Federal Court of Appeal  Cour d'appel fédérale

Date: 20121009

Docket: A-357-12

Citation: 2012 FCA 255

Present: **STRATAS J.A.**

BETWEEN:

GLOOSCAP HERITAGE SOCIETY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on October 5, 2012.

Order delivered at Ottawa, Ontario, on October 9, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The applicant, Glooscap Heritage Society, is a registered charity under the *Income Tax Act*. The Minister has notified Glooscap that he will exercise his authority under the Act and revoke Glooscap's registration as a charity. Glooscap intends to challenge the revocation.

[2] Under the Act the revocation can take place before Glooscap can challenge it. This will be explained in more detail below.

[3] In this application, Glooscap seeks an order delaying the revocation until this Court hears its challenge.

[4] In order to delay the revocation, Glooscap must satisfy the Court that it has met the normal test for the granting of stays and injunctions: *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 114 at paragraph 5. Glooscap must show it has an arguable case against the revocation, it will suffer irreparable harm if the revocation is allowed to happen, and the balance of convenience lies in its favour: *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[5] For the reasons set out below, Glooscap has not satisfied this test. Therefore, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity, with costs.

A. Preliminary matter

[6] Initially, Her Majesty the Queen was named as the respondent to this application. The parties agree that the correct respondent is the Minister of National Revenue. I agree and will so order. The style of cause on these reasons and my order dismissing Glooscap's application shall reflect this change.

B. Facts

(1) The legislative scheme

[7] When the Minister concludes that a charity's registration should be revoked, he issues a notice of intention to revoke it: *Income Tax Act*, subsection 168(1). The revocation only takes effect when notice of it is published in the *Canada Gazette*.

[8] Where the charity has not requested the revocation, the publication of the notice is deferred for 30 days in order to allow the charity to challenge it: paragraph 168(2)(*b*). The challenge consists of the making of an objection and, if necessary, an appeal to this Court: Act, section 172.

[9] Any time before the Court determines the appeal, the Court may extend the 30 day period for non-publication of the notice of revocation. Before the appeal is brought, the extension may be granted on the basis of an application brought under Rule 300(*b*) of the *Federal Courts Rules*. After the appeal is brought, an extension may be granted by way of notice of motion within the appeal. See *International Charity Association Network (ICAN) v. Minister of National Revenue*, 2008 FCA 62 at paragraph 7.

(2) The basic facts of this case

[10] Since May 2005, Glooscap has been a registered charity under the Act.

[11] At that time, broadly stated, its objects were to research, study, exhibit, and publicize artifacts and evidence relating to the history of the Mi'kmaq First Nation in central Nova Scotia. In conjunction with the Central Nova Tourist Association, Glooscap operates the Glooscap Heritage Centre and Mi'kmaw Museum. The museum is located on the Millbrook First National reserve on the outskirts of Truro, Nova Scotia.

[12] Some of artifacts and exhibits in the museum come from charitable donations. But the bulk of the museum's artifacts and exhibits – some 80% – are on loan from another museum.

[13] The evidence filed before the Court suggests that the relationship between the tourist association and Glooscap – an aboriginal/non-aboriginal partnership in a tourism endeavour – is special and rare, and formed only after overcoming initial resistance. Putting aside Glooscap's involvement with the tax shelter, described below, the evidence filed before the Court demonstrates that Glooscap's activities are socially worthy and important to the community.

[14] But in this application, Glooscap's involvement with the tax shelter is central.

[15] The Minister alleges that from 2006 to 2011, Glooscap issued donation receipts in the following approximate totals: $166,000 (2006), $0 (2007), $11,590,000 (2008), $13,312,000

(2009), $37,131,000 (2010), $54,985,000 (2011). This shows a massive increase in donations since 2006 – ranging from 6,880% to over 33,000%.

[16] The Minister says this increase was due to Glooscap's involvement, starting in 2008, with an illegitimate tax shelter known as the Global Learning Gifting Initiative.

[17] In this regard, the Minister makes several allegations, largely on the basis of an audit it has conducted. On this application, it is not the role of the Court to determine whether these allegations are true. The Minister's allegations, to the extent they have a *prima facie* basis, are primarily relevant to the assessment of the public interest under the balance of convenience branch of the *RJR-Macdonald* test.

[18] The Minister's alleges that the illegitimate tax shelter worked in the following way:

- Each participant made a cash payment to Glooscap.

- Each participant then applied to become a capital beneficiary of the Global Learning Trust.

- The trust provided each participant with free courseware.

- Each participant donated the courseware to a registered charity that was participating in the tax shelter. In 2009 and 2010, participants donated the courseware to Glooscap.

- Each participant received an official donation receipt for the cash payment and the donated courseware.

- Although each participant purportedly donated the courseware at fair market value, Glooscap issued receipts for the courseware that were typically at least three times the amount of the cash payment the participant had made to Glooscap.

- Under this arrangement, Glooscap kept very little of the cash payments from participants. For example, in 2009, Glooscap retained 11.6% of the payments, with the promoter of the scheme receiving 88.4% of the payments.

[19] Following an audit, the Canada Revenue Agency concluded, among other things, that:

- Glooscap was not operating exclusively for charitable purposes as required under the Act, and instead was operating for the primary purpose of activities benefiting the tax shelter.

- Glooscap improperly issued receipts for cash and courseware that were not valid gifts under the Act.

[20] In an administrative fairness letter, the Canada Revenue Agency notified Glooscap of its concerns and invited Glooscap to respond. In a responding letter, Glooscap defended itself, urged that its registration as a charity not be revoked, and advised that it had terminated its relationship with the tax shelter.

[21] After some months, on July 17, 2012, the Canada Revenue Agency issued a Notice of Intention to revoke Glooscap's registration as a charity under the Act. Further, the Minister has told participants in the tax shelter their deductions arising from the scheme will be disallowed, and they will be reassessed for back taxes, interest and penalties.

[22] In the oral hearing of this application, Glooscap advised the Court that it has just filed an objection to the Minister's Notice of Intention.

[23] Assuming that the Canada Revenue Agency maintains its position, Glooscap will soon be able to challenge in this Court the Minister's planned – or, by then, actual – revocation of its registration as a charity. In the meantime, Glooscap wants this Court to stop the Minister from revoking its registration.

C. Analysis

(1) Arguable case

[24] On the first branch of the threefold test for a stay, Glooscap must establish that there will be a serious question to be tried when it challenges the Minister's position in this Court. Although it has not filed its objection to the Minister's Notice of Intention, it has filed its responding letter to the Minister's administrative fairness letter.

[25] The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald*, *supra* at page 337; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). Glooscap need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald*, *supra* at page 337.

[26] Given the low threshold for "arguable case," the Minister has conceded that Glooscap has met this branch of the *RJR-Macdonald* test.

(2) Irreparable harm

[27] Glooscap submits that if its registration as a charity is revoked, it will suffer irreparable harm. It points to reputational effects upon itself, the First Nation with which it is associated, the First Nation's business relationships, and business collaborations between aboriginal and non-aboriginal communities. It also says that potential donors to the museum will donate to other museums that can provide a donation receipt, and they will not lightly come back.

[28] Glooscap adds that under the irreparable harm branch of the test, the Court is to look at the nature of the harm – whether it can be remedied later – and not the quantity of harm.

[29] The Minister submits that the irreparable harm must be that of the moving party, here Glooscap. Harm to third parties may be considered under the balance of convenience branch of the test, but not under the irreparable harm branch of the test. The Minister also points to the general, unparticularized nature of the harm and the absence of proof of a real likelihood of harm.

[30] On the law governing irreparable harm and on the record before the Court, the Minister's submissions carry some force.

[31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*,

2010 FCA 232 at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[32] The reason behind this was explained in *Stoney First Nation* as follows (paragraph 48):

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[33] Finally, only harm suffered by the moving party qualifies under this branch of the test. As was said in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at page 128, "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm." It is "the applicants' own interests" that fall to be considered under this branch of the test, not that of third parties: *RJR-MacDonald*, *supra* at page 341.

[34] In cases such as this, a modest modification of this principle has been made. The interests of those who are dependent on the registered charity may also be considered under this branch of the test: *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265 at paragraph 17.

[35] Glooscap has adduced evidence from very well-placed deponents: the executive director of the tourist association with which Glooscap is partnered, a multi-decade councillor with the Millbrook First Nation reserve, and the general manager of the museum. However, much of the evidence of harm given by these deponents consists of sweeping, unparticularized assertions and declarations that difficulties would arise that *might* result in actual harm.

[36] Without a better understanding of Glooscap's overall financial situation and fundraising ability, I cannot conclude that a loss of donations would result in any irreparable harm to it or its activities.

[37] Glooscap submits that revocation of its registration as a charity will cause harm to its relationships, particularly with non-aboriginal organizations, and these injuries are not capable of later remediation. However, its evidence goes no higher than to identify "jeopardy" or a risk to those relationships: see paragraphs 11 and 13 of the Mingo Affidavit.

[38] The Court does accept that Glooscap will suffer some reputational harm. However, as explained below, much of the reputational harm, especially in the donor community, will be caused not by the revocation of Glooscap's registration as a charity, but rather by the reassessment of the donors to the tax shelter.

[39] Ultimately fatal to Glooscap`s application is the requirement that it establish irreparable harm that is *unavoidable*, *i.e.*, irreparable harm that will be caused by the failure to get a stay, not harm caused by its own conduct in running a clearly-known risk that it actually knew about, could

have avoided, but deliberately chose to accept: *Dywidag Systems International*, *supra* at paragraphs 14 and 16.

[40] In *Dywidag Systems International*, the irreparable harm was said to be the disclosure of confidential documents. Often the release of confidential documents causes irreparable harm. But in Dywidag, this irreparable harm was avoidable: months earlier, Dywidag was invited to agree upon a confidentiality order protecting the documents, but it did nothing.

[41] In this case, Glooscap knew about the sizeable advantages of registered charitable status: exemption from income tax and the ability to issue receipts for donations received. It was warned at an early stage that it might lose its advantageous charitable status if it associated with this tax shelter. Part of that risk is the very thing that has now materialized – the revocation of its charitable status before it can challenge the revocation in this Court. Warnings about involvement with this tax shelter came from the Canada Revenue Agency (two emails and a meeting), Glooscap's own lawyer (two letters) and its own auditor. Glooscap's auditor resigned, at least in part over the issue. There were also warnings that involvement in the tax shelter would require an amendment to Glooscap's objects and the approval of the Canada Revenue Agency. Yet, knowing of the risks, Glooscap chose to continue its association with the tax shelter, and in fact renewed its association in 2009.

[42] Glooscap submits that it exercised good faith throughout. In support of that submission, among other things, Glooscap points to confirmatory testimony given on cross-examination of a representative of the Canada Revenue Agency. That may be so, but the fact remains that at an early

stage Glooscap knew of the risk of the very harm that has eventuated here and it chose to run that risk.

[43] If Glooscap blundered itself into involvement in this tax shelter, oblivious to any real risk, the irreparable harm might not be fairly laid at its feet. Similarly, circumstances such as mistaken advice, mistake as to the facts, trickery, duress or unauthorized conduct by someone wrongly purporting to act for Glooscap might cause a different view to be taken of the matter. But in this case none of these circumstances are present.

(3) Balance of convenience

[44] Were it necessary to proceed to this branch of the test, this Court would have found that the balance of convenience lies against the granting of relief to Glooscap.

[45] This Court recognizes the high significance and importance of the aboriginal/non-aboriginal partnership in this case between Glooscap and the tourist association, especially when viewed against the regrettable, often abysmal, sometimes unspeakable events surrounding Canada's history of aboriginal/non-aboriginal relations: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996).

[46] As mentioned in paragraph 37 above, the evidence offered by Glooscap falls short of establishing a real likelihood that this partnership will fail or that the broader aboriginal/non-aboriginal relationship will suffer if Glooscap's charitable status is revoked. That being said, the evidence does describe a risk – albeit undefined, abstract and perhaps speculative – of that happening.

[47] The Court also accepts that if Glooscap's registration as a charity is revoked, the reputations of it and perhaps those associated with it will suffer, with possible, undefined, perhaps speculative detrimental effects on their businesses and activities.

[48] However, one would expect that the Minister's reassessment of all of Glooscap's donors who participated in the tax shelter will cause negative news to spread through all of the donor community, if not the wider community. This will happen regardless of whether the Court grants Glooscap the relief it seeks in this application.

[49] Glooscap's evidence falls short of establishing that the museum will fail, or that its educational mission will be detrimentally affected. No financial information has been given that would allow such a finding to be made.

[50] Putting aside the donations involving the tax shelter, Glooscap has received only $19,775 in total donations during 2007-2011, and no evidence has been provided suggesting that the loss of this level of donation will cause any significant harm.

[51] On the Minister's side, is the public interest in enforcement – a matter deserving of significant weight in this case. The Minister's allegations in support of revocation of Glooscap`s registration as a charity are supported, on a *prima facie* basis, by the conclusions of the audit that appears in the record before the Court. Therefore, the public interest in enforcement, as contemplated by the Act, is in play.

[52] Glooscap seeks to prevent the Minister from revoking its registration, something the Act permits the Minister to do at this time, subject, of course, to later challenge. Where the moving party seeks to prevent statutory actors from carrying out their statutory duties, a "very important" public interest "weigh[s] heavily" in the balance: *143471 Canada Inc.*, *supra* at page 383, Cory J. (for the majority); *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 at paragraph 9; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 12.

[53] The weight to be accorded to that public interest, already significant, is driven upward by the sizeable amounts said to be in issue in this case: $116,999,482 given in receipts to participants in the tax shelter in 2008-2011, in circumstances where valid non-tax shelter donations over the same period totalled only $19,775. It is also driven up by Glooscap's decision to involve itself in the tax shelter despite the clear warnings it received.

[54] In assessing and weighing the public interest considerations in this case against the considerations offered by Glooscap, I can do no better than to adopt the words of my colleague, Sharlow J.A., in *International Charity Association Network*, *supra* at paragraph 12 (2008 FCA 62):

> The Minister takes the position, properly in my view, that the public has a legitimate interest in the integrity of the charitable sector. It is reasonable for the Minister to attempt to safeguard that integrity by carefully scrutinizing tax shelter schemes involving charitable donations of property and, where there are reasonable grounds to believe that the property has been overvalued, by taking appropriate corrective action. In the circumstances of this case, the Minister's factual allegations, while untested, are sufficiently serious to outweigh any advantage [the charity] might derive from an order deferring the revocation of its registration as a charity.

D. Disposition

[55] For the foregoing reasons, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity. The Minister shall have his costs of the application.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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