

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170620

Docket: A-135-16

Citation: 2017 FCA 129

**CORAM: GAUTHIER J.A.
DE MONTIGNY J.A.
WOODS J.A.**

BETWEEN:

STEVE GRIER

Appellant

And

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on June 15, 2017.

Judgment delivered at Ottawa, Ontario, on June 20, 2017.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**DE MONTIGNY J.A.
WOODS J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. Grier appeals the decision of Rowe D.J. of the Tax Court of Canada (TCC) dismissing his appeals from a number of reassessments made pursuant to the *Income Tax Act* R.S.C. 1985, c. 1(5th supp.) (the Act) for the 2007, 2008 and 2009 taxation years. The TCC upheld the gross negligence penalty assessed by the Minister of National Revenue (the Minister).

[2] The only issue before the TCC at trial was whether the imposition of the gross negligence penalty for the 2009 taxation year pursuant to subsection 163(2) of the *Act* was justified.

[3] In a detailed decision rendered orally, the TCC found that Mr. Grier was wilfully blind in placing his absolute trust in Fiscal Arbitrators, an unscrupulous tax preparer, after reviewing the indicia set out in *Torres v. The Queen*, 2013 TCC 380 at para. 65, 235 A.C.W.S. (3d) 844, a decision confirmed by our Court in *Strachan v. The Queen*, 2015 FCA 60, 250 A.C.W.S. (3d) 352.

[4] Mr. Grier had claimed a business loss of \$120,572.00 for the 2009 taxation year based on what was described as “gross business or professional income receipts as agent” in the amount of \$18,664.06 minus expenses described as “amount to principal from agent” in the amount of \$139,236.06. He also filed a Request for Loss Carryback for his 2006, 2007 and 2008 returns totalling \$104,755.00. It is worth noting that for the taxation year 2009, Mr. Grier also reported income of \$15,817.00 (unemployment insurance benefits). As a result of these claims, the Minister assessed the 2007, 2008 and 2009 taxation years and Mr. Grier received refunds from the Canada Revenue Agency (CRA) totalling \$20,831.56. Subsequently, reassessments were issued to deny the business loss and the refunds.

[5] At the trial, Mr. Grier was the only witness. Although the burden of establishing the right to apply a penalty was on the Minister, Mr. Grier produced no documentary evidence to support the reported amount of business revenue and business expenses incurred. The only document he filed was an affidavit he swore before a Commissioner for taking Affidavits in the Registry of

the TCC on the morning of the hearing, March 21, 2016, and which he asked to file after the Minister had completed her examination-in-chief. The Minister's evidence essentially consisted of Mr. Grier's examination and documents filed by Mr. Grier with the CRA or issued to him by the CRA (such as tax returns and the Request for Loss Carryback, notices of objection, notice of confirmation for the 2007, 2008 and 2009 taxation years, etc.) as well as four letters sent to him by the CRA between February 7, 2011 and November 6, 2012. The Minister also filed an affidavit of an officer of the CRA pursuant to subsection 244(9) of the *Act*.

[6] It appears, although this is not very clear, that a copy of these documents was received by Mr. Grier on March 17, 2016, while he apparently received a copy of the Minister's Book of Authorities the next day, on March 18, 2016 (a Friday).

[7] In this appeal, Mr. Grier, a self-represented litigant, does not contest the actual findings of the TCC in respect of the Minister's tax assessment. Rather, he argues that the TCC breached its duty to act fairly and submits that the TCC failed to seriously consider the evidence and arguments in his affidavit.

[8] It is thus worth reviewing in some detail the nature of this affidavit as I will deal first with Mr. Grier's second argument, including his constitutional argument based on subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The affidavit consists of nine paragraphs which essentially summarize Mr. Grier's arguments. For example, paragraphs 2, 3 and 7 of the said affidavit read as follows:

...

2. That at all times a man's labour is private property created from his body and or mind, and this private property belongs to the man creating it.
3. A man's private property labour that is exchanged for equal value cannot be regarded as a profit or gain under the Income Tax Act and therefore any money received, is not taxable.
7. Source deduction taxes, which are withheld from the Affiant's wages suggests that the amounts earned in exchange for labour by the Affiant are net profits and therefore, it is suggested that this imposed obligation by the Minister of the Canadian Revenue Agency does not comply with section 15.1 of the Charter of Rights and Freedoms, as the Affiant's right to equal protection and equal benefit of the law, being the Income Tax Act is not being afforded to the Affiant, in the same manner as they are afforded to major corporations.

...

[9] In his memorandum of fact and law, Mr. Grier refers to a statement at paragraph 6 of the affidavit where he swears "the Affiant asserts his right to operate as a business at all times ...". He submits that this constitutes evidence that he operated a business and should have been considered as such by the TCC.

[10] The TCC noted in its reasons that this affidavit was in a form and uses words that the TCC had seen many times before and that have been referred to in several reported cases. With regard to the argument therein, it found:

...

Basically, it is without foundation. It is without merit and has been found to have been without merit many, many times, and it is part of the boilerplate nonsensical material that was generated by Fiscal Arbitrators and its many imitators over the past few years as part of that amorphous organization or disorganization of individuals known collectively now as detaxers. There is no merit whatsoever in the assertions contained in the affidavit filed as Exhibit A-1.

...

[11] When this Court asked Mr. Grier at the hearing what wages he was referring to at paragraph 7 of his Affidavit and what evidence, if any, supported his constitutional argument based on subsection 15(1), Mr. Grier could not provide any answer. He said that he had not recently reviewed the documents in the Appeal Book.

[12] Although Mr. Grier was adamant that he used his own words in paragraph 7 of the Affidavit, he was not able to specify which ground of discrimination enumerated in subsection 15(1) of the *Charter* he was relying on.

[13] This panel was confronted with a similar situation a few days before this hearing in the appeal of Mr. Engel, another former client of Fiscal Arbitrators (see 2017 FCA 122).

[14] The argument based on subsection 15(1) of the *Charter* is not included in the Fresh Notice of Appeal dated October 15, 2013, that Mr. Grier filed or that was filed under his signature, to contest the Minister's tax assessment. Mr. Grier did not serve a Notice of Constitutional Question on the Attorney General of Canada or on the Attorney General of each province in accordance with section 19.2 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2 (TCC Act). Such notice is normally a prerequisite to a *Charter* challenge of any section of the *Act* before any Court of Law.

[15] In the circumstances, it is not surprising that the TCC did not deal with Mr. Grier's *Charter* argument based on subsection 15(1) at any length.

[16] Among other things, there is no doubt that the subsection 15(1) argument has no merit as the discrimination referred to by Mr. Grier is not based on any of the grounds enumerated in this provision or any other analogous ground.

[17] Mr. Grier raised for the first time before us a *Charter* argument based on subsection 6(2). Given that subsection 6(2) of the *Charter* was not raised before the TCC and is not at all developed in Mr. Grier's memorandum, this Court should not deal with it.

[18] I now turn to Mr. Grier's main argument that the trial was conducted in a biased manner. Such argument is serious as it puts into question not only the integrity of the trial judge involved, but of the whole administration of justice. This is why an allegation of bias requires convincing evidence.

[19] The test is a "reasonable apprehension of bias". This means that the apprehension must be held by reasonable and right-minded persons applying themselves to the question and obtaining thereon the required information. In other words, the question before us is: "would an informed person viewing the matter realistically and practically conclude that the judge would not decide fairly".

[20] To meet this burden, Mr. Grier argues that the TCC improperly dismissed his oral motion for adjournment, disregarded a prior case management Order issued on August 5, 2015, used inappropriate and offensive language in reference to the nature of his argument, and as

mentioned, did not fairly consider his arguments especially when one compares its brief reasons with the detailed reasons dealing with the Minister's argument and evidence.

[21] I have already explained why it was not improper in the circumstances for the TCC to deal only summarily with Mr. Grier's *Charter* argument. Further, as explained by the TCC to Mr. Grier at the hearing, the TCC had to assess based on the facts before it and the indicia established in the caselaw whether the Minister was entitled to impose a penalty.

[22] With respect to the dismissal of his oral request for an adjournment, it is important to first mention that contrary to Mr. Grier's apparent belief, he had no absolute right to an adjournment to retain legal counsel (*Wagg v. Canada (Attorney General)*, 2003 FCA 303 at para. 19). The decision as to whether to grant an adjournment is a discretionary decision of a trial judge.

[23] Here, Mr. Grier asked the TCC for an adjournment at the beginning of the trial on the basis that he did not have time to "discover" the documents delivered to him only a few days before the hearing. He said that he had little time to look at them and that, in any event, he did not understand them.

[24] When it appeared that the TCC was not inclined to grant the adjournment on that basis, Mr. Grier added that he wanted to retain a counsel who had been recommended to him but was too busy to attend to the matter immediately. No details were given as to when this attempt was made and why he could not otherwise obtain legal advice or representation.

[25] Although in his memorandum, Mr. Grier states that he was entitled to no less than seven clear days for the disclosure of documents under the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (Rules of General Procedure), he acknowledged before us that what he was really relying on before the TCC was an Order dated August 5, 2015, which set out among other things, that lists of documents had to be exchanged 90 days before the hearing and that discovery if any was to take place no later than 60 days before the said hearing, which was set for March 21, 2016.

[26] At the hearing, the Minister explained that this Order must have been issued in error when many appeals involving Fiscal Arbitrators' clients were set for a case management conference over a period of three days. The list of cases in the Supplementary Appeal Book at pages 16 to 26 indicates that as many as 321 appeals were involved, comprising a mix of general and informal procedures. On June 25, 2015, the informal procedure appeal filed by Mr. Grier (the Fresh Notice of Appeal dated October 15, 2013) was reviewed with 94 other cases and an Order was issued in Mr. Grier's appeal as if it had been filed under the TCC Rules for General Procedure. The Minister wrote to the TCC to obtain a direction as to whether or not an amended Order had to be sought, as this was an informal procedure that had not been "bumped up" to a general procedure. The TCC wrote to Mr. Grier for comments in that respect and received none. No Amended Order was issued.

[27] At the hearing, the TCC explained to Mr. Grier that there was no right to discovery under the informal procedure. The TCC was not satisfied that Mr. Grier had been diligent in seeking an adjournment for retaining counsel or seeking relevant advice even from the TCC website.

Having considered the nature of the proceedings, it found that Mr. Grier had more than two and a half years to take the necessary steps to prepare himself, and that the mandate of the TCC was to proceed without any further delay. The adjournment was denied. The TCC also noted that in respect of the only issue before it (the penalty), the Minister had the onus of proof.

[28] As is apparent from the file number on his Fresh Notice of Appeal, Mr. Grier elected to proceed according to the informal procedure. The Rules of General Procedure do not apply to such simplified process. The vast majority of appellants using this process are self-represented litigants and the process is meant to deal with such appeals expeditiously.

[29] Pursuant to subsection 18.15(3) of the TCC Act, the TCC is not bound by any legal or technical rules of evidence in conducting a hearing under the informal procedure and the appeal must be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

[30] The Order dated August 5, 2015 was spent as the deadline to seek discovery of a representative of the CRA was well past. It was not unfair for the TCC to proceed without giving the right to Mr. Grier to discover the documents given that under the informal procedure, such process is generally not available.

[31] In theory, Mr. Grier could object to the fact that the Minister had failed to provide him with a list of documents ninety days before the hearing. However, the TCC still had the power to admit those documents, especially considering their nature. During his testimony, Mr. Grier

stated that he did not recall receiving or reading any of the documents. In any event, he noted that he was under strict instruction from Fiscal Arbitrators to simply forward to them any correspondence or documents received from the CRA, and this is exactly what he did.

[32] I also note that the documents in the Minister's Book of Documents received by Mr. Grier four days before the hearing were mostly the documents evidencing the material facts listed in his Fresh Notice of Appeal. I am satisfied that the TCC did not treat Mr. Grier unfairly when it denied his request for an adjournment. In his testimony later on, Mr. Grier said that he was still considering whether he needed counsel (Appeal Book at p. 159, lines 3-4).

[33] There is also nothing untoward in the manner in which the TCC dealt with the August 5, 2015 Order. In that respect, it is worth mentioning that the TCC treated Mr. Grier exactly as it treated the Minister and allowed him to file his affidavit, even if no prior notice (list of documents or otherwise) had been given to the Minister. I have not been persuaded that the TCC made a reviewable error in denying the said adjournment.

[34] I agree with Mr. Grier that the TCC used stronger language than it should have (Appeal Book at p. 169, line 27) when the Minister's counsel was insisting on questioning Mr. Grier to clarify the allegations in his affidavit after he had already answered that it was for the Minister to decipher what he meant in his affidavit.

[35] Obviously, this Court does not condone objectionable language, but the TCC made it clear later on in its oral reasons that what it meant was that the arguments in the affidavit were

nonsensical. In and of itself, this language would not be sufficient in the particular circumstances of this matter and considering all of Mr. Grier's arguments before us, to conclude that there was a reasonable apprehension of bias.

[36] I would therefore dismiss the appeal with costs fixed at an amount of \$1,000.00 (all inclusive).

"Johanne Gauthier"

J.A.

"I agree
Yves de Montigny J.A."

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-135-16

**APPEAL FROM A JUDGMENT OF THE HONOURABLE D.W. ROWE DATED
MARCH 31, 2016, DOCKET NO. 2013-1837(IT)I**

STYLE OF CAUSE: STEVE GRIER v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 15, 2017

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

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

DATED: JUNE 20, 2017

APPEARANCES:

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ON HIS OWN BEHALF

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