CITATION: *Muslim Association of Canada v. Attorney General of Canada*, 2022 ONSC 7284
COURT FILE NO.: CV-22-679625-0000
DATE: 20221223

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MUSLIM ASSOCIATION OF CANADA	)	*Geoff R. Hall, Anu Koshall and Adam Kanji*, for the Applicant
	)	
Applicant (Moving Party)	)	
– and –	)	
	)	
	)	
	)	
ATTORNEY GENERAL OF CANADA	)	*Lynn Marchildon, James Gorham, Anna Maria Konewka, Mitchell Meraw*, for the Respondent
	)	
Respondent (Responding Party)	)	
	)	
	)	
	)	
	)	
	)	**HEARD: DECEMBER 9, 2022**

VELLA J.

REASONS FOR DECISION

[1] The Muslim Association of Canada ("MAC") is a national not for profit organization that operates a network of schools, mosques, student programs, community centres and other programs to primarily benefit the Canadian Muslim population across Canada. It describes itself as the "largest Muslim charity" in Canada. It operates with a multimillion-dollar budget derived from donations received in its capacity as a registered charity.

[2] Since 2015, MAC has been the subject of a lengthy audit by the Canadian Revenue Agency ("CRA") regarding the fiscal periods ending in 2013, 2014 and 2015. As such the audit has been ongoing for approximately seven years.

[3] In March 2021, after concluding its audit, the CRA issued an Administrative Fairness Letter ("AFL") to MAC comprised of approximately 151 pages, including exhibits. In the AFL, the CRA set out its preliminary findings of "serious" violations of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). It also proposed that MAC's charitable status be revoked, and a financial penalty of $1,312,542 be imposed, subject to receiving MAC's submissions responding to the AFL. The AFL sets out in detail the CRA's allegations and evidence in support of its findings.

[4] The CRA's review of MAC's responding submissions was ongoing as at the date of the hearing.

[5] In the meantime, MAC has commenced the within application (on April 11, 2022) alleging that the audit by the CRA has been tainted by systemic bias and Islamophobia. MAC alleges that the audit has been conducted in a manner that violates its rights under the *Canadian Charter of Rights and Freedoms*; in particular, ss. 2(a), 2(b), 2(d) and 15. MAC seeks relief under s. 24(1) of the *Charter* either terminating the audit or directing that the audit proceeds in a *Charter* compliant manner.

[6] MAC seeks an interlocutory injunction prohibiting the CRA from rendering its final audit decision, with the related recommendations, to the Minister of National Revenue pending the hearing of the application on the merits, which is scheduled to be heard on April 4, and 6, 2023. It is noteworthy that MAC modified its position at the hearing from its original position that the injunction continue until the final determination of its application.

[7] The Attorney General of Canada (the "Attorney General") opposes the motion.

Test for Interlocutory Injunctive Relief

[8] Whether or not to grant an interlocutory injunction is a matter within the discretion of the court, taking into account whether, in all of the circumstances specific to the case at bar, it is just or convenient to grant, or deny, an injunction (s. 101, *Courts of Justice Act*, R.S.O. 1990, c. C.43; *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34, [2017] 1 S.C.R. 824, at para. 25).

[9] MAC must establish the three mandatory elements set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[10] Also noteworthy for this case, in considering the three elements of the *RJR* test, strength in one of the elements may compensate for weakness in another part of the test (*Bell Canada v. Rogers Communications Inc*., 2009 CanLII 39481 (Ont. S.C.), at para. 39). However, the strength of one or two of the elements cannot compensate for the complete failure to establish any of the remaining elements. This is because all three elements are mandatory.

Issues

[11] The issues for determination are:

(a) Is there a serious issue to be tried?

(b) Will MAC suffer irreparable harm if the injunction is not granted?

(c) Does the balance of convenience favour MAC or the CRA?

(d) Does MAC satisfy the criteria for granting a *quia timet* injunction?

[12] For the reasons that follow, it is not just, equitable or convenient that an interlocutory or *quia timet* injunction be granted. The motion is accordingly dismissed.

Issue 1: Is there a serious issue to be tried?

[13] It is clear that a serious issue is raised by the Notice of Application. The Attorney General concedes this.

[14] The alleged *Charter* violations raised by MAC are neither frivolous nor vexatious based on a preliminary assessment of the merits. MAC clearly meets the low threshold posed under this element of the *RJR* test.

Issue 2: Has MAC demonstrated it will suffer irreparable harm if an injunction is not granted?

[15] In *RJR*, at pp. 340 – 341, the Supreme Court of Canada, citing *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, at p. 128, frames irreparable harm as being whether the moving party "would, unless the injunction is granted, suffer irreparable harm".

[16] It is the nature of the harm, not its magnitude, which must be examined. The fact that what is at stake is the potential violation of *Charter* rights is an important consideration in this analysis *(Automotive Parts Manufacturers' Association v. Jim Boak*, 2022 ONSC 1001, 28 M.P.L.R. (6th) 329, at para. 42).

[17] While the jurisprudence does not require absolute certainty in establishing that irreparable harm would occur, the evidence must go far beyond speculation and satisfy the balance of probabilities. As will be shortly seen, in the case of a *quia timet* injunction, that standard of proof is elevated to a high degree of probability.

[18] Canada submits that MAC must demonstrate with evidence that, there is "a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour*), 2018 FC 102, 47 Admin. L.R. (6th) 207, at para. 62; *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232, at para. 31).

[19] In my view, MAC must prove that it is likely that the type of irreparable harm it is asserting will occur should the injunction be denied (*Automotive Parts Manufacturers' Association*, at paras. 41-42; *Jungle Lion Management Inc. v. London Life Insurance Company*, 2019 ONSC 780, at paras. 25-26; *Newbould v. Canada (Attorney General)*, 2017 FCA 106, 23 Admin. L.R. (6th) 233, at paras. 29, 31; *West Hill Minor Hockey Association v. Scarborough Hockey Association*, 2009 CanLII 26609 (Ont. S.C.), at para. 19).

[20] MAC must elicit clear and non-speculative evidence that irreparable harm will follow if the injunction is denied (*West Hill Minor Hockey*, at para. 18*; Right to Life Association*, at para. 60). This standard of proof also applies where *Charter* violations are alleged. (*Right to Life Association*, at para. 60).

[21] MAC relies on the AFL with its preliminary findings of serious violations and its indication that the CRA intends to recommend that its charitable status be revoked and a substantial penalty assessed as the event that will trigger the irreparable harm. MAC presumes that the CRA's position will not change, irrespective of MAC's response to the AFL.

[22] In *RJR*, the Supreme Court expressly recognized at p. 341 that being put out of business, suffering permanent market loss or irrevocable damage to its business reputation all constitute examples of harm that is irreparable. By analogy, these types of harms apply to a charitable organization like MAC.

[23] The Supreme Court also observed at p. 342 that there was, at that time, an insufficient body of damages jurisprudence developed under s. 24 of the *Charter* and that due to the uncertain state of damages as a *Charter* remedy, it was too difficult for a judge, on an interlocutory injunction motion, to determine whether adequate compensation could even be obtained at trial. Therefore, at that time, a *Charter* breach constituted an irreparable harm. Since then, some jurisprudence has developed on how to approach damages as a *Charter* remedy. However, this caution from the Supreme Court in *RJR* is still apt at the interlocutory injunction stage.

[24] MAC has provided evidence that should its charitable status be revoked, then it will likely suffer the type of harm that cannot be compensated by an award of damages. This submission is based, in part, on its claim that it will have to immediately start winding down its cross-country programs and facilities in order to meet the one-year time frame for winding up its organization once its charitable status is revoked. Furthermore, its reputation will have been tainted and donors will be guarded in making future donations even if a decision to revoke is ultimately overturned as a result of the disposition of the Application.

[25] Canada counters that should a final audit decision be rendered finding serious violations have been committed by MAC warranting the revocation of its charitable status and/or a heavy monetary penalty, MAC has administrative remedies including applying for a stay of the decision before the Federal Court and/or Tax Court and requesting that the CRA not publish its decision pending a judicial review or appeal (depending upon what route MAC takes to challenge the decision). Canada also states that MAC can seek a longer period of time to wind up its affairs,

pending the outcome of any court challenges it brings so that it would not have to immediately begin winding down its affairs and selling its substantial assets and real property.

[26] In *Bell Canada*, the court found that irreparable harm was not established because the precipitating wrongful activity that would cause the irreparable harm (the existence of a server test site) had been removed and the impugned direct mailing had stopped and would not resume. Therefore the evidence with respect to irreparable harm in that case was considered to be weak. This ratio is particularly apt in the context of this motion.

[27] The fundamental flaw with MAC's submission is its premise that CRA will ultimately recommend that its charitable status will be revoked and/or a fine levied, notwithstanding the fact that its decision has yet to be made pending review of MAC's response to the AFL, and that the Minister of National Revenue will follow that recommendation in the exercise of her discretion.

[28] MAC has tendered evidence that establishes that it will suffer irreparable harm to it (though not third parties, contrary to its submissions) in the form of reputational damage, likely loss of donor support (or market share) and the impossibility of determining at this early stage whether damages would be an adequate remedy under s. 24(1) of the *Charter*, should the CRA issue a final audit decision reflecting the findings and recommendations in its AFL and the Minister follows that recommendation (which she is not obliged to do).

[29] However, under cross examination, CRA's deponent, Leah Harris (Manager of CRA's Review & Analysis Division) steadfastly maintained that it was a possibility that CRA would maintain its position, and that equally it was a possibility that it would change its position.

[30] MAC has not proven that the CRA will *likely* validate its preliminary conclusion and recommendations as reflected in the AFL, irrespective of its responses to the AFL. MAC's affiant, Dr. Sultan, could only speculate that the CRA will not change its preliminary position as set out in the AFL based on a belief that the audit has been conducted in a discriminatory, Islamophobic manner. In contrast, Ms. Harris only conceded that it was a possibility that the CRA would ultimately confirm its preliminary findings that MAC committed serious violations of the *Income Tax Act* and that it will recommend to the Minister that its charitable status be revoked and/or a financial penalty be imposed. Ms. Harris also testified that it is also possible that the CRA, after considering MAC's extensive response, would change its mind and reverse its conclusions and/or recommendations. Furthermore, she stated under cross examination that there were times when the CRA confirmed its position as outlined in an administrative fairness letter after receiving the subject of the audit's response, and other times when it changed that position.

[31] MAC's position that irreparable harm will occur if an injunction is denied is premised on the CRA ultimately maintaining the position reflected in its AFL. However, if, after having considered MAC's responses, the CRA reverses it position, then there will be no irreparable harm. MAC could still arguably pursue its *Charter* challenge to the manner in which it alleges the CRA conducted its audit.

[32] While MAC's position is not entirely speculative given the preliminary findings reflected in the AFL, the evidence falls short of establishing on a balance of probabilities that irreparable harm would result if an injunction is not issued. MAC has not demonstrated that the anticipated final decision from CRA is likely to result in a recommendation to the Minister that MAC should be sanctioned in any way, much less have its charitable status revoked. In this sense, MAC's position is based on a hypothetical scenario – one that may well develop, but cannot be said, on the basis of the existing evidentiary record, to be likely.

[33] Put another way, the alleged precipitating acts, namely the pending CRA final audit decision which, it is anticipated by MAC, will simply rubber stamp its preliminary findings, followed by a Minister's decision, anticipated by MAC to follow the CRA's recommendations, are too contingent and uncertain to reach the bar that the irreparable harm would follow if an injunction is not granted.

[34] A contingent or possible precipitating act is not sufficient, in my view, to satisfy the *RJR* test that, absent an injunction, irreparable harm would occur.

[35] MAC's advancement of irreparable harm is therefore premature since the acts that would cause the irreparable harm, as asserted by MAC, have yet to occur and may never occur.

[36] While MAC has established that the nature of the harm would be irreparable, it has not satisfied me, on the evidentiary record adduced, that this harm would occur if an injunction does not issue. Accordingly, MAC has failed to satisfy the irreparable harm element of the *RJR* test.

Issue 3: Which Party Does the Balance of Convenience Favour?

[37] The question to be answered in this weighing of the competing interests of MAC and CRA is whether the harm to be suffered by MAC will be greater if the injunction is denied than the harm that will be suffered by the CRA if the injunction is granted, pending a decision on the merits of the application.

[38] At this stage of the analysis, the public interest must be weighed (*RJR*, at pp. 341, 343-344).

[39] MAC asserts a legitimate public interest in ensuring the CRA conducts its audits without it being tainted by Islamophobia and in a *Charter*-compliant manner. It argues that all that is being sought is a short "pause" in the CRA's lengthy audit process that has already been ongoing for seven years, and deals with fiscal periods that are now seven to nine years ago. On the other hand, MAC submits that there is nothing in the record that supports a claim that CRA or the public will suffer any harm should injunctive relief be granted with respect to this isolated audit.

[40] However, MAC's position understates the legitimate interest the public has in the CRA being permitted to "regulate [the charitable sector] to ensure that their donations and registered charities' resources are, in fact, used for charitable purposes", as reflected in the affidavit of Leah Harris. An injunction would temporarily restrain the Minister of National Revenue from

discharging her statutory duty since the ultimate authority as to the outcome of MAC's charitable authority resides in the Minister, and not the CRA. The Minister is presumed to act in the public interest, and significant weight should be accorded to the Minister's ability to carry out her statutory duties (*Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116.

[41] Irreparable harm occurs when a public authority is prevented from exercising their statutory powers (*Ahousaht First Nation*, at paras. 124-127).

[42] In the context of other interlocutory injunction motions, the Federal Court has recognized the public interest in oversight and enforcement of tax laws and regulations as applied to charities in cases in which, like in the current matter, the plaintiff/applicant was facing possible revocation of charitable status; e.g.: *Glooscap*, at paras. 51-53; *Fortius Foundation v. Canada (National Revenue)*, 2022 FCA 176, at para. 39. In both of those decisions, interlocutory injunctive relief was denied.

[43] Furthermore, should MAC's worst case scenario occur and CRA ulitmately recommends to the Minister of National Revenue that its charitable status be revoked and/or a penalty be imposed as a result of serious violations of the *Income Tax Act*, MAC is not without remedy. The administrative law regime provides MAC with recourse, including moving to seek an immediate stay of the decision and non-publication of the audit decision, pending a determination of the application or other proceeding on the merits.

[44] As demonstrated by Canada, even where a decision is made to revoke an organization's charitable status, it will not become public until a copy of a notice of intention to revoke is published in the Canadian Gazette (*Income Tax Act*, s. 168(2)(b)). Furthermore, the shortest period that the charity has notice of such an intention is 30 days, and the common period of time is 90 days. During that period of time, a charity can apply to the Federal Court of Appeal to have the publication of the revocation stayed. A charity may also file a notice of objection with the Appeals Branch of the CRA which provides for a dispute resolution process challenging CRA decisions. Furthermore, if the charity is either unhappy with the Appeal Branch's decision or the length of time it is taking to process the objection, the charity can appeal to the Tax Court of Canada or the Federal Court of Appeal if it is sanctioned with a notice of intention to revoke its charitable status. During the course of the objections and appeals process a charity can continue to operate as a registered charity and issue tax receipts to donors.

[45] Only after exhausting its objection and appeal rights is a charity's registered status ultimately revoked, at which time it will have one year to wind up its affairs.

[46] In the meantime, this application will be heard on its merits in early April 2023.

[47] On balance, on a contextual analysis, the balance of convenience favours Canada. A greater irreparable harm will occur to it in the sense of undermining the public interest in the regulatory and statutory role of the CRA and ultimately the Minister of National Revenue if an

injunction issues, than will occur to MAC should it be declined. This is the case particularly when the fact that no final decision has been made by CRA, much less by the Minister, is balanced against the administrative law and other remedies MAC can avail itself of to effectively stay the CRA's decision should it indeed recommend sanctions including revocation of its charitable status, pending a determination in this court of this application on the merits and/or exhausting its objection and appeal avenues before the Appeal Branch, Tax Court of Canada and/or Federal Court of Appeal.

Issue Four: Is a *Quia Timet* Injunction Warranted?

[48] In response to a question from the bench requesting authority for the proposition that irreparable harm can be premised on an event that was not yet certain or likely to happen, MAC advanced for the first time a request for a *quia timet* injunction. As a result, I requested and subsequently received supplementary written submissions from Canada and MAC concerning the possible application of a *quia timet* injunction.

[49] The *quia timet* injunction is intended to provide relief to the moving party where the anticipated act has yet to be realized. Rather, the plaintiff fears that without an injunction irreparable harm will be imminent. This type of injunction is relied upon when the moving party's motion for an injunction is met with the defence that it is premature.

[50] The test for a *quia timet* injunction is the same as the *RJR* test except with respect to the irreparable harm element of the test. In *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, the Supreme Court of Canada at para. 35 affirmed, with respect to irreparable harm in relation to a *quia timet* injunction, that "there must be a high degree of probability that the harm will in fact occur".

[51] Justice Sharpe's text, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Carswell, 2022), at 1:20.50, provides the following guidance concerning this type of injunction:

> What the court does look for is the information necessary to predict with confidence not only that the harm will occur but also other relevant circumstances which will then exist. In other words, the court must be satisfied that the relevant factors which bear upon the granting of injunctive relief have crystallized.

[52] In *Wiggins v. WPD Canada Corp*., 2013 ONSC 2350, 1 C.C.L.T. (4th) 294, this court considered whether a *quia timet* injunction was just and equitable. In that case, certain landowners sought interlocutory relief against WPD prohibiting the construction and operation of industrial wind turbines. The site plans for the prospective turbines had not yet obtained the requisite regulatory approvals. The landowners feared that if the site plans were approved, and the wind turbines built as per the proposed drafts, they would suffer irreparable harm.

[53] In rejecting the landowners' request for a *quia timet* injunction, the court observed that until the draft site plans were approved, the court was left speculating as to what the ultimate outcome would be. The irreparable harm advanced by the landowners would only occur if the

ongoing administrative process went WPD's way. Accordingly the landowners failed to prove "with a high degree of probability" that irreparable harm would follow if this type of injunction was not granted.

[54] The situation dealt with in *Wiggins* is analogous to the situation presented in this motion.

[55] Conversely, this is not a situation such as was presented in *Uber Canada Inc. v. Surrey (City)*, 2020 BCSC 173, 97 M.P.L.R. (5th) 193, relied upon by MAC. In that case, the City of Surrey had not only expressed an intention to fine Uber's drivers for failure to have the requisite Transit Network licence (which Surrey already advised would not be available to Uber), but it had already started fining Uber's drivers.

[56] This motion is also distinguishable from *British Columbia (Legislative Assembly) v. John Doe*, 2020 BCSC 301, also relied upon by MAC. In that case a protest group, after having already conducted a protest in front of British Columbia's legislative assembly, posted on Facebook a notice to attend the Legislative Assembly on a fixed day between certain hours to "shut down" the Legislature. Again, this scenario involved a certain fixed intention to engage in illegal activity, not a tentative intention to so engage.

[57] MAC's inability to make out the standard of proof for a *quia timet* injunction accentuates the hurdle it faced in satisfying that it will suffer irreparable harm at this juncture in the CRA's audit process if an injunction is denied. MAC must convince the court that it is likely, highly likely in the case of the *quia timet* injunctive relief, that CRA will not change its tentative audit findings and proposed sanctions as reflected in its AFL, notwithstanding MAC's detailed responses to each and every allegation posed by the CRA in its AFL. It is clear that the evidentiary record does not support such a finding on the ordinary balance of probabilities much less the high degree of probability required for a *quia timet* injunction.

[58] MAC has failed to establish irreparable harm with the requisite high degree of probability required for the issuance of a *quia timet* injunction.

Conclusion: Is it just and equitable to grant or deny the injunction?

[59] In examining all three of the elements of the *RJR* test, in a holistic manner as mandated by the Supreme Court of Canada in *Google*, it is just and equitable that the motion for injunctive relief be dismissed at this stage. The interlocutory injunctive relief sought is premature and also does not reach the high bar required for a *quia timet* injunction.

[60] The motion is therefore dismissed.

[61] However, in the event that CRA issues a final decision in the interim in which it recommends sanctions against MAC based on its finding of serious violations as set out in its AFL, then MAC is at liberty to bring a further motion for interlocutory and/or permanent injunctive relief before this Court, on fresh evidence.

[62] If the parties cannot agree on costs, then Canada will deliver its cost outline and submissions to my judicial assistant within 10 business days from the release of this decision. MAC will then deliver its cost outline and submissions within 10 business days thereafter. The written submissions shall not exceed three double-spaced pages each.

Justice S. Vella

Released: December 23, 2022

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