

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201202

Docket: A-204-18

Citation: 2020 FCA 205

**CORAM: GAUTHIER J.A.
DE MONTIGNY J.A.
LOCKE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

BCS GROUP BUSINESS SERVICES INC.

Respondent

Heard by online video conference hosted by the Registry on October 23, 2020.

Judgment delivered at Ottawa, Ontario, on December 2, 2020.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**DE MONTIGNY J.A.
LOCKE J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal of Her Majesty the Queen from a decision of the Tax Court of Canada (TCC) (2018 TCC 120, per Campbell Miller J.) granting BCS Group Business Services Inc. (BCS) leave to be represented by Denis Gagnon, its sole shareholder, director and officer, in this proceeding instituted by BCS under the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (GP Rules).

[2] Since 2017, there have been conflicting decisions by various judges of the TCC on whether the TCC can grant leave to an individual who is not a lawyer to represent a corporation in an appeal subject to the General Procedure set out in the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2 (the Act), and more particularly, its section 17.1.

[3] Before proceeding with the interpretation of section 17.1 of the Act, it is important to state that it is not the role of this Court to change the authentic meaning of legislation, properly interpreted. We are not to envisage what the best policy might be, or examine our own personal preferences about who should represent corporations before the TCC in a proceeding subject to the General Procedure. Instead, our task is to interpret legislation following the accepted method set out by the Supreme Court of Canada and call it as it is. If the authentic meaning of legislation is bad in policy terms, it is for the legislator to change the legislation. The Court must apply the authentic meaning of the legislation.

I. Positions of the Parties

[4] The appellant relies heavily on the reasoning set out in *Masa Sushi Japanese Restaurant Inc. v. The Queen*, 2017 TCC 239 (*Masa Sushi*), which has been endorsed by other judges of the TCC (see *Suchocki Accounting Ltd. v. The Queen*, 2018 TCC 88; *1532099 Ontario Ltd. v. The Queen*, 2020 TCC 30). Generally, the appellant argues that a corporation is a legal fiction. It has no physical body, so it cannot appear in person at the hearing as required by the ordinary meaning of the expression “in person”. It needs to be represented by a physical person: in this case, a lawyer. This is also apparent, says the appellant, when the words of section 17.1 are read in their proper context, including section 18.14 of the Act. The appellant submits that the

interpretation adopted by the TCC in this matter renders the words “agent” and in French “*représentant*” in this section meaningless. The appellant adds that one cannot presume that the legislator wanted to displace the common law, which never recognized that a corporation can appear “in person” in court, even though it had the status of a separate legal entity and is a legal person. Therefore, the appellant says that, as a matter of statutory interpretation of section 17.1, Mr. Gagnon, who is not a lawyer, cannot represent the corporation under any circumstances.

[5] On the other hand, Mr. Gagnon who was granted leave by this Court to argue the appeal on behalf of BCS, relies heavily on the reasons of the TCC (the Order) in this case and on the fact that a corporation is a “person” and a party to this appeal. He argues that because of its grammatical structure, section 17.1 should be interpreted as enabling the corporation as of right to appear “in person” through its director or sole shareholder. In the Order before us, the TCC expressly stated that a corporation could do so through whoever the Court might decide to grant leave (the Order at para. 12). Like the TCC, Mr. Gagnon argues that in accordance with section 17.1, BCS is not represented by an agent, but rather exercises its right to appear in person by someone like him who personifies BCS. To supplement his representations, I have considered the reasons of the other judges of the TCC who adopted the same conclusion in other decisions, including those expressed in *Sutlej Foods Inc. v. The Queen*, 2019 TCC 20 (*Sutlej Foods*) and in *Groupe Nepveu Inc. v. the Queen*, 2020 TCC 80.

[6] For the reasons that follow, I have concluded that the legislator did not intend to oust the common law and civil law principle that a corporation, because of its very nature, cannot appear “in person” before a court. It can only be represented by an agent who is a distinct person than

the corporation. In my view, the grammatical structure of the provision is not sufficient to reach a different conclusion when one considers the nature of the rights described in the paragraph, the clear statutory scheme and its object. By adopting detailed provisions dealing with representation in the Act, the legislator limited the TCC's implied power to control who may represent the corporation in their courtroom, especially in proceedings subject to the General Procedure.

II. Legislative Framework

[7] It is appropriate to reproduce immediately the most relevant provisions of the Act and of the GP Rules. Also, in light of the arguments that I had to consider, I reproduce the two previous iterations of the GP Rule 30(2) since the adoption of section 17.1 of the Act.

Tax Court of Canada Act, R.S.C., 1985, c. T-2

General Procedure

Right to appear

17.1 (1) A party to a proceeding in respect of which this section applies may appear in person or be represented by counsel, but where the party wishes to be represented by counsel, only a person who is referred to in subsection (2) shall represent the party.

Officers of the Court

(2) Every person who may practise as a barrister, advocate, attorney or solicitor in any of the provinces may so practise in the Court and is an officer of the Court.

[...]

Informal Procedure

Procédure générale

Comparution

17.1 (1) Les parties à une procédure peuvent comparaître en personne ou être représentées par avocat; dans ce dernier cas, toutefois, seules les personnes visées au paragraphe (2) peuvent agir à titre d'avocat.

Qualité de fonctionnaire judiciaire

(2) Quiconque peut exercer à titre d'avocat ou de procureur dans une province peut exercer à ce titre à la Cour et en est fonctionnaire judiciaire.

[...]

Procédure informelle

Right to appear

18.14 All parties to an appeal referred to in section 18 may appear in person or may be represented by counsel or an agent.

[...]

Comparution

18.14 Les parties à un appel visé à l'article 18 peuvent comparaître en personne ou être représentées par avocat ou par un autre représentant.

[...]

Tax Court of Canada Rules (General Procedure), SOR/90-688
(Original version adopted in 1990)

30 (2) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on a proceeding otherwise than by counsel.

30 (2) Sauf disposition contraire contenue dans un texte législatif, une personne morale ne peut engager ou continuer une instance que par avocat.

Tax Court of Canada Rules (General Procedure), SOR/90-688
(Version as amended in 1993 by SOR/92-41)

30 (2) A corporation shall be represented by counsel in all proceedings in the Court, unless the Court, in special circumstances, grants leave to the corporation to be represented by an officer of the corporation.

30 (2) Une personne morale se fait représenter par un avocat dans toute instance devant la Cour, sauf lorsque dans des circonstances spéciales, la Cour autorise la personne morale à se faire représenter par un de ses dirigeants.

Tax Court of Canada Rules (General Procedure), SOR/90-688a
(Current version adopted in 2007)

[...]

[...]

Representation

Representation by Counsel

30 (1) Subject to subsection (3), a party to a proceeding who is an individual may act in person or be represented by counsel.

30 (2) Where a party to a proceeding is not an individual, that party shall be represented by counsel except

Représentation

Représentation par avocat

30 (1) Sous réserve du paragraphe (3), la partie à une instance qui est une personne physique peut agir en son nom ou se faire représenter par un avocat.

30 (2) La partie à une instance qui n'est pas une personne physique se fait représenter par un avocat, sauf avec l'autorisation de la Cour et sous

with leave of the Court and on any conditions that it may determine.

réserve des conditions que celle-ci fixe.

30 (3) Unless the Court orders otherwise, a person who is the representative of a party under a legal disability in a proceeding shall be represented by counsel, except where that person is also counsel acting in such a capacity.

(3) Sauf ordonnance contraire de la Cour, la personne qui agit à titre de représentant d'une partie frappée d'incapacité et qui n'est pas avocat se fait représenter par un avocat.

III. Issues and Standard of Review

[8] There is only one issue before us: the interpretation of section 17.1. This is a question of law subject to the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[9] Nobody has argued before us that if the interpretation suggested by the appellant is the right one, the TCC could still grant leave to Mr. Gagnon. As a matter of fact, the TCC stated in the Order that it would be revoked if this Court concluded that Mr. Gagnon did not personify BCS so that it could not be said that BCS was exercising its statutory right to appear in person pursuant to section 17.1.

IV. Preliminary Comments

[10] Before proceeding with the analysis, it is appropriate to outline the issues that are not in dispute in this appeal and some relevant context arising from the special nature of the legislation in question.

[11] First, it is not in issue that a corporation is a legal person that can sue and be sued (*Interpretation Act*, R.S.C., 1985, c. I-21, section 21(1)). Thus, in a proceeding, a corporation is a party that is distinct from its shareholders, directors, officers and other employees.

[12] Second, there is no issue arising in appeals instituted under the Informal Procedure set out at sections 18 to 18.3 of the Act. Pursuant to section 18.14 of the Act, “all parties” may appear in person, through counsel or through an agent (“*représentant*” in French). Thus, both a physical person and a corporation may choose who will represent them without any intervention of the TCC.

[13] As for the relevant legal context, at the time section 17.1 of the Act was drafted, neither the common law nor the civil law (as codified in the Code of Civil Procedure of Quebec (CCP)) recognized that a corporation could appear “in person” through its officers, directors, or shareholders. The reason for this at civil law was explained as follows by Gonthier J. in *National Bank of Canada v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059 at 1070, emphasis added:

As a preliminary point, I would note that Tardi [a physical individual] and Atomic [a corporation] were not represented by counsel. Tardi is fully entitled to appear on his own behalf, but he claimed to represent Atomic. The very nature of a corporation is such that it cannot appear in person (art. 365 *C.C.L.C.*). It can only appear through an agent. In Quebec, only lawyers are entitled to represent a party before the courts (art. 61 *C.C.P.* and s. 128 of the *Act respecting the Barreau du Québec*, R.S.Q., c. B-1) and it follows that a corporation can only appear in court through counsel (*Thomassin v. General Finance Corp.*, [1953] Que. Q.B. 375).

[14] In *Trifidus Inc. v. Samgo Innovations Inc. et al.*, 2011 NBCA 59 at paragraph 20, Justice Quigg uses similar words to describe the state of the common law. She wrote that “[u]nlike individuals, who are legally and logically capable of self-representation, corporations must

inevitably rely on representation by individual agent. Even if the agent is the corporate director and sole shareholder, he or she is still considered to be legally distinct from the corporation and, therefore, a third party to it.”

[15] It is useful in such circumstances to put GP Rule 30(2) in context and to consider that it is not unique in its approach. Courts, including statutory courts like the Federal Courts, have an implicit power or discretion to control their own process, unless limited by specific legislation (see for example article 87 of Quebec’s CCP, which lists who must be represented by counsel). This is why for many years, many courts have adopted rules of procedure allowing them to grant leave to corporations to be represented by physical individuals other than counsel in special circumstances. This has become particularly important given the increase in the legal costs of litigation and the need to foster access to justice. This approach, based on a by leave process, enables the court to balance this need with the need for efficiency in the administration of justice. In none of those cases did a statute give a corporation a statutory right to appear “in person”. The granting of leave is a privilege arising from the court’s discretion to control its own process. Therefore, this discretion can be taken away by an express clause in the legislation constituting the court when Parliament expressly deals with representation in the courtroom.

[16] Where no such limitation exists, as in the *Federal Courts Act*, R.S.C., 1985, c. F-7 for example, such leaves are granted neither automatically nor easily. Typically, many factors are considered before leave is granted to a particular physical individual to represent a corporation. These factors include the complexity of the issues, the competence of the individual to represent the corporation, the individual’s capability to deal expeditiously with the issues, whether the

individual will be a witness, etc. The TCC applies those same factors under GP Rule 30(2). The factors I just mentioned are not directed to the question of whether or not the individual can be considered to “personify” the corporation.

[17] In *TPG Technology Consulting Ltd. v. Canada*, 2011 FCA 345, at paragraph 8, Pelletier J.A. explains the rationale for general rules such as the one applicable in the Federal Courts (very similar to the GP Rule 30(2)) as follows:

The general rule is that corporations must be represented by solicitor: see Rule 120, *Federal Courts Rules*, SOR/98-106, [...]. There could be many reasons for such a rule but one which is particularly compelling is that those who have received the benefits of incorporation in the form of tax planning opportunities, immunity from liability in tort etc. should also bear the costs of incorporation, one of which is that the corporation must be represented before the courts by a solicitor.

[18] At the time sections 17.1 and 18.14 were adopted, legislators in Canada had created many so-called small claims procedures where the main aim was to simplify procedure and facilitate access to justice. In most cases, all parties (physical individual and corporations) are expressly granted the right to be represented by a physical individual other than a counsel. Who that individual may be varies depending on the provisions applicable (see for example article 542 of Quebec’s CCP, where a physical individual may be represented by a member of his family, etc.). This is similar to the terms used at section 18.14 and will become relevant when one considers the scheme of the Act and the purpose or object of the Informal Procedure versus the General Procedure.

[19] Obviously, if section 17.1 creates an automatic and new right of audience “in person” for a corporation, as opposed to a discretionary privilege granted by a judge, this right would be

available to all corporations, be it Google, Loblaws, or a one-person corporation. This also means that, for example, this right could not be made subject to conditions such as the one set out in the Order before us, that BCS would lose its right to appear “in person” through its main shareholder if Mr. Gagnon missed a deadline in the proceedings before the Court (the Order at para. 18).

[20] Finally, being supreme in law making, Parliament obviously has the power to modify the common law and civil law in its legislation. It can also adopt a definition of ordinary words that is different from their ordinary meaning.

V. Analysis

[21] As stated above, the only issue in this appeal is the correct interpretation of section 17.1 of the Act, and specifically the words “in person” in the expression “may appear in person”. The modern approach to statutory interpretation is well established. The words of the Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object and the intention of Parliament. This means that one must read the text, taking into account the purpose of the Act and of the provision at issue and all relevant context, including established common law and civil law concepts unless these are clearly ousted by legislation.

A. *Grammatical and ordinary meaning of the words*

[22] There is no statutory definition of the expression “in person”. However, the ordinary meaning of the expression “in person” is uncontroversial. Both in French and in English, “in person” refers to a being physically present, “*en chair et en os* [in the flesh]” before the Court (Katherine Barber, *Canadian Oxford Dictionary* (Don Mills, Ontario: Oxford University Press, 2004) sub verbo “person”; Paul Robert, *Le petit Robert* (Paris: Le Robert, 2018) sub verbo “personne”).

[23] Unlike the GP Rules, which clearly distinguish between an individual and a corporation as a party (GP Rules 30(1) and (2)), there is no such explicit distinction in the wording of section 17.1 of the Act. The subject of the sentence is “a party”, and this would ordinarily include a corporation. In the view of some TCC judges, the interpretation effectively ends here, because to say otherwise would mean reading out the full meaning of the word “party” and would ignore the presumption against tautology (*Sutlej Foods*).

[24] But grammatical and logical interpretations must complement each other. For example, if section 17.1 of the Act read “a party may appear in person or may be represented by their wife or husband, or any another member of their family or by counsel”, would it be logical to conclude that the enumeration applies to all parties regardless of the inherent characteristics of the party? My answer is no. In this case, if the ordinary meaning of “in person” is the meaning adopted by the legislator, I believe that despite the grammatical structure, a party would refer to a physical

person throughout, but it would include a corporation in respect of the right to be represented by counsel. I will now explain why.

[25] While recognizing that there are distinctions between the interpretation of the Constitution and of ordinary statutes, I believe that some constitutional precedents can still provide some guidance in understanding how grammatical and logical interpretations must complement each other. In that respect, there are no real distinctions between the approach taken by the Supreme Court of Canada in ordinary statutory construction and constitutional interpretation.

[26] Some jurisprudence of the Supreme Court of Canada concerning section 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the Charter), is particularly helpful because the grammatical structure of this section is similar in the following respect to that of section 17.1. In both sections, the right holder is described by a general expression. Whereas in section 17.1, “a party” is said to have the right to appear, in section 11 of the Charter, “any person charged with an offence” has the right described in the subsections. The description of the right in section 17.1 has two alternatives: in person or be represented by counsel. This is why I have also referred to the hypothesis above where the enumeration is slightly longer, but not as long as that found in section 11 of the Charter which has nine subsections. In my view, the general principle should apply in the same manner.

[27] What is of interest in the jurisprudence concerning section 11 of the Charter is that the description of the right will have an impact on the meaning of the general expression used to describe the right holder. Indeed, the Supreme Court found that the word “person”, which is always the only subject of the sentence, may apply or may not apply to a corporation. For example, while subsection 11(c) does not, some others like subsection 11(b) do.

[28] In *R. v. Amway*, [1989] 1 S.C.R. 21 (see p. 39-41), Justice Sopinka, writing for the Court, considered whether a corporation has the right set out in subsection 11(c) of the Charter dealing with the compellability of an accused to be a witness. The Court found that even if the words “any person charged with an offence” at subsection 11(c) would ordinarily include corporations, it would strain the interpretation of this section if an artificial entity were held to be a witness. According to the Court, when an officer of the corporation testifies in a proceeding against the corporation, he does so as an individual and as a distinct person who can only invoke that right for himself. It is not the corporation being compelled to testify, as was argued by the respondent corporation. Therefore, under subsection 11(c), “any person” does not include a corporation.

[29] On the other hand, in *R v. CIP Inc.*, [1992] 1 S.C.R. 843, the Supreme Court of Canada found that the right to be tried within a reasonable time afforded by subsection 11(b) of the Charter applies to a corporation. The Court could not find a reason to distinguish between the application of the right to an individual and its application to a corporation, so it concluded that in respect of subsection 11(b), “any person” includes a corporation.

[30] Inasmuch as an artificial entity could not be held to be a witness, even when its officer testified, an artificial entity under section 17.1 could not appear in person in flesh and blood because of its very nature. It simply cannot present its case through its own mouth.

[31] Very recently the Supreme Court of Canada provided another example in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (*Quebec (Attorney General)*) of how the nature of a right will have an impact on the meaning of a general expression like “everyone” (which is as general as “a party”). This decision concerned the application of section 12 of the Charter to a corporation. The Court found that even though section 12 of the Charter uses wording that would normally include a corporation as a legal person (“everyone has the right to”), other words used in their ordinary meaning in the provision, such as “cruel”, strongly suggest that it could not have been intended by the legislator to apply to inanimate objects or legal entities such as corporations. On this point, the dissenting judges agreed with the majority that the word “everyone” as found in the text of section 12 cannot, by virtue of its literal meaning, expand the protection to corporations (see paras. 82-87).

[32] I digress here to note that in that case, the Supreme Court reaffirmed the distinction between a corporation and its shareholders and officers when it rejected the argument accepted by the majority of the Court of Appeal of Quebec that one could rely on the prejudice suffered by individuals within a corporation to assess if the corporation was subjected to an unusual and cruel treatment. In rejecting this argument, Abella J. (dissenting but not on this point), noted that corporations are separate legal persons, as was stressed by Lamer C.J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, even if in a closely held corporation, the stigma which affects

the corporation can carry over to those individuals (see p. 182 of *Wholesale* last paragraph).

Whether a punishment could put the corporation in financial difficulty, which would affect its shareholders, was held irrelevant. The following words from *Wholesale*, which are reproduced at paragraph 129 of *Quebec (Attorney General)*, are perfectly in line with the rationale expressed by Pelletier J.A. (see para. 17 above):

The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit).

[33] At this stage, the ordinary meaning of the words “in person” (as opposed to the legal concept of “person”), and the common law/civil law concept that a corporation cannot appear in person because of its very nature strongly suggest that under section 17.1, a party who is a corporation must be represented by counsel as defined by subsection 17.1(2).

B. *Other meaning*

[34] I must now consider whether the words “in person” are used elsewhere in the Act and if so, whether it would suggest a special meaning to be attributed to the words “in person” in section 17.1. There is only one other provision where they are used — section 18.14 under the Informal Procedure. These words appear in a longer enumeration at section 18.14, which states that all parties “may appear in person or may be represented by counsel or an agent.” This would suggest that “in person” is not synonymous with “represented by an agent” (in French, “représenté par un autre représentant”).

[35] Before I go on to examine the legislative evolution of the Act and the object and purpose of section 17.1, I ought to say a few words about one of the arguments raised by the TCC at paragraphs 5 to 8 of its Order. It appears that the TCC did not give any weight to the ordinary meaning of the words or the traditional common law interpretation described in *Masa Sushi* on the basis that the TCC is a specialized Court that has never had to apply the common law concept that only physical individual parties have the right of audience “in person”. With all due respect, it is clear that all courts of law are bound by the Supreme Court of Canada, and must apply the same approach to statutory interpretation when dealing with statutes such as the Act. This matter does not involve the *Income Tax Act* or other fiscal or taxation legislation. Nor does it involve any special expertise of the TCC. Moreover, the issue here is not whether the TCC is bound by certain courts’ precedents. Rather the question is whether the legislator, who is presumed to know the common law or civil law interpretation, intended to change it.

[36] Nobody has suggested that the expression “in person” had a special “technical” meaning before the Tax Review Board at the time it was included in the Act. When the TCC was first created in 1983, section 15 of the Act did not require one to consider the meaning of “in person” and whether it could apply to corporations because it simply stated that all parties “may appear in person or may be represented at the hearings by counsel or an agent.” As will be explained, this provision reproduced section 10(1) of the *Tax Review Board Act*, S.C. 1970 c. 11 (see also Rules 2(1) and (3) of the *Rules of Practice and Procedure in Appeals to the Tax Review Board*, SOR/73-512).

[37] As a matter of fact, if one looks at the language used by the TCC itself in the Order before us in this appeal, under “Appearances”, Denis Gagnon is listed as the agent for the Appellant. This is also true in all the other Orders of the TCC that were produced before us where an individual was seeking leave to represent a corporation pursuant to GP Rule 30(2). This would suggest that “in person” is synonymous with “represented by an agent”, if this is supposed to be a technical meaning.

[38] As mentioned, the general principles of statutory interpretation at this stage of my analysis do not allow me to accept or conclude that the words “in person” mean the same thing as the words “represented by an agent”, either by leave or not.

C. *Object and Purpose*

[39] To ascertain the object and purpose of section 17.1, one should consider the legislative evolution and history of the Act and the GP Rules. The Tax Review Board was created in 1970, but in 1983, it was replaced by the TCC (S.C. 1980-81-82-83, ch.158, introduced as Bill C-167 the same year). The TCC, a superior court of record, was meant to enhance the status of the former Tax Review Board and more clearly establish its judicial independence. However, it still shared its jurisdiction on income tax matters (the majority of its work) with the Federal Court, which had concurrent original jurisdiction.

[40] Also, even when a taxpayer chose to go first before the TCC, the decisions of the TCC were subject to an appeal *de novo* to the Federal Court. Needless to say that, when matters were

introduced at first instance by a taxpayer before the Federal Court or on an appeal *de novo*, the rules and procedure of the Federal Court applied.

[41] The 1983 Act appears to have been the subject of criticism, even if it maintained the practice of the Tax Review Board, at least insofar as there was no special form required to file an appeal, legal or evidentiary rules did not apply, and as mentioned, all parties could appear in person, or be represented by counsel or an agent (sections 14 and 15 of the 1983 Act).

[42] While in opposition, the Progressive Conservative Party even formed a task force on Revenue Canada and published a report on April 8, 1984 advising that a new tribunal, which might be known as the Small Claims Tax Tribunal, could be interposed between Revenue Canada and the TCC to hear small disputes on a strictly informal basis “without the intervention of counsel” (see Denis Lefebvre Q.C., Assistant Deputy Attorney General Tax Law, Department of Justice, “A Government Perspective of the Amendments to the Tax Court of Canada Act” (Report of Proceedings of the 40th Tax Conference, 1988 Conference Report (Toronto, Canada Tax Foundation 1989), 49:1-5)).

[43] Between 1984 and 1987, the Act was amended three times: i) in 1984 to provide for the award of costs to appellants, ii) in 1985 to require parties to apply for, rather than request, *in camera* hearings; and iii) in 1987 to modify the tenure of the TCC judges. However, the overall scheme of the Act did not change.

[44] But in 1988, Bill C-146 was introduced. Although the Bill received Royal Assent in 1988, only those parts dealing with the Rules Committee came into force on September 29, 1988. The rest of the amended Act was proclaimed in force as of January 1, 1991 (by an Order in Council dated September 28, 1990). It is worth mentioning that the first version of GP Rules 30(1) and (2) adopted by the new Rules Committee, was approved before the amended Act actually came into force (SOR/90-688, dated September 7, 1990). This first version of this rule clearly spelled out that corporations had to be represented by counsel. There was no exception. This indicates that at least those who were very close to the development of Bill C-146 and lived through this major change in the scheme of the Act understood that the right to appear in person did not apply to a corporation.

[45] The important changes that took place under the 1988 amendment should not be understated, for they shed much light on the purpose of section 17.1 and the new scheme of the Act. The TCC was given exclusive original jurisdiction for appeals under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), as well as jurisdiction under other legislation (section 12 of the Act). Appeals from its decisions would now be made directly to the Federal Court of Appeal and would no longer be on a *de novo* basis (sections 17.6 and 18.24 of the Act).

[46] Notably, the Act as amended created two types of procedures: the General Procedure and the Informal Procedure. I understand that the aim of the procedure under the title General Procedure was to subject those matters to the rules of evidence and procedure generally applicable before other superior courts of law, as this was formerly the case when such matters came before the Federal Court before 1988. One exception to this is very clearly spelled out in

the General Procedure. At section 17.3, the extent of the right to examine for discovery is limited in certain cases. It is worth noting that in such cases, the Act expressly identifies when the TCC has discretion to grant leave otherwise, and when a more extensive examination is in fact mandatory. My view and understanding is confirmed by Lefebvre, at page 49:2, who appears to describe section 17.3 as the only exception to the general purpose of adopting a procedure not unlike that before most other courts of law at the time. I ought to mention that when Bill C-146 was reviewed by the Banking, Trade and Commerce Committee of the Senate, Mr. Lefebvre was the government representative and the only witness.

[47] As mentioned, section 17.1 was introduced under the General Procedure, replacing the statutory provision dealing with representation that had previously applied to all cases before the TCC and the Tax Review Board before it (see paragraph 36 above). Importantly, for the purpose of this analysis, the word “agent” was removed while it was retained in the Informal Procedure (section 18.14 of the Act).

[48] Although the legislator retained the right of taxpayers to be represented by counsel under the Informal Procedure, it is clear in my view that the prime aim of the Informal Procedure was to continue to provide easy and less costly access to justice to all taxpayers for the type of claims to which the procedure applied. As mentioned, it was expected at the time that this would apply to 70 percent of the matters brought before the TCC.

[49] I need not say much more in respect of the Informal Procedure as it is not the focus of the appeal. However, it is certainly important to consider that the scheme of the Act indicates that

the two procedures have different purposes. Lefebvre, at page 49:2, confirms that with the introduction of the new chapter on Informal Procedure, the legislator upheld the concept of providing taxpayers with small claims with access to a kind of small claims court. The TCC adopted five sets of Informal Procedure rules to deal with various types of matters now within its jurisdiction. Finally, as explained by Lefebvre at pages 49:2 to 49:5, although not totally new, the Informal Procedure does differ from the one that was applicable before the TCC and the Tax Review Board prior to 1988.

[50] To my knowledge, there is nothing else in the legislative evolution and history of section 17.1 or of the Act as amended in 1988 that can shed light on the intention of the legislator.

[51] Thus, while access to justice was the prime objective of the Informal Procedure, it was not the prime objective of the provisions under the General Procedure. The TCC now had exclusive original jurisdiction to deal with more complex and legally significant cases. The purpose of the General Procedure was to ensure that these cases, which were not subject to the Informal Procedure (including those to which section 18.11 applies) would be dealt with respecting the parties' right to evidentiary and procedural rules, as in any other court of law. Unlike the Informal Procedure, precedential value applied to the decisions under the General Procedure (section 18.28 of the Act).

[52] I note that in *Sutlej Foods*, the judge mentioned that “[h]aving a lawyer represent an appellant is important, for a lawyer would be expected to know applicable jurisprudence, court procedure and pre-hearing proceedings. General procedure is not informal procedure” (para. 20).

In my view, these words, although expressed in a slightly different context, still capture the important distinction in the prime object and purpose of section 17.1, and that of section 18.14, particularly in respect of corporations. Efficiency in the administration of justice in proceedings subject to the General Procedure was the prime objective of the legislator. It is also evident that the legislator did not intend to take away the long recognized right of physical persons to present their case through their own mouth. To do otherwise would have been a major change of the common and civil law in the same manner that it would be a major change to grant a corporation an unconditional statutory right to appear “in person”.

[53] It is worth recalling the following statement of the Supreme Court in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at paragraph 83:

Hence, while there can be no doubt as to the importance of promoting access to justice (see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 1), this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the *Arbitration Act* [...]

[54] Finally, I cannot agree with the comments of the TCC at paragraph 8 of the Order, that suggest that it is relevant here to consider the uniqueness of the TCC. Like the TCC (GP Rule 4), other courts, including this Court and the Federal Court have a practice Rule (see Rule (3) of *Federal Courts Rules*, SOR/98-106), describing the need to construe their Rules and apply them to secure the just and most expeditious and least expensive determination of the proceedings on its merits. But as mentioned, this does not mean that artificial entities such as corporations are given an automatic right to appear in person, nor that it allows the TCC to construe the Act in accordance with its own policy preference.

[55] At this stage of my analysis again, other than the grammatical structure of section 17.1 (the reference to “a party”), there is nothing that suggests that the legislator intended to change the common law/civil law concept that only individuals had the right to appear “in person” or to adopt a definition other than the ordinary meaning of these words at section 17.1. As explained, this grammatical structure here is insufficient to justify reaching such a conclusion.

[56] Furthermore, as I said, despite what I believe to be an inadvertently flawed grammatical structure, the Rules Committee tasked with adopting the GP rules before the amended Act came in force appears to have had no difficulty understanding exactly what the words at section 17.1 meant. Their interpretation at the time is in line with my purposive interpretation: corporations can only be represented by counsel.

[57] None of the TCC judges that concluded that the words “in person” were meant to mean something more than their ordinary meaning came up with a definition or a different meaning of these words in section 17.1. Rather, in their view, how a corporation can appear in person was simply left to be defined in the GP Rules. I cannot accept this view.

[58] First, I note that there is nothing in section 20 of the Act dealing with this (see to the contrary paragraph 66(2)(c) of Ontario’s *Courts of Justice Act*, R.S.O. 1990, c. C.43). It is not one of the matters expressly set out as being within the jurisdiction of the Rules Committee. Even if this were so, as indicated the very first version of this Rule did not attempt to define “in person” vis-à-vis a corporation; rather, it completely rules out the notion of a corporation being able to appear in person.

[59] Furthermore, even if I assumed that the GP Rule 30(2) as amended in 1993 could be interpreted as meaning that only an officer of the corporation could personify a corporation within the meaning of section 17.1, the TCC Rules Committee could not then subdelegate its jurisdiction to each individual judge by making a right presumably granted unconditionally by the legislator subject to a leave to be granted only “in special circumstances”. This is especially so considering that the factors used to assess whether to grant such leave have little, if anything, to do with whether an individual “personifies” the corporation. Obviously, the individual must be authorised to represent the corporation in respect of a specific litigation, but this is a distinct issue for a corporation could adopt a resolution granting such authority to its accountant.

[60] The GP Rule 30(2) in its latest iteration, which appears to enable any individual (including one outside of the corporation, such as its regular accountant) to represent it on leave, could not by any stretch of the imagination be considered a definition of the words “in person” in section 17.1.

[61] Hence, I cannot agree that how section 17.1 would apply in any given case was left open. In fact, as mentioned, at the time the Act came into force, the GP Rules of the TCC had already been approved and published, and GP Rule 30(2) was clearly in line with my purposive interpretation of section 17.1.

[62] In 1988, the adoption of the General Procedure and the restriction as to who could represent a party (see paragraph 36) was a major change in the procedure to be followed by the judges of the Tax Review Board, who were now sitting on the TCC, as well as the new judges

appointed in 1983, for they now had to follow more formal rules that characterized a court of law such as the Federal Court. The purpose of this restructuring may have been lost in the last iterations of the GP Rules, especially because it is somewhat unusual to find a statutory provision dealing expressly with matters of procedures such as the one under discussion.

[63] Certainly, section 17.1 could have been worded more clearly, as was the 1990 version of GP Rules 30(1) and (2). However, at the relevant time, nobody could have thought that a corporation could appear in person.

VI. Conclusion

[64] I conclude from all of the above that on the proper statutory interpretation of section 17.1 of the Act, the TCC could not find that Mr. Gagnon personified BCS and that he was exercising BCS's right to appear "in person". As Mr. Gagnon is not a lawyer, he could not act as counsel for BCS. The TCC could not grant leave to Mr. Gagnon to act as BCS's agent in the appeal before it.

[65] At the hearing, the appellant made it clear that it does not seek costs. Therefore, I propose that the appeal be allowed without costs. The TCC Order at paragraph 18 states that it will be

revoked if this Court concludes that Mr. Gagnon cannot act for BCS pursuant to section 17.1. It is not clear if this revocation is automatic, so to avoid any uncertainty, I propose to set it aside.

"Johanne Gauthier"

J.A.

"I agree
Yves de Montigny J.A."

"I agree
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE CAMPBELL J.
MILLER DATED JUNE 28, 2018, NO. 2017-4722(IT)G**

DOCKET: A-204-18

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
BCS GROUP BUSINESS
SERVICES INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 23, 2020

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

DATED: DECEMBER 2, 2020

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