Cour d'appel fédérale

Federal Court of Appeal

Date: 20091105

Docket: A-165-09

Citation: 2009 FCA 321

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

BERTRAND BOUCHARD

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Montréal, Quebec, on October 21, 2009.

Judgment delivered at Ottawa, Ontario, on November 5, 2009.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Justice Harrington of the Federal Court (Federal Court judge) dated March 10, 2009 (2009 FC 249), dismissing the appellant's application for judicial review of the decision of the Minister of National Revenue (the Minister) to retain by way of deduction or set-off, under section 224.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), part of the retirement benefits and income supplement owed to him.

[2] Section 224.1 allows the Minister to require the retention of certain monies under the circumstances specified in that section:

224.1 Where a person is indebted to Her Majesty under this Act or under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of the taxes payable to the province under that Act, the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to the person by Her Majesty in right of Canada.	**224.1** Lorsqu'une personne est endettée envers Sa Majesté, en vertu de la présente loi ou en vertu d'une loi d'une province avec laquelle le ministre des Finances a conclu un accord en vue de recouvrer les impôts payables à la province en vertu de cette loi, le ministre peut exiger la retenue par voie de déduction ou de compensation d'un tel montant qu'il peut spécifier sur tout montant qui peut être ou qui peut devenir payable à cette personne par Sa Majesté du chef du Canada.

[3] The appellant, who acted (and continues to act) without the assistance of counsel, submits that the preconditions for applying this provision have not been met in this case and that the Federal Court Judge was required to reverse the retention effected by the Minister and order the reimbursement.

FACTS

[4] The appellant does not challenge the fact that, in February 2008, he owed $68,789.23 in taxes (the tax debt). The evidence also shows that, at the same time, he was a Crown creditor under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP) and the *Old Age Security Act*, R.S.C. 1985, c. O-9 (OASA). The appellant had been receiving $965.33 per month in benefits under these plans.

[5] In March 2008, the Minister began deducting 30% of the monthly amount payable to the appellant and applying it to his tax debt, with the result that the total monthly benefit amount paid to the appellant was reduced to $675.74.

[6] Subsections 65(1) and (1.1) of the CPP and 36(1) and (1.1) of the OASA respectively stipulate that the benefits paid under these acts are exempt from seizure:

65. (1) A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.	**65.** (1) Une prestation ne peut être cédée, grevée de privilège, saisie, escomptée ou donnée en garantie. Toute opération qui vise à céder, grever, saisir, escompter ou donner en garantie une prestation est nulle.
(1.1) A benefit is exempt from seizure and execution, either at law or in equity.	(1.1) Les prestations sont, en droit ou en equity, exemptes d'exécution de saisie et de saisie-arrêt.

36. (1) A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.	**36.** (1) Les prestations sont incessibles et insaisissables et ne peuvent être ni grevées ni données pour sûreté; il est également interdit d'en disposer par avance. Toute opération contraire à la présente disposition est nulle.
(1.1) A benefit is exempt from seizure and execution, either at law or in equity.	(1.1) Les prestations sont, en droit ou en equity, exemptes d'exécution de saisie et de saisie-arrêt.

[7] On April 17, 2008, the appellant sought the cancellation of the statutory set-off and reimbursement of the monies retained. When his request went unanswered, the appellant brought

his case to the Minister's attention. After receiving a negative response, the appellant challenged the Minister's decision by way of an application for judicial review in Federal Court.

[8] In support of his request, the appellant raised two arguments. First, he submitted that, since the amounts deducted are exempt from seizure under the sections of the CPP and OASA, set-off cannot be effected according to the applicable private law, in particular article 1676 of the *Civil Code of Québec*, R.S.Q. 1991, c. 64 (CCQ), which reads as follows:

1676. Compensation is effected regardless of the cause of the obligation that has given rise to the debt. Compensation does not take place, however, if the claim results from an act perform with intention to harm or if the object of the debt is property which is exempt from seizure.	**1676.** La compensation s'opère quelque soit la cause de l'obligation d'où résulte la dette. Elle n'a pas lieu, cependant, si la créance résulte d'un acte fait dans l'intention de nuire ou si la dette a pour objet un bien insaisissable.

[Emphasis added.]

[9] In the alternative, the appellant argued before the Federal Court that the benefits to which he is entitled are held in trust for him and are not debts that can be subject to the set-off mechanism under section 224.1 of the Act.

DECISION OF THE FEDERAL COURT

[10] The Federal Court judge identified the issue as follows: does the term "set-off" ("compensation" in the French version) in section 224.1 of the Act incorporate civil law concepts

of compensation, more specifically, paragraph 2 of article 1676 of the CCQ, according to which compensation "does not take place . . . if the object of the debt is property which is exempt from seizure"? He recognizes that, if so, compensation could not take place, as the "property" in question is exempt from seizure (reasons, paras. 1 to 5).

[11] The Federal Court judge began his analysis by explaining the role of provincial private law in federal law. In this regard, he cites sections 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which read as follows:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	**8.1** Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.	**8.2** Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

[Emphasis added.]

[12] In this case, the Federal Court judge asked [TRANSLATION] "whether Parliament intended paragraph two of article 1676 to be available to a tax debtor" (reasons, para. 15). He then referred to the decision of the Court of Appeal in *Mintzer v. Canada*, [1996] 2 F.C. 146 (*Mintzer*) and the distinction made therein regarding the potentially distinct effect of civil law (reasons, paras. 15 and 16).

[13] The Federal Court judge went on to explain that, for section 224.1 of the Act to apply, the two debts must be liquid and that, surely, Parliament was therefore referring to legal set-off, not judicial liquidation (reasons, para. 17). He added that the Minister can, in exercising his discretion, determine the extent of the set-off amount (for example, here, he requires only 30% of the amounts paid to the appellant) and that [TRANSLATION] "[i]t is therefore clear that Parliament did not intend to make all the compensation provisions of the *Civil Code of Québec* applicable in such circumstances" (reasons, para. 18). In the Federal Court judge's opinion, Parliament could

not have intended to provide tax debtors with another way to avoid seizure (reasons, paras. 19 and 20).

[14] Lastly, relying on *Mintzer*, the Federal Court judge dismisses the appellant's argument that the monies owed to him [TRANSLATION] "are not debts in the hands of Her Majesty" but rather sums that are held in trust for him.

GROUNDS OF APPEAL

[15] In support of his appeal, the appellant repeats the arguments he raised before the Federal Court judge. First, he submits that the Federal Court judge erred in law in declining to give effect to the civil law as suppletive law. Second, the Federal Court judge should not have relied on *Mintzer* to find that the benefits owed to the appellant are not held in trust. According to the appellant, the conclusion in *Mintzer*, to the extent that it established that the benefits payable to him are debts, was incorrect.

ANALYSIS AND DECISION

[16] The first issue is as follows: on the basis of sections 8.1 and 8.2 of the *Interpretation Act*, must the term "compensation" found in the French version of section 224.1 of the Act be interpreted in reference to the concept of compensation as defined at articles 1672 to 1682 of the CCQ? More specifically, must paragraph 2 of article 1676 of the CCQ, which states that property that is exempt from seizure cannot be subject to compensation, apply? This is a matter of pure statutory interpretation that is subject to the standard of correctness.

[17] According to sections 8.1 and 8.2 of the *Interpretation Act*, it is appropriate to refer to the civil law when it is "necessary" to do so, except where "otherwise provided by the law" (see on this point *St-Hilaire v. Canada (Attorney General)*, 2001 FCA 63, [2001] F.C.J. No. 444 (QL), para. 43). The burden is therefore on the appellant to show that it is necessary to incorporate the civil law notions on which he relies and that there is no provision to the contrary in federal law.

[18] The purpose of the collection measures set out in section 224.1 of the Act is to allow the tax authority to collect debts owing to that authority. At first glance, Parliament wanted to allow the Minister to retain the amounts owing by the Crown to a tax debtor to ensure payment of that person's tax debt. Contrary to what the appellant seems to believe, that the Minister may satisfy the appellant's debts from the amounts payable to the appellant is consistent with the objective sought (appellant's memorandum, paras. 42 and 43).

[19] Like any statutory provision, section 224.1 must be read in its "entire context and in [its] grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21). The context of section 224.1 obviously includes the provisions of the Act that pursue the same objective.

[20] In this respect, a reading of subsection 225(5) of the Act reveals that, when Parliament wishes to make its collection measures subject to the seizure exemption rules made by the provinces, it does so expressly:

225. (5) Such goods and chattels of any person in default as would be exempt from seizure under a writ of execution issued out of a superior court of the province in which the seizure is made are exempt from seizure under this section.	**225.** (5) Les biens meubles de toute personne en défaut qui seraient insaisissables malgré un bref d'exécution décerné par une cour supérieure de la province dans laquelle la saisie est opérée sont exempts de saisie en vertu du présent article.

[21] This Court also upheld the effect of this recognition in circumstances similar to the ones here. In *Marcoux v. Canada (Attorney General)*, 2001 FCA 92, [2001] F.C.J. No. 493 (QL), the issue was whether the seizure exemption rules set out in article 553(7) of the Quebec *Code of Civil Procedure,* R.S.Q. c. C-25**,** prevented the Minister from exercising his power to collect. The Court dealt with this argument as follows (para. 13):

> . . . As Décary J.A. noted in St-Hilaire, supra, at para. 30 of his reasons, Parliament may derogate from the civil law when it legislates on a subject that falls within its jurisdiction. Section 224, when read with s. 225, shows that in creating the methods of seizure mentioned in those sections Parliament had in mind the exemptions from seizure enacted in private law, and chose to take them into account in s. 225 and not take them into account in s. 224. Contrary to what was argued by counsel for the appellant, Parliament has spoken on the point at issue.
>
> [Emphasis added.]

[22] Similarly, paragraph 122.61(4)(*b*) of the Act states that child tax benefits "cannot be assigned, charged, attached or given as security". However, at paragraph 122.61(4)(*d*),

Parliament deemed it necessary to specify that these benefits “cannot be retained by way of deduction or set-off under the *Financial Administration Act*”.

[23] It is therefore clear that, when Parliament wishes to limit its power to effect a set-off, it does so expressly. The inevitable conclusion is that there is no such limitation imposed on section 224.1.

[24] Beyond the context of section 224.1, the statutory set-off mechanism set out in this section is fundamentally different from the one underlying compensation under Quebec civil law. For example, unlike article 1673 of the CCQ, which states that compensation is effected “by operation of law”, section 224.1 provides that “the Minister may require the retention”. Similarly, section 224.1 grants the Minister the power to determine the amount that will be subject to the set-off, whereas, under article 1673 of the CCQ, mutual debts are automatically extinguished up to the amount of the lesser debt. Lastly, the right to effect a set-off provided at section 224.1 is exercised in respect of an “amount [. . .] payable” and not a debt, as stipulated in article 1676 of the CCQ.

[25] These characteristics reveal that the statutory set-off described in section 224.1 is inspired by common law and is a complete departure from the civil law concept of compensation. Not only is it unnecessary to refer to civil law to give effect to section 224.1, but the law underlying this provision, in particular the concept of set-off borrowed from common law, requires

otherwise. In my respectful view, the argument that Parliament relied on civil law as suppletive law cannot succeed, and the Federal Court judge was correct in law in rejecting it.

[26] Next, the appellant submits that the Minister cannot effect set-off, as the benefits payable to him are held in trust and not "debts" owing to him by the Crown. In *Mintzer*, this Court already decided this issue (*Mintzer*, para. 17):

> On the basis of section 108 the appellant contends that the "benefits" are held in trust by the Crown and cannot be set-off against a debt for unpaid taxes. In my opinion this argument is without merit. It is not the contributions which are paid into the Consolidated Revenue Fund that are subject to the statutory set-off but the "benefits" which are or become "payable" to a beneficiary under the Canada Pension Plan. It seems to me that the "benefits" as such would no longer be subject to any trust for which the appellant contends, if a trust there be. I am not satisfied, in any event, that the statute manifests an intention to create a trust either in respect of contributions or benefits. As I read the Canada Pension Plan the role of the Crown with respect to monies credited to the Canada Pension Plan Account or to benefits not yet paid, is that of an administrator in exercise of its governmental functions rather than of a trustee. (endnotes omitted)
>
> [Emphasis added.]

[27] The appellant challenges that decision, citing subsection 8(3) of the *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c. 32 (2nd Supp.), whose full title is *An Act respecting pension plans organized and administered for the benefit of persons employed in connection with certain federal works, undertakings and businesses*. Subsection 8(3) states, among other things, "The administrator shall administer the pension plan and pension fund as a trustee . . .". The appellant contends that, according to this provision, the funds of the plans to which he contributes are held in trust.

[28] It is unclear whether this provision applies to the CPP or the OASA, but, in any event, this has no bearing on the reasoning of this Court in *Mintzer*, according to which the benefits to be paid, once payable, are no longer part of the trust.

[29] Lastly, and in any case, the Crown is not bound by the seizure exemption provisions set out in the CPP and OASA. Under section 17 of the *Interpretation Act*, "[n]o enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner", unless otherwise indicated. The provisions of the CPP and OASA appear to be aimed at "ensuring that benefits payable under [these] statute[s] be for the beneficiary's own use by preventing that person from alienating or encumbering them" (*Mintzer*, para. 15). Although these provisions apply to third parties, there is no indication of any intention to bind the Crown (*idem*, para. 18).

[30] I would dismiss the appeal with costs.

"Marc Noël"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Johanne Trudel J.A."

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-165-09
(APPEAL FROM A JUDGMENT OF JUSTICE HARRINGTON OF THE FEDERAL COURT DATED MARCH 10, 2009, DOCKET NO. T-959-08.)	
STYLE OF CAUSE:	Bertrand Bouchard and Attorney General of Canada
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 21, 2009
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Pelletier J.A. Trudel J.A.
DATED:	November 5, 2009

APPEARANCES:

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