Federal Court of Appeal | Cour d'appel fédérale

Date: 20140725

Docket: A-358-13

Citation: 2014 FCA 184

CORAM: **SHARLOW J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

DAVID TUCCARO

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on June 18, 2014.

Judgment delivered at Ottawa, Ontario, on July 25, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: SHARLOW J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Both Mr. Tuccaro and the Crown have appealed the order of Bocock, J. (Tax Court Judge) dated September 23, 2013 (2013 TCC 300). The Crown had brought a motion to strike certain parts of Mr. Tuccaro's Notice of Appeal and the Tax Court Judge:

(a) allowed the motion in part and struck the parts related to Mr. Tuccaro's claim that he is exempt from tax as a result of Treaty 8 (which is a Treaty between the Crown and certain Aboriginal peoples signed in 1899) and the paragraphs related to the historical background to the signing of this Treaty;

(b) ordered Mr. Tuccaro to redraft paragraph 43 which only provided that:

> [t]he status Indian employees of Neegan were treated as tax-exempt

(Neegan is Neegan Development Corporation Ltd.. Mr. Tuccaro, in his Notice of Appeal, stated that he was the sole shareholder of this company during the taxation years under appeal); and

(c) dismissed the Crown's motion to strike the paragraphs related to the *Indian Act Exemption for Employment Income Guidelines* published by the Canada Revenue Agency and the honour of the Crown.

[2] Mr. Tuccaro has appealed the decision to strike the paragraphs related to Treaty 8. The Crown has cross-appealed the decision to order Mr. Tuccaro to redraft paragraph 43 on the basis that the statement related to the tax treatment of another taxpayer is not relevant in the appeal of Mr. Tuccaro to the Tax Court. The Crown also has appealed the decision not to strike the paragraphs related to the Guidelines and the honour of the Crown on the basis that the Tax Court Judge erred in not finding that it was plain and obvious that Mr. Tuccaro could not succeed in relation to these claims.

[3] For the reasons that follow I would allow the appeal of Mr. Tuccaro and I would dismiss the cross-appeal of the Crown.

I. Standard of Review

[4] In *Canadian Imperial Bank of Commerce v. The Queen*, 2013 FCA 122, [2013] 4 C.T.C. 218, this Court noted that:

> 5 The decision of a judge to grant or refuse a motion to strike is discretionary. This Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice: *Apotex Inc. v. Canada (Governor in Council), 2007 FCA 374*, *Collins v. Canada*, 2011 FCA 140.

II. Test For Striking Pleadings

[5] Iacobucci, J., writing on behalf of the Supreme Court of Canada in *Odhavji v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, set out the test for striking pleadings:

> 15 An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:
>
> > ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ... .
>
> The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to

> fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

III. Treaty 8

[6] Mr. Tuccaro is appealing certain reassessments issued under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). In "Part II – Statement of Facts" of his original Notice of Appeal Mr. Tuccaro stated that:

> 8. …The income earned by the Appellant during the Relevant Years was the personal property of a status Indian situated on a reserve, within the meaning of s. 87 of the *Indian Act*, and is exempt from taxation pursuant to Treaty 8 of 1899 and by operation of s. 35 of the *Constitution Act, 1982*.

[7] Mr. Tuccaro also referred to various events that occurred prior to the signing of Treaty 8 and also to the contents of the report of the treaty commissioners. However in the section entitled "Part II [sic] – Issues", none of the identified issues related to whether he was exempt from taxation pursuant to Treaty 8. The only issues identified related to section 87 of the *Indian Act* and the effect of the *Indian Act Exemption for Employment Income Guidelines* produced by the Canada Revenue Agency and / or Form TD1-IN "Determination of Exemption of a Status Indian's Employment Income".

[8] The Crown brought a motion to strike various paragraphs of the Notice of Appeal. The basis for seeking to strike the sentence of paragraph 8 referred to above is that although this statement was in the "Statement of Facts" section of the Notice of Appeal, it was not a fact but rather a conclusion of law. The only issue in the part identified as "Issues" that was related to any exemption from tax was a claim based on section 87 of the *Indian Act*.

[9] With respect to the potential merits of any claimed exemption under Treaty 8, the Crown stated in paragraph 6 c) of the Notice of Motion that:

> Further, pursuant to s. 53(c) of the *Rules*, the sentence should be struck because the Treaty 8 right to be exempt from tax relied on by the Appellant has been reviewed by the Federal Court of Appeal and leave to appeal was denied by the Supreme Court of Canada and the Appellant has raised no new material facts beyond those already considered by the Court of Appeal…

[10] Before the motion was heard, Mr. Tuccaro filed a revised Notice of Appeal which changed several paragraph numbers and which made it clear that he is alleging that he is exempt from tax as a result of the provisions of Treaty 8. There is no indication that any changes were made to the Notice of Motion and therefore the original motion was heard in relation to the revised Notice of Appeal.

[11] In his Reasons for Order, the Tax Court Judge stated, in relation to the motion to strike the paragraphs related to Treaty 8, that:

> 2 Generally, the impugned sections within the draft Amended Notice of Appeal and the Respondent's (Applicant in the Motion) related grounds for challenge may be described as follows:
>
> > 1. a claimed exemption from taxation by the Appellant by virtue of Treaty 8 of 1899 and the conjunctive operation of section 35 of the *Constitution Act* ought to be struck on the basis of *res judicata*;
> >
> > 2. the description of various historical facts and events in paragraphs 10 through 34 is challenged on the basis that same either advance the alleged Treaty 8 exemption and/or are irrelevant to the validly pleaded claimed exemption under section 87 of the *Indian Act*, RSC 1985, c. I-5;

[12] The Tax Court Judge identified *res judicata* as the basis for the Crown's motion to strike the paragraphs related to Treaty 8. In *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, Dickson J. described *res judicata* as follows:

> 3 In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday*, [[1964] P. 181.], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of $34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(c) proceedings. The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537)], at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

[13] It is evident from this excerpt that issue estoppel was initially described by Higgins J. as a distinct and separate doctrine from *res judicata* and then later by Diplock L.J. and Dickson J. as one of the two species of *res judicata*. In the more recent case of *Genpharm Inc. v. The Minister of Health, Procter & Gamble Pharmaceuticals Canada, Inc. and the Procter & Gamble Company*, 2002 FCA 290, [2003] 1 F.C. 402) Rothstein J. (as he then was) writing on behalf of this Court also described issue estoppel as one of the species of *res judicata*. As noted by the Alberta Court of Appeal in *420093 B.C. Ltd. v. Bank of Montreal*, 1995 ABCA 328, [1995] A.J. No. 862 at paragraph 18, the requirements to establish either cause of action estoppel or issue estoppel are essentially the same.

[14] The requirements for issue estoppel to apply are set out in *Angle* by Dickson J. (who was quoting from the decision of Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935):

> (1) …the same question has been decided;
>
> (2) …the judicial decision which is said to create the estoppel was final; and,
>
> (3) …the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[15] In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, Binnie J. also listed these preconditions and noted in paragraph 24 that "…the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ('the questions') that were necessarily (even if not explicitly) determined in the earlier proceedings."

[16] Therefore, unless the discretion not to apply issue estoppel is exercised, a person will be precluded from bringing an action to determine a question of a material fact or a conclusion of law or mixed fact and law where that same question was determined in a prior final judicial decision and the parties (or their privies) to the earlier decision are the same person as the parties (or their privies) to the subsequent proceeding.

[17] In this case, there is no discussion by the Tax Court Judge of the requirements of either "cause of action estoppel" or "issue estoppel", which are the two components of *res judicata*. Instead, the Tax Court Judge concluded that the decisions of this Court in *Benoit v. Canada*, 2003 FCA 236 and *Dumont v. Canada*, 2008 FCA 32 were binding precedents that he had to follow. In paragraph 9 he noted that:

> 9 *Benoit* and *Dumont* are definitive findings of the Federal Court of Appeal. The Tax Court of Canada is bound by such established law regarding the lack of legal effect of Treaty 8 in granting tax exempt status to its signatories. In the words of Justice Sheridan at paragraph 4 in the trial decision of *Dumont* (2005 TCC 790 at paragraph 4) for these very reasons the "argument that Treaty 8 shelters ... income from taxation is without merit."

[18] Although the Tax Court Judge did not refer to *stare decicis*, his reference to being "bound by such established law regarding the legal effect of Treaty 8" as a result of the previous decisions of this Court indicates that he was applying the principles of *stare decisis*. *Stare decisis* is the principle that a lower court is bound by particular findings of law made by a higher court to which decisions of that lower court could be appealed, directly or indirectly. *Stare decisis* applies only to questions of law. *Res judicata*, on the other hand, applies if a person is attempting to relitigate a particular matter (whether a question of law, fact or mixed fact and law) that was determined in a prior proceeding to which that person (or that person's privy) was a party.

[19] The appeal before us was argued on the basis that the Tax Court Judge had decided to strike the paragraphs related to Treaty 8 on the basis of *stare decisis*. Since the Tax Court Judge relied only on *Benoit* and *Dumont* in striking the paragraphs related to Treaty 8 on the basis that he was bound by the "established law" arising from these decisions, it is necessary to determine what was decided in these cases. In *Dumont* "the Appellant's only response to Benoit was that he disagreed with it and urged this Court to reject the decision" (paragraph 4 of the decision of the Tax Court 2005 TCC 790). As a result the focus turns to what was actually decided in *Benoit*.

[20] The Federal Court Judge in *Benoit* (2002 FCT 243, [2002] 4 C.T.C. 295, after finding that "the Dene and Cree people believed that the Commissioners promised a tax exemption"

(paragraph 319), found that "the Plaintiffs are entitled to claim the benefits of Treaty No. 8, including the Treaty Right not to have any tax imposed upon them at any time for any reason" (paragraph (a) of the Judgment). The Federal Court Judge, therefore, made findings of fact and law.

[21] In allowing the appeal, this Court focused on the factual finding of whether "the Aboriginal signatories understood that they would be exempted from taxation at any time for any reason" and, after a detailed review of the record, concluded that there was "insufficient evidence to support" this view (paragraph 116). This was a factual finding following a review of the evidence and reversed the finding of fact that had been made by the Federal Court Judge. Having made this finding of fact, there was no need to address any question of law related to Treaty 8. The only finding made by this Court in *Benoit* was a finding of fact. Therefore, the principles of *stare decisis* would not apply. The question is not whether the Tax Court of Canada is "bound by [the] established law regarding the lack of legal effect of Treaty 8 in granting tax exempt status to its signatories" (as stated by the Tax Court Judge), but whether Mr. Tuccaro is bound by the finding of fact in *Benoit*. The applicable principles are those related to issue estoppel (which is a specie of *res judicata*), not *stare decisis*.

[22] It was an error of law for the Tax Court Judge to rely on the "established law regarding the lack of legal effect of Treaty 8 in granting tax exempt status to its signatories" in striking the paragraphs of Mr. Tuccaro's Notice of Appeal related to Treaty 8. There is no law decided in the *Benoit case* - only the question of fact of whether the Aboriginal signatories to this treaty had understood that a promise of tax emption had been made by the commissioners who negotiated

the Treaty on behalf of the Crown. The failure to identify and address all of the required elements of issue estoppel – which is a species of *res judicata* that was initially identified as the basis for the motion to strike the paragraphs related to Treaty 8 – was also an error of law.

[23] To determine whether issue estoppel is applicable in relation to a particular proceeding, the first matter that must be determined is whether the question that is raised in the current proceeding is the same question that was addressed in the previous proceeding. Counsel for Mr. Tuccaro acknowledged during the appeal that Mr. Tuccaro is raising the same question that was addressed by this Court in *Benoit*, *i.e.* whether "the Aboriginal signatories understood that they would be exempted from taxation at any time for any reason". He also acknowledged that the decision of this Court in *Benoit* was a final decision (leave to appeal the decision of this Court in *Benoit* to the Supreme Court of Canada was denied). The only remaining precondition for issue estoppel is whether Mr. Tuccaro or his privy was a party in *Benoit*.

[24] There were three plaintiffs in the *Benoit* case (who were also respondents in the appeal) in addition to Mr. Benoit – Athabasca Tribal Corporation, The Lesser Slave Lake Regional Council and Kee Tas Kee Now Tribunal Council. Since the appeal in this Court was focused on the decision of the Tax Court Judge who had determined that the paragraphs should be struck on the basis that he was bound by the "established law", there was no discussion by the Tax Court Judge or by the parties in this appeal with respect to whether Mr. Tuccaro should be considered to have been represented by any of the plaintiffs in *Benoit* or whether any of those plaintiffs was a privy for Mr. Tuccaro. There was no indication in the record that either party had presented evidence on this point at the hearing of the Crown's motion.

[25] In *Danyluk*, Binnie J. made the following comments in relation to privity:

> 60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in The Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis.

[26] Without any submissions from the parties with respect to whether there is any privity between Mr. Tuccaro and the parties in *Benoit*, it is not possible for me to make any finding in this regard. I would also note that there is no reference in the Notice of Motion filed by the Crown in the Tax Court to any question of whether any of the parties in *Benoit* were a privy for Mr. Tuccaro.

[27] Even if the requirements of issue estoppel are satisfied, there is still a discretion to allow a matter to proceed, as noted by Binnie, J. in *Danyluk*:

> 33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

[28] This determination of whether to exercise this discretion to allow a matter to continue can only be made after a moving party has established the essential elements for issue estoppel to apply.

[29] As a result I would allow Mr. Tuccaro's appeal in relation to the Order to strike those paragraphs of his Notice of Appeal that relate to Treaty 8.

IV. Cross-Appeal

[30] The Crown has cross-appealed in relation to the decision of the Tax Court judge to order Mr. Tuccaro to redraft paragraph 43 of his Notice of Appeal. The argument of the Crown is not that Mr. Tuccaro should not redraft this paragraph but that the one sentence that was in paragraph 43 (and which is quoted above) should have been struck. It seems to me that since the Tax Court Judge has ordered Mr. Tuccaro to redraft this paragraph, it is premature to address the question of whether the single existing sentence of paragraph 43 should be struck as this sentence may not be in the redrafted paragraph. I would therefore dismiss the Crown's cross-appeal in relation to the existing paragraph 43.

[31] With respect to the cross-appeal related to the refusal to strike the paragraphs related to the Guidelines and the honour of the Crown, I am not persuaded that the Tax Court Judge committed any error in finding that "the Guidelines Argument, even in the context of the Honour of the Crown argument, cannot be said to have 'no chance of success' when considered in the context of the Appellant's factual history, the sequence of events in his claim for a section 87 exemption and the fact that a trial judge has not previously weighed the probative value and weight of the Guidelines Argument in such a factual context". I would dismiss the Crown's appeal in relation to those paragraphs.

V. Proposed Disposition

[32] I would allow Mr. Tuccaro's appeal and I would dismiss the Crown's cross-appeal. As a result, I would delete paragraphs 1 and 2 of the Order of the Tax Court Judge dated September 23, 2013.

[33] I would award costs to Mr. Tuccaro.

"Wyman W. Webb"
J.A.

"I agree,

K. Sharlow"

"I agree,

A.F.Scott"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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