

Federal Court



Cour fédérale

Date: 20241108

Docket: T-2135-24

Citation: 2024 FC 1796

Toronto, Ontario, November 8, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

**JEWISH NATIONAL FUND OF CANADA INC.
FONDS NATIONAL JUIF DU CANADA INC.**

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

I. Overview

[1] This is a motion for an interlocutory injunction brought by the Applicant, the Jewish National Fund of Canada Inc./Fonds National Juif du Canada Inc. [the Applicant]. In the underlying proceeding, the Applicant is seeking judicial review of the decision of the Canada Revenue Agency, Charities Directorate [the CRA] as the delegate of the Minister of National Revenue [the Minister] to publish a copy of a notice of intention to revoke [NITR] the

registration of the Applicant as a charity in the *Canada Gazette* on August 20, 2024 [the Publication]. Upon Publication, the Applicant's registration as a charity was revoked.

[2] The Applicant submits that the Minister's Publication of the NITR was procedurally unfair as the Publication was not in accordance with the Applicant's legitimate expectations which arose from not only the past practice of the CRA as reflected in its policies, publications and internal communications, but also the five-year history of the Applicant's own dealings with the Minister following the Minister's decision to issue the NITR [the Revocation Decision].

[3] The Applicant moves for a mandatory injunction compelling the Minister to publish a retraction in the *Canada Gazette* which would have the effect of reinstating the Applicant's charitable status.

[4] The motion is opposed by the Attorney General of Canada [the Respondent] on behalf of the Minister. The Respondent submits that the Federal Court is without jurisdiction to entertain the Applicant's motion, as the publication of the NITR by the Minister is not a separate decision capable of review; rather, it is inextricably linked to the Revocation Decision which the Federal Court of Appeal has the exclusive jurisdiction to review. Alternatively, it submits that the Applicant has failed to make out the test for the grant of a mandatory injunction.

[5] For the reasons that follow, I find that this Court is without jurisdiction to entertain this motion. Accordingly, the Applicant's motion is dismissed.

II. The Statutory Scheme

[6] Subsection 168(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended [the *Act*], authorizes the Minister to revoke a charity's charitable status. This determination is made by the Minister's delegate, the CRA, and within the CRA, by the Charities Directorate's Compliance Division.

[7] Pursuant to subsection 168(1) of the *Act*, the Minister is required to provide notice to a charity of its intention to revoke its charitable status by sending the charity a NITR. Revocation is effective once a copy of the NITR is published in the *Canada Gazette*.

[8] Paragraph 168(2)(b) of the *Act* allows the Minister to publish the NITR after the expiration of 30 days from the day of mailing the NITR to the registered charity. However, paragraph 168(2)(b) also provides the charity with the ability to fix or extend the period of time for publication by bringing an application to the Federal Court of Appeal. Paragraph 168(2)(b) is of particular significance on this motion; accordingly, the relevant portion of the provision is set out below:

**Revocation of Registration
of Certain Organizations
and Associations**

Revocation of registration

168 (2) If the Minister gives notice under subsection (1) to a registered charity, ...

**Révocation de
l'enregistrement de
certaines oeuvres et
associations**

**Révocation de
l'enregistrement**

168 (2) Si le ministre, dans le cas de l'alinéa a) et dans les autres cas, publie dans la *Gazette du Canada* copie de l'avis prévu au

paragraphe (1), sur publication de cette copie, l'enregistrement de l'organisme de bienfaisance, de l'association canadienne de sport amateur ou de l'organisation journalistique est révoqué. La copie de l'avis doit être publiée dans les délais suivants :

[...]

(b) in any other case, the Minister may, after the expiration of 30 days from the day of mailing of the notice, or after the expiration of such extended period from the day of mailing of the notice as the Federal Court of Appeal or a judge of that Court, on application made at any time before the determination of any appeal pursuant to subsection 172(3) from the giving of the notice, may fix or allow, publish a copy of the notice in the *Canada Gazette*, and on that publication of a copy of the notice, the registration is revoked.

[...]

b) dans les autres cas, soit 30 jours après la mise à la poste de l'avis, soit à l'expiration de tout délai supérieur à 30 jours courant de la mise à la poste de l'avis que la Cour d'appel fédérale ou l'un de ses juges fixe, sur demande formulée avant qu'il ne soit statué sur tout appel interjeté en vertu du paragraphe 172(3) au sujet de la signification de cet avis.

[9] A charity who receives a NITR has both a right of objection and appeal.

[10] The right to object to the NITR is set out in subsection 168(4) of the *Act* and allows a charity to file a notice of objection [the Objection] within 90 days from the mailing date of the

NITR. Upon receipt of an Objection, the matter is transferred within the CRA to the Charities Section, Tax and Charities Appeals Directorate of the CRA's Appeals Branch [the Appeals Branch].

[11] The Appeals Branch is tasked with conducting its own consideration of the Minister's decision to revoke and may vacate, confirm or vary the decision. If the Appeals Branch agrees with the decision to revoke, it issues the charity a notice of confirmation [NOC]. The NOC also advises the charity of its right to appeal the NOC to the Federal Court of Appeal.

[12] Subsection 172(3) of the *Act* provides the right to appeal from a revocation of registration to the Federal Court of Appeal. The jurisdiction of the Federal Court is expressly ousted by subsection 180(2) of the *Act* in respect of matters referred to in subsection 172(3).

III. Factual Background

[13] The Applicant has been a registered charity under the *Act* since August 30, 1967. It is involved in a large number of charitable projects that provide important services supporting vulnerable populations in Israel.

A. *The Minister's Audit*

[14] Commencing on May 2, 2014, the CRA conducted an audit of the Applicant's charitable status for the fiscal periods ending December 31, 2011 and 2012 [the CRA Audit].

[15] When the CRA Audit concluded, the CRA informed the Applicant by letter dated August 20, 2019 of its determination that the Applicant had failed to comply with the requirements of its registration under the *Act*. The Minister advised the Applicant that it would be issued a NITR, which would become effective upon the publication in the *Canada Gazette*.

B. *The CRA's Revocation Practice*

[16] The Respondent's evidence on this motion includes, *inter alia*, the affidavit of Melissa Shaughnessy, who has held the position of Director of the Charities Directorate's Compliance Division [the Director CDCD] since April 2019. The Director CDCD acknowledges that in 2019, the CRA's general administrative practice was to: (i) wait 90 days before proceeding with revocation to allow charities to file an objection; and (ii) where an objection was filed, to generally hold revocation in abeyance pending a decision on the objection, before publishing revocation in the *Canada Gazette* [the CRA Revocation Practice].

[17] The Applicant has filed evidence on this motion showing that the Minister consistently acted in accordance with the CRA Revocation Practice as reflected in:

- (i) public statements of procedure, including a statement in the *CRA, Charities Program Update-2015 (Director General's Message)*, dated April 9, 2015, which states that "[i]n most instances, the CRA will not finalize its decision to revoke until the charity has had the opportunity to exercise its appeal options";
- (ii) internal CRA communications in 2019 and 2024, including an email dated August 30, 2019 from the Director CDCD which states, in connection with a conversation with the authorized representative of the Applicant [the Applicant's Representative], "I confirmed that our process would be to await the decision of the objection and any possible

subsequent FCA/SCC appeals before taking any further steps toward replication”; and

- (iii) CRA communications with the Applicant’s Representative including the call on August 30, 2019 where the Director CDCD advised that the CRA would not take any further steps in effecting revocation until the Applicant had objected and exhausted its appeals including to the Supreme Court.

C. *The Applicant Files a Notice of Objection*

[18] The Applicant filed a Notice of Objection on November 18, 2019.

[19] In July 2023, the Tax Appeals Case Specialist in the Appeals Branch who conducted an independent review of the Minister’s decision to revoke drafted an initial proposal to confirm the NITR which was approved by the Manager of the Appeals Branch.

D. *Confirmation of the CRA’s Revocation Decision*

[20] On June 26, 2024, the Appeals Branch confirmed the Minister’s intention to revoke the Applicant’s charitable status by sending the Applicant a NOC.

[21] The NOC indicated that the Applicant could appeal the NOC to the Federal Court of Appeal, but said nothing about the timing of the publishing of the NITR as this is not an act falling within the authority of the Appeals Branch.

E. *The Applicant's Extra-Procedural Request for an Annulment*

[22] The Applicant wrote to the CRA by letter dated July 12, 2024, requesting that in lieu of revocation, the CRA consider annulling the Applicant's charitable status and that the CRA stay the revocation to provide time for the CRA to consider this alternative. This had first been raised in discussions with the CRA in early August 2023, but ultimately put off. An annulment of the Applicant's registration would allow official receipts issued before the annulment to be deemed valid.

[23] The CRA responded to the Applicant's request by letter dated July 24, 2024 [the July 24, 2024 Letter], stating in part:

Please be advised that your request for annulment will be held in abeyance until the period to appeal the Notice of Confirmation, issued to the Organization on June 26, 2024, has expired, or if an appeal is filed, after a determination of the appeal has been made by the Federal Court of Appeal.

With respect to your request to stay the revocation pending the consideration of your annulment request, we are prepared to delay the publication of the revocation until the period to appeal the Notice of Confirmation has expired.

[24] The Applicant takes the position that the July 24, 2024 Letter constitutes either a new decision or a change in the CRA Revocation Practice constituting a breach of procedural fairness since it was contrary to the Applicant's legitimate expectations over many years and the CRA provided no notice of the change to the Applicant.

[25] The Respondent acknowledges that there was a change in the CRA Revocation Practice. The Director CDCD says the CRA “now has a risk-based approach towards compliance in the charities sector” and that since 2019 it has been issuing an increasing number of 30-day revocations that do not allow for a charity to have exhausted their appeal rights before publication of the NITR. The Respondent argues that it is the Minister’s prerogative to change its practices and the July 24, 2024 Letter constituted notice of that change. According to the Respondent, the Minister has a statutory duty to publish a NITR. The Respondent also submits that the statutory scheme and other published policies or guidelines do not provide a charity with either a right to personalized notice, or a right to exhaust its appeal rights before publication.

F. *Publication of the NITR*

[26] On August 10, 2024, less than 30 days after providing the July 24, 2024 Letter, the Minister published the NITR in the *Canada Gazette* and the Applicant’s charitable status was thereby revoked. The CRA gave notice to the Applicant of the publication by letter dated August 15, 2024.

G. *The Applicant’s Applications for Judicial Review*

[27] On August 20, 2024, the Applicant brought the underlying application in this proceeding in the Federal Court seeking judicial review of the Minister’s decision to publish the NITR pursuant to section 18.1 of the *Federal Courts Act*, RSC 1982, c F-7. The relief sought includes an order compelling the Minister to publish a retraction of the revocation of the Applicant’s charitable status and prohibiting the Minister from taking any further action to publish a copy of

the NITR in the *Canada Gazette* until the Applicant's appeal of the revocation is heard on its merits by the Federal Court of Appeal. This is essentially the same relief sought by the Applicant on this interlocutory motion.

[28] On September 9, 2024, the Applicant filed an application for judicial review in the Federal Court of Appeal seeking the same relief. The Notice of Application states that the Federal Court has jurisdiction to hear the issues raised in connection with the publication of the NITR, nevertheless an application was being filed in the Federal Court of Appeal "on a protective basis."

IV. Preliminary Issues

A. *Additional Affidavits*

[29] On the day of the hearing of this motion, the Court received two additional affidavits [the Applicant's Affidavits] which the Applicant had e-filed with the Court on Sunday, November 3, 2024. The first affidavit is from the Applicant's Representative and attaches a cover letter addressed to the Director CDCD dated October 10, 2019 which refers to their discussion on August 30, 2019 [the First Affidavit]. The second affidavit is from junior counsel for the Applicant attaching an internal email dated August 30, 2019 from the Director CDCD to senior CRA officials summarizing her call that day with the Applicant's Representative [the Second Affidavit]. The Respondent does not consent to the late filing of these affidavits.

[30] At the end of the hearing I advised the parties that I would not accept the Applicant's Affidavits for filing on the basis that: (i) they were filed too late for the Respondent to adequately address them; (ii) the Respondent has not located a copy of the October 10, 2019 letter attached to the First Affidavit in its records and it is not contained in the Certified Tribunal Record that was filed in the Federal Court of Appeal; and (iii) the email string attached as an exhibit to the Second Affidavit was already produced as part of the Respondent's motion record.

B. *Jurisdiction*

[31] The Respondent challenges the jurisdiction of this Court to entertain this motion or grant the relief sought.

(1) The Respondent's Position

[32] The Respondent submits that the Federal Court lacks jurisdiction to hear appeals related to the publication of a NITR in light of subsection 172(3) of the *Act*, which provides exclusive jurisdiction to the Federal Court of Appeal on an appeal of a revocation decision. It also relies on subsection 180(2) of the *Act*, which expressly ousts the jurisdiction of the Federal Court in respect of matters arising under subsection 172(3).

[33] The Respondent argues that the only procedure provided by statute relating to the publication of the NITR is that found in paragraph 168(2)(b) of the *Act*, which requires that a motion for an extension of time for the publication of a NITR be brought in the Federal Court of Appeal.

(2) The Applicant's Position

[34] The Applicant does not dispute that judicial review of the Revocation Decision must be brought in the Federal Court of Appeal and it has commenced an application for doing so.

However, the Applicant says that it is also challenging the decision to publish the NITR, which it claims is not captured by subsection 172(3) or paragraph 168(2)(b) of the *Act* and therefore is reviewable by the Federal Court.

[35] The Applicant says it was not able to seek a stay in the Federal Court of Appeal as the publication of the NITR occurred before it could do so, barring it from the relief offered under paragraph 168(2)(b) of the *Act*. It points out that in cases where publication of a NITR has occurred, the Federal Court of Appeal considers issues related to publication to be moot (citing by way of example *Operation Save Canada Teenagers v Canada (National Revenue)*, 2011 FCA 71 at para 11). Instead, the Applicant brings this motion to reverse the publication which would then allow it to seek the relief from the Federal Court of Appeal that it was denied.

V. Analysis

A. *Does the Publication Constitute a Reviewable Decision?*

[36] The question for this Court is whether the Minister's Publication can be characterized as a separate decision from the Revocation Decision capable of being judicially reviewed in the Federal Court.

[37] The Respondent relies on the unreported decision of Associate Justice Coughlan in *Stewards' Charitable Foundation v Minister of National Revenue* (Court File No T-2706-22) [*Stewards'*] where Associate Judge Coughlan struck an application for judicial review brought in the Federal Court by a charity whose registered charitable status had been revoked. In *Stewards'*, the applicant challenged the decision related to the publication of a NITR in the Federal Court and sought an order of *mandamus* to compel the Minister to issue an *erratum* of the NITR. The applicant in *Stewards'* alleged that it was an abuse of power for the Minister to publish the NITR after the applicant had commenced judicial review of the revocation decision in the Federal Court of Appeal.

[38] Associate Judge Coughlan struck the applicant's notice of application on the basis that it was bereft of any possibility of success given the Federal Court's lack of jurisdiction. She gave three reasons why a publication decision cannot be the subject of a separate judicial review application in the Federal Court.

[39] First, where matters are specifically assigned to the Federal Court of Appeal, they are not within the jurisdiction of the Federal Court (citing section 18.5 of the *Federal Courts Act* and *Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainment Ltd*, 2005 FC 640 at paras 6-7).

[40] Second, Parliament, through the provisions of the *Act*, created a comprehensive scheme or "complete code" related to revocation and related remedies. That scheme grants exclusive jurisdiction to the Federal Court of Appeal not only for an appeal of a revocation decision, but to fix

the timing of the publication of a notice before the determination of any such appeal (subsection 172(3) and paragraph 168(2)(b) of the *Act* respectively). Moreover, the scheme expressly ousts the jurisdiction of the Federal Court via subsection 180(2) of the *Act*.

[41] Third, the act of publication is not a separate and distinct decision from a revocation decision. Rather it “is simply the mechanism or vehicle by which effect is given to the Minister’s decision to revoke” (*Stewards’* at para 27). This is consistent with a line of jurisprudence that establishes that while a continuing course of conduct can be the subject of judicial review, acts that show a continued commitment to an original decision do not constitute a new decision or course of conduct (see for example *McLaughlin v Canada (Attorney General)*, 2022 FC 1466 at para 22 citing *Francoeur v Canada (Treasury Board)*, 2010 FC 121 at para 13).

[42] I find, based on the authority of *Stewards’* with which I am in agreement, that the Federal Court is without jurisdiction to entertain judicial review of the publication of a NITR and is, therefore, determinative of this motion.

[43] I acknowledge that Associate Judge Coughlan gave an additional reason for her decision, namely that she considered that in seeking to reverse the publication, the applicant was attempting to “recast” its failure to bring a motion for a stay which the applicant could and should have brought (*Stewards’* at paras 24 and 25). In this case, the Applicant argues that it was the Minister’s unfair actions that denied it the benefit of such a motion, not its failure to act. The Applicant suggests that it is the casualty of a “lacuna” in the statutory scheme. Whether that is the case will be up to the

Federal Court of Appeal to decide or for Parliament to correct; it is not a gap that the Federal Court may step in to fill.

[44] As the Court lacks jurisdiction to grant the relief sought, it is not necessary to consider whether the Applicant meets the test for a mandatory interlocutory injunction.

VI. Conclusion

[45] Based on the foregoing reasons, this Court is without jurisdiction to entertain this motion, or to grant the relief requested. Accordingly, the Applicant's motion is dismissed.

[46] The parties did not make any submissions on costs either in writing or at the hearing. In light of this and the fact that this motion raises a novel issue, there shall be no order as to costs.

ORDER in T-2135-24

THIS COURT ORDERS that:

1. The Applicant's motion is dismissed; and
2. There is no order as to costs.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2135-24

STYLE OF CAUSE: JEWISH NATIONAL FUND OF CANADA INC.,
FONDS NATIONAL JUIF DU CANADA INC. v
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: HELD BY WAY OF ZOOM VIDEOCONFERENCE

ORDER AND REASONS: WHYTE NOWAK J.

DATED: NOVEMBER 8, 2024

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