Federal Court of Appeal | Cour d'appel fédérale

Date: 20150930

Docket: A-407-15

Citation: 2015 FCA 209

Present: **RENNIE J.A.**

BETWEEN:

VIRGINIA HILLIS
and GWENDOLYN LOUISE DEEGAN

Appellants

and

THE ATTORNEY GENERAL OF CANADA
and THE MINISTER OF NATIONAL REVENUE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 30, 2015.

REASONS FOR ORDER BY: RENNIE J.A.

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REASONS FOR ORDER

RENNIE J.A.

[1] On September 15, 2015 the Federal Court dismissed, in part, the appellants' action for declaratory and injunctive relief with respect to intention of the Minister to disclose certain financial information to the Internal Revenue Service of the United States of America. The summary trial decision of Justice Martineau addressed only that part of the action dealing with what might be characterized as the statutory interpretation and statutory authority of the Minister

to make the disclosure. *Charter* challenges to the proposed action were, on consent, not addressed and await trial. Thus, the summary judgment dealt exclusively with the allegation that the disclosure was contrary to the *Canada–United States Tax Convention Act*, 1984 (S.C. 1984, c. 20), the *Canada-US Tax Treaty* and *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)), collectively described as the authorizing legislation.

[2] The appellants move on an urgent basis for an interlocutory injunction, effectively staying the disclosure of their financial information by the Canada Revenue Agency (CRA) to the Internal Revenue Service (IRS) under the authority of this legislation. The Minister has made clear that she intends to disclose this information at the close of business today, hours from now.

[3] By way of background, and at the highest level of generality, the legislation mandates the disclosure of information about "US persons" held by Canadian banks to the CRA, and provides for the CRA to automatically disclose that information to the IRS on an annual basis. The IRS may or may not use that information to pursue enforcement actions against US persons resident in Canada.

[4] The appellants are "US persons" by virtue of birth, but have spent their working lives in Canada and are Canadian citizens. They do not hold US passports. They claim to be "accidental Americans", US citizens only by reason of birth. Their information would be disclosed under the regime, which could lead to the IRS enforcement action. The judgment below is candid that the application of the law could cause the appellants serious difficulties.

[5] The appellants argue, amongst several other grounds, that the disclosure of this information constitutes assistance to the United States in its enforcement and collection of its taxes, which is prohibited under Article XXVI A of the *Canada-US Tax Treaty*. The Federal Court found that this prohibition only applies once tax liability has been determined and is enforceable, and is thus not triggered, and that in any event, any such claim was premature.

[6] The appellants further argued that information sharing was only permissible when that information "may be relevant" to enforcing the treaty or domestic laws of a contracting state (Article XXVII), and as such the information must be assessed for relevance on a case-by-case basis rather than handed over in bulk. The judge below found that, even when the information is still in bulk form and has not been shown to have any further utility, it already meets the "may be relevant" test. The appellants argue, in support of the interlocutory injunction, that the learned judge's reasons fail to respond to this argument; the judge erred in focussing on the fact that Canada cannot challenge US tax policy choices, but failed to explain how that establishes or meets the statutory requirement of relevance.

[7] The appellants also argue that the regime violates the non-discrimination provision of Article XXV, wherein a US National resident in Canada cannot be subject to a burden that is not also imposed on Canadians in Canada. The appellants argue that the privacy intrusion, and the burden of complying with the filing requirements, are thus unequally imposed on them as US Nationals resident in Canada. The judge rejected this argument. While he did not directly address the privacy interest, he said that the filing costs are borne by the banks rather than the individuals and thus cannot ground unequal treatment.

I. The test for an interlocutory injunction

[8] I am not satisfied that each of the three criteria governing the grant of an injunction or stay pending appeal set forth in *RJR -- MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, 1994 have been met.

[9] The appellants assert four serious questions to be addressed on appeal. At this stage the Court only needs to examine the questions and be satisfied that they "may" form the foundation of a meritorious appeal. In addition to the grounds reviewed above, the appellants argue that the automatic disclosure of taxpayer information of Canadian residents who are also US citizens, is not authorized by the Canada –US Tax Treaty. While Martineau J rejected this argument, and the subsidiary arguments which underlie it, the question at this stage is only whether the appellants might have a credible case to make an appeal. I am satisfied that they do.

[10] I am not, however, satisfied that the criteria of irreparable harm has been met. The Minister concedes, on two occasions in her memoranda, that "there is no taxpayer information concerning the Appellants in the batch of 'slips' that have been collected by the Minister from financial institutions pursuant to Par XVIII of the *Income Tax Act* and which the Minister must disclose to the United States, pursuant to the IGA, on or before September 30, 2015."

[11] On this understanding, the appellants do not meet the second criteria of the *RJR -- MacDonald* test. As no financial information concerning the appellants will be sent to the IRS, there can be no irreparable harm.

[12] Turning the third criteria, the balance of convenience, the Minister concedes that the appeal will not be moot as of this transfer of information this afternoon. The Minister concedes the existence of a continuing live controversy. While mootness is always an question for the panel of this Court hearing the appeal, at this stage, the Minister's position that the appeal will not be moot tips the balance of convenience in favour of the Minister.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-407-15
STYLE OF CAUSE:	VIRGINIA HILLIS and GWENDOLYN LOUISE DEEGAN v. THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
DATED:	SEPTEMBER 30, 2015

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