# Chapter 5
# Appeals

**The existing appeals system has been described as not easily accessible and too expensive. Because only a few cases have been decided under the existing system, there is insufficient guidance for the regulatory authority and the voluntary sector. Reform of the system should allow for greater access to appeals and a richer accumulation of expertise by adjudicators.[1]**

## The current environment

### Role of the courts

Currently the *Income Tax Act* specifies that organizations seeking recourse must turn to the Federal Court of Appeal if the Charities Directorate:

- denies their application for registration as a charity;
- takes away their registration; or
- gives them a designation (as a charitable organization, public foundation, or private foundation) with which they disagree.

The Federal Court of Appeal decides cases "on the record," that is, on the evidence that has already been gathered. The "record" in charity cases is made up of the materials assembled by the organization and the CCRA during the course of an application or a deregistration. Moreover, the proceedings of the Federal Court of Appeal are formal. Unless the court decides otherwise, which it has done in a few charity cases, parties appearing before it must be represented by counsel.

Almost all other disputes[2] under the *Income Tax Act* use the Tax Court as the first court level, with the Federal Court of Appeal serving as the appellate court.

The Act contains no appeal provisions for the many decisions the Charities Directorate makes that affect how charities operate on an ongoing basis. These decisions mainly involve special permissions relating to the minimum amount that

[1] *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*, 1999.

[2] Apart from the decisions of the Charities Directorate, the only other CCRA decisions that are appealable directly to the Federal Court of Appeal are those of the Registered Plans Directorate (registered pension plans, registered education savings plans).

charities have to spend on their programs each year. However, the courts can still review these decisions, like all administrative decisions.[3]

## Internal administrative review

The Act also contains no provisions for any administrative review of the Charities Directorate's decisions, short of a formal appeal to the court. For nearly all other tax issues, the Act sets out procedures for objections and appeals, as administered by the CCRA's Appeals Branch. This internal review process leads to a fresh look at a case.

While Appeals Branch officers base their decisions on the facts that have already been recorded, they often receive and consider new information that was not available at the local tax services office. If a person is not satisfied with the Appeals Branch decision, the case can then be appealed to the Tax Court. The person also has the option of proceeding directly to Tax Court, rather than dealing first with the Appeals Branch.

The Federal Court of Appeal has held that procedural fairness obligates the Charities Directorate to invite submissions from an affected charity before proceeding to deregister it.[4] Although the Court has not called for submissions from an organization for the registration process, this would likely be required under current principles of procedural fairness.

In practice the Charities Directorate, in handling both registrations and deregistrations, does invite submissions. It presents its preliminary assessment in an Administrative Fairness Letter to an organization and invites it to respond to the concerns the Directorate has raised. Organizations can and do reply by telephoning or meeting with Directorate officials, but usually respond only in writing. Afterwards, if the decision is negative, it is reviewed by each higher level in the Directorate until the Director General issues a Final Denial or Deregistration Letter.[5] Once this letter is signed, the administrative process is over, and any further proceedings must be at the judicial level.

## Review of positive decisions

No comparable appeals procedures exist to check the correctness of positive decisions. This is because there is no right of third parties to challenge the CCRA's decision either to register or to maintain the registration of a charity.

---

[3] The courts have the jurisdiction to review administrative decisions. Such a review usually focuses on how a decision is reached, in order to ensure that there is procedural fairness in the decision making and that the decision is not unreasonable. If an application for judicial review is successful, the court normally sends the matter back to the administrative body for decision instead of substituting its own decision.

[4] *In re Renaissance International v. M.N.R.* 83 D.T.C. 5024.

[5] The Directorate uses somewhat different terminology for the various stages of deregistration, because deregistrations become effective only when the decision is published in the *Canada Gazette*, not when the Director General signs the Final Letter.

## Recent experience

Between 1980 and 2002, 136 charity appeals were received: 28 from proposed deregistrations and the rest from the Charities Directorate's refusal to register an organization. The outcomes of these appeals are shown in Table 1.

**Table 1**

**APPEALS, 1980–2002**

| | |
|---|---|
| Cases still pending | 6 |
| Went to hearing; organization registered | 5 |
| Case discontinued; organization registered | 28 |
| Went to hearing; organization not registered | 23 |
| No hearing; appeal withdrawn or dismissed by the court; organization not registered | 74 |

These figures do not tell us how many organizations would use a more accessible appeals system if one were in place. The best estimate we could arrive at is that a new system could attract some 70 charity cases each year.[6]

Between 1993 and 2002, the Federal Court of Appeal heard 15 charity cases. For these, the average time between launching the appeal and the judgement being rendered was 25 months for cases involving a refusal to register and 29 months for cases involving a deregistration.

Perhaps the most striking thing about the number of appeals that have been launched from the Charities Directorate's decisions is that only 28 charity cases in total have ever gone to court. And of these 28 cases, nearly half have produced judgements that were brief, dealt with procedural issues, or otherwise did not produce precedents in charity law. In making its decisions, the Directorate must rely largely on the common law, found in previous court decisions, to determine what is and is not charitable. While the Directorate can look at charity decisions made at the provincial level (for example, decisions dealing with municipal taxation or the interpreting of wills) and similar cases in other countries, these are not binding in cases involving charitable registration under the Canadian *Income Tax Act*.

[6] This tentative estimate does not include charity cases arising from the regulator's use of the intermediate sanctions we are proposing in Chapter 6.

# Factors affecting the reform of the existing appeals system

In weighing the various options for reform, we have kept the following objectives in mind:

- transparency of the proceedings to the organization, the voluntary sector and the general public;
- correctness of the decision, including consistency in the decision making;
- independence of the adjudicator;
- prompt resolution of disputes;
- creation of precedents for the guidance of the regulatory authority and the sector;
- accessibility, in terms of location, procedures and costs to the organization;
- creation of a complete evidentiary record; and
- the cost to government of establishing and maintaining the appeals system, including not duplicating existing mechanisms for review that could be readily adapted to handle charity cases.

## Transparency

Transparency is a factor affecting how the decision making is perceived. On the one hand, the courts with their decisions and the evidence they relied upon are usually fully in the public domain. On the other hand, internal review panels sometimes operate on a confidential basis. This enables them to use various alternative dispute resolution techniques, but does nothing to promote an understanding of their decisions.[7]

## Correctness of the decision

A primary goal of any appeals system is to make sure that the correct decision is made. A "correct" decision is one that is not only technically right in law, but also one that is generally perceived to be just. That is, the decision maker has reached a decision that is consistent with previous cases while, where it is appropriate, developing charity law that reflects changes in society. How much flexibility in developing the law is expected from an administrative body? At what point does flexibility tip over into decision making that is inconsistent and lacking a proper legal basis?

In considering procedures at the various levels of appeal, another factor bearing on the quality of the decision making is the role, if any, third-party interveners should play. One concern is the inability of those not directly affected to provide input in

[7] Moreover, as pointed out in the chapter on Accessibility and Transparency, transparency must be balanced against other values, such as protecting an organization's reputation from unwarranted harm.

the initial decision making. Should such a role be built into the appeals mechanisms, recognizing that those opposed to a particular organization may want to participate as well as those supporting it? Another factor to consider is that such interventions can eat up the time of a court or tribunal, unless some limitation is placed on them.

If a lower-level decision maker is to hear a case before it goes to the Federal Court of Appeal, are there any candidates for this role with expertise in charity law or that are more familiar with working with common law as opposed to statute law?

## Independence of the decision maker

One factor affecting how an appeals system is perceived is the degree of independence held by the decision maker. On a continuum, judges lie at the far end of independence. Their independence from all influences is a constitutional guarantee. Other decision makers have lesser degrees of independence. A review panel inside the regulatory authority may be seen to operate with less independence from the regulatory authority than a quasi-judicial tribunal completely outside the agency. A quasi-judicial tribunal may not be seen by the public to operate as independently as a judge.

## Prompt resolution of disputes

The courts cannot handle every dispute that arises in the course of administrative decision making. How, then, to decide which cases can and should proceed to the court level? At one level, the answer is that this is a matter for the affected organization to decide. But if the organization in question does not understand the legal issues in play, if it simply wants someone to take a second look at its case, or if it has suffered as a result of a decision at the initial level, an administrative review process may be more appropriate than the courts.

## Obtaining more precedents

Precedents to guide administrative decision making are particularly important when the regulatory body has to rely on the common law to determine what is and is not charitable. The existing system has yielded only a handful of Federal Court of Appeal decisions on what it means to be a charity for the purposes of the *Income Tax Act*. Clearly, more precedents are highly desirable. However, a legally binding precedent means using the courts, with all the attendant costs and delays.

Securing sufficient precedents raises a number of issues. Should organizations involved in such cases also have to exhaust the administrative review process before they proceed to court? And what needs to be done to ensure that they do get to court and present the best possible case to the judge? The organization in question may decide not to pursue its case, because it does not have the resources necessary to prepare a case. A funding mechanism for appeals in turn raises questions about who decides which cases to bring forward, on what basis these decisions should be made, and how much money should be available.

## Accessibility

Also to be considered is how to develop a more accessible appeals system. By accessible, we do not simply mean geographically accessible. The Federal Court of Appeal holds hearings at 17 venues across the country, and for charities an even greater number of locations may be desirable. However, the main concern is the ease and speed with which an appeals mechanism can be set in motion and the simplicity of the procedures at any subsequent hearing. Highly informal procedures are not likely to provide persuasive precedents, but they may serve a purpose that some may consider to be equally or more valuable – to provide organizations with an inexpensive and rapid means to have someone hear their case in a more informal atmosphere.

## Constituting the record

In designing an appeals system, a critical issue is deciding at what point the case record is constituted, and what type of proceedings are necessary to properly constitute such a record. Once the record is constituted, any further appeals are based on the evidence in that record, and decisions are based on whether the law has been correctly applied to the facts at hand. Currently the record is the Final Decision of the Charities Directorate, plus all materials contained in the file that relate to that decision, such as the information provided by the organization in support of its application or the audit results that led up to a proposed deregistration. Many would argue that this prematurely closes off the possibility of introducing new evidence. Some would go further and say that such a record is deficient in not allowing sworn testimony and the cross-examination of witnesses.

## Costs

Another concern arises as to the case that an organization might present to these next levels of judicial decision making. Good decisions typically depend on both parties fully presenting relevant evidence, jurisprudence and arguments before the decision maker. If relevant evidence or information is not presented, perhaps because one party does not have the financial backing and legal knowledge to fully argue its case, the decision may not be as useful as it could have been.

Administrative systems vary in their layers of appeal. The more layers, the more opportunities an appellant has to make its case. But the more layers, the more time consuming and costly the system becomes.

The efficiency of an appeals system has to be judged not only in terms of how expensive it is to the parties using it, but also in terms of how much it costs the government to establish and maintain it. There are cost implications to proposals to change the existing system by adding new layers of appeal or new institutions. Potentially, some proposals could reduce government costs if more informal procedures replace a hearing before the Federal Court of Appeal. But for other proposals, such as creating a new tribunal that would specialize in charity law, we would need

to be convinced that no existing government review mechanism could adequately take its place.

### What we heard

During our consultations, commentators endorsed our preliminary conclusion that the existing recourse mechanism for charities under the *Income Tax Act* is inadequate. A few argued that the effort to reform the system would be better placed elsewhere – in getting the initial decision right, in producing clear guidelines, and in educating applicants and existing charities on the rules so that there would be fewer disputes. However, these comments were outweighed by others pointing to the need to develop more case law, and to provide an accessible, inexpensive, and rapid recourse system for organizations, especially in light of the proposed introduction of intermediate sanctions (see Chapter 6).

Some commentators wanted to include another factor when assessing the various options for reform. In their view, those making decisions in the recourse system should be knowledgeable about the sector either in addition to, or instead of, charity law.

## Reform recommendations

We accept the arguments in favour of reforming the existing appeals system. The single option now available, an appeal to the Federal Court of Appeal, has failed to create sufficient precedents or to provide organizations with an accessible and quick means of appeal.

Instead, we propose an appeals system for charity decisions that involves the following elements:

- internal reconsideration,[8] within the original decision making body;
- a hearing *de novo*[9] in the Tax Court; and
- an appeal on the record[10] to the Federal Court of Appeal.

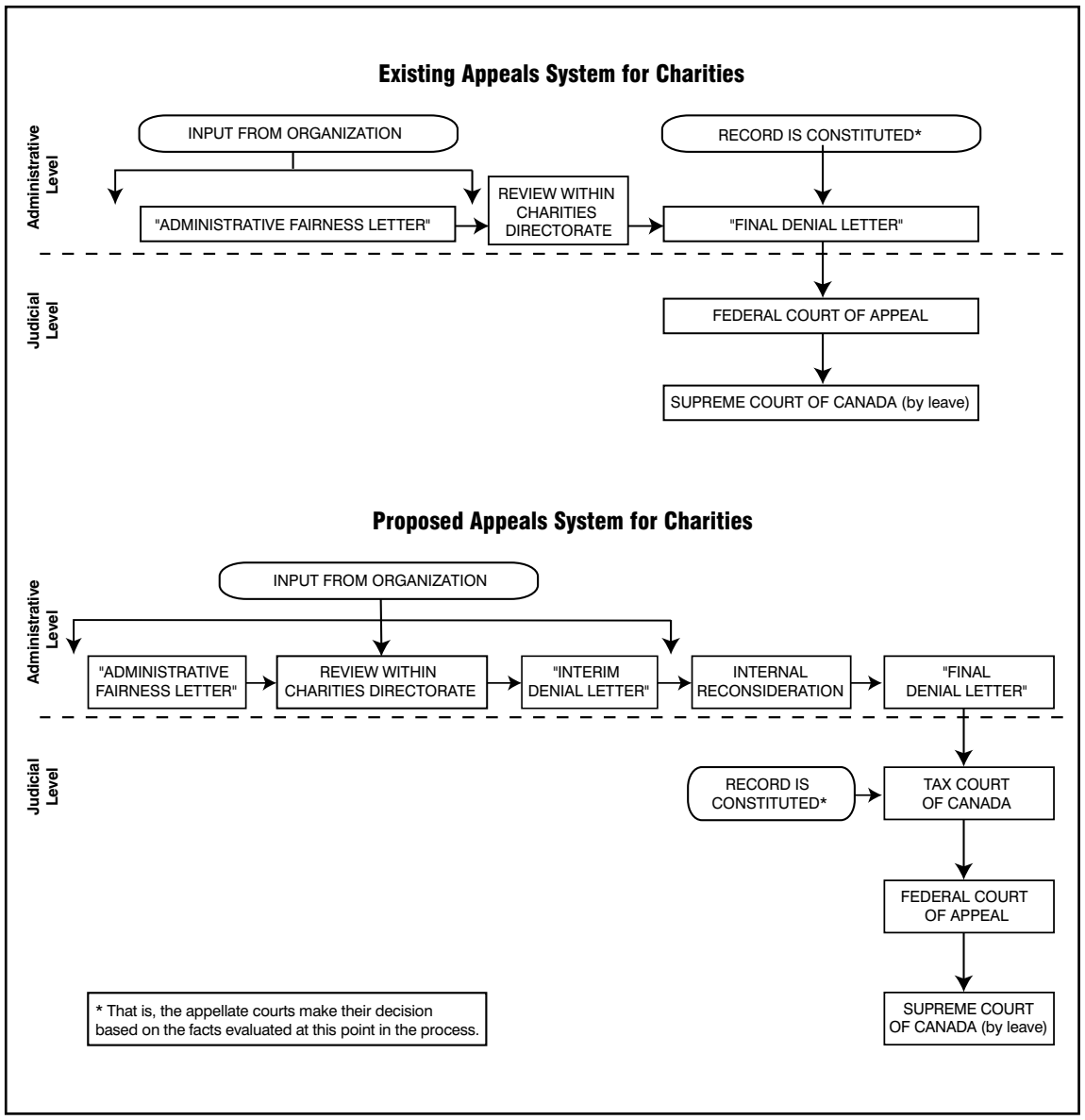
[8] These are internal processes within the original decision-making body. Various administrative decision-making bodies employ a wide variety of procedures – some review panels exist within the usual decision-making hierarchy, while others are removed from it; some focus on service complaints, while others study the correctness of the original decision; some accept new evidence, meet with the people seeking recourse, and employ alternative dispute resolution techniques such as mediation and arbitration, while others do not. Review processes are usually private, and decisions are often not published.

[9] *"De novo"* means starting afresh. Typically, such hearings are held at a lower court level than an appellate court. In a hearing *de novo*, the court does not rely on previously gathered evidence. Rather, its decisions turn on the evidence that is brought before it. An oral hearing is common, but a hearing can be held on a documentary basis.

[10] This involves an appellate court deciding whether a decision made by lower courts or administrative decision makers is correct, based on the evidence these decision makers had before them.

In addition, we make recommendations on the role of interveners, how costs related to an appeal should be handled, and the need for a special fund to subsidize appeals.

The following diagram illustrates the existing and the proposed appeal structure.




## Internal reconsideration

We proposed that an organization should have the right to have its case reviewed by review officers[11]. These officers would be a part of the regulatory authority but separate from the initial decision makers. This provides the review officers with some degree of independence, although outsiders may still not see them as unbiased.

[11] In our interim report, we referred to these officials as hearing officers.

Internal reconsideration would be easily accessible and virtually cost-free to an organization. Its procedures would be simple, involving a combination of paper reviews with written submissions and informal meetings (including phone conversations). It would also be speedy. We suggest a maximum of two months for reconsideration, unless both parties agree to extend the process. Reasons for decisions would be provided to the organization, but would not otherwise be made public except in a general report.

Reconsideration should focus on (1) identifying any errors made at the initial decision making stage and (2) listening to what an organization's representatives have to say. When a misunderstanding is the reason for the dispute, attempts would be made to resolve the dispute by determining whether the law has been correctly understood and applied. However, a review officer would be bound by the existing policies of the regulatory authority, although the officer could report an apparent need for change to the head of the authority.

We propose that, as a general rule, internal reconsideration should be mandatory. That is, a dissatisfied organization could not appeal directly to the court, but rather would first have to exhaust the internal reconsideration process. As a new process, reconsideration deserves the opportunity to establish its value in resolving disputes. We believe this can most readily be done by guiding organizations into what will at first be an unfamiliar process. However, an organization and the regulator should be allowed to agree to bypass reconsideration and move directly to court, if they choose to do so because, for example, both recognize that an important legal principle is in dispute that only a court can resolve.

## What we heard

Most of those commenting on the subject supported introducing internal reconsideration into the recourse system. However, a few doubted that a body inside the regulatory authority would be sufficiently independent to overturn initial decisions.

Some commentators stressed the need for reconsideration to provide prompt recourse, so that an applicant organization does not lose momentum or a charity under a proposed sanction is not left in limbo. This raised the question of how long an organization should be given to file a claim for reconsideration. While 30 days is the usual period suggested, one brief argued that the system could get bogged down with applications for permission to file late protests, because in practice 30 days is insufficient time for a charity to decide whether it wants to seek recourse.

We assumed that the review process would be confidential. However, some participants cautioned against giving the appearance of closed-door deals.

Several speakers disagreed with our proposal that internal reconsideration should be mandatory. They would allow an organization to proceed directly to court instead of being obliged to spend time first seeking internal reconsideration. They pointed

out that people and organizations disagreeing with the CCRA on other matters can go directly to court.

## Our conclusions and recommendations

On the basis of our research on practices in other countries and within CCRA for other tax issues, we continue to believe that internal reconsideration can play a valuable role in a recourse system for charities.

To clarify, we are not proposing a "hearing," but rather a review of a file by an experienced officer, who is organizationally separated from the initial decision maker. Review officers would perform the same tasks and evaluations, and have the same discretionary powers, as the initial decision maker. In addition, they would look at the record established to date, so that they could correct procedural or legal error and resolve misunderstandings. In some cases, they might need to visit an organization to clear up misunderstandings, and their budget should allow for some travel. Their purpose, however, does not extend to advising a charity on how to get registered or avoid a sanction.

In *Working Together*, the first joint table proposed the use of alternative dispute resolution measures like mediation or arbitration at the internal reconsideration stage. With respect, we have concluded that such processes may not always be appropriate at the reconsideration stage, because they would tend to prolong this phase and make it more expensive. However, there may be situations where mediation could play a role, and we would commend its use to both review officers and charities as a mechanism to overcome difficulties.

While wanting internal reconsideration to be as speedy as possible, we accept that for many charities 30 days is too short a time to determine whether they wish to seek reconsideration. We believe a 60-day period would be more appropriate.

We have decided, however, to maintain our original proposal to make reconsideration mandatory, unless both parties agree to go directly to court. We continue to believe that a system that is efficient, low cost and user-friendly should be mandatory. We believe that exactly the same rules, as described in the previous chapter, should apply to the decisions of the reconsideration unit as apply to the regulator's original, non-appealed decisions. For example, nothing would be in the public domain if the decision is that no penalty is warranted, while a decision to register an applicant organization would be published with reasons on the regulator's website. However, we also believe that public scrutiny of the reconsideration unit should be facilitated by the regulator's annual report including statistics on the number and type of cases heard, and on whether the original decision was upheld or varied.

**Recommendations**

**43. An independent unit should be established within the regulator to provide internal reconsideration both of applications for registration that have been denied and of sanctions the regulator proposes to impose.**

**44. Organizations should be obliged to seek internal reconsideration before proceeding to court, unless the regulator and the organization agree otherwise.**

**45. Organizations should have 60 days to decide whether to seek a review of their case, and the review unit should have 60 days to complete the review, unless both the review officer and the organization agree to extend the time-frame.**

**46. The review unit should be staffed by officers experienced in charity law and in dealing with sector organizations.**

**47. The review unit should be centrally located, but adequately resourced to permit officers to travel.**

**48. The review unit should be bound by the regulator's existing policies.**

**49. The review unit should provide the organization seeking review with written reasons for its decision.**

**50. The decisions of the review unit should be reported in accordance with the applicable transparency recommendations of Chapter 4, and the regulator's annual report should provide a statistical profile of the unit's work.**

## Hearing *de novo*

We considered three locations for holding such a hearing:

- a specially constituted tribunal to hear charity decisions;
- the Tax Court of Canada; and
- the Federal Court of Canada, Trial Division.

The idea of a specially constituted tribunal, that would specialize in charity law and potentially allow sector members to bring their expertise in the sector to bear on the decision making, is attractive. While the workload would probably not be enough to justify a permanent body, it would be possible for its members to assemble when needed. However, we propose using an existing court, partly for reasons of efficiency, and partly because the courts would not defer to common law decisions made by a non-judicial body. Therefore, in order to save extra steps in creating a body of binding precedents, we recommend moving directly from internal reconsideration into the existing court system.

In deciding between the Tax Court and the Trial Division of the Federal Court, there are arguments to be made for both courts. The Trial Division is accustomed to dealing with complex cases and the common law (as well as statute law) involving broad social issues, but has no recent experience with the *Income Tax Act*. The Tax

Court, on the other hand, is highly familiar with the *Income Tax Act* in that it handles virtually all appeals under this Act. However, it is primarily accustomed to dealing with statute law.

While the Trial Division does have a simplified procedure for some cases, and case management and dispute resolution tools, the *Tax Court of Canada Act* provides for cases to be decided using either a formal or an informal procedure. When acting informally, the Tax Court is not bound by any legal or technical rules of evidence in conducting its hearings. This enables the Court to deal with appeals quickly. Neither the formal nor the informal procedure requires parties to be represented by counsel. However, decisions made under the informal procedure are not precedent setting in the formal sense, and are final in that there is no further right of appeal arising from the decision, although the Federal Court of Appeal can still review them.[12]

Both the Trial Division and the Tax Court under formal procedure could create a satisfactory evidentiary record. Both courts allow for oral testimony. Admittedly, such testimony is likely to be helpful in only some charity cases (those where the facts are in dispute and credibility is an issue, or when personal testimony not obtainable through documentary evidence is needed). However, in cases where oral testimony is not required (primarily those where the matter in dispute is a question of law), the rules could allow the parties to dispense with witnesses. Instead, they would rely on documentary evidence and oral argument, which would result in simpler and less costly proceedings.

On balance, we propose using the Tax Court as the hearing court, primarily on the basis that both its formal and its informal procedures make appeals more easily accessible for organizations than the equivalent procedures in the Federal Court Trial Division. This would also be true for geographic access. The Tax Court sits in 68 locations, as opposed to the Federal Court's 17 locations.

## What we heard

Opinion was split on our interim proposal that the recourse system for charities should include a hearing *de novo* in the Tax Court. Roughly half agreed, seeing the Tax Court as providing a venue from which more precedents for the guidance of the sector and the regulator could be obtained, and which would be more accessible and less costly to organizations. Some explicitly favoured the Tax Court over a specialized tribunal, in that a tribunal would entail start-up costs and would, in their view, create an overly complex and potentially confusing system, with its blend of courts and administrative tribunals.

[12] The Tax Court's current rules on what cases can be heard under its informal procedure (which are based on such criteria as the amount of tax in dispute) would have to be adapted to the charity context. The possibility of charities using the informal procedure would be conditional on the Court agreeing to change its rules.

However, an equal number disagreed with our proposal. Most of these wanted a specialized tribunal or arbitration panel instead of the Tax Court. The advantage of such a body, in their opinion, was that it could develop expertise in charity law and include members familiar with the sector. Charity cases, they argued, are not really about tax law.

A few questioned the need for any type of hearing *de novo*. These included commentators who were concerned that:

- organizations would do an "end-run" around the initial decision makers, hoping for a more favourable outcome at the hearing level;
- the initial decision makers would come to rely on others to move the law forward and so adopt a conservative approach to their work; and
- a hearing, especially if witnesses were on the stand, would be more expensive than the current system (both to the organization and the regulator) and slower, given the possibility of an additional layer of appeal.

Others questioned the need for an oral hearing to determine what are primarily questions of law.

## Our conclusions and recommendations

While recognizing the validity of many of the points raised during the consultations, we believe that a recourse system that is handling both denied applications for registration and sanctions on a charity requires some form of accessible hearing *de novo*. A hearing *de novo* lets organizations put their case before a fully independent arbiter if they are dissatisfied with the outcome of internal reconsideration. Oral testimony and cross-examination permit questions of potential regulatory bias to be tested.

We also continue to believe that the Tax Court is to be preferred over a specialized tribunal. Only a court can establish the precedents on which the common law of charity is based. As well, we doubt that a convincing case for creating a new tribunal can be made based either on its projected workload or on the unique needs of charities.

While we agree that a regulatory system (comprising both the regulator and the associated appeals mechanism) needs to be knowledgeable about those it is regulating, we are not convinced that members of the sector need to serve as adjudicators in this system. The background knowledge needed for effective decision making can be introduced by other mechanisms. The organization in question has some responsibility for bringing key factors to the adjudicator's attention. As well, broader factors can be introduced through the policy surveillance exercised by the ministerial advisory group at the administrative level and through interveners at the court level. We discuss the role of interveners later in this chapter.

On balance, we believe the Tax Court provides the most accessible option for a hearing *de novo*. We acknowledge that the Tax Court has no recent experience with

charity law, although its predecessors (the Income Tax Appeal Board and the Tax Review Board) determined which organizations were charitable. However, we believe that any court is capable of developing the expertise it needs.

**Recommendation**

**51. Careful consideration should be given to making the Tax Court of Canada the site of appeals from decisions of the regulator, and such appeals should be held by way of hearing *de novo.***

## Appeal on the record

The existing system, under which appeals from a Tax Court decision on a matter of law or mixed fact and law can proceed to the Federal Court of Appeal, should be followed.

This proposal attracted little attention in the consultations.

**Recommendation**

**52. An appeal on the record from the Tax Court should lie to the Federal Court of Appeal.**

## Judicial review of administrative decision making

The Tax Court of Canada does not have the power to judicially review an administrative decision. The Federal Court Trial Division should continue to play this role.

This proposal attracted little attention in the consultations.

**Recommendation**

**53. The Federal Court Trial Division should continue to provide judicial review of administrative decisions.**

## Interveners

We suggest that the current rules established by the various courts provide adequate opportunity for interested parties, including members of the voluntary sector, to present their views in significant cases. Under its formal procedure,[13] the Tax Court, for example, allows a person claiming an interest in a proceeding to apply to the court for leave to intervene. If allowed, the person intervenes as a friend of the court for the purpose of assisting the court with evidence or argument.

[13] The Tax Court's current rules do not allow interveners when it is operating under its informal procedure. While an amendment to the rules to allow for third-party intervention in these proceedings could be sought, it is believed that charity cases using the informal procedure would not likely raise issues of general interest.

We are not recommending the adoption of a provision similar to that found in the British *Charities Act*, which allows third parties to challenge the decision of the Charities Commission to register an organization. In our view, the possible gain in ensuring that only properly qualified organizations are registered is outweighed by the possibility of harassing legal actions.[14]

This proposal also attracted little attention in the consultations.

**Recommendation**

**54. Existing court rules should apply in determining whether to allow interveners in a case.**

## Costs

It is necessary to distinguish between costs awarded by the court in the course of its decision, and the various expenses that the parties actually incur before that decision is rendered. Even if the court were to award costs that covered the actual expenditures incurred, which is seldom the case, the parties have to have the money in hand in order to bring the case forward.

We propose that the regular cost rules apply at the Tax Court level. After a hearing, the Tax Court determines whether to award costs and at what level.[15] For appeals from the Tax Court to the Federal Court of Appeal, and from the Federal Court of Appeal to the Supreme Court, the court would determine the level of the costs, and also determine if costs should be awarded against an organization when it appeals and loses. Therefore, above the Tax Court level, the system would look like this:

- If the regulatory authority appeals a lower-level court decision, the regulator would pay the costs of the organization.
- If the organization appeals a lower-court decision, and wins, the regulator would pay the costs of the organization.

[14] However, as described, in the Institutional Models chapter, under Model 3 (Enhanced CCRA plus Commission) and Model 4 (Charity Commission), the CCRA would have the right to challenge the Commission's decisions. Under Model 1 (Enhanced CCRA) and Model 2 (Enhanced CCRA plus Voluntary Sector Agency), the current system would continue: the CCRA would remain solely responsible for initiating actions designed to correct errors in registration.

[15] The Tax Court rules summarize the criteria used by the courts in exercising their discretion to award costs as follows:
(a) the result of the proceeding,
(b) the amounts in issue,
(c) the importance of the issues,
(d) any offer of settlement made in writing,
(e) the volume of work,
(f) the complexity of the issues,
(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,
(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted,
(i) whether any stage in the proceedings was
    (1) improper, vexatious or unnecessary, or
    (2) taken through negligence, mistake or excessive caution,
(j) any other matter relevant to the question of costs.

- If the organization appeals the lower-court decision, and loses, the organization is responsible for its own costs. Although it would be normal practice for the regulator not to seek its costs, it could seek costs if the appeal was frivolous or designed primarily to delay a regulatory action. The court would then decide whether the awarding of costs is justified in the circumstances.

Again, this proposal attracted little attention in the consultations.

**Recommendation**

**55. Existing Tax Court rules on awarding costs should apply to charity cases heard before it but, in subsequent appeals, provision be made that:**

**55.1 regardless of the outcome of the appeal, the regulator would bear the costs of both parties, if it initiates the appeal from the lower-court decision;**

**55.2 the regulator would bear the costs of both parties, if the organization initiates the appeal from the lower-court decision, and the appeal court overturns the lower-court decision in the organization's favour; and**

**55.3 in all other cases, the regulator would bear its own costs, except that, if it considers an appeal frivolous or designed to delay, the regulator could ask the court to award it costs.**

## Appeal fund

We stress again the importance of precedents to the framework employed by the *Income Tax Act* for the registration of charities. More precedents would help to clear up grey areas in the common law and to adapt charity law to changes in society. For this reason, we believe that, in appropriate circumstances, the expenses for developing and presenting a case to the hearing court should be subsidized. Interveners should also receive funding where their intervention would assist the court in developing the law.

The difficulty lies in selecting appropriate cases for subsidy and in determining how much should be spent. We suggest that the selection be made by a body independent of the regulator. This would avoid placing the regulator in a possible conflict of interest and enable it to argue that in fact the law in this area does not need to be clarified.

As for the amount that should be allocated to the program, we note that there is a backlog of issues needing to be addressed.

## What we heard

During the consultations, we heard overwhelming support for our proposal to develop charity law by subsidizing appeals where the issues at stake are potentially precedent-setting. While many participants conceived of such a fund as a form of legal aid for small organizations, the majority recognized that public funding for such appeals is only justifiable on the grounds of the broader public interest served in obtaining judicial clarification of charity law.

Nobody wanted to see the regulator administering such an appeal fund. Participants suggested a number of alternative mechanisms, including a joint sector-government body and a ministerial advisory group. Some participants were familiar with the Court Challenges Program and felt that it could serve as a model. (This Program currently selects cases for funding that involve significant issues under the *Charter* or the *Official Languages Act*.)

## Our conclusions and recommendation

We continue to believe that an appeal fund is necessary and that it should be used to subsidize cases of substantive importance, and not as a form of legal aid. We also believe that a body at arm's length to both the government and the sector is required to administer the fund.

We have looked into how the Court Challenges Program operates and believe this Program can serve as a model for the administration of an appeal fund for charity law.

**Recommendation**

**56. An appeal fund to develop and present charity cases under the *Income Tax Act* should be established; and**

**56.1 the fund should be administered by a body like the Court Challenges Program;**

**56.2 cases should be selected for financial support on the basis of their potential to clarify charity law, for the benefit of the public at large, the sector and the regulatory authority;**

**56.3 additional funding should be provided for the appeal fund, of sufficient size to obtain cumulatively the desired effect of clarifying charity law; and**

**56.4 financial support should also be available for interveners.**