Federal Court of Appeal | Cour d'appel fédérale

Date: 20191127

Docket: A-115-19

Citation: 2019 FCA 293

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
WOODS J.A.

BETWEEN:

DAVID BROOKS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on November 21, 2019.

Judgment delivered at Ottawa, Ontario, on November 27, 2019.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] This is an appeal of an order of the Tax Court of Canada that granted a motion brought by the Crown to strike out parts of notices of appeal filed by David Brooks (2019 TCC 47).

[2] The context giving rise to the appeal is that Mr. Brooks instituted an appeal in the Tax Court with respect to reassessments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for

the 2004 to 2008 taxation years. The reassessments were issued on the basis that Mr. Brooks had failed to report certain business income. According to the notices of appeal, Mr. Brooks informed the Canada Revenue Agency auditor "that he had received income … which was not reported on his T1 returns on the basis that he was contractually a "natural person.""

[3] The Crown sought to strike out parts of the notices of appeal that related to alleged unlawful conduct on the part of the auditor which arose when the civil audit division and the criminal enforcement division were examining Mr. Brooks' tax affairs simultaneously. The pleadings allege that the auditor unlawfully collected information during this time. Although the auditor used civil audit powers to collect the information, it is alleged that the auditor's actions were unlawful because the auditor was acting for a purpose that was predominantly penal in nature and acting as an agent of the criminal enforcement division.

[4] The Tax Court's findings in granting the motion are briefly summarized below:

- Based on an established line of jurisprudence, the Tax Court determined that it is plain and obvious that the Court cannot vacate assessments based on wrongful conduct by officials of the Minister of National Revenue (*Main Rehabilitation Co. Ltd. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597).

- The Court also concluded that it is plain and obvious that there is no breach under section 7 or section 8 of the *Charter of Rights and Freedoms*, and therefore

evidence cannot be excluded on this basis (for example, *Bauer v. Canada*, 2018 FCA 62, 2018 D.T.C. 5041).

- The decision in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 does not extend the limited jurisdiction of the Tax Court as determined in *Main Rehabilitation*.

- The discretionary remedy under section 24 of the Charter that was applied in *Canada v. O'Neill Motors Ltd.*, [1998] 4 F.C. 180 (F.C.A.), 162 D.L.R. (4th) 248 has no application because there has been no Charter breach in this case.

[5] Although Mr. Brooks' main arguments were directed to alleged errors of law in the above-mentioned findings, he also had to respond to the Crown's argument that in any event the pleaded facts do not support a conclusion that the auditor acted without statutory authority. The Crown relied on *Klundert v. Canada*, 2014 FCA 155, 461 N.R. 323 in which this Court stated that "the exposition of historical narrative combined with bare assertions results in an appeal premised upon conjecture, speculation and innuendo" (at para. 12).

[6] At the hearing in this Court, Mr. Brooks relied on two pleaded facts that he submitted were sufficient material facts. The first is that the auditor was told by Mr. Brooks that his T1 returns were based on a "natural person" argument. Mr. Brooks suggested that it was reasonable for him to believe that such a statement would lead the auditor to become primarily focussed on a criminal investigation. The second factual pleading was that the auditor had referred the matter

to the criminal enforcement branch for review. It is submitted that this reinforced Mr. Brooks belief of unlawful conduct on the part of the auditor.

[7] Assuming as we should that these pleaded facts are true, they are completely inadequate to support a conclusion that the auditor acted for a predominately penal purpose.

[8] In my view, the reference to *Klundert* is apt in this case. It is plain and obvious that Mr. Brooks allegations of unlawful conduct cannot succeed because the pleadings do not contain sufficient material facts that, if proven, could establish unlawful conduct. The notices of appeal allege that the auditor was acting with a predominantly penal purpose and was an agent of the enforcement division. However, these are merely bare assertions premised on "conjecture, speculation and innuendo" that do not constitute material facts. See also the decision of this Court in *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301 in which this Court stated (para. 34): "Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5."

[9] For the reasons given above, the parts of the pleadings that relate to unlawful conduct have no reasonable chance of success. Mr. Brooks suggests that the pleadings should not be struck out at this stage because it is only through discoveries that he can uncover the relevant facts. This is not a sufficient reason to allow the litigation to proceed on this issue. Material facts must be pleaded and not obtained through a fishing expedition in the litigation process.

[10] In light of this conclusion, it is not necessary to consider Mr. Brooks' argument that the Tax Court erred in its interpretation of the jurisprudence as described above. It should not be inferred that this is meant to endorse all of the Tax Court's findings in this regard.

[11] In this Court, Mr. Brooks also raises an unrelated issue concerning the part of the Tax Court order that struck out paragraphs 10 and 18(d) and parts of paragraph 22 of the notices of appeal. These paragraphs concern the allegation that some of Mr. Brooks' paper income tax returns have either been lost or destroyed by the Minister.

[12] Mr. Brooks points to an inconsistency in this part of the order and suggests that the Tax Court intended to preserve his ability to argue that the destruction of the returns places the onus of proof on the Minister as a matter of common law. He submits that the Tax Court should not have struck out the parts of paragraphs 10 and 18(d) which deal with this argument. It is not clear that Mr. Brooks raised this point at the Tax Court.

[13] I agree with Mr. Brooks that there is an inconsistency. At the hearing, the Crown acknowledged that the inconsistency was caused by its oversight as the Tax Court simply granted the order that it requested. In the circumstances, I would allow the appeal to the limited extent of permitting Mr. Brooks to argue that the loss or destruction of his T1 returns is an appropriate circumstance for the Tax Court to shift the onus of proof. I would vary the order of the Tax Court accordingly.

[14] Except for this variation, I would dismiss the appeal with costs to the respondent.

"J. Woods"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-115-19
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	PELLETIER J.A. GAUTHIER J.A.
DATED:	NOVEMBER 27, 2019

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