

Date: 20090416

Docket: A-55-09

Citation: 2009 FCA 112

**CORAM: NOËL J.A.
RYER J.A.
TRUDEL J.A.**

BETWEEN:

TONY PAPA

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 16, 2009.

REASONS FOR ORDER BY:

NOËL J.A.

CONCURRED IN BY:

**RYER J.A.
TRUDEL J.A.**

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REASONS FOR ORDER

NOËL J.A.

[1] The appellant has filed a Notice of Appeal against an order of Teitelbaum J. rendered pursuant to subsection 225.2(11) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) wherein he refused to vacate a jeopardy order issued against the appellant. The appellant now brings an application to stay the order of Teitelbaum J. pending the disposition of the appeal.

[2] The respondent opposes this application and at the same time brings an application to strike the Notice of Appeal on the ground that this Court is without jurisdiction to hear it. Reliance is placed on subsection 225.2(13) of the Act which provides:

(13) No appeal lies from an order of a judge made pursuant to subsection 225.2(11).

(13) L'ordonnance rendue par un juge en application du paragraphe (11) est sans appel.

[3] Subsection 225.2(11) and (8) provide in turn:

(8) Where a judge of a court has granted an authorization under this section in respect of a taxpayer, the taxpayer may, on 6 clear days notice to the Deputy Attorney General of Canada, apply to a judge of the court to review the authorization.

(8) Dans le cas où le juge saisi accorde l'autorisation visée au présent article à l'égard d'un contribuable, celui-ci peut, après avis de six jours francs au sous-procureur général du Canada, demander à un juge de la cour de réviser l'autorisation.

(11) On an application under subsection 225.2(8), the judge shall determine the question summarily and may confirm, set aside or vary the authorization and make such other order as the judge considers appropriate.

(11) Dans le cas d'une requête visée au paragraphe (8), le juge statue sur la question de façon sommaire et peut confirmer, annuler ou modifier l'autorisation et rendre toute autre ordonnance qu'il juge indiquée.

[4] The appellant resists the Motion to Strike on the ground that the proceeding before Teitelbaum J. was not only based on subsection 225.2(8) of the Act, but also on Rule 399 of the

Federal Courts Rules, S.O.R./98-106. Rule 399 provides that an *ex parte* order may be set aside if the party against whom the order is made discloses a *prima facie* case why the order should not have been made. Rule 399 and in particular decisions made thereunder were relied upon in support of the argument that the order should be quashed because the Crown had failed to make a frank and full disclosure to the Court in the present matter.

[5] It is apparent from the decision of Teitelbaum J. that the application before him was brought pursuant to subsection 225.2(8) of the Act and that his decision was rendered pursuant to subsection 225.2(11) of the Act. A Court hearing an appeal pursuant to that provision has the power to set aside a jeopardy order if the duty of frank and full disclosure has not been met (*Canada (Minister of National Revenue – M.N.R.) v. Reddy*, 2008 FC 208, [2008] F.C.J. No. 261 at para. 9). The fact that Rule 399 and the jurisprudence developed under that Rule were relied on does not transform the order into one rendered pursuant to Rule 399 (compare *Ismail v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 396, [2006] F.J.C. No. 1835 at para. 4).

[6] The alternative argument that subsection 225.2(13) cannot apply because Teitelbaum J. exceeded or refused to exercise his jurisdiction is also groundless. The appellant has alleged in his Notice of Appeal that Teitelbaum J. made comments which give rise to a reasonable apprehension of bias but his responding motion material does not identify any such comment nor has the appellant seen fit to order the transcript of the proceedings before Teitelbaum J. in order to support this allegation.

[7] I would therefore strike the Notice of Appeal with costs in favour of the respondent. Given this, the appellant's Motion becomes moot and is accordingly dismissed, also with costs.

“Marc Noël”

J.A.

“I agree.

C. Michael Ryer J.A.”

“I agree.

Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-55-09
STYLE OF CAUSE: Tony Papa v. Her Majesty the Queen

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Noël J.A.
CONCURRED IN BY: Ryer J.A.
Trudel J.A.

DATED: April 16, 2009

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