

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20100122

Docket: A-391-09

Citation: 2010 FCA 25

**CORAM: NÖEL J.A.
EVANS J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

DOREEN TENNINA

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

NADINE TALOTTA

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

FRANCESCO CARNOVALE

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on January 22, 2010.

REASONS FOR JUDGMENT BY:
CONCURRED IN BY:

LAYDEN-STEVENSON J.A.
NÖEL J.A.
EVANS J.A.

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The Minister of National Revenue (the Minister) seeks to quash the appellants' notice of appeal filed on September 29, 2009 appealing Federal Court orders dated September 1, 2009 rendered pursuant to subsections 225.2(1) and 225.2(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The orders in question are commonly known as jeopardy orders. The appellants also filed a notice of application for review pursuant to subsection 225.2(8) of the Act in the Federal Court with respect to the same jeopardy orders.

Relevant Statutory Provisions

[2] The text of section 225.2 of the Act is attached to these reasons as Schedule "A". Briefly, for context, section 225.1 of the Act prohibits the Minister, while an amount assessed under the Act is in dispute, from taking any of the collection actions that are delineated in paragraphs 225.1(a) to (g). The effect of this restriction is to prevent the Minister from taking collection action on the

account until such time as the objection and/or appeal from the assessment has been determined or the relevant time period within which to file such objection and/or appeal has expired.

[3] Subsection 225.2(2) constitutes an exception to the prohibition in section 225.1. Where, on *ex parte* application by the Minister, a judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in collection of that amount, the judge shall authorize the Minister to proceed with collection. The taxpayer, subsequently, may seek a review of the authorization under paragraph 225.2(8) of the Act. The judge who hears the review may confirm, set aside or vary the authorization and make such other order as the judge considers appropriate. Pursuant to subsection 225.2(13), the review order is final and may not be appealed.

The Appellants' Notice of Appeal

[4] In their notice of appeal, the appellants request that the jeopardy order(s) be set aside, that the collection action(s) taken pursuant to the order(s) be set aside or quashed and that the normal procedure pursuant to section 225.1 of the Act resume on the ground that “the *ex parte* provision(s) in s. 225.2 of the *Income Tax Act* are of no force and effect and unconstitutional.” Various breaches of the *Canadian Charter of Rights and Freedoms* are alleged.

The Arguments

[5] The Minister submits that section 225.2 of the Act provides a complete and exhaustive process to challenge the jeopardy order. The appellants must follow that process (subsection 225.8 of the Act) and are expressly precluded from appealing to this Court by section 225.2(13).

[6] The appellants argue that subsection 225.2(13) does nothing other than “specifically and strictly” bar an appeal from an application under subsections 225.2(8) and 225.2(11) of the Act. It does not bar an appeal from the initial order itself, “particularly when the appeal challenges, on constitutional grounds, the jurisdiction of the Federal Court to make the order under subsection 225.2(2) in the first place.” Apparently, identical grounds are contained in the review application before the Federal Court.

Analysis

[7] For the reasons that follow, I conclude that the appellants’ notice of appeal must be struck.

[8] First, it is inappropriate for the identical point to be raised by the identical parties in the identical file, simultaneously, in two courts. Such an approach has the potential to give rise to contradictory decisions and draw the administration of justice into disrepute: *Del Zotto v. Canada (Minister of National Revenue)* (2000), 181 F.T.R. 168 (F.C.).

[9] Second, the Supreme Court of Canada has repeatedly stated, as a matter of statutory interpretation, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of

Parliament. While Canadian tax legislation has been strictly interpreted in an era of more literal statutory interpretation, today, all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601. The Act's provisions are to be interpreted in order to achieve consistency, predictability and fairness: *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622.

[10] Section 225.2 of the Act provides a comprehensive scheme with respect to jeopardy orders. Parliament provided a remedy for taxpayers aggrieved by *ex parte* jeopardy orders. Upon application by the taxpayer, subsection 225.2(8) provides for a review of the order by a judge of the same court that granted the authorization under subsection 225.2(2). Subsection 225.2(11) grants broad powers to the reviewing judge who may set aside or vary the authorization and may make such other order as the judge considers appropriate. In short, the legislative scheme contemplates and incorporates a review mechanism for *ex parte* orders. The mechanism chosen and legislated by Parliament is the one set out in subsection 225.2(8), no more and no less.

[11] It is settled law that, by virtue of subsection 225.2(13), no appeal lies from an order made pursuant to subsection 225.2(11): *Papa v. Her Majesty the Queen*, 2009 FCA 112, 2009 DTC 5090; *Dauphin c. Canada*, 2009 CAF 257, 2009 DTC 5164. It is also settled law that there is no right of appeal from a decision unless expressly granted by statute; the *Charter* does not provide such a right. The provisions of section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which grant a right of appeal, may be overridden by other statutes: *Luitjens v. Canada (Secretary of State)* (1992),

142 N.R. 173 (F.C.A.); leave to appeal refused (1992), 143 N.R. 316n. The appellants, in relying on section 27 of the *Federal Courts Act*, seek to do indirectly what they cannot do directly.

[12] Third, while it is unquestionably open to litigants to challenge the constitutionality of a statute or the provisions of a particular enactment, characterizing an argument as one of constitutional invalidity does not create a right of appeal, where none otherwise exists.

[13] In summary, there is no right of appeal from an order made pursuant to subsection 225.2(2) of the Act. The appellants' remedy is the review provision provided by Parliament in subsection 225.2(8).

[14] I would therefore strike the notice of appeal with costs to the respondent.

“Carolyn Layden-Stevenson”

J.A

“I agree.
M.N. J.A”

“I agree
J.M.E. J.A.”

SCHEDULE "A"

Income Tax Act (1985, c. 1 (5th Supp.))

225.2 (1) In this section, "judge" means a judge or a local judge of a superior court of a province or a judge of the Federal Court.

225.2 (1) Au présent article, « juge » s'entend d'un juge ou d'un juge local d'une cour supérieure d'une province ou d'un juge de la Cour fédérale.

Authorization to proceed forthwith

(2) Notwithstanding section 225.1, where, on *ex parte* application by the Minister, a judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in the collection of that amount, the judge shall, on such terms as the judge considers reasonable in the circumstances, authorize the Minister to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) with respect to the amount.

Recouvrement compromis

(2) Malgré l'article 225.1, sur requête *ex parte* du ministre, le juge saisi autorise le ministre à prendre immédiatement des mesures visées aux alinéas 225.1(1)a) à g) à l'égard du montant d'une cotisation établie relativement à un contribuable, aux conditions qu'il estime raisonnables dans les circonstances, s'il est convaincu qu'il existe des motifs raisonnables de croire que l'octroi à ce contribuable d'un délai pour payer le montant compromettrait le recouvrement de tout ou partie de ce montant.

Notice of assessment not sent

(3) An authorization under subsection 225.2(2) in respect of an amount assessed in respect of a taxpayer may be granted by a judge notwithstanding that a notice of assessment in respect of that amount has not been sent to the taxpayer at or before the time the application is made where the judge is satisfied that the receipt of the notice of assessment by the taxpayer would likely further

Recouvrement compromis par la réception d'un avis de cotisation

(3) Le juge saisi peut accorder l'autorisation visée au paragraphe (2), même si un avis de cotisation pour le montant de la cotisation établie à l'égard du contribuable n'a pas été envoyé à ce dernier au plus tard à la date de la présentation de la requête, s'il est convaincu que la réception de cet avis par ce dernier compromettrait davantage, selon toute vraisemblance, le recouvrement du montant. Pour l'application des

jeopardize the collection of the amount, and for the purposes of sections 222, 223, 224, 224.1, 224.3 and 225, the amount in respect of which an authorization is so granted shall be deemed to be an amount payable under this Act.

Affidavits

(4) Statements contained in an affidavit filed in the context of an application under this section may be based on belief with the grounds therefor.

Service of authorization and of notice of assessment

(5) An authorization granted under this section in respect of a taxpayer shall be served by the Minister on the taxpayer within 72 hours after it is granted, except where the judge orders the authorization to be served at some other time specified in the authorization, and, where a notice of assessment has not been sent to the taxpayer at or before the time of the application, the notice of assessment shall be served together with the authorization.

How service effected

(6) For the purposes of subsection 225.2(5), service on a taxpayer shall be effected by
(a) personal service on the taxpayer; or
(b) service in accordance with directions, if any, of a judge.

articles 222, 223, 224, 224.1, 224.3 et 225, le montant visé par l'autorisation est réputé être un montant payable en vertu de la présente loi.

Affidavits

(4) Les déclarations contenues dans un affidavit produit dans le cadre de la requête visée au présent article peuvent être fondées sur une opinion si des motifs à l'appui de celle-ci y sont indiqués.

Signification de l'autorisation et de l'avis de cotisation

(5) Le ministre signifie au contribuable intéressé l'autorisation visée au présent article dans les 72 heures suivant le moment où elle est accordée, sauf si le juge ordonne qu'elle soit signifiée dans un autre délai qui y est précisé. L'avis de cotisation est signifié en même temps que l'autorisation s'il n'a pas été envoyé au contribuable au plus tard au moment de la présentation de la requête.

Mode de signification

(6) Pour l'application du paragraphe (5), l'autorisation est signifiée au contribuable soit par voie de signification à personne, soit par tout autre mode ordonné par le juge.

Application to judge for direction

(7) Where service on a taxpayer cannot reasonably otherwise be effected as and when required under this section, the Minister may, as soon as practicable, apply to a judge for further direction.

Review of authorization

(8) Where a judge of a court has granted an authorization under this section in respect of a taxpayer, the taxpayer may, on 6 clear days notice to the Deputy Attorney General of Canada, apply to a judge of the court to review the authorization.

Limitation period for review application

(9) An application under subsection 225.2(8) shall be made (a) within 30 days from the day on which the authorization was served on the taxpayer in accordance with this section; or (b) within such further time as a judge may allow, on being satisfied that the application was made as soon as practicable.

Hearing *in camera*

(10) An application under subsection 225.2(8) may, on the application of the taxpayer, be heard *in camera*, if the taxpayer establishes to the satisfaction of the judge that the circumstances of the case justify *in camera* proceedings.

Demande d'instructions au juge

(7) Lorsque la signification au contribuable ne peut par ailleurs être raisonnablement effectuée conformément au présent article, le ministre peut, dès que matériellement possible, demander d'autres instructions au juge.

Révision de l'autorisation

(8) Dans le cas où le juge saisi accorde l'autorisation visée au présent article à l'égard d'un contribuable, celui-ci peut, après avis de six jours francs au sous-procureur général du Canada, demander à un juge de la cour de réviser l'autorisation.

Délai de présentation de la requête

(9) La requête visée au paragraphe (8) doit être présentée:
a) dans les 30 jours suivant la date où l'autorisation a été signifiée au contribuable en application du présent article;
b) dans le délai supplémentaire que le juge peut accorder s'il est convaincu que le contribuable a présenté la requête dès que matériellement possible.

Huis clos

(10) Une requête visée au paragraphe (8) peut, à la demande du contribuable, être entendue à huis clos si le contribuable démontre, à la satisfaction du juge, que les circonstances le justifient.

Disposition of application

(11) On an application under subsection 225.2(8), the judge shall determine the question summarily and may confirm, set aside or vary the authorization and make such other order as the judge considers appropriate.

Directions

(12) Where any question arises as to the course to be followed in connection with anything done or being done under this section and there is no direction in this section with respect thereto, a judge may give such direction with regard thereto as, in the opinion of the judge, is appropriate.

No appeal from review order

(13) No appeal lies from an order of a judge made pursuant to subsection 225.2(11).

Ordonnance

(11) Dans le cas d'une requête visée au paragraphe (8), le juge statue sur la question de façon sommaire et peut confirmer, annuler ou modifier l'autorisation et rendre toute autre ordonnance qu'il juge indiquée.

Mesures non prévues

(12) Si aucune mesure n'est prévue au présent article sur une question à résoudre en rapport avec une chose accomplie ou en voie d'accomplissement en application du présent article, un juge peut décider des mesures qu'il estime les plus aptes à atteindre le but du présent article.

Ordonnance sans appel

(13) L'ordonnance rendue par un juge en application du paragraphe (11) est sans appel.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-391-09

STYLE OF CAUSE: Doreen Tennina et al v. Minister of
National Revenue

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

DATED: January 22, 2010

WRITTEN REPRESENTATIONS BY:

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