

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210312

Docket: A-423-19

Citation: 2021 FCA 55

Present: WEBB J.A.

BETWEEN:

JEAN-MICHEL CLÉMENT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 12, 2021.

REASONS FOR ORDER BY:

WEBB J.A.

Federal Court of Appeal



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REASONS FOR ORDER

WEBB J.A.

[1] The appellant filed a motion for an order allowing him to present new evidence in this appeal. Rule 351 of the *Federal Courts Rules*, SOR/98-106, provides:

351 In special circumstances, the Court may grant leave to a party to present evidence on a question of fact.

351 Dans des circonstances particulières, la Cour peut permettre à toute partie de présenter des éléments de preuve sur une question de fait.

[2] The principles that apply in determining whether new evidence should be admitted on an appeal are set out by the Supreme Court of Canada in *Palmer v. R.*, [1980] 1 S.C.R. 759:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[3] The appellant, in his written submissions, acknowledges that he does not meet the test for the admission of new evidence as set out in *Palmer*. However, he submits that the new evidence should be admitted based on the residual discretion that this Court has to admit evidence in situations where the test as out in *Palmer* is not met (*Brace v. Canada*, 2014 FCA 92, at para. 12). However, as noted in paragraph 12 of *Brace*, “this is a residual discretion to be exercised only ‘in clearest of cases’ and ‘with great care’”.

[4] The only justification for the admission of this new evidence submitted by the appellant is “to avoid contradictory judgments at the levels of the Court of Quebec and the Tax Court of Canada because the said evidence will be admitted into evidence at the level of the Court of

Quebec”. This is not a sufficient reason to allow the appellant to admit the new evidence. This is an appeal of the decision of the Tax Court, not a trial *de novo*.

[5] If there is a different decision of another court, that would be the result of the litigation strategy adopted by the appellant. Whether the decision to not introduce this evidence at the Tax Court was made intentionally or inadvertently, the residual discretion to allow the appellant to introduce new evidence in this appeal should not be exercised to allow him to supplement the record by adding documents that he could have introduced at the Tax Court but, in hindsight, now regrets not introducing.

[6] The appellant’s motion will be dismissed with costs, payable in any event of the cause.

“Wyman W. Webb”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-423-19

STYLE OF CAUSE: JEAN-MICHEL CLÉMENT v.
HER MAJESTY THE QUEEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: WEBB J.A.

DATED: MARCH 12, 2021

WRITTEN REPRESENTATIONS BY:

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Julien Dubé-Sénécal FOR THE RESPONDENT
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