

**Date: 20080307**

**Docket: A-281-07**

**Citation: 2008 FCA 92**

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

**BETWEEN:**

**BRIAN ELLIS**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Ottawa, Ontario, on March 5, 2008.

Judgment delivered at Ottawa, Ontario, on March 7, 2008.

**REASONS FOR JUDGMENT BY:**

**NOËL J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
PELLETIER J.A.**

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**REASONS FOR JUDGMENT**

**NOËL J.A.**

[1] This is an appeal from a decision of Bowie J. of the Tax Court of Canada, which dismissed the appellant's ("Mr. Ellis" or "the appellant") appeal against assessments issued with respect to his 2000 and 2001 taxation years, pursuant to the *Income Tax Act*, R.S.C., 1985, c. 1 (5<sup>th</sup> Supp.) (the "Act"), whereby, amongst other things, losses incurred on disposition of 148 500 shares of eDispatch.com in 2001, were treated on a capital account. Mr. Ellis submits that these losses should be treated on income account.

[2] In the decision under review, Bowie J. concluded that in not having a clear plan regarding how to deal with shares at the time of their acquisition (upon options being exercised), in retaining the shares due to his position as president of eDispatch.com and holding them for 16 months – despite the rapid decline in share value – Mr. Ellis did not act as a trader.

[3] The sole ground of appeal is based on paragraph 20 of the reasons:

Even taking his evidence of intention at its highest, it does not establish that he was looking to sell these shares for a quick profit. What he really wanted to do was to realize the difference between the option price and the market price, and immediately monetize the value at the time of exercising the options, without either gain or loss. This would have effectively produced the same result as he achieved on the two earlier occasions when he sold shares on the day he bought them. There would have been no opportunity for either profit or loss from the shares after the purchase, because under the monetization contract that he envisioned either the bank, or some third party, would have been the one to profit, or to lose, when the share price rose or fell. In short, entering into the monetization contract that he envisioned immediately following the exercise of the options would have negated any possibility of dealing with the shares as a trader would do.

[4] According to the appellant, Bowie J., having found that Mr. Ellis' intention was to realize the difference between the option price and the market price, and immediately monetize the value at the time of exercising the option, was bound to conclude that Mr. Ellis acted as a trader. The appellant submits that Bowie J. committed a palpable and overriding error in concluding otherwise.

[5] With respect, this argument confuses Mr. Ellis' motivation in exercising the options (e.g. to realize the difference between the market price of the share and the option price thereby giving rise to employment income of a commensurate amount) and his intent with respect to the shares at the time they were acquired. Although it is clear that Mr. Ellis did intend to realize the value of the

option by exercising it and monetizing the underlying shares the same day, it is equally clear that he did not intend to trade the shares or otherwise benefit from them as the contemplated monetization had the effect of sheltering him from any potential gain or loss arising from a subsequent disposition of those shares.

[6] I would dismiss the appeal with costs.

“Marc Noël”

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J.A.

“I agree.

M. Nadon J.A.”

“I agree.

J.D. Denis Pelletier J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-281-07

**(APPEAL FROM A JUDGMENT OF JUSTICE BOWIE OF THE TAX COURT OF CANADA DATED MAY 14, 2007 NO. (DOCKET NUMBER 2003-2745(IT)G.)**

**STYLE OF CAUSE:** BRIAN ELLIS and  
HER MAJESTY THE QUEEN

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** March 5, 2008

**REASONS FOR JUDGMENT BY:** NOËL J.A.

**CONCURRED IN BY:** NADON J.A.  
PELLETIER J.A.

**DATED:** March 7, 2008

**APPEARANCES:**

Mr. Roger Taylor  
Mr. Al-Nawaz Nanji

FOR THE APPELLANT

Mr. Roger Leclaire  
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FOR THE RESPONDENT

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