Federal Court of Appeal | Cour d'appel fédérale

Date: 20170427

Docket: A-276-16

Citation: 2017 FCA 87

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

RON FINK

Respondent

Heard at Edmonton, Alberta, on April 25, 2017.

Judgment delivered at Ottawa, Ontario, on April 27, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20170427

Docket: A-276-16

Citation: 2017 FCA 87

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

RON FINK

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The Attorney General of Canada (on behalf of the Minister of National Revenue, hereinafter referred to as Canada Revenue Agency or the CRA) appeals from an interlocutory decision made by Justice Manson of the Federal Court (the Judge) which allowed the motion brought by the respondent, Mr. Ron Fink, seeking to compel answers to certain cross-examination questions and to order the production of a number of documents.

[2] The respondent's motion was heard in the context of a judicial review proceeding challenging the decision of the Assistant Commissioner of the CRA refusing to recommend that the Governor in Council issue a remission order for the purposes of the respondent's 2007 tax liability under subsection 23(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (as amended) (the FAA). Pursuant to that provision, the Governor in Council may remit any tax or penalty when of the view that the collection of the tax or the enforcement of the penalty "is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty".

[3] There is no need to go into the details of Mr. Fink's tax liability. Suffice it to say that the CRA assessed the respondent for a taxable employee benefit under section 7 of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th supp.) (ITA) in respect of a stock option plan, the amount of which was eventually settled at $648,000 in April 2013. When he sold the shares he had bought under the stock option plan, the respondent realized a capital loss in the amount of $419,250, but was unable to apply this capital loss to offset the amount of his employee benefit due to the operation of the employee stock option rules and other provisions of the ITA. As a result, the respondent submitted a request for remission of any income tax, plus interest, in excess of the after-tax amount he received on the sale of those shares.

[4] In support of his remission request, the respondent submitted that his situation was akin to that of other taxpayers (the SDL employees) who had been granted relief as a result of being unable to offset taxable employee benefits with a subsequent capital loss on the sale of employee stock purchase shares. The respondent relied on statements made by the Minister of National Revenue at the time, appearing before the Standing Finance Committee, in support of his position that his remission request should be treated consistently with the remission orders

granted to a number of SDL employees. He also argued that his circumstances fell within the "financial setback coupled with extenuating factors" criteria for remission, as provided by the Canada Revenue Agency Remission Guide (the Guidelines, Exhibit "A" of the Affidavit of Lynne Laplante, Appeal Book at p. 84).

[5] Following the decision of the Assistant Deputy Commissioner of the CRA (on behalf of the Minister) not to recommend remission to the Governor in Council, the respondent applied for judicial review of that decision. In response, the CRA tendered the affidavits of the Assistant Deputy Commissioner, Mr. Geoff Trueman, and of a senior policy analyst, Mrs. Lynne Laplante. During cross-examination, the Attorney General of Canada objected to a number of questions posed by the respondent's counsel, five of which are the subject of this appeal. These questions relate to the SDL employees' remission orders referred to by the respondent.

[6] Applying the principles set out in *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1997), 146 F.T.R. 249, 79 A.C.W.S. (3d) 609 (per Hugessen, J.) (F.C.), affirmed 169 F.T.R. 320 (note), 249 N.R. 15 (F.C.A.) [*Merck Frosst*], the Judge found that the questions met the tests both of formal and legal relevance. He also found that the documents requested by the respondent fell within the exception of paragraph 241(3)(*b*) of the ITA, which authorizes Revenue Canada to disclose tax related information in respect of "proceedings relating to the administration or enforcement" of the ITA. Accordingly, he ordered that the documents requested be produced, subject to redactions in order to protect the personal information of the taxpayers.

[7] Despite the Attorney General's able arguments to the contrary, I have not been convinced that the Judge made any reviewable errors. The power to compel answers or the production of documents is discretionary in nature. Such decisions are subject to the palpable and overriding standard of review, unless an extricable error of law is identified (*Hospira Healthcare Institute of Rheumatology*, 2016 FCA 215 at para. 79, [2016] F.C.J. No. 943). In the case at bar, the Judge identified the correct legal framework for a finding of relevance in the specific context of cross-examination of affidavits, and identified the proper governing authority, being the Federal Court's decision of *Merck Frosst* (as affirmed by this Court). The CRA argues that the Judge failed to fully consider the question of formal and legal relevance, and applied an over-broad test for relevance. It becomes clear from its submissions, however, that it simply disagrees with how the criteria for a finding of relevance was applied to the set of facts before the Judge.

[8] The CRA could have taken the position from the outset that the treatment of other taxpayers is never relevant to its discretionary remission determinations. In reviewing the affidavits tendered by the CRA, however, and especially Exhibit "A" of Mr. Trueman's affidavit, it appears that the CRA did in fact consider the financial circumstances of other employees in making its determination regarding the respondent. While I accept that, generally speaking, the CRA's treatment of other taxpayers is irrelevant when assessing whether to grant discretionary relief to a given individual, the Judge could reasonably infer in the particular circumstances of this case that the CRA's decision not to recommend remission was premised, at least in part, on the respondent not being in similar circumstances as the SDL employees. Such being the case, the Judge's finding that the disputed questions were formally and legally relevant and went to the very reasonableness of the CRA's decision, was open to him.

[9] The Attorney General submitted that the issue as to whether the financial circumstances of Mr. Fink are similar to those of the SDL employees "begins and ends in this case with whether the respondent participated in a stock purchase plan or not" (Appellant's Memorandum at para. 52). On that reasoning, there would be no need to disclose the personal financial circumstances of those employees, since the similarity of Mr. Fink's stock option plan with the SDL employees' stock purchase plan could be assessed simply by comparing the two schemes. This restrictive interpretation may well be CRA's position, but it did not bind the Judge. Indeed, it would appear from Mr. Trueman's letter dated October 28, 2015, that other circumstances are taken into consideration to determine whether a taxpayer is in the same situation as SDL employees. After noting that the Minister of National Revenue had indicated that the same treatment would be provided to any taxpayer with the same circumstances than the SDL employees, Mr. Trueman stated:

> An individual is considered to be in the same circumstances if he or she participated in a stock purchase plan offered by their employer and the purchase price of the shares was lower than the fair market value of the shares at the time the individual signed up for the stock purchase plan. In addition, an individual's financial circumstances would also be taken into consideration as well as their overall participation in the stock purchase plan.
>
> (emphasis in original)

[10] Bearing in mind that it will be for the application judge to determine whether a stock purchase plan and a stock option plan amount to the "same circumstances", and that Mrs. Laplante did swear that she "consulted the decisions taken in other taxpayers' files" (Affidavit dated February 17, 2016 at para. 28) and "took a random sampling of information from a CRA file drawer containing the SDL former employee information" (Affidavit dated July 5, 2016 at para. 7), I am of the view that the Judge did not make a reviewable error in finding that the

questions put to the affiants on cross-examination were legally relevant. The answers to those questions may clearly be of assistance to the respondent in trying to convince the application judge that he deserves to be treated the same way SDL employees have been treated in the past.

[11] On the statutory interpretation question, the CRA urged a narrow reading of paragraph 241(3)(*b*) of the ITA and invited this Court to find that it has no application to the case at hand since remission orders, being an exercise of discretion under a separate piece of legislation (the FAA), lack the requisite nexus to the administration and enforcement of the ITA. Such a restrictive approach is not supported by the decision of the Supreme Court of Canada in *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430, 106 D.L.R. (4th) 212, upon which the Judge relied. This case stands for the proposition that a broad view must be adopted in determining whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the ITA. As the outcome of a remission request ultimately affects an individual's tax liability, it follows that such a proceeding is "connected" or "in relation to" the administration or enforcement of the ITA. Accordingly, the Judge made no reviewable error and correctly interpreted the above-mentioned provision of the ITA.

[12] It goes without saying that any information disclosed is subject to the implied undertaking rule, which means that the information must be held in confidence by the parties within these proceedings.

[13] For the above reasons, I would dismiss the appeal, with costs.

"Yves de Montigny"
J.A.

“I agree.

David Stratas J.A.”

“I agree.

D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-276-16
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MANSON OF THE FEDERAL COURT, DATED JULY 21, 2016, FILE NO. T-2032-15.	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. RON FINK
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	APRIL 25, 2017
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	STRATAS J.A. NEAR J.A.
DATED:	APRIL 27, 2017

APPEARANCES:

Margaret McCabe	FOR THE APPELLANT
James C. Yaskowich	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT
Felesky Flynn LLP Barristers and Solicitors Edmonton, Alberta	FOR THE RESPONDENT