Docket: 2003-1066(GST)G

BETWEEN:

TELUS COMMUNICATIONS (EDMONTON) INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on July 24, 2003 at Calgary, Alberta

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Applicant:	Michel Bourque
Counsel for the Respondent:	William L. Softley

ORDER

Upon motion made by counsel for the Respondent requesting that an extension of the time fixed by section 44 of the *Tax Court of Canada Rules* (*General Procedure*) for filing a Reply to Notice of Appeal herein be extended;

Upon reading the affidavits of Jocelyn Danis, Jacques Allard, Christine Morgan and Marium Giga, filed;

And upon hearing what was alleged by the parties;

The motion is granted and the Appellant is awarded costs fixed at $2,000 payable in any event of the cause.

Signed at Ottawa, Canada, this 5th day of December 2003.

"B. Paris"

Paris, J.

Citation: 2003TCC853
Date: 20031205
Docket: 2003-1066(GST)G

BETWEEN:

TELUS COMMUNICATIONS (EDMONTON) INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Paris, J.

[1] This is an application by the Respondent for an Order extending the time fixed by section 44 of the *Tax Court Rules* (General Procedure) to file a Reply to Notice of Appeal.

[2] The grounds for the motion are:

1. Section 12 of the Rules empowers this Honourable Court to extend the time fixed by section 44 of the Rules after such time has expired;

2. The Respondent failed to file a Reply to Notice of Appeal within the time fixed by the Rules, as a result of administrative misapprehension of fact;

3. The delay in filing such Reply to Notice of Appeal will not cause prejudice to the Appellant;

4. The Respondent's defence to the Notice of Appeal has merit; and

5. The Respondent had a continuing intention to file the Reply to Notice of Appeal.

[3] The Respondent relied on the affidavits of Jacques Allard, Jocelyn Danis, Christine Morgan and Marium Giga, and on a proposed Reply to Notice of Appeal, all of which were filed with the Notice of Motion.

[4] The Appellant opposes the motion and relies on the affidavit of Timothy Kevin McGillicuddy.

Background:

[5] The materials filed by both parties show that the Appellant filed its Notice of Appeal on March 10, 2003, and that it was served on the Deputy Attorney General of Canada on March 18, 2003. A Reply to the Notice of Appeal was not filed by the Respondent within the sixty-day period provided by section 44 of the *Rules*, which period expired on May 20, 2003[1].

[6] In her affidavit, Marium Giga, assistant to Kathleen Lyons, the Director of Tax Law Services in the Edmonton Regional Office of the Department of Justice, sets out the procedures followed by the Department of Justice once a Notice of Appeal is served on the Deputy Attorney General by this Court. Those steps are as follows:

a) When a Notice of Appeal is served on the Deputy Attorney General of Canada's office in Ottawa, it is then assigned by Ian S. MacGregor, Q.C. (Assistant Deputy Attorney General) to the Tax Law Services section of Justice in Ottawa or in one of Justice's regional offices.

b) Mr. MacGregor gives notice of the file assignment by sending an instructing letter to the Director of the Tax Law Services section in the office to which the appeal is assigned, with a copy of the Notice of Appeal. A copy of that letter is sent to Canada Customs and Revenue Agency ("CCRA").

[1] The sixtieth day from the service of the Notice of Appeal on the Respondent was May 19, 2003. However, that day was a holiday and, by virtue of section 11(*a*) of the *Rules* the last day the Reply could be filed was May 20, 2003.

c) CCRA then sends its departmental materials to the Tax Law Services section in the office to which conduct of the appeal has been assigned. Justice counsel requires these materials in order to prepare a Reply.

[7] The procedures followed by the CCRA in respect of new appeals to this Court are set out in the affidavit of Jocelyn Danis, the Manager of GST Appeals in the Appeals Branch of the CCRA in Ottawa as follows:

a) CCRA receives a copy of the Notice of Appeal from the Tax Court of Canada. The Notice of Appeal is reviewed to determine whether it will be retained by CCRA in Ottawa or assigned to one of the regional CCRA Tax Services Offices. If it is determined that the file will be retained by CCRA in Ottawa, CCRA does the following:

i) CCRA's Registry Unit creates a file and enters information about the appeal in CCRA's computer system ... The computer system calculates the date on which the Reply is due to be filed.

ii) The Registry Unit sends the file ... to one of the Managers of the Tax Appeals Directorate.

iii) The Manager, having received the file from the Registry Unit, assigns conduct of the file to an Appeals Officer. ...

iv) The Registry Unit enters the assigned Appeals Officer's name to the information in its computer system.

v) The Registry Unit advises the Tax Services Office of the CCRA involved that the appeal is being handled by CCRA in Ottawa and requests that the departmental materials be sent to the Registry Unit.

vi) CCRA subsequently provides the departmental materials to the Department of Justice ("Justice") office to which the file has been assigned in order that counsel can prepare a Reply to Notice of Appeal.

> b) CCRA receives, ... a copy of the instructing letter which has been sent by Ian S. MacGregor, Q.C. (Assistant Deputy Attorney General) to the Tax Law Services Section of Justice in Ottawa or in one of Justice's regional offices. The Registry Unit enters the information as to the Justice office to which the appeal has been assigned in its computer system and forwards the instructing letter to the assigned Appeals Officer.
>
> c) The Registry Unit generates weekly reports, which list appeals which were served more than 45 days ago and on which Replies have not been filed. These reports are given to the Managers to follow up.

[8] In this case, the Assistant Deputy Attorney General, Mr. Ian MacGregor, sent a letter to Ms. Lyons asking that conduct of the Respondent's case in this appeal (and 3 unrelated appeals) be assigned to counsel in the Edmonton Regional Office. The letter also stated that the departmental material would be forwarded directly to the Edmonton Regional Office by the CCRA.

[9] When Ms. Lyons' assistant, Ms. Giga, made an enquiry about the departmental material relating to this appeal, a clerk at the Registry unit of the CCRA in Ottawa told her that conduct of the file had been assigned to counsel in the Ontario Regional Office of Justice because it was related to another appeal that was being handled by that office. On the basis of this information, Ms. Giga made no further enquiries about the appeal and the file was never assigned to counsel in the Edmonton Regional Office.

[10] Meanwhile, the CCRA received a copy of the Notice of Appeal on March 19, 2003 and created a file for it in its computer system. The file was assigned to Mr. Jacques Allard, an appeals officer, on March 24, 2003. He did not receive a copy of Mr. MacGregor's letter assigning conduct of the file to counsel in the Edmonton Regional Office but assumed that the departmental materials had been forwarded to the appropriate Justice office and that a Reply to the Notice of Appeal would be sent to him for review in advance of the date on which it was due to be filed. He became aware that no Reply had been filed on June 5, 2003, when he was reviewing his files. At about the same time he discovered the departmental materials had been placed in with the materials for a large group of files he was working on at the time. Up until that point he did not realize that he had received them.

[11] The CCRA contacted Justice when it was discovered that no Reply had been filed. Upon further investigation it was found that the information Ms. Giga had been given that the Ontario Regional Office of Justice had conduct of the file was erroneous and that conduct of the file, in fact, remained with the Edmonton Regional Office.

[12] The CCRA internal monitoring system for the filing of Replies did not pick up the fact that 45 days had passed since it had received the Notice of Appeal and that no Reply had been filed. In his affidavit, Mr. Danis states that he does not recall receiving any weekly reports showing that the Reply had been outstanding for more than 45 days.

Respondent's Position

[13] Respondent's counsel submits that, according to the Federal Court of Appeal in *Canada v. Hennelly*[2], an order extending time for filing a pleading should be granted where an applicant shows:

a) that a reasonable explanation for the delay exists;

b) that no prejudice to the other party arises from the delay;

c) that the Applicant's case has merit; and

d) that the Applicant had a continuing intention to file the document.

[14] He submits that the affidavits have been filed show that the Respondent meets all of these conditions.

Appellant's Position

[15] The Appellant's counsel argues that the Respondent's explanation for the delay in filing the Reply is not reasonable and that the Appellant has been prejudiced by the delay.

[2] (1999) 244 N.R. 399

[17] Counsel for the Appellant submits that the Court should not grant extensions of time in cases involving administrative error. He also says that the number of administrative errors that occurred in this case and which led to the failure to file the Reply on time should lead the Court to conclude that the explanation for the delay is unreasonable and that no accommodation in terms of a time extension should be afforded to the Respondent.

[17] He further submits that the Appellant has, in the affidavit of Mr. McGillicuddy, shown prejudice:

> (a) The Appellant has incurred legal fees in order to obtain legal advice arising from the Applicant's failure to file her Reply within the deadline set out in the Rules;
>
> (b) The Appellant has been delayed in bringing this matter to trial; and
>
> (c) The Appellant will be prejudiced in that it will bear the onus of disproving the assumptions made by the Minister of National Revenue in raising the reassessment and that such prejudice cannot be remedied by a generous award of costs.

Analysis

[18] The test laid down by the Federal Court of Appeal in *Hennelly* is the proper test to be applied in this case.

[19] The first matter to consider is, therefore, whether the Respondent has provided a reasonable explanation for the 23-day delay in filing her Reply to the Notice of Appeal.

[20] It is clear that the delay was due to an administrative error attributable to the misinformation given to Ms. Giga that the conduct of the Respondent's case in the appeal had been assigned to another Justice office and to Ms. Giga's failure to confirm this information with anyone in the Department of Justice. Had she tried to do so, there is no reason to believe that the question of who had conduct of the file would not have been resolved before the filing deadline.

[21] While it is also apparent that errors were made by officers of the CCRA in handling the file, the CCRA system is, in my view, only a backup to the

procedures in place in the Department of Justice for ensuring Replies are filed on time. While the CCRA system could, if operating properly, have prevented the failure, it was not the cause of the failure. Furthermore, it is the responsibility of counsel having conduct of a matter in litigation to ensure time limits for filing pleadings are met.

[22] The explanation provided by the Respondent for the delay is, in my view, a reasonable one. The delay is attributable to human error, and is there is no indication of any continuous or repeated breakdown of the internal system put in place within the Department of Justice to ensure the timely filing of Replies. Furthermore, the error occurred at the clerical level prior to the file being assigned to counsel.

[23] Although in certain earlier cases this Court has held that extensions of time should not be granted in cases involving administrative error[3], all but one of these cases were decided prior to the Federal Court of Appeal decision in *Carew*[4]. In *Carew*, the Court reversed this Court and granted the taxpayer an extension of time to file his Reply to Notice of Appeal. Hugessen, J. said:

> As a matter of principle courts today are loath to let procedural technicalities stand in the way of allowing a case to be decided on its merits".[5]

[24] Counsel for the Appellant also relied on the case of *Gordon v. The Queen*[6] (decided by this Court after the Federal Court of Appeal decision in *Carew*) in which this Court held that a time extension should not be granted where the delay was due to administrative error or oversight. The Court relied on its earlier decision in *Foundation Instruments Inc.* although that decision had been reversed by the Federal Court of Appeal[7]. In addition, the Court did not refer to *Carew*. In

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[3] *Discovery Research Systems Inc. v. Her Majesty the Queen* 1992 DTC 1291

Foundation Instruments Inc. v. Her Majesty the Queen 1992 DTC 1879

[4] 1992 DTC 6608 (followed by this Court in *B.W. Strassburger v. The Queen*, 2001 DTC 694)

[5] *supra*, footnote 4, at page 6609

[6] 2003 GTC 775

[7] 93 DTC 5508. While the reversal was on the consent of the parties, it was consistent with the FCA's decision in *Carew*, which was decided after argument.

any event, I am bound to follow the Federal Court of Appeal, and to apply the principle set down in *Carew*, which suggests to me that it is appropriate to grant an extension of time in the circumstances of this case.

[25] The Appellant states that it has been prejudiced in terms of additional legal fees it has incurred, and because of the delay in bringing the matter to hearing. The former can be considered in the award of costs and, in my view the latter is not of such significance in relation to the length of the appeal process that the Respondent should be prevented from having the case decided on its merits.

[26] The Appellant also says that it is prejudiced because it will bear the onus of disproving the assumptions of fact made by the Minister in raising the assessment. Bowie, J. of this Court, rejected the same argument in *Bruner v. Canada*[8] in which the Respondent was seeking an extension of time to file a Reply:

> ... If no extension of time is granted then the Respondent may nevertheless file a reply, but there arises a rebuttable presumption that the facts alleged in the notice of appeal are true. The only possible prejudice that the Appellant suggested to me that he would suffer if I were to grant the extension of time is that he will lose the benefit of that rebuttable presumption, which is his only by reason of a slip. If that alone were sufficient prejudice to prevent the extension of time from being granted then there would never be a case for doing so on an application made after the time had expired, and the power to grant an extension of time in such a case would be rendered nugatory ...[9]

[27] I concur with this reasoning and find that the Appellant will suffer no significant prejudice if the extension of time is granted.

[28] I am also satisfied that the Respondent has shown that the case has merit, and that She had a continuing intention to appeal. I note that the Appellant did not take issue with these points.

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[8] [2002] G.S.T.C. 87

[9] supra, footnote 8 at p 87-14

[29] For these reasons, the Respondent's motion is granted and the proposed Reply to the Notice of Appeal is deemed to be filed as of the date of my Order herein.

[30] I also award the Appellant costs of this motion fixed at $2,000 payable in any event of the cause, as a result of the expense to which it has been put by the Respondent's error.

Signed at Ottawa, Canada, this 5th day of December 2003.

"B. Paris"

Paris, J.

CITATION:	2003TCC853
COURT FILE NO.:	2003-1066(GST)G
STYLE OF CAUSE:	Telus Communications (Edmonton) Inc. and H.M.Q.
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	July 24, 2003
REASONS FOR ORDER BY:	The Honourable Justice B. Paris
DATE OF ORDER:	December 5, 2003

APPEARANCES:

Counsel for the Appellant:	Michel Bourque
Counsel for the Respondent:	William L. Sofltey

COUNSEL OF RECORD:

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