

Date: 20080904

Docket: A-385-08

Citation: 2008 FCA 254

Present: RYER J.A.

BETWEEN:

KATHRYN KOSSOW

Applicant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 4, 2008.

REASONS FOR ORDER BY:

RYER J.A.

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REASONS FOR ORDER

RYER J.A.

[1] This is a motion by Kathryn Kossow for an order staying the proceedings in the Tax Court of Canada, in particular the hearing of her appeal in file 2005-1974(IT)G that is scheduled to be heard in that Court on September 8, 2008, pending the determination of her appeal in this Court in file A-385-08.

[2] To succeed in this motion for a stay, Ms. Kossow must satisfy the tripartite test set forth in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Accordingly, Ms. Kossow must show that there is a serious issue to be tried, that she will suffer irreparable harm if the motion is not granted and that the balance of convenience favours the granting of the motion.

Serious Issue to be Tried

[3] In her notice of appeal in file A-385-08, Ms. Kossow raises a number of issues for this Court's consideration in that appeal. The Crown has essentially conceded that at least some of these issues meet the low threshold with respect to whether there is a serious issue to be tried. Having considered the notice of appeal and the other materials that were provided to the Court, in my view, this concession is warranted. Accordingly, this requirement of the *RJR-MacDonald* test has been satisfied. In so concluding, I am expressing no opinion as to the outcome of any of the issues that will be considered in the appeal in file A-385-08.

Irreparable Harm

[4] Jurisprudence in this Court has determined that irreparable harm can be established where the denial of an application for a stay will result in an appeal of the applicant for the stay becoming moot. See *Wyndowe v. Rousseau*, 2006 FCA 422; *Bining v. Canada*, 2003 FCA 286 and *Bisaillon v. Canada* (1999), 251 N.R. 225 (F.C.A.).

[5] Ms. Kossow argues that she will suffer irreparable harm if she is required to proceed with the hearing in the Tax Court of Canada without the benefit of this Court's judgment in her appeal in file A-385-08. In essence, she contends that her appeal right will be lost without a stay of the proceedings in the Tax Court of Canada. Having regard to the circumstances disclosed in the materials that were provided to the Court, I am inclined to agree with this contention and I am satisfied that if the hearing in the Tax Court of Canada proceeds as scheduled, the appeal before this

Court will, at least to some extent, become moot. Accordingly, I am satisfied that the second requirement of the *RJR-MacDonald* test has been established.

Balance of Convenience

[6] Under this portion of the *RJR-MacDonald* test, the Court is required to determine which of the parties would suffer greater harm from the grant or the refusal to grant the stay that has been requested.

[7] According to the Crown, the hearing that will take place in the Tax Court of Canada has the potential to impact as many as 1,500 other taxpayers whose circumstances are similar to those of Ms. Kossow. In these circumstances, I am of the view that it is important that Ms. Kossow should be as well prepared, as reasonably practicable, for that hearing, in fairness to her and all of the other potentially affected taxpayers. In my view, the hardship that may be visited upon the Crown as a result of the delay of the hearing in the Tax Court of Canada will be less than the hardship that may be suffered by Ms. Kossow, and potentially a large number of other taxpayers, if she is required to proceed with that hearing without being as well prepared, as reasonably practicable, for that hearing, as might be the case if she is deprived of her appeal right in this Court in file A-385-08. Accordingly, I am satisfied that the third requirement of the *RJR-MacDonald* test has been established.

Disposition

[8] For the foregoing reasons, the proceedings in the Tax Court of Canada in file 2005-1974(IT)G will be stayed until the final disposition of the appeal in this Court in file A-385-08.

[9] In the circumstances, I am of the view that Ms. Kossow must do her part to ensure an expeditious disposition of the appeal in this Court. Accordingly, the grant of the stay will be subject to the condition that the time within which the agreement as to the contents of the appeal book is required to be filed, in accordance with Rule 343(1) of the *Federal Courts Rules*, is extended to September 30, 2008, and all subsequent steps in the appeal must proceed in strict compliance with the timelines prescribed in the *Federal Courts Rules*. If Ms. Kossow should fail to comply with this condition, it will be open to the Crown to apply to a justice of this Court to quash the stay.

[10] Costs will be in the cause.

“C. Michael Ryer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-385-08

STYLE OF CAUSE: **Kathryn Kossow** Applicant
and
Her Majesty the Queen Respondent

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: RYER J.A.

DATED: September 4, 2008

WRITTEN REPRESENTATIONS BY:

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