Date: 20091214

Docket: A-558-08

Citation: 2009 FCA 370

CORAM: **BLAIS C.J.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

GUY PICARD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Québec, Quebec, on December 14, 2009.

Judgment delivered from the Bench at Québec, Quebec, on December 14, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Québec, Quebec, on December 14, 2009)

LÉTOURNEAU J.A.

[1] The appellant, who is acting on his own behalf, is challenging a decision of Justice Bédard (judge) of the Tax Court of Canada. In this decision, the judge upheld the reassessments issued by the Minister of National Revenue (Minister) under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (Act). The reassessments were for the 1999, 2000 and 2001 taxation years.

[2] The judge found that the appellant's unreported income was property subject to income tax because it was not property situated on a reserve within the meaning of paragraph 87(1)(*b*) of the *Indian Act*, R.S.C. 1985, c. I-5.

[3] To reach this conclusion, the judge applied the teachings of the Supreme Court of Canada in *Williams v. Canada*, [1992] 1 S.C.R. 877, and the connecting factors to the reserve analyzed by our Court in *Southwind v. Canada*, [1998] F.C.J. No.15 (QL), to the facts of the case.

[4] The judge's finding is therefore one of mixed fact and law to which the standard of palpable and overriding error must be applied. In other words, we cannot intervene to set aside or vary this finding unless it contains such an error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[5] We are of the opinion that the judge was properly instructed as to the law applicable in this case. We are also of the view that the evidence before the judge supported his finding that the income added by the Minister was not income earned on the reserve.

[6] The services rendered by the appellant were done so at his customer's place of business situated off the reserve, where, according to the evidence, he had his office and worked at least eight (8) hours a day, every business day. It was neither erroneous nor unreasonable for the judge to find that the income had been earned off reserve. We agree with the judge that the fact that the appellant lived on the reserve and had an office in his home does not obliterate the two important factors he used in his analysis of this part of the income added to the appellant's tax return.

[7] Another portion of the income in question was made up of so-called passive income. In one instance, this was the appropriation by the appellant, as a shareholder, of funds belonging to the company. In the other, passive income resulted from the appellant's failure to reimburse a loan made to him by the company. In both cases, the company, which was the same, was, as has already been mentioned, situated off reserve, as were the appellant's customers.

[8] The appellant explained that the appropriation he made as a shareholder was a payment for services rendered during the initial transaction. Yet he admitted that he did not provide the company with any services at that time: see the transcript in the appeal book, at pages 36, 42 and 53.

[9] At the hearing he submitted that because he had not rendered any services and did not receive the amount in issue, the amount could not be added to his income. In fact, the amount had been taken from the company's own funds to purchase shares in the company. The purpose of the invoices for fees issued by the appellant for services allegedly rendered was to reduce or cancel the debt owed by him to the company. The judge did not err in finding that the appellant had consequently received a benefit as a shareholder.

[10] Although this point was not made in his notice of appeal, the appellant alleged an apprehension of bias on the part of the judge on the grounds that the judge had heard the appellant's case and that of his partner with whom he was in conflict within a day of each other.

[11] More specifically, his partner, Mr. Gravil, who had been called as a witness by the respondent, had a young law student in the courtroom taking notes for him, even though he had been excluded from the hearing because he was a witness. This was discovered, and Mr. Gravil was released as a witness. He then left the court room without having testified. There was therefore no prejudice to the appellant.

[12] The appellant nonetheless fears that the judge who reserved judgment on his case was influenced by the testimonies heard in Mr. Gravil's case.

[13] From a legal point of view, there is no reason why a second hearing that may be interrelated with a first one should not be held before the same judge. In *Arthur v. Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 94, at page 102, Justice MacGuigan quoted Jackett P. in *Nord-Deutsche Versicherungs Gesellschaft et al. v. The Queen et al.*, [1968] 1 Ex.C.R. 443, at pages 457 and 458:

> In my view the correct view of the matter is that which, as I understand it, was adopted by Hyde J. in *Barthe v. The Queen* [(1964), 41 C.R. 47], when he said that "The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process". In my view, there can be no apprehension of bias on the part of a judge merely because he has, in the course of his judicial duty, expressed his conclusion as to the proper findings on the evidence before him. It is his duty, if the same issues of fact arise for determination in another case, to reach his conclusions with regard thereto on the evidence adduced in that case after giving full consideration to the submissions with regard thereto made on behalf of the parties in that case. It would be quite wrong for a judge in such a case to have regard to "personal knowledge" derived from "a recollection of the evidence" taken in the earlier cause. It is not reasonable to apprehend that there is "a real likelihood" that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case.

> If I may be permitted to say so, it seems to me that the real apprehension is that the judge who hears a case in which the same issues of fact arise as have recently been decided in the same court can hardly ignore the existence of the earlier decision for he cannot be unconscious of the possibility of apparently conflicting decisions creating an atmosphere of lack of confidence in the administration of justice. I should have thought, however, that a judge who participates in both of two such matters is more likely to appreciate and explain different results flowing from different bodies of evidence or differences in presentation and argument than a judge who had no part in the earlier case. I do not say this to indicate that I have a view that the same judge should always try two such cases, but to indicate that, in my view, it is not necessarily prejudicial to the party who assumes the burden of producing a result in the second case that is apparently in conflict with the earlier decision.

[14] In addition, there is nothing in the judgment in this case or in the record that could lead one to conclude, let alone believe, that the judge used facts proven, evidence heard or personal knowledge acquired in Mr. Gravil's case.

[15] For these reasons, the appeal will be dismissed with costs.

"Gilles Létourneau"

J.A.

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Guy Picard	THE APPELLANT (ACTING ON HIS OWN BEHALF)
Michel Lamarre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT