Federal Court of Appeal Cour d'appel fédérale

**Date: 20140611**

**Docket: A-237-13**

**Citation: 2014 FCA 155**

**CORAM: DAWSON J.A.**
**TRUDEL J.A.**
**NEAR J.A.**

**BETWEEN:**

**JACK KLUNDERT**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on June 10, 2014.

Judgment delivered at Vancouver, British Columbia, on June 11, 2014.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: TRUDEL J.A.
NEAR J.A.

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## REASONS FOR JUDGMENT

**DAWSON J.A.**

[1] For reasons cited as 2013 TCC 208, a judge of the Tax Court of Canada struck out the appellant's notice of appeal and dismissed his appeals from reassessments made under the *Income Tax Act* (*Act*), R.S.C., 1985 c. 1 (5th Supp.), for the 1993 through 1996 taxation years. This is an appeal from that decision.

[2] The relevant underlying facts were concisely summarized by the Judge at paragraph 3 of his reasons:

> The facts providing context for the issues in dispute here are not themselves disputed. The Appellant, an optometrist practising in Windsor, Ontario, either filed tax returns showing nil income or failed to file tax returns between 1993 and 1997 taxation years and was investigated by audit at first and then subject to a criminal investigation pursuant to which a warrant for search and seizure was executed pursuant to section 487 of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended. The Appellant had three trials before the Ontario Superior Court of Justice on tax evasion, two appeals before the Ontario Court of Appeal, and leave to appeal to the Supreme Court of Canada was denied. The third and last trial before the Ontario Superior Court of Justice, by jury, was decided on May 20, 2010, in which the Appellant was convicted of tax evasion under section 239 of the *Income Tax Act* (the "*Act*"); which conviction was appealed to the Ontario Court of Appeal which dismissed his appeal on September 12, 2011, and for which leave to appeal to the Supreme Court of Canada was denied on April 5, 2012. Based on the findings of this third trial, in which the Appellant was found to have failed to report respective amounts of $241,625, $270,403, $434,931, $254,520 and $272,910 for the years from 1993 to 1997, the Canada Revenue Agency ("CRA") reassessed his income taxes on exactly the same basis.

[3] The notice of appeal filed by the appellant did not challenge the amount of tax reassessed by the Minister, or any part of her reassessment which would alter the amount of the appellant's tax liability. Rather, the notice of appeal recited a chronological narrative of events together with bare assertions that the Canada Revenue Agency used its audit powers to gather information for the ongoing criminal investigation. In the result, the appellant sought a declaration that all evidence gathered using the Canada Revenue Agency's audit powers while his criminal investigation was ongoing infringed rights guaranteed under the *Canadian Charter of Rights and Freedoms* (*Charter*) and should be excluded in the Tax Court pursuant to subsection 24 (2) of the *Charter*. The appellant did not advance any argument based upon the misuse of audit powers at any point in any of the criminal proceedings.

[4] The Judge gave two reasons for striking the notice of appeal and dismissing the appeal.

[5] First, the Judge found the pleading disclosed no cause of action; the pleading simply cited a chronology of events without any specific allegation as to what information was improperly obtained and used. Second, the Judge found the notice of appeal constituted an abuse of process.

[6] I agree the notice of appeal did not disclose a cause of action, substantially for the reasons given by the Judge. In *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, the Supreme Court considered the distinction between an audit inquiry related to the administration of the *Act* and an investigation that could lead to charges under section 239 of the *Act*. Once the "predominant purpose" of an inquiry is related to the investigation and prosecution of an offence, the Canada Revenue Agency can no longer use its audit powers to gather information or documents that may be used in such investigation and prosecution.

[7] That said, the Supreme Court expressly confirmed that although an investigation has been commenced, audit and administrative powers may continue to be used in relation to the administration of the Act, including in relation to a reassessment. See also the decision of this Court in *Romanuk v. Canada*, 2013 FCA 133, 445 N.R. 353.

[8] In the present case, beginning in January of 1996 the Canada Revenue Agency commenced using its administrative powers (such as requirements to provide information and documents) in order to obtain information. This was in response to taxation returns filed by the appellant, a practicing optometrist, who reported nil income for the 1993 and 1994 taxation

years. Endorsed on the 1993 return was the notation "Collecting income tax by the government is against the constitution of Canada".

[9] The appellant then failed to file returns for the 1995 and 1996 taxation years. A return was filed in respect of the 1997 taxation year that reported nil income.

[10] On March 31, 1999, search warrants were executed on the appellant's home and business premises.

[11] Because information was obtained by both administrative/audit processes and search warrant, it was incumbent on the appellant to point to specific evidence that was improperly obtained. However, no material facts were pled as to what information was improperly obtained or in what manner it was obtained, or that improperly obtained information was used.

[12] I agree with the Judge that the exposition of historical narrative combined with bare assertions results in an appeal premised upon conjecture, speculation and innuendo.

[13] The Judge also denied a request to amend the notice of appeal. In my view, the Judge properly denied such request because the proposed amendment related only to the relief requested and so would not cure the deficient nature of the pleading.

[14] The finding that the notice of appeal did not disclose a cause of action was dispositive of the motion to strike. It is therefore not necessary to consider whether the notice of appeal constituted an abuse of process. Therefore, we neither accept nor reject the Judge's analysis.

[15] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
D.G. Near J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-237-13 |
| **STYLE OF CAUSE:** | JACK KLUNDERT v.<br>HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | JUNE 10, 2014 |
| **REASONS FOR JUDGMENT BY:** | DAWSON J.A. |
| **CONCURRED IN BY:** | TRUDEL J.A.<br>NEAR J.A. |
| **DATED:** | JUNE 11, 2014 |

**APPEARANCES:**

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| Elizabeth McDonald | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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