

Docket: 2009-2545(IT)G

BETWEEN:

MICHAEL F.G. NOEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application brought under subsection 147(7) of the
Tax Court of Canada Rules (General Procedure)

Before: The Honourable Justice Robert J. Hogan

For the Appellant: The Appellant himself
Counsel for the Respondent: Sheherazade Ghorashy

ORDER

Upon application by the Respondent requesting that the Court reconsider its decision to award costs in the appeal of *Michael F.G. Noel v. The Queen*.

And upon having read the submissions filed by both parties.

The application is dismissed in accordance with the attached reasons for order.

Signed at Ottawa, Canada, this 14th day of June 2011.

"Robert J. Hogan"

Hogan J.

Citation: 2011 TCC 282
Date: 20110614
Docket: 2009-2545(IT)G

BETWEEN:

MICHAEL F.G. NOEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hogan J.

[1] This application is brought under subsection 147(7) of the *Tax Court of Canada Rules (General Procedure) (Rules)*. The Respondent has requested I withdraw the award of costs at trial since the Appellant did not plead costs in his notice of appeal, citing *Canada (Attorney General) v. Pascal*¹ as authority.

[2] The Appellant replies that the following sections of the *Rules* apply to any general proceeding before the Tax Court of Canada:

7. A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or direction in a proceeding a nullity, and the Court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute, or

(b) only where an as necessary in the interests of justice, may set aside the proceeding or a step, document or direction in the proceeding in whole or in part.

...

9. The Court may, where and as necessary in the interests of justice, dispense with compliance with any rule at any time.

¹ 2005 FCA 31.

[3] This gives the Court discretion on costs when they are not pled by waiving compliance with the *Rules*. The award of costs on January 14, 2011 was therefore within my discretion. The Appellant in this case was wholly successful in his appeal and so was awarded party and party costs. I see no reason to disturb that decision now.

[4] The Respondent however asks for the costs award to be struck under *Pascal*. In that case the Minister asked for costs on a motion to dismiss previously granted by the Court. In that case, Noël J. refused to award costs. Part of the reason was that costs were not pled in the motion. However, he went on to say that the motion was unopposed and would not have warranted costs in any case.

[5] This case is distinguishable from the present matter. The motion in *Pascal* was unopposed and therefore would not have warranted costs in any respect. The present matter was a trial, fully opposed (as both parties appeared before me), and costs were available to be awarded by the Court's discretion under the *Rules*. I therefore will not follow *Pascal* in the present matter.

[6] As for the Appellant, he argues he has no onus to plead relief under the *Rules*, as the required forms do not say that relief must be stated or it will be denied. This amounts to saying that the requirements of the forms are optional. They are not. All relief sought by appellants must be pled. To say the Appellant is afforded the opportunity to omit pleading relief is to prejudice the Respondent by denying the opportunity to respond properly to such requests. This is not the intent of the *Rules*, which are designed to insure full disclosure by both sides so that a matter can be decided on its merits.

[7] When a party fails to plead relief they are then at the mercy of the Court who *may* allow relief that was not originally pled. This requires considering prejudice to the other side, which there is little of in this case. However, only the Court has discretion to waive compliance with the *Rules*, and it is presumptuous of the Appellant to think otherwise.

[8] The Appellant is correct, however, that denying a party costs when they have not pled them is unjust. He states that to allow the Respondent's request would be to deny costs even though the conduct leading to an award may have happened after pleadings were filed.

[9] In this matter, the Respondent is not prejudiced by this award of costs. While not pled, it is still in my discretion to award costs under sections 7 and 9 of the *Rules*. After losing at trial and failing to refute the evidence offered by the Appellant, it should come as little surprise to the Respondent that costs were awarded against it. This does not mean costs will be unreasonable or onerous, as they must still be based on Tariff B. If there is a dispute to quantum either party may apply for taxation under section 155 or 156 of the *Rules* as the case may be. Since the award of costs in this matter was proper I see no reason to alter it.

Signed at Ottawa, Canada, this 14th day of June 2011.

"Robert J. Hogan"

Hogan J.

CITATION: 2011 TCC 282

COURT FILE NO.: 2009-2545(IT)G

STYLE OF CAUSE: MICHAEL F.G. NOEL v. HER MAJESTY
THE QUEEN

REASONS FOR ORDER BY: The Honourable Justice Robert J. Hogan

DATE OF ORDER: June 14, 2011

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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