

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151102

Docket: A-472-14

Citation: 2015 FCA 239

**CORAM: RYER J.A.
BOIVIN J.A.
RENNIE J.A.**

BETWEEN:

CONNIE O'BYRNE

Appellant

And

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on November 2, 2015.
Judgment delivered from the Bench at Calgary, Alberta, on November 2, 2015.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Calgary, Alberta, on November 2, 2015).

RYER J.A.

[1] This is an appeal by Connie O'Byrne (the "Taxpayer") from an amended order of Justice Patrick Boyle (the "Judge") of the Tax Court of Canada (2014 TCC 136). In the amended order, the Judge dismissed an application by the Taxpayer to extend the time within which to serve notices of objection to a number of assessments and a reassessment (the "Assessments") issued

under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”) in respect of her taxation years from and including 1986 to and including 1997.

[2] In 1992, the Taxpayer and her husband separated and it was apparently agreed that any amounts owing under the Assessments would be paid by him.

[3] Upon becoming of an age that would entitle her to Canada Pension Plan, Old Age Security and other federal benefits (the “Entitlements”), the Taxpayer filed income tax returns for her 2009, 2010 and 2011 taxation years. She was surprised and dismayed to learn that according to the Canada Revenue Agency (the “CRA”), there was still an unpaid indebtedness in respect of the Assessments, which had not been paid by her estranged husband and which amounted to over \$40,000 (the “Tax Arrears”).

[4] After discussions with CRA officials in June of 2012, the Taxpayer applied for administrative relief in respect of the Tax Arrears. The CRA denied this request by correspondence dated May 2, 2013.

[5] On June 11, 2013, the Taxpayer filed a notice of objection with respect to her 1986 to 1998 taxation years. In this regard, it is noted that although the notice of objection included the Taxpayer’s 1998 taxation year, no Assessment was issued in respect of that year.

[6] The notice of objection was treated by the Minister as an application for an extension of time for serving a notice of objection, pursuant to subsection 166.1(1) of the Act.

[7] By correspondence dated June 26, 2013, the Minister advised the Taxpayer that her application for an extension of time was denied by virtue of the limitation in paragraph 166.1(7)(a) of the Act. Under that provision, an application cannot be granted if it is made later than one year after the end of the 90 day period in subsection 165(1) of the Act, within which a notice of objection in respect of a taxation year can be filed. In the circumstances, this limitation was missed by more than 10 years in relation to each of the taxation years in respect of which the Taxpayer purported to object.

[8] By correspondence dated September 27, 2013, the Taxpayer applied to the Tax Court of Canada, pursuant to subsection 166.2(1) of the Act, for the extension of time relief that the Minister had denied in respect of the Taxpayer's application pursuant to subsection 166.1(1) of the Act.

[9] The Judge denied the Taxpayer's application on the basis that it was made outside of the time period referred to in paragraph 166.2(5)(a) of the Act in respect of each of the applicable taxation years. That provision prevents the Tax Court of Canada from granting an extension of time where the application to the Minister under subsection 166.1(1) was made more than one year after the expiration of the 90 day period in subsection 165(1) of the Act, within which a notice of objection can be filed.

[10] The Judge determined that in fact the Taxpayer did not wish to dispute any of the Assessments that were made against her. The Judge described what he understood to be the Taxpayer's real complaint in relation to the computation of the amount of the Tax Arrears,

explained why the Tax Court of Canada had no jurisdiction to redress that complaint and urged counsel for the Minister to provide whatever assistance he could to point the Taxpayer in the direction of a possible avenue of redress for her complaint.

[11] In appellate review of a decision of the Tax Court of Canada, the standards of review are correctness, with respect to questions of law, and palpable and overriding error, with respect to questions of fact and mixed fact and law in respect of which there is no extricable question of law (see *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 7-37, [2002] 2 S.C.R. 235).

[12] We are of the view that in reaching his conclusion that the application for an extension of time to file the notices of objection must be dismissed, the Judge made no errors of law, fact or mixed fact and law.

[13] We commend the Judge for his efforts in going beyond what was necessary to explain the reasons for his denial of the application, making clear the limitations of the Tax Court of Canada in relation to the Taxpayer's real complaint and describing other possible venues where she might seek redress for that complaint.

[14] The Appellant has served and filed a Notice of Constitutional Question, raising for the first time a question of the constitutional validity, applicability and effect of subsection 152(9) and sections 166.1, 166.2, 222, 165 and 169 of the Act, on the basis that they contravene sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*.

[15] In *Guindon v. Canada*, 2015 SCC 41, 387 D.L.R. (4th) 228, the Supreme Court of Canada confirmed that this Court has the discretion to decide a newly raised constitutional question, in respect of which a Notice of Constitutional Question has been served and filed, but that such discretion should only be exercised in rare cases. In our view, this is not one of those rare cases. Having regard to the evidentiary record before the Court and the assertions of the Appellant, we are not persuaded that addressing this newly presented constitutional challenge is required by the public interest or important to the administration of the Act. Accordingly, we decline to exercise our discretion to consider the Appellant's constitutional question.

[16] For these reasons, the appeal will be dismissed without costs.

“C. Michael Ryer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-472-14

**(APPEAL FROM AN AMENDED ORDER OF JUSTICE PATRICK BOYLE DATED
AUGUST 1, 2014, DOCKET NO. 2013-3666(IT)APP)**

STYLE OF CAUSE:

CONNIE O'BYRNE v. HER
MAJESTY THE QUEEN

PLACE OF HEARING:

Calgary, Alberta

DATE OF HEARING:

NOVEMBER 2, 2015

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.
BOIVIN J.A.
RENNIE J.A.

DELIVERED FROM THE BENCH BY:

RYER J.A.

APPEARANCES:

Connie O'Byrne

FOR THE APPELLANT

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