

**Date: 20090331**

**Docket: A-214-08**

**Citation: 2009 FCA 101**

**Present: SHARLOW J.A.**

**BETWEEN:**

**HOLY ALPHA AND OMEGA CHURCH OF TORONTO**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 31, 2009.

**REASONS FOR ORDER BY:**

**SHARLOW J.A.**

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**REASONS FOR ORDER**

**SHARLOW J.A.**

[1] The applicant Holy Alpha and Omega Church of Toronto (HOAC) is seeking an order under paragraph 168(2)(b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) to delay the revocation of its registration as a charity until its objection and any resulting appeals are resolved. Before me is a motion by the respondent (the Crown) for leave under Rule 312 of the *Federal Courts Rules*, SOR/98-106, to file a further affidavit. HOAC opposes the motion.

[2] The decision to grant or deny leave under Rule 312 to file an additional affidavit is a discretionary one. In exercising that discretion, the overriding consideration is whether the interests

of justice will be served by permitting the Crown to file the additional affidavit. Generally, the following questions should be taken into account:

- a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
- b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
- c) Will the evidence cause substantial or serious prejudice to the other party?

(See *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503, at paragraphs 8 and 9.)

[3] HOAC is registered as a charitable organization under the *Income Tax Act*. In April of 2008, HOAC received a notice of intention to revoke its registration. Many reasons are given for the proposed revocation. It is alleged that (1) HOAC failed to maintain adequate books and records, so that the tax auditors were unable to determine the propriety of claimed expenses totalling over \$2.3 million in 2003 and 2004; (2) only a small portion of HOAC's claimed revenues in those years were reflected in bank deposits; (3) HOAC failed to exercise direction and control over funds allegedly sent overseas; and (4) HOAC failed to obtain the required information for donation receipts issued for gifts in kind, or to account for 2,499 missing numbered receipt forms.

[4] HOAC has filed a notice of objection pursuant to subsection 168(4) of the *Income Tax Act*. However, the pending objection does not preclude the Minister from proceeding with the revocation by publishing the notice in the Canada Gazette pursuant to subsection 168(2).

[5] On May 9, 2008, HOAC filed an application in this Court to seek an order under paragraph 168(2)(b) of the *Income Tax Act* staying the publication of the notice in the Canada Gazette until the disposition of its objection and any resulting appeal. Such an application requires the Court to apply the normal test for interlocutory relief from *RJR – Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Thus, the questions to be considered upon the hearing of the application will be (1) whether HOAC’s objection raises a serious issue, (2) whether HOAC will suffer irreparable harm if the stay is not granted, and (3) whether the balance of convenience favours granting or denying the stay (*International Charity Association Network v. Minister of National Revenue*, 2008 FCA 114, *Chosen Kallah Fund of Toronto v. Minister of National Revenue*, 2008 FCA 311).

[6] In support of its application for a stay, HOAC filed the affidavit of Pastor John A. Mensah sworn September 4, 2008 and the affidavit of Lino Mastromonaco sworn September 22, 2008. The Crown filed the affidavit of James Wells affirmed on November 6, 2008 (the first Wells affidavit). Mr. Wells has been cross-examined on his affidavit. The cross-examination was completed on December 5, 2008. HOAC filed the applicant’s record on January 12, 2009. The respondent’s record has not yet been filed.

[7] In the first Wells affidavit, Mr. Wells explains that HOAC came to the attention of the tax authorities as the result of a project initiated to investigate allegations that certain charities and tax preparers in the Toronto area were engaged in the selling of false charitable donation receipts. In cross-examination, Mr. Wells stated that the investigation had produced “no clear indication” that HOAC directly sold donation receipts, but that tax officials had identified tax preparers that were

selling HOAC's receipts to taxpayers. He also stated that the investigation is ongoing. The intended revocation of HOAC's registration as a charity is not based on any allegation that HOAC was involved in the selling of false donation receipts.

[8] The new affidavit the Crown wishes to file is the affidavit of Mr. Wells sworn February 11, 2009 (the second Wells affidavit), with appended documents. The new evidence sought to be adduced comprises the appended documents and the interpretation of those documents as set out in the second Wells affidavit.

[9] Mr. Wells says in the second Wells affidavit that the appended documents were first made available to him on December 18, 2008 (after the completion of his cross-examination). He says that the documents were seized by the police in the course of its investigation of a tax preparer believed to be participating in a tax receipt selling scheme. He also says that the "CRA believes" that these documents comprise evidence that the tax preparer paid HOAC a percentage of the value of the false receipts, and also that certain amounts were paid to Pastor Mensah, thus implicating HOAC in the receipt selling scheme.

[10] I do not doubt that Mr. Wells was not personally aware of the new evidence until December 18, 2008. However, Mr. Wells is not the only tax authority involved in this matter. The question I must consider is whether, with due diligence, the Crown could have obtained the new evidence prior to filing the first Wells affidavit. That question is impossible to answer because the second Wells affidavit does not say when the documents comprising the new evidence were seized. The

onus of establishing the answer to that question is on the Crown, and it has not been discharged.

That is a sufficient basis for denying this motion, but there is a further reason.

[11] The Crown argues that the new evidence could be relevant to the question of whether the balance of convenience favours granting or denying the stay. I agree that if the new evidence is capable of establishing that HOAC is involved in a fraudulent receipt selling scheme, it would assist the position of the Crown on that issue. Perhaps the documents might be interpreted as proposed by the Crown, but they may also be understood to be consistent with the argument of HOAC that some of its receipts were taken without authority by a person who is no longer involved with HOAC. The second Wells affidavit does not explain how the tax authorities concluded from their analysis of the documents that they comprise evidence of HOAC's participation in a fraudulent receipt selling scheme. On balance, I am not persuaded that the second Wells affidavit is sufficiently probative to assist the Court in determining the application.

[12] For these reasons, the motion of the Crown to file a further affidavit will be dismissed, and a new deadline will be established for the filing of the respondent's record. HOAC is entitled to its costs of this motion.

“K. Sharlow”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-214-08

**STYLE OF CAUSE:** Holy Alpha and Omega Church of  
Toronto v. Attorney General of  
Canada

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** SHARLOW J.A.

**DATED:** March 31, 2009

**WRITTEN REPRESENTATIONS BY:**

Natalie Worsfold

FOR THE APPLICANT

Joanna Hill

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Barrister & Solicitor  
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FOR THE APPLICANT

John H. Sims, Q.C.  
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FOR THE RESPONDENT