**Date: 20081017**

**Docket: A-38-08**

**Citation: 2008 FCA 311**

**PRESENT: RYER J.A.**

**BETWEEN:**

**CHOSON KALLAH FUND OF TORONTO**

**Applicant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

Heard at Ottawa, Ontario, on October 7, 2008.

Order delivered at Ottawa, Ontario, on October 17, 2008.

REASONS FOR ORDER BY: RYER J.A.

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## REASONS FOR ORDER

[1] This is an application by Choson Kallah Fund of Toronto (the "Fund"), pursuant to paragraph 168(2)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"), for an order extending the period of time that must expire before the Minister of National Revenue (the "Minister") is permitted to publish a copy of the notice of intention to revoke the registration of the Fund as a registered charity (the "Notice of Intent to Revoke"), which was given by the Minister on December 21, 2007, in accordance with subsection 168(1) of the ITA, until the conclusion of the process that commenced with the filing by the Fund of a notice of objection (the "Notice of Objection") to the Notice of Intent to Revoke, pursuant to subsection 168(4) of the ITA.

[2] To succeed in this application, the Fund must establish that each of the requirements of the tripartite test set forth in *RJR−MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 have been met. (See *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 114 ("*ICAN*").) Thus, the Fund must demonstrate that there is a serious issue to be tried, it will suffer irreparable harm if the requested order is not granted and the balance of convenience favours granting the order.

**Serious Issue to be Tried**

[3] The Crown does not dispute that this element of the test is present and I am of the view that the low threshold with respect to this element has been made out.

**Irreparable Harm**

[4] With respect to this element of the test, Sopinka and Cory JJ. stated at page 341 of *RJR-MacDonald*:

> At this stage the only issue to be decided is 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.
>
> "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 (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). 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 (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[5] In *Haché v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 424, [2006] F.C.J. No. 1886 (QL), this Court described the requirements that must be established with respect to this element of the test. At paragraph 11 of that decision, Desjardins J.A. stated:

> The moving parties must demonstrate, on a balance of probabilities, that the harm that they would suffer is irreparable: *Halford v. Seed Hawk Inc.*, 2006 FCA 167 at paragraph 12. Mere assertions do not suffice. Irreparable harm cannot be inferred. It must be established by clear and compelling evidence: *A. Lassonde Inc. v. Island Oasis Canada Inc.*, [2001] 2 F.C. 568 at paragraph 20.

[6] The Fund argues that the revocation of its status as a registered charity, which is expected to occur if the requested order is not granted, will cause it to suffer irreparable harm. This is so, according to the Fund, because the inability to issue income tax receipts for donations, which will result from the revocation of its charitable registration, will lead to its receiving fewer donations. As a result, the Fund contends that its ability to engage in ongoing charitable works will diminish.

[7] The Fund provided no direct evidence to support these contentions. Instead, the Fund referred to various portions of the transcript of the cross-examination of Ms. Holly Brant of the Canada Revenue Agency on her affidavit that is included in the Crown's record. The Fund argued that these passages establish that in each of the years in which the Fund had no involvement with the Canadian Humanitarian Trust donation program, the Fund typically received donations of several millions of dollars and that those donations were distributed in amounts of a few thousand dollars to a number of needy recipients.

[8] I am prepared to accept that the evidence establishes these assertions as facts. However, these facts are largely historical and, in and of themselves, do not establish that the Fund will suffer irreparable harm if the Crown is permitted to proceed with the revocation of the registration of the Fund as a registered charity.

[9] The Fund further contends that the inability to issue official donation receipts that will flow from such a revocation will, of necessity, result in it receiving fewer donations. While this proposition appears sensible, accepting it as a proven fact does not necessitate the conclusion that the Fund will suffer any harm at all from the receipt of a smaller amount of donated funds. In my view, the record before the Court contains nothing that would indicate how or why the receipt of donations smaller in amount than those previously received by the Fund would cause any harm to the Fund that could be considered to be irreparable.

[10] The pattern of the Fund is to disburse the funds it receives from donations in relatively small amounts, presumably to a relatively large number of recipients. If the Fund receives less money from donations, it would appear that the Fund would only be able to disburse the smaller amounts received, presumably to a smaller number of recipients. In my view, these circumstances, even if they were established, would not constitute compelling evidence of irreparable harm to the Fund.

[11] I note that the record contains no evidence of the current financial position of the Fund. Such evidence might have disclosed the presence or absence of liquid and fixed assets, as well as

obligations to provide funding for on-going charitable programs of a size that might be affected by the receipt of smaller amounts of donations. In the absence of any evidence as to the current financial position of the Fund, I am unable to conclude that the receipt of donations at levels lower than those received by the Fund in prior years would have any impact upon the Fund, other than enabling it to distribute a smaller amount of money to needy persons.

[12] For these reasons, I conclude that the Fund has failed to establish that it will suffer irreparable harm if the requested order is not granted. It follows, in my view, that the failure of the Fund to establish this element of the *RJR-MacDonald* test leads to the conclusion that the application must be dismissed.

**Balance of Convenience**

[13] Because the Fund has failed to persuade me that the irreparable harm element of the test has been met, I am not required to consider this element of the test.

**DISPOSITION**

[14] For the foregoing reasons, I am of the view that all of the elements in the *RJR-MacDonald* test have not been satisfied and, accordingly, the application for the requested order should be dismissed, with costs.

"C. Michael Ryer"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-38-08 |
| **STYLE OF CAUSE:** | Choson Kallah Fund of Toronto<br>Applicant<br>v.<br>The Minister of National Revenue<br>Respondent |
| **PLACE OF HEARING:** | Ottawa |
| **DATE OF HEARING:** | October 7, 2008 |
| **REASONS FOR ORDER BY:** | Ryer J.A. |
| **DATED:** | October 17, 2008 |

**APPEARANCES:**

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| Robert McMechan | FOR THE APPLICANT |
| Joanna Hill<br>Wendy Burnham | FOR THE RESPONDENT |

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