

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20110510**

**Docket: A-127-11**

**Citation: 2011 FCA 160**

**Present: SHARLOW J.A.**

**BETWEEN:**

**CHERYL ALISON LANS**

**Appellant**

**and**

**ATTORNEY GENERAL (CANADA REVENUE AGENCY)**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 10, 2011.

**REASONS FOR ORDER BY:**

**SHARLOW J.A.**

Federal Court  
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**Respondent**

**REASONS FOR ORDER**

**SHARLOW J.A.**

[1] The appellant Cheryl Alison Lans has appealed the judgment of the Tax Court of Canada dismissing her appeal of assessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) for the 2004 and 2005 taxation years (2011 TCC 121). Before me is a motion by Ms. Lans to determine the contents of the appeal book and for an order relieving her of the cost of the transcript of the proceedings in the Tax Court of Canada, and requiring the Administrator to prepare the appeal books and the joint book of authorities. For the following reasons, this motion will be granted only in part.

[2] From the reasons for judgment of Justice Woods, it appears that Ms. Lans contributed more money to her registered retirement savings plan than permitted by the applicable statutory provisions. She was assessed the excess contributions tax under subsection 204.1(2.1) of the *Income Tax Act*. She was also assessed penalties by virtue of the combined operation of subsections 204.3(1), 204.3(2), and 162(1), and she has been charged interest on the unpaid amounts. Ms. Lans argued in the Tax Court that she should not be liable for the excess contributions tax, penalties or interest. Justice Woods rejected all of her arguments and dismissed her appeal, for reasons that I need not summarize here.

[3] Ms. Lans filed a notice of appeal. Her grounds of appeal read as follows:

I do not believe that I was negligent or that the CRA can prove that I was, therefore their reassessment of November 30, 2009 for the years 2004 and 2005 was too late, and in error in any case since my RRSP over-contributions were made in 2003 and 2004, not in 2005. The CRA is acting unreasonably and perhaps with misfeasance in my case, given my income level post 2006. I was treated differently as a postdoctoral scholar-tax payer by the Canada Revenue Agency for 2003, 2004 and 2005 than postdoctoral scholars in Quebec, Ontario and the Maritimes. I want the Court to dismiss the taxes, late-filing penalties and arrears interest on my RRSP over contributions for the years 2004 and 2005 due to the unfairness and perhaps malice with which they were imposed and due to the financial hardship that they would impose on me.

#### Determination of the contents of the appeal book

[4] Ms. Lans and counsel for the Crown have been unable to agree on the contents of the appeal book. Essentially, the Crown does not consent to the inclusion in the appeal book of documents that Ms. Lans considers relevant to her appeal but were not in evidence before Justice Woods.

[5] It appears that Ms. Lans considers the disputed documents relevant to her claim that the tax should have been waived by the Minister under subsection 204.1(4). Ms. Lans says that she did not present the disputed document as exhibits in the Tax Court because Justice Woods said at the outset that she had no jurisdiction to intervene with the Minister's discretion under that provision.

[6] The contents of the appeal book are prescribed by Rule 344 of the *Federal Courts Rules*, SOR/98-106, which reads as follows:

344. (1) An appeal book shall have a grey cover and contain, on consecutively numbered pages and in the following order,

- (a) a table of contents describing each document;
- (b) the notice of appeal and any notice of cross-appeal;
- (c) the order appealed from, as signed and entered, and any reasons, including dissenting reasons, given in respect of that order;
- (d) the originating document, any other pleadings and any other document in the first instance that defines the issues in the appeal;
- (e) subject to subsection (2), all documents, exhibits and transcripts agreed on under subsection 343(1) or ordered to be included on a motion under subsection 343(3);

344. (1) Le dossier d'appel porte une couverture grise et contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après :

- a) une table des matières désignant chaque document;
- b) l'avis d'appel et, le cas échéant, l'avis d'appel incident;
- c) l'ordonnance portée en appel, telle qu'elle a été signée et inscrite ainsi que les motifs, le cas échéant, y compris toute dissidence;
- d) l'acte introductif d'instance, les autres actes de procédure et tout autre document déposé dans la première instance qui définit les questions en litige dans l'appel;
- e) sous réserve du paragraphe (2), les documents, pièces et transcriptions énumérés dans l'entente visée au paragraphe 343(1) ou dans l'ordonnance qui en tient lieu;

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|---|---|
| <i>(f)</i> any order made in respect of the conduct of the appeal;  | <i>f)</i> toute ordonnance relative au déroulement de l'appel;  |
| <i>(g)</i> any other document relevant to the appeal;   | <i>g)</i> tout autre document pertinent;  |
| <i>(h)</i> an agreement reached under subsection 343(1) as to the contents of the appeal book or an order made under subsection 343(3); and       | <i>h)</i> l'entente visée au paragraphe 343(1) ou l'ordonnance qui en tient lieu;   |
| <i>(i)</i> a certificate in Form 344, signed by the appellant's solicitor, stating that the contents of the appeal book are complete and legible. | <i>i)</i> le certificat établi selon la formule 344, signé par l'avocat de l'appellant et attestant que le contenu du dossier d'appel est complet et lisible. |
- (2) Transcripts may be reproduced in a separate document.      (2) Les transcriptions peuvent être reproduites dans un document séparé.

[7] This rule must be interpreted in the context of the function of an appellate court. Generally, an appellate court must determine whether the judgment under appeal is based on an error of law, or a palpable and overriding error of fact based on the evidence presented at the hearing. An appellate court does not retry the case. Nor is an appeal an opportunity for the appellant to have the case heard anew, based on documents that the appellant could have submitted as evidence at the hearing but were not because of a tactical decision made at that time. Put simply, Rule 344 cannot be used as a device for putting before this Court evidence that was not before the trial judge. It follows that the disputed documents cannot be included in the appeal book.

[8] The contents of the appeal book will be as follows:

- (a)* table of contents describing each document;

- (b) notice of appeal in A-127-11 filed March 16, 2011 in the Federal Court of Appeal;
- (c) judgment and reasons for judgment of Justice Woods in Tax Court of Canada Docket No. 2010-3135(IT)I, dated February 23, 2011;
- (d) notice of appeal filed in the Tax Court of Canada on October 4, 2010;
- (e) reply filed in the Tax Court of Canada on December 2, 2010;
- (f) transcript of the hearing in the Tax Court of Canada on February 17, 2011;
- (g) Exhibit A-1 filed in the Tax Court of Canada;
- (h) this order and the reasons for this order; and
- (i) certificate in Form 344, signed by the appellant.

Request to have the administrator prepare the appeal books

[9] Ms. Lans has requested that the Administrator prepare the appeal books. Counsel for the Crown has taken no position on that request. In light of the information provided by Ms. Lans as to her financial circumstances, this part of her motion will be granted. In accordance with Rule 343(5), the Administrator will be directed to prepare the appeal books from material provided by Ms. Lans. The order issued with these reasons will set a deadline for the provision of that material.

Cost of transcript

[10] Ms. Lans has asked that a copy of the transcript be provided to her at no cost, or alternatively that the Court order that an audio recording be made available if that option is cheaper.

[11] The record discloses no justification for requiring the transcript to be provided to Ms. Lans at no cost, and therefore that part of Ms. Lans' motion will be dismissed. The argument of Ms. Lans

on this point appears to be based on the premise that the funding of her appeal is a matter of entitlement. She is mistaken. On the contrary, the appeal process in an ordinary civil matter, such as an appeal from the Tax Court relating to an income tax assessment, requires the party invoking the Court's process to bear some of the costs of the procedure.

[12] If the transcript of the hearing in the court below is required for the appeal book, it is normally obtained at the cost of the appellant. If the appeal succeeds, the appellant may seek an award of costs which normally will include the reimbursement of outlays such as the cost of obtaining the transcript. If the appeal does not succeed, the respondent is entitled to seek costs against the appellant. Thus, in this case, if the Crown were ordered to pay for the cost of the transcript at the outset, Ms. Lans would be at risk, if her appeal were to fail, of reimbursing the Crown for those costs. In that regard, it is important to note that in appeals to this Court, even appeals from the Tax Court involving relatively small amounts of money, the respondent may ask for costs if the appeal is dismissed, and costs normally are granted if sought. An award of costs includes not only disbursements, but amounts for the assessable services of counsel as set out in Tariff B of the *Federal Courts Rules*.

[13] I would observe that it is not always necessary to include the transcript in the appeal book. It is needed only if the appellant or the respondent wishes to refer in argument to oral evidence presented at the hearing. I note that in this case, counsel for the Crown has taken no position on the question of whether the transcript should be included in the appeal book. Therefore, it is open to Ms. Lans to have the appeal book prepared without the transcript. The order issued with these reasons

will ensure that she is entitled to make that choice. However, Ms. Lans must be aware that she cannot give oral evidence on the appeal, and if the transcript is not included in the appeal book, she may be unable to establish in her appeal exactly what oral evidence was presented in the Tax Court.

[14] The alternative request for an audio recording of the Tax Court proceedings must also be dismissed. There is no provision in the *Federal Courts Rules* for including audio recordings of proceedings in an appeal book, and it would be impracticable to do so. Nor is a party permitted to use an audio recording to make a transcription for inclusion in the appeal book. Professional transcription, accompanied by the customary certification provided by the court reporting service, is intended to ensure the integrity of the transcript.

#### Book of authorities

[15] Ms. Lans has asked that the Court direct the Administrator to prepare the joint book of authorities. I agree with counsel for the Crown that this request is premature. The *Federal Courts Rules* require the joint book of authorities to be prepared and served after the parties file their memoranda of fact and law.

[16] I would also point out that there is no provision in the *Federal Courts Rules* for the parties to be relieved of the cost of preparing the joint book of authorities. For that reason, that part of Ms. Lans' motion will be dismissed.



Other matters

[17] It is noted that notice of appeal has named the “Attorney General (Canada Revenue Agency)” as the respondent in this appeal. That is not correct. The respondent should be “Her Majesty the Queen”, the same as the named respondent in the Tax Court proceedings. An order will be made requiring the style of cause to be amended accordingly.

Conclusion

[18] The motion is granted in part. Costs have not been requested on this motion, and therefore none will be awarded.

“K. Sharlow”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-127-11

**STYLE OF CAUSE:** Cheryl Alison Lans v. Attorney  
General (Canada Revenue Agency)

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** SHARLOW J.A.

**DATED:** May 10, 2011

**WRITTEN REPRESENTATIONS BY:**

Cheryl Alison Lans

FOR THE APPELLANT  
(SELF REPRESENTED)

Andrew Majawa  
Kristian DeJong

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

N/A

FOR THE APPELLANT  
(SELF REPRESENTED)

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT