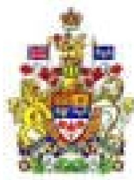
Federal Court of Appeal



Cour d'appel fédérale

Date: 20100412

Docket: A-5-09

Citation: 2010 FCA 96

CORAM: LÉTOURNEAU J.A.
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

GAÉTAN CLOUTIER

Appellant

and

HER MAJESTY THE QUEEN

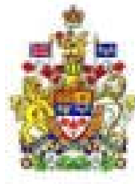
Respondent

Heard at Montréal, Quebec, on April 12, 2010.

Judgment delivered from the Bench at Montréal, Quebec, on April 12, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

Cour d'appel fédérale



Federal Court of Appeal

Date: 20100412

Docket: A-5-09

Citation: 2010 FCA 96

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

BETWEEN:

GAÉTAN CLOUTIER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on April 12, 2010)

LÉTOURNEAU J.A.

[1] The Tax Court of Canada heard an application for an extension of time to institute an appeal before it. Although the appeal period expired on February 21, 2008, the appellant did not file his application for an extension until July 10, 2008, some four and a half months later.

[2] Subsection 167(5) of the *Income Tax Act* requires that the following conditions be met for an application for an extension of time to appeal to be granted:

167(5) When order to be made. No order shall be made under this section unless	**167(5) Acceptation de la demande**. Il n’est fait droit à la demande que si les conditions suivantes sont réunies:
(*a*) the application is made within one year after the expiration of the time limited by section 169 for appealing; and	*a)* la demande a été présentée dans l’année suivant l’expiration du délai imparti en vertu de l’article 169 pour interjeter appel;
(*b*) the taxpayer demonstrates that	*b)* le contribuable démontre ce qui suit:
(i) within the time otherwise limited by section 169 for appealing the taxpayer (A) was unable to act or to instruct another to act in the taxpayer’s name, or (B) had a bona fide intention to appeal,	(i) dans le délai par ailleurs imparti pour interjeter appel, il n’a pu ni agir ni charger quelqu’un d’agir en son nom, ou il avait véritablement l’intention d’interjeter appel,
(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application,	(ii) compte tenu des raisons indiquées dans la demande et des circonstances de l’espèce, il est juste et équitable de faire droit à la demande,
(iii) the application was made as soon as circumstances permitted, and	(iii) la demande a été présentée dès que les circonstances le permettaient,
(iv) there are reasonable grounds for the appeal.	(iv) l’appel est raisonnablement fondé.

[3] Justice Tardif of the Tax Court of Canada did not believe the explanations for the delay put forward by the appellant’s representative, his accountant. He also found that, with respect to

the practice of the appellant's representative and the appellant's failure to act, there was either complicity between the two or blatant wilful blindness on the part of the appellant.

[4] The appellant alleges that the judge's behaviour gave rise to a reasonable apprehension of bias. Referring to the decision of the Supreme Court of Canada in *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at pages 842 and 843, he submits that the final decision cannot be valid if it rests on findings as to credibility made under such circumstances.

[5] In addition to the judge's alleged speculations about the complicity between the appellant and his accountant, counsel for the appellant faults the judge for having cut short the respondent's cross-examination of the accountant, viewing this as another indication of an apprehension of bias.

[6] With respect, we cannot agree with this last conclusion of the appellant. The judge intervened to end an aspect of the cross-examination that he deemed to be irrelevant to this case: see the Appeal Book, at page 34. In fact, counsel for the respondent wanted to establish that, contrary to what the appellant seemed to be alleging, the Revenue Agency had not been negligent in its dealings with the appellant. In our opinion, the judge was right to conclude that this aspect of the cross-examination was irrelevant.

[7] Lastly, counsel for the appellant refers us to this statement of the judge, made after both parties had closed their cases. This statement is found at page 43 of the Appeal Book:

> [TRANSLATION]
> <u>APPELLANT'S CASE CLOSED</u>
> <u>BOTH PARTIES' CASES CLOSED</u>
>
> > JUDGE: Listen, I am ready to render my decision. I will hear you first.
> > MARTIN FOURNIER: You are going to hear me?
> > JUDGE: Yes.
> > MARTIN FORTIER: All right.
> > SUBMISSIONS BY M. FORTIER:
>
> . . .

[8] In exercising his functions, a judge is entitled to a presumption of impartiality that, to be rebutted, requires an apprehension of bias that rests on serious grounds: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at paragraphs 59 and 76.

[9] Here, this statement alone is not enough to rebut the presumption. On the contrary, at the outset of his oral judgment delivered from the Bench, the judge expressed his reluctance and distress in depriving a taxpayer of a fundamental right because of another person's mistake.

[10] Nevertheless, the fact is that a mandator is liable for actions of his or her mandatary. Here, as the judge found, the appellant's mandatary failed to carry out his mandate.

[11] Obviously, absent a palpable and overriding error, we may not substitute our assessment for that of the judge regarding the credibility of witnesses whom we have not heard; such an error was not shown to exist.

[12] There was enough evidence on file for the judge to find, as he did, that the appellant did not exercise due diligence and remedy his representative's failures and that the application for an extension of time was not made, as it should have been, as soon as circumstances permitted.

[13] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-5-09
STYLE OF CAUSE:	GAÉTAN CLOUTIER v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 12, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	LÉTOURNEAU J.A. PELLETIER J.A. TRUDEL J.A.
DELIVERED FROM THE BENCH BY:	LÉTOURNEAU J.A.

APPEARANCES:

Benoit Aubertin	FOR THE APPELLANT
Annick Provencher Simon-Olivier de Launière	FOR THE RESPONDENT

SOLICITORS OF RECORD:

De Chantal, D'Amour, Fortier Longueuil, Quebec	FOR THE APPELLANT
Myles Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT