

Tax Court of Canada Rules 58 and 91 - Sas Ansari

Author : admin

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3488063 *Canada Inc v Canada*, [2016 FCA 233](#)

This case has a long procedural and factual history that will not be repeated here. The appeal issues included whether the Tax Court of Canada properly dismissed the Rule 58 and 91 ([Tax Court of Canada Rules, General Procedure](#)) applications brought before it.

ANALYSIS

Rule 58 provides that a Court may grant an order to determine a question of law or mixed fact and law before a full hearing, and Rule 91 provides that, where the conditions are satisfied, a judge may grant certain remedies (including allow an appeal). Both rules provide for discretionary decisions by a Judge (para 32). The appeal also wanted to review a decision with respect to amendments of pleadings, also a discretionary decision - *Merck & Co., Inc. v. Apotex Inc.*, [2003 FCA 488](#).

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Standard of Review

The Federal Court of Appeal stated that, in reviewing the decisions of the TCC Judge, the Judge was to be shown deference in relation to discretionary decisions (para 34). An Appeal Court is not to interfere with such decisions lightly unless the judge made an error of law or an obvious serious error (para 34) - *Turmel v. Canada*, [2016 FCA 9](#), para 12; *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, [2016 FCA 215](#); *Housen v. Nikolaisen*, [2002 SCC 33](#), [2002] 2 S.C.R. 235. The standard of review is correctness for questions of law and palpable and overriding error for questions of fact.

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Rule 91

Here, the CRA failed to have a policy in place to ensure that the email messages of employees, now retired, were properly retained. Rather, the retiring employees themselves determine what

emails should be archived and not destroyed. The CRA stated that (para 39):

It would seem to me that any party to litigation or potential litigation should have an adequate policy in place to ensure that potentially relevant documents are not destroyed. In particular, once a notice of objection has been served on the Minister, the Canada Revenue Agency should ensure that the email accounts of those involved are preserved and a policy is in place to ensure that such emails will be available for disclosure if they are determined to be documents that are to be disclosed in relation to any subsequent litigation before the Tax Court of Canada.

That said, the relevant matter was not the conduct of the CRA, but the procedural history and the provisions of the ITA (rules that deal with assessments and appeals).

The Court examined the difference between a party's disclosure obligations under Rule 82 versus under Rule 81. Unlike Rule 82, a party is only required by Rule 81 to provide a list of those documents that such party would be proposing to use either to establish its case or to attach the case of the other side, NOT a list of all relevant documents that may have been in a party's possession or control (para 43). Where appeals are joined, how do these rules interact?

The FCA also noted that the remedies that a Tax Court can grant under section 171 of the ITA, on appeal to it, relate to a particular assessment or reassessment. As such, even where joined, each assessment remains a separate assessment for purposes of an appeal (para 48), and concluded (para 51):

As noted above, each assessment that is under appeal to the Tax Court of Canada retains its separate identity throughout the Tax Court process with respect to the merits of the assessment. Because each assessment retains its separate identity, it would seem to me that each appeal of a particular assessment would also retain its identity as a separate appeal with respect to the merits of the appeal. Since the *Act* provides that an appeal relates to a particular assessment, this one to one relationship of an appeal to an assessment with respect to the merits of such assessment or appeal cannot be altered by the *Rules*.

The [Rules](#) can, however, consolidate or merge appeal in relation to procedural steps applicable to all appeals subject to the consolidation order. Once consolidated, the appeals will proceed as one for purposes of the [Rules](#) and each step under the [Rules](#) will apply equally to each appeal

part of the consolidated proceedings (including one list of documents applying to all appeals) (para 52). The allowance of an appeal under Rule 91, since in relation to a particular assessment, can only operate in relation to a breach of a Rule in respect to an appeal of a particular assessment (para 54). The application of Rule 91 is restricted to appeals that were before the Court when the misconduct occurs and to which the misconduct relates, not later joined appeals (para 59).

Rule 58

The review of a Rule 58 application must consider the particular statutory provision involved in the dispute (para 61). The FCA agreed with the TCC that the matter could not be resolved prior to a full hearing.

Amendments to Replies

This was dealt with in paras 65 -69, not summarized here.

Sas Ansari, BSc BEd PC JD LLM PhD (exp) CPA In-Depth Tax 1, 2 &3

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