Federal Court of Appeal | Cour d'appel fédérale

Date: 20210119

Docket: A-118-18

Citation: 2021 FCA 6

CORAM: **NADON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JAMES S.A. MACDONALD

Respondent

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on January 19, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

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

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This appeal is a cautionary tale. Prosecuting multiple, overlapping matters is fraught with risk. Unless the risk is managed carefully, a judgment in one matter can put an end to some of the issues in another matter.

[2] But sometimes it can do more. Sometimes it can stop the other matter right in its tracks. This is what happened here. As a result, I would dismiss this appeal.

A. Background

[3] Here, there were two overlapping matters. For the purposes of these reasons, I will call them the "first matter" and the "second matter". The first matter and the second matter have one issue in common: the validity and appropriateness of the costs awarded by the Tax Court for the proceedings in that Court.

[4] Here are the two matters:

- *The first matter*. Mr. MacDonald appealed the Minister's assessment of income tax for certain taxation years. He succeeded in the Tax Court: 2017 TCC 157. He received costs on the usual scale for those proceedings. The Crown appealed to this Court (file A-281-17). It succeeded: 2018 FCA 128. It received costs on the usual scale for, among other things, the proceedings in the Tax Court. Mr. MacDonald appealed to the Supreme Court. His appeal was dismissed with costs: 2020 SCC 6. As a result, this Court's decision concerning costs for the proceedings in the Tax Court was left undisturbed.

- *The second matter.* This matter arose after Mr. MacDonald's success in the Tax Court in the first matter but before this Court heard the Crown's appeal. Mr. MacDonald brought a motion in the Tax Court to vary the Tax Court's costs award. He sought enhanced costs for the proceedings in the Tax Court because of a settlement offer he made. The Tax Court granted Mr. MacDonald's motion and

varied its judgment in the first matter: 2018 TCC 55. The Crown now appeals (file A-118-18). It seeks enhanced costs for the proceedings in the Tax Court because of a settlement offer it made that was not accepted. This is the appeal currently before the Court.

B. Analysis

[5] The Crown's appeal must be dismissed. There are two reasons for this.

(1) The doctrine against relitigation

[6] When the Supreme Court determined the first matter—when it dismissed Mr. MacDonald's appeal—the legal doctrine of *res judicata* was triggered. Under that doctrine, an entitlement to relief that has been finally determined cannot be relitigated by the same parties in another proceeding: *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) at 319; *Farwell v. The Queen* (1894), 22 S.C.R. 553 at 558; *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544. As is evident from the notices of appeal, the judgments and the reasons for judgment in both this Court and the Supreme Court, the entitlement for costs in the proceedings in the Tax Court was raised and decided in the first matter. It cannot be relitigated in the second matter.

[7] Put another way, the appeal presently before this Court—which seeks a determination of the issue of costs for the proceedings in the Tax Court—represents an impermissible collateral

attack against the Supreme Court's judgment that dealt with that issue: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, 158 D.L.R. (4th) 193; *Wilson v. The Queen*, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577. The Supreme Court dismissed the appeal from the judgment of this Court and left this Court's judgment to stand—including its award of costs for the proceedings in the Tax Court.

[8] Incidentally, no one advised the panels hearing the appeals in this Court or the Supreme Court that the second matter was pending. As I shall explain below, had that been done, the problem the Crown now faces probably never would have arisen.

(2) In law, the order appealed from no longer exists

[9] There is another way of analyzing this situation. The Tax Court's order in the second matter was wholly contingent on the order it made in the first matter. It stood or fell with it.

[10] This is seen from the rule that authorized the order in the second matter: *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a, Rule 147(7). Under that Rule, the Tax Court has the power to give directions to a taxing officer concerning a costs order already made by the Tax Court or to reconsider that costs order. When this Court issued a judgment allowing the Crown's appeal and setting aside the Tax Court's judgment (including its costs award), the entire basis for the Tax Court's Rule 147(7) order in the second matter fell away, with the result that it no longer had legal effect.

[11] Thus, as a legal matter, this Court's judgment rendered both the Tax Court's judgment (including its costs award) and the Tax Court's Rule 147(7) order a nullity.

[12] To have an appeal from an order, there must be an order. Because the Tax Court's Rule 147(7) order—the order of the Tax Court in the second matter—has been nullified, the appeal from that order also became a nullity. Thus, there is no longer an appeal that can be prosecuted in this Court.

C. Further guidance

[13] This is sufficient to explain why the Crown's appeal must be dismissed. But for the benefit of future cases, more must be said on how this sort of result can be avoided. A good place to begin is the law concerning orders and judgments and their effect.

[14] The formal order or judgment issued by the Court, not its reasons, is the document that has final and binding legal effect: See *Rogerville v. Canada (Public Service Commission Appeal Board)* (1996), 117 F.T.R. 53 at para. 7 (T.D.); *Canadian Express Ltd. v. Blair* (1991), 6 O.R. (3d) 212, 5 C.P.C. (3d) 161 (Ont. Div. Ct.). When the formal order or judgment is issued, all issues raised or that could have been raised in the proceedings are finally determined: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at paras. 18-19; *Collins v. Canada*, 2011 FCA 171, 421 N.R. 201 at para. 12.

[15] If an appeal is brought, the appeal court can interfere with the order or judgment. Thus, an order or judgment under appeal is not final for the purposes of the doctrine of *res judicata*. But an aspect of finality remains: the court that issued the order or judgment cannot reconsider, suspend, set aside or vary it.

[16] That is the general rule. But narrow, often time-limited exceptions exist to it. As we shall see, sometimes a party can invoke these exceptions to mitigate finality and, in so doing, avoid the sort of thing that happened in this case.

[17] In the Federal Courts system, the exceptions are found in the *Federal Courts Rules*:

- Rule 397: the power to reconsider orders and judgments in order to deal with any mistakes, omissions, or matters overlooked. This is much narrower than it sounds. Under this rule, the Court cannot rethink the matter and reverse itself: *Bell Helicopters Textron Canada Limitée v. Eurocopter*, 2013 FCA 261, 116 C.P.R. (4th) 161. This power is available in the ten days after judgment and only the judge or two of three judges on the panel that made the order or judgment can act: Rule 397(1); *Federal Courts Act*, s. 45.

- Rule 398: the power to stay an order or judgment of the Court.

- Rule 399: the power to set aside or vary an order or judgment of the Court. *Ex parte* orders are subject to later review when all affected parties come before the

Court. Otherwise, this power is almost never available. It is triggered by matters that strike at the root of the order or judgment such as fraud, procedural defects of grave significance, or significant matters that could not have been discovered earlier.

- Rule 403: the power to give directions supplementing the content of a costs award in an order or judgment. The power is available for thirty days after judgment and it can be exercised only by the judge(s) who participated in the order or judgment.

[18] Rule 105 of the *Federal Courts Rules* supplies another vital tool for the management of multiple proceedings: the consolidation or hearing together of multiple proceedings. When this is done, each proceeding remains separate and in the end a separate judgment for each is made. But because the Court deals with all of the issues and makes the judgments at the same time, no issue is left behind and barred by the principle of finality or the doctrine against relitigation.

[19] Finally, on occasion, multiple proceedings can be managed informally by telling the panel hearing the first proceeding about any related proceeding. When this is done, the panel can craft its order or judgment to preserve the parties' ability to litigate the other proceeding. Or the panel can act on its own motion and consolidate or hear the proceedings together: *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 6; *Montana Band v. Canada* (1989), 182 F.T.R. 161 (T.D.).

[20] These tools could have been used in the case at bar:

- *Consolidation or hearing together.* The Tax Court's award of enhanced costs in the second matter took place before this Court heard the appeal in the first matter. The parties could have moved in this Court to consolidate the Crown's appeal to this Court in the second matter (*i.e.*, this appeal) with the Crown's appeal to this Court in the first matter. Or they could have asked that the two be heard together so that the Court can ensure consistency between the two.

- *Inform this Court about settlement offers.* When arguing the appeal of the first matter in this Court, the parties could have informed this Court about the existence (but not the content) of settlement offers that might affect the costs in both the Tax Court and this Court and asked for the opportunity to make submissions on costs later. If this were done, this Court would have dealt with the costs issue in the second matter along with all of the issues in this first matter.

- *Make submissions on costs following judgment.* Within thirty days of this Court's judgment in the first matter, the parties could have used Rule 403 to make additional cost submissions. Alternatively, within ten days of this Court's judgment in the first matter, they could have used Rule 397 to address a matter overlooked, namely the issue whether enhanced costs should be awarded because of settlement offers.

D. Response to the Crown

[21] I wish to address a number of the Crown's submissions.

[22] The Crown submits that enhanced costs were not argued in the appeal in this Court in the first matter. The suggestion is that it is free to argue for enhanced costs now. This ignores that the doctrines against relitigation apply to arguments that could have been raised as well as those that were actually raised: *Erschbamer v. Wallster*, 2013 BCCA 76, 41 B.C.L.R. (5th) 160 at para. 12; *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) at 319; *Apotex Inc. v. Merck & Co.*, 2002 FCA 210 at para. 26; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224, [2003] 1 F.C. 242 at para. 24. Otherwise, there would be no end of litigation—parties would continually come back to the Court to reargue points not raised earlier. Our court system, which prizes finality and certainty, does not operate that way.

[23] The Crown submits that the issue of "costs" and "enhanced costs" are separate issues. It is not clear to me how this affects the issue before us. In any event, they are not separate issues. When a court awards costs it is understood to be deciding the issue of entitlement to costs fully, finally and once and for all, subject only to the narrow exceptions under the Rules discussed above.

[24] The Crown also submits that the doctrine of *res judicata* should not apply because the memorandum of fact and law for the appeal to this Court in the first matter was filed before the Tax Court rendered its costs order in the second matter. This too must be rejected. As set out

above, the Crown had many courses of action available to it and availed itself of none. Before or during the hearing, it could have asked to submit written submissions on the issue of enhanced costs. It could have asked for enhanced costs at the hearing of the appeal or, as I have explained above, within thirty days afterward. The Crown did none of these things.

[25] The Crown points to the fact that this Court stayed this appeal in the second matter on the parties' consent, pending the resolution of the first matter. The suggestion is that this Court was somehow agreeing, advising or condoning that the appeal was somehow immunized against *res judicata*. This was not so. The parties asked for the appeal in the second matter to be stayed and it is not the role of the Court to warn them about the risks of doing so or query their strategy. The parties must look after their own interests.

[26] As for the mechanism of Rule 403, it is now too late for the Crown to avail itself of it. It has not moved under that Rule. Nor has it asked for an extension of time under Rule 8 to do so. Even if it did so, an extension of time would not be granted: *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, 63 N.R. 106 (C.A.) and *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184. Rules 397 and 403 have short deadlines, in one case ten days and in the other case thirty days. Its delay—31 months and counting—is many multiples of the deadlines. Even if the Crown can surmount that tall obstacle, this Court would still not grant an extension of time. Nothing stopped the Crown from arguing the issue of enhanced costs when the matter was properly before this Court or the Supreme Court. Further, the Supreme Court has ratified this Court's judgment, including its disposition of costs.

[27] The Crown has asked for relief under Rule 397. Once again, an extension of time is necessary. I would not grant it for the reasons set out above.

[28] Finally, even if any of the above submissions were accepted, one insurmountable problem remains: the order appealed from in the second matter—the order that is the subject of the appeal in this Court—no longer exists.

E. Other Issues

[29] In this case, the Court itself raised with the parties whether it should decline to consider issues that it has previously determined. The Crown rightly has not objected to this. This Court can act to promote, enforce and vindicate certain prized values of our litigation system such as efficiency, judicial economy and finality: *Federal Courts Rules*, Rule 3; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; see also *Mazhero v. Fox*, 2014 FCA 219 at para. 4, *Fabrikant v. Canada*, 2018 FCA 171 at para. 3 and many similar cases concerning the plenary powers of the Court to regulate and manage its files.

[30] It is true that issues of *res judicata* and finality are usually raised by a party and, indeed, particular legislation may require these issues to be pleaded if they are to be asserted as a defence: *Cooper v. Molsons Bank* (1896), 26 S.C.R. 611 at 620; *BriDawn Holdings Inc. v. Wabana (Town)*, 2019 NLSC 106 at para. 75. But those authorities do not speak to whether the Court itself can raise the issue in a circumstance like this. It can.

[31] The Crown rightly has not argued that "fairness" is an exception to the principle of finality of judgments that applies in this case. It is not. If it were, some losing litigants would try to relitigate, and then try again, and perhaps even again and again.

[32] Fairness is relevant to other doctrines against relitigation such as issue estoppel and abuse of process. If a party to a proceeding that has resulted in final judgment later finds itself in litigation in a different matter involving different parties, it might be barred from relitigating an issue that was raised and decided in the earlier proceeding. In that situation, considerations of fairness recognized in the case law come to bear: *Danyluk*, above; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. But the case before us is not one of issue estoppel or abuse of process. Even if it were, I would not give effect to fairness arguments in this case for the reasons set out above.

F. Postscript

[33] At the request of the parties, this appeal was heard and determined without an oral hearing. The Court relied upon the parties' memoranda of fact and law. As these did not invoke or discuss *res judicata* or the legal effect of this Court's judgment in the first matter, the Court brought these issues to the attention of the parties and invited them to file further written representations. Both did so and the Court has considered them.

[34] In those representations, neither party submits that the appeal in the first matter has determined this appeal. For the reasons set out above, it has.

G. Proposed disposition

[35] I would dismiss the appeal. I do not consider it necessary to make any specific order concerning the Tax Court's costs order in the second matter. As explained in paragraphs 9-12, above, that order has been set aside by this Court's judgment in the first matter.

[36] Both parties should have informed this Court in the first matter about the second matter. Therefore, I would not award any costs.

"David Stratas"
J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-118-18
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. JAMES S.A. MACDONALD

APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE LAFLEUR DATED MARCH 16, 2018, NO. 2013-4032(IT)G

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	JANUARY 19, 2021

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