

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20110120**

**Docket: A-227-10**

**Citation: 2011 FCA 21**

**CORAM: LÉTOURNEAU J.A.  
NADON J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**DONALD PELLETIER**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Hearing held at Québec, Quebec, on January 12, 2011.

Judgment delivered at Ottawa, Ontario, on January 20, 2011.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
MAINVILLE J.A.**

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**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**Issues**

[1] The appellant is seeking this Court's intervention with regard to a Tax Court of Canada decision in which the judge allowed in part his appeal from the reassessments made by the Minister of National Revenue for the 2000, 2001 and 2002 taxation years.

[2] I note immediately that the 2000 and 2001 taxation years were statute-barred and that the reassessments were made beyond the normal assessment period.

[3] Counsel for the appellant is asking this Court to deal with the following issues:

1. In his calculation of the housing benefit received by the appellant, did the judge make an error that must be corrected and warrants this Court's intervention?
2. Did the judge fail to correct an error concerning the 2000 taxation year made by the auditor, who allegedly failed, in calculating the appellant's net worth, to take into account the fact that the appellant had an amount resulting from his taxable capital gain received from an insurance claim settlement, which amount explains and expunges the amount of income alleged to be unreported income?

### **Factual background of the dispute**

[4] The statement of facts, given at paragraphs 5 to 8 and 25 of the judge's Reasons for Judgment, is sufficient for the purposes of this appeal:

[5] During the three years in question, the appellant was the president, administrator and sole shareholder of Domaine [Ste-Flore Inc. (Domaine)]. He was also the person primarily responsible for the tasks required for successful operation of the business.

[6] Domaine operates a tourist accommodation business near Ste-Flore de Grand-Mère on lake Chrétien. Eleven cottages with a capacity for 122 people are

for rent all year round. Guests can also rent equipment for seasonal activities of their choice.

[7] The appellant and his spouse are on call to perform tasks necessary to the successful operation of Domaine. Their main responsibilities are to welcome guests, perform customer service and assist with reservations. The appellant maintains the cottages and other areas such as the grounds, paths and skating rink and performs minor repairs. He also sees to the cleaning of the cottages, to accounts payable and receivable, work schedules, etc.

[8] In order to carry out all those tasks, the appellant, his spouse and their son occupied and still occupy one of the Domaine cottages, which served as reception area for guests, as well as office and storage unit for Domaine's needs. . . .

. . .

[25] According to the auditor and the appeals officer, the appellant and his representatives made few observations about the net worth other than the fact that the appellant received a large sum of money in 2000 as part of an insurance claim settlement after one of the properties he owned was destroyed by fire. Several exchanges and meetings took place between the auditor and the appellant, his accountant and his legal representative at the time. Very little information and very few explanations were given by the appellant and his representatives, which meant that the assessment was issued after the only known changes were made.

[5] As needed, I will add other factual elements necessary to understand and resolve the dispute.

### **Tax Court of Canada decision**

[6] The judge made findings of fact that were devastating for the appellant. Many of them were based on the appellant's lack of credibility.

[7] He found, regarding the unreported business income, that the respondent was justified in calculating the differential using the net worth method given the appellant's failure "to keep sufficiently detailed books and records so that his business could be adequately audited": see paragraph 31 of the decision. As shown at paragraphs 26, 27, 28, 29, 32, 34, 35, 36 and 37 of the Reasons for Judgment, the judge did not believe the appellant's version. He preferred the auditor's version instead.

[8] Regarding the auditor's work, in performing her calculations she relied, not on hypotheses, but on the evidence provided by the appellant during interviews. The judge stated that he was satisfied that the evidence submitted by the appellant provided no basis for changing the data obtained and casting the results of the auditor's calculations into doubt: *ibidem* at paragraph 34.

[9] According to the judge, the appellant was unable to explain or justify numerous disbursements, including one for \$21,000 made in 210 \$100 bills: *ibidem*, at paragraph 26. Aside from his contradictory assertions regarding certain disbursements (*ibidem*, at paragraph 28), and his submissions that he paid \$35,046 for subcontracting in the 2000 taxation year, the appellant has failed to provide any supporting evidence. He also never answered the questions asked by the auditor to identify the recipients of those amounts: *ibidem*, at paragraph 36.

[10] As for the housing benefit, the judge made note of the auditor's assessment. Taking into account the amount reported by the appellant, the auditor had estimated the value of the benefit

at \$22,620 for the 2000 and 2001 taxation years and \$23,268 for the 2002 taxation year: *ibidem*, at paragraph 8.

[11] The judge acknowledged that at the objection stage, the objections officer had rightly reduced the value of the benefit by the respective amounts of \$13,565, \$16,103 and \$17,328 for the 2000, 2001 and 2002 taxation years: *ibidem*, at paragraphs 3 and 16.

[12] However, the judge used the amounts of \$12,436 for 2000, \$9,898 for 2001 and \$8,672 for 2002 reached by the property appraisal expert retained by the respondent at the objections stage. To obtain the total annual benefit, the judge determined that “the household expenses incurred by Domaine such as heating, taxes, insurance, electricity and maintenance” had to be added: *ibidem*, at paragraph 10. Once those expenses were included, the value of the benefit amounted to \$14,548 (\$1,024 a month) for 2000, \$11,916.96 (\$993.08 a month) for 2001 and \$11,340 (\$945 a month) for 2002.

[13] Last, the judge estimated that it had to be taken into account that the appellant did not use the entire cottage for personal needs and that his quiet enjoyment of the premises was disturbed at all hours of the day on a regular basis. He reduced the value of this benefit to \$750 a month.

[14] Although the judge was provided with a fairly detailed description of the cottage and the percentage of the appellant’s use of each room (Exhibit A-4), he stated that he found himself facing the fact that the use percentages for each area were only “estimations or approximations

dependent on various factors sometimes impossible to assess”. Although he stated that each case must be looked at individually, the judge acknowledged that it is important to analyze all of the facts and circumstances leading to the benefit so as to determine its value. That is the approach he used in his analysis of the evidence on the subject: *ibidem*, at paragraphs 13 to 19.

### **Analysis of the Tax Court of Canada decision and the appellant’s submissions**

[15] I will begin with the appellant’s complaint that the auditor erred in calculating the net worth differential.

#### **Auditor’s error in calculating the net worth differential**

[16] The argument made by counsel for the appellant may be summarized as follows:

[TRANSLATION]

My client received \$260,000 from his insurance company after a property he owned was destroyed by fire: see his income tax return, Appeal Book, Vol. 1 at page 132. He then reported a capital gain of \$142,855.36, of which \$95,236.81 was taxable: *ibidem*, at page 127. Once taxes were paid on that amount, he was left with at least \$50,000 in cash assets, which explains the net worth differential.

[17] The problem with this argument by counsel for the appellant—and it is major and insurmountable—is that this ground for appeal was never expressly or implicitly raised in the appellant’s notice of appeal and memorandum of fact and law. It was raised for the first time on appeal.

[18] There is more: aside from a brief allegation in the appellant's arguments at trial, he has not adduced any evidence that the auditor's analysis was flawed in this respect. The appellant cross-examined the auditor and in no way asked her to explain this supposed deficiency in her analysis. At the most, the oral argument of counsel for the appellant conveys a sense of puzzlement, as expressed at page 42 of Volume 2 of the transcript:

[TRANSLATION]

Another element that leaves me really puzzled is that when we look at the auditor's document, which the auditor filed, here I am referring you to Appendix 1 of the document. What we see is for 2000: non-taxable capital gains are being deducted. In other words, I have additions and deductions. And in the deduction, what is being deducted, that is the portion—she told us in her testimony—it is the non-taxable portion of the capital gain that she is adding in there. But, with all respect, I think something is missing. What is missing is that when you have a capital gain, you have a non-taxable portion, but there is still a fraction of the taxable portion that is left over. And I do not think that this part appears anywhere here. It does not appear anywhere in the file. I think that the auditor forgot about it because I do not see it anywhere.

So, when I do a net worth, I am certainly required to look at everything that comes in. And here, the auditor only deducted this—the non-taxable portion—she did not deduct the taxable portion, that is, the part of it that is pocketed. I do not see it. And that is what she told us in her testimony.

[19] Puzzlement and doubt felt and expressed do not constitute evidence of an error with regard to the subject of those two feelings. The appellant had the burden of proving, on the basis of the auditor's analysis document, that a calculation error had been made determining the net worth differential and he failed to do so, both at trial and on appeal: see *Molenaar v. Canada*, 2004 FCA 349; *Lacroix v. Canada*, 2008 FCA 241.



[20] At paragraph 25 of his Reasons, reproduced above, the judge stated, with regard to the issue of net worth, that aside from the fact that the appellant received a significant amount of money in 2000, “[v]ery little information and very few explanations were given by the appellant and his representatives, which meant that the assessment was issued after the only known changes were made”.

[21] If evidence of an error in the calculation of the net worth differential had been submitted at trial, the judge would have carefully reviewed it as he did all of the other evidence produced by the parties.

[22] In any event, the amount exempted from the taxable capital gain came from the \$260,000 obtained from the presumed transaction concerning the destroyed property. The auditor explained, and her testimony is not contradicted on this point, that any transaction following a disposition does not result in a net worth differential: see Volume 1 of transcript, at pages 238 and 239. If, there is a differential in the end, then it is, she stated, [TRANSLATION] “an amount from other sources, not an amount resulting from the disposition transaction”: *ibidem*. She added that what counts is the differential: *ibidem*, at pages 238 and 241.

[23] At pages 278 and 279, she returned to this matter in order to explain to counsel for the appellant how the effects of a disposition are dealt with from a tax perspective in calculating the net worth. She stated the following:

[TRANSLATION]

And next, what we have here, this is specific to the sale of the building. O.K. Here, I've just taken off \$47,000; that is the non-taxable portion. Your Honour, to avoid penalizing Mr. Pelletier, I have to take off the non-taxable portion. Because Mr Pelletier, if we are still looking at my differential, the example that I just gave a moment ago, there was a \$100,000 apartment block. He receives \$260,000. O.K. My differential is 100, my worth, my differential, is \$160,000. From that, I deduct, a little further on, total income by reported income, two-thirds of \$160,000, let us say \$120,000, and I deduct \$120,000, he is taxed on that. O.K. There is the non-taxable portion left, so I have to deduct that non-taxable portion. Taxation-wise, it is like that. That is how it is done. O.K.

To be very clear, I can give you an example that we give, that we give in training. We call it isolating the transaction. And you will see the effect. The effect of a disposition. O.K. When we dispose of a property, regardless of the amount received, it is not reflected in the end, here. That is because my \$88,000, forget that it is from \$260,000. Because it is always the differential from one year to the next. And from the \$88,000, my differential, I tried to remove the most elements known, and my result is \$28,000 in income from all other unidentifiable sources. And I am unable to identify it. And it is not up to me to identify it.

So, any transaction, I would agree with you, and it would have had an impact if and only if I had not had my building as part of my worth in '99. In that case, there would have been an impact. But, I had my worth in '99, so I considered the differential, and it has no impact on the final figures. As I told you, Mr. Daigle, I can show you on paper how it works. And the result is that it is zero.

[Emphasis added]

[24] Although the auditor's testimony is sufficient to deal with the appellant's argument on appeal, the fact remains that on appeal, an appealing party cannot raise a new ground for appeal when this would prejudice the respondent because the respondent is denied the opportunity to rebut this new argument, which would have occurred in this case: see *Genex Communications Inc. v. Her Majesty the Queen*, 2010 FCA 353.

[25] For these reasons, I would dismiss this new ground for appeal. This leads me to the second issue raised by the appellant.

Value of the housing benefit received by the appellant

[26] We are faced with six different estimations of the value of the benefit the appellant received. I am laying them out in table form so as to properly compare them.

	<b>2000</b>	<b>2001</b>	<b>2002</b>
Auditor	\$22,620	\$22,620	\$23,268
Minster of National Revenue	\$22,620	\$22,620	\$20,802
Objections officer	\$9,055	\$6,517	\$3,474
Expert's assessment	\$12,436	\$9,898	\$8,672
Judge's estimation	\$9,010	\$9,010	\$9,010
Appellant's estimation	\$5,400	\$5,400	\$5,400

[27] I am leaving aside the initial assessments of the auditor and the minister in order to compare the four others on a cumulative basis over the three years at issue. The expert's assessment is \$31,016. The judge's is \$27,030, the one established by the objections officer is \$19,046 and the assessment the appellant is arguing for is \$16,200. The difference between the last two figures is \$2,846 over three years. The gap between the judge's and applicant's assessments is \$10,830.

[28] It is far from clear in the evidence that the household expenses, such as heating, taxes, insurance, electricity and maintenance, were borne by the appellant. According to the appellant's testimony, the household expenses were paid by Domaine, but then an accounting adjustment was applied to the shareholder's account receivable: see Volume 1 of the transcript, at pages 85 to 88.

[29] The appellant had serious credibility problems, as revealed through the evidence at trial and the judge's decision. The appellant, as previously stated, was the president, administrator and sole shareholder of Domaine. At paragraph 10 of his Reasons for Judgment, the judge stated that to "obtain the total amount of the annual benefit, the household expenses incurred by Domaine . . . must be added".

[30] This statement by the judge can be explained by the fact that he did not believe the appellant's version, according to which the appellant reimbursed Domaine for the household expenses. However, it can also be explained, as the appellant submits, by the fact that the judge forgot this part of the appellant's testimony. Regardless of the cause, I do not think that it is necessary to decide this question for the following reason.

[31] At the objection stage, the objections officer reduced the value of the benefit by taking the figures used by the Minister for 2000, 2001, 2002 (that is, \$22,620, \$22,620, \$20,802) and decreasing them by \$13,565, \$16,103, \$17,328 such that the value of the benefit was \$9,055 for

2000, \$6,517 for 2001 and \$3,474 for 2002. By rounding those figures, the monthly average accepted by the objections officer for the three years was \$530, whereas the judge set it at \$750 and the appellant estimated it at \$450.

[32] Considering the minimal disparity between the amounts determined by the objections officer and those claimed by the appellant, as well as the costs and waiting times that would result if the matter were referred back to the Tax Court of Canada to redetermine the value of the benefit, I am of the opinion that it is reasonable to defer to the value accepted by the objections officer, which is more favourable to the appellant than the amount determined by the judge.

### **Conclusions**

[33] For these reasons, I would allow the appeal for the sole purpose of establishing the value of the housing benefit for 2000, 2001, and 2002 at \$9,055, \$6,517 and \$3,474, respectively.

[34] I would refer the assessments back to the Minister for reconsideration and adjustment in accordance with these reasons for judgment

[35] In all other respects, I would dismiss the appeal with costs to the respondent.

“Gilles Létourneau”

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J.A.

“I agree

M. Nadon J.A.”

“I agree

Robert M. Mainville J.A.”

Certified true translation  
Sarah Burns

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-227-10

**STYLE OF CAUSE:** DONALD PELLETIER v.  
HER MAJESTY THE QUEEN

**PLACE OF HEARING:** Québec, Quebec

**DATE OF HEARING:** January 12, 2011

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

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

**DATED:** January 20, 2011

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