Federal Court  Cour fédérale

Date: 20170531

Docket: T-81-17

Citation: 2017 FC 536

Ottawa, Ontario, May 31, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ELIZABETH BERNARD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] This is an appeal, brought by the Applicant pursuant to Rules 51 and 369 of the *Federal Court Rules*, SOR/98-106 ("Rules"), of the Order of Prothonotary Tabib, dated April 21, 2017, wherein she stayed the Applicant's application for judicial review until July 1, 2017.

[2] Discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at

paras 64 and 79, application for leave to appeal to the Supreme Court of Canada filed on December 9, 2016 in 2016 CarswellNat 7112 (WL)).

[3] On January 18, 2017 the Applicant filed an application for judicial review of the December 19, 2016 decision of the Minister of National Revenue ("Minister") to waive the reporting requirements for all labour organizations and labour trusts, pursuant to s 149.01 of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) ("ITA"), for fiscal periods starting in 2017.

[4] Section 149.01 came into force on December 30, 2015 and requires such entities to provide information returns to the Canada Revenue Agency ("CRA"), including detailed financial information, failure to comply being an offence pursuant to s 239 (2.31)). Pursuant to s 149.01(4), information contained in the information return shall be made available to the public by the Minister, including by publication on the department's website. Pursuant to s 220 (2.1), the Minister has the discretion to waive the requirement to file prescribed forms or information.

[5] The Applicant is an employee in a unionized workplace who pays union dues to a labour organization subject to s 149.01 of the ITA.

[6] On February 7, 2017, the Respondent brought a motion seeking to strike out the application for judicial review and to suspend all further steps in the litigation until the motion was addressed. Alternatively, that the matter be held in abeyance pending the passing of Bill C-4, subsequent to which the matter would be moot. This was because s 149.01 and s 239(2.31)

would be repealed by Bill C-4 which, at the time of the motion, was on second reading before the Senate.

[7] The motion to strike raised a number of grounds, lack of standing, mootness and abuse of process. The Prothonotary did not accept these grounds but granted the alternate relief. She concluded that, although at that time the matter could not be declared moot, Parliament had expressed a clear intention to repeal s 149.01 and, given the legislation's progress, it was reasonable to believe that this would occur by July 1, 2017. Even in the absence of the challenged waiver by the Minister, the earliest any union or trust would be required to report pursuant to s 149.01 is July 1, 2017. The Prothonotary concluded that staying the application until that date struck the appropriate balance between avoiding needless expenditure of funds and resources in the very likely event that the matter may become moot before the waiver truly takes effect, and ensuring that in the event the legislation to repeal the reporting requirement stalls or fails, the judicial review can proceed without delay.

[8] On April 12, 2017, the Senate passed Bill C-4, with amendments, with the result that it was returned to the House of Commons to consider the amendments.

[9] The Applicant submits that the failure to consider a required element of a legal test, or similar error in principle, can be characterized as an error of law and subject to a standard of correctness (*Housen v Nikolaisen*, 2002 SCC 33 at para 36). She asserts that there is no evidence that the Prothonotary considered or applied the *Apotex Inc v Astrazeneca Canada Inc*, 2003 FCT 149 ("*Apotex*") test for applying s 50(1) of the *Federal Courts Act*, RSC, 1985, c F-7, which

provision permits the Court to stay a proceeding. Nor did the Respondent provide evidence or argument to establish that the continuance of the action would work an injustice because it would be oppressive or vexatious or would be an abuse of process or that a stay would not cause an injustice to the Applicant. Accordingly, the Respondent failed to meet its burden of proof.

[10] The Applicant also submits that the Prothonotary inappropriately deferred to the convenience of the Minister. Delaying the matter on the possibility of legislative change is an error in principle and an improper exercise of the Prothonotary's discretion. Further, that it is the role of the Court to hear and decide a citizen's challenge, not to facilitate a decision-maker's obvious attempts to immunize her decision from judicial oversight. The Court must apply the law as it currently exists. Staying a proceeding while Parliament considers legislative changes is tantamount to allowing the intrusion by the legislative branch upon matters entrusted to the judicial branch. Further, even if the matter becomes moot the Court retains the discretion to determine the matter *(Borowski v Canada (Attorney General)*, [1989] 1 SCR 342). It was procedurally unfair for the Prothonotary to presume that the matter would not proceed without giving the parties the opportunity to be heard on this point.

[11] For its part, the Respondent submits that the Prothonotary properly determined that a stay of proceedings to July 1, 2017 would be in the interests of justice when both chambers of Parliament have clearly spoken in favour of the repeal. The Prothonotary balanced the cost to the justice system against the prejudice a stay might create to the Applicant and her right to pursue her application. This balance was struck by selecting a date before which no return can have become due, July 1, 2017, even if there had been no waiver. The Prothonotary took into

account the expenditure of public funds necessary to carry on with the litigation of a matter that will very likely become moot and balanced it against the Applicant's lack of prejudice when no return can possibly have become due. This approach is in keeping with the applicable guiding principles (*Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 at paras 8-11) ("*Coote*")).

[12] Having considered the Applicant's submissions, including those made in reply, as well as the submissions of the Respondent, I am not persuaded that the Prothonotary erred in law.

[13] In an application for judicial review, the Court may, pursuant to s 18.2 of the *Federal Courts Act*, make any interim order that it considers appropriate pending the final disposition of the application. Pursuant to s 50(1)(b), the Court may, in its discretion, stay any proceeding or matter where it is in the interest of justice to do so. And, as set out in Rule 3, the Rules are to be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[14] In *Coote*, the Federal Court of Appeal, in the context of staying of appeals, found that the Court had jurisdiction to effect a stay based on s 50 of the Federal Courts Act and its plenary jurisdiction to manage and regulate its own proceedings. Further, that the three-part test in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 had no application. Rather, in that circumstance the Court need only determine whether a stay is in the interest of justice (*Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc.*, 2011 FCA 312 at paras 3-14 ("*Mylan*"); *Federal Courts Act* s 50(1)(b)) and stated:

> [11] As explained in *Mylan*, there is a difference between this Court issuing a stay to enjoin another body from exercising its jurisdiction and this Court issuing a stay to refrain from exercising its own jurisdiction in a pending appeal. The *RJR-MacDonald* test, a test suitable for injunctive relief, applies to the former. With respect to the latter,
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> > …we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in RJR-MacDonald do not apply here.
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> (*Mylan*, *supra* at paragraph 5.)

[15] And, whether the Court would issue a stay to refrain from exercising its own jurisdiction over a pending appeal depended on the factual circumstances as guided by certain principles, including Rule 3. Additional principles guide the Court in the exercise of its plenary jurisdiction to manage and regulate proceedings. As long as no party is unfairly prejudiced and it is in the interest of justice, the Court should exercise its discretion against the wasteful use of judicial resources (*Coote* at paras 8-13; also see *Mylan* at paras 5-14).

[16] The Applicant asserts that the test for a stay under s 50(1)(b) is whether, in all of the circumstances, the interests of justice support the application being delayed (*Mylan*, at para 14). She also asserts, however, that the applicable test is found in *Apotex* where this Court, in the context of s 50(1)(a), stated:

> [13] The jurisprudence of this Court which has considered subsection 50(1) of the Act is to the following effect:

> i) The power to stay should be exercised sparingly and a stay will only be ordered in the clearest of cases;
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> ii) In order to justify a stay two conditions must be met, one positive and one negative. They are that:
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> a) The defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to the defendant or would otherwise be an abuse of process; and
>
> b) The stay must not cause an injustice to the plaintiff.
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> The burden of proof is on the defendant to establish both conditions.
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> iii) Where there are fundamental jurisdictional reasons for bringing an action in both a provincial superior court and the Federal Court of Canada, a stay of the Federal Court proceedings is not appropriate.
>
> See: Varnam v. Canada (Minister of National Health and Welfare) et al. (1987), 12 F.T.R. 34 (T.D.); Figgie International Inc. v. Citywide Machine Wholesale Inc. (1993), 50 C.P.R. (3d) 89 (F.C.T.D.).

[17] However, the 2003 decision of *Apotex* was not mentioned by the Federal Court of Appeal in *Coote*. In addition, *Apotex* concerned the granting of a stay under s 50(1)(a) on the basis that the proceeding was already before another court. That is not the situation in this case. Accordingly, I am not persuaded that the Prothonotary erred in law by failing to consider the "test" set out in *Apotex*.

[18] In any event, the Prothonotary recognized that it was very likely that by July 1, 2017 Bill C-4 would have been passed, thereby repealing s 149.01 of the ITA.

[19] She also recognized the significance of the date July 1, 2017 being that, even in the absence of the challenged waiver by the Minister, this was the earliest possible date that any union or trust would be required to report pursuant to s 149.01. This is significant because the Applicant could not suffer any prejudice prior to July 1, 2017. If the subject provisions are repealed on or before that date, with or without the waiver there will be no information reported and that information will not be made public. Thus, on a practical level, the Applicant cannot be prejudiced by the stay as she will not be deprived of this information.

[20] The Prothonotary also recognized that there was a balance to be struck between avoiding needless expenditure of public funds and resources in the very likely event that matter may become moot before the waiver has any practical effect and ensuring, if the repealed legislation is delayed or fails, that the matter can proceed without undue delay.

[21] The Prothonotary considered the factual circumstance in the context of the appropriate guiding principles. In my view, although her reasons were brief, it is apparent that she applied the approach described by the Federal Court of Appeal in *Coote*.

[22] As to the Applicant's submission that it was procedurally unfair for the Prothonotary to presume that the matter would not proceed even if it is rendered moot by the repealing of the subject provisions, this is not a basis upon which the Order can be appealed. Nor was there anything preventing the Applicant from making that argument when appearing before the Prothonotary and addressing the mootness ground nor precluding her from bringing a motion to that effect if the repeal is effected by July 1, 2017.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Appeal from the Order of Prothonotary Tabib dated April 21, 2017 is dismissed.

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-81-17
STYLE OF CAUSE:	ELIZABETH BERNARD v MINISTER OF NATIONAL REVENUE

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE FEDERAL COURTS RULES

JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MAY 31, 2017

WRITTEN REPRESENTATIONS BY:

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