

Federal Court of Appeal



Cour d'appel fédérale

fDate: 20170921

**Dockets: A-315-16
A-316-16**

Citation: 2017 FCA 194

**CORAM: NADON J.A.
STRATAS J.A.
WEBB J.A.**

Docket: A-315-16

BETWEEN:

**GIUSEPPE MONTANA a.k.a GIUSEPPI MONTANA
AND JOE MONTANA, 1585677 ONTARIO LTD. and
PRIVATE DISPOSAL SYSTEMS LTD.**

Appellants

and

MINISTER OF NATIONAL REVENUE

Respondent

Docket: A-316-16

AND BETWEEN:

**LUCA M. CICIARELLI a.k.a LUCA CICARELLI
and 1585677 ONTARIO LTD.**

Appellants

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on September 21, 2017.
Judgment delivered from the Bench at Toronto, Ontario, on September 21, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on September 21, 2017).

STRATAS J.A.

[1] The appellants appeal an order dated August 9, 2016 of the Federal Court (*per* Brown J.). In this order, the Federal Court denied the appellants' request for an adjournment of the respondent's application. The respondent applied for an order requiring the appellants to comply with certain requirements issued under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and the *Excise Tax Act*, R.S.C. 1985, c. E-15.

[2] Two substantially similar appeals have been brought. These reasons deal with both appeals. A copy of these reasons shall be placed in each appeal file.

[3] The Federal Court's decision to deny the adjournment was a discretionary one very much based on the facts before it. It can be set aside only if the Federal Court erred in law or in principle or if it committed palpable and overriding error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. As is well-known, palpable and overriding error is a high standard: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46 and *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77.

[4] The Federal Court identified a number of well-recognized considerations that could support an adjournment. These included the appellants' failure to offer evidence in support of their adjournment request, their delay in retaining counsel in circumstances where they could have obtained one earlier, the appellants' delay in satisfying requirements to produce the required documents, the non-responsiveness of the appellants' earlier correspondence that was "calculated to delay the Minister's request," and the overall delay in the respondent's application and the need for it to be determined promptly.

[5] In oral argument, the appellants submitted that they were not impugning the Federal Court's decision on the basis of palpable and overriding error.

[6] In essence, the appellants submitted that because they suffered procedural unfairness on these facts, there was an error of law. Absent a demonstration of legal error, whether there was procedural unfairness on these facts is a question of mixed fact and law reviewable only on the basis of palpable and overriding error.

[7] During oral argument, the appellants submitted that any time an unrepresented litigant advises the Court that counsel has been retained the Court is bound as a matter of law to adjourn. We disagree. While in a case like this the retaining of counsel is no doubt deserving of very significant weight and is often determinative, other factors—such as those the Federal Court identified and considered here—also fall for consideration. Whether, on balance, on particular facts, an adjournment should be granted is a question of mixed law and fact reviewable on the

ground of palpable and overriding error. Again, the appellants do not argue palpable and overriding error in this case.

[8] The appellants submit that this Court's decision in *Siloch v. Canada (Minister of Employment and Immigration)* (1993), 10 Admin. L.R. (2d) 285, 151 N.R. 76 sets out factors that must be considered whenever a party requests an adjournment. We do not agree that a failure to consider a *Siloch* factor constitutes an error of law. Rather, the *Siloch* factors, developed in the immigration context, are a non-exhaustive list of the sorts of factors a judge deciding a case like this may find useful on the facts of the case.

[9] During argument, the appellants noted that the record before the Federal Court was incomplete. On this, the Federal Court noted that the appellants failed to file any affidavit in support of their request for an adjournment. We are satisfied that the Federal Court had an adequate basis in the material before it and the submissions made to it to decide upon the adjournment request.

[10] The principles governing whether or not an adjournment should be granted are set out in the principles of procedural fairness and the factors in Rule 3 of the *Federal Courts Rules*, SOR/98-106.

[11] The Federal Court considered the aspects of these principles that were live on the facts of this case and, in doing so, committed no error in law or in legal principle.

[12] We note that the appellants did not challenge the merits of the Federal Court's granting of the respondent's application. In some circumstances, this can render a procedural challenge moot. For this reason, a notice of appeal—the document that defines the scope of an appeal—should be drafted with care.

[13] We also want to make it clear that these reasons do not foreclose the possibility that a denial of the right to counsel by itself in some circumstances can constitute legal error reviewable on correctness. Given the fact-based and discretionary nature of the Federal Court's order here and given the appellants' failure to challenge the Federal Court's decision on the merits of the application, that is not the case here.

[14] Therefore, for the foregoing reasons, we will dismiss the appeals with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-315-16 AND A-316-16

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BROWN DATED AUGUST 9, 2016, DOCKET NOS. T-1148-16 and T-1147-16

DOCKET: A-315-16

STYLE OF CAUSE: GIUSEPPE MONTANA a.k.a
GIUSEPPI MONTANA AND JOE
MONTANA, 1585677 ONTARIO
LTD. and PRIVATE DISPOSAL
SYSTEMS LTD. v. MINISTER OF
NATIONAL REVENUE

AND DOCKET: A-316-16

STYLE OF CAUSE: LUCA M. CICIARELLI, a.k.a
LUCA CICARELLI and 1585677
ONTARIO LTD. v. MINISTER OF
NATIONAL REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 21, 2017

REASONS FOR JUDGMENT OF THE COURT BY: NADON J.A.
STRATAS J.A.
WEBB J.A.

DELIVERED FROM THE BENCH BY: STRATAS J.A.

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