Federal Court of Appeal | Cour d'appel fédérale

**Date: 20100910**

**Docket: A-93-10**

**Citation: 2010 FCA 224**

**Present: PELLETIER J.A.**

**BETWEEN:**

**2786885 CANADA INC.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 10, 2010.

REASONS FOR ORDER BY: PELLETIER J.A.

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**REASONS FOR ORDER**

**PELLETIER J.A.**

[1] The Crown brings a motion in which she seeks to have the appellant's notice of motion struck on two grounds, the first being that the notice of appeal was filed out of time, the second being that the appeal has no chance of success. The appellant brings a cross motion seeking the dismissal of the Crown's motion. For the reasons which follow, both motions will be dismissed.

[2] The appellant filed a notice of appeal from the decision of the Tax Court of Canada dismissing his appeal. The appeal was heard in Montréal, Quebec, on January 13, 2010. At the conclusion of the hearing, the Tax Court Judge said the following:

> HIS HONOUR: I'm ready to render my decision. Look, I'm very sympathetic to your situation. An error appears to have been made and not corrected. But unfortunately, I cannot help you here because there are strict rules for lodging appeals to this Court. There's a one year delay, and that we cannot bypass. So I cannot here, I cannot give you any relief because the appeal has been lodged beyond the requirements of the Act, beyond the delay that is specified in the Act. So, per se, I mean, I cannot even consider the basis, whether you were right or not. You appear to be right, but I cannot even go that far, because there was a delay, a one year delay from the assessment to lodge the appeal, and that was not done within the delay. There's nothing I can do, so, unfortunately, I will have to dismiss your appeal for that reason only. It's not because I think you were wrong. It's not that.

[3] On January 19th 2010, the Tax Court Judge signed the formal judgment, which read:

> The appeals from the assessments made under Part IX of the Excise Tax Act, for 1993, 1994, 1995, and 1996 are dismissed.

[4] In signing the formal judgment when he did, the Tax Court Judge was simply following the established practice of the Tax Court of Canada.

[5] On January 20, 2010, a registry officer of the Tax Court of Canada certified a true copy of the Judgment.

[6] On February 17th, 2010, the appellant filed its Notice of Appeal in this Court.

[7] The Crown moves to strike the Notice of Appeal on the ground that it was filed outside the 30 day limit for filing a Notice of Appeal. The appellant says that its appeal was filed in time as the

judgment under appeal is the written document dated January 19, 2010. The Crown's written brief proceeds on the basis that time for the filing of the notice of appeal began to run from the date of the oral decision rendered on January 13, 2010. No authority is provided for this position.

[8] The appellant refers to the case of *Vidéotron Ltée v. Netstar Communications Inc.*, 2003 FCA 56, [2003] F.C.J. No. 150, as authority for the proposition that "the judgment appealed from was made effective on January 20, 2010, and as such was recorded by the Registry of this [sic] Court and therefore is deemed to have been "made" for the purposes of appeal in the present instance on January 20, 2010, by reason of the prior signing by the hearings justice of his judgment on January19, 2010.": Appellant's Notice of Motion in response to the respondent's motion, paragraph 3. I understand this to mean that the appellant considers that time did not begin to run with respect to the appeal period in his case until the judgment signed by the Tax Court Judge on January 19 was filed in the Tax Court Registry on January 20, 2010. In point of fact, January 20, 2010 is simply the date that a registry officer certified a copy of the judgment as a true copy.

[9] Time limits for appeals to the Federal Court of Appeal, including appeals from proceedings under the informal procedure under the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, are dealt with at section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides as follows:

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| 27 (2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal | 27 (2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de : |
| (a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and | a) dix jours, dans le cas d'un jugement interlocutoire; |
| (b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days. | b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements. |

[10] The jurisprudence of this Court is to the effect that where judgment is pronounced orally in public, the time for the filing of a notice of appeal commences to run as of that time. See *Carlile v. Canada*, [1993] F.C.J. No. 841 at paragraph 4, *Vidéotron Ltée v. Netstar Communications Inc.*, 2003 FCA 56, [2003] F.C.J. No. 150 at paragraph 6.

[11] Sections 17.6 and 18.24 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, provide that appeals under the general procedure and the informal procedure respectively shall lie to the Federal Court of Appeal, in accordance with section 27 of the *Federal Courts Act*. Rule 167 of the *Tax*

*Court of Canada Rules (General Procedure),* (SOR/90-688a), which deals with the disposition of matters coming before the Court provides as follows:

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| 167 (1) The Court shall dispose of an appeal or an interlocutory or other application that determines in whole or in part any substantive right in dispute between or among the parties by issuing a judgment and shall dispose of any other interlocutory or other application by issuing an order. | 167 (1) Dans le cas d'un appel, d'une requête interlocutoire ou de toute autre demande ayant pour objet de statuer au fond, en tout ou en partie, sur un droit en litige entre les parties, la Cour rend un jugement et, dans le cas de toute autre demande ou requête interlocutoire, elle rend une ordonnance. |
| (2) A judgment shall be dated on the day it is signed and that day is the date of the pronouncement of the judgment. | (2) Le jugement est daté du jour de la signature, qui constitue la date du prononcé du jugement. |

[12] There is no equivalent disposition under the *Tax Court of Canada Rules (Informal Procedure),*SOR/90-688b.

[13] This disposition complements section 27 of the *Federal Courts Act* by specifying the date of pronouncement of judgment in the case of a written judgment. I am not convinced that it has the effect of displacing the date of pronouncement of judgment where an oral judgment has been pronounced before a written judgment is rendered. In *Carlile v. Canada,* Mr. Justice Mahoney of this Court described a written judgment issued after the pronouncement of an oral judgment as a "redundant nullity": *Carlile v. Canada*, paragraph 4. As I have no assistance from the parties on this point, I prefer not to decide the question. That said, the fact that it *may* be possible to create a gap between an oral judgment pronounced in open court and a subsequent written judgment with respect

to the same matter does not mean that it is desirable to do so. The better practice, in any event, would be to ensure that the written judgment is signed on the date the oral judgment is pronounced so that no possibility of confusion can arise.

[14] In this case, a gap exists and the Crown seeks to take advantage of the appellant's reliance upon the written judgement. I consider this to be an unfortunate tactic, made possible by an unfortunate practice. In my view, the public should not be penalized in this way. Subsection 27(2) allows a judge of this Court to extend the time for filing a notice of appeal. Without deciding whether an extension is necessary or not, I extend the time for filing the appellant's notice of appeal until February 18th, 2010, with the result that, in any case, the appellant's notice of appeal was filed in time.

[15] As for the second aspect of the Crown's motion, it is misconceived. It is, in substance, an application for summary judgment. The motion seeks to have this Court determine the appeal on the basis of affidavit material which the parties have placed before it rather than on the basis of the record which was before the Tax Court Judge. No authority is cited in support of this way of proceeding. The Rules relating to summary judgment appear in Part IV of the *Federal Courts Rules*, SOR/98-06, which, according to Rule 169, applies to "all proceedings that are not applications or appeals". Since this is an appeal, Part IV does not apply. There is no provision in the *Federal Courts Rules* for the summary dismissal of appeals except as provided in Rule 382.4 dealing with status review. Of course, in the exercise of its inherent jurisdiction, the Court always has the power to

dispose summarily of appeals which are an abuse of its process. I have not been satisfied that that is the case here.

[16] I would therefore dismiss the Crown's notice of motion but without costs. I would also dismiss the appellant's notice of motion seeking the dismissal of the Crown's motion, also without costs, on the ground that it was superfluous. It is neither necessary nor desirable to oppose one motion by another. It is sufficient for the responding party to set out in its respondent's motion record the basis for its argument that the moving party's motion should be dismissed.

"J.D. Denis Pelletier"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-93-10 |
| **STYLE OF CAUSE:** | 2786885 CANADA INC. v. HER MAJESTY THE QUEEN |

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

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| **REASONS FOR ORDER BY:** | PELLETIER J.A. |
| **DATED:** | SEPTEMBER 10, 2010 |

**WRITTEN REPRESENTATIONS BY:**

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| STEPHEN M. BYER | FOR THE APPELLANT |
| DANNY GALARNEAU | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| PRESIDENT, 2786885 CANADA INC.<br>VERDUN, QUEBEC | FOR THE APPELLANT |
| LARIVIÈRE MEUNIER<br>QUÉBEC, QUEBEC | FOR THE RESPONDENT |