



Tax

Decision shows difficulty of establishing fraud in tax court

By AdvocateDaily.com Staff



A lawyer's failed bid to reopen his Tax Court of Canada case after accusing the justice department of defrauding the court not only shows how difficult it is to establish fraud, but also how important it is for lawyers to communicate clearly with large groups of related appellants, Toronto tax litigator [Adrienne Woodyard](#) tells [Law Times](#).

As the article notes, Michael Davies, a partner at Dentons Canada LLP, was one of 25 or 30 taxpayers who appealed the Canada Revenue Agency's (CRA) decision to disallow capital cost allowance claims for software licences in the 2005 – 2007 tax years. He claimed allowances totalling just under \$1 million over the period.

In his decision, Justice Randall Boccock writes that after being reassessed for the claims in 2009 and launching an appeal in tax court in 2010, Davies and the other appellants took part in a conference call with the group's law firm, Osler Hoskin and Harcourt LLP, late that year, where "authority appears to have been given to resolve the appeals within the range of 20-40% of deductibility of the capital cost."

The article says Davies heard nothing more from the law firm until September 2013, but in the meantime, it had entered negotiations with Justice Canada lawyers and ultimately settled on behalf of the entire group for just 10 per cent capital cost deductibility.

Davies claimed the agreement had been made without his authority and was invalid, says Boccock's decision. *Law Times* notes that since justice department lawyers knew of his objections, Davies' new counsel argued they should never have filed a notice of discontinuance in his appeal without judicial direction, and that doing so constituted a fraud



on the court.

However, Bocoock found Davies' objection arrived too late in the day, leaving Justice Canada lawyers little choice but to proceed with the discontinuance.

“Even if the Court were to find such legal logic faulty, such an error did not constitute fraud. The Discontinuance when dated was correct not just in the mind of Respondent’s counsel, but in the mind of [Oslers], the very and only firm retained to protect the Appellant’s rights,” says the decision.

Bocoock ordered Davies to pay the CRA’s costs on a substantial indemnity basis due to the unproven fraud allegations. Davies has appealed.

Woodyard, a partner with [DLA Piper \(Canada\) LLP](#), explains that the Tax Court of Canada can only set aside notices of discontinuance where they were obtained by fraud, or on the basis of facts arising or discovered after a judgment is made — as a result, Davies faced an uphill task.

“The court will only find fraud in exceptional circumstances...[N]ot only is it very difficult to establish but the failure to do so can also carry fairly serious cost consequences,” Woodyard says in the article.

“That’s why the court cautioned them about the cost consequences of alleging fraud, and ultimately awarded substantial indemnity costs, which in itself is quite unusual.”

Woodyard also tells *Law Times* that Davies’ case for fraud was “seriously undermined” by the fact that Justice Canada had asked for, and received, confirmation from Oslers of its continued retainer for all individual appellants before signing the settlement.

“That was a particularly prudent step in this case, but probably advisable in any event. Lots of things can change over a long period, especially when you are dealing with such a large group of clients,” Woodyard explains.

Bocoock also rejected Davies’ call for him to examine the minutes of settlement and find them invalid, due to Oslers’ alleged lack of authority to settle the appeal.



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As Woodyard explains: “The court is saying that really this is a matter for the appellant and their former counsel to resolve between themselves, and not for the court to resolve at this point.

“I think the case underscores the importance to lawyers of maintaining clear lines of communication, particularly when dealing with large groups of similarly situated individuals.”