Federal Court of Appeal  Cour d'appel fédérale

Date: 20130823

Docket: A-276-13

Citation: 2013 FCA 196

Present: **MAINVILLE J.A.**

BETWEEN:

CHEDER CHABAD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard by telephone conference on August 21, 2013.

Order delivered at Ottawa, Ontario, on August 23, 2013.

REASONS FOR ORDER BY: MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] The applicant is a registered charity under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("Act"). The Canada Revenue Agency ("CRA") determined that the applicant failed to comply with the requirements incumbent on a registered charity, and as a result, the respondent Minister of National Revenue ("Minister"), through her delegate the Director General of the Charities Directorate, proposed on July 5, 2013, pursuant to subsection 168(1) of the Act, to revoke the registration of the applicant as a charity under the Act. The applicant now seeks an order prohibiting the Minister from giving effect to that proposal by publishing a copy of the notice in the *Canada Gazette* pursuant to subsection 168(2) of the Act.

[2] On August 16, 2013, Trudel J.A. issued an interim order prohibiting the Minister from publishing the notice of revocation pending the determination of the applicant's motion. Both the applicant and the respondent Minister have now submitted their respective motion records, and I have now heard the representations from counsel by way of a telephone conference held on August 21, 2013.

Context and background

[3] The applicant operates a school for boys in the Toronto area. Approximately 180 boys from different areas in Ontario, and some from Alberta, attend the school. The school teaches both secular studies and Jewish studies of the Orthodox Chabad – Lubavitch tradition. The applicant claims to be the only school for boys in the Toronto area that provides Chabad – Lubavitch religious instruction.

[4] Based on the affidavit evidence submitted by the applicant, over 80% of the students at the school receive a partial or full subsidy to cover their tuition costs, and the funds required to subsidize the tuition come from the fundraising activities of the applicant in its capacity as a charity registered under the Act.

[5] The CRA audited the operations of the applicant for the period from July 2007 to June 2009. In a letter dated October 25, 2011, the CRA identified numerous specific areas of non-compliance which it says were uncovered by the audit. One notable area of alleged non-compliance is with respect to a substantial number of gifts in kind, ranging from artwork to jewellery and timeshares,

which the applicant was unable to substantiate the existence, the value or the use to the satisfaction of the auditor, but for which it issued donation receipts over a number of years. The amounts at issue are substantial, since the total value of all such assets was reported to be over $10 million.

[6] A series of correspondence from the applicant to the CRA ensued as a result of this audit letter, in which the applicant denied any wrongdoing. It notably attributed the discrepancies in the values indicated in the donation receipts for the gifts in kind and the actual realizable value of the assets to devaluation, physical losses resulting from flooding of its various storage facilities, and difficulties obtaining the full value of the assets through sales and silent auctions.

[7] The applicant's representations did not convince the Minister. As mentioned above, on July 5, 2013 the Minister's representative, on the basis of the audit findings, issued a notice of a proposal to revoke the applicant's registration as a charity under the Act.

[8] On July 31, 2013 the applicant filed an objection pursuant to subsection 168(4) of the Act. After unsuccessfully attempting to convince the Minister to delay the publication of the notice until its objection has been dealt with, on August 15, 2013 the applicant submitted to this Court (a) an application for judicial review with respect to the refusal of the Minister to postpone the publication, and (b) a notice of motion seeking the same relief.

Procedural matter

[9] The applicant has proceeded by way of a judicial review application with respect to the refusal of the Minister to postpone the publication of the notice of proposal to revoke, and it has also submitted a motion for this purpose within the framework of this judicial review application.

[10] The appropriate procedure is not by way of a judicial review application, but rather by way of an application under paragraph 300(*b*) of the *Federal Courts Rules*, SOR/98-106 ("Rules") brought under paragraph 168(2)(*b*) of the Act: *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 62, 375 N.R. 383 at para. 7.

[11] Under section 57 of the Rules, an originating document is not to be set aside only on the ground that a different originating document should have been used. Moreover, under section 55 of the Rules, in special circumstances, a rule may be varied or dispensed with. In addition, the respondent Minister suffers no prejudice from the procedural irregularity. I consequently intend to deal with the motion on its merits as if it were an application under rule 300(*b*) of the Rules brought under paragraph 168(2)(*b*) of the Act.

The applicable test

[12] It is well established that the applicable test, under paragraph 168(2)(*b*) of the Act, to extend the period during which the Minister is precluded from publishing a notice of revocation in the *Canada Gazette* is that set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R 311 ("*RJR-MacDonald*") for the granting of a stay or an injunction: *International Charity*

Association Network v. Minister of National Revenue, 2008 FCA 114, 375 N.R. 387 at para. 5; *Millennium Charitable Foundation v. Minister of National Revenue*, 2008 FCA 414, 384 N.R. 119 at paras. 5 to 15.

[13] Adapting the test set out in *RJR-MacDonald* to the circumstances of paragraph 168(2)(*b*) of the Act, I would formulate the test as follows:

i. First, a preliminary assessment must be made of the merits of the objection made or proposed to be made under subsection 168(4) of the Act to ensure that there is a serious issue to be determined. The threshold here is a low one. It suffices that the objection is not frivolous or vexatious. A prolonged examination of the merits of the objection is neither necessary nor desirable.

ii. Second, it must be determined whether the party seeking the extension will suffer irreparable harm if it were refused. The only issue to be decided at this stage is whether the refusal to grant the extension could so adversely affect the applicant's interests that the harm could not be remedied in the event that the objection or the subsequent appeal to this Court is successful. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured, usually because the applicant cannot normally collect damages from the Minister resulting from the revocation of its registration under the Act.

iii. Third, an assessment must be made as to whether the applicant would suffer greater harm from the granting or refusal of the extension than the Minister. The factors which may be considered in the assessment of this "balance of convenience" test are numerous and vary with each case. Public interest considerations may be considered within this balancing exercise.

Serious Issue

[14] In this case, the respondent Minister accepts that there is a serious issue to be determined resulting from the applicant's notice of objection under paragraph 168(4) of the Act, and I am persuaded that the low threshold with respect to this element of the test has been met.

Irreparable Harm

[15] The thrust of the Minister's objection to the extension is based on the second component of the test concerning irreparable harm. Since the applicant provided little financial information regarding its operations, current financial situation and future funding requirements, the Minister submits that the applicant has failed to demonstrate that the revocation of its registration will result, as it alleges, in the cancellation of the upcoming school year and to the dismissal of teachers and staff.

[16] The Minister relies on *Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 for the proposition that general assertions of harm are insufficient to establish irreparable harm. The Minister also relies on the 2012 Registered Charity Information Return of the applicant in which it reported over $10 million in assets, and operating expenditures of just over $1.6 million. As a result, the information the applicant has reported in its own returns suggests that it has the means to continue operating pending the outcome of its objection and its eventual appeal to this Court.

[17] At the hearing, counsel for the applicant acknowledged that it reported substantial assets that, if liquidated, could cover the costs of its operations pending the outcome of its objection and of

an eventual appeal to this Court. However, these assets are in kind, and the applicant would need sufficient time to liquidate them in an orderly fashion. Counsel consequently informed the Court that the applicant was no longer seeking the prohibition of publication of the notice until its rights of objection and appeal were exhausted, but was now rather seeking an extension of six months to proceed with an orderly liquidation of its assets in kind.

[18] The applicant also relies heavily on the impact the revocation would have on its ability to issue donation receipts for its tuition fees. As set out in the audit letter from the CRA dated October 25, 2011, although tuition payments do not normally qualify as gifts, it has nevertheless been the CRA's position to treat as gifts the portion of tuition fees from schools that operate in the dual capacity of providing both secular and religious education, and that may be attributable to the religious education component of the curriculum. The methods for doing so are set out in CRA Circular IC75-23 *Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools*. If the applicant loses the ability to issue such receipts, the costs of tuition will necessarily be greater for the parents since they will no longer benefit from any resulting tax relief. This may impede access to the school for some students.

[19] The applicant thus submits that without an orderly liquidation of its assets and the ability to collect tuition fees and to issue donation receipts for the religious instruction component of its curriculum, the school may be left without sufficient liquid funds to operate this year, resulting in its closure or in serious disruption of its activities affecting both the students and staff of the school.

[20] Counsel for the respondent Minister recognizes that the after-tax costs of the tuition would be affected by the revocation. However, counsel submits that in light of the substantial assets at the disposal of the applicant, it could elect to compensate the affected parents through additional tuition subsidies.

[21] As stated above, and as noted by Sopinka and Cory JJ. In *RJR-MacDonald* at p. 341, "the notion of irreparable harm is closely tied to the remedy of damages". Even if the applicant is successful in its objection under paragraph 168(4) of the Act or in an eventual subsequent appeal to our Court under subsection 172(3) of the Act, barring exceptional circumstances, it would not be entitled by law to claim damages from the Minister as a result of the prior revocation of its registration as a charity.

[22] The situation here is analogous to some extent to that of stays and injunctions in cases involving the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 ("*Charter*"). Again in *RJR-MacDonald* at p. 341, Sopinka and Cory JJ. noted that the assessment of irreparable harm involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application, since damages are not the primary remedy in *Charter* cases. This led the learned judges to conclude (at p. 342 of *RJR-MacDonald*) that in light of the relatively low threshold of the first component of the test relating to a serious issue, and the difficulties in applying the second component of the test involving irreparable harm where damages are not normally available, that many proceedings will

be determined when considering the third component of the test concerning the balance of convenience.

[23] Since this state of affairs is essentially the same with respect to an application under paragraph 168(2)(*b*) of the Act, it is my considered opinion that the same approach, which emphasizes the balance of convenience component of the test, should be applied to decide many such applications.

[24] This approach does not negate the component of the test respecting irreparable harm. The applicant must still clearly demonstrate that it will suffer irreparable harm. However, in light of the fact that an applicant may not seek damages against the Minister, the significance of that component must be assessed accordingly. Likewise, the peculiarities of the charitable activities sector and of charitable organizations generally, which are not based on profit or gain, must also be taken into account.

[25] In this regard, I note that this Court has repeatedly stated that the loss of the ability to issue tax receipts for gifts and the reduction in the ability of a charity to transfer funds to qualified donnees is not *per se* proof of irremediable harm: *Choson Kallah Fund of Toronto v. Minister of National Revenue*, 2008 FCA 311, 383 N.R. 196 at paras. 6 to 10. I agree. Charitable donations may be directed by donors to other charitable organizations, and the charitable work of an affected charitable organization may in many instances be assumed by another charity. Irreparable harm in the context of an application under paragraph 168(2)(*b*) of the Act requires more.

[26] Addressing first the evidentiary issue raised by the respondent based on *Gateway City Church v. Minister of National Revenue*, above, that decision simply reiterates the well-known and long established principle that irreparable harm cannot be inferred, but must rather be established by clear and compelling evidence: *Imperial Chemical Industries PLC v. Apotex Inc. (C.A.)*, [1990] 1 F.C. 221 at p. 228; *A. Lassonde Inc. v. Island Oasis Canada Inc. (C.A.)*, [2001] 2 F.C. 568 at paras. 2, 19-20; *Haché v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 424 at para. 11; *Choson Kallah Fund of Toronto v. Minister of National Revenue*, above at para. 5.

[27] That being said, each case turns on its own facts as set out in the evidentiary record submitted to the Court. In this case, there is ample evidence in the record establishing that the operations of the applicant's school are principally funded through tuition fees from parents and funds generated from charitable gifts, including more particularly gifts in kind. This is referred to throughout the correspondence between the CRA and the applicant. Moreover, this is specifically set out in the affidavit of Rabbi Yona Shur, which confirms that over 80% of the concerned students receive a partial or full subsidy for their tuition costs through funds generated from the fundraising efforts of the applicant in its capacity as a registered charity. The respondent has not challenged this affidavit.

[28] Moreover, the affidavit of Chanoch Nelekn, a parent of a student attending the school, confirms that his child's tuition is subsidized by funds raised by the school, and that if such subsidies were not provided he would not be able to afford to have his son attend the school.

[29] Turning to the respondent's submissions concerning the assets, I recognize that the applicant has reported substantial assets. However, it is not challenged that these are for the most part in the form of assets in kind. Moreover, the entire record before me shows that the heart of the dispute between the CRA and the applicant revolves around the difficulties associated with the liquidation of similar assets in kind at reported market values. In these circumstances, the applicant has convinced me that it will be difficult for it, in the immediate short term, to secure the cash required to operate the school this fall from the liquidation or pledge of its assets in kind.

[30] This cash-flow problem will be compounded by the fact that the parents of the students would be precluded from obtaining receipts with respect to the religious education component of the tuition fees, as allowed under the CRA Circular IC75-23 *Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools*. Though there may be a dispute between the CRA and the applicant as to the methodology used to calculate this component, the revocation of the registration would preclude disputing the matter through notices of objection and in the Tax Court of Canada. The parents have obviously already made their choice to send their sons to this school this fall, and any change in the financial arrangements associated with the tuition fees, including the receipt related to the religious education component, would result in unexpected financial hardship for at least some parents with respect to the tuition for the fall session.

[31] Taking into account the circumstances of this case and after carefully considering all the evidence submitted, the applicant has demonstrated, on a balance of probabilities, that the revocation of its registration will cause irreparable harm.

Balance of convenience

[32] The concept of inconvenience should be widely construed in applications under paragraph 168(2)(*b*) of the Act. The Canadian public has a legitimate interest in the integrity of the charitable sector and in ensuring that the important advantages conferred under the Act at great expense to the taxpayers are properly managed and applied. As noted in the affidavit of Holly Brant submitted by the respondent Minister, the Department of Finance estimated the federal cost associated with the charitable sector credit and deduction was $2.9 billion for the 2011 taxation year alone.

[33] It is consequently appropriate and reasonable for the CRA to closely scrutinize the activities of a registered charitable organization, and for the Minister to proceed with the revocation of the registration of such an organization where there are serious grounds to believe that the property gifted to it has been overvalued in the receipts it issues and which confer important tax benefits. In such circumstances, the balance of convenience weighs heavily in favour of the public interest which the Minister represents. As a consequence, applicants prevailing themselves of paragraph 168(2)(*b*) of the Act bear a heavy burden on the balance of convenience component of the test, since (barring evidence to the contrary) the Minister should be presumed to be acting faithfully in discharging his duty of promoting the public interest.

[34] Under the circumstances of this case, and taking into account the evidence submitted, had the only harm inflicted on the applicant been that identified in the above discussion concerning the irreparable harm component of the test, I would not have found that the balance of convenience favoured the applicant.

[35] However, in the analysis required under the balance of convenience component of the test, I must also include a "consideration of any harm not directly suffered by a party to the application" (*RJR-MacDonald* at p. 344). In this case there are the interests of the 180 students of the concerned school to take into account.

[36] The academic year will begin in the next few days, and should the operations of the school be disrupted as a result of a shortfall of liquidities, the students and their parents will be placed in a difficult situation. I have no doubt that the parents of the students of the school would have serious difficulties finding, within the next few days, another education institution suitable to their religious convictions, since the uncontested evidence before me shows that the school is the only institution of its kind providing Chabad - Lubavitch religious instruction in the Toronto area. Moreover, with the academic year about to begin, these students would face a disruption in the education pathway that they expect to follow this fall.

[37] In these circumstances, the balance of convenience requires that an orderly solution be crafted which takes into account both the interests of the students as well as the general public interest in the integrity of the charitable sector.

Conclusions

[38] In light of the above I will order, pursuant to paragraph 168(2)(*b*) of the Act, that the period during which the Minister is precluded from publishing a copy of the notice proposing to revoke the

registration of the applicant in the *Canada Gazette* be extended, on a one-time basis, to December 31, 2013.

[39] This order will allow the applicant to pursue the operations of the school without major disruptions for the fall semester, thus hopefully allowing the students to pursue their preferred curriculum of secular and religious studies for that semester. During this period, the applicant will be expected to proceed with an orderly liquidation of a large part of its assets in kind. It will also be expected to develop, if feasible, an alternative plan to continue the operations of the school after December 31, 2013 without the status of a registered charity under the Act. The applicant will further be expected to notify forthwith the parents of the students of the fact that the Minister will, in all likelihood, proceed with the required publication so as to revoke its registration soon after December 31, 2013. This information will allow the parents sufficient time to consider and secure alternative arrangements for the education of their affected children for the winter 2014 semester, or continued enrolment with the applicant's school in a non-registered charity context if that is feasible.

[40] In light of the circumstances, there shall be no order as to costs.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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