

***"Compliance Overview –Major Non-Compliance Issues" to International Committee on Fundraising Organizations Annual General Meeting, May 14, 2010,* Appendix to Oct. 1, 2012 submissions, AC, Vol. 8, Tab J-39, page 2056.**

92. The Appellant submits that the Minister's statutory discretion pursuant to section 165(3) of *the ITA* to confirm the revocation of its charitable status must be exercised in accordance with *Charter* values. In exercising its discretion in a manner based on an interpretation of *the Act*, the Minister must aim to address any adverse differentiation antithetical to *Charter* values.

Sections 15, *Charter of Rights and Freedoms*

***Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (CanLII) at para. 117**

***Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII) at para. 49**

93. However, in the present case, the Minister's decision violates section 15 of the *Charter* by exercising discretion in a way that has disproportionately affected the Appellant as a small, ethnically identifiable charity supported by a predominantly Muslim donor base carrying out humanitarian relief programs for predominantly Muslim beneficiaries in the West Bank and Gaza.

Sections 15, *Charter of Rights and Freedoms*

***Little Sisters Book & Art Emporium v Canada*, [2000] 2 SCR at para 78**

94. The Minister has adopted an erroneous assessment for direction and control whereby it does not matter where a charity may be operating in the world, it will be held to a singular standard of maintaining books and records. The Appellant's charitable work funding humanitarian relief projects in the West Bank and Gaza has necessarily tied it to foreign banking institutions that have less rigorous standards of document retention and record keeping that banking institutions in Canada.

Report on Objection dated November 30, 2012, AC, Vol. 10 TAB N, page 2658.

Affidavit of Reem Attieh, [Tab 5 to April 6, 2011 Appeal Submissions, paras. 19-26], AC, Vol. 5, TAB 5, pp. 1583-86.

Memo to IRFAN-Canada by K. Mann dated March 15, 2011, [Tab 9 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB I-9, pp.1598-1603.

Affidavit of Sami A. Kaoud sworn September 24, 2012, Appendix to October 1, 2012 Appeal Submissions, AC, Vol. 7, Tab J-12, pp. 1823-25.

95. Despite the disparity in record maintenance standards between Canadian and Palestinian banks, some of the components that make up the books and records that were requested by Charities Directorate during its audit of the Appellant are not standard records in the context in which the Appellant operates. For example, it is not standard practice for existing Palestinian banks to return original cancelled cheques or provide copies. When the return of originals was rejected, then they permitted photocopying.

96. A blanket requirement for producing cancelled cheques undermines dealings with Palestinian banks and thereby precludes the ability of the Appellant to send funds to the West Bank or Gaza by donors who wish to support Palestinian human rights and welfare. It is submitted that the Minister's position that the Appellant must strictly conform to a uniform banking records retention standard adversely affects the Appellant's ability to deliver funds to beneficiaries in the West Bank and Gaza, which require the use of a Palestinian bank to receive funds.

CBA Report on PCMLTFA dated March 8, 2012, Appendix to Oct. 1, 2012 Appeal Submissions, AC Vol. 7, TAB J-3, page 1768.

Affidavit of Sami A. Kaoud sworn September 24, 2012, Appendix to October 1, 2012 Appeal Submissions, AC, Vol. 7, TAB J-12, pp. 1823-25.

Affidavit of Rasem Abdel-Majid sworn September 24, 2012, Appendix to October 1, 2012 Appeal Submissions, AC Vol. 7, TAB J-11, page 1796.

97. In this manner, the Appellant is being treated in a differential manner relative to other charities that are not ethnically tied to foreign banking institutions that use financial record keeping procedures that do not operate using identical procedures to those found in Canada or similar systems. The Appellant also submits that the Minister's exercise of discretion is discriminatory in a secondary and more direct manner that is intimately tied to its religious support base and project work in Gaza, a geographic region which is administered by Hamas and a listed entity under the *Anti-Terrorism Act*.

***Anti-terrorism Act,* SC 2001, c 41**

98. The Appellant submits that the vague criterion of "association" used by the Minister, which is informed by its procedurally unfair listing as an unlawful association by Israel presumes a connection with Hamas that does not exist. Because of its use of Zakat Committees and its support base within Muslim communities in Canada and Muslim beneficiaries in The West Bank and Gaza, the Appellant is an easy-target to be scape-goated as an organization linked to the extremist religious politics of Hamas. Such an approach belies a serious misunderstanding of the Islamic traditions surrounding Zakat Committees. It also represents an endemic problem for Muslim funded charities operating in the Middle East in an era of increased vigilance against Islamic terrorism since 9/11.

Affidavit of Loren Lybarger, [Tab 4 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB 4, pp. 1540-49.

Affidavit of Reem Attieh, [Tab 5 to April 6, 2011 Appeal Submissions, paras. 19-26], AC, Vol. 5, TAB 5, pp. 1583-86.

Affidavit of Jonathan Bentall, [Tab 4 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB 1, pp. 1503-24.

Affidavit of Nathan Brown, [Tab 2 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB 2, pp. 1525-32.

99. The Appellant's charitable work for predominantly Muslim beneficiaries within the constantly shifting terrain in the conflict-zone of the Middle East does not make the Appellant a political tool or arm of Hamas. However, the regulatory moving target created by CRA records requirements exponentially complicate the ability for charitable work to be done in the region by a humanitarian organization such as the Appellant. Moreover, the Minister's rigorous application of records requirements presumes that technical non-compliance is an indicator of the Appellant's linkage to Hamas. Such an approach by the Minister unfairly overlooks the goodwill, solid delivery of humanitarian assistance and nuanced, diligent and careful work of the Appellant in one of the most incendiary and complex geopolitical conflict zones in the world.

Affidavit of Loren Lybarger, [Tab 4 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB 4, pp. 1540-49.

Affidavit of Reem Attieh, [Tab 5 to April 6, 2011 Appeal Submissions, paras. 19-26], AC, Vol. 5, TAB 5, pp. 1583-86.

Memo to IRFAN-Canada by K. Mann dated March 15, 2011, [Tab 9 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB I-9, pp. 1598-1603.

Letter from Palestinian National Authority re: Good Conduct, [Appendix to April 6, 2011 Appeal Submissions] AC, Vol. 6, TAB I-7, page 1594.

100. Significantly, this position resonates with the Canadian Bar Association comments during the recent consultation to update Canada's Anti-Money Laundering and Anti-Terrorist Financing regime criticizing the "moving target" problem of CRA compliance for "ethnically identified charities carrying out programs in conflict zones facing deregistration on the basis of questionable allegations of terrorist financing."

CBA Report on PCMLTFA dated March 8, 2012, Appendix to Oct. 1, 2012 Appeal Submissions, AC Vol. 7, TAB J-3, page 1768.

Minister's Exercise of Direction Violates Section 2(d) of *the Charter*

101. Whereas this Court has previously denied a section 2(b) challenge to the definition of "charitable organization" under section 149.1 of *the ITA*, it has not specifically addressed the question of the proper exercise of discretion of the Minister to confirm a notice of revocation consistent with section 2 of *the Charter*. It has also specifically left open the possibility of a challenge based on the "registration and revocation of registration of organization" contrary to section 15 of *the Charter*.

***Human Life International in Canada Inc. v. M.N.R.*, 1998 CanLII 9053 (FCA), [1998] 3 FC 202 (CanLII).**

***Alliance for Life v. MNR*, [1999] 3 FC 504 (CanLII).**

102. In the present appeal, the Appellant submits that the Minister's decision to revoke IRFAN's charitable status was not based on the Appellant's use of designated funds for purposes prohibited by *the ITA*. Rather, the record of evidence establishes that the Minister's decision to initiate the 2008 audit of the Appellant was based upon a suspicion that the Appellant was linked directly or indirectly with Hamas by internal and external pressure and an improper reliance on the Holy Land Foundation case. Such suspicion is false and was not reasonably based. Notably, for a similar allegation and speculative conclusion, CCD retracted its comment to the Appellant in resolution of a defamation action filed against it by the Appellant.

Affidavit of Nancy Hollander, [Tab 54 to Oct. 1, 2012 Appeal Submissions], AC, Vol. 9, TAB J-54, pp. 2254-59.

Memo to IRFAN-Canada by K. Mann dated March 15, 2011, [Tab 9 to April 6, 2011 Appeal Submissions], AC Vol. 5, TAB I-9, pp.1598-1603.

Minutes of Settlement signed April 8, 2010 in the matter of IRFAN-Canada v. Stockwell Day et al., [Appendix to October 1, 2012 Appeal Submissions], AC, Vol. 8, Tab J-47, pp. 2132-37.

103. The Minister applied a subjective and arbitrary test for evaluating the direction and control of the Appellant's activities by which it inferred that the Appellant and/or its partners were affiliated with Hamas. In the context where Hamas has governmental authority over the Gaza Strip the standard is tantamount to prohibition. Here, the Appellant submits that the Minister's adoption of a "same standard" test for direction and control in and outside of Canada improperly impugned the Appellant's association with lawful organizations.

104. The Minister's exercise of discretion to confirm revocation of status under section 165(3) of *the Act* has impaired the ability of the Appellant to associate with its partners and agents in the depressed and strife torn areas of The West Bank and Gaza. Accordingly, the Minister should have applied a more flexible approach to the question of confirmation of revocation. Rather, than considering the necessary basis upon which revocation could be confirmed, the Minister had a legal duty to consider whether the revocation would have the effect of limiting or stigmatizing the Appellant's association with lawful organizations.

105. In this regard, the Minister's exercise of discretion in evaluation of the Appellant's books and records was overly broad and contrary to the section 2(d) *Charter* protected value of guarantee of lawful association by the Appellant with other lawful organizations. While the Minister is not required to guarantee that the Appellant must maintain its status as a registered charity, she is precluded from seriously impairing its associational rights that undermine its viability. This is what the Supreme Court has referred to as ensuring the "breathing space" for a meaningful exercise of the right to freedom of association. Contrary to section 2(d), it is submitted that the Minister's exercise of discretion has suffocated the Appellant's to freely associate with other lawful organizations and in so doing has killed the capacity of the Appellant to deliver humanitarian relief to the destitute in some of the most dire conflict zones of the world by requiring disassociation from anyone proscribed by any foreign governmental authority or the subject of any adverse mention in "open-source" reports.

***Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016 at para 148**

106. Consolidated lists of individuals and entities proscribed by all governments worldwide are not readily or economically available nor does "open-source" equate to availability, notoriety, or accessibility at any given time. Such a position has domino-like implications for anyone in Canada who has had a relationship with the Appellant since December 31, 2004 when it was purportedly designated as an unlawful association by Israel, or anyone in Canada that had any relationship with any of the 250 UCC named in the HLF proceedings since 2007.

Part V. Remedy Sought

107. In view of the foregoing, the Appellant seeks the following relief:

a) That the Minister's decision pursuant to section 165(3) of *the ITA* confirming the revocation of its status is vacated;

b) Such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS SUBMITTED THIS 16th day of December, 2013

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