Section de première instance de
la Cour fédérale du Canada

Federal Court of Canada
Trial Division

SEP 0 2 1997

T-1481-97

97 245 099

Between:

THE MINISTER OF NATIONAL REVENUE,

Applicant,
(Respondent-on-motion)

- and -

DEBRA CALB,

Respondent
(Applicant-on-motion)

REASONS FOR ORDER

Muldoon, J.

The respondent, (applicant-on-motion) Debra Calb (hereinafter, the respondent or Mrs. Calb) will, by order ***nunc pro tunc***, be shown in the style of cause as Debra Lynn Calb.

This matter came on once again for hearing on August 13, 1997, by tele-video-conference technology with counsel for each party being in Toronto, appearing before the Court in Ottawa.

Counsel had apparently agreed, but not too clearly, to litigate the review of a July 10, 1997 "jeopardy order" pronounced by this judge pursuant to section 225.2 of the ***Income Tax Act*** commencing on July 28, 1997 in Toronto. The respondent's application for review had been filed on July 23, 1997, so first of all, the Minister's counsel waived the statutory six days' notice to which she was entitled.

Prior to that hearing on July 28, 1997, the registry notified the respondent's solicitors and counsel that the judge available to hear her review application was the very judge who pronounced the jeopardy order on July 10, previously. This judge thought it proper to direct that notification of his identity before the matter came on for hearing. Nevertheless, the respondent's counsel persisted in bringing on the review before this judge instead of seeking to adjourn the hearing to another day and another judge.

The hearing, as it turns out, and as each party's counsel well knew, was ripe for adjournment, but the respondent's counsel did not seek an adjournment. Furthermore, both counsel were most unclear as to how they wished, apparently by agreement, to proceed. It seemed to the Court that there were two parts to the application. Because the respondent's husband, Edward Calb had then recently filed an affidavit sworn on July 23, 1997, the Minister's counsel sought, as she was entitled to do, to cross-examine Mr. Calb on his affidavit. An adjournment was needed for that purpose, and it ought to have been the adjournment of the whole hearing to another day and another judge.

The Court was given by counsel to understand that Edward Calb's affidavit was in support of some part of the respondent's unclear and redundant notice of motion which was intended to operate pursuant to rule 330 of this Court. Thereupon this Court expressed doubt, because of the exclusiveness of section 225.2 of the ***Income Tax Act***, that the Court's own rules could purport to give a second remedy in regard to the statutory ***ex parte*** jeopardy order, and the Court declined to entertain any such proceeding for review pursuant to the rules, as distinct from the Act. The parties' respective counsel seemed to be content to adjourn that matter with cross-examination of Mr. Calb to another day. Nothing was said or resolved about another judge. It now seems that the Court misapprehended what counsel were trying to convey, or counsel have now revised what they wanted to convey. The Court's misapprehension was not made up out

of whole cloth: it is corroborated by the respondent's solicitor, Salvador M. Borraccia, who, in his affidavit sworn on August 8, 1997, deposes:

> 2. On July 25th, 1997, Debra Calb brought a motion under section 225.2 of the ***Income Tax Act*** and Rule 330 of the ***Federal Court Rules*** for a review of an ***ex parte*** order. The motion was scheduled for July 28th, 1997.

Mr. Borraccia was present in the courtroom throughout the proceedings on July 28, 1997.

In paragraph 3 of his said affidavit, Mr. Borraccia, said the respondent's counsel, agreed (with the applicant's counsel, presumably to adjourn "provided that we could proceed with just that part of our client's motion regarding the admissibility of the evidence initially before Mr. Justice Muldoon, which did not require further evidence or cross-examination." Of course, counsel ought not to have persisted in litigation by instalment, especially because the review under the ***Income Tax Act*** is required to be summary, not that summary proceedings cannot be adjourned for completion.

However, counsel not only persisted in going on with the part hearing of the review, but asked for an order to dispose of that first instalment. Such is confirmed by Mr. Borraccia's affidavit in which he swears, still in paragraph 3:

> We all agreed [see exhibit A] that, if we succeeded on that issue, the balance of the motion would be moot anyway.

Their understanding was wrong in law, according to Mr. Justice MacKay's decision in ***R. v. Satellite Earth Station***, (1989) 43 DTC 5506 at p. 5510.

However, on this now apparently faulty understanding what counsel were trying to convey, somewhat inarticulately, to the Court, on Tuesday, July 29, 1997, this Court issued an order dismissing the respondent's review application in regard to the ***ex parte*** order under section 225.2 of the ***Income Tax Act***.

Then, the respondent's counsel sent two successive letters to the Court to say: "No, no, that is not what we meant to say to you about our agreement" or words certainly to that effect.

Subsequently the Court untangled the snarl and permitted the litigation to proceed to its second instalment. However, the duty judge before whom the matter was brought protested that she would have no jurisdiction to adjudicate the parties' second instalment, because, the review having been merely adjourned for completion and being an integral codified proceeding, this judge is seized of the matter. That colleague certainly appears to be absolutely correct in her assessment of the matter.

Understandably, the respondent who sought a judicial conclusion to the first instalment in which her lawyer persisted, no doubt believing that success would attend her, is reluctant to bring the second instalment before the same judge who pronounced the jeopardy order of July 10, 1997 and who unsuccessfully adverted to his being the only judge available to hear her review application on July 28, 1997. This is the same judge who dismissed the first instalment of her review proceeding.

Being seized of the review application upon its adjournment, and being informed by the respondent's counsel that his client apprehends bias, the Court, with the agreement of both counsel, adjourned this hearing of the second instalment ***sine die***.

This case certainly emphasizes the need for the Court to be assertive in public law cases, as this one is, and not to accept the Crown's or the government's consent to unusual procedures without demanding cogent reasons. Courts want to be able to rely on the lawyers who appears before the Court for their presumed professional skill and because they are officers of the Court. Here the Court did express misgivings about the urged manner of proceeding, but was

not hard-headed enough to thwart counsel. Accordingly, no costs are awarded to either party in these proceedings.

F.C. Muldoon

Judge

Ottawa, Ontario

August 13, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-1481-97
STYLE OF CAUSE:	DEBRA LYNN CALB v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	AUGUST 13, 1997
REASONS FOR JUDGMENT OF THE HON. MR. JUSTICE MULDOON	
DATED:	AUGUST 13, 1997

APPEARANCES:

CELIA RASBACH	FOR APPLICANT
JAMES HOLLOWAY SALVADOR BORRACCIA	FOR RESPONDENT

SOLICITORS OF RECORD:

GEORGE THOMSON DEPUTY ATTORNEY GENERAL FOR CANADA	FOR APPLICANT
BAKER & McKENZIE	FOR RESPONDENT

6P