Docket: 2016-323(IT)I

BETWEEN:

RABBI ADAM LICHTMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Rabbi Lawrence Goldman*, 2016-324(IT)I and *Rabbi Shlomo Estrin*, 2016-326(IT)I on February 7, 2017, May 8, 9, 10, 11, 2017 and June 14, 15, 16, 2017, at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Edwin G. Kroft, Q.C. Deborah Toaze Eric Brown
Counsel for the Respondent:	Robert Danay Elizabeth MacDonald

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2012 and 2013 taxation years are dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of December 2017.

"Diane Campbell"

Campbell J.

Docket: 2016-324(IT)I

BETWEEN:

RABBI LAWRENCE GOLDMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Rabbi Adam Lichtman*, 2016-323(IT)I and *Rabbi Shlomo Estrin*, 2016-326(IT)I on February 7, 2017, May 8, 9, 10, 11, 2017 and June 14, 15, 16, 2017, at Vancouver, British Columbia

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Counsel for the Appellant:	Edwin G. Kroft, Q.C. Deborah Toaze Eric Brown
Counsel for the Respondent:	Robert Danay Elizabeth MacDonald

JUDGMENT

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Signed at Ottawa, Canada, this 18th day of December 2017.

"Diane Campbell"

Campbell J.

Docket: 2016-326(IT)I

BETWEEN:

RABBI SHLOMO ESTRIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Rabbi Adam Lichtman,* 2016-323(IT)I and *Rabbi Lawrence Goldman*, 2016-324(IT)I on February 7, 2017, May 8, 9, 10, 11, 2017 and June 14, 15, 16, 2017, at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Edwin G. Kroft, Q.C. Deborah Toaze Eric Brown
Counsel for the Respondent:	Robert Danay Elizabeth MacDonald

JUDGMENT

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HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

I. Introduction:

[1] These appeals deal with the interpretation and application of subparagraph 8(1)(c)(ii) of the *Income Tax Act* (the "*Act*") and, more specifically, clause

8(1)(c)(ii)(B). I must determine whether the Appellants' teaching duties and functions at the Vancouver Hebrew Academy (the "VHA") constituted "ministering to a...congregation", which would then permit them to claim the "clergy residence deduction" (the "Deduction") pursuant to this provision.

[2] Rabbi Adam Lichtman appeals notices of reassessment and assessment issued by the Minister of National Revenue (the "Minister") in respect to his 2012 and 2013 taxation years, respectively. Rabbi Lawrence Goldman appeals notices of reassessment and assessment in respect to his 2011, 2012 and 2013 taxation years, respectively. Rabbi Shlomo Estrin appeals notices of reassessment in respect to his 2011 and 2012 taxation years.

[3] The Appellants are ordained rabbis in the Vancouver Orthodox Jewish community. During the taxation years under appeal, the Appellants taught Judaic studies curriculum to children attending the VHA, the only Orthodox Jewish elementary day school in the Vancouver Jewish community. In computing their net income during these taxation years, each of the Appellants claimed the Deduction which the Minister denied on the basis that the Appellants were not in charge of or ministering to a congregation pursuant to subparagraph 8(1)(c)(ii) of the *Act*.

[4] Paragraph 8(1)(c) sets out a two-fold test, the status and function test, both of which must be met in order to qualify for this Deduction. The Appellants satisfy the first part, the status test, in that they are "members of a clergy or of a religious order or a regular denomination under subparagraph 8(1)(c)(i) of the *Act*. It is the second part, the function test, that is in dispute under subparagraph 8(1)(c)(ii) of the *Act*. The sole issue before me is whether the Appellants' activities and functions at the VHA and as well in the greater Vancouver Orthodox Jewish community can be considered as "ministering to a...congregation", pursuant to clause 8(1)(c)(ii)(B). One of the aspects in resolving this issue involves a determination of the admissibility and weight to be accorded to two expert reports, one from the Rabbinical Court tendered on behalf of the Appellants and a second from Rabbi William (Zev) Eleff, tendered on behalf of the Respondent.

[5] These appeals, being heard on common evidence, commenced before me in February, 2017, pursuant to the Informal Procedure. Almost immediately after the examination-in-chief began in respect to the Appellants' first witness, Rabbi Dan Pacht, Respondent counsel objected to a line of questions being pursued by

counsel for the Appellants in respect to the texts and principles of Orthodox Judaism. The basis of the objection was that the questions delved into an area that was within the realm of expert evidence. I agreed with the Respondent's objection and because the proceeding was brought under the *Tax Court of Canada Rules (Informal Procedure)*, I adjourned the appeals and directed the parties to obtain and submit expert reports. When the hearing resumed in May, 2017, the Appellants tendered an expert report, written by Rabbi Andrew Rosenblatt and co-signed by Rabbi Avraham Feigelstock. This report was provided "…on behalf of the Beit Din or Rabbinical Court of the Orthodox Rabbinical Council of British Columbia (the "Rabbinical Court"). [Rabbinical Court Report, page 3]. The Respondent tendered an expert report written by Rabbi William Eleff. Without providing advance notice to the opposing party, both Appellant and Respondent counsel proceeded to challenge the admissibility of each other's reports. Voir dires were held to determine the admissibility of both reports. I used my discretion under the *Tax Court of Canada Rules (Informal Procedure)* and adopted the suggestion of counsel for both the Appellants and the Respondent in reserving my decisions in the voir dires and issuing those decisions concurrently with my written reasons in these appeals.

[6] After reviewing the evidence presented in the voir dires, I have concluded that both reports will be admissible subject to the qualifications that I have imposed. The reports which were previously marked at the hearing for identification only as Exhibits A-2 and R-14, are now accepted and form part of the record as full Exhibits.

II. Appellant's Position:

[7] The Appellants submit that they were entitled to claim the clergy residence deduction during the relevant periods because they provided Jewish religious instruction and guidance to elementary Orthodox Jewish children attending VHA, who were assembled primarily for this instruction. In leading these children in Jewish worship and instructing them in Jewish principles and values, the Appellants were ministering to a congregation. The Appellants relied on a number of cases decided by the former Chief Justice Bowman to support their argument (Appellants' Opening Statement, pages 7-8).

III. Respondent's Position:

[8] The Respondent submits that if I accept the Appellants' argument on the interpretation of subparagraph 8(1)(c)(ii) of the *Act*, it would be inconsistent with

the plain meaning of the provision, its context in the overall statutory scheme, Parliament's intention to deliberately exclude full-time teaching activities from the ambit of this provision and that it would lead to the absurd result where, unlike other Judeo-Christian denominations, any religious activities undertaken by Orthodox Rabbis would necessarily fall within the meaning of ministering to a congregation (Respondent's Written Submissions, paragraph 4).

IV. The Facts:

[9] I heard evidence from seven witnesses, each of whom is an Orthodox Jewish Rabbi:

- the three Appellants in these appeals;
- Rabbi Dan Pacht, the head of the VHA;
- Rabbi Avraham Feigelstock, currently the head of the Beit Din, a Hebrew term for a Rabbinical Court translated as "House of Judgment" (Exhibit A-2, page 3), the authority in Jewish law for the Orthodox Rabbinical Council of British Columbia;
- Rabbi Andrew Rosenblatt, a member of the Orthodox Rabbinical Court of British Columbia since 2003, senior Rabbi with Schara Tzedeck, the largest Orthodox Jewish synagogue in Vancouver and a member of the executive of the Rabbinical Council of America and chair of its Ethics Development Committee. He was introduced by the Appellants as both a proposed expert witness in the laws and practices of Orthodox Judaism and as a fact witness in respect of his role as the Rabbi at the Schara Tzedeck;
- Rabbi William (Zev) Eleff, currently the Chief Academic Officer of the Hebrew Theological College, the major Orthodox college and rabbinical seminary in the North American Midwest and a member of the Orthodox Rabbinical Council of America, the largest Orthodox rabbinical organization in the world. He was the Respondent's only witness and was called as a proposed expert on religion in North America with a particular focus on the history, religious laws and practices of Orthodox Judaism and the Rabbinate.

I will discuss the evidence presented by Rabbi Feigelstock, Rabbi Rosenblatt and Rabbi Eleff in my analysis of the expert reports.

A. Orthodox Judaism:

[10] Orthodox Judaism is one of three modern movements or denominations of Judaism in North America. Because of the central role that both tradition and the customs and practices play in Orthodox Judaism, it is important to impart these principles to children beginning at an early age. These customs and beliefs have their origins in two sacred texts, the Torah and Talmud. The Torah sets out the 613 commandments that affect every aspect of the life of an Orthodox Jew. These include observance of kosher dietary laws, reciting of prayers, studies of the Torah, ritual circumcisions and bearing children.

[11] Orthodox Jews believe that the Torah was directly passed from God to Moses at Mount Sinai. Orthodox Judaism is founded in the belief that this group was exiled to Babylonia and returned to Israel with Ezra and Nehemiah. Orthodox Judaism preserved the subsequent foundational texts of Jewish law in the Mishnah and in the Babylonian Talmud. After generations of compiled commentary on the earlier Mishnah, Rabbis eventually adopted the Babylonian Talmud as their most authoritative text (Appellants' Argument and Submissions, page 23).

[12] The Talmud is a codification of the oral law, edited to include subsequent clarifications to the laws contained in the Torah. Those laws have been further added to and elaborated upon by Rabbis who have produced further codes and texts in this regard. In addition to Jewish law, the Talmud also contains lore (aggadah), although there does not appear to be any rabbinic consensus as to how authoritative the aspects of the Talmud relating to lore may be. Talmudic lore does provide that the Biblical commandment to study the Torah is greater than all of the other 613 commandments combined and the Rabbinical Court Report relied on this to assert the fundamental importance to Orthodox Judaism of religious education. However, on cross-examination, Rabbi Rosenblatt admitted that this statement would be a common "statement of hyperbole" that is used to describe and emphasize the importance of a variety of commandments (Transcript, Vol. 3, pages 314-317 and Respondent's Written Submissions, page 14). The Rabbinical Court Report asserts that the obligation to study Torah is a religious act and that the recital of blessings is required before studying Torah. Rabbi Rosenblatt also testified that Orthodox Jews are required to recite more

than 100 blessings daily, some of which occur during prayer services while others are recited before or after routine activities such as upon wakening, upon leaving the bathroom, eating bread or washing one's hands. Orthodox Jews are required to participate in three daily prayer services during weekdays, four prayer services on the Sabbath and on holidays and on the Yom Kippur holiday five prayer services.

B. The Vancouver Hebrew Academy ("VHA") and the Evidence of Rabbi Dan Pacht:

[13] Rabbi Pacht holds undergraduate and graduate degrees in Rabbinic and Talmudic studies from the New York Talmudical Institute, as well as a Master of Science in Education Administration from New York State University. He received his ordination in Tennessee. Rabbi Pacht has been at the VHA since August, 2004 and was head of the school during the relevant taxation years. He hired both Rabbi Goldman and Rabbi Lichtman.

[14] The Orthodox Jewish community in Vancouver is a relatively small one, comprised of approximately 600 families. About 20 to 30 Orthodox Jewish rabbis, including the three Appellants, serve this community. There are five Jewish day schools, two elementary schools and three high schools. VHA is the only Orthodox Jewish elementary day school in Vancouver and parents pay in order for their children to attend. During the relevant taxation years, the parents paid yearly tuition costs of $10,000 per child.

[15] The VHA was established and is operated by the Vancouver Hebrew Academy Society (the "VHA Society"). The constitution of the VHA Society states that its purposes were, among other things:

> …
>
> a. to establish and operate one or more schools for Jewish children, consisting of both a full general studies curriculum and full Jewish studies curriculum and whose policies will be in keeping with the principles of Orthodox Judaism;
>
> b. to carry on activities dedicated to the advancement of Orthodox Jewish education;

> c. to develop a strong positive Jewish identity, a love for Judaism and a deep sense of commitment to and involvement with the nation of Israel and "K'lal Yisrael" – the worldwide community of Israel;
>
> d. to teach children in those traits of character, morality and ethics that are reflected in the teachings of the Jewish faith and that are reflective of traditional Jewish life;
>
> ...
>
> (Exhibit A-1, Tab 1).

[16] The VHA operates an accredited elementary school that offers a dual curriculum consisting of Judaic studies and general studies that conform with the requirements of the British Columbia Ministry of Education. Students attend the VHA from kindergarten to grade seven. During the taxation years under appeal, a total of 115 to 130 students were enrolled at the VHA. Of the families of the students attending the VHA, 35 percent are affiliated with the synagogue, Schara Tzedeck. The remaining families are affiliated with synagogues of Orthodox or other Jewish religious denominations.

[17] Rabbi Pacht testified that VHA fulfills the purposes of the VHA Society by conveying to the Orthodox Jewish children the values, ethics and principles embedded in the Torah and specifically the 613 commandments (Mitzvots), which govern almost every aspect of life for an Orthodox Jew. "Torah" may have either a broad or narrow meaning but in this context it is used in its broad sense to refer to the whole body of religious law contained in the written law (the Five Books of the Bible) and the oral law (Talmud) together with the subsequent explanations and commentaries (Rabbinical Court Report, Exhibit A-2, page 4). The VHA's mission for its Judaic studies curriculum is specifically to provide Torah education which "inspires the pursuit of academic excellence and provides children with the foundation skills to fortify their Jewish identity and ignite in them a passion for a lifetime of exploring their Jewish heritage and the world." (Exhibit A-1, Judaic Studies Curriculum, Tab 5, page 110).

[18] Students attending the VHA spend more than 50 percent of their day studying Judaism, starting with the morning prayers in which all students participate. Afternoon prayers are introduced to the students in the intermediate grades. These prayers are led by Judaic studies teachers, such as the Appellants, with the students being taught not only how to recite the prayers but also their

meaning. Although prayer services are held in a regular room, students orient themselves in a manner facing east that is similar to prayers being recited in a synagogue. In the higher grades, students are given the opportunity to lead the prayers, "…the same way that there might be a leader in the congregation…much like they would see in synagogue." (Transcript, Vol. 3, page 423, lines 16-20, Testimony of Rabbi Pacht). During the weekdays, over 90 percent of the students participate in religious worship only at the VHA, as opposed to a synagogue, but this is meant to prepare the students for synagogue prayer.

[19] The Judaic studies curriculum is composed of courses in Chumash (Bible), Navi (Prophets), Tefillah (Prayer), Halachah (Jewish law), Gemara (Talmud), Jewish history and general Judaic knowledge. The Hebrew language is also taught to the students to enable them to continue their life-long study of Torah.

[20] Rabbi Pacht testified in respect to those courses that were offered to the students at VHA. Chumash introduces students to the sacred texts of the Bible, the Five Books of Moses. Navi is a course where students study the books of the prophets – Joshua, Judges, the Books of Samuel and the Book of Kings. The Tefillah encompasses a course on how prayers are properly recited. Halachah introduces students to Jewish law, with emphasis on the laws and practices relating to Shabbat and religious holidays. Gemara exposes students to the Talmud, the oral tradition of the law that is viewed by Orthodox Jews as having been passed directly from God to Moses and subsequently codified. The study of Jewish law exposes students to the entire history of the Jewish people from ancient times through to modern Jewish history, including the formation of the state of Israel. The general knowledge course covered particular building blocks in Jewish knowledge including the commandments, categories of kosher animals, birds and fish named in the books of the written law, such as the Five Books of the Bible.

[21] Students at VHA also follow other customs and practices of Orthodox Judaism, as they are taught how to live their lives in accordance with the 613 commandments in the Torah. For example, only kosher food is permitted in the school. In addition, students are required to bring bread for their lunch so that they could participate in the practice of "benching", a term used for reciting grace after eating a bread-based meal, one of the 613 commandments.

[22] During the taxation years, the VHA employed female teachers to teach some of the Judaic studies curriculum. The teaching duties contained in the

employment contracts, that each of the Appellants had with the VHA, were the same duties as those stipulated in the contracts of the female teachers who are not ordained rabbis.

[23] VHA also offered special classes to students, such as an advanced course in Talmud studies, over the lunch hour and after school.

[24] Although three Orthodox synagogues in Vancouver offer religious instruction to children for a few hours weekly, Rabbi Pacht testified that the VHA curriculum in Judaic studies was a more detailed, intense and experiential program (Transcript, Vol. 3, pages 418-419).

[25] Rabbi Pacht testified that he encouraged VHA rabbis to be actively engaged in the broader Jewish community and in the synagogues, even though this requirement was not part of their duties under their employment contracts with VHA (Transcript, Vol. 3, pages 426-428).

C. The Appellants' Role with the VHA and in the Vancouver Jewish Community:

[26] During the relevant taxations years, the Appellants were employed as teachers of Judaic studies at the VHA pursuant to employment contracts (the "Teaching Contracts") with the VHA Society. The Appellants did not teach any of the courses in the general studies curriculum. The Teaching Contracts define each of the Appellants as the "employee" or the "teacher" and require that the teacher's performance of the duties at VHA under these contracts are to "take priority over any other professional commitments made to other parties" (Exhibit A-1, Tab 2, Clause 3.2). Each contract provides further that the teacher is responsible for all of the duties that are outlined in Schedule "A" of the contract.

[27] Schedule "A" of the Teaching Contracts is titled "Teaching Staff Job Description". This schedule sets out both general and specific duties that are required of the teacher.

[28] The general duties that are outlined in Schedule "A" are those that would be typically required of any teacher in a regular school setting and include: demonstrating professional conduct, participating in supervisory duties, responsibilities respecting special programs, attending staff meetings,

parent-teacher interviews, school events and preparation and submission of course outlines with particular content in September of each school year.

[29] The specific duties of each teacher set out the particular classes that each Appellant would be teaching in a given school year. It also specified the working hours for full-time and part-time teachers. Each Appellant, being full-time teachers or employees, was expected to be present at the school between the hours of 8:15 a.m. and 4:10 p.m..

[30] The Teaching Contracts also stipulated that a teacher shall be responsible for teaching components of the British Columbia curriculum if these duties were assigned to that teacher. While the Appellants did not teach any general studies curriculum during the relevant taxation years and Rabbi Lichtman testified he was not certified to teach any general studies courses, the school reserved the right to assign the Appellants to teach such courses pursuant to that clause in their contracts. All or substantially all of the Appellants' income during the relevant years originated from their employment as teachers with the VHA.

[31] In addition to teaching at the VHA, all of the Appellants were actively involved in the greater Vancouver Jewish community through their involvement at the local synagogues, providing spiritual guidance and counselling to community members and hosting families in their homes on the Sabbath and for holiday meals.

D. Rabbi Lawrence Goldman:

[32] Rabbi Goldman was ordained in Israel in 2004. During this period, he also studied with Ner Le'Elef, an organization that trained rabbis in several outreach programs designed to assist Jews of the Orthodox Jewish faith living in smaller Jewish communities around the world. Individuals enrolled at Ner Le'Elef studied one of three streams of curriculum: those who wished to become a pulpit/synagogue rabbi, those who wanted to become an outreach professional and those who wanted to be involved in Jewish youth education. Rabbi Goldman received training in the Jewish youth education stream.

[33] After his ordination, Rabbi Goldman was recruited in 2004 to the VHA by Rabbi Pacht. During the period in issue, he was involved with boys and girls in Grades 4 to 7 and taught the Talmud (Jewish oral law), Chumash (the Bible), Navi (the prophets), Jewish law (Halachah), Jewish history and Mussar

(character development). He also regularly led the male students in Grades 5 to 7 in morning prayers, using the same prayer book and materials as he would use in an Orthodox synagogue. The words of the prayers were the same at VHA as he used when acting as a rabbi at the synagogue. When praying with his students he used the same words he used when leading a group of ten adult men but admitted that there would be more content within the latter setting. On cross-examination, he also admitted that he was required to teach students how to pray as part of the Tefillah curriculum.

[34] Rabbi Goldman's teaching methodology or philosophy toward his students was to "…impart skills to them, the skills that could lead them to becoming life-learners and be able to open up texts later in life." (Transcript, page 475, lines 8-10) and even more importantly, according to his testimony, he "…tried to give them an excitement for Judaism. …an understanding of how important it is, how vital it is, how connected we are to our heritage." (Transcript, page 475, lines 12-15). The teaching of Jewish ethics and values based on the Torah was at the centre of all subjects that were taught.

[35] The VHA curriculum contained specific exit expectations respecting students. Rabbi Goldman was required to mark his students for the purposes of report cards, the same requirement as in the general studies courses, although he factored in effort as well. He assessed students through both written and oral work but testified that he always judged success beyond the raw score that a student received for the purposes of a report card.

[36] Rabbi Goldman's duties under the Teaching Contract included preparation of a course outline containing course content, planning for assessment (teaching strategy), achievement indicators and learning outcomes (linkage to the British Columbia curriculum organizers). This last item was a unique feature of a combined Judaic program and a general studies program being offered to students, which Rabbi Goldman explained in the following manner:

> …since our school is a 50 percent Judaic program and 50 percent general studies program, we had to find areas within the Judaic curriculum that would fulfill some of the B.C. Ministry outcomes to get certain amount of hours. So, often in our -- the language arts outcomes or analytical reasoning skills, which is something we do on a very regular basis in the Judaic curriculum, we were able to link it to the B.C. curriculum as well.

> Q And just to be clear, these government mandated curriculum points, these were not related to Judaic studies at all. They were sort of general knowledge, what you call general knowledge?
>
> A Well, I would say it didn't change our Judaic curriculum at all, but it was -- it was general studies or general knowledge that the -- I guess that happened to have fallen under the realm of our Judaic curriculum.

(Transcript, Vol. 4, page 507, lines 1-18)

[37] Rabbi Goldman was also required under his Teaching Contract to attend parent/teacher interviews, staff meetings, professional day development sessions four to five times yearly and also to supervise students during recess and lunch. He also led prayer services for the older students. His Teaching Contract did not require that he conduct any of his contractual duties in his home.

[38] In addition to his contractual duties at VHA, Rabbi Goldman testified that he was actively involved in the Vancouver Jewish community, leading prayer services in the community on regular weekdays and on holidays and leading prayer services on almost every Sabbath at a local synagogue in Richmond, British Columbia, composed of about 20 Jewish families. He testified that for an extended period, in the absence of a lead rabbi, both he and Rabbi Estrin led services at this synagogue. In this regard he stated:

> ...and the two of us took on with one other community rabbi, we took on the helm of the entire congregation, and we became, I guess, three rabbis who were leading the congregation. And we did all that *pro bono*. (Emphasis added)

(Transcript, Vol. 3, page 474, lines 17 - 20)

[39] Rabbi Goldman's involvement with the synagogue in Richmond occurred in his spare time. The course content in the Torah that he offered at this synagogue was very similar to the content taught at the VHA. However, he did not formerly test or grade the members at the synagogue. His preparation was also different since the synagogue members were adults. For the children attending this synagogue, a special miniature version of the sermon was offered. When asked to compare his roles in teaching students at VHA as opposed to members at the Richmond synagogue, he testified that they all had the same goal which was to deliver the message of Torah to the audience in order to inspire them to live as Torah observant Jews.

[40] Rabbi Goldman also provided bar mitzvah lessons within the community. At one point, he was approached by the board of the Schara Tzedeck and Rabbi Rosenblatt to teach primary bar mitzvah at the synagogue. In carrying out these duties, he taught boys how to read the Torah on Saturday mornings and sometimes on several days through the week. He tailored his Torah instruction differently than at the VHA, as many of the boys to whom he taught bar mitzvah lessons at the Schara Tzedeck were not students at the VHA. He also acted as a witness for conversions and for divorce proceedings, gave lectures at the Schara Tzedeck and in peoples' homes during his spare time and hosted people for Sabbath and for other holiday meals. Rabbi Goldman provided a number of additional examples of his activities in the Jewish community outside of his teaching responsibilities at VHA but they occurred outside the relevant taxation years at issue in these appeals.

[41] None of those community activities was required under his Teaching Contract with the VHA but Rabbi Pacht, as head of the school, strongly encouraged him to be involved.

E. Rabbi Shlomo Estrin:

[42] Rabbi Estrin followed a little different path to his ordination. In 1987, he graduated from California State University with an Arts degree as a screenwriter. While in college he started working with youth at a residential treatment centre and continued this work after graduation. He testified that initially he was not religious until his brother sparked his interest in Judaism.

[43] Around 1990, he relocated to a Yeshiva (house of learning) in Jerusalem to study Torah on a full-time basis. At a certain point during the ten years he spent in Israel, he decided he wanted to become a teacher, which led him to enroll in the same curriculum stream that Rabbi Goldman had studied at Ner Le'Elef. While studying at Ner Le'Elef, Rabbi Estrin took courses in Jewish law (Halachah), the Torah and courses on how to provide guidance in marriage, community growth, listening skills and in "reading people". He received his ordination in 2000 and moved to Vancouver to teach at the VHA.

[44] At the VHA, during the relevant taxation years, Rabbi Estrin taught Torah and specifically classes in Chumash or Bible, Halachah or Jewish law, Jewish history, Hebrew, origins and practices of Jewish holidays, Mussar or conduct, Navi or prophets, Talmud and ethics. At various points in time during this

period, he taught students in Grades 2, 4 and 5. His goal in teaching at VHA was to give his students as well as their families "…true Torah teaching and set a true example for what Torah is,…" so that they could grow to appreciate the special heritage of the Jewish people (Transcript, Vol. 4, page 529, lines 22-23). He taught the Hebrew language with the goal of providing his students with the tools to learn Torah on their own initiative and to be able to pray from a prayer book.

[45] In addition, Rabbi Estrin taught and led prayers with the students on a daily basis. He taught tunes to the students to assist in remembering the prayers and composed "yiddle riddles" to assist in discussions of weekly Torah readings. He hosted the families of students for Sabbath on a weekly basis and counselled families on personal issues.

[46] Apart from his duties at the VHA, Rabbi Estrin, like Rabbi Goldman, was also involved in the Richmond synagogue, giving weekly Torah lessons, leading services on Sabbath and occasionally delivering sermons and classes at not only that synagogue but at others as well.

F. Rabbi Adam Lichtman:

[47] In 1999, Rabbi Lichtman commenced two years of study in Torah at the Wisconsin Institute for Torah Study. In 2001, he attended Yeshiva Toras Chaim in Florida and in 2002 began his studies at the Rabbinical Seminary of America in New York, from which he received his ordination in 2012.

[48] After his ordination, he learned that Rabbi Pacht from VHA was recruiting a Judaic studies teacher. He joined the staff of the VHA commencing in the 2012-2013 school year. During the relevant taxation years, he taught Chumash, Navi, Jewish holidays, Jewish law, Jewish history and Mishmah. He taught Grade 2 in the morning and Grade 5 in the afternoon. He was not certified to teach courses in the general studies curriculum. He led his students including Grade 3 students each morning in prayers or Tefillah. Every Friday, he also delivered a sermon to his classes regarding the weekly Torah reading, which included topics such as humility, honesty, the 613 commandments and generally ethical lessons on how to live as Torah observant Jews.

[49] Similarly to the other Appellants, Rabbi Estrin was required to assess his students on their course performance. In addition, he attended parent/teacher interviews and staff meetings and supervised students at recess and over lunch.

These duties were all in accordance with his duties prescribed in his employment contract.

[50] Rabbi Estrin also provided counselling to his students and their families on matters such as how to deal with death. He attended houses of mourning to deliver sermons and prayer services. He also visited students when they were ill at home or in hospital.

G. Congregation Schara Tzedeck and the Role of the Synagogue Rabbi:

[51] Of the approximately 600 families in the Vancouver Orthodox Jewish community, 500 of these families are members of the Schara Tzedeck, the largest Orthodox Jewish synagogue in Vancouver. Rabbi Rosenblatt has been employed as a rabbi at this synagogue since 2003.

[52] Because of the nature of the issues in these appeals, a comparison of the Appellants' activities and duties at the VHA and in the Vancouver Jewish community to the role that Rabbi Rosenblatt has as a synagogue rabbi is helpful. Rabbi Rosenblatt's role is described in his employment contract as "…that of a rabbi and Judaic and religious leader of the congregation" (Exhibit R-6, paragraph 3.1). This contract outlined a list of his duties and attached it as Schedule "B" to the contract. Those duties included:

- serve as the Congregation's pulpit Rabbi, including attending religious services on weekdays and on Shabbat and festival days, delivering a "D'var Torah" from the pulpit on Shabbat morning and festival days and delivering "D'var Torah" and teaching those relevant classes as directed through the planning of the education, programming, and strategic planning committees of the Congregation;

- develop and effect, in cooperation with the Board, "outreach" programs…;

- work in cooperation with the Orthodox Rabbinical Council of British Columbia to facilitate conversion…;

- oversee the Congregation's Bar and Bat Mitzvah programs,…;

- develop and effect, in cooperation with the Board, the Congregation's youth activities and programs,…;

- perform wedding ceremonies for members of the Congregation…;
- visit sick and infirm members of the Congregation;
- perform funeral ceremonies of deceased members of the Congregation;
- in months where unveilings are permitted by halacha attend at and perform the rites for unveilings for deceased members or the deceased relatives of members,…;
- provide spiritual, moral, and personal counselling to members…;
- in conjunction with such other employees of the Congregation…;

  supervise, plan and administer programs of religious education;

  assess the appropriateness of visiting scholars and programs…
- serve as final content editor…;
- supervise the Kashrut of the Eruv, the mikveh and all food preparations…;
- develop his own knowledge…;
- work in conjunction with the Board…;
- serve as a permanent voting member of the Religious Services Committee;
- give direction to any member of the staff or clergy of the Synagogue…;
- perform limited executive and administrative functions…;
- …hosting members of the Congregation…;
- maintain fixed, regular office hours in the Synagogue on weekdays,…;
- attend at such meetings of the Board or the Executive or committees of the Congregation…;

- generally devote such time as is required to effectively conduct the religious and spiritual affairs of the Congregation;

- generally promote the good reputation of the Congregation.…

[53] Rabbi Rosenblatt's testimony respecting his activities and duties were consistent with the list of duties of a synagogue rabbi outlined in the Schedule "B" attached to his employment contract. He delivers sermons at Schara Tzedeck and spends time in the community outreach program recruiting new members to the synagogue, one of the primary sources of funding for the activities of the synagogue. He is responsible for a weekly blog that disseminates the Torah message. He also spends time teaching Torah in both the synagogue and the larger Jewish community. As part of this duty, he teaches an after-school education program at the Schara Tzedeck, called the "T-Jex" or "The Jewish Experience" (Exhibit A-1, Tab 13) to children within the Jewish community who are not enrolled in a Jewish elementary school. He testified that the nature and aim of the T-Jex curriculum at his synagogue is the same as the Judaic studies curriculum offered at the VHA, although admittedly less intense. He also taught weekly Torah classes at Talmud Torah, a Vancouver Jewish community day school for the broader Jewish community. He also gave lectures at various locations within the Jewish community, including private homes and community centres.

[54] Despite the extensive list of duties contained in his employment contract with the Schara Tzedeck synagogue that have no connection or very little connection to teaching, Rabbi Rosenblatt took the view that his teaching responsibilities were his "…primary responsibility as a rabbi" (Transcript, Vol. 2, page 243, line 11). In comparison, the duties listed in the Teaching Contracts that the Appellants had with VHA are those that would be typically required of any teacher in a typical school setting and although some of the activities undertaken by the Appellants within the Jewish community are similar to those duties of Rabbi Rosenblatt, they occurred in the Appellants' spare time and were not a part of their contractual duties with VHA.

V. Analysis of the Expert Reports:

A. Admissibility of the Rabbinical Court Report:

[55] The Appellants tendered this report to the Court when the hearing resumed in May, 2017. The author of this report was Rabbi Rosenblatt and the Appellants

proposed that he be accepted as an expert witness on the doctrine and principles of Orthodox Judaism. The report had been reviewed for its accuracy and co-signed by Rabbi Feigelstock. He made no substantive changes to Rabbi Rosenblatt's report and testified that the report represented a "formal ruling by the Beit Din" or the Rabbinical Court (Transcript, Vol. 2, page 165, lines 2-3). Rabbi Rosenblatt also had a brief conversation with Rabbi Hillel Brody, head of the Vancouver Torah Learning Centre, to discuss the accuracy of information contained in the report.

[56] Appellant counsel submits that this report meets all of the requirements or criteria for expert reports set out in *The Queen v Mohan*, [1994] 2 SCR 9 ("*Mohan*"): (i) relevance, (ii) necessity, (iii) expert that is properly qualified and (iv) absence of any exclusionary rules.

[57] Respondent counsel did not specifically object to the admissibility of the Appellants' report based on the *Mohan* criteria but rather based his objection on two very specific grounds:

(a) the report was tendered on behalf of the Rabbinical Court of British Columbia and was presented in a manner that was meant to "bolster the perceived reliability of their evidence" as a formal ruling of a religious court" (Respondent's Written Submissions, paragraph 179), and

(b) both Rabbi Rosenblatt and Rabbi Feigelstock were not sufficiently independent from the three Appellants which prevented them from providing the Court with fair, objective and non-partisan expert evidence that would assist the Court with the issues.

[58] Although both of these objections have merit, I have concluded that neither is sufficient to exclude the Rabbinical Court Report.

a) Objection Based on "Formal Ruling" of a Religious Court

[59] The Respondent objects to the fact that the Appellants have tendered the report not only on behalf of its authors, Rabbi Rosenblatt and Rabbi Feigelstock, personally, but also as a report of the Beit Din or Rabbinical Court of British Columbia. The Respondent argued that this amounts to an attempt by the Appellants to improperly cloak the evidence with an added layer of authority in

presenting it from a religious court in order to bolster the perceived reliability of the evidence of both Rabbis. This "…heightens the danger that the fact finding process will be distorted and the Court will inappropriately defer to the Rabbis' opinion" (Respondent's Written Submissions, paragraph 177) by lending undue weight to the opinion of both Rabbis. The Respondent felt this danger would be significantly increased by the fact that both Rabbis purported to not only speak on their own behalf but also on behalf of the Rabbinical Court of British Columbia. Rabbi Feigelstock testified that he reviewed the report because as a ruling of the Rabbinical Court it must contain information that is 100 percent correct (Transcript, Vol. 2, pages 147-148 and pages 173-174).

[60] The Appellants correctly pointed out that there is nothing improper respecting organizations and entities holding and rendering opinions on its behalf. In fact, there have been precedents before this Court in which reports are tendered and accepted on behalf of a particular organization, which has been authored by its members (*Grimes v The Queen*, 2016 TCC 280, 2016 DTC 1210 and *Zeller Estate v The Queen*, 2008 TCC 426, 2008 DTC 4441).

[61] I acknowledge that the Respondent's concerns are legitimate but the decisions or rulings of any religious court, no matter how prestigious, will have no force of law before this Court. I rely on the well-known common-law principle of *stare decisis* that this Court is bound only by decisions of the Supreme Court of Canada, the Federal Court of Appeal and this court in the general procedure and in that order. I do not believe that I will be ensnared by any baseline danger of giving undue weight to this report or the evidence of either Rabbi Feigelstock or Rabbi Rosenblatt because it is a report of a religious court. While I acknowledge the Respondent's concerns, I am able to carefully and fairly evaluate the evidence before me and weigh it accordingly.

b) Objection Based on the Independence of Rabbi Feigelstock and Rabbi Rosenblatt

[62] This is the Respondent's main objection to the admissibility of the Appellants' report because the facts call into question the ability of both Rabbi Feigelstock and Rabbi Rosenblatt to provide fair and objective opinion evidence when they have extensive personal and professional ties to the Appellants.

[63] Both Rabbis have wide ranging ties with the Appellants and their families through the VHA and the Schara Tzedeck. The Respondent argued that the facts

show that these parties are involved in an intricate web of interconnections of personal, professional and religious relationships within the Vancouver Orthodox Jewish community. Consequently, the Respondent believes, that on a balance of probabilities, they will be unable to give independent and impartial expert evidence to the Court.

[64] The connection among the three Appellants, Rabbi Feigelstock and Rabbi Rosenblatt can be summarized as follows:

- Because the Vancouver Orthodox Jewish community is small and the VHA is the only Orthodox Jewish elementary day school in the community, the families and teachers at VHA are closely connected. Rabbi Rosenblatt personally knew most, if not all, of the group of approximately 20 to 30 Orthodox Jewish rabbis, including the Appellants, Rabbi Pacht and Rabbi Feigelstock, living in Vancouver.

- Rabbi Rosenblatt's five children, the Appellants' children and many of Rabbi Feigelstock's thirteen children, and his 25 to 30 grandchildren and Rabbi Pacht's children have attended and interacted with each other and with the Appellants in small classes at the VHA that were being taught by the Appellants.

- Rabbi Feigelstock's wife, daughter and daughter-in-law all taught Judaic studies at the VHA. They are or were at one point colleagues at the VHA of one or more of the Appellants. A VHA newsletter indicated that the Feigelstock family are a part of the VHA family.

- The Appellants testified that their interactions at VHA were not limited to the students but extended to the families, including activities such as counselling, hosting them on the Sabbath and other religious holidays and so forth.

- Rabbi Rosenblatt and his wife were actively involved in VHA school activities along with the Appellants and their families.

- VHA functions, such as graduation and Shabbaton retreats, were and continue to be held at Schara Tzedeck where Rabbi Rosenblatt presided.

- Rabbi Rosenblatt had hosted Rabbi Goldman and his family at his home overnight and also hosted Rabbi Lichtman when he interviewed him for his teaching position at VHA.

- The Appellants have many personal and professional interactions with Rabbi Rosenblatt through the synagogue, the Schara Tzedeck. For example, many VHA activities take place at this synagogue and are attended by all of the parties and their families. In addition, Rabbi Goldman was hired after consultation with Rabbi Rosenblatt and he regularly attends services at the synagogue to pray with Rabbi Rosenblatt. Rabbi Lichtman periodically gave sermons at the synagogue while Rabbi Estrin was responsible for the youth programs at the synagogue.

[65] The leading case on the admissibility of expert evidence where it is being challenged on the grounds of independence and impartiality is the recent Supreme Court of Canada decision in *White Burgess Langille Inman v Abbott & Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 ("*White Burgess*"). The Court concluded, at paragraph 40, that "…the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence…." The test for assessing whether an expert is independent or impartial is to examine whether the relationship or shared interest results in the proposed expert being unable or unwilling to carry out his primary duty to the Court which is to provide fair, non-partisan and objective assistance (*White Burgess*, paragraph 30). Apparent or perceived bias resulting from a proposed expert's relationship or interest with a party to the litigation will not be determinative. At the end of the day, the proposed expert's duty to the Court must supersede any duty that may exist to the party that calls them as a witness. The Supreme Court in *White Burgess* at paragraph 32 held that three related concepts, impartiality, independence and absence of bias, underlie the duty to provide independent opinion evidence to the court. An expert's opinion must be first, impartial in that it reflects an objective assessment of the matters requiring an expert opinion, second, independent in that it will be the product of independent thinking and judgment uninfluenced by the retainer paid or the outcome and third, unbiased in that it does not unfairly favour one party over another.

[66] In assessing the admissibility of a proposed expert's evidence where independence and impartiality are at issue, the Supreme Court of Canada, at paragraphs 47-48, stated the following respecting the burden of proof:

> [47] …While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.
>
> [48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the Mohan framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[67] The threshold for admissibility, however, "is not particularly onerous" (*White Burgess*, paragraph 49). The Supreme Court in its reasons emphasized this at paragraph 49:

> …exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

Finally, this decision directed that a trial judge is required to examine both the particular circumstances of the proposed experts and the substance of the proposed evidence to determine if the threshold is met.

[68] The Supreme Court at paragraph 49 also sets out several examples where independence and impartiality may or may not become an issue for the purposes of admissibility:

> …For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her

> opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence. (Emphasis added)

[69] In addition to the intricate web of relationships and connections the Appellants and their families have with Rabbi Feigelstock and Rabbi Rosenblatt and their families, the Respondent submitted that the substance of the Rabbinical Court Report contains examples of the authors of that report assuming the role of advocate on the Appellants' behalf and therefore it is tainted by a lack of objectivity. For example, both Rabbi Feigelstock and Rabbi Rosenblatt asserted that "…the role of the rabbi is always to give instruction in either Torah knowledge generally or in a specific application" (Rabbinical Court Report, paragraphs 7.1 and 7.3). However, the Respondent submits that this is not supported by the evidence or by the actual employment duties of Rabbi Rosenblatt as pulpit rabbi at Schara Tzedeck.

[70] The evidence submitted in the voir dire does establish a myriad of personal, professional and religious relationships and interconnections linking the authors of the Rabbinical Court Report and their families to the Appellants and their families. Given these ties, the burden remained on the Appellants, who proposed to tender Rabbi Feigelstock and Rabbi Rosenblatt as experts, to establish their independence and objectivity. Although the Respondent, in challenging their independence and impartiality has established a "realistic concern" that they may lack a sufficient degree of independence from the Appellants, I conclude that the Appellants have met the low threshold that has been established by the Supreme Court of Canada in *White Burgess*. Based on the evidence, the web of ties, although intricate, among Rabbi Rosenblatt, the primary author of the report, Rabbi Feigelstock, who reviewed and co-signed it and the Appellants, is not sufficient to disqualify the expert report and evidence at the threshold stage.

[71] Neither Rabbi Rosenblatt nor Rabbi Feigelstock have any personal direct or indirect financial interest in the outcome of these appeals. They did not receive

payment for authoring the report, which was written at the request of Appellant counsel for the purposes of these appeals.

[72] Despite the many ties within this small and closely-knit Orthodox Jewish community, neither Rabbi Rosenblatt nor Rabbi Feigelstock have actual familial connections to the Appellants. Rabbi Rosenblatt was fulfilling his contractual duties as the rabbi of Schara Tzedeck when he hosted Rabbi Goldman and Rabbi Lichtman. Rabbi Feigelstock testified that he personally had little interaction with the Appellants although he did acknowledge that his wife was more actively involved with the VHA.

[73] Neither Rabbi Rosenblatt nor Rabbi Feigelstock will incur any professional liability if their report is inadmissible. Both testified, however, that their reputations as well as the reputation of the Rabbinical Court, could be seriously impacted if the ruling of the Rabbinical Court was found to be less than 100 percent accurate.

[74] Their report, as a whole, set out their responses respecting questions posed to them by Appellant counsel in respect to the principles and beliefs of Orthodox Judaism. Although the Respondent was of the view that the report contained instances where the Rabbis appeared to take on the role of advocate, those instances are not so self-evident that I would exclude its admissibility based solely on this factor. Neither Rabbi advocated that the Appellants should be entitled to the deductions they had claimed or that their functions at VHA constituted "ministering to a congregation" within the meaning of the *Act*.

[75] Both Rabbis testified that they were providing a fully accurate report to the Court and both testified that their relationship with the Appellants did not affect their objectivity in authoring the report. Rabbi Rosenblatt disclosed that he consulted only very briefly with Rabbi Brody regarding accuracy and a Yeshiva student who assisted with formatting only. Neither Rabbis discussed or showed the Report with or to the Appellants.

[76] On a balance of probabilities, the evidence presented in the voir dire is insufficient in establishing that either Rabbi Rosenblatt or Rabbi Feigelstock were unwilling or unable to provide this Court with fair, objective and non-partisan evidence. The low threshold test established in *White Burgess* has been met and consequently there is no basis that would warrant excluding the Appellants' expert report.

[77] In the alternative, the Respondent argued that if I did admit the Rabbinical Court Report, that it should be accorded very little weight in these appeals for two reasons:

(a) The questions that were posed and the resulting substance of the report has little to do with the customary matters such as divorce, conversion, civil disputes that the court generally deals with. The Respondent pointed out that its witness, Rabbi Eleff, testified that the bulk of any Rabbinical Court's rulings deal with "life cycle" issues, being primarily divorce.

(b) Based on the testimony of Rabbi Rosenblatt and Rabbi Feigelstock, Rabbinical Court rulings are signed by three rabbis in accordance with rabbinic law and customs. The Rabbinical Court Report authored by Rabbi Rosenblatt and Rabbi Feigelstock contains only their signatures and therefore not the required three signatures signing off on a report.

I will deal with the Respondent's concerns respecting these two matters in my analysis.

[78] I note that the Ontario Court of Appeal in *The Queen v Tang*, 2015 ONCA 470, at paragraph 6 stated:

> …*Burgess* indicates, in most cases, suggestions that an expert witness lacks independence or impartiality will go to the weight of the expert's evidence rather than its admissibility. (Emphasis added)

[79] While the Court, in its role as gatekeeper, has a residual discretion to exclude the evidence, the prejudicial effect on the integrity of the trial process in admitting the report does not outweigh the probative value in admitting it. It will assist this Court in its fact finding functions except where I limit its weight in my analysis. In addition, although there were peculiarities in the manner in which these appeals were conducted and unforeseen complexities that arose, they were nevertheless commenced and conducted pursuant to the Informal Procedure Rules of the Court, which remain less stringent in respect to procedure regarding expert evidence. In coming to this conclusion, I have applied the two-part test set out in *White Burgess* in that I have considered the ability of the proposed experts to comply with their duty to the Court to be independent and impartial in light of the

Respondent's concerns and weighed the risks and benefits associated with such admission into evidence.

B. Admissibility of Rabbi Eleff's Expert Report:

[80] The Respondent's proposed expert report was authored by Rabbi William (Zev) Eleff, who was also the Respondent's only witness. He was tendered as an expert on religion in North America with a particular focus on the history, religious laws and practices of Orthodox Judaism and the Rabbinate (Exhibit R-15). Although not specifically required under the Informal Procedure Rules, Rabbi Eleff signed a Certificate Concerning the Code of Conduct for Expert Witness pursuant to paragraph 145(2)(c) of the *Tax Court of Canada Rules (General Procedure*), SOR/90-688a, as amended (Exhibit R-16). In doing so, he acknowledged his overriding duty to assist this Court impartially on matters relevant to these appeals.

[81] The Appellants challenged the admissibility of the Eleff Report and Rabbi Eleff's testimony on the basis that the *Mohan* criteria have not been met. The Appellants argue that: (1) Rabbi Eleff, as an expert in the history of Judaism in the United States, lacked special knowledge and expertise concerning the practices of Orthodox Judaism in Canada, or of Christianity and Protestantism, or of the laws and practices of Orthodox Judaism in general; (2) the evidence was not relevant to the matters at issue in these appeals; (3) the evidence was not necessary as it usurped the role of the trier of fact by defining the term "congregation" and it failed to address the laws and practices of Orthodox Judaism; and (4) the Report should be excluded since it did not set out the facts and assumptions on which it relied nor did it disclose the source documents.

[82] For the reasons set out in the following analysis of these four *Mohan* criteria, I am concluding that the Eleff Report and the testimony of Rabbi Eleff be admitted subject to the qualifications and parameters set out in these conclusions.

a) Properly Qualified Expert

[83] The Appellants' primary objection to Rabbi Eleff's expertise focused on the fact that he was better qualified as an American Jewish scholar and historian but that he was not well versed in Orthodox Judaism, its history, laws and practices, within Canada. The Appellants submit that in addition to the concerns

over Rabbi Eleff's qualifications in respect to Orthodox Judaism in Canada, there are also concerns regarding his qualifications to address Christianity and in particular Protestantism.

[84] Rabbi Eleff is an American Jewish historian. He did not study or take courses in Canadian Jewish history in completing either his academic studies and degrees or his ordination. His Ph.D. dissertation and Master of Arts thesis did not address or discuss Canadian Jewish history. He has not written any books on this topic and, on cross-examination, he displayed little knowledge of Canadian geography. He testified that he has been in Canada on four or five occasions but that he did not visit any of the Canadian Jewish archives and heritage centres situated in major Canadian cities (Transcript, Vol. 4, page 648). He did not know the history of Jewish communities in many of the Atlantic provinces or in the Prairies. He admitted that he is not an expert in the regional history of Jews in British Columbia nor had he conducted any primary research in this area.

[85] However, notwithstanding that Canadian Jewish history is not Rabbi Eleff's primary focus of his research and scholarly studies, he testified that he was conversant in this area (Transcript, Vol. 4, page 624). He has written about Jewish history in Toronto and Montreal, the sites of the two largest Canadian Jewish communities. He was also invited to be editor of the Journal of Canadian Jewish History (Transcript, Vol. 4, page 671). In cross-examination, he readily identified and described the authors and the leading scholarly works on Canadian Jewish history. The fact that he has almost no knowledge of Canadian geography nor the fact that he has not visited many Canadian cities nor any of the repositories for Canada Jewish history, does not preclude him from gaining knowledge about the history and developments of Orthodox Judaism in Canada. In fact, Rabbi Eleff testified that most of the primary sources, on Canadian Jewish history, are actually held by an institution affiliated with the Hebrew Union College in Cincinnati, Ohio (Transcript, Vol. 4, pages 646, 647 and 669) and, at the very least, there are copies located at the Cincinnati archives. When sources from the Montreal archives are required, he used his research funding to request microfilms from McGill University (Transcript, Vol. 4, page 673). There was no need for Rabbi Eleff to physically attend at a Canadian archive in order to engage in scholarship studies or to obtain relevant sources. The fact that he did not specifically study any of the regional Canadian Jewish communities or their histories, does not make him any less of an expert in the history and developments of Orthodox Judaism in Canada. His testimony on this remained uncontradicted.

[86] The Respondent submitted that the Appellants' objections to Rabbi Eleff's expertise, respecting Canadian Orthodox Judaism and Canadian Jewish history, were based on two false premises:

> (1) that Canadian and American Jewish history are distinct fields of study; and
>
> (2) that Orthodox Jewish communities in the United States and Canada are disconnected communities with materially different religious beliefs or practices (Respondent's Written Submissions, paragraph 161).

[87] Based on the evidence, I am of the view that the field of Canadian Jewish history has not developed independently to such an extent that it forms a distinct field of study separate and apart from the broader field of American Jewish history. Rabbi Eleff's testimony supports that conclusion that the study of Canadian Jewish history is enveloped "within the broader field of American Jewish history (Transcript, Vol. 4, pages 656-657). In fact, the evidence supports that the former is still in its emergent period and that there are very few scholars who spend their careers focusing on this field (Transcript, Vol. 4, page 643).

[88] I am also of the view, based on the evidence, that the beliefs and practices of Orthodox Judaism in Canadian communities are not so materially different from those of the Orthodox Jewish communities in the United States. The Appellants' submissions that these communities are disconnected in respect to their beliefs and practices is not supported by the evidence. First, many of the rabbis in these proceedings had professional ties to the United States. All three Appellants, as well as Rabbi Pacht and Rabbi Rosenblatt are American expatriates or were educated in that country. Many of them received Rabbinical ordination in the United States. Rabbi Rosenblatt occupied the position of treasurer of the Rabbinical Council of America to which many Canadian rabbis belong. The theological seminary in New York where Rabbi Eleff and Rabbi Rosenblatt were ordained is regarded as "the flagship of modern Orthodoxy in North America and its rabbis populate pulpits throughout North America and in the world" (Transcript, Vol. 4, page 608, lines 16-18). The same Hebrew rituals and prayer books are used in Orthodox Jewish communities throughout both Canada and the United States and they all follow the same sacred texts. Rabbi Rosenblatt's contract of employment with his synagogue, Schara Tzedeck, describes his duties as those typically performed by a rabbi of a "North American" Orthodox synagogue (Transcript of the Cross-Examination of Rabbi

Rosenblatt, Vol. 3, page 266, lines 7-27). According to the evidence of Rabbi Eleff, many young men from Canadian Jewish communities study in either Israel or the United States because of the lack of institutionalized rabbinical programs in this country (Transcript of the Re-Examination of Rabbi Eleff, Vol. 4, page 673, lines 20-26).

[89] Further, the Appellants' concern, that Rabbi Eleff's qualifications did not qualify him to speak to the laws and practices of Orthodox Judaism, is misplaced and without merit. This concern is based partly on the fact that Rabbi Eleff is not a member of any Rabbinical Court. His curriculum vitae clearly shows that he possesses the academic training, experience, publications, teaching and lecturing to be considered an expert in the laws and practices of Orthodox Judaism. He received two rabbinical ordinations, one of which was from the same "flagship" seminary that the Appellants' expert, Rabbi Rosenblatt, had attended. Rabbi Eleff has published many peer-reviewed articles on Jewish law (Halakah) in the Hebrew publication, Beit Yitzhak, the official rabbinical studies journal of the seminary (Eleff Report, Tab A, page 8). For example, one of the publications was specifically titled "The Intersection between Halakah and History". In addition, in 2016 he was interviewed by the Atlantic magazine regarding the subject matter of the conversion of Ivanka Trump to Orthodox Judaism, a matter that was evidently within the ambit of the rabbinical courts (Transcript, Vol. 4, pages 625-626, lines 24-28 and 1-8).

[90] I have not been convinced by the evidence before me that the experience gained from being a member of a rabbinical court, which deals primarily with family matters, necessarily better qualifies someone in providing answers to the matters in dispute in these appeals. The issue before me involves broader questions relating to the basic texts of Orthodox Judaism, the centrality of Torah education, the role of Orthodox Jewish rabbis and the importance of Torah education for the children of this faith. These are not issues that rabbinical courts and in particular, the Rabbinical Court of British Columbia, deal with on a daily basis. Although these broad questions of religious principles may arise from time to time, a rabbinical court deals primarily with life-cycle issues relating to marriage, divorce and conversions along with the occasional civil dispute.

[91] However, the Appellants' objection, that Rabbi Eleff may not possess the necessary knowledge and expertise in Christianity and particularly Protestantism, to qualify him as an expert to address this area, is in fact supported by the evidence. Rabbi Eleff's knowledge and experience in this area are sparse to

non-existent. Any experience he may possess is extremely limited. After completing his Ph.D. dissertation, he continued with the Department of Near Eastern and Judaic Studies at Brandeis University and taught a course in religious pluralism in the United States that focused on the history of Judaism, Christianity and Islam. He studied these religions with a scholar at Harvard University where he completed numerous reading courses. Apart from these few endeavours, he has never practiced the Christian faith, he has never visited a church and he did not complete primary research in Christianity. His purported knowledge in this field is derived almost entirely from reading primary sources written by other scholars. His Ph.D. dissertation was on the topic of American Judaism while his Master of Arts thesis was on Orthodox Jews and racial desegregation. His published books focus on various topics on Judaism in the United States. Similarly, none of his articles, book chapters, book reviews, online articles, Hebrew publications, conference papers or presentations centre on the topic of Christianity and other religions, but instead focus on Judaism.

[92] Consequently, I conclude that Rabbi Eleff is not qualified to speak to Christianity and other religions and therefore those parts of his report that address the concepts of Christianity, particularly Protestantism and other religions will be excised and excluded as part of the evidence that I will consider in my analysis. However, he is otherwise qualified to provide expert evidence respecting the history of Orthodox Judaism in Canada as well as the laws and practices of Orthodox Judaism in general.

b) Relevance

[93] The Appellants submit that both the Eleff Report and Rabbi Eleff's testimony are not relevant because they focus primarily on the history of Judaism in the United States which will not be pertinent to the issue before this Court. More specifically, the Appellants object to the inclusion of the following sections of the Eleff Report:

- the Different Religious Movements/Denominations in North American Judaism;
- the Role of the Synagogue in North American Orthodox Judaism;
- Comparisons between Orthodox Jewish Congregations and the Local Church in Protestant Christianity in North America;

- the Current Process Required to Become Ordained as an Orthodox Jewish Rabbi in North America;

- How the Roles and Functions of the Orthodox Congregational/Pulpit Rabbis in North America have Changed Over Time.

  (Appellants' Argument and Submissions, paragraphs 515-519).

[94] With respect to the Appellants' first concern regarding the Report's emphasis on the history of Judaism in the United States, I have already canvassed this area in my discussion of the section dealing with "properly qualified expert". Briefly, I am of the view that Canadian Jewish history, as a field of study, is covered under the broad umbrella of American Jewish history.

[95] There is no evidence before me that the laws and practices of Orthodox Jewish communities and Orthodox Judaism in Canada is materially distinct from those in the United States.

[96] Generally, with respect to the remaining Appellants' concerns regarding the Eleff Report, I go back to the initial decision on the necessity for expert evidence in these appeals. To adequately deal with the issue of whether the Appellants were "ministering to a congregation" within the meaning of paragraph 8(1)(c) of the *Act*, I am required to position the Appellants' activities and functions at the VHA and within the Vancouver Jewish community in the context and principles of Orthodox Judaism. The sections in this report to which the Appellants object, are largely relevant to these appeals subject to several exceptions.

[97] The first section dealing with "The Different Religions Movements/Denominations in North America Judaism" provides the Court with a basic overall understanding of some of the background information concerning Orthodox Judaism. Although the content is quite extensive, to the degree that it provides information on and a comparison between Reform Judaism and Conservative Judaism, it will assist this Court in appreciating the texts of the Orthodox movement.

[98] The section titled "The Role of the Synagogue in North America Orthodox Judaism" provides historical and background details on one of the key infrastructures in any viable Jewish community, the synagogue. Traditionally, the

role of education was the responsibility of the synagogue. Through time, Jewish day schools developed and assumed this responsibility. This section of the Eleff Report provides a comparison between the synagogue and the Jewish day school and will be relevant in understanding the role of a rabbi who teaches Judaic studies at a Jewish day school.

[99] However, I am excluding the section of the Eleff Report dealing with the comparisons between Orthodox Jewish Congregations and the local church in Protestant Christianity in North America. Although this had the potential of being relevant, I have already concluded in my reasons that Rabbi Eleff clearly lacks the expertise to testify as an expert in regard to Christianity.

[100] The section dealing with the process required to become ordained as a rabbi in North America will also be excluded because, while it may be informative on how rabbinical training prepares rabbis in fulfilling various functions in the community, it is not relevant to these appeals as the status test under paragraph 8(1)(c) of the *Act* is not in dispute.

[101] Lastly, the section in the Eleff Report, that dealt with the evaluation of the roles and functions of Orthodox Pulpit Rabbis and focused on the rabbi/teacher, the rabbi/scholar and the rabbi/pastor is relevant. Rabbi Eleff pursued an historical narrative but it is relevant because the role and function of rabbis in different settings is key to the issue before the Court. A consideration of how their roles evolved over time will assist this Court in understanding the current roles that they now exercise within the Orthodox Jewish community.

[102] The balance of the Eleff Report is relevant to the issue before the Court.

c) Necessity in Assisting the Trier of Fact

[103] The Appellants submit that the Eleff Report does not meet the *Mohan* criteria because the report attempts to usurp the role of the trier of fact in its deliberate use of the word “congregation” throughout the report and uses it as a synonym for the word “synagogue”. The Appellants argue that in doing so Rabbi Eleff has defined synagogue and those who gather there as the only circumstances in which a “congregation” exists in Orthodox Judaism. However, I conclude that he was not attempting to usurp my role but rather he was simply employing the common usage of the term, which is consistent with a dictionary definition of “congregation”. In fact, some of the Rabbis in their testimony also

utilized the term "congregation" in a similar fashion and the employment contract of Rabbi Rosenblatt with Schara Tzedeck utilizes the term as well.

[104] In using the term "congregation", Rabbi Eleff did not attempt to equate the meaning of "congregation" in Orthodox Judaism to its meaning under paragraph 8(1)(c) of the *Act* nor did he attempt to offer his opinion on this.

[105] Expert evidence will generally be required in respect to matters that involve religious law. The expert evidence provided by Rabbi Eleff is necessary in that it will assist this Court in considering highly technical matters such as the basic texts and practices of Orthodox Judaism, the role of the rabbis in the modern Orthodox Jewish community and the place of the synagogue within the community, all of which are beyond the expertise of the Court.

d) Exclusionary Rules

[106] The Appellants submit that Rabbi Eleff fails to include in his report the facts and assumptions and the source documents upon which he relied. Although there is merit in this objection, it does not warrant excluding the entire report on this basis alone.

[107] The admissibility of an expert report and expert evidence must be viewed within the proper procedural context. Subsection 7(1) of the Informal Procedure Rules provides a more lenient approach to such evidence when introduced under those Rules:

> **7(1)** A party who intends to call an expert witness at the hearing of an appeal shall, not less than 10 days before the commencement of the hearing, file at the Registry and serve on the other parties a report, signed by the expert, setting out the expert's name, address and qualifications and the substance of the expert's testimony. (Emphasis added)

[108] In electing to proceed under the Informal Procedure Rules, the parties must recognize that, in the Court's discretion, the normal requirements respecting expert evidence may be relaxed when compared to the General Procedure Rules. In contrast, Rule 145 and section 3, Schedule III, of the General Procedure Rules specifically set out the requirement that facts and assumptions as well as literature and materials relied on must be included in an expert report.

[109] With respect to the omission of the facts and assumptions and source documents, although it would have improved his report and provided additional assistance to this Court, the Informal Procedure Rules do not impose any such requirement. In addition, Rabbi Eleff testified that he was not asked to include these in his report. He stated that he did not make any factual assumptions and instead used "data" and "analysis" in his report which he equated to facts and assumptions as his means of scientific inquiry (Transcript, Vol. 6, pages 954-955 and 993-994).

[110] However, with the exception of one article that he authored, as the Appellants correctly submitted, the common law rule of evidence against hearsay evidence still applies and Rabbi Eleff therefore should have included the factual foundation and source documents that would support his opinions. The lack of attached source documents extends to two areas: the books, articles and sources cited in footnotes 1-20 and in 22-26 of the report and (2) the Jewish legal sources specifically cited in Part II of the report titled "The Definition of Congregation in Traditional Jewish Law and Practice".

[111] The Supreme Court of Canada in *Lavallee v The Queen*, [1990] 1 SCR 852 ("*Lavallee*") and later in *The Queen v Gibson*, [2008] 1 SCR 397, 2008 SCC 16, clarified that, where an expert opinion relies on hearsay content, without factual or source foundation, the resulting issue goes to the weight to be attributed to such opinions, rather than to its admissibility. Sopinka J. in his concurring reasons in *Lavallee* stated:

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point.

[112] In these appeals, the sources which were referenced in the footnotes did not originate with a party to this litigation. Nor were the sources inherently suspect. The content in those footnotes provided a roadmap that would allow the Court to look up and review those published sources, even though that is not the ideal situation. Rabbi Eleff was subjected to intense cross-examination of his report. I conclude that the issue of the footnote content will go to the weight that can be properly attributable to the various statements and propositions for which these sources were listed and intended to support.

[113] On the other hand, the objection respecting the Jewish legal authorities presents a much greater problem. I have already concluded that the Court must be assisted by expert evidence in the area of religious law. The Federal Court of Appeal in *The Queen v Lefebvre*, 2009 FCA 307, 2009 DTC 5180, at paragraph 21, stated that religious law is a form of foreign law that must be proved by expert evidence. Central to these appeals is the definition of "congregation" in the context of Judaism. The inclusion of this section in the Eleff Report without properly appended sources that would allow this Court to check the veracity of reliability of these statements, would be highly prejudicial. It is a crucial deficiency in the report that outweighs any benefit that might be obtained in admitting such evidence. Therefore, Part II of the Eleff Report as well as any of Rabbi Eleff's testimony relating to this aspect of his evidence will be excluded.

Conclusion Respecting the Eleff Report:

[114] The Eleff Report and Rabbi Eleff's testimony will be admitted into evidence subject to the following portions of his report that will be excised together with any of the testimony of Rabbi Eleff relating to those portions:

- That portion of the Report regarding "Definition of Congregation in Traditional Jewish Law and Practice" and any testimony of Rabbi Eleff relating to this portion is not admissible because I have concluded that it is largely based on hearsay content and information in respect of foreign or religious law.

- That portion regarding the "Comparisons between Orthodox Jewish Congregation and the Local Church in Protestant Christianity in North America" and related testimony will not be admissible to the extent that it contains content relating to any aspects of Protestant Christianity because Rabbi Eleff lacks expertise and training in this area as he is primarily a scholar in Jewish history, law and practices.

- The portion of the Report respecting the "Current Process Required to Become Ordained as an Orthodox Rabbi in North America" and any related testimony is not admissible because it is not relevant to the issue in these appeals.

VI. The Clergy Residence Deduction:

A. Were the Appellants "Ministering" to the Students Attending VHA?

(i) Case law

[115] The words "ministering" and "congregation" are not defined in the *Act*. However, a group of appeals, heard together on common evidence and decided by former Chief Justice Bowman in the late 1990's under the General Procedure, discussed these concepts, together with a number of other concepts, not relevant in these appeals: *Kraft v The Queen*, 1999 TCJ No. 131, 99 DTC 693 ("*Kraft*"); *McGorman v The Queen*, [1999] TCJ No. 133, 99 DTC 699 ("*McGorman*"); *Fitch v The Queen*, [1999] TCJ No. 129, 99 DTC 721 ("*Fitch*"); *Koop v The Queen*, [1999] TCJ No. 130, 99 DTC 707 ("*Koop*"); *Austin v The Queen*, [1999] TCJ No. 126; 99 DTC 710 ("*Austin*"); and *Alemu v The Queen*, [1999] TCJ No. 125, 99 DTC 714 ("*Alemu*"). These decisions must be discussed together in order to appreciate the scope that the cases gave to paragraph 8(1)(c) of the *Act*.

[116] According to the Oxford English Dictionary, the verb "minister" has two common, day-to-day meanings that are presently applicable, one broad and one narrow:

> To serve, perform the function of a servant; to attend to the comfort or needs of another; to assist, be of use [...]
>
> To serve or officiate at a religious service, etc.; to act as a minister of religion.

[117] In *McGorman*, at paragraph 56, Bowman J. adopted an expansive definition of "ministering":

> "To minister" means merely "to serve", or "to attend to the needs of". A physician or nurse ministers to the physical needs of a patient. A clergyman, minister, priest or spiritual counsellor ministers to the spiritual needs of a congregation, collectively or individually. Ministers are, however, called on to do much more than offer spiritual guidance. They provide psychological and marital counselling. They advise on family and career related matters. It is to the church that people turn when faced with the infinite variety of problems that arise in life. Ministering is a very broad concept, particularly in the context of the work of a person of the cloth.

[118] Based on this broad interpretation, the Court held that one of the appellants, who worked as a minister of a worldwide Christian missionary organization, had been "ministering to a congregation", consisting of the Somali Muslim community in Toronto. Bowman J. at paragraph 56 held that, notwithstanding that many of that appellant's work was performed outside the context of a traditional church setting, his "…work encompassed everything that is traditionally done by a minister or priest who has one church" and that "there is no question that Mr. Miller was ministering to the persons with whom he dealt." I agree with the conclusions reached by Bowman J. in *McGorman* since the appellant in that appeal had been hired as a missionary, whose work by its nature necessitates leaving the comfort of a traditional religious setting and venturing into the broader community.

[119] Consistent with this broad interpretation, Bowman J. held that other activities and functions also fell within the scope of the term "ministering to a congregation". The second appellant in *McGorman*, a Baptist missionary travelling and preaching the gospel throughout Canada, including speaking to women, youth and children's groups and speaking about her mission overseas, came within the scope of this provision and entitled her to the deduction. In *Koop*, the net was cast a little further to include within the more expansive definition, members of the Youth for Christ organization, who attended to disadvantaged youth in Winnipeg and Saskatoon, running drop-in centres, sports facilities and leading services and preaching the gospel to youth.

[120] In *Kraft*, an ordained Baptist minister, who served as a chaplain of three custodial facilities, providing spiritual counselling to and leading services and bible studies to young offenders as well as occasionally preaching in churches, was ministering to a congregation. Other appellants in this case were also entitled to the deduction and their duties included: a Baptist minister who was travelling to churches throughout Canada preaching and leading services as part of an outreach program; a minister of a Christian Evangelical church in England who led services, Bible studies and prayers and provided counselling to Toronto churches; a Baptist minister who preached, provided counselling and led services to aboriginal communities in Manitoba.

[121] In *Austin*, Bowman J. found that a minister of music in the Pentecostal church, who was in charge of the musical aspect of the services and also visited hospitals, attended funerals and weddings, provided counselling and delivered sermons, was ministering to a congregation.

[122] In *Alemu*, a minister of a Christian organization, for individuals with exceptional needs, who acted as a chaplain to these families providing counselling, preaching and giving daily and Sunday services, was within the scope of the definition and entitled to the deduction.

[123] The Appellants relied on these decisions and particularly the liberal and expansive definition given to the term “ministering to a congregation” to support their interpretation that the activities of the Appellants as full-time teachers of Jewish studies at the VHA constituted ministering to a congregation within the meaning of paragraph 8(1)(c) of the *Act*. Specifically, the Appellants argue that they perform many of the same functions that were performed by the taxpayers in the group of cases decided by Bowman J., such as leading prayer services at the VHA, counselling students and their families, giving lectures on Torah in the community and so forth.

[124] However, the decisions in this group of cases do not present the entire picture of the interpretation that Bowman J. gave to the scope of paragraph 8(1)(c). Although the *McGorman* line of cases provided a broad interpretation, in *Fitch*, Bowman J. narrowed the scope of “ministering” by specifically carving out an exception pertaining to teachers of religious studies. He concluded that, one of the appellants in *Fitch*, Reverend Bissell, a full-time professor of religious studies at the Canadian Bible College established by the Seventh Day Adventist Church, did not meet the function test of ministering to a congregation within paragraph 8(1)(c). The ratio of the case is found at paragraphs 40-43. They are reproduced here as they are particularly instructive to the present appeals:

> 40 Reverend Bissell's case raises the question whether teaching students in a divinity class in what is clearly a denominational college is ministering to a congregation.
>
> 41 It cannot be denied that ministering to a congregation involves in many instances teaching. It is an important part of the role of a minister. Among the many appellations given to Jesus Christ is "The Great Teacher". Nonetheless, although ministering may include teaching, the converse is not true.
>
> 42 It is important to put Reverend Bissell's activities in their proper perspective. He taught religion to persons intending to become ministers. No doubt he also counselled them, and probably prayed with them. He also preached from time to time to local congregations. Counsel for the appellants referred me to a number of cases in which the courts have recognized that ministering can include specialized ministries. I agree with this as a broad

> proposition, as far as it goes, but it does not in my view go far enough to assist Reverend Bissell. I do not think that teaching classes of students in a Bible college can be said to be ministering to a congregation in the sense in which I have used the expression in other cases, such as *Miller* and *McGorman* or *Baker*.
>
> 43 As noted above, teaching may well - and frequently does - form a component of ministering, but teaching in itself is not ministering in any ordinarily accepted connotation of that term of which I am aware. Nor do I think that a group of students can be said to be a congregation in the sense of an assemblage or gathering of persons to whom a minister provides spiritual counselling, advice, illumination and inspiration. While for the reasons given in *Kraft et al*. I do not subscribe to the view of the word congregation expressed in *McRae*, I do not think that it encompasses a group of college students' assembled for academic instruction. (Emphasis added)

[125] Subsequently, in *Shepherd v The Queen*, [2002] TCJ No. 104 ("*Shepherd*"), this Court followed the conclusion of Bowman J. in *Fitch* and found that a professor of a Baptist college and seminary in Edmonton, whose primary task was teaching, did not meet the definition of ministering to a congregation. Although this was decided under the Informal Procedure, its reasoning is in line with the *Fitch* decision.

[126] The Appellants submitted that the decisions in both *Fitch* and *Shepherd* were distinguishable from the present appeals because the taxpayers in those two cases were professors of religious studies at theological colleges who taught post-secondary studies for vocational training, whereas the Appellants in the present appeals were involved with "…teachings of Torah and Jewish spiritual, liturgical and ethical concepts and values to their students was the essential and principal component of the Appellants' ministry as rabbis (Appellants' Argument and Submissions, paragraph 372). In addition, the Appellants argued that in imparting fundamental knowledge and homiletics, attending to the spiritual needs of students, providing religious worship and assisting them to become observant members of the Jewish faith, they were fulfilling one of the fundamental roles of a Jewish minister of religion. Their work was a specialized ministry to youth and consequently they were not providing vocational training to students at a secondary or post-secondary institution.

[127] Despite Appellant counsel's able arguments in this regard, I must agree with the Respondent that *Fitch* has already answered the question whether a full-time teacher of religious studies in a school can be considered as ministering

to a congregation. As Bowman J. stated at paragraph 42 of *Fitch*, it is important to put the Appellants' activities in "their proper perspective".

[128] All of the Appellants had contracts of employment with the VHA to teach Jewish religious studies at the school. They were referred to as "teachers" throughout the employment contracts in contrast to Rabbi Rosenblatt's employment contract with Schara Tzedeck that referred to him as "The Rabbi" of this synagogue. The Appellants' primary activities at VHA consisted of teaching duties. The Appellants were paid for these duties. They were required to prepare course syllabi at the commencement of each school year and to evaluate students' performance, despite the Appellants' testimony that they seldom judged a student's success based on grades. It is interesting to note that the same contracts were used for the female Jewish studies teachers employed at the VHA. The women were not ordained rabbis but nothing prevented them from being employed to provide Jewish religious instruction to the students at VHA.

[129] VHA operated a dual curriculum consisting of Judaic studies and general studies. In *Fitch*, at paragraph 18, the Bible college was also established for the dual purpose of providing "…higher education, in a context of academic excellence and Christian commitment to the members of the church and to others who wish to study in an Adventist setting." Similarly, while education holds an important place in Orthodox Judaism and in the Jewish faith generally, the Court in *Fitch* also found that education held a special place and was integral to the religion within the Adventist church and the Bible college.

[130] With respect to the Appellants' submissions, I do not believe that there is a fundamental distinction between rabbis who teach Jewish studies to elementary school children and professors who teach adults for the purposes of vocational training. In these two scenarios, the particular audience and the purposes for which they are gathered may be different but the role of the religious teacher does not change. In all instances, the teacher or professor attempts to impart spiritual knowledge and ethical values and concepts to the respective student bodies. While the actual subject matter of the curriculum may distinguish a teacher of religion from a general studies teacher, or for that matter from a physical education teacher, there are no other readily discernible differences between religious teachers of elementary, secondary and post-secondary institutions. A teacher remains a teacher in all of these circumstances.

[131] Apart from the distinction that the Appellants attempted to draw, the facts in *Fitch* and *Shepherd* are virtually indistinguishable from those in the present appeals. In addition to their teaching duties, the Appellants led prayer services or prayed with the students as part of the curriculum of Tefillah studies (studies of prayers). In *Shepherd*, the appellant also chaired the Student Life Committee at the Baptist seminary and one of his key duties was to plan, organize and implement prayer services to the student community. The Appellants taught VHA students' knowledge about the scared Jewish texts and the Hebrew language. In *Shepherd*, the taxpayer also taught students courses on both sacred biblical texts and the Hebrew language. The taxpayers in those appeals provided spiritual guidance and counsel to students as well as to their families and community members at large and also counselled students. Apart from their teaching functions, the Appellants in the present appeals provided worship services for members of the Vancouver Jewish community and were involved in one or more local Jewish synagogues where they gave sermons and lectures. In *Shepherd*, the taxpayer, like every other faculty member, gave Sunday sermons and preached in local churches. He also taught Sunday school. In *Fitch*, at paragraph 42, the Court also found that Reverend Bissell "preached from time to time to local congregations".

[132] I do not believe that the cases that the Appellants relied on truly assist them. The Appellants in the present appeals were employed as full-time teachers of Judaic studies at the VHA. Their employment responsibilities were to teach the students, gathered at this Orthodox Jewish elementary day school, the practices, values and principles of Orthodox Judaism. By contrast, none of the taxpayers in *McGorman*, *Kraft*, *Koop* or *Austin* were engaged in full-time employment as teachers at any religious schools at any level, although some led Bible study groups or Sunday schools. The two roles are not comparable.

[133] Although the decision in *Austin* may assist the Appellants to some extent, a key to the Court's finding, that a minister of music was engaged in a recognized speciality within the Pentecostal church, was the conclusion that music itself was an integral part of the services of the church. At paragraph 37, the Court concluded:

> …his principal activity was dealing with the all-important musical aspect of the Church. It was in this way that he served God and ministered to the spiritual needs of his congregation. The way in which one ministers to the needs of a congregation depends upon the denomination in which one operates. In the Pentecostal Church a person who provides the musical aspect of the service is

> indeed ministering to the congregation's spiritual needs in as significant a way as a minister who preaches sermons.

[134] If the Appellants were to succeed in these appeals, I would first have to be able to conclude, on a balance of probabilities, that a rabbi teaching Torah to Orthodox Jewish children represents a specialized ministry within the context of Orthodox Judaism, a finding that would be akin to the conclusion reached in *Austin*. Second, I would then also have to conclude that the students at VHA constituted a congregation for the purposes of paragraph 8(1)(c). However, this second part of the issue never arose in *Austin* as the ministry of music occurred inside the traditional context of a church and not a school.

[135] To assist in dealing with these issues, I turn to the expert evidence.

(ii) Expert Evidence on Orthodox Judaism, Torah Education and the Role of Rabbis

a) Weight of the Rabbinical Court Report

[136] Although I have concluded that this Report and Rabbi Rosenblatt's testimony are admissible, I have concerns respecting the weight that I may be able to give the evidence.

[137] During the voir dire, the Respondent raised realistic concerns in respect to the independence of both Rabbi Rosenblatt and Rabbi Feigelstock from the Appellants. The facts reveal an extensive web of connections and relationships among those parties. Although it was not sufficient to exclude the Report and the expert evidence, it must be taken into account in respect to the weight I will give the evidence. My concern is heightened by the obvious deficiency in the composition of the Rabbinical Court in issuing a "formal ruling". Both Rabbi Rosenblatt and Rabbi Feigelstock testified that rabbinical courts are "typically composed of three justices." (Transcript, Testimony of Rabbi Rosenblatt, Vol. 2, page 83, lines 11-13). Rabbi Eleff also confirmed that the composition of a rabbinical court must be three rabbis and that there would never be only two issuing a ruling because "…there is a rabbinic prescription against even numbers." (Transcript, Vol. 4, page 711, lines 12-13). Even though the Report was signed by only two rabbis, Rabbi Feigelstock nevertheless called it a "formal ruling" of the Rabbinical Court of British Columbia despite it being contrary to rabbinic law and practice. This contradiction casts doubt on the objectivity of

Rabbi Feigelstock's testimony with regard to the content of the Report. This somewhat diminishes the weight I am able to attribute to the Report or some parts of it.

b) No Consensus on the Spirituality of Torah Education

[138] My reservations, concerning the proper weight that should be attributed to the Rabbinical Court Report and Rabbi Rosenblatt's evidence, are reinforced additionally by content in the Report and the testimony of Rabbi Rosenblatt that are contradicted: (1) by sources within the Report itself; (2) by Rabbi Eleff's evidence; and (3) by unchallenged factual evidence tendered by both parties. These contradictions are best understood through an understanding of the background of Orthodox Judaism, based on the evidence provided by the experts.

[139] Orthodox Judaism is one of three modern religious movements in North American Judaism. Its adherents understand that they are the direct outgrowth of the Children of Israel, to whom Torah was passed down by God to Moses atop Mount Sinai. The experts employed the term differently in their reports. The Rabbinical Court Report uses the term "Torah", depending on the context, in its broader meaning which envelops both the Written Law (Torah, in its narrow sense, consisting of the Five Books of the Bible) and the Oral Law (Talmud), together with subsequent explanations, extrapolations and commentary on them. The Eleff Report tended to confine the use of "Torah" to its narrow meaning, which is the written law.

[140] Orthodox Jews believe in two sacred texts, the Torah, in the narrow sense, that is the written law and the Talmud, a digest of the Oral Law recorded during the 6th to 9th centuries which expands and clarifies the Torah. The Mishnah is the foundational text that forms the basis of the Talmud. It provides guidance in all areas of life and is considered to be binding by Orthodox Jews. Matters that are covered include dietary laws, ritual circumcision, civil commandments and prayers.

[141] While Torah is undoubtedly important in the life of an Orthodox Jew, the Rabbinical Court Report's assertion that Torah education is more than an intellectual pursuit and that it is in and of itself a "spiritual engagement akin to prayer or other rituals" does not hold up under close scrutiny (Rabbinical Court Report, paragraph 3.5). More specifically, the Report appears to rely on sources that have no consensus among rabbinic authorities and scholars.

[142] The Rabbinical Court Report at paragraph 3.2 relies on a statement made in the foundational text of Talmud, the Mishnah, to suggest that the study of Torah, being one of the 613 commandments, is equivalent or equal to all of the other commandments. (Appendix E, page 7, "Mishnah, Pe'ah Chapter 1")

[143] However, based on the evidence before me, there is no consensus on the meaning of the passage contained in Appendix E to the Rabbinical Court Report in respect to the study of Torah being equal to all other commandments. Rabbi Eleff testified that this statement fell within the "lore" category (also called the Aggadah) of Talmud as opposed to the legislative or binding portion (Transcript, Vol. 4, pages 683-684, lines 21-28 and lines 1-12). Further, there is no consensus on the interpretation or treatment of lore because it is "…difficult to wade through the rhetoric and sometimes hyperbole of some of the language." (Transcript, Testimony of Rabbi Eleff, Vol. 4, pages 681-682, line 28 and line 1). While some treat it as authoritative, others view it as advice or stories and many rabbinical academics do not address them at all. In cross-examination, Rabbi Rosenblatt also admitted that this kind of formulation, to emphasize the particular importance of certain commandments, is common (Transcript, Vol. 3, pages 313 and 317). He also recognized the hyperbolic nature of such statements:

> The point I think is that the rabbinic language tries to talk about the superlative nature of a commandment when it says something like that. So, when they are saying that it is equivalent to all the other commandments, obviously you can't have two commandments that are equivalent to all the others because if you just do the simple math it would be a contradictory scenario. That's why I use the term "hyperbole" because it really means that they are trying to discuss the importance, the central importance of a *mitzvah*.

(Transcript, Vol. 3, page 317, lines 11-20).

[144] This lack of consensus was also confirmed in a passage from the work of Rabbi Norman Lamm, former President and Chancellor of Yeshiva University, where, in commenting on another rabbis' work, he stated "…whether Talmud ("study") is superior to Maaseh ("deed, action") or to prayer…different evaluations go back to the Talmud itself. However, the virtue of the study of Torah, as such, is incontestable." (Emphasis added) (Rabbinical Court Report, Appendix F, page 8, "Torah Lishmah").

[145] To suggest the claim that the study of Torah is more than an intellectual pursuit and is more akin to a spiritual engagement, the Rabbinical Court Report

relied heavily on the lesson drawn by Rabbi Aharoy Lichtenstein, who commented on the requirement to recite a blessing prior to studying Torah:

> To learn Torah without a preceding berakha does not merely constitute failure to fulfill a particular halakha. It entails – and here, we return to our point of departure –missing the essence of Torah itself. Learning without praise, thanksgiving, and petitionary aspiration is learning which fails to realize the joy and the marvel, the awe and the wonder, of Talmud Torah. To learn with insouciance or indifference, or even with presumed dispassionate objectivity grounded in intellectual curiosity, is to reduce devar Hashem to an academic discipline.

(Rabbinical Court Report, Appendix H, pages 14-15, "Reflections Upon Birkot Ha Torah")

[146] On the other hand, on cross-examination, Rabbi Rosenblatt admitted that while it is customary to recite 100 blessings daily, many are achieved through daily and Sabbath prayer services as well as those blessings recited before and after such routine activities as washing one's hands, eating bread, or eating fruit and vegetables (Transcript, Vol. 3, pages 321-323).

[147] Despite the alleged importance of blessings in the spiritual act of learning Torah, it is interesting to note that there was no evidence presented as to whether the students at the VHA actually recited a blessing before their Torah classes. However, there was evidence presented respecting the requirement for students to bring bread for lunch each day so that they could recite the blessings for bread based meals. According to Rabbi Lichtenstein, this would mean "missing the essence of Torah" and "devar Hashem", the word of God, is then reduced to an "academic discipline" (Rabbinical Court Report, Appendix H, page 14).

[148] In view of the facts presented, there is simply no convincing evidence that Torah education provided to students at the VHA is in and of itself a spiritual act. Like Bible studies in other religious schools, Torah education certainly has a religious dimension. However, there is no consensus that the religious dimension necessarily outweighs the academic dimension. This is particularly true in the context of a day school that offers its students a dual curriculum. Students at VHA studied in two streams: first, Judaic studies, of which Torah was a part and second, general studies. Students were subjected to tests and performance assessments in both streams. The Appellants were required to mark the

performance of the students and to complete report cards. This was no different than the general studies assessments.

c) The Primary Role of a Rabbi

[149] Rabbi Rosenblatt's testimony respecting his role as a rabbi for the Schara Tzedeck, attempted to portray "Torah education" as his primary duty as a rabbi at this synagogue. Consistent with his testimony, the Rabbinical Court Report, at paragraph 7.3, states that "Education is the primary activity of a Rabbi…". The Report also makes the statement, at paragraph 5.3, that a Torah teacher is "synonymous" with a rabbi. However, the evidence adduced before me does not support this position and, in fact, it is clearly contradicted by three factors: the internal contradiction contained in the Rabbinical Court Report, the expert evidence of Rabbi Eleff and the fact evidence of Rabbi Rosenblatt.

[150] With respect to the internal contradictions contained in the Rabbinical Court Report, it cited at paragraphs 5.2 – 5.3 a passage from the Talmud in Tractate Bava Metziah Folio 33a, Appendix L, page 26, which does not mention the term "Torah teacher" only a "teacher". In fact, the identity of this "teacher" has been debated by many respected Rabbis over the centuries. This disagreement is also captured in the same source relied on in the Rabbinical Court Report:

> IF HIS FATHER AND HIS TEACHER WERE [EACH] CARRYING A BURDEN etc. Our Rabbis taught: The teacher referred to is he who instructed him in wisdom, not he who taught him Bible and Mishnah: this is R. Meir's view. R. Judah said: He from whom one has derived the greater part of his knowledge. R. Jose said: Even if he enlightened his eyes in a single Mishnah only, he is his teacher. Said Raba: E.g., R. Sehora, who told me the meaning of zohama listron.

(Tractage Bava Metziah Folio 33a, Appendix L, page 26.)

[151] Rabbi Meir in this passage specifically rejects the idea that a teacher of Bible (or Torah) and Mishnah (the foundational text of Talmud) can be a teacher in the context which the Rabbinical Court Report cited.

[152] There is also an acknowledgement in the Rabbinical Court Report that rabbis specialize in various roles, of which youth education is but one of those specializations (paragraph 7.2). The report goes on at paragraph 8.2 to state:

> I note that the specialization of Rabbis is often to the exclusion of teaching or administering the practice of Torah in other areas. It is entirely *de rigueur* for Rabbis to function solely in one area of specialization or for Rabbis to neglect an entire area.…

The Rabbinical Court Report contains very clear statements respecting the role of an Orthodox rabbi. Yet the report still makes the contradictory claim, as does Rabbi Rosenblatt, that education is nevertheless the primary role of any rabbi (paragraph 7.3).

[153] The Eleff Report also canvassed this specialization in the roles and functions of Orthodox rabbis, which were grouped into four major roles: the synagogue rabbi, the organizational rabbi, the chaplain and the Jewish educator (Eleff Report, pages 9-12). Only the last role is exclusively dedicated to education and not all of those roles have a strong religious dimension either.

[154] The synagogue/pulpit rabbi is functioning in the most traditional role for an Orthodox rabbi (Eleff Report, page 10), where he is first and foremost a pastor delivering sermons, providing counselling and visiting the members. He is also a spiritual guide and leader, an organizational executive for the Board of Directors, hiring synagogue employees and participating in fundraising as he represents the face of the synagogue. Lastly, the synagogue rabbi is also a teacher who conducts lectures including classes on the Bible, Talmud, Jewish history, law and practices. However, teaching is not his primary role or function.

[155] If an Orthodox Rabbi has focussed on the role of organizational rabbi, he will lead the cause of that institution, whether it involves political lobbying groups, kosher certification agencies, charities and so forth (Eleff Report, page 10). An example of this type of role, provided by Rabbi Rosenblatt, was that of Rabbi Hier's role at Simon Wiesenthal Centre, an organization in the United States dedicated to fighting anti-Semitism, hate and terrorism (Transcript, Testimony of Rabbi Rosenblatt, Vol, 3, pages 285-286). Notwithstanding the clear distinction in Rabbi Hier's role from teaching, Rabbi Rosenblatt nevertheless described the role and function of Rabbi Hier in the following manner:

> Q And you would agree with me that when Rabbi Hier is doing his job as the head of the Simon Wiesenthal Centre, he's not teaching Torah?

> A I would imagine that if I asked Rabbi Hier he would say that the Torah teaches tolerance. That the exodus from Egypt was in its very essence the idea that equality is a -- is one of the values that God promotes. And so he may not be teaching Torah in Hebrew from scripture, but his messaging of tolerance is very much a lesson embedded in the Torah, and I would imagine that Rabbi Hier would so characterize his efforts.

(Transcript, Vol. 3, page 286, lines 4-15).

[156] As the Respondent pointed out, this exchange demonstrates a lack of objectivity on the part of Rabbi Rosenblatt in providing his expert evidence as he clearly conflates the concept of teaching Torah with almost every function that a rabbi does. Teaching is simply not the primary duty of an organizational rabbi.

[157] The third role that a rabbi may specialize in is that of chaplain, where he will serve the military, hospitals and law enforcement settings. In those settings, his role may extend to all individuals in those institutions and not just Orthodox Jews. He will be pastor, teacher and advocate, leading prayers, ensuring the availability of Kosher food and ensuring that Jewish rites are observed in the event of a death. Education is one of the components of a rabbi specializing in the role of chaplain but it is not the primary activity or function of an Orthodox Rabbi/Chaplain.

[158] Lastly, the Eleff Report discusses the role of the Orthodox Rabbi as a Jewish educator, where rabbis serve as teachers, as the Appellants do, or as administrators of Orthodox day schools, as Rabbi Pacht does. Those wishing to pursue this role will obtain advanced degrees in education and in certain certification programs. In this role, they teach Judaic studies to Orthodox Jewish children attending day schools, prepare lesson plans and complete report cards. They are viewed as role models given their rabbinic designations. Teaching is their primary role and function. In these appeals, both Rabbi Goldman and Rabbi Estrin studied in the teaching stream at Ner Le'Elef in order to prepare for their eventual roles as teachers, as did Rabbi Lichtman at the RSA in New York. The Appellants taught various courses in respect to Judaic studies, including Bible, Talmud, Jewish history and Jewish law. They prepare lesson plans, grade students, complete report cards and attend meetings. It is noteworthy that the nature of the teaching activities engaged in by the Appellants at VHA was the same as those of the female teachers who also taught the same Judaic studies curriculum but without a Rabbinic ordination.

[159] While these various areas of specialization may be "permeable" in that a rabbi can serve in multiple settings, the Appellants did not do that (Eleff Report, page 11). They received a salary only from VHA to teach Judaic studies to students at VHA. Their employment or teaching contracts stipulate that their duties at VHA would "take priority over any other professional commitments made to other parties." (Teaching Contract, page 8) The evidence contains many examples of how the Appellants were actively involved in the Vancouver Jewish community but those activities were voluntary and were completely unrelated to their teaching jobs at VHA.

[160] Finally, the assertions made in the Rabbinical Court Report and in Rabbi Rosenblatt's testimony regarding the role of rabbis as teachers are further contradicted by the fact evidence of Rabbi Rosenblatt himself.

[161] Rabbi Rosenblatt would be referred to as a synagogue or pulpit rabbi at the Schara Tzedeck, where he has been employed since 2003. The description of the role that a synagogue rabbi assumes, which the Eleff Report details, mirrors the role of Rabbi Rosenblatt. In fact, he carries out most of the activities and duties described in the Eleff Report and those activities are contained in his job description under his employment contract. He serves as the pastor and spiritual leader for the synagogue members, delivers sermons at the synagogue and engages in fundraising by recruiting new members to the synagogue. He also acted as the CEO when he was involved in the hiring of Rabbi Goldman to be the primary bar mitzvah instructor at the synagogue.

[162] In addition to the foregoing duties, he also has a role as a Jewish educator within the context of a synagogue rabbi but it is not his primary duty. He does engage in Torah instruction in the T-Jex curriculum which the synagogue offers as an after-school program one day per week from 4:30 p.m. to 6:00 p.m. His time commitment to T-Jex is in no way comparable to the Appellants' full-time employment as teachers at VHA. According to the facts, Rabbi Rosenblatt also taught other Torah classes in the community, but none of those were full-time commitments comparable to the Appellants' teaching responsibilities.

[163] Although Appellant counsel presented some very able arguments in an attempt to align the activities of a synagogue rabbi with the Appellants' activities at VHA and in the Vancouver Jewish community (Appellants' Argument and Submissions, Appendix A), the Appellants were not required to carry out any activities and duties other than teaching at VHA and perhaps the daily prayers

offered at VHA. However, to the extent that prayers are a necessary part of the teaching job, they are merely incidental to their role as teachers. Further, the daily prayer services are not explicitly set out in the teaching contract.

[164] The Appellants also argued that if specific duties or tasks had to be included in a contract, it would create an "administrative nightmare" for clergyman in this country. (Transcript, Vol. 8, pages 1332-1333, lines 22-28 and lines 1-2). With respect, there is no merit to this argument. While I agree with Appellant counsel that it would certainly be cumbersome to list in a written contract every single duty or function to be performed by a party to that contract, it is essential that a contract for services or employment define the general and specific parameters of the job. It is after all what defines it as this particular "job" as opposed to some other "job". That is precisely what was done in Rabbi Rosenblatt's employment contract with Schara Tzedeck where the parameters set out clearly that he would be the synagogue rabbi and expected to fulfill the duties listed in Schedule "B" of his contract, which is "typically performed by a rabbi of a North American Orthodox synagogue". (Rosenblatt Contract, Schedule "B") No reasonable person in the public could confuse his role as synagogue rabbi of Schara Tzedeck with that of a teacher in a Jewish day school.

d) My Conclusions Respecting the Expert Evidence on Orthodox Judaism and "Ministering"

[165] To summarize my conclusions:

1) I am unable to give full weight to the Rabbinical Court Report and the expert testimony of Rabbi Rosenblatt due to my concerns that I have outlined respecting independence and objectivity.

2) There is no consensus that learning Torah is any more of a spiritual or religious act than it is an academic and intellectual pursuit.

3) Rabbis may engage in a variety of specializations, of which education is one. The Appellants pursued this particular specialization while Rabbi Rosenblatt as a synagogue rabbi, clearly did not function primarily in the educational realm.

[166] On a balance of probabilities, there was no credible evidence that would allow me to conclude that the Appellants' role in teaching Judaic studies at VHA

constitutes "ministering" within the context of paragraph 8(1)(c)(ii) of the *Act*. Their role and the attendant duties and functions that accompanied that role, do not amount to the type of specialized ministry exhibited by a minister of music in the Pentecostal church that the Court in *Austin* concluded fell within the parameters of the provision.

B. Do the Students Attending VHA Constitute a "Congregation" within the Meaning of Paragraph 8(1)(c)(ii)?

[167] Even if I had been persuaded that the Appellants' activities and duties at the VHA constituted "ministering", I could not conclude that a class of elementary school students gathered for Jewish religious education and instruction would be a "congregation" within the meaning of paragraph 8(1)(c)(ii) of the *Act*. In addition to the expert evidence in this appeal, my conclusion is supported by case law, evidence of the usage of the term "congregation" in Judaism and statutory interpretation of the legislation.

(i) Case Law

[168] In looking at the treatment of the term "congregation" in the jurisprudence, its scope has gradually been expanded by this Court, particularly by the group of cases decided by Bowman J. in the late 1990's. However, none of the case law in the Federal Court or this Court has extended its scope to include classes of students gathered for religious instruction.

[169] A definition of "congregation" was set out by MacKay J. in *McRae v The Queen*, [1994] FCJ 1648, 94 DTC 6687 ("*McRae*"), [This case is also indexed as *Zylstra Estate v Canada (F.C.T.D.)*] at paragraph 52, as follows:

> ...Thus, a gathering of persons may well be a congregation for some purposes, but unless it is a gathering for shared religious purposes recognized by a religious denomination for its regular organizational religious activities, it does not qualify as a "congregation" within the meaning of that word in paragraph 8(1)(c) of the Act.

[170] This decision was affirmed on appeal although it should be noted that Isaac C.J. commented that the trial judge was not attempting to set out a detailed definition of the words and phrases contained in paragraph 8(1)(c) that would apply in every set of facts (*McRae*, [1997] FCJ No. 186, 97 DTC 5124).

[171] Subsequently, Bowman J. at paragraph 35 of his reasons in *Kraft*, questioned McKay J.'s "extraordinarily restrictive" definition of the term "congregation" criticizing it for failing "…to recognize the variety of ways in which people may come together to worship God, or the disparity in belief, background and motivation that may exist among the members of the heterogeneous group that may make up an assemblage which the term "congregation" encompasses…." (*Kraft*, paragraph 36). It is unclear why Bowman J. stated that McKay J.'s observation regarding congregation was obiter because whether the faculty, students and staff of the Ontario Bible College were a congregation was clearly at issue.

[172] In *Kraft*, Bowman J. relied primarily on the definitions of "congregation" provided under the Oxford English Dictionary and, in doing so, concluded the following prominent points concerning the meaning of congregation in the context of the facts before him:

- it does not require voluntary attendance (the youth offenders at the custodial facilities in *Kraft* were a captive audience); and

- it does not require a homogeneity of beliefs (the audience in *Kraft* held a variety of beliefs) (*Kraft*, paragraph 33).

[173] Essentially, the Court concluded that the so-called "captive" youth offenders at these facilities constituted a congregation to which the Baptist minister was ministering much the same as a prison chaplain. It is clear from this decision that Bowman J. was displeased with the departure of Revenue officials from the long-standing policy of treating chaplains within the scope of paragraph 8(1)(c) (*Kraft*, paragraphs 28-29). In fact, he commented with approval respecting the Federal Court of Appeal's comments on the trial decision of McKay J. in *McRae* that established a limitation on the extent to which it could be applied (*Kraft*, paragraph 33).

[174] In *McGorman*, when Bowman J. further expanded the definition of "congregation" to include the broader Somali community in Toronto, to which a Christian missionary ministered, he concluded that the term congregation has a variety of meanings, depending on the context. It can mean the body of persons who regularly and customarily attend a particular church or it can mean a body of persons assembled to hear a sermon on a given day, irrespective of their religious beliefs or their reasons for being there (*McGorman*, paragraph 57).

[175] There is no dispute that the word “congregation” has been expanded since the decision in *McRae*. However, Bowman J. stated unequivocally in his decision in *Fitch*, that similarly to the meaning of ministering, he was not prepared to extend the meaning of congregation to include an assembly of students gathered for the purposes of religious instruction. At paragraph 43 of *Fitch*, he stated the following:

> …Nor do I think that a group of students can be said to be a congregation in the sense of an assemblage or gathering of persons to whom a minister provides spiritual counselling, advice, illumination and inspiration. While for the reasons given in *Kraft et al.* I do not subscribe to the view of the word congregation expressed in *McRae*, I do not think that it encompasses a group of college students' assembled for academic instruction.

[176] In the subsequent decision of this Court, Teskey J. in *Shepherd* at paragraph 36, confirmed the scope of “congregation” and followed Bowman J.’s conclusions in *Fitch*.

[177] The Appellants sought to distinguish the decisions in both *Fitch* and *Shepherd* on the basis that they dealt with post-secondary students who attended lectures for vocational training to be clergy members themselves (Appellants’ Argument and Submissions, paragraph 382). By contrast, the Appellants argue that, in the present case, students gather at VHA to pray daily and increase their knowledge of their Jewish faith (Appellants’ Argument and Submissions, paragraph 417). The only two realistic distinctions, that I see between those cases and the present appeals, are that, first, the present appeals deal with an elementary day school versus college students engaged in vocational training and, second, the cases deal with different religious faiths. Neither of these distinctions is sufficient to carve out some type of exception to the existing case law. While the cases of *Fitch* and *Shepherd* deal with adult students seeking to be ordained as clergy as opposed to children attending VHA, both are immersed in religious education in their respective faiths.

[178] To the extent that the case law leaves any ambiguity respecting the scope of paragraph 8(1)(c)(ii) of the *Act*, the statutory interpretation of the provision reinforces my conclusion that a congregation does not extend to include students attending a religious school.

(ii) Statutory Interpretation

a) Textual and Ordinary Meaning

[179] The rule of statutory interpretation requires that "…the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." (*Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, [2005] 2 SCR 601 at paragraph 10).

[180] According to the number of possible definitions contained in the Oxford English Dictionary, the scope of the word "congregation" is quite extensible. Since the definitions range from very broad to quite narrow, the question is which one should be applied in the context of paragraph 8(1)(c) of the *Act* and in particular, Orthodox Judaism. In my view, the evidence adduced in these proceedings supports the application of a narrower definition in this context with the term "congregation" being defined as either synonymous with synagogue or in reference to a group of individuals that assemble for religious activities at a synagogue.

[181] Orthodox Jewish synagogues often contain the word "congregation" in their titles or names. Rabbi Rosenblatt worked as the rabbi at the Congregation Schara Tzedeck in Vancouver and Congregation Ahavath Torah in Englewood, New Jersey. Rabbi Pacht referred to the Vancouver Congregation Beit Hamidrash when testifying about children from other synagogues that attend VHA (Transcript, Vol. 3, page 384, lines 7-15). Rabbi Feigelstock worked for the Etz Chaim Congregation in Richmond (Transcript, Vol. 2, page 150, lines 21-22). In addition, his resume at Appendix B of the Rabbinical Court Report stated that he "…founded and currently serves as a Rabbi at the Ohel Yaakov Community Kollel, a congregation and outreach center in Vancouver, British Columbia."

[182] Even more telling was the manner in which many of the Orthodox Rabbis who testified, including the Appellants, used the word "congregation" either to reference a synagogue or a group of individuals that gather for religious purposes at a synagogue. When asked about his role in taking over the duties at the Richmond synagogue after the pulpit rabbi left, Rabbi Goldman testified that "…we took on the helm of the entire congregation and we became, I guess, three rabbis who were leading the congregation. And we did all that pro bono."

(Transcript, Vol. 3, page 474, lines 18-20). Rabbi Rosenblatt also repeatedly used the word congregation to discuss an organization called the Orthodox Union (Transcript, Vol. 3, page 291, lines 14-26). When asked about the organization, he responded that it was the union of Orthodox congregations in North America, likening it to a network or trade association for Orthodox congregations. When asked what he meant by "congregation" in this context, he responded that he believed the word to be part of its title but then recanted and testified it was the Union of Orthodox Synagogues although he did not have the organization's documents in front of him. Rabbi Eleff, like the witnesses for the Appellants, also used the word congregation as a synonym for synagogue.

[183] While I do not wish to place too much weight on these responses, it does show that in the context of Orthodox Judaism, the word congregation in the everyday parlance of Orthodox Jewish rabbis, has a connection to synagogues, the centres of Jewish religious life. However, it is noteworthy that, during the course of the proceedings, there were no instances where the witnesses referenced the classes of students at VHA as a "congregation".

[184] The Appellants also submit that in the Vancouver Orthodox Jewish community context, any time that Orthodox Jewish individuals gather at various locations for Torah study and prayers, they form a congregation because congregations do not need to be tied to the synagogue (Appellants' Argument and Submissions, paragraph 359). The Appellants also pointed out that a prominent rabbi, whom Rabbi Eleff held in high regard, used the word congregation to mean "a collection of individuals with a single past, a common future, shared aspirations, identical yearnings for a world that is totally good and pleasant, a singular and harmonious identity." (Exhibit A-12, Kol Dodi Dofek by Joseph B. Soloveitchik, translated by David Z. Gordon, 2006).

[185] To properly address these alternative interpretations, adopted by the Appellants, which were intended to cast doubt on the normal usage of the term congregation, I turn now to the contextual and purposive context of the provision.

b) Contextual Meaning

[186] The pertinent portion of the provision in respect to these appeals reads as follows:

> **8(1)(c)** where, in the year, the taxpayer

> (i) is a member of the clergy or of a religious order or a regular minister of a religious denomination, and
>
> (ii) is
>
> …
>
> (B) ministering to a diocese, parish or congregation, …

The word "congregation" appears at the end of a series of words, that is "diocese, parish or congregation". The Respondent's position is that the word congregation has to be interpreted in light of the immediate statutory context with the surrounding words, "diocese" and "parish". Based on this "associated words" rule of statutory interpretation, the term "congregation" cannot be interpreted without taking into account those preceding words as part of the list. The Respondent submitted that when the word "congregation" is understood by comparison to the definitions of the words "diocese" and "parish", it cannot include students gathered for religious instruction in a classroom setting but rather it must be connected to "activities associated with religious services offered to a religious community in a particular area or house of worship." (Respondent's Written Submissions, paragraph 128).

[187] The Appellants appear to reject the "associated words" rule and argue that there is no case law that suggests that the words "diocese, parish and congregation" must be read by reference to one another. Specifically, it was submitted:

> Mr. Kroft: …my friend at paragraph 130 referred to the *ejusdem generis* rule, and the fact that we have parish, diocese, congregation? We have no case law that actually says you're supposed to read them congruently, in other words by reference to one another. I think actually there is case law that says the opposite.
>
> […]
>
> MR. BROWN: Just in terms of if the references to the *ejusdem generis* rule, the decision of the Tax Appeal Board in *Atwell,* it specifically rejected that reliance. And in our view, the reading of Justice McKay in *McRae* adopts the *noscitur a sociis* rule of interpretation, rather than the *ejusdem generis* rule. *Ejusdem generis* being where you're looking at what congregation

> means, as being limited by the meanings of the other two parish and diocese in the sub-paragraph.

(Transcript, Vol. 8, page 1366, lines 9-25)

[188] To the extent that the Appellants are attempting to draw a distinction between different canons of statutory interpretation, it seems that counsel may have conflated the concepts of the associated words rule, that is, *noscitur a sociis* and the *ejusdem generis* rule.

[189] Black's Law Dictionary, 10th ed. (2014), explains *noscitur a sociis* as follows:

> [Latin "it is known by its associates"] (18c) A canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it. – Also termed *associated-words canon*....
>
> > "The *ejusdem generis* rule is an example of a broader linguistic rule or practice to which reference is made by the Latin tag *noscitur a sociis*. Words, even if they are not general words like 'whatsoever' or 'otherwise' preceded by specific words, are liable to be affected by other words with which they are associated.

[190] According to the online "The Law Dictionary", the term *noscitur a sociis* means literally "...known from its associates. A word whose meaning is uncertain, questionable or doubtful can be understood and defined by its association with surrounding words and its context."

[191] Professor Sullivan in *Sullivan on the Construction of Statutes*, 6th ed (Markham, Lexisnexis Canada, 2014) at paragraph 8.58, explained the "associated words rule" as follows:

> The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator....

[192] The statutory construction canon, *ejusdem generis*, is explained in Black's Law Dictionary as follows:

> [Latin "of the same kind or class"] (17c) **1.** A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed....**2.** Loosely, *noscitur a sociis*.

[193] In very general terms, the difference between these two statutory construction terms is that the *noscitur a sociis* rule is used, where the meaning of a general word in a series of words is to be determined, then all of the words or terms in the series are engaged in order to define the commonality among them so that a particular meaning can be assigned to that word or term that is in question. *Ejusdem generis* determines the meaning of a general word used at the end of a list of specific items by confining it to subjects that are comparable to the earlier terms or in other words, by determining the commonality in order to ascertain what types of items might fall within the broader general term that the statute uses. By contrast in using the *noscitur a sociis* rule, all of the items in the series are reviewed in order to determine their commonality and, in turn, give meaning to the general term utilized in the series.

[194] Clearly it is the associated words rule or *noscitur a sociis* that should be used in interpreting clause 8(1)(c)(ii)(B) of the *Act*. In *Attwell v MNR*, 1967 CarswellNat 206, [1967] Tax ABC 862 ("*Atwell*"), the Tax Appeal Board rejected the *ejusdem generis* rule of construction in considering the words "diocese, parish or congregation" and stated the following at paragraph 5:

> I do not agree as each of these words has a clear connotation; the first two are descriptive of a particular territorial area ministered by the Church; a parish is altogether different from a diocese as it is only a small part of the latter. Also, there may be a congregation irrespective of any parish or other boundaries....

[195] In *McRae*, MacKay J., at paragraph 52, made it clear that the word "congregation" must be read in light of its statutory context:

> I note that in *Attwell*, Mr. Fordham for the Tax Appeal Board expressly rejected reliance upon the *ejusdem generis* rule of construction of the words "diocese, parish or congregation" in part because each of the words, in his view, "had a clear connotation". If he meant by that that each word has a clear meaning without reference to the context in which it is used then I must disagree. It is because the parties do not agree on a clear meaning here that they

> disagree on the meaning of the word "congregation". The word must be read in the context of the paragraph as a whole.…

[196] MacKay J. made it clear that he was rejecting the Board's view in *Attwell*, that the word "congregation" can somehow be read in a vacuum without reference to the two preceding words, "parish" or "diocese". While Bowman J. in *Kraft* questioned the definition of "congregation" that was adopted by MacKay J. in *McRae*, as being too limited, he did not purport to overrule the basic principle of statutory interpretation that the word "congregation" must be read in light of the statutory context. Defining the word congregation is not limited by the *ejusdem generis* rule but it is still subject to the associated words rule, *noscitur a sociis*, rule. This is, in fact, the position adopted by the Respondent in these appeals.

[197] Applying this statutory interpretation canon to assist with the interpretation of congregation requires that the words "parish" and "diocese" be defined. "Parish" is defined as "…the body of people who attend a particular church; the inhabitants of a parish; a territorial subdivision of a diocese"(Oxford English Dictionary). The 1993 version of the New Shorter Oxford Dictionary also defines "parish" as a "geographical area having a church with a priest or preacher with spiritual responsibility for the people living in the area". A "diocese" is defined as "…the sphere of jurisdiction of a bishop; the district under the pastoral care of a bishop (Oxford English Dictionary). These definitions are in line with the comments of MacKay J. in *McRae* where he stated that the words, "parish, diocese or congregation", used to describe the qualifications for the clergy residence deduction in paragraph 8(1)(c) are intended to describe different organizational or institutional structures for regular ongoing organized activities of the members.

[198] Based on a contextual analysis, all three words, parish, diocese and congregation, share the common element of regularized religious worship in an organized institutional setting. While it is too restrictive to disregard other activities that accompany the practice of a particular religion, the element of religious worship in the ordinary sense of those words must be the predominant feature of a congregation, a parish or a diocese. Although, as I have outlined, there are a number of possible dictionary definitions for the word "congregation", viewed from this perspective, congregation must be limited to mean either "the body of persons who habitually attend or belong to a particular

place of worship" or "a body of persons assembled for religious worship or to hear a preacher".

[199] Applying this analysis to the present appeals, the VHA, as an elementary day school, cannot be categorized as a "place of worship", nor can its students be viewed as gathering there for the purposes of religious worship. Even though the Appellants led students in prayer services, this was simply not the predominant reason the students gathered at VHA. The primary character of the VHA is that of a school that conforms to the requirements of the British Columbia Ministry of Education. Since it offers a dual curriculum to students, VHA could be considered a place of academic and religious instruction but it cannot be characterized as a place of religious worship. In reaching these conclusions, I am following the reasoning in *Fitch* and *Shepherd*.

[200] According to the Rabbinical Court Report, there are three types of Jewish communal structures where Orthodox Jews gather for the purpose of religious worship, the synagogue (Beit Kenesset), a house of study for adults for studying Torah and for communal prayers (Beit Hamidrash) and a house of study for children (Beit Rabban). The Appellants submitted that the Beit Rabban can now exist within a synagogue or within a day school (Appellants' Argument and Submissions, paragraphs 362 and 364). According to the evidence, Jewish day schools are essential features of Jewish communities as they have assumed the function of education that was traditionally part of the role of the synagogue. However, the function of the day school in a Jewish community cannot be equated to that of a synagogue. The distinction that the Appellants suggest between adults attending theological colleges for vocational training (*Fitch*) and children attending VHA who "pray daily and increase their knowledge about their shared Jewish faith" is unwarranted (Appellants' Argument and Submissions, paragraph 417). In both settings, the students, whether children or adults, were gathered for religious knowledge and instruction. Both study sacred texts, prayers, religious values and ethics as part of the requirements to eventually graduate. It is noteworthy that students attending VHA spend half of their day also taking general studies courses and in light of this an argument can be made that the religious worship component is even weaker than it is in the case of *Fitch*, given the additional academic dimension underlying the school endeavours at VHA.

[201] Lastly, the Appellants relied on two very old Tax Court Appeal Board decisions, *Attwell* (previously discussed) and *Adam v MNR*, (1974) 74 DTC

1220. The Board allowed the deduction in each of those decisions for teachers of religious studies who also led daily chapel services for the students at the colleges. Aside from the fact that those decisions may not have much precedential value, if any, they are easily distinguished on their facts. The Appellants in the present appeals never led daily chapel services at VHA, were not required to engage in activities of a religious nature under their employment contracts and their responsibilities for "…teaching the Board approved VHA Judaic Studies Curriculum" at VHA (Exhibit A-1, Tabs 2, 3 and 4) could be and were performed by female teachers who are not ordained rabbis.

c) Purpose and Scheme of the *Act*

[202] Finally, a purposive reading of this provision in light of the general scheme of the *Act*, together with the related legislative history, supports the conclusion that Parliament never intended for this deduction to be made available to members of the clergy, whatever the religion or denomination, who are engaged in full-time teaching duties.

[203] First, the scheme of the *Act*, requires that the term "ministering to a congregation" be interpreted narrowly. There are two broad principles within the general scheme of the *Act* that catch this wording. Employment expenses, in contrast to business expenses, are generally not deductible except as expressly permitted in the *Act*. Also personal and living expenses are generally precluded, except as expressly permitted under the *Act*. The clergy residence deduction falls within these prohibited categories which means the scope of the deduction should be construed narrowly.

[204] Second, a review of the legislative history and debates, regarding the legislative changes for this provision, reveals that since its inception clergy persons engaged in full-time teaching duties were never meant to be eligible for the deduction. In *McRae*, the Court, at paragraph 13, made the following comments with respect to the history and legislative intent of paragraph 8(1)(c):

> The history of the statutory provision may be indicative of legislative intent. Here, the predecessor provisions to paragraph 8(1)(c) were dealt with by Parliament in 1949 and 1956 and it is clear that the Ministers responsible at those times indicated that the deduction was not intended to be applicable in the case of all clergymen or ministers, that originally it was to apply for those whose regular occupation was the ministry concerned with full-time religious or pastoral activities. When extended to include those engaged exclusively in

> full-time administrative work by appointment of a religious order or denomination, the suggestion that it be extended to clergymen teaching on the staff of theological colleges, in part because they may also be engaged frequently in pastoral work, was rejected. (Hansard (House of Commons), November 10, 1949 pp. 1633-1634; Id., July 31, 1956 pp. 6775-6777).

[205] When the deduction was first introduced in Parliament in 1949, that version did not contain a "function test" as it does today. The original intent was to allow any member of the clergy or a religious order to deduct the cost of their residence because it often served as the place where clergy worked from their home carrying out functions connected to their office. [House of Commons Debates, 13 George IV, Vol. II, 1949 (November 10, 1949), page 1634]. Even in 1949, when the original provision was debated, it was clear that Parliament did not intend for the deduction to be available to members of the clergy engaged in full-time teaching studies. [House of Commons Debates, 13 George IV, Vol. II, 1949 (November 10, 1949), page 1637].

[206] The "function test" was added to the provision in 1956. The Federal Court of Appeal in *The Queen v Lefebvre*, 2009 FCA 307, 2009 DTC 5180, summarized the Parliamentary debate that occurred, when this test was adopted, stating that:

> 23. ...Seven years later, following a judgment in which the deduction was granted to a minister of the United Church of Canada whose sole occupation was teaching (*James Rattray Guthrie v. Minister of National Revenue*, 55 DTC 605 (QL)), the then Finance Minister proposed that the right to the deduction be limited to persons who, in addition to having the required status, fulfilled the functions described at subparagraph 8(1)(c)(ii) of the *Act*. According to the Finance Minister (House of Commons, Official Report of Debates, Volume V, (1956), at p. 6775):
>
> > The present amendment provides that any clergyman, whether he be in fact a pastor in charge of a congregation or a member of the church body in the higher level, if I may put it that way, who engages in church work exclusively including acting as pastor from time to time, would have the benefit of the deduction.

[207] In responding to questions about whether this legislative change would bring about an injustice to theology teachers in religious colleges, who as clergy members, are equally devoted in a full-time capacity in the same religious causes, the then Minister of Finance, Walter Harris, made his position clear:

> …there would be no sound distinction to be drawn between a professor in a theological college and a professor in any college. (Emphasis added)

(House of Commons Debates, 22nd Parliament, Vol. 7, 1956 (July 31, 1956), pages 6676-6777)

[208] The legislative history respecting this provision is clear. Parliament never intended to confer the benefit of this deduction to members of the clergy engaged in full-time teaching duties.

[209] The Appellants dispute the legislative intent on the same basis that they proposed that I should not follow the decisions in *Fitch* and *Shepherd*, and that is, that the focus of the Debates was on professors at theological colleges involved in vocational training and not on rabbis teaching children in Jewish elementary day schools. I have already provided the reasons for my conclusion that such a distinction is unwarranted based on the facts before me and on the expert evidence.

[210] In addition, the purpose of the clergy residence deduction was to provide a subsidy for the use of the clergy person's home. The facts in the present appeals show that, while the Appellants were encouraged to provide spiritual leadership to the Jewish community, they are neither expected nor contractually obligated to engage in any of the outreach activities that would involve the potential use of their residence, including hosting students and families in their homes. The evidence was uncontradicted that all of their activities were performed on a voluntary basis, other than teaching at the VHA, which was a contractual obligation for which they received compensation. In contrast, Rabbi Rosenblatt's employment contract at Schara Tzedeck requires that he invite members of the community to his home for meals and for overnight stays and, in fact, he testified that he had hosted some of the Appellants and their families on a number of occasions.

[211] In summary, a purposive reading of this provision, in light of its purpose, history and the general scheme of the *Act*, also supports a conclusion that students gathered in a religious school cannot be considered a congregation nor can the teachers of religious studies be considered to be ministering to those students within the meaning of paragraph 8(1)(c) of the *Act*.

C. Did the Appellants also Minister to a Congregation of the Wider Vancouver Jewish Community?

[212] The Appellants also presented the argument that they ministered to a congregation or congregations of the greater Vancouver Jewish community through their involvement with local synagogues, providing spiritual guidance and counselling to community members.

[213] While there can be more than one congregation to which an ordained clergyperson may minister (Bowman J. in his reasons in *Kraft*), the deduction under paragraph 8(1)(c) may only be taken against the same source of employment for which the clergyperson's ministering activities garnered the employment income. The Appellants' extra-curricular and volunteer activities, undertaken of their own volition and outside their employment contract, do not entitle them to claim that deduction. This limitation is derived from the clear language contained in paragraph 8(1)(c) which provides the general qualifier for deductions of employment-related expenses as follows "…there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto." The provision contains an additional restriction for the deduction in that it must be an amount "not exceeding the taxpayer's remuneration for the year from the office or employment." (Emphasis added)

[214] The Appellants did not earn the employment income from ministering to a congregation of the wider Vancouver Jewish community. They did not earn income from their volunteer activities in the community. They earned their employment income from VHA in their capacities as teachers pursuant to their employment contracts. Notwithstanding that some of their activities within the Vancouver Jewish community may amount to ministering to a congregation given the expansive definition that Bowman J. applied to the term, they are not entitled to the deduction unless the employment with the VHA from which they derive income meets the function test. In light of my conclusion that teaching at VHA does not amount to ministering to a congregation within paragraph 8(1)(c), it follows that whatever the Appellants were doing in the community on a voluntary basis will not entitle them to the deduction.

VII. Conclusion:

[215] The Appellants are not entitled to the clergy residence deduction because they do not meet the function test of "ministering…to a congregation" pursuant to

paragraph 8(1)(c) of the *Act*. The Appellants cannot be considered to be "ministering" when they are teaching Judaic studies curriculum at VHA and neither can the students, gathered for religious instruction, whom they teach, be identified as a "congregation". This conclusion is supported by the case law, a textual, contextual and purposive interpretation of the deduction, as well as the facts before me and the expert evidence.

[216] The appeals are dismissed. If the parties are unable to reach an agreement on the issue of costs, they may provide written submissions on the issue within 60 days of the date of this Judgment.

Signed at Ottawa, Canada, this 18th day of December 2017.

"Diane Campbell"

Campbell J.

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