Federal Court of Appeal | Cour d'appel fédérale

Date: 20260326

Docket: A-245-24

Citation: 2026 FCA 63

Present: **STRATAS J.A.**

BETWEEN:

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

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 26, 2026.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] In this appeal, the Jewish National Fund of Canada Inc. seeks to set aside the Minister's decision to revoke its status as a registered charity. Among other things, the Fund says the Minister's decision is fatally tainted by bias.

[2] The Fund says that over a period of thirty years or so, the Minister and, more broadly, the Canada Revenue Agency, actively considered letters, petitions, and other materials from parties who wanted the Fund's registration revoked because it is Jewish. It asserts that in making the decision in this case, the Minister succumbed to a weighty and illegitimate pressure campaign against the Fund.

[3] The Minister denies the allegations of bias and maintains that the Fund's books and records show that it did not comply with several legal requirements for charitable organizations.

[4] Due to the skilled and dogged efforts of counsel for the Fund, the hard work of the Minister's counsel and staff, and the orders of this Court—the June 10, 2025 Order being the latest—the evidentiary record in this appeal is now over 13,000 pages.

[5] Now the Fund moves for an order allowing the appeal. It says the Minister has disobeyed some of the search terms in the June 10, 2025 Order. If the appeal continues, the Fund seeks a strict order requiring compliance with the June 10, 2025 Order.

A. The basis for search and production orders

[6] This is an administrative appeal and so administrative law principles largely apply: *Canadian National Railway Company v. Canada (Transportation Agency)*, 2025 FCA 184. And some of the rules in the *Federal Courts Rules*, S.O.R./98-106 relevant to applications for judicial

review apply here: see Rule 350 which makes Rule 317 (the production of the record underlying the administrative decision) and its case law relevant to an administrative appeal.

[7] Under Rule 317, “[a] party may request material relevant to an application [or administrative appeal] that is in the possession of [an administrative decision-maker] whose order is the subject of the application [or administrative appeal] and not in the possession of the party by serving on the [administrative decision-maker] and filing a written request, identifying the material requested”.

[8] Under Rule 318, the administrative decision-maker can object to producing certain materials. If the objection is not settled, the parties proceed to Court.

[9] Where appropriate, the Court can make a search and production order against the administrative decision-maker. The Court can also permit cross-examinations to take place to see if any other documents should be produced.

[10] In this way, the evidentiary record for administrative appeals or judicial reviews is built and finalized. All Canadian jurisdictions have case law or legislative equivalents to Rules 317-318 and proceed in the same way.

B. An opening concern in this case

[11] For a while now, the parties in this administrative appeal have been busy with interlocutory issues and many search and production issues on the issue of bias. This administrative appeal is starting to resemble a full-scale action for abuse of public office with numerous discoveries. It is crawling slowly at great expense to all concerned, including the Court.

C. A countervailing concern

[12] But sometimes search and production orders, with all their potential for delay and expense, must be made. Denying parties search and production orders can keep maladministration hidden and unexposed, immunizing administrative decision-makers from meaningful review and accountability: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128; *Canadian National Railway Company v. Canada (Transportation Agency)*, 2023 FCA 245 at paras. 7-10 (decrying situations where an administrative decision-maker can "become a law unto itself, accountable to no one except itself").

[13] Meaningful review and accountability matter:

> "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two

> corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.
>
> Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power—no matter how lofty, no matter how important—must be subject to meaningful and fully independent review and accountability.

(*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24. See also *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72 at paras. 102-105 and *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315.)

D. Searches and productions in this case

[14] Concerns about administrative immunity, meaningful review and accountability and a dearth of helpful case law in the area may well have prompted the June 10, 2025 search and production Order in this case, and the resulting huge amount of searching, producing and cross-examining thereafter.

[15] An appeal of a search and production order made by this Court lies only to the Supreme Court with leave, and no one has pursued that route: *Ignace v. Canada (Attorney General)*, 2019 FCA 239 at paras. 20-29. Thus, the June 10, 2025 Order is final. In the absence of manifest

error—and no one has alleged that sort of error—the Court will not question or cast into doubt that Order: *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460; *Miller v. Canada*, 2002 FCA 370 at para. 10.

[16] But it cannot be denied that this administrative appeal—which must "be heard and determined in a summary way" under s. 180(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)—now has the flavour, if not the reality, of a slow-moving, complex action for abuse of process, bad faith decision-making, and abuse of public office.

[17] This sort of thing has happened all too often in judicial reviews and administrative appeals. Some guidance must now be given.

E. The two poles in our jurisprudence

[18] The allegation in this case is bias. But that is just one species of administrative misconduct or maladministration. Others include abuse of process and fraudulent or dishonest conduct. These reasons will use the general term "maladministration" to describe all these things.

[19] Our jurisprudence on Rule 317 search and production orders is inconsistent. Individual cases fall somewhere on a spectrum between two poles:

- *An allegation of maladministration can be enough.* If a party alleges a serious enough form of maladministration, the Court will make a search and production

order. Statements in cases like *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at paras. 50-52, *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201 at para. 21 and *Jewish National Fund of Canada v, Minister of National Revenue*, 2025 FCA 114 at paras. 13-18 (the June 10, 2025 Order) place these cases reasonably close to this pole.

- *An allegation of maladministration is not enough.* Here, the Court requires something more underlying or surrounding the allegation, such as some evidence, before the Court will make a search and production order. Statements in cases like *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66 especially at paras. 10-13, *Ron W. Cameron Charitable Foundation v. Canada (National Revenue)*, 2023 FCA 175 at paras. 26-27 and *Public Service Alliance of Canada v. Canada (Attorney General)*, 2025 FC 1126 place these cases reasonably close to this pole.

F. An allegation of maladministration is not enough

[20] Many legal and practical reasons support this view.

[21] Time and time again, our Court has said that Rule 317 forbids "fishing expeditions", *i.e.*, "attempts to conduct discovery of material to see whether a ground of judicial review might exist": *Canadian National* at para. 25; *Access Information Agency Inc. v. Canada (Attorney*

General), 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15917 (F.C.T.D.) at para. 11; *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204 at para. 15; *Public Service Alliance of Canada v. Canada (Attorney General)*, 2025 FC 1126 at para. 13; and many others.

[22] But fishing expeditions often can take place despite judges' best intentions. Even a carefully drawn and narrow search and production order, when carried out, can sprawl into much more. Searching, producing and cross-examining can lead to undertakings to search and produce more, triggering more cross-examining, and after that maybe even more. That's if things are going well. Disputes along the way mean trips to Court and, after that, maybe more searching, producing and cross-examining and, who knows, maybe even more after that. The upshot? In some cases, by making a search and production order, judges have fuelled the fishing boat, cast off the mooring lines, and sent the boat off to trawl the deep for whatever fish are to be found.

[23] Take, for example, a Court making a search and production order based only on allegations, even serious allegations that sound in maladministration, without any circumstantial or direct evidence. These bare allegations must be seen for what they are—idle musings or gossip. Far from being a golden ticket to months or even years of inquiry, bare allegations don't warrant any consideration at all.

[24] Here, counsel have a responsibility. They must remember that making bare allegations—alleging things without evidence—is unethical: see many jurisdictions' rules of professional ethics. See also *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at

para. 5, *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301 at para. 34, *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198, 335 D.L.R. (4th) 312; and many others. Those who allege something "simply in the hope that something will turn up" abuse the Court's process: *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 (F.C.A.) at para. 4. Incidentally, this has not happened here.

[25] Finally, and most importantly, the law. As mentioned above, administrative appeals, like judicial reviews, must "be heard and determined in a summary way": s. 180(3) of the *Income Tax Act* and s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. They are no substitute for a civil action for abuse of public office, with long and searching documentary and oral discoveries: see s. 28.4 of the *Federal Courts Act*, which provides that administrative appeals under s. 28 of the Act (similar to the statutory appeal in this case) cannot be converted into an action with discoveries, with all the delay and expense that entails. Instead, the law requires that administrative appeals and judicial reviews be fast and efficient, with procedures proportionate to the stakes and the public benefit: see oft-ignored Rule 3 of the *Federal Courts Rules*; and see *Canada (Attorney General) v. Larkman*, 2012 FCA 204 for why the law requires speed and efficiency in these proceedings.

[26] Thus, for all these reasons, a party seeking a search and production order must go beyond the allegations and give the Court something more.

G. Something more: an air of reality and proportionality

[27] The Court can make a search and production order when there is an air of reality to an allegation of maladministration, and the order is a proportionate measure. These two requirements embody all the competing values discussed earlier in these reasons—the wise use of resources, reducing expenses, expedition, proportionality, and the meaningful review and accountability of administrative decision-makers.

[28] In other areas of law, the Court insists on an air of reality before a resource-intensive, potentially distracting inquiry takes place. For example, there must be an air of reality to a criminal defence before it is left to a jury: see, *e.g.*, *R. v. Cinous*, 2002 SCC 29, [2002] S.C.R. 3; *R. v. Pan*, 2025 SCC 12.

[29] And in administrative law, there must be an air of reality to an allegation of maladministration before a party can go behind the administrative decision-makers' deliberative privilege and obtain their hearing notes and confidential briefing memos: *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 at 965-966; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Canadian National Railway Company v. Canada (Transportation Agency)*, 2023 FCA 245 at para. 31.

[30] What is an air of reality? It is perhaps best defined by what it is not. It is not suspicions, speculations, conjectures, imaginings, hunches, theories, beliefs or opinions.

[31] Instead, an air of reality is a tangible concern supported by some circumstantial or direct evidence. At this early stage, the evidence must be capable of being believed or, to put it negatively, not unbelievable from the outset. The Court, viewing the evidence in totality and keeping the concern about administrative immunization front of mind, must be able to conclude that, subject to concerns about proportionality, a deeper investigation into the allegations is warranted.

[32] As a matter of law, proportionality—a core tenet in most jurisdictions' procedural law and in our procedural law by virtue of Rule 3 of the *Federal Courts Rules*—must also enter the mix. The Court must consider whether the probable benefits of a search and production order justify the probable detriments. There must be proportionality between:

- the time and expense associated with carrying out a search and production order and its follow-up (including undertakings, cross-examinations, possible further forays to court and further orders and follow-ups) and the resources the Court will likely expend; and

- the importance of the matters at stake in the litigation, both to the parties and public interest. This includes public confidence in the administrative decision-maker and, more generally, our system of administrative justice.

H. The motion for a search and production order: practical considerations

[33] For the reasons in paragraphs 20-26 above, a motion for a search and production order cannot itself become an exercise in searching and producing. The motion is only about whether an order permitting searching, producing and cross-examining is warranted, *i.e.*, whether the moving party has shown proportionality and has produced sufficient evidence showing an air of reality behind its allegation of maladministration.

[34] The motion for a search and production order is not about whether the respondent can successfully defend against the moving party's allegation. That is for the panel of the Court hearing the merits of the administrative appeal or judicial review based on the entire evidentiary record before the Court, including the evidentiary record that was before the administrative decision-maker, the evidence obtained from a search and production order and cross-examinations under it, and any supplementary evidence relevant to the merits that might be allowed into an administrative appeal under Rule 351 or a judicial review with leave of the Court.

[35] Thus, on a motion for a search and production order, only the moving party can file evidence that it says creates an air of reality. The respondent may cross-examine that evidence with a view to showing that the moving party's evidence does not in law create an air of reality. The moving party cannot cross-examine to see if there is any more evidence that might support an air of reality. Were it otherwise, the motion for a search and production order would itself

become an exercise in searching and producing, leading to all the detriments described in paragraphs 20-26 above.

[36] On a motion for a search and production order, evidence from the parties on the issue of proportionality is not needed. The Court can rely on its own experience in estimating, on the one hand the likely time and expense associated with a search and production order and all the possible, detailed follow-up orders that often have to be made concerning the allegation of maladministration in the case and, on the other hand, the importance of the matters at stake and other public interest considerations.

[37] When considering a motion for a search and production order, the Court should consider two other things.

[38] First, are there legal bars or insurmountable obstacles to relief for maladministration? If so, a search and production order to investigate maladministration will serve no purpose. Some examples are as follows:

- If a party knew enough during the administrative proceeding to raise a concern about maladministration with the administrative decision-maker and did not do so, it may be barred by the doctrine of waiver from making the allegations later in Court: see *Halton (Regional Municipality) v. Canada (Transportation Agency)*, 2024 FCA 122 at para. 38 and cases cited therein. The timely raising of

a concern gives the administrative decision-maker a chance to address it before it makes its decision. Parties cannot harbour a concern and lay in the weeds.

- Allegations that every decision-maker in a decision-making department is implicated in maladministration will fail due to the doctrine of necessity. Under that doctrine, the department must still carry out its statutory responsibility to decide the matter, notwithstanding the maladministration: *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1998] 1 S.C.R. 3 at paras. 4-7; *Paré c. Lord,* 2017 QCCS 656 at paras. 31-33; *Brame v. Paramedic Association of New Brunswick,* 2023 NBKB 47 at paras. 28-33.

- In some cases, the inquiry authorized by a search and production order will go nowhere because of legal professional privilege, public interest privilege, cabinet confidentiality, national security, and the like, with no means by which the Court can relax or circumvent them.

[39] Second, are there alternatives that better accomplish administrative accountability while satisfying the need for efficiency, speed and conservation of resources under Rule 3 of the *Federal Courts Rules*? Some examples are as follows:

- Should the party alleging maladministration be required to prosecute its allegation in a separate action for abuse of process, abuse of public office or regulatory negligence—proceedings with broad discovery procedures? This would allow the

administrative law appeal or judicial review to continue without the allegation. The party alleging maladministration is likely not prejudiced by this: if the action is successful and maladministration is established, the final order made in the administrative appeal or judicial review can be set aside under Rule 399(2)(a) of the *Federal Courts Rules*.

- In rare cases, an administrative decision turns on a non-discretionary application of the law to the facts, and the facts and the law are so clear that the result is inevitable, *i.e.*, only one decision, the one made by the administrative decision-maker, could have reasonably been made: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 142; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Maple Lodge Farms v. Canada* (C.F.I.A.), 2017 FCA 45; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 at paras. 53-54. In these "inevitable result" cases, a procedural defect, of which bias is one variety, is of no consequence: see, *e.g.*, *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202; *Grover v. Alberta (Human Rights Comm.)*, 1996 CanLII 20067 (Alta. K.B.) (*Mobil Oil* applied in a bias case); and see also *Histed v. Law Society of Manitoba*, 2006 MBCA 89 at paras. 59-60 to the effect that a finding of bias renders an administrative decision voidable, not void *ab initio* for all purposes. Where a bias allegation is made and the "inevitable result" scenario is live, the Court might wish to decide the "inevitable result" issue first and delay the

proceedings on the bias allegation. If the result was inevitable, the case is over and the bias allegation need not be pursued.

I. Professional obligations

[40] Orders of the Court must be obeyed. Counsel, their clients, and those acting under their supervision must be punctilious in complying with search and production orders. The consequences of non-compliance are just too great. This should be explained to everyone doing the searching and producing.

[41] Misconduct can trigger severe cost consequences. Counsel can suffer serious professional sanctions. Civil liability can be in play. Criminal liability too: see the contempt provisions in Rules 466-472, and in the most serious cases, charges under the *Criminal Code*, R.S.C. 1985, c. C-46 could be laid.

[42] In extreme cases, the Court has the power to allow the appeal or judicial review under Rule 97(*d*); see also *McMeekin v. Canada (Human Resources and Skills Development)*, 2011 FCA 165 at para. 32 and *Abi-Mansour v. Canada (Aboriginal Affairs)*, 2014 FCA 272 at para. 12 (egregious conduct amounting to a serious abuse of process where no other remedy will do).

[43] At a more general level, if an administrative decision-maker and its staff carrying out a search and production order are later found to have participated in a cover-up, life-changing consequences—civil and criminal—will follow.

J. Court management

[44] A judge who makes a search and production order should remain seized with any interpretation or compliance issues and any later follow-up requests for supplementary orders. This prevents a newly assigned judge from spending weeks getting up to speed. It also leads to continuity and consistency in the Court's management of the matter. And parties and their counsel will be more likely to comply with the Court's order and act civilly to each other when they know that if they do otherwise, they will be hauled before the same judge.

K. This case

[45] On June 10, 2025, this Court issued a lawful and final Order for the search and production of documents. Regardless of whether it was issued in accordance with the principles set out in these reasons, it must be followed.

[46] Nothing said in these reasons shall have any bearing on the ultimate issues in this case. The bias allegations will go before the appeal panel with whatever evidence the Fund places before the Court, along with whatever explanations, evidence and submissions the Minister offers. The appeal panel will decide.

[47] Contrary to the Fund's submissions, the Minister's conduct does not warrant this Court granting the appeal. As explained, that remedy is most exceptional. There is no egregious

conduct amounting to a serious abuse of process where no remedies will do. Satisfactory remedies are available here and will be ordered.

[48] On the evidence filed on this motion, the Fund has persuaded me that the Minister has not fully complied with the Court's June 10, 2025 Order. A remedy must be given.

[49] The June 10, 2025 Order required "a supplementary search of [the Canada Revenue Agency's] records, including records of the Charities Directorate" to ensure the disclosure of, among other documents, "any further materials within [the Canada Revenue Agency's] possession and not included in the proposed [certified tribunal record] in respect of the allegation that the Minister was biased," including "relevant material in possession of [the Canada Revenue Agency] relating to communications from and to the public, whether involving the Charities Directorate or the Appeals Branch".

[50] The Minister says it has met this requirement. But the Fund's cross-examination of the Minister's affiant reveals some discrepancies. The affiant admitted that she did not address a supplementary search request to any of the Tax and Charities Appeals Directorate, the Public Affairs Branch, the National Leads Centre, the Commissioner's Office, the Deputy Commissioner's Office, or the Minister's Office. While the June 10, 2025 Order only mentioned the Charities Directorate specifically, it required the disclosure of "any further materials within [the Canada Revenue Agency's] possession" that are relevant to the allegation of bias. Given the nature of the allegations, it is plausible that these departments may possess relevant documents, and the Minister must perform a search to confirm whether this is the case.

[51] The Fund also points to paragraph 71 of its written representations from its prior motion for search and production, in which it refers to an email chain discussing a potential meeting between the Commissioner and another senior employee about the Fund's case. While the Minister directed the participants in the email conversation to search for records of this meeting, it did not make any such request of the Commissioner or the other purported attendee of the meeting. It should now do so.

[52] The Fund submits that the Minister's affiant was unable to properly confirm that the nature and scope of the supplementary search was adequate to ensure that the requirements of the June 10, 2025 Order were met. The Minister asserts that the information the affiant provided is enough and that the further detail the Fund seeks is beyond what the June 10, 2025 Order or Rule 317 requires.

[53] The June 10, 2025 Order required an affidavit "detailing the nature and scope of the supplementary search" that "address[es] who at [the Canada Revenue Agency] conducted the supplementary search and to confirm that relevant material considered by the Charities Directorate in issuing the [Notice of Intention to Revoke] has been included in the [certified tribunal record]".

[54] The Minister is correct that the June 10, 2025 Order did not require the affiant to have intimate knowledge of the underlying appeal nor to personally oversee the search efforts. But the affiant did have to be able to explain the nature of the searches that were undertaken, describe who performed the searches, and be able to confirm that all relevant material has been disclosed.

[55] Although the affiant testified that the Canada Revenue Agency had standard practices for searches, the affiant could not describe these practices, nor confirm they were followed. This falls short of the requirements of the June 10, 2025 Order.

[56] Therefore, the Minister must conduct a further search for certain documents, confirm the adequacy of certain previous searches, and provide a further affidavit on the nature and scope of certain searches. The Fund can cross-examine on that affidavit and, with leave of the Court, can cross-examine on answers to undertakings given during that cross-examination.

[57] Due to the delay to date in this administrative appeal, the timelines for these tasks will be short. Near the end of the tasks, the Court will set a tight schedule for the parties to complete the remaining procedural steps in the appeal.

[58] Details of all the foregoing are set out in the five-page Order contemporaneously issued with these reasons. If the parties need any clarification, they may address the Court by filing an informal letter addressed to the Judicial Administrator. The filing should be marked as urgent.

[59] Costs of this motion are in the cause. I shall remain seized.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MARCH 26, 2026

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