Federal Court of Appeal

Cour d'appel fédérale

Date: 20210614

Docket: A-392-18

Citation: 2021 FCA 118

CORAM: STRATAS J.A.
BOIVIN J.A.
MACTAVISH J.A.

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

LEONARD BOGUSKI, KENNETH W. MUZIK, PEGGY ALLMAN-ANDERSON, JOSE ARAUJO, JASON ARAUJO, TRUSTEE FOR DAVID G. BLACKMORE, TARA L BRUNEN, ESTATE OF WOO CHIN, DINARTE DE SOUSA, GORDON DENNING, DARCY DESCHAMBAULT, JOHN ROSS GERMAN, AL GUENTHER, DONNA D. GUENTHER, LOIS L. GUENTHER, ROBERT B. GUENTHER, ESTATE OF THOMAS HALL, MYRTHLYN V HAZELL, OTTO KEMERLE, ART KORNELSEN, F. ELAINE J. LEIGHTON, LIONEL MAGUMBE, JAMES J. MANN, WARREN MARK, ROBERT SCOTT MCMULLAN, MELVYN R MERKER, NICOLE MICHAUD-BRUNETTE, JOSE MOTA, WESLEY NICKEL, BEVERLY OLIVER, CRAIG OZIRNEY, JOHN G PARTRIDGE, ALEX PENNER, LYNDA PENNER, ALVIN PICH, ESTATE OF LOUISE REINHEIMER, CARLA G. REINHEIMER, JAMIE C. REINHEIMER, LANCE B. REINHEIMER, RODNEY G ROMYN, DENISE SCOTT, GARY SLOAN, JEFFREY B TAYLOR, JEREMY TER MORS, TRUSTEE FOR AIME L J TETRAULT, RODNEY WALL, RUTH WALL, TRUSTEE FOR THE LATE GLEN WATSON, ARON WIEBE, LINDA E WIELER, MICHAEL WILHELM, AND DARCY WOYCHYSHYN

Respondents

Heard by online video conference hosted by the Registry on June 14, 2021.
Judgment delivered from the Bench at Ottawa, Ontario, on June 14, 2021.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 14, 2021).

STRATAS J.A.

[1] In the Tax Court, the Minister applied for an order under section 174 of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) allowing for the determination of a question of fact or law that is common among more than one taxpayer.

[2] The Tax Court (*per* D'Arcy J.) dismissed the application: 2018 TCC 236. The Minister now appeals. For the following reasons, we will dismiss the appeal.

[3] The Tax Court has broad discretion to act or refuse to act under section 174. Absent an error of law or principle or palpable and overriding error, this Court cannot interfere with its exercise of discretion. The Minister argued that the failure of the Tax Court to take into account all relevant factors is reversible error. This is not necessarily palpable and overriding error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331. Palpable and overriding error is well-described in *Canada v. South Yukon Forest Corp.*, 2012 FCA 165 at para. 46, cited with approval in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38.

[4] Before the Tax Court makes any order it must be satisfied that there is a common question "in respect of two or more taxpayers": s. 174(3). If the Tax Court is not satisfied there is a common question, it may not make any order and it must dismiss the application. If the Tax

Court is satisfied that there is a common question, it may answer that question (para. 174(3)(*a*)) and decide which taxpayers are bound by that answer: ss. 174(3)(*c*), 174(4) and 174(4.1).

[5] Section 174 does not require the Tax Court to make any type of order. Section 174 is merely permissive and discretionary; it allows the Tax Court to make an order if the precondition of a common question is met.

[6] In this case, the Tax Court refused to make a section 174 order for two reasons. It was not satisfied the Minister had led sufficient evidence to show there was a common question. And, in its view, even if there were a common question, the Court would exercise its discretion not to proceed under section 174. In the circumstances of this case, it considered it inefficient and procedurally unfair to do so.

[7] These were factually suffused questions of mixed fact and law and the assessment of the weight and significance of evidence that can be overturned only for an extricable error in principle or palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Here, no such error is present.

[8] The Tax Court was entitled to take into account issues of efficiency and procedural fairness. These issues underlie the purpose of section 174 and are part and parcel of the Tax Court's inherent ability to control its own practice and procedure: *Levy v. Canada*, 2021 FCA 93. The Court had a basis for finding that proceeding under section 174 would be unfair to many taxpayers, most of whom are self-represented, and it refused to allow this unfairness.

[9] At the best of times, this Court must defer to such a factually suffused, discretionary finding. But even more so here. The Tax Court was case-managing the proceeding and, thus, was in a privileged position to appreciate the dynamics of this litigation.

[10] The Minister submits that the Tax Court made sweeping statements about many things, including the legal test and the evidentiary standard on a section 174 application. The Minister says this Court must correct these sweeping statements. The Minister also says that the Tax Court did not "turn its mind" to a variety of things.

[11] The Minister develops that submission by impermissibly parsing the Tax Court's reasons and assuming that anything not said in the reasons was not considered. The Minister does so to the point that distorts what the Tax Court decided.

[12] The reasons of first-instance courts are to be read holistically, making due allowance for awkward expression and efforts to synthesize large amounts of information: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 35 and 55; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 68; *South Yukon* at paras. 49-51. When the Tax Court's reasons are read in this way, it is clear that the Tax Court did not make any sweeping statements about a legal test or an evidentiary standard. In a non-exhaustive way, it identified a number of factors and considerations relevant to its consideration of section 174 on the facts of this case. It did not commit reversible error in doing so. As well, it is presumed that the judge considered all of the evidence in the record: *Housen* at para. 46.

[13] The Minister also submits that the Tax Court erred by finding the application was an abuse of process. We need not address this, not do we need to comment on this one way or the other.

[14] Accordingly, we will dismiss this appeal with costs to the only respondents who filed a memorandum of fact and law in this appeal, Leonard Boguski and Kenneth W. Muzik.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-392-18

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE STEVEN K. D'ARCY DATED NOVEMBER 22, 2018, DOCKET NOs. 2014-972(IT)G and 2015-148(IT)G

STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v. LEONARD BOGUSKI, *et al.*
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	JUNE 14, 2021
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. BOIVIN J.A. MACTAVISH J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

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