COURT OF APPEAL FOR ONTARIO

CITATION: Muslim Association of Canada v. Canada (Attorney General), 2024 ONCA 541
DATE: 20240708
DOCKET: COA-23-CV-1096

Sossin, Monahan and Madsen JJ.A.

BETWEEN

Muslim Association of Canada

Applicant
(Appellant)

and

Attorney General of Canada

Respondent
(Respondent)

Geoff R. Hall, Anu Koshal and Almut MacDonald, for appellant

Lynn Marchildon, Kevin Palframan and Mitchell Meraw, for the respondent

Heard: June 18, 2024

On appeal from the judgment of Justice Markus Koehnen of the Superior Court of Justice, dated September 13, 2023.

REASONS FOR DECISION

Overview

[1] The appellant appeals the dismissal of its application challenging a Canadian Revenue Agency ("CRA") audit (the "Audit"), on the basis that the Audit

process violated its *Charter* rights. The application judge dismissed the application as premature.

[2] The appellant argues that the application judge erred by improperly applying the prematurity principle to an application for *Charter* relief, and in finding that the administrative appeal process under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "*ITA*") provided the appellant with an effective alternate means to obtain the relief it seeks.

[3] While we disagree with one aspect of the application judge's analysis, we find that he did not err in dismissing the application on the basis that, at this preliminary stage of the process, it is premature. Accordingly, for the reasons set out below, the appeal is dismissed.

Background

[4] The applicant describes itself as Canada's largest grassroots Muslim charity, committed to promoting a moderate, balanced view of Islam. It has over 500 members, 1500 volunteers, operates 22 mosques and community centres, runs 30 schools, and serves more than 150,000 members of the Canadian Muslim community through local chapters in 14 cities across Canada.

[5] The CRA is the regulator of registered charities in Canada. Its mandate includes ensuring that registered charities meet statutory requirements for registration and are not abused by terrorist organizations.

[6] In 2015, the CRA commenced the Audit. It was extensive, involving dozens of interviews and visits to the appellant's properties, as well as a review of approximately 1,000,000 financial transactions, over 415,000 emails, and over 63,000 other files.

[7] In March 2021, the CRA issued a 150-page Administrative Fairness Letter (the "AFL") setting out CRA's preliminary findings and recommendations. The AFL identified numerous areas where the CRA alleged that the appellant had failed to comply with relevant provisions of the *ITA* and/or its regulations, and recommended that the appellant's charitable status be revoked. The AFL invited the appellant to respond to these preliminary findings and recommendations, and appellant did so in writing in August 2021, December 2021 and January 2022.

[8] In April 2022, the appellant commenced an application in Superior Court (the "Application") seeking an order terminating the Audit on grounds that the Audit, including the AFL, had violated its *Charter*-protected rights to freedom of religion, freedom of expression, freedom of association, and freedom from discrimination. The Application identified three aspects of the Audit process that had infringed its *Charter* rights (collectively, the "Audit Process Concerns"): (i) the risk-based assessment used by the CRA to determine which charities to audit, which the Appellant argues disproportionately single out Muslim charities; (ii) the appellant's referral for auditing, which it argues was based on dubious and unreliable sources; and (iii) the manner in which the Audit had been carried out, resulting in the AFL,

which the appellant argues reflects Islamophobic attitudes and a profound misunderstanding of Islam.

The Application Judge's Reasons

[9] The application judge indicated that he shared many of the concerns identified by the appellant. He doubted, for example, that many of CRA's objections to the appellant's activities would have resulted in charities from other religious groups having their charitable status being called into question.

[10] The application judge nevertheless declined to find that the appellant's *Charter* rights had been violated at this stage of the Audit process since, in his view, the Application was premature. The application judge described the prematurity principle as holding that, absent "exceptional circumstances", a court will not interfere in an ongoing administrative process until that process has been completed. In the application judge's view, requiring parties to work through the administrative process has the practical advantage of relieving courts of the obligation to address matters that may subsequently be resolved and thus never need be considered. Moreover, while courts are well equipped to adjudicate disputes over well-defined legal disputes, they are ill-suited to design or supervise ongoing administrative processes.

[11] These considerations led the application judge to conclude that the Application was premature, primarily because there was an insufficient record

upon which to make the findings sought by the appellant. The application judge pointed out that he had not been provided with any standard or criteria against which to measure the decision by an investigating body such as the CRA to commence an audit, nor how to determine the point at which the commencement of an investigation can itself amount to a violation of *Charter* rights. Completion of the Audit process would provide the court with the benefit of the final reasons from the administrative body, rather than an incomplete work in progress.

[12] The application judge further relied on the fact that, once the Audit is concluded, the *ITA* provides a process of internal appeal within CRA, culminating in a right of appeal either to the Tax Court of Canada (if CRA levies financial penalties) or the Federal Court of Appeal (if CRA decides to revoke charitable status). In the application judge's view, permitting this internal administrative process to run its course would narrow or refine the issues and produce a final decision that would make judicial proceedings manageable and appropriate. Moreover, either the Federal Court of Appeal or the Tax Court of Canada are equally, if not better, equipped to determine the alleged *Charter* violations raised through the Application.

[13] The application judge concluded by indicating that, just prior to releasing his endorsement, he had been advised that the Audit had been completed. After consulting with the parties, it was agreed that he should proceed to release his judgment without reviewing the Audit decision.

[14] The application judge further clarified that, because he had dismissed the application on grounds of prematurity, his findings were not intended to be binding on any future court that might be asked to decide identical or similar issues arising out of the Audit or the steps that led to it.

Grounds of Appeal

[15] The appellant says the application judge erred in his prematurity finding in two respects:

> (i) by improperly relying upon prematurity principles that have been developed in the judicial review context and applying them to an application for *Charter* relief; and,
>
> (ii) by wrongly assuming that the statutory appeal process under the *ITA* provides the appellant with an alternative process that will allow it to obtain the relief it seeks.

[16] Both parties have sought to adduce fresh evidence on the appeal. The respondent seeks to introduce the final Audit decision and related documents.[1] The appellant opposes the respondent's fresh evidence motion but argues that, if the Audit decision is admitted, it wishes to introduce evidence of its response to the Audit.

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[1] The respondent also argued in its written submissions that the application was moot. This argument was not pursued in oral argument. In any event, the Audit is ongoing and the Audit Process Concerns raised by the appellant have not been resolved, such that the dispute between the parties is not moot.

Analysis

(1) Standard of Review

[17] We agree with the parties that the issue of whether the prematurity principle applies to a *Charter* application is an extricable question of law that is reviewable on a correctness standard.

[18] Assuming the prematurity principle applies, the issue of whether this particular application should be found to be premature on the basis of an insufficient factual record involves the exercise of discretion and is one of mixed fact and law. Accordingly, it is reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26-33.

(2) The Application Judge did not err in applying the prematurity principle in the circumstances of this case

[19] The appellant argues that the prematurity principle has been developed and applied in the context of judicial review proceedings and has no relevance to an application for relief under s. 24(1) of the *Charter*. It relies in particular on cases such as *R v. Mills*, [1999] 3 S.C.R. 668, at paras. 19 and 36, and *Henry v. Canada (Attorney General)*, 2010 BCSC 610, 211 C.R.R. (2d) 53, at paras. 157-80, aff'd 2014 BCCA 30, 53 B.C.L.R. (5th) 282, leave to appeal refused, [2014] S.C.C.A. No. 134, where *Charter* relief was granted even though no actual *Charter* violation of the applicant's rights had yet occurred.

[20] This argument was raised before the application judge, who distinguished *Mills* and *Henry* on the basis that those cases involved challenges to the constitutionality of legislation. The application judge contrasted those cases with the proceeding before him, which the parties agreed involved the application of valid legislation to the facts of a particular case. The application judge further observed that the prematurity principle had little, if anything, to do with the technical form of the action but much to do with concerns about the appropriate use of judicial resources.

[21] We agree with the application judge's analysis of this issue. Courts necessarily have discretion to refuse to decide a case based on an insufficient factual record. This principle is grounded in the inherent jurisdiction of the court to manage its own process and is not dependent on the manner in which the proceeding is framed.

[22] This is entirely consistent with *Mills* and *Henry* since, in both those cases, the court found that there was a sufficient factual record to determine the legal question presented. In contrast, the application judge found the factual record in this proceeding to be preliminary and incomplete. He therefore exercised his discretion to dismiss the application as premature, a determination that is reviewable on a standard of palpable and overriding error.

[23] The appellant has identified no error in that finding, much less one that is palpable and overriding, instead arguing that the application judge should simply not have considered the prematurity principle at all. As we have explained, the application judge correctly found that he had discretion to dismiss the application for prematurity, and made no reviewable error in declining to make legal determinations based on an insufficient factual record.

[24] Accordingly, we dismiss this ground of appeal.

(3) The application judge did not err in requiring the appellant to complete the internal CRA review and appeal process before bringing a court proceeding

[25] The appellant argues that the application judge did not appreciate that the administrative appeal process under the *ITA* fails to provide it with an effective alternative means to achieve the remedy it seeks. The appellant argues in particular that the Tax Court does not have jurisdiction to grant redress for the Audit Process Concerns in the event that the CRA imposes a financial penalty following completion of the Audit, since the Tax Court's jurisdiction is limited to confirming, varying, or setting aside a CRA assessment.

[26] In considering this ground of appeal, we regard the following considerations as relevant.

[27] First, the application judge approached the dispute on the basis that the CRA had not yet imposed a financial penalty and may or may not ultimately decide

to do so. As such, the basis for any such penalty, and the grounds upon which it might be reviewed or appealed, were unknown. Moreover, while we have not reviewed the Audit decision, we were advised in oral submissions that the CRA is no longer seeking revocation of the appellant's charitable status (as was recommended in the AFL).

[28] Second, in considering an objection to an assessment or a notice of intent to revoke charitable status, and in vacating, confirming, or varying it, the CRA has an obligation to consider, not only whether the decision respects *Charter* rights, but the relevant values underlying such rights: *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, at para. 66.

[29] Third, in an appeal of a CRA assessment, the Tax Court has jurisdiction to grant a remedy pursuant to s. 24(1) of the *Charter*. This includes the right to vacate the assessment where the evidence obtained by the CRA to support it was collected in a manner that violates *Charter* rights and no other evidence is available to support it: *O'Neill Motors Ltd. v. Canada* (1998), 162 D.L.R. (4th) 248 (Fed. C.A.), at pp. 251-54.

[30] Fourth, the application judge dismissed the application on grounds of prematurity, not jurisdiction. In other words, the parties do not dispute that the Superior Court has independent jurisdiction to grant relief for *Charter* breaches that

may have been committed by the CRA in the process of conducting an audit, consistent with *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585. It follows that, once a final CRA decision has been made (i.e. after any internal CRA reviews and appeals have been completed), the fact that the appellant may then have a right to appeal a penalty assessment to the Tax Court would not, in itself, bar the Superior Court from exercising its independent jurisdiction to grant *Charter* relief arising from the Audit Process Concerns. We agree with the appellant that the application judge seemed to conclude otherwise, a finding with which we disagree.

[31] Even if the application judge erred on this particular issue, this does not call into question the correctness of his ultimate finding that there was an insufficient factual record upon which to grant the relief sought. Moreover, as noted above, we understand that the CRA has subsequently modified the preliminary findings and recommendations set out in the AFL. This confirms the wisdom of the practical and principled considerations identified by the application judge in dismissing the application on grounds of prematurity.

Disposition

[32] The application judge did not err in dismissing the application for prematurity. This finding is sufficient, in itself, to dispose of the appeal.

[33] Given this disposition, it is unnecessary for us to consider the fresh evidence, and the fresh evidence motions are dismissed. We invite the parties to make further written submissions as to whether any of the fresh evidence that was sought to be adduced on the appeal should be sealed. In the meantime, the temporary sealing order issued by van Rensburg J.A. on May 14, 2024 in respect of the proposed fresh evidence shall remain in place for a further 60 days. Those submissions should be made in writing no later than 21 days following the release of this decision. For clarity, the redaction order respecting certain information in the application record made by Centa J. on March 24, 2023, and continued in this court on consent of the parties by the May 14, 2024 order of van Rensburg J.A., shall continue on a permanent basis.

[34] We invite the parties to come to an agreement on the issue of costs. In the event they are unable to do so, each party may serve and file written costs submissions of no more than five pages, not including Bills of Costs, within 21 days of the release of this decision.

"L. Sossin J.A."
"P.J. Monahan J.A."
"L. Madsen J.A."