Federal Court of Appeal | Cour d'appel fédérale

Date: 20151106

Docket: A-358-15

Citation: 2015 FCA 248

CORAM: **STRATAS J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

ROBERT MCNALLY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 6, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NEAR J.A.
DE MONTIGNY J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Previously, in reasons cited at 2015 FCA 195, I directed the parties to provide submissions on the issue whether this appeal had become moot and, if so, whether this Court should nevertheless hear the appeal.

[2] The circumstances behind my direction are set out in those reasons. In brief, the Minister appeals a judgment of the Federal Court cited at 2015 FC 767 (*per* Justice Harrington). The

Federal Court ordered that the Minister examine the respondent's 2012 tax return and issue him a notice of assessment within thirty days. The Minister has done that—she has complied with the judgment—but still wishes to continue her appeal in order to pursue a jurisprudential point. However, the respondent taxpayer has declined to participate in the appeal. He got what he wanted: the Federal Court gave judgment in his favour and the Minister has complied with it.

[3] The parties have now filed their submissions on whether this appeal should be heard. I have read and considered them.

[4] The Minister properly concedes that "[t]here is no question that the appeal is moot" and so the "only question is whether this Court should exercise its discretion to hear the appeal in any event." The parties agree that the controlling authority on this is the Supreme Court's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231. Three factors guide this Court's discretion: the presence of an adversarial context, the concern for judicial economy and the Court's need to be sensitive to its status as the adjudicative branch of government.

[5] I wish to say a little more about the last factor, the Court's need to be sensitive to its status as the adjudicative branch of government. The task of courts within our constitutional separation of powers is to pronounce on legal principles only to resolve a real dispute. Absent a real dispute, the judicial pronouncement of legal principles can smack of gratuitous law-making, something that is reserved exclusively to the legislative branch of government: see the opening words of sections 91 and 92 of the *Constitution Act, 1867*. While *Borowski* and cases that apply

it do not forbid courts in appropriate circumstances from determining a proceeding after the real dispute has disappeared, this underlying rationale reminds us that the discretion to do so must be exercised prudently and cautiously.

[6] The Minister wishes to continue this appeal to resolve jurisprudential issues she says are important. Broadly, these issues concern the scope of her authority to conduct an audit in the face of subsection 152(1) of the *Income Tax Act* which requires the Minister to review a taxpayer's return for a particular taxation year and assess him or her for tax, interest and penalties "with all due dispatch." The Minister has been undertaking a lengthy audit program into certain tax shelters and the Minister says this has taken much time, holding up the respondent's assessment and the assessments of many others. The Minister raises the spectre of harm to its authority to conduct audits and to review tax returns if the Federal Court's judgment is allowed to stand. In a general sense, the question the Minister raises and wants answered is what sorts of reviews or audits can hold up assessments.

[7] On the first *Borowski* factor, the presence of an adversarial context, the Minister concedes that the respondent's refusal to participate in the appeal takes away the adversarial context. This indeed is a problem. If this Court hears the appeal, will anyone occupy the other side of the courtroom? Will anyone be present to oppose the Minister's submissions?

[8] To address this problem, the Minister offers to pay the reasonable and proper costs of counsel "to present opposing arguments, whether that person is [the respondent's] counsel…or another lawyer willing to take on that role." But the problem remains. The respondent declines

outright to participate in the appeal so counsel cannot be appointed for him against his will. And there are no other parties before the Court who could oppose the Minister.

[9] It is true that in highly unusual circumstances of great public interest this Court can appoint an *amicus* to argue a position that would not otherwise be advanced. Here there are no circumstances of great public interest and the only party before the Court is the Minister: see *Alliance for Marriage and Family v. A.A.*, 2007 SCC 40, [2007] 3 S.C.R. 124, a case similar to the case at bar, where the Supreme Court refused to permit the proceeding to continue.

[10] On the second *Borowski* factor, judicial economy, the Minister points out that judicial economy is furthered where an appellate court decides to take on an important issue that is evasive of appellate review. In the abstract, I agree with that proposition. The Minister says that the question here—what sorts of reviews or audits can hold up assessments—is evasive of appellate review. I disagree with that.

[11] Taking this case as an example, the Minister could have appealed the judgment of the Federal Court and could have moved for an immediate stay of the judgment on the basis of the principles set out in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. To enhance its chances of success on the stay motion, the Minister also could have moved for an order that the appeal be expedited in order to minimize any prejudice to the respondent.

[12] The Minister says that she would never be able to get a stay in a case like this because she could never establish irreparable harm. Again, I disagree.

[13] Suppose in a hypothetical case the Federal Court finds that on the facts the Minister wrongly failed to assess the taxpayer's return in a timely way. If the Minister appeals on the ground that that finding is vitiated by palpable and overriding error, if the Minister points to evidence showing that a detailed review of the taxpayer's return is necessary for purposes envisaged by the Act, and if a later reassessment is not likely on the facts to repair any harm (for instance where collection is likely to be a problem), the Minister would have a pretty good argument for a stay.

[14] As well, in a future case the Minister might argue that failure to get appellate review of an important question causes her or the treasury some sort of harm that cannot be otherwise addressed. I offer no definitive opinion on that argument. It is enough here to say that it is not doomed to fail and, on the right evidence, could perhaps succeed. Here there is no such evidence.

[15] Finally, on the third *Borowski* factor, I am concerned that this appeal, if heard, would be a wholly academic exercise divorced from any plausible factual or legal basis whatsoever. This Court would be acting outside of its status as the adjudicative branch of government. This is seen by examining what the Federal Court did and the nature of the Minister's appeal before us.

[16] The Federal Court found that the Minister could not justify the delay in this case on any acceptable factual or legal basis, *i.e.*, any basis authorized in the Act. The Minister delayed her

assessment in this case to discourage other taxpayers from participating in certain tax shelter arrangements. The Federal Court found that this was an "extraneous purpose" (at paragraph 41). In other words, on the facts of this case the Minister decided not to assess the taxpayer's return in order to further a collateral purpose, improper purpose, or one not authorized by the Act. Decisions of that sort cannot be regarded as acceptable or defensible and are liable to be set aside or, in appropriate circumstances, otherwise redressed: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689; *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1977), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (C.A.); *Doctors Hospital v. Minister of Health et al.* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.); *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, 382 D.L.R. (4th) 720 at paragraph 145.

[17] Does the Minister advance a plausible challenge to these factual and legal findings in this Court? The only document I have before me that defines the issues in this appeal is the Minister's notice of appeal. The notice of appeal simply says that the findings are capricious and in error. It does not say why and offers no particulars. Wholly bald notices of appeal count for very little, if anything: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paragraphs 38-48.

[18] The Minister wants us to hear this case and tell her what sort of reviews or audits can justify holding up assessments. But she asks this in a case where on the facts and the law the Minister had no proper reason to hold up an assessment and the appeal, as pleaded, does not supply a particular or concrete ground that will shake that finding. We would be answering a

question completely in the abstract, departing far from our proper adjudicative role, in circumstances where future cases can provide answers to the Minister's question.

[19] None of the *Borowski* factors favour hearing this appeal. Therefore, I would dismiss the appeal for mootness. The respondent has not asked for his costs concerning the submissions made to this Court on this matter, and so none shall be awarded.

"David Stratas"
J.A.

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

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-358-15
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v. ROBERT MCNALLY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	NEAR J.A. DE MONTIGNY J.A.
DATED:	NOVEMBER 6, 2015

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