Federal Court of Appeal | Cour d'appel fédérale

Date: 20221121

Docket: A-175-22

Citation: 2022 FCA 199

[ENGLISH TRANSLATION]

CORAM: **GLEASON J.A.**
LASKIN J.A.
LEBLANC J.A.

BETWEEN:

TONY DOUSSOT

Appellant

and

HIS MAJESTY THE KING

Respondent

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, on November 21, 2022.

REASONS FOR ORDER BY: LEBLANC J.A.

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

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REASONS FOR ORDER

LEBLANC J.A.

[1] This is a motion to dismiss and quash the appeal filed by the appellant from a notice he received by way of a letter signed by a Tax Court of Canada (the TCC) registry officer and dated August 24, 2022, stating that the application to reopen his TCC file had been dismissed (the Letter).

[2] The respondent argues that the Letter is not a final or interlocutory judgment or order within the meaning of subsections 27(1.1) and (1.2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act) and therefore may not be appealed.

[3] Underlying this matter are notices of reassessment issued on behalf of the respondent by the Minister of National Revenue (the Minister) for the 2016, 2017, and 2018 taxation years. The appellant objected to these notices but was unsuccessful. He then applied to the TCC to challenge the merits of the Minister's decision. In March 2022, the parties signed an agreement in the form of a consent to judgment to settle their dispute. On March 28, 2022, the TCC allowed the appellant's appeal and referred the matter to the Minister [TRANSLATION] "for reconsideration and reassessment, under the terms of the attached consent to judgment".

[4] On April 22, 2022, after receiving the notices of reassessment arising from the consent to judgment, the appellant objected, arguing that the new notices did not reflect the agreement with the Minister. He also applied to have the TCC reopen his case.

[5] On April 26, 2022, a TCC registry officer asked the Minister to file submissions and comments on the appellant's application to reopen the case. The Minister did so on May 12, 2022, arguing that there was *res judicata* because the consent to judgment had been confirmed by the TCC. The Minister further submitted that, in such a context, according to this Court's decision in *Mailloux v. Canada*, 2012 FCA 331 at paragraph 8 (*Mailloux*), the case could not be reopened in the absence of exceptional circumstances, a burden that the appellant had not met. In the alternative, the Minister argued that the criteria set out in paragraph 172(2)(*a*) of the *Tax*

Court of Canada Rules (General Procedure), SOR/90-688a (the Rules), for setting aside or varying a TCC judgment—fraud or facts arising or discovered after the judgment was made—were not satisfied in this case.

[6] As stated at the outset, on August 24, 2022, a TCC registry officer informed the appellant [TRANSLATION] "that the Court has dismissed your application of April 22, 2022, to reopen your case at the Tax Court of Canada". No judgment or order from a TCC judge came with the Letter.

[7] A few days earlier, on August 15, 2022, the appellant was informed by the Minister that his notice of objection to the notices of reassessment for 2016, 2017, and 2018 issued further to the consent to judgment was inadmissible on the grounds that, having signed this consent, he [TRANSLATION] "no longer had a right of objection for those taxation years".

[8] At first glance, the respondent is technically correct. The Letter does not have the characteristics of a judgment or an order issued by the TCC inasmuch as there is no indication in the body of the Letter or in any document appended to it that the "decision" of which the appellant is informed is the decision of a TCC judge. In this respect, I agree with Graham J. of the TCC in *Ghaffar v. The Queen*, 2015 TCC 46 at paragraph 2 (*Ghaffar*), that a "letter from the Registry signed by a registry officer is not an order of this Court" because the Rules, in particular subsection 167(2), when read in conjunction with the definition of "judgment" in section 2, require that such a judgment or order be signed. Under subsection 167(2), a TCC judgment or order is "pronounced" on the day it is signed and, as Graham J. in my view rightly pointed out, it is difficult to imagine that a TCC judgment or order could be signed by anyone other than a TCC

judge (*Ghaffar* at para. 2). The rules in this respect are the same when the judgment or order is pronounced under an informal procedure (see *Tax Court of Canada Rules (Informal Procedure)*, SOR-90/688b, section 9 (Informal Rules)).

[9] Graham J.'s judgment on this point must not have produced the expected impact, because we find ourselves in the same situation here. In my opinion, it is an unfortunate situation for the litigant, because the real judgment—the one pronounced and signed by a TCC judge and promptly filed with the registry, along with the reasons, if any—was not sent to him. This seems to me to be at odds with the Rules and with what should normally govern the communication of a record as important for the litigant as the judgment or the order that concerns him. Nor have I seen anything in the Notices and Practice Notes posted on the TCC website that endorses this type of practice.

[10] Be that as it may, although this technical problem may theoretically seal the fate of this appeal, it does not determine the outcome of the underlying application to reopen the case that gave rise to the issuance of the Letter. This type of problem cannot deprive litigants of their rights, as *Ghaffar* shows us. In other words, it can be said that this application has still not been decided and that the appellant is entitled to a proper decision.

[11] However, it is far from certain here that the appellant can apply to have the TCC case reopened. Nothing in the Rules or the Informal Rules empowers the TCC to reopen a case or a hearing once judgment has been rendered. The wording of section 138 of the Rules is clear in this respect, while the Informal Rules contain no provisions empowering the TCC to reopen a

case or a hearing. Although it may be possible under section 168 of the Rules to move the Court to reconsider a judgment disposing of an appeal, the Court may do so only on strictly technical grounds, either (i) that the judgment does not accord with the reasons for judgment, or (ii) that the judge who pronounced the judgment overlooked or accidentally omitted a matter that should have been dealt with. Clearly, this is not the matter raised here, especially because the judgment at issue in this case merely confirms the consent to judgment signed by the parties.

[12] It is settled law that, under its plenary jurisdiction, this Court has the power to summarily dismiss an appeal, even on its own initiative, when it is doomed to fail (*Dugré v. Canada (Attorney General)*, 2021 FCA 8 at paras. 19 and 20). That is the case here, because the TCC does not have the power to reopen a case or hearing, as the appellant requests, once judgment has been rendered. In my view, this is a sufficient basis to find that this appeal is doomed to fail and should therefore be summarily dismissed.

[13] I would point out here that the criterion of "exceptional circumstances" the respondent puts forward, drawing from the judgment of this Court in *Mailloux*, has no bearing on this case because *Mailloux* was not decided in the context of an application to reopen a case but rather in an appeal from a TCC judgment dismissing the taxpayer's appeal from a notice of reassessment issued following a consent judgment. The difference is significant. Therefore, the issue of whether the TCC can reopen a case once judgment has been rendered concerns the powers granted, not the discretion exercised.

[14] This appeal would be no more likely to succeed if the appellant's underlying application were treated as a motion to have a judgment set aside or varied under paragraph 172(2)(*a*) of the Rules. As the respondent argues, such an application must be made by filing a motion and not, as here, by simply sending an email. This is not a procedural whim but a stringent requirement, because in order to succeed, an applicant must prove that setting aside or varying the judgment at issue is warranted on the grounds of fraud or of facts arising or discovered after the judgment was rendered. This requires evidence. It is therefore necessary to file a formal motion with the TCC.

[15] In other words, still supposing that his underlying motion was filed under paragraph 172(2)(*a*) of the Rules, the appellant could not simply submit a general statement that he could refine with supporting evidence before the Court, because that is not this Court's role when it hears an appeal. In short, even in this scenario, and even if the Letter were considered a judgment of the TCC, this appeal could not succeed because the TCC and, ultimately, this Court, lack the factual basis to assess the application.

[16] In his submissions in response to this motion to dismiss the appeal, which are dated October 17, 2022, the appellant changed the scope of his notice of objection, stating that he also wanted to challenge the merits of the consent judgment rendered on March 28, 2022. It is in fact an objection to the settlement that gave rise to the consent judgment. It seems that the appellant's only criticism of the TCC in this respect is that it rendered this judgment without a hearing, as allowed under paragraph 170(*a*) of the Rules. I note that there is no evidence in the record that the appellant requested such a hearing. I would add that an appeal from a consent judgment

cannot be used as a back door to apply to have the judgment set aside or varied on the grounds of fraud or of facts arising or discovered after the judgment was rendered, a process which, as I mentioned earlier, requires that evidence be filed. This process must be undertaken before the Court that rendered the judgment, not before this Court.

[17] At any rate, the addition of this new ground of appeal on October 17, 2022, could not take place, as the respondent notes, without the appellant being relieved of the failure to do so in a timely manner, i.e., within 30 days after the pronouncement of the consent judgment, as required by paragraph 27(2)(*b*) of the Act. The appellant did not make any such application. Therefore, at least for the time being, this addition cannot be considered a valid ground of appeal before this Court.

[18] I will conclude as follows. The appellant, who is representing himself, feels as if he is in the middle of a bad movie. He objects to what he, rightly or wrongly, considers a settlement he never consented to, but all avenues to contest it are closed off. As we have seen, a motion to set aside or vary a judgment, whose success obviously cannot be guaranteed, seems to be a potential avenue, provided that the appellant goes about it the right way. If he has not already done so, he could also read the judgment of this Court in *Mailloux* and see if it applies to his situation. Regardless of the remedy he chooses, he must ensure that, where applicable, he applies for the remedy within the time limit or, if necessary, ensure that he is relieved of his failure to comply with the time limit. One thing is certain, the appellant’s continuing intention to challenge the notices of reassessment issued further to the consent judgment cannot be denied.

[19] For all these reasons, I would grant this motion and dismiss the appeal. The respondent is not seeking costs, as is entirely appropriate in the very specific circumstances of this case. I would therefore grant the motion without costs.

"René LeBlanc"

J.A.

"I agree.
Mary J. L. Gleason J.A."

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

Certified true translation
Vera Roy, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-175-22
STYLE OF CAUSE:	TONY DOUSSOT v. HIS MAJESTY THE KING

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LEBLANC J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	November 21, 2022

APPEARANCES:

Tony Doussot	APPELLANT
Éliane Mandeville Julien Dubé-Sénécal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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