Federal Court of Appeal | Cour d'appel fédérale

Date: 20161024

Docket: A-516-15

Citation: 2016 FCA 259

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

DAVID TUCCARO

Appellant

And

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on October 18, 2016.

Judgment delivered at Ottawa, Ontario, on October 24, 2016.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. Tuccaro appeals from an interlocutory order of the Tax Court of Canada (TCC) (2015 TCC 290) dismissing his motion to strike portions of Her Majesty the Queen's (Crown) reply to his amended notice of appeal.

[2] Mr. Tuccaro argues that the TCC erred in law in failing to strike the portions of the Crown's reply relating to whether he was estopped from asserting a treaty right to a tax exemption pursuant to Treaty 8 of 1899.

[3] I agree with Mr. Tuccaro that this Court must apply the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 37, [2002] 2 S.C.R. 235 (see also *Hospira Health Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 69, 72, 78-79, 83).

[4] The only question before us is whether it is plain and obvious that our Court, in an earlier decision (*Tuccaro v. Canada*, 2014 FCA 184 [*Tuccaro 2014*]) decided the issue raised in the paragraphs of the Crown's reply that are the subject of Mr. Tuccaro's motion to strike, and therefore, that the TCC had to grant Mr. Tuccaro's motion on the basis of *res judicata* (more particularly on the basis of issue estoppel).

[5] To answer this question, one must briefly consider the relevant history of these proceedings.

[6] Mr. Tuccaro, a status Indian, filed an appeal before the TCC from a Notice of Confirmation issued by the Minister of National Revenue on December 27, 2012. He alleged at paragraph 8 of his notice of appeal, and more clearly so in his then draft amended notice of appeal, that he was exempt from taxation by virtue of section 87 of the *Indian Act*, R.S.C., 1985, c. I-5 and by virtue of Treaty 8.

[7] Pursuant to Rule 53(1)(a) and (c) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688 (*TCC Rules of Procedure*), the Crown originally filed a motion to strike paragraph 8 of the notice of appeal relating to Treaty 8 on the basis that it constituted an abuse of process and would delay the hearing (the 2013 Motion). By the time the motion was argued, a draft amended notice of appeal was before the TCC and the argument proceeded based on it. Although the Crown also challenged other parts of the pleadings, these are not relevant to the matter before us. Thus, the expression "the 2013 Motion" will only refer to the part of the motion relating to the allegations relevant to the argument that Treaty 8 provided for a tax exemption.

[8] The TCC granted the 2013 Motion because, in its view, Mr. Tuccaro's argument based on Treaty 8 had no chance of success given that the TCC was bound to apply the decision of this Court in *Benoit v. Canada*, 2003 FCA 236, 228 D.L.R. (4th) 1 [*Benoit*], which it described as establishing the law regarding "the lack of legal effect of Treaty 8 in granting tax exempt status to its signatories" (2013 TCC 300, at paras. 9 and 10).

[9] This decision of the TCC was appealed to this Court, and it was modified (paragraphs 1 and 2 of the TCC Order were deleted) so as to dismiss the 2013 Motion in respect of all references to a Treaty 8 right to a tax exemption, including paragraphs 14 to 32 of the draft amended notice of appeal.

[10] After the filing of the amended notice of appeal containing the references to a Treaty 8 right to a tax exemption, the Crown filed its reply including the paragraphs at issue before us. This prompted the filing of Mr. Tuccaro's motion to strike from the reply all references relevant to the defence that Mr. Tuccaro was estopped from arguing a tax exemption based on Treaty 8 on

the basis of *Benoit*. At the hearing, the parties agreed that this was limited to paragraphs 42-46 and 56 of the reply.

[11] The Crown also filed a motion pursuant to Rule 58 of the *TCC Rules of Procedure* to determine before trial the question of whether, based on *Benoit*, Mr. Tuccaro was estopped from relying on Treaty 8 to claim a tax exemption. This motion was dismissed. Essentially, the TCC found that it would not be appropriate to deal with this issue by way of another preliminary motion, regardless of whether the argument raised in Mr. Tuccaro's motion (i.e. that the Crown was estopped from raising issue estoppel as a defence) was accepted or not. The TCC noted that it was not satisfied that the proposed question would "probably be decided in such a way as may dispose of the [appeal] or some substantial part of it" (2015 TCC 290 at paras. 29 *in fine* and 30). The TCC was also not convinced that such preliminary motion would save time and costs (2015 TCC 290 at paragraph 33).

[12] There is no need to say more in respect of this portion of the TCC decision, for it is not the subject of the appeal, and it is now final. However, nothing herein should be construed as an endorsement of the TCC's findings with respect to the motion under Rule 58.

[13] On my reading of the decision before us, the TCC dismissed Mr. Tuccaro's motion to strike the paragraphs in the reply relating to issue estoppel because in its view, this issue was "not squarely before [our Court in Tuccaro 2014] <u>as one that could be dealt with</u>" (my emphasis), and thus it was not clear that the Crown's argument was bound to fail before the trial judge (2015 TCC 290, at paras. 44-45, 47). The TCC made other comments that I do not consider determinative and, as such, they do not warrant further discussion.

[14] Like the TCC, I am of the view, that the only issue that was properly before our Court in *Tuccaro 2014* was whether the TCC made a reviewable error in determining that it was plain and obvious that Mr. Tuccaro's allegation that he was entitled to a tax exemption based on Treaty 8 was an abuse of process because the TCC was bound as a matter of law to follow *Benoit* (*Tuccaro 2014*, at paragraph 19).

[15] Indeed, our Court in *Tuccaro 2014* expressly noted that the parties had made no submissions whatsoever, either before the TCC in 2013 or to our Court in 2014, with respect to issue estoppel (*Tuccaro 2014*, at paras. 17, 19, 26). In addition, our Court never considered the argument that Mr. Tuccaro now makes, namely, that the 2013 Motion determined whether *res judicata* and, more precisely, issue estoppel applied in respect of *Benoit* simply because the Crown based the 2013 Motion on the doctrine of abuse of process

[16] In fact, it is quite clear from the review of the 2013 Motion (particularly paragraph 6(c)), the memoranda of the parties before the TCC in 2013 and those filed before our Court in 2014, that the Crown in fact never raised *res judicata* (be it cause of action estoppel or issue estoppel). However, it would appear that our Court in 2014 may not have had the benefit of reviewing the memoranda filed before the TCC as these are usually not included in the Appeal Book.

[17] Thus, I am satisfied that our Court's comments in *Tuccaro 2014* in respect of *res judicata* and issue estoppel arose solely from the TCC's misapprehension or mischaracterization of the grounds on which the Crown challenged the relevant portions of Mr. Tuccaro's notice of appeal and later on, its draft amended notice of appeal (2013 TCC 300, at paragraph 2(1)). Indeed, in its

said decision, the TCC only ever discussed the argument actually made before it – that it was bound to follow the law set out by this Court in *Benoit*. This is particularly clear when one considers that the Crown also relied on *Dumont v Canada*, 2005 TCC 790, 2006 D.T.C. 2160, affirmed 2008 FCA 32,where the TCC noted that *Benoit* clearly established that the same Treaty 8 argument was without merit. It appears that the TCC understood (or rather misunderstood) that *stare decisis* was somehow part of the doctrine of *res judicata*. However, the actual concept of *res judicata* was never advanced before the TCC and is quite distinct from the type of abuse of process actually relied upon by the Crown.

[18] Indeed, as noted by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paragraph 37, [2003] 3 S.C.R. 77 (Crown's memorandum, Appeal Book Volume 1, tab J at paragraph 30 and footnote 34), there is a critical distinction between *res judicata* (including issue estoppel) and an abuse of process based on a previous determination of an issue by a court on an identical matter that arose between different parties. There is no need for the party relying on such an abuse of process to establish mutuality or privity i.e. that the same parties or their privies were involved in the previous case to succeed. This explains why, before our Court in 2014, the parties focussed on the application of the then recent decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and the Crown filed no evidence in respect of privity.

[19] Having found that the decision of this Court in *Benoit* was based on the facts of the case (more particularly that the evidentiary record did not support the finding of fact made by the trial judge) as opposed to a finding of law, our Court held in *Tuccaro 2014* that the TCC had erred in

law in construing *Benoit* to be a binding legal precedent with regard to the question of the existence of a Treaty 8 right to a tax exemption (*Tuccaro 2014*, at paras. 20-22). Considering the type of motion before it, this necessarily meant that the TCC could not conclude that it was plain and obvious that this ground of appeal had no chance of success.

[20] Despite the able arguments to the contrary of counsel for Mr. Tuccaro, in my view the other comments in *Tuccaro 2014* directed to the possible application of *res judicata* were necessarily *obiter* considering that the argument was never raised in the 2013 Motion or addressed by the TCC. This is particularly so considering that the Court could not reach a conclusion on whether Mr. Tuccaro was privy to a party in *Benoit* as it had no evidence in the Appeal Book and no submissions on this issue.

[21] As mentioned, our Court had already dealt with the ground advanced by the Crown in the 2013 Motion when it found that the TCC had erred in law in concluding that *Benoit* was a binding legal precedent. Such error was sufficient to justify granting the appeal.

[22] With this in mind, I turn back to the question before the TCC and thus before us: was the TCC bound to find that it was plain and obvious that the Crown was estopped from relying on issue estoppel in its reply?

[23] The preconditions to the operation of issue estoppel are well established and their application is the first step in the analysis set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 25 and 33, [2001] 2 S.C.R. 460 [Danyluk].

[24] It is obvious that *Tuccaro 2014* is a final decision. It is also clear, given that this decision was made in the same proceedings, that the parties are the same.

[25] What is not as obvious, and I agree with the TCC on this point (2015 TCC 290 at paragraph 42), is whether it is plain and obvious that the issue before our Court in *Tuccaro 2014* is the same issue that the trial judge hearing the appeal on its merits would have to decide if the reply is allowed to stand as it is.

[26] As mentioned, the question before the TCC and thus our Court in *Tuccaro 2014*, was whether it was plain and obvious that reliance on a Treaty 8 tax exemption was an abuse of process because the TCC was bound to follow *Benoit* as a matter of binding legal precedent. This question and the question before the trial judge in respect of the defence of issue estoppel are not the same. Rather, the issue estoppel defence asks whether as a matter of mixed fact and law Mr. Tuccaro should be bound by the ruling in *Benoit* because he is a privy to one of the parties to that decision. While the two issues may involve the same factual background, this, in and of itself, does not make them identical for the purpose of determining if the Crown is estopped from relying on *Benoit* to raise issue estoppel as a defence.

[27] There may well be other cases where courts have, on a motion to strike (or other interlocutory motions), determined on a final basis an issue, and as a result, that issue cannot be re-litigated. For example, a successful motion to strike settles the issue struck. But, as mentioned, this is not what occurred here as the 2013 Motion was dismissed by this Court in *Tuccaro 2014.* This necessarily means that it was not plain and obvious that the argument raised by Mr. Tuccaro could not succeed. (See in the same vein, albeit in a different context, *Tsleil-Waututh Nation v.*

Canada (National Energy Board), 2016 FCA 219 at paragraph 97; also *Giroux v. Canada*, 2001 FCT 531 at paras. 78-79, 210 F.T.R. 63; *Mintzer v. Canada*, 2004 FC 1289 at paragraph 21 last sentence, 2004 D.T.C. 6655).

[28] Even if I accepted that the issue before our Court in 2014 properly included issue estoppel, I agree with the TCC that our Court decision in *Tuccaro 2014* cannot preclude the Crown from raising issue estoppel as a defence to a pleading allowed to stand by our Court.

[29] This Court in *Tuccaro 2014* never dealt with the merits *per se* of the Crown's defence other than to conclude that it did not meet the stringent test applicable on the motion before it. This is very different from what would have occurred had the motion been presented under Rule 58 and the motion judge (and our Court) had had to deal with the merits of a Crown argument that Mr Tuccaro's was estopped from relying on Treaty 8. In such a scenario the Crown would be estopped from including issue estoppel in its reply.

[30] That said, even if I were to assume that as argued by Mr. Tuccaro, the issue before our Court in 2014 was the same as that which would have to be decided by the trial judge assessing the merits, I still believe that the TCC in this appeal was justified in not striking the paragraphs of the reply at issue, because one must proceed to the second step of the *Danyluk* analysis, namely, whether there are special circumstances that warrant the exercise of the discretion to refuse to apply issue estoppel. (*Danyluk* at paras. 33 and 62)

[31] Indeed, as found by the Supreme Court of Canada in *Danyluk*, the Crown "is entitled at some stage to appropriate consideration of the discretionary factors and to date, this has not

happened" (*Danyluk* at paragraph 66). Thus, in *Danyluk*, the Supreme Court considered how the discretion should be exercised rather than returning the file to the motion judge, and concluded, after a review of various relevant factors including most importantly whether "taking into account the entirety of the circumstances, that the application of issue estoppel would work an injustice". In that case, like here, the party facing a possible estoppel never had an opportunity to respond to the argument relied upon by the decision maker (*Danyluk* at paragraph 80).

[32] In this case, if Mr. Tuccaro's motion is dismissed, he will for the same reasons discussed earlier, be entitled to argue before the trial judge that the Crown is estopped from raising this defence of issue estoppel. This means that the trial judge will be in a position to exercise his or her own discretion in respect of this estoppel argument (as well as in respect of the Crown defence based on issue estoppel). Thus, in my view, I need only to assess whether it is plain and obvious that such discretion could not be exercised in favour of the Crown as argued by Mr Tuccaro. I have no hesitation in concluding that this is not so. Indeed, in my opinion, after a review of all the relevant circumstances, there is an arguable case that the discretion should be exercised in favour of the Crown because, among other things, the Crown never had the chance to present its argument and to file evidence on the issue of "privity".

[33] At the hearing, Mr. Tuccaro submitted that the fact that the Crown had no opportunity to present arguments on issue estoppel was of no moment because by filing the 2013 Motion on the basis of abuse of process, it was bound to put its best foot forward and had to expressly raise issue estoppel if it had an arguable case. For Mr. Tuccaro, the simple fact that issue estoppel may be raised as a type of abuse of process means that there is no particular injustice, because prior judicial decisions dealing with the merits of a question (here abuse of process) will operate as an

estoppel even when a party failed to raise a particular argument. I cannot agree that this is so here.

[34] Had it not been for the TCC's misapprehension of the grounds raised in the 2013 Motion, this Court would not even have used the words "issue estoppel". Thus, the situation is more akin to what occurred in *Danyluk*. Further, as mentioned, I cannot agree that the principle that applies to decisions dealing with the merits of an issue (*Danyluk at paragraph 24*) apply to decisions dismissing a motion to strike because the party has not met the stringent test applicable to such motion.

[35] In fact, Mr. Tuccaro's argument can have grave consequences. It would force a litigant to raise grounds that she or he knows have no chance of meeting the stringent test applicable to motions to strike, simply to avoid facing a possible argument of issue estoppel. This runs counter to the fundamental judicial policy of promoting judicial economy, efficiency and proportionality. This is particularly so when one considers that abuse of process is a flexible concept that can encompass many scenarios.

[36] In the present case, as noted by the TCC, it is far from obvious how the evidence produced in support of the Crown's Motion under Rule 58 would be construed and whether it would be sufficient to succeed on the merits (2015 TCC 290 at paragraph 29 *in fine*). Thus, why would the Crown be forced to raise it in its 2013 Motion? Considering that the concept of "privity" was described in *Danyluk* as one where the degree of interest required must be determined "on a case-by-case basis" (*Danyluk* at paragraph 60), how could one conclude that

the Crown is precluded from raising as a defence an argument that is, on its face, ill-suited to meet the stringent test applicable under Rule 53?

[37] For all of the above reasons, I believe that the TCC did not err in dismissing this motion because it is not plain and obvious that the Crown is estopped from relying on issue estoppel as a defence. In sum, while I do not endorse all the reasons given by the TCC, I believe that it reached the correct result.

[38] I thus propose that the appeal be dismissed with costs fixed at an amount of $3000.00 (all-inclusive).

"Johanne Gauthier"
J.A.

“I agree
Yves de Montigny J.A.”

“I agree
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-516-15
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE J.E. HERSHFIELD OF THE TAX COURT OF CANADA, DATED NOVEMBER 20, 2016, NO. 2013-188(IT)G	
STYLE OF CAUSE:	DAVID TUCCARO v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	OCTOBER 18, 2016
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. GLEASON J.A.
DATED:	OCTOBER 24, 2016

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