Federal Court Cour fédérale

Date: 20191022

Docket: T-454-19

Citation: 2019 FC 1321

Ottawa, Ontario, October 22, 2019

PRESENT: THE CHIEF JUSTICE

BETWEEN:

LAWRENCE WATTS

Applicant
(Responding Party)

and

CANADA REVENUE AGENCY

Respondent
(Moving Party)

ORDER AND REASONS

I. Introduction

[1] In this Motion, the Respondent, Canada Revenue Agency [**CRA**], seeks to strike Mr. Watts' Application for declaratory relief in its entirety. It does so on three grounds: (i) the issue being raised by Mr. Watts is *res judicata*, (ii) there is an alternative remedy available to Mr. Watts, and (iii) this Court has no jurisdiction to entertain his application.

[2] I agree that the issue raised by Mr. Watts on this Application is *res judicata*. I also agree that he ought to pursue the alternative remedy that is available to him, rather than coming to this Court. Moreover, I consider his Application to constitute an abuse of process. Indeed, Mr. Watts' Application also constitutes a collateral attack on the prior rulings of other courts in which the core issue of statutory interpretation raised before this Court was finally determined. Given these conclusions, it is unnecessary for me to address the jurisdictional issue that CRA has raised.

[3] I note in passing that the CRA raised an argument in its written submissions that was abandonned in the hearing of this Motion. Specifically, the CRA argued that the issues raised in this Application are not properly the subject of an application for judicial review. However, at the outset of the hearing, counsel to the CRA conceded that Mr. Watts is not seeking judicial review in this Application, but rather is seeking declaratory relief pursuant to subsection 17(1) of the *Federal Courts Act*, RSC 1985, c F-7.

II. **Background**

[4] In his underlying Application, Mr. Watts seeks two related declarations. The first is a "declaration as to whether the provisions under subsection 231.3(1) of the *Income Tax Act* R.S.C. 1985, c. 1 (5th Supp) [the ***ITA***] 'otherwise provide' as contemplated by subsection 34(2) of the *Interpretation Act* R.S.C., 1985, c. I-21 in regard to the jurisdiction to issue search warrants under section 487 of the *Criminal Code* R.S.C., 1985, c C-46 [the ***Criminal Code***] when offences under the [*ITA*] are alleged."

[5] The second is a "declaration that a Justice of the Peace or a Provincial Court Judge either *does* or *does not* have the jurisdiction to issue section 487 Search Warrants, when offences under the [*ITA*] are alleged" [emphasis in original].

[6] In November 2011, two search warrants issued by a judge of the Ontario Court of Justice pursuant to section 487 of the *Criminal Code* were executed at Mr. Watts' residence and his business office, respectively. One of those search warrants [the **Search Warrants**] alleged offences under both the *ITA* and the *Criminal Code*, whereas the other one alleged offences solely under the *ITA*.

[7] In November 2012, Mr. Watts was arrested and charged with tax fraud, pursuant to paragraph 380(1)(a) of the *Criminal Code*. Approximately three years later, and after two unsuccessful attempts to have the Search Warrants quashed, he was convicted by a jury of one count of tax fraud under that provision. The following year, he was sentenced to six years incarceration and a fine in lieu of forfeiture. He was then taken into custody in June 2016, released on day parole after one year, and granted full parole another year later, in June 2018.

[8] His appeal of his conviction and sentence was dismissed earlier in 2018: *R v Watts*, 2018 ONCA 148 [***Watts OCA***].

[9] In his unsuccessful challenges to the Search Warrants before the Ontario courts, Mr. Watts steadfastly maintained that the Search Warrants were invalid because they were issued

by a judge of the Ontario Court of Justice, pursuant to the *Criminal Code*, rather than by a judge of a superior court (including the Federal Court), pursuant to the *ITA*.

III. **Relevant Legislation**

[10] Pursuant to section 487 of the *Criminal Code*, a "justice" may issue a search warrant in prescribed circumstances. Under section 2 of that legislation, a "justice" is defined to be "a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction."

[11] Pursuant to section 231.3 of the *ITA*, a "judge" may issue a search warrant in prescribed circumstances where, among other things, the judge is satisfied that there are reasonable grounds to believe that an offence under the *ITA* was committed. In section 231 of that legislation, a "judge" is defined to be "a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court."

[12] In support of his position that the search warrant provisions of the *ITA*, rather than those set forth in the *Criminal Code*, apply when offences under the former legislation are alleged, Mr. Watts relies upon subsection 34(2) of the *Interpretation Act*, RSC 1985 c I-21. That provision states:

Criminal Code to apply	**Application du Code criminel**
(2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that	**(2)** Sauf disposition contraire du texte créant l'infraction, les dispositions du Code criminel relatives aux actes criminels s'appliquent aux actes criminels

Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.	prévus par un texte et celles qui portent sur les infractions punissables sur déclaration de culpabilité par procédure sommaire s'appliquent à toutes les autres infractions créées par le texte.

IV. **Issues**

[13] The issue raised on this Motion is whether Mr. Watts' underlying Application for declaratory relief should be struck in its entirety on one or more of the following three grounds:

i. the issues that Mr. Watts raises before this Court are *res judicata*;

ii. there is an alternative remedy available to Mr. Watts; and

iii. this Court has no jurisdiction to entertain Mr. Watts' application.

V. **Analysis**

A. *Test for motion to strike*

[14] A motion to strike an application in this Court will only be granted where it is "plain and obvious" that the application is "bereft of any possibility of success," assuming the facts alleged in the application are true: *Windsor (City) v Canadian Transit Co*, 2016 SCC 54, [2016] 2 SCR 617, at paras 24 and 72; *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, at paras 47 and 52 [***JP Morgan***]; *Chrysler Canada Inc v Canada*, 2008 FC 727, aff'd 2008 FC 1049, at para 20.

[15] In considering such motions, the initiating pleadings should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of drafting deficiencies: *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441, at para 14; *Amnesty International Canada v Canada (Minister of National Defence)*, 2007 FC 1147 at para 33; *Toyota Tsusho America Inc v Canada (Border Services Agency)*, 2010 FC 78 at para 13, aff'd 2010 FCA 262.

B. *Are the issues raised by Mr. Watts* res judicata*?*

[16] The CRA submits that the issues raised by Mr. Watts are *res judicata*, and that therefore he is estopped from raising those issues before this Court. I agree.

[17] The doctrine of *res judicata* is premised on the principle that a litigant "is only entitled to one bite at the cherry": *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 46, at para 18 [***Danyluk***]. Put differently, once an issue has been decided, it "should not generally be re-litigated to the benefit of the losing party and the harassment of the winner": *Danyluk*, above.

[18] There are two steps to the Court's approach to the issue estoppel form of *res judicata.* In the first, the Court determines whether the following three preconditions to the application of the doctrine are met*:*

i. the same issue must have been previously decided;

ii. the prior decision that is said to create the estoppel must have been final; and

iii. the parties to the prior decision (or their representatives) must be the same as the parties to the proceedings in which the doctrine of issue estoppel is being raised.

Danyluk, above, at para 25.

[19] In the second step, the Court assesses whether to exercise its discretion to apply issue estoppel.

[20] In the present circumstances, each of the above-mentioned three preconditions to the application of the doctrine of issue estoppel is met.

[21] Regarding the first precondition, Mr. Watts characterizes the fundamental issue raised in his Application as being "the applicability of s. 487 of the *Code* to offence [sic] created by the *Income Tax Act*": Application Record, at page 32. More specifically, as noted above, he seeks a declaration "as to whether or not the provisions under subsection 231.3(1) of the [*ITA*] 'otherwise provide' as contemplated by subsection 34(2) of the [*Interpretation Act*] in regard to the jurisdiction to issue search warrants under section 487 of the [*Criminal Code*] when offences under the [*ITA*] are alleged": Notice of Application, at para 1. In this regard, he submits, among other things, that section 231.3 of the *ITA* "is a clear expression of parliament's intent to otherwise provide": Notice of Application, at para 3(j).

[22] Mr. Watts raised this precise issue in two separate attempts to have the Search Warrants quashed by the Ontario Superior Court of Justice. He also raised this issue before the Ontario

Court of Appeal, where he challenged his conviction. He has therefore had not one, but three, previous "bites" at the proverbial "cherry."

[23] In the first of those previous proceedings, Mr. Watts argued that "the judge who granted the search warrants did not have jurisdiction to do so," because "the CRA obtained *Criminal Code* search warrants rather than search warrants under the *Income Tax Act*": *R v Watts*, [2012] OJ No 4482, at paras 5-6 [***Watts 2012***]. Justice Nordheimer, as he then was, rejected that argument by simply observing: "While it would have been open to the CRA to obtain search warrants under either statute, there can be no serious issue raised that *Criminal Code* search warrants were obtained when a criminal offence is alleged": *Watts 2012*, at para 6.

[24] In the second of those previous proceedings, Justice Bale addressed in much greater detail the issue that Mr. Watts is now raising yet again before this Court. He stated as follows:

> [15] The accused argues that the *Income Tax Act* "otherwise provides", because it requires search warrants to be issued by a judge of a superior court, or a judge of the Federal Court, and not by a justice of the peace or provincial court judge. On this basis, he argues that, while during the course of investigations of offences under the *Income Tax Act*, warrants may be issued under the *Criminal Code*, the procedure under s. 487 of the *Code* is modified to the extent that the *Income Tax Act* otherwise provides, and that therefore, in tax cases, a warrant issued under s. 487 of the *Code* may only be issued by a superior court judge, or a judge of the Federal Court. I do not accept this argument, for the following reasons.
>
> [16] First, the court having jurisdiction to issue a search warrant is only one of the differences between the *Income Tax Act* procedure, and the *Criminal Code* procedure, for obtaining a search warrant. If the accused's argument were to be accepted, then the procedure under the *Code* would have to be modified in all respects to accord with the procedure under the Act (including

> the test for obtaining a warrant, the scope of the search & cet.), at which point the modified *Code* procedure would be identical to the procedure under the *Income Tax Act*, and could no longer be said to be a warrant issued under the *Code*.
>
> [17] Second, where an investigation included offences under both the *Criminal Code* and the *Income Tax Act* (as it did in the present case), there would be no basis upon which to apply the modified procedure to the investigation of the *Code* offences, with the result that warrants would have to be obtained from two different courts to carry out essentially the same search, a result that Parliament could not have intended when enacting s. 34 of the *Interpretation Act*.
>
> [18] Third, although s. 34 of the *Interpretation Act* provides the *Criminal Code* procedure to be used (summary conviction or indictment) for the prosecution of offences under enactments other than the *Criminal Code*, it does not, in my view, apply the investigative provisions of the *Criminal Code* to the investigation of offences under other enactments. The availability of, and the procedure for obtaining, *Criminal Code* search warrants to investigate offences under other enactments is provided for in s. 487(1)(a) of the *Code*, and the availability of, and the procedure for obtaining, *Criminal Code* production orders to investigate offences under other enactments is provided for in s. 487.012(3)(a) of the *Code*. In both cases, the procedure to obtain the investigative remedy is available without resort to the *Interpretation Act*, and is applicable to the offences under the other enactments without qualification (such as the "except to the extent the enactment otherwise provides" qualification contained in s. 34 of the *Interpretation Act*).

R v Lawrence Watts, 2015 ONSC 5597, at paras 15-18 [***Watts 2015***].

[25] On his appeal of his subsequent conviction by Justice Bale, the Ontario Court of Appeal specifically addressed this issue once again in the following passage of its short decision:

> The appellant's objection to the fact that the CRA obtained *Criminal Code* search warrants, rather than search

> warrants under the *Income Tax Act*, was rejected by Nordheimer J. (as he then was) in his decision dismissing the appellant's application for an order quashing the search warrants. See *R. v. Watts* [2012] O.J. No. 4482 at para. 6, citing *R. v. Multiform Manufacturing Co.* 1990 CanLII 79 (SCC), [1990] 2 S.C.R. 624. There is nothing to be added to this analysis.

Watts OCA, above, at para 4.

[26] It is readily apparent from the foregoing, particularly the detailed treatment of the issue in *Watts 2015*, that the issue of statutory interpretation that Mr. Watts has raised in his application to this Court is precisely the same as the issue he previously raised before both the Ontario Superior Court of Justice and the Ontario Court of Appeal. I acknowledge that the relief that Mr. Watts was seeking in those other Courts is different from the relief that he seeks in this Court. But that does not change the fact that the issue of statutory interpretation that he is now raising before this Court has already specifically been dealt with by the Ontario courts.

[27] It follows from the foregoing that the first pre-condition to the operation of the doctrine of *res judicata* is met.

[28] The same is true with respect to the second precondition, namely, that the prior decision said to create the estoppel must have been final. After Mr. Watts' unsuccessful appeal in *Watts OCA*, above, his Application for Leave to Appeal to the Supreme Court of Canada was dismissed: *Watts OCA*, leave to appeal refused, 38141 (27 September 2018). As he himself recognized in his Affidavit sworn on March 27, 2019 [the **March 2019 Affidavit**], this

effectively exhausted his appeal options. Accordingly, the decision in *Watts OCA*, which specifically rejected the legal argument that Mr. Watts is now raising again, was final.

[29] The third precondition to the operation of the doctrine of *res judicata* is that the parties (or their representatives) must be the same as the parties to the proceedings in which the doctrine of issue estoppel is being raised. Mr. Watts implicitly acknowledged that this precondition is met when he stated the following in his Application: "The respondent, in accordance with the *Canada Revenue Agency Act*, S.C. 1999, C17 [the ***CRAA***], is an agent of Her Majesty and as a result is represented by the Attorney General of Canada": Notice of Application, at para 3(b).

[30] In fact, subsection 4(2) of the *CRAA* states: "The [CRA] is for all purposes an agent of Her Majesty in right of Canada."

[31] In *Watts OCA*, above, the Respondent is specifically identified as being "Her Majesty the Queen."

[32] The only other party in the proceedings before the Ontario courts, and the only other party to the present Application, is Mr. Watts himself. Accordingly, I am satisfied that the parties (or their representatives) to the proceedings before the Ontario courts and to the Application in this Court are the same. This conclusion is consistent with findings made in other civil proceedings, where the issue estoppel was based on issues that had been determined in prior criminal proceedings: See, for example, *Samaroo v Canada Revenue Agency*, 2016 BSCS 531, at

paras 82, 110 and 124; and *Golden v The Queen*, 2008 TCC 173, at paras at 20 and 47, aff'd 2009 FCA 86, at para 6.

[33] Notwithstanding my findings that the three preconditions to the application of the issue estoppel branch of the doctrine of *res judicata* have been met, it is incumbent upon me to consider whether there is anything about the circumstances of this case that would give rise to an injustice if I were to apply the doctrine in the CRA's favour: *Danyluk,* above, at paras 63-67.

[34] In my view, no such injustice would arise by precluding Mr. Watts from raising, before this Court, the precise issue of statutory interpretation that he has already raised on three separate occasions before the Ontario courts. This is not a situation in which *res judicata* is invoked to prevent the relitigation of issues that were previously addressed in expeditious or informal administrative proceedings with attenuated procedural safeguards or non-expert decision-makers: *Danyluk*, above at paras 73 and 77. The prior proceedings that finally determined the issue Mr. Watts seeks to raise yet again were all proceedings before the courts. Moreover, Mr. Watts has had an opportunity to appeal one of the first instance determinations of that issue: *Danyluk*, above, at para 74. There is nothing in the record of those prior decisions to suggest that the issue Mr. Watts seeks to raise before this Court was not properly considered. In addition, Mr. Watts has not identified anything about the circumstances that gave rise to Application in this proceeding that raises any concerns about the possibility of an injustice resulting from the application of the doctrine of *res judicata*.

[35] In this particular context, I consider that Mr. Watts' Application constitutes an abuse of process by relitigation: *Danyluk*, above, at para 63, quoting *British Columbia (Ministry of Forests) v Bugbusters Pest Management Inc* (1998), 50 BCLR (3d) 1, 107 BCAC 191, at para 32; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77, at paras 37-55; *R v Gough*, 2006 NLCA 3, at para 50. For greater certainty, it bears underscoring that Mr. Watts has not adduced any evidence or suggested in any way that any of the prior proceedings referenced above were tainted one way or another. Nor has he suggested that there is any new evidence which would impugn the results reached in those prior proceedings.

[36] Indeed, I consider that Mr. Watts' Application before this Court also constitutes a collateral attack on the prior determinations made by the Ontario courts regarding the issue of statutory interpretation that he now seeks to raise for a fourth time before this Court: *Danyluk*, above, at para 20; *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629, at para 71. The fact that the remedy being sought by Mr. Watts before this Court is different from the remedy he sought before the Ontario courts does not change the fact that the specific issue of statutory interpretation that he seeks to raise before this Court was raised and finally determined in the prior proceedings.

C. *Is an alternative remedy available to Mr. Watts?*

[37] As an additional, alternative, ground in support of this Motion to strike Mr. Watts' Application in this proceeding, the CRA submits that there is an alternative remedy available to him and his spouse. That remedy lies in the "civil matter" that is described in his March 2019 Affidavit. I agree.

[38] According to Mr. Watts, the intent of the present Application is to obtain a determination of "a question of law for the purpose of deciding the next steps in dealing with a civil matter which directly affects" him. He stated that "[t]his civil matter arises as a result of the commencement of collection action [*sic*], in the latter half of the year 2016, by the [CRA] against [him] and which resulted in an assessment dated April 30, 2018 against [his] spouse." He added that the information relied upon by the CRA in issuing the assessment against his spouse was obtained as a result of the execution of the Search Warrants: March 2019 Affidavit, at paras 21, 22, 25 and 27. During the hearing of this Motion, he acknowledged that his ultimate objective is to get the CRA's assessment against his spouse set aside, once he obtains the declaration that he is seeking in this Application**.**

[39] The CRA maintains that Mr. Watts' spouse has the ability to challenge her assessment within the context of her ongoing civil dispute with the CRA. It states that she can do so by filing a notice of objection under section 165 of the *ITA* and then, if she wishes, filing an appeal before the Tax Court of Canada [the **TCC**], pursuant to section 169 of the *ITA*. The CRA asserts that this is the most appropriate remedy available to Mr. Watts and his spouse, if they disagree with its above-mentioned assessment of his spouse. During the hearing of this Motion, the CRA added that Mrs. Watts can raise before the TCC any issue that she feels would invalidate the assessment.

[40] Mr. Watts has not suggested otherwise. In fact, in his written submissions provided in connection with his underlying Application, he states that "a challenge to [the CRA's]

assessment is proceeding through the appeals process provided in the [*ITA*]": Applicant's Written Representations, at para 18.

[41] Quite apart from the foregoing, Mr. Watts has not provided any sound basis for seeking to achieve his ultimate objective of having the notice of assessment set aside by the indirect route of obtaining one or both of the declarations he seeks in this Court, when he is already pursuing the direct route, as described above.

[42] I acknowledge that Mr. Watts purports to seek from this Court the declaratory relief described at paragraphs 4 and 5 above, solely "to get clarity on a question of law," for his own private purposes and in the public interest: Affidavit sworn on August 8, 2019, at para 6. However, there is no indication anywhere in the submissions that Mr. Watts has made to this Court that the issue of statutory interpretation that he is now raising for the fourth time is of interest to anyone but himself and his spouse. Indeed, it bears underscoring that, in para 21 of his March 2019 Affidavit, he states: "The intent of this application is to seek a declaration as to a question of law for the purpose of deciding the next steps in dealing with a civil matter which directly affects the applicant." In my view, this makes it very clear that Mr. Watts seeks declaratory relief from this Court to advance his and his spouse's private interests, rather than any public interest.

[43] In these circumstances, I consider that it would be inappropriate to permit Mr. Watts to proceed with this unusual Application before this Court. This is particularly so given that the

Ontario courts have already clarified for the public the issue of statutory interpretation that Mr. Watts has raised in his Application.

[44] In my view, it is readily apparent that what Mr. Watts and his spouse are truly seeking from this Court is relief that will assist them in their private civil dispute with the CRA. There is an alternative, more appropriate, course of action that is available to them to challenge the assessment pursuant to subsection 165 and 169 of the *ITA*.

[45] In addition to the fact that those provisions of the *ITA* appear to have been specifically created for the purpose of challenging assessments made by the CRA under that legislation, the TCC has greater expertise than this Court has in dealing with assessments of the type that are in dispute between Mr. Watts' spouse and the CRA. Moreover, considerations of judicial economy weigh in favour of having the issue of statutory interpretation that Mr. Watts has raised dealt with by the TCC, rather than by this Court, particularly considering Mr. Watts' confirmation that a challenge to the CRA's assessment of his spouse is already proceeding through the appeals process provided in the *ITA*. Of course, the TCC may decline to address that issue on the basis of the issue estoppel doctrine that is discussed in part V.B. of these reasons above.

[46] Collectively, the foregoing considerations provide a second, independent, reason for granting the CRA's Motion to strike Mr. Watts' application. The fact that the remedy available before the TCC is not identical to the remedy being sought before this Court is not a sufficient basis for invoking this Court's jurisdiction, when it would clearly be more appropriate for Mr. Watts and his spouse to avail themselves of the remedies that are available in their existing

dispute with the CRA: *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713, at paras 40-42.

D. *Does this Court have the jurisdiction to entertain Mr. Watts' Application?*

[47] Given the conclusions that I have reached in sections V.B. and V.C. of these reasons above, it is not necessary to address this issue.

VI. **Conclusion**

[48] For the reasons set forth in sections V.B. and V.C. above, this Motion is granted. Mr. Watts' Application in this proceeding shall be struck in its entirety. Based on those reasons, it is "plain and obvious" that Mr. Watts' application is "bereft of any possibility of success."

ORDER IN T-454-19

THIS COURT ORDERS that:

1. This Motion is granted. Mr. Watts' Application in Court File T-454-19 is struck in its entirety.
2. Mr. Watts shall pay costs in the amount of $750 to the CRA.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	LAWRENCE WATTS v CANADA REVENUE AGENCY
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APPEARANCES:

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