Docket: 2004-1415(IT)G

BETWEEN:

HUGH STANFIELD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 23, 2004 at Vancouver, British Columbia

Before: The Honourable Justice R.D. Bell

Appearances:

Counsel for the Appellant: Edwin G. Kroft

Counsel for the Respondent: Lynn Burch

ORDER

The Respondent having filed and served upon the Appellant a Notice of Motion returnable before this Court on June 21, 2004;

And the Justice of this Court by whom the matter was to be heard having withdrawn from this matter on the basis of potential conflict of interest;

And the matter having been set on June 21, 2004 before a different Justice to be heard on June 23, 2004;

And the parties having been heard;

IT IS ORDERED THAT:

The Respondent may file and serve a Reply to the Notice of Appeal on or before July 30, 2004.

Costs in the sum of $2,500 are awarded to the Appellant payable forthwith by the Respondent.

Signed at Ottawa, Canada, on this 2nd day of July, 2004.

Bell, J.

Citation: 2004TCC480
Date: July 2, 2004
Docket: 2004-1415(IT)G

BETWEEN:

HUGH STANFIELD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bell, J.

[1] The Respondent filed and served on the Appellant on Friday, June 18, 2004 Notice of Motion for an order extending the time within which the Respondent could file and serve its Reply to the Notice of Appeal to August 31, 2004, with costs "payable forthwith and in any event of the cause."

[2] Appellant's counsel advised the Court that he agreed, even though the appropriate notice had not been given, to have the motion heard on Monday, June 21, 2004. The time for filing the Reply expired on Saturday, June 19, 2004, but was, in accordance with the appropriate Rules, extended to June 21, 2004, the date of the hearing. Appellant's counsel also advised the Court that he and his co-counsel spent the weekend preparing material for this hearing. That material consisted of a twenty-five paragraph affidavit by his associate, Elizabeth Junkin, attaching nine exhibits, a thirty-one paragraph affidavit by the Appellant, sworn on June 20, 2004 and a Book of Authorities containing the pertinent sections of the *Tax Court of Canada Rules (General Procedure)* ("Rules"), sections of the *Income Tax Act* ("*Act*") and the text of various cases.

[3] The Notice of Motion was brought because Appellant's counsel, on instructions from the Appellant, advised Respondent's counsel that the Appellant

would not consent to an order for the extension of time to file the Reply to the Notice of Appeal.

[4] An affidavit by one Ron D.F. Wilhelm, (“Wilhelm”), containing twenty-five paragraphs and attaching several exhibits and dated June 18, 2004 set forth circumstances relating to the appeal.

[5] No oral evidence was tendered or was sought to be tendered.

[6] The foregoing affidavits disclose that,

1. The Minister of National Revenue ("Minister") reassessed the Appellant on July 17, 2002 for his 1998 taxation year disallowing a claimed loss of $6,202,959 respecting a certain trading joint venture;

2. The Appellant filed and served a Notice of Objection on the Minister on August 30, 2002;

3. On April 7, 2004 the Appellant filed a Notice of Appeal to this Court respecting the reassessment;

4. On April 20, 2004 this Court transmitted a copy of the Notice of Appeal to the Deputy Attorney General of Canada;

5. Wilhelm. Lynn Burch (“Burch”), and Robert Carvalho (“Carvalho”), were, on May 11, 2004 assigned as counsel for the Respondent in this matter.

6. Wilhelm's affidavit stated that as of that date no Canada Revenue Agency ("Revenue") materials had been forwarded to the Department of Justice.

7. On May 13, 2004 the Litigation Manager in Revenue advised that his section had not received any file material.

8. On May 19, 2004 Wilhelm reviewed printed Revenue materials of approximately 500 pages and stated that the legal issues involved were complex and that the materials contained:

> …only one of numerous source and other documents that would allow me to properly understand this appeal and prepare the Reply.

9. On May 20, 2003 Wilhelm requested additional materials from Revenue and followed up that request on May 28, 2004. He was advised on that day that one Chris Fleming (“Fleming”) was in charge of most of Revenue materials but that he was away from the office until May 31, 2004.

10. On May 31, 2004 and June 1, 2004 Wilhelm and Fleming exchanged "voice mail messages".

11. On June 2, 2004 Wilhelm advised Fleming that it was important that he received all Revenue materials as soon as possible, "particularly given the deadline for filing the Reply." Fleming advised Wilhelm that he was "very busy dealing with a complex case" and that he had a lot of materials respecting the transactions in issue that were loaded "on to a computer server for ease of use."

12. On June 7, June 9 and on June 11, 2004 Wilhelm called Fleming and was advised that:

> …the process was going slowly because there are over 14 thousand computer files involved and the system appeared to be trying to conduct a virus scan of each one before copying.

13. On June 11, 2004 Wilhelm called Elizabeth Junkin ("Junkin") advising of the difficulty in obtaining Revenue materials necessary to prepare the Reply. He advised that he would be seeking an extension of time to file the Reply.

14. On June 16, 2004 Wilhelm again called Fleming and left a "voice mail message" for him to call respecting the materials and compact disks.

15. On June 16, 2004 Edwin Kroft (“Kroft”), counsel for the Appellant called Wilhelm and advised that the Appellant would not consent to an extension of time for filing the Reply.

16. On June 17, 2004 Fleming called Wilhelm and advised that he should receive the compact discs that day and that they contained about 18,000 pages of documents. Fleming also advised that he had identified approximately 110 Revenue employees involved in "the subject

transactions" and that he had not checked with each of them to confirm that he had all of Revenue's materials.

17. Junkin's affidavit described in some detail the communications between one Deanna Pumple ("Pumple"), of the Tax Avoidance Section of Revenue requesting certain information and documents relating to the losses claimed.

18. An April 7, 2000 letter from Pumple informed the Appellant that Revenue had concluded its review of his trading activities.

19. The Appellant's response of May 6, 2000 suggested that Revenue did not "have a very good grasp on markets (particularly commodities and futures) and the way they work." This letter went on to challenge the knowledge of departmental officials both with respect to the nature of the transactions and the state of law in Canada.

20. Pumple's letter of September 12, 2000 to the Appellant advised that Revenue was making arrangements with its head office to consult with specialists.

21. On February 12, 2002 Pumple wrote to the Appellant notifying him of proposed adjustments to his 1998 tax return.

22. Appellant's counsel requested information pursuant to the *Privacy Act* and received 101 pages of documents including Pumple's audit report for the Appellant's 1995 to 1990 taxation years, such letter being signed by Pumple on April 29, 2002.

23. The Minister issues a Notice of Reassessment dated July 17, 2002 respecting that taxation year.

24. On August 30, 2002 the Appellant filed a Notice of Objection.

25. A September 5, 2002 letter from the Appeals Division of Revenue acknowledged the Notice of Objection and stated that:

> Our Investigations Division is examining the taxation affairs of a number of individuals who have claimed commodities losses, operating losses, interest expenses, and other claims related to

> future contracts, which were subject to review by our Tax Avoidance Division…
>
> We are holding your Notices of Objection in abeyance for the duration of this investigation.

26. No notification of confirmation respecting the said reassessment was received by the Appellant or his representatives.

27. Pumple's August 27, 2002 requested documentation and the completion of a detailed questionnaire respecting the Appellant's 1999 and 2000 taxation years.

28. On September 20, 2002 the Appellant filed an application to the Federal Court – Trial Division for judicial review of the aforesaid request for information and attached questionnaire seeking an order that the act by the Minister was invalid or unlawful and restraining the Minister from taking any action against the Applicant for failure to respond to the letter.

29. Various steps including the preparation of an affidavit by Pumple and the cross-examination of her.

30. The Appellant brought a motion to the Federal Court of Canada seeking an order compelling the Respondent to provide certain documents and for Pumple to re-attend the cross-examination to answer certain relevant questions.

31. This motion was heard by Mr. Hargrave (“Hargrave”), Prothonotary on February 3, 2003.

32. In his Reasons for Order dated April 20, 2004 Hargrave granted the motion in part and ordered the production of the "principal file" referred to in the audit report.

33. The Respondent provided the Appellant with that principal file, a binder containing approximately 2 inches of documents.

34. The Appellant filed a Notice of Appeal to this Court on April 7, 2004.

35. A May 13, 2004 letter from Burch advised Appellant's counsel that a Reply would be filed in the near future.

36. Wilhelm advised Dunkin by telephone on June 11, 2004 that he was working on this matter. This was described as the "first telephone contact from the Department of Justice … since the receipt of the foregoing letter…."

37. On June 16, 2004 Kroft advised Wilhelm that the Appellant was not prepared to consent to the request for an extension of time.

38. The Appellant's affidavit of June 20, 2004, in reference to Wilhelm's affidavit aforesaid, stated that he vehemently denied that there was no prejudice to him by further delays by the Respondent.

39. That affidavit also stated that in his 1999 taxation year he declared the profit corresponding to the loss claimed in 1998. The affidavit goes on to say that Revenue left the profit in his income thereby issuing inconsistent reassessments for those two years and that his tax debt was, accordingly, "huge".

40. Appellant said that as a result of these actions by Revenue his health was affected and he was taking anti-depressant medication. His affidavit went on to describe the damage to his credit reputation and also how his economic position would suffer and how his wife's health was deteriorating because of these events.

41. He described his experience and expertise with computers and commented questioningly on the results reached by Revenue.

[7] The grounds for the motion stated in the Notice of Motion are:

> 1. the Respondent intends to file a Reply to the Notice of Appeal;
>
> 2. there is an arguable case for supporting the reassessment at issue;
>
> 3. the reason the Respondent requests the extension of time to file the Reply to the Notice of Appeal is due to the enormous volume of materials collected during the audit process that need to be organized and produced by the Canada Revenue Agency as are relevant to this Appellant

> and at this time, counsel for the Respondent simply to not have all the materials necessary to put forward the Respondent's position with sufficient particularity;
>
> 4. an extension of time for the Respondent to file the Reply to the Notice of Appeal causes no prejudice to the Appellant;
>
> 5. denial of an extension of time for the Respondent to file the Reply to the Notice of Appeal causes significant prejudice to the Respondent;
>
> 6. denial of an extension of time for the Respondent to file the Reply to the Notice of Appeal would hamper this Court's ability to be fully apprized of all the relevant facts and assumptions, particularly given the complexity of the issues involved.

[8] Burch, representing the Respondent, submitted that the Respondent had done all it could do in order to obtain material necessary for the preparation of a Reply to the Notice of Appeal. She also said that because the records of the Appellant may be relevant to other investigations, the only way for Revenue to give the Department of Justice information was by compact discs.

[9] Appellant's counsel referred to Rule 44 which reads as follows:

> ***Time for Delivery of Reply to Notice of Appeal***
>
> **44.**(1) A reply shall be filed in the Registry within 60 days after service of the notice of appeal unless
>
> (a) the appellant consents, before or after the expiration of the 60-day period, to the filing of that reply after the 60-day period within a specified time; or
>
> (b) the Court allows, on application made before or after the expiration of the 60-day period, the filing of that reply after the 60-day period within a specified time.

He pointed out that under Rule 44(2) the allegations of fact in the Notice of Appeal are *presumed* to be true and that under 44(4) that presumption is a rebuttable presumption.

[10] Counsel pointed out that under subsection 163(3) of the *Act* the burden of establishing the facts justifying an assessment of penalty is upon the Minister. He

then referred to *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (F.C.A.), a decision of Muldoon, J. of the Federal Court of Canada. Counsel said that he decided, in respect of an inadvertent failure to file a certain record within the time provided, that inadvertence was not a sufficient ground at law for the forgiving of the failure to meet a required time limitation. Muldoon, J. said:

> On the basis of that jurisprudence this motion, unfortunately for the applicant, is to be dismissed, because even candidly admitted inadvertence will not suffice in the absence of the respondent's forgiving consent. Here no one concerned was in a coma or otherwise incapacitated, and while inadvertence is a more than a sufficient ground for sympathy for every day of the inadvertent delay, it is not a sufficient ground in law and in the jurisprudence.

On appeal to the Federal Court of Appeal McDonald, J.A. said:

> The proper test is whether the applicant had demonstrated
>
> 1. a continuing intention to pursue his or her application;
>
> 2. that the application has some merit;
>
> 3. that no prejudice to the respondent arises from the delay; and
>
> 4. that a reasonable explanation for the delay exists.

He then agreed with the decision of Muldoon, J.

Counsel also referred to *Chin v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1033. In this case an Applicant filed an application for leave to apply for judicial review of a decision of an immigration officer. It was required to be filed by before August 27, 1993. A request for an extension of time for filing same was made on the ground that counsel for the Applicant was going to be attending an out-of-town bar convention and would be unable to complete the application record before her departure. The request was denied. Reed, J. said:

> I think I should set out my approach to motions for extensions of time. I start with the premise that the time limits set out in the rules are meant to be complied with. If they are too short then requests

> should be made to have the rules amended so that the time limits are lengthened. I do not grant requests for extensions of time merely because it is the first time that counsel has asked or because the workload which counsel has assumed is too great. I think such decisions are unfair to those counsel who refuse clients because their work-load is too heavy to allow them to meet required deadlines or who "pull out all the stops" to meet the deadlines, at great inconvenience to themselves. As I have indicated I take the view that the time limits set out in the rules are meant to be complied with and they are meant to apply to everyone equally. If an automatic extension was meant to be available merely because counsel seeks one, then the rules should provide for such an automatic extension, for everyone, when such is sought.

[11] Kroft then referred to Junkin's affidavit and submitted that counsel for the Respondent had access to documents before the Reply filing period had expired. He referred to Revenue's proposal to the Appellant and the conclusion of Revenue determining that the Appellant was involved in a sham. He suggested that the matter was the simple issue of whether the Appellant was entitled to the losses and referred to the documents and the position of Revenue which he suggested were foundation enough for preparation of a reply to the notice of appeal. He referred also to the 1999 taxation year in which the amount of revenue declared by the Appellant had been left in his income, this being exactly opposite to the decision made with respect to the disallowance of loss in the preceding year. He referred to the Order of Prothonotary Hargrave in the Federal Court judicial review matter and particularly to the reasons for same in which Hargrave said:

> The so called principal file, referred to in question 50 and following, is to be produced.

[12] Counsel also referred to Wilhelm's affidavit stating that the Respondent, namely Revenue, not the Department of Justice had the necessary material and seemed not to be cooperating with Wilhelm in its production to the Department of Justice. With reference to the materials that were available at the time of the Federal Court judicial review Appellant's counsel questioned how Wilhelm could not know all that needed to be known to prepare a Reply.

[13] Appellant's counsel also referred to *Budget Steel Ltd. v. Seaspan International Ltd.* where the matter at issue was the appropriate test to apply in order to consider an application for the late filing of a defence to a counterclaim. Hargrave, Prothonotary said:

> As I understand the Plaintiff's argument, it is that a late defence ought to be accepted so long as the case is arguable on its merits and there is no demonstrable prejudice, to the other side, which cannot be compensated for in costs. To exceed to the Plaintiff's view would be to acknowledge that time limits in the *Federal Court Rules* mean little or nothing. The Plaintiff submits that the test set out in *Hennelly (supra)* is too severe. … given the facts, I am of the view that the Plaintiff may in fact have an extension. However I would note in passing that in *Bellefeuille v. Canada (Human Rights Commission)* (1993), 66 F.T.R. 1 (Fed. T.D.), at 4, Madam Justice Reed allowed an extension of time for the filing of a judicial review record, on the basis of a four-part test identical to that set out half a dozen years later by the Court of Appeal in *Hennelly*.

[14] In *Bellefeuille v. Canada (Human Rights Commission)*, [1993] F.C.J. No. 168 an application was filed four months late and no reasonable explanation was offered for the delay. Reed, J. said:

> Counsel for the respondents argues that insofar as the merits of the application are concerned, the applicant must demonstrate: (1) a continuing intention to pursue his appeal; (2) that there is some merit in his application; (3) that no prejudice to the respondents arises as a result of the delay and (4) that a reasonable explanation for the delay exists. It is quite clear that conditions (1) and (3) are met. With respect to condition (2), the applicant's claim is not frivolous. The respondent, Commercial Transport (Northern) Ltd., made extensive submissions to the Canadian Human Rights Commission which apparently caused the Commission not to follow the recommendations of the Canadian Human Rights Officer who initially reviewed the complaint, which submissions were filed out of time and to which the applicant had no opportunity to respond.
>
> There is no doubt, however, that a reasonable explanation for the delay which occurred has not been provided. This is not a case where there has been a brief delay. Four months elapsed between the time when the application record should have been filed and when it was filed. This is not a mere administrative slip or minor non-compliance with the rules. What is more, even after counsel for the applicant was notified, by letter dated November 3, 1992, that he had ten days to respond or have the application struck, it was still another month before any attempt was made to file an application record. For reasons essentially similar to those given by Mr. Justice Teitelbaum, I conclude that a reasonable explanation has not been given.

> We all appreciate, that in busy law practices and especially in overworked legal aid clinics, it is not easy to meet deadlines. At the same time, the timely and expeditious disposition of applications before the courts is very much a matter of public as well as private concern and in the public as well as private interest.

This was affirmed by the Federal Court of Appeal.

[15] Reference was also made to *Discovery Research Systems Inc. v. R*, 92 DTC 1306, a decision of this Court. Bonner, J. said:

> The intent of the *Tax Court Act* in its present form and of the Rules is clearly set out in section 3 of the Rules. Cases are to be dealt with as expeditiously as circumstances and considerations of fairness and justice permit. If extensions of the time for filing replies were permitted in cases of delay caused by simple inadvertence there would be a swift return to the "bad old days" when, under the rules which governed proceedings commenced before 1991, the great majority of replies were served and filed well after the 60-day deadline. That practice was one of the evils the present Rules were intended to eradicate. The Rules would be rendered toothless if late filing were permitted in cases such as this.

The last day for filing and serving the Reply was August 25, 1991. This was overlooked until October 4, 1991. The learned Justice said:

> It appears to be a simple case of oversight.

[16] Reference was also made to *Foundation Instruments Inc. v. R*, 92 DTC 1879, in which Garon, J., as he then was, said after reference to the comments in *Discovery Research Systems*:

> Applying these principles to the facts of the present situation, I am of the view that the present case is not a proper one for granting an extension of time for filing the reply. It seems to me that an extension of time for filing or serving the reply to the notice of appeal should not be granted if the tardiness is ascribable to an administrative oversight or an error of the type with which we are concerned here. On the other hand, such remedy would seem to be an appropriate exercise of the Court's discretion if the delay is attributable to a clearly unforeseen event or unusual circumstance over which the respondent had little or no control and the latter is able to show due diligence in coping with the situation.

[17] Reference was also made to *Telus Communications (Edmonton) Inc. v. R.* 2004 G.T.C. 70, in which an extension of time was granted.

[18] Finally, in resisting Respondent's motion, Appellant's counsel referred to the grounds for the motion contained in the Notice of Motion under discussion and with respect to the second reason, asked how the Respondent knew that there was an arguable case if it did not have the material necessary to file a reply. With respect to the third reason, he challenged that an extension of time was necessary

> … due to the enormous volume of materials collected during the audit process that need to be organized and produced by the Canada Revenue Agency as are relevant to this Appellant and at this time, counsel for the Respondent simply do not have all the materials materials necessary to put forward the Respondent's position with sufficient particularity.

[19] With respect to the ground that an extension of time causes no prejudice to the Appellant, counsel for the Appellant stated that the Appellant's affidavit evidence was to the contrary. He further challenged whether there was any "significant prejudice to the Respondent" asking what that significant prejudice was. Finally, with respect to the sixth ground he referred to the apparent lack of knowledge of "all the relevant facts and assumptions" stating simply that a reassessment had been issued, thereby suggesting that the Minister had the facts necessary so to do.

[20] The Appellant is one of over one hundred taxpayers involved in the transactions under examination. There is no doubt that the respondent has taken a substantial length of time in order to process this matter. The Court does not have knowledge of the transactions and their complexity. It has no information respecting the relation of any one taxpayer to any other taxpayer and whether the present Appellant is in a unique situation or whether he is interconnected with other taxpayers and, if so, how he is so connected. Appellant's counsel advised the Court that this was not a test case, implying that there may be some difference from other taxpayer's circumstances. However, that is an unsafe assumption for this Court to make because it has no knowledge of what may have taken place respecting the selection of a test case if, in fact, any discussion of that matter has occurred. This appeal involves a large sum of money and it appears that the total is enormous.

[21] This is not a situation in which the Reply has not been filed because of inadvertence. It is not a situation where the delay is borne of any personal desire of counsel to be elsewhere. It is not an application brought after four months of delay. Failure to file a Reply by June 21, 2004 is not the result of any oversight. Whereas some of the authorities are firm in the tests to be applied to applications for extension of time, and while I have some sympathy with the submissions of Appellant's counsel, I cannot conclude that no extension of time should be given in this case. While realizing, if the motion is denied, that there would be only a presumption that the allegations of fact in the Notice of Appeal would be true and while that presumption is rebuttable, the facts surrounding the Appellant's claim are best known to him, including perhaps, those with whom he was associated in the transactions. Logically, the Court should be better informed of the circumstances if the Appellant presents his case in the normal way. This Court must be interested in fairness and in justice and it appears to me that those objectives are better served by this case proceeding in the normal fashion. While Appellant's counsel urges the Court to find that the Respondent had all facts necessary for the preparation of a Reply, counsel for the Minister have, according to Wilhelm's affidavit and submissions made at this hearing not obtained all the information apparently necessary for the preparation of a proper Reply. It is idle for me to hypothesize about whether this matter was assigned to present counsel for the Respondent at a time early enough for them to have obtained required information. I must, however, say that assessments should be made, generally only after appropriate fact collection and examination by the Respondent. Normally, that information would enable the preparation of a Reply. Respondent’s counsel did not deal with that proposition when put to her by the Court.

[22] It should be stated that this matter was to be heard before another Justice of this Court on June 21, 2004. The question of that Justice having some potential conflict of interest was considered by him on that day and he decided that day, to withdraw from hearing this motion. As I was sitting in Vancouver during that week and as the 23rd of June became clear for me, I decided, on June 21, rather than have the parties wait, to hear this motion.

[23] I shall issue an Order to the effect that the Respondent may file and serve a Reply to the Notice of Appeal herein on or before July 30, 2004.

[24] The Respondent, curiously, asked for costs in its motion. Having regard to the fact that it was the party seeking relief from this Court and having regard to the fact that no motion for the extension for time was brought until 3 days before the deadline and having regard to the above comments respecting the basis for

reassessment being in the Respondent’s possession and to the extraordinary effort of Appellant's counsel over the weekend to prepare for this short notice hearing, costs in the sum of $2,500 are awarded to the Appellant payable forthwith by the Respondent.

Signed at Ottawa, Canada, on this 2nd day of July, 2004.

Bell, J.

CITATION:	2004TCC480
COURT FILE NO.:	2004-1415(IT)G
STYLE OF CAUSE:	Hugh Stanfield v. The Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 23, 2004
REASONS FOR JUDGMENT BY:	The Honourable Justice R.D. Bell
DATE OF JUDGMENT:	July 2, 2004

APPEARANCES:

Counsel for the Appellant:	Edwin Kroft
Counsel for the Respondent:	Lynn Burch

COUNSEL OF RECORD:

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