Date: 20020726

Docket: T-2220-01

Neutral citation: 2002 FCT 824

BETWEEN:

NORMAN JOHN RAYMOND MACKINNON

Applicant

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Respondent

REASONS FOR ORDER

ROTHSTEIN J.A. (*ex officio*)

[1] This is a judicial review of a decision of the Minister of National Revenue, apparently by way of Statement of Account provided by the Minister to the Applicant on November 22, 2001, showing a balance owing by the Applicant of $164,454.48 as of that date for taxes, Canada Pension Plan, interest and penalties. The Applicant says that the vast bulk of the indebtedness in the Statement of Account is statute barred, that the statute barred indebtedness is extinguished and that the Minister is precluded from collection action for that part of the indebtedness which is statute barred.

[2] The indebtedness arises from assessments and reassessments as follows:

Taxation year	Assessment/reassessment	Date
1979	Assessment	July 14, 1980
	Reassessment	April 16, 1984
1980	Assessment	August 4, 1981
	Reassessment	April 16, 1984
1981	Assessment	August 10, 1982
	Reassessment	April 16, 1984
1982	Assessment	September 16, 1983
1983	Assessment	June 25, 1984
1984	Assessment	July 22, 1985
	Reassessment	January 15, 1988
1997	Assessment	June 4, 1998

[3] On January 20, 1988, the Minister filed a certificate in the Federal Court of Canada certifying the applicant's indebtedness under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and *Canada Pension Plan*, R.S.C. 1985, c. C-8, covering the applicant's 1979 to 1984 taxation years inclusive. On December 15, 1989, the applicant signed a hypothecation agreement with the Minister acknowledging his indebtedness for the years 1979 to 1984 inclusive. Commencing on September 1, 1989, and continuing to August 16, 1999, the applicant made over 50 payments to the Minister ranging from $250.00 to $2,500.00 each.

[4] This is a case in which section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and the British Columbia *Limitation Act*, R.S.B.C. 1996, c. 266, apply. Section 32 provides:

32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	**32**. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

The relevant provisions of the Limitation Act are as follows:

> 3. (5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.
>
> 5. (1) If, after time has begun to run with respect to a limitation period set by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.
>
> 5. (2) For the purposes of this section,
>
> (a) a person confirms a cause of action only if the person
>
> (i) acknowledges a cause of action, right or tile of another, or
> (ii) makes a payment in respect of a cause of action, right or title of another,
>
> 5. (5) For the purposes of this section, an acknowledgment must be in writing and signed by the maker.
>
> [Emphasis added]

[5] In addition, subsection 225.1(1) of the *Income Tax Act* provides:

> 225.1. (1) Where a taxpayer is liable for the payment of an amount assessed under this Act, other than [...], the Minister shall not, for the purpose of collecting the amount [take collection action],
>
> [...]
>
> until after the day that is 90 days after the day of the mailing of the notice of assessment.

[6] The Minister's cause of action arises upon an assessment or reassessment issuing and the elapsing of the relevant delay period under subsection 225.1(1) of the *Income Tax Act*. See *Markevich v. The Queen*, [2001] 3 F.C. 449 at paragraph 60 (C.A.). The applicant says the cause of action could arise earlier because of the provisions respecting jeopardy orders under section 225.2 of the *Income Tax Act*. However, even a jeopardy order requires an assessment by the Minister. In any event, there was no jeopardy order sought or granted in this case.

[7] The relevant limitation period under subsection 3(5) of the *Limitation Act* is 6 years. The Minister concedes that his causes of action, in respect of the assessments for the applicant's 1979 and 1980 taxation years, are statute barred. However, he says that the certificate filed in the Federal Court on January 20, 1988, was less than 6 years after the other assessments and all reassessments were issued and would permit an action to be brought on the certificate within 6 years thereafter.

[8] In *Ross v. Canada* 2002 D.T.C. 6884 (F.C.T.D.), Dawson J. stated at paragraphs 33 and 34:

> [33] Where, however, the Minister has preserved the debt by filing a certificate, which has the same effect as a judgment, the debt is not extinguished, the debtor remains liable to pay moneys owing under the Act (tax, penalties, interest and the like) and the requirement to pay may be issued.
>
> [34] Moreover, section 3 of the *Limitation Act* would permit an action to be brought on a certificate, which would be deemed to be a judgment of this Court, within 6 years.

[9] I agree with Dawson J. The certificate in this case would permit the Minister to bring an action or to take statutory collection proceedings until January 20, 1994.

[10] However, the hypothecation agreement of December 15, 1989, which acknowledged the Minister's cause of action and, therefore, constituted a confirmation of it under subparagraph 5(2)(a)(i) of the *Limitation Act*, further extended the limitation period for 6 years after that date. Thereafter, each payment made by the applicant constituted confirmation under subparagraph 5(2)(a)(ii) of the *Limitation Act* and extended the limitation period after each such payment a further 6 years. As the last of such payments occurred on August 16, 1999, the limitation period has not yet expired, the applicant's indebtedness is not extinguished and the Minister may take steps either by action or statutory collection procedures to enforce collection.

[11] The applicant says that the January 20, 1988, certificate contains calculation errors. Even if it does, that does not invalidate the certificate. Where a certificate contains calculation errors the remedy is to correct them.

[12] The applicant does not argue that the Minister is required to allocate his payments to any specific indebtedness or to any specific year. Indeed, he made no request for any particular allocation of his payments. It was, therefore, open to the Minister to allocate payments to the oldest indebtedness first (see *Clayton's Case* (1816), 35 E.R. 781 at 793 and *Agricultural Insurance Co. v. Sargeant* (1896), 26 S.C.R. 29 at 36).

[13] By reason of the Minister's concession and because they are statute barred, the Minister shall not enforce collection of any amounts for taxes, Canada Pension Plan, interest or penalties pertaining solely to the Minister's July 14, 1980, and August 4, 1981, assessments of the applicant's 1979 and 1980 taxation years. In all other respects, the application for judicial review should be dismissed. The Minister should be entitled to his costs.

[14] The parties made written supplementary submissions relative to the fact that *Markevich, supra*, and *Ross, supra*, are under appeal and that there should be some sort of recognition of these circumstances in the order made in respect of this judicial review. The Minister takes the position that if he is successful on the appeal of *Markevich*, there would be no applicable limitation period and any amounts due as a result of the July 14, 1980, and August 4, 1981, assessments would not be statute barred and collection of such amounts could be enforced. The applicant says that if the *Ross* appeal is successful, the Minister's January 20, 1988, certificate would not have the effect of extending the limitation period.

[15] I have carefully considered the parties' supplementary written submissions on this point. If the *Markevich, supra,* and *Ross, supra,* appeals were imminent, it might be appropriate to hold the decision in this judicial review in abeyance pending those appeals. However, it will be many months before those appeals are heard, let alone decided. The judgment that issues on a judicial review is final and the parties have not satisfied me that there is any appropriate way in which, in effect, to keep the matter open for subsequent redetermination pending the outcome of the appeals in *Markevich, supra*, and *Ross, supra*. The judgment in this judicial review will issue on the basis that the *Markevich, supra*, and *Ross, supra,* decisions have been correctly decided and it will be up to the parties to appeal if they wish to preserve their rights should the appeals in *Markevich, supra,* or *Ross, supra,* be successful.

"Marshall Rothstein"

J.A.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2220-01

STYLE OF CAUSE: Norman John Raymond MacKinnon v The Queen

PLACE OF HEARING: VANCOUVER, BC

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