Federal Court of Appeal | Cour d'appel fédérale

Date: 20250128

Docket: A-70-24

Citation: 2025 FCA 25

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

BETWEEN:

DAVE SHULL

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Vancouver, British Columbia, on January 21, 2025.

Judgment delivered at Ottawa, Ontario, on January 28, 2025.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: WOODS J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The appellant, Dave Shull, appeals a January 18, 2024 judgment of the Tax Court of Canada in Tax Court file 2019-243(IT)I (*per* Visser J). For reasons delivered from the bench, that judgment dismissed Mr. Shull's appeal of assessments for his 2009 to 2014 taxation years.

[2] The assessments imposed income tax on amounts Mr. Shull received from Concept Mechanical Ltd. (Company), and penalties associated with the late filing of his returns for the 2009 to 2013 taxation years. The Minister's position was that Mr. Shull was an employee of the Company so that amounts it paid him constituted employment income that Mr. Shull failed to report.

[3] Before the Tax Court, Mr. Shull argued that his arrangements with the Company were a "non-commercial, personal endeavour" under which he would "provide his labour to the Company…and the Company would compensate [him] for his labour" to obtain "money for personal and livelihood expenditures", and that at all material times he had "no subjective intention to pursue profit". Thus, in Mr. Shull's view, the amounts received were not income.

[4] The Tax Court noted that the Tax Court and this Court repeatedly have held this argument is without merit, citing *Meerman v. Canada*, 2019 FCA 119, leave to appeal to SCC refused, 38886 (13 February 2020), and *De Geest v. Canada*, 2022 FCA 22. The Tax Court found that Mr. Shull was an employee of the Company and had not timely filed his tax returns for 2009 to 2013. Accordingly, it dismissed his appeal and awarded the respondent $1,000 in costs.

[5] Although Mr. Shull's notice of appeal in this Court raises several issues, most of them are without merit. However, Mr. Shull's assertion the Tax Court denied him procedural fairness by failing to grant his request for an adjournment to seek representation is not of that nature.

[6] When it comes to procedural fairness, the focus of the inquiry is on whether a fair and just process was followed having regard to all of the circumstances: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 54.

[7] I agree with Mr. Shull that the Tax Court breached procedural fairness. However, I also agree with the respondent that Mr. Shull's appeal of the tax assessments has no merit. This leaves the Tax Court's costs award. In my view, the Tax Court made an error of law in awarding the respondent costs.

[8] In these circumstances, I see no reason to return the matter to the Tax Court. Despite the breach of procedural fairness, the outcome of Mr. Shull's appeal of the assessments is inevitable. Moreover, this Court can correct the Tax Court's error of law. Thus, returning the matter back to the Tax Court would serve no useful purpose.

[9] Let me explain why I have come to these conclusions.

A. *Procedural Fairness*

[10] Before the Tax Court, David Lindsay represented Mr. Shull. While Mr. Lindsay is not a lawyer, an agent may represent an individual in the Tax Court in informal proceedings: *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 18.14; *Tax Court of Canada Rules (Informal Procedure)*, S.O.R./90-688b (*Informal Rules*). Mr. Shull's appeal was governed by those rules.

[11] At the beginning of the Tax Court hearing, Mr. Lindsay asked the Tax Court judge to recuse himself because he had presided over Mr. Shull's earlier appeal in Tax Court file 2015-5383(GST)I (the GST appeal). That appeal concerned the payments Mr. Shull received from the Company in 2009 to 2013. At that time, the Minister was of the view that Mr. Shull provided his services to the Company as an independent contractor carrying on a business and assessed Mr. Shull for goods and services tax on the Company's payments to him.

[12] Following Mr. Shull's testimony in the GST appeal, the respondent conceded Mr. Shull was not carrying on a business. While the Tax Court acknowledged that concession, it made its own findings: that Mr. Shull was not carrying on a business and was an employee of the Company. Therefore, by judgment dated May 31, 2016, for reasons delivered orally, the Tax Court allowed Mr. Shull's appeal in the GST appeal.

[13] The Minister then assessed Mr. Shull for income tax, claiming the amounts received from the Company were income from employment. Those assessments gave rise to the appeal to the Tax Court that is the subject of the present matter.

[14] Before the Tax Court, the respondent asserted issue estoppel applied—Mr. Shull was bound by the Tax Court's finding in the GST appeal that he was an employee of the Company. This assertion led Mr. Lindsay to make the recusal request and to seek an adjournment to bring a formal recusal motion. The Tax Court judge denied the adjournment and determined that there was no reason to recuse himself.

[15] The Tax Court judge then said he wanted to "deal with the issue of [Mr. Lindsay] continuing" to act as Mr. Shull's agent. In doing so, the Tax Court judge referenced comments another Tax Court judge, acting as case management judge, made regarding Mr. Shull's earlier motion to strike the respondent's amended reply to Mr. Shull's amended notice of appeal. Mr. Lindsay represented Mr. Shull on that motion. The case management judge dismissed the motion for having no basis in law, characterizing it as a frivolous motion intended to delay the hearing of the appeal, and awarded the respondent $500 in costs payable forthwith.

[16] At the Tax Court hearing of the present matter, Mr. Lindsay asserted that if the Tax Court had concerns about his appearance on Mr. Shull's behalf, it should have given them advance notice. In response, the Tax Court judge asked Mr. Lindsay whether he would be prepared to proceed without raising arguments "which [have] generally been considered to be not legitimate" and "vexatious and illegitimate arguments that have all been dismissed…In other words, *deal with the case on its merits*": Appeal Book at 51-52 (emphasis added). Here, the Tax Court judge was referring to the arguments described in paragraph 3 above. I note that the case management judge also suggested the efforts on appeal focus on the merits.

[17] Mr. Lindsay sought a brief adjournment to discuss the matter with Mr. Shull. The Tax Court judge agreed to grant the adjournment after hearing from respondent's counsel on the matter. Counsel expressed concern about Mr. Lindsay's continued representation of Mr. Shull because of the Supreme Court of British Columbia's finding that Mr. Lindsay is a vexatious litigant, as well as concerns about possible further delay.

[18] Before adjourning to permit Mr. Lindsay to speak with Mr. Shull, the Tax Court judge said he was going to "address [his] comments to [Mr. Shull]". The Tax Court judge expressed "serious concern about Mr. Lindsay's continued involvement in this matter". The Tax Court judge warned Mr. Shull that if Mr. Lindsay continued, on Mr. Shull's behalf, to raise the arguments the Tax Court judge had asked him not to, "it may be detrimental to your case". He warned Mr. Shull the respondent was seeking costs. The Tax Court judge then said, "[o]n the other hand, the court has already denied an adjournment request *so it's up to you to decide how you want to proceed with this case today*": Appeal Book at 53 (emphasis added).

[19] Following a brief adjournment, Mr. Lindsay advised the Tax Court judge that he would withdraw, but that Mr. Shull had told him he wanted an adjournment to seek representation by counsel. After confirming Mr. Lindsay was withdrawing, the Tax Court judge asked Mr. Lindsay to leave the counsel table.

[20] The Tax Court judge then asked Mr. Shull whether he was ready to proceed. In response, Mr. Shull said he did not know how to proceed and that he "maybe…need[ed] a lawyer": Appeal Book at 55. He expressed some uncertainty about the effect of the GST appeal. The Tax Court judge said one legal question was whether the finding that Mr. Shull was an employee in that case applied for all but 2014. The Tax Court judge said he had not made any decision on that and it would be addressed at the argument stage. He then explained the typical process in informal proceedings before the Tax Court. Mr. Shull again expressed uncertainty about how to proceed and asked if court could be "adjourned so [he could] get help": Appeal Book at 57.

[21] The Tax Court judge said he would consider the request after hearing from the respondent. The respondent objected to the adjournment submitting that Mr. Shull was involved in the appeal, was aware of the subject matter and, at least since the hearing of the motion before the case management judge, knew that Mr. Lindsay was an unsuitable representative. The respondent submitted Mr. Shull should be able to proceed, meaning of course without counsel.

[22] After asking Mr. Shull if he had any other submissions, the Tax Court judge denied Mr. Shull's adjournment without explaining why. He then asked Mr. Shull if he was ready to proceed, explaining "[i]n other words…at this stage you have two choices. You can withdraw your appeal, file a notice of discontinuance, or you can continue with the hearing": Appeal Book at 59. Mr. Shull indicated he wanted to proceed and, after the hearing, the Tax Court dismissed Mr. Shull's appeal. The Tax Court also awarded the respondent $1,000 in costs.

[23] I pause here to mention that Mr. Shull's notice of appeal to this Court states he "has a significant brain injury and resulting cognitive disabilities". The Tax Court judge knew this. In his oral reasons in the GST appeal, the Tax Court judge explained that he allowed Mr. Shull to have an agent assist him because of his brain injury. (That agent was not Mr. Lindsay.) In the present matter, Mr. Lindsay raised Mr. Shull's brain injury before he withdrew. Mr. Shull also later testified to the same effect. With the greatest respect to Mr. Shull, it was evident he struggled in presenting his submissions before us.

[24] Caution is required when unrepresented litigants, particularly those with a disability, appear before courts; judges should "ensure that self-represented litigants are treated fairly and

are in a position to fully understand and participate in a proceeding": *Haynes v. Canada (Attorney General)*, 2023 FCA 244 at para. 10, citing *Canada (Public Safety and Emergency Preparedness) v. Ewen*, 2023 FCA 225 at para. 30 and *Haynes v. Canada (Attorney General)*, 2023 FCA 158 at paras. 33-34, leave to appeal to SCC refused, 41047 (6 June 2024).

[25] At the outset of the Tax Court hearing, Mr. Shull was not an unrepresented litigant. However, after the Tax Court judge expressed significant concerns about Mr. Lindsay's continued representation, Mr. Lindsay withdrew. At that point, Mr. Shull became an unrepresented litigant.

[26] The transcripts of the hearing show that Mr. Shull was confused about several points. They suggest he did not understand all aspects of the proceeding. For example, Mr. Shull did not appear to understand what costs are, what factors go into a determination of costs, or their purpose. He sought an explanation more than once. He was unable to make effective representations on costs. I will return to the Tax Court's costs award later in these reasons.

[27] While the decision to grant an adjournment is a discretionary one, that decision must be made fairly: *Wagg v. Canada*, 2003 FCA 303 at para. 19. I accept that the Tax Court judge is in the best position to manage the proceeding and is owed significant deference on decisions made in that regard. However, based on the record before us, I am very troubled by how fair the Tax Court judge's approach here was, especially given the absence of reasons for refusing the adjournment to permit Mr. Shull to seek assistance in the face of his disability.

[28] The Tax Court judge twice told Mr. Shull he had a choice—once on "how to proceed", which I take to mean with or without Mr. Lindsay before he withdrew; and a second time "to discontinue his appeal or proceed" after refusing Mr. Shull's request for an adjournment to seek assistance. With respect, I do not consider either as giving Mr. Shull a real choice. Moreover, the Tax Court judge did not explain why Mr. Shull might wish to discontinue his appeal—for example, to avoid a costs award. Had the Tax Court judge given Mr. Shull an opportunity to seek other advice, Mr. Shull might well have learned his appeal had no merit and that he should discontinue it.

[29] In my view, in the circumstances, the Tax Court judge should have granted Mr. Shull an adjournment to seek help. In saying this, I neither underestimate nor discount the costs to the judicial system of taxpayers who pursue meritless arguments and engage in delay tactics. To the contrary, such arguments and tactics must be strongly discouraged. Judicial resources are limited and such actions have a significant negative impact on the ability of others to access the justice system promptly.

[30] Moreover, to be clear, I do not see the Tax Court judge's refusal to recuse himself or to grant Mr. Shull an adjournment to bring a formal recusal motion as inappropriate. The same is true of the Tax Court judge questioning the appropriateness of Mr. Lindsay acting as Mr. Shull's agent.

[31] However, the same cannot be said of the Tax Court's refusal to grant Mr. Shull an adjournment to allow him to seek alternative representation or help (*e.g.*, advice), particularly

given his known disability. In my view, the Tax Court breached Mr. Shull's procedural fairness rights by refusing the adjournment.

[32] A finding of a breach of procedural fairness renders a decision liable to be overturned: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 23 [*Cardinal*]; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at 493. However, where the result is inevitable, a court may exercise its discretion to not grant a remedy for the breach: *Rebello v. Canada (Justice)*, 2023 FCA 67 at para. 16, leave to appeal to SCC refused, 40752 (2 November 2023), citing *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228-229 and *Ilaslan v. Hospitality & Service Trades Union*, 2013 FCA 150 at para. 28; see also *Canada v. Bowker*, 2023 FCA 133 at para. 77.

[33] This exception is admittedly narrow. A court should not decline to overturn a decision based on "speculation as to what the result might have been": *Cardinal* at para. 23; see also *Gale v. Canada (Solicitor General)*, 2004 FCA 13 at para. 13. In other words, it is not sufficient that a new hearing is unlikely to lead to a different result: *R. v. Habib*, 2024 ONCA 830 at paras. 27-28.

[34] That said, I am satisfied that narrow exception applies here insofar as the Tax Court dismissed Mr. Shull's appeal. On that issue, Mr. Shull's appeal has no prospect of success. Returning the matter back to the Tax Court would be futile: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 at para. 117. The result is inevitable.

[35] Let me explain why.

B. *The Appeal of the Assessments Has No Merit*

[36] First, Mr. Shull's argument that the Tax Court erred by not applying section 18.28 of the *Tax Court of Canada Act*, and instead accepting the respondent's submission that issue estoppel applied, is entirely without merit.

[37] Section 18.28 provides that a judgment on an appeal under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) in an informal proceeding before the Tax Court cannot be treated as a precedent for any other appeal. This rule applies to judgments in GST appeals taken in an informal proceeding: *Tax Court of Canada Act*, s. 18.302. However, the Tax Court did not treat the GST appeal as a precedent. Rather, it applied the principle of issue estoppel, a principle that is not displaced by section 18.28 of the *Tax Court of Canada Act*: *742190 Ontario Inc. (Van Del Manor Nursing Homes) v. Canada (Customs and Revenue Agency)*, 2010 FCA 162 at paras. 41-44; *Connolly v. Canada (National Revenue)*, 2019 FCA 161 at para. 74.

[38] Second, I agree with the Tax Court that, by virtue of the 2016 judgment in the GST appeal, the requirements of issue estoppel were satisfied for Mr. Shull's 2009 to 2013 taxation years. The same question (*i.e.*, was Mr. Shull an employee of the Company?) was decided in a final decision (the decision in the GST appeal) and the parties are the same (in each case, the parties are Mr. Shull and the respondent): *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 25, citing *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254.

[39] Finally, the GST appeal did not concern the 2014 taxation year and, in dismissing that appeal, the Tax Court did not rely on issue estoppel. Rather, it concluded Mr. Shull was an employee of the Company in that year based on the pleadings and evidence before it.

[40] I have read the transcripts from the hearing and the pleadings in the Tax Court (Mr. Shull's amended notice of appeal and the respondent's amended reply). In his amended notice of appeal, Mr. Shull made no distinction among the taxation years when describing his arrangements with the Company. He plead that the terms of his arrangement were that he would "agree to provide his labour to the Company…and the Company would compensate [him] for his labour". He also plead as a fact that he filed his tax returns for 2009 to 2013 in 2015. Moreover, Mr. Shull confirmed this was so in both his examination-in-chief and under cross-examination.

[41] In his notice of appeal, Mr. Shull also attempts to appeal the Tax Court's order dismissing Mr. Shull's motion to strike the respondent's amended reply. That order is an interlocutory order, not a final judgment, in the Tax Court's informal proceedings. This Court has already decided it cannot be appealed: *Shull v. Canada*, 2023 FCA 107.

[42] In these circumstances, were the matter returned to the Tax Court, the result would be the same: the Tax Court would dismiss Mr. Shull's appeal of his tax assessments.

C. *The Tax Court's Costs Award*

[43] This leaves only the matter of costs.

[44] Costs awards are “quintessentially discretionary”: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 126. The standard of review for discretionary decisions is the appellate standard: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215. Thus, we should interfere with the Tax Court’s costs award only if the Tax Court “made an error in principle or if the costs award is plainly wrong”: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 247, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[45] The *Informal Rules* allow the Tax Court to award costs in informal proceedings: see ss. 10-13. However, the Tax Court may award costs to the respondent only if the actions of the appellant “unduly delayed the prompt and effective resolution of the appeal”: *Informal Rules*, s. 10(2).

[46] At the hearing before us, we asked respondent’s counsel about the Tax Court’s costs award in view of the *Informal Rules*. We took counsel to the parts of the transcript addressing costs submissions made to the Tax Court and to the Tax Court’s reasons for awarding the respondent costs. As noted above, Mr. Shull did not understand costs. I have no doubt he was unaware of the relevant provisions in the *Informal Rules* for awarding costs to the respondent.

[47] It is true, as respondent’s counsel submitted, Mr. Shull did not expressly raise errors in the costs award in his notice of appeal to this Court. However, appellate courts have the discretion to consider new issues on appeal where failing to do so would risk an injustice: *R. v. Mian*, 2014 SCC 54 at paras. 41-42 [*Mian*]; *Adamson v. Canada (Canadian Human Rights*

Commission), 2015 FCA 153 at para. 89, leave to appeal to SCC refused, 36630 (10 March 2016). Whether the failure to raise the new issue would do so depends on the circumstances, but appellate courts can intervene to assist an unrepresented litigant to ensure the proceeding is fair: *Mian* at para. 44. Intervention may also be justified where there is good reason to believe the result would have been different had the error not been made: *Mian* at para. 45. *Mian* seeks to strike a balance between the adversarial process and the appellate court's duty to ensure that justice is done: paras. 37-41, 46; see also *R. v. G.F.*, 2021 SCC 20 at para. 93.

[48] The Tax Court judge did not refer to the *Informal Rules* in his reasons for the costs award. Nor did the Tax Court judge expressly find that the appellant's actions unduly delayed the prompt and effective resolution of the appeal.

[49] In awarding the respondent costs, the Tax Court judge referred to the respondent's submissions in support of a $1,000 costs award, describing them as submissions that Mr. Shull and Mr. Lindsay brought "frivolous motions…that delayed the hearing of these appeals". He also added that "Mr. Shull effectively sought to relitigate aspects of the GST appeal".

[50] The only motions the respondent mentioned in costs submissions were the motion before the case management judge and the motions brought by Mr. Lindsay at the Tax Court hearing itself. However, the case management judge awarded $500 in costs for the motion he decided, finding that it was frivolous and brought for the purpose of delaying the proceedings. Presumably, the case management judge concluded that motion unduly delayed the prompt and effective resolution of the appeal, a finding that was certainly open to him based on my review of

the transcript of that hearing. However, relying on that motion to support an award of costs on the hearing of the appeal effectively awards costs to the respondent twice for the same delay: see, for example, *Stockall v. Stockall*, 2020 ABQB 545 at para. 24; *Breen v. Foremost Industries Ltd.*, 2024 ABKB 9 at para. 31.

[51] This leaves the motions Mr. Lindsay brought at the hearing before the Tax Court judge. The Tax Court judge found they were frivolous and dismissed them at the hearing. After Mr. Lindsay withdrew, the hearing of the appeal proceeded as scheduled.

[52] I accept that frivolous motions may delay, and sometimes unduly delay, the resolution of an appeal. However, that is not what happened here. Regardless of whether the motions were frivolous, about which I express no view, the entire hearing of Mr. Shull's tax appeal, including dealing with the motions and the brief adjournments, lasted two hours and four minutes. The Tax Court delivered its reasons for dismissing Mr. Shull's appeal later that same day. In my view, Mr. Lindsay's motions at the Tax Court hearing cannot be reasonably characterized as having *unduly* delayed the prompt and effective resolution of the appeal.

[53] I have the same view of the so-called "attempts to relitigate". Even if it was not open to Mr. Shull to argue that issue estoppel did not apply in 2009 to 2013, about which I express no view, the Tax Court judge himself said it did not apply to 2014. There was no relitigation to that extent.

[54] Taking all of this into account, I must conclude that the Tax Court judge did not turn his mind to the limitation on costs awards in favour of the respondent under subsection 10(2) of the *Informal Rules*. This led the Tax Court to make an error of law in awarding the respondent costs. In these circumstances, we are justified in intervening: Mr. Shull is unrepresented and there is good reason to believe the result would have been different had the error not been made. Therefore, to that extent, the Tax Court's judgment should be set aside.

[55] This brings us to the remedy. In my view, applying the correct law, the result is clear. Thus, this Court can make the decision the Tax Court should have made, avoiding the delay and the costs associated with allowing the appeal and returning the costs award to the Tax Court.

D. *Conclusion*

[56] The Tax Court breached Mr. Shull's procedural fairness rights and erred in law in awarding costs to the respondent. In the circumstances, I would allow the appeal, set aside the judgment of the Tax Court and, rendering the decision the Tax Court should have made, dismiss Mr. Shull's appeal of the income tax assessments for his 2009 to 2014 taxation years, without costs. In my discretion, I would award no costs in this appeal.

"K.A. Siobhan Monaghan"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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