

Citation: 2007TCC62  
Date: 20070126  
Docket: 2005-1163(GST)G

BETWEEN:

COMMISSION SCOLAIRE DES PATRIOTES,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

**REASONS FOR ORDER**

Archambault J.

[1] On October 2, 2006, the Commission scolaire des patriotes (the "School Board") filed a Notice of Application for leave to file an amended Notice of Appeal, and attached that amended Notice of Appeal to its application.<sup>1</sup> In a letter dated September 27, 2006, the Respondent objected to the filing of this amended Notice of Appeal. However, at the hearing, the Respondent stated that she was not really objecting to the filing of such a notice, but was challenging the addition of paragraphs 25, 26, 27 and 29, and the inclusion of the alternative plea set out in paragraph 28. The paragraphs of the Amended Notice of Appeal state as follows:

[TRANSLATION]

25. Should this Honourable Court decide that the Minister did not exhaust his discretion by issuing the assessment of May 10, 2004, the Appellant respectfully submits that the exercise of its discretion on May 11, 2004, was patently unreasonable under the circumstances.

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<sup>1</sup> The Notice of Appeal amends the Notice of Appeal dated April 13, 2005.

26. Since subsection 64(3) of the *Budget Implementation Act, 2003* does not require the Minister to assess the Appellant according to the new retroactive rules, but confers a discretion on the Minister to do so, it was patently unreasonable for the Minister to ignore its consent to judgment, the judgment of this Honourable Court and the assessment that he issued on May 10, 2004, to give effect to it, by issuing a reassessment on May 11, 2004, aimed at cancelling what he had previously decided to allow.
27. Moreover, if the Minister never intended to honour his consent to this Honourable Court's judgment, the conduct of the Minister was patently unreasonable.
28. Should this Honourable Court decide that subsection 64(3) of the *Budget Implementation Act, 2003*, clearly authorizes the Minister to act as he did or that it shields the exercise of his discretion in the instant matter from judicial review, the Appellant respectfully submits that subsection 64(3) of the *Budget Implementation Act, 2003* is unconstitutional.
29. The Appellant submits that subsection 64(3) of the *Budget Implementation Act, 2003* did not authorize the Minister to undermine the credibility of the courts by asking them to render judgments that he had no intention of complying with, or by shielding the Minister from judicial review in the exercise of his discretion.

[2] To sum up, the real issue to be decided is whether it is appropriate to strike out those paragraphs. The parties made their submissions as though the Respondent had filed a motion to strike out a pleading.

[3] It is helpful to place this dispute in its factual context. The School Board claimed input tax credits (ITCs) under Part IX of the *Excise Tax Act* (ETA) for the period of April 1 to April 30, 1999, and the Minister granted only a part of those ITCs. The School Board appealed from the assessment, notice of which is dated September 2, 1999. It is of the view that it is entitled to a full refund. The same issue was dealt with in several court decisions, including *Commission scolaire Des Chênes v. Canada*, 2001 FCA 264, [2001] G.S.T.C. 120, a decision rendered by the Federal Court of Appeal on October 17, 2001, where it was held that school boards are entitled to a full refund of ITCs.<sup>2</sup> On February 18, 2003, the Minister of Finance tabled a budget that included a measure amending section 5 of Part III of Schedule V of the ETA, justifying, retroactively to December 17, 1990, the Respondent's

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<sup>2</sup> In addition, see my decision dated April 30, 2002, in *Commission scolaire de Victoriaville v. Canada*, [2002] G.S.T.C. 49, 2003 G.T.C. 889, particularly paragraphs 130 *et seq.* The School Board was one of the applicants in that decision.

interpretation that the Federal Court of Appeal had rejected in *Commission scolaire Des Chênes*.

[4] On March 7, 2003, the Minister and the School Board signed a consent to judgment in favour of the School Board. On April 14, 2003, I signed a judgment giving effect to this consent. On May 10, 2004, the Minister of National Revenue made an assessment giving effect to that judgment. On the following day, May 11, 2004, the Minister made a new assessment based on subsection 64(3) of the *Budget Implementation Act, 2003* (which enacted the aforementioned budget measure of February 18, 2003) extinguishing, by way of set-off, the School Board's entitlement to the refund granted on May 10, 2004. The School Board submits that the Minister did not have the power to make the assessment of May 11, 2004, because he had exhausted his discretion to do so on May 10, 2004, and that, if he had not exhausted that discretion, the latter assessment was an unreasonable exercise of discretion.

[5] On October 31, 2006, following a hearing that lasted more than four and a half hours and during which a dialogue was established between the Court and each of the attorneys, I rendered orally the following oral decision on the motions:

[TRANSLATION]

It is not this Court's responsibility to dispose of the merits of the argument made by counsel for the Commission scolaire des patriotes in paragraphs 25 to 29 of his Amended Notice of Appeal. Rather, this Court must merely decide whether the argument is patently erroneous beyond a reasonable doubt. While I am far from certain that the School Board's argument is well founded, I am not convinced of this beyond a reasonable doubt. In addition, I find that it would be appropriate, and in the best interests of justice, that this issue be decided by the judge who will hear the merits of the appeal. Therefore, the Court allows the School Board's application to amend its Notice of Appeal and dismisses the Respondent's application to strike out paragraphs 25 to 29 of the Amended Notice of Appeal. At the request of counsel for the Respondent, the Court grants 40 days in which to file the Reply to the Amended Notice of Appeal.<sup>3</sup>

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<sup>3</sup> The text has been amended for greater clarity and accuracy.

Signed at Ottawa, Canada, this 26th day of January 2007.

"Pierre Archambault"  
Archambault J.

Translation certified true  
on this 25th day of January 2008

François Brunet, Revisor

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The Queen  
PLACE OF HEARING: Montréal, Quebec  
DATE OF HEARING: October 31, 2006  
REASONS FOR JUDGMENT BY: The Honourable Justice Pierre Archambault  
DATE OF JUDGMENT: January 26, 2007

APPEARANCES:

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