Federal Court of Appeal

Cour d'appel fédérale

Date: 20181101

Docket: A-74-18

Citation: 2018 FCA 200

CORAM: WEBB J.A.
RENNIE J.A.
LASKIN J.A.

BETWEEN:

AKANDA INNOVATION INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 3, 2018.

Judgment delivered at Ottawa, Ontario, on November 1, 2018.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the Order of the Tax Court of Canada dated February 19, 2018 (2018 TCC 35). That Order dismissed the motion of Akanda Innovation Inc. (Akanda) requesting an extension of time to make an application to set aside the two Judgments issued on March 10, 2017. These two Judgments collectively dismissed Akanda's appeals in relation to its 2007, 2008, 2009 and 2010 taxation years. Akanda, in its motion, also requested that these

Judgments be set aside (which could only be considered if the extension of time to make the application was granted).

[2] For the reasons that follow, I would allow this appeal.

I. Background

[3] Akanda was reassessed to deny scientific research and experimental development expenditures in excess of $6 million and related investment tax credits in excess of $1.5 million collectively for its 2007, 2008, 2009 and 2010 taxation years.

[4] Akanda filed notices of objection to these reassessments and subsequently filed notices of appeal to the Tax Court. The notice of appeal related to the 2007, 2008 and 2009 taxation years was filed on November 18, 2015. The notice of appeal for the 2010 taxation year was filed as a result of an Order of the Tax Court dated March 18, 2016 that granted Akanda an extension of time to file this notice of appeal.

[5] Although the parties initially agreed upon certain dates to file and serve lists of documents and complete discovery examinations, Akanda did not file its list of documents by the agreed upon date and, consequently, the discovery examinations were not completed. Akanda requested and was granted two extensions of time to complete these. The last application for an extension of time was made on January 12, 2017. On January 6, 2017, just prior to making this application for an extension of time, Barrett Law (who had been representing Akanda) submitted

a letter to the Tax Court indicating that Barrett Law was to be removed as counsel of record for Akanda.

[6] By letter dated January 10, 2017, Akanda was notified by the Tax Court that "[s]ection 30(2) of the *Tax Court of Canada Rules (General Procedure)* stipulates that where a party to a proceeding is not an individual, that party shall be represented by counsel except with leave of the Court and on any conditions that it may determine".

[7] On January 19, 2017, an Order was issued by the Tax Court granting Akanda's request for an extension of time to file and serve its list of documents to May 31, 2017 and to also extend the date for the examinations for discoveries to September 29, 2017. The Crown had consented to these extensions of time. This Order also provided that:

> 2. The Appellant shall inform the Court on or before February 10, 2017 whether it has retained new counsel or whether a person intends to bring a motion seeking leave to represent the Appellant;
>
> 3. If the Appellant informs the Court that a person intends to bring a motion seeking leave to represent the Appellant, such motion shall be filed on or before February 24, 2017;
>
> 4. If the Appellant does not file the noted communication on or before February 10, 2017, or if the Appellant informs the Court that a motion will be filed and the motion is not filed on or before February 24, 2017, then a show cause hearing will be held on March 7, 2017; at 9:30 a.m., or as soon after that time as the parties can be heard, at the Federal Judicial Centre, 180 Queen Street West, 6th Floor, Toronto, Ontario, to show cause why this appeal should not be dismissed for delay; and
>
> 5. If a representative of the Appellant fails to appear at the time and place set for the show cause hearing, an application may be made on behalf of the Respondent to dismiss the appeal for failure to appear.

[8] Akanda did not inform the Tax Court as provided in paragraph 2 of this Order nor did Akanda appear at the show cause hearing as provided in paragraph 4 of this Order. As a result, two Orders dated March 10, 2017 were issued by the Tax Court that collectively dismissed Akanda's appeals for its 2007, 2008, 2009 and 2010 taxation years.

[9] Subsequent to these Orders dismissing its appeals, Akanda retained new legal counsel. On July 25, 2017, it filed a motion requesting an extension of time to bring an application to set aside the default Judgments and to also set aside the default Judgments that had been issued.

II. Decision of the Tax Court

[10] The Order that is the subject of this appeal provided as follows:

> Upon a motion by the Appellant pursuant to Rule 12 of the *Tax Court of Canada Rules (General Procedure)* requesting that the Court extend the time that the Appellant has under subsection 140(2) of the *Tax Court of Canada Rules (General Procedure)* to have a judgment set aside;
>
> And upon written submissions by the parties;
>
> The motion is dismissed in accordance with the attached Reasons for Order.

[11] The Order that was issued only addressed the application for an extension of time. In the Reasons attached to this Order, the focus was on the following criteria:

1. whether Akanda had a continuing intention to pursue the appeal;
2. whether the appeal has some merit;
3. whether there is any prejudice to the Crown arising from the delay; and
4. whether there is a reasonable explanation for the delay.

[12] The Tax Court was satisfied that the first two criteria favoured Akanda. However, the Tax Court found that there was prejudice to the Crown arising from the delay and that there was no reasonable explanation for the delay. The reasons for these findings are in paragraph 8:

> c. There is no prejudice to the Respondent arising from the delay. This is a requirement which is problematic for the Appellant. The Respondent asserts that the Appellant does not appear to have completed discovery obligations. There can be no dispute in this particular claim as looking at the relative effects of granting the motion, to allow the motion to succeed would likely disproportionately prejudice the Respondent due to the failure of the Appellant to carry out the fundamental obligation in litigation; that is, their discovery obligations. It is the Appellant's fundamental obligation to prosecute the appeal on a timely basis – this does not occur.
>
> d. A reasonable explanation is given for the delay. I do not believe that this requirement has been satisfied. The Appellant claims that their lack of compliance with the Tax Court of Canada procedures was because of an e-mail received from their counsel saying that the Court had been satisfied of its intention to pursue the appeal. Because of this mistaken belief, the Appellant thought that the next step was to file a list of documents. As a result, no one appeared at the status hearing. This is simply not the case and the e-mail does not reflect this exchange. The Appellant was receiving Tax Court of Canada correspondence from at least the date of Appellant's counsel withdrawing as counsel of record, including the January 19, 2017 Order requiring the Appellant to find new counsel and inform the Court of a new counsel of record by February 10, 2017. The e-mail of the Appellant's counsel sent on January12, 2017 does not say what the Appellant claims it says as the e-mail never mentions the status issue has been resolved like the Appellant claims. What the e-mail does say is that he judge can take up to two weeks to issue a decision but for now the Appellant should proceed as though the Court has granted the request. This of course does not, in any way, guarantee that the issue has been resolved – only saying to proceed as thought *[sic]* the Court has been satisfied until contradicted by the evidence. The e-mail also suggests hiring new counsel, advice which was not heeded by the Appellant until after the March status hearing.

III. Standard of review

[13] Since this is an appeal in relation to a discretionary decision of the Tax Court, the standard of review is as set out in *Housen* v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235

(*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331). As a result, the standard of review for any question of fact or mixed fact and law (where there is no extricable question of law) will be palpable and overriding error and for any question of law will be correctness.

IV. Analysis

[14] Subsection 140(2) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, provides that:

(2) The Court may set aside or vary, on such terms as are just, a judgment or order obtained against a party who failed to attend a hearing, a status hearing or a pre-hearing conference on the application of the party if the application is made within thirty days after the pronouncement of the judgment or order.	(2) Pourvu que la demande soit faite dans les trente jours qui suivent le prononcé du jugement ou de l’ordonnance, la Cour peut infirmer ou modifier, aux conditions qui sont appropriées, un jugement ou une ordonnance obtenu contre une partie qui n’a pas comparu à l’audience, à l’audience sur l’état de l’instance ou à la conférence préparatoire à l’audience.

[15] Akanda did not apply to have the default Judgments that were issued on March 10, 2017 set aside within 30 days of these Judgments being issued. Hence, in its motion made on July 25, 2017, Akanda first asked for an order extending the time within which it could make an application to set aside the default Judgments and also for an order to set aside the default Judgments. Although Akanda did not indicate that the application for an order setting aside the default Judgments was conditional on the first order being granted, it would necessarily follow since without the extension of time, the application to set aside the default Judgments could not be brought.

[16] In this case, since the Order that was issued by the Tax Court (and which was appealed to this Court) only dismissed the application for an extension of time (without which the application to set aside the default Judgments could not be brought), the only issue in this appeal is the application for an extension of time.

[17] In *Tomas v. The Queen*, 2007 FCA 86, 2007 D.T.C. 5178 (*Tomas*), this Court stated that:

> 10 While it is true that the motions judge was mistaken when he stated that he had no discretion to grant the appellant's motion as it was made more than thirty (30) days after the pronouncement of the judgment, the fact remains that no application was made to the Tax Court of Canada for an extension of time.
>
> 11 The appellant's Memorandum of Fact and Law in this appeal does not address that issue either. It contains no discussion of the factors usually considered on such applications, i.e. a continuing intention to pursue the appeal, that the appeal has some merit, that no prejudice to the respondent arises from the delay and that a reasonable explanation is given for the delay: see *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399; *Rosen v. Canada*, [2000] F.C.J. No. 415 (Q.L.); *Canada (Minister of Human Resources Development) v. Hogervorst*, [2007] F.C.J. No. 37, 2007 FCA 41, at paragraph 32.

[18] One of the cases relied upon by this Court in relation to the factors that are to be considered in an application for an extension of time was *Canada (Minister of Human Resources Development) v. Hogervorst*, (*Hogervorst*) in which this Court, after setting out the four factors described above, noted that:

> 33 This test is not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal v. Canada (Min. of Employment and Immigration)*, [1985] 2 F.C. 263 that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The above stated four-pronged test is a means of ensuring the fulfillment of the underlying consideration. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied: see *Grewal v. Canada, supra*, at pages 278-279.

[19] That an applicant need not satisfy all of the factors was also confirmed by this Court in the more recent decision of *Attorney General of Canada v. Larkman*, 2012 FCA 204, 433 N.R. 184 where, at paragraph 62, it was noted that “[t]he overriding consideration is that the interests of justice be served”.

[20] In the Reasons of the Tax Court in this case, it is not entirely clear whether the focus was on the application for an extension of time or on the application to set aside the default Judgments. In paragraph 5, the Tax Court stated that:

> [5] As noted, the only issue before the Court was whether the Court should exercise its inherent jurisdiction under Rule 140(2) and set aside the judgment rendered against the Appellant for the failure to attend the status hearing on March 7, 2017

[21] None of the cases referred to above, which set out the factors to be considered in an application for an extension of time, are identified in the Reasons of the Chief Justice in this case although he does refer to his earlier decision in *Izumi v. The Queen*, 2014 TCC 108, [2014] 5 C.T.C. 2094 (*Izumi*) in which he cites *Tomas*. The four factors that are considered by the Chief Justice in this case are the same four factors identified in the cases referred to above, but the facts that are discussed in relation to these four factors are not the facts that are relevant in this application for an extension of time. This is particularly highlighted with respect to the facts discussed in relation to the delay and the prejudice to the Crown.

[22] In this application for an extension of time, the delay that is relevant is the delay in bringing the application for an extension of time. The default Judgments were issued on March 10, 2017 and, therefore, the 30 days within which an application could have been brought

to set these Judgments aside under Rule 140(2) would have expired on April 9, 2017. It is the delay from this date (April 9, 2017) to the date the motion was brought (July 25, 2017) that is relevant in relation to the discussion of the reasonable explanation for the delay. In relation to this application, any previous delays in pursuing the appeal are not relevant. The focus is only on the delay in bringing the particular application that is late.

[23] This delay from April 9, 2017 to July 25, 2017 is, in this motion for an extension of time, also the relevant delay in relation to the prejudice that would have been suffered by the Crown. Akanda had the right to bring this motion within 30 days of the default Judgments. Therefore, the issue is what prejudice did the Crown suffer as a result of the application being made on July 25, 2017 instead of April 9, 2017?

[24] In both the discussion of the reasonable explanation for the delay and the prejudice that the Crown would suffer as a result of the delay, the Tax Court discussed the overall delay in proceeding with the appeal. There is no discussion of the prejudice that the Crown suffered as a result of the application being made on July 25, 2017 instead of April 9, 2017.

[25] There is also no discussion of the overriding interests of justice or that it is not necessary that Akanda satisfy all four factors. In paragraph 7 of his Reasons, the Chief Justice stated that:

> [7] I noted in *Izumi v. R.*, 2014 TCC 107 *[sic]* (CanLII), that the correct and analytical framework is not to apply a rigid set of factors but rather to consider a more contextual approach.

[26] The Chief Justice made these comments in paragraph 16 of *Izumi*:

> 16 Is there prejudice to the Respondent arising from the delay? In *GMC*, Justice Woods noted that like with other procedural matters, the Court should not apply a set of factors in a rigid manner to determine whether or not to set aside a judgment, but rather, adopt a contextual approach in light of the particular facts of the case. Justice Woods described the "overriding consideration" should be the relative effect on the persons that will be affected by the decision.

[27] The comments in *Izumi* (related to not applying a rigid set of factors but instead to adopting a contextual approach) were made in relation to a motion to set aside a default judgment, not in relation to a motion to extend the time to bring an application.

[28] In my view, the Tax Court committed errors of law in not identifying the relevant period for the delay, in not considering the facts that are relevant in relation to this application to extend the time to apply to set aside the default Judgments and in not addressing the decisions of this Court in *Hogervorst* and *Larkman* which held that not all four factors would need to be satisfied in order for Akanda to be successful. As a result, the decision of the Tax Court in relation to the application for an extension of time cannot stand. Paragraph 52(*c*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides that this Court can give the decision that the Tax Court should have given. Since all of the relevant facts that relate to this application are in the record before us, in the interests of not prolonging this matter, in my view, the merits of the application for an extension of time should be considered and this Court should decide this application for an extension of time.

[29] As noted above, the four factors that are to be considered in an application for an extension of time are:

1. whether Akanda had a continuing intention to pursue the application to set aside the default Judgments;
2. whether the application to set aside the default Judgments has some merit;
3. whether there is any prejudice to the Crown arising from the delay from April 9, 2017 to July 25, 2017; and
4. whether there is a reasonable explanation for this delay.

A. *Continuing Intention*

[30] Akanda had a continuing intention to pursue this application as Akanda retained new legal counsel as soon as it learned of the default Judgments and the motion was filed within a relatively short period of time (three and a half months) after the expiration of the time period permitted by Rule 140(2) for doing so.

B. *Merit in the Application*

[31] With respect to the merits of the application to set aside the default Judgments, the principles that are to be considered in an application to set aside a default judgment dismissing a taxpayer's appeal before the Tax Court can be gleaned from the decision of Justice Woods (as she then was) in *GMC Distribution Ltd. v. The Queen*, 2009 TCC 287, 2009 G.S.T.C. 89 and from the cases to which she refers:

- The application should be made as soon as possible after the taxpayer learns of the judgment
- Mere delay will not bar the application unless the Crown will suffer irreparable harm or the delay is wilful
- The taxpayer will need to explain the circumstances which resulted in the default judgment which would justify setting the default judgment aside
- The taxpayer will need to show that the appeal that was dismissed has merit and this is particularly so if the delay in bringing the application to set aside the default judgment is long
- The Court is to consider the relative effect on the taxpayer and the Crown of setting aside the default judgment and of not doing so
- The factors are not be to applied in a rigid manner

[32] In my view, as in an application for an extension of time, the central question is whether the interests of justice are better served by setting aside the default judgment or dismissing the application to do so.

[33] In this case, it should be noted that the default Judgments were issued before the time within which Akanda was to serve and file its list of documents had expired (as a result of the Order of the Tax Court dated January 19, 2017).

[34] With respect to the merits of Akanda's tax appeal, the Chief Justice found that there was merit in Akanda's underlying tax appeal and the Crown does not dispute this. There is also no indication of any harm that would be suffered by the Crown as a result of the delay in bringing

the application to set aside the default Judgments, let alone irreparable harm. There is also no indication that the delay in bringing the application to set aside the default Judgments was wilful.

[35] As noted above, the approach to be taken in an application to set aside a default judgment is not a mere application of rigid factors. As a result, there is sufficient merit in Akanda's application to set aside the default Judgments to satisfy this factor.

C. *Prejudice to the Crown*

[36] In the Crown's written representations to the Tax Court in relation to Akanda's motion, the Crown did not identify any particular prejudice that would be suffered as a result of the delay from April 9, 2017 to July 25, 2017. The three brief paragraphs in the Crown's submission that address this issue only provide general statements of prejudice that may arise as a result of delays in pursuing an appeal and Akanda's failure, in this case, to produce its list of documents (which, as a result of the Order issued with the consent of the Crown, was not due until after the date of the default Judgments). The Tax Court also did not identify any particular prejudice that would be suffered by the Crown as a result of the delay from April 9, 2017 to July 25, 2017.

[37] Therefore, there is no basis to find that any prejudice would be suffered by the Crown arising from the delay from April 9, 2017 to July 25, 2017.

D. *Reasonable Explanation for the Delay*

[38] Akanda does not provide a reasonable explanation for this delay from April 9, 2017 to July 25, 2017.

E. *Interests of Justice*

[39] It is not necessary that Akanda satisfy all four factors to be successful in its application for an extension of time. Since the findings with respect to three of the four factors favour Akanda and since the amounts involved are significant, the interests of justice support a finding that the application for an extension of time should be granted in this case.

V. Conclusion

[40] As a result, in my view, the Tax Court erred in dismissing the application for an extension of time and this appeal should be allowed. Since the Order only addressed the application for an extension of time, the second part of Akanda's motion, in which it requested an order setting aside the default Judgments, remains outstanding and will need to be addressed by the Tax Court.

[41] I would, therefore, allow the appeal and set aside the Order of the Tax Court. Issuing the order that the Tax Court should have granted, I would allow the application for an extension of time for Akanda to bring an application under Rule 140(2) to set aside the two default Judgments issued on March 10, 2017. At the hearing the parties agreed that, regardless of the disposition of

this appeal, Akanda would pay $5,000 in costs to the Crown and, therefore, I would also order Akanda to pay $5,000 in costs to the Crown.

"Wyman W. Webb"
J.A.

"I agree
Donald J. Rennie J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA DATED FEBRUARY 19, 2018, CITATION NO. 2018 TCC 35 (DOCKET NOS. 2015-5215(IT)G AND 2016-217(IT)G)

DOCKET:	A-74-18
STYLE OF CAUSE:	AKANDA INNOVATION INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 3, 2018
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A. LASKIN J.A.
DATED:	NOVEMBER 1, 2018

APPEARANCES:

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