Federal Court of Appeal  Cour d'appel fédérale

Date: 20210609

Docket: A-241-20

Citation: 2021 FCA 114

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

BLUE BRIDGE TRUST COMPANY INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 9, 2021.

REASONS FOR ORDER BY: RIVOALEN J.A.

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

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REASONS FOR ORDER

RIVOALEN J.A.

I. Introduction

[1] Blue Bridge Trust Company Inc. (the appellant) is bringing a motion seeking a stay of execution of the Federal Court judgment rendered on September 11, 2020. The Federal Court judgment was affirmed by a judgment of this Court dated March 24, 2021 (2021 FCA 62) until final judgment is rendered by the Supreme Court of Canada.

[2] The appellant relies on subsection 65.1(2) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (*Supreme Court Act*), which allows this Court to grant a stay of execution where the party seeking the stay intends to apply for leave to appeal to the Supreme Court.

[3] The Federal Court judgment was the culmination of requirements for information and documents (RFIs) sent by the Minister of National Revenue (the Minister) under subsection 231.2(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), care of the appellant, regarding French residents who were being audited by the French tax authorities. France had been seeking to exchange this tax information with Canada since 2012 under the obligation set out in Article 26 of the *Convention Between Canada and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Canada and France, 2 May 1975, [1976] Can. T.S. No. 30, amended version (the Convention).

[4] The appellant is a trustee of Canadian Trusts that have been the subject of 14 requests for information made by France in connection with audits of its tax services involving 11 French residents. After reviewing the requests, the Minister sent the appellant RFIs pursuant to subsection 231.2(1) of the Act. The information required included: (1) the identity of the beneficiary or beneficiaries of the Trusts; (2) the detailed inventory of the property, rights and capitalized products of the Trusts, their [TRANSLATION] “market value”, as well as any amendment, transmission, allocation or disposal; (3) the total amount of the assets of certain Trusts; and (4) a copy of the balance sheets and T3 statements of the Trusts.

[5] In dismissing the appeal, this Court determined that the appellant was required to provide these documents and information to the respondent pursuant to subsection 231.2(1) of the Act. The appellant continues to refuse to release such information and documents and is applying for a stay of order.

[6] At paragraph 54 of this Court's reasons, we noted that, at the end of the hearing, the appellant applied for a stay of execution of the Federal Court's judgment pursuant to rule 398 of the *Federal Courts Rules*, S.O.R./98-106 in the event that its appeal was dismissed. It had not submitted any arguments other than its right to appeal our decision to the Supreme Court. Therefore, we declined to grant the request for a stay. However, taking into account the agreement between the parties, we recognized that it might be in the interests of justice to give the appellant an opportunity to comply with the judgment of the Federal Court rendered on September 11, 2020. We therefore gave the appellant 30 days from the date of this Court's judgment to comply with the judgment rendered by the Federal Court. This time limit was to allow the appellant to file an application for leave to appeal and to choose the appropriate course of action to protect its rights, if any, under the rules of the Supreme Court.

[7] To obtain a stay of the Federal Court judgment, the appellant must satisfy the three-stage test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at page 334, 1994 CanLII 117 [*RJR-MacDonald*]. It must demonstrate that there is a serious question to be tried, that it would suffer irreparable harm if its application were refused and that the balance of convenience favours a stay. These three questions must be answered in the affirmative; a single negative response is fatal to the motion. The standard of proof is the balance

of probabilities and the burden of proof is on the appellant at each stage (*Novopharm Limited v. Janssen-Ortho Inc.*, 2006 FCA 406, 358 N.R. 155 at paras. 8 and 11).

II. Position of the appellant

A. *Serious question*

[8] The appellant advises us that, on April 21, 2021, it resolved to file an application for leave to appeal from the judgment of this Court to the Supreme Court and ordered its counsel to apply for leave within the time limits set out in the *Supreme Court Act*, i.e., by May 23, 2021 at the latest.

[9] The appellant claims that it has serious grounds to argue before the Supreme Court and that it intends to raise the following questions:

> [TRANSLATION]
>
> (a) This case requires establishing the intensity and the terms of the respondent's duty to demonstrate that the conditions governing the exchange of information under an international convention are satisfied, in order to obtain a production order pursuant to [subsection] 231.7(1) [of the Act]. The interaction between, on the one hand, the condition that the taxation stipulated by the foreign state comply with the international convention and, on the other hand, the criteria for a Canadian court's issuance of a production order raises a question of national importance that needs to be clarified. It is important to the public that the courts ensure the validity of requests for assistance from foreign states to which they give effect by issuing production orders against Canadian residents;
>
> (b) Determining the extent to which Canadian tax authorities can rely on their foreign counterparts as part of a request for assistance in order to determine that the taxation stipulated by the foreign state is not contrary to a bilateral convention to which Canada is a party is a question of national importance. By failing to analyze the merits of the foreign state's claim, Canadian authorities are evading their responsibility to the detriment of Canadian

> residents. This question is even more crucial when it appears that the foreign authorities are trying to circumvent the convention by subjecting the assets of Canadian trusts to their tax system.
>
> (Motion Record, Affidavit of Alain E. Roch at para. 18, p. 82)

B. *Irreparable harm*

[10] The appellant contends that if the stay of order is not granted, it will suffer irreparable harm in that its application for an appeal to the Supreme Court will become moot.

[11] The appellant also argues that if a stay of order is not granted, it will be compelled to disclose the confidential information of Canadian residents and taxpayers to a foreign state, without regard to how the information will be used and to the foreign taxation that will ensue. This would render any appeal to the Supreme Court moot because it would be impossible to remedy the delivery of information and documents to France after the fact. In other words, once the information and documents are disclosed, no judgment could remedy the harm suffered or return the parties to the state that they were in prior to the challenge. The appellant relied on the following decisions of this Court as authorities: *Bining v. Canada*, 2003 FCA 286, [2003] 4 C.T.C. 165 [*Bining*] and *Bisaillon v. Canada*, 1999 CanLII 8197 (FCA), [2000] 1 C.T.C. 179 [*Bisaillon*].

[12] Therefore, the appellant alleges that not only will it suffer irreparable harm, but the public interest will also suffer irreparable harm if this motion is not granted.

C. *Balance of convenience*

[13] To satisfy the third stage of the test set out in *RJR-MacDonald*, the appellant claims that this motion will preserve the status quo in order to allow the Supreme Court to answer serious questions (*Tervita Corporation v. Commissioner of Competition*, 2012 FCA 223, 434 N.R. 159 at para. 20). This means that if this motion is granted, the situation of the parties will not change. Therefore, according to the appellant, the third stage is satisfied.

III. Analysis

A. *Serious question*

[14] In *Via Rail Canada Inc. v. Cairns*, 2004 FCA 297, 327 N.R. 221 [*Via Rail*] at paragraph 18, this Court held that for the purposes of a motion for stay, the question of whether an application for leave to appeal to the Supreme Court raises a serious issue pursuant to *RJR-MacDonald* must be determined in reference to the terms set out in subsection 40(1) of the *Supreme Court Act*.

[15] In other words, the appellant must establish "that it is reasonably arguable that the Supreme Court may conclude that 'any question involved therein [that is, in the case sought to be appealed] is, by reason of its public importance or the importance of any issue of law or any issue of mixed fact and law involved in that question one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it'" (*Via Rail* at para. 19, citing the *Supreme Court Act*, s. 40(1)).

[16] The case law confirms that, for a proceeding to raise a serious issue to be decided, it is sufficient that the issue not be frivolous or vexatious. This test has a low threshold (*Via Rail* at para. 20).

[17] I am of the opinion that this first stage has been met.

B. *Irreparable harm*

[18] The party seeking a stay of order must, on one hand, establish clear and credible evidence of the harm that it will suffer if a stay is not granted and, on the other, demonstrate that this harm will be irreparable, that is, if applicable, it could not be subject to compensation (*RJR-MacDonald* at p. 341).

[19] The appellant maintains that if it does not obtain a stay, its appeal will become moot. I am of the opinion that this possibility in itself is insufficient because it would result in a stay in every case where one is sought and would deprive the Court of the discretion to decide questions of irreparable harm on the facts of each case (*United States Steel Corporation v. Canada (Attorney General)*, 2010 FCA 200, 406 N.R. 297 at para. 17).

[20] The judgments, upon which the appellant relied, *Bining* and *Bisaillon*, both involved a requirement made by the Minister of National Revenue pursuant to the Act to compel a person to disclose certain information. However, as this Court pointed out in *The Wellcome Foundation Ltd. v. Apotex Inc.*, 2004 FCA 161 at paragraph 6, the stay was not granted simply to protect a right of appeal. Rather, the stay was granted to preserve the opportunity to prevent the breach of

a right guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter). Here, the rights guaranteed by the Charter are not at issue.

[21] Furthermore, in the present case, in 2012, France requested the information at issue as part of audits of French residents in relation to taxation years going back to 2007. Notwithstanding the passage of time, this dispute means that the audits conducted by France have still not been completed. I therefore find that any assessments that could be made against France's taxpayers, as well as the content of such assessments, remain hypothetical. The same is true of any consequential assessment against the appellant.

[22] Moreover, at paragraph 49 of this Court's reasons, we pointed out that the Federal Court judge acknowledged that once the assessments, if any, have been issued, the French taxpayers will be entitled to challenge them before the competent French authorities, and they, or the appellant, will be entitled to file a request for assistance with the competent authorities under Article 25 of the Convention. At that time, the Minister will be able to take an informed position on the validity of the tax system. Article 25 of the Convention stipulates that a taxpayer who considers himself or herself to be the subject of measures not in accordance with the Convention may submit his or her case to the State of which he or she is a resident so the two Contracting States may endeavour to resolve the case by mutual agreement.

[23] More importantly, I believe that the alleged harm could be subject to compensation. In addition to the fact that the harm alleged by the appellant is hypothetical, in the event that assessments are made against it, the appellant, like any other taxpayer, could have to comply

with the obligations of a well-founded assessment or, if, on the contrary, the required legal conditions are met, seek reimbursement for the costs it would have incurred in relation to the challenge. In either case, I do not believe that it could constitute irreparable harm.

[24] Therefore, I am of the view that the appellant has not demonstrated that it will suffer irreparable harm if it is compelled to provide the information and the documents.

C. *Balance of convenience*

[25] I am not required to provide a response with respect to the third stage because the appellant did not satisfy me that the second stage was met. The evidence in support of the motion for a stay of order does not meet the three-stage test set out in *RJR-MacDonald*.

IV. Conclusion

[26] For the foregoing reasons, I find that the motion to stay the execution of the Federal Court judgment rendered on September 11, 2020 (2020 FC 893), as affirmed by the judgment of this Court delivered on March 24, 2021 (2021 FCA 62), must be dismissed, with costs.

"Marianne Rivoalen"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-241-20
STYLE OF CAUSE:	BLUE BRIDGE TRUST COMPANY INC. v. MINISTER OF NATIONAL REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RIVOALEN J.A.
CONCURRED IN BY:	GAUTHIER J.A. LOCKE J.A.
DATED:	JUNE 9, 2021

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