When I was asked to speak at this conference, I was told that many of the lawyers and other professionals in this audience have concluded that it is very difficult for a charity, or a donor to a charity, to win a case in the Federal Court of Appeal.

Are they right? Perhaps they are.

If they are right, I can assure you that it is not because of any lack of legal talent, advocacy skill, or imagination on the part of the lawyers who represent charities and their donors.

Despite the title I have given to this presentation, I do not propose to answer the question I have posed, because I cannot. I hope that will not be
too much of a disappointment. But what I do hope to do is to focus your
attention on what often proves to be the most difficult hurdle for an appellant
or applicant in the Federal Court of Appeal. That hurdle is the standard of
review. The law of standard of review requires appellate courts to give
significant deference to trial judges and administrative decision makers. In a
moment, I will try to explain what I mean.

But first, let me set the stage. Charities are governed mostly by the
laws of the provinces. That is because charities, in their creation and in their
operation, deal mostly in the realm of the laws of property within the
constitutional authority of the provinces.

However, charities are significantly impacted by the federal laws
relating to taxation. Two aspects of federal taxation in particular are
important to charities. One is the general exemption from taxation. The other
is the legal right to issue official receipts for a gift, entitling the donor to a tax
credit.

In terms of tax policy, the general exemption from income tax and
the tax credit available for charitable gifts are tax subsidies. In practical
terms, these are contributions by all taxpayers to all registered charities.
These tax expenditures, if I may call them that, are circumscribed by many
laws and regulations designed to call charities to account - to ensure, broadly
speaking, that the financial contribution to all charities from all taxpayers is put to legitimate charitable uses.

The laws and regulations I spoke of, which constrain and burden charities in the public interest, give rise to numerous disputes. Some of these disputes - I would say the smallest number - are about the law itself, or in other words, the interpretation of a specific provision of the *Income Tax Act* or the Regulations.

Other disputes, perhaps a larger number, have to do with how the law should be applied to particular facts. Into this category fall most cases in which the Minister has refused to register an organization or foundation as a charity because the objects or proposed activities are not exclusively charitable, and the applicant believes the Minister is wrong. This category also includes most disputes about whether a donor has made a gift for which a tax credit may be claimed, or has simply transferred something of value to a charity for consideration.

The third class of dispute, which also covers many situations, involves a challenge to a decision by the Minister to revoke the registration of a charity. That kind of decision is also a question of applying the facts to the law (the statutory provisions listing the grounds for revocation). However, it also
involves a measure of discretion, in which the Minister must assess whether the facts warrant revocation or some lesser measure.

These disputes must follow one of two litigation paths - in some cases from the Minister by notice of objection, then to the Tax Court of Canada, and then to the Federal Court of Appeal. In other cases, the path begins with the Minister and goes directly to the Federal Court of Appeal. After the Federal Court of Appeal, there is of course the chance of an appeal to the Supreme Court of Canada, but only with leave, which is rarely granted.

While both of these paths may end at the Federal Court of Appeal, the two classes of case are treated somewhat differently as a result of the applicable procedure. But what they have in common is that there is a significant measure of deference owed to the decision maker - the Tax Court judge in the case of an appeal from the Tax Court, and the Minister in the case of a direct appeal to the Federal Court of Appeal. This deference is a function of the standards of appellate review.

In appeals from a trial court, such as the Tax Court of Canada or the Federal Court, the standard of review is governed by the three main principles from *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.
The first principle is that the standard of review on a pure question of law is correctness. On a pure question of law, the appellate court is free to replace the opinion of the trial judge with its own.

The second principle is that the standard of review on a finding of fact is “palpable and overriding error” - an error that is plainly seen and important to the outcome of the case. That standard of review also applies to inferences of fact.

The third principle relates to questions of mixed law and fact - the matter of applying the law - or the legal standard - to the facts as found. For these questions the standard of review is palpable and overriding error, unless it is clear that the trial judge made an extricable error in principle in characterizing or applying the legal standard. Where that occurs, the error may be an error of law, which is reviewed on the standard of correctness.

I emphasize that these three principles apply in appeals from a trial judge, which includes an appeal from a decision of the Tax Court of Canada in an income tax appeal. In cases involving charities, the most common class of appeals of this kind are appeals relating to the validity of a gift, or the valuation of a gift.
Some appeals in this category involve a pure question of law. But it is more common for the outcome to turn mostly on the application of the law, or a legal standard, to a set of facts or, in other words, a question of mixed law and fact. That means, as a practical matter, that an appeal will succeed only if the appellant can demonstrate a palpable and overriding factual error, or an error of law or principle that is extricable from a finding of mixed fact and law.

In an appeal, it is not enough for an appellant to get the judges on appeal to the point where they can conclude that they would have decided the case differently, if they had tried the case. The appellant must persuade the judges on appeal that - for example, a particular key finding of fact was not reasonably open to the judge on the evidence, or that the judge could not have concluded as he did unless he was acting on a mistaken view of the law. And those alleged errors must be based on what the judge said in his or her reasons, and what appears in the record of the case - the documentary evidence and the oral evidence. This kind of persuasion engages the art of the advocate, of whom there are many highly skilled practitioners, but it is not an easy task even for them.

Let me turn now to the other class of case that comes to the Federal Court of Appeal, in which the standard of review is somewhat different. I am speaking of applications for judicial review - cases in which the Federal Court
of Appeal is asked to resolve a challenge to a decision by an administrative
decision maker - in this context the Minister.

This class of case includes statutory appeals that come directly to
the Federal Court of Appeal from the Minister - for example, a decision not to
register a charity, or a decision to revoke the registration of a charity.
Although these proceedings are called appeals, they are dealt with
procedurally and substantively in the same way as applications for judicial
review.

In an application for judicial review, the standard of review is
normally reasonableness. That is, the decision under review will stand if it is
reasonable.

The reasonableness standard of review is explained in the leading
paragraph 47. That paragraph is quoted often in the case and I will quote from
it now (and bear in mind that the references in this quotation to
“administrative tribunals” should be understood as references to the Minster):

. . . . [Certain] questions that come before
administrative tribunals do not lend themselves to one
specific, particular result. Instead, they may give rise to a
number of possible, reasonable conclusions. Tribunals
have a margin of appreciation within the range of
acceptable and rational solutions. A court conducting a
review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

An application for judicial review, or a statutory appeal from a decision of the Minister, may sometimes involve a dispute about a point of law or statutory interpretation. But in an application for judicial review, even a question of law is subject to the reasonableness standard of review where the decision maker is interpreting his “home statute”, meaning, the statute that gives him the authority to make the decision. The most recent example of the application of the reasonableness standard to a question of statutory interpretation is Smith v. Alliance Pipeline Ltd., 2011 SCC 7.

In applications for judicial review, the correctness standard of judicial review will apply to some legal questions, including a constitutional issue or a question of general law of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise.

That is not to say that questions of law in statutory appeals involving registration or revocation will necessarily be reviewed on a reasonableness
standard. In my experience, the Federal Court of Appeal has never deferred to the Minister on a pure question of law or statutory interpretation, in any context. That may be because the courts, which are comfortable in finding that a tribunal such as a labour board has more expertise in labour law that the courts, are not at all comfortable in finding that a Minister of the Crown has more expertise in the law than the courts, especially a Minister who is responsible for both the general administration of a statute and the resolution of disputes arising under it.

However, in a registration or revocation appeal, pure questions of law rarely arise. The closest such cases come to true legal issues are registration appeals where the issue is whether the organization seeking registration has objects that are exclusively charitable, or whether its operations are exclusively charitable. Even there, the real dispute is usually a question of mixed law and fact - which takes us back to reasonableness.

Revocation appeals seem to involve, mostly, the exercise of discretion by the Minister - in which the Federal Court of Appeal will invariably apply the reasonableness standard, and thus will defer to the Minister unless the appellant makes the case that the decision is unreasonable, in the sense of being outside a range of acceptable outcomes. This is a very difficult standard to meet. The difficulty of meeting that standard is, in my view, the
explanation for the low rate of success in the Federal Court of Appeal for revocation appeals.

I should not leave the question of direct appeals - or judicial reviews - without mentioning the possibility of an appeal based on an allegation of lack of procedural fairness. That ground of appeal, strictly speaking, does not engage the principles of standard of review because the appellate court is assessing the procedure following by the Minister, not the decision itself. So, there is no standard of review. The procedure is either procedurally fair, or it is not. However, allegations of procedural fairness are difficult to prove because the record - the written record that mostly consists of the Minister’s file - typically presents a picture of a long standing dialogue of explanations and requests by the Minister, leaving the impression that the charity was treated fairly in so far as the procedure is concerned.

Finally, I will mention a class of case in which the Federal Court of Appeal is the decision maker of first instance - the application for a stay of revocation. This is not an appeal or an application for judicial review. This involves a charity asking the Federal Court of Appeal to stop the Minister from proceeding with a revocation.

As far as I have been able to determine from the reported cases, no stay application has ever succeeded. The reason seems to be that the applicant
has failed to meet the three established tests from *RJR-McDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

First, there must be an arguable case on appeal (that is, an arguable case - something more than frivolous - that the revocation decision should be reversed on appeal). Second, there must be evidence that the applicant for the stay will suffer irreparable harm if the stay is not granted. Third, the balance of convenience must favour granting the stay - that is, the likelihood of harm to the Minister (as the representative of the public interest) if the stay is granted must outweigh the harm to the applicant if the stay is not granted.

Under the third of these tests - the balance of convenience - the Court will consider any evidence produced by the Minister of unlawful practices, or the suspicion of unlawful practices, in relation to the issuance of charitable donation receipts. The judges are keenly aware of the harm that can be caused to ordinary people who rely on what appears to be an official tax receipt, only to find years later that it does not bear scrutiny.

But for charities, the hardest of the three *RJR-McDonald* hurdles seems to be proof of irreparable harm. I do not propose to try and summarize the deficiencies noted in the cases thus far. But some commentators have suggested that the Federal Courts have applied a standard that is too strict, so much so that its jurisprudence might be vulnerable to a challenge on legal
grounds. I will say no more about that, but I commend to you the article written by Norman Siebrasse in the October 2010 edition of the Canadian Bar Review, entitled “Interlocutory Injunctions and Irreparable Harm in the Federal Courts”. And if anyone here brings a stay motion citing that case, and succeeds, please remember - you did not hear any of this from me.

Thank you for your attention.