Federal Court of Appeal | Cour d'appel fédérale

Date: 20110606

Docket: A-490-10

Citation: 2011 FCA 191

CORAM: **NADON J.A.**
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

WAYCOBAH FIRST NATION

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on May 30, 2011.

Judgment delivered at Ottawa, Ontario, on June 6, 2011.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NADON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by the Waycobah First Nation (Waycobah) from a decision of the Federal Court (2010 FC 1188), in which Justice de Montigny (Judge) dismissed Waycobah's application for judicial review to set aside a decision by Brian McCauley, Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency (CRA). In that decision, contained in a letter dated November 9, 2009, the Assistant Commissioner declined to recommend the remission of Waycobah's substantial tax debt.

[2] The debt arose from Waycobah's failure to collect harmonized sales tax (HST) from non-natives who bought gasoline and tobacco from a gas station on the reserve. Two individuals had purchased the business in 2000 in trust for Waycobah which, like the previous owner, took the view that its trading activities were exempt from taxation under an eighteenth century treaty with the Crown. This view was apparently widely held by First Nations in Nova Scotia, but was not shared by either the federal government or, as it transpired, the courts. After losing an appeal on the issue in the Tax Court of Canada in 2000, Waycobah recognized that it had lost the judicial battle when, in June 2003, the Supreme Court of Canada refused leave to appeal a decision of this Court upholding the decision of the Tax Court. Waycobah started to collect HST on taxable sales to non-natives from June 2003.

[3] Because Waycobah had not previously collected HST to guard against the possibility that the courts might reject its claim to an exemption, it had accumulated a tax debt of over $1.3 million (including penalties and interest) by the time that it was assessed for the period April 1, 2000 to December 31, 2001. Following further audits of the gas station business, assessments of the amount outstanding were made for subsequent years, ending in March 31, 2005.

[4] Negotiations on repayment took place between Waycobah and CRA officials over several years, starting in 2002. As a result, Waycobah agreed to a repayment schedule, and the CRA waived a substantial amount owing for penalties and interest. However, Waycobah did not comply with the repayment agreement and HST collection problems persisted until 2005. By September 2009 the debt exceeded $3.4 million.

[5] Waycobah is an impoverished small community: its basic infrastructure (schools, housing, water, and sewers) needs to be replaced and its capacity expanded. The First Nation's financial situation is precarious: it has a significant budget deficit and, at the instance of the Department of Indian Affairs and Northern Development, has operated under a co-management agreement since 2001. The deficit, comprising largely the tax debt, has substantially impeded its ability to borrow funds to make good its infrastructure deficiencies.

Decision of the CRA

[6] The Assistant Commissioner made the decision under review in these proceedings as the delegate of the Minister of National Revenue. He exercised the power under subsection 23(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (Act), which provides as follows:

23(2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	23(2) Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

[7] While recognizing Waycobah's extreme financial difficulties, the Assistant Commissioner also noted the First Nation's history of non-compliance with its tax obligations, despite repeated warnings from CRA officials. He concluded:

> As a result of the foregoing, the facts of this case do not conform to the CRA's remission guidelines to warrant granting relief.

Decision of the Federal Court

[8] Waycobah challenged the Assistant Commissioner's decision in the Federal Court on essentially two grounds.

[9] First, the decision letter indicates that he unlawfully constrained the exercise of his discretion under subsection 23(2) of the Act by basing the decision solely on the criteria contained in the *CRA Remission Guide* (guidelines), without reference to the broader statutory criteria of whether collection of the tax or enforcement of the penalties would be "unreasonable or unjust", or if it would otherwise be in the "public interest" to remit the tax or penalty. In particular, counsel argued, the Assistant Commissioner did not consider the request for remission in light of the government policy of encouraging First Nations' self-governance.

[10] Second, by failing to read Waycobah's representations in support of its request and relying, instead, on officials' summaries of them, the Assistant Commissioner breached a principle of the duty fairness: those who decide must also hear.

[11] In careful and comprehensive reasons, the Judge upheld the Assistant Commissioner's decision and concluded that Waycobah had not demonstrated that the decision was erroneous on either of the grounds on which it relied. I agree with the Judge's conclusion. For the reasons given by the Judge, and those that follow, I would dismiss the appeal.

Analysis

(a) *standard of review*

[12] Reasonableness is the standard of review applicable to the judicial review of the Assistant Commissioner's discretionary decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53 (*Dunsmuir*). I agree with counsel for Waycobah that the Court may set aside as unreasonable an exercise of discretion if the decision-maker has unduly constrained the exercise of discretion by refusing to take into account a statutorily relevant factor because it was not included in administrative guidelines.

[13] A standard of review analysis is not required for the allegation of procedural impropriety. The only question is whether, in all the circumstances, the decision-making procedure was fair.

(b) *unreasonableness of outcome*

[14] Counsel's principal argument on appeal was that the Assistant Commissioner's refusal to recommend remission was unreasonable because the decision did not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at para. 47.

[15] In particular, he said, the guidelines require the decision-maker to attach great weight to the "extreme financial hardship" that the taxpayer would sustain if required to pay the tax. In contrast, they deal only briefly with taxpayer non-compliance as a basis for refusing to recommend remission, an indication, counsel argued, that it was intended to be given little weight. He said that

the Assistant Commissioner's refusal to recommend remission was flawed because it undervalued Waycobah's financial hardship and exaggerated its degree of non-compliance.

[16] Counsel for Waycobah relied on *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 72, where Justice L'Heureux-Dubé said that the fact that the decision under review in that case was contrary to the applicable guidelines was "of great help in assessing whether the decision was an unreasonable exercise" of the statutory power in question. Thus, partly on the basis of the guidelines, she concluded that the immigration officer's rejection of an application to remain in Canada on humanitarian and compassionate grounds was unreasonable, because the officer had not given serious consideration to the best interests of the applicant's Canadian-born children.

[17] I do not agree with the inference that counsel asks us to draw from the guidelines in the present case, namely that, once an applicant has demonstrated extreme financial hardship, remission will normally be granted. In my opinion, the amount of space that the guidelines devote to hardship is not indicative of the weight that it is to be given by the decision-maker. Equally significant, in my view, is the fact that the guidelines specifically state that remission will likely not be recommended if non-compliance is the result of negligence or carelessness, or an imprudent decision by the taxpayer, as was found to be the case here.

[18] Nor does the language of subsection 23(2) itself ("unreasonable or unjust" or "otherwise in the public interest") indicate that Parliament intended that a debt should normally be remitted if

payment would cause extreme hardship. These are open-ended terms that enable the Minister to take into account the wider impact of recommending remission, including, for example, the public interest in the integrity of the tax system and its proper administration, and fairness to other taxpayers. The decision-maker must balance the competing interests to determine whether, in light of the particular facts, collection of the tax would be unreasonable, unjust or otherwise not in the public interest.

[19] In the absence of any clear indication in either the guidelines or subsection 23(2) itself that the Minister must give almost decisive weight to extreme financial hardship, counsel's argument comes down to an invitation to the Court to reweigh the factors taken into account by the Assistant Commissioner in the exercise of the discretion. This is an invitation that courts must normally refuse: see *Chogolzadeh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 405, 327 F.T.R. 39 at paras. 36-40 (*per* Shore J.), particularly where, as here, the discretion is conferred in broad, policy-based terms, and is exercisable by a Minister or a delegate of the Minister within a decision-making context that may result in the grant of extraordinary relief by the Governor in Council.

[20] In these circumstances, it is no easy task for a litigant to satisfy a reviewing court that the outcome of the exercise of discretion is unreasonable. In my view, Waycobah has not succeeded in so doing.

(c) *fettering discretion*

[21] In the alternative, counsel argues that the Assistant Commissioner treated the guidelines as exhaustive and did not take into account other factors on which Waycobah based its request for remission and which are relevant to the application of the statutory criteria governing the exercise of the Minister's discretion. In particular, the Assistant Commissioner did not refer to Waycobah's submission that, unless its tax debt was remitted, it could not move towards self-governance in accordance with government policy.

[22] I do not agree. Like the Judge, I do not read the Assistant Commissioner's decision as precluding consideration of factors because they are not mentioned in the guidelines, which expressly state that they are not exhaustive. Indeed, the decision letter sets out Waycobah's submission that remission would afford it "the opportunity for self-governance and financial independence." While he does not specifically mention this factor again, the Assistant Commissioner had it in mind, and there is no evidence that he subsequently excluded it from consideration. In my view, his acknowledgement of the financial hardship that Waycobah was experiencing can be taken to include its consequences, including the adverse impact on the First Nation's ability to replace inadequate infrastructure (along with the attendant health and other social problems), and to achieve financial independence and self-governance.

[23] Nor do I accept that the Assistant Commissioner's decision letter treated non-compliance as a virtual bar to a positive recommendation, without regard to other considerations. It is evident that he viewed Waycobah's history of non-compliance as extensive and gave it decisive weight "in the

circumstances" before him, all of which were more fully set out in the reports prepared by CRA officials to assist him in making the decision.

[24] I agree that the Assistant Commissioner may have given the impression that he regarded the guidelines as binding and determinative when, after dealing with non-compliance, he ended his letter by saying:

> As a result of the foregoing, the facts of this case do not conform to the CRA's remission guidelines to warrant granting relief.

Counsel also pointed out that this was not an isolated example. Similar language is found in the two principal documents that the Assistant Commissioner had before him when he made his decision: a report from Karen Stirling of the Excise and GST/HST Rulings Directorate, dated June 25, 2009, summarizing the file and recommending against remission, and the minutes of the meeting of the Headquarters Remission Committee on September 2, 2009, recording its recommendation against remission.

[25] These documents may suggest a departmental "mind set" that remission can only be granted if the request complies with the guidelines, something that has already drawn negative judicial comments in respect of officials' use of similar guidelines on the waiver of penalties and interest: see *Robertson v. Canada (Minister of National Revenue)*, 2003 FCT 16, 2003 D.T.C. 5068 at para. 12; *McNaught Pontiac Buick Cadillac Ltd. v. Canada (Customs and Revenue Agency)*, 2006 FC 1296, 302 F.T.R. 117 at para. 10.

[26] Counsel for the Minister conceded that the use of language that gives the impression that a remission request cannot be granted because it does not comply with the guidelines is “unfortunate”. Nonetheless, she argued that, when the documents are read as a whole, it is clear that neither the Assistant Commissioner, nor the authors of the other documents on which he relied, excluded considerations because they were not in the guidelines, or treated non-compliance as an automatic bar to a recommendation of remission.

[27] I agree with this submission. The Assistant Commissioner’s letter and the supporting documents set out details of the financial hardships of Waycobah, and explain the serious consequences that they may have for the First Nation, including their effect on Waycobah’s ability to achieve financial independence, on its property, and on the environment. While Waycobah’s history of non-compliance was regarded as fatal to its request for remission, I am persuaded that the decision was made in light of the particular facts of this case, and was not improperly pre-determined by a rigid approach to the guidelines, without regard to the totality of the facts and the width of the statutory discretion conferred by subsection 23(2).

[28] It is not unlawful for an administrative decision-maker to base a decision on valid, non-exhaustive guidelines, formulated as a decision-making framework to promote principled consistency in the exercise of a discretion. However, the decision-maker cannot treat guidelines as if they were law, and exhaustive of the factors that may be considered in the exercise of a broader statutory discretion. In my opinion, this is not what the Assistant Commissioner did.

[29] Incidentally, I note that the cover page of the guidelines relevant to the present case is marked “For CRA use only”. It is, in my view, unfortunate if this means that they are not made available to the public. Applicants for remission, as well as the wider public, ought to have access to the bases on which discretion conferred by subsection 23(2) is exercised.

(d) *procedural unfairness*

[30] The Act prescribes no procedures for dealing with requests for tax debt remission. This is left to the discretion of the Minister. Nonetheless, counsel for Waycobah argued that the duty of fairness applies, and that it requires the Minister, or his or her delegate, to personally examine the representations made by applicants before deciding whether to recommend remission. He based this proposition on the principle of the duty of fairness that those who decide must also hear.

[31] However, to my knowledge, and counsel could point to no authority to the contrary, the duty of fairness has never required a Minister, or a senior departmental official, personally to do all the preparatory work before making an administrative decision, including summarizing any representations made by those liable to be affected by the decision.

[32] The content of the duty of fairness is flexible and takes into account the nature of the decision in question, and the administrative and institutional contexts in which it is made. On the present facts, the duty will have been discharged if the Assistant Commissioner had available to him a summary of Waycobah’s representations that was sufficiently accurate and complete to enable him to make an independent decision. From Waycobah’s perspective this may not be as satisfactory

as an opportunity to "speak" directly to the decision-maker, albeit in writing. However, the duty of fairness affords individuals an adequate, not the optimum, opportunity to inform the decision-maker of their case.

[33] I agree that the summaries of the file prepared for the Assistant Commissioner were not perfect. For example, they did not mention the threat to health posed by the overloaded sewerage system that had been identified in a consultant's report that Waycobah had sent to the CRA in support of its request. Nonetheless, despite some shortcomings, I am satisfied that the summaries provided a substantially accurate and complete account of the principal bases of Waycobah's request for remission. The First Nation was thus afforded a reasonable opportunity to be heard by the decision-maker, who was able to make an independent decision that was informed by Waycobah's representations. There was, in my opinion, no breach of the duty of fairness.

Conclusions

[34] For these reasons, I would dismiss the appeal but, in all the circumstances, without costs.

"John M. Evans"
J.A.

"I agree
M. Nadon J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-490-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE de MONTIGNY J. OF THE FEDERAL COURT DATED NOVEMBER 26, 2010, FILE NO. T-2011-09)	
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CONCURRED IN BY:	NADON J.A. LAYDEN-STEVENSON J.A.
DATED:	June 6, 2011

APPEARANCES:

Bruce S. Russell, QC Daniel F. Wallace	FOR THE APPELLANT
Caitlin Ward	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McInnes Cooper Halifax, Nova Scotia	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT