

Date: 20081222

Docket: A-196-08

Citation: 2008 FCA 414

Present: RYER J.A.

BETWEEN:

MILLENNIUM CHARITABLE FOUNDATION

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on December 8, 2008.

Order delivered at Ottawa, Ontario, on December 22, 2008.

REASONS FOR ORDER BY:

RYER J.A.

Date: 20081222

Docket: A-196-08

Citation: 2008 FCA 414

Present: RYER J.A.

BETWEEN:

MILLENNIUM CHARITABLE FOUNDATION

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER

[1] On April 2, 2008, the Minister of National Revenue (the “Minister”) gave notice (the “Notice of Intent to Revoke”) to the Millennium Charitable Foundation (the “Foundation”), pursuant to subsection 168(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “ITA”), that the Minister intends to revoke the registration of the Foundation as a registered charity, within the meaning of subsection 248(1) of the ITA (a “registered charity”). In response, the Foundation applied to this Court, pursuant to paragraph 168(2)(b) of the ITA, for an order prohibiting the Minister from publishing the Notice of Intent to Revoke in the *Canada Gazette* until the rights of objection and appeal of the Foundation under the ITA have been fully exercised and exhausted. On June 30, 2008, the Foundation filed a notice of objection to the Notice of Intent to Revoke, pursuant to subsection 168(4) of the ITA (the “Notice of Objection”).

BACKGROUND

[2] The Foundation was registered as a registered charity in 2000 but did not become active until 2003.

[3] The record indicates that, with one minor exception, almost all of the amounts received by the Foundation as donations during the period from 2003 to the end of 2007 arose out of two tax shelter gifting programs: the Insured Giving Program by Insured Donations Inc. and the Global Learning Gifting Initiative by Global Learning Group Inc. Tax shelter identification numbers were provided to persons who made contributions to the Foundation under these programs. The record also indicates that, with one minor exception, all of the donations that have been made by the Foundation were made to the entities that were participants in the two tax shelter gifting programs.

[4] The affidavit of Mr. Thomas A. Koger, the former executive director of, and consultant to, the Foundation states:

34. Given the issue CRA raised regarding receipting tax shelter donations, the Foundation voluntarily ceased receiving donations from donors participating in tax shelter programs in January 2008. The foundation will not use tax shelters to fundraise, pay a tax shelter developer, knowingly gift to another charity receipting tax shelter gifts or issue receipts for gifts from donors participating in tax shelter programs pending the final determination of this issue on the merits in the revocation objection and appeal.

35. The Foundation is not able to commit to any future fundraising action given that it is faced with possible revocation.

The record also indicates that the sole employee of the Foundation, Mr. Koger, has stepped down from his position as executive director of the Foundation and is providing consulting services to the

Foundation, presumably on an “as needed” basis. This evidence indicates that for all practical purposes, the Foundation has ceased to carry on any activities.

THE APPLICATION

[5] The jurisprudence in this Court affirms the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, as the framework within which applications pursuant to paragraph 168(2)(b) of the ITA should be considered (see *International Charity Association Network v. The Minister of National Revenue*, 2008 FCA 114, and *Choson Kallah Fund of Toronto v. Canada (National Revenue)*, 2008 FCA 311). Under this test, a registered charity that brings an application pursuant to that provision must demonstrate that there is a serious issue to be tried, it will suffer irreparable harm if the requested order is not granted, and the balance of convenience favours granting the order.

[6] In paragraph 8 of its memorandum of fact and law, the Foundation states:

8. This Application should be determined in accordance with the *RJR – MacDonald Inc.* principles for interlocutory injunctions, whether:

- (a) there is a serious issue to be determined;
- (b) failure to grant the order is likely to cause irreparable harm; and
- (c) the balance of convenience favours retaining the status quo until the court has disposed of the legal issue.

[Emphasis added.]

[7] Notwithstanding this clear assertion, at the hearing, counsel for the Foundation argued that the application should not be determined under the framework of the tripartite test in *RJR-MacDonald*.

[8] Counsel for the Foundation urged the Court to characterize the Foundation's application as a request for an extension of time to pursue its objection and appeal against the Notice of Intent to Revoke, arguing that granting such an extension of time would be a "reasonable exercise of the Court's discretion" under paragraph 168(2)(b) of the ITA.

[9] Counsel for the Foundation urged the Court to consider the arguments in its memorandum of fact and law, as to why the requisite elements of the tripartite test were met, to be alternative arguments in the event that the Court did not accept its new "extension of time" argument.

[10] In its Notice of Application, dated May 1, 2008, the Foundation did not request an "extension of time". In paragraph 2(a) of that document, the Foundation requested:

An order prohibiting the Respondent from publishing in the Canada Gazette any notice of revocation of the charitable registration of the Millennium Charitable Foundation (the "Foundation") until the Foundation's rights of objection and appeal under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), have been exercised and all appeal processes are concluded.

Additionally, in paragraph 3(d) of the Notice of Application, the Foundation stated as a supporting ground:

- (d) the Foundation has requested that the CRA postpone publication of the revocation notice in the *Canada Gazette* until the Foundation's rights of objection and appeal have been exercised and the appeal process concluded.

[11] Counsel for the Crown did not consent to this new argument by the Foundation and reaffirmed her position that the application before this Court should be considered in the context of the tripartite test in *RJR-MacDonald*.

[12] While I am inclined to the view that this new argument should not have been raised at the hearing, I will nonetheless consider it.

[13] I am unpersuaded that this argument has merit and counsel for the Foundation offered no jurisprudence to support it. In my view, an application under paragraph 168(2)(b) of the ITA is not an application for an “extension of time” within which to pursue objection and appeal rights. In the circumstances under consideration, it is obvious that the Foundation is pursuing its rights in this regard and needs no “extension of time” to do so because there is no legal impediment that prevents it from doing so.

[14] The application made by the Foundation plainly states that the Foundation is requesting an order to prohibit the Minister from taking an action that the Minister is entitled to take, namely, publication of the Notice of Intent to Revoke in the *Canada Gazette* after the expiration of 30 days from the day of mailing of such notice. The effect of such publication will be to revoke the registration of the Foundation as a registered charity. However, the revocation of the present status of the Foundation as a registered charity does not provide any legal impediment to the exercise by the Foundation of its objection and appeal rights in respect of the Notice of Intent to Revoke.

[15] Based on the existing record, I am satisfied that the Foundation's application must be assessed in the context of the tripartite test in *RJR-MacDonald*.

Serious Issue

[16] The Crown has not contested the serious issue to be tried element of the test and I am persuaded that the low threshold with respect to this element has been met.

Irreparable Harm

[17] The irreparable harm element of the tripartite test was described by Sopinka and Cory JJ. at page 341 of *RJR-MacDonald*, as follows:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[18] This Court has described the requirements that must be met to establish irreparable harm. In *Haché v. Canada*, 2006 FCA 424, Desjardins J.A. stated, at paragraph 11:

The moving parties must demonstrate, on a balance of probabilities, that the harm that they would suffer is irreparable: *Halford v. Seed Hawk Inc.*, 2006 FCA 167 at paragraph 12. Mere assertions do not suffice. Irreparable harm cannot be inferred. It must be established by clear and compelling evidence: *A. Lassonde Inc. v. Island Oasis Canada Inc.*, [2001] 2 F.C. 568 at paragraph 20.

[19] The Foundation argues that it will suffer irreparable harm because the revocation of its status as a registered charity will harm its reputation. The Foundation asserts, in paragraph 14 of its memorandum of fact and law, that “its reputation as a legitimate charity in good standing with all governmental authorities is essential to its attracting and retaining donors in the long term”.

[20] While reputational damage may constitute irreparable harm, in the present circumstances, the evidence falls short of establishing that the Foundation has a reputation with any donor group or community other than those persons who have participated in the two tax shelter gifting programs named above. The Foundation has no “track record” of any charitable activities outside of its participation in those programs. Moreover, the affidavit evidence of Mr. Koger that is referred to above can be reasonably taken as indicating that the Foundation has essentially ceased its fundraising operations, at least until its challenge to the Notice of Intent to Revoke has concluded.

[21] The Foundation, in essence, asks me to infer that the revocation of its charitable registration will damage its reputation because the inability to issue income tax receipts for donations after such a revocation will no doubt lead to its receiving fewer donations. While that may well be the case, the

evidence indicates that apart from its participation in the tax shelter gifting programs, with one minor exception, the Foundation did not receive any donations at all. It follows, in my view, that the reputation of the Foundation is that of a charity that participates in tax shelter gifting programs. If the Foundation is successful on the merits of its challenge to the Notice of Intent to Revoke and is able to participate in tax shelter gifting programs in the future, in all likelihood, donors who participated with the Foundation in the tax shelter gifting programs would be willing to participate with the Foundation in future programs of that type, assuming that such donors are satisfied that they will obtain the tax benefits associated with participating in those types of programs. Accordingly, I am not persuaded that any reputational damage that may be suffered by the Foundation as a consequence of a revocation of its status as a registered charity will constitute irreparable harm to it.

[22] The Foundation also argues that its financial position is such that if the revocation of its status as a registered charity is not prohibited, it may not be able to finance the cost of prosecuting its challenge to the Notice of Intent to Revoke. The Foundation contends that this problem is exacerbated by virtue of its potential obligation to dissipate its assets by way of donations or pay the so-called “revocation tax” under Part V of the ITA if the revocation takes place.

[23] In my view, this concern is speculative. In paragraph 16 of its memorandum of fact and law, the Foundation states:

16. If the stay [sic] is published, the Foundation may be financially unable to have the revocation [sic] heard on the merits because all of its remaining funds may become payable to the Minister before the appeal is heard. [Emphasis added.]

Indeed, there may be any number of ways in which the Foundation's future litigation costs could be financed. For example, additional donations might be received, existing funding (which is in the range of \$0.5 million to \$1.7 million) might be utilized to prepay such costs or the Crown might apply its "administrative policy" of extending the deadline for payment of any Part V tax assessed against the Foundation until all rights of objection and appeal against the proposed revocation have been exhausted. Suffice it to say that the present uncertainty with respect to the financing of the Foundation's future litigation costs falls well short of the clear and compelling evidence that is required to establish that the Foundation will suffer irreparable harm if its status as a registered charity is revoked.

[24] Subsequent to the hearing, counsel for the Foundation wrote to the Registrar of the Court submitting additional written arguments for the Court's consideration. Counsel for the Crown objected to the additional written submissions, correctly stating that the Court had not requested them. I agree with counsel for the Crown that the post-hearing submissions are improper and accordingly, those submissions will not be considered.

[25] For these reasons, I conclude that the Foundation has failed to demonstrate, on a balance of probabilities, that it will suffer irreparable harm if the requested order is not granted. As a result of the Foundation's failure to establish this element of the *RJR-MacDonald* test, the application must be dismissed.

Balance of Convenience

[26] The failure of the Foundation to establish the irreparable harm element of the tripartite test makes it unnecessary for me to consider the balance of convenience element of the test.

DISPOSITION

[27] For the foregoing reasons, I am of the view that all of the elements of the *RJR-MacDonald* test have not been established and, therefore, the application should be dismissed with costs.

“C. Michael Ryer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-196-08

STYLE OF CAUSE: Millennium Charitable Foundation
Applicant
v.
Minister of National Revenue
Respondent

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 8, 2008

REASONS FOR ORDER BY: RYER J.A.

DATED: December 22, 2008

APPEARANCES:

Andrew J. Roman
Robert Hayhoe

FOR THE APPLICANT

Joanna Hill

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Miller Thomson LLP
Toronto, Ontario

FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General

FOR THE RESPONDENT