

Docket: 2007-4674(IT)APP

BETWEEN:

INTERNATIONAL CHARITY ASSOCIATION NETWORK,
Applicant,

and

HER MAJESTY THE QUEEN,
Respondent.

Application heard on December 10, 2007, at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Associate Chief Justice

Appearances:

Counsel for the Applicant: Evelyn R. Schusheim and Christina Tari
Counsel for the Respondent: Roger Leclaire and Justine Malone

ORDER

Upon application pursuant to subsection 188.2(4) of the *Income Tax Act* by the applicant for an order to postpone a suspension by the Minister of National Revenue of its authority to issue official tax receipts for one year beginning on November 28, 2007;

And upon having heard what was alleged by the parties;

The application is dismissed.

Signed at Ottawa, Canada, this 3rd day of January 2008.

"Gerald J. Rip"

Rip A.C.J.

Citation: 2008TCC3
Date: 20080103
Docket: 2007-4674(IT)APP

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INTERNATIONAL CHARITY ASSOCIATION NETWORK,
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REASONS FOR ORDER

Rip, A.C.J.

Introduction

[1] International Charity Association Network ("ICAN"),¹ in accordance with subsection 188.2(4) of the *Income Tax Act* ("Act"), has applied for a postponement of a suspension by the Minister of National Revenue of its authority to issue an official tax receipt for one year beginning on November 28, 2007.

[2] On November 21, 2007 ("Suspension Notice"), the Minister pursuant to subsection 188.2(2) of the *Act* suspended ICAN's authority to issue tax receipts on the basis that ICAN failed to maintain books and records and failed to provide

¹ The applicant's original name was "Canadian Charity Association of Ontario". In 2004 the name was changed to "Canadian Charity Association" and in 2005 to "International Charity Association Network". In these reasons I refer to "International Charity Association Network" or "ICAN".

records or to provide access to records to the tax authority, contrary to subsections 230(2), 231.1(1) and 231.2(1) of the *Act*.²

[3] The CRA alleges that ICAN failed to maintain and/or provide access to books and records relating to receipts issued by it totalling \$284,653,300 for donations of non-cash gifts and disbursements of approximately \$270,696,107. ICAN failed to provide the CRA with documentation to explain, support or justify payments and expenditures of \$270,696,107 in the 2005 fiscal year that includes \$26,372,685 in fundraising payments and \$244,343,422 in charitable program expenditures. The CRA acknowledges that although ICAN has provided access to some records, serious deficiencies remain.

[4] On November 23, 2007 ICAN filed a Notice of Objection to the suspension declaring that it at all times attempted to comply with requests by the CRA to provide information and to make its books and records available to CRA representatives. ICAN says it responded to questions by the CRA and submitted its records for review. The applicant also claims it allowed the CRA to remove certain of its records for review.

Statutory Provisions: Similar to Injunction

[5] The relevant portions of subsection 188.2(2), (4) and (5) are as follows:

(2) The Minister may give notice by registered mail to a registered charity that the authority of the charity to issue an official receipt referred to in Part XXXV of the *Income Tax Regulations* is suspended for one year from the day that is seven days after the notice is mailed

(a) if the charity contravenes any of sections 230 to 231.5; or

...

(2) Le ministre peut, par avis envoyé en recommandé, informer tout organisme de bienfaisance enregistré que son pouvoir de délivrer des reçus officiels, au sens de la partie XXXV du *Règlement de l'impôt sur le revenu*, est suspendu pour un an à compter du jour qui suit de sept jours l'envoi de l'avis si, selon le cas :

a) l'organisme a contrevenu à l'un des articles 230 à 231.5;

[...]

² By letter dated December 3, 2007 the Canada Revenue Agency ("CRA") notified ICAN of its intention to revoke the registration of ICAN in accordance with subsection 168(1) of the *Act*. This action may make the applicant's application academic.

(4) If a notice of objection to a suspension under subsection (1) or (2) has been filed by a registered charity, the charity may file an application to the Tax Court of Canada for a postponement of that portion of the period of suspension that has not elapsed until the time determined by the Court.

(5) The Tax Court of Canada may grant an application for postponement only if it would be just and equitable to do so.

(4) L'organisme de bienfaisance enregistré qui produit un avis d'opposition à une suspension prévue aux paragraphes (1) ou (2) peut présenter à la Cour canadienne de l'impôt une demande pour que soit reportée, jusqu'à un moment déterminé par cette cour, la partie de la période de suspension non encore écoulée.

(5) La Cour canadienne de l'impôt ne peut faire droit à la demande de report que s'il est juste et équitable de le faire.

[6] The power of the court to grant a postponement under subsection 188.2(5) of the *Act* is essentially a statutory injunction. Counsel for the applicant referred to the procedure as a "form of equitable relief similar to an injunction".

[7] In *Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd.*,³ Beetz J., writing for the Supreme Court of Canada, considered the reasons for judgment in *American Cyanamid Co. v. Ethicon Ltd.*⁴, a decision of the House of Lords, and noted that a stay of proceedings and an interlocutory injunction are remedies of the same nature and, absence any statutory prescription, they have sufficient characteristics in common to be governed by the same rules; the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions:

The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.

The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a *prima facie* case.

³ [1987] 1 S.C.R. 110 at pp. 127-29.

⁴ [1975] 1 All E.R. 504. With respect to the three tests that follow, Beetz J. viewed the first test, sometimes referred to as a "serious question," is sufficient in a constitutional case where the public interest is to be considered in the balance of convenience, and discussed later. Beetz J. refrained from expressing his view with respect to the sufficiency of this "serious question" formulation in any other type of case. The three part test was discussed later in *RJR-MacDonald Canada (A.G.), infra*.

[Authorities omitted.]

...

The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

[8] In *RJR-MacDonald Inc. v. Canada (A.G.)*,⁵ the Supreme Court of Canada confirmed the tripartite test as follows: the applicant must establish first, a serious question to be tried, second, that irreparable harm will result if the injunction is not granted, and third, that the balance of convenience favours an injunction.

Applicant's Position

[9] ICAN declares that at all times it maintained proper books and records. Certain records referred to in the letter of November 21, 2007, including reports on certifications by affiliated charities receiving property from ICAN, were never referred to earlier by the CRA and ICAN argues that it be given a fair opportunity to obtain such documents.

[10] Carol French, a director of ICAN, and David Penney, a founder and consultant to ICAN, filed affidavits in support of its application for postponement. Ms. Holly Brant, an auditor in the Charities Directorate of the CRA, filed an affidavit in favour of the respondent.

Affidavit of Ms. French

[11] According to Ms. French's affidavit, ICAN was established on August 17, 2000 and was registered as a charitable organization, as defined by the *Act*, also on August 17, 2000.

⁵ [1994] 1 S.C.R.

[12] Ms. French described ICAN's activities in paragraph 8, 9, 10, 11, 12 and 13 of her affidavit:

8. The Applicant raises funds and receives donations-in-kind of food, household goods and other items including educational materials and licenses for the use of educational software programs (the "Courseware") for use directly in the charitable activities it carries on and for distribution to other organizations for use in their charitable activities.
9. ICAN has 16 employees across Canada, only 3 of whom deal with the office administration. These 3 employees were the personnel at ICAN that had to deal with all the requests for information from the CRA that have been received by ICAN during the past year.
10. There are currently 367 agencies or organizations that receive such goods from the Applicant and are dependant on the Applicant in order to continue to carry on their activities.⁶
11. The Applicant operates as an "umbrella organization" for other charities, soliciting, purchasing and collecting donated items in bulk and distributing the items in smaller quantities to ICAN Member Agencies. The Applicant also operates internet based information exchange facilities to assist ICAN Member Agencies in operating their own programs and communicating their information and requirements for assistance to other ICAN Member Agencies.
12. The ICAN Member Agencies include churches that operate food banks, schools and other organizations that operate breakfast and snack programs for children, hostels and shelters for the homeless, and organizations that run youth programs in troubled neighbourhoods. The Courseware is distributed to computer training centres operated by ICAN as well as churches, municipalities, community centres, correctional institutes and other charitable organizations for the purpose of operating their skills and job training programs.
13. Many of the corporations who have already promised to deliver donations of food and household items to ICAN require receipts from ICAN in order to record the donations of inventory in their own accounting records. It is my understanding that while these corporations do not claim a deduction

⁶ Ms. French attached to her affidavit an exhibit listing 367 member agencies of ICAN ("ICAN Member Agencies"). These included schools, churches, food banks, computer centers, hostels, shelters and other agencies, including recreation and community centres.

for these donations as charitable donations, the receipts are required in order to record the reduction in inventory in their accounting records.

[13] If the receipting suspension is not lifted, Ms. French deposes, ICAN and its agencies will suffer irreparable harm in that ICAN will be unable to continue or complete its programs during the suspension period. This, she claims, would affect meal and food distribution to an estimated 750,000 people across Canada as well as training programs for the unemployed and underemployed and after school programs in some Toronto schools. Also, she fears a number of ICAN employees will have to be terminated. Mr. Penney agreed.

[14] Ms. French declared that ICAN has provided its accounting records and provided access to its records on a number of occasions — 15 person days according to applicant's counsel — to CRA representatives in order to permit the CRA to audit ICAN as well as others who were engaged as fundraisers for ICAN. ICAN retains professional accountants to maintain its records. Furthermore, she adds, ICAN has at all times maintained proper books and records "based on its understanding of the requirements of the CRA and on accounting advice it has received from its professional advisors".

[15] ICAN's Notice of Objection, an exhibit to Ms. French's affidavit, advises that ICAN has a limited staff, a small number involved in soliciting and receiving donations in kind, determining needs of affiliates and distribution. "There is only a few administrative staff who handles the issuance of receipts, bookkeeping and records management."

[16] The Notice of Objection reviews the flurry of correspondence between the CRA and ICAN from October 30, 2006 to November 21, 2007. It is obvious that the CRA was not satisfied with the responses it was getting from ICAN and its advisors. CRA's original letter, dated October 30, 2006, from its Toronto East Tax Services requested documents and records in connection with an audit by the CRA of Global Learning Gifting Initiative ("Global Learning") for the 2004 taxation year. ICAN complains that this letter "included 13 very detailed questions and provided only 30 days for response". There were a number of people required to be interviewed to reply to these questions and there was not sufficient time to complete the questionnaire within the period of 30 days. In a subsequent letter, dated November 26, 2006, ICAN's accountants, Sennet and Associates, requested additional time to obtain the information. In another letter to CRA, also dated November 26, 2006, ICAN states that Ms. French provided a response to certain of the questions raised in the October 30th letter.

[17] In the suspension letter of November 21, 2007, the CRA acknowledged ICAN's requests on October 30, 2006, February 26, 2007 and May 29, 2007 for extensions of time to retrieve, organize and make available the records requested by CRA. CRA had noted that ICAN's requests for an extension of time to answer the October 30, 2006 and February 26, 2007 letters were not received until 30 days after the charity received the requests and that ICAN failed to specify the timeframe to make the records available.

[18] The Notice of Objection also refers to a CRA letter dated March 27, 2007 referencing the Global Learning, and included 28 questions or requests which, in ICAN's view, appears to be the same information that was requested in the October 30, 2006 letter. By letter dated April 11, 2007, Sennet and Associates asked for an extension of time to after April 30th to respond to the letter. Upon reviewing the letter of March 27, 2007, Mr. Sennet and ICAN's staff believed that the CRA's request for information was an error since so much of the requested information had already been provided, in their view, to the October 30, 2006 letter. ICAN responded to the March 27, 2007 letter on September 21, 2007.

[19] In the interim CRA forwarded additional correspondence to ICAN. A letter of February 26, 2007 from Ms. Brant was overlooked by ICAN, according to ICAN, "due to the confusion that was caused by receiving so many letters from CRA and the administrative burden imposed on the staff and accountant of ICAN in obtaining the information to respond to the various and numerous requests for information".

[20] In any event, ICAN denies that it failed to maintain its books and records. CRA questioned the payments made by ICAN to Global Learning Systems Inc. ("Global Systems") for fundraising services; according to CRA there were no documents supporting these payments. ICAN declares that payments to Global Systems were made pursuant to a contract between ICAN and Global Systems. The only copy of a contract that is before me is an agreement dated November 19, 2004 between Canadian Charity Association, ICAN's previous name, and Global Learning Group Inc. ("Global Group") for fundraising services. The copy of the agreement is an exhibit to Ms. Brant's affidavit.⁷ The contract provides that ICAN

⁷ In her affidavit, Ms. Brant states that ICAN participates in the "Global Learning Gifting tax shelter (formerly Global Learning Systems)". There is no indication if this entity is a corporation. The contractual parties are ICAN and Global Group. However, the Notice of Objection, at paragraphs 19 and 20, refers to CRA being unable to verify payments under contract to Global Learning Systems Inc. Again, there is no indication whether Global

pay to Global Group a base fundraising fee of 16.62% plus GST of the gross fair market value of cash donations and in-kind donations raised and delivered by Global Group to ICAN. In-kind donations were anticipated to exceed 75% of the total donations. Also, a based fundraising fee was payable immediately to Global Group upon Global Group's delivery to ICAN of the net cash donations and confirmation of delivery agreements for the in-kind donations. An additional amount was payable by ICAN as an expense allowance to Global Group to reimburse Global Group for reasonable expenses incurred by it on ICAN's behalf, such amount not to exceed 100% of the GST rebate claimed by ICAN on the base fundraising fees paid. ICAN declares that payments to Global Group were made in accordance with the contract and there is evidence in its bank records, made available to the CRA, that such payments were in fact made.

[21] In the Notice of Suspension, CRA advises that ICAN's payments to Global Group should be supported by invoices by Global Group and the lack of any such invoice constitutes a failure by ICAN to maintain proper records of books and records. ICAN disagrees with this conclusion stating that the contract reflected the agreement to make the payments and the banking records demonstrated that the payments were made. No invoices are necessary, according to ICAN.

[22] The Notice of Objection also refers to payments made to "English Lake Group". The CRA maintains, according to the Notice of Objection, that it is unable to verify that payments were made to English Lake Group for duplication services relating to courseware. CRA had requested a list of the date, serial number and name of each unit of courseware that was distributed. ICAN states that it provided copies of the bills of lading together with license numbers for all the courseware and that the staff believed that this comprised all of the requested information. However, what CRA really wanted, according to ICAN, were copies of the invoices from English Lake Group. Once ICAN received this clarification, it advised CRA on November 13, 2007 that copies of invoices from English Lake Group were available; the CRA did not take up ICAN'S offer.

[23] There is also a reference in the Suspension Notice to the distribution of software licences: CRA complains that there is not sufficient evidence of the distribution of software licences because ICAN does not record the name, address

Learning Systems Inc. and Global Group are one and the same entity or if Global Learning Systems Inc. and Global Learning Systems referred to in Ms. Brant's affidavit are one and the same. I am assuming that Global Learning Systems Inc. and Global Group are the same corporate entity to the extent it may be pertinent.

and other information regarding the end user. Specifically, CRA complains that there is no documentary evidence to substantiate that ICAN actually used the software licences in charitable programs. ICAN in turn complains that it would be an invasion of privacy to obtain such personal information from persons receiving charitable assistance, in particular inmates of prisons. Also, according to ICAN, it was only in the Suspension Notice that CRA asked ICAN to have reports from its affiliates stating how the courseware was used and/or confirming that it was used by an individual.

Affidavit of Mr. Penney

[24] In his affidavit Mr. Penney confirms the charitable activity information contained in Ms. French's affidavit and adds harms that ICAN "and the Canadians that it serves" will suffer if the suspension is not postponed. He describes some of the programs that would be affected by the suspension: Youth at Risk, Inuit First Nations, Courseware licences, Job Skills Training, Brock Township Libraries and Food Box Program.

[25] The Youth at Risk, Mr. Penney states, operates in Toronto; it includes an "After-4 School Program", the object of which is to get youth at risk back into school and into educational programs that ICAN is able to offer. These programs started in 2005 and operate in 13 Toronto neighbourhoods. The material used by the program included educational courseware that ICAN receives as donations. The youth who participate in the After-4 School Programs have mentors to assist with homework, teach music, dance and crafts.

[26] ICAN is also involved in the process of assisting Inuit First Nations in Nunavut, establishing education centres in five locations in Nunavut, according to Mr. Penney. Here, too, individuals are initially trained, using the courseware licenses that ICAN receives as donations. Individuals are educated with the courseware to be trainers of others who, in turn, will train other Inuit, all the time using the ICAN courseware.

[27] Mr. Penney also states that ICAN is involved with major corporations in negotiations to establish an education centre at which certain courseware licenses ICAN receives as donations would be used to train individuals in job skills with the corporations. Mr. Penney advises that the negotiations with the corporations are nearing completion and ICAN expects contracts to be in place for delivery of this program in January 2008. ICAN fears suspension of receipting privileges will

cause the corporations not to continue with the program. Mr. Penney estimates the harm to Canada to be \$250 million, the harm to individuals is also substantial.

[28] ICAN has also scheduled 120 new learning centres to open within the next 60 days of the date of Mr. Penney's affidavit, November 30, 2007, he declares, in such places as First Nations reservations, all of the John Howard Society and Elizabeth Fry locations, the Salvation Army East Coast Educational program, Cornerstone Family Resource Centre and local libraries. ICAN believes, Mr. Penney avers, that ICAN will no longer receive donations of courseware and be unable to open these learning centres.

[29] ICAN has also worked with Brock Township Libraries, Mr. Penney explains, to create a model that "empowers the library to continue to promote the joy of reading and the essentials of literacy" in cases where libraries face increasing costs and reduced government grants and donations. ICAN provided to the library courseware licenses, online mentoring and market support. The library, according to Mr. Penney, was able to offer digital literacy training to its staff at no cost.

[30] ICAN also developed a concept allowing the library to solicit relatively small donations to allow need community members to use the courseware licenses for job skills training.

[31] Like Ms. French, Mr. Penney referred to corporate donors providing food products to ICAN for distribution to food banks.

[32] Mr. Penney described the courseware licences that are donated to and distributed by, ICAN and their use:

12. The courseware licenses that ICAN receives as donations permit the user to access approximately 190 computer courses with such subjects as: basic typing; training in word processing, accounting (Quicken, Quick Books) the full Microsoft Suite (Windows, Word, Excel, Access, Powerpoint, Office); training in advanced employment skills such as internet core computing certification ("IC3"), Microsoft engineering certification, A+ Certification (Microsoft programming), and blogging certification; training in soft skills such as budgeting, employment communication strategies, business writing; help for students including Kindergarten to Grade 12 math, English and science; and many others.
13. ICAN obtains courseware licenses from donors as gifts and issues each donor a receipt for the value of the courseware licenses. The receipts are issued in accordance with the Regulations and include a copy of the Deed

of Gift and a Schedule indicating the fair market value of the license as determined by a qualified appraisal. The courseware licenses are then incorporated into various training programs that ICAN either runs directly, such as the Broadview Skills and Training Centre, the After-4 School Programs and the education centres, or are used in other educational and job skills training programs run by a number of its 367 affiliates.

14. ICAN obtained valuations from professionals to support the amount that is reported on the charitable donation receipts that are issued.
15. In addition to these valuations, it should be noted that the courseware licenses used by ICAN in its programs are available for purchase over the internet at retail prices that exceed the value that ICAN has been advised to use in issuing charitable donation receipts.

Irreparable Harm to Applicant

[33] Both Ms. French and Mr. Penney declare that if the receipting privileges are not revived, ICAN and its member agencies will suffer irreparable harm and will not be able to continue their programs or complete programs that had been undertaken or committed from November 28, 2007 through 2008. Food will not be distributed, proposed food distribution programs will have to be cancelled, training programs for the unemployed will be terminated and after-school programs would be at risk. ICAN may have to dismiss some of its employees.

Respondent's Position

[34] The CRA naturally opposes the application made by ICAN.

[35] The respondent submits that the sanction imposed by the Minister under subsection 188.2(2) of the *Act* is warranted. The applicant does not have a serious question to be determined by the Court and has not met its burden of establishing that it would suffer irreparable or serious harm if the postponement is not granted. Any balance of inconvenience favours the respondent.

[36] The respondent submits that the following facts support its position:

- 1) The applicant failed to provide the CRA with documentation to explain, support or justify payments and expenditures in the 2005 fiscal year that include \$26,372,685 in fundraising payments and \$244,343,422 in charitable program expenditures.

- 2) The applicant has seriously contravened the provisions of the *Act* in respect of its obligations to keep proper books of account, more specifically, ss.230(2), 231.1(1) and 231.2(1) of the *Act*.
- 3) The amount the applicant has failed to account for and justify through proper books of account is substantial.
- 4) The applicant is involved in tax shelter arrangements which has led its operations to increase from \$528,000 in total reported revenue in 2001 to \$314 million in total reported revenue in 2005.
- 5) The applicant has not substantiated whether it actually received most of the goods for which it issued donation receipts.
- ...
- 7) The applicant has agreed to issue donation receipts for transactions that do not qualify as gifts and has issued donation receipts for more than the actual value of the property gifted.

Affidavit of Ms. Brant

[37] In her affidavit Ms. Brant states that she conducted an audit of ICAN's operations for the fiscal periods 2001 to 2006. As a result of ICAN's participation in tax shelters its operations have increased from \$528,000 in total revenue in 2001 to \$314 million in total reported revenue in 2005. According to ICAN's general ledger for 2006 and the CRA database in respect of Canadian registered charities, Mr. Brant notes, ICAN now ranks first in Canada in terms of the value of donation receipts issued in 2006. ICAN's general ledger for 2006 reflects that ICAN issued donation receipts aggregating approximately \$464 million. By comparison, Ms. Brant says that the United Way of Greater Toronto issued \$95,513,617 in tax-receipted gifts in 2006. United Way of Greater Toronto employed in that year a staff of 165 full-time and 43 part-time positions. The majority of the applicant's income is received from its participation in the Global Group tax shelter. In 2005 there were approximately 12,177 donors who participated in the tax shelter resulting in approximately \$248 million of courseware for which the applicant issued official donation receipts. In 2006 there were approximately 22,674 donors, resulting in approximately \$464 million of courseware donated and receipted. A courseware was described by Ms. Brant as a one-time license to use a software application whether or not on CD format.

[38] Ms. Brant describes the Global Learning tax shelter in the following manner:

Donors participating in the Global Learning Gifting Initiative tax shelter make a cash donation to a charity called the Millennium Charitable Foundation ("Millennium"). Donors then apply to the Global Learning Trust to become a beneficiary of the trust in order to receive free courseware. A condition to becoming a beneficiary of the trust is that they must have given to a charity within the past two years. The donor receives the courseware from the trust and can choose to donate it to the applicant at its fair market value. Typically, the courseware donated to the applicant is valued at three times the cash donation made to Millennium.

[39] Ms. Brant states that the applicant's income and disbursements are mainly comprised of gifts in kind; the CRA questions the valuation and existence of the gifts. The CRA is also concerned whether the applicant actually received most of the goods for which it issued donation receipts.

[40] In the course of the audit of ICAN, Ms. Brant concluded that ICAN does not conduct activities consistent with its registered objects, more specifically:

- a) Minimal information was provided by the applicant regarding the applicant's operation of community computer centres.
- b) The applicant does not conduct any activities to relieve poverty in developing nations.
- c) The applicant does not develop training and education programs for needy persons.
- d) Despite having reported in its information returns that it provides counseling and other similar services to shelters, charities and non-profit organizations, the applicant has not supplied counseling services to these entities.
- e) Although the applicant reports operating over 50 community computer centres across Canada, little or no details were provided to the CRA to support that the applicant actually maintains or operates the centres or that the services provided, if any, are limited to needy persons.
- f) Of the activities which we could confirm, the information provided was wholly inconsistent with the volume of activity being reported: the support of 367 member agencies, the operation of 50 community computer centres, \$244 million in expenditures in 2005 and serving over 20,000,000 meals. The information provided by the applicant did not support this volume of activity.

[41] CRA is of the view that ICAN is more involved in tax shelter agreements than in fulfilling its charitable mandate. In 2005 and 2006, for example, the applicant recorded receiving over \$797 million in cash and property from its participation in tax shelters, which represented 90% of its reported income. That is income coming out of its income from both the tax shelters and charitable donations devoid of the tax shelter. ICAN's 2006 information return has not yet been filed.

[42] Ms. Brant complains that minimal documentation was provided to support ICAN's claim that the software it said it received is shipped to computer centres for use by needy persons. ICAN has reported disbursing more than \$300 million in program expenses related to the transfer or distribution of courseware in the years 2003 to 2005. However, there is no record of the transfer and distribution taking place, to whom the courseware may have been distributed and for what purpose. ICAN, says Ms. Brant, makes little if any attempt to verify the value of the donations represented by the tax shelter promoters. The audit, she declares, strongly suggests that ICAN has agreed to issue donation receipts for transactions that do not qualify as gifts and has issued donation receipts for more than the actual value of the property gifted.

[43] With respect to the allegation that ICAN has issued donation receipts for more than the actual value of the property gifted, Ms. Brant refers to ICAN's association with the DGD Donation Program ("DGD"). Under this program ICAN issued in 2003 inflated official donation receipts for Tupperware that had been purchased from DGD by the donors. Ms. Brant's audit disclosed that in 2003, ICAN issued donation receipts in the amount of \$726,199 for plastic containers purchased from DGD for \$135,968. DGD originally bought these containers for \$25,000 plus GST in December 2003. Attached to Ms. Brant's affidavit are copies of invoices from DGD for plastic containers in the amounts of \$2,675 and \$2,000 and official donation receipts from the applicant in the amounts of \$13,684 and \$10,312, respectively, for the same two individuals on the same day. All of the donors the CRA identified as having received such receipts were audited and reassessed to reduce the amount of the credit claimed.

[44] The CRA, through Ms. Brant, alleges that ICAN issued charitable donation receipts for property or items it did not receive. For example, she states that in its 2004 fiscal year ICAN issued \$1.2 million in receipts for gifts of PET Scan Certificates. These certificates entitled recipients to the diagnostic medical procedure at a particular clinic. In exchange for a \$35 donation, donors were to receive a PET Scan Certificate valued at \$1,000 which was then purportedly

donated to ICAN in exchange for donation receipts for the amounts of both the \$35 fee and the purported value of the gift certificate, that is, \$1,000. Ms. Brant asserts that ICAN did not provide to CRA the documentation relating to the clinic that issued the PET Scan Certificate, details of the criteria used to determine eligible recipients or whether the certificates were even received by or under the control of the applicant.

[45] Ms. Brant reviewed the contract of November 19, 2004 between ICAN and Global Group. Her analysis of receipts issued for in-kind donations, the amount of gifts received from the Millennium Charitable Foundation and the amount reported as fundraising fees by the applicant leads her to conclude that in the 2004, 2005 and 2006 fiscal years ICAN did not pay Global Group amounts provided for by the contract. Rather, ICAN remitted to Global Group 90% of the cash donations it received from Millennium in its 2004 and 2005 fiscal years and 80% of these donations in 2006.

[46] Ms. Brant says that ICAN has not provided the CRA with any documentation supporting the fundraising payments made to Global Group, except to claim that a contract was signed and payments were made pursuant to the contract. CRA requested in writing on July 12, 2006 that ICAN provide the books and records pertaining to the Global Learning for 2005 and 2006. An auditor of the CRA reviewed the books and records made available by ICAN on September 27, October 2, 12 and 15, 2007. The applicant was subsequently advised that it failed to provide the records to support \$26,372,685 in fundraising expenses paid to Global Group. Ms. Brant therefore concluded that ICAN failed to provide CRA with documentation to explain, support or justify payments and expenditures in its 2005 fiscal year that include \$26,372,685 in fundraising payments.

[47] Also in 2005, ICAN reported issuing receipts totalling \$248,037,041 for donation of courseware licenses. The applicant also claims a disbursement of \$244,343,422 related to the distribution of the property to other organizations. According to Ms. Brant, ICAN has not provided documentation to substantiate its claim that the software was received by ICAN, shipped, used in charitable programs or that it was even used at all. ICAN has also failed to provide the CRA, she says, with a listing of the licenses distributed to the centres, a listing of the licenses converted to CDs or the number of CDs distributed. CRA has made numerous requests, she says, that ICAN provide access to its books and records in accordance with section 231.1 of the *Act*. More specifically, ICAN was asked to provide documentation relating to the Global Learning Gifting Initiative in 2005

and 2006 and the \$26,372,685 on fundraising expenses paid to Global Group in 2005.

[48] CRA submits that in failing to provide the CRA with the documentation referred to in the immediately preceding paragraphs, ICAN has seriously contravened the provisions of the *Act* in respect of its obligations to keep proper books of account. This failure not only prevents the Minister from determining whether the applicant is pursuing charitable activities, but also raises the concern that hundreds of millions of dollars in disbursements are not being properly accounted for. CRA submits that this contravention warrants a Notice of Suspension.

[49] The CRA suggests that no irreparable harm will be suffered by ICAN if its application is denied and the harm alleged to be suffered by third party charities and benefices is unsubstantiated and speculative. There is evidence, according to CRA, that the applicant has the means to carry out most of its programs and that there is little cost to the applicant for doing so. On a balance of inconvenience, the Crown submits, this case favours the respondent in light of the restraint of government action and the harm to the public confidence in the government's supervisory role of the registered charitable sector if this application is successful. The public interest also favours the denial of the application as the receipting practices of the applicant are the cause of tens of thousands of audits relating to taxpayers participating in the tax shelter program in which ICAN is involved.

[50] To support the respondent's position that any balance of inconvenience is on its side, Ms. Brant cites ICAN's general ledger as of December 31, 2006 which records a multi-media inventory of \$575,633,643. This inventory includes courseware. A copy of the applicant's general ledger for the 2006 fiscal year was included in her affidavit. She adds that ICAN's general ledgers for the 2003 to 2006 fiscal years discloses that it paid no more than approximately \$10,345 in postage and delivery costs for the whole period. In some years the cost was nil, she adds. ICAN paid \$251,000 in replication costs in 2005. There were no other replication costs in the other years.

[51] Ms. Brant advises that she was informed by the Tax Avoidance Division of the CRA and verily believes that the donors who participated in the Global Group tax shelter and received donation receipts from the applicant in 2004 have been audited and proposal letters with a view to reassess have been sent to most, if not to all of these people. The Tax Avoidance Division also informed her that the CRA was preparing audits of the 12,177 donors who participated in the program in 2005

and the 22,674 donors who participated in 2006. The CRA proposes to deny the entire amount of the donation.

[52] The tax shelter continues to be promoted by Global Group. Ms. Brant states that the probability of ICAN's donors being audited and reassessed is extremely high, given the past practices of the CRA in respect to the Global Group tax shelter program. She declares that any potential donor for the 2007 taxation year is most likely to be audited and reassessed.

[53] If the suspension is postponed, Ms. Brant is concerned that the CRA would suffer serious harm by being precluded from effectively ensuring compliance with the *Act* and the safeguard of charitable funds. It is the CRA's position that the application, scope and effect of subsection 188.2(2) will be eroded by a postponement of the applicant's suspension and the postponement would lead to the restraint of government action in serious cases such as this one where the management of charitable funds in excess of \$270,696,107 cannot be properly accounted for or explained.

[54] Finally, according to CRA, it would not be just and equitable to grant the relief sought by the applicant as it has not demonstrated that the current situation results from circumstances beyond its control or that it has suffered any inequity.

[55] It is not my task to determine whether ICAN carried on activities that may lead to the revocation of its status as a registered charity. Rather, I must determine whether on the affidavit evidence before me, it would be just and equitable for me to grant the application for postponement. However, it is quite clear from the evidence of both parties that ICAN's activities play no small part in the CRA's motives to get access to ICAN's records and books of account. The amounts of income and disbursements in question are quite substantial. The *Act* requires ICAN to maintain records and books of account to enable the Minister, among other things, to determine whether the amounts of income and the issuance of receipts, and the amounts of disbursements comply with the requirements of the *Act* for a registered charity and that ICAN has not contravened section 149.1 or any other provision of the *Act*. Records that CRA are entitled access to include invoices, receipts, vouchers, valuation reports, that is, documents that permit the CRA to confirm that the charity's income and disbursements are properly accounted for.

[56] In the application at bar the CRA claims it has not been able — or permitted — to properly examine ICAN's records and books of account and the Minister has therefore suspended ICAN's receipting privileges for one year.

Law: three part test

[57] In *RJR-MacDonald* the Supreme Court of Canada confirmed that the three-part test be applied to applications for interlocutory injunctions as well as for stays in both private law and *Charter* cases.⁸

i) Serious Question to be Tried

[58] In *RJR-MacDonald* the Supreme Court of Canada asked:

What [...] are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. . . .

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.⁹

[59] Among the reasons the CRA opposes ICAN's application is that ICAN does not have a serious question to be determined. Respondent's counsel claims that ICAN has acknowledged, in a letter to CRA dated November 5, 2007, that it does not maintain invoices and detailed computations supporting an amount of \$26,372,685 in fundraising fees. It has also acknowledged that it does not maintain a record of the recipients or use of the \$244,343,422 of courseware it claims to have distributed in 2005. Finally, the CRA's audit of ICAN raised questions of whether ICAN received gifts equal to the value entered as the amount on receipts issued.

[60] ICAN's reaction has been that it has maintained proper books and receipts based on "its understanding" of the CRA requirements and on advice of advisors.

[61] A charity's ability to issue receipts to donors for income tax purposes is its lifeblood. Prohibiting ICAN from issuing receipts for a year will probably affect its activities. On the other hand, even a charity with the most altruistic and humanitarian activities is subject to the *Act's* requirements to maintain proper

⁸ *Supra*, at p.347.

⁹ *Supra*, at pp. 337-38.

books and records and permit the CRA to examine these documents to ensure that such activities are being carried out properly and within the confines of the *Act*. The quality, quantity or nature of charitable activities of a registered charity do not trump the requirements of the *Act*. Status as a registered charity is conditional on the charity observing statutory requirements granting its status.

[62] I am prepared to find that there is a serious issue to be tried. However, ICAN has to satisfy me that, assuming the Minister was correct in concluding that books of account and records, or access to them were not available to permit his officials to administer the *Act*, it will suffer irreparable harm if the suspension continues and that the harm to be incurred by the Crown if the suspension is postponed is less than the harm to be incurred by ICAN if the suspension is not postponed.

ii) Irreparable Harm

[63] The irreparable harm test is described in *RJR-MacDonald* as follows:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration.¹⁰

[References omitted.]

[64] The onus to prove irreparable harm lies with the applicant. In *Eli Lilly and Co. v. Novopharm Ltd.*,¹¹ the Federal Court of Appeal stated that:

It is trite law in our Court that a plaintiff seeking an interlocutory injunction must establish with clear evidence that it, as opposed to another person or party, will suffer irreparable harm.

¹⁰ *Supra*, p. 341.

¹¹ (1996), 69 C.P.R. (3d) 455 (FCA).

[65] In *RJR-MacDonald* the Supreme Court of Canada stated that the following should be examined:

. . . whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[Emphasis added.]

[66] Applicant's counsel submitted that I must only consider the effects of any postponement of the suspension on the parties before me. She stated that I need not be concerned with any harm to taxpayers; I need only be concerned with the CRA since this application is not a constitutional or *Charter* matter. The affidavits of Carole French and David Penney stress the irreparable harm on third parties, the member agencies of ICAN and its potential beneficiaries, that weigh on ICAN. Potential ICAN donees, as well as taxpayers, will be affected by my decision and their interests have to be considered. If ICAN is as important to these third parties as Mr. French and Mr. Penney say they are, then they would definitely be affected.

[67] Unfortunately, the applicant introduced no evidence from its member agencies describing how the suspension of receipting privileges would affect them. There are no exhibits from any third party to either affidavit that corroborate that any third party would be affected as adversely and significantly as described by either Ms. French or Mr. Penney. I do not know, for example, how much any agency depends on ICAN to operate. Is ICAN's contribution to an agency modest or substantial? What proportion of the agency's income comes from ICAN? In other words, what is the significance of ICAN's contribution to any one agency? ICAN has not met the burden of proof incumbent on it to demonstrate irreparable harm on its side.

[68] That the applicant may have to lay-off employees in the event the suspension continues can hardly be said to constitute irreparable harm to the applicant, although it would surely harm the affected employees.

[69] On the other hand, Ms. Brant's descriptions of amounts of income collected by ICAN and disbursements to Global Group and receipts given for PET Scan certificates are disturbing. I note Ms. Brant's allegation that the receipts for courseware donations equalled three times the value of the donor's original gifts. ICAN claims that professionals valued the gifts donated to it but no valuations were attached as Exhibits to the affidavits of Ms. French or Mr. Penney. These

valuations normally would have been among ICAN's records and readily available. I also note that Ms. Brant's reference to over 30,000 taxpayers who purportedly made donations to ICAN and whose tax returns have been, and are being, audited. The public interest is an important consideration in deciding whether to postpone the suspension.

[70] I do not sympathize with ICAN's claim that it employed only limited staff to run its office and, I assume, to maintain its records and books of account. This is not a reason that it may have poor records or absence of records. This only demonstrates that the maintenance of records and books of account was not a priority to ICAN. Over half a billion dollars came into the charity's coffers, yet according to the CRA, ICAN apparently did not hire sufficient people to record and maintain its records and books and account. That CRA was given access to some books and records does not assist ICAN. The books and records must be a complete record of what transpired and the evidence before me suggests that the CRA may have had problems in completing its audit because of insufficient or poor documentation.

iii) Balance of Inconvenience

[71] The third test, who would suffer greater harm, was described by Beetz J. in *Metropolitan Stores, supra*, as "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits".¹²

[72] Applicant's counsel argues that harm to public confidence in the CRA should only be taken into account in constitutional cases. I have touched on this earlier. The consideration of harm to public confidence is admissible in the present case, precisely because it is the public's confidence in the CRA to oversee registered charities that is at issue. This directly affects the respondent and should be taken into account. Public authority cannot be prevented from exercising its statutory powers that are of public interest.¹³

[73] In *RJR-MacDonald*, the Supreme Court observed:

¹² *Supra*, p. 129.

¹³ *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, at p. 795 (FCA).

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry". This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission*, (1993), 14 O.R. (3d) 280, at pp. 303-4:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.¹⁴

[74] The Court explained:

. . . In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.¹⁵

[75] Browne L.J. in *Smith v. Inner London Education Authority*, considered the public interest in these words:¹⁶

He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of convenience which are referred to by Lord Diplock in *American Cyanamid Co v. Ethicon Ltd.*

[76] While the respondent is not a regulator of charities *per se*, the *Act* charges the CRA with the responsibility of protecting the public interest by ensuring the compliance of registered charitable organizations with the *Act*.

¹⁴ *Supra*, p. 343.

¹⁵ *Supra*, p. 346.

¹⁶ [1978] 1 All E.R. 411, at p. 422.

[77] Also, one cannot ignore that registered charitable status confers special tax treatment to the charity. In ensuring compliance of registered charities with the *Act*, the CRA is acting in the interests of the public — by protecting a degree of public confidence in the charitable sector as well as by protecting potential taxpayer donors.

[78] The balance of convenience (or inconvenience) is in favour of the CRA. To postpone the suspension in the circumstances would handcuff the CRA's capacity to administer the charities' provisions of the *Act*, to ensure compliance and protect public interest. ICAN has been aware for some time that the CRA was questioning its management of its books of account and records. On May 29, 2007, CRA sent a letter to ICAN listing suspected areas of non compliance by ICAN, including books and records. CRA described deficiencies it found in ICAN's books and records. The suspension letter of November 21, 2007 was not a bolt from the blue. ICAN's directors knew, or ought to have known, the serious problems ICAN was having with CRA. I am not impressed with the affidavits in support of ICAN's application. A good portion of the affidavits in support of the application describing ICAN's importance to various umbrella organizations has an air of hyperbole. Ms. French and Mr. Penney assert the importance of ICAN to the operations of several organizations and programs but no one from these organizations or programs corroborates ICAN's view of its own importance.

[79] It is not just and equitable to grant the applicant's application for postponement of the suspension to issue official tax receipts. The application is dismissed.

Signed at Ottawa, Canada, this 3rd day of January 2008.

"Gerald J. Rip"

Rip A.C.J.

Note

Section 188.2 of the *Act* provides for a temporary suspension of receipting privileges; it is not at all similar to the provisions of section 168 which provide for an actual and permanent revocation of the charity's registration. During the one year period the "suspended" charity has the opportunity to put its books of account in proper order and assemble its records. If the charity is successful in doing so

within the year it may make an application pursuant to section 188.2 and, if successful, continue its activities.

However, a charity seeking to have its suspended receipting privileges restored faces a relatively lengthy delay before the situation may be resolved. The suspension under section 188.2 is for a maximum of one year. Subsection 188.2(4) deals only with a postponement of a portion of the period of suspension. For the suspension period to be cancelled, assuming the suspension is confirmed on objection, the charity would have to file an appeal. Unless the charity invites the Minister to immediately confirm the suspension, as suggested by respondent's counsel as one way of speeding up the process, it would take at least 91 days before the charity could appeal the suspension to this Court and then further delays would transpire until a reply to the notice of appeal is filed and discoveries are held before the appeal is heard. Ms. Schusheim, appellant's counsel, estimated that it could be close to the one-year suspension period before the appeal is disposed of. And if the charity puts its books and records in order, say 3 months after suspension, the time to have the suspension cancelled when the year is even shorter, unless, of course, the CRA consents to the cancellation.

Parliament may wish to consider a summary procedure permitting a charity to contest a suspension.

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