Chapter 2: Appeals

The existing appeals system has been described as not easily accessible and too expensive. Because only a few cases have been decided, 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.[9]

The Current Environment

Role of the courts

Currently the *Income Tax Act* specifies that organizations 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.

Almost all other disputes[10] 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 mainly involve special permissions relating to the minimum amount that charities have to spend on their programs each year. However, the courts can still review these decisions, like all administrative decisions.[11]

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

[10] 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).

[11] The courts have the jurisdiction to review administrative decisions. Such a review usually focuses on how a decision is reached, in order to ensure 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.

Internal Administrative Review

The Act also contains no provisions for any administrative review[12] 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 Canada Customs and Revenue Agency's (CCRA) 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 service 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 has held that procedural fairness obligates the Charities Directorate to invite submissions from an affected charity before proceeding to de-register it.[13] 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 de-registrations and registrations, 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 a negative, the decision is reviewed by each higher level in the Directorate until the Director General issues a Final Denial or De-registration Letter.[14] Once this letter is signed, the administrative

[12] 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.

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

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

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.

Recent Experience

Between 1980 and 2001, 131 charity appeals have been made: 28 from proposed de-registrations and the rest from the Charities Directorate's refusal to register an organization. (There have been no appeals over a charity's designation.) Here is the outcome of these appeals:

Cases still pending	9
Went to hearing; organization registered	5
Case discontinued; organization registered	26
Went to hearing; organization not registered	20
Appeal withdrawn, or dismissed by the court; organization not registered	71

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.[15]

During the last 10 years, the Federal Court of Appeal has heard 14 charity cases. For these, the average time between launching the appeal

[15] This estimate is calculated by adding: (1) the existing rate of appeals to the Federal Court of Appeal (an average of six a year); (2) roughly half of the organizations being de-registered for serious forms of non-compliance (for an average of 13 to 14 a year); (3) roughly half of the organizations applying for registration that are formally turned down (for an average of 12 a year); and (4) 10% of the organizations that drop out of the registration process at a late stage, based on the assumption that some of these applicants might be encouraged to pursue their applications through to a formal denial if they knew that doing so would enable them to apply to a more accessible appeals system (for an average of 37 a year). Note the estimate does not include charity cases arising from the regulator's use of the intermediate sanctions the Table is proposing in another chapter.

and the judgement being rendered was 23 months for cases involving a refusal to register and 35 months for cases involving a de-registration.

Perhaps the most striking thing about the number of appeals that have been launched from the Charities Directorate's decisions is that only 25 charity cases in total have ever gone to court. (The Directorate deals with some 4,000 applications each year.) And of these 25 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 the case of charitable registration under the Canadian *Income Tax Act.*

Arthur Drache, in his paper *Charities, Public Benefit and the Canadian Income Tax System* (1998) stated that reform is needed because costs and other constraints have limited the number of cases proceeding to appeal. His ideal solution was to create a "charity court" as a stand-alone body that would develop its own expertise, but the Tax Court would be an acceptable alternative. The procedure in the Federal Court of Appeal is, in his view, inappropriate.

In a later paper, (Drache and Hunter, *A Canadian Charity Tribunal: A Proposal for Implementation,* 2000), the authors point out that the process in the Federal Court of Appeal is an appeal, and not a hearing *de novo*.[16] This means that the responsibility is on the organization to prove that the Charities Directorate's decision was wrong. Also, the appellant does not have the right of examination for discovery, calling witnesses, and cross-examining the government's decision makers for potential bias.

Patrick Monahan in *Federal Regulation of Charities* (2000) regarded the current appeal process as anomalous and outdated. It places a considerable financial burden on an organization, requiring the

[16] "*De novo*" means staring 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.

organization to retain legal counsel and prepare significant documentation.[17] The Federal Court of Appeal itself, he noted, had questioned a process that asks it to "review relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence."[18] Monahan considered whether a special tribunal holding a hearing *de novo* would be the best option but doubted that there would be sufficient workload to justify appointing such a body. Instead, he opted for the Tax Court as the logical place for hearings, with the organization having the option of using that Court's informal procedures.

The Broadbent Panel in its report, *Improving Governance and Accountability in Canada's Voluntary Sector* (1999) also urged that the appeal process be made more accessible and less expensive, and proposed that appeals should go to the Tax Court.

The Table on Improving the Regulatory Framework, in its contribution to *Working Together: A Government of Canada/Voluntary Sector Joint Initiative* (1999) proposed that the appeals system allow for a hearing *de novo.* Tax Court was not recommended as the venue for such a hearing, but rather a newly created quasi-judicial body. They recommended that, if the initial decision making stayed with the CCRA, it should establish a reconsideration of the initial decision by an internal review process. They also recommended the use of alternative procedures for resolving disputes as an alternative to court proceedings.

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;

[17] 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 de-registration. 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.

[18] *Human Life International in Canada Inc.* v. *Minister of National Revenue* [1998] 3 F.C. 202.

- correctness of the decision, including consistency in the decision making;
- independence of the adjudicator;
- prompt resolution of disputes;
- accessibility, in terms of location, procedures, and costs to the organization;
- creation of precedents for the guidance of the regulatory authority and the sector;
- creation of a complete evidentiary record; and
- 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, we have the courts with their decisions and the evidence they relied upon 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.[19]

Correctness of the decision

A primary goal of any appeals decision 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. This is because the decision maker has reached a decision that is consistent with previous cases while, where appropriate, developing charity law that reflects changes in society. How much flexibility in developing the law is expected from an administrative body? At what

[19] 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.

point does flexibility tip over into decision making that is inconsistent and lacking a proper legal basis?

Independence of the decision maker

"Correct" decisions depend on many factors. One factor affecting how a question 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.

In considering procedures at the various levels of appeal, another consideration is what role, if any, third-party intervenors should play. One concern is the inability of those not directly affected to provide input in 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 upon 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 that have developed expertise in charity law or that are more familiar with working with common law as opposed to statute law?

Prompt resolution to 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 going to court.

Nevertheless, some cases should go before a court as soon as possible because they are potentially precedent setting. In the chapter on Institutional Reform, we have stressed the importance of precedents for the proper functioning of a regulatory system that relies on a common law definition of charity. However, 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 into 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 grounds these decisions should be made, and how much money should be available.

Accessibility

Developing more precedents needs to be balanced against providing 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. That is to provide organizations with an inexpensive and rapid means to have someone hear their case in a more informal atmosphere.

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 going to court with all the attendant costs and delays. Perhaps as well, it should be remembered that decisions at the pre-court

level could offer persuasive guidance, if that decision making becomes recognized as being of high quality and if those decisions can be published in some form.

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 set out in that record, and appeals turn 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 de-registration. 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.

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[20], within the original decision-making body;
- a hearing *de novo* in the Tax Court; and
- an appeal on the record[21] to the Federal Court of Appeal.

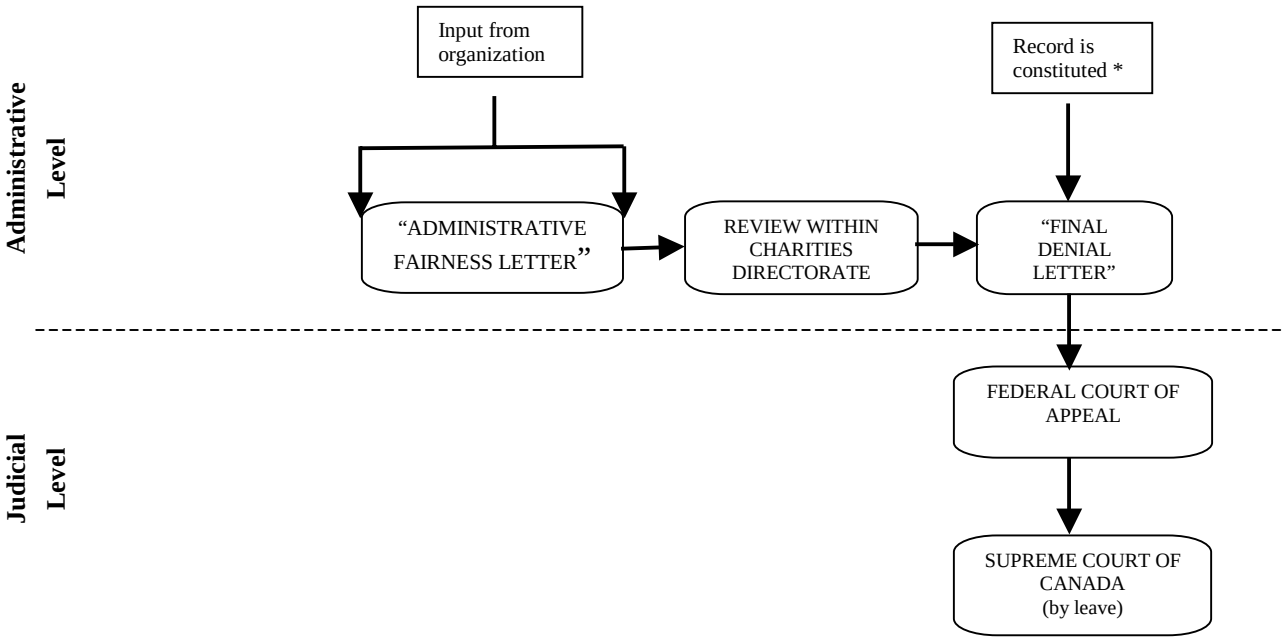
Figure 1 on the following page illustrates the existing and the proposed appeal structure.

[20] 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.

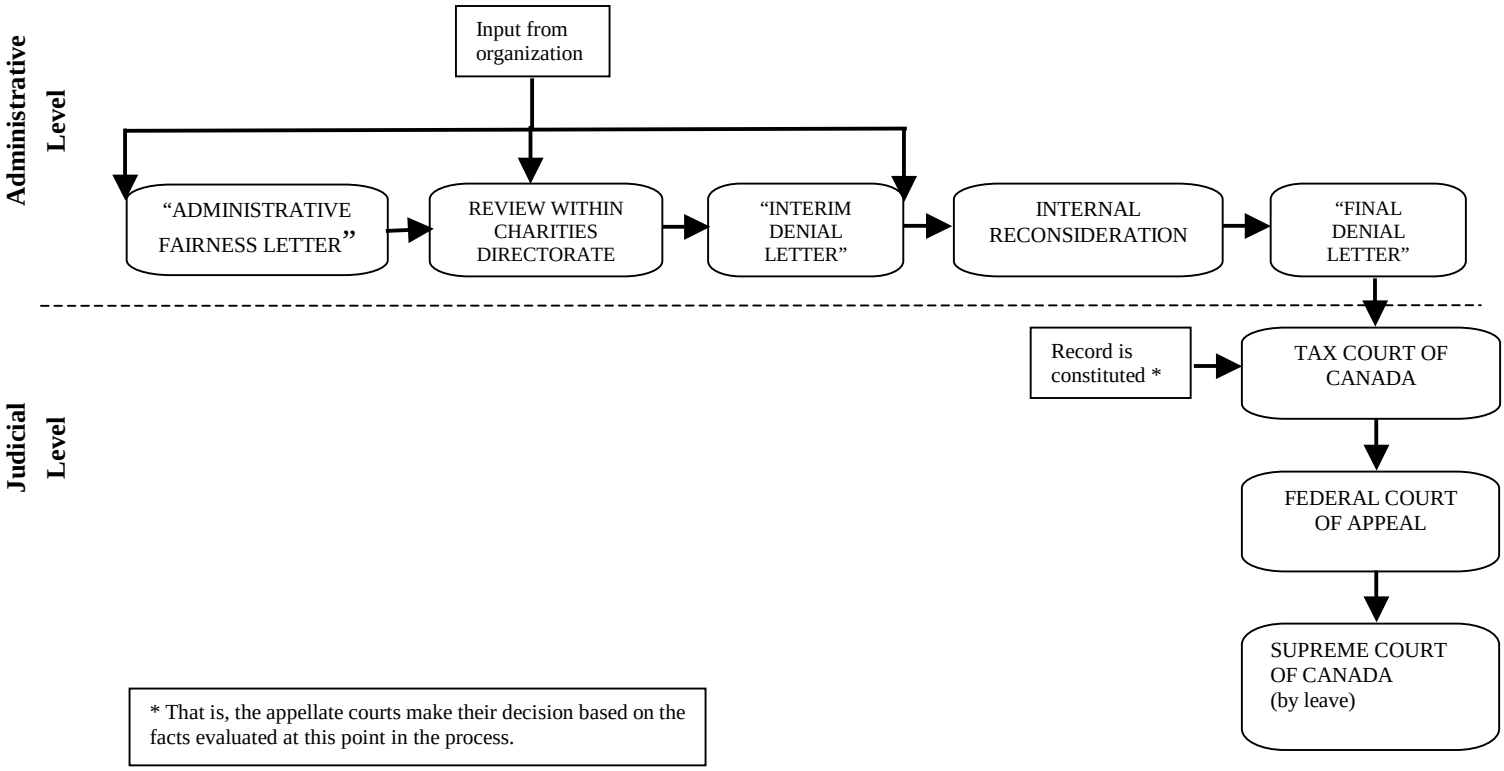
[21] This involves an appellate court deciding whether a decision made by lower courts or administrative decision-makers is correct, based on the evidence these decision-makers had before them.

Figure 1:

Existing Appeals System for Charities



Proposed Appeals System for Charities



* That is, the appellate courts make their decision based on the facts evaluated at this point in the process.

Internal reconsideration

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

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 hearings officer would be bound by the existing policies of the regulatory authority, although the hearings 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.

To use an international comparison, in the United States, all applications to the Internal Revenue Service for tax-exempt status are handled centrally, in Cincinnati. An organization that is refused a tax-

exempt status (or receives a letter proposing the IRS will revoke an existing exemption) may appeal to a separate branch of the IRS. (the Appeals Office), by filing a protest within 30 days.

The protest letter must include details such as the aspects of the original decision the organization disagrees with, the facts supporting its position and the law or authority on which it is relying. If requested, a conference can be held. This procedure can be by correspondence or phone. Appeals Office staff can only determine cases according to established precedents and policy. Where there are no established precedents and policy, the matter is referred to Washington where the head office determines the matter. The organization also has the option of having the file referred directly to Washington.

Also, organizations can go directly to court,[22] rather than using the Appeals Office. Or they can go to court if they disagree with the decision of either the Appeals Office or head office. If successful in court, an organization can recover its administrative and legal costs.

In England and Wales, if the Charity Commission[23] decides an applicant does not qualify for registration, it writes to explain why. The organization may write back if it disagrees with the Commission's decision or feels the Commission has misunderstood the application. Such a response triggers an internal review of the decision.

The reviewer is independent of the original decision makers. If the review upholds the negative decision, the organization can then ask for a review by the head of the legal department and ultimately by the commissioners sitting as a board. If the decision is still negative, the organization can then go outside the Commission and appeal to the High Court.[24] Very few cases have gone to the English courts from decisions of the Charity Commission in recent years.

An organization facing removal from the register on the grounds that it no longer appears to be a charity can also ask for an internal review. It remains on the register until the review is complete, but its name is

[22] The court in question would generally be the equivalent of the Canadian Tax Court.

[23] The Charity Commission also has a system in place to handle complaints about its service, as opposed to its decisions. A complainant can turn to an Independent Complaints Reviewer after the complainant has exhausted the Commission's internal procedures.

[24] The approximate Canadian equivalent of the High Court would be the Federal Court Trial Division or the trial division of the provincial superior courts.

removed if the reviewer issues a negative decision. At that point, the organization has a statutory right of appeal to the High Court.

Third-party interventions are allowed. The *Charities Act* allows "any person who is or may be affected by the registration of an institution as a charity" to object to the decision because the organization is not a charity. They also may take the matter to court if the Commission does not allow their objection.

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.

In its *Report on the Law of Charities* (1996), the Ontario Law Reform Commission was critical that the only appeals mechanism provided in the *Income Tax Act* is an appeal to the Federal Court of Appeal. Given the need for expertise in charity law, the Commission favoured creating an intermediate tribunal devoted exclusively to deciding questions of charity law. However, it felt that reducing administrative costs and providing fairness, openness, and a more fully developed record might be more easily achieved by using an existing appeals system: the Tax Court. Hearings would be conducted along the lines of an appeal from a tax assessment, which is fundamentally a hearing *de novo*.

The Commission also recommended that applicants should have an automatic right of appeal if the Charities Directorate has not decided on the application within 90 days, as opposed to the current 180 days.

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 have chosen to use an existing court, partly for reasons of efficiency, and partly because the courts would not defer to common law decisions. 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 simplified procedures for some cases, and case management and dispute resolution tools, the *Tax Court of Canada Act* provides for cases to be decided using either formal or informal procedures. 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 procedures require parties to be represented by counsel. However, decisions rendered 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.[25]

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 information 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.

[25] The Tax Court's current rules on what cases can be heard under its informal procedures (which turn 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.

On balance, we would recommend 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.

Appeal on the record

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

Judicial review of administrative decision making

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

Intervenors

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,[26] 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.

In the appeals system we are proposing, sector representatives would have no direct role as decision makers. However, feeding sector expertise into the decision-making process remains a valid objective so as to ensure that the decision making is relevant and practical. This expertise can be supplied, it is suggested, either by way of interventions at the hearing level, or through the use of the ministerial advisory group, as described in the chapter on Institutional Reform.

[26] The Tax Court's current rules do not allow intervenors 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 also 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.[27]

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 fact remains that 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.[28] 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:

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[27] However, among the models outlined in the Institutional Reform 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.

[28] 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 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.
- 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.

Subsidization

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. Intervenors 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. Therefore, the program would initially need higher funding than it would in subsequent years.