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Federal Court of Appeal discourages Tax Court from sending out draft judgments to parties

By **John Schofield**

Law360 Canada (January 17, 2025, 2:20 PM EST) -- Draft decisions are best kept behind closed court doors, the Federal Court of Appeal has indicated in a decision admonishing the Tax Court of Canada for sending out a draft copy of a decision for review by the parties involved.

"We wish to comment on the practice the Tax Court followed here," Justice David Stratas wrote for the three-judge panel in a recent decision in *Doostyar v. Canada* 2025 FCA 6. "It is for the Tax Court alone — not the parties — to vet its judgment and supporting reasons for typographical, grammatical, punctuation and similar errors."

In a brief email received late Friday afternoon, Jan. 17, Tax Court of Canada executive legal counsel Stéphanie Lauriault said that the court and its judges do not comment on specific rulings. "However," she added, "please note that the Tax Court of Canada does not follow such a practice."

But the past chair of the Ontario Bar Association's Taxation Law Section, Bhuvana Rai of boutique firm Mors & Tribute Tax Law, said it may become more common for federal courts to send out draft decisions because of the expanded requirement under s. 20 of the *Official Languages Act* (OLA) for potentially precedent-setting court decisions at the federal level to be translated and available in both French and English.

Justice David Stratas

In their concise decision in *Doostyar*, released Jan. 13, Federal Court of Appeal Justices Stratas, George Locke and Anne Mactavish rejected an attempt by the appellant, Khair Mohammad Doostyar, the owner of a now defunct Toronto restaurant, to reopen a Dec. 14, 2023, Tax Court decision that involved the 2012 balance on a shareholder loan account he had with his business.

According to facts detailed in the decision, the Tax Court prepared the draft ruling by now retired Justice Don R. Sommerfeldt and sent unsigned copies to the parties, asking them to provide comments on any"typographical, grammatical, punctuation, or [any] similar error[s] or any omissions"and any"comments in respect of the written presentation of…[the] decision".

"The Court explicitly told the parties that this was not an invitation to revisit' the substance of his decision,'" Justice Stratas wrote for the court. "In response, the appellants filed a letter with the Tax Court seeking to do just that."

Calling the Tax Court decision "grossly unfair and a miscarriage of justice," counsel for Doostyar, Toronto lawyer Osborne Barnwell, argued in court filings that in refusing to allow further submissions, the Tax Court committed a reversible error.

"In these circumstances, the appellants' request smacks as an attempt to appeal to the Tax Court to revisit a decision it had already made," wrote Justice Stratas. "The Tax Court did not commit any reversible error in declining to do so.

"In asking the parties for comments, the Tax Court was looking for input on small, non-substantive things," he added. "It was not inviting the parties to apply to reopen the evidentiary portion of the trial or to provide further submissions on issues already argued."

Justice Stratas noted that nothing in the Tax Court's decision was contrary to the Supreme Court of Canada's leading, 2001 decision on a first-instance court reopening a decision, *671122 Ontario Ltd. v. Sagaz Industries* 2001 SCC 59, [2001] 2 S.C.R. 983.

Toronto tax lawyer Bhuvana Rai

In an email to Law360 Canada, Rai noted that the amendments to s. 20 of the OLA, implemented in June 2023, have placed a huge administrative burden on courts at the federal level.

"Given the Federal Court's and Tax Court's public comments on how this requirement was not accompanied by additional funding for translations, I can only imagine that the OLA amendments create the need for additional input on draft decisions from courts," she said.

"I don't think Doostyar was necessarily a case involving additional translation, to be clear," she added, "But I think the practice of sending out draft judgments for review will only grow, rather than subside, given the onerous requirements to provide simultaneous translation.

"In short, I can't see the practice stopping, particularly given the simultaneous translation burden and the consequent use of AI," said Rai. "But judges may couch their language even more carefully when requesting comments."

She noted that both the Tax Court and Federal Court have routinely discussed the administrative burden caused by the s. 20 amendments, including at the Tax Court Bench and Bar Committee meeting in 2024 and the Canadian Tax Foundation national conference in late 2024.

"I am sure," she added in a separate email, "that the increased administrative burden will mean that both those courts will continue to — or expand — their practices of sending out draft judgments for review because the only other option is even more increased reliance on AI (artificial intelligence).

"The government presented this (the s. 20 amendments) as an access to justice solution, but the impact seems to be the opposite," said Rai.

In the Doostyar case, she noted, distributing the draft judgment may have also been prompted by the fact that Justice Sommerfeldt was due to retire soon after the judgment was released. "He may have requested comment for that purpose since changes (e.g., misspelled names) may not have been easy to make afterwards," she explained.

Barnwell, the appellant's lawyer, said the draft judgments are also intended to assure counsels that their submissions have been considered.

Draft judgments or not, he said, he would like to see the Tax Court take a more compassionate approach to the tax burden borne by struggling immigrants like Doostyar, who came to Canada as a refugee from Afghanistan.

"I am truly tired of seeing the courts turn a blind eye on these poor folks," he said.

The expanded translation burden on the federal courts has been a source of controversy. In November, for example, the Quebec language and constitutional rights group, *Droits collectifs Québec*, filed suit against the Supreme Court's registry, stating that the court's decision to remove all unilingual judgments — rather than proceed to translate them into the other official language in a timely way — is not in line with the spirit of the OLA.

(Editor's note: The original version of this story has been updated to include additional information.)

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