

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *TOBACCO TAX ACT* OF  
THE NORTHWEST TERRITORIES, R.S.N.W.T. 1988,  
c. T-5 AND THE *TOBACCO TAX REGULATIONS* OF  
THE NORTHWEST TERRITORIES, R.R.N.W.T. 1990  
c. T-14.

AND IN THE MATTER OF AN APPLICATION FOR A  
STAY OF THE SUSPENSION OF TOBACCO RETAIL  
DEALER'S PERMITS R1-003 AND R1-018 PENDING  
THE HEARING OF THE APPEAL

BETWEEN:

ARCTIC GROCERS LTD. O/A MID TOWN MARKET  
(also known as Midtown Market) and  
ARCTIC GROCERS LTD. O/A CORNER STORE  
Appellants/Applicants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE  
GOVERNMENT OF THE NORTHWEST TERRITORIES  
and THE MINISTER OF FINANCE

Respondents

MEMORANDUM OF JUDGMENT

[1] The applicant sells tobacco products at two retail outlets in Inuvik. In this regard it is the holder of two Tobacco Retail Dealer's Permits issued pursuant to the *Tobacco Tax Act*. On February 11, 2011 the Minister suspended the two permits pursuant to s. 22.2 of the Act, for failure to comply with certain provisions of the

Act and Regulations. The applicant appeals the suspensions, and applies for a stay of the suspensions pending the hearing of the appeal.

[2] The granting of a stay pending appeal is discretionary. The test to be applied is threefold: a) is there a serious issue to be tried at the hearing of the appeal?, b) has the applicant shown that it will suffer irreparable harm if the stay is not granted?, and c) does the balance of convenience favor the applicant?

[3] From the Notice of Appeal I glean essentially two grounds of appeal. In the first, the applicant acknowledges that it imported tobacco products from Alberta, but asserts a “due diligence” defence to any breach of the Act, i.e., that it was misled into believing that its Alberta supplier was a duly registered wholesaler authorized by the Act to sell and transport the tobacco products to the applicants in Inuvik. It says that, on the hearing of its appeal, it will adduce evidence of its due diligence as a defence to the alleged illegal activity on which the Minister founded the suspension of the permits. (The receipt of evidence on questions of fact is permissible on a s. 22.3 appeal). No particulars of this proposed evidence are provided in the affidavit material in support of the application for a stay.

[4] The other ground of appeal alleges that the search and seizure conducted by the investigating authorities, which resulted in the suspension of the permits, was unlawful. No specifics are provided, either in the Notice of Appeal or in the affidavit filed on behalf of the applicant.

[5] I find that the applicant has satisfied the first part of the test.

[6] As to irreparable harm, the applicant says that in the operation of its two retail outlets, the sale of tobacco products represents a substantial portion of its operational revenue, and that since the suspensions, its daily sales revenue has decreased significantly. As a result, the applicant says, it may have to cease operations at its retail outlets. The applicant provides no supportive evidence, documentary or otherwise, to corroborate these assertions. Presumably, because of the limited scope of its within appeal, the applicant ought to be able to get its appeal on for hearing in this Court in short order, and accordingly the period of time during which its business will be affected by the suspensions until the appeal is adjudicated is finite, and surely the financial harm it will have suffered, in the event of a successful appeal, can be quantified.

[7] As the *RJR* decision points out, “irreparable harm” in the context of a stay application is harm which either cannot be quantified in dollar terms, or, if capable of quantification in dollar terms, cannot be collected as damages from the other party. Here, if the stay is not granted, and the applicant is successful in its appeal, and claims damages against the GNWT, there is no risk that the GNWT will not be able to pay any damages award.

[8] I find that the applicant has failed to establish that it will suffer irreparable harm if the stay is not granted.

[9] Although it is unnecessary to carry out a full analysis of the balance of convenience, or balance of inconvenience, aspect of the test, I will simply note that if stay of the suspension was granted until the appeal was adjudicated, it cannot be said that the public interest would not suffer harm. In the present case, the Minister is the guardian of the public interest. On the evidence before the Court at present, the Minister was exercising the Minister's statutory powers of suspension in the face of breaches of the Act. (The applicant here concedes the factual breaches, but wishes to mount a due diligence defence). The Court traditionally gives considerable deference to a Minister exercising statutory powers in the public interest. To grant a stay, i.e., to allow this applicant to continue to sell tobacco products pending the advancing of his appeal, in these circumstances, would in my view erode the public's confidence in the Minister's ability to carry out the Minister's responsibilities under the Act.

[10] There is irreparable harm to the public interest when a public authority such as the Minister is restrained from exercising its statutory powers in a case like this where there has not (yet) been any finding of wrong-doing or error by the public authority.

[11] I am not satisfied on the evidence before the Court at present that it is the applicant who would suffer the greater harm by a denial of a stay of the suspensions while the applicant advances its appeal.

[12] The notices of suspension from the Minister to the applicant, dated February 11, 2011, stated that the permits were suspended until March 25, and would be

“permanently cancelled” on March 26 if certain evidence was not provided to the Minister.

[13] For reasons stated above, the request for a stay of the suspension of the permits is denied. The cancellation of the permits is stayed pending the appeal.

J.E. Richard,  
J.S.C.

Dated at Yellowknife, NT  
this 15<sup>th</sup> day of March 2011

Counsel for the Appellants/Applicants: Sid M. Tarrabain, Q.C.  
Counsel for the Respondents: Erin L. Delaney

S-1-CV 2011000031

---

IN THE SUPREME COURT OF  
THE NORTHWEST TERRITORIES

---

IN THE MATTER OF THE *TOBACCO TAX ACT* OF  
THE NORTHWEST TERRITORIES, R.S.N.W.T.  
1988, c. T-5 AND THE *TOBACCO TAX  
REGULATIONS* OF THE NORTHWEST  
TERRITORIES, R.R.N.W.T. 1990 c. T-14.

AND IN THE MATTER OF AN APPLICATION FOR  
A STAY OF THE SUSPENSION OF TOBACCO  
RETAIL DEALER'S PERMITS R1-003 AND R1-018  
PENDING THE HEARING OF THE APPEAL

BETWEEN:

ARCTIC GROCERS LTD. O/A MID TOWN MARKET  
(also known as Midtown Market) and  
ARCTIC GROCERS LTD. O/A CORNER STORE  
Appellants/Applicants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE  
GOVERNMENT OF THE NORTHWEST TERRITORIES  
and THE MINISTER OF FINANCE  
Respondents

---

MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE J.E. RICHARD

---