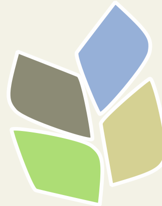
Background Briefing

Administrative Law Issues Arising under the Registered Charity Regime

Dr. Kathryn Chan



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"The law of charity is a moving subject"
– Lord Wilberforce

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Named after the 1891 House of Lords decision, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, which established the four principal common law heads of charity used in Canada and elsewhere, The Pemsel Case Foundation is mandated to undertake research, education and litigation interventions to help clarify and develop the law related to Canadian charities. The Pemsel Case Foundation is incorporated under the Alberta *Societies Act* and is a registered charity.

The Pemsel Case
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Suite 1150, 10060 Jasper Avenue,
Edmonton, Alberta, T5J 3R8

www.pemselfoundation.org

Administrative Law Issues Arising under the Registered Charity Regime*

1. Purpose

The purpose of this briefing is to identify some of the major "administrative law" issues that arise within the registered charity regime, and to propose some areas of law for review and/or regulatory reform.

2. Context

Administrative law is that branch of public law that is concerned with the authorization and constraint of regulatory activity. The concerns of administrative law are general and can apply to the administration of any statute or public program.[1] However, the determination of any particular administrative law issue will depend on the legal and policy context in which it arises.

The principles of administrative law authorize and place limits upon the Canada Revenue Agency's administration of the *Income Tax Act*[2] registered charity regime, including its decisions to grant, deny, or revoke registered charity status. A number of contextual factors are potentially relevant to the application of administrative law principles in this field. These include, but are not limited to, the following:

- Jurisdiction over registered charities is divided between the federal and provincial governments. While Parliament has authority over taxation, the provinces have exclusive authority to make laws regarding the 'establishment, maintenance and management of…charities and eleemosynary institutions', and over property and civil rights in the province.[3]
- Charities vary widely in their size, resources, activities and operation. They also take many different legal forms, each of which is subject to distinct federal and/or provincial laws that interact in various ways with the registered charity regime.
- Most charities are run primarily by volunteers, and have limited ability to understand a complex regulatory regime or to pay for legal advice. In this situation, it may be assumed that charities rely heavily upon the extra-statutory guidance that the CRA makes available online.
- The statutory provisions that authorize and constrain the CRA's regulation of registered charities are relatively sparse. By way of comparison, the *Charities Act* 2011 (UK) contains approximately 350 sections and eleven schedules that articulate in great detail the UK Parliament's intentions regarding the legal definition of charity, the functions and powers of

* The author, Dr. Kathryn Chan, is an Associate Professor in the University of Victoria Faculty of Law.

[1] Gus Van Harten et al, *Administrative Law: Cases, Text and Materials* (Emond Montgomery 2015) at 4.

[2] RSC 1985, c. 1 (5th Supp), as amended.

[3] *Constitution Act 1867*(U.K.), 30 & 31 Vict. c..3., ss 91(3), 92(7), (13).

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the Commission, and the reporting and registration requirements for charities.[4] The registered charity provisions, on the other hand, are set out in a dozen sections of the *Income Tax Act*,[5] which are often noted for what they do *not* say.[6]

- The registered charity provisions leave many key terms undefined, including the term "charitable" (*de bienfaisance*). In *Vancouver Society,* the Supreme Court of Canada held that in this situation, the courts should resort to the common law for both the definition of charity, *and* the principles that should guide the courts in applying that definition.[7]
- Many of the guiding principles to which the SCC referred in *Vancouver Society* were developed by the English Court of Chancery in the eighteenth and nineteenth centuries. These equitable principles subject charities to strict judicial oversight, but also treat them as entitled to "extraordinary favor". They include the principle that the court may give a benignant construction to a document in order to carry into effect a donor's charitable intent.

Registered charities (and applicants for registered charity status) have never appealed the registration and revocation decisions of the Minister of National Revenue in large numbers. Those that have appealed have been spectacularly unsuccessful: in the last fifteen years, there have been approximately seventeen such appeals, all of which have been dismissed with costs.

While the expertise and fact-finding processes of the CRA are entitled to a measure of judicial deference, this perfect record of appellate losses should be of concern to both the government and the charitable sector. Anecdotally, very few charity lawyers today advise their clients to appeal registration or revocation decisions that they deem wrong or unfair, opting instead for work-arounds or closed-door negotiations. While these solutions may be appropriate in some circumstances, they do not encourage transparency, clarity or accountability within the registered charity regime. Moreover, the widely-held view that it is near-impossible to win a registered charity appeal has contributed to a dearth of case law in a field that has traditionally been developed by the courts. After reviewing the evidence on this point, the Special Senate Committee on the Charitable Sector recommended that the Government of Canada consider measures to assist organizations to appeal charitable registration and revocation decisions.[8]

The registered charity regime raises a number of administrative law concerns, many of which could usefully be addressed during a process of regulatory reform. For purposes of this briefing note, I will touch briefly on four: the standard of review applicable to registration and revocation decisions, the range of "reasonableness" for such decisions, the evidentiary record in registration/revocation appeals, and the effect of 168(1)(b) on a revoked charity's right to be heard.

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[4] It has been said that the *Charities Act* 2006 was subject to 'more consideration and more parliamentary scrutiny than any other piece of legislation in the UK': Lindsay Driscoll, 'England and Wales: *Pemsel* plus' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar 2010) 48.

[5] The core provisions of the registered charity regime are set out in sections 149(1), 149.1, 168, 172, 188, 188.1, 189 and 248(1), ITA.

[6] *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 SCC 42, [2007] 3 SCR 217 [8], [15].

[7] *Vancouver Society of Immigrant and Visible Minority Women* [1999] 1 S.CR. 10 at para 175.

[8] Special Senate Committee on the Charitable Sector, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* (June 2019) at 77.

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3. Proposed areas for review

1. Standard of Review applicable to registration and revocation decision

Pursuant to paragraph 172(3)(a.1) of the *Income Tax Act,* a person may appeal the confirmation by the Minister of National Revenue of a proposal to refuse to register that person as a charity or to revoke that person's registered charity status. Like other statutory appeals from the decisions of administrative decision-makers, subsection 172(3) appeals are governed by administrative law review, not (judicial) appellate review principles.[9] Subsection 180(3) specifies that ss 172(3) are to be "heard and determined in a summary way".

In the 2012 *Prescient Foundation* decision*,* the Federal Court of Appeal addressed the standard of review applicable in paragraph 172(3)(a.1) appeals. The Court's holding has been adopted a number of times since: "extricable questions of law, including the interpretation of the Act, are to be determined on a standard of correctness. On the other hand, questions of fact or of mixed fact and law, including the exercise of the Minister's discretion based on those facts and the law as correctly interpreted, are to be determined on a standard of reasonableness."[10]

The difference between correctness and reasonableness review is addressed in *Dunsmuir v New Brunswick,* the leading standard of review authority. "When applying the correctness standard", *Dunsmuir* states, "a reviewing court will not show deference to the decision-maker's reasoning process; it will rather undertake its own analysis of the question."[11] Reasonableness, on the other hand, is a deferential standard animated by the principle that certain questions do not lend themselves to one particular result.[12] Reasonableness has proven difficult to apply and will be discussed further below.

In *Dunsmuir,* the Supreme Court of Canada established a general standard of review analysis that matches different categories of questions with either correctness or reasonableness review. The *Dunsmuir* categories differ from those that the Federal Court of Appeal articulated in *Prescient.* According to *Dunsmuir*, correctness is *not* applicable to all extricable questions of law, but only constitutional questions, questions of "true jurisdiction or *vires",* and questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise."[13] Reasonableness is normally the standard of review where a tribunal is interpreting its own statute, or where it has "developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context"[14]. Recent case law has confirmed that the presumption of reasonableness for a tribunal interpreting its home statute applies to a decision by a Minister.[15]

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[9] *Mouvement laique;* 2015 SCC 16; *Edmonton (City) v Edmonton East,* 2016 SCC 47 (cf *Housen v Nikolaisen,* 2002 SCC 33).

[10] 2013 FCA 120 at para 12. See also, for example, *Public Television Association of Quebec v. Canada (National Revenue)* 2015 FCA 170, *Jaamiah Al Uloom Al Islamiyyah Ontario v. Canada (National Revenue)*, 2016 FCA 49 and *Ark Angel Foundation v. Canada (National Revenue)* 2019 FCA 21.

[11] *Dunsmuir v New Brunswick,* [2008] 1 SCR 190 at para 50.

[12] *Ibid* para 47.

[13] *Ibid* para 62.

[14] *Ibid* para 54.2.

[15] *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85, CNR, 2014 SCC 40.

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The inconsistency between the *Dunsmuir* and *Prescient* standards raises the following question:

1.1 Should para 172(3)(a.1) be amended to clarify that the standard of review for questions of law arising in revocation and registration appeals is correctness?

As previously indicated, the Federal Court of Appeal has held that the proper standard of review for "extricable" questions of law arising under paragraph 172(3)(a.1) is correctness. There is much to be said for this position. First, as the Federal Court or Appeal noted in *Prescient,* the courts do not defer to Ministerial interpretations of the *ITA* in the normal course of tax litigation, and there is no evident rationale for changing this approach when dealing with paragraph 172(3)(a.1) appeals.[16] Second, as the Supreme Court of Canada noted in *Vancouver Society,* some of the key terms in the registered charity provisions fall to be interpreted in accordance with equitable principles. Since CRA has no equitable jurisdiction, and since the case law it must rely upon in applying the registered charity provisions spans historical periods and jurisdictions, there is a strong argument that Parliament intended to accord little deference to the revenue authority's determinations of questions related to the law of equity under paragraph 172(3)(a.1).

In *Dunsmuir,* the Supreme Court of Canada indicated that pre-*Dunsmuir* standard of review decisions would be grand-parented, so long as they had determined "in a satisfactory manner" the degree of deference to be accorded a particular category of question: para 57, 62. *Prescient* was decided after *Dunsmuir,* but one of the two cases upon which the Federal Court of Appeal relied in identifying the standard of review in *Prescient* was decided some years before.[17] This would seem to provide a jurisprudential basis for allowing the *Prescient* standard to stand.

However, the Supreme Court of Canada's standard of review jurisprudence remains notoriously unstable, with at least one recent case suggesting that the Court will not consider a standard of review precedent to be determined "in a satisfactory manner" where it is "inconsistent with recent developments in the common law principles of judicial review."[18] The reasoning in *Prescient* is inconsistent with some of these recent developments, leaving its standard of review similarly unstable.

The most direct way of eliminating this uncertainty would be for Parliament to amend subsection 172(3) and/or section 180 of the *Income Tax Act* to clarify the standard of review for registration and revocation appeals. In *Tervita Corp v Canada (Commissioner of Competition)*, the SCC applied a correctness standard to the decision of a competition tribunal on the basis of a statutory provision stating that the decision was appealable "as if it were a judgment of the Federal Court".[19] If section 180 similarly provided that the Minister of National Revenue's charitable registration and revocation decisions were appealable as if they were judgments of the Federal Court , this would signal that the standard of review for questions of law arising in revocation and registration appeals is correctness.

[16] *Prescient* at para 14.

[17] *Action by Christians for the abolition of torture v. Canada*, 2002 FCA 499, paras 23 and 24.

[18] *Agraira v Canada (Public Safety and Emergency Preparedness)* [2013] 2 SCR 559 at para 48.

[19] But see *Kanthasamy v Canada,* 2015 SCC 61, where the Supreme Court of Canada rejected the view that appeal clauses could ever be "determinative" of the standard of review.

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1.2 What are the markers of an unreasonable registration or revocation decision?

Regardless of the treatment of extricable questions of law, reasonableness has been (and presumably will continue to be) the standard of review applicable to the majority of questions arising in paragraph 172(3)(a.1) appeals. The Federal Court of Appeal has held that reasonableness is the appropriate standard when the question is "whether activities are charitable"[20], whether a registered charity has made a gift to a non-qualified donee,[21] and whether a registered charity has failed to devote its resources to its own charitable activities.[22] Where an organization's charitable registration is refused or revoked for multiple reasons (the usual case), the Federal Court of Appeal has consistently held that the appellant must demonstrate that the Minister acted unreasonably in respect of each ground.[23] However, the Court has offered very little guidance on the markers of an unreasonable charitable registration/revocation decision. This raises an issue for further research and possible regulatory reform.

The Supreme Court of Canada articulated the two fundamental components of a reasonable decision in *Dunsmuir*. First, the decision-making process must be marked by "justification, transparency and intelligibility"; this has subsequently been framed as a requirement that a reviewing court be able to "clearly understand", on the basis of the record and reasons, how the decision-maker reached its decision.[24] Second, the decision must "fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law."[25] The majority in *Dunsmuir* was clear that there is only *one* standard of reasonableness. However, it has also acknowledged that reasonableness takes its colour from the context, and the range of reasonable outcomes will necessarily vary based on "the particular type of decision making involved and all relevant factors."[26]

There is an ongoing debate about how to apply the reasonableness standard, which it is beyond the scope of this briefing note to review. From the perspective of possible reforms to the registered charity regime, however, it is noteworthy that the Court appears to be turning (back) towards a contextual view of reasonableness. The courts have identified a number of contextual factors that may limit the range of "reasonable" or "defensible" outcomes. These include the purposes of the statutory scheme,[27] the evidence adduced before the decision-maker,[28] the clarity of the statutory language,[29] and the existence of settled case law. On the other hand, where the question being considered is "fuzzy" or the statutory language or case law

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[20] *Fuaran Foundation v Canada (Customs & Revenue Agency),* 2004 FCA 181, 2004 CarswellNat 1367, para 10.

[21] *Opportunities for the Disabled Foundation v Minister of National Revenue,* 2016 FCA 94, 2016 CarswellNat 844.

[22] *Public Television Association of Quebec v Minister of National Revenue*, 2015 FCA 170, 2015 CarswellNat 3184 ["PTAQ"]. But see *Action des Chrétiens pour l'Abolition de la Torture c R,* 2002 FCA 499, 2002 CarswellNat 3598 ["ACAT"] at paras 23-24, where the FCA held that the characterization of a registered charity's activities as "political" was a conclusion of law that was subject to a correctness standard.

[23] *World Job and Food Bank Inc v R*, 2013 FCA 65, 2013 CarswellNat 534 at para 5.

[24] Paul Daly, "The Scope and Meaning of Reasonableness Review" in (2015) 52(3) Alberta Law Review 799 at para 58, citing *Agraira* at para 89.

[25] *Dunsmuir* at para 47.

[26] *Catalyst Paper Corp v North Cowichan (District),* [2012] 1 SCR 5. See also *Wilson v Atomic Energy of Canada Ltd*., 2016 SCC 29 at para 22.

[27] *CUPE v Ontario (Minister of Labour)* [2003] 1 SCR 539.

[28] *B010 v Canada (Citizenship and Immigration),* 2013 FCA 87.

[29] *McClean v BC (Securities Commission),* 2013 SCC 67.

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is unclear, this may broaden the range of reasonable outcomes.[30]

In the context of the registered charity regime, the identified contextual factors can be called upon to support an expansive view of the scope of the Minister's discretion to decide matters concerning charitable registration and revocation. We have already noted the registered charity provisions' well-known gaps and ambiguities; the associated case law is sparse and contains ambiguities of its own. The effect of this lack of clarity is to broaden the range of reasonable options that are available to CRA officials, and reduce the prospects of a successful judicial review. Parliament could narrow the range of reasonable or defensible Ministerial decisions by articulating the purpose of the registered charity regime or by tightening up the language around grounds for revocation.

2. Procedural Fairness Issues relating to the registered charity regime

The twin principles of procedural fairness – *audi alteram partem* and *nemo judex in sua causa*[31] – are applicable to the registered charity regime. Registered charities have quite often raised procedural fairness issues in paragraph 172(3)(a.1) appeals, though generally with little success. The particular issues that merit further review include the following:

2.1 Disclosure of Evidence and Case to Meet

Subsection 180(3) of the *ITA* provides that paragraph 172(3)(a.1) appeals "shall be heard and determined in a summary way". Among other things, this means that the evidentiary record in revocation appeals stops with the issuance of the Notice of Intention to Revoke,[32] and the evidentiary record in registration appeals is limited to the documents in the CRA's file. As the Canadian Bar Association has previously noted in a submission to the Minister of Justice, the inability of appellants to adduce *viva voce* or affidavit evidence tested by cross-examination significantly limits their ability to present a complete record on which all relevant factual and legal issues may be argued.[33] This is a matter of particular concern in the not-for-profit field, where (as previously mentioned) most actors lack the financial resources and knowledge to anticipate this evidentiary problem. The CBA and the Senate Special Committee on the Charitable Sector have both recommended, on this basis, that jurisdiction over registration and revocation appeals be transferred to the Tax Court of Canada. However, consideration might also be given to amending subsection 180(3), or changing the rules regarding the evidentiary record before the Federal Court of Appeal.

2.2 The effect of section 168(2)(b)

Section 168(2)(b) of the *ITA* provides that where the Minister gives a registered charity notice of intention to revoke its registration (NIR), the Minister may publish a copy of the notice in the Canada Gazette 30 days after the day of mailing of the notice, unless the Federal Court of Appeal makes an order extending the time. Upon publication, the charity's registration is revoked and it can no longer issue charitable donation tax receipts. Section 188 provides that on the date of the NIR, the taxation year of the charity is deemed to end, and it becomes liable for a revocation tax equivalent to the fair market value of all its property, minus amounts expended

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[30] *CUPE v Ontario (Minister of Labour)* [2003] 1 SCR 539.

[31] In English, essentially, "let the other side be heard as well" and "no-one is judge in his own cause".

[32] Appeal Book Order of Stratas JA (7 September 2015: Docket A-230-15), referred to in *Opportunities for the Disabled Foundation v Canada(MNR),* 2016 FCA 94.

[33] "Appeal Jurisdiction for Registered Charities", available at (http://www.cba.org/Sections/Charities-and-Not-for-Profit-Law/Submissions-and-Legislative-Updates/Submissions).

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during a one-year "winding-up period" on gifts to arms'-length charities and charitable activities.[34]

Section 168(2)(b) places an additional burden on organizations that want to challenge revocation decisions of the Minister. It is very difficult to obtain a Federal Court of Appeal order within the 30-day limitation period set out in paragraph 168(2)(b). Further, an organization that has its charitable registration revoked has a greatly reduced capacity and incentive to pursue an appeal. Regulatory reform in this area could improve access to justice for registered charities, and potentially lead to the production of useful case law by facilitating meritorious appeals.

[34] *ITA,* s 188(1), (1.1), (1.2), (1.3).

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