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Punitive Taxation ?

Readers of this newsletter will recall two earlier articles during the past eighteen months dealing with the Federal Court of Appeal decision in *Soper v. The Queen*¹ which addressed the issue of director liability arising from the failure of a corporate taxpayer to remit the required source deductions and the more recent Supreme Court of Canada decision of *Eurig v. The Registrar of the Ontario Court (General Division)*² dealing with the invalidity of the Ontario probate fee legislation. In what will now constitute a Current Affairs trilogy, we shall examine the very recent judicial pronouncement of the British Columbia Supreme Court in *Longley v. Minister of National Revenue*. In rather stark contrast to the Soper and Eurig decisions, the Longley decision will bring a smile to the face of even the most accepting and compliant taxpayer.

In Longley, The Honourable Madam Justice Quigano of the British Columbia Supreme Court ruled that:

“In the circumstances of this case I have concluded that the appropriate award of punitive damages, intended to dissuade Revenue Canada from acting again in such a highhanded, arrogant and dishonest way, is \$50,000.”

Highhanded, Arrogant, Dishonest

Setting aside the issue of the amount of the punitive damage award for a minute, the facts of this case are of some interest and humor. In or about 1984, Blair Longley conceived of a plan whereby taxpayers could receive federal political contribution tax credits for contributions made to a political party which the taxpayer could direct to be paid so as to benefit either the taxpayer or some other individual whom the taxpayer designated. This plan became known as the “Contributor’s Choice Concept” or “Longley’s Loophole”. Not surprisingly the scheme was met with some skepticism by potential contributors. As a result, Mr. Longley sought to obtain written confirmation from Revenue Canada that the scheme was legal. He pursued Revenue Canada for five years seeking this confirmation.

As you may surmise, the written confirmation from Revenue Canada that the Contributor’s Choice Concept was not contrary to the provisions of the Canada *Elections Act* or the *Income Tax Act* would then be used by Mr. Longley to encourage members of the public to participate in the federal political process by contributing to political parties, in particular the Rhinoceros Party.

By early 1985 Elections Canada had confirmed that the scheme did not offend the provisions of the Canada *Elections Act*. In a letter to the defendant dated May 2, 1985, Mr. Longley asked Revenue Canada to advise him in writing whether his scheme was contrary to the *Income Tax Act*. After receiving this request, the Chief of the Charitable and Non-Profit Organizations Section, sought legal advice from the Department of Justice, who responded with the following advice:

“In our view Mr. Longley should **not** be given an official supportive letter to assist him in his fund-raising. While we do not label this plan as a tax evasion scheme on the present information, the plan **does seem to have abusive elements.**”[N.B. Emphasis added]

Mr. Longley says that from 1985 to 1990, Revenue Canada knew that his plan did not offend the provisions of the *Income Tax Act* but refused to acknowledge this to him in writing. This refusal, he says, caused damage to him and resulted in an enormous benefit to the Federal Government in the form of unclaimed tax credits.

Finally, after pursuing this matter with Revenue Canada for five years, Mr. Longley commenced an action in 1990,

seeking damages against Revenue Canada for breach of his ss. 2, 7 and 15 Charter rights or, alternatively, for misfeasance in public office. Moreover, Mr. Longley also sought a declaration that s. 245 of the *Income Tax Act*, the General Anti-Avoidance Rule³, offends ss. 2, 7 and 15 of the *Charter of Rights and Freedoms* and that it is void for vagueness.

Opinion of the Court

While there were a number of legal issues and arguments in this case, including two separate hearings in the British Columbia Court of Appeal as to whether Mr. Longley had a viable cause of action, the British Columbia Supreme Court focused on the “misfeasance in public office” cause of action. In reviewing the state of the law, the court established that:

“...underlying the case law giving rise to the tort of abuse of power or misfeasance in public office is the element of intent. Therefore, the tort of abuse of authority must be described as intentional and it is incumbent upon the plaintiff to establish this element either in the form of malice or action knowingly taken without authority.”

The court continued:

“Such unlawful action may arise either when a statutory actor purposefully exercises a power which they do not possess with the foreseeable result of injury to the plaintiff, or when a statutory actor exercises a discretion or power under a statute with malice, thereby rendering the action unlawful.”

Madam Justice Quijano, having reviewed the arguments of lawyers for Revenue Canada and Mr. Longley’s argument advanced on his own behalf, pronounced that:

“I have no hesitation in finding that throughout most of the period from 1985 to ...1988, the advice given to Mr. Longley by Revenue Canada as to the legality of the Contributor’s Choice Concept was known to the representatives of Revenue Canada to be untrue: It was intentionally misleading.”

The court then examined the two primary resulting heads of damages. The court was of the view that as a result of the refusal of Revenue Canada to acknowledge that the scheme did not contravene provisions of the *Income Tax Act*, Mr. Longley lost the opportunity to enhance his political reputation and concluded that an appropriate award of damages under this head is \$5,000.

It is the question of the punitive damages that really demonstrates the substance of the courts displeasure with the public officials at Revenue Canada. The court found that Revenue Canada clearly dealt dishonestly with Mr. Longley. It was apparent that Revenue Canada was aware from early on that Mr. Longley’s scheme did not appear to be contrary to the provisions of s. 127(3) of the *Income Tax Act*. Nevertheless, they set out to discourage him and his potential contributors by refusing to confirm that fact and, ultimately, to mislead him with respect to the legal strength of the Department’s position. The Department acted without regard for its obligation to deal fairly and openly with all taxpayers and to administer the

Income Tax Act in accordance with the law. Madam Justice Quijano clearly stated that the award in this case ought to be one which reflects the court’s displeasure with the abuse by Revenue Canada of its position and, on that basis, awarded the amount of \$50,000 in punitive damages to Mr. Longley.

Conclusion

One is hopeful that this type of strong judicial rebuke will serve to remind the tax collecting mandarins in Ottawa that not only must they act fairly and openly with the public they allegedly serve, but that they must do so in the context of the law which defines, amongst other things, their role in the administration of justice. This concept underlies the Rule of Law that protects and serves us all, and both Mr. Longley and Madam Justice Quijano deserve our gratitude in adhering to the fundamental principle of justice and fairness.

Footnotes

- ¹ The Soper decision has been cited 23 times and followed 7 times since the decision was handed down in 1997.
- ² On April 20, 1999, the British Columbia Government introduced legislation to confirm in law the practice of charging probate fees on estate settlements over \$25,000, retroactive to 1988.
- ³ [Madam Justice Quijano] “I am unable to conclude that the application of the provisions of the GAAR would *prima facie* lead to a Charter violation in every case. It is, in my view, likely that there will be circumstances where the GAAR operates within the Charter. Therefore I decline to declare that the GAAR is of no force or effect.”