Federal Court of Appeal | Cour d'appel fédérale

Date: 20200123

Docket: A-317-18

Citation: 2020 FCA 18

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

COLIN McCARTIE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on January 14, 2020.

Judgment delivered at Ottawa, Ontario, on January 23, 2020.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

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

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REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] Mr. McCartie appeals from an order of the Tax Court of Canada dated September 19, 2018 (Court file No. 2016-2716(IT)G and 2016-2717(GST)G) (the reasons), wherein Bocock J. (the Tax Court judge) declined the approval of preliminary questions pursuant to a motion made under Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a.

I. Background

[2] The main issue for trial before the Tax Court is the appellant's reassessment for income tax and GST regarding unreported income for the 2005-2009 period. The appellant was charged with tax evasion for that same period. During the criminal proceedings, the Provincial Court of British Columbia (the BCPC) held that documentary evidence was inadmissible. The BCPC excluded all bank records obtained through requirements for information issued by the Canada Revenue Agency's audit division and all business records obtained through a search warrant executed on the appellant's home and office. The exclusion of these records resulted in the appellant's acquittal. This then re-triggered the appellant's appeal of his 2005-2009 reassessments to the Tax Court.

[3] Prior to the trial, the appellant moved that four questions (the Questions) be determined under Rule 58 regarding the admissibility of evidence:

1. What evidence was relied on for the assessment under appeal?

2. Was the evidence relied on for the assessments obtained in violation of the appellant's rights under the *Canadian Charter or Rights and Freedom*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982. c 11 (the Charter)?

3. If yes, should that evidence be excluded from this proceeding under subsection 24(2) of the Charter?

4. If the evidence is excluded, is it appropriate and just in the circumstances for the assessments of tax relevant to this reference be vacated by virtue of subsection 24(1) of the Charter? (appellant's memorandum, para. 131; respondent's memorandum, para. 10).

[4] The Tax Court judge exercised his discretion and found none of the Questions were appropriate for determination under Rule 58. He denied the appellant's motion, concluding that the admissibility of the evidence in this specific case was better left to the trial judge (reasons, paras. 45-48).

[5] The Tax Court judge made three core conclusions. First, there would be no savings in costs or time since the trial judge would need to hear evidence to determine if there was a Charter breach (reasons, paras. 34-43). Secondly, a risk of inconsistent results between the motions judge and the trial judge would arise by considering the same or similar evidence (reasons, para. 45). Lastly, he noted that Question #4 is not an appropriate question under Rule 58 since it "is simply the outcome of the entire appeal". Therefore, this proposed question should be determined on a hearing with the full evidence at trial (reasons, para. 28-29).

[6] The Crown opposed the motion and opposes this appeal. It maintains the Tax Court judge made no reviewable errors.

[7] For the following reasons, I agree with the Crown. I propose that the appeal be dismissed.

II. Standard of Review

[8] The parties agree on the standard of review as it was set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Therefore, the standard of review on appeal for questions of fact and for questions of mixed fact and law is palpable and overriding error. Under Rule 58 a motions judge has the discretion to decide whether to grant an order that a question be determined before the hearing. Absent an error of law, the order can be set aside only on the basis of palpable and overriding error (*Paletta v. Canada*, 2017 FCA 33, [2017] D.T.C. 5039, para. 4; *3488063 Canada Inc. v. Canada*, 2016 FCA 233, 270 A.C.W.S. (3d) 665, paras. 32-34; *Viterra Inc. v. Canada*, 2019 FCA 55, [2019] G.S.T.C. 23, para. 6).

III. Issues

[9] The appellant frames the issue as the Tax Court judge having a "misapprehension of key facts amount to a palpable and overriding error" (appellant's memorandum, para. 39). He does not challenge the appropriateness of Question #4 and does not advance any errors of law.

[10] The appellant takes the position that the Tax Court judge misapprehended four key facts and relied on these facts to come to his conclusion.

[11] Firstly, the Tax Court judge committed an error by assuming that there was a genuine dispute between the parties regarding the documents the Minister relied on to proceed with the reassessments in 2011 (appellant's memorandum, para. 53). Secondly, the Tax Court judge was wrong in finding that the evidence obtained through requirements for information was not

subject to a Charter challenge (appellant's memorandum, para. 60). Thirdly, the Tax Court judge made an error with his finding that there was other admissible evidence in the criminal proceedings and that it proceeded with this admissible evidence (appellant's memorandum, para. 88). Lastly, the Tax Court judge committed an error with his finding that the impugned evidence was obtained through two distinct audits (appellant's memorandum, para. 103).

[12] Before starting my analysis, it is useful to be reminded that the threshold for finding palpable and overriding error is very high. This Court's decision in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at paragraph 46, cited in *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at paragraph 38, described a palpable and overriding error in this way:

> Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

IV. Analysis

[13] Turning to the appellant's first argument, I disagree that the Tax Court judge made a palpable error in holding that there was a genuine issue between the parties regarding the documents the Minister relied upon to proceed with the assessments.

[14] In the pleadings before the Tax Court judge and during oral submissions, the question of what the Minister relied on was a live issue and remained unanswered.

[15] Dealing with the appellant's second argument, the relevance of this error according to him is that the Tax Court judge concluded that the "section 24(2) Charter analysis would need to begin in relation to the Question #2 and #3" (appellant's memorandum, para. 69). Had the judge properly construed the facts the appellant submits, "he may have considered the BCPC findings of *Charter* violations in light of the principals of judicial comity, issue estoppel, abuse of process and/or the rule against collateral attack" since the requirements for information records were excluded in their entirety (appellant's memorandum, para. 75).

[16] The Crown concedes that the Tax Court judge erred when he found that certain documents were not excluded by the BCPC. However, the Crown argues that this constitutes a palpable error but not an overriding one (respondent's memorandum, para. 46). Indeed, the bank records obtained through the requirements for information were excluded in their entirety by the BCPC. It found that it was unable to fairly adjudicate the appellant's section 7 and subsection 11(d) Charter rights because the evidence of lost or missing auditor notes did not allow it to reach a conclusion on the question of whether the bank records were obtained in a manner which infringed or denied a Charter right.

[17] I agree with the Crown. Evidence excluded and found to be inadmissible in criminal proceedings because of Charter breaches may very well be admissible in Tax Court proceedings (*Warawa v. Canada (Attorney General)*, 2005 FCA 34, [2005] 1 C.T.C. 402, para. 6). The Tax Court judge also pointed to this Court's decision in *Canada v. Jurchison*, 2001 FCA 126, 274 N.R. 346, noting, it is conceivable that evidence might be inadmissible for purposes of a criminal prosecution, but admissible for purposes of a trial before the Tax Court (reasons, para. 20).

[18] The appellant's second argument therefore cannot stand. This error has no impact on the Tax Court judge's conclusion that answering the Questions would not save or shorten the proceedings.

[19] Likewise, for the same reasons set out in paragraph 17, the appellant's third argument is not persuasive. The Tax Court judge did not commit a reviewable error when he found that certain documents were not excluded by the BCPC.

[20] On the fourth argument, the Tax Court judge may have made some minor factual errors, such as referring to two distinct audits, identified as the "Prior Audit" and the "Second Audit", rather than the one at issue, being the "Second Audit". None of these errors amount to an overriding error.

[21] Rule 58(2) requires the Tax Court to examine the proposed questions and decide if by answering them before the hearing, those answers may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs. The Tax Court judge did exactly that, and committed no reviewable errors in his analysis. In these proceedings, the trial judge will be tasked with answering questions on the admissibility of evidence in light of alleged Charter breaches. The Crown intends on calling witnesses such as the auditor to testify and establish part of the evidentiary record. It was therefore open to the Tax Court judge to conclude that no time or costs would be saved by having any of the Questions dealt with by a motions judge.

[22] Furthermore, as the Tax Court judge rightfully pointed out, given the circumstances of the present case, he declined to order under Rule 58 the determination of the Questions because "[t]he Rule 58 Questions 1, 2, and 3, however answered, would require testimony before the motion judge which would most likely need be repeated before a trial judge. The prospects of two judges, after considerable testimony, opining on the credibility and weight of the same witnesses in the same appeals is neither fair, nor consistent to the parties nor the interests of justice." (reasons, para. 45).

[23] None of the factual errors relied upon by the appellant go to the three core conclusions and outcome of the Tax Court's decision. In conclusion, the appellant has not convinced me that there are any errors upon which the Tax Court's order can be reversed.

[24] Therefore, I would dismiss this appeal, with costs.

"Marianne Rivoalen"

J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
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APPEARANCES:

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