

Date: 20090915

Docket: A-214-08

Citation: 2009 FCA 265

PRESENT: RYER J.A.

BETWEEN:

HOLY ALPHA AND OMEGA CHURCH OF TORONTO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 9, 2009.

Order delivered at Ottawa, Ontario, on September 15, 2009.

REASONS FOR ORDER BY:

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REASONS FOR ORDER

BACKGROUND

[1] A notice (the “Notice of Intent to Revoke”) dated April 10, 2008, was given by the Minister of National Revenue (the “Minister”) to Holy Alpha and Omega Church of Toronto (the “Charity”) pursuant to subsection 168(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “ITA”), stating the Minister’s intention to revoke the registration of the Charity as a registered charity, within the meaning of subsection 248(1) of the ITA (a “registered charity”).

[2] The Charity applied to this Court, pursuant to paragraph 168(2)(b) of the ITA, for an order extending the 30-day period referred to in that provision and therefore prohibiting the Minister from

publishing the Notice of Intent to Revoke in the *Canada Gazette* until the Charity's rights of objection and appeal in respect of the proposed revocation of its status as a registered charity have been exhausted.

[3] The Notice of Intent to Revoke arose out of an audit of the Charity in respect of its 2003 and 2004 taxation years that was conducted by the Canada Revenue Agency (the "CRA"). The audit was undertaken because the CRA had a concern that the Charity's donation receipts had been sold by income tax preparers to taxpayers who would then be in a position to claim income deductions or credits in respect of donations to the Charity that were never made.

[4] As a result of the audit, the CRA wrote a so-called administrative fairness letter to the Charity on November 27, 2007. That letter informed the Charity of a number of concerns that the audit had revealed and invited the Charity to make representations as to why its registered charity status should not be revoked.

[5] The contraventions of the charitable registration requirements under the ITA that were alleged by the CRA in the administrative fairness letter may be summarized as follows:

- a) Keeping of books and records: In 2003 approximately \$678,858 of \$742,553, and in 2004 approximately \$1,619,011 of \$1,696,069, in total expenditures by the Charity had not been substantiated with supporting documentation of any kind. The lack of documentation made it impossible for the CRA to confirm the charitable nature of the

Charity's expenditures. Similarly, significant portions of the revenue reported by the Charity had not been deposited into its bank account.

- b) Disbursement quotas: The lack of documentation of expenditures made it impossible for the CRA to determine whether the Charity had expended its required disbursement quota in respect of its charitable activities.

- c) Direction and control over resources: In 2003 and 2004, cash was transferred in a series of personal deliveries in the sums of \$223,520 and \$557,776 respectively. Additionally, merchandise valued at \$153,296 and \$324,952 was shipped in container shipments in each of the years audited. However, no agency agreements or reporting documentation were available with respect to these transfers and shipments. As such, it was impossible for the CRA to establish whether the funds and shipped goods were subject to control and direction by the Charity and whether they were used for charitable purposes.

- d) Official donations receipts: The official donation receipts issued for the gifts in kind received by the applicant lacked basic information related to the gift made. Further, there were instances of missing and unaccounted official donation receipts, including a block of approximately 2,500 receipts.

- e) Board of directors: Two of the four members of the Charity's board of directors did not appear to deal with each other at arm's length, which violated the requirement that more than 50% of the directors must deal at arm's length.

[6] The CRA agreed to allow the Charity until mid-February of 2008 to respond to the administrative fairness letter but the Charity failed to meet that deadline, apparently because of difficulties it had in obtaining professional assistance.

[7] In early March of 2008, an advisor retained by the Charity wrote to the CRA describing the progress that the Charity was making with respect to the concerns expressed by the CRA in the administrative fairness letter. However, that correspondence did not satisfy the CRA.

[8] The Notice of Intent to Revoke was issued on April 10, 2008. In it, the Minister stated an intention to revoke the registration of the Charity as a registered charity for the reasons described in the administrative fairness letter.

[9] The issuance of the Notice of Intent to Revoke caused the commencement of a 90 day period within which the Charity was entitled to file a notice of objection to the Notice of Intent to Revoke, in accordance with subsection 168(4) of the ITA.

[10] On May 8, 2008, the Charity filed the application that is before this Court. However, the Charity missed the mid-July, 2008 deadline with respect to the filing of a notice of objection.

[11] On September 22, 2008, the Charity attempted to late-file a notice of objection, requesting the consent of the Minister to do so. Initially, the Minister refused to accept the notice of objection but that is apparently no longer the case and the notice of objection is before the Appeals Branch of the Charities Directorate.

THE APPLICATION

[12] The parties have stipulated that this application should be considered in light to the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and, consistent with recent jurisprudence in this Court, I am prepared to proceed on that basis (see *International Charity Association Network v. Canada (National Revenue)*, 2008 FCA 114 and *Choson Kallah Fund of Toronto v. Canada (National Revenue)*, 2008 FCA 311).

[13] To obtain an order under paragraph 168(2)(b) of the ITA on the basis of the *RJR-MacDonald* text, the Charity must establish that there is a serious issue to be tried, it will suffer irreparable harm if the order is not granted and the balance of convenience favours granting the order.

Serious Issue

[14] The Crown has chosen not to contest this element of the *RJR-MacDonald* test.

Irreparable Harm

[15] The establishment of the irreparable harm element of the *RJR-MacDonald* test requires evidence of harm of a type or nature that cannot be quantified in monetary terms or cannot be cured. In that case, the applicant challenged the constitutional validity of legislation that regulated its ability to advertise its products for sale and alleged in its application that its business interests were damaged by that legislation.

[16] Where the application under consideration is made pursuant to paragraph 168(2)(b) of the ITA, the establishment of this element of the test is complicated by the fact that as a registered charity, the applicant's essential purpose is to acquire property and then give it away. In contrast, a business organization is typically motivated by the desire to earn and, at least to some extent, accumulate profits.

[17] It follows, in my view, that where the applicant is a registered charity, a somewhat broader view of the requirements of the second element of the *RJR-MacDonald* test is warranted. More particularly, it is appropriate to consider whether irreparable harm would be suffered by persons or organizations that are dependent upon the applicant and that would suffer if the applicant were to reduce its donations to them as a result of the loss of its status as a registered charity. A similar approach was adopted by Chief Justice Rip of the Tax Court of Canada in *International Charity Association Network v. Her Majesty the Queen*, 2008 TCC 3, a case in which the *RJR-MacDonald* test was applied in relation to an application, pursuant to subsection 188.2(4) of the ITA, for a

postponement of a one-year suspension by the Minister of the authority of a registered charity to issue official tax receipts for donations.

[18] In *Choson Kallah*, I held that the irreparable harm element of the test had not been established because there was no evidence of any such harm to the applicant or to any specific person or organization that was demonstrably dependent upon the applicant. More particularly, I held that the possibility that the applicant would receive fewer donations if it were unable to provide income tax receipts to the donees was not, in and of itself, sufficient to establish that the irreparable harm element of the test was met.

[19] At the hearing, counsel for the Charity urged me to reconsider this latter finding on the basis that there was uncertainty as to the Charity's ability to recover damages for lost donations in the event that a revocation of its status as a registered charity should be rescinded as a consequence of a hearing of the merits of the revocation. In my view, this contention cannot be accepted.

[20] Any concern about possible uncertainty with respect to the Charity's ability to recover damages for lost donations arising out of a revocation of its charitable status before there has been a determination of the merits of the revocation presupposes the Charity can establish that it has suffered harm as a result of the lost donations.

[21] In my view, the receipt of a diminished amount of donations would simply mean that the Charity would have less money to give away or to meet any obligations that it may have. I fail to

see how the Charity could be harmed simply because it may have less money to give away.

However, harm could be demonstrated if there was evidence that specific obligations of the Charity would go unfulfilled because of a shortfall in donations. In the present circumstances, the Charity has provided no evidence of any such obligations. Indeed, the record does not appear to contain any financial statements that would portray the financial circumstances of the Charity insofar as those circumstances may be relevant to the proposed revocation of its status as a registered charity.

[22] Finally, the argument that the receipt of diminished donations necessarily establishes the irreparable harm element of the *RJR-MacDonald* test 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. In my view, that result would be unacceptable.

[23] The Charity also argued that the proposed revocation would cause irreparable harm to its reputation, although counsel for the Charity conceded at the hearing that the Charity had not put forward, and the record does not contain, any evidence of any reputational harm that would result from such a revocation.

[24] Counsel for the Charity argued that reputational damage might arise if the CRA were to publicly state that the Charity had been involved in sales of its official donations receipts prior to the outcome of the hearing on the merits. In response to this concern, counsel for the Crown undertook to provide and, in fact, provided an undertaking, the form of which was reviewed by the Charity, to the effect that no such public statement would be made.

[25] Apart from the foregoing contentions, the Charity made no additional arguments that the Charity itself would suffer irreparable harm if the requested order is not granted. Nonetheless, the record contains evidence that Holy Alpha Academy (the “Academy”) in Ghana has received significant donations from the Charity. According to the affidavit of Mr. James Wells of the CRA, cash and goods and merchandise of approximately \$376,816 in 2003 and \$882,728 in 2004 were delivered by the Charity to the Academy in Ghana. The record further indicates that for the 2003/2004 and 2004/2005 years of the Academy, donations from the Charity made up a large percentage of the total donations received by the Academy (see applicant’s record at pages 70 and 71). This evidence points to a significant degree of dependence by the Academy on the Charity in those years. However, the record contains no evidence from the Academy or the Charity indicating the reasons for that degree of dependence in those particular years and whether that degree of dependence would likely continue in subsequent years. Accordingly, in the absence of such evidence, I am unpersuaded that the Academy, as an agency potentially dependent upon the Charity, will suffer irreparable harm if the requested order is not granted. It follows that the Charity has not established the second element of the *RJR-MacDonald* test.

Balance of Convenience

[26] Because the Charity failed to establish the irreparable harm element of the *RJR-MacDonald* test, it is unnecessary for me to consider this element of the test.

DISPOSITION

[27] For the foregoing reasons, the application will be dismissed with costs.

“C. Michael Ryer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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Canada

PLACE OF HEARING: Ottawa

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APPEARANCES:

Natalie Worsfold

FOR THE APPLICANT

Joanna Hill

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Natalie Worsfold
Ottawa, Ontario

FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE RESPONDENT