

Federal Court of Appeal



Cour d'appel fédérale

Date: 20221019

Docket: A-167-22

Citation: 2022 FCA 176

Present: RENNIE J.A.

BETWEEN:

FORTIUS FOUNDATION

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 19, 2022.

REASONS FOR ORDER BY:

RENNIE J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20221019

Docket: A-167-22

Citation: 2022 FCA 176

Present: RENNIE J.A.

BETWEEN:

FORTIUS FOUNDATION

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER

RENNIE J.A.

[1] The applicant, Fortius, is a registered charity under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA).

[2] The Canada Revenue Agency (CRA) determined that the applicant failed to comply with the requirements for continued registration as a charity under the ITA. The Minister of National Revenue (the Minister) consequently advised the applicant, through the Director General of the

Charities Directorate, of her intention to publish a notice revoking Fortius's registration in the *Canada Gazette* pursuant to paragraph 168(2)(b) of the ITA.

[3] In response, Fortius commenced two proceedings before this Court to prevent the Minister from implementing her decision to revoke its charitable status.

[4] The first is an application for an order under paragraph 168(2)(b) of the ITA precluding the Minister from publishing the notice of revocation until Fortius has had the opportunity to pursue the objection process available under subsection 168(4) of the ITA, as well as any possible appeal of the Minister's decision to this Court under subsection 172(3) of the ITA (the application). The second proceeding is a motion for interim relief under Rules 372 and 373 of the *Federal Courts Rules*, S.O.R./98-106, seeking to enjoin the Minister from publishing the notice of its revocation in the *Canada Gazette* until the application is decided.

[5] The Minister agreed to postpone publication of the notice of revocation until the motion for interim relief is determined. This order and its reasons address the motion.

[6] In broad terms, Fortius asserts that it will suffer irreparable harm if the Minister is allowed to proceed to publication. First, Fortius says that publication of the notice of revocation would effectively render the application moot. Next, Fortius says that publication of the notice of revocation would prematurely eliminate the statutory advantages that it enjoys as a registered charity, and any subsequent success on the application could not remedy the resulting damages. Finally, Fortius asserts that publication of the notice will cause the flow of contributions and

donations to its organization to immediately cease, which would undermine Fortius's ability to fund the legal costs of its statutory rights of objection and appeal of the Minister's decision to revoke its registered charity status.

[7] I have concluded that these arguments are without merit and that the evidence before the Court falls short of establishing irreparable harm warranting interim relief.

I. Background

[8] The CRA conducted an audit of Fortius's operations for the period from October 1, 2014 to September 30, 2016. The CRA concluded that several aspects of Fortius's operations did not comply with the statutory requirements for its continued registration:

- a) Fortius was not constituted and operated exclusively for charitable purposes;
- b) Fortius failed to devote resources to charitable activities carried on by Fortius itself;
- c) Fortius failed to meet the disbursement quota;
- d) Fortius failed to maintain adequate books and records;
- e) Fortius failed to issue donation receipts in accordance with the ITA and/or the *Income Tax Regulations*, C.R.C., c. 945 (Regulations); and
- f) Fortius failed to file an information return as and when required by the ITA and/or the Regulations.

[9] If a charity ceases to comply with any of the requirements governing registration, the Minister may give notice to the charity that she proposes to revoke its registration under subsection 168(1) of the ITA. Thirty days following the mailing date of that notice, the Minister may publish a copy of the notice in the *Canada Gazette* under paragraph 168(2)(b) of the ITA,

notwithstanding a charity's objection and appeal rights. Paragraph 168(2)(b) establishes that revocation is effective as of the date the notice is published.

[10] On July 21, 2022, the Charities Directorate sent Fortius a notice of intention to revoke its registration as a charity. The notice informed Fortius that its registration would be immediately revoked 30 days after the date of the notice, on August 20, 2022.

[11] On August 18, 2022, Fortius filed the application for an injunction and the motion for interim relief.

[12] On August 19, 2022, the Minister agreed not to publish the revocation notice in the *Canada Gazette* until 30 days after the Court has issued its decision on the motion.

[13] Fortius has yet to file an objection to the Minister's notice of intention to revoke. The deadline for Fortius to do so is October 19, 2022, which is 90 days from the notice's mailing date as prescribed by subsection 168(4) of the ITA.

II. Issue

[14] The issue before me is whether Fortius has shown that it would be just and equitable for the Court to stay the Minister's publication of the notice revoking Fortius's registration until the Application has been determined, based on the well-established tripartite test (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824 (*Google*) and *RJR-MacDonald Inc.*

v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 (*RJR-MacDonald*)).

III. Analysis

[15] The *Google/RJR-MacDonald* test applies to both applications to restrain the publication of revocation notices as well as to motions for interim stays (*Ahlul-Bayt Centre, Ottawa v. Canada (National Revenue)*, 2018 FCA 61, 2018 D.T.C. 5037 at para. 8 (*Ahlul-Bayt*)). Consequently, in both the application and the motion, the applicant must satisfy the same three requirements: that there is a serious issue to be tried, that publication of the notice will cause Fortius irreparable harm, and that the balance of convenience favours Fortius and not the Minister. Assessing these criteria is context-specific and requires the Court to determine whether granting the relief is “just and equitable in all of the circumstances of the case” (*Google* at para. 25). The Court must consider each part of the tripartite test based upon the evidentiary record before it (*Ahlul-Bayt* at para. 12).

[16] The Minister concedes that there is a serious issue to be tried. She was correct to do so. The threshold for establishing a serious issue is a low one (*RJR-MacDonald* at 337). To satisfy this test, the moving party must demonstrate only that the objection is “neither vexatious nor frivolous” based on a “preliminary assessment of the merits of the case” (*RJR-MacDonald* at 337).

[17] The Minister contends, nevertheless, that Fortius has not proven that it would suffer irreparable harm if the Court does not grant the motion. The Minister also contends that the balance of convenience favors maintaining the *status quo*.

A. *Irreparable Harm*

[18] To prove that it would suffer irreparable harm, the applicant must establish, on a balance of probabilities, that it will suffer harm of a type or nature that “cannot be quantified in monetary terms or cannot otherwise be cured” (*Ahlul-Bayt* at para. 10). The Court may consider the interests of those who are dependent on the charity in this assessment (*Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255, 440 N.R. 232 at para. 34 (*Glooscap*)). Only clear and compelling evidence can satisfy this branch of the *RJR-MacDonald* test, as irreparable harm cannot be inferred; this branch requires “evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless the stay is granted” (*Haché v. Canada*, 2006 FCA 424, [2006] F.C.J. No. 1886 (QL) at para. 11; *Glooscap* at para. 31). That said, the evidentiary burden on an applicant seeking interim relief, such as the case here, is no different – it remains the balance of probabilities.

[19] Fortius raises three arguments that it says establishes the irreparable harm it will suffer upon publication of the notice to revoke.

[20] First, Fortius contends that if this interim stay is not granted, the application becomes moot, and that this result in and of itself is evidence of irreparable harm. This argument asks the Court to determine whether irreparable harm is automatically proven where an applicant has

filed an application seeking deferral of the Minister's ability to publish the notice of revocation until the objection and appeals process has completed, along with an interim motion seeking to enjoin the Minister from publishing until the application has been adjudicated. I conclude that such circumstances do not prove irreparable harm.

[21] The application seeks a stay of publication pursuant to paragraph 168(2)(b) of the ITA until such time as the objections and appeals process is completed. It seeks, in its claim for relief,

... an order extending the period of time that must expire before the Minister of National Revenue is permitted to publish in the Canada Gazette a copy of the notice proposing to revoke the applicant's charitable registration until such time as the applicant has completed the objection process under subsection 168(4) of the [ITA], and if necessary, an appeal to the Court under subsection 172(3) of the [ITA].

[22] The motion seeks to enjoin the Minister from publishing until such time as the application has been adjudicated:

An interim order ... that the Minister of National Revenue be enjoined from publishing in the Canada Gazette a copy of the notice proposing to revoke the applicant's charitable registration until such time as this Court has determined the applicant's application under section 168(2)(b) of the [ITA].

[23] I accept the Minister's argument that the only difference between the relief sought in the motion and the application is the "end date" of the prohibition to publish. The end date for the stay sought in the motion is the date the application is determined. The end date for the stay sought in the application is the date the appeals process is finished. The relief sought in the two processes is merely the same stay covering different periods along one timeline, with no material difference in content. Put otherwise, there is no substantive difference between the relief sought on the motion and the relief sought on the application.

[24] Further, the legal test and criteria governing the motion and the application are identical. Whether or not the request to stay publication of the notice is made in an application or in a motion, the *RJR-MacDonald* test will apply (*Ahlul-Bayt* at para. 8). Fortius has the same legal and evidentiary onus of satisfying the Court that the *RJR-MacDonald* factors are met in both the motion and the application.

[25] Turning more specifically to the record before me, the motion relies on the affidavit of one of Fortius's directors affirmed on August 17, 2022. The application states that it will also only rely on this affidavit. As the motion and the application rely on the same evidence, the Court cannot find that Fortius suffers any prejudice by being deprived of the opportunity to adduce evidence in support of its argument in the application. Fortius is, on its own evidence, in no better position to advance evidence on the application than it is currently on the motion. All the evidence it deems necessary to support the motion will be in the application. It has presumably already put its best case forward.

[26] Publication of the notice of revocation also does not foreclose Fortius's statutory appeal rights. The ITA permits the Minister to revoke charitable registration "at this time, subject, of course, to later challenge" (*Glooscap* at para. 52). An applicant has the right to file an objection with the Minister in response to her decision to revoke the charity's registration, and if the Minister confirms her decision, the applicant can then file an appeal in this Court pursuant to subsection 172(3) of the ITA. At that stage, the Court will hear the appeal on its merits. The outcome on this motion does not therefore eliminate any opportunity Fortius has under the ITA to challenge the Minister's decision to revoke its registration as a charity.

[27] Finally, to accept the assertion that a dismissal of a motion for interim relief renders the application moot would result in a predetermined outcome in all analogous cases; in every case, a registered charity facing revocation of its charity status could effectively frustrate the Minister's ability to employ the statutory powers under subsection 168(2) of the ITA by filing both an application seeking a long-term stay of the revocation and a motion seeking an interim stay.

[28] Second, Fortius also asserts that its loss of the statutory benefits conferred upon registered charities is itself evidence of irreparable harm. I disagree.

[29] This Court has rejected general assertions of irreparable harm in the context of charitable status revocation on the basis that, in every case, a charity could say that its work would be seriously impaired by the Minister's revocation and any consequential reduction in donations (*Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, 445 N.R. 360 at para. 14):

Accepting [such general assertions] as sufficient evidence of irreparable harm would unduly undercut the power Parliament has given to the Minister to protect the public interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal.

[30] A parallel may be drawn between Fortius's argument about its loss of statutory benefits to arguments about the harm inherent in an individual's loss of immigration status. This Court has rejected arguments that family separation and emotional hardship arising from removal from Canada constitute irreparable harm, as they are usual consequences attendant on removal (*Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, 330 N.R. 300 at para. 16; *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81,

[2010] 2 F.C.R. 311 at para. 69). Such usual consequences, while sometimes heartbreaking, do not give rise to “some prejudice beyond that which is inherent in the notion of the [lost status] itself” and do not therefore establish irreparable harm resulting from a dismissal of the applicant’s claim (*Melo v. Canada (Minister of Citizenship and Immigration)*, 188 F.T.R. 39, 2000 CanLII 15140 (FC) at para. 21).

[31] Absent evidence of unique or specific harm or damage, irreparable harm does not encompass the ordinary consequences that flow from an entity losing its registered charity status (such as loss of tax-exempt status, ineligibility to issue donation receipts, and payment of a revocation tax pursuant to section 188 of the ITA). To accept the argument that a reduction in donations, for example, invariably satisfies the second branch of the *RJR-MacDonald* test in all circumstances would “effectively eliminate that element of the test in relation to each and every application made pursuant to paragraph 168(2)(b) of the ITA” (*Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265, [2010] 1 C.T.C. 161 at para. 22 (*Holy Alpha*)).

[32] The determination whether irreparable harm has been established takes place within the parameters or guardrails of certain principles; those include the rejection of evidence that is based on speculation or that is not sufficiently compelling to meet the evidentiary burden. As discussed, a further constraint is that the normal, foreseeable consequences associated with the exercise of the statutory powers granted the Minister do not, in and of themselves, give rise to irreparable harm.

[33] The existence of irreparable harm is a highly fact specific exercise; each case must be considered in light of the evidence and context. For this reason, the Court requires specific, direct evidence demonstrating the damage to the charity's operations that would be caused by the Minister's publication of the notice. Evidence showing that a reduction in donations would entirely frustrate a charity's ability to fulfill specific obligations, for example, could meet this threshold (*Holy Alpha* at para. 21). Similarly, in *Cheder Chabad v. Canada (National Revenue)*, 2013 FCA 196 at paras. 31, 27 and 30, irreparable harm was established where the evidence showed that the majority of students attending the applicant's school relied on tuition subsidies, generated from the charity's fundraising efforts, to afford their schooling.

[34] Third, Fortius asserts that revocation of its charity status would result in an inability to raise money from donors to fund its legal expenses and an obligation to pay a revocation tax under subsection 188(1.1) of the ITA, which together would deprive it of the financial resources it requires to exercise its statutory rights of objection and appeal. This argument is contradicted by the evidence before the Court.

[35] As the Minister points out, in a November 15, 2021 letter to the CRA, one of Fortius's directors asserted that "there are enough funds to fight this issue in the Tax Court of Canada should CRA proceed" and that Fortius's assets, valued at "less than \$1 million", generate income that "[Fortius] may be required to use ... to retain a law firm to make further complex technical legal representations and to represent [Fortius] in the Federal Court of Appeal and/or the Tax Court of Canada."

[36] Even if the Court accepted that a charity could prove irreparable harm on the basis of a general reduction in donations, Fortius's T3010 filings for 2014 through to 2021 demonstrate that it in fact received negligible funding from receipted donations. The evidence demonstrates that receipted donations comprised between 0.05% and 1.5% of the overall declared revenue received by Fortius between 2015 and 2021.

[37] Given the insignificance of receipted donations relative to its overall revenues, Fortius cannot contend that being deprived of the ability to issue donation receipts would irreparably harm its ability to fund recourse to its appeal rights and associated legal expenses.

B. *Balance of Convenience*

[38] Although Fortius's failure to establish irreparable harm is sufficient to dismiss this motion, I will comment nonetheless on the final consideration of the *RJR MacDonald* test – the balance of convenience. The balance weighs in favour of the Minister.

[39] The public has a legitimate interest in the exercise of CRA's statutory mandate to enforce the obligations applicable to registered charities under the ITA. This public interest attracts significant weight in the analysis of the balance of convenience on a motion for interim relief in this context (*Glooscap* at para. 53). The CRA's enforcement of these obligations protects both the public's confidence in registered charities as well as potential donors (*International Charity Association Network v. The Queen*, 2008 TCC 3, [2008] 4 C.T.C. 2064 at paras. 76-77).

[40] Public interest considerations take on greater resonance where the charity has enjoyed sizeable monetary benefits due to its registration as a charity (*Glooscap* at para. 53). The Minister asserts that the amounts in issue are sizeable, as Fortius sustained benefits of \$2,379,884 and \$2,656,657 during the two fiscal periods included in the CRA's audit of its operations. I agree that the extent of these benefits favours permitting the Minister to revoke Fortius's registration as a charity prior to the determination of the application.

[41] The weight that the Court will give to public interest considerations is increased where the charity has previously declined to respond to prior warnings regarding non-compliance with its statutory obligations (*Glooscap* at para. 53). In this case, the Minister asserts that Fortius breached commitments previously made to CRA concerning how it would operate, as evidenced in a compliance agreement. Whether Fortius, in fact, breached the terms of the compliance agreement and the associated requirements of the ITA is a question for the objection and appeal process to determine. At this stage, however, the assertion that Fortius has breached the terms of the agreement has not been sufficiently refuted on the evidence.

[42] Fortius puts considerable emphasis on its assertion that the Minister's review of its practices were prompted by a disaffected third party, who allegedly embarked on a campaign of letter writing to spread rumours and false information about its operations. This argument is not relevant to this proceeding.

[43] The reasons for the Minister's decision to revoke charitable registration are open to review on appeal pursuant to subsection 172(3) of the ITA. In the event that Fortius pursues the

appeals process, Fortius can then adduce evidence and argue that the Minister's decision was influenced by a third party "citizen journalist" and that this bears on the legality of the decision to revoke. At this stage however, those allegations are irrelevant to both the irreparable harm and balance of convenience considerations of the *RJR-MacDonald* test. These considerations focus on the motion, not on the Minister's decision-making process. In any event, the Minister may often act on third party information or tips. Regardless of the motive of the informant, the question for the Minister remained one of whether Fortius was entitled, as a matter of law, to continued registration as a charity under the ITA.

IV. Conclusion

[44] For the reasons above, I would dismiss the motion for interim relief.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-167-22

STYLE OF CAUSE: FORTIUS FOUNDATION v.
MINISTER OF NATIONAL
REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

DATED: OCTOBER 19, 2022

WRITTEN REPRESENTATIONS BY:

Greg J. Allen FOR THE APPLICANT

Lynn Burch FOR THE RESPONDENT
Selena Sit
Yianni Pappas-Acreman

SOLICITORS OF RECORD:

Allen / McMillan Litigation Counsel FOR THE APPLICANT
Vancouver, British Columbia

A. François Daigle FOR THE RESPONDENT
Deputy Attorney General of Canada