

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20121214**

**Docket: A-349-12**

**Citation: 2012 FCA 330**

**CORAM: EVANS J.A.  
STRATAS J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**MICHAEL EDWARDS**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on December 10, 2012.

Judgment delivered at Ottawa, Ontario, on December 14, 2012.

**REASONS FOR JUDGMENT BY:**

**EVANS J.A.**

**CONCURRED IN BY:**

**STRATAS J.A.  
MAINVILLE J.A.**

**Federal Court of Appeal**



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**BETWEEN:**

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**Appellant**

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

[1] This is an appeal by Michael Edwards from a decision of the Tax Court of Canada (2012 TCC 264), dated July 23, 2012, in which Justice Woods (Motions Judge) dismissed his motion to adjourn the hearing of his Tax Court appeal. The appeal had been set down for November 26, 2012, and was scheduled to last for five days.

[2] Mr. Edwards brought his motion in the context of his appeal from an assessment for the 2003 taxation year to disallow a charitable donation of \$10,000. He had made the donation under a

leveraged donation program, “The ParkLane Charitable Donation Program,” in which, for an outlay of \$3,150, he received a tax receipt for \$10,000 from the charity of his choice.

[3] Approximately 18,000 taxpayers participated in this and similar programs, about 8,000 of whom have been reassessed. The amount of the donations to these programs is around \$500 million. Mr. Edwards’ case was selected as the lead case for eight other appeals which are being held in abeyance pending the outcome of this appeal, but without being bound. And, the Motions Judge found (at para. 4), “thousands of other taxpayers are waiting in the wings.”

[4] Mr. Edwards requested an adjournment of twelve months pending the enactment of proposed amendments to the *Income Tax Act*, R.S.C. 1985, c 1 (5th Supp.) concerning the tax treatment of charitable gifts. In certain circumstances, they allow a taxpayer to claim a charitable deduction in respect of a portion of a donation to a charity where the value of the donation exceeds the value of the benefit received. He said that, if enacted, the proposed amendments might assist him either to reach a settlement with the Minister of National Revenue or to win his appeal. The Budget of March 2012 indicated the Government’s intention to enact the proposed amendments, which would be made retroactive to December 2002, when they were first announced.

[5] Even though the proposed amendments have not been enacted, the Canada Revenue Agency (CRA) has been applying them as if they were already law, and has stated that taxpayers may rely on CRA guidelines issued on December 24, 2002 explaining its administration of the proposed amendments. However, the CRA has refused to give Mr. Edwards the benefit of the proposed amendments because, it says, the circumstances of his donation take it outside their scope. Because

the proposed amendments are not law, Mr. Edwards cannot appeal an assessment to challenge the Minister's view that they do not apply to the facts of his case.

[6] After carefully reviewing the facts of the case and the factors relevant to the exercise of the discretion to grant an adjournment, the Motions Judge concluded that the potential prejudice to Mr Edwards in proceeding with the appeal before the proposed amendments were enacted was outweighed by the prejudice to the public interest in the timely conduct of tax litigation. In this latter regard, she noted that the appeal concerns a 2003 taxation year assessment and that it had originally been set down for hearing in 2010.

[7] Because it was uncertain whether or when the proposed amendments would be enacted, or whether, even if enacted, they applied to Mr Edwards' situation, the Motions Judge did not regard this case as "a rare circumstance" (*Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2004 FCA 354 at para. 3) in which an adjournment should be granted pending the enactment of legislation that could affect the outcome of an appeal.

[8] On the basis of the material before her, the Motions Judge did not, in my view, make any error in principle, misapprehend the facts or otherwise reach an unreasonable decision in the exercise of the broad discretion conferred on a judge by section 137 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a to adjourn a hearing "on such terms as are just".

Appellate courts are rightly deferential to the discretionary decisions of Tax Court Judges, including on motions to adjourn, because they are generally in the best position to assess all the circumstances of the litigation.

[9] However, in a letter dated December 5, 2012, 5 days before the hearing of this appeal, counsel for Mr. Edwards filed a supplementary book of authorities, which disclosed that the proposed amendments, together with other technical amendments to the *Income Tax Act*, were included in *Bill C-48*, which received first reading on November 26, 2012.

[10] In my view, this is a new fact that was not, and could not have been, put before the Motions Judge when she dismissed the motion for adjournment on July 23, 2012. It is a fact that might well have caused her to decide the motion differently, because it is highly probable that the proposed amendments will be enacted next year, especially since the Government now has a majority in both the House of Commons and the Senate.

[11] In addition, if Mr Edwards' appeal were heard before the proposed amendments became law and decided on the basis of the existing law, another lead case would be selected to litigate the issues in dispute on the basis of the proposed amendments as enacted. Refusing an adjournment of Mr Edwards' Tax Court appeal now will thus not promote judicial economy.

[12] Since the introduction of *Bill C-48* substantially reduces the uncertainty about the enactment of the proposed amendments, the requested adjournment will cause less prejudice to the public interest in the timely administration of justice. In any event, dismissing the appeal might well not have avoided further delay because it is not clear that the Tax Court could reschedule a hearing within the next twelve months.

[13] For these reasons, I would allow the appeal and adjourn the hearing of Mr. Edwards' Tax Court appeal until November 26, 2013, or such earlier date as the proposed amendments are enacted, defeated or withdrawn. This is the length of the adjournment that Mr Edwards' counsel proposed to us. Counsel also undertook not to seek another adjournment of the appeal if the proposed amendments are not enacted by November 26, 2013. Absent extraordinary circumstances, no further adjournments should be granted in this matter.

[14] I would add that there seems something fundamentally unfair in the CRA's administration of proposed amendments to the *Income Tax Act* for the past ten years as if they were already law. A taxpayer is not able to challenge a decision by the CRA that the proposed amendments do not apply to the circumstances of the taxpayer. I emphasize, however, that I am expressing no view as to whether Mr. Edwards will benefit from the proposed amendments when and if they are enacted.

[15] Mr. Edwards has also appealed the Tax Court's refusal to award him his reasonable and proper costs of the motion. In an Order dated May 23, 2008, then Chief Justice Bowman allowed the Crown's motion that the appeal be removed from the *Informal Procedure Rules* of the Tax Court to the *General Procedure Rules*. Pursuant to subsection 18.11(6) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, he ordered that the Crown should bear Mr Edwards' reasonable and proper costs in the appeal.

[16] The Motions Judge gave no reasons for not awarding Mr Edwards his costs on the motion, despite the earlier Order of Bowman C.J. Counsel for the Crown conceded before this Court that the only basis on which the Motions Judge could properly have ordered that the parties bear their own

costs that was consistent with Bowman C.J.'s Order, was that she did not consider Mr. Edwards' costs in bringing the motion for an adjournment to be "reasonable and proper."

[17] In the absence of reasons for a Motions Judge's exercise of discretion, the Court may decide the issue *de novo*, and make the order that the Motions Judge should have made. I am not persuaded that Mr. Edwards' motion for an adjournment was frivolous or otherwise improper, despite the length of time that it has taken to bring the Tax Court appeal this far. Accordingly, I would award costs of the motion in the Tax Court to Mr Edwards.

[18] For these reasons, I would allow the appeal with costs to Mr. Edwards in this Court and below, set aside the Order of the Motions Judge, and adjourn the hearing of the Tax Court appeal until November 26, 2013 or such earlier time as the proposed amendments are enacted, defeated or withdrawn.

"John M. Evans"

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J.A.

"I concur  
David Stratas J.A."

"I concur  
Robert M. Mainville J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-349-12

**STYLE OF CAUSE:** Michael Edwards v. Her Majesty  
The Queen

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 10, 2012

**REASONS FOR JUDGMENT BY:** EVANS J.A.

**CONCURRED IN BY:** STRATAS AND MAINVILLE  
J.J.A.

**DATED:** December 14, 2012

**APPEARANCES:**

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