Federal Court of Appeal | Cour d'appel fédérale

Date: 20220609

Docket: A-436-19

Citation: 2022 FCA 108

CORAM: **GAUTHIER J.A.**
GLEASON J.A.
LOCKE J.A.

BETWEEN:

COLEL CHABAD LUBAVITCH FOUNDATION OF ISRAEL

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Montréal, Quebec, on December 14, 2021.

Judgment delivered at Ottawa, Ontario, on June 9, 2022.

REASONS FOR JUDGMENT BY: GLEASON J.A.
CONCURRED IN BY: GAUTHIER J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this appeal, brought under paragraph 172(3)(a.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA), the appellant seeks to have this Court set aside the October 22, 2019 Notice of Confirmation issued by the Minister of National Revenue and the earlier Notice of Intention to Revoke, issued on December 19, 2016, that was confirmed in the Notice of Confirmation. The effect of the Notice of Intention to Revoke will be to revoke the appellant's

registration as a charitable organization for the purposes of the ITA once the Notice is published in the Canada Gazette.

[2] For the reasons that follow, I would dismiss this appeal, with costs.

I. Background

[3] Given the various arguments raised by the appellant, it is necessary to review the relevant factual background in some detail. For ease of reading, the relevant provisions in the ITA mentioned in these Reasons are reproduced in the attached Appendix.

[4] The appellant was incorporated as a charitable organization on June 9, 1993. Its main objects were stated as being to: (1) provide buildings for the use of synagogues to conduct services and teach children in accordance with the Jewish faith; (2) provide scholarships for students to attend schools that teach Jewish studies; and (3) receive and maintain a fund or funds and to apply them from time to time to help attain one of the first two stated objectives. On October 7, 1993, the Minister registered the appellant as a charitable organization, with an effective date of June 9, 1993.

[5] In its T3010 Registered Charity Information Returns for the 2003 to 2007 fiscal periods, the appellant stated that its activities consisted of providing scholarship assistance to students to attend courses in Israel, providing information about Jewish holidays throughout Canada and,

beginning in 2007, providing poverty relief to needy people in Israel. Some of these activities were not consistent with the appellant's objectives.

[6] The appellant was subject to two audits by the Charities Directorate (the Directorate) of the Canada Revenue Agency (CRA).The first audit took place between April 2006 and August 2007 and covered the 2003 and 2004 fiscal periods. It identified several areas of non-compliance, namely:

- conduct of activities that were not consistent with the appellant's objects;
- failure to keep documents identifying scholarship recipients and their incomes;
- failure to properly document the relationship with the appellant's agent in Israel;
- errors in the appellant's information returns in not accurately reporting the salary received by one of its directors;
- making loans to a director and others in contravention of the appellant's objects;
- failure to maintain proper books and records with respect to travel expenses for a director; and
- failure to issue T4 or T4A slips and provide the CRA with information in respect of payments made to persons employed for fundraising activities.

[7] On May 29, 2007, the appellant executed a Compliance Agreement in which the appellant agreed:

- not to undertake activities in contravention of its objects unless a request to modify them were approved by the Directorate;
- to send all scholarships directly to students and to document the provision of them in accordance with details prescribed in the Compliance Agreement;
- to sign the T1240 Registered Charity Adjustment Request form;
- not to lend money to those in need until its objects and activities allowed;
- not to provide monthly travel allowances to individuals who undertook activities on behalf of the appellant and to instead directly pay travel expenses related to the appellant's charitable activities; and
- to keep records of all individuals who received more than $500 annually for part-time work and to issue a T4 or T4A for such work.

[8] Following the execution of the Compliance Agreement by the appellant, the Directorate wrote to the appellant on June 13, 2007 to confirm the receipt and acceptance of the Agreement. In its June 13, 2007 letter, the Directorate also noted that the audit that gave rise to the Compliance Agreement did "not cover the full scope of [the appellant's] operation and it [was] possible that an audit at some future time could cover the same period" (Appeal Book Vol. III, p. 349).

[9] The first audit was conducted by an auditor named Mr. Jean Dion. During the course of his audit, Mr. Dion consulted with five other employees who worked in the Directorate. One of them was Mr. Daniel Racine. The documents before the Court indicate that the role of Mr. Racine during the first audit was limited to:

- sending Mr. Dion a copy of the appellant's 2004 Registered Charity Information Return;
- providing advice on the required documentation relating to selection criteria and recipients of the scholarships given by the appellant;
- reviewing documents regarding the appellant's formula to determine scholarship amounts;
- advising on tax withholdings required to be made from the scholarship payments made by the appellant;
- reviewing the appellant's representations with respect to the proper documentation required in respect of the scholarships;
- reviewing a draft of the first letter to the appellant, outlining the compliance issues;
- reviewing the draft compliance agreement; and
- advising Mr. Dion on the recourses available to the appellant if the Minister did not agree with the appellant's representations.

[10] Following the execution of the Compliance Agreement, the appellant sought and obtained the approval of the Directorate for a modification of its objects to allow for provision of assistance to needy people in Israel. In connection with this modification, the Directorate advised the appellant that "[c]haritable organizations may not directly provide cash (funds) to non-qualified donees, in this case the poor [in Israel]…" but could provide them with furniture and clothing as the appellant proposed (Appeal Book Vol. III, p. 376). In response, the appellant advised the Directorate that its intent was to send money to an agent in Israel (Rabbi Moshe Shmuel Deutsch), who, in turn, would use the funds to purchase food for the needy and to run a soup kitchen. The appellant provided the Directorate with an agency agreement in which Rabbi Deutsch undertook to use the funds in this fashion and, on the strength of these representations, the Directorate approved these activities being undertaken by the appellant.

[11] In August 2011, the Directorate again selected the appellant for an audit, which initially concerned its 2008 and 2009 fiscal periods but was later extended to the appellant's 2003 to 2009 fiscal periods. Mr. Dion conducted the second audit. Mr. Racine was not involved in the second audit.

[12] The only issue uncovered during the second audit in respect of the appellant's 2003 and 2004 taxation years (the years that had been previously audited) related to the appellant's participation in a donation scheme. More specifically, during the course of the second audit, the Directorate obtained evidence that indicated that the appellant had been engaged in a scheme through which it issued receipts for amounts well in excess of monies actually donated, thereby facilitating claims by the donor for charitable credits to which the donor was not entitled.

[13] During the second audit, the Directorate also noted several other areas of non-compliance with the Compliance Agreement that the appellant had signed and with the requirements of the ITA in respect of taxation years subsequent to 2004.

[14] Mr. Dion sent two fairness letters to the appellant, outlining the various concerns uncovered during the second audit. These letters, sent in November 2013 and January 2016, listed the following areas of non-compliance:

- issuance of donation receipts over the 2003 to 2007 period where a partial gift was made by a donor, Dr. Lorne Sokol, through which he was given receipts for approximately $3.5 million but approximately 80-90% thereof was remitted back to him by the appellant via a corporation registered in Belize, the Moshe Shmuel Deitsch Corp;

- failure of the appellant to devote all of its resources to charitable purposes and activities outside of Canada in 2008 and 2009 in that:

    - the appellant could not demonstrate that nearly $600,000.00 was actually paid to purchase food and clothing for needy people in Israel as there were no documents to adequately support such payments;
    - the appellant's agent in Israel, Rabbi Deutsch, distributed approximately $39,000.00 to other individuals, purportedly to have them provide assistance to needy individuals, but there were no agency agreements with these individuals;

- the appellant distributed an additional approximate amount of $31,000.00 to an organization in Israel but could not demonstrate that the funds donated directly achieved a charitable purpose;

- failure to maintain adequate books and records related to the travel expenses of one of the appellant's directors, Rabbi Zalman Zirkind, and related to the appellant's fundraising activities over the period from 2007 to 2009; and

- failure to file accurate information returns in 2008 and 2009 by misreporting the salary paid to one of the appellant's directors and in respect of payments made to those engaged in telephone solicitations.

[15] Mr. Dion also expressed concern in the second fairness letter that the appellant had falsified the minutes of its board of directors' meetings for 2009 and 2010. The appellant had provided copies of these minutes to the Directorate during the audit. The individuals the appellant claimed were directors told the Directorate that they had no active involvement with the appellant or knowledge of the meetings. One of them in addition confirmed that he did not attend either of the two meetings that the minutes stated he attended.

[16] Following a meeting with the appellant's representatives and review of the evidence and the appellant's representations, the Directorate issued a Notice of Intention to Revoke the appellant's registration as a charitable organization on December 19, 2016. The Notice was signed by Mr. Tony Manconi, the Director General of the Directorate. In the Notice, Mr.

Manconi advised that the CRA had concluded that the appellant was not complying with the requirements of the ITA because the appellant:

- failed to issue donation receipts in accordance with the ITA by issuing official donation receipts where a partial gift was made;
- failed to devote all of its charitable resources to its own charitable activities, notably by gifting funds to non-qualified donees;
- failed to maintain adequate books and records;
- failed to file accurate information returns as required by the ITA;
- had no active board of directors; and
- had misrepresented its fundraising solicitations.

[17] The appellant filed a Notice of Objection to the Notice of Intention to Revoke. Mr. Racine, who was by then assigned to the Tax and Charities Appeals Directorate (the Appeals Directorate), was assigned as the appeals officer. Following his review of the audit findings of the Directorate and the appellant's Notice of Objection, Mr. Racine issued a letter on March 6, 2019, in which he stated:

> We have reviewed the CD's [*i.e.*, the Directorate's] audit findings and the information submitted by the Foundation with its objection. We agree with the decision of the CD to issue the [the Notice of Intention to Revoke] in accordance with subsection 168(1) and 149.1(2) of the [ITA] because of the following non-compliance issues. (Appeal Book Vol. I, p.61)

[18] The letter then went on to enumerate the grounds for revocation. These were:

- paragraph 168(1)(b) of the ITA - ceased to comply with the requirements of the ITA for registration via participation in the donation scheme;

- paragraph 168(1)(b) of the ITA - ceased to comply with the requirements of the ITA for registration by not having direction and control over the activities undertaken in Israel and thus not devoting the appellant's resources to its own charitable activities;

- paragraph 168(1)(c) of the ITA - failure to file an information return as required under the ITA by allocating charitable expenditures that were not its own;

- paragraph 168(1)(c) of the ITA – failure to file an information return as required under the ITA by not correctly allocating fundraising expenditures;

- paragraph 168(1)(c) of the ITA – failure to file an information return as required under the ITA by not accurately listing the names of the appellant's directors;

- paragraph 168(1)(d) of the ITA – issuing a receipt for a gift that did not comply with the ITA and its Regulations or that contained false information because by the charity ultimately received only 10%-20% of the receipted amount;

- paragraph 168(1)(e) of the ITA – failure to comply with subsection 230(2) of the ITA through a failure to keep information in such a form as will enable the Minister to determine whether there are grounds for the revocation of its

registration by having insufficient documentation for activities undertaken overseas;

- paragraph 168(1)(e) of the ITA – failure to comply with subsection 230(2) of the ITA through a failure to keep information in such a form as will enable the Minister to determine whether there are grounds for the revocation of its registration by not providing supporting documentation for travel and fundraising expenditures;

- paragraph 168(1)(e) of the ITA – failure to comply with subsection 230(2) of the ITA through a failure to keep information in such a form as will enable the Minister to determine whether there are grounds for the revocation of its registration by providing minutes of board meetings that were inaccurate;

- paragraph 149.1(2)(c) of the ITA – the making of disbursements by way of a gift to a non-qualified donee; and

- subsection 230(2) of the ITA – failure to file an information return as required under the ITA due to the foregoing issues.

[19] The appellant was provided a final chance to make submissions in response to Mr. Racine's letter. After review of them, the Appeals Directorate determined that the additional submissions did not adequately respond to the concerns raised in the Notice of Intention to Revoke. On October 22, 2019, the Minister issued a Notice of Confirmation to the appellant,

confirming ten grounds for revocation of the appellant's registration as a charitable organization, namely:

1. The appellant participated in a donation scheme in which 80-90% of the funds received were returned to Dr. Sokol and not used for charitable purposes (paragraph 168(1)(b) of the ITA);

2. The appellant did not have direction and control over the activities undertaken in Israel and Belize, and thus did not devote its resources to its own charitable activities (paragraph 168(1)(b) of the ITA);

3. The appellant failed to file an information return as required under the ITA by allocating charitable expenditures for activities that were not its own (paragraph 168(1)(c) of the ITA);

4. The appellant failed to file an information return as required under the ITA by not correctly allocating fundraising expenditures related to Rabbi Zirkind's salary (paragraph 168(1)(c) of the ITA);

5. The appellant failed to file an information return as required under the ITA by not listing accurately the names of its directors (paragraph 168(1)(c) of the ITA);

6. The appellant issued receipts for a gift otherwise than in accordance with the ITA and the Regulations or that contain false information, as it issued official

donation receipts while receiving only 10-20% of the receipted amount (paragraph 168(1)(c) of the ITA);

7. The appellant failed to comply with subsection 230(2) of the ITA because it failed to keep information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration by having insufficient supporting documentation for activities undertaken overseas (paragraph 168(1)(e) of the ITA);

8. The appellant failed to comply with subsection 230(2) of the ITA because it failed to keep information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration by not providing supporting documentation for travel and fundraising expenditures (paragraph 168(1)(e) of the ITA);

9. The appellant failed to comply with subsection 230(2) of the ITA because it failed to keep information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration by providing minutes of board meetings which were inaccurate (paragraph 168(1)(e) of the ITA); and,

10. The appellant made a gift to a non-qualified donee (paragraph 149.1(2)(c) of the ITA).

[20] The Notice of Confirmation was signed by Mr. Isaac Piotrkowski, Manager of the Appeals Directorate.

[21] On November 19, 2019, the appellant appealed to this Court.

II. Issues

[22] In its memorandum of fact and law, the appellant challenges each of the bases for revocation upon which the Minister relied. The appellant also asserts that there is a reasonable apprehension of bias arising from the involvement of Mr. Racine in the first audit and his assignment as the appeals officer in the appeal from the Notice of Intention to Revoke that was issued as a consequence of the second audit. The appellant focused its oral submissions before this Court on the bias argument.

[23] The appellant makes two inter-connected submissions in respect of bias. It first asserts that the dual role played by Mr. Racine as part of the first audit and as the appeals officer in respect of the findings made following the second audit violated the principle that an administrative decision-maker should not sit in appeal from a decision the decision-maker was involved in making. Second, the appellant asserts that the roles played by Mr. Racine in the first audit and in the appeal from the Notice of Intention to Revoke violated the appellant's legitimate expectations based on statements contained in the CRA's Appeals Manual and in the *Taxpayer Bill of Rights*, which are publicly available documents.

[24] The Appeals Manual provided in relevant part that "…appeals officers must not work on files with which they were involved when they were in a different work section (for example, the appeals officer was the auditor on that file)" (Canada Revenue Agency, "Appeals Manual 2015-03" March 2015 at para. 1.1). The relevant section in the *Taxpayer Bill of Rights*, published on the CRA website, states that "[t]he officer responsible for handling your file will not have been involved with the original decision under dispute" (Canada Revenue Agency, RC17(E) Rev. 20, "*Taxpayer Bill of Rights*" (last modified April 8, 2021) at section 4).

[25] The appellant's other arguments, directed to the merits of the Minister's decision and set out in its memorandum of fact and law, may be summarized as follows.

[26] In relation to the donation scheme, the appellant argues that the Minister could not conclude that it participated simply because the appellant was unable to demonstrate to the Minister's satisfaction that it did not take part in the scheme. Further, it suggests that because the conclusion comes from the "fraudster himself", the evidence from Dr. Sokol is unreliable. As such, the appellant argues that the Minister made an error of law in concluding that the appellant participated in a donation scheme. The appellant also submits that the Minister erred in law in concluding that it issued donation receipts including false information because the appellant issued the donation receipts in good faith based on the information available at the time of their issuance.

[27] Next, in relation to the revocation of the appellant's registration due to its failure to have direction and control over its activities in Israel, the appellant argues that the Compliance

Agreement governed the appellant's obligations going forward. According to the appellant, the Minister therefore erred in law in relying on activities that were occurring prior to the execution of the Compliance Agreement as a basis for revocation in respect of the continuation of these activities in later years. The appellant further argues that the Minister's findings were in near-complete disregard of the evidence submitted by it and of the context in which the appellant's activities were undertaken in Israel. The appellant says that the Minister therefore made a palpable and overriding error of fact in concluding that the appellant did not maintain direction and control over its activities in Israel in 2008 and 2009.

[28] In relation to the charitable information returns, the appellant argues that the Minister made an error of law in concluding that the appellant did not accurately list the names of its directors in them because in 2008 and 2009 the individuals it listed as directors were *de jure* directors even though they had minimal involvement with the appellant. The appellant also argues that Rabbi Zirkind was involved in the daily operations of the appellant, so there is no reason why his salary should be considered a fundraising expense and that the Minister made a reviewable factual error in concluding otherwise.

[29] The appellant further argues that the Minister made a palpable and overriding error of fact in concluding that it submitted inaccurate minutes of board meetings. It maintains that the Directorate did not seek additional evidence from Mr. Abraham Neuwirth, one of the directors whose involvement was in issue, and that its failure to do so constitutes a reviewable error. The appellant also suggests that the Directorate ought to have followed up with Mr. Meir Man, the other director, after he cancelled a planned meeting.

[30] The appellant next contends that the Minister cannot revoke its registration for any alleged insufficient reporting documentation for activities undertaken abroad prior to the signature of the Compliance Agreement. The appellant also says that the Minister's conclusions that the appellant had insufficient documentation were based on improper inferences. The appellant finally submits that the reporting problems the Directorate found are an insufficient basis for revocation of the appellant's registration as a charitable organization.

III. Analysis

[31] In accordance with the Supreme Court's holding in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 37, and, as this Court recently confirmed in *Ark Angel Fund v. Canada (National Revenue)*, 2020 FCA 99 at para. 4 [*Ark Angel Fund*], the normal appellate standards of review apply to this appeal as it is a statutory appeal. Therefore, errors of law are reviewable for correctness and errors of fact or of mixed fact and law from which a legal issue cannot be extricated are reviewable for palpable and overriding error (*Ark Angel Fund* at paras. 4-5 and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]).

[32] The appellant's bias allegations raise an issue of law (*Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 at paras. 46-47, citing *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 54; *Gulia v. Canada (Attorney General)*, 2021 FCA 106 at para. 9).

[33] All the appellant's other arguments, on the other hand, raise questions of fact. Contrary to what the appellant says, each of its challenges to the Minister's grounds for issuing the Notice of Confirmation and Notice of Intention to Revoke involve challenges to factual determinations that the appellant wishes this Court to overturn. The standard of review applicable to each of the appellant's challenges to these determinations is that of palpable and overriding error (*Housen* at para. 10).

[34] The test for setting aside a decision for palpable and overriding error is an exacting one. An error is only palpable if it is obvious or plainly seen and only overriding if it affects the result reached. As stated by this Court in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46:

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* 2006 CanLII 37566 (ONCA), (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-159; *Waxman, supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[35] I turn now to address the appellant's arguments under the above-described standards of review.

A. *Does Mr. Racine's involvement in the first audit give rise to a reasonable apprehension of bias?*

[36] The test applicable to the assessment of an allegation of bias like the one made in this case is well known and involves asking, "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would [that person] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" *(Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 at p. 394 [*National Energy Board*]). Thus, a claim that circumstances give rise to a reasonable apprehension of bias must be evaluated "through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail" (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R (4th) 193 (S.C.C.) at para. 36 [*S. (R.D.)*]).

[37] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias is inherently contextual and fact-specific (*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 at para. 26). In addition, the case law firmly establishes that the threshold for a finding of bias is high; a party alleging bias must rebut a strong presumption of impartiality on the part of the decision-maker and must do so with concrete evidence, as opposed to speculation (*National Energy Board* at p. 395; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at paras. 76-77 [*Wewaykum*]; *S. (R.D.)* at paras. 112-114).

[38] A reasonable apprehension of bias—if not a finding of actual bias—may well arise where the same decision-maker makes an initial decision and then sits in appeal from that decision or appoints the appellate decision-maker (see, for example, *MacBain v. Lederman*, [1985] 1 F.C. 856 (FCA), 22 D.L.R. (4th) 119 at paras. 11, 14; *Port Colborne Warehousing Ltd. v Canada (Bd. of Steamship Inspection)*, 73 N.R. 126, 1987CarswellNat 924 at para. 12). In such circumstances, there is a perceived denial of an impartial appellate decision-maker. This sort of circumstance has sometimes been described as a violation of the maxim "*nemo judex in causa sua*" or that no one shall be a judge of that person's own cause.

[39] Turning to the notion of legitimate expectations, an administrative decision-maker's failure to follow the procedure it has said it would follow may give rise to a breach of procedural fairness (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (1999), 174 D.L.R. (4th) 193 at para. 26 [*Baker*]; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 [*Mavi*]). The Supreme Court set out the conditions where an administrative decision-maker's representations give rise to legitimate expectations in *Mavi* at paragraph 68:

> Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision-maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center* [*v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281], at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.

[40] Application of the foregoing principles in the instant appeal results in a determination that the appellant's legitimate expectations were not violated and that Mr. Racine's dual role did not give rise to either actual bias or to a reasonable apprehension of bias through violation of the prohibition against playing both the role of initial and appellate decision-maker.

[41] Here, the involvement of Mr. Racine in the first audit was minimal and, to the extent he has been shown to have actually examined issues during the first audit as opposed to merely providing general advice or reviewing others' drafts, his examination was related to issues surrounding the scholarships provided by the appellant. Scholarships were not at issue in the second audit or the appeal.

[42] The first audit, moreover, was a partial one of the appellant's 2003 and 2004 taxation years, where the donation scheme was not at issue because it had not yet been uncovered. With the exception of the donation scheme, the second audit and the appeal of the Notice of Intention to Revoke did not relate to the 2003 and 2004 taxation years. There was accordingly no overlap in the files or issues that Mr. Racine considered in the first audit and during the appeal from the Notice of Intention to Revoke.

[43] Furthermore, Mr. Racine was not the decision-maker in respect of the determinations that give rise to this appeal. Rather, it was Mr. Manconi, who issued the Notice of Intention to Revoke, and Mr. Piotrkowski, who issued the Notice of Confirmation.

[44] Based on the foregoing, Mr. Racine cannot be said to have sat in appeal from a decision he made.

[45] The present case is somewhat similar to *Wewaykum*. There, the Supreme Court held that tangential involvement in a case by one of its members when he was the Associate Deputy Minister of Justice and generally oversaw the litigation that ended up before the Supreme Court several years later did not give rise to a reasonable apprehension of bias, even where that member of the Court wrote the reasons in the case. Similarly, Mr. Racine's tangential involvement, many years earlier, in respect of different issues in different taxation years from those that were examined in the appeal does not give rise to a reasonable apprehension of bias in the present case.

[46] Nor does what occurred here violate any legitimate expectations the appellant might have had flowing from the CRA's Appeals Manual and the *Taxpayer Bill of Rights*. The passages in those publications upon which the appellant relies do not prohibit what occurred in this case. The two audits concerned different taxation years, except for the donation scheme, which was discovered only during the second audit. Mr. Racine was therefore not involved in auditing any issues that were part of the appeal. Accordingly, he cannot be said as an appeals officer to have been "involved with the original decision under dispute", to use the wording of the *Taxpayer Bill of Rights*, or to have been involved with the same file, as prohibited by the CRA's Appeals Manual.

[47] Particularly in light of the need for clear, unambiguous and unqualified representations in order to find a violation of a party's reasonable expectations as required by *Mavi*, there has been no violation of the appellant's legitimate expectations in this case.

[48] I therefore conclude that there has been no violation of the appellant's procedural fairness rights and that what occurred in the present case does not give rise to either actual bias or a reasonable apprehension of bias.

B. *Did the Minister commit a reviewable error in respect of the grounds for revocation?*

[49] Turning to the appellant's other arguments challenging the merits of the Minister's decision to revoke the appellant's registration as a charitable organization, as the appellant acknowledges, it must succeed on each of the other grounds it raises to be successful in this appeal if its bias argument fails. Thus, if just one of the bases for revocation is maintained, this appeal must be dismissed (see, for example, *Humane Society of Canada for the Protection of Animals and the Environment v. Canada (National Revenue)*, 2015 FCA 178, 474 N.R. 79 at para. 64 [*Humane Society of Canada*]).

[50] As already noted, the standard of review applicable to these additional issues is that of palpable and overriding error—an exacting standard. As this Court recently held in *Ark Angel Fund*, under the standard of palpable and overriding error, this Court "cannot reweigh the evidence or second-guess the Minister's factual findings; instead, we must be convinced there has been obvious, calamitous error" (at para. 6).

[51] The appellant has not so convinced me in respect of all but one of the issues it raises. The one meritorious issue was conceded by the Minister and relates to the composition of the appellant's board of directors in 2008 and 2009, which did include the two named individuals who were *de jure* directors. Success on this one issue, however, does not affect the result because there is no basis to interfere with the nine other grounds upon which the Minister based the decision to revoke the appellant's registration as a charitable organization.

[52] I move to next discuss these grounds and, for ease of reading, have grouped them together based on the issues to which they relate.

(1) Grounds relied on in relation to the donation scheme

[53] The most significant justification for revocation of the appellant's registration as a charitable organization was doubtless its participation in the donation scheme with Dr. Sokol. Contrary to what the appellant says, it was not an error for the Minister to have relied on the evidence from Dr. Sokol to support the conclusion that the appellant was complicit in the scheme. Dr. Sokol's evidence was clear, compelling, and demonstrated the appellant's knowing involvement in the scheme. It was open to the Minister to accept such evidence from Dr. Sokol. Further, the Minister had ample additional evidence to support the decision to revoke on this basis, including documents from the appellant's own records and bank accounts, from the accounts in Belize of the Moshe Shmuel Deitsch Corp., and from Rabbi Moshe Shmuel Deutsch, himself.

[54] Nor does the fact that the scheme was discovered only after the conclusion of the first audit and signature of the Compliance Agreement limit the Minister's ability to rely on the appellant's participation in the scheme from 2003 onward as a basis for revocation. There is no suggestion that the Minister in any way ignored the existence of the scheme during the first audit, which was conducted only on a partial basis.

[55] The Minister therefore did not make a palpable and overriding error in concluding that the appellant had knowingly participated in the donation scheme with Dr. Sokol.

[56] Under paragraph 168(1)(d) of the ITA, the Minister may revoke a charitable organization's registration if it issues a receipt for a gift otherwise than in accordance with the ITA or if it issues a receipt that contains false information. The appellant issued many such receipts to Dr. Sokol for amounts that were returned to him.

[57] In addition, pursuant to paragraph 168(1)(b) of the ITA, the Minister possesses authority to issue a Notice of Revocation if a charity ceases to comply with the requirements for registration. One of the requirements for registration, set out in the definition of "charitable organization" in subsection 149.1(1) of the ITA, is that the charitable organization devote all of its resources to charitable activities carried on by the organization, itself (paragraph 149.1(1)(a.1) of the ITA). When a charity participates in the donation scheme, it fails to devote all its resources to charitable activities as resources are funnelled back to a donor, a non-qualified donee.

[58] The Minister therefore possessed ample authority to revoke the appellant's registration by virtue of its participation in the donation scheme, which was a serious violation of the ITA.

[59] While the foregoing is sufficient to result in the dismissal of this appeal, for sake of completeness, I will briefly review the appellant's other arguments.

(2) Grounds related to the failure to have direction and control over activities in Israel

[60] Contrary to what the appellant says, it was entirely open to the Minister to have concluded that the appellant had inadequate control over the distribution of funds in Israel in 2008 and 2009. Indeed, the appellant acted in contravention of how the Directorate had told it to operate after the first audit and allowed funds to be disbursed directly to individuals in Israel in the total amount of nearly $600,000.00. The appellant was unable to establish how these funds were used. Further, according to correspondence to Rabbi Deutsch, the appellant was not involved in the selection of the individuals to whom such funds were given. In addition, there were no agency agreements with several other individuals to whom other funds were disbursed, and it was unclear whether the funds distributed to an organization were used for a charitable purpose.

[61] The appellant's challenges to the Minister's conclusion that the appellant failed to demonstrate that its funds were directed toward its charitable works in Israel in 2008 and 2009 amount to no more than a disagreement with the Minister's conclusion. Such disagreement does not amount to a palpable and overriding error.

[62] The determination that the appellant had inadequate control over the distribution of funds in Israel in 2008 and 2009 and thus failed to demonstrate that its funds were directed toward its charitable works afforded the Minister authority to revoke the appellant's registration for non-compliance with paragraph 168(1)(b) and subsection 149.1(1)(a.1) of the ITA.

[63] This Court has made it clear that, although charities may use agents, they still must direct and control the use of their resources and cannot be a conduit to funnel money to non-qualified donees. Thus, a charity that has an agent must ensure that the agent uses the charity's resources to carry out activities on the charity's behalf (*Canadian Committee for the Tel Aviv Foundation v. Canada*, 2002 FCA 72, 287 N.R. 82 at paras. 30-31; *Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)*, 2002 FCA 323, 218 D.L.R. (4th) 718 at para. 66; *Bayit Lepletot v. Canada (Minister of National Revenue)*, 2006 FCA 128, 352 N.R. 374 at para. 5). As Justice Scott stated in *Public Television Association of Quebec v. Canada (National Revenue)*, 2015 FCA 170 at para. 44, "[t]he control over the agent's activities is a key element to establish that it maintained direction and control over its resources."

[64] Such control was absent in respect of the appellant's activities in Israel in 2008 and 2009, which accordingly afforded the Minister another basis for the revocation of the appellant's registration as a charitable organization.

(3) Failure to maintain proper books and records

[65] The Minister identified four areas in which the appellant's books and records were inaccurate: (1) its 2009 and 2010 minutes of board of directors' meetings, which were found to have been falsified; (2) lack of documentation to support travel expenditures by Rabbi Zirkind from 2007 to 2009; (3) lack of documentation regarding remuneration paid to fundraisers in 2008 and 2009; and (4) insufficient documentation for the appellant's activities in Israel in 2008 and 2009 and also with respect to the donation scheme involving Dr. Sokol.

[66] Paragraph 168(1)(e) of the ITA permits the Minister to revoke the registration of a charitable organization by reason of its non-compliance with any of sections 230 to 231.5 of the ITA. Subsection 230(2) of the ITA governs the books and records to be kept by organizations, including registered charities, and provides that they must keep records and books of account. This Court has described the requirement to maintain such books and records as "foundational", noting that, "[g]iven the significant privileges that flow from registration under the Act as a charitable organization, the Minister must be able to monitor the continuing entitlement of the charitable organizations to those privileges" (*Humane Society of Canada* at para. 80).

[67] In *Jaamiah Al Uloom Al Islamiyyah Ontario v. Canada (National Revenue)*, 2016 FCA 49, Justice Ryer observed at paragraph 15 that maintaining adequate books and records is a "basic requirement" that is "foundational" because "the absence of proper books and records places the Minister in the position of being unable to meet [the Minister's] basic obligation to verify the accuracy and validity of the charitable donation receipts that the Charity has issued."

For this reason, he found that non-compliance with the requirement was serious enough to warrant revocation. (See also, to similar effect, *Lord's Evangelical Church of Deliverance and Prayer of Toronto v. Canada,* 2004 FCA 397, 328 N.R. 179 at paras. 17-19 and *College rabbinique de Montreal Oir Hachaim D'Tash v. Canada (Minister of the Customs and Revenue Agency),* 2004 FCA 101, 58 D.T.C. 6182 at para. 2).

[68] As concerns the first of the bases upon which the Minister found the appellant's books and records to be insufficient, contrary to what the appellant says, it was open to the Minister to have concluded that the appellant had falsified the minutes for its board of directors' meetings, without speaking again with Mr. Neuwirth or Mr. Man. Mr. Neuwirth had signed a statement confirming that he had not attended the meetings and Mr. Man told the Directorate he did not recall having attended them. He cancelled a second meeting with the Directorate to discuss the issue due to the tragic death of his child.

[69] In the circumstances, there was no need for the Directorate to have further questioned either Mr. Neuwirth or Mr. Man in light of the evidence it had obtained, all of which supported the conclusion that the minutes were falsified. Had the appellant been in possession of evidence to the contrary, it was incumbent on it to have tabled it. It failed to do so. Thus, based on the evidence the Directorate gathered, it was entirely open to the Minister to have concluded that the minutes of the board of directors meetings were falsified.

[70] As concerns the Minister's determination that there was a lack of documentation to support Rabbi Zirkind's travel expenditures, the appellant challenges only the inferences drawn

by the Minister and can point to no palpable and overriding error in the conclusion reached. Moreover, the record before this Court indicates that the appellant failed to provide documentation to support these travel expenditures beyond estimates from the Rabbi. In the absence of supporting documentation, like a mileage logbook, invoices for hotels, airline tickets or other similar documentation, it was open to the Minister to conclude that the appellant had failed to keep a sufficient record of the Rabbi's travel expenditures.

[71] Similarly, the appellant cannot point to any palpable and overriding error in the Minister's determination that it did not maintain adequate records of amounts paid to students engaged in telephone solicitations, who were given cash and not issued any T4 or T4A documentation in circumstances where the appellant had no records of how much was paid to any of the students. The appellant's argument that the Directorate should have interviewed the students misses the point, namely, that it is precisely to avoid needing to undertake such investigations that the ITA requires the maintenance of adequate records.

[72] Finally, as already discussed, incomplete and inaccurate documentation existed for the appellant's activities in Israel in 2008 and 2009 and in respect of the donation scheme.

[73] The Minister therefore did not make a reviewable error in determining that the appellant's registration as a charitable organization should be revoked due to its multiple failures to maintain adequate books and records.

(4) Failure to file accurate information returns

[74] Paragraph 168(1)(c) of the ITA authorizes the Minister to revoke a charitable organization's registration if it files inaccurate information returns. While minor errors made in returns do not warrant revocation as this Court noted in *Opportunities for the Disabled Foundation v. Canada (National Revenue)*, 2016 FCA 94, 482 N.R. 297 at para. 49, there were many significant errors made in this case which provided the Minster grounds for revocation, particularly when coupled with the numerous other instances of non-compliance discussed above.

[75] As noted, the Minister conceded that the appellant did not fail to accurately list its directors as the two non-active directors had been appointed as directors. The other instances of inaccurate reporting upon which the Minister principally relied for the revocation included: (1) the failure to accurately report Rabbi Zirkind's salary (which should have been a fundraising expense, not a charitable expenditure); (2) the failure to accurately report the amounts paid to student fundraisers, for which there was no substantiation; (3) misreporting of charitable expenditures in Israel, which the appellant could not demonstrate had been made for allowable charitable purposes; and, (4) misreporting associated with the funds funnelled back to Dr. Sokol as part of the donation scheme.

[76] All of the foregoing (with the exception of the characterization of Rabbi Zirkind's salary) have already been discussed as breaches of other requirements in the ITA, and, for similar

reasons, the Minister made no palpable and overriding error in finding them to likewise constitute a violation of paragraph 168(1)(c) of the ITA.

[77] As for the characterization of Rabbi Zirkind's salary, the appellant has pointed to no reason why his salary ought not have been considered a fundraising expense as opposed to a charitable expenditure and, indeed, the appellant concedes that the Rabbi spent much of his time during the years in issue raising funds. I accordingly see no reviewable error in the Minister's conclusion that the appellant failed to accurately report his salary as a fundraising expense.

[78] Thus, there is no reviewable error in nine of the ten grounds upon which the Minister relied in deciding to revoke the appellant's registration as a charitable organization.

IV. Proposed Disposition

[79] I would accordingly dismiss this appeal with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
George R. Locke J.A."

APPENDIX A:
RELEVANT STATUTORY PROVISIONS

***Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)**	***Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.)**
149.1(1) ***charitable activities*** includes public policy dialogue and development activities carried on in furtherance of a charitable purpose; (activités de bienfaisance)	149.1(1) ***activités de bienfaisance*** Y sont assimilées les activités qui sont relatives au dialogue sur les politiques publiques ou à leur élaboration et qui sont exercées en vue de la réalisation de fins de bienfaisance. (charitable activities)
…	[…]
charitable organization, at any particular time, means an organization, whether or not incorporated,	***oeuvre de bienfaisance*** Est une oeuvre de bienfaisance à un moment donné l'oeuvre, constituée ou non en société :
…	[…]
(a.1) all the resources of which are devoted to charitable activities carried on by the organization itself,	a.1) dont la totalité des ressources est consacrée à des activités de bienfaisance qu'elle mène elle-même;
…	[…]
qualified donee, at any time, means a person that is	***donataire reconnu*** Sont des donataires reconnus à un moment donné :
(a) registered by the Minister and that is	a) toute personne enregistrée à ce titre par le ministre qui est :
(i) a housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i) that has applied for registration,	(i) une société d'habitation résidant au Canada et exonérée de l'impôt prévu à la présente partie par l'effet de l'alinéa 149(1)i) qui a

	présenté une demande d'enregistrement,
(ii) a municipality in Canada,	(ii) une municipalité du Canada,
(iii) a municipal or public body performing a function of government in Canada that has applied for registration,	(iii) un organisme municipal ou public remplissant une fonction gouvernementale au Canada qui a présenté une demande d'enregistrement,
(iv) a university outside Canada, the student body of which ordinarily includes students from Canada, that has applied for registration, or	(iv) une université située à l'étranger qui compte d'ordinaire parmi ses étudiants des étudiants venant du Canada et qui a présenté une demande d'enregistrement,
(v) a foreign charity that has applied to the Minister for registration under subsection (26),	(v) un organisme de bienfaisance étranger qui a présenté au ministre une demande d'enregistrement en vertu du paragraphe (26);
(b) a registered charity,	b) tout organisme de bienfaisance enregistré;
(b.1) a registered journalism organization	b.1) toute organisation journalistique enregistrée;
(c) a registered Canadian amateur athletic association, or	c) toute association canadienne enregistrée de sport amateur;
(d) Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations; (donataire reconnu)	d) Sa Majesté du chef du Canada ou d'une province, l'Organisation des Nations Unies ou une institution reliée à cette dernière. (qualified donee)
…	[…]
149.1 (2) The Minister may, in the manner described in section 168, revoke the registration of a charitable organization for any reason described	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

in subsection 168(1) or where the organization

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

(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 organization's disbursement quota for that year; or

(c) makes a disbursement by way of a gift, other than a gift made

(i) in the course of charitable activities carried on by it, or

(ii) to a donee that is a qualified donee at the time of the gift.

…

168 (1) The Minister may, by registered mail, give notice to a person described in any of paragraphs (a) to (c) of the definition qualified donee in subsection 149.1(1) that the Minister proposes to revoke its registration if the person

(a) applies to the Minister in writing for revocation of its registration;

(b) ceases to comply with the requirements of this Act for its registration;

motifs énumérés au paragraphe 168(1), ou encore si l'oeuvre :

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

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 à son contingent des versements pour l'année;

c) soit fait un versement sous forme de don, sauf s'il s'agit d'un don fait, selon le cas :

(i) dans le cadre de ses activités de bienfaisance,

(ii) à un donataire qui est un donataire reconnu au moment du don.

[…]

168 (1) Le ministre peut, par lettre recommandée, aviser une personne visée à l'un des alinéas a) à c) de la définition de donataire reconnu au paragraphe 149.1(1) de son intention de révoquer l'enregistrement si la personne, selon le cas :

a) s'adresse par écrit au ministre, en vue de faire révoquer son enregistrement;

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

(c) in the case of a registered charity, registered Canadian amateur athletic association or registered journalism organization, fails to file an information return as and when required under this Act or a regulation;

c) dans le cas d’un organisme de bienfaisance enregistré, d’une association canadienne enregistrée de sport amateur ou d’une organisation journalistique enregistrée, omet de présenter une déclaration de renseignements, selon les modalités et dans les délais prévus par la présente loi ou par son règlement;

(d) issues a receipt for a gift otherwise than in accordance with this Act and the regulations or that contains false information;

d) délivre un reçu pour un don sans respecter les dispositions de la présente loi et de son règlement ou contenant des renseignements faux;

(e) fails to comply with or contravenes any of sections 230 to 231.5; or

e) omet de se conformer à l’un des articles 230 à 231.5 ou y contrevient;

…

[…]

230 (2) Every qualified donee referred to in paragraphs (a) to (c) of the definition qualified donee in subsection 149.1(1) shall keep records and books of account — in the case of a qualified donee referred to in any of subparagraphs (a)(i) and (iii) and paragraphs (b), (b.1) and (c) of that definition, at an address in Canada recorded with the Minister or designated by the Minister — containing

230 (2) Chaque donataire reconnu visé aux alinéas a) à c) de la définition de donataire reconnu au paragraphe 149.1(1) doit tenir des registres et des livres de comptes — à une adresse au Canada enregistrée auprès du ministre ou désignée par lui, s’il s’agit d’un donataire reconnu visé aux sous-alinéas a)(i) ou (iii) ou aux alinéas b), b.1) ou c) de cette définition — qui contiennent ce qui suit :

(a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;

a) des renseignements sous une forme qui permet au ministre de déterminer s’il existe des motifs de révocation de l’enregistrement de l’organisme ou de l’association en vertu de la présente loi;

(b) a duplicate of each receipt containing prescribed

b) un double de chaque reçu, renfermant les renseignements

information for a donation received by it; and

(c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

prescrits, visant les dons reçus par l'organisme ou l'association;

c) d'autres renseignements sous une forme qui permet au ministre de vérifier les dons faits à l'organisme ou à l'association et qui donnent droit à une déduction ou à un crédit d'impôt aux termes de la présente loi.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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