

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20160125**

**Docket: A-127-15**

**Citation: 2016 FCA 21**

**CORAM: TRUDEL J.A.  
STRATAS J.A.  
RYER J.A.**

**BETWEEN:**

**BEMCO CONFECTIONERY AND SALES LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on January 25, 2016.  
Judgment delivered from the Bench at Toronto, Ontario, on January 25, 2016.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**STRATAS J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**

(Delivered from the Bench at Toronto, Ontario, on January 25, 2016).

**STRATAS J.A.**

[1] Bemco Confectionery and Sales Ltd. appeals from the order dated June 20, 2014 of the Tax Court of Canada (*per* Paris J.): 2015 TCC 48. The Tax Court dismissed Bemco's motion for an order under section 53 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a striking out certain paragraphs of the respondent's Reply without leave to amend.

[2] The order under appeal is a discretionary one, namely an order reached by applying legal standards to the particular facts of the case in circumstances where the court could reach different outcomes. Absent legal error or an error in legal principle, the standard of review to be applied is an onerous one for the appellant to meet.

[3] Recently, in *Turmel v. Canada*, 2016 FCA 9 this Court noted that over the years many turns of phrase have been used to describe this onerous standard—such the standard of “palpable and overriding error” discussed in *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 and applied by this Court a number of times since. What is common to each of these turns of phrase is that:

...in the absence of an error of law or legal principle an appellate court cannot interfere with a discretionary order unless there is an obvious, serious error that undercuts its integrity and viability. This is a high test, one that the case law shows is rarely met.

(*Turmel* at paragraph 12). It follows that in substance we agree with the respondent’s submission that absent legal error or an error in legal principle, Bemco must show a readily apparent error that could change the result of the case.

[4] In our view, this Bemco has not done. We see no legal error or an error in legal principle on the part of the Tax Court and no other readily apparent error that could change the result of the case.

[5] Bemco submits that a number of facts alleged in the Reply are inadmissible evidence of prior discreditable conduct, improperly suggesting that Bemco has a propensity to breach the

*Tobacco Tax Act*, R.S.O. 1990, c. T.10. The Tax Court characterized the impugned portions of the Reply differently (at paragraphs 25-27). It found that the impugned portions of the Reply merely describe times, places and circumstances concerning the transactions in issue and do not suggest that Bemco engaged in discreditable conduct unrelated to its obligations under the *Excise Tax Act*, R.S.C., 1985, c. E-15. In the words of the Tax Court (at paragraphs 26-27), the Reply “sets out the position of the Respondent that the commercial structures in place between [Bemco] and the Indian purchasers were a sham,” a position that “precludes any suggestion of propensity-based reasoning” contrary to *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 980.

[6] Given the standard of review, we see no grounds to interfere with this finding. There was no error of law or legal principles and the Tax Court’s characterization of the impugned portions of the Reply is supportable given the standard of review we must apply. If the respondent later uses these portions of the Reply as part of an improper propensity argument, the Tax Court can intervene and prevent any prejudice or reject the argument outright.

[7] In the Tax Court, as part of its motion to strike, Bemco also complained that there was insufficient particularity concerning the names and locations of the alleged true purchasers of the products in question. The Tax Court, with the correct legal test in mind, concluded (at paragraphs 47-49) that particulars were unnecessary because the pleadings gave Bemco enough information to know the case it has to meet, the Minister might bear the burden of proof and, if necessary, particulars could be sought through a demand for particulars. Here again, we see no error of law or error in legal principle and we are not persuaded that there are any other grounds to interfere with this finding given the standard of review we must apply.

[8] Consistent with the fact that the Tax Court did not grant costs below, in this Court the Crown does not ask for its costs. Accordingly, none shall be granted. We shall dismiss the appeal.

"David Stratas"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-127-15

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE B. PARIS DATED  
FEBRUARY 26, 2015, DOCKET NO. 2013-4833(GST)G**

**DOCKET:** A-127-15

**STYLE OF CAUSE:** BEMCO CONFECTIONERY AND  
SALES LTD. v. HER MAJESTY  
THE QUEEN

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** JANUARY 25, 2016

**REASONS FOR JUDGMENT OF THE COURT BY:** TRUDEL J.A.  
STRATAS J.A.  
RYER J.A.

**DELIVERED FROM THE BENCH BY:** STRATAS J.A.

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