Federal Court of Appeal | Cour d'appel fédérale

Date: 20090605

Docket: A-358-08

Citation: 2009 FCA 190

CORAM: **DESJARDINS J.A.**
NOËL J.A.
BLAIS J.A.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Appellant

and

NASSEREDDIN DERAKHSHANI

Respondent

Heard at Montréal, Quebec, on May 27, 2009.

Judgment delivered at Ottawa, Ontario, on June 5, 2009.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DESJARDINS J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision by Justice Martineau (the Federal Court judge or the trial judge) refusing to give effect to the *ex parte* application filed by the Minister of National Revenue (the Minister) for authorization to issue a requirement to provide information relating to unnamed persons pursuant to section 231.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] The brief order dismissing the application reads as follows:

> [TRANSLATION]
>
> The applicant's *ex parte* application for an order requiring the provision of information and the production of documents regarding unnamed persons is dismissed, without costs. For the reasons delivered from the bench at the hearing, the Court is not satisfied, in view of the evidence in the record and the applicant's submissions, that both of the conditions set forth at subsection 231.2(3) of the *Income Tax Act*, as they are interpreted in the case law, have been met in this case.

[3] The reasons delivered from the bench were not entered in the minutes. According to counsel for the Minister, the judge made the following comments in the course of the proceedings (Appellant's Memorandum, at paragraph 10):

> [TRANSLATION]
>
> - The CRA could not justify an extensive audit of the tax returns prepared by Mr. Derakhshani solely on the basis of the results of audits on three taxpayers' returns;
>
> - The audit would likely involve the returns of taxpayers who are blameless.

[4] Initially, the Minister attempted to appeal this decision by filing a notice of appeal that was not served on the respondent. Since, according to the *Federal Courts Rules*, a notice of appeal cannot be filed before having been served, a registry officer referred the notice of appeal to the motions judge. On August 19, 2008, Justice Pelletier issued the following direction:

> [TRANSLATION]
>
> The *Income Tax Act* contains no provision authorizing the filing of an *ex parte* notice of appeal. The *Federal Courts Rules* contain some provisions dealing with motions filed *ex parte*, Rule 361 for example, but there is nothing in the Rules or the *Federal Courts Act* that authorizes the filing of an *ex parte* notice of appeal. Such a notice of appeal cannot be filed

> without prior authorization through a Court order made further to a motion that can itself be filed *ex parte*.

The terms of the direction granted the Minster a 30-day time limit to request, by *ex parte* motion, leave to pursue the appeal without notice and seek any ancillary relief.

[5] Counsel for the Minister did not make use of this invitation. Instead, he chose to pursue the appeal in accordance with the normal rules (Order dated October 27, 2008). The notice of appeal was therefore served, the memoranda filed and argument and counter-argument presented at the appeal hearing.

Preliminary objection

[6] First, the respondent argues that section 231.2 of the Act provides no right of appeal from a decision of a Federal Court judge dismissing the Minister's *ex parte* application. Therefore, this Court has no jurisdiction to hear the Minister's appeal. According to the respondent, this bar would also apply if the motion had been brought before a judge of the Superior Court.

[7] It is true that the only relief provided in the Act against an order made under section 231.2 of the Act is found at subsection 231.2(5), which entitles a third party to apply for a review of the authorization once it has been granted. However, we must take into account section 27 of the *Federal Courts Act*, which provides for a general right of appeal from any final or interlocutory judgment of the Federal Court. In this case, the ruling by the Federal Court judge is necessarily one of those two types of judgments.

[8] The respondent nonetheless submits, on the basis of the Supreme Court of Canada's decision in *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 (*Kourtessis*), that the right of appeal provided at section 27 is not applicable here. In that case, which concerned a criminal investigation, the Supreme Court of Canada ruled that the British Columbia Court of Appeal did not have jurisdiction to hear an appeal from a decision of the B.C. Supreme Court authorizing the issue of a search warrant pursuant to section 231.3 of the Act. The dissenting judges, referring to section 27 of what was then the *Federal Court Act*, had argued in support of the contrary opinion that it would be incongruous for different rights of appeal to exist depending on whether the motion is brought before a judge of a provincial superior court or a judge of the Federal Court.

[9] Justice La Forest, writing for the majority, set aside that argument by explaining that it would be unsafe, in the absence of argument, to take for granted that the general right of appeal set forth at section 27 applies to a proceeding provided in a separate statute. According to him, the minor grant of an untypical jurisdiction in criminal matters to the Federal Court afforded a basis to doubt that Parliament would have intended for the general right of appeal provided at section 27 to apply in that type of case (*Kourtessis*, above, at page 85).

[10] There is no such concern here. The case at hand concerns the Federal Court's exercise of its superintending power over the Minister's actions in administering and enforcing the Act (see, in this regard, the distinction made by the Supreme Court of Canada in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at page 641) (*McKinlay Transport Ltd.*). This jurisdiction is in no way unusual or exceptional. Furthermore, the Supreme Court of Canada has since recognized that the general

right of appeal provided at section 27 applies to an appeal arising from a separate statute unless it is expressly excluded by that statute (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at paragraph 47).

[11] In my view, there is no basis for calling into question the right of appeal arising from the clear and unequivocal language of section 27 of the *Federal Courts Act*. Therefore, I would dismiss the respondent's preliminary objection.

Procedural issue

[12] In addition to requesting the reversal of the decision of the Federal Court judge to refuse to authorize the application, the Minister advanced the following collateral issue at paragraph 13(b) of his memorandum:

> [TRANSLATION]
>
> Must the appeal of a decision dismissing an application for authorization that is heard *ex parte* proceed *ex parte*?

[13] As evidenced by this appeal, nothing prevents an appeal from an *ex parte* decision from proceeding in accordance with the normal rules. At the hearing, I understood that the issue submitted to the Court was instead whether the appeal of a decision dismissing an application for authorization filed *ex parte* could proceed without notice so as to preserve the surprise effect sought by the original application.

[14] As Justice Pelletier indicated in his direction, a motion can be brought before a judge of the Court of Appeal without notice, such that there is a procedure for submitting the issue to a judge. In the case at bar, the Minister did not choose to make use of that opportunity. Each case is distinguishable on its facts, and it is preferable to leave it up to the judge who hears such an application to decide whether it is appropriate, in light of the facts presented to him or her, to allow an appeal to be heard without notice (by way of comparison, see the comments of the British Columbia Court of Appeal in *Canada (Deputy Minister of National Revenue – M.N.R.) v. Tioseco*, 2000 BCCA 673, at paragraph 25).

Substantive issue

[15] In support of the Minister's appeal, counsel for the Minister alleges that the Federal Court judge should have granted the requested authorization since the evidence filed established that the two conditions provided at subsection 231.2(3) of the Act were met:

231.2 …	**231.2** […]
(3) On *ex parte* application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") where the judge is satisfied by information on oath that	(3) Sur requête *ex parte* du ministre, un juge peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent article —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :
(*a*) the person or group is ascertainable; and	*a*) cette personne ou ce groupe est

	identifiable;
(*b*) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.	*b*) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;

[Minister's emphasis.]

[16] According to counsel for the Minister, the record clearly establishes that the group of persons to whom the required information refers is ascertainable and that the provision of that information is necessary for the purposes of enforcing the Act. It follows that it was the duty of the Federal Court judge to issue the authorization; he had no discretion in the matter.

[17] That being said, counsel for the Minister is misreading subsection 231.2(3) of the Act. The judge hearing an application under this provision is the one who must be satisfied ("est convaincu" in the French text) that the required conditions are met. Clearly, such discretion must be exercised judicially, but, where it has been, the judge has the final say.

[18] Contrary to what counsel for the Minister asserts, I do not believe that the decision of our Court in *M.N.R. v. Greater Montréal Real Estate Board*, 2007 FCA 346, [2008] 3 F.C.R. 366, supports the argument he advances (Memorandum, at paragraph 22). In that case, our Court began its analysis with the following statement (at paragraph 5):

> This provision clearly states that the *ex parte* order will be made if the person or group referred to is ascertainable and if the information or documents are required to verify compliance with any duty or obligation under the Act.
>
> [Double underlining added.]

In that case, it was not a matter of establishing whether the judge hearing an application under subsection 231.2(3) has any residual discretion. The dispute pertained to the contents of the two conditions under that provision and, more specifically, to the question of whether a "genuine and serious" inquiry remains one of the applicable conditions. After having explained that this criterion has its origins in case law dating from when the Act read differently, the Court ruled that it did not apply. That was the context in which the Court explained that an authorization "will be made" when the two conditions now found at subsection 231.2(3) are satisfied.

[19] It is useful to recall that the existence of judicial discretion is essential to the constitutional validity of this type of provision, which is comparable to a seizure even when used in a regulatory (or even non-criminal) context (*McKinlay Transport Ltd.*, above, at page 642). It is this discretion, conferred upon an independent judge, which protects individuals from the damaging use of this kind of power and brings it in line with the requirements of section 8 of the *Canadian Charter of Rights and Freedoms* (*Baron v. Canada*, [1993] 1 S.C.R. 416, at page 443). In this case, the wording of paragraph 231.2(3), according to which the judge ". . . may, subject to such conditions as the judge considers appropriate . . ." authorize the requirement ". . . where the judge is satisfied . . ." that the prescribed conditions are met, leaves no doubt as to the existence of this discretion.

[20] In the alternative, the Minister alleges that the Federal Court judge clearly misused his discretion. This brings into question the use that can be made of the oral “reasons” related by counsel for the Minister and reproduced at the beginning of this analysis (at paragraph 3).

[21] At the hearing, counsel for the Minister explained that he felt uneasy relying on the words of the judge that he himself had related and are not entered in the minutes. After being reminded by the Court that the respondent had not raised any objection in that regard, counsel for the Minister hinted at another problem. He explained that after having informed counsel for the Minister that his application would be dismissed, the Federal Court judge had given him a number of options, including that of dismissing his application with or without reasons. Counsel for the Minister had opted for dismissal without reasons, which explains why the reasons are not reported in the minutes.

[22] In the circumstances, I understand better why counsel for the Minister did not rely on the statements he related to attack the trial judge’s exercise of discretion. In my opinion, it would have been inappropriate to do so.

[23] In the absence of reasons, we can only review the case as it was made to the trial judge by the Minister and ask ourselves whether, in light of that case, it was open to the trial judge to exercise his discretion as he did.

[24] The affidavit filed in support of the application is brief. It is signed by Francis Goulet, the Canada Revenue Agency auditor in charge of the respondent’s file. The inquiry was part of an audit

project aimed at taxi drivers. The affidavit reveals that the respondent does business under the legal name “Service d’impôt Bilan Enr.” and prepares tax returns for others. The inquiry revealed that the returns of three taxi drivers prepared by the respondent between 2002 and 2006 were prepared [TRANSLATION] “without the necessary documentation and based on an estimation of earnings and expenditures” in two cases and [TRANSLATION] “without supporting documentation on income and by estimating expenditures from receipts” in the other case (Affidavit of Francis Goulet, at paragraphs 9, 10 and 11).

[25] At paragraph 13, the auditor explained having been unable to obtain the information sought because

> [TRANSLATION]
>
> [The respondent] did not send the CRA his clients’ tax returns using the electronic filing system. I am unable to establish the identity or number of his clients because that information is not manually recorded in the CRA’s databases.

[26] Lastly, the auditor explained that once the information is obtained, he will be able to conduct the necessary audits on the respondent’s clients and determine, if applicable, the assessments and penalties that are required (*idem.* at paragraph 14).

[27] What is astounding, in reading this affidavit, is that it does not provide the judge with a single piece of information regarding the requirement to provide information that he is being asked to authorize. Accepting that the number of individuals affected by the requirement is unknown, the auditor in charge of the respondent’s file still has knowledge of the respondent’s business. In that

respect, no reference is made to the respondent's tax returns or to the information likely to be found therein about his business, including the amount of income from the business. I must observe that the affidavit filed in support of the requirement does not point to any suspicion of inaccuracy in the information appearing on the respondents' tax returns.

[28] The affidavit also seems incomplete in another respect. Normally, the name of a professional who prepares a tax return on behalf of another person must appear on the return. That is part of the required information. The affidavit is silent on the subject. I clarify, in that respect, that nowhere is it stated in the affidavit that the required information is not available, but indeed that such information is not manually recorded in the databases (see paragraph 13, quoted at paragraph 25, above). This implies, without it being possible to know for certain, that the required information could be obtained other than by a requirement to provide information.

[29] The fact that it may be possible to obtain the information using other means does not exclude the possibility that a requirement might be authorized, but that is information that must be provided to the judge. A judge must not be left in the dark on such an important point.

[30] In my view, the affidavit filed in support of the requirement shows a fundamental lack of rigour, and the Federal Court judge exercised his power appropriately in declaring that he was not satisfied.

[31] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I concur.
Alice Desjardins J.A."

"I agree.
Pierre Blais J.A."

Certified true translation
Sarah Burns

FEDERAL COUR OF APPEAL

SOLICITORS OF RECORD

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