

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20101004**

**Docket: A-166-10**

**Citation: 2010 FCA 254**

**Present: STRATAS J.A.**

**BETWEEN:**

**TERRY LONG**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard via tele-conference between Ottawa, Ontario,  
Castlegar, British Columbia and Vancouver, British Columbia on September 29, 2010.

Order delivered at Ottawa, Ontario, on October 4, 2010.

**REASONS FOR ORDER BY:**

**STRATAS J.A.**

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**REASONS FOR ORDER**

**STRATAS J.A.**

[1] The appellant, Mr. Long, has appealed to this Court from an interlocutory order of the Tax Court of Canada (2010 TCC 197). Mr. Long has now moved in this Court for various forms of relief. The primary relief sought is a stay or suspension of the Tax Court's interlocutory order until this Court decides the appeal.

[2] To get this relief, Mr. Long must show that his appeal is arguable, he will suffer irreparable harm if the Tax Court's order is not stayed, and the balance of convenience lies in his favour: *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[3] This Court will grant the stay. The respondent has conceded that there is an arguable case on appeal, in the sense that the law does not render Mr. Long's appeal frivolous. Further, as will be seen below, the respondent has not made submissions that seriously contest the remaining parts of the *RJR-MacDonald* test.

A. *Background*

[4] The Minister of National Revenue believes that certain business income of Mr. Long should have been included in his income for income tax purposes. The Minister issued an assessment to that effect. Mr. Long challenges that assessment. He has appealed to the Tax Court.

[5] A dispute has arisen in the Tax Court about disclosure of relevant documents and information. Mr. Long is concerned that if he discloses a list of relevant documents, the documents themselves, and other information to the respondent, the existence of criminality may be revealed. Mr. Long says that the respondent may pass this information along to investigators at the Canada Revenue Agency, to prosecutors at the Department of Justice and/or to officers of the Royal Canadian Mounted Police. Therefore, Mr. Long says that requiring him to disclose may require him to self-incriminate, contrary to his rights under the Charter.

[6] Mr. Long raised this issue in the Tax Court. He sought an order that only the respondent should make disclosure in the Tax Court appeal, and alternative relief. The Tax Court dismissed his motion and ordered, among other things, that Mr. Long prepare and serve a list of documents by a certain date, under section 81 of the *Tax Court of Canada Rules (General Procedure)*. This is the order that Mr. Long appeals to this Court and seeks to stay in this motion.

*B. Analysis*

[7] On this motion, the respondent has conceded that the appeal raises a serious issue to be tried. It has not argued that self-incrimination cannot arise on the law as applied to these facts, *e.g.* that there is some case that conclusively denies Charter protection to Mr. Long on these facts. Accordingly, this motion turns on whether there is irreparable harm and whether the balance of convenience lies in Mr. Long's favour.

[8] Mr. Long has filed evidence on these issues. He alleges that disclosure would reveal criminality, but what the criminality might be is vague. Mr. Long did not seek to file his sensitive evidence under the protection of a confidentiality order. This Court is left to assess this evidence, vague as it is.

[9] The respondent did not cross-examine Mr. Long on this evidence, nor did it file evidence rebutting it. The respondent's concession that there is an arguable case that disclosure would result

in self-incrimination could be taken as a concession that there is a genuine concern about the disclosure of criminality. The respondent's main submission is that there is "no evidence of irreparable harm," a submission that is plainly wrong: Mr. Long has put forward evidence, albeit vague evidence.

[10] The Tax Court was prepared to accept that Mr. Long had a genuine concern about the disclosure of criminality. In light of the state of the evidence and the ruling of the Tax Court, this Court is prepared to accept, for the purposes of this motion only, that Mr. Long has a genuine concern about the disclosure of criminality. Further, based on the evidence, albeit vague, filed by Mr. Long and the concession by the respondent that the arguments based on self-incrimination are not frivolous, this Court accepts that the disclosure of criminality could work severe consequences to Mr. Long.

[11] In its reasons for decision, the Tax Court felt that Mr. Long's concerns about disclosure and distribution of his information would not arise because the respondent would be subject to a blanket obligation to keep confidential all material disclosed to it (at paragraph 27):

[Mr. Long] is concerned that information he provides will be used in criminal proceedings against him. The concept of implied undertaking confirms that documents produced during the discovery process will not be used by the [Canada Revenue Agency] for collateral purposes.

(On the scope of the implied undertaking, see generally *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157.)

[12] The Tax Court's finding that the respondent is subject to a blanket confidentiality obligation normally would be a complete answer to Mr. Long's concern that material disclosed to the respondent might find its way elsewhere. However, during the parties' oral submissions on the motion in this Court, it became apparent that there is great uncertainty regarding the scope of this obligation. Despite the statement of the Tax Court, the respondent sees some potential for it or others to use Mr. Long's disclosure at some time. The respondent was not prepared to restrict this potentiality in any way.

[13] Often when there is uncertainty regarding the nature and extent of the confidentiality obligation over material to be disclosed in litigation, the parties proceed to court by way of motion in order to define the obligations with particularity. That has not happened here.

[14] In this motion, it is not for this Court to pronounce on whether there is a confidentiality obligation as broad as that suggested by the Tax Court, or whether the respondent can use discovery information in some circumstances at some times for some purposes. That issue may be relevant to the merits of the appeal before this Court. Until this Court hears and determines the merits of the appeal, we are left with the respondent's position concerning the scope of its confidentiality obligation. The respondent takes a narrower view of that obligation than the Tax Court does. Accordingly, Mr. Long's concerns would appear to be justified: his sensitive disclosures may well be used in a manner that will cause irreparable harm.

[15] On the issue of the balance of convenience, the respondent has asserted that Mr. Long is the author of his own misfortune: he has appealed the income tax assessment against him and this has triggered the potential of harmful disclosures. That is true. But Mr. Long has the statutory right to challenge the assessments against him. And, as for who has created the potential for harm, the respondent bears some responsibility. In the face of Mr. Long's concerns, it has not attempted to restrict itself or define its confidentiality obligation but, instead, has left open the possibility of collateral use of the information, contrary to the Tax Court's statement in paragraph 11, above. This is not meant as criticism of the respondent; its position might end up being vindicated in this Court. However, the respondent's position does make it appropriate that the *status quo* be maintained pending the appeal.

[16] Also on the issue of the balance of convenience, the respondent has not filed any evidence or made any submissions regarding the need for the matters in the Tax Court to proceed quickly. It did not point to evidence that there would be any specific prejudice if the decision of the Tax Court were stayed. Indeed, it is evident that until the appeal in this Court is heard and determined, the Tax Court proceedings will be ensnared in these disclosure issues and may not progress quickly or in an orderly way. Finally, if a stay is not granted, Mr. Long's appeal to this Court will be moot. Therefore, considering all these discretionary factors, this Court finds that the balance of convenience is in Mr. Long's favour.

[17] Finally, the respondent submitted that a stay should be denied because of Mr. Long's failure to follow a scheduling order made by the Tax Court.

[18] It is true that from the time the scheduling order was made, Mr. Long did not follow it. This would normally be a matter of very serious concern. Mr. Long explains the delay by saying that he was concerned that complying with the scheduling order would reveal his sensitive information and make his appeal moot. He acted on his concern. Soon after the Tax Court made the scheduling order, Mr. Long brought a motion in the Tax Court to adjust it, and he filed his notice of appeal in this Court. At roughly the same time, Mr. Long sought out the respondent's position regarding a stay pending appeal to this Court. In my view, these steps show that Mr. Long did not intend to flout the Tax Court's scheduling order. Rather, he only wanted to have this Court adjudicate his appeal before he suffered any harm. In the circumstances of this case, Mr. Long's failure to follow the scheduling order should not deny him entitlement to a stay.

[19] Therefore, all three elements of the *RJR-MacDonald* test have been satisfied. The decision of the Tax Court is stayed pending determination of Mr. Long's appeal. Mr. Long shall have his costs.

*C. Scheduling issues*

[20] The appellant also sought an order scheduling this proceeding on an expedited basis. The respondent consents to such an order.



[21] Mr. Long has not progressed his appeal significantly in this Court. The discipline supplied by a scheduling order is needed. Further, the stay that has been granted by this Court should remain in place for the shortest time possible. Therefore, this Court will set a schedule for the completion of the procedural steps in this appeal.

[22] During oral submissions, the deadlines set out in this Court's order were discussed and agreed to by both parties. The schedule embodies some shortening of the normal deadlines under the *Federal Courts Rules*. Mindful of Mr. Long's somewhat dilatory pace in this Court to date, this Court warns him, as it did during argument on the motion, that any failure to meet the deadlines ordered by this Court may well result in the dismissal of his appeal without further notice to him.

"David Stratas"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-166-10

**STYLE OF CAUSE:** Terry Long v. Her Majesty the Queen

**MOTION DEALT VIA TELE-CONFERENCE WITH APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** Stratas J.A.

**DATED:** October 4, 2010

**APPEARANCES:**

Terry Long  
David Lindsay

FOR THE APPELLANT

Elizabeth McDonald  
David Everett

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT