

Docket: 97-333(UI)

BETWEEN:

ÉRIC DUCHESNE

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion in revocation of judgment
heard on March 22, 2004, at Chicoutimi, Quebec

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:

The Appellant Himself

Counsel for the Respondent:

Sylvain Ouimet

JUDGMENT

Upon motion by the Appellant for a revocation of a judgment rendered on October 7, 2003;

Considering that, in the circumstances, it was unreasonable to expect the Applicant (Appellant) to attend the hearing;

The judgment dismissing the appeal filed by the Applicant, rendered October 7, 2003, is quashed.

Signed at Ottawa, Canada, this 30th day of April 2004.

"François Angers"

Angers J.

Translation certified true
on this 26th day of October 2004.

Ingrid B. Miranda, Translator

Citation: 2004TCC304
Date: 20040430
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MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Angers J.

[1] This is a motion in revocation of a judgment rendered by the Tax Court of Canada on July 7, 2003. The judgment granted Counsel for the Applicant permission to be removed as Counsel of record, and dismissed the appeal of the Applicant on the ground that he did not come to Court the morning his case was to be heard, on July 2, 2003, at Roberval, Quebec. A related case was to be heard the same day, relating to the father of the Applicant, Berthold Duchesne. The Applicant and his father were both represented by the same Counsel. On June 27, 2003, Counsel sought to adjourn both files. On June 30, he was informed that only the father's case has been adjourned for medical reasons. Therefore, on the morning of the hearing, the attorney reiterated his request for an adjournment respecting the Appellant's case, but his request was rejected by the judge presiding at the hearing.

[2] That same morning, the attorney attended the hearing alone, without his clients or witnesses, in spite of the fact that he had received a copy of the order directing that the hearing be heard on July 2, 2003. The order was dated May 13, 2003, and was served with the attorney on June 30, 2003, informing him that his petition to adjourn was rejected.

[3] Counsel explained the absence of his clients and witnesses to the trial judge. Following these explanations, the judge concluded that the Applicant had no interest in his case and that Counsel had not received his client's support in preparing his appeal. The lawyer affirmed that he had sent a letter to his clients one month prior to July 2, 2003, asking them to contact him. Berthold Duchesne contacted the lawyer, since one of the adjournments was granted for medical reasons. The lawyer also called the Applicant several times, but to no avail. When his request for an adjournment was rejected on the morning of July 2, 2003, he also tried to contact his client again: he informed the Court that he was unable to reach his client, but that he left a message on his answering machine. He made this last effort in order to proceed with the hearing of the case the next morning, on July 3. It is worth noting that the Respondent's witnesses were not present either on the morning of July 2, 2003, knowing that the adjournment had been rejected on June 30, 2003.

[4] The Applicant and his mother, Diane Gaudreau, attended at the hearing before me and they both testified under oath. The message left by the lawyer on July 2, 2003, was in fact left on Ms. Gaudreau's answering machine. The Applicant does not reside with his mother. Ms. Gaudreau is simply a potential witness in the case, in her capacity as Employer. She is separated from and has not lived with Berthold Duchesne for six years. She heard the message during the day on July 2, and the next morning went, with the Applicant, to the Courthouse in Roberval at 9:30a.m. They returned on July 4, 2003. Following the advice of the registrar, the Applicant initiated these proceedings.

[5] According to Ms. Gaudreau and the Applicant, Berthold Duchesne retained the services of the attorney to represent him and his son. Ms. Gaudreau stated that she was never informed that the hearing was scheduled for July 2, 2003. In fact, she received the first call from the lawyer about this matter on July 2. She testified that it was impossible for the Applicant to receive any messages because his telephone was not equipped to do so. Moreover, she informed the Court that her son had always lived at 2264 rang 3 west, Métabetchouan and that, if the lawyer had sent a letter to the Applicant, he had used Berthold's address at 164 St-Georges Street, Métabetchouan, the same address where he mailed his invoice on July 18, 2003. She also confirmed that during the time at issue, Berthold was in fact in the hospital.

[6] The Applicant confirmed his mother's testimony. According to him, his lawyer had already represented him in another proceeding and he should have known his address and telephone number. He claims he did not receive any letter

or telephone call. Once his mother reached him on July 2, 2003, the Applicant came to the Roberval Courthouse with his mother on the mornings of July 3 and 4, 2003.

[7] Paragraphs 18.21(3)(a) and (b) of the *Tax Court of Canada Act* prescribe two conditions for the granting of a motion in revocation of judgment: the application had to be filed as soon as circumstances permitted within 180 days; and that it would have been unreasonable in all the circumstances for the Applicant (appellant) to have attended the hearing.

[8] There is no doubt in the case at bar that we are facing significantly inconsistent explanations, to say the least. Counsel for the Applicant did not testify at the hearing of this motion: I read his account of facts from the Reasons for Judgment related to the hearing that took place on July 2, 2003. It is therefore impossible for me to compare his account of facts with that of the Applicant or the mother and to make a determination. I will simply try to understand how something like this could happen in 2004, with all the very sophisticated means of communication that we now have. Here are the background facts that I am retaining:

- 1 – The notice of hearing was sent on May 13, 2003, peremptorily setting the hearing date at July 2, 2003, in the Roberval Courthouse.
- 2 - At the time, Berthold Duchesne was in the hospital.
- 3 - The doctor confirmed that on June 23, 2003, Berthold was hospitalized for depression.
- 4 - Counsel for the Appellants filed an application for adjournment for both cases on June 27, 2003.
- 5 - The Respondent did not object.
- 6 - On June 30, 2003, the hearing coordinator informed the parties that only the adjournment of Berthold Duchesne's case was allowed and that the parties should be ready to proceed with the hearing scheduled for July 2 and 3, 2003.

7 - The lawyers for both parties came to Court on the morning of July 2, 2003. Counsel for the Appellant was there without his client or witnesses, and Counsel for the Respondent was there without his witnesses.

[9] In light of the last fact, it seems obvious to me that both lawyers involved in the case were clearly under the impression that the Court would agree to adjourn the Applicant's case, without making that request. In some circumstances, both could have seriously endangered the case of their respective clients, since if the Court refuses to grant an adjournment, Counsel would have found themselves with no means of presenting evidence, without witnesses and without clients. This is exactly what happened here. In my opinion, this situation is absolutely unacceptable if one considers the obligations and responsibilities that every lawyer assumes when undertaking to represent his clients. This is a situation where a lawyer committed himself professionally to his clients, and may, by his acts, discredit the administration of justice.

[10] Lawyers who choose to attend hearings without their clients or witnesses on a mandatory hearing date, in hopes that the trial judge will grant them an adjournment, display a serious lack of respect towards the Court. Such action is detrimental to an efficient management of the cases before the Court. Unless there is an extraordinary reason, this should never happen. The consequences resulting from the judge's refusal to grant the adjournment could be much more detrimental to an Appellant, even if the lawyers of both sides are at fault.

[11] Considering all the difficulties arising from this application for adjournment, Counsel for the Applicant sought permission to be removed as counsel of record because he was unable to contact his client. Nevertheless, the same day, he contacted him and the client and his mother came to the Court the next day and the day following. If I believe the Applicant, how — within a few hours — could Counsel manage to contact them while he was unable to do so between May 13, 2003, and the morning of July 2, 2003?

[12] Whenever a hearing is peremptorily scheduled, the case must proceed regardless of the circumstances. Only very exceptional situations may justify the granting of an adjournment and this rests entirely upon the discretion of the judge.

[13] In this case, I accept the explanations of the Applicant and his mother. In my opinion, it would be unjustifiable to prevent his case from being heard in these circumstances. The Applicant found himself in the middle of a free fall, without being able to understand what was happening to him. It was not reasonable to

expect the Applicant to attend the hearing on July 2, 2003. Moreover, I cannot disregard the fact that the Applicant was present in the Roberval Courthouse on the morning of July 3, 2003. This date was one of the hearing days scheduled by the coordinator, in her message dated June 30, 2003.

The motion is granted.

Signed at Ottawa, Canada, this 30th day of April 2004.

"François Angers"

Angers J.

Translation certified true
on this 26th day of October 2004.

Ingrid B. Miranda, Translator