

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180327

Docket: A-200-16

Citation: 2018 FCA 62

**CORAM: WEBB J.A.
NEAR J.A.
LASKIN J.A.**

BETWEEN:

RONALD BAUER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on December 6, 2017.

Judgment delivered at Ottawa, Ontario, on March 27, 2018.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**NEAR J.A.
LASKIN J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal raises the issue of whether it is plain and obvious that, in a proceeding before the Tax Court of Canada related to the validity of a reassessment, certain evidence cannot be excluded based on section 8 of the *Canadian Charter of Rights and Freedoms* (the Charter). The evidence in issue was obtained by the Canada Revenue Agency (CRA) as a result of issuing requirements for information under subsection 231.2(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (ITA). Prior to issuing the requirements, an investigation had commenced to

determine if charges should be laid in relation to an offence under section 239 of the ITA and the same person who was conducting the investigation also issued the requirements for information.

[2] This matter arises as a result of a motion by the Crown to strike certain portions of an amended notice of appeal that Mr. Bauer had filed with the Tax Court of Canada. The Tax Court judge allowed the motion of the Crown (2016 TCC 136) and struck several paragraphs of Mr. Bauer's amended notice of appeal. Mr. Bauer has restricted his appeal to only those paragraphs that were struck that relate to his argument that any information that was obtained as a result of the requirements is not admissible in the proceedings before the Tax Court of Canada related to the appeal of his reassessments, because, in his view, his rights under section 8 of the Charter were infringed.

I. Background

[3] Mr. Bauer moved to Canada in 2004. As a result of a referral from a law enforcement agency the CRA special investigations division started an investigation on December 1, 2010. For the purposes of this appeal, it is assumed that the purpose of this investigation was to determine if Mr. Bauer should be charged in relation to an offence under section 239 of the ITA. As part of this investigation, requirements were issued to two banks under subsection 231.2(1) of the ITA. Largely based on the documents that were then obtained from the banks, a net worth assessment was prepared which resulted in the CRA determining that Mr. Bauer had unreported business income and a tax liability for 2007 and 2008. Following certain representations made by Mr. Bauer to the CRA, he was reassessed on the basis that he had unreported business income of \$5,855,773 for 2007 and \$4,815,601 for 2008. It is these reassessments that Mr. Bauer has appealed to the Tax Court of Canada.

[4] Mr. Bauer filed an amended notice of appeal with the Tax Court of Canada in relation to these reassessments. As part of the amended notice of appeal he alleged that the investigation related to section 239 of the ITA had commenced before the audit had commenced. He, therefore, alleged that he was under investigation at the time that the requirements were issued under section 231.2(1) of the ITA. His argument, in this amended notice of appeal, is that any information obtained under these requirements is inadmissible in his proceedings before the Tax Court of Canada because his rights under section 8 of the Charter were infringed. The Crown brought a motion to strike these parts of the amended notice of appeal as well as other parts that are no longer in dispute.

II. Decision of the Tax Court

[5] As noted by the Tax Court judge, the Supreme Court of Canada in *Her Majesty the Queen in Right of Canada v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paragraph 17, confirmed that “[a] claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action” or that “the claim has no reasonable prospect of success”.

[6] The Tax Court judge allowed the Crown’s motion and struck the paragraphs that are the subject of this appeal based on the decisions of the Supreme Court of Canada in *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 (*Jarvis*) and the decisions of this Court in *Romanuk v. Her Majesty the Queen*, 2013 FCA 133, 445 N.R. 353 (*Romanuk*) and *Piersanti v. Her Majesty the Queen*, 2014 FCA 243, 466 N.R. 129 (*Piersanti*). Leave to appeal to the Supreme Court of Canada for *Romanuk* and *Piersanti* was denied.

III. Issue and Standard of Review

[7] Mr. Bauer's argument in this appeal is a legal argument – whether in law it is plain and obvious that evidence obtained as a result of the issuance of a requirement under subsection 231.2(1) of the ITA, at a time when an investigation is ongoing, cannot be excluded from proceedings before the Tax Court of Canada as a result of the application of section 8 of the Charter. Since this is a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

IV. Analysis

[8] In making a determination with respect to whether certain pleadings should be struck, the facts as alleged in those pleadings are assumed to be true. Therefore, in this case, it is to be assumed that the person conducting the penal investigation on behalf of the CRA was the same person who issued the requirement under subsection 231.2(1) of the ITA to the two banks. It is also to be assumed that at the time that such requirements were issued, the primary focus of the investigation was in relation to the possibility of charging Mr. Bauer with offences under section 239 of the ITA.

[9] Based on these assumptions, the question is whether it is plain and obvious that Mr. Bauer cannot succeed, based on section 8 of the Charter, in having the evidence obtained from the banks excluded from his Tax Court of Canada hearing in relation to the reassessments that were issued.

[10] In *Romanuk* the issue before this Court was whether the taxpayer should have been allowed to amend her notice of appeal to add certain pleadings. The additional pleadings alleged that the CRA violated Ms. Romanuk's rights under sections 7 and 8 of the Charter by using its audit powers under section 231.1 of the ITA after an investigation had been commenced in relation to section 239 of the ITA. Ms. Romanuk was seeking to have the evidence obtained as a result of the use of the audit powers by CRA excluded from her hearing before the Tax Court of Canada.

[11] In confirming the decision of the Tax Court judge in *Romanuk* that leave should not have been granted to amend the notice of appeal, this Court stated that:

6 Assuming that the proposed additional facts are proven, it does not seem to me that the appellant has any cause of action arising from these additional facts. In *R. v. Jarvis*, [2002] 3 S.C.R. 757, the issue was whether the audit and inspection rights under subsection 231.1(1) of the *Act* and the requirement to produce documents or information under subsection 231.2(1) of the *Act* could be used to gather information or documents for the purpose of prosecuting a person in relation to an offence under section 239 of the *Act*. The Supreme Court referred to the distinction between an audit inquiry related to the administration of the *Act* (which could include the assessment of penalties under subsections 162(1) and 163(2) of the *Act*) and an investigation that could lead to charges for an offence under section 239 of the *Act*. Once the "predominant purpose" of an inquiry is related to the investigation and prosecution of an offence under section 239 of the *Act*, the CRA can no longer use its inspection and requirement powers under subsections 231.1(1) and 231.2(1) of the *Act* to gather information or documents that may be used in such investigation and prosecution (paragraphs 46 and 88 of *Jarvis*).

7 In paragraph 103 of *Jarvis*, the Supreme Court also confirmed that "...it is clear that, although an investigation has been commenced, the audit powers may continue to be used, though the results of the audit cannot be used in pursuance of the investigation or prosecution". Since the audit powers may continue to be used, even though the results cannot be used in relation to an investigation or prosecution, the results can be used in relation to an administrative matter, such as a reassessment.

8 The use of such information or documents in administering the *Act* and reassessing the appellant does not violate her rights under either section 7 or 8 of

the *Charter* because the CRA has the right to continue to use its audit powers provided that the information or documents are only used for the purposes of administering the *Act*. If the information or documents are to be used in an investigation or prosecution of an offence under section 239 of the *Act*, the issue for the particular court dealing with the prosecution of the offence under section 239 of the *Act*, will be whether the predominant purpose of the exercise of such powers was to gather information or documents for such investigation or prosecution.

[12] Mr. Bauer's argument is that his case can be distinguished from *Romanuk* on the basis that while the audit powers remain in effect following the commencement of an investigation, these powers cannot be exercised by the same person who is doing the investigation related to section 239 of the ITA. In my view this distinction is not material. If the powers can be exercised by two different individuals at CRA there does not seem to be any reason why the powers cannot be exercised by the same person at CRA. In each case the question will be whether the documents obtained are to be used for administrative purposes or for the purposes of a prosecution under section 239 of the ITA.

[13] In my view, even though an investigation had commenced that could lead to charges being laid under section 239 of the ITA, this does not preclude the CRA from using requirements to obtain information or documents that could be used only in relation to the reassessments. Both the reassessments and any charges under section 239 of the ITA ultimately relate to the underlying tax liability of the taxpayer. Therefore, there is a common element in both matters – the determination of the unreported income of the taxpayer for a particular year. Common facts will be needed for both the administrative reassessment and the penal charges under section 239 of the ITA.

[14] While using requirements under section 231.2 of the ITA to obtain information or documents after an investigation has commenced may result in that information or those documents not being admissible in a proceeding related to the prosecution of offences under section 239 of the ITA, it does not preclude that information or documents from being admissible in a Tax Court of Canada proceeding where the issue is the validity of an assessment issued under the ITA. It is the use of the information or documents that is relevant, not who at CRA issued the requirement for information or documents.

[15] In *Piersanti* the issue was the admissibility of certain documents in a hearing before the Tax Court of Canada in relation to Mr. Piersanti's liability under the *Excise Tax Act*, R.S.C. 1985, c. E-15. The documents had been obtained as a result of requirements that had been issued under that Act while the CRA was investigating Mr. Piersanti to determine if criminal charges should be laid. In confirming the admissibility of such documents this Court noted, at paragraph 5, that "[a] taxpayer's *Charter* rights are engaged when an audit becomes a criminal investigation". Since these Charter rights are engaged when this criminal investigation commences, these Charter rights, that could affect the admissibility of documents in court proceedings, must relate to proceedings arising from this criminal investigation and not to proceedings that do not relate to the commission of a criminal offence under the ITA or the *Excise Tax Act*.

[16] In relation to the appeal of his reassessment, Mr. Bauer is in the same position as any other taxpayer appealing a net worth assessment that is based on documents received following the issuance of a requirement under section 231.2 of the ITA. He should not be in a better position simply because he was also under investigation in relation to section 239 of the ITA.

[17] In my view, it is plain and obvious that the CRA's power to issue requirements under section 231.2 of the ITA to obtain information or documents that will be used for the administrative purpose of reassessing a taxpayer is not suspended by the commencement of an investigation. Therefore, any information or documents obtained as a result of the issuance of the requirements in this case cannot be excluded, based on section 8 of the Charter, from the proceedings in the Tax Court of Canada related to the validity of the reassessments of Mr. Bauer's tax liability for 2007 and 2008.

[18] As a result, I would dismiss the appeal with costs.

"Wyman W. Webb"

J.A.

"I agree
D. G. Near J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA,
DATED MAY 31, 2016, NO.(2015-413(IT)G)**

DOCKET: A-200-16

STYLE OF CAUSE: RONALD BAUER v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER,
BRITISH COLUMBIA

DATE OF HEARING: DECEMBER 6, 2017

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

DATED: MARCH 27, 2018

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