

Date: 20050301

Docket: T-253-05

Citation: 2005 FC 309

Ottawa, Ontario, the 1st day of March 2005

PRESENT: THE HONOURABLE MADAM JUSTICE GAUTHIER

BETWEEN:

9101-9380 QUÉBEC INC. (LES TABACS GALAXY)

Applicant

and

CANADA CUSTOMS AND REVENUE AGENCY

Respondent

REASONS FOR ORDER AND ORDER

[1] The corporation 9101-9380 Québec Inc. (Tabacs Galaxy) is a tobacco manufacturer. It therefore requires a licence issued in order to operate, pursuant to the *Excise Act, 2001*, S.C. 2002, c. 22 (the Act). After several months of discussions and exchanges between the parties, the Director of the Canada Customs and Revenue Agency, as a delegate of the Minister of National Revenue, on January 31, 2005, confirmed to Tabacs Galaxy that its licence would be revoked as of February 17, 2005, because it had ceased to meet the eligibility requirements set out in the

Regulations respecting Excise Licences and Registrations, SOR/2003-115 (the Regulations). In the respondent's submission, Tabacs Galaxy failed to comply with an Act of Parliament or of the legislature of a province respecting the taxation of or controls on alcohol or tobacco products within five years prior to its licence application (subsection 12(1) of the Regulations).

[2] Tabacs Galaxy challenged the legality of that decision and filed an application for judicial review on February 11, 2005.

[3] In this motion, it is asking the Court to issue an interlocutory injunction staying the execution of the cancellation pronounced on January 31, 2005, until a decision is rendered on its application for judicial review.¹

[4] In order to succeed, Tabacs Galaxy must show that it meets the criteria laid down by the Supreme Court of Canada and set out *inter alia* in *R.J.R. - Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, namely that:

- (I) there is a serious issue to be determined;
- (ii) the cancellation will cause it irreparable harm; and
- (iii) the balance of convenience is in its favour.

¹ The respondent agreed to stay cancellation until the Court rules on this motion.

[5] On the first test, namely the existence of a serious issue, it is important to bear in mind that the Court does not have to decide the merits of the arguments raised in the application for judicial review. At this stage, the Court must be satisfied that the grounds of review put forward in the application are not frivolous or vexatious.

[6] However, in *R.J.R. MacDonald, supra*, the Supreme Court of Canada identifies two exceptions to this rule. It describes them as follows:

& 51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

[7] The respondent submitted that issuing the requested injunction would amount to substantially granting the relief sought by the applicant in its application for judicial review.

[8] The Tabacs Galaxy licence was issued for a period of two years. It was therefore valid until October 2005, barring cancellation. If an injunction is granted and if the decision on the application for judicial review is not rendered before that date, Tabacs Galaxy will in effect be in the same situation that it would have been in had the decision on the principal application been set aside.

[9] However, the parties submitted an expedited timetable which would allow the Court to schedule the hearing of the application for judicial review for June 2005, four months after the date initially scheduled for the cancellation, and four months more or less before the date the licence is due to expire. In these circumstances, the Court is not satisfied that this is an exceptional case whereby the arguments raised on review require the application of a higher standard or level of analysis.

(a) Serious issue

[10] The application for judicial review raises five grounds on which the decision of January 31, 2005, should be set aside (including the unconstitutionality of paragraph 2(2)(b) and subsection 12(1) of the Regulations). However, at the hearing the submissions addressed only

two points: the retroactive effect of the Regulations and the insufficiency of the reasons given in the decision dated January 31, 2005. They agreed that the Court would not have to consider the other points raised in the application, with respect to which no argument was made by the applicant.

[11] The Act deals with the taxation of spirits, wine and tobacco. It received Royal Assent on June 13, 2002. However, it appears from the summary of the impact analysis statement accompanying the Regulations that during consultations with the industry the responsible government officials undertook to ensure that the Regulations came into effect four to six months before the effective date of the Act, which was then scheduled for July 1, 2003, so as to allow them to become familiar with the new legislation and meet the new requirements contained therein. In this regard, it is worth noting that a draft of the Regulations was distributed in 2001. In April 2002, a notice was sent to all holders of licences under the *Excise Act*, R.S.C. 1985, c. E-14, i.e. well before the draft Regulations were published in February 2003, and came into effect on April 1, 2003.²

[12] In that impact analysis statement, it is also stated that:

² The evidence did not indicate whether the eligibility requirements in section 2 of the Regulations were included in the text distributed or whether Tabacs Galaxy received a copy.

The current *Excise Act* has remained largely unchanged since 1883, with periodic amendments to address specific issues. These Regulations will require certain conditions to be met to obtain and maintain a licence or registration, including age and sufficient financial resources requirements, which will provide a more comprehensive but strengthened licensing framework. The Regulations will also allow for the licensing of the applicant rather than the current requirement to licence each premise. This approach is consistent with the Canada Customs and Revenue Agency=s (CCRA) initiative to provide a unique client identifier to replace the various account numbers a business was obliged to hold for GST, corporate income tax, excise tax, and excise duty. Furthermore, while the Minister will retain the power to cancel or suspend a licence, the criteria for exercising that power will be formalized. [Emphasis added.]

[13] On June 19, 2003, Tabacs Galaxy submitted a licence application to the Minister of National Revenue pursuant to section 14 of the Act. That application was approved on October 3, 2003.

[14] Under the Regulations, the eligibility requirements were then as follows:

2.(1) In order to be issued a licence, a person must submit to the Minister a completed application, in the form authorized by the Minister, accompanied by a list of the premises in respect of which the application is being made.

(2) Subject to subsections (3) and (4), an applicant is eligible for a licence, other than a licence issued under section 22 of the Act, if

(a) they are not the subject of a receivership in respect of their debts;

(b) they have not, in the five years immediately before the date of the application,

(i) failed to comply with any Act of Parliament, other than the Act, or of the legislature of a province respecting the taxation of or controls on alcohol or

2.(1) Quiconque souhaite obtenir une licence ou un agrément présente une demande au ministre sur le formulaire approuvé par lui, accompagné d'une liste des locaux visés par la demande.

(2) Sous réserve des paragraphe (3) et (4), est admissible à une licence ou un agrément, autre que l=agrément délivré en vertu de l=article 22 de la Loi, le demandeur qui rempli les conditions suivantes :

a) il ne fait pas l=objet d=une mise sous séquestre à l=égard de ses dettes;

b) dans les cinq ans précédant la date de la demande :

i) il n=a pas omis de se confirmer à toute loi fédérale, autre que la Loi, ou provinciale B ou à leur règlements B portant sur la taxation ou la réglementation de l=alcool

tobacco products or any regulations made under it, or

(ii) acted to defraud Her Majesty;

(c) in the case of an applicant who is an individual, they

(i) are at least eighteen years of age, and

(ii) have sufficient financial resources to conduct their business in a responsible manner;

(ii) dispose des ressources financières suffisantes pour gérer son entreprise d'une manière responsable;(d) in the case of an applicant that is a partnership or unincorporated body,

(i) where the partnership or unincorporated body is composed only of individuals, each of the individuals meets the requirement of subparagraph (c)(i) and the partnership or unincorporated body meets the requirement of subparagraph (c)(ii),

(ii) where the partnership or unincorporated body is composed only of corporations, each of the corporations meets the requirement of subparagraph (c)(ii), and

(iii) where the partnership or unincorporated body is composed of both individuals and corporations, each of the individuals meets the requirement of subparagraph (c)(i) and the partnership or unincorporated body and each of the corporations meet the requirement of subparagraph (c)(ii); and

(e) in the case of an applicant that is a corporation, the corporation meets the requirement of subparagraph (c)(ii). [My emphasis]

ou des produits du tabac,

(ii) il n'a pas agi dans le but de frauder Sa Majesté;

c) dans le cas où il est un particulier, il est :

(i) âgé d'au moins dix-huit ans,

d) dans le cas où il est une société de personnes ou un organisme non doté de la personnalité morale :

(i) s'il est composé uniquement de particuliers, ceux-ci remplissent chacun la condition visée au sous-alinéa c)(i) et le demandeur remplit la condition visée au sous-alinéa c)(ii),

(ii) s'il est composé uniquement de personnes morales, celles-ci remplissent chacune la condition visée au sous-alinéa c)(ii),

(iii) s'il est composé à la fois de particuliers et de personnes morales, les particuliers remplissent chacun la condition visée au sous-alinéa c)(i) et le demandeur ainsi que les personnes morales qui le composent remplissent chacun la condition visée au sous-alinéa c)(ii);

e) dans le cas où il est une personne morale, il remplit la condition visée au sous-alinéa c)(ii). [Je souligne]

[15] At the date its application was filed, Tabacs Galaxy had already been charged because in September 2002 it had allegedly conducted operations subject to excise tax elsewhere than in the

premises mentioned in its licence and illegally transferred or permitted the transfer of tobacco that was not packed in accordance with the requirements, contrary to the *Excise Act*.³

[16] Similarly, in August 2001 Tabacs Galaxy also failed to comply with an Act of the legislature of a province, namely the *Tobacco Tax Act*, R.S.Q., c. I-2, specifically paragraph 6(a). However, it was not convicted of this offence until November 7, 2003, after its new licence was issued.

[17] Although this matter was not addressed at the hearing, the Court can reasonably assume that these events were not brought to the Minister=s attention when the licence application was filed on June 3, 2003.

³ In its defence, Tabacs Galaxy admitted having committed the acts with which it was charged but argued that it was acting in good faith and was not aware that it could not conduct its activities away from the premises described in its licence without obtaining prior authorization and filing a new security.

[18] On May 5, 2004, Tabacs Galaxy was convicted of the offence against the *Excise Act* with which it had been charged in January 2003.⁴ On May 14, the Minister informed the applicant that it would have to suspend its operations. After exhausting the appellate process provided under the Act, Tabacs Galaxy tried to apply to the Superior Court, and then the Federal Court, but the parties finally reached an out-of-court settlement of their dispute involving the decision to suspend the applicant's licence.

[19] New operating conditions were imposed by the respondent.

[20] However, the respondent indicated to Tabacs Galaxy that despite this arrangement, considering that the Minister had now learned that the applicant had also infringed the *Tobacco Tax Act*, its licence would still be revoked after the expiry of the 90-day deadline, during which time the applicant could make written submissions.

[21] Section 12 of the Regulations provides that the licence may be cancelled if the licensee ceases to meet the applicable requirements of sections 2 or 3, as the case may be.

⁴ An appeal from this judgment was dismissed on February 7, 2005, and the deadline for appealing this decision has not yet elapsed.

[22] Tabacs Galaxy submits that since the acts with which it is charged occurred before the Regulations came into effect, those acts cannot justify the cancellation of its licence. In the absence of clear and unambiguous language to that effect, Parliament cannot in new legislation increase the penalties applicable to an act committed before the legislation came into effect. Subsections 24(1) and 304(1) of the Act, which define the authority under which the Regulations were adopted, contain no language indicating that Parliament expressly or by implication delegated the power to adopt regulations with retroactive effect.

[23] In its memorandum, the applicant referred to paragraph 11(g) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982 (U.K.)*, 1982, c. 11, and to section 37 of the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. At the hearing, the parties agreed that those two statutes did not apply in the case at bar and that the Court should analyze the matter on the basis of the general rules of statutory interpretation.

[24] The respondent did not argue that the Act permitted the adoption of retroactive regulations. In its submission, that argument is not relevant since the Regulations do not have a retroactive effect. They apply only to licence applications filed after the Act and Regulations came into effect.

[25] In the respondent's submission, therefore, this is a false retroactivity, and in this connection the writer Pierre-André Côté says, in *The Interpretation of Legislation in Canada*, 3d ed., at p. 171:

Having endeavoured to clarify what retroactivity is, it should be helpful to examine what it is not, and to look at the matter from a negative angle. We will consequently examine cases of false retroactivity, where the temptation has been great to make impetuous conclusions of retroactivity. [Emphasis added.]

[26] The writer goes on to indicate that legislation is not retroactive merely because its application encroaches upon vested rights.

[27] It should at once be noted that the issuing of a licence is not a right, but a privilege. There is no question in this case of Tabacs Galaxy having a vested right, even though it held a licence under the *Excise Act* from 2001 to 2003.

[28] In the respondent's view, it is clear from reading the eligibility requirements set out in section 2 of the Regulations (and restated in section 12, dealing with cancellation) that Parliament intended to limit the granting of licences to persons beyond reproach whose enjoyment of the privilege granted would be unlikely to conflict with the public interest.

[29] Commentary⁵ and case law⁶ confirm that referring to facts predating the coming into effect of legislation or regulations does not constitute retroactivity when such reference is intended to define the status of a person. That status is an ongoing fact to which Parliament may legitimately refer in order to define the characteristics required to obtain the privilege.

[30] Tabacs Galaxy submitted that the case law relied on by the respondent could not be applied in this case because the Act is meant to impose a penalty or harmful consequence in respect of an act in a context where it is not clear that the purpose is to protect the public. In the cases cited, the purpose of the legislation was to protect the public against criminals consistently

⁵ In addition to the text by Pierre-André Côté cited above, the respondent relied on the article by P.-A. Côté, *La position temporelle des faits juridiques et l'application de la loi dans le temps* (1988), 22 R.J.T. 207, especially at pages 210, 215, 228, 229, 236 and 237-239, and Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths Canada Ltd., 2002), pages 553-563.

⁶ *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *R. v. Vine* (1875), L.R. 10 Q.B. 195; *Bazile v. Fonds d'indemnisation en assurance de personnes*, [1999] R.J.Q. 1; *Ward v. Manitoba Public Assurance Corp.* (1975), 49 D.L.R. (3d) 638; *Paton v. The Queen*, [1968] S.C.R. 341; *Bonin v. Société de l'assurance-automobile du Québec*, [2002] J.Q. n° 217; *Royal Canadian Mounted Police Act (Can.) (Re)*, [1991] 1 F.C. 529 (C.A.).

engaging in criminal practices or individuals who abused children, securities brokers who had committed acts that called their commercial integrity into question, and so on.

[31] In this connection, it argued that a distinction must necessarily be made between the public interest and protection of the public. It can reasonably be assumed that all legislation is adopted in the public interest, but it is not all intended to protect the public. This concept of public protection is in⁴ fact used to justify the retroactivity of certain legislation, and such an exception would have no meaning if it were to be understood as including all legislation adopted in the public interest. The provisions of the Act and the Regulations in the case at bar are designed to ensure that taxes are collected on tobacco. Their purpose is not to protect the public.

[32] Further, in the applicant=s submission, in most of the case law, the interpretation of regulations was not at issue and the very wording of the legislation indicated that Parliament expressly intended to apply it to past events.

[33] Finally, Tabacs Galaxy submitted that the offences with which it was charged are technical offences and that there was no evidence of bad faith or fraud on its part. For example, it

noted that one of the offences of which it was convicted was that of selling tobacco to the provincial government as part of a project for the rehabilitation of inmates.

[34] After reviewing the authorities cited, the Court agrees that the respondent's position is a solid one and is supported by sound authority. However, though Tabacs Galaxy's chance of success appear to be slim, the Court cannot determine that the applicant's position is frivolous and vexatious.

[35] In the circumstances, it is not necessary to review the parties' arguments regarding breaches of the rules of natural justice, except to indicate that in this connection the Court is also not satisfied by the respondent that Tabacs Galaxy's argument was frivolous in view of the Federal Court's judgment in *University of Saskatchewan v. Canada (Commissioner of the Plant Breeders' Rights Office)*, [2001] 3 F.C. 247.

(ii) **Irreparable harm**

[36] Tabacs Galaxy filed the affidavit of its president, Mr. Vaillancourt, which indicated *inter alia* that cancellation of the tobacco licence would necessarily end his operations and ruin the company.

[37] The respondent agreed that without an injunction the company would have to cease operations, at least until a decision was rendered on its review application. Accordingly, operations will cease for at least four months.

[38] In the respondent=s submission, the harm resulting from its suspension of operations is quantifiable and can be compensated for by an award of damages. It referred to consistent case law of the Court applying this principle in cases involving trademark or patent infringements.

[39] However, the respondent agreed that Tabacs Galaxy=s right to recover damages from it is not clear in this case. Even if Tabacs Galaxy was able to have the decision of January 31, 2005, set aside, it would also have to prove bad faith or equivalent circumstances for the respondent to be liable. There is no indication that such circumstances exist here.

[40] As the Supreme Court noted in *R.J.R. - MacDonald, supra*, A >irreparable= refers to the nature of the harm suffered rather than its magnitude@. That includes harm which cannot be repaired, because one party cannot recover damages from the other or would find it difficult to do so. This includes cases in which the right to compensation is not clear or is limited.

[41] The Court is satisfied that closing Tabacs Galaxy for a period of four months will necessarily entail a loss of earnings, and probably the loss of part of its clientele, and that in this specific case such harm must be regarded as irreparable.

(iv) **Balance of convenience**

[42] The respondent argued that the balance of convenience is in its favour, since the public interest requires that the Act be applied by officers of the government as promptly as possible.

[43] It also indicated that staying a decision that was based on a valid regulation amounts to suspending the proper application of the Regulations. That is contrary to the public interest and should weigh heavily in the balance. The respondent relied on decisions of the Supreme Court of Canada in *R.J.R. - MacDonald, supra*, and *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57.

[44] Further, the respondent indicated that 107 new counts were filed on January 27, 2005, against Tabacs Galaxy and its directors for a whole range of offences against the Act which occurred between February 23 and May 7, 2004. These new charges are thus clearly linked to events which occurred after the Act and Regulations came into effect.

[45] With respect to these new proceedings, the Court notes that it cannot prejudge these matters and that the filing of a charge does not establish that Tabacs Galaxy actually failed to comply with the Act. If the applicant is convicted before a decision is rendered on the application for judicial review, its licence clearly can be cancelled by the respondent.

[46] The effect of an injunction is not to prevent the respondent from continuing to apply the Act and Regulations. Likewise, if Tabacs Galaxy were to make an assignment of its property contrary to section 12 of the Regulations, its licence could be cancelled.

[47] The respondent knows that Tabacs Galaxy has committed at least one breach of the *Excise Act* since at least May 14, 2004. Nevertheless, the decision to cancel the licence was not finally taken until January 31, 2005, five months after the filing of the licensee=s last written submissions. The cancellation imposed would not take effect until two weeks later.

[48] Since the summer of 2004, however, the respondent has imposed further conditions which the applicant had to observe in order to keep its licence, and it has been the subject of increased monitoring.

[49] Accordingly, it is not unreasonable to find based on this conduct that the respondent was satisfied that the measures taken since the summer of 2004 were sufficient to protect the public interest until it could make an informed decision on this matter. It would not appear there was any urgent need to take action.

[50] The third test of the balance of convenience involves determining which of the two parties will suffer the greater harm, depending on whether the injunction is granted or denied, pending a decision on the application for judicial review. It is clear when the validity of

legislation is at issue that the nature of the legislation and the public interest as well as that of the parties are factors that should be taken into account.

[51] Having considered the circumstances of this case as a whole, the Court finds that the balance of convenience favours the applicant.

[52] Accordingly, the motion for an injunction is granted until judgment is rendered on the application for judicial review (at first instance only).

[53] Further, it is essential that this case be heard as soon as possible. Taking into account the expedited schedule proposed by the parties, I order that the application for judicial review be heard in Québec on June 15, 2005.

ORDER

THE COURT ORDERS:

1. The motion is allowed with costs;
2. Execution of the decision of January 31, 2005, is stayed until a decision is rendered on the applicant=s application for judicial review;
3. An order setting the schedule to be observed and the hearing in Québec will be issued separately.

AJohanne Gauthier@
Judge

Certified true translation

K.A. Harvey

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-253-05

STYLE OF CAUSE: **9101-9380 QUÉBEC INC. (LES TABACS GALAXY) v. CANADA CUSTOMS AND REVENUE AGENCY**

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: February 17, 2005
AND BY TELECONFERENCE: February 18, 2005
AND BY WRITTEN SUBMISSIONS: February 24, 2005

REASONS: **The Honourable Madam Justice Gauthier**

DATED: March 1, 2005

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