Federal Court of Appeal | Cour d'appel fédérale

Date: 20110411

Docket: A-137-08

Citation: 2011 FCA 131

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

DAVID L. BRACE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on March 10, 2011.

Judgment delivered at Ottawa, Ontario, on April 11, 2011.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT BY THE COURT

[1] We are of the view that this appeal should be allowed and that the matter should be remitted back to the Tax Court for a new trial.

[2] While the appellant complained that the trial was rushed and that he was not given the opportunity to present his case, we are of the view that notwithstanding the unfortunate references to the need to catch a plane, the trial judge was clear that the appellant should take the time he needed to put in his case. In response to a suggestion by the appellant that he would not be calling witnesses because of shortage of time, the trial judge said, at page 655 of the Appeal Book:

> No, no, but you're not going to not be calling witnesses because of a time factor. If you have witnesses, we'll hear your witnesses. That's no problem.

Later at pages 666 to 668 of the Appeal Book, the trial judge said:

> The reason I'm raising this is because if at all possible, if we could finish the evidence tomorrow and if it means having to sit until five tomorrow, we'll do it. I mean, I'm trying to find out if there are any flights out of St. John's on Saturday and I'll probably know in a few minutes if there are, and if there are, well, I would much prefer that we at least finish the evidence part and if we can't do the argument, well, we can probably ask the parties to provide those in writing. So this would eliminate having to come back to finish the trial. On the other hand, if there's no way possible that we can finish this tomorrow, and I'm talking the evidence part or the witnesses, then there's no point staying on tomorrow afternoon. We'll adjourn at noon tomorrow and we'll reschedule a new hearing, and I don't know when we'll be able to resume the trial. But if it means that we can do all of the evidence tomorrow and we need the half day tomorrow afternoon, I don't mind. We'll fly out of here on Saturday. But at least we won't be – we won't have to come back to finish the trial, and this I'd like to avoid because everybody knows that trying to get back into a trial four or five months after we've started it, it's a nightmare for everybody. So I guess we'll play it by ear and we'll see tomorrow what happens, but bear in mind that its possible that we may be here until five, unless there's a major problem that you are not available or you would need to be somewhere, either you or Mr. Hickey, somewhere tomorrow night or Saturday or something, or even you.

The trial judge then returned to the issue later that day and said, at page 670 of the Appeal Book:

> Okay. So let's try that at least, because obviously we need to be out of here by 2:00 if we want to leave tomorrow afternoon, and if at all possible, if we can do it by two, fine. If not, we'll go on, as long as we can finish the evidence tomorrow, and unless there's a major obstacle, we'll simply finish or fly out of here Saturday and we'll finish the trial, the evidence part at least tomorrow. Okay. So we'll see – we'll start at nine, and we'll take it from there. All right.

[3] In the circumstances, we are not persuaded that the trial judge failed to give the appellant the time to put in his case.

[4] That said, there are three other matters which, in our view, lead us to the conclusion that the appellant did not get a fair trial.

[5] The first was the trial judge's acquiescence in the Crown's failure to call Mr. Parsons, the Revenue Canada auditor, after the Crown's counsel led both the appellant and the trial judge to believe that he would call him. When the Crown failed to call Mr. Parsons, the appellant lost the opportunity to cross examine him with respect to the calculation of the amounts of the assessments and the circumstances of the seizure of documents which the appellant alleged were seized illegally. The trial judge went on to find that the appellant had not led any evidence as to the accuracy of the assessment and confirmed the amount of the assessment. Similarly, the question of the legality of the seizure was never addressed by Court. In all the circumstances, the trial judge ought to have held the Crown to its implied undertaking to call Mr. Parsons, even if only for the limited purpose than of producing him for cross-examination. His failure to do so was unfair to the appellant.

[6] The trial judge formed a very unfavourable view of Mr. Harvey, a witness called by the appellant. The witness was examined and cross-examined by video-link as he was present in Vancouver while the trial was unfolding in St. John's. The parties were to have arranged to have the documents on which they wished to examine Mr. Harvey sent to Vancouver so that they could be put before him during his examination and cross-examination. Inexplicably, the Crown's documents were not available when Mr. Harvey testified. The trial judge allowed the Crown to cross examine Mr. Harvey with respect to those documents even though the witness did not have them before him. This was unfair to the witness. It was not surprising that the witness could not remember matters

contained in documents upon which he was being cross-examined and which he did not have before him. It was unfair for the trial judge to allow the Crown to cross-examine Mr. Harvey on documents which the Crown, for whatever reason, was unable to put before him for purposes of cross-examining him and then to draw adverse inferences from the witnesses failure to remember various matters.

[7] Finally, the appellant raised a number of preliminary objections at the start of the trial, one of which involved a document which he said had been illegally seized from his lawyer's files. The trial judge correctly observed that the appropriate time for making the objection was the point at which the Crown sought to introduce the document in evidence. However, when the Crown tendered the document, the trial judge allowed the Crown to cross-examine the appellant on the document without first disposing of the issue of admissibility. At page 731 of the Appeal Book, the trial judge said, in relation to this document:

> So what we're going to do is, as I've said, I was going to take the admissibility of that document, I would reserve my decision on it, but I'm not going to prevent or stop the evidence or the trial until I rule on that.
>
> […]
>
> So I'm going to allow Mr. Bodurtha to cross examine you on the document. It will be admitted in evidence, under reserve, pending my decision on its admissibility, and of course, everything you said – that will be said about the document as well goes, okay?

[8] It is not unusual for judges to defer questions of admissibility so as to preserve the flow of the trial. But where the objection to the admissibility of a document is that it was illegally seized from the custody of a solicitor, the Court has an obligation to ensure that illegally obtained

evidence, in breach of solicitor client privilege, is not tendered to the detriment of the taxpayer. In this case, the trial judge relied on this document to draw one (of many) inferences which were adverse to the appellant's credibility. In the end, the trial judge never did rule on the appellant's objection as to admissibility.

[9] In so saying we do not purport to rule on the legality of the seizure; we say only that it was an important issue which ought to have been dealt with.

[10] All of these circumstances, taken together, lead us to the conclusion that the appellant did not get a fair trial and that, as a result, a new trial must be ordered. We would therefore allow the appeal with costs, set aside the judgment of the Tax Court, and remit the matter to the Tax Court for a new trial before a different judge.

"Marc Noël"
J.A.

"J.D. Denis Pelletier"
J.A.

"Johanne Trudel"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-137-08
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ANGERS OF THE TAX COURT OF CANADA DATED FEBRUARY 25, 2008, NO. 2003-3069(GST)G.)	
STYLE OF CAUSE:	David L. Brace and Her Majesty the Queen
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 10, 2011
REASONS FOR JUDGMENT BY:	THE COURT
DATED:	April 11, 2011

APPEARANCES:

David L. Brace	FOR THE APPELLANT (ON HIS OWN BEHALF)
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