Federal Court  Cour fédérale

Date: 20230615

Docket: T-2047-22

Citation: 2023 FC 842

Ottawa, Ontario, June 15, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

AZ-ZAHRAA HOUSING SOCIETY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] Az-Zahraa Housing Society [the Society] asked the Minister of National Revenue to be designated as a municipality for the purposes of the GST/HST rebate because it provides affordable housing, which is considered to be a municipal service. The Minister refused, based on administrative guidelines that require that an entity seeking such a designation to be the recipient of an ascertainable amount of government funding. The arrangements between the Society and the British Columbia Housing Management Commission [BC Housing] are structured in a way that does not include the payment of ascertainable amounts of money.

[2] The Society is now seeking judicial review of this decision. I am granting its application. The Minister's delegate fettered her discretion by rigidly applying the administrative criteria and refusing to consider the broader economic rationale of the arrangements between the Society and BC Housing.

I. Background

A. *The Society's Affordable Housing Project*

[3] The Society is a non-profit society, the goal of which is to provide affordable, or "rent-geared-to-income," housing in the city of Richmond, British Columbia. To that end, it acquired fifteen strata units in a residential development project.

[4] To ensure the viability of the project, the Society entered into agreements with BC Housing, which can be summarized as follows.

[5] The Society sold six of the fifteen units to BC Housing (or a related public body), which leased them back to the Society at no cost. According to the relevant agreement, the Society collects rents, pays the operating expenses and retains the surplus. As the Society does not own these units, it need not make mortgage payments for them. Therefore, mortgage payments are not included in the operating expenses assumed by the Society. The parties have called these units the "BC Housing units."

[6] The other nine units remain owned by the Society, which operates them in conformity with British Columbia's affordable housing program. The Society financed the acquisition of these units through a mortgage loan offered by BC Housing. It has to assume mortgage payments and other operating expenses.

[7] The economic logic behind this arrangement is simple. It was determined that the rent from the fifteen units could not cover the mortgage payments and other operating costs. By assuming ownership of six units, and relieving the Society from making mortgage payments regarding these six units, it was estimated that the project would break even going forward.

B. *Designation as a Municipality*

[8] The *Excise Tax Act*, RSC 1985, c E-15 [the Act], affords public service bodies, including municipalities, a rebate from the goods and services tax and the harmonized sales tax [GST/HST]. Because municipal services are sometimes offered by entities other than municipalities, Parliament provided a mechanism for the designation of such entities as municipalities. In this regard, section 259 of the Act, which governs the calculation of the rebate, includes the following definition:

259 (1) In this section,	**259 (1)** Les définitions qui suivent s'appliquent au présent article.
. . .	[…]
municipality includes a person designated by the Minister, for the purposes of this section, to be a municipality, but only in respect of activities, specified	**municipalité** Est assimilée à une municipalité la personne que le ministre désigne comme municipalité pour l'application du présent article, aux seules fins des

in the designation, that involve the making of supplies (other than taxable supplies) by the person of municipal services; (*municipalité*)	activités, précisées dans la désignation, qui comportent la réalisation de fournitures de services municipaux par la personne, sauf des fournitures taxables. (*municipality*)
. . .	[…]

[9] The Canada Revenue Agency published an information sheet regarding the designation as municipalities of entities offering rent-geared-to-income [RGI] housing. The information sheet states:

> An organization can be designated as a municipality if it meets all of the four eligibility criteria listed below:
>
> 1. the organization is a charity, a cooperative housing corporation, a non-profit organization or a public institution;
>
> 2. the organization supplies long-term residential accommodation within a program to provide housing to low to moderate-income households;
>
> 3. more than 10% of the housing units in a particular housing project are provided on a RGI basis; and
>
> 4. the organization receives funding from a government or municipality to assist it in providing the accommodation within a program to provide housing to low to moderate-income households.

[10] Only the fourth criterion is at issue in the present matter. In this regard, the information sheet provides further guidance:

> In order to be designated as a municipality, an organization must receive government funding to subsidize the provision of RGI housing to individual tenants. Government funding may be provided by a municipality, by a province or territory, or by the federal government. Acceptable types of funding include on-going subsidies that make up the difference between the organization's

> costs to operate the housing units and the RGI paid by the tenants to the organization, and capital funding.

C. *The Minister's Decision*

[11] The Society first applied to be designated as a municipality in July 2018. The Minister issued a first decision denying the application in August 2020. The Society sought reconsideration of this decision. In May 2021, the Minister reaffirmed the first decision. The Society applied for judicial review of this decision. The application for judicial review was discontinued on the basis that a different decision-maker would conduct a fresh review of the application for designation.

[12] In August 2022, the Minister issued the decision now being challenged. The Society's application was again denied.

[13] With respect to the nine units owned by the Society, the Minister's delegate agreed that the first three criteria mentioned in the information sheet were met, but found that the Society did not receive government funding. This was because the agreement with BC Housing provided that the project had to be sustainable without operating subsidies and the repayable mortgage loan is not considered to be government funding.

[14] With respect to the six BC Housing units, the Minister's delegate found that there was no government funding. She rejected the Society's contention that the rent for these six units belonged to BC Housing and that the latter granted it to the Society because, under the relevant agreements, the Society, not BC housing, is the landlord and is entitled to collect the rent. She

added that if the Society were correct, it would not be the provider of housing and would therefore not be entitled to be designated.

[15] Turning to the combined effect of the relevant agreements, the Minister found that this did not constitute government funding:

> Although the Society may use any accumulated operating surplus to pay the principle [*sic*] and interest on the mortgage loan for the nine housing units owned by the Society, the use of internal income to reduce loan or mortgage payments due to the Province does not constitute government funding. . . . The fact that the Province is permitting the Society to rent out units owned by the Province and retain income is not government funding per the CRA administrative guidelines, even if the surplus may have a positive effect on the rents required to be charged from tenants.
>
> In addition, an operating surplus is not an ascertainable or easily identifiable amount that is paid to the Society.

[16] The Society now seeks judicial review of this decision.

II. Analysis

[17] While the Society challenges the decision on several grounds, in my view the determinative issue is that the Minister's delegate fettered her discretion, as argued in paragraphs 87–93 of the Society's memorandum.

[18] There is no serious dispute that the agreements between BC Housing and the Society result in government assistance being provided to the Society. As counsel for the Minister stated at paragraph 51 of her written submissions: "the Province allowing the Applicant to use the Province's property in the Applicant's endeavours would likely be assistance within the ordinary

meaning of that word." Nor is there any serious dispute that these agreements do not result in the payment of an ascertainable sum of money to the Society, if that is what is meant by "funding."

[19] Rather, the real issue is whether the Minister's delegate could reasonably insist on applying the narrow definition of funding found in the information sheet instead of considering all the facts put forward by the Society. I find that by focusing on a narrow definition of funding, the Minister's delegate fettered her discretion and made an unreasonable decision.

A. *Fettering of Discretion*

[20] The principle that administrative decision-makers must not fetter the exercise of discretionary powers by strictly following administrative guidelines was explained by the Supreme Court of Canada in *Maple Lodge Farms Ltd v Government of Canada*, [1982] 2 SCR 2 at 7:

> The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion . . . but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion . . .

[21] This principle was reiterated in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 32, [2015] 3 SCR 909, where the Court mentioned that decision-makers

> . . . should not fetter their discretion by treating these informal Guidelines as if they were mandatory requirements . . .

[22] Likewise, in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 [*Stemijon*], the Federal Court of Appeal stated, at paragraphs 22 and 24:

> Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.
>
> . . .
>
> A decision that is the product of a fettered discretion must *per se* be unreasonable.

[23] These holdings have not been affected by the Supreme Court of Canada's restatement of the principles of judicial review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]. At paragraph 108, the Court noted that "where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion." Moreover, *Stemijon*'s holding that fettering of discretion automatically results in an unreasonable decision was followed in decisions of this Court subsequent to *Vavilov*: *Sheikh v Canada (Citizenship and Immigration)*, 2020 FC 199 at paragraphs 15–16; *Canada (Public Safety and Emergency Preparedness) v Keto*, 2020 FC 467 at paragraph 29; *Saulteaux v Carry the Kettle First Nation*, 2022 FC 1435 at paragraph 35.

[24] In the present case, the decision is based exclusively on the criteria laid out in the information sheet. The decision sets out the four criteria and, after summarizing various aspects of the facts, recites, sometimes word-by-word, sometimes by paraphrasing, portions of the information sheet dealing with the fourth criterion to explain what can be considered as

government funding. Both parts of the decision end with a statement that the Society "does not meet the administrative criteria."

[25] This is an obvious case of fettering of discretion. Section 259 of the Act, quoted above, simply does not lay out any criteria for the exercise of the Minister's power to designate an entity as a municipality. By refusing to consider circumstances that fell outside the four corners of the information sheet, the Minister's delegate essentially treated the latter as if it superseded the broad discretion granted by section 259 of the Act.

[26] This is even more obvious when one considers how the Minister's delegate responded to the Society's submission that

> . . . in policy terms, there is no relevant difference or mischief between the Society keeping an operating surplus and an arrangement whereby the Society is required to remit any surplus to the Province and receive it right back from the Province in the form of a grant or subsidy.

[27] The Minister's delegate did not consider the substance of this submission, which was an invitation to exercise the discretion beyond the strict criteria of the information sheet. Rather, she replied in a manner that stressed that "government funding," narrowly construed, was a condition *sine qua non* for obtaining a designation:

> The Society must provide documentation supporting that it actually receives an ascertainable or easily identifiable amount of government funding and that the funding is an acceptable type of funding that is linked to the organization's provision of RGI housing to individual tenants. The fact remains that the Society has not demonstrated that it receives government funding, and the Operator Agreement supports that this is an agreed upon condition of the agreement.

[28] Counsel for the Minister relied on *Wellesley Central Residences Inc v Canada (National Revenue),* 2011 FC 760 [*Wellesley*], to buttress her submission that the Minister's delegate acted within her discretion, especially as the matter involved policy choices. My colleague Justice Robert L. Barnes rejected the applicant's suggestion that the Minister fettered his discretion, because there was nothing to suggest that the administrative criteria "were elevated to a set of immutable legal principles to the exclusion of other relevant considerations": *Wellesley*, at paragraph 24. In contrast, as I have shown above, this is precisely what the Minister's delegate did in this case by expressly refusing to consider situations outside the criteria of the information sheet. I will return to *Wellesley* later in these reasons.

[29] As the Minister's delegate fettered her discretion, the decision is unreasonable. To put the matter in simple terms, she had to consider the possibility that receiving government assistance is sufficient to warrant designation as a municipality pursuant to section 259 of the Act, in contrast to the narrower concept of "government funding" mentioned in the information sheet.

B. *PSB Regulations*

[30] Counsel for the Minister sought to save the decision by arguing that it was reasonable for the Minister's delegate to import the definition of government funding found in section 2 of the *Public Service Body Rebate (GST/HST) Regulations*, SOR/91-37 [the PSB Regulations], which reads, in its relevant part:

government funding of a particular person means	***montant de financement public*** Le montant de financement public d'une personne s'entend :

(a) an amount of money (including a forgivable loan but not including any other loan or a refund, rebate or remission of, or credit in respect of, taxes, duties or fees imposed under any statute) that is readily ascertainable and is paid or payable to the particular person by a grantor . . .	**a)** de toute somme d'argent, y compris un prêt à remboursement conditionnel, mais à l'exclusion de tout autre type de prêt et des remboursements, ristournes, remises ou crédits de frais, droits ou taxes imposés en application d'une loi, qui est facilement vérifiable et qui est payée ou payable à la personne par un subventionnaire […]

[31] This submission runs into a number of difficulties. First, I am unsure that the Minister's delegate had the PSB Regulations in mind when making the decision. It is possible that the above-quoted definition was, directly or indirectly, the inspiration for the Minister's delegate's reference to an "ascertainable or easily identifiable amount." However, the reasons for the decision do not reference the PSB Regulations and do not provide any indication that they were the reason for rejecting the Society's submission that the Minister should consider the economic reality of the situation. It is not permissible to buttress an administrative decision with reasons that were not provided by the decision-maker: *Vavilov,* at paragraph 96.

[32] In addition, it is unclear how this submission can save a decision that is the result of a fettered discretionary power. Counsel for the Minister acknowledges that the definition in the PSB Regulations is not directly applicable to the situation at hand. Thus, that definition does not constrain the exercise of the discretion associated with the designation of an entity as a municipality. It follows that one cannot rely on the definition to justify a hard-and-fast rule that amounts to fettering of that discretion. Put simply, fettering of discretion is not excused by reliance on an inapplicable statutory provision.

[33] Nevertheless, for the sake of exhaustiveness, I will address the merits of this submission.

[34] To do this, it is necessary to take a step back and to provide additional context regarding section 259. This provision affords a GST/HST tax rebate to several categories of entities involved in the provision of public services, including municipalities, universities, hospitals and charities. Each category is governed by a different regime and is entitled to a different percentage of rebate.

[35] In some cases, the entitlement to a rebate depends on ascertaining the amount of public funding that an entity receives. For example, under subsection 259(3), a "qualifying non-profit organization" may be entitled to a rebate. To qualify as such, subsection 259(2) provides that a person must have a "percentage of government funding" that is at least 40%. In turn, subsection 259(1) provides that the latter phrase is defined in the "prescribed manner," that is, according to the definition in the PSB Regulations quoted above.

[36] In contrast, the rebate afforded to municipalities is provided by subsection 259(4). The concept of government funding plays no role in the application of that subsection. In fact, counsel for the Minister acknowledges that the definition of "government funding" in the PSB Regulations is not directly applicable to the case at hand.

[37] Rather, the argument is that, for the sake of consistency, it would be reasonable for the Minister to use the PSB Regulations' definition of government funding for all components of section 259, including to decide which entities deserve to be designated as municipalities. As I

mentioned above, this would set preconditions incompatible with the wide discretion afforded by the definition of municipality in subsection 259(1) and would still amount to fettering of discretion.

[38] Moreover, it is trite law that a discretionary power must be exercised for the purposes of the legislation conferring the discretion: *Vavilov*, at paragraph 108. In this regard, I agree with the following description of the purpose of the power to designate entities as municipalities offered by counsel for the Minister:

> The provision provides a way to obtain the same application of the public service body rebate with respect to the provision of municipal services whether those services are provided by municipalities or by other organizations.

[39] I fail to understand how a distinction between funding, as defined by the PSB Regulations, and other forms of government assistance is related in any way to the achievement of this purpose. One can easily understand that an organization that does not receive any form of government assistance is unlikely to provide municipal services. It is, however, difficult to see why the precise form of assistance matters and why creativity in structuring the relationship between government and providers of municipal services should be discouraged.

[40] The decision does not reveal any "valid taxation rationale" for requiring government funding instead of government assistance and counsel did not suggest any at the hearing of this application. This distinguishes the present matter from *Wellesley*, where it was noted, at paragraphs 21–22, that the proposed designation encompassed services usually offered on a

commercial basis, which would lead to tax unfairness. Here, no suggestion was made that designating the Society as a municipality would give rise to any form of tax unfairness.

[41] It is true that, for some categories of entities, Parliament chose to make access to the GST/HST rebate conditional upon an organization receiving a certain percentage of government funding. In that case, one can easily appreciate the need for a definition of government funding based on easily ascertainable data. Indeed, this was done through regulations, not informal guidelines. Parliament, however, did not set such a requirement for designating an entity as a municipality, nor does the information sheet rely on a certain percentage of government funding. Counsel for the Minister has not suggested any other rationale for importing the definition of the PSB Regulations into the process for being designated as a municipality. I fail to see how it can be reasonable to do so when this does not appear to serve any rational purpose and Parliament instead chose to give a wide discretion to the Minister.

C. *Remedy*

[42] The Society seeks an order in the nature of *mandamus* requiring the Minister to designate it as a municipality pursuant to section 259 of the Act. However, in *Vavilov*, at paragraphs 139-142, the Supreme Court states that the usual remedy is to remit the matter to the decision-maker. This is because section 259 grants a discretion to the Minister, not to the Court.

[43] In spite of this, the Society argues that there is only one reasonable outcome on the facts. I am unable to agree. The decision is unreasonable because the Minister's delegate fettered her discretion. As a result, her reasons focused exclusively on the criteria found in the information

sheet. We have no indication of what decision she would have rendered had she not so restricted her review and, instead, took the real measure of her discretion.

[44] I am also mindful that the Society asked for reconsideration of a first decision, and that an application for judicial review of a second decision was withdrawn on consent, so that the matter could be reconsidered again. While this means that close to five years have elapsed since the initial application, this is the first time that this Court considers the matter and the Minister's delegate is entitled to make a new decision in light of the Court's decision.

III. Disposition

[45] For these reasons, the application for judicial review will be granted and the matter will be remitted to a different Minister's delegate for reconsideration, with costs.

JUDGMENT in T-2047-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted to a different delegate of the Minister for reconsideration.

3. Costs are awarded to the applicant.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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