

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130611

Docket: A-75-13

Citation: 2013 FCA 154

Present: SHARLOW J.A.

BETWEEN:

**HUMANE SOCIETY OF CANADA FOR THE PROTECTION
OF ANIMALS AND THE ENVIRONMENT**

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on June 6, 2013.

Order delivered at Ottawa, Ontario, on June 11, 2013.

REASONS FOR ORDER BY:

SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR ORDER

SHARLOW J.A.

[1] The appellant, Humane Society of Canada for the Protection of Animals and the Environment, has commenced an appeal pursuant to subsection 172(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The appeal is from the confirmation by the Minister of National Revenue of the notice of intention to revoke the registration of the Society as a “charitable organization” as defined in the *Income Tax Act*. The failure of the parties to agree on the contents of the appeal book has led to the motion now before me. For the reasons that follow, I will dismiss the motion and order steps to be taken that I hope will enable the parties to have this matter made ready for a hearing on the merits within a reasonable time.

The decision under appeal

[2] Subsection 168(1) of the *Income Tax Act* states the grounds upon which the Minister may revoke the registration of a qualified donee (which, by virtue of a number of definitions in subsection 149.1(1) of the *Income Tax Act*, includes a charitable organization). The parts of subsection 168(1) that are cited in the confirmation letter read as follows:

168. (1) The Minister may, by registered mail, give notice to a person described in any of paragraphs (a) to (c) of the definition “qualified donee” in subsection 149.1(1) that the Minister proposes to revoke its registration if the person

...

(b) ceases to comply with the requirements of this Act for its registration;

...

(e) fails to comply with or contravenes any of sections 230 to 231.5 ...

168. (1) Le ministre peut, par lettre recommandée, aviser une personne visée à l’un des alinéas a) à c) de la définition de « donataire reconnu » au paragraphe 149.1(1) de son intention de révoquer l’enregistrement si la personne, selon le cas :

[...]

b) cesse de se conformer aux exigences de la présente loi relatives à son enregistrement;

[...]

e) omet de se conformer à l’un des articles 230 à 231.5 ou y contrevient

[...]

[3] The Minister’s confirmation is set out in a letter dated January 22, 2013. That letter reads in part as follows:

... we confirm the Minister’s proposal to revoke the registration of the Organization issued under subsection 168(1) of the Act on the basis that the Organization:

- Failed to demonstrate that it devoted all of its resources to charitable activities, [paragraph 168(1)(b)],
- Provided part of its income for the personal benefit of a member of its governing board [paragraph 168(1)(b)], and

- Failed to comply with or contravened any of sections 230 to 231.5 of the Act [paragraph 168(1)(e)].

[4] The confirmation letter refers to the previous letter from the Minister dated February 17, 2010, which is the document by which the Society was notified of the Minister's intention to revoke its registration as a charitable organization. That letter in turn referred to prior letters from the Minister that set out points raised at various times during the period when the Minister was considering whether the Society's registration should be revoked.

[5] From the material filed by the Minister in response to the Society's motion, it is now clear that the reference in the confirmation letter to sections 230 to 231.5 of the *Income Tax Act* is meant to be a partial paraphrase of paragraph 168(1)(e) and not a statement that the grounds for the revocation include everything in sections 230 to 231.5. The Minister has formally confirmed in this motion that, with respect to the ground of revocation based on paragraph 168(1)(e), only the statutory obligations of the Society under paragraph 230(2)(a) are in issue. The appeal of this matter on the merits, as well as this motion, are limited accordingly. Paragraph 230(2)(a) requires a registered charity to keep records and books of account containing:

(a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act ...

a) des renseignements sous une forme qui permet au ministre de déterminer s'il existe des motifs d'annulation de l'enregistrement de l'organisme ou de l'association en vertu de la présente loi [...]

[6] Given the generality of paragraph 230(2)(a), it is necessary to discern from the confirmation letter and the letters mentioned above what deficiencies in the Society's books and records were

relied upon by the Minister to justify the revocation of the Society's registration. At this stage it appears to me that the Minister's reliance on paragraph 230(2)(a) is aptly reflected in the following statement in paragraph 8 of the Minister's submissions in response to this motion (respondent's motion record, page 4):

The appellant was repeatedly advised that its books and records failed to separate out amounts paid in respect of Mr. O'Sullivan's personal expenditures and charitable expenditures and failed to break down expenditures directly related to charitable activities.

[7] The Society is concerned that it might be surprised, when the Minister's memorandum of fact and law is filed, to learn that the Minister's reliance on paragraph 230(2)(a) is based on different grounds than is now apparent. By that time, the contents of the appeal book will have been settled by agreement or court order.

[8] At the hearing of this motion, the Minister was not willing to confirm that the decision to confirm the revocation, in so far as it is based on paragraph 230(2)(a), is necessarily as limited as the statement quoted above might suggest. Although I have been referred to nothing in the material now before me that suggests that the Minister is relying on any other deficiency in the books and records, and my own review of the material reveals nothing more, I cannot assume that I have been provided with a complete record of all correspondence that passed between the Society and the Minister in relation to this matter.

[9] If the Minister's memorandum of fact and law sets out an allegation of a deficiency in the books and records of the Society that is not fairly encompassed by the statement quoted above, it

will be open to the Society to seek an interlocutory order which, depending on the circumstances, may include any or all of the following: an order granting leave to file a reply memorandum, an order granting leave to file a supplementary appeal book, and an order granting leave to present evidence on appeal.

[10] It will also be open to the Society to argue at the hearing of this appeal on the merits that the Minister cannot rely on any alleged deficiencies in the Society's books and records that are not part of the reasons for the Minister's decision to confirm the revocation. In that regard, the Society is entitled to assume that the Minister's reasons can be found in the confirmation letter, read in the context of the prior correspondence to which the confirmation letter refers expressly or implicitly.

[11] I turn now to the orders sought by the Society in this motion.

Preliminary comments on the motion

[12] As indicated above, the preparation of this appeal for hearing has been stalled by the inability of the parties to agree on the contents of the appeal book. The failure to agree should have led the Society to move under Rule 343(3) of the *Federal Courts Rules*, SOR/98-106, for an order determining the contents of the appeal book.

[13] The Society is aware of Rule 343(3), but says that it cannot determine what documents it will need to be in the appeal book because the Minister has failed to provide it with information it requires to make that determination. Therefore, the Society is seeking an order that the Court:

... assist the parties in determining the content of the appeal book pursuant to Rule 343(3) of the *Federal Courts Rules* as follows:

- a. By ordering that the [Minister] provide full particulars of the allegation, in the notice of confirmation dated 22 January 2013, that the [Society] failed to comply with or contravened any of sections 230 to 231.5 of the *Income Tax Act*, in order that the [Society] may determine which of its documents are required for inclusion in the appeal book to dispose of those issues in this appeal; and
- b. By ordering that the [Minister] cause the tribunal to certify, pursuant to Rules 317(1) and 318(1)(a), those materials which were before the Tax and Charities Appeals Directorate when it considered whether to confirm the Minister's proposal to revoke the [Society's] registration issued under subsection 168(1) of the *Income Tax Act*, in order that the parties may determine which of the [Minister's] documents are required for inclusion in the appeal book to dispose of the issues in this appeal.

[14] I will refer to paragraph (a) of the notice of motion as the "motion for particulars" and paragraph (b) as the "motion for certification". I will discuss them separately.

Motion for particulars

[15] The Society's motion for particulars is based on its allegation that the Minister has not clearly identified the information that the Society is alleged to have failed to keep, and has not explained why the purported failure justifies the revocation of its registration as a charity (*Prescient Foundation v. Minister of National Revenue*, 2013 FCA 120, paragraph 47). The position of the Society is that Rule 343(3) is not yet in play because the Minister's reasons do not disclose the case it has to meet, and therefore it cannot determine what it requires in the appeal book.

[16] What the Society has phrased as a motion for particulars is in reality a motion for an order requiring the Minister to give further, better or more detailed reasons for the revocation decision. In my view, the Minister's reasons must stand or fall as they are. If, when considered against the relevant evidence, they fail to disclose a reasonable basis for the revocation of the Society's registration, the remedy is to set the decision aside after the hearing on the merits.

[17] By the combined operation of subsection 172(3) and section 180 of the *Income Tax Act*, an appeal of the Minister's decision to revoke the registration of a charity is an appeal in the traditional sense: *Renaissance International v. Minister of National Revenue*, [1983] 1 F.C. 860 (F.C.A.). It is an appellate review of a decision based on the record that was before the decision maker. It is not a trial *de novo* or other similar proceeding that is grounded in pleadings in respect of which a motion for particulars might be appropriate. For that reason, the motion for particulars will be dismissed.

Motion for a certificate as to what documents were before the Minister

[18] In the second part of the motion, the Society is seeking an order requiring the Minister to certify which documents were before the "tribunal" (the Minister) when the confirmation decision was made. That motion is based on Rules 317(1) and 318(1)(a) which apply to appeals by virtue of Rule 350. Rules 317(1) and 318(1)(a) read as follows:

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête

précise les documents ou les éléments matériels demandés.

[...]

[...]

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

(a) a certified copy of the requested material to the Registry and to the party making the request [...].

(a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause [...].

[19] These rules do not require a specific certification as to what material was before the Minister when the decision under appeal was made. Therefore, this part of the motion will be dismissed.

Going forward

[20] This appeal is procedurally stalled because the time spent on the motions now before me has caused the Society to miss the time limit for filing the agreement as to the contents of the appeal book or seeking an order to determine its contents. There is no motion before me to extend that time limit. However, the order disposing of this motion will set a new deadline on my own motion, with consequential directions.

[21] In this Court, an appeal is based on a record consisting of the documents referred to in Rule 344. Broadly speaking, the record should include all documentary evidence that the parties agree (or that the Court determines on a Rule 343(3) motion) may assist the Court in determining the issues

raised in the appeal, provided the documentary evidence was before the Minister when the decision was made, or leave to present it as evidence on appeal is granted under Rule 351.

[22] The task of the parties, in attempting to agree on the contents of the appeal book, is to consider what documents should be included in the appeal book, and to confer with each other as to their respective conclusions on that point.

[23] Typically, the first step is for the appellant to determine what documents it considers should be included in the appeal book. The appellant then informs the respondent of its determination. The respondent may agree, or object to the inclusion of one or more documents, or propose the inclusion of additional documents. The parties are expected to attempt to resolve any differences but if they cannot, the appellant must seek an order under Rule 343(3) determining the contents of the appeal book. That generally requires submissions by both parties, based on affidavit evidence, as to which documents should be included or excluded, as the case may be.

[24] In this case, it appears to be common ground that the documents covered by the Rule 318 certificates dated March 13 and 15, 2013 are part of the record (to the extent they are relevant to the specific issues under appeal). I assume that the parties should have no difficulty in identifying which of those documents should be included in the appeal book. However, it appears that there may be some difficulty with respect to certain other documents. I will address that difficulty now.

[25] There are many documents – referred to as the “Teachman Documents” – that are said to be the source documents from which the Society’s own auditor, Mr. Teachman, prepared the Society’s annual audit for the year 2006. The audit by the Canada Revenue Agency covered the same period, and led to the revocation proceedings that are the subject of this appeal. According to the Society, the Teachman Documents were made available to the Canada Revenue Agency auditor.

[26] The auditor deposes that she was given access to 6 boxes of documents at the office of Mr. Teachman, which she reviewed. She had a number of concerns about the documents, which she lists in her affidavit. Because of the volume of documents, she did not copy them all, but she scanned and retained copies of what she considered to be a representative sample. It was initially her conclusion that the books and records of the Society were deficient “in that there was no separation of personal expenditures and charitable expenditures, and there was no breakdown of expenditures directly related to charitable expenditures” (paragraph 9 of her affidavit, page 14 of the respondent’s motion record).

[27] Thus, it appears that of the documents reviewed by the auditor at the office of Mr. Teachman, at least the documents that she copied are likely to be relevant to the issue of the sufficiency of the Society’s books and records. It is reasonable to infer that within the 6 boxes of documents that were made available to the auditor, there may be some other documents that were not copies but could be relevant to that issue, including some that may be capable of casting doubt on the Minister’s conclusion that the books and records were deficient.

[28] It may not be possible to determine with certainty which of the Teachman Documents were made available to the auditor. However, where certainty is not possible, presumptions and reasonable inferences must suffice. Since the evidence indicates that the auditor was given access to a large volume of documents for 2006, and the decision to limit the copying of documents was made by the Minister, any reasonable doubt as to which documents the auditor saw, or to which documents she was given access, should be resolved in favour of the Society.

[29] Counsel for the Minister agreed at the hearing that it would be reasonable to infer that the auditor was given access to any of the Teachman Documents that appear to be books and records of the Society. Such documents would *prima facie* be relevant if they would assist the Court in understanding how the books and records would inform an auditor as to the relationship between particular expenditures and the charitable activities of the Society.

[30] In my view, the Society is also entitled to the benefit of a presumption that any document that it made available to the auditor or any other Canada Revenue Agency official during the audit, or during the revocation and confirmation process, were or should have been before the Minister at the relevant time. Thus, any Teachman Document that is now identified as relevant to the issues raised in this appeal should be included in the appeal book, whether or not it can be established with certainty that a copy of the document was retained by an official of the Canada Revenue Agency.

[31] With these guidelines in mind, it is to be hoped that the parties will be able to agree on the contents of the appeal book within the deadlines I will stipulate.

Conclusion

[32] For these reasons, the motion will be dismissed. At the hearing of this motion, both parties requested costs. I am not persuaded that an order for costs is appropriate at this stage. Costs of this motion will be costs in the cause.

“K. Sharlow”

J.A.



FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Gib van Ert FOR THE APPELLANT

Lynn M. Burch FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hunter Litigation Chambers FOR THE APPELLANT

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada