

FEDERAL COURT OF APPEAL

BETWEEN:

PUBLIC TELEVISION ASSOCIATION OF QUÉBEC

Appellant

- and -

MINISTER OF NATIONAL REVENUE

Respondent

- and -

IMAGINE CANADA

Intervener

INTERVENER'S MEMORANDUM OF FACT AND LAW

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INTERVENER'S MEMORANDUM OF FACT AND LAW

PART I - FACTS

1. The Appellant, Public Television Association of Québec, is appealing the proposal of the Minister of National Revenue (the "Minister" or the "Respondent") to revoke the Appellant's charitable registration under the *Income Tax Act* (the Act).¹
2. The Respondent asserts that the Appellant was a conduit used to issue charitable receipts to the Canadian donors of Vermont Public Television, a United States ("U.S.") charity duly registered and recognized as exempt under section 501(c)(3) of the *Internal Revenue Code* (the "Code").² Vermont Public Television broadcasts educational television programming in Vermont and Québec.
3. The Respondent further asserts that the funds donated to the Appellant were used to finance the activities of Vermont Public Television, not the

¹ Income Tax Act, RSC 1985, c.1 (5th Supp.), as amended [ITA].

² Internal Revenue Code of 1986, as amended [IRC].

charitable activities carried on by the Appellant, as required under the Act.³

PART II – ISSUES RAISED BY THE INTERVENER

4. The Intervener, Imagine Canada (“Imagine”), respectfully submits that the Court should consider the following issues when deciding this appeal:
- Whether in proposing to revoke the Appellant’s charitable registration, the Respondent relied on and applied a misinterpretation of the law, as reflected in the Canada Revenue Agency (the “CRA”) guidance that deals with how Canadian charities may carry on activities outside of Canada (the “Guidance”);⁴
 - Whether in deciding if a charity has sufficient direction and control over its activities, the CRA and the Minister should apply the approach established by this Court in *Canadian Committee for the Tel Aviv Foundation v. Canada* (“Tel Aviv”),⁵ an approach based on the operational considerations that are relevant to a particular charity and its intermediary and that requires the charity to direct and control its resources and be in a position to account for its intermediary’s spending;
 - Whether the standard for deciding that a charity has sufficient direction and control should be, as stated by this Court in *Canadian Magen David Adom/Magen David Adom Canadian pour Israël v. Minister of National Revenue* (“Magen David Adom”),⁶

³ ITA, supra note 1, at subsection 149.1(1).

⁴ CRA Guidance number CG-002, “*Canadian Registered Charities Carrying Out Activities Outside Canada*,” July 8, 2010 [CG-002]; and its predecessor guidance RC4106, “*Registered Charities: Operating Outside Canada*,” October 16, 2000 [RC4106].

⁵ *Canadian Committee for the Tel Aviv Foundation v. Canada*, 2002 FCA 72 [Tel Aviv].

⁶ *Canadian Magen David Adom/Magen David Adom Canadian pour Israël v. Minister of National Revenue*, 2002 FCA 323 [Magen David Adom].

whether there is evidence to support a reasonable expectation that the charity's funds are being used exclusively for charitable purposes; and

- Whether in this case the Appellant should be given the opportunity to put before the Court or the Minister, if the Court refers the matter back for reconsideration, evidence of its direction and control of its activities, in accordance with the correct test and standard to be applied.

PART III – SUBMISSIONS

A. Charities must carry on their “own activities”

5. Subsection 149.1(1) of the Act requires a charitable organization to devote all of its resources to “charitable activities carried on by the organization itself [...]” This has been taken to mean that charities must carry on their “own activities”, a requirement that is commonly referred to as the “own activities” test.
6. The Act does not require charities to carry on their “own activities” in a specific geographic location. Thus, it is commonly understood that charities may carry on their “own activities” in Canada or anywhere else in the world.⁷
7. Imagine submits that when Parliament introduced the “own activities” requirement in the Act, it was not considering the question of charities working with non-charity intermediaries or how those arrangements might be construed. Rather, Parliament was concerned with making a distinction between charities that pursue charitable activities directly, and those charities that act primarily as funders. The legislation was introduced to provide for the distinctions that are currently in the Act between charitable

⁷ B.C. Drache, Robert B. Hayhoe, and David P. Stevens, *Charities Taxation, Policy and Practice* (Toronto: Thomson Canada Ltd., 2007), at page 12-3.

organizations and charitable foundations and included provisions that ensured that “funders” disbursed income.⁸

B. Charities need to work through intermediaries outside of Canada

8. In order to carry on their “own activities” outside of Canada, charities very often need to work through intermediaries.⁹ If charities were not permitted to work through intermediaries, many charities would not be able to operate outside of Canada unless they did so by sending their own staff or volunteers to work abroad, which is not possible in every circumstance.
9. The CRA recognizes in the Guidance that the practice in Canada is for charities to engage intermediaries when they are unable to carry on their “own activities” through their own staff or volunteers.¹⁰
10. The CRA further acknowledges the need for charities to work through intermediaries by describing the formal arrangements that registered charities are permitted to enter into in order to conduct their “own activities” outside of the country. In the Guidance, the CRA states that: “[i]n general, a registered charity can operate in the same way abroad as it can in Canada.”¹¹
11. The courts have also recognized that charities may work through intermediaries. For example, in *Tel Aviv*, this Court stated that “[i]t is common ground that a charitable organization is considered to be carrying on its own activities to the extent that it acts through an agent.”¹²

⁸ See Canada, Department of Finance, *Discussion Paper: The Tax Treatment of Charities* (Ottawa: Department of Finance, June 23, 1975).

⁹ It should be noted that charities may also need to work through intermediaries to carry on their own activities in Canada, albeit this is not raised by the facts in the present case.

¹⁰ RC4106, *supra* note 4, at page 5.

¹¹ RC4106, *ibid.*, at page 2.

¹² *Tel Aviv*, *supra* note 5, at paragraphs 7, 30.

- C. The test established in *Tel Aviv* requires that charities exercise “direction and control” over their activities in order to meet the “own activities” test in the Act
12. The test that was developed by this Court in *Tel Aviv* for determining whether a charity carries on its “own activities” outside of Canada is whether a charity, by exercising direction and control in respect of activities which further its charitable purposes, will be considered to be carrying on its “own activities”.
 13. *Tel Aviv* defined direction and control to mean that a charity must be able to provide evidence of where and how its funds are spent by its intermediary¹³ and be in a position to report on such spending.¹⁴
 14. *Tel Aviv* involved an appeal of the Minister’s proposal to revoke the charitable registration of the Canadian Committee for the Tel Aviv Foundation (the “Committee”). The Committee was registered based on representations it had made to the Minister that its activities would be carried on through its agent in Tel Aviv, pursuant to a written agency agreement. However, upon auditing the Committee, the Minister provided an extensive list of reasons why the Committee’s charitable status should be revoked.¹⁵
 15. The Court held that the Committee’s appeal should fail based on the evidence in support of the Minister’s position.¹⁶ More specifically, it was the Court’s view that the agency agreement had been completely ignored by the Committee such that the Committee was not in a position to provide evidence of or report on where and how its funds were spent by its agent in Tel Aviv.

¹³ *Tel Aviv*, supra note 5, at paragraphs 13, 30.

¹⁴ *Tel Aviv*, ibid., at paragraph 40.

¹⁵ *Tel Aviv*, ibid., at paragraph 13.

¹⁶ *Tel Aviv*, ibid., at paragraph 44.

16. At paragraph 30, the Court stated as follows:

For example, the evidence discloses that the Committee sent the majority of the funds it raised to its agent in Israel, but provided little documentary evidence of the Committee's control over how those funds were spent.¹⁷

17. In deciding whether the Minister has erred in concluding that the Committee had ceased to comply with the requirements of the Act, the Court stated as follows at paragraph 40:

Pursuant to subsection 149.1(1) of the Act, a charity must devote all its resources to charitable activities carried on by the organization itself. While a charity may carry on its charitable activities through an agent, the charity must be prepared to satisfy the Minister that it is at all times both in control of the agent, and in a position to report on the agent's activities. In this case, the Minister's main reasons for revocation are that the Committee could not demonstrate, through documentary evidence, that it exercised a sufficient degree of control over the use of its funds by its agent in Tel Aviv and the Committee did not keep proper books and records of activities carried on by its agent. Even though the Minister's reasons are couched in terms of non-compliance with the [a]gency [a]greement, the requirements under the latter are, in my view, simply a means of ensuring compliance with the Act [emphasis added].¹⁸

18. The Committee argued that the agency agreement was irrelevant for purposes of determining compliance with the Act. However, based on the above, the Court held that the Minister was effectively trying to ensure compliance with the "own activities" test in the Act. Thus, the Court held,

¹⁷ *Tel Aviv*, supra note 5, at paragraph 30.

¹⁸ *Tel Aviv*, *ibid.*, at paragraph 40.

the Minister was entitled to consider the fact that the Committee had completely ignored the agency agreement. Nevertheless, the Court held that the fact that the Minister's reasons were "couched in terms of non-compliance with the [a]gency [a]greement" had misled the Committee in respect of the test it had to meet in order to show that it had complied with the Act.¹⁹

19. In a subsequent case, *Bayit Lepletot v. Minister of National Revenue* ("*Bayit Lepletot*"),²⁰ the Court was asked to consider whether the appellant Canadian organization (the "Organization") was carrying on its "own activities" in Israel. The Organization was appealing from the Minister's proposal to revoke the Organization's charitable status. The Court did not accept the Organization's argument that it was carrying on its own charitable works and dismissed the appeal.
20. The Court in *Bayit Lepletot* commented on the meaning of direction and control. In response to the Organization's argument that the Minister was wrong to require proof that the activities of the agent were subject to the Organization's control, the Court stated as follows:

The Minister's concern with respect to control of the agent's activities is not directed at proof of the agency relationship but rather to the issue of whether the charitable works are the [Organization's] works or someone else's.²¹

21. As in *Tel Aviv*, the Court in *Bayit Lepletot* was of the view that in interpreting the meaning of direction and control, the Minister should assess whether a charity complies with the Act, which requires a determination of whether the charity's direction and control over its

¹⁹ *Tel Aviv*, supra note 5, at paragraph 30.

²⁰ *Bayit Lepletot v. Minister of National Revenue*, 2006 FCA 128 [*Bayit Lepletot*].

²¹ *Bayit Lepletot*, ibid., at paragraph 6.

activities is sufficient to establish that those activities will be considered to be the charity's "own activities" for purposes of the Act.

22. *Magen David Adom* also involved an appeal by a charity of the Minister's proposal to revoke its registration. In this case, the charity had provided ambulances and related equipment to an organization in Israel. The charity's appeal was dismissed by the Court on the basis that there was no evidence that an agency relationship existed between the charity and the Israeli organization or that the charity took any steps to control or monitor the use by the Israeli organization of the ambulances and related equipment.
23. In *Magen David Adom*, the Court commented on the meaning of direction and control. Its reasoning is effectively summarized at paragraph 66 of the decision:

[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. [...] 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.²²

24. The Court's decision in *Magen David Adom*, like in the other cases, was that in determining whether a charity is carrying on its "own activities",

²² *Magen David Adom*, supra note 6, at paragraph 66.

the Minister should focus on what evidence is necessary in that instance to show that the charity has sufficient direction and control over its activities in order for those activities to be considered to be the charity's "own activities", rather than focus on the terms of an agreement between a charity and its intermediary.

D. Under the test in *Tel Aviv*, a contract of agency is neither sufficient nor necessary

25. The Court held in *Tel Aviv* that the Committee and its agent did not abide by any of the terms and conditions of the agreement and that the Committee was, as a consequence, a "mere conduit". The Court did not conclude that a contract of agency was necessary.
26. It should be noted that under the common law and civil law of agency, a contract of agency does not require the same level of direction and control that is required for purposes of the "own activities" test in the Act.
27. Imagine submits that only certain contracts of agency – those that reflect the level of direction and control that a charity requires in order to carry on its "own activities" in a particular circumstance – are sufficient for purposes of the Act.
28. It is common for agency contracts in the charitable sector to contain terms that charities know the CRA will accept for purposes of the "own activities" test. For example, agency contracts in the charitable sector explicitly provide that the agent has no authority to bind the principal in contract, that the principal is not required to indemnify the agent, and that the agent is obliged to indemnify the principal for any liability in tort or delict. The CRA accepts contracts of agency with these features even if, as a matter of common law and civil law, such agency contracts are atypical and possibly not even contracts of agency at all.

29. In reviewing the test stated by the Court in *Tel Aviv*, it becomes clear that the Court looked at whether a charity exercises the appropriate level of direction and control in order to meet the “own activities” test in the Act. The Court did not conclude that an agency agreement was necessary to determine whether the charity met the test. The continued focus of the CRA and the Minister on “agency” contracts or any other form of contract in the Guidance is unnecessary and misleading and not required per the test in *Tel Aviv*.

E. The Guidance mandates a limited number of legal relationships and in doing so strongly suggests impractical, restrictive, and ineffective conditions

30. The Guidance is not in accordance with *Tel Aviv* since it proposes that charities and their intermediaries may only enter into a limited number of legal relationships with specified terms. These relationships are not always necessary given the need for contextual direction and control of resources, as expressed in *Tel Aviv*.

31. The Guidance provides that charities may work through an intermediary in the following ways: (i) by entering into an agency relationship with an intermediary containing specified terms; (ii) through a contract of joint venture containing specified terms; (iii) by engaging a contractor according to specified terms; or (iv) by working side by side with another organization in a co-operative partnership containing specified terms.

32. The Guidance provides that the specified terms that charities must include in written agreements are largely the same for each type of arrangement.²³ These terms illustrate the CRA’s misinterpretation of the “own activities” test in the Act, as later interpreted by this Court in *Tel Aviv*, *Bayit Lepletot*,

²³ There are some additional guidelines that apply to joint ventures; see RC4106, *supra* note 4, at page 7.

and *Magen David Adom*, which properly set out the test for direction and control.

33. The Guidance provides that an arrangement can be an acceptable devotion of a charity's resources to its "own activities" provided that certain conditions are met. The conditions require that charities:

- Enter into adequate agreements containing the minimum elements outlined in the Guidance;
- Provide periodic, specific instructions to individuals or organizations;
- Regularly monitor the progress of projects or programs and provide satisfactory evidence of this to the CRA;
- Make periodic payments on the basis of monitoring and maintain the right to discontinue payments at any time if they are not satisfied.²⁴

34. The Guidance also provides that charities must know how a project will be completed "from beginning to end":

Before engaging agents or contractors, it is important that the registered charity have a clear idea of the charitable project or program it is trying to achieve, and how it will be conducted from beginning to end. *This will allow the charity to give precise instructions to its agents or contractors* [emphasis added by the CRA].²⁵

35. Some of the further terms that charities should include in written agreements are:

²⁴ RC4106, *supra* note 4, at pages 6-7.

²⁵ RC4106, *ibid.*, at page 4.

effectively undertake that aspect itself, which defeats the purpose of using an intermediary. Additionally, the Guidance provides that the charity must directly control that aspect of the operation:

In contrast to the relatively passive transfer of money or other resources involved in making gifts to qualified donees, carrying on one's own activities implies that the Canadian charity is an active and controlling participant in a program or project that directly achieves a charitable purpose.²⁸

38. According to the Guidance, a charity's failure to enter into an agency agreement that effectively circumscribes the specific foreign project or program could put that charity's status at risk:

If a Canadian charity operates outside the country without a written agency 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].²⁹

39. The specified terms in the Guidance are overly restrictive because they ignore context, because in a large number of situations they are nearly impossible to meet, and because they do not focus on contextual measures that are effective to ensure proper direction and control.
40. The specified terms set out in the Guidance are impractical because they do not take into account the operational realities of conducting activities outside of Canada.
41. Finally, the stipulations in the Guidance are ineffective because portions of the method of compliance proposed are, in practice, often artificial and token. Yet, in many circumstances where compliance is artificial and

²⁸ RC4106, *supra* note 4, at page 4.

²⁹ RC4106, *ibid.*, at page 8.

token there is no doubt that Canadian charitable dollars will be spent on exclusively charitable activities.³⁰

F. The Guidance does not accord with a correct interpretation of *Tel Aviv*

42. The Guidance is wrong because it stipulates that the Appellant, and all registered charities in Canada, need to demonstrate a level of direction and control over their “own activities” carried on outside of Canada that is not required under in the Act as interpreted by this Court’s decision in *Tel Aviv*.
43. As previously discussed, the Court in *Tel Aviv* defined direction and control to mean that a charity must be able to account for where and how its funds are spent by its intermediary.³¹ It is the presentation of evidence of direction and control that will allow the CRA of the Minister to determine whether activities are the charities “own activities”.
44. The fact that the CRA and the Minister stipulate an increased and uniform level of direction and control regardless of context has, in many circumstances including in the case of the Appellant, made the interpretation of the Guidance susceptible to uncertainty and arbitrariness, leaving the CRA and the Minister scope to conclude that a charity that fails to comport itself within the proposed approaches of the Guidance is a “conduit”.
45. This level and type of direction and control required by the Guidance does not take into account the diversity of relationships that charities need to enter into when working outside of Canada in a variety of contexts. One of the main reasons why charities work through intermediaries is because

³⁰ All of the above excerpts from the Guidance are taken from RC4106, *ibid.*, which was in effect during the relevant period. It should be noted that the new Guidance CG-002, *supra* note 4, which is currently in effect, contains additional restrictions.

³¹ *Tel Aviv*, *supra* note 5, at paragraphs 13, 30, and 40.

intermediaries often possess the knowledge and expertise to carry on a particular charitable activity in a location outside of Canada that the Canadian charity does not possess.

46. It is Imagine's submission that the designation of "conduit" is a conclusion that can only be reached after a contextual and purposive analysis.
47. RC4106, the applicable Guidance published by the CRA during the period of the events in issue, and reflecting the Minister's position with respect to "own activities", does not even mention the word "conduit", nor does it describe the circumstances in which a charity will be considered to be "conduit". Thus, it was impossible for the Appellant to know what standard the Minister was applying to its conduct and when its failure to follow the stipulations set out in the Guidance led the Minister to conclude that it was a "conduit".
48. The Guidance does not refer to "conduit". It merely states that: "[t]he *Income Tax Act* does not allow a registered charity to carry out its purposes by handing over its money or other resources to another organization (that is not a qualified donee)."³²
49. In insisting on a single, narrow test for "own activities", the CRA and the Minister apply a Guidance that is incorrect, although it was not intended to be misunderstood by charities.

³² RC4106, *supra* note 4, at page 2.

G. The test for direction and control should be expressed in a manner to ensure that a charity's property remains devoted exclusively to charitable purposes that the charity can properly call its own

50. In its charitable goods policy expressed in the latest iteration of the CRA's Guidance ("CG-002"), the CRA accepts that "charitable goods" may be transferred directly to an intermediary that is not a qualified donee.³³

51. In its charitable goods policy, the CRA states that examples of a transfer of resources to a non-qualified donee where the above conditions could apply include the following:

- Transfers by a Canadian research charity of books and scientific reports to a reputable foreign library or school;
- Transfers of food and blankets to a foreign charity coping with a natural disaster and that has a long history of successful operations; and
- Transfers of drugs or medical equipment to a fully-equipped foreign hospital with an excellent record of serving its community.³⁴

52. Imagine respectfully submits that the CRA and the Minister should apply an approach that is consistent with the CRA's charitable goods policy set out in the Guidance when looking at whether any activity pursued by a charity through an intermediary can be considered to be that charity's "own activities".

53. Imagine submits that the CRA's policy on charitable goods is the preferable approach because it illustrates that what matters is that there is certainty or near certainty that the charity's resources are devoted to

³³ CG-002, *supra* note 4, at paragraph 5.2.

³⁴ CG-002, *ibid.*

exclusively charitable projects in the foreign country, and not whether the charity can distinguish its activities from those of the intermediary.

54. The requirement of the charitable goods policy that the goods granted be charitable (for example, medical supplies, such as antibiotics and medical instruments, school textbooks, etc.)³⁵ is sufficient but, in *Imagine's* submission, not necessary. Rather, what should be required is such direction and control that the charity knows can demonstrate that its resources have been used for exclusively charitable purposes.
55. There is no material difference between the examples in paragraph 51 above and similar situations where instead of "charitable goods" the charity transfers funds to be used by the foreign organization to purchase the charitable goods.
- H. Charities should be required to show that their direction and control of arrangements is reasonable and that they acted with due diligence**
56. In *Magen David Adom*, the Court concluded that the Minister's proposal to revoke the charity's registration was based on the absence of evidence demonstrating that the charity maintained direction and control over the use of the ambulances and related equipment it had provided to the Israeli organization. The standard that the Court used to assess whether the charity had provided sufficient evidence was articulated by Sharlow J.A., who, in writing for the Court, stated as follows:

I am unable to find in the record evidence to support a reasonable expectation that the ambulances and related equipment provided to [the Israeli organization] by the [charity] were used by the [Israeli organization] only for charitable purposes [emphasis added].³⁶

³⁵ GC-002, *supra* note 4, at paragraph 5.2.

³⁶ *Magen David Adom*, *supra* note 6, at paragraph 74.

57. Imagine submits that the standard applied to private foundations in the U.S. under its *Internal Revenue Code*, which is also a reasonable person standard, may assist this Court in developing an appropriate test for a Canadian registered charity to meet in demonstrating that activities are its own.³⁷
58. The standard would require a charity to demonstrate that it has been duly diligent and that a reasonable person would proceed with the arrangement based on the facts and circumstances before it and that sufficient thought had been given to satisfy that reasonable expectation. In other words, a registered charity would not have to “insure” the assets were properly used but it would need to be able to provide evidence that it had taken all reasonable steps to be satisfied that the assets would be properly used. Imagine submits that in fact the legal test that should be considered is the one presented above, notwithstanding whether or not a formal agreement is in place.
59. The following factors, many of which are already identified in RC4106 (or the newer CG-002), are some of the factors that should play a role in deciding whether a charity has provided reasonable evidence that the direction and control it exercises over its activities is sufficient to establish that the activities are the charity’s “own activities” for purposes of the Act:
- The degree to which the charity reviews and approves the nature of specific foreign projects and related fundraising efforts;
 - The degree to which the charity reviews the purposes and activities of the foreign organization with which it wants to work to ensure that it can fulfil its charitable purposes and with a view that demonstrates the funds will be used in a manner that allows the charity to account to the CRA or the Minister with respect to the use of the funds;

³⁷ IRC, *supra* note 2, at sections 507-509.

- Whether the charity demonstrates that it has completed due diligence on the foreign organization and the foreign charitable project before it commits to the project. The due diligence could include a review of all the fundamental documents of the foreign organization and its financial situation, again to allow the charity to assess and to be in a position to provide evidence that the funds will be used in a manner that allows it to account to the CRA with respect to the use of the funds;
- Whether the charity and the foreign organization enter into an arrangement specifying the details of the projects for which funding will be used; and
- Whether the foreign organization can account for the use of the funds on an annual or more frequent basis, depending on the circumstances, in a manner that demonstrates the funds were used in accordance with the agreement and in a manner that allows the charity to account to the CRA with respect to the use of the funds.

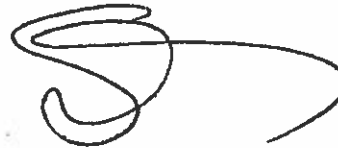
PART IV – CONCLUSION

60. Imagine respectfully submits that the Guidance, in reflecting the position of the CRA and the Minister, is so narrowly and erroneously drafted that charities should not reasonably be expected in many circumstances to rely on the Guidance.
61. Imagine respectfully submits that in determining whether a charity carries on its “own activities” when working through an intermediary, the CRA and the Minister should apply a contextual, purposive analysis that takes into account the operational realities that evidence direction and control in a particular circumstances, as contemplated by this Court in *Tel Aviv, Bayit Lepletot*, and *Magen David Adom*. The standard should be whether the charity has contemplated the need to and is able to produce evidence to

support a reasonable expectation that the charitable activities will be pursued.

62. Imagine submits that the Appellant should be given the opportunity to demonstrate to the Court how it directs and controls the activities it carries on outside of Canada based on the proper test to be applied.
63. In the alternative, Imagine submits that the matter should be referred back to the Minister for reconsideration based on the proper test to be applied.

All of which is respectfully submitted.



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PART V – LIST OF AUTHORITIES

Legislation

Income Tax Act, RSC, c.1 (5th supp.), as amended, at subsection 149.1(1).

Jurisprudence

Bayit Lepletot v. Minsiter of National Revenue, 2006 FCA 128.

Canadian Committee for the Tel Aviv Foundation v. Canada, 2002 FCA 72.

Canadian Magen David Adom for Israel/Magen David Adom Canadien pour Israël v. Minister of National Revenue, 2002 FCA 323.

Doctrine

B.C. Drache, Robert B. Hayhoe, and David P. Stevens, *Charities Taxation, Policy and Practice* (Toronto: Thomson Canada Ltd., 2007).

Other

CRA Guidance number CG-002, “*Canadian Registered Charities Carrying Out Activities Outside Canada*,” July 8, 2010.

CRA Guidance number RC4106, “*Registered Charities: Operating Outside Canada*,” October 16, 2000.