Federal Court of Appeal | Cour d'appel fédérale

Date: 20000526

Dockets: A-823-99
A-106-00

CORAM: **DESJARDINS J.A.**
ROTHSTEIN J.A.
McDONALD J.A.

A-823-99

BETWEEN:

ANGELO DEL ZOTTO

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE
and JOHN EDWARD THOMPSON

Respondents

AND

A-106-99

BETWEEN:

HERBERT NOBLE

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE
and JOHN EDWARD THOMPSON

Respondents

HEARD at Ottawa, Ontario, on Friday, May 26, 2000.

JUDGMENT delivered from the Bench at Ottawa, Ontario, on Friday, May 26, 2000.

REASONS FOR JUDGMENT OF THE COURT BY: ROTHSTEIN J.A.

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REASONS FOR JUDGMENT
(Delivered from the Bench at Ottawa, Ontario
on Friday, May 26, 2000)

ROTHSTEIN J.A.

[1] These reasons apply to Court files A-823-99 and A-106-00.

[2] These are appeals from a decision of the Trial Division of December 3, 1999 in which the learned Trial Division Judge dismissed a judicial review application of a decision of the Honourable Keith Flanigan, Q.C., Hearing Officer appointed under subsection 231.4(2) of the *Income Tax Act*, relating to Angelo Del Zotto. The appellants argue the following errors by Mr. Flanigan and the Trial Division Judge.

1. The terms of reference of the inquiry authorized under subsection 231.4(1) are too broad.
2. There is no provision for reasonable advance disclosure to Mr. Del Zotto and his counsel.
3. Mr. Del Zotto's counsel is only given the opportunity to clarify the evidence of witnesses at the inquiry, not the opportunity to cross-examine them.
4. The subpoena requiring Mr. Noble to appear at the inquiry is out of date and has no legal effect.
5. Mr. Noble is wrongfully denied prior disclosure of the evidence he will be asked to provide.

6. Counsel for Mr. Noble is wrongly excluded from the inquiry after Mr. Noble's evidence is completed.

7. There is reasonable apprehension of bias in respect of the learned Trial Division Judge.

TERMS OF REFERENCE

[3] The terms of reference of the section 231.4 inquiry are established by the Minister of National Revenue. Subsection 231.4(1) provides:

231.4(1) The Minister may, for any purpose related to the administration or enforcement of this Act, authorize any person, whether or not the person is an officer of the Canada Customs and Revenue Agency, to make such inquiry as the person may deem necessary with reference to anything relating to the administration and enforcement of this Act.	231.4(1) Le ministre peut, pour l'application et l'exécution de la présente loi, autoriser une personne, qu'il s'agisse ou non d'un fonctionnaire de l'Agence des douanes et du revenue du Canada, à faire toute enquête que celle-ci estime nécessarie sur quoi que ce soit qui se rapporte à l'application et l'exécution de la présente loi.

The Hearing Officer does not establish his own terms of reference and cannot change those established by the Minister. The October 9, 1992 authorization for the inquiry provided:

> To make an inquiry into the financial affairs of the said Angelo Del Zotto, for the taxation years 1979 to 1985 inclusive.

[4] Following the words of Strayer J.A. in *Del Zotto v. Canada*, [1997] 3 F.C. 40, dissenting, but which reasons were adopted by the Supreme Court of Canada in allowing the appeal from the Federal Court decision, [1999] 1 S.C.R. 3, Mr. Flanigan correctly limited the inquiry to matters pertaining to "the administration or enforcement of [the *Income Tax*] Act". In our view, under subsection 231.4(1), he was authorized to do no more or less as he (and the Minister) was required to comply with the words of the statute. What the appellants are attempting to do in

seeking to challenge the decision of Mr. Flanigan is to challenge the terms of reference established by the Deputy Minister on behalf of the Minister on October 9, 1992 when the inquiry was authorized. That decision however, was not the subject of the judicial review application before the Trial Division.

[5] To be sure, the inquiry must not exceed the terms of reference. However, within the terms of reference established by the Minister, the nature and extent of the inquiry is within the discretion of the Hearing Officer, provided it is relevant to the administration and enforcement of the Act. This ground of the appellants is without merit.

THE RIGHT TO PRIOR DISCLOSURE BY MR. DEL ZOTTO

[6] Mr. Del Zotto argues that he should be given prior disclosure of the names of witnesses, the subject matter of their evidence, and the documents that will be presented to witnesses. As to the claimed right to disclosure, Mr. Flanigan referred to *Guay v. Lafleur*, [1965] S.C.R. 12, in which the Supreme Court held that, having regard to the nature of the inquiry, it was not for the Court to specify how it was to be conducted. Mr. Flanigan stated, at paragraph 19 of his reasons:

> Neither the *Guay* case nor the Act, in my view, gives the target or his counsel any control over the manner in which the inquiry is held, save and except to object to any denial of natural justice or unfairness, and certainly in no way gives the target Del Zotto any rights to direct the manner in which the inquiry shall be held.

And at paragraph 22, he concluded:

> In this particular matter before me, no charges have been laid, notwithstanding the heavy suspicion that charges will be laid, they have in fact not been laid to date. Therefore, in my view, until charges have been laid, there is no right to disclosure to either the witness or the target in this case.

[7] We agree with the approach of Mr. Flanigan. It does not conflict with *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 which provides for a right of disclosure after charges are laid. No charges are laid at the inquiry stage in these proceedings. It is the duty of the Hearing Officer to conduct the inquiry as he considers necessary and appropriate, in accordance with the statute and having regard to considerations of procedural fairness applicable in the circumstances. None of these obligations require prior disclosure as a matter of right.

[8] The Court was told that in the course of proceedings, counsel for Mr. Del Zotto was given time, after documents had been adduced, to review them, although counsel complained that the time provided was insufficient in his view.

[9] It is open to the Hearing Officer to require prior notification of evidence to be sought or to provide witnesses or counsel with reasonable time to provide evidence or review documents if prior notification is not required. These are matters pertaining to the conduct of the inquiry and are under the control and subject to the discretion of the Hearing Officer.

THE RIGHT TO CROSS-EXAMINE

[10] Mr. Del Zotto submits that the right to cross-examine is implicit in his "right to be represented by counsel throughout the inquiry" under subsection 231.4(6). He says that the one exception as stated in subsection 231.4(6) is if, on an application by the Minister or a person

giving evidence, the Hearing Officer orders otherwise on the ground that the presence of the person whose affairs are being investigated and his counsel or either of them, would be prejudicial to the effective conduct of the inquiry. Otherwise, there is an entitlement to have counsel present and have counsel do the work that counsel normally does, i.e. cross-examine witnesses.

[11] However, counsel did not provide any authority to the effect that a statutory right to be represented by counsel necessarily implies, without exception, the right to cross-examine.

[12] The requirements of fairness will vary depending upon the circumstances. A statutory right to be represented by counsel, without further directive, does not necessarily imply a right to cross-examine. The role of counsel will be determined by the Hearing Officer. That was the approach adopted by Estey J. in *Irvine v. Canada (Restricted Trade Practices Commission)*, [1987] 1 S.C.R. 181, at 231.

> It follows from the above discussion that neither s. 20(1) of the Act nor the doctrine of fairness provides the appellants with a right to cross-examine witnesses at the inquiry. Fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the extent of the right to counsel and, where counsel is authorized by statute without further directive, the role of such counsel. The investigating body must control its own procedure. When that body has determinative powers, different considerations enter the process. The case against the investigated must be made known to him. This is provided for in the Act at each of the progressive stages of the inquiry. [Emphasis added]

At page 235, he stated:

> These proceedings have not reached the stage in the words of Lord Wilberforce in

> *Wiseman v. Borneman* (1971) Appeal Cases 297 at p. 313 that "it is necessary to look at the procedure in its setting as ask the question whether it operates unfairly to the tax payer to the point where the courts must apply the legislative omission". Courts must in the exercise of this discretion remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of raw material for further consideration, the inclination of the courts is away from intervention. Where on the other hand the investigations conduct by a body seized of powers to determine, in a final sense or in a sense that detrimental impact may be suffered by the individual, the courts are more inclined to intervene.

Mr. Flanigan relied on *Irvine* in finding at paragraph 21:

> In the present case, it was sufficient that the Hearing Officer allowed all the parties to be represented by counsel who could object to improper questioning and re-examine their clients to clarify the testimony given and to ensure that the full story was communicated by the witness counsel represented.

Counsel for Mr. Del Zotto is being given the right to object to improper questions and to clarify testimony of witnesses in order that the full story be communicated. In our view, that is sufficient for purposes of the inquiry. We can find no error in Mr. Flanigan's reasoning or his conclusion.

THE SUBPOENA

[13] Counsel for Mr. Noble argued that the subpoena served on Mr. Noble is out of date and that its contents are no longer applicable. He said that it no longer has legal validity. However, he cited no authority to the effect that a subpoena expires with the passage of time or because the date or place of hearing may have changed from what was noted on the subpoena. Nor did he indicate what criteria the Court should apply to determine when and whether a subpoena loses its validity.

[14] In this case, Mr. Noble was a party in the litigation in this Court that arose after the authorizing of the inquiry and culminating in the decision of the Supreme Court of Canada on January 21, 1999 on Mr. Del Zotto's and Mr. Noble's constitutional challenge to the inquiry. Mr. Noble knows what is going on. This is not the case of a dormant inquiry that is resurrected after many years. Suffice it to say that, Mr. Noble has not demonstrated any reason why the subpoena should not continue to have effect.

MR. NOBLE'S ALLEGED RIGHT TO PRIOR DISCLOSURE

[15] Our comments with respect to Mr. Del Zotto's claim to prior disclosure are applicable to Mr. Noble. Counsel for Mr. Noble argues that much of the evidence that may be sought from Mr. Noble is old and it may be difficult to answer questions unless prior notice is given.

[16] That is a matter for the Hearing Officer. If he considers it necessary for the efficacy of the inquiry, it is open to him to order prior disclosure of some of the questions to be asked or the documents to be provided by Mr. Noble. Otherwise, he may give time to Mr. Noble to provide answers to questions or produce documents if, in his view, the circumstances warrant. However, there is no right to prior disclosure on the part of Mr. Noble.

EXCLUSION OF MR. NOBLE'S COUNSEL

[17] Counsel for Mr. Noble argues that he is being wrongly excluded from the inquiry after Mr. Noble has testified. In making this argument before this Court, he does not speak for Mr.

Noble but rather as a friend or a person that might assist Mr. Del Zotto. He says that if Mr. Del Zotto waives his right to privacy in the conduct of the hearing, he, Mr. Del Zotto, is entitled to have anyone he wishes attend the inquiry.

[18] In our view, *Del Zotto v. Minister of National Revenue* (1993), 93 DTC 5455 is dispositive on this point. In that decision, Hugessen J.A. (as he then was) stated at page 5456:

> Those provisions, in their turn, had been subject to a definitive interpretation by the Supreme Court of Canada in the case of *Guay v. Lafleur*. In that case, Abbott J., speaking for the majority, said as follows:
>
> > Hyde and Montgomery J. dissenting, held that the investigation conducted by the appellant on behalf of the Minister, is a purely administrative matter which can neither decide nor adjudicate upon anything, that it is not a judicial or quasi-judicial enquiry but a private investigation at which the respondent is not entitled to be present or represented by counsel.

After referring to changes to the legislation after *Guay v. Lafleur*, Hugessen J. A. continued:

> They (the subsequent changes to the legislation) do not otherwise change the nature of the inquiry which remains, as it was described by the Supreme Court, "a purely administrative matter which can neither decide nor adjudicate upon anything".

The inquiry is a private investigation. While a taxpayer's privacy may be a relevant consideration, it is not the sole reason for it being a private investigation. It is private, as we understand it, to assist in the efficacy of the investigation itself. While there have been amendments to the inquiry process of the *Income Tax Act* since *Guay v. Lafleur*, they do not change this fundamental aspect of the inquiry. In particular, the right of a witness and the taxpayer whose affairs are being investigated to have counsel present does not convert the inquiry into a public one at the discretion of the taxpayer.

[19] Mr. Flanigan refused to allow counsel for Mr. Noble to remain at the hearing when Mr. Noble was not giving evidence. However, the Court was told that Mr. Flanigan permitted counsel for Mr. Noble to make application to remain in the inquiry, provided he was not acting as counsel for Mr. Noble, but rather, was assisting Mr. Del Zotto. As we understand it, the opportunity to make such an application is still open.

REASONABLE APPREHENSION OF BIAS

[20] The final question is whether there is a reasonable apprehension of bias in respect of the Trial Division Judge. Counsel for the appellants says that the Judge was a partner in the firm that was counsel for Mr. Del Zotto until his appointment to the Federal Court in 1999. Evidence was produced that in 1993, the Trial Division Judge logged 0.4 hours on the Del Zotto file. Apparently, this was in relation to the obtaining of some documents from the Tax Court of Canada. Counsel for the appellants says it is impossible to know whether the Judge was privy to any confidential information in respect of the matter.

[21] The appellants rely on the majority reasons of Laskin C.J.C. in *Committee for Justice and Liberty et al. v. National Energy Board* (1976) 68 D.L.R. (3d) 716, at 730:

> Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori* they would not sit in any case in which they played any part at any stage of the case.

[22] This statement is referred to by The Honourable J.O. Wilson in *A Book for Judges*, written at the request of the Canadian Judicial Council, in which the author stated at page 28,

referring to the statement of Laskin C.J.C. cited above:

> The statement may be an *obiter dictum*, but it comes from an august source and sets a proper standard of conduct, and in the latter part of the statement, a possible ground for disqualification. A newly appointed judge, formerly associated with a law firm, should not sit on a case in which the action had been commenced while he was still associated with a firm.

[23] Finally, the appellants rely on the Canadian Judicial Council *Ethical Principles for Judges*, November 1998, under the heading "Conflicts of Interest". On page 29, the advice given is:

> 2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.
>
> 3. Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) ...

[24] In the Commentaries under the heading "Former Clients" on page 47 is found the following:

> Judges will face the issue of whether they should hear cases involving former clients, ... There are three main factors to be considered. First, the judge should not deal with cases concerning which the judge actually has a conflict of interest, for example, as a result of having had confidential information concerning the matter prior to appointment ...
>
> The following are some general guidelines which may be helpful:
>
> (a) A judge who was in private practice should not sit on any case in which the judge or the judge's former firm was directly involved as either counsel of record or in any other capacity before the judge's appointment.
>
> . . .
>
> (c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "cooling off period," often established by local tradition at two, three or five years and in any event at

> least as long as there is any indebtedness between the firm and the judge and subject to guideline (a) above concerning former clients.

[25] We do not read the Judicial Council advice and guidelines as a code of prohibited behaviour or setting standards of judicial misconduct. Indeed section 2 of the Principles states:

> The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

Nor do we consider that deviation from a statement or a guideline automatically equates to a reasonable apprehension of bias. On the other hand, the statements and guidelines are drafted with a view to identifying those circumstances in which a reasonable, fair minded and informed person could have a reasoned suspicion of a conflict.

[26] As to the facts, it should first be observed that Mr. Del Zotto recently changed counsel so that when the matter came before the Trial Division Judge in December 1999, present counsel, and not the Judge's former firm, was acting for Mr. Del Zotto. We are certain that had his former firm been acting, the Trial Division Judge would have recused himself having regard to his recent association with that firm. However, when different counsel appeared, it seems that the Trial Division Judge did not suspect the presence of any conflict. Nor, apparently did counsel, as no one raised it before him.

[27] In this case, there are two relevant considerations. The first is that the Judge's former firm was directly involved in the matter of the Del Zotto inquiry under the *Income Tax Act* when

the Judge was a member of the firm. The second is that the Judge had recorded time on the Del Zotto file.

[28] The evidence is that the Judge did not practice in the office where the Del Zotto file was being handled. Further, it is clear that the Judge's involvement in the file was some six years before he heard the judicial review and was minimal and peripheral.

[29] The cases suggest that sometimes the fact that a judge hears a case in which his firm was involved before his appointment does not give rise to a reasonable apprehension of bias. However, these cases also indicate that there was no direct or indirect involvement by the judge with the matter when he was at the firm. (See, for example, *R. v. Bagot* [2000] M.J. No. 223 (Q.L.) (C.A.), at paragraph 5, and *R. v. R.T.A.* [2000] O.J. No. 1319 (Q.L.) (Gen. Div.), at paragraph 37(a)).

[30] In the circumstances here, in an abundance of caution, we would allow the appeal from the Trial Division on this issue. However, we reiterate that what transpired was inadvertent and arose because of the unusual fact that there had been a change of counsel which apparently caused both the learned Judge and counsel to be caught off guard.

[31] Having said this, paragraph 52(b)(i) of the *Federal Court Act* authorizes this Court to give the judgment that should have been given by the Trial Division. Paragraph 52(b)(i)

provides:

52. The Federal Court of Appeal may ... (b) in the case of an appeal from the Trial Division, (i) dismiss the appeal or give the judgment and award the process or other proceedings that the Trial Division should have given or awarded, ...	52. La Cour d'appel peut: ... (b) dans le cas d'un appel d'une décision de la Section de première instance: (i) soit rejeter l'appel ou rendre le jugement que la Section de première instance aurait dû rendre et prendre toutes mesures d'exécution ou autres que celle-ci aurait dû prendre, ...

Counsel for the appellants agrees that we have this jurisdiction and does not ask that the matter be remitted to the Trial Division for redetermination.

[32] Accordingly, we would allow the appeal, set aside the decision of the Trial Division and find that the judicial review application against the decision of the Honourable Keith Flanigan be dismissed. In view of this conclusion, there will be no award as to costs.

[33] The appellants' moved to introduce new evidence on this appeal. We will dismiss the motion insofar as transcripts of the inquiry are concerned and will order that such transcripts be returned to the appellants.

"Marshall Rothstein"

J.A.

FEDERAL COURT OF CANADA
APPEAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

DOCKET: A-823-99

APPEAL FROM THE JUDGMENT OF THE TRIAL DIVISION OF THE FEDERAL COURT OF CANADA, DELIVERED DECEMBER 3, 1999 IN DOCKET T-1724-99.

STYLE OF CAUSE: Angelo Del Zotto v. The Minister of National Revenue and other

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: May 26, 2000

REASONS FOR JUDGMENT OF THE COURT: (Desjardins, Rothstein, McDonald JJA)

DELIVERED FROM THE BENCH BY: Rothstein J.A.

APPEARANCES:

Mr. Thomas G. Heintzman, Q.C. Mr. William C. McDowell	FOR THE APPELANT
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