Federal Court of Appeal | Cour d'appel fédérale

Date: 20200331

Docket: A-129-19

Citation: 2020 FCA 68

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

VALERO ENERGY INC.

Respondent

Heard at Montréal, Quebec, on February 24, 2020.

Judgment delivered at Ottawa, Ontario, on March 31, 2020.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200331

Docket: A-129-19

Citation: 2020 FCA 68

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

VALERO ENERGY INC.

Respondent

REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] The issues raised on this appeal and cross-appeal focus on whether the Federal Court (2019 FC 319, per St-Louis J.) erred by striking out only a portion of Valero Energy Inc.'s

(Valero) Notice of Application for judicial review dated April 20, 2018, (the Application) and allowing other portions to remain, finding that they were not bereft of any possibility of success.

[2] In its Application, Valero challenges its obligation to provide certain documents and information pursuant to a requirement for information issued under subsection 231.2(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) in the context of an audit of its 2011 to 2015 taxation years. In addition, Valero seeks a declaration that in the process of her review, the Minister of National Revenue (the Minister) cannot require it to answer questions or submit documents in the context of compliance with section 105 of the *Income Tax Regulations*, C.R.C., c. 945 (the Regulations). In the alternative, Valero seeks a declaration that the Canada Revenue Agency (CRA) made representations to it or that it had legitimate expectations that no withholding or deduction was required under section 105 of the Regulations. Finally, in the further alternative, Valero invokes the exercise of the Minister's discretion under subsection 153(1.1) of the Act which allows her to determine a lesser amount of withholding tax under subsection 153(1) of the Act.

[3] Before the Federal Court, the Attorney General of Canada (the Crown) argued that the entire Application should be struck. Valero argued that the entire Application should be left intact. The Federal Court agreed in part with both parties.

[4] The Federal Court agreed with Valero and concluded that the Crown had not met its burden to show that the Application was bereft of any possibility of success in regards to three

paragraphs in the statement of the relief sought (Reasons at paragraph 6). The relief that survived the motion to strike is summarized as follows (Reasons at paragraph 2):

A. an order setting aside the Minister's requirement for information dated July 18, 2017, requesting certain documents and information related to international shipping services rendered in Canada;

B. a declaration that based on administrative law principles and the doctrines of promissory estoppel and legitimate expectations, the Minister cannot in the circumstances of this case require Valero to comply with the requirement for information; and,

C. in the alternative, a declaration that the CRA made representations to Valero, or that Valero had legitimate expectations, that no withholding or deduction was required under section 105 of the Regulations for international shipping services.

[5] However, the Federal Court agreed with the Crown and struck from the Application Valero's request for a declaration finding arbitrary and unreasonable, and therefore invalid, the refusal of the Minister to exercise her discretion under subsection 153(1.1) in its favour. The Federal Court found that any review of the Minister's discretion under subsection 153(1.1) of the Act was premature. It found that Valero had failed to identify a decision for the Court to review (Reasons at paragraphs 6, 38-39). The Federal Court also struck a related paragraph in which Valero sought an interim order under Rule 55 of the *Federal Courts Rules*, S.O.R./98-106, dispensing with the need for separate applications as required under Rule 302.

[6] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal. The entire Application should be struck.

II. Background

[7] The Federal Court described the background and relevant legislative provisions at play in paragraphs 7 to 14 of its Reasons, but it is helpful to repeat some here for context.

[8] The Application outlines certain factual underpinnings and legal bases as the statement of grounds for the relief it is seeking.

[9] The Application describes Valero as being a manufacturer, distributor and marketer of transportation fuels. It imports crude oil products from foreign jurisdictions into Canada, to its refinery located in Lévis, Quebec. Valero pays fees for international shipping services provided by carriers that are non-residents of Canada. From January 1, 2011 to December 31, 2015, Valero did not withhold 15% tax on its payments to the non-resident carriers, contrary to subsection 105(1) of the Regulations (Notice of Application, AB Vol. 1, Tab 4, p. 36, at paragraph 17).

[10] The CRA is currently auditing Valero's liability for the taxation years 2011 to 2015. In the course of that audit, the CRA is reviewing the payments Valero made relating to international shipping services provided by the non-resident carriers.

[11] Valero says it is relying on a well-established practice and long-standing administrative policy of the CRA permitting it to forego withholding the 15% tax on payments to the non-resident carriers. Valero asserts this practice and policy make perfect sense because the income tax payable by the non-residents in respect of income from international shipping from previous years was always nil.

[12] In addition, Valero states that the withholding requirements under section 105 of the Regulations only apply to the portion of international shipping services rendered in Canada, making it very difficult for Valero to determine the amount of withholding. It notes that several factors may be used to apportion fees paid for services rendered in Canada and outside Canada (Notice of Application, AB Vol. 1, Tab 4, p. 36, at paragraph 16).

[13] Furthermore, Valero maintains it has requested on numerous occasions, during meetings between its consultants and the CRA, a waiver of the requirement to withhold tax under section 105 of the Regulations (Respondent's memorandum of fact and law at paragraph 107). Valero says that the CRA did not dispute the assertions put forth by their consultants. Valero is also relying on a letter dated January 5, 2000, from the CRA to the consultants confirming the Minister's current practices under section 105 of the Regulations in situations involving international shipping services rendered in Canada.

[14] The Application discloses Valero's written offer to the CRA to make available all international shipping information requested in the requirement for information, provided the Minister undertake not to assess any withholding tax under section 105 of the Regulations in

respect of payments made for the portion of international shipping services rendered in Canada during the relevant period (Notice of Application, AB Vol. 1, Tab 4, p. 38.1, at paragraph 31).

[15] Finally, Valero acknowledges that it did not withhold or deduct any monies as required under section 105 of the Regulations. Valero admits never formally applying for a waiver under section 105 of the Regulations.

III. The standard of review

[16] On this appeal and cross-appeal from the judgment of the Federal Court, our Court is to apply the standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The standard of review to be applied to questions of law is correctness. Findings of fact and inferences of fact are to be reviewed on the basis of palpable and overriding error. Findings of mixed fact and law are to be reviewed on the same deferential standard unless an extricable legal error can be demonstrated, in which event such error is reviewed on the correctness standard.

IV. The issues on the appeal and cross-appeal

[17] The Crown raises four issues on its appeal.

[18] First, it submits that the Court erred when it found that the requirement for information was a "matter" within the meaning of subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and not a "decision" as described in subsection 18.1(2).

[19] Second, the Crown says that the 30-day time limit imposed by subsection 18.1(2) of the *Federal Courts Act* for filing the Application applies. Valero filed outside of that time limit. It has not brought a separate motion for an extension of time prior to the filing of the Application, therefore the Application should be struck.

[20] Third, the Crown submits that the Application should be struck as its true essence is a collateral attack on an assessment, or an attempt to prevent the Minister from assessing.

[21] Fourth, the Crowns maintains that paragraph 1(c) of the Application should be struck as it relates to Valero's challenge of the Minister's discretion under subsection 153(1.1) of the Act which was ruled as being premature and against Rule 302 of the *Federal Courts Rules*.

[22] On the cross-appeal, Valero raises three issues.

[23] First, it claims that the Court erred in striking Valero's request for a declaration finding arbitrary and unreasonable, and therefore invalid, the refusal of the Minister to exercise her discretion under subsection 153(1.1) in its favour.

[24] Second, it argues that the Court erred when it struck Valero's request for an interim order under Rule 55 of the *Federal Courts Rules* dispensing with the need for separate applications as required by Rule 302.

[25] Third, it maintains that the Court erred in finding that the parties' affidavits were inadmissible.

V. The test on a motion to strike a pleading

[26] On a motion to strike a notice of application for judicial review, this Court set out the relevant test to be followed in C*anada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557, at paragraph 47 [*JP Morgan*]: the Court will strike an application only where it is bereft of the possibility of success because there is "an obvious, fatal flaw striking at the root of this Court's power to entertain the application". The Federal Court correctly cited this test (Reasons at paragraph 6).

VI. Analysis of the issues raised on the appeals

[27] While the parties raise a number of issues and sub-issues on the appeal and cross-appeal, in my view, a single question is dispositive of the appeals. When looking at the entire Application, including most importantly its factual underpinnings, the real question turns on whether the Minister can be blocked from exercising her statutory authority under subsection 231.2(1) of the Act. While this appeal deals with the striking of an application for judicial review on administrative law principles, at its heart is the examination of the Minister's authority under subsection 231.2(1) of the Act to issue a requirement for information for use in an audit. A closer look at the text of subsection 231.2(1) is instructive.

Requirement to provide documents or information	**Production de documents ou fourniture de renseignements**

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,	**231.2 (1)** Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :
(*a*) any information or additional information, including a return of income or a supplementary return; or	*a*) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
(*b*) any document.	*b*) qu'elle produise des documents.

[28] The text is clear. The Minister may for any purpose related to the administration of the Act, including the collection of any amount payable under the Act, require that a person provide any information or additional information, or any document. This tool permits the Minister to properly administer and enforce the Act. On occasion, the Minister must have access to information and documents during the course of an audit in order to accurately review tax returns and decide whether to issue an assessment. In the appeals before us, once provided, this information would allow the Minister to complete her review of Valero's returns for its 2011 to 2015 taxation years, and determine whether she should issue an assessment.

VII. The statement of the relief sought

[29] In the Application, Valero requests an order setting aside the requirement for information issued on July 18, 2017, to provide information and documents under subsection 231.2(1) of the Act, insofar as it applies to international shipping issues. In my view, the Application stands or falls on this first request for relief. It is the lynchpin holding the elements of the Application together, failing which, the entire Application must be struck.

[30] Turning to the Crown's first issue, the requirement for information raises the question of whether in the factual context of this case it is a "decision" under subsection 18.1(2) or a "matter" under subsection 18.1(1). If it is a decision, the Application was filed outside of the 30-day time limit allowed in the *Federal Courts Act*.

[31] The Federal Court found that the requirement for information in the context of this case was a "matter" and therefore the 30-day time limit did not apply. It relied on the *Rosenberg v. Canada (National Revenue)*, 2015 FC 549, [2015] 4 C.T.C. 105 [*Rosenberg*] decision when arriving at this conclusion. The Crown argues that the case before us is distinguishable from *Rosenberg*.

[32] I agree. In the appeals before us, I would characterize the requirement for information at issue more properly as a decision. Valero frames the relief sought by relying on a policy and representations. Here, unlike in *Rosenberg*, there is no written agreement between the parties or

arguments surrounding the binding nature and the scope of such written agreement. A policy and representations are not akin to a written agreement between the CRA and a taxpayer.

[33] Furthermore, I would distinguish *Airth v. Canada (National Revenue)*, 2006 FC 1442, [2007] 2 C.T.C. 149 [*Airth*] from the appeals before us. In *Airth*, the judicial review attacked the entire audit process and there were 42 requirements for information (*Airth*, at paragraphs 2, 8-9). Here we have a singular decision to send a requirement for information.

[34] Notwithstanding my comments about the requirement for information being a "decision" in this case, I find that I need not address the Crown's second argument that the Application should be struck because it is out of time. If that were the only issue before us, the Application would likely not be struck without the Court having provided Valero the opportunity to file affidavit evidence to explain the reasons for the delay.

[35] I turn now to the Crown's third issue. As outlined in paragraph [29] above, the actual question is whether the Application has any possibility of success when reviewed in its entirety. If an order setting aside the requirement for information is granted, the Minister will be prevented from properly exercising her powers under the Act. She will be impeded from completing a fulsome review of Valero's taxation years of 2011 to 2015 and will be unable to calculate accurately what amount of tax, if any, should have been withheld by Valero in regards to the international shipping services provided to it in Canada. Valero itself admits in its Application that the calculation of these amounts is complex. Preventing the Minister from having the requested documentation in this context cannot stand.

[36] The Minister has not yet assessed. Once she has received the complete information and documents, she may well find that Valero has no liability. In my view, Valero cannot stop the Minister from carrying out her statutory duty under the Act to assess income tax payable by way of an application for judicial review. It is clear from the overall Application, noting in particular the settlement offer it made to the CRA, that this is precisely what Valero is attempting to do.

[37] Taking a holistic approach with a view to understanding the real essence of the Application, I find that in the circumstances of this case, the doctrines of promissory estoppel and legitimate expectations cannot be utilized to prevent the Minister from obtaining the necessary documents she requires to properly administer the Act and fulfill her obligations. The Minister is required to administer and enforce the Act. This positive duty encompasses, at the very least, an obligation to assess taxpayers under the Act and to take appropriate steps to collect unpaid taxes (*Vallelunga v. Canada*, 2016 FC 1329, [2017] 2 C.T.C. 192, at paragraphs 12-13). To accede to Valero's arguments would, effectively, override the power granted to the Minister under subsection 231.2(1) of the Act to obtain the proper documents to assess Valero during the 2011 to 2015 period. Again, this cannot be right (see also *Prince v. Canada (National Revenue)*, 2020 FCA 32, 314 A.C.W.S. (3d) 658, at paragraph 17).

[38] Valero's second request for relief in the Application is for a declaration that in the circumstances of this case, the CRA cannot require it to answer questions or submit documents seeking to review the withholding tax. This request is tied to the Minister's authority to request information under subsection 231.2(1) of the Act. Likewise, it must be struck.

[39] Finally, I would also strike Valero's alternative request for a declaration that the CRA made representations to it or that it had legitimate expectations that no withholding or deduction was required under section 105 of the Regulations in respect of payments made during the relevant period for international shipping services rendered in Canada. This is premature. Once the Minister receives the documents, if she assesses Valero for not withholding tax, Valero may have recourse in accordance with administrative law principles.

VIII. The cross-appeal

[40] I will now consider the issue of the admissibility of affidavits in support of the motion to strike the application for judicial review. It is well-established law that the statement of grounds in the application for judicial review must include the material facts necessary to show that the Court can and should grant the relief sought. It does not include the evidence by which those facts are to be proved (*JP Morgan*, at paragraph 40). As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review (*JP Morgan*, at paragraph 51).

[41] Quite properly in this case, the Federal Court did not admit any affidavit evidence on any of the issues before it. I have not been persuaded that there should be an exception to the rule against admitting affidavits on this motion to strike. Our review therefore is limited to the confines of the Application (Reasons at paragraphs 28-30).

[42] For the same reasons given by the Federal Court at paragraphs 37 to 41 of its Reasons, I have not been persuaded by the other arguments advanced by Valero in the cross-appeal. I find

that the Judge made no reviewable errors when she found that any review of the Minister's discretion under subsection 153(1.1) of the Act was premature. Therefore, it also follows that the related paragraph 1(f) of the Application, seeking an interim order under Rule 55 of the *Federal Courts Rules* for relief from the need to file a separate application as required by Rule 302, should be struck.

[43] The cross-appeal therefore cannot succeed.

IX. Conclusion

[44] In summary, taking a realistic appreciation of the essential character of the Application by reading it holistically and practically, I am of the view that the Application has no chance of success and is premature. It may not even be required if the Minister determines that Valero's tax liability is nil once she receives the documents to which she is entitled under subsection 231.2(1) of the Act. The Minister may exercise her discretion under subsection 153(1.1) of the Act in favour of Valero once she has completed her audit and assessments. If she does not exercise her discretion in Valero's favour once the assessments are complete, Valero may have administrative law arguments to advance before the Federal Court about procedural fairness and any representations upon which it relied at the time. However, for the time being, Valero must comply with the requirement for information and await the Minister's conclusions.

[45] As set out in paragraphs [36] to [40] above, I find that the Federal Court committed a reviewable error when it found that Valero's Application was not an attempt to prevent the

Minister from assessing Valero. This error was palpable and overriding, and fatal to the entire Application.

[46] For these reasons, I would allow the appeal and dismiss the cross-appeal, with costs.

"Marianne Rivoalen"
J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Yves de Montigny”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-129-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. VALERO ENERGY INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 24, 2020
REASONS FOR JUDGMENT BY:	RIVOALEN J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	MARCH 31, 2020

APPEARANCES:

Marie-France Camiré Ian Demers	FOR THE APPELLANT
Pierre-Louis Le Saulnier Frédéric Paré	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPELLANT
STIKEMAN ELLIOTT LLP Montréal, Quebec	FOR THE RESPONDENT