Federal Court of Appeal | Cour d'appel fédérale

Date: 20160330

Docket: A-319-15

Citation: 2016 FCA 100

CORAM: **DAWSON J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

1455257 ONTARIO INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 17, 2016.

Judgment delivered at Ottawa, Ontario, on March 30, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160330

Docket: A-319-15

Citation: 2016 FCA 100

CORAM: **DAWSON J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

1455257 ONTARIO INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] A single issue is raised on this appeal: did the Tax Court of Canada err by concluding that the appellant, as a dissolved corporation, lacked the capacity to initiate an appeal to the Tax Court from an assessment issued against it under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act)? Flowing from this conclusion, the Tax Court adjourned the appellant's pending appeal for 60 days in order to allow the appellant the opportunity to take steps to revive

its corporate status. The appellant did not avail itself of this opportunity. Instead, it appealed the order of the Tax Court to this Court. This is that appeal.

[2] For the following reasons, I conclude that the Tax Court reached the correct result. However, I reach this conclusion by way of a different analysis than that conducted by the Tax Court.

I. The Facts

[3] The facts are simple and undisputed.

[4] The appellant was incorporated in 2000 pursuant to the provisions of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (Ontario BCA). It was dissolved, and its corporate certification cancelled, early in 2007.

[5] On October 18, 2010, the Minister of National Revenue issued a notice of assessment against the appellant pursuant to section 160 of the Act in respect of the tax indebtedness of a related corporation. The appellant objected to the assessment. However, the Minister confirmed her assessment.

[6] As a result, the appellant filed a notice of appeal in the Tax Court. The respondent then brought a motion seeking an order adjourning the appeal so as to allow the appellant to revive its corporate status. For reasons cited as 2015 TCC 173, the Tax Court granted the respondent's motion.

II. The relevant legislation

[7] The pertinent provisions of the Ontario BCA are subsections 241(5) and 242(1) which deal with the revival of dissolved corporations and actions that may be taken by or against corporations after their dissolution:

241(5) Where a corporation is dissolved under subsection (4) or any predecessor of it, the Director on the application of any interested person, may, in his or her discretion, on the terms and conditions that the Director sees fit to impose, revive the corporation; upon revival, the corporation, subject to the terms and conditions imposed by the Director and to the rights, if any, acquired by any person during the period of dissolution, shall be deemed for all purposes to have never been dissolved.	241(5) En cas de dissolution d'une société aux termes du paragraphe (4) ou d'une disposition qu'il remplace, le directeur peut, à la demande de toute personne intéressée et à sa discrétion, reconstituer la société aux conditions qu'il estime opportunes. Dès lors, sous réserve des conditions que le directeur impose et des droits éventuels acquis par toute personne après la dissolution, la société est réputée à toutes fins ne jamais avoir été dissoute.
[…]	[. . .]
242(1) Despite the dissolution of a corporation under this Act,	242(1) Malgré la dissolution d'une société aux termes de la présente loi :
(*a*) a civil, criminal or administrative action or proceeding commenced by or against the corporation before its dissolution may be continued as if the corporation had not been dissolved;	*a*) les actions ou instances de nature civile, pénale ou administrative introduites par la société ou contre elle avant sa dissolution peuvent être poursuivies comme si la dissolution n'avait pas eu lieu;
(*b*) a civil, criminal or administrative action or proceeding may be brought against the corporation as if the corporation had not been dissolved;	*b*) des actions ou instances de nature civile, pénale ou administrative peuvent être introduites contre la société comme si la dissolution n'avait pas eu lieu;
(*c*) any property that would have been available to satisfy any judgment or	*c*) les biens qui auraient servi à satisfaire à un jugement, à une

order if the corporation had not been dissolved remains available for such purpose; and	ordonnance ou à un ordre, si la société n'avait pas été dissoute, restent disponibles à cette fin;
(*d*) title to land belonging to the corporation immediately before the dissolution remains available to be sold in power of sale proceedings. [emphasis added]	*d*) le titre d'un bien-fonds qui appartenait à la société immédiatement avant sa dissolution peut être vendu par suite d'une instance visant l'exercice d'un pouvoir de vente. [Non souligné dans l'original.]

III. The decision of the Tax Court

[8] The Tax Court began its analysis, at paragraph 16, by noting that the principal focus on the motion was the correct interpretation of paragraph 242(1)(*b*) of the Ontario BCA and what the Court characterized to be the conflicting lines of authority that have considered this provision. Included in such authorities was the decision of this Court in *495187 Ontario Ltd. v. Canada (Minister of National Revenue)* (1993), 156 N.R. 398, 94 DTC 6229 (F.C.A.) ('187 Ontario).

[9] In '187 Ontario, a notice of reassessment was issued after the corporation was dissolved. The corporation appealed the assessment unsuccessfully to the Tax Court and then sought to appeal the decision of the Tax Court to the Federal Court by way of a trial *de novo*. This Court held that the dissolved corporation could pursue the appeal for the reasons given by Associate Chief Justice Jerome in *460354 Ontario Inc. v. Canada (Minister of National Revenue)*, [1992] F.C.J. No. 805, 92 DTC 6534(F.C.T.D.) ('354 Ontario).

[10] In ‘354 Ontario, Associate Chief Justice Jerome considered the then relevant legislative provision which was substantially similar to what is now subsection 242(1) of the Ontario BCA. In his view, the argument that the dissolved corporation could not defend itself against a “civil, criminal or administrative action or proceeding” commenced against it after its dissolution was “untenable”.

[11] Associate Chief Justice Jerome rejected the argument that the plaintiff’s appeal to the Federal Court from the decision of the Tax Court represented the initiation of a legal proceeding. In his view, once the Minister issues a notice of assessment, it must be open to the taxpayer to exercise the rights of appeal set out in the Act. Although the appeal to the Federal Court was by way of a trial *de novo*, such appeal did not represent the commencement of an action. Rather, it was the final stage of the appeal procedure. Therefore, the dissolved corporation was held to have the requisite capacity to conduct an action challenging assessments and a reassessment issued by the Minister.

[12] The Tax Court distinguished ‘187 Ontario and ‘354 Ontario on the basis that subsequent to these decisions the Ontario BCA was amended to provide that upon revival a corporation “shall be deemed for all purposes to have never been dissolved” and this differed from the previous wording.

[13] Having distinguished the jurisprudence of this Court, the Tax Court reviewed the conflicting jurisprudence from the Ontario Courts and a previous decision of the Tax Court. Ultimately, the Tax Court preferred the line of authority that supported the view that, until

revived, a dissolved corporation lacks the capacity to pursue an appeal of an assessment to the Tax Court.

IV. Standard of Review

[14] I accept the submission of the parties that the question of whether the appellant as a dissolved corporation has the legal capacity to initiate and continue an appeal in the Tax Court is a question of law, reviewable on the standard of correctness.

V. Application of the Standard of Review

[15] In my respectful view, the Tax Court erred in its assessment of the impact of the amendment made to subsection 241(5) of the Ontario BCA.

[16] At the time '187 Ontario was decided by this Court, the provision of the Ontario BCA dealing with revival was subsection 241(5), which read:

241(5)Where a corporation is dissolved under subsection (4) or any predecessor thereof, the Director on the application of any interested person immediately before the dissolution, made within five years after the date of dissolution, may, in his or her discretion, on such terms and conditions as the Director sees fit to impose, revive the corporation and thereupon the corporation, subject to the terms and conditions imposed by the Director and to any rights acquired by any person after its dissolution, is restored to its legal position, including all its property, rights and privileges	241(5) En cas de dissolution d'une société aux termes du paragraphe (4) ou d'une disposition qu'il remplace, le directeur peut, à sa discrétion, si une personne qui avait un intérêt dans la société immédiatement avant sa dissolution lui présente une demande à cet effet dans les cinq ans de la dissolution, rétablir la société aux conditions qu'il estime opportunes. Dès lors, la société, sous réserve des conditions que le directeur impose et des droits acquis par toute personne après la dissolution, recouvre son statut juridique, ainsi que ses biens, droits, privilèges et concessions et est

and franchises, and is subject to all its liabilities, contracts, disabilities and debts, as of the date of its dissolution, in the same manner and to the same extent as if it had not been dissolved. [emphasis added]	assujettie de la même manière et dans la même mesure aux obligations, contrats, incapacités et dettes qui existaient à la date de la dissolution que si celle-ci n'avait pas eu lieu. [Non souligné dans l'original.]

[17] For ease of reference, I again set out subsection 241(5) of the current legislation:

241(5) Where a corporation is dissolved under subsection (4) or any predecessor of it, the Director on the application of any interested person, may, in his or her discretion, on the terms and conditions that the Director sees fit to impose, revive the corporation; upon revival, the corporation, subject to the terms and conditions imposed by the Director and to the rights, if any, acquired by any person during the period of dissolution, shall be deemed for all purposes to have never been dissolved. [emphasis added]	241(5) En cas de dissolution d'une société aux termes du paragraphe (4) ou d'une disposition qu'il remplace, le directeur peut, à la demande de toute personne intéressée et à sa discrétion, reconstituer la société aux conditions qu'il estime opportunes. Dès lors, sous réserve des conditions que le directeur impose et des droits éventuels acquis par toute personne après la dissolution, la société est réputée à toutes fins ne jamais avoir été dissoute. [Non souligné dans l'original.]

[18] Read together, there is no distinction of substance between the words "in the same manner and to the same extent as if it had not been dissolved" and "shall be deemed for all purposes to have never been dissolved". It follows that '187 Ontario was not distinguishable from the situation before the Tax Court. In this circumstance, the appropriate course of action would have been for the Tax Court to indicate that it was bound to follow '187 Ontario, it being a decision of this Court, while explaining why this decision is problematic (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paragraph 21).

[19] Before us, the matter presents itself differently as this Court is authorized to depart from its prior decisions where special circumstances warrant such a departure.

[20] Departing from a precedent of this Court is a serious matter. In *Craig*, Justice Rothstein, writing for the Supreme Court, quoted with approval at paragraph 26 the following passage from *Queensland v. Commonwealth*, [1977] HCA 60, 139 C.L.R. 585:

> No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[21] Thus, in *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, this Court held that to protect the values of certainty and consistency, it will only depart from one of its prior decisions if satisfied that the previous decision is manifestly wrong.

[22] In the present case, I am satisfied that '187 Ontario is no longer good law. I reach this conclusion for the following reasons.

[23] As set out above, the rationale for this Court's decision in '187 Ontario is found in the reasons of Associate Chief Justice Jerome in '354 Ontario. There, Associate Chief Justice Jerome relied upon the decision of the Supreme Court in *Johnson v. Canada (Minister of National Revenue)*, [1948] S.C.R. 486 for the proposition that a judicial appeal taken against an assessment continues to be directed against the assessment. From this proposition he reasoned that when an appeal is launched in a Court, such appeal is not the initiation of a proceeding. Rather, the court proceeding is the "final stage of the appeal procedure" that is commenced by the filing of a notice of objection.

[24] In *Johnson* Justice Rand, writing for the majority, stated at page 489 that:

> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted.

[25] Two points arise from this passage. First, the Supreme Court did not conclude that an appeal to the courts by a taxpayer was a continuation of the administrative proceeding initiated when a taxpayer is assessed or reassessed by the Minister. Rather, Justice Rand explained that it is the product of the assessment, that is the taxation, which is at issue on an appeal to the courts.

[26] Second, Justice Rand was disposing of the taxpayer's argument about the question of onus. *Johnson* remains good law with respect to which party bears the onus of proof.

[27] Moreover, *Johnson* raised a question of the correct interpretation of a schedule to the *Income War Tax Act*, R.S.C. 1927, c. 97. Of relevance to this appeal is the difference between the scheme under this Act when compared with that in existence both now and when '354 Ontario was decided. Under the *Income War Tax Act*, a person objecting to an assessment was entitled to appeal the assessment to the Minister. If the Minister rejected the appeal, the taxpayer could serve a "notice of dissatisfaction" upon the Minister. In such notice, the taxpayer was required to state that he wished to have his appeal set down for trial. The taxpayer was required to forward with the notice of dissatisfaction a final statement of such further facts, statutory

provisions and reasons that the taxpayer intended to submit to the Court in support of the appeal that were not included in the original notice of appeal filed with the Minister. In the alternative, the taxpayer could file a recapitulation of all facts, statutory provisions and reasons included in the notice of appeal, together with such further facts, provisions and reasons as the taxpayer intended to submit to the Court in support of the appeal.

[28] The Minister was then required to reply to the notice of dissatisfaction and to then transmit to the Exchequer Court the relevant income tax return, the notice of assessment, the notice of appeal, the Minister's decision, the notice of dissatisfaction, the Minister's reply to the notice of dissatisfaction and all other documents and papers relevant to the assessment under appeal. The legislation provided that "the matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing".

[29] This procedure differs significantly from that now in place and in place at the time '354 Ontario was decided (a point not considered by Associate Chief Justice Jerome).

[30] Under section 17.2 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 a proceeding is instituted before the Tax Court by filing "[a]n originating document" as prescribed by the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a. The proceeding is deemed to be "instituted" on the day the originating document is received by the Registry of the Tax Court. Contrary to the situation before the Supreme Court in *Johnson*, the Minister plays no role in the commencement of the proceeding; the material before the Minister is not transmitted directly to

the Tax Court by the Minister. There is no provision that deems the matter to be an action or proceeding.

[31] When this legislative regime is considered, in my respectful view, it is no longer correct to say that the filing of a notice of appeal in the Tax Court does not constitute the initiation of a legal proceeding. Filing a notice of appeal in the Tax Court does constitute the initiation of a legal proceeding. The fact that the legal proceeding is directed against the Minister's assessment is a separate issue that does not detract from the conclusion that by filing a notice of appeal in the Tax Court one institutes a legal proceeding.

[32] Subsection 242(1) of the Ontario BCA does not authorize a dissolved corporation to initiate a civil proceeding. It follows that the Tax Court did not err by adjourning the appeal and requiring the appellant to revive its corporate status so that it could continue the appeal.

[33] As explained above, I have reached this conclusion on the basis of what was in issue in *Johnson* and the significant change in procedure subsequent to the decision of the Supreme Court. This said, this interpretation avoids the mischief that concerned the Tax Court. Of concern to the Tax Court was who is entitled to instruct counsel for the dissolved corporation and who is responsible for paying counsel and using the assets of the corporation, before forfeiture, to pay the legal costs and other required expenditures.

[34] Finally, during oral argument counsel for the appellant submitted that not all dissolved Ontario corporations can be revived. Thus, the appellant argued that unless dissolved

corporations are permitted to commence and prosecute appeals in the Tax Court, some dissolved corporations will be unable to appeal against assessments and reassessments issued against them under the Act.

[35] As this was a novel and important argument, the Court sought and received supplemental submissions on this point.

[36] On the basis of those submissions, I accept that the revival provision found in subsection 241(5) of the Ontario BCA applies only to corporations which have been dissolved by the Director appointed under that Act after being noted in default of certain specified obligations. Therefore, corporations that are voluntarily dissolved, corporations that are dissolved for cause or corporations dissolved more than 20 years prior to the intended revival cannot be revived pursuant to the administrative provision found in the Ontario BCA.

[37] However, I am satisfied that in the perhaps unlikely event that a party wishes to take proceedings against such a dissolved corporation, a mechanism exists to effect revival. When articles of revival cannot be filed under subsection 241(5) of the Ontario BCA, the dissolved corporation may be revived by a Private Act of the Ontario Legislature. This right is real and not illusory because the Ontario Legislative hears Private Acts to revive corporations on a regular basis.

[38] Thus, I reject the submission that corporations that cannot be revived administratively cannot be revived.

VI. Conclusion

[39] It follows that I would dismiss the appeal with costs. I would continue the adjournment of the pending appeal ordered by the Tax Court for a further 60 days from the date of the judgment of this Court in order to allow the appellant to revive its corporate status.

"Eleanor R. Dawson"

J.A.

"I agree.
D. G. Near J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-319-15
STYLE OF CAUSE:	1455257 ONTARIO INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 17, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NEAR J.A. BOIVIN J.A.
DATED:	MARCH 30, 2016

APPEARANCES:

Domenic Marciano Raphel Retman	FOR THE APPELLANT
Craig Maw Christa Akey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Marciano Beckenstein LLP Barristers & Solicitors Concord, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT