

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20100127**

**Dockets: A-237-09  
A-240-09**

**Citation: 2010 FCA 31**

**CORAM: BLAIS C.J.  
LÉTOURNEAU J.A.  
TRUDEL J.A.**

**BETWEEN:**

**A-237-09**

**LOCATION ROBERT LTÉE**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

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**A-240-09**

**TRANSPORT ROBERT (1973) LTÉE**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Montréal, Quebec, on January 25, 2010.

Judgment delivered at Montréal, Quebec, on January 27, 2010.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**BLAIS C.J.  
TRUDEL J.A.**

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## REASONS FOR JUDGMENT

### LÉTOURNEAU J.A.

#### Issues

[1] The appellants (hereafter the appellant) in dockets A-237-09 and A-240-09 are appealing against two decisions of Justice Hugessen (judge) of the Federal Court: *Location Robert Ltée v. Sa Majesté la Reine; Transport Robert (1973) Ltée v. Sa Majesté la Reine*, 2009 CF 516.

[2] In his decisions, the judge allowed the motion for summary judgment submitted by the respondent. He accordingly dismissed the appellant's action in each of the cases.

[3] The appellant raises the four following errors of law in the judge's decision. He allegedly erred when he

- a) concluded that the appellant's action disclosed no genuine issue for trial;
- b) stated that the respondent had discharged her burden of proof on a motion for summary judgment;
- c) denied the appellant the right to present its case on the merits before the Federal Court; and

- d) held that the *Budget Implementation Act, 2003*, S.C. 2003, c. 15 (Act) eliminated the appellant's substantive right to claim a rebate for excise taxes it had paid.

### Analysis of the judge's decision and the parties' submissions

[4] The appellant's submission on appeal, as in the Federal Court, was based on its interpretation of section 63 of the Act which amended subsection 68.1(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15. I reproduce both sections, beginning with the *Excise Tax Act*:

**68.1** (1) Where tax under this Act has been paid in respect of any goods and a person has, in accordance with regulations made by the Minister, exported the goods from Canada, an amount equal to the amount of that tax shall, subject to this Part, be paid to that person if that person applies therefore within two years after the export of the goods.

**63.** (1) Section 68.1 of the Act is amended by adding the following after subsection (2):

(3) For greater certainty, no amount is payable to a person under subsection (1) in respect of tax paid on gasoline or diesel fuel transported out of Canada in the fuel tank of the vehicle that is used for that transportation.

(2) Subsection (1) applies in respect of any application for a payment under

**68.1** (1) Lorsque la taxe prévue par la présente loi a été payée sur des marchandises qu'une personne a exportées du Canada en conformité avec les règlements pris par le ministre, un montant égal à cette taxe est, sous réserve des autres dispositions de la présente partie, payé à la personne si elle en fait la demande dans les deux ans suivant l'exportation des marchandises.

**63.** (1) L'article 68.1 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :

(3) Il est entendu qu'aucun montant n'est à payer à une personne aux termes du paragraphe (1) au titre de la taxe payée sur l'essence ou le combustible diesel qui est transporté en dehors du Canada dans le réservoir à combustible du véhicule qui sert à ce transport.

(2) Le paragraphe (1) s'applique à toute

section 68.1 of the Act received by the Minister of National Revenue after February 17, 2003.

demande de paiement, prévue à l'article 68.1 de la même loi, reçue par le ministre du Revenu national après le 17 février 2003.

[5] The appellant submits that section 63, on the one hand, eliminates the right to a rebate after February 17, 2003, and, on the other hand, retroactively establishes a time limit for submitting refund applications based on the right to a rebate which existed before February 17, 2003. From this, the appellant concludes that the provision imposed a time limit on its right to a rebate.

[6] On the basis of this interpretation, it deduces that section 63 is a limitation provision barring the right to a rebate of the tax as of February 17, 2003.

[7] That said, the appellant argues that the time limit should be suspended because, in practice, it was impossible for it to take action. This absolute impossibility of taking action allegedly stemmed from the conduct of a representative of the Canada Revenue Agency (Agency) who told the appellant not to submit additional rebate applications for the years subsequent to 1993. Instead, the appellant was supposed to wait for a final decision to be rendered in *Penner*, at which time it would be contacted by a representative.

[8] The judgment in *Penner International Inc. v. Canada*, 2002 FCA 453 was rendered in November 2002. It confirmed the right to a rebate of tax paid on gasoline or diesel fuel transported out of Canada in the tank of the vehicle used for that transportation.

[9] The Federal Court judge rejected the appellant's interpretation of section 63. It concluded that the section did not establish a limitation period or a deadline, but rather completely eliminated the right to a rebate as of February 17, 2003. The judge wrote the following at paragraphs 3 and 4 of his decision:

[TRANSLATION]

[3] In 2003, Parliament enacted the *Budget Implementation Act, 2003*, S.C. 2003, c. 15, and in this statute it completely eliminated the taxpayers' right to claim excise taxes paid in the circumstances alleged by the plaintiffs from the very date of the budget in February 2003.

[4] This is not a limitation period or even a deadline. It is simply the elimination of a right which taxpayers used to have.

[10] The appellant's submission that the provision in question merely establishes a limitation period is ingenious; however, it does not stand up to the analysis made by the trial judge. For a right to be time barred and, accordingly, for there to be a limitation period, there has to be a right subject to limitation. However, in this case, the right was simply eliminated, as the judge rightly concluded. Simply put, section 63 extinguishes the right to a tax rebate, as opposed to placing a time limit on it. That which has no legal existence cannot be time barred.

[11] This conclusion is sufficient to deal with both appeals. However, I would add the following about the *de facto* impossibility of taking action, which is invoked by the appellant as a ground for suspending the time limit.

[12] It is true that *de facto* impossibility of taking action is no longer limited to situations of superior force. It may result from the fault of the debtor of the obligation committed in a context

of bad faith or abuse of rights or, in delictual matters, from a psychological state of fear caused by the defendant's fault: see *Oznaga v. Société d'exploitation des loteries et courses du Québec*, [1981] 2 S.C.R. 113; *Gauthier v. Brome Lake (Town)*, [1998] 2 S.C.R. 3; *Laurentian Pilotage Authority v. Voyageur (The)*, 2005 FCA 221, [2006] 1 F.C.R. 37.

[13] That said, [TRANSLATION] “the concept of it being ‘absolutely impossible . . . in fact to act’, provided for in art. 2232 of the *Civil Code*, should not be unduly extended as a basis for a suspension of deadlines”, as the Court of Appeal of Québec noted in *J.C. v. D.B.*, 2006 QCCA 1090, [2006] J.Q. No. 9223, referring to the warning made by Justice Lamer in *Oznaga*, above.

[14] Even if we assume that an Agency representative told the appellant to wait for the Court's decision in *Penner* before making its rebate applications, it cannot be concluded that the Agency committed a fault, absent an argument and evidence that the Agency acted in bad faith to prevent or avoid the payment of a rebate.

[15] In addition, nothing in fact or in law prevented the appellant from submitting its rebate applications in spite of the advice given by an Agency representative. At most, any decision on these applications would have been suspended while the judgment in *Penner* was pending. In so doing, the appellant would have protected its rights.

[16] Finally, as already mentioned, the judgment of our Court in *Penner* was rendered in November 2002, on the 20th, to be more precise. However, the budget amending section 68.1 of the *Excise Tax Act* was not tabled until February 2003. During that intervening period, the

appellant had sufficient time to file its applications. In such circumstances, it is simply impossible to conclude that there was a *de facto* impossibility of taking action; similarly, we cannot substitute a fault on the debtor's part for the creditor's lack of diligence, as the appellant would have it. If the creditor's lack of awareness of the legal facts which are the basis of its right cannot be regarded as an absolute *de facto* impossibility of acting (*Oznaga*, above, at page 126), it is difficult to conceive how a creditor's lack of awareness of the legal facts which extinguish that right, in this case, the Act, might constitute such an impossibility.

### **Conclusion**

[17] For these reasons, I would dismiss both appeals with costs, the costs for the hearing being limited to one set. I would place a copy of these reasons in file A-240-09 in support of the judgment to be rendered.

“Gilles Létourneau”

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J.A.

“I agree  
Pierre Blais J.A.”

“I agree  
Johanne Trudel J.A.”

Certified true translation  
Michael Palles



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-237-09

**STYLE OF CAUSE:** LOCATION ROBERT LTÉE v.  
HER MAJESTY THE QUEEN

**PLACE OF HEARING:** Montréal, Quebec

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TRUDEL J.A.

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**APPEARANCES:**

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