
FCA RULES THAT PTAQ FAILS TO EVIDENCE DIRECTION AND CONTROL

*By Terrance S. Carter and Linsey E. C. Rains**

A. INTRODUCTION

Following a May 26, 2015 hearing in Montréal, the Federal Court of Appeal (“FCA”) upheld the Minister of Revenue’s (“Minister”) revocation of the Public Television Association of Quebec’s (“PTAQ”) registration as a charity under the *Income Tax Act* (“ITA”) on July 22, 2015. Imagine Canada intervened on behalf of the sector and challenged the Minister’s reliance on its [Guidance](#)¹ for carrying out activities outside Canada and the proper test and standard for determining direction and control. For further detail on the hearing, see the [May 2015 Charity Law Update](#).² Prior to the release of the judgment in *Public Television Association of Quebec v Minister of National Revenue*,³ many in the sector had high hopes that the FCA would provide some clarity on the nuanced issues raised in the appellant and intervener’s factums. Unfortunately, the FCA did not embrace the opportunity to address the issues put to them and as a result, the subsequent judgment is very fact specific and reflects no new developments in the legal tests for direction and control.

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¹ The intervener’s factum referred to both CRA Guidance CG-002, *Canadian Registered Charities Carrying Out Activities Outside Canada* (8 July 2010), online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html>> and the previous guidance RC4106, *Registered Charities: Operating Outside Canada* (16 October 2000).

² Online <<http://www.carters.ca/pub/update/charity/15/may15.pdf>>.

³ 2015 FCA 170 (CanLII), <http://canlii.ca/t/gkd9n> [PTAQ].

The Minister advanced two grounds for revocation, namely that PTAQ:

- (1) “ceased to comply with the requirements of the definition of a charitable organization as prescribed in subsection 149.1(1) [of the ITA] since it failed to devote all of its resources to its own charitable activities;” and
- (2) made gifts to a non-qualified donee in violation of subparagraph 149.1(2)(c)(ii) of the ITA.⁴

The FCA dealt only with the first ground and found that it was a sufficient ground on its own for the revocation of PTAQ’s charitable registration, as PTAQ failed to demonstrate that the Minister’s conclusion was unreasonable. Accordingly, the key issue considered by the FCA was whether PTAQ was using an agent to carry out its own charitable activities or acting as a conduit for a non-qualified donee.

B. FACTS

PTAQ was registered as a charity in 1990 for the main purpose of advancing “education through the production, distribution and promotion of non-commercial television programs and films that are educational in nature.”⁵ PTAQ’s other purposes included acquiring and selling the rights to these programs and films, and engaging in joint ventures to produce, distribute, and promote these programs.

In 1991, PTAQ entered into Broadcasting and Fundraising Agreements with Vermont ETV Incorporated (“VPT”), a corporation and US charity based in the state of Vermont. These agreements set out that PTAQ was to act as principal and VPT as agent. In accordance with the Broadcast Agreement, VPT was to prepare a proposed list of programs for selection by PTAQ. PTAQ would then purchase programming from VPT for the programs broadcast on its behalf. The Fundraising Agreement stated that VPT would promote PTAQ and its programming to potential donors, informing them of their relationship. The terms of the Fundraising Agreement also required VPT to submit for PTAQ’s approval a summary of all proposed fundraising activities. In addition, VPT was to record the names of donors, dates and amounts of donations, and deposit funds into an account in the name of PTAQ. The Fundraising Agreement further stated that donations received by VPT from its Canadian viewers were deemed to be donations received on PTAQ’s behalf.

⁴ *Ibid* at paras 2-3.

⁵ *Ibid* at para 11.

Beginning in the Fall of 2007, PTAQ was audited by Canada Revenue Agency (“CRA”) for its fiscal periods ending in 2005 and 2006. The audit found that PTAQ “failed to devote all its resources to charitable activities” because its only activity in the 2006 fiscal period was the purchase of a program package from VPT.⁶ A Notice of Intention to Revoke (“NIR”) under paragraph 168(1)(b) of the ITA was issued on August 23, 2011. The NIR stated that PTAQ’s activities “cannot be reasonably interpreted as ‘advancing education through the use, creation, publication and distribution’ of educational materials, particularly since [it]...does not create or publish television programs but rather serves to facilitate broadcasting of programming developed outside its control and direction.”⁷

PTAQ filed an objection to its revocation with CRA’s Appeals Branch on November 21, 2011. PTAQ asserted that it retained “a high degree of control over its activities and it is actively involved in choosing the programs that it sponsors,” in part, because PTAQ’s directors determined “the programming choices that it purchases and has control over the funds received from its donors.”⁸ The Appeals Branch’s initial response to the objection was sent on April 4, 2013 and confirmed CRA’s position that some of the television programs being funded were not educational. The Appeals Branch also raised the issue of whether PTAQ had direction and control over its resources and activities. In particular, the Appeals Branch was not convinced that PTAQ was operating in accordance with its agreements due to a lack of supporting evidence, such as documentation to show PTAQ had control over the selection of the television programs.

In its responses to the Appeals Branch’s concerns, PTAQ relied on its minutes from its Board meetings, correspondence between PTAQ and VPT and affidavit evidence. However, on October 21, 2013, the Appeals Branch confirmed the Minister’s proposal to revoke because, in its view, there was no evidence to show the agreements were being conformed with, that PTAQ monitored the activities of its agent to ensure it was carrying out its own activities, or that PTAQ was used for any purpose more than to issue receipts received by VPT from Canadian donors. PTAQ appealed the Minister’s confirmation of its revocation to the FCA.

⁶ *Ibid* at para 18.

⁷ *Ibid* at para 20.

⁸ *Ibid* at para 21 [emphasis in original].

C. SUMMARY OF DECISION

After reviewing the documentary evidence on the record relating to how PTAQ selected and monitored costs of the television programs and determined fundraising targets, the FCA found the record was insufficient to demonstrate that PTAQ maintained direction and control over VPT. In particular, the FCA held that the Minister's determination was reasonable because PTAQ did not:

- follow or respect the provisions of its agreements with VPT;
- adduce evidence “that it exercised proper control over the activities of its agent by demonstrating how it monitored the cost of the broadcasting activities, the donations received and the fundraising;” or
- establish “how the Minister erred in coming to the conclusion that PTAQ is only used to issue receipts for donations received by VPT from Canadian donors.”⁹

D. COMMENTARY

As noted above, this judgment is quite fact specific and does not change or create any new law. However, the judgment is instructive insofar as it (1) illustrates the application of the FCA's well established principles for a charitable organization to engage an agent in carrying out its own charitable activities in the context of a unique set of facts; and (2) reiterates the scope of the *onus* a charitable organization must meet to establish that its status as a registered charity should not be revoked.

With regard to the former, the FCA referenced the respective principles that the FCA had previously set out in *Canadian Committee for the Tel Aviv Foundation v Canada*¹⁰ and *Bayit Lepletot v Canada (Minister of National Revenue)*,¹¹ i.e. that the charity must control the agent, be able to report on its activities, and demonstrate not only “that the agent is carrying on the work on its behalf but that proof of control over the activities of the agent is necessary to establish that the charitable works are those of the charity and not those of the agent.”¹²

⁹ *Ibid* at para 55.

¹⁰ *Canadian Committee for the Tel Aviv Foundation v Canada*, 2002 FCA 72, 2 CTC 93.

¹¹ *Bayit Lepletot v Canada (Minister of National Revenue)*, 2006 FCA 128, 3 CTC 252.

¹² *PTAQ*, *supra* note 3 at paras 41 and 43.

As for the second issue, the FCA confirmed that:

[t]he jurisprudence is clear, the *onus* lies on the charitable organization to overturn the Minister's assumption and in order to do so; it must adduce evidence that it is carrying on the charitable works on its own behalf and not merely acting as a conduit. The control over the agent's activities is a key element to establish that it maintained direction and control over its resources.¹³

Finally, the FCA's characterization and analysis of the facts, including the FCA's thorough review of and deference to the Minister's position concerning the failure of PTAQ to follow the provisions of the agreements that it had entered into with VPT, provide a good indication that CRA and the courts will continue to give considerable weight to whether there is a written agreement in place between the charity and the third party intermediary (non-qualified donee) with whom the charity is working. The decision, however, also underscores the fact that CRA and the courts will not hesitate to disregard these same written agreements if the charity does not adduce sufficient evidence to substantiate that the provisions of a written agreement have in fact been followed or respected. In this regard, the judgment serves as a good reminder for charities that carry out activities outside of Canada or in Canada through intermediaries that are not qualified donees about the importance of carefully crafting an agreement with an intermediary that not only evidences an appropriate degree of direction and control in its terms as required by the ITA and jurisprudence, but also can be implemented in accordance with its terms on an ongoing and consistent basis.

¹³ *Ibid* at para 44.