

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20130528**

**Docket: A-446-11**

**Citation: 2013 FCA 138**

**CORAM: PELLETIER J.A.  
GAUTHIER J.A.  
WEBB J.A.**

**BETWEEN:**

**WILLIAM JAMES LOUGHEED**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on May 22, 2013.

Judgment delivered at Ottawa, Ontario, on May 28, 2013.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

GAUTHIER J.A.  
WEBB J.A.

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**BETWEEN:**

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**Appellant**

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

[1] This is an appeal of the dismissal of a motion seeking various heads of relief, including a finding of contempt of court on the part of the respondent in relation to production of documents. Among the other heads of relief sought is a summary judgment allowing Mr. Lougheed's appeal.

[2] Mr. Lougheed was assessed for third party liability for GST under s. 323(1) of the *Excise Tax Act*, R.S.C. 1985 c. E-15 in the amount of \$297,431.59 in his capacity as a director of Enterprise Expansion Corporation (EEC) .

[3] Prior to the assessment against EEC being issued, an audit was undertaken. In the course of that audit, the Canada Revenue Agency (CRA) received 24 bankers boxes of documents relating to the affairs of EEC from Mr. Lougheed: see A.B. p. 187. On January 13, 2006 Mr. Lougheed acknowledged receipt of 26 bankers boxes of documents, including it seems, the 24 bankers boxes originally given to the CRA: see A.B. p.189.

[4] Following the audit, an assessment issued against EEC. The latter was subsequently petitioned into bankruptcy. A CRA employee was elected an inspector in the bankruptcy.

[5] Mr. Lougheed filed a notice of objection to the assessment against him, the assessment was confirmed, with the result that on July 3, 2006, Mr. Lougheed filed a notice of appeal against the assessment.

[6] Following the filing of Mr. Lougheed's Notice of Appeal, it appears that there were various discussions over time between officials of the CRA and Mr. Lougheed with respect to disclosure and production of documents. Some of those discussions involved documents which Mr. Lougheed says were included in the 24 bankers boxes of documents which were given to the CRA but which were not returned to him when the bankers boxes were. Others involved various documents related to EEC's bankruptcy, either documents which originated with the CRA (e.g.

proof of claim in bankruptcy) or which would have come into the CRA's possession in its capacity as either a creditor or an inspector of the estate of EEC in bankruptcy.

[7] Apparently, these discussions were not fruitful with the result that Mr. Lougheed made a motion in the Tax Court seeking various heads of relief. Neither the original motion nor the affidavit in support of that motion are in the materials before this Court. In response to that motion, Mr. Justice Favreau of the Tax Court of Canada made the following order (the Favreau Order):

#### ORDER

Upon motion by the appellant [Mr. Lougheed] for:

[1] An order compelling the respondent [Her Majesty the Queen] and its representatives to deliver to the appellant any and all Entrepreneur Expansion Corporation (EEC) and Global ATM Management Inc. documents currently being withheld from the appellant by the respondent, including but not limited to the 1999, 2000, 2001 Thomas McBrayne income tax audits of Entrepreneur Expansion Corporation;

In the alternative, an order allowing the appellant's appeal, dismissing the respondent's response and/or expunging the Gustyn audit for causes laid out in the appellant's affidavit of January 29, 2010 or as this Honourable Court deems just;

[2] An order placing the burden of producing EEC documents in support of this appeal on the respondent;

[3] An order extending (or creating) a timetable in this matter, as may be advised by counsel and as this Honourable Court deems just;

[4] Costs of having to bring this motion; and

[5] Any other relief as may be advised by counsel and as this Honourable Court deems just.

Having heard the parties, the motion is allowed and the respondent is given 30 days from the date of this order to deliver to the appellant the documents referred to in paragraph 1 of the motion.

The appellant is entitled to his costs.

[8] Following the making of the order, the CRA delivered two 3 inch binders of documents to Mr. Lougheed. The CRA'S position is that it has complied with the terms of the Favreau order. Mr. Lougheed continues to take the position that it has not.

[9] In June 2011, in the course of the Tax Court of Canada's case management procedures, Mr. Lougheed appeared before Madam Justice Woods (the Tax Court Judge, or simply the Judge) for a case management conference. At the conclusion of that conference, the Tax Court Judge made an order that a motion to compel compliance with Mr. Justice Favreau's order would be heard on August 15, 2011.

[10] Mr. Lougheed then filed a notice of motion, returnable on August 15, 2011 seeking the following relief:

1- An order declaring the Respondent is in contempt of the Order of Favreau J. dated May 5, 2010 and a further order allowing the appellant's appeal for reasons

of the Respondent's failure to comply with the order of Favreau J. dated May 5, 2010.

IN THE ALTERNATIVE

An order allowing the Appellant's appeal for reasons that the appellant has been found to have acted with reasonable care, skill, and diligence in this matter.

IN THE ALTERNATIVE

An order declaring the Respondent is in contempt of the order of Favreau J., dated May 5, 2010 and a final order to the Respondent (and also to the Trustee in the bankruptcy of EEC) to comply with the order of Favreau J. dated May 5, 2010.

2. An order extending (or creating) a timetable in this matter, as may be advised by counsel and as this Honourable Court deems just.

[11] In addition, the motion seeks costs, pre-judgment and post-judgment interest, special costs, special damages and/or special punitive damages.

[12] By happenstance, Madam Justice Woods was the judge who heard Mr. Lougheed's motion on August 15, 2011.

[13] The Tax Court Judge began by dismissing out of hand Mr. Lougheed's request that his appeal be allowed, either on the basis of CRA's alleged failure to comply with Mr. Justice Favreau's order or on the basis that Mr. Lougheed had acted with due diligence in his capacity as director. The Judge found that the appeal could only be allowed after a trial, which is a reasonable conclusion since the question of due diligence is a question of fact, and she had no evidence before her on that question. As for the respondent's failure to comply with the Favreau order, she found, as will be seen, that there was no credible evidence of non-compliance.

[14] On the merits of the motion for a finding of contempt of court, Madam Justice Woods, after having attempted to get Mr. Lougheed to identify more precisely the documents which he says continue to be withheld, found that evidence with respect to the allegedly missing documents was too vague and would not support even a *prima facie* case of contempt.

[15] In particular, the Tax Court Judge accepted, based on the cross-examination of Mr. Lougheed on his affidavit, that he received back from the CRA the 24 boxes of documents which were originally provided to the CRA. She also accepted the *viva voce* evidence of a CRA employee who testified that she had been asked by counsel to provide Mr. Lougheed with all the documents in the CRA's possession and that she had instructed CRA staff to comply with this request.

[16] These are findings of fact by a trial judge who considered the affidavit evidence and heard both Mr. Lougheed and the witness called by counsel for the CRA. Following *Housen v. Nikolaisen* 2002 SCC 33, [2002] 2 S.C.R. 235, such a finding cannot be overturned unless vitiated by a palpable and overriding error. No such error has been shown here. I would not disturb the Tax Court Judge's conclusion on this issue.

[17] In any event, I am of the view that Mr. Justice Favreau's order was incapable of being enforced by contempt proceedings because it was too vague.

[18] Before a person can be found guilty of contempt of court, it must be shown that "the order that was breached must state clearly and unequivocally what should and should not be

done." see *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at paragraph 27. The person who must comply with the order must know exactly what he or she must do in order to comply. In this case, the order refers to the return of documents currently being withheld by the respondent. Furthermore, since the respondent produced two binders of documents in response to Mr. Justice Favreau's order, it is impossible to tell by reference to the order, which documents remain outstanding. As a result, Mr. Justice's order is not enforceable by contempt proceedings.

[19] Before us, Mr. Lougheed argued that the hearing before the Tax Court Judge was not fair. Having read the transcript of the hearing, I am of the view that the Tax Court Judge gave Mr. Lougheed every opportunity to set out his case as advantageously as possible. His lack of success before the Tax Court Judge is not due to any lack of fairness on her part.

[20] Mr. Lougheed served a notice of constitutional question along with his notice of appeal. In his notice of constitutional question, he says, in effect, that unless the respondent produces the documents that he claims are being withheld, his rights under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11 will be breached. The jurisprudence of this Court is consistently to the effect that a Charter challenge cannot be raised for the first time on appeal: see *Re Harkat*, 2012 FCA 122, [2012] 3 F.C.R. 635 at paragraph 148, *Coca-Cola Ltd. v. Pardhan (c.o.b. Universal Exporters)*, 2003 FCA 11, at paragraphs 31-32. The basis for this position is that Charter challenges invariably require a fully developed factual record. When a Charter challenge is raised for first time on appeal, that record is absent. Furthermore, the Crown



has the right, in any Charter litigation, to lead evidence that a breach is justified under section 1 of the Charter. When the matter is raised for the first time in this court, the Crown is deprived of that right. As a result, I will not consider Mr. Lougheed's Charter arguments.

[21] It is unfortunate that so much time and energy has been taken up by an issue for which there is a reasonable and workable solution in the *Tax Court of Canada Rules (General Procedure)*(SOR/90-688a). That solution is found at Rules 81 and 82 which provide for the preparation of either full or partial lists of documents by the parties. Had Mr. Lougheed read the Rules and made a motion seeking the production of a list of documents pursuant to Rule 82, the issue of which documents are or are not in the CRA's possession would have been resolved. He would then have been in a position to demand production of any of the documents on that list which he needed to prepare his appeal.

[22] Given the nature of Mr Lougheed's allegations, the respondent would have been well advised to prepare such a list without waiting for Mr. Lougheed to demand it.

[23] I would add that it became apparent in the course of the hearing of this appeal that Mr. Lougheed is acting under some fundamental misapprehensions as to the nature of the issues which he must address in his appeal. In particular, his understanding of the effect of the bankruptcy proceedings on the assessment is a matter which he should review with counsel who is knowledgeable in the area of taxation. The assessment against Mr. Lougheed is for a very large amount (and increasing daily) and, if upheld, could have catastrophic consequences for

him. Given his assertion that he is the president of several companies and, presumably, not without financial resources, he would be well advised to retain counsel.

[24] For all of these reasons, I would dismiss the appeal. Given the failure of both parties to avail themselves of the solution available for problems related to document production, costs of the appeal should be costs in the cause.

"J.D. Denis Pelletier"

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J.A.

"I agree  
Johanne Gauthier J.A."

"I agree  
Wyman W. Webb J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-446-11

**APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE JUDITH WOODS OF THE TAX COURT OF CANADA DATED AUGUST 26, 2011, DOCKET NO. 2006-2031(IT)G**

**STYLE OF CAUSE:** WILLIAM JAMES LOUGHEED v.  
HER MAJESTY THE QUEEN

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** May 22, 2013

**REASONS FOR JUDGMENT BY:** PELLETIER J.A.  
**CONCURRED IN BY:** GAUTHIER J.A.  
WEBB J.A.

**DATED:** May 28, 2013

**APPEARANCES:**

William James Lougheed FOR THE APPELLANT, ON HIS  
OWN BEHALF

Bobby J. Sood and Brent E. Cuddy FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

William James Lougheed FOR THE APPELLANT, ON HIS  
St. Catharines, ON OWN BEHALF

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada