Docket: 2004-4073(IT)G

BETWEEN:

PATRICK JOSEPH EMILE BURKE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Motion heard by Conference Call on November 28, 2008

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kathleen Lyons

ORDER

The Application by the Appellant to set aside the judgment of this Court dated August 15, 2008 dismissing the Appellant's appeal, is allowed and the judgment of this Court dated August 15, 2008 dismissing the Appellant's appeal is set aside. The costs of this Motion shall be in the cause.

Signed at Halifax, Nova Scotia, this 21st day of December 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC680
Date: 20081221
Dockets: 2004-4073(IT)G

BETWEEN:

PATRICK JOSEPH EMILE BURKE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR ORDER

Webb J.

[1] This is an application by the Appellant to set aside the Order of this Court dated August 15, 2008 dismissing the Appellant's appeal. This Order was granted following the failure of the Appellant to appear at the hearing of his appeal scheduled for August 5, 2008.

[2] The *Tax Court of Canada Rules (General Procedure)* apply in this case and paragraph 140 of these *Rules* provides as follows:

> 140. (1) If at a hearing, either party fails to appear, the Court may allow the appeal, dismiss the appeal or give such other direction as is just.
>
> (2) The Court may set aside or vary, on such terms as are just, a judgment or order obtained against a party who failed to attend a hearing, a status hearing or a pre-hearing conference on the application of the party if the application is made within thirty days after the pronouncement of the judgment or order.

[3] The Appellant wrote to the Court on September 8, 2008 to request that his appeal be reinstated. However, no affidavit accompanied the Appellant's letter.

[4] In *Farrow v. The Queen*, [2003] T.C.J. No. 713, [2004] 2 C.T.C. 2223, 2004 DTC 2055, then Associate Chief Justice Bowman described the principles that

would be applied in setting aside a default judgment:

> 17 The principles upon which the court will set aside a default judgment are discussed further in Hamel, (supra). At pages 117-118 Culliton, C.J.S. said:
>
> > The principles upon which a court in its discretion will act to set aside a judgment legally entered were set forth by Lamont, J.A. in Klein v. Schile, [1921] 2 W.W.R. 78, 14 Sask. L.R. 220, when he said at p. 79:
> >
> > > **The circumstances under which a Court will exercise its discretion to set aside a judgment regularly signed are pretty well settled.** The application should be made as soon as possible after the judgment comes to the knowledge of the defendant, but mere delay will not bar the application, unless an irreparable injury will be done to the plaintiff or the delay has been wilful. *Tomlinson v. Kiddo* (1914) 7 WWR 93, 29 WLR 325, 7 Sask LR 132; Mills v. Harris & Craske (1915) 8 WWR 428, 8 Sask LR 114. **The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits.** Chitty's Forms, 13[th] ed., p. 83.
> >
> > > It is not sufficient to merely state that the defendant has a good defence upon the merits. The affidavits must show the nature of the defence and set forth facts which will enable the Court or Judge to decide whether or not there was matter which would afford a defence to the action. *Stewart v. McMahon* (1908) 7 WLR 643, 1 Sask LR 209.
> >
> > > If the application is not made immediately after the defendant has become aware that judgment has been signed against him, the affidavits should also explain the delay in making the application; and, if that delay be of long standing, the defence on the merits must be clearly established. *Sandhoff v. Metzer* (1906) 4 WLR 18 (N.W.T.).
> >
> > > (emphasis added)

[5] Then Associate Chief Justice Bowman also made the following comments:

> 15…..I agree that the court must be satisfied that a litigant who seeks to have a default judgment set aside has an arguable case, but the threshold is a relatively low one. I do not think a litigant needs to testify or call evidence to show that there is a prima facie case. Moreover, it does not add much to the strength of the applicant's case for him or his solicitor to make the self-serving statement “I believe that I have a good case”.

[6] In *Amethyst Greenhouses Ltd. v. The Queen* 2006 TCC 575, 2006 DTC 13 (Eng.), [2007] 1 C.T.C. 2323, Justice Sheridan summarized this as follows:

> 6 The hurdle the Appellant faces in this motion is to show that its appeals disclose an arguable case on the merits and that the circumstances in which its failure to appear arose justify the setting aside of the default judgment.

[7] The Appellant, in his affidavit, needed to address the following two issues:

(a) the reasons why he failed to appear at his hearing; and

(b) that he has an arguable case.

[8] The Appellant in his affidavit indicated that he has had several health issues for many years and that this was compounded approximately two months before the hearing date by the discovery of an 18 cm soft tissue mass in his chest. The stress of not knowing whether this mass was malignant or benign caused the Appellant to lose his focus on personal matters including the date of his hearing. I accept that his affidavit satisfactorily dealt with the first issue noted above with respect to the reasons for his failure to appear.

[9] The next issue is whether the Appellant has an arguable case. The facts, as assumed by the Respondent in the Amended Reply, are that:

a) The Appellant owned a locked in RRSP that could not be cashed in before the age of 65.

b) The Appellant opened a self directed RRSP account, being Plan 22110723-15 with “Investor Line” as the designated Trustee;

c) The Appellant transferred his locked in RRSP to the Investor Line account (the “trust”);

d) On January 27, 1999 the Appellant signed a direction to Investor Line to buy 80,000 Class A shares in First-One Investments Corp. (“First One”);

e) deleted

f) the only activity of First One is to receive funds to buy shares in Total Success Systems (“TSS”) or to loan money to the owners of RRSPs who invest in First One;

g) On February 25, 1999 the Appellant received a loan from Total Success Systems (“TSS”) for $56,000;

h) On March 4, 1999 First One issued a cheque for the sum of $45,280 to the

Appellant;

i) The fair market value of the 80,000 Class A shares as of January 29, 1999, the date of acquisition, was $80,000.

[10] The issue as identified by the Appellant in his Notice of Appeal, was as follows:

c) The tax was based on a loan that the *(sic)* respondent received from First-One Investments and is basing the appeal on the fact it was a loan. In addition, the amount of moneys received by the *(sic)* respondent was less than $20,000.

d) The issue is whether this is a qualified investment or whether a loan should be taxable.

[11] The issue as identified in the Amended Reply is:

14….whether the investment made by Investor Line, on behalf of the Appellant's RRSP, in First One is a non-qualified investment according to paragraph 146(10)(a) of the *Act*.

[12] An alternative issue was identified in paragraph 15 of the Amended Reply:

Alternatively, the issue is whether the trust was used or permitted to be used, the property of the trust as security for a loan pursuant to 146(10)(b) of the *Act*.

[13] Subsection 146(10) of the *Income Tax Act* provides as follows:

(10) Where at any time in a taxation year a trust governed by a registered retirement savings plan

(a) acquires a non-qualified investment, or

(b) uses or permits to be used any property of the trust as security for a loan,

the fair market value of

(c) the non-qualified investment at the time it was acquired by the trust, or

(d) the property used as security at the time it commenced to be so used,

as the case may be, shall be included in computing the income for the year of the taxpayer who is the annuitant under the plan at that time.

[14] A non-qualified investment is defined as an investment that is not a qualified investment as defined in subsection 146(1) of the *Income Tax Act*. There is a detailed list of investments that would be qualified investments in section 4900 of the *Income Tax Regulations*.

[15] The Appellant needed to show that he had an arguable case in relation to the issue of whether the Class A shares of First One Investments Corp. ("First One") were a qualified investment for an RRSP. Whether the Appellant has an arguable case will depend, in this case, on whether the Appellant or the Respondent would have the onus of proof.

[16] The first two paragraphs of the Appellant's affidavit following the heading "Merits of proceeding with this case" are as follows:

> 12. I wish to state my case in this Honourable Court because there are relevant facts that need to be brought forward.
>
> 13. The facts in my situation are analogous to existing decisions from this Honourable Court. My position has been, and will be, that the money advanced to me in the initial agreement was a loan, and therefore not taxable.

[17] The issue is not, however, whether the Appellant received a loan but whether the Class A shares of First One were a qualified investment. In the remaining paragraphs of his affidavit, the Appellant deals with the repayment of the loan he received, his dealings with the Canada Revenue Agency and other matters not related to the issue of whether the shares of First One were a qualified investment. The Appellant does not address this issue in his affidavit.

[18] At the conclusion of the conference call related to the Appellant's motion, I allowed the Appellant an additional two weeks to submit a supplementary affidavit to address this issue. The Appellant did not submit a supplementary affidavit but did submit a letter. Without realizing it the Appellant did raise an interesting issue. The issue is whether the Appellant or the Respondent would have had the onus of proving that the shares of First One were a qualified investment (or conversely were not a qualified investment).

[19] Counsel for the Respondent has assumed that the Appellant would have the onus of proving that these shares were a qualified investment. In the recent decision of the Federal Court of Appeal in *Anchor Pointe Energy Ltd.* 2007 FCA 188 Létourneau J.A. stated that:

> [35] It is trite law that, barring exceptions, the initial onus of proof with respect to assumptions of fact made by the Minister in assessing a taxpayer's liability and quantum rests with the taxpayer. ...
>
> [36] I agree with Bowman A.C.J.T.C., as he then was, that there may be instances where the pleaded assumptions of facts are exclusively or peculiarly within the Minister's knowledge and that the rule as to the onus of proof may work so unfairly as to require a corrective measure: see *Holm et al. v. The Queen, supra,* at paragraph 20.

[20] In this particular case there is no suggestion that the Appellant had any involvement with First One other than as an investor through his RRSP. Is this a situation where "the rule as to the onus of proof may work so unfairly as to require a corrective measure"? How could the Appellant be expected to bring forth the evidence that would be required to establish that the shares of First One were a qualified investment for an RRSP?

[21] There is no indication that First One is a public company. Therefore if the shares were to qualify as a qualified investment presumably the shares would have had to satisfy the provisions of either subsection 4900(6) or subsection 4900(12) of the *Income Tax Regulations*. The investment only has to satisfy the requirements of one of these subsections, not both. Since an eligible corporation for the purposes of subsection 4900(6) of the *Income Tax Regulations* will not include "a corporation the principal business of which is the lending of money" (subsection 5100(1) of the *Income Tax Regulations*), the provisions of subsection 4900(12) of the *Income Tax Regulations* will be examined. Subsection 4900(12) of the *Income Tax Regulations* provides as follows:

> (12) For the purposes of paragraph (d) of the definition "qualified investment" in subsection 146(1) of the Act, paragraph (e) of the definition "qualified investment" in subsection 146.1(1) of the Act and paragraph (c) of the definition "qualified investment" in subsection 146.3(1) of the Act, a property is prescribed as a qualified investment for a trust governed by a registered retirement savings plan, a registered education savings plan or a registered retirement income fund at any time if, at the time the property was acquired by the trust,
>
> > (a) the property was a share of the capital stock of a corporation (other than a cooperative corporation) that would, at that time or at the end of the last taxation year of the corporation ending before that time, be a small business corporation if the expression "Canadian-controlled private corporation" in the definition "small business corporation" in subsection 248(1) of the Act were read as "Canadian corporation (other than a corporation controlled at that

> time, directly or indirectly in any manner whatever, by one or more non-resident persons)",
>
> (b) the property was a share of the capital stock of a venture capital corporation described in any of sections 6700, 6700.1 or 6700.2, or
>
> (c) the property was a qualifying share in respect of a specified cooperative corporation and the plan or fund
>
> and, immediately after the time the property was acquired by the trust, each person who is an annuitant, a beneficiary or a subscriber under the plan or fund at that time was not a connected shareholder of the corporation.

[22] To satisfy the conditions as set out in subsection 4900(12) of the *Income Tax Regulations*, the corporation (First One) must satisfy certain tests and the shareholder must satisfy certain tests (i.e. the Appellant must not be a connected shareholder). In particular, First One would have to be a small business corporation either at the time the shares were acquired or at the end of the last taxation year of First One ending before that time. Subsection 4900(12) of the *Income Tax Regulations* refers to a "small business corporation" and not an "eligible corporation". The definition of "small business corporation", as modified by Subsection 4900(12) of the *Income Tax Regulations* is as follows:

> "small business corporation", at any particular time, means, subject to subsection 110.6(15), a particular corporation that is a [Canadian corporation (other than a corporation controlled at that time, directly or indirectly in any manner whatever, by one or more non-resident persons)] all or substantially all of the fair market value of the assets of which at that time is attributable to assets that are
>
> (a) used principally in an active business carried on primarily in Canada by the particular corporation or by a corporation related to it,
>
> (b) shares of the capital stock or indebtedness of one or more small business corporations that are at that time connected with the particular corporation (within the meaning of subsection 186(4) on the assumption that the small business corporation is at that time a "payer corporation" within the meaning of that subsection), or
>
> (c) assets described in paragraphs (a) and (b),
>
> including, for the purpose of paragraph 39(1)(c), a corporation that was at any time in the 12 months preceding that time a small business corporation, and, for the purpose of this definition, the fair market value of a net income stabilization account shall be deemed to be nil;

[23] Active business is defined in subsection 248(1) of the *Income Tax Act* as follows:

> "active business", in relation to any business carried on by a taxpayer resident in Canada, means any business carried on by the taxpayer other than a specified investment business or a personal services business;

[24] A specified investment business is defined in subsection 125(7) of the *Income Tax Act* as follows:

> "specified investment business" carried on by a corporation in a taxation year means a business (other than a business carried on by a credit union or a business of leasing property other than real property) the principal purpose of which is to derive income (including interest, dividends, rents and royalties) from property but, except where the corporation was a prescribed labour-sponsored venture capital corporation at any time in the year, does not include a business carried on by the corporation in the year where
>
> (a) the corporation employs in the business throughout the year more than 5 full-time employees, or
>
> (b) any other corporation associated with the corporation provides, in the course of carrying on an active business, managerial, administrative, financial, maintenance or other similar services to the corporation in the year and the corporation could reasonably be expected to require more than 5 full-time employees if those services had not been provided;

[25] There are very few facts related to First One that are disclosed in either the Notice of Appeal or the Amended Reply. The only fact as stated in the Amended Reply that relates to the activity of First One is that "the only activity of First One is to receive funds to buy shares in Total Success Systems ("TSS") or to loan money to the owners of RRSPs who invest in First One". There is no indication whether this activity or the activity of TSS was a business or whether First One or TSS had more than five full time employees. There is also no indication whether TSS was related to or connected with First One. It should be noted that the definition of active business in subsection 248(1) of the *Income Tax Act* does not include a reference to an adventure or concern in the nature of trade, which is to be contrasted with the definition of "active business carried on by a corporation" in subsection 125(7) of the *Income Tax Act* which does include an adventure or concern in the nature of trade. It is the definition of "active business" in subsection 248(1) of the *Income Tax Act* and not the definition of "active business carried on

by a corporation" in subsection 125(7) of the *Income Tax Act* that would be relevant in this case.

[26] The facts as assumed by the Respondent in the Amended Reply are not sufficient to make any determination of whether the activities of First One were a business or whether First One had more than five full time employees. If a corporation employs more than five full time employees in a business of lending money to earn interest income, then that business will be an active business not a specified investment business. The issues of who would have the onus of establishing that First One was carrying on a business (or not carrying on a business) and whether, if it was carrying on a business, that business was an active business (or a specified investment business) are issues that should be resolved at a hearing.

[27] As well no facts were assumed in the Amended Reply in relation to the ownership of shares of First One or in relation to who had control of First One. The issue of who would have the onus of proof with respect to the facts required to determine whether First One was "controlled at that time, directly or indirectly in any manner whatever, by one or more non-resident persons" is a matter that should be resolved at a hearing. It is not clear whether this is even an issue in this case. As well it is also not clear whether there is any issue in relation to the question of whether the Appellant was a connected shareholder of First One. There are very few facts that are assumed in relation to First One.

[28] In *Loewen*, [2004] F.C.J. No. 638, 2004 FCA 146, Justice Sharlow, on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. **If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown.** This is well explained in Schultz v. R. (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).
>
> (emphasis added)

[29] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused (338 N.R. 195 (note)). If the Crown has the onus of proof with respect to facts asserted "elsewhere in the Reply", then the Crown

would have the onus of proof with respect to facts that are not asserted at all in the Reply.

[30] The position of the Respondent is that the Appellant's case is governed by the decision of the Federal Court of Appeal in *Nunn v. The Queen*, 2006 FCA 403, [2007] 2 C.T.C. 222, 2007 DTC 5111. The Federal Court of Appeal in that case noted that once shares that were not a qualified investment were acquired in an RRSP account, the provisions of subsection 146(10) of the *Income Tax Act* were applicable. The shares that were acquired in the *Nunn* case were shares of Jovalguy Inc. In that case Jovalguy Inc. subsequently acquired shares in La Financière Inc. These are not the same companies that are involved in this matter. A finding that the shares of Jovalguy Inc. are not a qualified investment for an RRSP does not necessarily mean that the shares of First One (a different corporation) are not a qualified investment for an RRSP.

[31] The Federal Court of Appeal in the *Nunn* case raised the issue of the fair market value of the shares. In this case, the Appellant, in his Notice of Appeal, states that:

> e) …and the market value of my investment of $80,000 was included in my income according to subsection 146(10).

[32] The Appellant appears to be conceding that the fair market value of his investment was $80,000 and he did not raise the valuation of the investment as an issue in his notice of appeal.

[33] However, it is important to remember that the issue in this Motion is simply whether the Appellant should be permitted to have a hearing. It is not to decide whether the Appellant will succeed but only whether the Appellant has an arguable case and whether it is in the interests of justice that he be permitted to have his appeal heard. In my opinion, it is in the interests of justice that the Appellant be allowed to have his appeal heard in relation to the issue of whether the shares of First One were a qualified investment for an RRSP. At a hearing the issue of who has the onus of proof in this case can be determined and the evidence presented can be examined to determine whether the assessment based on paragraph 146(10)(a) of the *Income Tax Act* is correct. The assumption of facts as set out in the Amended Reply are inadequate to make any determination of whether First One is a small business corporation, who has control of First One or whether the Appellant was a connected shareholder. Whether the Appellant or the Respondent should have the onus of proof in this case is a matter best resolved at a hearing.

[34] The alternative issue raised in the Amended Reply is whether "the trust … used or permitted to be used, the property of the trust as security for a loan pursuant to 146(10)(b) of the *Act*". This paragraph of the *Income Tax Act* provides as follows:

> (10) Where at any time in a taxation year a trust governed by a registered retirement savings plan
>
> …
>
> (b) uses or permits to be used any property of the trust as security for a loan,
>
> the fair market value of
>
> …
>
> (d) the property used as security at the time it commenced to be so used,
>
> as the case may be, shall be included in computing the income for the year of the taxpayer who is the annuitant under the plan at that time.

[35] In the Amended Reply it is stated that in paragraphs 12 g) and h) that:

> g) On February 25, 1999 the Appellant received a loan from Total Success Systems ("TSS") for $56,000;
>
> h) On March 4, 1999 First One issued a cheque for the sum of $45,280 to the Appellant;

[36] It is not at clear how these two paragraphs should be read. Is the Respondent assuming that the Appellant received both amounts - $56,000 + $45,280? Paragraph g) refers to **the Appellant receiving $56,000** as a loan from TSS and paragraph h) refers to **First One issuing a cheque to the Appellant for $45,280**. Since the amount invested was only $80,000, it does not seem logical that the Appellant would have received in excess of $100,000. In the Notice of Appeal, the Appellant indicated that he received less than $20,000. Clearly the correct facts would have to be determined and this could only be determined at a hearing. The issue, in relation to an assessment based on paragraph 146(10)(b) of the *Income Tax Act*, would be the fair market value of the property used as security. What property was used as security for the actual loan received by the Appellant? What was the fair market value of this property at the time that the loan was made? There are no assumptions in the Amended Reply with respect to the property that

was used as security for the loan. There is a reference in paragraph 13 of the Amended Reply to the Minister relying "on the fact that the Appellant used the trust as collateral for the loan from TSS". However this was not one of the facts that was assumed and the issue would be what property **of the trust** was used as security (and the fair market value of that property), not whether the Appellant used the trust as collateral.

[37] It should also be noted that the only assumption related to fair market value of any property was the fair market value of the Class A shares of First One as of January 29, 1999. No assumptions were made with respect to the fair market value as of either February 25, 1999 or March 4, 1999.

[38] It also seems to me that in the interests of justice the Appellant should have his appeal heard in relation to the alternate issue. Given the limited assumptions made by the Respondent, the issue of who has the onus of proof with respect to the facts related to the alternate issue should also be determined at a hearing and whether the evidence as presented at the hearing supports the particular finding of fact advocated by the person who has the onus of proving such facts should be determined at a hearing.

[39] The Appellant's Motion, to set aside the Order dismissing his appeal, is allowed. The costs of this Motion shall be in the cause.

Signed at Halifax, Nova Scotia, this 21st day of December 2008.

"Wyman W. Webb"

Webb J.

CITATION:	2008TCC680
COURT FILE NOS.:	2004-4073(IT)G
STYLE OF CAUSE:	PATRICK JOSEPH EMILE BURKE AND THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	November 28, 2008
REASONS FOR JUDGEMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	December 21, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kathleen Lyons

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada