CITATION: Muslim Association of Canada v. Attorney General of Canada, 2023 ONSC 5171
COURT FILE NO.: CV-22-00679625-0000
DATE: 2023-09-13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
MUSLIM ASSOCIATION OF CANADA Applicant	*Geoff Hall, Anu Koshal, Adam H. Kanji* for the applicant
– and –	
ATTORNEY GENERAL OF CANADA Respondent	*Lynn Marchildon, James Gorham, Anna Maria Konewka, Mitchell Meraw* for the respondent
	HEARD: April 4, 5, 2023 (in person), May 9, August 18 and 31, 2023 (in writing)

KOEHNEN J.

REASONS FOR JUDGMENT

OVERVIEW

[1] In this proceeding the applicant challenges the CRA's decision to conduct an audit of the applicant and the CRA's preliminary conclusion to suspend the applicant's charitable status. The applicant says the decision to audit, the conduct of the audit and the recommendation to suspend its charitable status are based on discriminatory information, beliefs and conclusions that violate the applicant's rights to freedom of religion, freedom of expression, freedom of association and freedom from discrimination under the *Charter of Rights and Freedoms.*

[2] While I am sympathetic to many, but not all, of the applicant's arguments in this regard, I nevertheless dismiss the application on the grounds of prematurity. Prematurity reflects the idea that courts should usually not intervene in the process of a government body until that process has been completed, especially not where the government process includes and appeal procedure within its scope.

[3] At the moment, the process is not complete. CRA has issued preliminary findings and a preliminary recommendation that the applicant's charitable status be revoked. The relevant legislation establishes a process that allows the applicant to respond to the preliminary findings and recommendation, allows dialogue between the parties to occur, has the CRA issue a final decision, allows the applicant to appeal the final decision internally within the CRA and then allows the applicant further rights of appeal to the Tax Court of Canada in the case of financial penalties and to the Federal Court of Appeal in cases of revocation of charitable status.

[4] There are both practical and principled reasons underlying the prematurity rule. As a practical matter, it ensures that courts are not required to deal with matters that might ultimately resolve themselves. It also ensures that courts deal with a final decision that has been refined and narrowed through a decision making and appal process rather than with a large variety of preliminary, partially formed views. This usually means that courts will have fewer and more focussed issues to deal with.

[5] From a principled perspective, the prematurity rule recognizes and respects the different roles of the legislative, executive and judicial branches of government. Governments bodies are, in principle, entitled to do their work. Courts are entitled to review certain government work or decisions. If courts intervene without restriction in the decision making process before it is completed, they are preventing the executive branch of government from carrying out its function. While there are exceptions to this principle, I am not persuaded that those exceptions apply here.

The Parties

[6] The Muslim Association of Canada ("MAC") describes itself as Canada's largest grassroots Muslim charity and as one that promotes a moderate, balanced view of Islam. It has over 500 members, 1,500 volunteers, operates 22 mosques and community centres, runs 30 schools and serves more than 150,000 members of the Canadian Muslim community through local chapters in 14 cities across Canada.

[7] MAC has four overarching goals: (i) to help Muslims develop a Muslim-Canadian identity; that is to say one that is both Muslim and Canadian, as opposed to having to choose one or the other; (ii) to uphold a balanced and mainstream message of Islam that promotes peace and understanding and that rejects all forms of violence and extremism; (iii) to deliver social programs and services, as required by the Muslim faith; and (iv) to create spaces for Canadian Muslims to come together and find belonging with each other.

[8] MAC is a registered charity and depends on charitable donations to fund its operations and programs. In turn, those charitable donations are contingent on MAC's ability to issue charitable receipts making donations tax deductible to donors.

[9] In this case, the respondent Attorney General of Canada represents the Canada Revenue Agency ("CRA"). The CRA is, among other things, the regulator of registered charities in Canada. Its mandates include ensuring that registered charities are not abused by terrorist

organizations and that registered charities meet the statutory requirements for registration. These statutory requirements include that a charity devote its resources exclusively to furthering the charitable purposes for which it is registered.

The Application

[10] MAC asks for a declaration that the audit infringes sections 2(a), 2(b), 2(d) and 15 of the *Charter of Rights and Freedoms*, namely its rights to freedom of religion, freedom of expression, freedom of association and freedom from discrimination. It seeks an order terminating the audit as a remedy under section 24 of the *Charter*.

[11] MAC divides its challenge to the audit into three categories: (i) the risk-based assessment process used to consider which charities are assessed for audit; (ii) the decision to audit MAC; and (iii) the preliminary findings of the audit contained in what is known as an Administrative Fairness Letter.

(i) The Risk Based Assessment Process

[12] The CRA oversees charities through its Charities Directorate. The Charities Directorate has two separate groups that conduct audits. The first is the "Compliance Division". It handles the majority of audits and addresses the more common issues that arise with respect to charitable status like the adequacy of the charity's books and records. The second group is the "Review and Analysis Division", known by the acronym "RAD". RAD is responsible for preventing the abuse of registered charities by terrorist groups. It uses what it refers to as a risk-based assessment process to determine whether a charity should be audited.

[13] MAC submits that the way in which RAD selects charities for audits is biased in a way that violates its *Charter* rights. MAC relies on two points for this submission.

[14] First, MAC submits that between 75% and 85% of charities that have had their charitable status revoked between 2008 and 2015 were Muslim. In support of this submission MAC points to a CBC News story which reported that between 2008 and 2015, 75% of the charities who had their charitable status revoked by RAD were Muslim charities and on a hearing before the Standing Senate Committee on Human Rights on November 28, 2022, at which senior CRA personnel testified that, since 2008, RAD has completed 39 audits, 14 of which resulted in a revocation of charitable status, and that 12 of those revocations (or 85%) involved Muslim charities.

[15] Second, MAC submits that RAD relies on a "risk-based assessment" that identifies Muslims as a source of terrorist financing risk. MAC argues that RAD's analysis is rooted in three publications that overtly identify Muslim organizations as a threat of terrorist financing risk. MAC submits that the starting point in these documents is wrong because they associate the risk of terrorist financing with minority groups it labels as "foreign", in particular Muslim entities. This, says MAC, paints all Muslim Canadians with the same brush and regards organizations like MAC as inherently suspect.

[16] The first publication is a 2013 publication of the federal government entitled *Building Resilience Against Terrorism: Canada's Counter-Terrorism Strategy*. The document states, among other things that "[v]iolent Islamist extremism is the leading threat to Canada's national security. The fuller context of that statement is as follows:

> Violent Islamist extremism is the leading threat to Canada's national security. Several Islamist extremist groups have identified Canada as a legitimate target or have directly threatened our interests. In addition, violent "homegrown" Sunni Islamist extremists are posing a threat of violence. As the 1985 Air India bombing demonstrates, terrorist threats to Canada can also come from other sources. Other international terrorist groups like Hizballah or the remnants of the Liberation Tigers of Tamil Eelam continue to pose a threat, whether it is a direct attack against Canada and its allies, or the use of our territory to support terrorism globally.
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> ….
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> International terrorism is not a new phenomenon in Canada. The threat posed by violent Sunni Islamist extremists may be Canada's most pressing concern, but Canada faces a broad range of international terrorist threats. It is worth recalling the tragic bombing of Air India Flight 182 in 1985 - the worst terrorist attack in Canadian history - was conducted by Sikh extremists and claimed 329 lives, 280 of them Canadian.
>
> ….
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> For these reasons, Canada must actively monitor the full spectrum of terrorist threats. Canada has listed under the Criminal Code more than 40 terrorist entities that are considered a threat, having either knowingly engaged in or facilitated international terrorism. These entities include the Liberation Tigers of Tamil Eelam (LTTE), the Euskadi ta Askatasuna (ETA), the Fuerzas Armadas Revolucionarias de Colombia (FARC), Lashkar-e-Tayyiba (LeT), Hamas and Hizballah.

[17] In this fuller context, *Building Resilience* does not single out Muslims. It singles out geopolitical threats which change over time. In recent years it happens to be that those threats come from countries with terrorist groups that claim legitimacy by invoking and distorting Islam.

[18] The second publication is a report from the Financial Action Task Force ("FATF"). FATF is an intergovernmental organization formed by the G7 group of countries to combat money

laundering. The FATF report refers to 10 terrorist groups, eight of which are Muslim organizations.

[19] FATF has recognized the risk of terrorist abuse within Canada's non-profit sector, including registered charities, as a particular concern.

[20] In a report published in June 2014, FATF examined more than 100 case studies submitted by FATF members, including Canada. The report identified vulnerabilities inherent in the non-profit sector. In more than half of the cases, attempts were made to divert funds raised legitimately by a non-profit organization to finance terrorist activities. In other cases, the risk involved officials of a non-profit organization maintaining an affiliation with a terrorist organization either wittingly or unwittingly. The majority of non-profit organizations described in the case studies were legitimate with the risk of terrorist abuse commonly resulting from weaknesses in internal governance and/or external oversight.

[21] The third publication was issued by the federal government in 2015 and is entitled *The Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada*. It is often referred to by the acronym "NIRA" which refers to "National Inherent Risk Assessment". It lists 10 terrorist groups, of which eight are identified as Muslim, one as Sikh and one as Tamil.

[22] MAC submits that, individually and collectively, these three publications paint a picture of terrorist financing as a problem that is foreign and associated with minority groups in Canada – predominantly Muslims.

[23] I am unable to accept that these submissions amount to a *Charter* violation on the record before me.

[24] The complaint is that these documents identify the risk of terrorist financing as foreign, and that violent Islamist extremism is the leading threat. That alone does not amount to a *Charter* violation. I have not been led to any information to suggest that the threat of terrorist financing is not foreign. Nor have I been taken to any information to suggest that "violent Islamist extremism" is not the leading threat. It is fair to say that, at least in the public consciousness, foreign terrorist organizations loom larger than domestic terrorist organizations. While this might not necessarily be accurate, the applicant has given me no information to suggest that focusing on foreign terrorist activity constitutes a security error of such a degree that it amounts to a *Charter* violation of Canadians who may also share the same nationality or religion as those of terrorist groups.

[25] Even if I accept that 12 out of 14 revocations of charitable status since 2008 related to Muslim charities, that does not necessarily mean that the "risk-based assessment" CRA claims to use unfairly targets Muslim charities. I have no information about the activities of the 12 charities whose status was revoked. I have no information about how the grounds for those revocations compare to grounds of revocation more generally either as found by the courts, contained in CRA guidelines or policies or as compared to the treatment of other, non-Muslim charities.

[26] One of the sad realities of the world we live in is that there are a wide range of terrorist groups that cloak themselves in the banner of certain nationalities, ethnicities or religions. They do not reflect those groups but pervert aspects of those identities for their own criminal ends. It is perhaps not surprising that agencies whose mandate it is to monitor terrorist threats would focus on the more prominent threats at any one time. In recent years, one major source of such threats has involved groups that pervert Islam and falsely cloak themselves in its mantle.

[27] I note that the documents the applicant challenges also refer to Sikh and Tamil terrorist groups. That comes as no particular surprise either given the history of ethnic conflict in India and Sri Lanka and the sizable Sikh and Tamil immigrant populations in Canada. In recent years Canada has attracted immigrants from Muslim countries whose civil strife has made Canada an attractive haven. Unfortunately, criminal or terrorist groups often try to channel money through safe foreign sources. While the overwhelming majority of those immigrants have nothing to do with and want nothing to do with terrorist organizations, there are inevitably a tiny number of Canadian residents (often Canadian born) who, wittingly or unwittingly, become involved with such organizations. There is nothing inherently improper in governments being alive to those threats and monitoring them. That does, however, mean that certain groups are more vulnerable to terrorist infiltration than others, depending on the nature of geopolitical risks at any one point.

(ii) RAD's Referral to an Audit

[28] The second step of the process to which the applicant objects is RAD's referral of the applicant to an audit. The referral is contained in an Audit Referral Analysis that sets out the various information RAD reviewed in arriving at the decision to have an audit conducted and extends to 65 pages.

[29] MAC objects that the referral letter is replete with references to what appear to be highly questionable sources including those of individuals whose public comments are racist and Islamophobic and cites purveyors of false conspiracy theories. While that appears to be the case, CRA explains that RAD sets out its complete analysis in the referral letter, including the dubious sources of information it has come across. In many cases the Audit Referral Analysis makes note of the unreliable nature of the sources.

[30] The analysis also contains more objective sources of information that were relied on in deciding to conduct an audit.

[31] It appears, for example, that MAC first came to the attention of RAD in part based on classified information that RAD received in 2009 from the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). That information is redacted in the Audit Referral Analysis pursuant to s. 38 of the *Canada Evidence Act*.[1]

1 *Canada Evidence Act*, RSC 1985, c C-5

[32] The Audit Referral Analysis also relied on the following additional considerations to refer MAC to an audit:

i. MAC's voluntary reporting indicates that it had received more than $4.5 million in donations from foreign sources between 2012 to 2014. This raised questions about whether the sources of foreign funding exercised influence over MAC.

ii. Some of the foreign funders, like the Qatar Charity Society, are believed to support the work of terrorist groups, notably Hamas, through its membership in the Union of Good which is part of Hamas' fundraising network, and which the US Department of the Treasury designated as an organization "created by Hamas leadership to transfer funds to the terrorist organization…"

iii. RAD had concerns about the relationship between MAC and the Muslim Brotherhood which RAD understood to be a foreign political party. MAC's website indicated its affiliation with the Muslim Brotherhood.

iv. Between 2009 and 2014, MAC's assets, including real estate holdings, had grown from $16 million to approximately $47 million. According to RAD, the rapid accumulation of real property raised concerns that the charity was potentially pursuing property accumulation as an investment strategy, which is not a charitable purpose.

v. MAC appears to have allowed collection boxes for the International Relief Fund for the Afflicted and Needy (IRFAN) to be on display at some of its functions after the government of Canada had listed it as a criminal entity.

[33] I agree that much of the information listed in the previous paragraph might not support adverse audit findings against MAC. By way of example, redacted evidence that even I have not seen on a judge's eyes-only basis would rarely amount to grounds for sanctions against MAC. The fact that a donor to a charity also donates money to illegal causes does not mean that the charity is involved in the illegal causes that the donor supports.

[34] In a similar vein, MAC explains that there is a distinction between the Muslim Brotherhood as a political party in Egypt (and some other countries) and the religious ideology of Imam Hassan al-Bann that led to the establishment of the Muslim Brotherhood as a religious and philosophical movement. A rough, directional analogy might be the distinction between Christianity and the Christian Democratic parties in certain European countries. MAC notes that adopting the religious philosophy of the Muslim Brotherhood is not the same thing as supporting the political ideology of the Egyptian Muslim Brotherhood. MAC submits that RAD has conflated these two separate concepts.

[35] It is important to remember, however, that at this stage of the analysis, the information in paragraph 32 above was only used to decide whether to initiate an audit of MAC. It was not used to impose any sanctions on MAC.

[36] The quality of information needed to justify an investigation is substantially lower than the quality of evidence needed to make findings. When considering whether to investigate, and even during an investigation, one can expect that an investigator would come across information of dubious reliability. When deciding to investigate, an investigator might also misunderstand information, like the distinction between the Muslim Brotherhood as a political party and the Muslim Brotherhood as a philosophical or religious movement.

[37] I was not directed to any authority about the standards an investigating body must meet to justify commencing an investigation or the point at which even the commencement of an investigation can amount to a breach of *Charter* rights. In these circumstances I am not prepared to find that the decision to refer MAC to an audit amounted to a breach of *Charter* rights.

(iii) The Audit and the Administrative Fairness Letter

[38] The RAD audit itself was carried out over 13 months. It involved 30 visits to MAC properties, 27 interviews, a review of approximately one million financial transactions in 60 bank accounts, a review of 415,874 emails, and a review of 63,523 other files.

[39] The audit led CRA to issue what is referred to as an Administrative Fairness Letter. An Administrative Fairness Letter is a document that sets out CRA's preliminary findings and recommendations. In the case of the applicant, the Administrative Fairness Letter recommends that its charitable status be suspended.

[40] A charity that receives an Administrative Fairness Letter has the opportunity to respond to it. A charity's response is then followed by a period of dialogue between the parties which will lead to a final determination of findings and sanctions by CRA. The charity then has a right of appeal to the Appeals Branch of CRA. If the Appeals Branch does not render a decision within 90 days or if the charity is unsatisfied with the decision of the Appeals Branch, it has a further right of appeal to the Tax Court of Canada with respect to any taxes or penalties and to the Federal Court of Appeal with respect to any notice of intention to revoke its charitable status.

[41] The applicant raises several objections to the Administrative Fairness Letter which it submits is rooted in Islamophobia and a profound misunderstanding of Islam. By way of summary, the applicant's objections fall into three broad categories:

i. Issues surrounding the credibility of the applicant's representatives.

ii. The applicant's involvement with the Muslim Brotherhood.

iii. The use of resources for non-religious purposes.

[42] By way of context for the latter two objections, CRA takes the position that in order to maintain its charitable registration, a charity must, among other things, operate exclusively for the charitable purpose(s) for which it is registered. MAC is registered for religious purposes.

i. Credibility of the Applicant's Representatives

[43] The applicant objects to the fact that CRA did not believe the information it received from the applicant's representatives in interviews.

[44] In certain cases, CRA noted that the responses it received to questions from the applicant's head office staff, especially about the applicant's relationship to the Muslim Brotherhood, were "less than clear." This prompted the CRA to ask similar questions of staff at other locations. CRA formed the view that the answers from all staff were prepared answers. CRA stated in the Administrative Fairness Letter that:

> Words that are spoken during an audit are often measured, calculated, and sometimes vague. Documents, emails, and financial transactions that occur during an audit period are snapshots of an event in time. They are written, produced, or transacted in an environment where there is little need for the person or organization to be cautious. They are often a realistic glimpse at the Organization's true intentions.

[45] The applicant submits that this is consistent with an Islamophobic narrative among some "national security pundits" about the inherent unreliability of Muslims. These pundits invoke a medieval Islamic term of art known as "taqiyya" to explain why Muslims are apparently unreliable. Taqiyya refers to the act of concealing one's beliefs or identity when a person's life, property, or reputation is in danger. It is primarily associated with certain minority Shia Muslims who, because of religious persecution by some Sunni majorities, hid their true beliefs.

[46] I was not taken to any evidence to suggest that individuals within RAD or the CRA knew about taqiyya or acted in a way to suggest that Muslims were inherently unreliable. In this instance, the view CRA's approach appears to be nothing more than than the standard litigation practice of preferring contemporaneous documents or statements over contradictory statements made during litigation.

ii. Involvement with the Muslim Brotherhood

[47] The applicant objects to the conclusion that CRA appears to draw in the Administrative Fairness Letter to the effect that the applicant is politically involved with the Muslim Brotherhood.

[48] The applicant submits that there is a distinction between the Muslim Brotherhood as a political party in Egypt and the religious and social philosophy of Imam Hassan al-Bann that led to the establishment of the Muslim Brotherhood. The applicant notes that adopting the religious philosophy of the Muslim Brotherhood is not the same thing as supporting the political ideology of the political party known as the Egyptian Muslim Brotherhood.

[49] The Administrative Fairness Letter also concludes that the applicant had political links to the Muslim Brotherhood political party because two of its former directors acted as

advisors to Mohammed Morsi, the Muslim Brotherhood candidate in the Egyptian election of 2012. Mr. Morsi won that election and was widely recognized as Egypt's legitimate President, including by Canada. Mr. Morsi was subsequently deposed in a military coup.

[50] This issue raises more serious concerns. I very much doubt that the charitable status of the United Way would be revoked if two of its former directors happened to participate in the election campaign of a Canadian political party. To the extent that some of the religious philosophy of the Muslim Brotherhood might also be reflected in the political party of the same name, I very much doubt that a Christian church would have its charitable status revoked if it made statements that were similar to ones made by certain Canadian political parties to promote greater social or economic equality. Indeed, Canadian churches do so regularly. A brief look at the websites of the United, Anglican, Presbyterian and Catholic churches of Canada discloses web links about social action on issues like climate change, the economy, housing, resource extraction, Palestinian rights, and LGBTQ+ rights that are similar to statements made by some Canadian political parties. No one suggests their charitable status should be revoked because of that. Indeed, many religions find their origin more in social policy or social philosophy than they do in theocratic dogma. The golden rule lies at the heart of many religions. It is good social policy, not theology.

iii. Non-Charitable Use of Resources

[51] The applicant objects to CRA proposing to revoke its charitable status because it was not using its premises and resources exclusively for religious purposes. In this regard CRA points to allegedly non-religious activities such as a soccer league for Muslim youth and daycare centres for the Muslim community. In this regard, the Administrative Fairness Letter states among other things:

> Although the above description states that the social activities during its MAC Youth Socials events are "incidental and ancillary" to its religious content, the Organization has not demonstrated that this is the case. Youth social activities were held frequently and consistently as part of the programming in various projects and for the most part, there does not appear to be any focus on religious programming. For example, makeup classes, sugar shack, puppet shows, ski trips, dodgeball, and movie and karaoke nights do not focus on religious programming.
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> …
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> In addition, the Organization also provides unstructured social or recreational activities. For example, the CI IC property has a large youth Centre on the fourth floor. The youth centre has ping-pong, football and air hockey tables, a series of sofas, and a television. In one corner, there is a play mat with toys for smaller children.

[52] Here again, I share the applicant's concerns. Recall that the audit was prompted by a concern about links to terrorism. It is difficult to understand how makeup classes, sugar shacks, puppet shows, ski trips, dodgeball, movie and karaoke nights, ping-pong, air hockey tables, or "a play mat with toys for smaller children" relate to terrorism. Once again, I would be surprised if a church or synagogue had its charitable status revoked because it offered any of these activities.

[53] I would have thought that providing a forum for community and social cohesion is incidental to any religious organization. Even more so for religious organizations that cater to immigrant communities. Immigrants can face serious isolation when they first come to Canada. A religious organization that gives them a social focus and sense of community is essential for their well-being and for their integration into Canadian society. A religious organization that offers nothing but dogma is unlikely to provide much utility in a modern, pluralistic society. To succeed, it must be able to offer some sense of community and enjoyment that goes beyond religious doctrine.

[54] In a similar vein, the respondent seeks to revoke the applicant's charitable status because it organized Eid festivals and other community events where, in the view of the CRA, the social aspect of the activity considerably outweighed the religious aspect of the activity. Quite apart from the fact that social activity can be an essential part of religious activity[2] in the sense that observation of a religious event promotes a sense of community, I again find myself asking whether CRA would revoke the status of a Christian charity because it organized Christmas parties or Thanksgiving dinners or whether it would revoke the status of a Jewish charity because it organized Seders or Succoth dinners for new immigrants.

[55] The Administrative Fairness Letter does, however, also contains findings that may well amount to objective infractions of the rules that apply to charities. I ask myself whether a Christian or Jewish charity would have its charitable status revoked for similar infractions or whether they would receive some sort of guideline, warning, reprimand or other sanction short of revocation of charitable status. These include the degree to which properties earn rental income and failure to maintain adequate books and records.

[56] Other allegations are more serious and include making premises available for uses deemed contrary to public policy and permitting funds to be raised by IRFAN at MAC events after IRFAN had been found to be a terrorist organization. These instances also involve a matter of degree. Was the infraction an instance of an individual within a larger organization engaging in conduct on his/her own or was it conduct that was either sanctioned by the applicant or conduct of which the applicant ought to have been aware. I do not have enough information from either side on the details of the evidence in this regard to come to a determination.

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2 *Loyola High School v. Quebec*, 2015 SCC 12 at para. 60; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 64.

Prematurity

[57] As noted earlier, the Administrative Fairness Letter reflects a preliminary view of the CRA and a preliminary recommendation to revoke the applicant's charitable status. There is a principle of law which I will refer to as prematurity, although it also goes by a variety of other names. The prematurity principle holds that, absent "exceptional circumstances," a court will not interfere in an ongoing administrative process until that process has been completed.[3] The Federal Court of Appeal helpfully summarized the principle in *C.B. Powell Limited v. Canada (Border Services Agency)*[4] as follows:

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.[5]

[58] The case law holds that the concept of prematurity allows a court to dismiss a proceeding on its own motion.[6]

[59] Although CRA raised the issue of prematurity in a general way in its factum and during oral argument before me, CRA provided no authority on the point. After seeking assistance from a law clerk to conduct further research into the point, I sent the parties a number of authorities on the issue and invited them to make further submissions on the point. Both parties made additional submissions in writing.

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3 See for example: *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61 at para. 31; *Kourtessis v. Minister of National Revenue*, 1993 CanLII 137 (SCC), [1993] 2 S.C.R. 53 at para. 96; *Canada (Attorney General) v. Haydon*, 2018 FCA 88 at para. 3.
4 *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61.
5 *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61 at para. 31.
6 *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at para. 38; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at para. 22; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2017 FCA 241, at paras. 47 to 56.

[60] As noted earlier, there are several steps that remain available to the applicant before resorting to the court including responding to the Administrative Fairness Letter, engaging in dialogue with CRA, and appealing to the appeals branch within CRA. The legislation then provides for further appeals to the Tax Court of Canada in respect of any financial penalties and to the Federal Court of Appeal if CRA ultimately decides to revoke its charitable status. The applicant is free to raise *Charter* arguments once a final decision has been made and the applicant appeals from it.

[61] The applicant submits that expecting it to await a final ruling from CRA is unrealistic and formalistic. It argues that its challenge is not to a final determination but to the CRA process which it submits has been tainted by bias from the start. As noted earlier in these reasons, I am sympathetic to some of the applicant's arguments in this regard but not to others. Even where I am sympathetic though, neither side has given me any authority to inform me about the degree of social or community activity that would fall afoul of the standards applicable to an organization that is charitably registered for religious purposes. Nor have I been given any authority that informs me about the circumstances in which other charities have had their charitable status revoked or have received some lesser sanction.

[62] In addition, the applicant argues that it is extraordinarily unlikely that CRA will reverse itself and change the views expressed in the Administrative Fairness Letter given the amount of time and energy it expended on the audit. That, however, is not the test. The test for a court to intervene in an administrative process before it has been completed is the existence of "exceptional circumstances."

[63] Exceptional circumstances has been narrowly defined. In *Operation Dismantle Inc. v. The Queen*,[7] Dickson C.J. required a party seeking to restrain government action to demonstrate a "high degree of probability" that a *Charter* infringement will occur before the court grants relief.[8] Given that there is an appeal from any decision to revoke the applicant's charitable status in which *Charter* issues can be argued, there is, by definition, no high probability that the applicant's *Charter* rights would be infringed.

[64] In *C.B. Powell Limited v. Canada (Border Services Agency)*,[9] the Federal Court of Appeal noted that:

> Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process,

7 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441.
8 *Ibid.* at p. 458.
9 *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61

> as long as that process allows the issues to be raised and an effective remedy to be granted.[10]

[65] The issues of procedural fairness, bias and the presence of an important constitutional issue which did not amount to exceptional circumstances in *Powell* are the very ones the applicant cites to justify interference with the administrative process here.

[66] The prematurity principle is not simply a dry, technical rule. It goes to the heart of the operation of the courts. It is supported by a variety of practical and principled considerations.

[67] As a practical matter it relieves courts of the obligation to consider matters that they may never have to consider.[11] Courts are extremely overburdened. At the moment, the waiting time for a hearing of more than 2 hours in Toronto is 15 months! With those sorts of delays, courts should not be burdening themselves with issues that they may never have to decide because the discussions and appeals that are part of the internal administrative process may resolve the matter without ever having to go to court.

[68] Similarly, from a practical perspective, requiring parties to work through the administrative process takes certain issues off the table or refines them to a narrower scope. That is particularly relevant here. The Administrative Fairness Letter is 151 single spaced pages long. The applicant's response is 280 single spaced pages long. The issue before me is not one that requires the court to consider limited portions of either of those documents. Rather it is an attack on the entire process that would require the court to parse through all 431 single spaced pages to form an impression of the matter as well as the 65-page RAD audit referral letter. That sort of review would require the court to address a great deal of detail that would usually fall by the wayside as issues become more refined as the process develops. Awaiting completion of the administrative process also means that the court will have the benefit of final reasons from the administrative body[12] rather than having a work in progress.

[69] As the Federal Court of Appeal put it in *Federation of Canadian Municipalities v. Allstream Corp*.,[13] the Court should wait until it has a "concrete case and a reasoned decision by the" administrative body that explains the legal basis of its decision and the relevant regulatory context.[14] As the court also recognized in *Federation of Canadian Municipalities*, I appreciate that my approach may put the applicant to the expense of further exchanges with CRA and the pursuit of an internal appeal within CRA with the possibility that the outcome of those discussions and appeals maintains the

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10 *Ibid.* at para 33 citing *Harelkin*, above; *Okwuobi*, above, at paragraphs 38–55; *University of Toronto v. C.U.E.W., Local 2* (1988), 1988 CanLII 4757 (ON SC), 65 O.R. (2d) 268 (Div. Ct.).
11 *Canada (Attorney General) v. Haydon*, 2018 FCA 88 at para. 3.
12 *Canada (Attorney General) v. Haydon*, 2018 FCA 88 at para. 3; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61 at para 32.
13 *Federation of Canadian Municipalities v. Allstream Corp*., 2004 FCA 96
14 *Federation of Canadian Municipalities v. Allstream Corp*., 2004 FCA 96 at para. 6.

recommendation to revoke the applicant's charitable status. In my view, however, the interests of the administration of justice are better served by not having the court address the issue until the issues have been refined and crystallised.[15]

[70] In *Taylor v. Aviva Canada Inc.*,[16] the Divisional Court found that, although the court retains discretion to intervene before an administrative process has worked itself out, if early intervention is exercised too frequently it will risk fragmenting administrative proceedings and increasing costs as parties seek to shut down government action at ever earlier stages.[17]

[71] There are also important principled reasons for requiring parties to complete the administrative process.

[72] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,[18] the Supreme Court of Canada noted that when addressing *Charter* issues, courts must be mindful of the separation of functions between the legislative, executive and judicial branches of government. The Supreme Court of Canada summarized the concerns that such preliminary interference creates at paragraph 34 of *Doucet* when it stated:

> In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role vis-à-vis other branches of government.

[73] The Court went on to observe that when awarding remedies, courts

> "must not depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matters in those disputes"[19]

and that courts must be mindful

> "of the decisions and functions for which [their] design and expertise are unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are

15 *Ibid.* at para. 7.
16 *Taylor v. Aviva Canada Inc*., 2018 ONSC 4472.
17 *Taylor v. Aviva Canada Inc*., 2018 ONSC 4472 at para. 19.
18 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 SCR 3
19 *Ibid*. at para. 56.

> normally charged and for which they have developed procedures and precedent."[20]

[74] Those comments are particularly appropriate here. Courts are designed to adjudicate disputes about well-defined issues. They are not designed to investigate organizations to determine whether an audit is appropriate. They are not designed to fashion an audit process. They are not designed to conduct audits or make decisions in the context of an audit. The case as presented by the applicant would require the court to conduct each of these functions because the court was not provided with appropriate benchmarks against which to measure RAD's or CRA's decisions. While courts are designed to adjudicate a specific dispute about each of these three steps, they are not designed to carry out those steps from the outset. The distinction is a critical one. Determination of a dispute means letting a process run to completion, having a government agency come to a final decision, having the agency explain that final decision and having a complainant raise specific, focussed complaints about that decision on which the parties can disagree, provide expert evidence and make submissions. Intervening before that stage of refinement has courts involved in the actual execution of day to day government tasks or has them reviewing the day to day execution of those tasks before those tasks have even led to a dispute. While the applicant may say there is a dispute now because it disagrees with a preliminary recommendation, that is not yet a dispute because the recommendation is only preliminary.

[75] In some respects, the current status of the audit can be seen as a work in progress. Intervening now would be akin to the court interfering in the middle of a process and telling a party that it could not think a certain thought as it was working through a problem. When working out a problem we tend to do so by taking certain tentative approaches. When we review those approaches, we have different ideas, we see errors in the approaches that we did not see when we first articulated them. Government agencies are entitled to work those issues out in good faith. For courts to interfere in mid-process would in fact prevent the development of proper decision making and problem solving within government.

[76] In *Kourtessis v. Minister of National Revenue*, [21] the Supreme Court of Canada articulated the approach slightly differently when stating at paragraph 96 that:

> The court is justified in refusing to entertain the action if there is another procedure available in which more effective relief can be obtained or the court decides that the legislature intended that the other procedure should be followed.

[77] Here the legislature intended that another procedure be followed with respect to Administrative Fairness Letters than judicial intervention. Parliament established a scheme of response and dialogue in answer to Administrative Fairness Letters, not judicial intervention. It then established a further scheme of internal appeal in response to final

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20 *Ibid.* at para. 57.
21 *Kourtessis v. Minister of National Revenue*, 1993 CanLII 137 (SCC), [1993] 2 S.C.R. 53

determinations. Only when the processes of response, dialogue and internal appeal were exhausted did Parliament intend for judicial intervention to occur. Although the court always retains the discretion to intervene at an earlier stage if necessary,[22] that discretion must be exercised with restraint[23] and reserved for truly unusual cases because early intervention may compromise carefully crafted, comprehensive legislative regimes.[24]

[78] In *Strickland v. Canada (Attorney General)*,[25] the Supreme Court of Canada addressed in more detail the circumstances in which courts could entertain a judicial review of administrative action before the action was complete. The court noted that a first step is to consider whether there is an adequate alternative remedy. The alternative remedy here is to complete the administrative process and an ultimate appeal to the Tax Court of Canada or the Federal Court of Appeal depending on the penalty imposed.

[79] The mere presence of an alternative remedy does not, however, end the analysis. The court should then consider whether the alternative remedy should lead the court to decline jurisdiction. That consideration is not a matter of following a checklist but of considering all relevant factors. The list of relevant factors is not closed and may vary from case to case. Relevant factors can include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum that could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost. This, said the Court, ultimately calls for a type of balance of convenience analysis which balances the statutory framework out of which the application arises against the applicant's need for judicial intervention.[26] Applications that are unduly disruptive of the normal process will generally be denied relief.[27]

[80] Applying that analysis here leads me to dismiss the application as premature. As noted, the administrative process offers an alternative remedy that ultimately leads to an appeal to either the Tax Court of Canada or the Federal Court of Appeal. The convenience of that remedy is no different than the present application except that this application avoids the process of response and dialogue with CRA and the CRA's internal review process. As noted earlier, however, those processes are critical to the development of a final decision and the refinement of issues that make judicial proceedings more manageable. The nature of the error alleged is that of a *Charter* violation. The Federal Court of Appeal is a forum that is at least equally, if not better, equipped to address that issue as this Court is. When addressing the balance of convenience, I see no benefit to entertaining this application. To do so would disrupt the statutory review process for no good reason. As noted, the avoidance of that process might be preferable to the applicant but creates a bad precedent

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22 *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 at paras 224-225.
23*Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 SCR 289 at para. 22.
24 *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para. 36.
25 *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 at paras 40-44.
26 *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 at para. 43.
27 *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 at para. 44.

and makes the process of determining this application substantially more onerous than it otherwise would be.

[81] MAC submits that the foregoing authorities on prematurity have no bearing on this case because those authorities relate to judicial review of decisions of a government body while this application is one for relief under section 24 of the *Charter*. MAC submits that this "simple reality is the complete answer" to the issue of prematurity. In my view, the prematurity cases arising out of judicial review have equal application here.

[82] The reason for the development of the principle of prematurity has little, if anything, to do with the technical form of action but much to do with concerns about the appropriate use of judicial resources, the need for courts to have defined issues before them, respect for the distinctions between the different branches of government and the general need to allow a government department to complete its work on an issue before intervening. Those concerns have as much force here as they do in any formal judicial review.

[83] MAC further submits that test for determining whether a *Charter* application is premature was established by the Supreme Court of Canada in *R. v. Mills* as follows:

> In determining whether a constitutional challenge is premature, one must ask whether the record provides sufficient facts to permit a court to adjudicate properly the issues raised.[28]

[84] MAC submits that this test has been met because it objects to the unconstitutional process to which it has already been subjected. This, submits MAC, turns on past events, not on future events.

[85] I do not quite see it that way. Although the risk-based assessment process and RAD's decision to refer MAC to an audit are past decisions, as noted earlier in these reasons, the record before me on this application does not provide me with sufficient information to conclude that those decisions constituted *Charter* breaches. Although the audit itself has occurred, it has not led to a *Charter* breach because no decision has been made. Even if a decision is made that upholds the CRA recommendation to revoke MAC's charitable status, Parliament has set up an appeal route for those decisions that should be respected.

[86] MAC relies on two cases that hold that *Charter* rights can be asserted in the courts where there is "an appropriate factual basis" to decide the issue.[29] In my view, those cases are distinguishable.

[87] The first case is *R. v. Mills*.[30] In *Mills* an accused argued that a so-called "rape shield" law violated his right to a fair trial because it prevented him from accessing the complainant's

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28 *R. v. Mills*, [1999] 3 SCR 668 (headnote).
29 *R. v. Mills*, [1999] 3 SCR 668 at paras. 41-42.
30 *R. v. Mills*, [1999] 3 SCR 668

medical records. The Crown asserted the principle of prematurity because the accused had not sought production of records. The Supreme Court of Canada concluded that the challenge was not premature because there was a sufficient basis to decide the issues. In doing so, however, the court noted at paragraph 36 that:

> The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. Establishing that the legislation is unconstitutional in its general effects would suffice, as s. 52 of the *Constitution Act*, 1982, declares a law to be of no force or effect to the extent that it is inconsistent with the Constitution. (Underscoring in original)

[88] Similarly, in the second case that MAC relies on, *Henry v. Canada (Attorney General)*,[31] the applicant challenged statutory voter identification requirements. There too, the court held that the application was not premature even though the applicant had not yet been denied the right to vote.

[89] Both *Mills* and *Henry* dealt with situations where the law as a whole was challenged as unconstitutional. The issue in those cases was not the application of the law to the facts of a particular case but whether the standards and procedures set out in the statutes themselves were unconstitutional. That is different from the case before me. MAC does not challenge CRA's ability to conduct audits. It challenges the particular decisions made in respect to it. For a court to review that conduct, the decision-making process should be completed so that the court knows precisely what it is dealing with.

[90] MAC further argues that the Supreme Court has cautioned that courts "must avoid a narrow, technical *Charter* interpretation which could subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*"[32] and that someone whose *Charter* rights have been infringed must always be able to apply to a court of competent jurisdiction."[33] While I agree with those principles, they must also be read in a manner that is consistent with the principle of prematurity and its constituent underlying policies.

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31 *Henry v. Canada (Attorney General)*, 2010 BCSC 610, aff'd. 2014 BCCA 30, leave to appeal refused 2014 CanLII 38981 (SCC).
32 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 23; see also *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC); *R. v. Big M Drug Mart Ltd*., 1985 CanLII 69 (SCC); *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC); *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC); *Vriend v. Alberta*, 1998 CanLII 816 (SCC).
33 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 45.

Late Breaking Developments

[91] As I was finalizing these reasons the day before their release, I was advised that CRA had very recently released its final decision in this matter. There was some suggestion that I may wish to let the parties confer and get back to me with a suggested course of action to address what further materials (if any) should be placed before me, what further submissions (if any) were appropriate, and any other issues that may arise because of this development.

[92] I advised the parties that I did not want to know what the CRA decision was and called a case conference to discuss what steps, if any, should be taken. To help the parties prepare for that case conference, I advised them of my inclination.

[93] My inclination was to release these reasons because the issue was put before me in a certain way and my decision should be based on the way the issue was framed before me. In addition, I had raised the issue of prematurity with the parties. If there were a need for further submissions in light of the CRA's final decision, that would give even more force to the concerns involved with the prematurity principle. That is to say, until the court has a fixed decision, there risks being an ever changing landscape that makes the issues shift and calls for shifting analyses and shifting reasons. Finally, given that I did not believe the release of the reasons prejudiced either side, I was inclined to release them, subject to hearing submissions on the point.

[94] By the time of the case conference, both parties agreed that the reasons should be released. The parties asked that I refer to these events in my reasons which I have now done as a result of that request.

Conclusion and Costs

[95] Although I sympathize with many of the applicant's arguments, there are other issues that CRA has raised which might provide a more solid basis for some sort of corrective action. The combination of the lack of a final decision and the absence of benchmarks against which to measure CRA's conduct leads me to decline to decide this case. I therefore dismiss the application as being premature. In doing so, however, I stress that I have, in these reasons, not made any findings that are intended to be binding on any future court that may decide the matter. As a result, my reasons should not give rise to issues of *res judicata* issue estoppel or abuse of process to the extent that, identical or similar issues arise again in a future challenge arising out of the audit or the steps that led to it.

[96] If either party seeks costs arising out of this application, the party seeking costs should post written cost submissions onto CaseLines within 21 days of receiving these reasons. The responding party will have 14 days to respond with a further 5 days for reply. The party seeking costs should advise me by email when all materials have been posted to CaseLines.

Koehnen J.

Released: September 13, 2023

CITATION: Muslim Association of Canada v. Attorney General of Canada, 2023 ONSC 5171
COURT FILE NO.: CV-22-00679625-0000
DATE: 2023-09-13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MUSLIM ASSOCIATION OF CANADA

Applicants

– and –

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

Koehnen J.

Released: September 13, 2023