Federal Court  Cour fédérale

Date: 20090930

Docket: T-499-08

Citation: 2009 FC 985

Toronto, Ontario, September 30, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

742190 ONTARIO INC COB
VAN DEL MANOR NURSING HOME

Applicant

and

CANADA CUSTOMS AND REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application brought under the provisions of section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, to quash a purported decision made by the Respondent dated March 22, 2007 and for mandamus requiring the Respondent to make a decision in respect of certain Notices of

Objection submitted by the Applicant in appealing assessments made by the Respondent under the Canada Pension Plan and Employment (Unemployment) Insurance. For the reasons that follow I find that the application is dismissed with no order as to costs.

[2] The facts of this case are unusual and complex. I thank Counsel for both parties for their assistance in focusing their attention to the relevant facts and issues and for their argument focused upon the applicable law.

Background

[3] The Applicant 741290 Ontario Inc, (Van Del Manor Nursing Home) carried on the business of operating a nursing home until about November 1998 when the Ontario Ministry of Health and Long Term Care occupied the nursing home and took possession of the files and documentation pertaining to its operations. Records concerning any tax assessments that may have been made by the Respondent up to that time cannot now be located, if they ever existed.

[4] Disputes between the Applicant and the Respondent as to taxes that may have been assessed have been ongoing. Some of these disputes have been resolved, including through proceedings in the Courts, others remain unresolved.

[5] Among such proceedings was an appeal taken by the Applicant from certain assessments made under the *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act/Unemployment Insurance Act* in the Tax Court of Canada under the Informal Procedure of that Court. The Respondent in that proceeding (Docket: *2007-3055(IT) I*) brought a Motion to Quash

which was heard by Justice Rossiter (as he then was). He delivered an Order with Reasons on January 30, 2008 (cited as 2008 TCC 55) in which he dismissed the Motion to Quash as it related to the *Income Tax Act* (ITA) assessments and granted the Motion as it relates to the *Canada Pension Plan* (CPP) and *Employment Insurance Act/ Unemployment Insurance Act* (EIA/UIA) assessments. Given that the proceeding was commenced under the Informal Provisions, no appeal could be taken from that decision.

[6] Justice Rossiter made a number of factual determinations based on the evidence before him as well as legal determinations. Those findings and determinations are largely accepted by the parties in the present application and include:

> 1. With respect to the CPP, appeals for reconsideration of assessment occurring before December 18, 1997 must be made within 90 days of the day of *mailing* of the notice of assessment. With respect to appeals arising on or after that date, they must be made within 90 days after the taxpayer is *notified* of the assessment. (paragraph 12 of the Reasons)
>
> 2. With respect to UIA, appeals for reconsideration which are before June 30, 1996 must be taken within 90 days of the day of *mailing* of the notice of assessment. With respect to the EIA (successor to UIA) assessments made on or after June 30, 1996 appeals must be made within 90 days after the taxpayer is *notified* of the assessment. (paragraph 12 of the Reasons)

[7] He summarized this situation in paragraph 13 of his Reasons:

> ***13*** *In summary, the limitation periods are as follows:*
> *1. Under the ITA the Notice of Objection must be served on or before 90 days after the day of mailing of the Notice of Assessment.*
>
> *2. The limitation period in subparagraph 1 is also applicable for CPP and UIA matters where the appeal for reconsideration, under the CPP relates to an assessment occurring before December 18,*

> *1997 and under the UIA, where the assessment relates to a matter that arose before June 30, 1996.*
>
> *3. In assessments under the CPP which arose on or after December 18, 1997 and in assessments under the EIA which relate to matters which arose on or after June 30, 1996 the appeals for reconsideration must be served on the Minister within 90 days after being notified of the assessment.*
> *It should be noted that notification is considerably different than the mailing of the Notice of Assessment and as such that there are different limitation periods.*

[8] With respect to those periods requiring an appeal to be made within 90 days from mailing, Justice Rossiter noted the evidence of Ms. Pinnock for the taxpayer who gave evidence that no Notices of Assessment were ever received. That evidence appears to have been uncontradicted, and remains uncontradicted in the record before me. He wrote at paragraph 24 of his Reasons:

> ***24*** *Before I make reference to what is required of the Respondent on this Motion to Quash, the Appellant in its defence in the Motion to Quash emphasized the September 20, 2007 affidavit of Stella Pinnock, the principal of the Appellant who administered the affairs of the Appellant wherein she stated in paragraph 2 in part as follows:*
>
> > *... I say unequivocally that at no time was the corporation in receipt of any Notice of Assessment concerning the continuous assessments of payroll source deduction discrepancies.*

[9] Justice Rossiter then reviewed the evidence offered on behalf of the Canada Revenue Agency (CRA) as to whether the Notices of Assessment were ever mailed and if so, when and to whom. He concluded that there was no evidence as to mailing at paragraph 35 of his Reasons:

> ***35*** *There is a lack of evidence, to establish the basis of when, where, how and by whom the original Notices of Assessment were mailed to the Appellant. Given the lack of evidence to establish that the particulars of mailing of the Notices of Assessment to the*

> *Appellant, the Respondent's Motion to Quash the Notice of Appeal as it relates to the Notices of Assessment under the ITA, and the Notices of Assessment under the CPP, for the period before December 18, 1997 and the Notices of Assessment under the UIA, for the period before June 30, 1996 should be dismissed on this basis alone but more will be said on this point later herein.*

[10] It appears from the evidence before Justice Rossiter that the CRA endeavoured to recreate the Notices of Assessment for the period between 1991 and 1998. The Applicant acknowledged in a statement entitled "Relevant Facts and Reasons for Objection" found in the Applicants Record in this application that such reconstruction was received by the Applicant sometime between October 27 and 31, 1998.

[11] It also appears from the Reasons of Justice Rossiter at paragraph 3 and elsewhere that the Applicant made various applications under the Fairness Provisions of the applicable statutes for relief in respect of penalties and interest. This caused Justice Rossiter to conclude that for the periods after December 18, 1997 under the CPP and after June 30, 1996 under the EIA the Applicant had been "notified" so as to trigger the 90 day period for appeal. He wrote at paragraph 45 of his Reasons:

> ***45*** *Quite clearly, the Appellant had to be notified or had to have had notice of the assessments under the* CPP *and* EIA *in order for the Appellant to pursue the Fairness application. (The* EIA *by section 99 and* CPP *by subsection 23(2) each incorporate by reference subsection 220(3.1) of the* ITA*, the Fairness interest relief provision of the* ITA*) Assuming that the very* <u>*last*</u> *Fairness application was applied for and the denial was received on the same date, November 15, 2005, the limitation period would commence to run from that particular point in time. I only make reference to the Fairness applications because those were applications, taken by the Appellant. There is the other evidence referred to, to show, that the Appellant had to have been notified. Given that the Notices of*

> *Objection were filed on January 23, 2007, the Appellant was well out of time so it would appear the Respondent should be successful on its motion as it relates to the assessments under the* CPP *which arose on or after December 18, 1997 and the assessments under the* EIA *which arose on or after June 30, 1996 but that does not end the matter.*

[12] The Applicant, within 90 days from the receipt of the reconstructed assessments in late October, 2006, submitted approximately 92 Notices of Objection (as set out in paragraph 4 of the affidavit of Serge Nadeau in this application). In response the CRA wrote a letter dated March 22, 2007 to the Applicant. This letter is a subject of the present application and stated in part:

> *This is to inform you that the Appeals Division of the London Tax Services Office received your appeals filed against notices of assessments relating to the 1991 and 1998 taxation years (see schedule).*
>
> *Section 92 of the Employment Insurance Act and section 27.1 of the Canada Pension Plan state that you must file an appeal to the Minister of National Revenue within 90 days of being notified of the assessment(s). The information provided to you by Margaret Ebanks, in October of 2006, were copies of assessments that had been issued between 1991 and 1998. They were reconstructed notices, as per your request, and are not new assessments or re-assessments that give appeal rights.*
>
> *In order to be able to entertain a late filed appeal, evidence must be provided to show that you did not receive the documentation sent to you by the department with regards to the assessments. There is no evidence that you were not aware of the assessments at the time they were assessed (between the taxation years 1991 and 1998). As such we are unable to proceed with the appeal filed against these assessments.*

[13] Justice Rossiter held that this letter constituted a refusal by the Minister to consider an appeal on the grounds that it was out of time, thus was not a “decision” of the Minister that could be

appealed to the Tax Court. He recommended that a Mandamus application be made to the Federal Court requiring that the Minister make a decision. Hence the present application. Justice Rossiter wrote at paragraphs 49 and 50:

> ***49*** *In Power v. Minister of National Revenue, [2005] T.C.J. No. 137, 2005 TCC 200, Mr. Justice Bowie held that, a refusal to consider an appeal to the Minister on the grounds that it was out of time, was not a decision by the Minister. Mr. Justice Bowie stated that the appropriate course of action was to seek a Mandamus Order from the Federal Court requiring the Minister to exercise its jurisdiction and to make a decision. In that case, the appeal related to CPP and EIA determinations of insurable employment and pensionable employment. The decision of CRA on the basis of a limitation period to refuse to deal with the objections of the Appellant on the CPP and EIA determinations is no decision at all for the purpose of the CPP and EIA. The remedy for the Appellant is not an appeal to the Tax Court of Canada but to seek an order for Mandamus from the Federal Court directing the Minister to exercise its jurisdiction to make a decision and if and when the Minister makes a decision and if the Appellant is still unsatisfied, the Appellant could proceed with a Notice of Appeal to the Tax Court of Canada.*
>
> ***50*** *The motion as it relates to CPP assessments and EIA assessments would be granted because the Minister has not made a decision that can be appealed to at this stage and therefore no appeal lies to the Tax Court of Canada. However, this is not the case in relation to assessments under the ITA. Under paragraph 169(1)(b) of the ITA, there is a right of appeal to the taxpayer even when no decision has been made by the Minister. Failure of the Minister to make a decision is fine provided 90 days have elapsed from the Notice of Objection in which case the Tax Court of Canada has jurisdiction over the ITA assessments, and as such the motion in relation to the ITA on this argument would fail.*

Issues

[14] Counsel for the Applicant stated in argument at the hearing of this matter that the Applicant was seeking relief in respect of EIA/UIA only in respect of the period before June 30, 1996 and in

respect to the CPP only in respect of the period before December 18, 1997. That is, the Applicant was directing its issues only to the period stipulating that an appeal must be taken within 90 days from the *mailing* of the assessment.

[15] Thus the Applicant seeks to quash the "decision" of March 22, 2007 as it relates to assessments made in respect of CPP and UIA before those dates, if it be a decision at all, and a mandamus requiring the Minister to make a decision in respect of the appeals submitted by the Applicant for the periods preceding those dates.

[16] The Respondent's Counsel in argument accepted that the findings of Justice Rossiter that there is no evidence of mailing the Notices of Assessment in the 1991-1998 period but Counsel says, that since at least 2005 the Applicant had notice of the assessments in those years and that the provisions of the CPP and EIA requiring that the time for appeals was from 90 days from *notice* applies. To re-iterate the Respondent relies on the findings of Justice Rossiter as set out in paragraph 45 of his Reasons:

> ***45*** *Quite clearly, the Appellant had to be notified or had to have had notice of the assessments under the* CPP *and* EIA *in order for the Appellant to pursue the Fairness application. (The* EIA *by section 99 and* CPP *by subsection 23(2) each incorporate by reference subsection 220(3.1) of the* ITA*, the Fairness interest relief provision of the* ITA*) Assuming that the very* <u>*last*</u> *Fairness application was applied for and the denial was received on the same date, November 15, 2005, the limitation period would commence to run from that particular point in time. I only make reference to the Fairness applications because those were applications, taken by the Appellant. There is the other evidence referred to, to show, that the Appellant had to have been notified. Given that the Notices of*

> *Objection were filed on January 23, 2007, the Appellant was well out of time so it would appear the Respondent should be successful on its motion as it relates to the assessments under the* CPP *which arose on or after December 18, 1997 and the assessments under the* EIA *which arose on or after June 30, 1996 but that does not end the matter.*

[17] Thus, according to the Respondent, since no appeal was taken by the Applicant within 90 days from November 2005, and not until January 23, 2007, the CRA was correct in taking the position that it did in the letter of March 22, 2007 that the CRA could not proceed with the appeal, since they were out of time.

[18] The Applicant takes the position that the provisions prevailing as of 1996 and 1997 as to appeals as to appeals from the date of *mailing* govern the circumstances of this case and, since the evidence is that the mailing of the reconstructed assessments only took place in late October 2006 the appeals were filed in a timely fashion.

Analysis

[19] The resolution of this application turns on the effect of the changes in the CPP and EIA/UIA from the date of *mailing* to the date of *notice* in 1996 and 1997. If the *mailing* provisions apply, then the "decision" of March 22, 2007 not to deal with the matter is not a decision at all and the CRA should be required to make a decision as to the Applicant's appeals. If the *notice* provisions apply, then the decision not to deal with the appeals is a decision. The question then being, should it be set aside.

[20] In dealing with the revisions to the CPP and EIA/UIA both parties have referred this Court to the provisions of the *Interpretation Act* R.S.C. 1985, c I-21 sections 43(c) and 44(d)(i)(ii) and (iii) which read:

43. *Where an enactment is repealed in whole or in part, the repeal does not* … *(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,* … ***44.*** *Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefore,* … *(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto* *(i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment,* *(ii) in the enforcement of rights, existing or accruing under the former enactment, and* *(iii) in a proceeding in relation to matters that have happened*	***43.*** *L'abrogation, en tout ou en partie, n'a pas pour conséquence :* … *c) de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;* … ***44.*** *En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :* … *d) la procédure établie par le nouveau texte doit être suivie, dans la mesure où l'adaptation en est possible :* *(i) pour le recouvrement des amendes ou pénalités et l'exécution des confiscations imposées sous le régime du texte antérieur,* *(ii) pour l'exercice des droits acquis sous le régime du texte antérieur,* *(iii) dans toute affaire se rapportant à des faits survenus avant l'abrogation;*

before the repeal;

[21] The Supreme Court of Canada has considered the effect of statutory changes in the context of the *Income Tax Act* in *Gustavson Drilling (1994) Ltd v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271. Dickson J, for the majority, after stating that *the Income Tax Act* contains a series of very complicated rules which change frequently, wrote at pages 282-283:

> *No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.*
>
> *The mere right existing in the members of the community or any class of them at the date of repeal of a statute to take advantage of the repealed statute is not a right accrued: Abbott v. Minister of Lands [[1985] A.C. 425.], at p. 431; Western Leaseholds Ltd. v. Minister of National Revenue [[1961] C.T.C. 490 (Excha.).]; Director of Public Works v. Ho Po Sang [[1961] 2 All E.R. 721 (P.C.).]*

[22] The Supreme Court of Canada subsequently dealt with the same problem in the context of the Criminal Code in *R v. Puskas*, [1998] 1 S.C.R. 1207 where the Chief Justice (Lamer) for the Court wrote in respect of the wording of section 43(c) of the *Interpretation Act*, *supra*, at paragraphs 14 and 15:

> *14 Since the usefulness of the jurisprudence is limited, it falls to the Court to determine the matter on the basis of statutory*

> *interpretation and principle. In our view, there are numerous reasons for deciding that the ability to appeal as of right to this Court is only "acquired," "accrued" or "accruing" when the court of appeal renders its judgment. The first is a common-sense understanding of what it means to "acquire" a right or have it "accrue" to you. A right can only be said to have been "acquired" when the right-holder can actually exercise it. The term "accrue" is simply a passive way of stating the same concept (a person "acquires" a right; a right "accrues" to a person). Similarly, something can only be said to be "accruing" if its eventual accrual is certain, and not conditional on future events (Scott v. College of Physicians and Surgeons of Saskatchewan (1992), 95 D.L.R. (4th) 706 (Sask. C.A.), at p. 719). In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.*
>
> *15 Under the former s. 691(2) of the Code, there were a number of conditions precedent to the acquisition of the right to appeal to this Court without leave. The first is that the accused is charged with an indictable offence. The second is that he is acquitted of that offence at trial. The third is that the acquittal must be reversed by the Court of Appeal, and the fourth is that the Court of Appeal order a new trial. Until those events occur, the accused does not acquire the right to appeal to this Court without leave, nor does it accrue, nor is it accruing to him or her. As a result, s. 43 of the Interpretation Act does not exclude the cases at bar from the operation of s. 44, which indicates that the old proceeding should be continued under the new enactment. Since the new enactment does not grant an appeal as of right, the appeals must be quashed.*

[23] Applying the rationale of these decisions to the circumstances of this case, I find that, given the findings of Justice Rossiter as accepted by the parties, the Applicant had notice of the 1991 to 1998 assessments no later than November 2005. No appeal in respect of those assessments was made until January 2007. The provisions respecting timelines of appeals under the CPP and EIA/UIA are then triggered by *notice* that is, by the provisions of those Acts prevailing as of November 2005. The appeals submitted January 2007 are, therefore, well out of time.

[24] As a result, the letter of March 22, 2007 was correct in stating that the Minister could not proceed with the appeals as they had not been submitted in a timely manner. This is a proper "decision" under the circumstances. That decision will not be set aside. No mandamus will issue.

[25] Given that the Reasons of Justice Rossiter recommended an application for mandamus to this Court, the Applicant cannot be faulted for making this application. No costs will, therefore, be awarded to the Respondent, even though successful.

JUDGMENT

For the Reasons given:

THIS COURT ADJUDGES THAT:

1. The application is dismissed.

2. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-499-08
STYLE OF CAUSE:	742190 ONTARIO INC (VAN DEL MANOR NURSING HOME) v. CANADA CUSTOMS AND REVENUE AGENCY
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APPEARANCES:

Mr. Osborne Barnwell	FOR THE APPLICANT
Mr. Eric Noble Ms. Samantha Hurst	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osborne G. Barnwell Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT