

Federal Court



Cour fédérale

Date: 20101026

Docket: T-1674-10

Citation: 2010 FC 1051

Ottawa, Ontario, October 26, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

BIATHLON CANADA

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER

[1] Biathlon Canada comes before the Court on an urgent basis seeking an interlocutory injunction preventing the Minister of National Revenue from publishing a notice revoking the registration of Biathlon Canada as a registered Canadian amateur athletic association (or “RCAAA”) in the *Canada Gazette*.

[2] For the reasons that follow, Biathlon Canada has not demonstrated with clear and convincing evidence that irreparable harm will result if the injunction is not granted. As a consequence, the motion will be dismissed.

Background

[3] Biathlon Canada is the national governing body for the sport of biathlon within Canada, and is the national federation representing Canada internationally within the International Biathlon Union. It is also an RCAA, as defined by section 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supplement).

[4] An RCAA is an association whose primary purpose and function is to promote amateur athletics in Canada on a nation-wide basis. As an RCAA, Biathlon Canada is exempted from having to pay income tax. In addition, it is allowed to issue income tax receipts for donations received.

[5] After completing an audit of the books and records of Biathlon Canada, the Canada Revenue Agency determined that the organization had failed to comply with the requirements of the *Income Tax Act* by issuing official donation receipts other than in compliance with the Act, and by failing to file an information return as and when required by the Act and Regulations.

[6] Briefly stated, the Canada Revenue Agency determined that Biathlon Canada had been involved in abusive tax shelter gifting arrangements whereby the organization would issue tax receipts for property received. It is the position of the Agency that this property was routed through

Biathlon Canada's bank accounts and then into off-shore investments purportedly held on behalf of Biathlon Canada by Trafalgar Trading Limited.

[7] According to the auditors, these "investments" do not actually exist, and the funds ostensibly donated are in fact subsequently returned to the credit of the original donors. Biathlon Canada disputes these findings, and insists that it has not knowingly done anything wrong.

[8] Biathlon Canada was provided with the findings of the audit, and was afforded the opportunity to respond. After an exchange of correspondence between Biathlon Canada and the Canada Revenue Agency, the Agency's Charities Directorate gave notice to Biathlon Canada of its intention to revoke the registration of Biathlon Canada as an RCAA for having issued "more than \$25.9 million in donation receipts for abusive transactions arising from its role as a participant in tax shelter arrangements that, in the opinion of the Canada Revenue Agency, do not qualify as gifts ...".

[9] The revocation of Biathlon Canada's registration as an RCAA takes effect with the publication of the Notice of Intention to Revoke in the *Canada Gazette*. The Canada Revenue Agency intends to publish this notice in the next issue of the *Canada Gazette*. I am advised by the parties that the publication deadline for the next issue of the *Canada Gazette* is noon today.

Jurisdiction of the Federal Court to Decide this Matter

[10] I canvassed the issue of this Court's jurisdiction to hear this matter with the parties, as appeals with respect to the revocation of the status of registered charities are ordinarily brought to

the Federal Court of Appeal, and any ancillary interlocutory injunctive relief would thus have to be sought in that Court.

[11] The parties agree that the effect of the 2005 amendments to paragraph 172(3)(a.1) of the *Income Tax Act* is to eliminate RCAAAs' right of appeal to the Federal Court of Appeal. The result is that Biathlon Canada's only avenue of recourse is by way of judicial review in this Court in accordance with the provisions of section 18.1 of the *Federal Courts Act*.

[12] Paragraph 168(1)(d) of the Act provides that where a registered charity or a registered Canadian amateur athletic association issues a receipt for a gift or donation "otherwise than in accordance with this Act and the regulations or that contains false information", the Minister may give notice to the registered charity or registered Canadian amateur athletic association that the Minister proposes to revoke its registration. This is what has happened here.

[13] Subsection 168(2) provides that:

168. (2) Where the Minister gives notice under subsection 168(1) to a registered charity or to a registered Canadian amateur athletic association,

[...]

168. (2) Le ministre doit, dans le cas de l'alinéa a), et peut, dans les autres cas, publier dans la Gazette du Canada copie de l'avis prévu au paragraphe (1). Sur publication de cette copie, l'enregistrement de l'organisme de bienfaisance ou de l'association canadienne de sport amateur est révoqué. La copie de l'avis doit être publiée dans les délais suivants:

[...]

(b) in any other case, the Minister may, after the expiration of 30 days from the day of mailing of the notice, *or after the expiration of such extended period from the day of mailing of the notice as the Federal Court of Appeal or a judge of that Court*, on application made at any time before the determination of any appeal pursuant to subsection 172(3) from the giving of the notice, may fix or allow, publish a copy of the notice in the Canada Gazette, and on that publication of a copy of the notice, the registration of the charity or association is revoked.
[emphasis added]

b) dans les autres cas, soit 30 jours après la mise à la poste de l'avis, *soit à l'expiration de tout délai supérieur à 30 jours courant de la mise à la poste de l'avis que la Cour d'appel fédérale ou l'un de ses juges fixe*, sur demande formulée avant qu'il ne soit statué sur tout appel interjeté en vertu du paragraphe 172(3) au sujet de la signification de cet avis. [je souligne]

[14] Subsection 180(1) of the Act provides that an appeal to the Federal Court of Appeal pursuant to subsection 172(3) may be instituted by filing a notice of appeal in the Court within 30 days of certain specified events.

[15] Subsection 180(2) of the Act is explicit that the Federal Court does not have jurisdiction to entertain any proceeding in respect of a decision of the Minister from which an appeal may be instituted under this section.

[16] All of this suggests that Biathlon Canada's recourse should be in the Federal Court of Appeal. However, the statutory provision creating the substantive right of appeal seems to state otherwise.

[17] That is, paragraph 172(3)(a.1) of the Act provides that where the Minister confirms a decision or designation in respect of which a notice was issued by the Minister "to a person that is or was registered *as a registered charity*" [emphasis added] under various provisions of the Act, including subsection 168(1), an appeal from the Minister's decision or from the giving of the notice by the Minister may be taken to the Federal Court of Appeal.

[18] Thus it appears that paragraph 172(3)(a.1) confers a right of appeal to the Federal Court of Appeal to registered charities with respect to the revocation of their charitable status, but RCAAAs are not provided with a similar right of appeal in relation to their registration as registered Canadian amateur athletic associations.

[19] It should be noted that this provision thus appears to be inconsistent with subsection 168(2) of the Act which provides that both registered charities *and* registered Canadian amateur athletic associations may seek extensions of time with respect to the notice period from the Federal Court of Appeal.

[20] That said, in the absence of any statutory right of appeal to the Federal Court of Appeal, it appears that the only recourse available to RCAAAs in cases such as this is indeed by way of judicial review in this Court in accordance with section 18.1 of the *Federal Courts Act*.

The Test for Injunctive Relief

[21] The parties agree that in determining whether Biathlon Canada is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 10.

[22] That is, Biathlon Canada must establish:

- 1) That there is a serious issue to be tried in the underlying application for judicial review;
- 2) That irreparable harm will result if the injunction is not granted; and
- 3) That the balance of convenience favours the granting of the injunction.

[23] Given that the test is conjunctive, Biathlon Canada has to satisfy all three elements of the test before it will be entitled to relief.

Serious Issue

[24] In *RJR-MacDonald*, the Supreme Court of Canada observed that the threshold for establishing the existence of a serious issue is a low one. The respondent concedes the existence of a serious issue in this case.

Irreparable Harm

[25] As is often the case in motions of this nature, the primary focus of the parties' submissions was on the issue of irreparable harm.

[26] An interlocutory injunction should only be granted in cases where it can be demonstrated that irreparable harm will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard, if the injunction is not granted: *Lake Petitecodiac Preservation Assn. Inc. v. Canada (Minister of the Environment)* (1998), 149 F.T.R. 218, [1998] F.C.J. No. 797 at para. 23.

[27] Irreparable harm is harm that cannot be quantified in monetary terms, or which cannot be cured by an award of damages: *RJR-MacDonald*, at para. 59.

[28] The burden is on the party seeking the injunction to adduce clear and non-speculative evidence that irreparable harm will follow if its motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd.* 2005 FC 815, 40 C.P.R. (4th) 210, at para.59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

[29] That is, it will not be enough for a party seeking the injunction to show that irreparable harm *may arguably result* if the stay is not granted. Allegations of harm that are merely hypothetical will

not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, [2008] F.C.J. No. 8 at paras. 22-25.

[30] The Federal Court of Appeal has confirmed that registered charities cannot satisfy the irreparable harm component of the *RJR-MacDonald* test by relying upon simple assertions: *Choson Kallah Fund of Toronto v. The Minister of National Revenue*, 2008 FCA 311 [2008] F.C.J. No. 1576 at paras. 5 and 8, (leave to appeal denied, [2008] S.C.C.A. No. 528).

[31] In this case, Biathlon Canada argues that three different forms of irreparable harm will result if the respondent is not prevented from publishing the Notice of Intention to Revoke. Firstly, it says that it will lose royalty and other income pursuant to the agreements that it has entered into with Trafalgar Trading Limited, and may also lose its capital investment. Secondly, it says that it will lose income from individual donations as a result of it no longer being able to provide receipts for income tax purposes. Finally, Biathlon Canada says that its reputation will be irreparably harmed by the publication of the Notice and the revocation of its RCAA registration and status.

[32] I will deal first with Biathlon Canada's argument with respect to the loss of royalty and other income from Trafalgar Trading Limited. It is the series of "Trading Agreements" entered into by Biathlon Canada with Trafalgar Trading Limited that give rise to the concerns of the Canada Revenue Agency in this case.

[33] Biathlon Canada says that in the event that it loses its status as an RCAA, this will trigger a default under the provisions of the Trading Agreements. This in turn may result in Trafalgar Trading Limited ceasing to make further royalty payments to Biathlon Canada, and could, as well, potentially lead to the ultimate loss of Biathlon Canada's capital investment.

[34] Insofar as the royalty payments are concerned, the amounts that have been paid to Biathlon Canada have varied significantly over the last few years - from a low of \$15,609 to a high of \$170,254 per annum. In 2009-2010, the last year for which information is available, Biathlon Canada received \$21,985 in royalty payments from Trafalgar Trading Limited.

[35] Biathlon Canada has not provided the Court with its financial statements, nor has it provided any information regarding its ongoing financial obligations or specific commitments to any athletes who may be dependant upon Biathlon Canada. In the absence of such direct evidence, the Federal Court of Appeal has rejected similar claims of irreparable harm: *Holy Alpha and Omega Church of Toronto v. Canada*, 2009 FCA 265, [2009] F.C.J. No. 1262 at paras. 19-21, *Choson Kallah Fund*, previously cited, at para. 9-11, *International Charity Network v. Canada*, 2008 FCA 114, [2008] F.C.J. No. 500 at paras. 7-8. While these cases deal with registered charities, the principles articulated therein are equally applicable to RCAAs.

[36] Counsel for Biathlon Canada also says that he "assumes" that Trafalgar Trading Limited will not resume making the royalty payments in the event that Biathlon Canada is successful on its application for judicial review. Clearly, this is nothing more than speculation on counsel's part.

[37] Insofar as the potential loss of capital is concerned, it should be noted that there is a live issue between the parties as to whether Biathlon Canada actually has any ongoing legal or beneficial interest in the capital amounts invested with Trafalgar Trading Limited. In this regard, it is noteworthy that these funds are evidently not recorded on Biathlon Canada's financial statements as assets of the organization.

[38] Moreover, Biathlon Canada has not demonstrated with clear and non-speculative evidence that the revocation of its status as an RCAA will lead to the forfeiture of any capital investment that it may have with Trafalgar Trading Limited, nor has it established that any capital funds would be left in the account after the payment of all of the fees contemplated by the Trading Agreements.

[39] Biathlon Canada also claims that it will suffer irreparable harm because it will lose income from individual donations if it can no longer provide receipts for income tax purposes. I am not persuaded that any loss of individual donations that may occur between now and the time that Biathlon Canada's application for judicial review is heard would result in irreparable harm to it, given the small amount of individual donations received by Biathlon Canada in the past, relative to the size of the organization.

[40] The respondent has provided information indicating that Biathlon Canada received \$5,450 in non-tax shelter donations in 2005, \$3,950 in 2006 and \$1,065 in 2007. We know from other information provided by the respondent that Biathlon Canada's annual expenses over the same

periods ranged between \$1,141,340 and \$1,605,991. In the absence of supporting financial information from Biathlon Canada as to specific obligations of the organization that would remain unfulfilled because of a reduction in the amount of individual donations, I am not satisfied that a loss of some or all of the relatively small amount of money that it obtains from individual donations would result in irreparable harm to the organization: see *Holy Alpha and Omega Church of Toronto*, previously cited, at para. 21.

[41] Finally, Biathlon Canada has provided affidavits from a number of its officials with respect to the potential damage to its reputation that it says will result from the publication of the Notice and the revocation of its RCAA registration and status. These affidavits refer to the impact that this would have in relation to support from funding partners and corporate sponsors, as well as the recruitment of athletes and volunteers. The information contained in these affidavits consists of little more than very general assertions unsupported by concrete or specific evidence.

[42] The affidavits also assert that Biathlon Canada's international reputation will be irreparably damaged by the revocation of its RCAA registration and status. Biathlon Canada says that this would impact on its ability to participate in the International Biathlon Union.

[43] In support of this contention, a number of examples are given of other cases where rumours of difficulties between member federations or individual representatives and their national governments have led to negative consequences for the national federations in question. Examples

are cited of problems incurred in relation to elections to positions within the International Biathlon Union and bids to host international competitions.

[44] Little information is provided with respect to the nature of the problems that other member federations may have had with their governments. Moreover, there is no indication in the record that there are any elections or bidding processes that are likely to occur within the next few months.

[45] Biathlon Canada has thus not satisfied me that it will suffer irreparable harm between now and the time that its application for judicial review is likely to be heard.

Balance of Convenience

[46] In light of my finding in relation to the issue of irreparable harm, it is not necessary for me to address this element of the test.

Disposition

[47] Having failed to satisfy the irreparable harm component of the *RJR-MacDonald* test, it follows that Biathlon Canada's motion for an interlocutory injunction will be dismissed, with costs in the cause.

ORDER

THIS COURT ORDERS AND ADJUDGES that the motion for an interlocutory injunction is dismissed, with costs in the cause.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1674-10

STYLE OF CAUSE: BIATHLON CANADA v.
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Ottawa, Ontario

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**REASONS FOR ORDER
AND ORDER:** Mactavish J.

DATED: October 26, 2010

APPEARANCES:

Daniel O'Connor

FOR THE APPLICANT

Joanna Hill

FOR THE RESPONDENT

SOLICITORS OF RECORD:

DANIEL F. O'CONNOR
Barristers and Solicitors
Pointe Claire, Quebec

FOR THE APPLICANT

MYLES J. KIRVAN
Deputy Attorney General of Canada

FOR THE RESPONDENT