

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120528

**Dockets: A-87-11
A-88-11
A-89-11**

Citation: 2012 FCA 154

**CORAM: NOËL J.A.
DAWSON J.A.
BLANCHARD J.A. (ex officio)**

A-87-11

BETWEEN:

MYRNA JOYCE ELLIOTT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-88-11

BETWEEN:

L. PAUL ELLIOTT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-89-11

BETWEEN:

LAWRENCE RALPH ELLIOTT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Fredericton, New Brunswick, on May 24, 2012.

Judgment delivered at Ottawa, Ontario, on May 28, 2012.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

DAWSON J.A.
BLANCHARD J.A. (ex officio)

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REASONS FOR JUDGMENT

NOËL J.A.

[1] These are appeals from judgments rendered by D'Arcy J. of the Tax Court of Canada (the Tax Court judge) pursuant to the informal procedure upholding assessments issued against the appellants in their capacity as director of Top Ventures Ltd. (the Company) under section 323 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act). The Tax Court judge held that the appellants did not exhibit the required degree of care diligence and skill to prevent the Company from failing to remit taxes properly owing under the Act.

[2] The Tax Court judge also dismissed the appellants' further submission that the assessments were invalid because the respondent failed to produce in evidence the registered certificate and writ contemplated by paragraph 323(2)(a) of the Act which provides:

323. ...

323. [...]

Limitations

Restrictions

(2) A director of a corporation is

(2) L'administrateur n'encourt de

not liable under subsection (1)
unless

responsabilité selon le paragraphe (1)
que si :

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;

a) un certificat précisant la somme pour laquelle la personne morale est responsable a été enregistré à la Cour fédérale en application de l'article 316 et il y a eu défaut d'exécution totale ou partielle à l'égard de cette somme;

[...]

...

[3] The three appeals were consolidated by order of this Court dated May 17, 2011, the appeal in file A-87-11 being designated as the lead appeal. In conformity with this order, these reasons will be filed in the lead file and a copy thereof will be filed as reasons for judgment in files A-88-11 and A-89-11.

[4] On appeal, the appellants no longer contend that they acted with due diligence to prevent the failure to remit. Rather, they rest their case entirely on the respondent's alleged failure to comply with paragraph 323(2)(a). They add – for the first time on appeal – that maintaining their liability to pay the Company's outstanding tax debt in circumstances where compliance with paragraph 323(2)(a) has not been demonstrated would affect their “economic liberty” and infringe their rights pursuant to sections 7 and 11(d) of the *Canadian Charter of Rights and Freedom*.

[5] The Tax Court judge decided to address the appellants' argument that paragraph 323(2)(a) was not complied with despite the fact that this contention was not advanced in their respective Notices of Appeal and indeed was not raised until closing argument. He noted that in the Replies to the Notices of Appeal, the respondent indicated that the Minister of National Revenue (the Minister) relied on a variety of assumptions of fact, including the following two:

19. m) A Certificate in the amount of \$34,791.02, representing the Company's GST/HST debt at the time, was registered in the Federal Court on November 1, 2007. It was also registered in the Provincial Property Registry System on April 4, 2008; and
- n) On or around November 1, 2007, a Writ of Seizure was sent to the Sheriff and served on the Company. It was returned on May 9, 2008 as *Nulla Bona* on the grounds that no goods, chattels or real property under the Company name could be found.

[6] After noting that the appellants did not challenge these assumptions until after the evidence was closed, he held that the Minister did not have the duty to present evidence in support of these assumptions.

[7] The appellants take issue with this conclusion. They point out that the liability of a director pursuant to section 323 cannot be established unless it is shown that the certificate and the unsatisfied writ of seizure contemplated by paragraph 323(2)(a) have been issued. According to the appellants the respondent was not entitled to rely on assumptions in order to demonstrate compliance with paragraph 323(2)(a). They rest this contention on the decision of the Tax Court in *Walsh v. Canada*, 2009 TCC 557 at paragraphs 23 to 29 [*Walsh*].

[8] *Walsh* is of no assistance to the appellants. The issue in that case was whether a letter from the Sheriff's Office advising that the writ had been returned unsatisfied could be produced in evidence despite the fact that it was not listed in the list of documents produced by the Attorney General on behalf of the Minister. Sheridan J. held that it could not. No such issue arises here as the informal procedure does not contemplate the production of a list of documents with the result that there was no omission to list either of the documents with which we are concerned.

[9] The appellants nevertheless maintain that it was not open to the Tax Court judge to hold that the respondent had demonstrated compliance with paragraph 323(2)(a) on the sole basis that the assumptions made by the Minister in this regard had gone unchallenged in the appellants' pleadings. They highlight in particular the fact that the onus of proving compliance with paragraph 323(2)(a) rested on the respondent, and that the underlying documents are peculiarly if not exclusively within the Minister's knowledge. I note that the Tax Court in *Soper v. Canada*, [1995] T.C.J. No. 257, came to the same conclusion as did the Tax Court judge. This last decision was confirmed by this Court on appeal, [1997] F.C.J. No. 881, without however any opinion being expressed on the narrow point with which we are concerned.

[10] In my respectful view, the Tax Court judge should not have addressed the novel argument raised by the appellants without first giving the respondent the opportunity to produce evidence in its possession that is relevant to this issue.

[11] In agreeing to dispose of the appellants' contention that paragraph 323(2)(a) had not been complied with by the Minister, the Tax Court judge entertained an issue that was not raised by the appellants in their respective Notices of Appeal. It is always open to a trial judge to authorize a novel issue to be pled even after the close of the evidence subject however to insuring that no prejudice is thereby caused to other side (see for example the decision of this Court in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 at para. 9 and the cases referred therein).

[12] In the present case, the decision of the Tax Court judge to allow the new issue to be pled without first giving the respondent an opportunity to tender evidence relevant to this issue was prejudicial to the respondent inasmuch as the registered certificate and the unsatisfied writ – if available for production – would have foreclosed the argument raised by the appellants altogether.

[13] I would have been inclined to allow the appeals on this basis and return the matter to the Tax Court judge with instructions that the respondent be granted leave to file evidence relevant to the novel issue raised by the appellants. However, as appellants' counsel recognized during the hearing of the appeal that the respondent is in a position to introduce the documents which demonstrate compliance with paragraph 323(2)(a), there would be no point in doing so.

[14] I would therefore dismiss the appeals but given the reasons advanced for reaching this conclusion, I would do so without costs.

“Marc Noël”

J.A.

“I agree

Eleanor R. Dawson J.A.”

“I agree

Edmond P. Blanchard J.A. (ex officio)”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-87-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE D'ARCY OF THE TAX COURT OF CANADA DATED JANUARY 28, 2011, DOCKET NUMBER 2009-1282(GST)I.

STYLE OF CAUSE: MYRNA JOYCE ELLIOTT and
HER MAJESTY OF QUEEN

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: May 24, 2012

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Dawson J.A.
Blanchard J.A. (ex officio)

DATED: May 28, 2012

APPEARANCES:

William Stephenson FOR THE APPELLANT

Dominique Gallant FOR THE RESPONDENT
Gregory King

SOLICITORS OF RECORD:

WILLIAM G. STEPHENSON FOR THE APPELLANT
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Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-88-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE D'ARCY OF THE TAX COURT OF CANADA DATED JANUARY 28, 2011, DOCKET NUMBER 2009-1284(GST)I.

STYLE OF CAUSE: L. PAUL ELLIOTT and HER MAJESTY OF QUEEN

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: May 24, 2012

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Dawson J.A.
Blanchard J.A. (ex officio)

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Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-89-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE D'ARCY OF THE TAX COURT OF CANADA DATED JANUARY 28, 2011, DOCKET NUMBER 2009-1285(GST)I.

STYLE OF CAUSE: LAWRENCE RALPH ELLIOTT
and HER MAJESTY OF QUEEN

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: May 24, 2012

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Dawson J.A.
Blanchard J.A. (ex officio)

DATED: May 28, 2012

APPEARANCES:

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