

Date: 20090129

Docket: A-385-08

Citation: 2009 FCA 26

Present: EVANS J.A.

BETWEEN:

KATHRYN KOSSOW

Applicant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 29, 2009.

REASONS FOR ORDER BY:

EVANS J.A.

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REASONS FOR ORDER

EVANS J.A.

[1] This is a motion by Kathryn Kossow for leave to admit new evidence in support of her appeal to this Court against an interlocutory order made by Justice Valerie Miller (Motions Judge) of the Tax Court of Canada, dated July 18, 2008.

[2] The order under appeal arises from Ms Kossow's appeal to the Tax Court against a decision by the Minister of National Revenue to disallow sums claimed as charitable donations, which Ms Kossow says that she gave to a gallery to enable it to make art purchases. The Minister alleges that the donations were part of an elaborate international scheme. The central dispute between the parties appears to be over the proper value of the works of art alleged to have been purchased.

[3] The trial in the Tax Court was originally set down to start on June 16, 2008, and was scheduled to last for two weeks. However, it has become bogged down in procedural disputes concerned, to a large extent, with allegations by Ms Kossow that the Minister has failed to make full disclosure of the documents in his possession that are relevant to her appeal. In May 2008, the Motions Judge adjourned the start of the trial until September 8, 2008, so that she could deal with Ms Kossow's interlocutory motion that has given rise to the appeal to this Court and the present motion to admit fresh evidence in support of it. It is now the end of January 2009, and a date for the hearing of the interlocutory appeal has not yet been set.

[4] As part of the context of this motion I would also note that there has already been voluminous disclosure and extensive discovery, both oral and written. In her order of July 18, 2008, which is the subject of the appeal from which the present motion arises, the Motions Judge refused to order the Minister to produce a third affidavit of documents, to permit further discovery, and to require certain questions to be answered properly by the Minister's nominee. Ms Kossow alleges, among other things, in her appeal that written interrogatories are inadequate in this case and that the Motions Judge erred in not ordering further discovery.

[5] The new evidence which Ms Kossow wishes to be admitted in the appeal comprises three affidavits: one of William Moore, the former director of the art gallery to which, Ms Kossow says, she made her charitable donations, and two of Michelle Julfs, an employee of Ms Kossow's counsel, together with eight exhibits. The whole occupies 200 pages of the Motion Record. Despite the reluctance of appellate courts to burden the appeal record unduly, Ms Kossow submits that these

documents satisfy the test for admissibility: their content was not reasonably discoverable before the Motions Judge rendered her decision; the evidence is reliable; and, if admitted, it would be practically conclusive of the appeal, in the sense that it likely would have affected the Motions Judge's decision (*BC Tel v. Seabird Island Indian Band*, [2003] 1 F.C.R. 475, 2002 FCA 288, at para. 29). The Minister takes issue with some or all of these assertions with respect to some or all of the documents that Ms Kossow seeks to have admitted.

[6] Having examined the parties' submissions and the material in question, I am not persuaded that Ms Kossow has demonstrated that the documents satisfy the fairly stringent test for admissibility. Nor, on the other hand, am I satisfied that the documents are clearly inadmissible.

[7] Anticipating this conclusion, Ms Kossow argues that I should leave it to the panel hearing her appeal to decide the issue of admissibility. She submits that, having had the benefit of an oral hearing and having a greater familiarity with the issues raised in the appeal, the panel will be in a better position to decide, either before or after they have heard the appeal, whether the documents should be admitted: see *R. v. Stolar*, [1988] 1 S.C.R. 480 at 491-92.

[8] The Minister, on the other hand, argues that if, contrary to his principal argument, I do not simply dismiss Ms Kossow's motion outright by finding the documents inadmissible as fresh evidence, the preferable course would be for the Tax Court to decide whether they should be admitted at the trial. Because of the complexity of the issues, he says, this Court ought not to make a first decision on admissibility in the context of an interlocutory appeal. Rather, the Court should

have the benefit of a decision by the Tax Court on their admissibility at the trial, with the possibility of an appeal to this Court. Indeed, Ms Kossow has a motion pending before the Tax Court on this very issue, which is suspended pending this Court's disposition of the appeal from the Motion Judge's order. However, the disadvantage of returning the matter to the Tax Court is, of course, that it would impose further expense on Ms Kossow and further delay the start of the trial.

[9] Having weighed these considerations, I have concluded that, on balance, the interests of justice are best served by permitting Ms Kossow, at the start of the hearing of her appeal, to bring a motion for the admission of the documents that are the subject of the present motion. In my opinion, having had the benefit of hearing counsel's submissions and their answers to questions from the Bench, the panel will be well placed to make a ruling. In view of the protracted procedural history of this matter and the missed trial dates, it would not, in my view, serve the interests of justice to require Ms Kossow, at this stage, to revive the motion pending before the Tax Court, thus starting up another round of pre-trial litigation and appeals.

[10] For these reasons, I would dismiss Ms Kossow's motion to admit the new evidence, with leave to renew it at the start of the hearing of her appeal by a panel of this Court. The costs of the present motion shall be in the cause.

“John M. Evans”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-385-08

STYLE OF CAUSE: Kathryn Kossow

and

Her Majesty the Queen

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Evans J.A.

DATED: January 29, 2009

WRITTEN REPRESENTATIONS BY:

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