Date: 20080806

Dockets: A-555-06
A-556-06
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Citation: 2008 FCA 248

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

Docket: A-555-06

BETWEEN:

JEAN-LUC FORTIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-556-06

BETWEEN:

FRANÇOIS PROTEAU

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-557-06

BETWEEN:

ROBERTE BOULANGER FORTIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on May 13, 2008.

Judgment delivered at Ottawa, Ontario, on August 6, 2008.

REASONS FOR JUDGMENT OF THE COURT

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REASONS FOR JUDGMENT

BY THE COURT

[1] These are three appeals consolidated from a judgment of Justice Archambault of the Tax Court of Canada, 2007 TCC 98, dated November 14, 2006, who dismissed the appeals filed by the appellants against the assessments by the Minister of National Revenue (the "Minister") under section 227.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") and section 83 of the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] Before addressing the merits of the appeals, we must deal with the conduct of Justice Archambault who, again, shirked his duty to provide a single set of reasons and allow the parties access thereto in a timely manner.

[3] In this case, the appellants' appeal from the Minister's assessments was heard on November 7, 2006, and Justice Archambault delivered an oral judgment at the conclusion of the hearing. He signed a judgment on November 14, 2006 and filed the written reasons on February 19, 2007, almost three months after the notice of appeal was filed before this Court.

[4] Owing to the belated filing of the reasons, the appellants put the following provision in their notice of appeal filed on November 30, 2006: [TRANSLATION] "The appellant reserves the right to amend this notice, considering that he does not yet have the transcripts of the oral judgment".

[5] It is important to note that there is no transcript recording the reasons for judgment delivered orally by Justice Archambault on November 7, 2006. Consequently, it is impossible to know whether the reasons he signed on February 17, 2007, differ from those supporting the oral judgment dated November 7, 2006.

[6] Recently, in *Micheline Brunet v. Her Majesty the Queen*, 2007 FCA 196, our Court examined the problems caused for the parties by Justice Archambault's practice of not remitting the reasons delivered at the hearing to the parties and amending said reasons after their announcement. After having concluded that Justice Archambault had not committed any error warranting the Court's intervention, here is what our Court said at paragraphs 6 to 14 of its reasons in *Brunet*, cited above:

> [6] However, at the hearing, the appellant stressed the fact that, despite repeated requests, unconditionally supported by the respondent's counsel, she was refused a copy of the reasons for judgment of the Tax Court of Canada rendered orally at the hearing. Instead, she received the reasons for judgment signed almost seven months later, which are intended

to be the reasons for judgment delivered orally at the hearing of November 23, 2005, but which have been [TRANSLATION] “amended for greater clarity and precision”.

[7] She alleges herself to be aggrieved by these reasons which, she says, do not correspond to those given at the hearing in which, again according to her, the judge granted her certain deductions. The reasons seem to have been amended and improved to her detriment.

[8] This refusal to remit a copy of the reasons for judgment rendered orally at the hearing is simply unacceptable. Aside from the feelings of injustice and mistrust it engenders in the taxpayer, it prevents the Court of Appeal from exercising its power of review because it cannot verify the merits of the appellant’s allegations and the scope of the amendments made seven months later to the judgment already rendered. The reasons given at the hearing are the reasons for judgment and the parties are entitled to receive a copy of the complete transcript upon request.

[9] In *Breslaw v. Canada*, 2005 FCA 355, our Court considered what appears to be the practice occasionally adopted by the Tax Court of Canada of amending reasons given orally at the hearing. In this case, our Court recognized the right to edit the reasons delivered at the hearing for grammar and style, but not the right to modify their substance. At paragraphs 24 and 25, Mr. Justice Pelletier wrote the following:

> [24] The difficulty arises when the edited version of the oral reasons does not accord with the original reasons, as recorded in the transcript. While an appeal is taken from the judgment of the Court and not from its reasons, the parties nonetheless rely upon the Court's reasons to frame their appeal. As a result, substantive differences between the reasons given in open court, and the edited version of those reasons are to be discouraged. A judge is entitled to edit his reasons for grammar and style so that they read correctly and fluently. But the addition of topics not raised at the time the oral reasons were delivered, or the subtraction of topics which were, goes beyond mere editing for grammar and style. One can readily appreciate that a judge reviewing his oral reasons after the fact may well feel that they are not the best statement of his reasoning process. But those are the reasons which were given to the parties, and it is unfair to them to modify their substance after the fact.
>
> [25] This is all the more true where the notice of appeal has been filed before the edited version of the reasons is released. A litigant who sees matters raised for the first time in the edited version of the oral reasons may well wonder whether the reasons are a response to the notice of appeal.

[10] In response to the appellant's unsuccessful requests to receive a copy of the complete transcript of the reasons given orally at the hearing, the clerk of the Tax Court of Canada provided the following explanation in a letter dated July 25, 2006:

> [TRANSLATION]
>
> Dear Ms. Brunet,
>
> I am writing further to your fax of July 6, 2006.
>
> Please be advised that, in accordance with its policy, the Tax Court of Canada provides only the certified transcript of the reasons given orally at the hearing.
>
> All the reasons given orally at the hearing are sent to the presiding judge for review and certification. In this way, the judge may revise and correct clerical errors before the reasons are given to the parties.
>
> Our contracts with the court reporting firm stipulate that the transcripts requested must be remitted to the Court.
>
> [Emphasis added]

[11] Two important facts emerge from this letter.

[12] First, the appellant's request was refused because the reasons were sent to the judge [TRANSLATION] "for review and certification". It is not the judge's responsibility to certify the transcript of the reasons given at the hearing. As in the case of witness depositions (see, for example, article 327 of the *Code of Civil Procedure*), it is the court reporter's responsibility to certify, in accordance with the law, the transcript of the recording tapes of the hearing. That is what the court reporter, Jean Larose, did in this case, with the exception however of the reasons for judgment rendered at the hearing which were unjustifiably omitted from the transcript and therefore not included in his certification.

[13] Second, the clerk's letter indicates that the reasons were sent to the judge to "correct clerical errors before the reasons are given to the parties." This letter and this Court's case law do not allow a judge to rewrite or improve his or her reasons. Nor is the Court allowed to refuse to provide a copy of the reasons as they were given at the hearing, which must be certified by the court reporter as being a true copy of what was said at the hearing.

[14] Even if we do not believe it is necessary to make it clear, we will do so so that there is no ambiguity. If the situation in this case should reoccur, our Court, which is

> deprived in part of the power to effectively exercise its appellate jurisdiction, will not hesitate to intervene.

[7] In *Brunet*, cited above, the problem arose from the fact that Justice Archambault refused to allow the appellant access to the transcript of his reasons given orally at the hearing. In *Breslaw*, cited above, the same problem occurred, but the Chief Justice of the Tax Court of Canada intervened to authorize that the transcript be sent to the appellant. The appellant noticed that the reasons delivered from the bench did not match the written reasons filed by Justice Archambault after the notice of appeal had been entered, specifically as regards one of the issues raised on appeal.

[8] As appears from paragraph 12 of the reasons of our Court in *Brunet*, cited above, the reasons for judgment delivered at the hearing were not recorded and, consequently, could not be certified by the court reporter. This same situation seems to have prevailed in this case during the hearing of the appellants' appeal before Justice Archambault.

[9] At paragraph 13 of the reasons in *Brunet*, cited above, the Court indicated that a judge is not allowed to rewrite or improve the reasons he or she delivered orally. Moreover, at paragraph 14 of the reasons, the Court stated unequivocally that if such a practice were to reoccur, the Court would not hesitate to intervene.

[10] In an order made on March 31, 2007, in *Brian Jenner v. Her Majesty the Queen*, docket A-601-06, Justice Létourneau reiterated the words of our Court in *Brunet*, cited above, and stated that

Justice Archambault's refusal to give the parties access to the transcripts of the reasons delivered from the bench was a [TRANSLATION] "reprehensible practice."

[11] In the case at bar, the parties did not complain about the fact that Justice Archambault failed to deliver his reasons before the time for appeal had expired. Even so, we believe it appropriate and necessary to repeat the warning the Court gave in *Brunet*, cited above, namely that Justice Archambault's refusal to remit the reasons delivered at the conclusion of the trial to the parties in a timely manner is not only unacceptable, it brings the administration of justice into disrepute. The administration of justice is also compromised by the deletion of the recording or transcript of the reasons given orally. This practice is quite simply reprehensible.

[12] Since Justice Archambault's refusal to allow the parties access to his reasons in a timely manner preceded our decision in *Brunet*, cited above, we are of the opinion that, for the moment, it will suffice to reiterate the warning we gave in *Brunet*, cited above, and send a copy of our reasons to the Chief Justice of the Tax Court of Canada, so that he may take the measures he considers appropriate to end this practice.

[13] With respect to the merits of the appeals, the Minister's assessments resulted in the appellants, as directors of various member companies of the Groupe St-Romain, being held jointly and severally liable for the source deductions that these companies failed to remit to the Minister.

[14] Although the appellants raised several grounds against the Minister's assessments in their notice of appeal, they relied on only one of those grounds before Justice Archambault. This was the ground embodied in subsection 227.1(3) of the Act, namely that they had exercised the degree of care, diligence and skill to prevent the failure—that is, to remit the source deductions to the Minister—that a reasonably prudent person would have exercised in comparable circumstances.

[15] The appellants, whose counsel received leave to be removed as solicitor of record by order of this Court dated April 22, 2008, were not present at the hearing of their appeal. Accordingly, we considered their arguments as they appeared in the memorandum filed by their counsel.

[16] In this memorandum, the appellants advanced only a single argument, as follows: the conditions for applying subsection 227.1(1) of the Act were not met because the National Bank had taken effective control of the operations of the companies of which the appellants were directors, and, more specifically, had taken control of the disbursements. Thus, according to the appellants, subsection 227.1(3) did not come into play.

[17] The respondent utterly disagrees with the appellants' point of view. The respondent submits that the appellants are calling into question the admissions made by their counsel before the Tax Court of Canada and refers us to the transcript of the hearing (Appeal Book, vol. III, p. 9), where Mr. Robert Jodoin, counsel for the appellants, informed Justice Archambault that the only issue before him was that of the reasonable diligence of the appellants.

[18] The respondent claims, and we fully agree, that given the arguments made before the judge, he was entitled to assume that the other conditions for applying section 227.1 had been met and that the only issue before him was that of reasonable diligence under subsection 227.1(3) of the *Act*.

[19] As regards this issue, the judge concluded that the appellants had not succeeded in showing that the Minister's assessments were incorrect. The judge arrived at this conclusion because, in his opinion, the National Bank had not taken control of the operations of the companies of which the appellants were directors, and the appellants had not taken the necessary measures to prevent the failure to remit the source deductions to the Minister.

[20] After considering the memoranda filed by the parties and the evidence in the record, we are not satisfied that Justice Archambault committed an error, of either fact or law, which would allow us to intervene.

[21] For these reasons, the appeals will be dismissed with costs.

"M. Nadon"

J.A.

"J.D. Denis Pelletier"

J.A.

"Johanne Trudel"

J.A.

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-555-06
STYLE OF CAUSE:	JEAN-LUC FORTIN v. THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 13, 2008
REASONS FOR JUDGMENT BY:	NADON J.A. PELLETIER J.A. TRUDEL, J.A.
DATED:	August 6, 2008

APPEARANCES:

Michel Lamarre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

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