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Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)

Federal Court of Appeal Decisions

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CORAM: LÉTOURNEAU J.A.

ROTHSTEIN J.A.

SHARLOW J.A.

BETWEEN:

CANADIAN MAGEN DAVID ADOM FOR ISRAEL/
MAGEN DAVID ADOM CANADIEN POUR ISRAËL

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario on June 18, 2002.

Judgment delivered at Ottawa, Ontario on September 13, 2002.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

LÉTOURNEAU J.A.

DISSENTING REASONS BY:

ROTHSTEIN J.A.

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MAGEN DAVID ADOM CANADIEN POUR ISRAËL

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT**SHARLOW J.A.**

[1] This is an appeal under subsection 172(3) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, from a notification dated July 10, 2001 that the Minister of National Revenue proposes to revoke the appellant's registration as a charitable organization. For the reasons stated below, I have concluded that this appeal should be dismissed.

Statutory framework

[2] Registration under the *Income Tax Act* gives a charity two important tax advantages. One is that, like other organizations established and operated for a purpose other than profit, a registered charity is exempt from tax on its own income. The other advantage is that a registered charity is entitled to issue official receipts for gifts it receives, so that its donors may claim tax relief. This tax relief represents an indirect tax subsidy to encourage the work of registered charities.

[3] Simply serving the public good does not entitle an organization to become registered as a charity under the *Income Tax Act*. Parliament has targeted the tax advantages of registration to organizations that meet specific requirements as to their formal objectives and their actual activities. The statutory requirements vary depending in part upon whether the charity is a "charitable organization" or a "charitable foundation" as defined in section 149.1 of the *Income Tax Act* (enacted by S.C. 1976-77, c. 4, s. 60,

effective January 1, 1977).

[4] A "charitable foundation" is a charity that raises money for one or more other organizations that meet the definition of "qualified donee". That definition is met by a registered charity, a registered Canadian amateur athletic association, a housing corporation that meets certain criteria, a Canadian municipality, the United Nations or an agency of the United Nations, a foreign university that meets certain criteria, a foreign charity to which a gift has been made by the Crown in right of Canada within a certain period, and the Crown in right of Canada or a province.

[5] The term "charitable organization" is defined in subsection 149.1(1) of the *Income Tax Act*. As far as is relevant for the purposes of this case, that definition reads as follows:

"charitable organization" means an organization, « oeuvre de bienfaisance » Oeuvre, constituée whether or not incorporated, ou non en société :

(a) all the resources of which are devoted to charitable activities carried on by the organization itself, a) dont la totalité des ressources est consacrée à des activités de bienfaisance qu'elle mène elle-même,

[...] [...]

[6] The requirement that a charitable organization must devote all of its resources to charitable activities carried on by itself is relaxed somewhat by subsection 149.1(6) of the *Income Tax Act*, which provides among other things that a charitable organization is considered to be devoting its resources to charitable activities carried on by itself to the extent that it carries on a related business, or disburses in any year not more than 50% of its income for that year to qualified donees.

[7] Any charity that ceases to meet the statutory requirements for registration may have its registration revoked, in which event the charity must be shut down. After the revocation of its registration, the charity can no longer issue official receipts, and it may become subject to a tax equal to the value of all of its assets remaining one year after the revocation. During that terminal year, the charity may use its assets only to discharge its liabilities and for specified charitable purposes.

[8] The circumstances under which a charity's registration may be revoked and the process for giving notice of an intent to revoke are set out in subsection 168(1) of the *Income Tax Act*, the relevant portions of which read as follows:

168(1) Where a registered charity [...]

(b) ceases to comply with the requirements of this Act for its registration as such,

[...]

the Minister may, by registered mail, give notice to the registered charity [...] that the Minister proposes to revoke its registration.

168 (1) Le ministre peut, par lettre recommandée, aviser un organisme de bienfaisance enregistré [...] de son intention de révoquer l'enregistrement lorsque l'organisme de bienfaisance enregistré [...] :

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

[...]

[9] Subsection 172(3) of the *Income Tax Act* gives a charity a right of appeal to this Court upon receipt of a notification under subsection 168(1). After 30 days from the mailing of the notification, or such extended period as may be allowed by this Court while an appeal is pending, the Minister may publish a copy of the notification in the *Canada Gazette*. The revocation of the charity's registration takes effect on the date of publication. The *Income Tax Act* does not specify the legal effect of a successful or unsuccessful appeal under subsection 172(2). It would appear that the only appropriate remedy following a successful appeal would be the quashing of the notice of intention to revoke the registration of the charity. However, an unsuccessful appeal would simply leave the notice in effect. That would mean that the Minister would be required to consider whether or not to publish the notice in the *Canada Gazette*. Thus, a charity could survive an unsuccessful appeal if the Minister could be persuaded not to publish the notice.

[10] The grounds for the revocation of the registration of a charity depend in part on whether the charity is a "charitable organization" or a "charitable foundation." Subsection 149.1(2) of the *Income Tax Act* deals specifically with the revocation of the registration of a charitable organization. The relevant parts of that provision read as follows:

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

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

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

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

(b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the total of

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

(i) the amount that would be the value of A for the year, and

(i) le montant qui représenterait, à son égard pour l'année, la valeur de l'élément A de la formule figurant dans la définition de « contingent des versements » au paragraphe (1) si elle était une fondation de bienfaisance,

(ii) the amount that would be the value of A.1 for the year,

in the definition "disbursement quota" in subsection (1) in respect of the organization if it were a charitable foundation.

(ii) le montant qui représenterait, à son égard pour l'année, la valeur de l'élément A.1 de cette formule si elle était une fondation de bienfaisance.

[11] This provision imports the rather complex definition of "disbursement quota" into the statutory obligations of charitable organizations. It is not necessary to understand that definition in detail. It is enough to note that, subject to certain adjustments, it requires a charitable organization to spend at least 80% of its receipted donations on charitable activities it carries on itself, and on gifts to qualified donees. Failure to meet that disbursement quota is grounds for revocation of the charity's registration.

Facts

[12] The appellant was incorporated on March 24, 1976 as a corporation without share capital under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. 32. Its corporate object is stated as follows in Part III of its application for Letters Patent (Appeal Book, Volume I, page 21):

To donate emergency medical supplies and ambulances directly to the people of Israel.

[13] When the appellant applied for registration as a charity on July 21, 1976, it indicated that it proposed to carry on the following activities (Appeal Book, Volume I, page 23):

To donate emergency medical supplies and ambulances directly to the people of Israel.

The organisation will aid any disaster areas and poor and disadvantaged people in Israel.

The organisation will appoint a Canadian representative in Israel to look after the implementation of this plan. In order to do so he will be assisted by a committee which now exists in Israel of Canadians who presently permanently reside in Israel and who are sympathetic to the aims of this organisation.

[14] By letter dated September 9, 1976, the appellant was notified that its application for registration was accepted effective March 24, 1976 (Appeal Book, Volume I, pages 24-5). The appellant thus became a "registered charity" as defined in the *Income Tax Act* as it then read. The letter includes some general information, including the following statement substantially reflecting what was then the statutory definition of "registered charity" (Appeal Book, Volume I, page 24):

No part of the income of the organization may be distributed to other charitable organizations; its income must be expended on some charitable project carried on under the direct supervision and control of the organization itself.

[15] The appellant, like all organizations that were registered charities on January 1, 1977, when section 149.1 of the *Income Tax Act* came into force, automatically fell within the new statutory definition of "charitable organization" on that date. That was not in itself a substantial change, because the definition of the new term, "charitable organization", is similar to the definition of the former term, "registered charity". The appellant continued to be subject to the requirement that it carry on its charitable activities itself, and the requirement that it could not make gifts to other organizations, even foreign charities, except

"qualified donees".

[16] What follows is an account of the rather long record of correspondence between the appellant and the Minister dealing with a number of issues, including the question of whether the appellant was carrying on charitable activities itself. Another recurring question was whether the appellant was issuing official receipts correctly. At the hearing of this appeal, counsel for the Minister conceded that the problems relating to official receipts would not by themselves have justified the revocation of the appellant's registration as a charity. In light of that concession, counsel for the appellant understood, reasonably in my view, that he was not required to make any submissions on the question of official receipts. I propose to say no more about that subject.

Audit of the appellant's 1983 and 1984 fiscal years

[17] The appellant was audited by the Minister for its 1983 and 1984 taxation years. In a letter to the appellant dated August 14, 1986 relating to that audit (Appeal Book, Volume I, pages 32-4), the following concerns were raised:

- 1) ambulances and medical supplies are being purchased and arranged for shipment to Israel by the American Red Magen David for Israel Inc. on behalf of the Organization; and
- 2) funds collected for the construction of a blood analysis centre are transferred to Magen David Adom in Israel.

[18] In response to the concerns raised in the August 14, 1986 letter, the appellant sent a letter to the Minister dated August 25, 1986 (Appeal Book, Volume I, pages 35-6). That letter reads in part as follows:

This organization [the appellant] devotes its' [sic] resources primarily to the people of the State of Israel through services which are rendered of a medical emergency nature. The funds, generally, are not used for current operating budgets, but are expended to acquire goods, services, and equipment to be used in a manner identical to many of the services rendered by the International Red Cross.

In particular, supplies, such as blood packs, emergency two-way radios, and ambulances are supplied on a regular basis. With regard to the ambulances, these mobile units must meet the unified specifications established by the Red Cross in Israel. Currently, the only company manufacturing the ambulance to these specifications is General Motors in the United States. For this reason, whenever an ambulance is acquired by the Canadian organization, funds are disbursed to the American sister organization to be used to acquire ambulances in conjunction with their own purchase order. We believe, that if there is a technical significance to this, we could arrange to purchase the ambulances directly from General Motors in the United States. It should be noted that the ambulances acquired by the Canadian organization bears the name of the Canadian organization and can always be so identified.

Recently, the organization made a commitment to build part of a blood refraction centre in Israel, in conjunction with a major project financed by various sister organizations in the world. As the Canadian undertaking represents only a small part of this project, it is virtually impossible for the Canadian organization to contract separately for its' [sic] undertaking and alternatively it had no

Canadian organization to contract separately for its [sic] undertaking and alternatively it had no choice but to disburse these funds to a central organization who would undertake to contract the entire project into a single plan for construction and erection.

The Canadian organization does not make contributions to other organizations for their general use, but instead, funds specific medical projects, and all disbursements in that regard are made specifically for an identifiable medical activity.

[19] This response apparently led to consideration of an internal staff memorandum dated December 11, 1985 (Appeal Book, Volume I, pages 39-40) which sets out what I will refer to as the "charitable goods policy". It reads as follows (emphasis added):

RE: Transfer of Goods and Services to Non-Qualified Donees

Section 149.1 of the Income Tax Act allows a registered charity to operate in two different ways: other [sic] by devoting its resources to charitable activities carried on by itself and/or by gifting to qualified donees. The inference sometimes drawn from this is that therefore gifts or other transfers to non-qualified donees can never be made by registered charities.

Such, of course is not the case. Gifts - and other transfers of goods and services - are often made by registered charities to non-qualified donees in complete compliance with the Act. Scholarships to students, assistance to the needy, salaries for the charity's employees, and payments for goods received are all examples of transfers of resources to non-qualified donees which are quite legitimate. They are transfers made in furtherance of charitable purposes and, more importantly, the expenditures are, themselves, evidence of charitable activities. The issue therefore, when determining whether a particular expenditure, activity or practice can be viewed as a charitable activity carried on by the activity [sic] or an inappropriate expenditure, depending on the nature of the transfer (i.e. cash, goods, services), who the recipient is and on the control exercised by the charity in the particular case at hand.

Where the recipient is an employee or agent of the charity who is obliged under the terms of a contract to use the resources that are transferred in the manner stipulated by the charity, objections should not be raised.

Equally acceptable are transfers of goods and services that are directed to a particular use by the very nature of the goods and services so transferred. Examples of such transfers include:

- transfers, by a research organization, of books and scientific reports to anyone interested (including foreign governments, libraries, schools, etc.),
- transfers of books - on a subject of particular interest to an educational charity - to public libraries in major cities all over the world,

- transfers of medical supplies to a refugee camp,
- transfers of food, blankets, etc. to a charity coping with a natural disaster,
- transfers of drugs, medical equipment, etc. to poorly equipped hospitals,
- transfers of personnel to schools or hospitals (on loan).

There will, of course, be suspicious transfers which will require obtaining as much information as possible to avoid approving sham transactions. Since the issue is really one of interpretation of the facts in a particular case and not a "policy" issue, it is impossible to give precise guidelines to cover all situations.

However, some general comments, in addition to the examples given above, can be made. An applicant, whose only activity is to support (especially by cash) another organisation, could be viewed with suspicion. Generally, gifts of cash to another organization would indicate that the applicant was not operating within the requirements of the Act. Gifts of cash to an individual would less likely give rise to such concerns, in that individuals, unlike organizations, can themselves be objects of charity whose needs can [sic] be alleviated by cash. For example, giving money to poor person [sic] will relieve their poverty, but giving money to an organization acting on behalf of poor people will not directly relieve their poverty (assuming there is no agency relationship). Of course there are exceptions, such as the funding of individual (independent) missionaries (refer Staff memorandum II.1.f).

Transfers of goods or services can more easily be viewed as charitable activities per se. The transfer of a piece of equipment that is meant to be used only for charitable purposes to an organization that will clearly use it for such purposes is likely to be a charitable activity. The examples given earlier would be applicable here.

However, a gift of cash to such an organization merely on the basis of an understanding or assumption that the money will be used for charitable activities would likely be in contravention of the Act. There may be applicants or charities who cannot or will not accept such a distinction, and will argue that if a gift of goods or services is charitable, then so is a gift of cash. Our response should be that the transfer is only acceptable where it can reasonably be viewed as a direct charitable activity itself. In many instances (though [sic] not all) a transfer of cash will only indirectly promote a charitable purpose whereas a transfer of goods or services will more [sic] often directly accomplish a charitable purpose.

Aside from being in keeping with the wording of the Act, this approach allows us some

flexibility. We can thus avoid having to take the rigid position that either all gifts to non-qualified donees are never acceptable, or that all such gifts are acceptable if they somehow eventually serve a charitable purpose.

Finally, it should be noted that our determination should not be influenced by whether or not the non-qualified donee is a Canadian or foreign entity. Where the transfer is to a foreign non-qualified donee who is an agent of the charity or who is a partner of a joint venture, or involves capital property, reference should be made to Staff Memo III.1.c.

[20] In reply to the August 25, 1986 letter from the appellant, the Minister sent the appellant a letter dated October 22, 1986 (Appeal Book, Volume I, pages 41-3), which contains these comments about the ambulances (at page 42):

... it is my opinion that the Organization does not maintain direction, control and supervision over the equipment it transfers to Israel and that the Magen David Adom for Israel does not act as an agent for the Organization. Furthermore the title of ownership of some of the equipment such as the ambulances is transferred to the Magen David Adom for Israel. The gifting or lending of assets by one entity to another entity to be used by the latter entity in the conduct of its own charitable activities does not constitute a charitable activity on the part of the first entity. Therefore, it appears that the Organization is not devoting all of its resources to charitable activities carried on by itself as required under subparagraph 149.1(1)(b)(i) of the Act.

[21] The same letter also indicates that the Minister did not consider the appellant's funding of the construction of the blood refraction centre to constitute a charitable activity carried on by the appellant itself. The letter invited a response by a certain date, failing which revocation proceedings would be considered. The appellant replied as follows by letter dated October 30, 1986 (Appeal Book, Volume I, pages 44-5):

... The relationship of this organization to the one in Israel is analogous to the relationship between the Canadian Red Cross and the International Red Cross.

The English translation of Magen David Adom is the Red Shield of David similar to the Red Cross or the Red Crescent for the Arabic countries. As the Canadian Red Cross supplies aid throughout the world through its' [sic] international organization, the Canadian Magen David Adom for Israel provides medical and emergency assistance through the Israeli organization.

We, therefore, believe that our problem does not rest with the nature of our activity but instead with the technical agreements between our organization and our sister organization in Israel, which apparently does not conform to Canadian regulations.

We have discussed this problem with Mr. Rainville of your department and we have informed him firstly that ambulances are now being purchased, and will be purchased in the future directly from the manufacturer. We understand from him that this would be acceptable to your

department.

With regard to the disbursement of funds, we are in the process of creating an agency relationship, to be covered by an agency agreement with the Israeli Red Shield. However, there is a need to obtain approval of the Board of Directors of both organizations which are half the world apart and this will take some time. We are therefore requesting a delay of sixty (60) days beyond the December 12th deadline which you have imposed.

We shall forward to Mr. Rainville a draft of the agreement for his review and approval as soon as it is available and prior to any official endorsement of such agreement.

[22] This response was apparently deemed satisfactory as far as the ambulances were concerned. It appears that the Minister accepted that the charitable goods policy applied to the appellant's provision of ambulances to Magen David Adom in Israel (MDA). I reach that conclusion because of the following comments in a letter dated October 19, 1987 from the Minister to the appellant (Appeal Book, Volume I, pages 47-9, at page 47) (emphasis added):

The Canadian Magen David Adom for Israel (hereinafter referred to as the "Organization") proposes to purchase ambulances and medical supplies directly from the manufacture [sic] and then transfer the items to Magen David Adom in Israel. If such an arrangement is put into place the resources used to acquire the items will be considered devotion of resources to charitable activities carried on by the Organization itself provided it can support the use of the funds with appropriate documentation such as vouchers indicating the use of the funds.

[23] However, the Minister was not satisfied with the appellant's response to the issue of the blood refraction centre. In the October 19, 1987 letter, the Minister advised the appellant as follows (Appeal Book, Volume I, pages 47-9, at page 48):

24) 2) Blood Refraction Center

25)

The Organization proposes to create an agency relationship to be covered by an agency agreement between it and the Israeli Red Shield. Before I can comment any further on this subject, a copy of the agreement should be submitted for my review, however I wish to remind you [sic] the following guidelines when establishing an agency agreement. To satisfy the requirement that a charity devotes its resources to charitable activities carried on by itself, funds transferred to an agent must be expended strictly in furtherance of the charity's own purposes. A satisfactory agency relationship does not exist where funds are supplied by a charity simply to fund projects of another organization. Furthermore, in carrying out its activities through an agent, a charity must ensure that the following conditions concerning expenditure of its funds are fulfilled:

(a) the charity must maintain direction, control and supervision over the application of its

funds by the agent;

(b) the charity's funds must remain apart from those of its agent so that the charity's role in any particular project or endeavour is separately identifiable as its own charitable activity;

(c) the financial statements submitted in support of the charity's annual information returns must include a detailed breakdown of expenditures made in respect of the charitable activities performed on behalf of the charity by its agent; and

(d) adequate books and records must be kept by the charity and its agent to substantiate compliance with the conditions outlined above.

Direction, control and supervision over the application of the funds by the agent include the concept of accountability by the agent to the principal. In turn, the principal must be able to account how the funds were spent on its behalf by the agent. The records in support of these disbursements must be maintained at the principal's address in Canada.

Amongst other possible arrangements where a registered charity will be considered carrying on its own charitable activities are partnerships and joint ventures.

[24] A letter dated November 17, 1987 from the appellant to the Minister (Appeal Book, Volume I, pages 50-1) indicates that the blood refraction centre issue soon became moot, or at least was represented by the appellant as having become moot. In any event, the appellant did not then enter into a formal agency agreement with MDA, although in its November 17, 1987 letter, it acknowledged the need to do so if a project similar to the blood refraction centre project were to be undertaken in the future. Again, the Minister appeared to be content with that response. By letter dated November 24, 1987 (Appeal Book, Volume I, page 53), the Minister advised the appellant that the audit for the 1983 and 1984 fiscal years was complete and that the appellant's status as a registered charity would remain unchanged.

Audit of the appellant's 1987 and 1988 fiscal years

[25] The appellant was audited again for its 1987 and 1988 fiscal years. The audit report is dated October 31, 1989 (Appeal Book, Volume I, pages 56-67). For present purposes, the only finding of note is that the appellant had, as of the end of 1988, a cumulative shortfall in its disbursement quota of \$169,404 (an amount the appellant disputes; its calculation indicated a shortfall of \$140,818). The Minister apparently did not consider the 1988 shortfall to be sufficiently grave to warrant a notification to revoke the appellant's registration. The matter of the disbursement quota, however, was followed up in subsequent audits.

Correspondence relating to special projects

[26] By letter dated October 5, 1993 (Appeal Book, Volume I, page 76), the appellant requested the Minister's permission to help MDA with the purchase of an identification system in the amount of \$84,000 (US) and a new ambulance telecommunication system. That request led to discussions about the legal

(US) and a new ambulance telecommunication system. That request led to discussions about the legal requirement that the appellant devote all of its resources to charitable activities it carries on itself. The following comments were made in a letter to the appellant from the Minister dated October 21, 1993 (Appeal Book, Volume I, pages 77-9, at pages 77-8) (emphasis in original):

... A registered charity may not simply act as a conduit to channel funds to those organizations to which a Canadian taxpayer could not directly make a gift and acquire some tax relief. Since there are very few "qualified donees" operating outside of Canada, it is therefore usually necessary for a registered charity interested in charitable relief abroad to become directly involved in those foreign charitable activities.

Revenue Canada acknowledges that this is not always practical either because of the registered charity's own limited financial resources, because of the size of the project or because the charity lacks the necessary expertise to operate effectively in a foreign country. Accordingly, Revenue Canada will consider that a registered charity is involved outside Canada in its own charitable activities if the charity demonstrates that it has a sufficient amount of responsibility and control over those activities. A charitable organization is not at liberty to transfer funds unless the recipient is an employee of the charity, an agent of the charity under contract, or a qualified donee.

A registered Canadian charity is expected to maintain the same degree of administrative control over the use of its resources outside Canada as it would if its activities were conducted in Canada.

[27] The letter continues with a detailed list of the elements of an agency agreement that, if adhered to, would meet the statutory requirements. The appellant followed up with a letter dated November 30, 1993 (Appeal Book, Volume I, pages 80-1) providing more information about the two expenditures it wished to have the Minister approve. The letter reads in part as follows:

We have been requested by MDA, Israel to pay for a new system of telecommunications between the headquarters and the ambulances. This system consists of approximately 100 Motorola transceivers which both receive and transmit radio signals. The old radios in the ambulances are nearly 20 years old and are not functioning efficiently. The main transmitter located in Tel Aviv will also be replaced at a later date.

As you know, the dispatching system of ambulances just as it is in Canada is done through radio dispatch signals only and is vital for the proper functioning of the ambulance system.

We trust that your department will accept this one-time expenditure since the radios should be good for at least 10 years.

The second non-medical expense consists of a new identification system. This will enable the administration of the headquarters and the blood centre in Israel to determine which people came

to work, at what time, and how long they worked. It is at the same time a security system as well as a time study system which permits computerization of payroll.

Each member of MDA, Israel carries a badge with a photograph and an incoded [sic] message on a microchip which when inserted into a slot of an uncoder [sic] machine will identify the person as well as make note of the date and time of arrival and upon leaving, identify the time and thereby establish the number of hours worked.

It is essential to streamline this particular aspect of the administration of the blood services and other functions as the present system of punch cards is unreliable, slow and provides no security. The new system will lead to considerable savings, especially in security staff and accounting procedures in the years to come.

Again, this is a one-time expense which we believe to be good for anywhere from 10 to 20 years.

[28] The Minister replied by letter dated March 23, 1994, which reads in part as follows (Appeal Book, Volume I, page 86):

Based upon the information provided, your organization may cover the expense incurred for the telecommunication system for the ambulances as it may be viewed as directly fulfilling your charity's charitable purposes. A charity may transfer certain goods or provide services to another organization in order that those goods and services can be used in the recipient's charitable programs if the goods and services provided can, by their very nature, be used only for a charitable purpose. Accordingly, we have determined that the purchase of the identification system is an administrative expense and, therefore, too indirect to be considered charitable.

[29] The Minister must have been aware at this time that there was no formal agency agreement between the appellant and MDA with respect to the ambulances, and that the telecommunication system was purchased for the ambulances. Again, it appears that the basis for permitting the purchase of the telecommunication system as a charitable activity was the charitable goods policy described above.

[30] Shortly thereafter, in September of 1994, MDA appealed to the appellant for \$650,000 (US) (Appeal Book, Volume I, pages 89-90). MDA wished to use \$350,000 (US) of that amount to purchase medical equipment for its first aid stations and ambulances (including semi-automatic monitors/defibrillators), \$100,000 (US) to computerize their new telecommunication system and \$200,000 (US) for "command cars", described as mobile command posts intended to facilitate disaster response. The appellant apparently put an oral request to the Minister.

[31] The Minister notified the appellant by telephone that the purchase of a single frequency transmitter for the ambulance communication system was approved, but not the purchase of command cars, because the cost of command cars was considered too remote from the appellant's charitable purposes (Appeal Book, Volume I, pages 91-3). Again, the charitable goods policy referred to above was the most likely justification for approving the purchase of the transmitter as a charitable activity.

Audit of the appellant's 1993 fiscal year

[32] The appellant was again audited by the Minister for its 1993 fiscal year. The audit report dated January 13, 1995 (Appeal Book, Volume I, page 95-101) includes the following comments (at pages 97-98):

[B.2] Failure to maintain adequate books and records.

The charity has transferred funds to Magen David Adom in Israel for the purchase of emergency medical supplies, ambulances and other equipments [sic]. It has also purchased equipments [sic] and transferred it to the same organization in Israel. Magen David Adom in Israel acts as the agent of the charity in Israel. On the other hand there is no formal agreement between the two parties. See Paragraph C.3 of this report. [...]

Response

The charity's representative told us that he will try strongly to have a formal agreement with the organization in Israel but that he can not force them to sign an agreement. He told us that previous requests have been made to Magen David Adom in Israel regarding a formal agreement but that the organization does not appear to be interested.

[B.3] T3010 - Incorrect information

The charity has included in its charitable expenditures an amount of \$113,994 transferred to Magen David Adom in Israel for the purchase of a magnetic card punch system. [...] This amount should have been considered as an administrative expense instead of a charitable expense.

In a letter dated November 30, 1993, the Charity asked Revenue Canada the [sic] authorization to utilize its funds for the purchase of a telecommunication system and an identification system (magnetic punch card system) for Magen David Adom in Israel. Revenue Canada has indicated in its response dated March 23, 1994 that based upon the information provided, the telecommunication system may be viewed as directly fulfilling the charity's charitable purposes but that the purchase of the identification system is an administrative expense and, therefore, too indirect to be considered charitable.

Response

The charity's representative told us that he was not aware of that letter. He told us that the purchase of the magnetic card punch system is necessary to operate ambulances in Israel. He told us that this expense should be accepted as a charitable expense. He also told us that representations can be made by the charity to explain the situation if Revenue Canada requires it.

[33] The conclusion of the auditor that the purchase of the magnetic card punch system was not a charitable expense resulted in a shortfall in the appellant's disbursement quota, so that the cumulative shortfall as of the end of 1993, as calculated by the auditor, was \$113,377 (this was based in part on the auditor's former calculation indicating a cumulative shortfall of \$169,404 as of the end of 1988; see above).

[34] The January 13, 1995 audit report also contains these statements (at page 101):

[C.3] Charitable activities and expenditures

A review of the activities and expenditures was carried out to compare them to the stated objectives of the charity. The activities undertaken are consistent with those of the stated objectives and are charitable in nature. [...] The expenditures reviewed relate to those expected considering the activities undertaken and are also considered charitable in nature.

The charity's objective is to donate emergency medical supplies and ambulances directly to the people of Israel. The charity buys ambulances, spare parts and emergency medical supplies for Magen David Adom in Israel, which act [sic] as their agent. According to the documentation provided, Magen David Adom in Israel operates more than 600 ambulances and Mobile Intensive Care Units to respond to emergencies all throughout Israel. The charity does not, however, have an agency agreement with Magen David Adom in Israel as mentioned in Paragraph B.2 of this report.

[35] The January 13, 1995 audit report is important for two reasons. The first is that it discloses evidence that the appellant apparently paid for an identification system for MDA in the face of the express disapproval of the Minister. The second is the indication that the auditor considered the existence of a formal agency relationship to be an aspect of the appellant's activities with respect to the provision of ambulances to MDA. As noted above, the record suggests that the Minister had until then accepted the notion that the provision of ambulances to MDA fell within the charitable goods policy.

[36] By letter dated January 23, 1997 (Appeal Book, Volume I, pages 102-3), the Minister advised the appellant of the result of the audit, stating its concerns about the lack of an agency agreement, the unauthorized purchase of the identification system for MDA for \$113,994 and the resulting shortfall in the appellant's disbursement quota. That letter indicated that if the appellant "addressed these concerns", its status as a registered charity would not be affected. The record does not contain any written response to this letter.

Audit of the appellant's 1996 fiscal year

[37] On June 24, 1997, the Minister instructed an auditor to conduct an audit of the appellant for its 1996 fiscal year, to follow up on deficiencies identified in the previous audit and to verify the validity of certain anonymous allegations of wrongdoing by the appellant (Appeal Book, Volume I, pages 104-5). The audit report dated October 31, 1997 (Appeal Book, Volume I, pages 106-10) indicates that the auditor noted and apparently accepted the representations of the appellant that the anonymous allegations were false. However, the auditor noted that the appellant was still providing emergency medical supplies, ambulances and related equipment to MDA without having in place a formal agency agreement, and that the appellant had accumulated further shortfalls in its disbursement quota of \$26,931 for the 1995 fiscal year and \$141,519 for the 1996 fiscal year.

[38] On April 15, 1998, the Minister sent the appellant a letter relating to the audit for the 1996 fiscal year (Appeal Book, Volume I, pages 111-4). That letter states among other things that the concerns being raised at that time were sufficiently serious to consider revoking the appellant's registration. The letter raises a number of issues, of which I will mention three. The first is the absence of an agency agreement between the appellant and MDA. The letter says the following with respect to that issue (at page 112):

... the Charity transferred funds to Magen David Adom in Israel for the purchase of emergency medical supplies, ambulances and other equipment. It also purchased equipment and transferred [sic] to the same organization in Israel. However, there is no formal agency agreement between the two parties. This deficiency was also identified during our last audit for the fiscal period ending August 31, 1993 in our letter dated January 23, 1997. A review of the file has indicated that the need for and the purpose of the agency relationship was also communicated to you in our letter dated October 18, 1987.

[39] The second issue is the persistent failure of the appellant to meet its disbursement quota, with the shortfall of \$113,377 as of the end of 1993 being increased by \$26,931 in 1995 and a further \$141,519 in 1996.

[40] The third issue is the auditor's discovery that the charity had acquired bullet proof vests for MDA. On that point the April 15, 1998 letter says this (at page 113):

The objects of the Charity, as filed with the Department, are to donate emergency medical supplies and ambulances directly to the people of Israel. The audit indicated that the *Charity* was involved in the purchase of 60 bullet proof vests at a cost of \$US146.00 each for a total expenditure of \$US10,249.00. A deposit of \$US3,075 was transferred to Hagor Industries Ltd. in Israel, with the balance payable upon receipt of the merchandise by the Magen David Adom in Israel.

Purchasing of bullet proof vests is not considered [...] to be an expenditure on a charitable activity. Accordingly, under paragraph 168(1)(b) of the Act, the minister may give notice to the *Charity* that he proposes to revoke its registration because it fails to comply with the requirements of this Act for registration as such.

[41] The appellant replied by letter dated April 21, 1998 (Appeal Book, Volume I, pages 115-7, at page 116):

... Concerning an agency agreement, there has been a tacit agreement with Magen David Adom in Israel since the inception of the Canadian charity, as evidenced by the use of the Canadian equivalent of the Israeli name. The objective of this charity [sic] to provide medical assistance and ambulance service to the people of Israel, as does the Canadian Red Cross in many countries worldwide. This mission is contained in the by-laws of the charity. We would be interested in your advising us specifically of the nature and form of [sic] agency agreement that your department requires so that we may pursue this matter. It should be noted that this charity does not give funds directly to its Israeli counterpart but acquires on its own, medical supplies and ambulances which it provides to the Israeli Red Cross.

Concerning the disbursement quota, this charity has been donating medical supplies and ambulances to the Israeli Red Cross since its inception. These donations have qualified for the disbursement quotas since 1981. If there has been a change in policy by your department, kindly provide me with a the [sic] appropriate interpretation bulletin.

Although the charity has been deficient in the quotas required at the end of 1996, this has been rectified in 1997. We are enclosing a copy of the 1997 statistics to illustrate this. We wish to add that the shortfall in 1995 and 1996 resulted from delays in disbursing funds for charitable purposes in order to safeguard and ensure that the funds disbursed fulfills the intentions of the Canadian board of directors.

You have commented that the purchase of bullet proof vests is not an expenditure of a charitable activity. We wish to point out that the ambulances that we supply are required to service areas unlike Canada, that are most dangerous, often having to assist people who have been subjected to terrorist attacks. To enter into such a scene requires equipment to protect the injured as well as the drivers. These vests provide such protection and cannot be separated from the rest of the equipment that is included with the ambulances.

The Minister's letter of December 14, 1998 putting revocation in issue

[42] The Minister found the appellant's April 21, 1998 response unsatisfactory, and sent the appellant a letter dated December 14, 1998 (Appeal Book, Volume I, pages 123-8) explaining why. The discussion about the need for an agency agreement begins as follows (at pages 124-5):

The Government of Canada's long standing position with respect to Israeli settlements in the Occupied Territories is that it does not recognize permanent control over territories occupied in 1967 (the Golan Heights, the West Bank, East Jerusalem and the Gaza [sic] Strip), and opposes all unilateral actions intended to predetermine the outcome of negotiations concerning these territories. This includes the establishment of Israeli settlements in the territories and Israel's unilateral moves to annex East Jerusalem and the Golan Heights, which Canada regards as being contrary to international law and unhelpful to the peace process. This policy is grounded in Canada's support for the United Nations Security Council Resolutions 242, 338 and 478 and in the belief that the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War of August 12, 1949 (the "Fourth Geneva Convention") is applicable to the Occupied Territories and imposes certain obligations on Israel, as the occupying power.

Resolutions 242 and 338 call for Israeli withdrawal from territories occupied in 1967 in exchange for secure and recognized boundaries. Resolution 478 censures the annexation of East Jerusalem by Israel, reaffirms the Fourth Geneva Convention to Jerusalem, and determines that any measures taken by Israel and altering the character of Jerusalem are null and void.

Article 49 of the Fourth Geneva Convention (which both Canada and Israel have ratified) provides that the "Occupying Power shall not deport or transfer part of its own civilian population into the territory it occupies". Canada has also ratified the 1977 Protocols to the Geneva Conventions. Article 85 of Protocol I makes "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" a grave breach of that Protocol.

Consistent with these instruments, and with the position articulated by successive Canadian governments since 1967, it is the Department's view that providing assistance to Israeli

settlements in the Occupied Territories, including assistance in establishing and maintaining physical and social infrastructure elements, serves to encourage and enhance the permanency of settlements and therefore is contrary to Canada's public policy on this issue. Consequently, it is our position that Canadian organizations that wish to sustain or augment services provided by the institutions within Israeli settlements outside Israel's 1967 borders are not eligible for registration as charities for Canadian income tax purposes.

Based on the above, a Canadian charity may operate in Israel, other than in the Occupied Territories under an agency agreement, the requirements for which are explained hereunder....

[43] There follows an explanation of the reason for the requirement of a formal agency agreement, which essentially repeats the explanation given in previous letters. There is also a detailed list of the kinds of provisions the agency agreement should contain. The agency discussion concludes with this (at pages 126-7):

Please note that if a Canadian charity operates outside the country without a written agreement in the suggested form, it will probably have serious difficulty establishing that a project is charitable and that it is carrying on its own activities. This could jeopardize the charity's registered status under the Act.

A charity also has to ensure that its resources are devoted to charitable purposes. Therefore, where resources the charity is proposing to send outside Canada are of [sic] general nature and could be used in a wide variety of non-charitable ways (money, for example, could be used for many things, while medicines, such as insulin, are only likely to be used to treat patients), the charity must be particularly careful to retain sufficient control to satisfy the requirements of the law. The more general the nature of the assets, the more structured and formal the arrangements should be for its distribution or use.

All of the above were explained to you in our letters dated October 22, 1986, October 19, 1987 and October 21, 1993. Despite your subsequent undertakings to comply accordingly per your letters dated October 30, 1986 and November 17, 1987, no corrective measures were taken by you to implement the agency requirement. It is noted that our letter of October 21, 1993 went unanswered, hence it is uncertain of your stance on this matter.

[44] On the question of the disbursement quota, the December 14, 1998 letter says this (at page 127):

It is understood that the title of ownership in ambulances is transferred to Magen David Adom for Israel. The gifting or lending of assets by one entity to another entity to be used by the latter entity in the conduct of its own charitable activities does not constitute a charitable activity on the part of the first entity. Therefore it appears that the organization is not devoting all of its resources to charitable activities carried on by itself as required under subsection 149.1(6) of the Act. Since the Magen David Adom for Israel is not a qualified donee, the donations fall within the meaning of gifting to another entity and therefore the amounts so expended do not get included in the computation of the disbursement quota per subsection 149.1(1) of the Act.

In response to your question, we confirm that there is no change in the policy of the Department in the calculation of the disbursement quota.

[45] Finally, on the question of the bullet proof vests, the December 14, 1998 letter states as follows (at page 127):

The object of the Charity as per Letters Patent registered with the Minister of Consumer and Corporate Affairs of Canada is "To donate emergency medical supplies and ambulances directly to the people of Israel." With regards to the bullet proof vests, you claim that "the ambulances that we supply are required to service areas unlike Canada, that are most dangerous, often having to assist people who have been subject to terrorist attacks. To enter into such a scene requires equipment to protect the injured as well as the drivers." It would therefore be appreciated if you could provide us with at least ten instances of the locations (e.g. streets, towns or cities) where these ambulance drivers, while rendering their services, had to encounter terrorist bullets.

In our opinion, the donation of bullet proof vests (which may be used by anyone) are too indirect to be considered charitable.

[46] A number of observations may be made about the Minister's December 14, 1998 letter. First, the purported policy that a Canadian charity cannot operate in the Occupied Territories had not previously been raised with the appellant. Counsel for the Minister indicated at the hearing of this appeal that this alleged policy has never been published by Revenue Canada in any interpretation bulletin or in any other publication made available to the general public or to registered charities and their advisers. Nor does the record contain any indication that the position stated in this letter has been authorized by Parliament or the Governor in Council.

[47] Second, while this is not the first time the appellant had been told that there ought to be an agency agreement with MDA with respect to the ambulances, it is the first time that the absence of a formal agency agreement was expressly named as a possible basis for the revocation of the registration of the appellant as a charity. It is also the first express explanation of the connection between the absence of an agency agreement and the failure to meet the disbursement quota. There is no indication in prior audits that any such expenditures were not included in the disbursement quota. Indeed, given the amount of money that the appellant must have spent on ambulances since 1976, the only inference that can be drawn from the various audit reports is that the cost of ambulances had in the past been accepted as qualified expenditures. Before this letter, the only expenditures relating to MDA that were identified as not qualified for the disbursement quota were the cost of the identification system and the cost of bullet proof vests.

[48] Third, the paragraphs about the bullet proof vests can be read in a number of ways. It may be a genuine request for further information about the use of the bullet proof vests by the MDA. More likely it is an expression of the conclusion that the provision of the vests to MDA is not a permitted charitable activity. I would not quarrel with that conclusion, although would I note that it is made in conjunction with a purported request for information that is unduly sarcastic. In any case, the letter of July 10, 2001, which states the basis for the Minister's intention to revoke the appellant's registration as a charity (see the discussion below), makes no mention of bullet proof vests. From that I conclude that ultimately the Minister did not rely on the appellant's purchase of bullet proof vests as a basis for revocation.

Correspondence and meetings in 1999

[49] The appellant responded to the Minister's letter on January 18, 1999 (Appeal Book, Volume I, pages 129-30). That letter acknowledges once again that there had been no written agency agreement during the years under audit, but asserts that all expenditures of the appellant's funds were under its control because of unwritten understandings between the appellant and MDA. The letter also indicates that the parties had finally entered into a formal agency agreement. Enclosed with the letter was an agreement dated January 11, 1999, apparently signed by the appropriate officials of the appellant and MDA, in which the latter undertakes to act as the appellant's agent in Israel, except in the Occupied Territories, for the supply of blood and blood plasma, the supply of ambulances, the supply of medical equipment and the construction of medical facilities. The appellant asked the Minister to review the agreement, and to meet with them to discuss the remaining issues.

[50] The record includes notes of a meeting on May 17, 1999 between representatives of the appellant and officials of the Minister (Appeal Book, Volume I, pages 133-4). The notes were apparently taken by one of the Minister's officials. It is not clear whether the notes were made at the meeting or sometime later. In any event, taking the notes at face value, it appears that the issues referred to in the Minister's December 14, 1998 letter were discussed. The appellant was also presented with a request, expressed as follows in the notes: "Charity to provide a list of all the ambulances owned by it and the areas where they are located". It is common ground that this was intended to be a question about the location of the ambulances that the appellant had provided to MDA, but there is controversy as to whether the appellant had agreed at that meeting that it was the owner of the ambulances.

[51] On July 6, 1999, the appellant gave the Minister a list of the 23 ambulances it had "donated to Israel" (Appeal Book, Volume I, pages 135-6) from 1994 to 1996. Beside the name of each ambulance was the name of a station. The note beside one ambulance sent to Israel in 1996, however, said this: "Given to I.D.F. (14.6.99)" ("I.D.F." refers to the Israeli Defence Force, which is the Israeli army).

The notification of proposed revocation

[52] After the appellant sent the July 6, 1999 letter, it heard nothing more from the Minister for two years. During that period, discussions occurred among the Minister's officials, and some internal memoranda were prepared (Appeal Book, Volume I, pages 137-45). On July 10, 2001, following the internal communications, the letter of notification which is the subject of this appeal was sent to the appellant (Appeal Book, Volume I, pages 6-17).

[53] Three grounds are stated as justification for the revocation. One relates to alleged improper receipting practices, which I will ignore. The second ground refers to "gifting of resources to MDA". The third ground relates to activities of the appellant that were said to be in contravention of Canadian public policy. The discussion about the second and third grounds indicates that the Minister's real concern was the relationship between the appellant and MDA, and in particular the appellant's failure to control and monitor the use of ambulances and related equipment provided to MDA. I will discuss first the argument relating to Canadian public policy, and then the remaining issues.

Canadian public policy

[54] The portion of the July 10, 2001 notification letter dealing with Canadian public policy repeats what was said in the December 14, 1998 letter on that subject, and concludes with the assertion that any activity of a Canadian charity that provides assistance to Israeli settlements in the Occupied Territories cannot be considered a charitable activity. Under the heading "CCRA findings" (Appeal Book, Volume I, at pages 12-23), the letter states as follows:

As it [MDA] has unfettered control over the use of its ambulances, nothing prevents MDA from using the ambulances where it wishes in fulfilling its stated mandate of operating throughout all of Israel. It should be emphasized that for MDA, "All of Israel" includes the Occupied Territories. For instance, on its Internet site at page <http://magendavidadom.org/newsflash6.html>, MDA speaks of its involvement in Arab Jerusalem as well as in Gaza. Furthermore, many of the first aid stations it lists at <http://magendavidadom.org/stations.html> are located in the Occupied Territories.

We further note that the aforementioned list compiled by MDA does not indicate where the ambulance gifted to the Israeli Defense Forces is stationed. But like all the other ambulances, where the ambulance is stationed is rather inconsequential given that there is no reason why it could not be used in the Occupied Territories by the I.D.F., or otherwise used for non-charitable purposes by its owners, the I.D.F.

As you may note from our guide RC 4106 *Registered Charities: Operating Outside Canada*, the CCRA exceptionally allows certain gifts of certain goods to non-qualified donees where it is demonstrated that the goods in question (i.e. medical supplies) can only be used by the recipient for charitable purposes. However, where the non-qualified donee plans to use those goods in a non-charitable manner for which the charity had prior knowledge, the gift in question cannot qualify as being for a charitable purpose and would thus not be allowed by the *Act ab initio*. On October 5, 1994, CAMDI wrote to ask permission to buy a telecommunication system in the amount of \$84,000 to replace MDA's old ambulance communication system. We approved the project on the understanding that the goods would be used exclusively for a charitable purpose. However, CAMDI failed to inform us at the time that:

"MAGEN DAVID ADOM in Israel provides all the Emergency Medical Services in times of PEACE and WAR. The entire High Frequency FM Radio Network of the MDA system is immediately available to the Israeli Defense Forces in times of crises." (emphasis as found on CAMDI's Internet site) (Copy attached for your convenience)

When CAMDI gifted the communication system and ambulances to MDA or the I.D.F., CAMDI should have known that these resources could be used for non-charitable purposes and purposes contrary to stated Canadian government policy. Therefore, these gifts could not be considered as charitable expenditures even by application of the aforementioned exception.

[55] This is followed by a paragraph entitled "Basis for revocation" (Appeal Book, Volume I, at page 13):

Gifts to non-qualified donees are not considered charitable expenditures for the purposes of the *Act*. For the most recent fiscal year that was audited, expenditures were made by CAMDI that were claimed to be charitable, but were in fact gifts made to non-qualified donees. Consequently, CAMDI has not demonstrated that these expenditures were charitable in nature. Moreover, CAMDI did not unequivocally show that all similar expenditures claimed in prior years were in

fact charitable expenditures.

[56] The appellant argues that there is no legal foundation for the position of the Minister that, because of Canadian public policy, the appellant cannot be considered to be carrying out its charitable objectives to the extent that it or MDA operates in the Occupied Territories. I agree with that submission.

[57] The notion that public policy has a role in the determination of charitable status was recognized by this Court in *Everywoman's Health Care Society (1988) v. Canada (Minister of National Revenue - M.N.R.) (C.A.)*, [1992] 2 F.C. 52 (C.A.). In that case, the Minister had refused to register as a charity an organization that proposed to operate a health care clinic that would provide abortions. The Minister had argued that a charitable purpose could not be established if the object of the charity is politically controversial. Décaré J.A., speaking for the Court, disposed of this argument as follows (at paragraphs 14-5, footnotes omitted):

[14] It is well established that an organization will not be charitable in law if its activities are illegal or contrary to public policy. As already noted, it is conceded here that the Society's activities are not illegal; they are contrary neither to criminal law nor to civil or "Anglo-Canadian law". But, argues the respondent, in the absence of clear statements of public policy on the issue of abortion, the Society's activities cannot be said to accord with public policy; the failure of Parliament to replace the provisions of the Criminal Code that were struck down in the *Morgenthauer* decision, leads the respondent to submit that "it cannot be concluded that first trimester abortions by choice of the patient, while clearly legal, reflects public policy on abortion."

[15] I have found no support for such an approach in the case law. It is one thing to act in a way which offends public policy; it is a totally different thing to act in a way which is not reflected in any, adverse or favourable, public policy. An activity simply cannot be held to be contrary to public policy where, admittedly, no such policy exists. It would impose an unbearable burden on those who apply for charity registration to require that there be a clear public policy favouring their activities. As I read the cases, for an activity to be considered as "contrary to public policy", there must be a definite and somehow officially declared and implemented policy.

[58] I also note the following concern of Iacobucci J., speaking for the majority of the Supreme Court of Canada in *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at paragraph 59:

... public policy arguments ask courts to make difficult determinations with questionable authority. ...

[59] The Minister's public policy argument in this case is based on an interpretation of a number of United Nations resolutions and conventions, which have consistently been supported by Canada. However, it is far from clear that these resolutions support the proposition, as the Minister seems to believe, that a Canadian charitable organization cannot operate in the Occupied Territories without offending Canadian public policy. I perceive no logic in the proposition that the provision of emergency medical assistance can be a charitable activity in downtown Tel Aviv, but not in the Occupied Territories. I would also note that it is difficult to reconcile the existence of such a policy with the Canada-Israel Free Trade Agreement (*Canada-Israel Free Trade Agreement Implementations Act*, S.C. 1996, c. 33) and related legislation which, taken

together, appear to permit preferential tariff treatment for goods imported to Canada from the Occupied Territories.

[60] The record in this appeal falls far short of establishing, to paraphrase Décary J.A., that there is a "definite and somehow officially declared and implemented policy" that a Canadian charitable organization cannot operate in the Occupied Territories. Certainly no such policy has found expression in any Act of Parliament, in any regulation, or in any publicly available government document of any kind. I have no doubt that it is open to Parliament, if it sees fit, to amend the *Income Tax Act* to preclude Canadian charities from operating in the Occupied Territories or any other part of the world, or to empower the Governor in Council to make regulations to that effect. In the absence of such legislation or some equally compelling public pronouncement, it seems to me that the Minister cannot justify the revocation of the registration of the appellant solely on the basis that it or MDA operates in the Occupied Territories.

[61] In this case, however, the existence of this supposed public policy was not the only basis for the proposal to revoke the registration of the appellant as a charity. The Minister's fundamental concern, even in the context of the stated public policy, was that the appellant did not take appropriate steps to ensure that the ambulances and related equipment it provided to MDA would be used for charitable purposes. I will therefore go on to consider that ground for the revocation.

Gifts to MDA: relationship between the appellant and MDA

[62] The July 10, 2001 notification letter substantially repeats much of what had been said to the appellant on other occasions about the need to establish an agency relationship between the appellant and MDA. There is an explanation of the relevant statutory provisions, and an explanation of the rationale for the requirement of an agency relationship between the appellant and MDA. Those explanations are followed by the following paragraphs under the heading "CCRA findings" (Appeal Book, Volume I, at pages 9-10):

As discussed at the May 17, 1999 meeting, the CCRA had audited the books and records of CAMDI [the appellant] on a number of occasions [...]. Each audit revealed that CAMDI exercised little or no control over the activities carried on in Israel to which its resources were devoted. In fact, CAMDI's only function was to raise funds in Canada and to gift its resources to MDA, a non-qualified donee [...].

Audit evidence, gathered during each of the previous audits shows that CAMDI did not implement an agency relationship between itself and MDA, notwithstanding our express recommendation to that effect, or CAMDI's undertakings to that effect. As a result, CAMDI could not prove that an appropriate principal-agent relationship existed between itself and MDA. In every tangible respect, CAMDI failed to establish that it acted as the principal in conformity with the *Act*. For all intents and purposes, all resources sent to Israel by CAMDI are controlled by non-qualified donees.

As a result of the meeting, it was decided that the CCRA would defer the revocation of CAMDI's status as a registered charity as long as CAMDI could meet the following conditions:

, establish that it had not gifted its resources to non-qualified donees;

- , implement an agency agreement which would allow it to maintain effective direction and actual control over its resources and the programs undertaken on its behalf;
- , carry out exclusively charitable activities;
- , not have its activities carried out in the Occupied Territories;
- , not have its resources used in the Occupied Territories; and,
- , respect all the other requirements of the *Act* as they pertain to registered charities.

[...]

[63] The letter then refers to the appellant's letter of July 6, 1999 and the enclosed list that indicated that an ambulance had been "given to the I.D.F.", and continues with these statements (at page 10):

... We take special note that this ambulance was gifted to the I.D.F. less than 6 months after CAMDI signed an agency agreement with MDA on January 11, 1999, and less than a month after the meeting. We conclude that by gifting its resources to non-qualified donees such as the I.D.F., CAMDI did not devote its resources to the pursuit of exclusively charitable purposes.

In addition, I further conclude that if CAMDI's [sic] had directed and controlled its resources as it could have by virtue of the January 11, 1999 agency agreement, the transfer of the ambulance to the I.D.F. would not have occurred. However, CAMDI chose to simply gift its resources to non-qualified donees even after it supposedly put in place the January 11, 1999 agency agreement. Therefore, even after signing the January 11, 1999 agency agreement, CAMDI was not responsible in a direct, effectual, and constant manner over its resources in a manner consistent with the *Act*.

[64] After the above statements, there follows this paragraph entitled "Basis for revocation" (Appeal Book, Volume I, at page 10):

Despite the myriad of letters and communications that have ensued since CAMDI [the appellant] was registered as a Canadian charity, your letter confirms the results of the fourth audit; namely, that CAMDI has continued its practice of simply gifting its resources to non-qualified donees.

[65] That paragraph should be read together with the "Basis for revocation" quoted above, which I repeat here for ease of reference (Appeal Book, Volume I, at page 13):

Gifts to non-qualified donees are not considered charitable expenditures for the purposes of the *Act*. For the most recent fiscal year that was audited, expenditures were made by CAMDI that were claimed to be charitable, but were in fact gifts made to non-qualified donees. Consequently, CAMDI has not demonstrated that these expenditures were charitable in nature. Moreover, CAMDI did not unequivocally show that all similar expenditures claimed in prior years were in fact charitable expenditures.

[66] As explained earlier, a charitable organization is obliged to carry on its charitable activities itself. If it does not do so, its registration may be revoked. A charitable organization that wishes to operate in a location where it has no officers or employees must somehow act through a person in that location. That obviously could be done by establishing an agency relationship between the charity and the person. Evidence that such a relationship has been established by contract, and that the contract has been adhered to, might well be the most straightforward means of proving to the Minister that a person purporting to carry out the charitable activities of a charity in a particular location is in fact acting on behalf of the charity. It is possible that the same result might be achieved by other means. However, a charity that chooses to carry out its activities in a foreign country through an agent or otherwise must be in a position to establish that any acts that purport to be those of the charity are effectively authorized, controlled and monitored by the charity.

[67] It should also be said, although the point is obvious, that the Minister is entitled to investigate whether registered charities are operating in accordance with the applicable provisions of the *Income Tax Act*. The Minister is entitled to insist on credible evidence that the activities of a charitable organization are, in fact and law, activities being carried on by the charitable organization itself.

[68] The appellant argues that the existence of an agency relationship is not always essential, and in particular it is not essential in this case. The appellant argues that the Minister has in the past accepted that the 1985 charitable goods policy applies, and that policy should continue to apply. It follows, according to the appellant's argument, that the appellant fulfilled its charitable objectives merely by donating ambulances and related equipment to MDA. If that is so, then it would also follow that the appellant would have had no continuing obligation to control or monitor MDA's use of the donated goods.

[69] A preliminary question is whether the Minister, having taken the position in the past that the provision of ambulances and related equipment to MDA was within the charitable goods policy, must continue to take that position. In my view, the Minister is under no such obligation. The Minister's obligation is to interpret the relevant provisions of the *Income Tax Act* and to determine how those provisions should be administered in each case, while ensuring that the affected person is given the appropriate degree of procedural fairness. The Minister does not breach any legal obligation merely by considering afresh the application of the relevant statutory provisions, even if the Act is applied less generously as a result.

[70] A second preliminary question is whether the charitable goods policy is valid, in the sense of being well founded in law. The answer is not clear. However, as the point was not argued, I am prepared to assume, without deciding, that a legal justification could be found for the policy. Given that assumption, the issue is whether the Minister erred in finding that the charitable goods policy does not apply to the appellant's provision of ambulances and related equipment to MDA.

[71] The application of the charitable goods policy requires the Minister to accept that even if the appellant gave ambulances and related equipment unconditionally to MDA, the Minister could reasonably expect MDA to use such goods solely for charitable purposes. Such a reasonable expectation would have to

be based on evidence as to the status and activities of MDA. In that regard, the appellant has relied upon its repeated assertions that MDA is like the Red Cross except that it operates primarily in Israel, and thus implicitly is an organization with solely charitable purposes.

[72] The record discloses little evidence to support those assertions. The documentation relating to the Minister's audit of the appellant for 1987 and 1988 includes a page that purports to contain general information about MDA (Appeal Book, Volume IV, page 156). The source of that document is apparently the appellant itself, although it is not clear when, why or by whom it was written. The document reads as follows:

11 GOOD REASONS WHY YOU SHOULD SUPPORT MAGEN DAVID

ADOM

1 MAGEN DAVID ADOM is the SECOND LINE OF DEFENSE in Israel and provides all the Emergency Medical Services in times of PEACE and WAR. The entire High Frequency FM Radio Network of the MDA system is immediately available to the Israel Defense Forces in times of crisis.

2 MAGEN DAVID ADOM has now completed its new 16 million dollar National Blood Bank Centre in Ramat Gan which will provide all the BLOOD PLASMA SERVICES for the Israel Defense Forces and all the hospitals of Israel.

3 MAGEN DAVID ADOM has a CARDIAC SURVIVAL SYSTEM with a fleet of Mobile Intensive Care Units equipped with two-way telemetry communication that operates immediately between the emergency vehicle and the receiving hospital.

4 MAGEN DAVID ADOM cooperates with all the hospitals and clinics throughout Israel and has instituted an Emergency Premature and High Risk Infant Ambulance Service together with Hadassah Hospital at Mt. Scopus.

5 MAGEN DAVID ADOM has an ongoing program for Emergency Lifesaving Training for all civil employees including postmen, policemen, firemen, tour guides, teachers and civilian guards.

6 MAGEN DAVID ADOM has built and maintains 63 MDA First Aid Stations throughout all of Israel which are on alert every minute of the day, every day of the year. Auxiliary services are maintained with Ambulances at all the critical border kibbutzim.

7 MAGEN DAVID ADOM is recognized as the "Outstanding Volunteer Organization of Israel" and has helped other Red Cross Service organizations in Europe and Africa. MAGEN DAVID ADOM, even after forty years, is not recognized by the family of International Red

Cross Societies.

8 MAGEN DAVID ADOM is celebrating almost 60 years of dedicated efforts on behalf of the People of Israel - Christians, Moslems and Jews. It was actually established 17 years before the birth of the State of Israel.

9 MAGEN DAVID ADOM provides a nationwide program of Youth Activities, with emphasis on First Aid instruction. Young people are trained to help in times of disaster and to administer rescue services in their own schools and communities.

10 MAGEN DAVID ADOM maintains a modern Ambulance fleet of 650 lifesaving vehicles that stand ready throughout all of Israel. They are replaced at the rate of 80 vehicles per year as they become inoperable.

11 MAGEN DAVID ADOM receives no allocation of funds from the United Israel. Appeal MAGEN DAVID ADOM must depend upon support from contributions from their own local fundraising and from friends, volunteers and Chapters throughout the world.

[73] This document may provide some basis for the representations of the appellant that MDA bears some resemblance to the Red Cross. However, it also discloses facts that make such a comparison somewhat questionable. For example, the statement in item 7 to the effect that MDA "is not recognized by the family of International Red Cross Societies" calls for some explanation, although it must also be noted that the material does not disclose the significance, if any, of such non-recognition. Similarly, if there is cooperation between the MDA and the Israeli Defence Force with respect to the use of MDA's communication facility as suggested in item 1, questions might fairly be raised as to whether and to what extent MDA is involved in Israeli military operations.

[74] I am unable to find in the record evidence to support a reasonable expectation that the ambulances and related equipment provided to MDA by the appellant were used by the MDA only for charitable purposes. I conclude therefore that the Minister did not err in finding that the 1985 charitable goods policy does not apply to the ambulances and related goods the appellant provided to MDA. It follows that the Minister was entitled to insist on evidence that MDA's use of the donated goods in Israel is subject to an appropriate agency agreement, or at least alternative arrangements that are capable of demonstrating that MDA's use of those goods amounted to the carrying on by the appellant of its charitable activities.

[75] The appellant argues that although there is no written agreement, there is and always has been an agency relationship between the appellant and MDA, and that in any event that relationship has now been reduced to writing and so the requirement for a written agency agreement, if it exists, has been met. I am of the view that these arguments must fail. There is no evidence in the record that there was ever an agency relationship between the appellant and MDA except the appellant's bare assertions to that effect. Nor is there any evidence that the appellant took any steps to control or monitor the use by MDA of ambulances and related equipment that it provided to MDA.

[76] I do not ignore the fact that a document signed in 1999 was presented as evidence of an agency

agreement, but that document is not capable of establishing the existence of an agency relationship prior to its execution. Also, the correspondence submitted with that document, far from suggesting that the appellant intended to adhere to the agency agreement, indicated that it was simply awaiting the Minister's review of the agreement.

[77] For the foregoing reasons, the revocation of the appellant's registration as a charity is justified. That would be sufficient to dismiss this appeal, except for the argument of the appellant that the process leading to the July 10, 2001 notification letter was fatally flawed by a breach of the requirement of procedural fairness. I will deal with that argument below.

Fairness of the process

[78] The appellant argues that the Minister's decision to issue the July 10, 2001 notification letter should be quashed because it was reached on the basis of evidence of which the appellant had no notice and upon which it had no opportunity to comment. The undisclosed material falls into two categories, the audit reports and the internal memoranda prepared in the two year period between the appellant's last submission in July of 1999 and the date of the notification letter, July 10, 2001.

[79] There is nothing of substance in any of the audit reports that was not disclosed to the appellant well in advance of the notification letter. Therefore, the Minister did not act unfairly in failing to disclose the audit reports.

[80] Material in the internal memoranda indicates that the Minister may have taken into account three factual allegations upon which the appellant claims it should have had an opportunity to comment.

[81] One factual allegation was that the MDA operates or may operate in the Occupied Territories. That information was apparently based on news stories and material the Minister found on the internet. Generally, it would be an error for the Minister to base the revocation of a charity on information from news reports and from the internet without giving the appellant an opportunity to refute the information or at least comment on it. However, in this case the error is of no consequence. The Minister believed that the location of MDA's activities was relevant because of the supposed Canadian public policy relating to MDA's activities in the Occupied Territories. For the reasons stated above, that ground of revocation is ill founded. However, it is not the only ground for the revocation notice, and the other grounds are not based in any way upon the location of MDA's activities. In these circumstances, the Minister's failure to elicit better facts about the location of MDA's operations was not an error that should vitiate the decision to issue the notification letter.

[82] The second factual allegation was that MDA shares its ambulance communication system with the Israeli Defence Force. In one of the internal memoranda, this was cited as support for the conclusion that the charitable goods policy does not or should not apply to the appellant's provision of ambulances and related equipment to MDA. In the July 10, 2001 notification letter, it was cited as an indication that MDA's activities may not be exclusively charitable. In my view, the appellant cannot complain that it was unaware that the Minister had this information, because the information is found in a document it had previously provided to the Minister (refer to the document quoted above entitled "11 Good Reasons Why You Should Support Magen David Adom").

[83] The third factual allegation was that in 1996 the appellant had given an ambulance to MDA which MDA gave to the Israeli Defence Force on June 14, 1999. That allegation was based on material provided by the appellant itself in its July 6, 1999 letter to the Minister. The Minister's interpretation of that information was reasonable. In my view, the Minister was under no obligation to ask the appellant to provide further particulars.

[84] The record is clear that the proposal to revoke the appellant's registration was based fundamentally on the absence of evidence demonstrating that the appellant maintained control over the use of ambulances and related equipment it provided to MDA, despite being advised many times since 1997 that it was required to do so. The appellant did not satisfy the Minister on this point because it could not do so. The fact is that the appellant exercised no control over MDA's activities. Therefore, even if the factual allegations referred to above had been disclosed in advance to the appellant and refuted, the revocation of the appellant's registration would still be justified.

[85] The appellant also argues that the provisions of the *Income Tax Act* relating to the process for revoking the registration of charities contravenes subsection 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985, Appendix III. That argument must be rejected for the same reasons as it was rejected in *The Canadian Committee for the Tel Aviv Foundation v. Her Majesty the Queen*, 2002 FCA 72, 2002 D.T.C. 6843.

Conclusion

[86] For the foregoing reasons, this appeal should be dismissed with costs.

"K. Sharlow"

J.A.

"I agree

Gilles Létourneau J.A."

ROTHSTEIN J.A. (Dissenting)

INTRODUCTION

[87] I have read the reasons of Sharlow J.A. in this appeal but I am respectfully not in agreement with her conclusion to dismiss the appeal. In my opinion, the Minister's decision is flawed for two reasons. One is that it was based on irrelevant considerations. It is not for the Court to speculate as to what decision the Minister would have come to, had he taken account only of relevant considerations. In these circumstances, the appropriate remedy is to quash the Minister's decision and remit the matter for redetermination based solely on relevant considerations.

[88] The second reason for considering the Minister's decision flawed is that the proceedings taken have been tainted by breaches of procedural fairness. Where a result is inevitable, breaches of procedural fairness may not require that a decision be quashed. See *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at paragraph 52. However, in all other circumstances, where there is a failure of procedural fairness, quashing the decision is the necessary result. See *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 660-661. The decision under appeal in this case is discretionary. It is not inevitable that the Minister would exercise his discretion to revoke the appellant's registration had breaches of procedural fairness not occurred. The appropriate result is to quash the Minister's decision and remit the matter for redetermination in accordance with the requirements of procedural fairness.

IRRELEVANT CONSIDERATIONS

[89] The provision in the *Income Tax Act* under which the Minister acted to give notice of revocation of the appellant's charitable registration was paragraph 168(1)(b).

168. (1) Where a registered charity [...]

(b) ceases to comply with the requirements of this Act for its registration as such,

[...]

the Minister may, by registered mail, give notice to the registered charity [...] that the Minister proposes to revoke its registration.

168. (1) Le ministre peut, par lettre recommandée, aviser un organisme de bienfaisance enregistré [...] de son intention de révoquer l'enregistrement lorsque l'organisme de bienfaisance enregistré

[...]

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

[...]

[90] There is no doubt that the provision confers a discretionary power on the Minister and that the Minister has exercised that discretion in the past, not to order revocation of a charity's registration, even though the Minister had been of the opinion that there had been failure by the charity to comply with the requirements of the Act.

[91] Where a discretionary decision, made pursuant to a statutory authority, is based upon irrelevant considerations, intervention by the Court will be justified. See *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at 7-8 per McIntyre J.

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