Federal Court of Appeal  Cour d'appel fédérale

Date: 20150915

Docket: A-358-15

Citation: 2015 FCA 195

Present: **STRATAS J.A.**

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

ROBERT MCNALLY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 15, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

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[1] In these unusual circumstances, the Minister moves by informal letter for directions under Rule 54.

[2] The Minister appeals from a judgment dated June 18, 2015 of the Federal Court (*per* Justice Harrington): 2015 FC 767. The Federal Court ordered that the Minister examine the respondent's 2012 tax return and issue him a notice of assessment within thirty days.

[3] Rather than staying the judgment pending appeal, the Minister complied with it. She examined the return and issued a notice of assessment. But the Minister nevertheless appealed from the judgment and has continued her appeal in this Court.

[4] The respondent wrote the Minister, advising that since the Minister has complied with the judgment, the appeal has become moot and should not be heard. The respondent advised the Minister that he would not file a notice of appearance and, thus, would no longer participate in the appeal.

[5] The Minister, desiring to continue this appeal, now seeks directions. She says that there is an important jurisprudential point that needs to be resolved.

[6] As things stand, the Minister could continue with the appeal, filing an appeal book, a memorandum and a requisition for hearing. The matter would then be ready for hearing. An oral hearing would be held. No doubt, the panel hearing the appeal would raise the issue whether the matter was moot. Because the respondent declines to participate, the Court would receive submissions only from the Minister.

[7] For many reasons, this is an unsatisfactory state of affairs. The Minister would prepare material for the appeal that might never be used. The Court would have submissions on the merits and on the issue of mootness from only one party. An appeal hearing on the merits—a hearing that might not be necessary—would be scheduled. A panel might have to travel hundreds or thousands of miles to conduct the hearing.

[8] But we are not driven to that unsatisfactory state of affairs. This Court has a plenary power to regulate the procedure of matters before it: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paragraph 36; *Mazhero v. Fox*, 2014 FCA 226 at paragraph 9. Indeed, even under the Rules, this Court has the power to dispense with the Rules in appropriate circumstances: see Rule 55.

[9] The plenary power and the discretion under Rule 55 to dispense with the Rules are governed by the objectives set out in Rule 3: achieving the "just, most expeditious and least expensive determination of every proceeding on its merits." The Supreme Court's comments in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 now boost the importance of these objectives.

[10] Using these powers and in pursuit of these objectives, the Court can raise the issue of mootness at any time on its own motion and can call for submissions as to whether an appeal shall continue. This often happens. For example, after reading the parties' memoranda on the merits of an appeal, on occasion the Court perceives that the appeal may be moot and so it issues a direction asking for submissions on that issue. Depending on the circumstances, the Court may request submissions in writing before the appeal hearing to see if it can determine the matter in advance. Or the Court may ask for oral submissions to be made at the start of the appeal hearing.

[11] In this particular case, bearing in mind the objectives of Rule 3 and desiring to end the unsatisfactory state of affairs described above—a state of affairs where a possibly moot appeal involving only one party will languish in our system for months—this Court calls for

submissions from the parties on the issue whether this appeal should be dismissed on account of mootness.

[12] Submissions in chief from the respondent are not necessary. As mentioned above, the respondent advised the Minister by letter that he would no longer participate in the appeal owing to the fact it has become moot. Helpfully, the respondent's letter, already filed with the Court, provides clear and complete argumentation on the facts and the law as to why the appeal should be dismissed on account of mootness.

[13] Within ten days, the Minister shall respond to the respondent's submissions in the letter. She may do so by filing an informal letter setting out why the appeal is not moot and should still be heard.

[14] Four days after the Minister has filed her submissions, the respondent may file reply submissions, also by way of informal letter.

[15] The Judicial Administrator may return the matter to me for determination.

[16] If, in preparing her submissions, the Minister agrees with the respondent that the appeal is moot and should not be heard, she may terminate this appeal by filing a notice of discontinuance under Rule 165.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-358-15
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v. ROBERT MCNALLY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	SEPTEMBER 15, 2015

WRITTEN REPRESENTATIONS BY:

Arnold H. Bornstein	FOR THE APPELLANT
Pooja Samtani	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT