Injunctions to Stop CRA Action - Chabad 2013 FCA 196

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Injunctions against the CRA

Chabad v Minister of National Revenue, 2013 FCA 196

At issue was the proper text to prohibit the MNR from issuing a notice of revocation in the *Canada Gazette* in respect of the applicant, and whether the text was met in this case.

FACTS

The applicant is a registered charity under the *Income Tax Act*. It operates a school for boys, and provides both secular and Jewish studies education. The School provides subsidies for 80% of the boys, and funds the subsidies through fundraising activities. The CRA allows this for religious schools contrary to its policy for other charitable activities (see CRA Circular IC75-23 *Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools*).

The CRA determined that the applicant had failed to comply with requirements, and proposed that (pursuant to subsection 168(1) of the ITA) the applicant's registration as a charity under the ITA be revoked. One area of non-compliance is with a substantial number of in-kind gifts, whose existence and value could not be substantiated.

The Applicant seeks an order prohibiting the Minister from giving effect to the proposal by publishing a copy of the notice in the *Canada Gazette* pursuant to subsection 168(2).

ANALYSIS

As a procedural matter, the court stated that the appropriate procedure is NOT by way of judicial review, but rather an application under paragraph 300(b) of the *Federal Courts Rules* brought under paragraph 168(2)(b) of the ITA (see *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 62). Since the Minister did not suffer any prejudice from the procedural irregularity, the court did not set aside the originating document under section 57 of the Rules, but rather dealt with the motion on its merits (using section 55 of the Rules to vary a Rule in special circumstances).

To extent the time period during which the MNR cannot publish a notice of revocation under paragraph 168(2)(b) is set out in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1

S.C.R 311 and is the same test for a stay or an injunction (see *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 114; *Millennium Charitable Foundation v. Minister of National Revenue,* 2008 FCA 414). The Court formulated the test for an application under 168(2)(b) as:

> 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.
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> 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.
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> 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.

The 'serious issue to be tried' test is a low threshold which the MNR accepted in this case.

The 'irreparable harm' test was where the MNR contended. General assertions of harm are insufficient to establish irreparable harm (*Gateway City Church v. Minister of National Revenue*, 2013 FCA 126). Also, the loss of the ability to issue tax receipts is not *per se* proof if irreparable harm (see *Choson Kallah Fund of Toronto v. Minister of National Revenue*, 2008 FCA 311). Irreparable harm cannot be inferred, but must be proven using clear and compelling evidence (see *Imperial Chemical Industries PLC v. Apotex Inc. (C.A.)*, [1990] 1 F.C. 221; *A. Lassonde Inc. v. Island Oasis Canada Inc. (C.A.)*, [2001] 2 F.C. 568 ; *Haché v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 424).

The Court noted that although the applicant had $10 Million in assets and operating expenditures of $1.6 Million, these assets were illiquid and require time to orderly liquidate. The notion of irreparable harm is closely related to the remedy of damages - in this case, even if successful, the applicant would (except in exceptional circumstances) not be able to claim

damages from the MNR as a result of the revocation of its status.

The court thought that this was similar to injunction cases involving the *Charter*, where damages are not the primary remedy (see *RJR-MacDonald*), and the proceedings will (often) be determined under the 'balance of conveniences' test. However, in this case, given that many of the students rely on the partial or full subsidy to attend the school, the unexpected financial hardship on the students and their families demonstrated irreparable harm.

The 'balance of convenience', in light of the substantial cost to taxpayers and the need for the CRA to ensure no abuse of the benefits granted to charities, the balance weights heavily in favour of the public interest and the MNR. Absent "consideration of any harm not directly suffered by a party to the application", the court would not have found the balance of convenience to favour the applicant. Therefore, the balance was shifted in favour of the applicant because of the unexpected hardship on the students and their parents.

The Court granted, on a one-time basis only, a prohibition against the MNR issuing a notice of revocation in the *Canada Gazette,* for 6 months to allow for an orderly liquidation of the applicant's assets.

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