Pemsel Paper

What We Don't Know **Does** Hurt Us

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The Pemsel Case
FOUNDATION

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

About Us

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

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1. Introduction

Canada, like most western democracies, has robust secrecy provisions governing information related to tax matters between taxpayers and the government.[1] For most situations, this is something that should be applauded: information about an individuals' income and deductions, their employment or business situation, and other matters that are reported on tax forms, are nobody else's business.

But does that hold true for matters related to charities and to those organizations that would like to be charities?[2]

In this paper, we will explore what information about charities and would-be charities can or ought to be released and to whom. More importantly, we'll explore what information can't be revealed by the Canada Revenue Agency (CRA), and whether those prohibitions are potentially impeding the development of the law related to charities or affecting public trust in the sector and in the CRA's oversight.

The paper will also look at the flip side of that coin: is CRA, in certain situations, barred from one of its roles – assuring the public of the integrity of the current system and, if so, exploring whether that is something that should be changed.

2. Why You Should Care

Charity law in Canada comes from a combination of two types of law:

- Statute law sets out the basic provisions of how charities are defined, how they can be registered, how they can lose their registered status, and what things they must do. Most of these provisions are contained in the Income Tax Act (ITA) as part of the regime that exempts them from taxes and allows donors to claim tax credits.[3]
- Common law (also known as judicial precedent, judge-made law, or case law) is the body of law created by judges and similar quasi-judicial tribunals. This body of law comes from court decisions, usually when an organization challenges the regulator's decision:
    - that the organization doesn't qualify as a charity;
    - to revoke the organization's registration as a charity for some violation of the ITA; or
    - to impose some sort of sanction on the charity for doing something it shouldn't have done, or not doing something it was required to do.

Canada has far fewer court decisions about charity law than do most other common-law

[1] For an interesting, if dated, overview of privacy provisions in the U.S. context, see Bittker, Boris I., *Federal Income Tax Returns – Confidentiality vs Public Disclosure*, 20 Washburn L.J. 479 (1980-81)

[2] For the purposes of the *Income Tax Act* (R.S.C 1985, c. 1 (5th supplement), a charity is considered a taxpayer, even though it is exempt from paying taxes.

[3] Other legislation can also impact charities, including laws related to terrorist financing, advertising, and engagement in election advertising. Some provinces also have legislation that impacts charities (and sometimes other nonprofit organizations).

countries. In part, this is because the cost of bringing a court case against CRA is prohibitive.[4]

Changes in the income tax rules regulating charities don't come only from court decisions. Sometimes, advocacy efforts can lead to changes, legislative or administrative. But those efforts can be stymied by a lack of complete and accurate information.

This paper will offer some suggestions for things that might need to be changed, both in law and in practice. If ever adopted, these changes would affect many registered charities and all organizations that apply for charitable registration. In one section, the paper will also explore something that may be more controversial amongst charities: whether CRA's requirement for secrecy should be waived in certain cases when CRA itself is accused of improper behaviour.

3. What's Secret?

The ITA starts off with a blanket provision that makes secret any information related to tax matters.

Section 241 of the ITA reads as follows:

241 *(1) Except as authorized by this section, no official or other representative of a government entity shall*
(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
(b) knowingly allow any person to have access to any taxpayer information; or
(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or for the purpose for which it was provided under this section.

Contravening that section can result in a fine of up to $5,000 or imprisonment for up to 12 months, or both.[5]

Certain exemptions from the secrecy provisions apply in the case of a registered charity, a registered Canadian amateur athletic association, or a registered journalism organization. Those exemptions are contained in section 241(3.2) of the ITA.[6] We will look at those exemptions as we discuss how the system works now, and how it might be changed.

4. The Current System

Administration of the ITA provisions related to charities and other qualified donees[7] is the responsibility of the Charities Directorate, a group within CRA.[8]

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[4] For further background on this issue, see: Wyatt, Bob, *The Appealing Illusion*, Pemsel Case Foundation, 2023, available at https://www.pemselfoundation.org/wp-content/uploads/2024/02/The-Appealing-Illusion.pdf. Last accessed August 6, 2024.
[5] See ITA, section 241(2.2). In the case of a public servant, conviction under this section would almost undoubtedly also result in termination of employment.
[6] The full text of that subsection is contained in Appendix A. Another section, 241(4) contains other exemptions from the secrecy rules. These apply, generally, to information provided to other departments or governments for purposes of administering various programs for which they are responsible, and to various law-enforcement organizations.
[7] "Qualified donees" are groups that have some, or all, of the same privileges as charities, but are not registered charities. They include registered Canadian amateur athletic associations, registered journalism organizations, certain universities outside Canada, the United Nations and its agencies, and certain other groups. (See ITA, s. 149.1(1))
[8] Issues related to nonprofits other than charities and qualified donees are generally handled by the Business Income Tax group within CRA.

For the purposes of this paper, we'll explore two aspects of the Charities Directorate's work: registration and compliance. We'll also examine the internal appeal mechanism within CRA as it applies to charity issues.

Registration

When an organization wants to be a charity, it files an online application with the Charities Directorate. The application asks for information about the organization's objects, what it will do to fulfil those objects, financial information and information about its directors.

Once the application is complete, it will be assigned to an analyst who will review it, consider past rulings of the Charities Directorate as well as court decisions, and decide whether the organization should be registered as a charity or not. Sometimes, the analyst will be in touch with the applicant for clarification or to ask for more documentation.

The latest report from the Charities Directorate, covering the period from April 1, 2022 to March 31, 2023[9], reports that it received, 2,375 applications for registration as a charity and another 84 for registration as some other type of qualified donee.

Table 1, drawn from the earlier reports on the same website, shows the results for the periods from 2015-16 to 2022-23.

TABLE 1

Year/outcome	2015-16	2016-17	2017-18	2018-2020 (combined two fiscal years, averaged)[10]	2020-21	2021-22	2022-23
Applications processed	3,670	2,427	2,245	n/a	n/a	n/a	n/a
Registered (%)	45.5	69.8	69.9	75	79	71	77
Incomplete (%)	31.7	n/a	n/a	n/a	n/a	15	2
Abandoned (%)	12.9	17.8	20.4	17	12	7	15
Withdrawn (%)	7.6	10.3	8.6	7	8	6	5
Refused (%)	2.3	2.1	1.1	1	1	1	1

Turning to the outcomes of the applications, the report says that 77% of the applications for charitable registration considered were approved in 2022-23, and only 1% refused. (It's important to note that the number of applications considered is not disclosed; not all of the 2,058 applications received would have been considered in the same fiscal year, and there would have been applications from previous fiscal years that were considered in the period reported on.)

[9] https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/report-on-charities-program/report-on-charities-program-2022-2023.html Last accessed October 12, 2024. .

[10] The annual reports provided the number of applications actually processed only until the end of the 2017-18 fiscal year. Later reports indicated the number of applications for registration received, but not the number of applications processed.

But the report also says that 2% of the applications considered were closed as incomplete, (down significantly from the 15% reported the previous year)[11], 15% were abandoned and 5% withdrawn. So, in a worst-case scenario, we can say that 22% of the applications considered in that one-year period were not approved. The problem is we don't know why – and that's where the secrecy provisions come into play.

For the applications that were approved, a lot of information can be made available. Under the existing law, anyone can request any of the following information about any (or all) of the organizations that were registered as charities:

- a copy of their governing documents, including the statement of purpose
- information provided on the application for registration[12]
- information about the organization's directors and the periods for which they were directors
- a copy of CRA's notification of the registration, including any conditions and warnings.

For those organizations which were refused registration, what anyone can obtain from CRA is … nothing! The application and the decision are all cloaked in the confidentiality provisions of the ITA.

Why is this an issue? Because it gives us no information about what is, or might be, happening within the registration group of the Charities Directorate. If there is systemic bias, as some have alleged over the years, or even if there is simply an unreasonable interpretation of law, that information will never be released by CRA.

An organization that has formally been refused registration will have received a letter from CRA outlining the reasons for the proposed refusal, and will have been invited to make any other submissions it wishes to make. There is nothing to stop that organization from publicizing the letter, or even just the fact that it has been refused registration. And should it decide to appeal to the Federal Court of Appeal, the information would become public in the court filings. Such an appeal is unlikely, for all the reasons outlined in *The Appealing Illusion*[13] – mainly the cost (and possibly, the uncertain outcome).

For the applications that were categorized as incomplete, abandoned, or withdrawn, there is even less information available. There would have been no letter from CRA with a formal refusal to register. There is no way of knowing, for example, whether the application didn't proceed because of a discussion with a CRA employee suggesting there was no chance of registration, but that the organization could continue to pursue it by providing even more information than is required on the application form. Because there was no formal refusal, there can be no appeal to the courts.

In most situations, an organization being registered as a charity is neither newsworthy nor contentious. But because of the possible impact on the interpretation of charity law, information about organizations that *don't* get registered could be illuminating – except, of course, that release of any of that information is illegal.

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[11] If one in seven applications is categorized as incomplete, one might well ask questions about whether there is a problem with the application process. However, absent any information (which CRA can't release), it is impossible to reach a conclusion on this point.

[12] Although the ITA says "any information" on the application for registration, certain parts of the application form indicate the information is confidential. This includes, for examples, residential addresses and birth dates of directors – a seemingly appropriate exclusion.

[13] *Op. cit.*, footnote 4

Compliance

The Compliance Division within the Charities Directorate is responsible for ensuring that charities continue to qualify for their registered status. This means checking to make sure that they have done what they're supposed to have done, and not done things that the Charities Directorate considers to be offside.

The Directorate's stated position is that in most cases, it will focus on education rather than taking more serious action, such as a compliance agreement, intermediate sanctions, or revocation. Those rules go by the board, though, when the Directorate thinks the non-compliance is "egregious" – something judged by the beholder.

When a serious case of non-compliance is suspected, there is normally a field audit. Someone from a CRA field office, under supervision of a Charities Directorate compliance official, visits the charity and reviews all manner of documents – board minutes, contracts, ledgers, everything. The auditor asks questions, and the charity is expected to answer them. The analyst will review the charity's website as well as social media and publicly available news sources.

If, after the audit, the Charities Directorate decides that something more than an education letter is required, it will send a detailed letter to the charity outlining its findings, stating why it thinks the charity has acted inappropriately, and setting out its intended action – whether that is to require the charity to sign a compliance agreement promising to behave, or to impose financial penalties and/or suspend the charity's receipting privileges, or to impose the ultimate sanction and revoke the charity's registration. This letter is called an Administrative Fairness Letter (AFL).

The fact that a charity is being, or has been, audited is captured by the secrecy provisions of the ITA. Of course, a charity could announce it, but the CRA can't.

But what happens at the end of the audit?

- If CRA gives a thumbs-up and finds that the charity has done nothing wrong, that can't be disclosed, although a charity might well want to announce that fact publicly for any number of reasons.[14]
- If CRA decides that an issue can be resolved by sending the charity an education letter, the letter, or even the fact that one was sent, will never be disclosed by CRA; it's not covered by any of the exemptions in the ITA.
- If the charity is found to have been offside, but CRA is willing to let it continue operating under a compliance agreement, that, again, will remain secret.
- If CRA considers the issues discovered under the audit more serious, it may, depending on the infraction, have the ability to impose what is called an intermediate sanction. These penalties can include such things as a monetary penalty for such things as improperly issuing donation receipts or allowing for undue private benefit. CRA can also suspend a charity's receipting privileges for a stated period, meaning the charity cannot issue tax-credit receipts to donors.[15] In these cases, that information (and presumably the correspondence leading up to the imposition of the penalty) are immediately available.[16]

[14] Consider, though, the situation where a charity says it had been audited, and CRA was satisfied with everything it found. If CRA disagrees with that interpretation, it is prevented from responding.

[15] Until recently, a suspension of receipting privileges also meant that an organization could not receive funds from other charities, including foundations. With the introduction of new legislation and policy allowing grants to non-qualified donees, it is an open question whether that is still the case. See ITA, section 188.2.

[16] Section 241(3.2)(g)

- If CRA decides that the audit justifies revocation of the charity's registration status, the AFL and response to any of the charity's submissions, will become available – eventually. The material will only be released once the revocation takes effect and that could be months or even years after the AFL was sent, depending on whether a charity appeals and how it appeals.

Internal Appeal

An organization that disagrees with a CRA decision, whether related to registration or compliance, is entitled to have that decision reviewed by CRA's Appeals Branch. Officials in that branch can independently confirm or overturn a decision. It can accept additional information from the organization and consider other factors before making its decision.

Information about what happens to a case when it's in the Appeals Branch has not, up to now, been made public. The decision is conveyed to the organization involved and to the Charities Directorate.[17]

Recently, the Appeals Branch has even redacted statistical information about the number of cases it deals with.[18]

So, for the moment, almost nothing that happens in the Appeals Branch is transparent to the public.

5. Possible Reforms

Modernizing, or reforming, charity law is not an easy or quick process. But it is an essential process if we are to ensure that charities are able to marshal efforts to address modern problems. We cannot rely on the 400-year-old *Statute of Elizabeth* 1601 and the 132-year-old *Pemsel* case to address 21st-century issues in Canada and elsewhere. Yet given the fossilized case law that exists as a result of the current appeal process, combined with the confidentiality provisions of the ITA, that old-English law continues to fill the vacuum.

To further a reform process, we must have a better understanding of what is happening now. That's not possible with the existing rules of confidentiality. Too much information is hidden behind those provisions, which were enacted for a good purpose but which we now know have unintended negative consequences.

At the same time, CRA needs to satisfy parliamentarians and the general public that it is appropriately administering the existing law. Especially at times when CRA is being attacked for a specific case, the secrecy provisions in the ITA create a barrier: CRA can simply not release any information except (for our purposes) in a court case.

Something needs to change.

[17] It is not clear whether that practice is consistent with the law. In the case of revocations and annulments, as well as in the case of sanctions, the ITA provides that CRA may release "the entirety of or any part of any letter sent by or on behalf of the Minister to the registrant". See ITA, sections 341.2(e) and 341.2(g) respectively. Clearly, in concluding an appeal, the Appeals Branch is sending a letter on behalf of the Minister. It would, therefore, appear to be something that is subject to release on request of any person.

[18] This refusal to release information is, at the time of writing, the subject of an investigation by the Information Commissioner.

So, let's look at each of the three areas we just discussed and consider what changes could be made that would help the sector work on modernizing charity law, while helping CRA show that everything it does reflects the highest degree of integrity and fairness.

In many of the suggestions to be discussed, the issue of privacy does raise its head. Federal legislation sets limits on what personal information can be disclosed, absent some sort of statutory authority. Similarly, there may be grounds to withhold information that could compromise law-enforcement efforts, particularly in cases where a charity application raises issues about potentially ineligible individuals, or concerns about connections to terrorism or other illegal activity. Some sort of balancing act will have to be performed; how that balance can be achieved depends on what information government agrees should be released, and is beyond the scope of this paper. But the balance should not replace the secrecy provisions now in the ITA with permitted redactions that still prevent analyses of what is going on in the world of charity law.

Registration

When an organization is registered as a charity, information about it automatically appears on the Charities Directorate's website. Being able to request additional information about a particular registration is a bonus, and it's specifically permitted by the ITA.

But knowing who the Charities Directorate is registering is not as useful as knowing who it *isn't* registering. Are there certain types of organizations that are being refused registration more often than other types? Are the reasons that the Charities Directorate gives for refusing registration an accurate reflection of the law – whether it's the law as it is, or the law as reformers believe it should be?

There is no way to tell.

Let's look at an example. Imagine if the people who handle registrations suddenly decided that they were not going to approve any applications from animal-welfare organizations. Or that, in refusing those applications, the letters to the applicants said that CRA believed there were too many existing animal-welfare organizations – something that is not a ground for refusing registration. In either case, we would never be able to find that out, simply because the ITA does not allow anyone to have any information about declined applications. Nor, for example, can we use either the ITA or the *Access to Information Act*[19] to try to get information about the one-quarter of applications that are considered incomplete or are withdrawn or abandoned.

In short, we have no way of independently verifying that the Charities Directorate is applying the law appropriately.

The simple solution, of course, is to amend the ITA to allow (or even require) CRA to release all letters refusing registration of an organization as a charity.[20]

An argument sometimes cited against this idea is that until an organization receives charitable status, it is entitled to secrecy. It's questionable as to whether that argument stands up to scrutiny. If an organization seeks to become a charity, it obviously intends to be "out there" in

[19] R.S.C. 1985, c. A-1

[20] It may be necessary to redact some information in such a letter to ensure compliance with privacy legislation. The extent of those redactions could render the letter less useful, but the redactions would presumably be open to review by the appropriate officers of Parliament.

the world: it will seek donations, it will be doing some type of work, it will be making its existence very public. So, it's not as if the organization is publicity-shy. By all means, the application process should include a statement that the results of the application – whether positive or negative – will become a matter of public record, as will the reasons for the CRA's decision, but the argument doesn't justify keeping all information about a refusal secret forever.

A suggestion has sometimes been made that CRA could release redacted refusal letters, eliminating any information that could tend to identify the applicant organization. That, however, is not going to allow for analysis. If, going back to our example, CRA is not permitting animal-welfare organizations to be registered, not having the organization's name or information about what and where it proposes to operate means that we would have insufficient data to determine if there are issues that need to be addressed by the sector and its allied professionals.

Of course, CRA will likely counter, there is nothing to stop an organization from revealing on its own that it has been refused charitable registration. They are absolutely right on that; the secrecy provisions prohibit release by CRA, not an applicant. But how would an organization know that it could release the information, or who it would release it to?

The only other way in which a refusal notice would become public is if the organization filed an appeal of the decision to the Federal Court of Appeal. This almost never occurs.

In order to adequately assess the registration process, even more information is needed. As noted earlier, in the last year for which data are available, almost one in four of the applications processed were categorized as abandoned, withdrawn, or incomplete. That number, at first blush, seems high. It may turn out that it is perfectly innocent – that a significant percentage of applicants either couldn't or wouldn't provide required information, or they decided that the whole process wasn't worth the effort. Or it may be that they gave up after initial indications that they would be unsuccessful. We don't know. We should know.

It would seem that the only way to examine this situation appropriately is through a review by the Auditor-General of Canada, who has the authority to look behind the numbers. The last time the Auditor-General looked at the Charities Directorate was in 2010.[21] It may be time for another visit.

There is another important reason why registration decisions should be more transparent.

There are four "heads" or categories of charities:

- relief of poverty
- advancement of education
- advancement of religion
- other purposes that benefit the community in a way the courts have said are charitable

The fourth "head" has been described by courts as one where regulators are expected to draw analogies between what an applicant organization wants to do and past cases where courts have held that something similar is charitable.

Drawing such analogies is not always easy, and there is not always a clear "right" answer. By seeing what analogies the Charities Directorate has drawn (through successful applications) and

[21] Canada. Office of the Auditor General. Report of the Auditor General of Canada to the House of Commons. Chapter 7, Registered charities – Canada Revenue Agency. Government of Canada, Ottawa, 2010. https://publications.gc.ca/site/eng/9.568349/publication.html. Last accessed August 10, 2024.

which they have rejected (through unsuccessful applications), we will be better able to assess whether charity law in Canada is moving forward and adapting to the realities of the 21st century.

Compliance

There is actually a significant amount of information available about the Charities Directorate's compliance activities. But, I will suggest, it would be useful to have even more, and/or to have it earlier.

To reiterate:

- information about a revocation or an annulment is fully available, but only when the revocation or annulment actually occurs, after appeals are refused or (in most cases[22]) the appeal period has expired; and
- information about an intermediate sanction – a financial penalty or suspension of receipting privileges – is available when the penalties come into effect.[23]

There are two things missing: information about education letters, and information about compliance agreements into which a charity has entered.

Education letters are used for minor transgressions. For example, the organization for which I work received an education letter for failing to include a person's middle initial on a donation receipt it issued.[24] While it may be that the issues covered in education letters are too minor to be important, they do give an insight into what the Charities Directorate considers to be "minor", and it also would provide information about the extent to which education letters are used, and could be used to help educate the sector to avoid these minor transgressions. Their release would also allow analyses of whether the Charities Directorate acts consistently – whether certain types of things are always dealt with by an education letter or whether their use varies significantly.[25]

Compliance agreements are another matter entirely. They are used in cases where CRA has discovered some action, or inaction, that is serious enough that it wants to say to a charity: "Don't ever do that again."

A proposal from the CRA for a compliance agreement is accompanied by a letter very similar to the AFL used for a revocation or intermediate sanction, setting out the problem(s) found during the audit. It then says that CRA won't impose a more serious penalty if the charity enters into an agreement that sets out what the charity must do to rectify the problem(s) and promises to follow all rules in future.[26]

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[22] CRA reserves the right to enter the revocation formally before the appeal period in cases it considers to be serious non-compliance. An organization faced with that situation needs to seek a postponement – or "stay" – of that decision from the Federal Court of Appeal. In cases that have been heard thus far, no stay has ever been granted.

[23] As with revocations, a stay to delay the imposition of an intermediate sanction is available, this time from the Tax Court of Canada. Again, however, there are no reported cases of a stay being issued.

[24] The "middle-initial" requirement was removed in the 2024 federal budget.

[25] To be clear, there has never been a suggestion that CRA has acted inconsistently, but in the absence of formal records, people can rely only on anecdotal information.

[26] Almost invariably, CRA will conduct a follow-up examination – at least a partial audit – a few years later to ensure that the charity is living up to its obligations under the agreement. If it has not, CRA may move to revoke the charity's registration. A recent example of this is reflected in the case of *Sigma Chi Canadian Foundation v Minister of National Revenue* 2024 FCA 59.

The ITA doesn't allow CRA to release these compliance agreements or even to acknowledge that a charity has entered into one.

Education letters and compliance agreements are not unusual situations, as reflected in Table 2, drawn from the Charities Directorate reports posted on its website.[27]

TABLE 2

Outcomes of Audits

	2015-16	2016-17	2017-18	2018-20[28]	2020-21	2021-22	2022-23
Audits completed	726	n/a	n/a	n/a	142	182	222
Notice of intention to revoke	21	39	25	n/a	0	28	40[29]
Voluntary revocation	22	17	35	n/a	5	5	6
Annulment	59	5	0	n/a	1	1	1
Compliance agreements	111	142	92	n/a	37	45	51
Education letters	444	387	313	n/a	90	81	113
Sanctions	4	3	5	n/a	0	6	4
No action	40	38	51	n/a	1	7	2
Other[30]	25	21	27	n/a	8	9	5

To provide a complete view of what is happening within the Charities Directorate – and the charitable sector – the time has come to amend the ITA to allow for release of education letters and information about compliance agreements, including what led up to the compliance agreement. They should be treated no differently than any other sanction.

Even if one believes that cases that generate only an education letter are too minor to justify disclosure, one cannot say the same about compliance agreements. The charity is, basically, on "probation", and there seems to be no principled reason why that information should not be available to the donating public, as well as to researchers interested in charity law.

[27] *Op. cit.*, footnote 8

[28] The 2018-20 report provided no statistics for outcomes of compliance activities.

[29] As noted by one researcher, 18 of these notices involved two groups of charities, each of which had a number of interconnected directors.

[30] This number "includes other audit activities such as pre-registration and revocation tax audits."

Appeals Branch

As noted earlier, almost all decisions that the Charities Directorate makes about registration or compliance can be sent to the Appeals Branch for a review. But what happens once a file reaches that group of officials is seriously opaque. Even when CRA has been asked to release information related to a revocation, there is no correspondence related to anything that happened during the review process – even in a case where the file was seemingly under review for 10 years.

The Appeals Branch has the ability to overturn a decision of the Charities Directorate. We have little information about how often that happens, and we have no information about why it happens when it does. This leaves a huge gap in assessing what is happening within the regulatory process in terms of modernizing charity law.

It is not clear whether this situation is a result of an interpretation of the ITA or an administrative procedure. If it is the former, it seems to be a misreading of the ITA.

When it comes to revocations, annulments, and sanctions, the ITA provides that CRA may release "a copy of the entirety of or any part of **any letter sent by or on behalf of the Minister to the registrant**"[31] (emphasis added).

It is beyond argument that any correspondence between the Appeals Branch and the charity is sent by or on behalf of the Minister. As a result, the correspondence should be released.

When it comes to cases where charitable registration has been refused and that decision has been upheld, that would require a legislative amendment at the same time CRA is given permission to release unsuccessful registration decisions.

6. But Wait … What's Good for The Goose and All That

Transparency works both ways. In recent years, there has been a disquieting series of cases where charities seem to have been using the secrecy provisions of the ITA to allow them to make uncontradicted claims of bad faith – or more – against the Charities Directorate.

In 2012-15, when the Harper government directed audits of charities engaged in political activities[32], a number of charities – mainly environmental groups – protested that there was political interference, and that they were being silenced. Even after the audits were completed and the charities received AFLs, the complaints persisted, despite the fact that government officials were appearing before parliamentary committees denying the charges, and saying that no charity was being sanctioned primarily because of political activities.

During this process, several of the most-vocal groups were asked to reveal, confidentially, the AFLs they received so that they could be analyzed to see if there were inconsistencies or to try to determine if CRA was changing previously held positions. None of the groups agreed to do that.

Subsequently, after a new government cancelled the audit project, and a few organizations were, in fact, stripped of their charitable status, the AFLs became available. They demonstrated that the government officials had spoken the truth before the parliamentary committees, and that the

[31] See ITA, s. 241(3.2)(e) in the case of revocations and annulments, and s. 241(3.2)(g) in the case of sanctions.
[32] There used to be limits on the amount of resources that a charity could expend on political activities, and differing interpretations of what constituted a political activity. The issue is now one of historical interest only, since amendments to the ITA eliminated the concept of political activities, and gave express approval to charities engaging in what are now called public policy dialogue and development activities.

CRA's complaints about the involved charities disclosed a number of other issues and were not focused primarily on political activities.

More recently, some charities have become very vocal – and litigious – over decisions by the Charities Directorate to revoke their charitable status.

In one case, a charity charged the Charities Directorate with being Islamophobic after receiving a notice of intention to revoke its charitable status. Because of the secrecy provisions of the ITA, the Charities Directorate could not respond, and the charity declined to release the AFL it had received. The charity launched legal action to try to stop the audit and revocation process on grounds of bias and inaccuracies. Even then, it tried to prevent release of the AFL which set out all the grounds on which CRA was relying. The trial judge made short order of that request, saying

> In my view, such serious allegations of government wrongdoing and constitutional violations must be litigated in public, with as much public and media access to the central documents of this case as possible. Without access to the core documents in this application, meaningful public discussion and criticism of state action on matters of significant public interest would be substantially impeded.
>
> The public should have access to these government records because they are necessary to permit meaningful public debate on the alleged CRA misconduct. The public should have access to the AFL and MAC's responses, not simply the parties' submission about what those documents say and mean. Where government misconduct is alleged, sunlight remains the best of disinfectants.[33]

In another recent case, a charity has accused CRA of being antisemitic because of its proposal to revoke the charity's registration. Again, CRA cannot answer that allegation because of the provisions of the ITA.

An organization should never be prevented from challenging CRA's decisions through whatever legal means it wishes. Indeed, there should be more appeals, not fewer.

But making public allegations challenging the integrity of the Charities Directorate, knowing that the Charities Directorate cannot respond, has more serious consequences, creating questions about the integrity of the enforcement of the ITA provisions related to charities. That can have an impact on the entire sector.

The Directorate can, of course, respond to legal proceedings and file its documentation with the court. But it probably cannot even issue a news release summarizing those submissions without running afoul of the secrecy provisions of the ITA.

One has to wonder, therefore, if it isn't time for these situations to be addressed in the ITA. Government could amend the ITA to provide that if a charity makes a public statement challenging a CRA decision, then it is deemed to have waived any rights it has to require the CRA to stay silent. This would be analogous to provisions in the federal *Privacy Act* which allow disclosure of otherwise private information where "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure."[34] This would seem to be

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[33] *Muslim Association of Canada v. Attorney General of Canada*, 2023 ONSC 1923. In the result, the charity's application was dismissed on the grounds it was premature. Its appeal was dismissed by the Ontario Court of Appeal although, in its decision, the Court of Appeal noted that CRA was no longer seeking revocation of the charity's status, but was seeking only to impose other sanctions.

[34] Privacy Act, R.S.C 1985, c. P-21, section 8(2)(m)(i)

entirely consistent with the views of the judge quoted above: public discourse requires access to documentation.

One could go even further, if one were prepared to incur the wrath of a large number of charities. Should CRA be allowed to reveal that it has audited a charity, even when nothing unacceptable has been found? Even further, should CRA be allowed to reveal that it is currently auditing a charity?

The issue was raised by the Joint Regulatory Table in its report "Strengthening Canada's Charitable Sector: Regulatory Reform."[35] In its interim report, the Joint Regulatory Table recommended that CRA be allowed to disclose that a charity had been, or was being, audited. The Table said that this change should be combined with a joint government-sector public-awareness campaign that would help people understand that audits were a part of a system designed to assure Canadians that the charitable sector was trustworthy.

However, after conducting cross-country consultations, the Table withdrew its recommendations. It heard that making such information public could be harmful to charities that had done nothing wrong, and doubts about whether any public-awareness campaign could prevent a charity from being "tarnished" by the fact that CRA auditors were reviewing its records.

It may be time to revisit that issue in the interest of the sector and the donating public.

7. Conclusion

Charity law in Canada innovates at a glacial pace. In part, this is due to a lack of judicial decisions that could, as is intended, keep the common law current, and appropriate for the times.

It's also possible that it is partly due to how charity law is administered.

We don't know. And we don't know largely because there is so much information to which there is no public access. It's true that there is a lot of detail available about individual charities – they are the only organizations in the country whose annual tax returns are publicly posted on CRA's website. But we know much less about what happens when an organization applies for registration as a charity, and too little about some of the things that happen when an organization goes offside.

This paper should not be taken as alleging that the Charities Directorate is intentionally doing anything wrong. Indeed, the author's experience in working closely with officials of the Directorate over the past 30 years demonstrates an ongoing commitment to providing fair and equitable treatment.

But if we are to improve the state of charity law and reassurance to the donating public, we require more information – detailed information that can be analyzed and individual decisions or trends critiqued. That can't happen under the existing secrecy provisions of the ITA.

The great barrier of secrecy, admirable in so many respects, must yield to the broader public and sector interests, so that the charitable sector can continue to develop and better serve Canadians and those around the world.

[35] Joint Table on Regulatory Reform, *Strengthening Canada's Charitable Sector: Regulatory Reform*, Voluntary Sector Initiative, Ottawa, 2003. https://publications.gc.ca/site/eng/9.686460/publication.html. Last accessed August 10, 2024.

Appendix A

Exemptions from Secrecy Provisions Related to Certain Organizations

241 (1) Except as authorized by this section, no official or other representative of a government entity shall

- (a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
- (b) knowingly allow any person to have access to any taxpayer information; or
- (c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

…

Certain qualified donees

(3.2) An official may provide to any person the following taxpayer information relating to another person (in this subsection referred to as the "registrant") that was at any time a registered charity, registered Canadian amateur athletic association or registered journalism organization:

(a) a copy of the registrant's governing documents, including its statement of purpose, and function in the case of a Canadian amateur athletic association;
(b) any information provided in prescribed form to the Minister by the registrant on applying for registration under this Act;
(c) the names of the persons who at any time were the registrant's directors and the periods during which they were its directors;
(d) a copy of the notification of the registrant's registration, including any conditions and warnings;
(e) if the registration of the registrant has been revoked or annulled, a copy of the entirety of or any part of any letter sent by or on behalf of the Minister to the registrant relating to the grounds for the revocation or annulment;
(f) financial statements required to be filed with an information return referred to in subsection 149.1(14) or (14.1);
(g) a copy of the entirety of or any part of any letter or notice by the Minister to the registrant relating to a suspension under section 188.2 or an assessment of tax or penalty under this Act (other than the amount of a liability under subsection 188(1.1));
(h) in the case of a registrant that is a charity, an application by the registrant, and information filed in support of the application, for a designation, determination or decision by the Minister under any of subsections 149.1(6.3), (7), (8) and (13); and
(i) in the case of a registrant that is a charity, in respect of an application for a determination by the Minister under subsection 149.1(5), information in respect of the application, including
    (i) the application,
    (ii) information filed in support of the application, and
    (iii) a copy of the entirety of or any part of any letter or notice by the Minister to the registrant relating to the application.

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