

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230214

Docket: A-423-19

Citation: 2023 FCA 34

**CORAM: GAUTHIER J.A.
LOCKE J.A.
ROUSSEL J.A.**

BETWEEN:

JEAN-MICHEL CLÉMENT

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Montréal, Quebec, on February 13, 2023.
Judgment delivered from the Bench at Montréal, Quebec, on February 13, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

LOCKE J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on February 13, 2023).

LOCKE J.A.

[1] Jean-Michel Clément appeals a decision of the Tax Court of Canada, which dismissed his appeal of an assessment by the Minister of National Revenue that provided that a payment Mr. Clément received in 2014 in the amount of \$121,250 (the Payment) was taxable as income entirely in that year. The Payment was made by Manulife Securities Incorporated (Manulife)

pursuant to a Transition Facilitation Letter Agreement (the Agreement) that he (and some colleagues) entered into when they moved their business as stockbrokers there. The dispute in this appeal relates to the status of the Payment in view of a provision in the Agreement for the return of some or all of the Payment under certain circumstances.

[2] Mr. Clément argued before the Tax Court that the Payment was a loan that would be gradually forgiven over a seven-year period, and that it should not be treated as income earned entirely in 2014. The Tax Court rejected that argument, and Mr. Clément now acknowledges that the Payment was not a loan.

[3] Instead, Mr. Clément argues that the Payment was for the transfer of a book of business to Manulife. As such, he argues (for the first time) that the Payment should be considered an advance on commissions to be earned over a seven-year period, and therefore a portion of the Payment should be treated as a reserve and assessed as income in later years. Repayment would be required in the event that the amount of business transferred (and commissions earned) fell short of expectations. The amount of the repayment would depend on the size and timing of the shortfall.

[4] One problem with Mr. Clément's argument is that, generally speaking, a new issue may not be raised for the first time on appeal: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712 at paragraph 36 (*Quan*). Mr. Clément's position before the Tax Court, and at the opposition stage, was consistently that the Payment was a loan. Had Mr. Clément's position before us been

presented to the Tax Court, we are of the view that the evidence might have been different. This is not a case where we should override the general rule set out in *Quan*.

[5] Turning back to the issues that were argued before the Tax Court, the standard of review this Court must apply on appeal from the Tax Court is as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness on questions of law, and palpable and overriding error on questions of fact or of mixed fact and law in which there is no extricable issue of law. We are not convinced that the Tax Court erred in either respect in dismissing Mr. Clément's appeal.

[6] The Tax Court found that, upon execution of the Agreement, Mr. Clément was entitled to receive the full amount of the Payment in 2014 and was under no restriction concerning the use thereof. The jurisprudence makes clear that the possibility that he might have to return all or part of the Payment based on a condition subsequent to the execution of the Agreement does not derogate from the quality of income of the Payment at the time of receipt: *Commonwealth Construction Co. v. Canada*, [1984] F.C.J. No. 416, [1984] C.T.C. 338 at paragraphs 21-22 (F.C.A.). The Tax Court discussed this principle, and the *Commonwealth Construction* decision, at pages 11 and 12 of its reasons, and we see no error therein.

[7] Mr. Clément also argues that the Tax Court erred in law by characterizing the Payment as a signing bonus. He argues that he operates a business and is not an employee, and therefore he could not have received a signing bonus. We see no error by the Tax Court here. It merely noted

that the Payment resembled a signing bonus more than a loan. It did not treat the Payment as income from employment.

[8] For the foregoing reasons, this appeal will be dismissed with costs.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-423-19

STYLE OF CAUSE: JEAN-MICHEL CLÉMENT v. HIS
MAJESTY THE KING

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: FEBRUARY 13, 2023

**REASONS FOR JUDGMENT OF THE COURT
BY:** GAUTHIER J.A.
LOCKE J.A.
ROUSSEL J.A.

DELIVERED FROM THE BENCH BY: LOCKE J.A.

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