Date: 20070912

Docket: A-218-06

Citation: 2007 FCA 281

CORAM: **LINDEN J.A.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

EDWARD PALONEK

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on September 10, 2007.

Judgment delivered at Toronto, Ontario, on September 12, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: LINDEN J.A.
TRUDEL J.A.

Date: 20070912

Docket: A-218-06

Citation: 2007 FCA 281

CORAM: **LINDEN J.A.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

EDWARD PALONEK

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal from a decision of Mactavish J. of the Federal Court of Canada (judge) rendered on April 18, 2006. She dismissed Mr. Palonek's (the appellant's) application for judicial review of the decision made by the Minister of National Revenue's delegate to deny the appellant access to the Voluntary Disclosures Program (VDP). The VDP finds its source in subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and section 281.1 of the *Excise Tax Act*, R.S.C. 1985, c. E-15.

[2] This appeal cannot succeed. There is no need to relate all the facts in details. The following summary will be sufficient to understand the issues at play before this Court and this Court's brief reasons for dismissing the appellant's allegations. I hasten to add that counsel on appeal had to struggle gallantly with a record created by the appellant in the Federal Court where he elected to be self-represented.

FACTS

[3] The appellant, who lives in the Republic of Panama, did not file Canadian income tax and Goods and Services tax returns for the 1993-2001 taxation years. In June 2002, his counsel contacted Canada Revenue Agency (CRA), which at the time was the Canadian Customs and Revenue Agency, in order to make a voluntary disclosure under the VDP. The VDP is a program which allows the CRA to provide relief from penalties, interests and possible prosecution to individuals who make a disclosure to correct inaccurate or incomplete information or to disclose information not previously reported. Neither the appellant nor his counsel were presented with or asked to sign a "Client Agreement Form" before disclosing any relevant information.

[4] At the request of the appellant's counsel, a CRA's agent asserted a few days later that the appellant was not under CRA's investigation by saying that "everything was fine" and asked the appellant to prepare documentation for submission. The appellant then produced his T-1 income tax and GST returns for the years in question.

[5] During the process, CRA's audit department advised the CRA's agent in charge of the appellant's file that the appellant was potentially involved with two or three companies, as well as with a "T3 Trust". CRA's audit department had located a website which indicated that the appellant had been very successful in a business venture known as "Found Money". Found Money Inc. and Found Money International were noted as associated companies.

[6] After being advised and asked to provide additional information concerning these entities and his source of income, the appellant asked for extensions of time due to his responsibilities outside Canada. He later declined to present further submissions other than the fact that he had disposed of his Found Money Inc. shares five or six years ago. According to the respondent, no capital gain or loss had been declared on any of the appellant's tax returns filed under the VDP.

[7] CRA's agents conducted three level of administrative review regarding the appellant's admissibility to the VDP. The last review confirmed the two earlier decisions which denied the appellant access to the VDP because of an incomplete disclosure by him. The third-level decision was rendered on November 15, 2004. This is the decision that was challenged by way of judicial review before the Federal Court.

THE ISSUES ON APPEAL

The respondent's failure to warn the appellant of the consequences of an incomplete disclosure

[8] First, the appellant complains that the Minister of National Revenue (Minister) failed to inform him of the possible consequences of making a disclosure under the VDP. That failure also consisted in not requesting the appellant to sign a "client agreement form". These failures, according to the appellant, constituted a violation of administrative law obligations of fairness as well as an infringement of his rights under sections 7 and 8 of the *Charter of Rights and Freedoms*.

[9] The short answer to this contention is, as the judge found, that the appellant was represented by knowledgeable counsel in the field of taxation, who, on behalf of his client, initiated the process of voluntary disclosure. In his initial contact with CRA, counsel for the appellant made a specific reference to the Information Circular describing the VDP in a way, as the judge found, that indicated "a familiarity with the VDP process": see reasons for judgment, at paragraphs 101 and 102 and counsel's letter at pages 312 and 313 of Appeal Book, volume 2.

[10] I agree with the learned judge that "in these circumstances, it was entirely reasonable for the Agency to presume that the appellant would have had the benefit of legal advice regarding the parameters of the program": see reasons for judgment at paragraph 101. There is no evidence at all on the record that appellant's counsel was incompetent.

[11] The appellant contends that the respondent had a specific duty to inform him individually of the consequences of an incomplete disclosure. This duty, he submitted, exists despite the fact that he was represented by counsel. Apart from the fact that it would have been unethical for the respondent or respondent's counsel to contact the appellant directly, the duty that the appellant faced here is not different from the duty that any taxpayer has with respect to income tax returns, i.e. full disclosure of all income from all sources.

[12] Nor are the consequences of a failure to disclose different for the appellant, as he contends, from those that a taxpayer would suffer if he failed to disclose income. Both would be subject to interests, penalties and a possible prosecution.

[13] The appellant submits that his situation is different because he is making voluntary disclosure. I do not agree. A taxpayer is in the same situation as the appellant when, at the end of the fiscal year, he files an income tax return: he voluntarily discloses his income. The only difference here is that the appellant has hidden his income for nine years when he should have declared it annually. Surely, he cannot be put in a better position than another taxpayer would be if he fails to make a complete and truthful disclosure.

The alleged unfair treatment by the judge in the judicial review proceedings

[14] As previously mentioned, the appellant elected to represent himself in the judicial review proceedings. On appeal, he was represented by two experienced counsel. He now complains that the

judge should have counselled and helped him throughout the process. The fact is that she did to the extent permissible. The appellant's complaint is not supported by the record as a whole.

[15] The appellant is a sophisticated businessman. He sought to obtain in his favour a summary judgment on his application for judicial review which certainly showed some knowledge of the procedure.

[16] Counsel for the appellant drew our attention to selected excerpts of this Court's decision in *Wagg v. Canada*, 2003 FCA 303, page 206 where Pelletier J.A., properly so, reasserted the need to maintain fairness in the proceedings when a person is self-represented. However, he also sounded the following warning at paragraphs 23, 24 and 25 of his reasons for judgment:

> [23] Litigants represent themselves for a variety of reasons. If they come to realize before the commencement of trial that they have underestimated the complexity of the task before them, it is in their interest and the Court's to allow them to obtain representation. But once a trial is underway, I do not think it unfair to hold appellants to their choice to represent themselves, and to be guided by their own judgment.
>
> [24] The decision to represent oneself is not irrevocable, nor is it trivial. Persons who undertake to represent themselves in matters of the complexity of the *Income Tax Act* [R.S.C., 1985 (5th Supp.), c. 1] or the *Excise Tax Act* must assume the responsibility of being ready to proceed when their appeal is called. If they embark upon the hearing of their appeal, they are representing to the Court that they understand the subject matter sufficiently to be able to proceed. …
>
> [25] Putting the matter another way, litigants who choose to represent themselves must accept the consequences of their choice (*Lieb v. Smith et al.* (1994), 120 Nfld. & P.E.I.R. 201 (S.C.T.D.), at paragraph 16):
>
> > Thus, while the court will take into account the lack of experience and training of the litigant, that litigant must also realize that, implicit in the

> decision to act as his or her own counsel is the willingness to accept the consequences that may flow from such lack of experience or training.
>
> [Emphasis added]

This is also true in judicial review proceedings challenging decisions made under or in relation to the *Income Tax Act or the Excise Tax Act*. The rationale in paragraphs 23 to 25 of the *Wagg* decision has also been applied in a number of decisions of this Court: see *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Bérubé v. Canada*, 2006 FCA 166; and *Dionne v. Canada*, 2003 FCA 451.

Whether the decision made by the third level of review was fatally flawed

[17] The appellant argues that the decision made by the third level of review was fatally flawed because the person who undertook the review did not have before her the tax returns filed by the appellant on August 12, 2002 for the taxation years 1993 to 2001.

[18] It should be recalled that this third review was a review of the appellant's file pursuant to the first and second level decisions made respectively on October 21, 2003 and August 19, 2004 which concluded that the appellant had not fully disclosed his income in his August 12, 2002 disclosure made in his tax returns. The date at which completeness of disclosure is to be assessed is August 12, 2002.

[19] The evidence on the record shows that, after August 12, 2002 the appellant was informed by CRA agents that they had discovered new sources of income and additional income. He was given ample opportunity to explain his position in this respect. He sought, and was granted over a 7-month period, numerous extensions of time to make submissions or provide explanations. He acknowledged that he had sold his shares in Found Money Inc., but he never provided additional information nor did he make further representations: see Appeal Book, volume 2, pages 337-338.

[20] The appellant also admitted, after having filed his tax returns, that he received income from Found Money International Ltd. as far back at least as year 2000 and possibly before.

[21] The decision makers at the first and second level of review examined the 2002 tax returns filed by the appellant. They found that no capital disposition of the shares were reported in these tax returns. Nor was the income from Found Money International Inc. declared.

[22] I should add that they found that the accuracy of some of the information disclosed by the appellant in his tax returns was dubious. According to the separation agreement signed with his wife, the maximum annual amount that he had to pay was $30,000. Yet he claimed payments of $70,769, $126,053, $116,810, $85,454, $100,536 and $88,484 for the years 1996 to 2001: see Appeal Book, volume 2, page 342.

[23] This now brings me to a consideration of the material upon which the third review decision was made.

[24] Mrs. Charlton was the Director of the Hamilton Tax Services Office. She is the person who made the decision at the third review level.

[25] In his argument, counsel for the respondent conceded that the appellant's 2002 tax returns were not before Mrs. Charlton when she conducted the review: see Appeal Book, volume 3, at page 618. However, she consulted the record of events and information prepared by CRA agents with respect to the appellant's voluntary disclosure, especially a substantial and detailed Voluntary Disclosure Report, dated July 28, 2004 prepared for the second level review: see Appeal Book, volume 2, pages 336 to 344. The Report is signed by three experienced officials: an Appeals Officer, the Team Leader, Appeals Division and the Chief of Appeals. No evidence was adduced by the appellant that the information regarding the appellant's 2002 tax returns was not properly summarized in that report considered by Mrs. Charlton. Nor is there any evidence filed with the CRA or the Federal Court on the judicial review proceedings which casts doubts on the accuracy of the information and on the facts set out in the report regarding these tax returns.

[26] In her decision, Mrs. Charlton informed the appellant that she based her decision on the "evaluation of the information provided by you during the Voluntary Disclosure review". At page 178 of the Appeal Book, volume 2, she provided the following as an example of incomplete disclosure:

> However, no evidence has been provided by you to establish the type of income i.e. management fees or capital dispositions arising from your involvement to be reported for tax

> purposes. Nor has any detailed breakdown been provided to confirm that the total of all source(s) of income have been included in your disclosure.

[27] Furthermore, in her decision and her affidavit, she referred to the appellant's omission to disclose his ownership of 30,000 shares in Rothwell Corporation and to provide appropriate information regarding child support and alimony payments. At pages 179 and 303 of the Appeal Book, volume 2, she wrote:

> I would also like to address the concern in your September 14, 2004 letter regarding documentation related to your child support and alimony payments having been either lost or misplaced by the Agency. Our records indicate that at no time were the requested receipts, cancelled cheques, bank transfers or other documentation provided by you to substantiate the deductions claimed. Your lawyer (Mr. Pister) indicated in December 2002 that he never received instructions from you in the making of further representations concerning this issue. Furthermore, the September 1993 separation agreement makes reference to ownership of 30,000 shares in Rothwell Corporation. Our records indicate that during the course of the voluntary disclosure process neither ownership nor involvement in this corporation by you was communicated. This omission confirms the incompleteness of the information provided by you.
>
> 27. In the Third-Level Decision, I noted that a September 1993 separation agreement between the Applicant and his former spouse makes reference to his owning 30,000 shares in Rothwell Corporation and that CRA records indicated that during the course of the VDP process neither ownership nor involvement in this corporation was communicated by the Applicant. Attached hereto as Exhibit "Q" is a copy of the separation agreement.
>
> [Emphasis added]

[28] Finally, the record in the proceedings before the Federal Court and this Court indicates that the appellant made substantial amendments to his 2002 income tax and GST returns, some in

relation to sources of income that he had not originally declared in 2002, but that he acknowledged after being confronted with the fact.

[29] The following is a summary of the amendments brought on February 7, 2005:

DATE	DOCUMENT	AMENDMENT
February 7, 2005	Exhibit 35 – Appeal Book (Volume 2) p.225	• 1994 Income Tax Return : - Sale of 12,125 Rothwell Corporation Class A Common Shares for 30 cents a share or $3,628.00, with an adjusted cost base of 60 cents a share or $7,275.00, resulting in a – **Capital loss totaling $3,637.00** - Reduction of professional income from $133,103.00 to $126,253.00 - Increase employment income from Found Money Inc. to $6,850.00 • 1995 Income Tax Return: - Sale of beneficial interest in the trust that owns Found Money Inc. **– Capital gain of $449,700.00** - Reduce professional income from $147,106.00 to $125,454.00 - Increase employment income from Found Money Inc. to $21,652.00 • 1996 to 2001 Income Tax Returns: - Reduce professional income from $144,991.00 to $48,030.00 - Increase employment income from Found Money Inc • 1994 to 2001GST Returns: - Reduce previously filed taxable revenue - Reduce GST payable

		• 2002 Income Tax Return: - Reduce employment income from $641,009.17 to $Nil - Reduce legal fees from $451,334.58 to $Nil
February 7, 2005	Exhibit 36 – Appeal Book (Volume 2) p.243	• 1994 to 2001 GST Returns: - Reduce previously filed taxable revenue - Reduce GST payable
February 7, 2005	Exhibit 39 – Appeal Book (Volume 2) p.256	• 1993 Income Tax Return: - Sale of 1,000 Rothwell Corporation Class A Common Shares for 55 cents a share or $550.00, with an adjusted cost base of 60 cents or $600.00, resulting in a **capital loss totaling $50.00**.

[30] At paragraphs 29 and 30 of her affidavit, Appeal Book, volume 2, pages 304 and 305, Mrs. Charlton stated the following with respect to some of these amendments:

> 29. I have reviewed the affidavit sworn by the Applicant on March 14, 2005 and filed in the within proceeding (the "Affidavit"). I note that Exhibit "35" to the Affidavit consists of "Notices of Amendment" dated February 7, 2005 sent by the Applicant to the Chief of Appeals of the CRA's International TSO in Ottawa in respect of his 1994 through 2001 taxation years. In each Notice of Amendment, the Applicant requests that the CRA reduce his previously filed gross professional income and increase employment income received from Found Money Inc. By my calculation, the Applicant now claims he received a total of $866,415 in employment income from Found Money Inc. In the T1 returns filed on August 12, 2002, as described in paragraph 5 above, the Applicant claimed no employment income from Found Money Inc. or from any other source.
>
> 30. In the Notice of Amendment dated February 7, 2005 for the 1994 taxation year found at Exhibit "35" to the Affidavit, the Applicant acknowledges the sale of

> 12,125 shares of Rothwell Corporation Class A common stock, where no such sale had been acknowledged in his T1 return filed for 1994 on August 12, 2002. In the Notice of Amendment dated February 7, 2005 for the 1995 taxation year found at Exhibit "35" to the Affidavit, the Applicant acknowledges the sale of his beneficial interest in the Trust that owns Found Money Inc. resulting in a capital gain of $449,700 for that year, where no such sale or gain had been acknowledged in his T1 return filed for 1995 on August 12, 2002.
>
> [Emphasis added]

[31] In assessing the reasonableness of the third level decision, the judge did not consider the amendments brought by the appellant because they occurred after the third level decision and, therefore, were not part of the CRA's record at that time. I think she made the right decision in this respect.

[32] However, I am now referring to them for two reasons. First, to show the amount of undeclared income received by the appellant from Found Money Inc. and the Trust that owned Found Money Inc. and to show how material these omissions to declare were. Second, to point out that, even if we were to accept the appellant's argument that the third level decision is flawed and order a new revision on the completeness of the appellant's disclosure in his 2002 income tax and GST returns, this new decision would be the same as those rendered by the three levels of review. To use professor Wade's words in *Administrative Law* (6th ed. 1988) at page 535, "the demerits of the claim are such that it would in any case be hopeless" if the matter were returned for a new review: see for example *Mobil Oil Canada Ltd. v. Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at page 228; *Vezina v. Attorney General of Canada*, 2003 FCA 67, at paragraph 7; *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH*, 2006 FCA 398; *Canada (Minister of Human*

Resources Development v. Hogervorst, supra; *Yassine v. Canada (Minister of Employment and Immigration*), [1994] F.C.J. No. 949 (FCA), at paragraph 9; and *Cartier v. Procureur general du Canada (Ministre du Revenu national)*, 2003 FCA 67, at paragraph 7.

[33] The issue of the extent of the appellant's actual disclosure involved a question of fact. The judge found that the third level decision was not only reasonable, but was also correct on the record before the decision maker: see reasons for judgment, at paragraphs 122 and 130. I see no overriding and palpable error in the judge's finding.

[34] Finally, on more than one occasion, the judge found the appellant not credible and inconsistent in his assertions regarding the extent of his disclosure in his 2002 income tax and GST returns: see for example paragraphs 83, 84, 85, 127 and 128. In these last two paragraphs she wrote:

> [127] During the hearing, Mr. Palonek was insistent that all of his sources of income were fully disclosed to the Agency in the tax returns that he filed in August of 2002. According to Mr. Palonek, the only debate was as to whether he should be claiming as an employee or as an independent contractor.
>
> [128] First of all, the evidence before this Court does not support Mr. Palonek's submissions in this regard. In addition, it is difficult to understand how Mr. Palonek can assert that all income was properly disclosed to the Agency in August of 2002, given his equally emphatic insistence that he had not prepared the tax returns in question, never signed them, and had no knowledge as to their contents.
>
> [Emphasis added]

She had the benefit of seeing and hearing the appellant. She made a credibility assessment that this Court is not in a position to second guess.

CONCLUSION

[35] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

" I agree
A.M. Linden"

J.A.

"I agree
Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-218-06
STYLE OF CAUSE:	EDWARD PALONEK v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 10, 2007
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	LINDEN J.A. TRUDEL J.A.
DATED:	September 12, 2007

APPEARANCES:

Edward Greenspan Q.C. David Stratus Ryan Teschner	FOR THE APPELLANT
Nancy Arnold Maria Vujonovic	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Greenspan, White Toronto, Ontario	
Heenan Blaikie LLP Toronto, Ontario	FOR THE APPELLANT
John H. Sims Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT