

Federal Court of Appeal



Cour d'appel fédérale

Date: 20231013

Docket: A-140-23

Citation: 2023 FCA 207

Present: HECKMAN J.A.

BETWEEN:

PRIORITY FOUNDATION

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 13, 2023.

REASONS FOR ORDER BY:

HECKMAN J.A.

Federal Court of Appeal



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HECKMAN J.A.

I. Introduction

[1] The appellant Priority Foundation appeals to this Court under paragraph 172(3)(a.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), from the respondent Minister of National Revenue's (Minister) failure to confirm or vacate its notice of intention to revoke the appellant's registration as a charity.

[2] The appellant claims that the respondent's decision to issue a notice of intention to revoke its registration ("NIR") under subsection 168(1) of the Act and to publish a copy of the NIR in the *Canada Gazette* immediately after the expiry of 30 days from the date of mailing of the NIR pursuant to paragraph 168(2)(b) of the Act was unlawful.

[3] Following a request by the appellant under Rule 317 of the *Federal Courts Rules*, SOR/98-106, the respondent provided a Certified Tribunal Record to the Registry and the appellant. However, pursuant to Rule 318(2), the Minister objected, with reasons, to providing some of the documents requested by the appellant in its Notice of Appeal. The appellant asks this Court to order the Minister, under Rule 318(4), to forward these documents to the appellant and to the Registry.

[4] I have read the Minister's reasons for objection and the parties' submissions thereon and, for the reasons that follow, would order the Minister to provide the withheld documents to the appellant and to the Registry.

II. Facts and statutory framework

[5] The framework governing the revocation of a registered charity's registration under the Act was recently summarized by this Court in *Brightline Foundation v. Canada (National Revenue)*, 2023 FCA 23, [2023] F.C.J. No. 137 (QL) at para. 2:

Subsection 168(1) of the *Income Tax Act* provides that the Minister may send to a registered charity, by registered mail, a notice that the Minister is proposing to

revoke the registration of that charity. The revocation is only effective once a copy of the notice is published in the *Canada Gazette* (subsection 168(2) of the Act). The copy of the notice can only be published after the expiration of 30 days from the day of mailing the notice to the registered charity or such longer period of time as may be fixed by this Court on an application as provided in paragraph 168(2)(b) of the Act [...]

[Citation omitted.]

[6] The Minister’s authority to publish the notice is expressed in paragraph 168(2)(b) of the Act as a discretionary power: “the Minister may [...] publish a copy of the notice in the *Canada Gazette*, and on that publication of a copy of the notice, the registration is revoked.”

[7] On November 10, 2022, the Minister notified the appellant of her intention to revoke the appellant’s registration as a charity and to publish a copy of the NIR in the *Canada Gazette* immediately following the expiration of 30 days from the date of mailing of the NIR.

[8] The Minister published the NIR on January 14, 2023, revoking the appellant’s registration: *Revocation of registration of a charity (Priority Foundation)*, (2023) C Gaz I, 59.

[9] The appellant objected to the NIR on February 6, 2023. It appealed to this Court from the Minister’s failure to confirm or vacate the NIR pursuant to paragraph 172(3)(a.1) of the Act (the 172(3)(a.1) appeal):

172 (3) Where the Minister

[...]

(a.1) confirms a proposal, decision

172 (3) Lorsque le ministre :

[...]

a.1) soit confirme toute intention,

or designation in respect of which a notice was issued by the Minister to a person that is or was registered as a registered charity, or is an applicant for registration as a registered charity, under any of subsections 149.1(2) to (4.1), (6.3), (22) and (23) and 168(1), or does not confirm or vacate that proposal, decision or designation within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal, decision or designation,

décision ou désignation à l'égard de laquelle le ministre a délivré, en vertu de l'un des paragraphes 149.1(2) à (4.1), (6.3), (22) et (23) et 168(1), un avis à une personne qui est ou était enregistrée à titre d'organisme de bienfaisance enregistré ou qui a demandé l'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette intention, décision ou désignation dans les 90 jours suivant la signification, par la personne en vertu du paragraphe 168(4), d'un avis d'opposition concernant cette intention, décision ou désignation;

[...]

[...]

the person described in paragraph (a), (a.1) or (a.2), [...] may appeal from the Minister's decision, or from the giving of the notice by the Minister, to the Federal Court of Appeal.

la personne, dans le cas visé aux alinéas a), a.1) ou a.2), [...] peut interjeter appel à la Cour d'appel fédérale de cette décision ou de la signification de cet avis.

[10] The appellant claims in its grounds of appeal that the Minister's decision to issue an NIR and to publish a copy of the NIR in the *Canada Gazette* when she did was unlawful. It argues that the Minister erred in interpreting a provision of the *Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital*, being Schedule I of the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20 ("Tax Treaty"), when it determined that US charities to whom the appellant had made gifts were not "qualified donees" under subsection 149.1(1) of the Act. With respect to the timing of the publication of the NIR, the appellant states that the "Minister published a copy of the notice of intention [...] prior to any objection or appeal and despite [the appellant's] position that the [Tax Treaty interpretation issue] was a long-outstanding legal question that has yet to be determined by this Court."

[11] In its Notice of Appeal, the appellant requested under Rule 317 that the Minister provide a certified copy of the following material to the appellant and to the Registry:

1. All materials produced by, referenced, consulted, or relied upon by the Minister in deciding to issue its notice of intention to revoke the appellant's registration;
2. All materials produced by, referenced, consulted, or relied upon by the Minister in deciding to publish a copy of the notice of intention to revoke in the *Canada Gazette*; and
3. If the Minister objects under Rule 318(2), a list describing each document that the Minister objects to producing, including materials not produced because the Minister believes the material is already in the possession of the appellant.

[12] The respondent provided the appellant with a Certified Tribunal Record. While the Minister did not object to the production of materials relevant to the matters in issue raised in the Notice of Appeal, she objected under Rule 318(2) to providing the appellant with the documents requested at paragraph 2 of its Rule 317 request, which relate to the Minister's decision to publish the NIR (the "publication documents"):

The Minister objects to their production on the basis that the documents are not relevant to the determination of the issues raised in the Notice of Appeal, and therefore, not subject to disclosure under Rule 317. The Minister's authority to publish a copy of the notice of intention to revoke registration in the *Canada Gazette* flows from paragraph 168(2)(b) of the *Income Tax Act* (the "ITA"), and not from any documents that may or may not have been before the Minister. So long as the Minister waits for the expiry of the prerequisite thirty days from the day of mailing of the notice, or after the expiration of any extension granted by the Federal Court of Appeal, the Minister is permitted to publish a copy of the notice in the *Canada Gazette* at any time.

[Citation omitted.]

[13] By order dated July 25, 2023, this Court directed the parties to make submissions with respect to the respondent's objection to producing the publication documents.

[14] There was no suggestion in the Minister's objection nor in the respondent's submissions that the Minister objected to production of the publication documents because they were or contained confidential documents.

III. The applicable rules

[15] The principles governing the scope of a tribunal's obligation under Rules 317 and 318 to produce material relevant to an application for judicial review or, in this case, an appeal are well-established and summarized in numerous decisions of this Court: *Ron W. Cameron Charitable Foundation v. Canada (National Revenue)*, 2023 FCA 175, [2023] F.C.J. No. 1168 (QL) at paras. 7–11; *Tsleil Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, [2017] F.C.J. No. 601 (QL) at paras. 106–115; *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103, [2016] F.C.J. No. 360 (QL) at paras. 6–18.

[16] In the context of an appeal, Rule 317 enables a party to request from a tribunal material relevant to the appeal. The party is entitled under Rule 318 “to be sent everything that it does not have in its possession and that was before the decision-maker at the time it made the decision under review, unless the decision-maker objects under Rule 318(2)”: *Lukács* at para. 6.

[17] Relevance is defined by the grounds of appeal in the Notice of Appeal: *Ron W. Cameron* at para. 10. As noted by this Court in the context of an application for judicial review:

A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.

[*Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 at 460 (C.A.), [1995] F.C.J. No. 555 (QL) at para. 10.]

[18] The Court should read the grounds of review (or in the context of an appeal, the grounds of appeal) “holistically and practically without fastening onto matters of form” in order to obtain “‘a realistic appreciation’ of their ‘essential character’”: *Tseil-Waututh* at para. 110, citing *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 50, 102 and *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at para. 29.

[19] In determining a Rule 318 objection, the Court seeks to further and reconcile three objectives: (1) meaningful review of administrative decisions, which the reviewing court will be unable to engage in without being satisfied that the record before it is sufficient to proceed with the review; (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while ensuring that court proceedings are as open as possible: *Girouard v. Canadian Judicial Council*, 2019 FCA 252, [2019] F.C.J. No. 1160 at para. 18, citing *Lukács* at para. 15. The first of these objectives recognizes that an inadequate evidentiary record on a judicial review

or an appeal may effectively immunize the administrative decision-makers from review on certain grounds and undermine the accountability of public decision-makers in their decision-making.

IV. The positions of the parties

[20] The appellant argues that the grounds of appeal in its Notice of Appeal make clear it is challenging both the Minister's decision to issue the NIR and her decision to publish the NIR in the *Canada Gazette* when she did (immediately after the expiry of the prerequisite 30 days from the mailing of the notice and before the objection and appeal processes were completed, despite the appellant's position that the Tax Treaty interpretation issue was a long-outstanding question yet to be determined by the Federal Court of Appeal).

[21] According to the appellant, the Minister's decisions to issue the NIR and to publish it are linked since publication cannot occur without first issuing an NIR. In the appellant's view, the audit report in support of the decision to revoke the appellant's registration explicitly linked the justification for issuance of the NIR to that for its publication when it described the appellant's "continued gifting to non-qualified donees in the post-audit" as serving as "rationale for pursuing a 30-day notice of revocation." The appellant submits that this Court's decision "will necessarily have to grapple with the Minister's decision to publish the notice in the *Gazette* when she did" and that the publication documents are thus relevant.

[22] The respondent submits that Parliament intended to make two separate avenues of relief available to a person faced with the issuance by the Minister of a notice of intention to revoke the person's charitable registration under subsection 168(1) of the Act. It could challenge the issuance of the NIR by appealing the substantive decision under paragraph 172(3)(*a.1*) of the Act, and/or it could address the timing of its publication by applying to the Federal Court of Appeal under paragraph 168(2)(*b*) to extend the time before the Minister is permitted to publish the NIR.

[23] According to the respondent, paragraph 172(3)(*a.1*) of the Act provides only a right of appeal from the Minister's decision to issue an NIR. It does not confer a right to appeal the Minister's decision to publish the NIR, including the timing of publication. If the appellant wanted to ensure that the objection and appeal process was allowed to unfold, it should have applied for an extension under paragraph 168(2)(*b*). It follows that, for the purpose of disclosure under Rule 317, only documents pertaining to the decision to issue an NIR are relevant to the appellant's 172(3)(*a.1*) appeal. The publication documents are irrelevant because the issue of the Minister's publication of the NIR falls outside the scope of that appeal.

[24] The respondent maintains that the appellant cannot broaden the scope of the 172(3)(*a.1*) appeal by including the issue of publication in the grounds of appeal: "pleading in the grounds of appeal that the NIR included notification of the Minister's intention to publish the NIR after 30 days, and that publication has in fact occurred, does not create a right of appeal on that issue where there is none in the first place, and does not render documents pertaining to that publication relevant and producible."

[25] In reply, the appellant claims that the Minister's decision to publish does not fall outside the scope of the 172(3)(a.1) appeal. Rather, it is "an extension of her power to issue an NIR and properly considered together with the NIR appeal." Moreover, acceding to the respondent's position would effectively insulate from judicial scrutiny the Minister's exercise of her discretionary power to publish the NIR. According to the appellant, the question of whether a charity can challenge the Minister's decision to publish and any uncertainties regarding the scope of the 172(3)(a.1) appeal should be decided by a full panel of this Court with the benefit of a full record.

[26] The respondent argues further that the publication documents are irrelevant to the relief sought by the appellant, namely that the Minister be ordered to vacate the NIR and reinstate the appellant's registration as a public foundation, because the relief claimed by the appellant flows solely from this Court's review of the Minister's decision to issue the NIR. In particular, if the NIR is vacated by this Court, the respondent claims that "it would be open to the Minister to publish an *erratum* in the *Canada Gazette* to reinstate the appellant's charitable status."

[27] The appellant maintains that the respondent's claim that the publication documents are irrelevant to the relief it seeks is based on the erroneous view that the Minister's decision to publish falls outside the scope of the 172(3)(a.1) appeal. It argues that, contrary to the respondent's submission, the Minister would retain no discretion with regards to publishing an *erratum* in the *Canada Gazette* to reinstate the appellant's charitable status: if the NIR were quashed, she would be required to undo her "precipitous publication" in the *Canada Gazette* as there would be no statutory basis for her revocation of its registration.

V. Analysis and conclusion

[28] The question before this Court is whether the publication documents are relevant to this appeal and producible under Rule 318.

[29] For purposes of the application of Rules 317 and 318, relevance is defined by the grounds of appeal set out in the appellant's Notice of Appeal.

[30] In these grounds of appeal, the appellant has challenged the lawfulness of the Minister's issuance of an NIR and of her exercise of the discretionary power to publish a copy of the NIR when she did.

[31] If the Minister's decision to publish the NIR is subject to the 172(3)(a.1) appeal, the materials produced, referenced, consulted, or relied upon by the Minister in making the decision to publish the NIR challenged by the appellant in its grounds of appeal are relevant to the appeal.

[32] The parties disagree on whether the statutory appeal provided in paragraph 172(3)(a.1) of the Act captures the Minister's decision to publish the NIR in addition to her decision to issue the NIR. The proper scope of the 172(3)(a.1) appeal is an important question and the parties have not referred in their submissions to a decision of this Court that squarely resolves it. In light of these circumstances, I am of the view that this question should be considered by the panel of this Court assigned to hear the merits of this appeal. Moreover, to ensure that that panel is able to

perform a meaningful review of the Minister's decisions, I am of the view that it should have the benefit of a full record, including the production documents.

[33] This is particularly so where the respondent's submissions regarding the scope of the 172(3)(a.1) appeal could reasonably be understood as effectively insulating from judicial scrutiny the Minister's exercise of her statutory discretion to publish the NIR, an issue best left for determination by the hearing panel.

[34] For these reasons, I am satisfied that, in the particular circumstances described above in paragraphs 32 and 33, the Minister should be ordered to provide to the appellant and to the Registry a copy of the material described in paragraph 2 of the Rule 317 request in the appellant's Notice of Appeal (the production documents).

[35] Costs on this motion will be in the cause.

[36] An order will issue in accordance with these reasons. It will address the timing of future steps in this appeal.

"Gerald Heckman"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-140-23

STYLE OF CAUSE:

PRIORITY FOUNDATION v.
MINISTER OF NATIONAL
REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

HECKMAN J.A.

DATED:

OCTOBER 13, 2023

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