Federal Court  Cour fédérale

Date: 20250225

Docket: T-163-24

Citation: 2025 FC 363

Toronto, Ontario, February 25, 2025

PRESENT: Associate Judge John C. Cotter

BETWEEN:

TRINITY GLOBAL SUPPORT FOUNDATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision concerns a motion to strike brought by the respondent in writing, pursuant to Rule 369 (any reference to a Rule is to those in the *Federal Courts Rules*, SOR/98-106 [*Rules*]) seeking an order striking the notice of application for judicial review, without leave to amend. The motion also seeks an order amending the style of cause to name the Attorney

General of Canada as the respondent, and no submissions were made in opposition to this aspect of the motion.

[2] For the reasons set out below, the motion to strike the notice of application is granted without leave to amend. As a result, the proceeding is dismissed.

[3] As per the notice of application, it is an application for judicial review in respect of:

> This is an application for the judicial review of the December 29, 2023 decision (the "Minister's Decision") made by the Canada Revenue Agency (the "CRA") on behalf of the Minister of National Revenue (the "Minister") denying the Applicant's request for payment of a public services body rebate (the "PSB Rebate") under subsection 259(2) and subsection 259(4.1) of the *Excise Tax Act*, RSC 1985, c E-15 (the "ETA") and its Costs of the Appeal bearing the Court file number 2015-4456(GST)G in accordance with the August 27, 2018 Judgment of the Honourable Deputy Justice Gaston Jorré.
>
> [Emphasis from original not included]

II. Preliminary issue – affidavit evidence

[4] In support of the motion, the respondent filed the affidavit of a legal assistant [Affidavit]. After the introductory paragraph, the Affidavit attaches certain documents as exhibits. In that regard, the Affidavit states:

> 2. Attached as Exhibit "A" is a copy of the Applicant's November 30, 2023 request for payment referred to in paragraph 1 of its Notice of Application, which I retrieved today from the DOJ's records for the purposes of this affidavit.
>
> 3. Attached as Exhibit "B" is a copy of the DOJ's December 29, 2023 communication to the Applicant referred to in paragraph 18 of the Applicant's Notice of Application, which I retrieved today from the DOJ's records for the purposes of this affidavit.

[Emphasis from original not included]

[5] The applicant takes issue with this affidavit evidence arguing in its memorandum of fact and law that it is inadmissible and contrary to Rule 221(1). However, the applicant's issue with this evidence is misplaced. First, this proceeding is an application. Rule 221 is found in Part 4 of the *Rules* pertaining to actions and does not apply, although there is a similar prohibition for applications articulated in the case law and discussed below. Second, and more importantly, as explained below, this evidence is the type of affidavit evidence that is permitted on a motion to strike out a notice of application.

[6] As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review (*JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] at paras 51-52). However, one of the exceptions to this rule is evidence of a document referred to and incorporated by reference into a notice of application, and a "party may file an affidavit merely appending the document, nothing more" (*JP Morgan* at para 54). This is precisely what the Affidavit does. As can be seen from the extract of the notice of application quoted above, it refers to and is in respect of what it asserts is a "December 29, 2023 decision […] made by the Canada Revenue Agency […] denying the Applicant's request for payment […]" [Emphasis added] (see also para 18 of the notice of application). The "request" and the "December 29, 2023 decision" are incorporated by reference into the notice of application. Exhibits "A" and "B" to the Affidavit are those documents. Specifically, Exhibit "A" is the "request", the letter dated November 30, 2023, from applicant's counsel to a CRA Appeals Officer at the Canada Revenue Agency [November 30 Letter].

Exhibit “B” is the alleged “decision”, namely the December 29, 2023, letter from respondent’s counsel [December 29 Letter]. The Affidavit is appropriate evidence on this motion.

III. General principles – motion to strike a notice of application

[7] Although there is no specific rule in the *Rules* providing for a motion to strike a notice of application, the Federal Court has jurisdiction to do so. As stated in *JP Morgan*, the jurisdiction “is founded not in the rules but in the Courts’ plenary jurisdiction to restrain the misuse or abuse of courts’ processes” (at para 48).

[8] The test on a motion to strike a notice of application for judicial review was described as follows by the Federal Court of Appeal in *JP Morgan*:

> [47] The Court will strike a notice of application for judicial review only where it is “so clearly improper as to be bereft of any possibility of success” : *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a “show stopper” or a “knockout punch”—an obvious, fatal flaw striking at the root of this Court’s power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959.

[9] As stated by the Supreme Court of Canada in *Iris Technologies Inc. v Canada*, 2024 SCC 24 [*Iris Technologies*] (see also paragraph 62):

> [26] There is no dispute on the proper test to be applied on a motion to strike in this context. A court seized of a motion to strike assumes the allegations of fact set forth in the application to be true and an application for judicial review will be struck where it is bereft of any possibility of success (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 47). It is understood to be a high

> threshold and will only be granted in the "clearest of cases" (*Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216, at para. 10).

[10] While facts in the notice of application are assumed to be true, legal conclusions or legal characterizations are not facts and are not assumed to be true. By way of example, paragraph 21.a. asserts that the "Revocation Tax Assessment is prima facie incorrect". The characterization of the Revocation Tax Assessment as being "prima facie incorrect" is a conclusion on a legal issue and is not assumed to be true.

[11] As stated in *JP Morgan* "in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application" and the "Court must gain 'a realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form" (at paras 49 and 50).

IV. Facts alleged in the notice of application

[12] The facts alleged in the notice of application leading up to the December 29 Letter include the following:

> 7. The Applicant was a charity registered under the ITA.
>
> […]
>
> 9. The Applicant obtained its charitable status on September 5, 2007, a status which it held until its revocation on May 3, 2013.
>
> […]
>
> 10. On September 17, 2013, the Minister reassessed the Applicant to deny the PSB Rebate for the years ending May

31, 2010, May 31, 2011, May 31, 2012, and February 1, 2013.

11. The Minister denied a significant portion of the Applicant's claim for the PSB Rebate, including its claim in respect of the GST/HST paid on the administrative fees charged to the Foundation by promoters for various services.

12. In total, the Minister denied the Applicant the following amounts of the PSB Rebate:

    a. $21,608.95;

    b. $51,753.63;

    c. $1,009,395.75; and,

    d. $1,182,453.56.

13. On October 13, 2015, the Applicant filed a Notice of Appeal with respect to Notices of Reassessments (the "Reassessments") issued for the years ending on May 31, 2010, May 31, 2011, May 31, 2012, and May 31, 2013.

14. By a Consent to Judgment dated August 20, 2018 (the "Consent"), the Minister conceded that it incorrectly disallowed substantially all of the PSB Rebate to the Applicant, and the following PSBR Rebate amounts were owed to the Applicant:

    a. $21,608.95;

    b. $51,753.63;

    c. $1,009,395.75; and,

    d. $1,139,707.21.

15. In addition, the Minister agreed to pay the Applicant a lump sum of $25,000 for its costs and disbursements in the Appeal.

16. Judgment was issued on August 27th, 2018.

V. Issues

[13] The grounds advanced by the respondent in support of the motion to strike give rise to two primary issues:

a) Does the notice of application express a cognizable administrative law claim?

b) Can the relief sought be granted by the Federal Court?

[14] Before turning to a discussion of these two issues, I note that by a Direction dated November 25, 2024, the parties were provided with an opportunity to serve and file written submissions on whether the decisions of the Supreme Court of Canada in *Iris Technologies Inc. v Canada*, 2024 SCC 24 and *Dow Chemical Canada ULC v Canada*, 2024 SCC 23 had any application to the issues on this motion and if so, how. Any such submissions were to be served and filed by December 16, 2024, with any responding submissions due by January 15, 2025. Neither party filed any submissions.

VI. Issue 1 – Does the notice of application express a cognizable administrative law claim?

[15] As indicated in *JP Morgan* a cognizable administrative law claim must satisfy two requirements (at para 67). It is the first requirement that is at play in the present case. On the first requirement, the following was stated in *JP Morgan*:

> [68] First, the judicial review must be available under the *Federal Courts Act*. There are certain basic prerequisites imposed by sections 18 and 18.1 of the *Federal Courts Act*: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, 426 N.R. 131 (summary of many, but not necessarily all, of the relevant prerequisites).

[16] As explained by Justice Stratas in *Air Canada*, it is not necessary for there to be a "decision" or "order" before an application for judicial review can be brought. The basic question is whether the December 29 Letter "has done anything that triggered any rights on the part of [the applicant] to bring a judicial review" (*Air Canada* at para 26; see also paras 23-29). While it is not necessary for there to be a "decision" for there to be judicial review, it is notable that in the context of this case what the applicant seeks is judicial review of what it characterizes as a "decision". I will, however, consider whether the December 29 Letter is a decision, and the broader question of whether it triggers any rights on the part of the applicant to bring a judicial review.

[17] It is useful to reproduce the content of the December 29 Letter and the November 29 Letter (without the enclosures to those letters).

[18] In the November 30 Letter, the applicant's counsel states:

> We are the representatives of Trinity Global Support Foundation ('Trinity Global").
>
> We have been advised by our client that, to date of this correspondence, Trinity Global has not received its PSB Rebate from the Canada Revenue Agency (the "CRA") for its periods ending on May 31, 2010, May 31, 2011, May 31,2012, and February 1, 2013.
>
> Trinity Global's entitlement to these PSB Rebates was confirmed by Judgment of the Honourable Deputy Justice Gaston Jorre on August 27, 2018, enclosed.
>
> To date, a total of $2,222,465.54 in rebate and $25,000.00 in legal costs remains owing to Trinity Global by the CRA.
>
> We require you to pay these amounts owing to our client within 30 days of this correspondence.

Govern yourself accordingly.

[19] In the December 29 Letter, the respondent's counsel states:

> We write further to your November 30, 2023 demand letter sent to Mr. Daniel Racine, of the Canada Revenue Agency's (the "CRA") Tax and Charities Appeals Directorate.
>
> In its notice of appeal for proceeding 2023-1244(IT)G, Trinity Global Support Foundation (the "Appellant") raises the issue of whether the CRA paid the Public Service Bodies' Rebate (the "Rebate") in accordance with the Tax Court's August 27, 2018 consent judgment in proceeding 2015-4456(GST)G. Whether the Rebate is an asset of the Foundation for the purpose of Part V tax under the *Income Tax Act* is also a justiciable issue currently before the Tax Court. As such, we request that you please send all correspondence regarding this issue to my attention, as counsel of record for the current Tax Court appeal, rather than contacting a representative of our client directly.
>
> With respect to the Foundation's understanding that the Rebate and $25,000.00 in lump sum costs have not been paid out, the Respondent's position is that the CRA reassessed the Foundation in accordance with the terms of the consent judgment on December 7, 2018 (copy of notice of assessment enclosed).
>
> The Respondent's position is that the CRA then applied the Rebate and $25,000.00 in costs to set-off the Foundation's Part V debt under the *Income Tax Act* as follows:
>
> - credit of $25,000.00 in lump sum costs on January 9, 2019;
> - credit of $21,922.26 from the Rebate for the fiscal period ending May 31, 2010 on March 14, 2019;
> - credit of $51,753.63 from the Rebate for the fiscal period ending May 31, 2011 on March 14, 2019;
> - credit of $1,009,395.75 from the Rebate for the fiscal period ending May 31, 2012 on March 14, 2019; and
> - credit of $1,139,707.21 from the Rebate for the fiscal period ending February 1, 2013 on March 14, 2019.

> We trust the above clarifies the Appellant's concerns and the Respondent's position regarding the CRA's payment of these amounts. If you would like to discuss further, please do not hesitate to contact the undersigned.

[20] The December 29 Letter is a response to a demand letter. The real essence of the notice of application is an attempt to seek judicial review of a response to a demand letter that merely sets out the respondent's position by referring to matters that had already transpired.

[21] It is clear from the case law that letters that do not affect legal rights, impose legal obligations, or cause prejudicial effects cannot be the subject of judicial review (*9027-4218 Québec Inc. v Canada (National Revenue)*, 2019 FC 785 at paras 38-41; *Landriault v Canada (Attorney General)*, 2016 FC 664 at paras 21-23; *Chekosky v Canada (Revenue Agency)*, 2019 FC 841 at para 26; *Prince v Canada (National Revenue)*, 2020 FCA 32 at para 21; *McLaughlin v Canada (Attorney General)*, 2023 FC 359 at paras 20-23 and 32; *Philipps v Librarian and Archivist of Canada*, 2006 FC 1378 at para 32).

[22] As explained by Justice Stratas in *Air Canada*:

> [28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> [29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.
>
> [30] The decided cases offer many illustrations of this situation: e.g., *1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, 375 N.R. 368 (an

> official's letter proposing dates for a meeting); *Philipps v. Canada (Librarian and Archivist)*, 2006 FC 1378, [2007] 4 F.C.R. 11 (a courtesy letter written in reply to an application for reconsideration); *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)*, [1998] 2 C.T.C. 176 (F.C.T.D.) (an advance ruling that constitutes nothing more than a non-binding opinion).
>
> [Emphasis added.]

[23] The December 29 Letter is not a decision and does not "affect legal rights, impose legal obligations, or cause prejudicial effects". As noted above, it is a response to the applicant's demand letter, which sets out the respondent's position by referring to matters that had already occurred. It does not trigger any rights to bring a judicial review. As a result, the application is bereft of any possibility of success and should be struck.

VII. Issue 2 - Can the relief sought be granted by the Federal Court?

[24] As a result of the conclusion on the first issue above, it is not necessary to deal with the second ground advanced by the respondent for striking the notice of application.

VIII. Applicant's request for leave to amend

[25] The applicant argues that "any flaw in the Applicant's Notice of Application, if it exists, can be rectified via amendment with leave of this Court" and requests "leave from the Court to amend the Notice of Application, if required, to seek judicial review of the Minister's decision to set-off the August 27th, 2018, Judgment amount owing to the Applicant pursuant to section 18.1 of the FCA" (paras 18 and 43 of the applicant's memorandum of fact and law). The applicant

also attempts to recast the notice of application in this way, without an amendment, in the applicant's memorandum of fact and law. For example, the applicant argues at paragraph 19 that:

> The fact that the Decision referred to in the Respondent's December 29, 2023, Letter was allegedly made nearly 5 years prior to the date of the Letter is irrelevant to the Applicant's Claim unless the Respondent can provide evidence that the Decision was communicated to the Applicant prior to December 29, 2023.

[26] However, the applicant has not sought judicial review of that prior decision. The applicant in its notice of application has sought judicial review of the December 29 Letter.

[27] The flaw with the notice of application is not a drafting deficiency. It is a radical defect that cannot be cured by amendment and the notice of application should be stuck (*Allabadi v Lahaie*, 2024 FC 1814 at para 10). It is not necessary to consider whether the applicant has provided sufficient particulars of the proposed amendment as there is a more fundamental problem with the proposed amendment. The primary problem with the proposed amendment is that it is not seeking to correct an issue with the judicial review that has been sought – namely, judicial review of the December 29 Letter - but rather, to seek judicial review of a different matter or decision - "the Minister's decision to set-off the August 27th, 2018, Judgment amount owing to the Applicant".

IX. Conclusion and Costs

[28] For the reasons set out above, the motion is granted, striking the notice of application, without leave to amend.

[29] Similar to the approach taken by Associate Judge Duchesne (as he then was) in *Suss v Canada*, 2024 FC 137 at para 59, this proceeding is dismissed pursuant to Rule 168. This is because it is not possible for the applicant to continue this application as a result of the notice of application being struck without leave to amend.

[30] Having regard to Rule 400, including the factors articulated in subrule (3), costs of this motion are awarded to the respondent. The factor that is of particular significance in arriving at this conclusion is the result of the motion. Having regard to Tariff B of the *Rules*, costs are fixed in the amount of $1,000.

X. Amendment to style of cause

[31] The motion also seeks an order amending the style of cause to name the Attorney General of Canada as the respondent instead of His Majesty the King. The applicant did not make any submissions on that point. That aspect of the respondent's motion is also granted, effective immediately.

JUDGMENT in T-163-24

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended effective immediately, as reflected above in this Judgment, to name the Attorney General of Canada as the respondent instead of His Majesty the King.

2. The notice of application is struck out, without leave to amend, and the proceeding is dismissed.

3. Costs are awarded to the respondent, fixed in the amount of $1,000, to be paid by the applicant within 30 days.

"John C. Cotter"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-163-24
STYLE OF CAUSE:	TRINITY GLOBAL SUPPORT FOUNDATION v ATTORNEY GENERAL OF CANADA

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

JUDGMENT AND REASONS:	ASSOCIATE JUDGE JOHN C. COTTER
DATED:	FEBRUARY 25, 2025

WRITTEN SUBMISSIONS BY:

Duane R. Milot Max H. Shin	FOR THE APPLICANT
Linsey Rains Mitchell Meraw	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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