

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220201

Docket: A-194-20

Citation: 2022 FCA 17

**CORAM: GAUTHIER J.A.
WOODS J.A.
MONAGHAN J.A.**

BETWEEN:

THE NATIONAL BENEFIT AUTHORITY CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 3, 2021.

Judgment delivered at Ottawa, Ontario, on February 1, 2022.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**GAUTHIER J.A.
MONAGHAN J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The appellant, The National Benefit Authority Corporation, is in the business of assisting individuals with claims for disability tax credits (DTCs). As part of this service, the appellant is responsible for appeals to the Tax Court in circumstances where the Minister of National Revenue has denied a DTC claim.

[2] An employee of the appellant who is not a lawyer appeared before the Tax Court in connection with these DTC appeals. An agent who is not a lawyer is permitted to represent a party only if the appeal is governed by the informal procedure (ss. 17.1 and 18.14 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 (TCC Act)).

[3] The appellant appeals to this Court from an order of the Tax Court dated August 6, 2020. It disposed of a motion seeking among other things the Tax Court's recognition of the appellant as the representative of its clients (DTC appellants) in their Tax Court appeals. The case management judge, Chief Justice Rossiter, denied the request and provided detailed reasons which appear to be unreported.

[4] In its memorandum of fact and law in this Court, the appellant stated that the appeal is from a final judgment of the Tax Court in which this Court has jurisdiction pursuant to s. 27(1.2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (FC Act). This statement was not discussed at the hearing. Subsequent to the hearing, at the Court's request the parties provided written submissions concerning the jurisdiction of the Court in this matter.

[5] Both parties submit that this Court has jurisdiction to hear the appeal. However, this agreement cannot provide this Court with jurisdiction (*Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 4, 431 D.L.R. (4th) 556).

[6] I do not agree with the parties' submissions on this issue. The Tax Court's order is interlocutory and not a final judgment for purposes of s. 27(1.2) of the FC Act. The term "final judgment" is defined in s. 2(1) as follows:

2. (1) In this Act,

...

"final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

[...]

« **jugement définitif** » Jugement ou autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

[7] The general legal principles to be applied when determining whether an order is interlocutory or final for purposes of section 27 are set out in the decision of this Court in *Ontario Federation of Anglers and Hunters v. Alderville Indian Band*, 2014 FCA 145, 461 N.R. 327, leave to appeal to S.C.C. refused, 36035 (12 March 2015) (*Alderville*). One of the issues in *Alderville* was whether a proposed intervener (Ontario Federation of Anglers and Hunters) was in time to appeal to this Court from a decision of the Federal Court that denied the Federation's request for intervener status. This turned on whether the Federal Court's order was interlocutory or final. Although this context is quite different from the context in which this appeal arises, the Court in *Alderville* provided helpful general principles that are applicable here.

[8] In *Alderville* (at paras. 21-22), Justice Stratas parsed the definition of "final judgment" in s. 2(1) and determined that to be a final judgment, the order would have to determine "in whole or in part any substantive right of any of the parties" in "any judicial proceeding". He concluded

that the term “proceeding” as used throughout the FC Act means the “matter before the Court – such as an appeal or application – and not a component of the matter, such as a motion.”

[9] Justice Stratas further wrote that the issue in the motion below (whether to grant intervener status) does not involve a substantive right. Instead, it concerns a procedural right to make submissions, in a proceeding where others’ substantive rights were yet to be determined (*Alderville* at paras. 23-24).

[10] These comments are applicable in this appeal. The motion at issue is not the “proceeding” for purposes of this appeal. The relevant proceedings are the DTC appeals. It makes no difference that the motion was before the Tax Court and governed by its rules.

[11] Further, the substantive right that the proceedings, the DTC appeals, will determine is the subject matter of those proceedings (*Hendrickson v. Kallio*, [1932] 4 D.L.R. 580 at 583-584, [1932] O.R. 675 (C.A.)). The subject matter of the DTC appeals is the DTC appellants’ entitlement to DTCs. The motion did not determine this substantive right. It determined a collateral, procedural right. Therefore, it is not relevant that the appellant is named as a party in the motion in addition to the DTC appellants. The order is interlocutory.

[12] In its submissions, the appellant relied on a judicial decision in Ontario which held that an order made in a contest between a party to an action and someone who is not a party is a final order if it finally disposes of the rights of the parties in the issue raised between them (*Smerchanski v. Lewis* (1980), 117 D.L.R. (3d) 716, 30 O.R. (2d) 370 (C.A.)).

[13] However, this principle has not been applied where the issue involves the removal of a solicitor who is acting in a representative capacity. The Ontario courts have firmly established that such matter is interlocutory and not final (*Edgeworth v. Shapira*, 2020 ONCA 374, 320 A.C.W.S. (3d) 357 at para. 5). The issue in this appeal is analogous since it involves the representation of the DTC appellants. It is an interlocutory matter.

[14] The appellant suggests in the alternative that the motion may be considered to be governed by the general procedure and therefore an appeal to this Court is not limited by s. 27(1.2) of the FC Act. The appellant relies on a comment made by Justice Graham in *Re Shannon*, 2016 TCC 255, 2016 D.T.C. 1204. In *Re Shannon*, the Tax Court of its own motion determined that an agent who had appeared in informal procedure appeals should be prohibited from representing parties before the Tax Court without leave of the Court.

[15] I disagree with this submission. The relevant provision is s. 27(1.1) of the FC Act. It provides that an appeal lies to this Court from any judgment of the Tax Court, except if the judgment is “one in respect of which [the informal procedure] applies.” In this case, the parties in the motion were the appellant, the DTC appellants, and the Crown. The order is one in respect of which the informal procedure applies since it applies to the DTC appellants in relation to their DTC appeals.

[16] Finally, the appellant submits that this Court has jurisdiction as a result of s. 27(4) of the FC Act. It provides:

27. (4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

27. (4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

[17] This submission suggests that, for purposes of section 27 of the FC Act, s. 27(4) is intended to override the limitation provided for in the general definition of “final judgment” in s. 2(1). The argument relies solely on a literal interpretation of s. 27(4), and does not consider its context. In any event, s. 27(4) does not assist the appellant because it requires a substantive right to be at issue. As discussed above, no substantive right is at issue in the motion.

[18] Therefore I would dismiss this appeal. In light of the agreement of the parties on the jurisdiction issue, I would propose that the parties bear their own costs.

"Judith Woods"

J.A.

“I agree.

Johanne Gauthier J.A.”

“I agree.

K.A. Siobhan Monaghan J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-194-20

STYLE OF CAUSE: THE NATIONAL BENEFIT
AUTHORITY CORPORATION v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 3, 2021

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: GAUTHIER J.A.
MONAGHAN J.A.

DATED: FEBRUARY 1, 2022

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