

Listing in the REIN: Cruel and unusual punishment under the Charter?

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On July 16, 2019, the [Court of Appeal](#) denied the Autorité des marchés publics (AMP) leave to appeal a Superior Court ruling made during the course of proceedings on an application for judicial review that stayed the AMP's decision to refuse to grant a company authorization to contract/subcontract with a public body.

This will give the Superior Court the opportunity to examine the following "serious issue": does the automatic listing in the Register of enterprises ineligible for public contracts (REIN) constitute cruel and unusual punishment within the meaning of section 12 of the *Canadian Charter of Rights and Freedoms* (Charter)?

Ruling by the Superior Court during the course of proceedings

Les Entreprises JRMorin Inc. (Morin) is a company working in the field of excavation and roadwork, and close to 70% of its income comes from contracts with public bodies.

On August 16, 2016, Morin applied to the AMP for authorization to contract/subcontract with public bodies for construction contracts worth more than \$5 million and service contracts worth more than \$1 million.

Almost 24 months later, the AMP sent Morin a notice of refusal. Morin then had the opportunity to submit its written arguments against it.

On April 25, 2019, the AMP refused to issue the authorization requested by Morin. Consequently, Morin was automatically listed in the REIN, and thereby prevented from bidding and contracting/subcontracting with any public bodies.

Morin applied to the Superior Court for judicial review of the AMP's decision and requested a stay of the decision in the meantime.

The criteria for granting a stay were not contested. Morin had to demonstrate: (1) a *prima facie* right or a serious issue, (2) irreparable prejudice, and (3) a balance of convenience in its favour between the refusal and the granting of the stay.

Morin started by arguing the unconstitutionality of section 21.2.0.0.1 of the *Act respecting contracting by public bodies* (Act), which reads as follow:

21.2.0.0.1. An enterprise for which the Autorité des marchés publics (the Authority) refused to grant or renew an authorization required under Chapter V.2 or revoked such an

authorization is ineligible for public contracts for five years as of the recording of the decision in the register of enterprises ineligible for public contracts or until the date preceding the date on which the enterprise's name is registered in the register of authorized enterprises, if the latter date is earlier.

In addition, the legal person in which the enterprise referred to in the first paragraph holds shares carrying 50% or more of the voting rights attached to the shares of the legal person's capital stock that may be exercised under any circumstances becomes ineligible for public contracts for the same time as the enterprise as of the recording of the situation referred to in the first paragraph in the register of enterprises ineligible for public contracts.

According to Morin, that provision goes against s. 12 of the Charter, since it would result in a cruel and unusual punishment or treatment in the circumstances. More specifically, Morin risks bankruptcy if it is listed in the REIN.

In view of the constitutional nature of the argument, the Attorney General of Québec (AGQ) was impleaded and joined forces with the AMP.

Morin also argued that the AMP failed to observe procedural fairness and natural justice during the process that led up to the decision to refuse to issue the requested authorization. For example, it alleged that the AMP did not completely disclose the file it had obtained from the Quebec's anti-corruption unit, known as UPAC, when it did its background checks.

The Superior Court is of the opinion that the first criterion has been met and that those issues need to be examined by the judge seized of the application for judicial review.

The Superior Court is also of the opinion that Morin has met the other two criteria. The Court said it was [TRANSLATION] "*troubling to note that if the company had not made its application in 2016 ... it might not have been listed in the REIN, would not have been penalized, and could continue to carry out public contracts below the \$5 million threshold.*"

The Court ordered the stay of the AMP's decision and ordered the Chair of the Conseil du Trésor to cancel Morin's listing in the REIN until such time as a final judgment on the application for judicial review is rendered.

Leave to appeal refused by the Court of Appeal

The AMP, AGQ and the Chair of the Conseil du Trésor sought leave to appeal the Superior Court decision and to suspend its execution. They argued that the judge at first instance erred as to the criterion of *prima facie* right and wrongly assessed the prejudice suffered by Morin.

It was not contested that an application for leave to appeal a judgment ordering a stay under the second paragraph of article 31 of the *Code of Civil Procedure* can only be granted in exceptional circumstances – that is, when the judgment determines part of the dispute or causes irremediable injury to a party.

The Court of Appeal dismissed the application for leave to appeal, which meant the application to suspend the execution of the Superior Court judgment also fell. According to the Court of Appeal, the judge at first instance made no error in considering Morin's issues serious, particularly the one concerning the constitutionality of s. 21.2.0.0.1 of the Act. In addition, and contrary to what the AMP and AGQ argued, the Superior Court did not put Morin's private interest ahead of the public interest, since it did not rule on the merits of the case. Rather, the stay is a temporary one and applies only to Morin's case.

Remarks

The stay was ordered because of the specific circumstances of this case. Before submitting its application for authorization to make contracts with public bodies above certain thresholds, 68% of Morin's sales were based on contracts with public bodies.

Therefore, a listing in the REIN will prevent Morin from contracting/subcontracting with any public bodies. It is reasonable to assume that if Morin had known the consequences of such a refusal it would not have submitted the application, so as not to jeopardize its business model.

This issue will allow the Superior Court to consider the consequences of an automatic listing in the REIN. The Superior Court may also be interested in the process the AMP uses when deciding on such authorizations, which seems to lack transparency.

We do believe that the Act and the REIN serve the public interest. However, since the legislator requires the AMP authorization above certain specific thresholds, the automatic consequence of a listing in the REIN for all contracts — regardless of how much they are worth — may well be contrary to s. 12 of the Charter in some circumstances. We will be watching this file with interest.