Docket: 2010-3907(EI)

BETWEEN:

SYLVIE MORIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Counsel for the Appellant:	Daniel Payette
Counsel for the Respondent:	**Gabriel Girouard**

AMENDED ORDER

The appellant's application under subsection 15(1) of the Rules to have the Court allow the appeal under paragraph 15(2)(*c*) of the Rules is dismissed.

The respondent's motion for an extension of time to file the reply to the notice of appeal is dismissed.

The Court orders the hearing of the appeal given that the facts alleged in the notice of appeal are presumed to be true.

Signed at Ottawa, Canada, this 21st day of April 2011.

"Johanne D'Auray"

D'Auray J.

Citation:2011 TCC 218
Date: 20110421
Docket: 2010-3907(EI)

BETWEEN:

SYLVIE MORIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

AMENDED REASONS FOR ORDER

D'Auray J.

[1] In this appeal, two motions were filed following the late filing and service of the reply to the respondent's notice of appeal.

[2] The first motion was signed by counsel for the appellant on March 11, 2011, but only filed with this Court on March 22, 2011. The appellant requests that the Court allow the appeal, finding that the facts alleged in the notice of appeal entitle her to obtain the judgment sought under subsection 15(1) and paragraph 15(2)(*c*) of the *Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act* (**Rules**).

[3] The second motion was filed by the respondent. He is asking the Court for an extension of time to file the reply to the notice of appeal, pursuant to section 18.16 of the *Tax Court of Canada Act*.

[4] After these motions were filed, the Court received written submissions from the appellant objecting to the motion for an extension of time. These submissions

were filed with the Court on March 22, 2011, but signed by counsel for the appellant on March 16, 2011.

[5] On March 18, the respondent filed a reply to the written submissions objecting to the motion for an extension of time.

[6] In this case, the notice of appeal was filed on December 15, 2010. The reply to the notice of appeal was filed one day late on March 9, 2011. It should have been filed on March 8, 2011. The reply to the notice of appeal was served on March 16, 2011, eight days late.

Analysis

[7] Let us start with the respondent's motion to extend the time for filing the reply to the notice of appeal. The respondent argued:

> [TRANSLATION]
> It is a well-established principle that, pursuant to its inherent jurisdiction, this Court has the authority required to govern its own proceedings.[1]
>
> ---
>
> 1 *Canada (Attorney General) v. Scarola*, [2003] 4 F.C. 645, 2003 FCA 157, paragraph 8.
>
> Under paragraph 12(2)(*a*) of the *Tax Court of Canada Rules (Employment Insurance)*, in a case where the Minister does not expect to be able to meet the deadline, the Minister may file an application for an extension of time before the time limit expires. However, in the case at bar, the respondent's motion sought to have him relieved of accidental failure to file pleadings within the time limit.
>
> Consequently, the respondent filed his motion based on subsection 18.16(1) of the *Tax Court of Canada Act* and the inherent powers of this Court. Also, paragraph 15(2)(*d*) of the *Tax Court of Canada Rules (Employment Insurance)* grants this Court the power to give such other direction as is just when it receives a motion for judgment from the appellant following the Minister's failure to file his reply to the notice of appeal within the time limit.
>
> It should be noted that this Court has exercised its inherent powers on several occasions, drawing from the other rules of procedure of this Court or sections of its Act, to resolve procedural issues not addressed in a specific statutory provision.
>
> For example, in *Duchesne v. Minister of National Revenue*,[2] this Court relied on subsection 18.21(3) of the *Tax Court of Canada Act* to grant a motion in revocation of judgment in respect of employment insurance, even if this provision only governed appeals under the *Income Tax Act*. In *Biron v. Minister of National*

> *Revenue*,[3] it was held that this Court's general administrative power allowed it to also rely on subsection 18.21(3) of the *Tax Court of Canada Act* to dismiss a motion in revocation even if the dispute in question should be governed by the Rules of Practice and Procedure governing appeals to the Tax Review Board. There is another example in *Savoie v. Minister of National Revenue*,[4] where this Court had relied on subsection 172(2) of the *Tax Court of Canada Rules (General Procedure)* to dismiss a motion in revocation of judgment in respect of employment insurance. It should be noted that in all these cases, this Court allowed a motion for revocation of judgment to be filed despite the absence of any statutory provision expressly empowering this Court to allow such a motion to be filed.

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2 2004 TCC 304, 2004 CarswellNat 1325.
3 98 D.T.C. 1186 (TCC)
4 [1993] 2 C.T.C. 2330, 93 D.T.C. 555 (TCC)

[8] I do not agree with the respondent's arguments.

[9] Section 18.29 of the *Tax Court of Canada Act* identifies the provisions of the informal procedure applicable to employment insurance.

> **18.29** (1) The provisions of sections 18.14 and 18.15, other than the reference to filing fees, subsection 18.18(1), section 18.19, subsection 18.22(3) and sections 18.23 and 18.24 apply, with any modifications that the circumstances require, in respect of appeals arising under
>
> (*a*) Part I of the *Canada Pension Plan*;
>
> (*b*) Parts IV, VII and VII.1 of the *Employment Insurance Act*;
>
> (*c*) the *Old Age Security Act*, to the extent that a ground of the appeal involves a decision or determination as to income; and
>
> (*d*) the *War Veterans Allowance Act*, or Part XI of the *Civilian War-related Benefits Act* from an adjudication of the Veterans Review and Appeal Board as to what constitutes income or as to the source of income.

[10] We note that not all sections of the informal procedure in the *Tax Court of Canada Act* listed in section 18.29 apply to employment insurance.

[11] Employment Insurance just borrows certain sections of this procedure. In this regard, we note that section 18.16 of the *Tax Court of Canada Act*, which authorizes the Court to grant an extension of time before or after the expiration of the period for filing the reply to the notice of appeal in respect of income tax, is not included. Thus, section 18.16 does not apply to employment insurance.

[12] In addition, the Rules stipulate how the reply to the notice of appeal must be filed and served, and describe the consequences of late filing.

[13] Section 12 of the Rules governs the filing and service of the reply to the notice of appeal in respect of employment insurance.

> **12.** (1) The Minister shall reply in writing to every notice of appeal or notice of intervention filed in or mailed to a Registry under subsection 5(5) or 9(1).
>
> (2) (*a*) The Minister shall file the reply at the Registry and serve it on the appellant or intervener, or both, as the case may be, within 60 days from the day on which the notice of appeal or notice of intervention was served on the Minister, or within such longer time as the Court, on application made to it within those 60 days, may allow.

[14] We note that under section 12 of the Rules, an application to the Court to file a reply to the notice out of time must be made within 60 days of service of the notice of appeal to the Minister.

[15] If I were to extend the time limit based on section 18.16 of the *Tax Court of Canada Act* as the respondent is asking me to do, I would be flouting the established legal framework for employment insurance.

[16] The case law cited by the respondent regarding the Court's inherent jurisdiction to govern its own proceedings is irrelevant in this appeal.[1] In these judgments involving the revocation of judgment, the Court was guided by the Informal Procedure Rules and the General Procedure Rules. It was pointed out that there was no rule on the revocation of judgment in the Rules, which is not the case here, as sections 12, 14 and 15 of the Rules set out the time for filing and serving the reply to the notice of appeal and the legal consequences of doing so out of time.

[17] I agree with the appellant's argument that the time limit under subsection 12(1) of the Rules for filing a reply to the notice of appeal in respect of employment insurance is a period for extinction of right. Consequently, I cannot extend the time limit for filing and serving a reply to the notice of appeal after the expiration of the 60-day period.[2]

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[1] *R. v. Cunningham*, [2010] 1 SCR 331, *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] SCR 626

[2] **Although subsection 27(3) of the Rules stipulates that the Court may, where and as necessary in the interests of justice, dispense with compliance with any rule, the remedy provided in paragraph 15(2)(*b*) of the Rules is appropriate in this appeal.**

[18] The appellant's motion requests that the Court allow the appeal pursuant to paragraph 15(2)(*c*) of the Rules.

[19] Section 15 of the Rules states that when an application for judgment is before the Court after the reply to the notice of appeal has been filed out of time, the Court may:

> **15.** (1) Where a reply to a notice of appeal has not been served within the 60 days prescribed under paragraph 12(2)(*a*) or within such longer time as the Court may allow, the appellant may apply on motion to the Court for judgment in respect of the relief sought in the notice of appeal.
>
> (2) On the return of the application for judgment the Court may
> (*a*) [Repealed, SOR/2007-146, s. 7]
> (*b*) direct that the appeal proceed to hearing on the basis that facts alleged in the notice of appeal are presumed to be true,
> (*c*) allow the appeal if the facts alleged in the notice of appeal entitle the appellant to the judgment sought, or
> (*d*) give such other direction as is just.
>
> (3) The presumption in paragraph (2)(*b*) is a rebuttable presumption.

[20] In *Paulus v. British Columbia (Minister of Finance)*,[3] the appellant asked that the appeal be dismissed because of an administrative error. It should be noted that the judge had to grant the extension of time, deem the reply to the notice of appeal valid, or allow the appeal.

[21] The judge set forth the following tests to identify the most appropriate remedy:

- Was the delay excessive?
- Was there a satisfactory reason for the delay?
- Was the request to remedy the breach made as quickly as possible?
- Did the appellant suffer serious prejudice?

[22] In this case, we cannot say the delay was excessive. The reply to the notice of appeal was filed one day late, and the reply was served eight days late.

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[3] *Paulus v. British Columbia (Minister of Finance)*, [1990] 1 TCC 322

[23] As to whether the delay was justified, Ms. Bienvenue's affidavit for the respondent indicated an administrative error: she had been absent from the office. That said, her affidavit did not mention the application she received from the appellant on March 11, 2011, requesting that the judgment be allowed. Moreover, the affidavit also did not deal with service on the appellant, which also had to be made within 60 days of service of the notice of appeal on the Minister, especially since, as a result of waiting until the last day to file, it was impossible to meet the service deadlines by using mail. We do not know how long Ms. Bienvenue was absent. Had she asked a colleague to look after her files while she was away? It cannot be said that there was a satisfactory reason for the delay.

[24] The application for an extension of time was filed when Ms. Bienvenue returned to her office. The time between serving and filing of the reply to the notice of appeal was surely attributable to the fact that the reply was filed electronically and served by mail.

[25] The issue of serious prejudice was not raised by the appellant, so it is difficult to say that the appellant suffered serious prejudice.

[26] It should also be noted that in *Paulus*, Justice Colliver did not have the option provided for in paragraph 15(2)(*b*) of the Rules, and the time limit for filing the reply to the notice of appeal was not a period for extinction of right.

[27] After having reviewed the tests, I am of the opinion that the appropriate remedy in this appeal is to direct that the appeal proceed to hearing on the basis that the facts alleged in the notice of appeal are presumed to be true under paragraph 15(2)(*b*).

[28] The appellant's application under subsection 15(1) of the Rules to have the Court allow the appeal by finding that the facts alleged in the notice of appeal give the appellant the right to obtain the judgment sought pursuant to paragraph 15(2)(*c*) of the Rules is dismissed.

[29] The respondent's motion for an extension of time to file the reply to the notice of appeal is dismissed.

[30] The Court orders the hearing of the appeal given that the facts alleged in the notice of appeal are presumed to be true.

Signed at Ottawa, Canada, this 21st day of April 2011.

"Johanne D'Auray"

D'Auray J.

CITATION:	2011 TCC 218
COURT FILE NO.:	2010-3907(EI)
STYLE OF CAUSE:	SYLVIE MORIN AND M.N.R.
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF AMENDED ORDER:	April 21, 2011
DATE OF AMENDED REASONS:	April 21, 2011

COUNSEL OF RECORD:

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Firm:	
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