

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20160127**

**Docket: A-51-14**

**Citation: 2016 FCA 25**

**CORAM: TRUDEL J.A.  
STRATAS J.A.  
RYER J.A.**

**BETWEEN:**

**WILLIAM A. KELLY**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on January 26, 2016.

Judgment delivered at Toronto, Ontario, on January 27, 2016.

**REASONS FOR JUDGMENT BY:**

**TRUDEL J.A.**

**CONCURRED IN BY:**

**STRATAS J.A.  
RYER J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT**

**TRUDEL J.A.**

[1] Mr. Kelly was not present for the hearing of his appeal. Counsel for parties also affected by the judgment under appeal, whose consolidated appeals were heard immediately after this one, informed the Court that Mr. Kelly was hospitalized and unable to attend the hearing.

[2] Counsel for these other parties also relayed Mr. Kelly's verbal request that his appeal be heard on the basis of the Amended Memorandum of Fact and Law filed by counsel on behalf of her clients. The respondent objected to this request.

[3] Mr. Kelly's request was denied. It was decided that the appeal would be disposed of on the basis of the written submissions and material filed by Mr. Kelly and the respondent before the de-consolidation of this appeal and appeals A-53-14 and A-52-14.

[4] These are the reasons dismissing Mr. Kelly's appeal.

[5] In a judgment cited as 2013 TCC 411, Graham J. for the Tax Court of Canada dismissed Mr. Kelly's appeal from the Minister of National Revenue's denial of limited partnership losses he claimed in the late 1990s. He did so by way of a motion brought by the Crown under Rule 64 of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688a (Rules), which provides that where the appellant has failed to prosecute with due dispatch, an appeal may be dismissed for delay.

[6] Mr. Kelly filed his Notice of Appeal on May 21, 2009, and the parties were ordered on June 14, 2010 to meet certain deadlines in the litigation process. Although Mr. Kelly served onto the Crown his list of documents, he did not meet the deadline to prove service, and did not seek an extension of time.

[7] He was later served with notices to attend examination for discovery on two occasions, and in both cases indicated that he would not attend with, respectively, two and three days' notice. On the first occasion, the Crown prepared a Request to Amend Timetable Order and agreed reschedule to Mr. Kelly's proposed date. The request was granted by the Tax Court on November 10, 2010. After Mr. Kelly indicated the second time that he would fail to attend examination for discovery, the Crown declined to reschedule, and obtained a certificate of non-attendance on January 19, 2011.

[8] In March, 2011, Mr. Kelly's appeal was added to a larger group of similar appeals under case management. Nothing further happened until a status hearing was held on April 3, 2012. The Court ordered a deadline of January 31, 2013 to satisfy undertakings given at examination for discovery.

[9] Once again, Mr. Kelly did not meet the deadline to satisfy his undertakings nor did he seek an extension from the Court. The Crown brought its motion to dismiss for delay on August 7, 2013, after the Tax Court denied its March 28, 2013 request for a show cause hearing. Mr. Kelly provided responses to his undertakings on October 22, 2013, before the motion to dismiss was heard.

[10] The Tax Court found that the answers he provided were nonetheless unresponsive (Tax Court Reasons at paragraph 27).

[11] Mr. Kelly argued before the Tax Court and again in his Memorandum of Fact and Law that his failure to satisfy his undertakings should be excused because the Crown did not provide a list of those undertakings subsequent to examination for discovery. He argues further that Graham J. erred by applying an unduly technical and formalistic analysis, and that he should not have considered any of the events prior to the April 3, 2012 status hearing by virtue of issue estoppel.

[12] I see no merit to any of Mr. Kelly's arguments. As Graham J. stated, the Crown had no obligation to provide Mr. Kelly with a list of his undertakings, and clearly indicated that it would not do so. He was in no way absolved of his responsibility to determine and to satisfy his undertakings by the deadline, or to bring a motion for an extension of time based on a compelling reason. He did neither.

[13] Graham J. demonstrated a careful consideration of the evidence in his reasons for exercising discretion to allow the Crown's motion. There is no cause to interfere with his conclusion that Mr. Kelly's pattern of conduct demonstrates such indifference to the prosecution of his appeal and to the orders of the Tax Court that dismissal under Rule 64 was justified.

[14] Further, Graham J. was correct to conclude that issue estoppel does not assist Mr. Kelly and it was appropriate to consider the full history of the appeal when determining the merits of the motion (see *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544 at paragraph 25).

[15] For these reasons, I would dismiss this appeal with costs.

"Johanne Trudel"

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J.A.

"I agree.

David Stratas J.A."

"I agree.

C. Michael Ryer J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-51-14  
**STYLE OF CAUSE:** WILLIAM A. KELLY v. HER  
MAJESTY THE QUEEN  
**PLACE OF HEARING:** TORONTO, ONTARIO  
**DATE OF HEARING:** JANUARY 26, 2016  
**REASONS FOR JUDGMENT BY:** TRUDEL J.A.  
**CONCURRED IN BY:** STRATAS J.A.  
RYER J.A.  
**DATED:** JANUARY 27, 2016

**APPEARANCES:**

Samantha Hurst  
Donna Dorosh  
FOR THE RESPONDENT  
HER MAJESTY THE QUEEN

**SOLICITORS OF RECORD:**

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Ontario  
FOR THE RESPONDENT  
HER MAJESTY THE QUEEN