

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160127

**Dockets: A-53-14
A-52-14**

Citation: 2016 FCA 26

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

Docket: A-53-14

BETWEEN:

STEVE DJELEBIAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

Docket: A-52-14

BETWEEN:

GLEN R. MULLINS

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



Cour d'appel fédérale

Date: 20160127

**Dockets: A-53-14
A-52-14**

Citation: 2016 FCA 26

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

Docket: A-53-14

BETWEEN:

STEVE DJELEBIAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

Docket: A-52-14

BETWEEN:

GLEN R. MULLINS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

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

[2] The Tax Court decided these motions together with one related to a third taxpayer, Mr. William A. Kelly, who then represented the appellants. All three taxpayers appealed to this Court, and by order of this Court the three appeals were consolidated. They were subsequently de-consolidated and now only Mr. Djelebian's and Mr. Mullins's appeals are consolidated, separate from the appeal of Mr. Kelly. Messrs. Djelebian and Mullins are represented by new counsel.

[3] The appellants rely essentially on two propositions:

- a) The motions Judge failed to consider relevant evidence of the appellants' compliance with the Tax Court's Timetabling Order and of their intention to proceed with their appeals and the lack of prejudice to the respondent caused by the delay;
- b) The motions Judge erred by holding against the appellants the delay during which their appeals were held in abeyance and the conduct of Mr. Kelly in relation to his own appeal.

[4] The appellants filed their Notices of Appeal to the Tax Court on April 28, 2009. Their appeals were part of a group of similar appeals, nine of which went forward as test cases and were settled in June 2011. The appellants were not among these nine and they did not settle their appeals. Their appeals went to a status hearing on April 3, 2012. Mr. Kelly, who did not previously represent the appellants and whose appeal had not been part of the group, appeared on their behalf as well as his own. The Tax Court ordered the three appeals to be heard together on common evidence and scheduled dates for the litigation to proceed.

[5] Discovery was ordered to be completed by October 31, 2012, and undertakings were to be satisfied by December 31, 2012. On October 2, 2012, the appellants were each served with a notice to attend examination for discovery to be held on October 30, 2012. On October 23, 2012, counsel for the appellants indicated that they would only be available in Windsor; the following day the Crown convened to this request. Two days later, counsel for the appellants sent an email to the wrong address indicating that they could not attend at all. On October 29, 2012, appellants' counsel successfully communicated that they would not attend, and the Crown submitted a Request to Amend Timetable Order to the Tax Court.

[6] The Tax Court's revised deadlines were to complete examinations for discovery by December 31, 2012, and to satisfy their undertakings by January 31, 2013. The appellants attended examinations for discovery before the deadline, but did not satisfy their undertakings, and did not seek an extension to the deadline.

[7] 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. The appellants provided responses to their undertakings on November 5, 2013, before the motion to dismiss was heard. The Tax Court found that the answers provided were nonetheless unresponsive (Tax Court Reasons at paragraph 27). In his reasons for granting the Crown's motions, Graham J. found that the appellants' conduct demonstrated a pattern of indifference to the prosecution of their appeals and to the orders of the Tax Court.

[8] The appellants seek to excuse the delay in satisfying their undertakings on the basis that the Crown did not provide a list to them. As Graham J. stated, the Crown had no obligation to provide the appellants with a list of their undertakings, and clearly indicated that it would not do so. They were in no way absolved of their responsibility to determine and to satisfy their undertakings by the deadline, and made no further effort to satisfy their obligations or to receive an extension of time until after the motions to dismiss had been brought forward.

[9] The appellants ask this Court to reweigh the evidence before the motions judge in a more positive light. This is not the role of an appellate court in review of a discretionary decision, absent an obvious, serious error that undercuts the integrity of the decision (*Turmel v. Canada*, 2016 FCA 9). In other words, absent a palpable and overriding error, it is inappropriate to intervene.

[10] Moreover, the appellants invite this Court to create a test for the application of Rule 64, which they propose would require the respondent to demonstrate an inordinate inexcusable delay and serious prejudice. Rule 64 simply sets out:

Tax Court of Canada Rules (General Procedure) SOR/98-688a

64. The respondent if not in default under these rules or a judgment of the Court, may move to have an appeal dismissed for delay where the appellant has failed to prosecute the appeal with due dispatch

Règles de la Cour canadienne de l'impôt (procédure générale) DORS/90-688a

64. L'intimée qui n'est pas en défaut en vertu des présentes règles ou d'un jugement de la Cour peut demander, par voie de requête, le rejet de l'appel pour cause de retard si l'appelant n'a pas poursuivi l'appel avec promptitude

[11] The text of the rule is clear and does not suggest the necessity of a multi-factor jurisprudential test. It is worth noting that its interpretation and application will always be guided by the interpretative principles set out in Rule 4, privileging a liberal interpretation of the Rules to ensure the just, expeditious, and inexpensive determination of appeals on their merits. The motions judge is best equipped to exercise discretion in determining whether dismissal for delay is warranted in accordance with a holistic view of the relevant evidence. There is no basis to insist in this case that the motions judge should have given greater weight to the evidence more favourable to the appellants.

[12] The appellants have also not satisfied us that Graham J. improperly blamed the appellants for delay while their appeals were held in abeyance, or that his conclusion with respect to the Crown's motions against them is attributable to his conclusions about Mr. Kelly's handling of his own appeal. Graham J.'s reasons demonstrate careful consideration of the evidence before

him and are based on ample evidence of the appellants' failure to prosecute their appeals after the April 3, 2012 status hearing.

[13] The appeals will therefore be dismissed, with costs. Copies of these reasons will be entered into each file.

"Johanne Trudel"

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

DOCKETS: A-53-14
A-52-14

STYLE OF CAUSE A-53-14: STEVE DJELEBIAN v. HER
MAJESTY THE QUEEN

STYLE OF CAUSE A-52-14: GLEN R. MULLINS 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:

Helen A. Daley FOR THE APPELLANTS
STEVE DJELEBIAN A-53-14 and
GLEN R. MULLINS A-52-14

Samantha Hurst FOR THE RESPONDENT
Donna Dorosh HER MAJESTY THE QUEEN

SOLICITORS OF RECORD:

Wardle Daley Bernstein Bieber LLP FOR THE APPELLANTS
Toronto, Ontario STEVE DJELEBIAN A-53-14 and
GLEN R. MULLINS A-52-14

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