Federal Court  Cour fédérale

Date: 20180130

Docket: T-8-18

Citation: 2018 FC 102

Montréal, Quebec, January 30, 2018

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE AND MATTHEW BATTISTA

Applicants

And

CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

Respondent

ORDER AND REASONS

I. Overview

[1] The applicants, the Right to Life Association of Toronto and Area [RTLT], Mr. Blaise Alleyne, its president, and Mr. Matthew Battista, a student who is said to intend to apply for employment this summer with RTLT, seek an interlocutory injunction to stay the

decision of the Minister of Employment, Workforce Development and Labour [the Minister] to add a new attestation requirement to the application for the 2018 Canada Summer Jobs Program [the 2018 Program].

[2] The applicants ask the Court to stay the operation of the Minister's decision pending final determination of the underlying application for judicial review [the Underlying Application] they commenced on January 4, 2018. In their Underlying Application, the applicants challenge the decision of the Minister to add the new attestation requirement to the application for funding under the 2018 Program and seek numerous reliefs, including one in the nature of *certiorari*, quashing the decision of the Minister, and one in the nature of a *mandamus*, requiring the Minister to award those funds which would be awarded but for the requirement of the new attestation.

[3] The applicants included the 2018 Program's Applicant Guide in their record, where it is confirmed that, as part of the 2018 Program application process, the organization's representative must tick a box labelled "I attest", confirming attestation, in bulk, to the four following statements:

- I have read and understood the Canada Summer Jobs Articles of Agreement and referred to in the Applicant Guide as needed;
- The job would not be created without the financial assistance provided under a potential contribution agreement;
- **Both the job and my organization's core mandate respect individual human rights in Canada, including the values underlying the Canadian *Charter of Rights and Freedoms* as well as other rights. These include reproductive rights and the right to be free from discrimination on the basis of sex, religion, race, national or ethnic origin, colour, mental or physical disability or sexual orientation, or gender identity or expression; (emphasis added)**
- I have all the necessary authorities, permissions and approvals to submit this application on behalf of myself and the organization.

[4] The third statement is the new attestation requirement at the center of these proceedings, and the Court will herein refer to it as the Attestation Requirement.

[5] On December 20, 2018, the RTLT applied for funding under the 2018 Program. It did not apply online, as the application cannot be submitted online unless the "I attest" box is ticked. RTLT thus sent a paper application, did not tick the "I attest" box and, since it has issues with the Attestation Requirement, attached a letter along with its application, stating the following:

> On the basis of conscience, we are unable to express the words that the Minister has required in the Applicant's Guide. We are, however, able to attest that "we support all Canadian law, including Charter and human rights law." We believe the Minister does not have the jurisdiction under law to compel us to make a statement that conflicts with our conscience rights under the Charter. Nor does the Minister have the right to compel speech as a condition of receiving a financial benefit from the government of Canada. We respectfully decline to make a statement that is inconsistent with our fundamental personal beliefs about the value of life and the right to life under section 7 of the Charter. Please confirm that you will accept our application with the above noted statement in substitution for the statement set forth in the on line application process and in the Applicant's Guide.

[6] On January 3, 2018, RTLT received a receipt of delivery from Service Canada, but has received no response or comments to its letter of objection and substitute statement.

[7] The Application Guide specifically notes that the attestation is mandatory, i.e. that the applicant must tick the "I attest" box, in order for the application to be considered complete and eligible for assessment.

[8] As the application deadline is February 2, 2018, the applicants are seeking urgent intervention of the Court, asking the Court to suspend the Attestation Requirement for the 2018 Program. The Court is here not tasked with deciding the merits of the Underlying Application, but with assessing whether or not the test allowing for the issuance of interlocutory injunctive relief staying the Attestation Requirement has been met.

[9] Hence, in order to succeed in their motion for an interlocutory injunction, the applicants must establish that they satisfy each prong of the conjunctive three-part test set forth by the Supreme Court of Canada [SCC] in *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-Macdonald*]. Under that test, the applicants must establish that: 1) a serious issue has been raised in the Underlying Application; 2) they will suffer irreparable harm if the stay is not granted; and 3) the balance of convenience, which examines the harm to the applicants and to the respondent, as well as the public interest, favours them.

[10] The applicants contend that they satisfy each prong of the test. On the serious issue component, the applicants set the low threshold, and contend that the issues raised in the Underlying Application meet this threshold as they are neither vexatious nor frivolous. They submit that the Attestation Requirement is compelled speech by the government, as it requires the applicant to attest to certain beliefs and to agree with the state's position on certain social issues as a condition to receiving government funding. The applicants assert that the imposition of the Attestation Requirement thus infringes their freedom of conscience protected by section 2(a) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being scheduled B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], their freedom of

thought, belief, opinion and expression protected by section 2(b) of the *Charter*, and their right to equality protected under section 15 of the *Charter*. On the irreparable harm component, the applicants first contend that the particulars of this case warrant a lower burden of proof as it involves a potential *Charter* breach. They submit that irreparable harm flows from the allegation of a *Charter* breach and lies in the loss of funding, the harm to the organization's activities, and the loss of opportunity for Mr. Battista, and on the impact to all those affected by the Attestation Requirement. Finally, on the last component, the applicants submit that the balance of convenience favours them as there is no injury to the Minister if the stay is granted while the applicants face a serious breach of their *Charter* rights if it is not. The consideration of the public interest weighs in their favour, particularly as a stay would not upset the *status quo*, reverting to the situation that prevailed in 2016 and 2017 in regard to the Summer Job Program.

[11] The Minister responds that the applicants have not met any of the three parts of the *RJR-Macdonald* test. On the serious issue component, the Minister argues that none of the issues raised by the applicants meet even the low threshold of not being vexatious or frivolous. On irreparable harm, the Minister disagrees with the applicants on the burden of proof imposed to them, arguing that it is not set lower in this case, and that irreparable harm does not flow uniquely from an allegation of a *Charter* breach. On the other impacts claimed by the applicants as being irreparable harm, the Minister stresses that the applicants have submitted no evidence to support their allegations of financial irreparable harm, and have thus failed to meet their burden. Finally, the Minister submits that the balance of convenience lies in her favour. She is tasked with promoting and creating employment opportunities, recognised as a public interest concern. As the 2018 Program is deployed pursuant to this responsibility, irreparable harm to the public

interest would result from restraining it, which weighs in her favour. The 2018 Program, with the Attestation Requirement, is in the public interest, which outweighs the applicants' speculative financial harm. Finally, the Minister argues that the *status quo* is the current situation, and that maintaining it weighs in favour of not staying the Attestation Requirement.

[12] For the reasons exposed hereinafter, I will dismiss the applicants' motion, as I am not satisfied that they have met the three parts of the conjunctive test set forth by the SCC in *RJR-Macdonald*.

[13] First, on the serious issue, I do not agree with the parties on the applicable threshold; however, given my conclusion on the two other parts of the test, I will assume without deciding that a serious issue exists. Second, on irreparable harm, I conclude that the applicants have not met their burden as irreparable harm does not flow uniquely from an allegation of a *Charter* breach, and the applicants have not submitted clear and convincing evidence of irreparable harm. Finally, as detailed in my reasons and in the absence of evidence of irreparable harm to the applicants, I find that the balance of convenience favours the Minister as granting a stay would cause irreparable harm to the public interest. Finally, prudence also weighs in favour of preserving the *status quo* and maintaining the 2018 Program as it stands.

II. Background

A. *The 2018 Program*

[14] As described in the Applicant Guide found in the applicants' record, the 2018 Program provides wage subsidies to certain employers to create employment for secondary and post-secondary students aged 15 to 30.

[15] On a broader note, the objectives of the 2018 Program are stated in the Applicant Guide as: (1) providing work experience for students; (2) supporting organizations, including those that provide important community services; and (3) recognizing that local circumstances, community needs and priorities vary widely. In setting these objectives, the government seeks to ensure that youth job opportunities funded by the 2018 Program take place in an environment that respects the rights of all Canadians.

[16] The 2018 Program is established pursuant to the authority granted to the Minister, as set out in section 7 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the Act]:

Programs	**Programmes**
7 The Minister may, in exercising the powers and performing the duties and functions assigned by this Act, establish and implement programs designed to support projects or other activities that contribute to the development of the human resources of Canada and the skills of	**7** Le ministre peut, dans le cadre des attributions que lui confère la présente loi, concevoir et réaliser des programmes destinés à appuyer les projets ou autres activités qui contribuent au développement des ressources humaines au Canada et au développement des

Canadians, or that contribute to the social development of Canada, and the Minister may make grants and contributions in support of the programs.	compétences des Canadiens ou au développement social du Canada et accorder des subventions et des contributions pour les appuyer.

[17] The Act grants broad discretion to the Minister as section 7 contains no indications as to how the programs should be construed.

[18] The 2018 Program provides funding to a number of eligible employers (not-for-profit organizations, public-sector employers and small businesses with 50 or fewer full-time employees) in order for them to create summer job opportunities for full-time students aged 15 to 30, who intend to return to their studies in the following school year. The 2018 Program also provides details on eligible costs, activities, duration and hours of work.

[19] As per the Applicant Guide, the applications for funding are assessed in terms of both the aforementioned eligibility criteria, and seven assessment criteria, which also account for the national priorities.

[20] According to the information contained on page 3 of the Applicant Guide, by way of five national priorities, the 2018 Program supports the following:

1. Employers who intend to hire youth who are in underrepresented groups, including new immigrant youth/refugees, Indigenous youth, youth with disabilities and visible minorities;
2. Small businesses, in recognition of their contribution to the creation of jobs;
3. Organizations that support opportunities for official language minority communities;
4. Organizations that provide services and/or supports for the LGBTQ2 community;

5. Organizations that support opportunities in science, technology, engineering and mathematics (STEM) and information and communications technology (ICT), particularly for women.

[21] Even more relevant to these proceedings, the Applicant Guide outlines the fact that applicants are required to tick the "I attest" box, and thus attest to four (4) statements in bulk, including the new Attestation Requirement that "Both the job and my organization's core mandate respect individual human rights in Canada, including the values underlying the *Canadian Charter of Rights and Freedoms* as well as other rights. These include reproductive rights and the right to be free from discrimination on the basis of sex, religion, race, national or ethnic origin, colour, mental or physical disability or sexual orientation, or gender identity or expression". As a guideline, the Applicant Guide indicates that the government "recognizes that women's rights are human rights. This includes sexual and reproductive rights — and the right to access safe and legal abortions".

[22] The Applicant Guide further indicates, at page 4, that the objective of the change (i.e. the new Attestation Requirement) is to "prevent Government of Canada funding from flowing to organizations whose mandates or projects may not respect individual human rights, the values underlying the *Charter of Rights and Freedom* and associated case law. This helps prevent youth (as young as 15 years of age) from being exposed to employment within organizations that may promote positions that are contrary to the values enshrined in the *Charter of Rights and Freedoms* and associated case law".

B. *Relevant Facts*

[23] Mr. Alleyne submitted an affidavit and testified that RTLT is a registered charity, incorporated under the *Corporations Act*, RSO 1990, c C 38, carrying on business in Toronto and the GTA. As per Mr. Alleyne's affidavit, RTLT is a volunteer, non-sectarian human rights organization dedicated, through education, to "upholding the sacredness and inviolability of human life from conception to natural death".

[24] Mr. Alleyne also confirms that in 2016, RTLT applied for summer student funding in the amount of $28,800.00 and was approved for the amount of $10,800.00. In 2017, RTLT applied for funding in the amount of $29,184.00, but its application was denied as it was informed there were no more funds available in its constituency. However, as it was revealed that the reason for denying the funds to RTLT and other organizations was linked to these organizations' stand on abortion (exhibit A referred to in the affidavit of Mr. Alleyne), RTLT and other organizations challenged the 2017 funding denial before the Court. In November 2017, they settled with the Minister, received funds, and the Minister acknowledged that their 2017 application for funding had been denied based on criteria neither set out in the Applicant Guide nor included in the MP's list of local priorities for 2017 (exhibit B referred to in the affidavit of Mr. Alleyne).

[25] In December 2017, the 2018 Program was released and the Attestation Requirement was introduced.

[26] On December 20, 2017, RTLT applied for funding under the 2018 Program by way of a paper application. Its representative did not tick the "I attest" box and thus did not attest to any of the four statements in the application. With its application, RTLT included a letter objecting to the Minister's Attestation Requirement and asking that its application be processed on the basis of its own substitute statement, already reproduced at paragraph 5 of this decision.

III. Interlocutory Injunction

A. *The appropriate test*

[27] The parties agree that the test to be applied in determining whether a stay or injunction can be granted is the one set forth by the SCC in 1994 in *RJR-Macdonald*. It is a three-part conjunctive test in which each element must be satisfied.

[28] The applicant seeking the stay must thus establish that there is a serious issue to be tried, that it will suffer irreparable harm if the relief is not granted, and that the balance of convenience lies in his favour.

[29] The Courts have confirmed that the injunction is an exceptional remedy (*Teva Canada Limited* v. *Sanofi-Aventis Canada Inc.*, 2011 FCA 149 at para12; *Aventis Pharma S.A. v Novopharm Ltd*, 2005 FCA 390 at para 4). In *Mylan Pharmaceuticals ULC v AstraZeneca Inc*, 2011 FCA 312, the Federal Court of Appeal confirmed the exceptional nature of the injunction relief and indicated that as "the Supreme Court recognized in *RJR-Macdonald Inc*., this is an unusual relief that requires satisfaction of a demanding test" (at para 5). In *Janssen v AbbVie*

Corporation, 2014 FCA 112, the Federal Court of Appeal confirmed that the test "is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing" (at para 20). The burden imposed on the applicants is onerous.

B. *Serious issue*

(1) The applicants' position

[30] The applicants' submissions on the serious issue prong of the *RJR-Macdonald* tripartite test are limited to two paragraphs in their memorandum.

[31] They first submit that the threshold for determining whether there is a serious constitutional issue to be determined is a low one, and that this first part of the test will be satisfied if the matter is not vexatious or frivolous. In this regard, and in response to a question from the Court, the applicants present the 2018 Program as a perennial one, rather than a yearly one, and argue that the relief sought in the interlocutory injunction is therefore different than the relief sought in the Underlying Application as the former is limited to the year 2018 while the latter impacts all subsequent summer jobs programs. As per their conclusion, the situation therefore does not give rise to the elevated test on the serious issue prong, and there is thus no need for them to establish a likelihood of success in their Underlying Application.

[32] The applicants then contend that the operation of the Minister's decision, if found unconstitutional, impinges on sections 2(a), 2(b), and 15 of the *Charter*. They submit that the

issue of the state compelling its citizens to agree with its position on social issues in order to receive government funding is a serious one. The applicants contend that the Attestation Requirement constitutes compelled speech by the state, as it is forcing them to agree to a specific political platform and to specific beliefs under threat of being punished, by being denied eligibility to apply for and/or denied funding on account of their beliefs.

[33] They assert that the obligation to attest in order to be allowed to apply and be eligible for funding breaches their freedom of conscience, as well as their freedom of thought, belief, expression and opinion protected by sections 2(a) and 2(b) of the *Charter*, breaches their right to equality guaranteed by section 15, and cannot be saved under section 1 of the *Charter*.

[34] The applicants refer particularly to *National Bank of Canada v Retail Clerks' international Union* [1984] 1 SCR 269, where, at p 296, the SCC affirmed that "these freedoms guarantee to every person the right to express the opinions he may have; a fortiori they must prohibit compelling anyone to utter opinions that are not his own".

[35] The applicants assert that it is not illegal to advocate against abortion, that any individual in Canada holds the right to either agree or disagree with abortion, as well as to hold different viewpoints on any other social issue, and that punishing its citizens on the basis of contrary views or beliefs infringes the right to equality protected by section 15 of the *Charter*.

(2) The Minister's position

[36] The Minister affirms, at para 53-55 of its memorandum, albeit as part of another argument, that in this case, the injunction relief would effectively grant the applicants the ultimate remedy sought in their Underlying Application, as the 2018 Program is not perennial, but yearly, could change from year to year or even be eliminated. However, at the hearing, the Minister accepted that the threshold for the serious issue nonetheless remains the lower one, *i.e.*, the "neither vexatious nor frivolous" one. Even on this lower threshold, the Minister submits that there is no serious issue to be made on the three (3) allegations of a *Charter* breach and on the submission that the Minister's decision to add the Attestation Requirement is unreasonable.

[37] First, the Minister argues that there is no serious issue as it relates to section 2(b) of the *Charter* (freedom of expression) as the 2018 Program is a voluntary one, and as no organization is either compelled to apply or has a right to receive funding. The Minister argues that the applicants are trying to assert a positive right's claim under section 2(b), seeking a positive entitlement of funding and a compelled access to government funding, while the claim under section 2(b) has been interpreted as essentially a negative right. The Minister submits that the factors allowing for a positive claim under section 2(b) of the *Charter* are not satisfied as the applicants' claim is not grounded in a fundamental freedom of expression; the applicants are rather seeking access to a particular statutory funding program, the exclusion from which does not substantially interfere with their freedom of expression (*Baier v Alberta*, 2007 SCC 31).

[38] The Minister refers to case law in which the Federal Court of Appeal held that freedom of expression in section 2(b) of the *Charter* does not guarantee public funding for the propagation of one's opinions, no matter how sincerely held (*Canadian Arab Federation v Canada*, 2013 FC 1283 at para 93; affirmed by 2015 FCA 168; *Human Life International In Canada Inc v Minister of National Revenue*, [1998] 3 FC 202 (FCA) at para 18; *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504 (FCA) at para 73).

[39] Second, the Minister argues that there is no serious issue as it relates to section 2(a) of the *Charter* (freedom of conscience), as the government has no *Charter* obligation to provide funding to groups such as RTLT so that they can support their views. In addition, the Attestation Requirement does not interfere with any of the applicants' *beliefs* as it relates to the *job* and the *core mandate* of RTLT.

[40] Third, the Minister submits that there is no serious issue as it relates to subsection 15(1) of the *Charter*, since equality rights under section 15 belong to individuals and not to corporations, and the applicants have not established *prima facie*, as required, that the Attestation Requirement treats them differently or has a disproportionate effect on them based on their membership in a group recognized as an enumerated or analogous ground of discrimination nor that this treatment is discriminatory (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19-21).

[41] Finally, the Minister contends that there is no serious issue as it relates to the reasonableness of the Minister's decision to require the Attestation Requirement, as the design of a funding program is discretionary and largely immune from judicial intervention.

(3) The Court assumes a serious issue exists

[42] The serious issue component usually imposes a low threshold, requiring only a preliminary assessment of the merits to ensure that the underlying application is neither vexatious nor frivolous (*RJR-Macdonald*, at para 55). However, certain circumstances warrant the elevated test of "likelihood of success" as per the SCC in *RJR-Macdonald*, at para 51. Hence where a favourable decision on the interlocutory motion effectively grants the relief sought in the underlying judicial review application, an elevated standard for the establishment of a serious issue applies. In such circumstances, the applicant is required to demonstrate that the underlying application for judicial review is likely to succeed.

[43] The parties both submit that the lower threshold apply in these proceedings. However, paradoxically, at para 53 of its memorandum, when addressing the balance of convenience test, the Minister states that granting the relief on the interlocutory injunction would, in fact, grant the relief sought by the applicants in the Underlying Application.

[44] Questioned by the Court on the issue of the proper threshold, the applicants responded that the relief sought in the interlocutory injunction will not grant the relief in the Underlying Application as the program is a perennial program, and the injunction would grant the relief solely for the year 2018 while the Underlying Application would not be limited to that year.

[45] On the other hand, counsel for the Minister confirmed to the Court that the 2018 Program is an annual one, designed and released yearly at the discretion of the Minister, that it is not perennial and that it could even be eliminated.

[46] The Court is not persuaded that the low threshold proposed by the parties is the appropriate one in the circumstances. However, given the conclusion on the two other parts of the three-part conjunctive test, the Court need not resolve this situation and will assume, without deciding, that a serious issue exists.

C. *Irreparable harm*

(1) The applicants' position

[47] In support of their motion, the applicants limited their evidentiary record to Mr. Alleyne's affidavit and the six (6) exhibits he introduced: (A) a copy of an article by Ms. Amenda Connoly published on April 13, 2017, and titled "Government looking to shut down summer job grants for anti-abortion groups"; (B) a copy of a two-page letter dated November 23, 2017, from the Department of Justice Canada to 3 organizations, including RTLT, confirming their agreement, the payment of funding for the year 2017 and the amounts to be paid; (C) the 28-page Canada Summer Jobs 2018 Applicant Guide; (D) a copy of RTLT's application for funding under the 2018 Program, dated December 20, 2017; (E) a copy of a receipt from Canada Post confirming delivery of an item in Brampton, Ontario, on December 22, 2017; and (F) copy of an email message dated January 3, 2018, from hrsdc-rhdcc to RTLT, confirming receipt of the application for funding under Canada Summer Jobs.

[48] The applicants assert that they will suffer irreparable harm if the stay is not granted. In regard to the threshold they must meet to establish irreparable harm, the applicants submit that where there is an alleged breach of constitutional rights, the threshold is a lower one, and the applicants simply need to demonstrate that there is a *reasonable likelihood* or *probability* of irreparable harm.

[49] The applicants further contend that the harm flowing from a breach of constitutional rights, which the applicants claim will be suffered if relief is not granted, constitutes irreparable harm. They advance that where there is a potential *Charter* breach, irreparable harm is made out because such breaches are assumed not to be compensable through damages (*RJR-Macdonald*, at para 60-61; *Tlicho Government v Canada (Attorney General)*, 2015 NWTSC 9 at para 66-68; *Siksika Health Services v Health Sciences Association of Alberta*, 2017 CanLII 61259 (AB LRB) at para 21).

[50] The applicants reassert the protected right to freedom, and the fact that, facing the choice of either violating their conscience by agreeing to the Attestation Requirement or facing the denial of a government service, amounts to coercion by the state that cannot be compensated (*National Council of Canadian Muslims (NCCM) v Attorney general of Quebec*, 2017 QCCS 5459 [NCCM]).

[51] In addition, the applicants submit that the irreparable harm manifests itself in several other forms, such as the loss of funding, harm to the organization's activities, loss of opportunity for Mr. Battista, and adverse impact on all those affected by the Attestation Requirement.

(2) The Minister's position

[52] The Minister responds that the applicants have not established irreparable harm.

[53] The Minister disagrees with the lower threshold set forth by the applicants. Relying on case law from the Federal Court of Appeal and the Federal Court, the Minister argues to the contrary that the applicants must demonstrate that irreparable harm *will* result; alleged harm must not be speculative or hypothetical and the applicants must present evidence at a convincing level of particularity demonstrating a real probability that unavoidable irreparable harm will result if the injunction or stay is not granted.

[54] Furthermore, the Minister submits that the lower standard put forth by the applicants is not permitted in cases where a party asserts a breach of constitutional rights. Irreparable harm must instead be established independently of arguments regarding the constitutionality of the measure at issue and cannot simply be inferred based upon a potential *Charter* breach that has yet to be determined.

[55] The Minister submits that the applicants have not provided clear and convincing evidence that irreparable harm will result either (1) to the organization RTLT, as it provided no evidence, information, financial documents or any other evidence regarding monetary harm; (2) to his president, the applicant Mr. Alleyne, as his personal beliefs are not in play in signing the attestation for the organization; or (3) to Mr. Battista as he submitted no sworn evidence on the impact of the Attestation Requirement.

[56] Finally, the Minister confirms her willingness to agree to expedite the hearing of the applicants' Underlying Application on the merits to ensure that it takes place well before the final start date for summer jobs, set for July 22, 2018.

(3) Irreparable harm has not been established

[57] Under this second prong of the test, the question is whether the applicants have provided clear and convincing evidence demonstrating, on a balance of probabilities, that it will suffer irreparable harm between now and the time the Underlying Application is adjudicated upon.

[58] At para 63 of *RJR-Macdonald*, the SCC described the duties of the Court in assessing irreparable harm as: "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".

[59] At para 65 and 66, the SCC acknowledged the difficulty in assessing irreparable harm in interlocutory applications involving *Charter* rights, and outlined that one reason is that the notion of irreparable harm is closely tied to the remedy of damages, but that damages are not the primary remedy in Charter cases (para 65). Hence, the SCC then concluded: "Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm" (*RJR-Macdonald*, at para 66, emphasis added).

[60] The Federal Court of Appeal has since developed case law that runs contrary to the applicants' argument that the irreparable harm threshold is lower in *Charter* cases, or that irreparable harm flows from the allegations of a *Charter* breach. In *Canada (Attorney General) v United States Steel Corp,* 2010 FCA 200 [*US Steel*], where the appellant raised allegations that the legislation at issue contravened section 11 of the *Charter*, the Court stated that "The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions" (at para 7, emphasis added).

[61] Madam Justice Kane reviewed the case law in a case involving section 8 of the *Charter* in *Professional Institute of the Public Service of Canada v. Canada (Attorney General),* 2015 FC 1101 [*Professional Institute of the Public Service of Canada*]. Given the urgency of the present matter, and for economy of time, I refer to her conclusion that the Federal Court of Appeal "has found that irreparable harm must be established independently of arguments regarding the constitutionality of the measures at issue and cannot be inferred based on a potential Charter breach that has yet to be determined" (*Professional Institute of the Public Service of Canada*, at para 154; *Groupe Archambault Inc. v. Cmrra/Sodrac Inc.*, 2005 FCA 330 at para 16; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3).

[62] In setting the standard, the Federal Court of Appeal stated that "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" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31).

[63] The applicants submitted case law from the Superior Courts of the Northwest Territories and Québec as well as from the Alberta Labor Relations Board in support of their position. However, even if the Court assumed that this case law supports their argument, the Federal Court of Appeal stated otherwise, and this Court is bound to follow the teachings of the Federal Court of Appeal. The doctrine of *stare decisis* provides that "a lower court is bound by particular findings of law made by a higher court to which decisions of that lower court could be appealed, directly or indirectly" (*Tuccaro v Canada*, 2014 FCA 184 at para 18). The Court can only depart from the *stare decisis* principle in exceptional circumstances, described by the SCC in *Carter v Canada (Attorney General)*, [2015] 1 SCR 331 at para 44. The applicants have not addressed this issue, and have presented no circumstances that would justify this Court to depart from the Federal Court of Appeal's position.

[64] Hence, the Court cannot retain the applicants' proposition that the irreparable harm threshold is lower given the allegations of a *Charter* breach, nor that irreparable harm flows from said allegations.

[65] On irreparable harm, the Court is therefore left with Mr. Alleyne's allegations about the other impacts resulting from the failure to attest, in terms of loss of funding, harm to the organization's activities, loss of opportunity for Mr. Battista, and adverse impact on all those affected by the Attestation Requirement.

[66] Unfortunately, the applicants have provided no evidence to support these allegations of irreparable harm. They provided no documentary evidence pertaining, for example, to the RTLT's constitution, mandate, financial situation, size, sources of funding, human resources or hiring plans. They have thus failed to establish, by clear and convincing evidence, that irreparable harm will occur to the organization. The Court is left with Mr. Alleyne's assertions in that regard, which fails to meet the aforementioned threshold of irreparable harm.

[67] As argued by the Minister, there is no more evidence of irreparable harm to Mr. Alleyne, who is not personally required to sign the application form and thus not personally required to attest to the Attestation Requirement. The application form must be signed by an authorised representative of the organization and refers to the job and the core mandate of the organization, not to the signatory's own personal beliefs.

[68] Turning now to the harm claimed to Mr. Battista, no sworn evidence was submitted by him. The Court is left to rely on unsubstantiated general assertions of harm which fail to meet the aforementioned threshold of irreparable harm.

[69] Finally, the same conclusion applies regarding the argument that other organizations would be negatively impacted by the new Attestation Requirement, as no evidence has been adduced in support of these allegations.

[70] In conclusion, the applicants' allegations of irreparable harm remain unsubstantiated, and the applicants have failed to meet their burden in this regard.

D. *Balance of convenience*

(1) The applicants' position

[71] The applicants submit that the balance of convenience favours them as the *Charter* issues are significant and serious, whereas the government would suffer no impact if the Attestation Requirement was stayed. They raise that (1) the government has not pointed to any public problem that relates to the need for the Attestation Requirement, and its decision does not prevent any identifiable harm; (2) the applicants experience grave and irreparable harm from the requirement to agree to attest or lose a government benefit; (3) citizens hold and share certain views on the issue of abortion, but they do not breach the law; (4) citizens are free to hold and share different beliefs without threat from the state; (5) the law adopted for the public good must be "coherent and complete" (*NCCM,* at para 58) while the actions of the Minister do not indicate transparent, "coherent and complete" government decision-making; (6) section 7 of the Act does not grant the Minister the power to design a program that limits its citizens' *Charter* rights; and (7) public interest does not here gravitate in favour of enforcing legislation.

[72] Furthermore, the applicants contend that granting the stay would preserve the *status quo* as the Minister did provide funding to RTLT in 2016 and in 2017 without the completed Attestation Requirement.

(2) The Minister's position

[73] The Minister responds that (1) contrary to the applicants' argument, granting the stay would upset the *status quo* by altering the criteria for evaluation and assessment of the funding applications as the program was launched in December 2017 and is currently underway; (2) promotion of the public interest must be presumed, and weighs in favour of the Minister; (3) in any event the 2018 Program, with the Attestation Requirement, is in the public interest; and (4) the public interest in the 2018 Program outweighs the applicants' speculative financial harm.

(3) The balance of convenience, public interest and *status quo* considerations favours the Minister

[74] Under the third component of the three-part test, the balance of convenience assessment, the Court must determine which of the parties will suffer the greatest harm from the granting or the denial of the injunction, pending the decision on the Underlying Application (*RJR-Macdonald*, at para 67). Important to these proceedings, the SCC also stated that the role of public authorities in protecting the public interest is an important factor in assessing the balance of convenience.

[75] The SCC, again in *RJR-Macdonald*, at para 73, indicates that "When a private applicant alleges that the public interest is at risk that harm must be demonstrated". On the other hand, in

the case of a public authority, the SCC teaches us that the onus of demonstrating irreparable harm to the public is less than that of a private applicant (*RJR-Macdonald*, at para 76), and that the test will "nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action" (*RJR-Macdonald*, at para 76).

[76] The Court is satisfied that the Minister is indeed charged with the promotion of the public interest. Her powers, duties and function, stated in subsection 5(1) of the Act, "extend to and include all matters relating to human resources and skills development in Canada or the social development of Canada over which Parliament has jurisdiction and which are not by law assigned to any other Minister, department, board or agency of the Government of Canada". As per subsection 5(2) of the Act, theses powers must be exercised: (a) relating to human resources and skills development with a view to improving the standard of living and quality of life of all Canadians by promoting a highly skilled and mobile workforce and an efficient and inclusive labour market; and (b) relating to social development with a view to promoting social well-being and income security.

[77] Under the authority of section 7 of the Act, the Minister may establish and implement programs designed to support projects or other activities that contribute to the development of the human resources of Canada and the skills of Canadians, or that contribute to the social

development of Canada, and the Minister may make grants and contributions in support of the programs. The Act thus grants broad discretion to the Minister.

[78] In addition, legislation intended to create job opportunities for Canadians has been held to constitute legislation in the public interest (*US Steel* at para 23), and the principles governing harm to the public interest have been found to apply to policies as well as statutes (*Canada v Ishaq*, 2015 FCA 90 at para 11-15). It stems from these premises that a policy intended to create job opportunities for young Canadian students is to be considered in the public interest.

[79] The Court is thus satisfied that irreparable harm to the public interest has been established, and that this tilts the balance of convenience in favour of the Minister (especially in a context where, conversely, the applicants have not demonstrated that they will suffer any irreparable harm at their end).

[80] On the issue of the *status quo*, the parties agree that preserving said *status quo* weighs in favour of granting a stay. However, they disagree on what constitutes *status quo* in this particular context.

[81] The applicants assert that the *status quo* must be construed as the situation that prevailed in 2016 and 2017, when there was no Attestation Requirement and they received funding. The Minister contends that the *status quo* is rather the situation as it stands presently, *i.e*. maintaining the 2018 Program that has been adopted pursuant to the valid exercise of the Minister's powers, and that is currently under way as designed and deployed by the Minister in December 2017.

[82] As the *status quo* refers to the situation that currently exists (Black's Law Dictionary, 10th edition, p 1633), the Court sides with the Minister and is satisfied that, as of January 2018, maintaining the *status quo* means keeping the program as it stands. Reverting to the situation that prevailed in 2016 and 2017 would, it seems, rather amount to the *status quo ante*.

[83] The Court thus concludes that granting the relief sought by the applicants would upset the current state of affairs, and thus weighs in favour of denying the interlocutory injunction.

[84] The applicants have not convinced the Court that the harm they expect to suffer in the absence of a stay outweighs the harm that will be caused to the public interest by a suspension of the Attestation Requirement. In the circumstances of this case, the balance of convenience therefore does not favour granting the stay requested by the applicants.

IV. Decision on the interlocutory injunction

[85] In conclusion, I will dismiss the applicants' motion, as I am not satisfied that they have met the three parts of the conjunctive test set forth by the SCC in *RJR-Macdonald*.

ORDER

THIS COURT'S ORDER is that:

1. The applicants' motion is dismissed;

2. No costs are granted.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-8-18
STYLE OF CAUSE:	RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE AND MATTHEW BATTISTA v CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 19, 2018
ORDER AND REASONS:	ST-LOUIS J.
DATED:	JANUARY 30, 2018

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