Date: 20090316

Docket: A-385-08

Citation: 2009 FCA 83

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
TRUDEL J.A.

BETWEEN:

KATHRYN KOSSOW

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 11, 2009.

Judgment delivered at Ottawa, Ontario, on March 16, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues on appeal

[1] This is an appeal from an interlocutory decision of V. Miller T.C.C.J. (judge) rendered on July 2008. The appellant takes issue with the judge's ruling regarding her motion to:

a) strike some of the pleadings on the basis that they contain evidence, conclusions of law or allegations of fact about third parties that the appellant does not know;

b) shift to the Minister the onus of proof of certain assumptions of fact made by him; and

c) direct the respondent to answer a number of identified questions and undertakings and the respondent's nominee to re-attend at the respondent's expenses for a continuation of the discovery.

[2] Before I proceed to analyze the decision of the judge, I need to address two motions made to the panel by the appellant at the hearing.

Motion to obtain leave to file new evidence on appeal

[3] Pursuant to some discovery which occurred as a result of the judge's interlocutory order, the appellant filed a motion to be authorized to file new evidence on appeal consisting of three affidavits with eight exhibits. The motion record then contained 200 pages: see reasons for order of Evans J.A. issued on January 29, 2009, 2009 FCA 26.

[4] Evans J.A. dismissed the appellant's motion but allowed her to renew it at the start of the hearing of her appeal as he felt that the panel would be in a better position to assess the relevancy of that evidence to the merit of the appeal.

[5] The appellant had ample time to file her motion between January 29, 2009 and March 11, 2009 which was the date fixed for the hearing of the appeal.

[6] On March 5, 2009, on the Thursday afternoon, a mere six days before the hearing of the appeal, the appellant filed her motion to obtain leave to introduce new evidence on appeal.

[7] However, this time the motion consisted of no less than four volumes totalling 1189 pages. In great haste, the respondent prepared a motion record in response and had it delivered by hand to the appellant and this Court on March 10, the eve of the hearing.

[8] The appellant's motion was presented at the beginning of the hearing of the appeal scheduled for two hours on March 11. The panel accepted the respondent's motion record for filing.

[9] We heard the submissions of the parties and took the motion under advisement in order to proceed to the hearing of the appeal.

[10] The motion in fact deals with new issues that were not raised before the Tax Court of Canada. There is a motion pending in the Tax Court of Canada regarding the same material filed before us. In addition, the motion before us deals with some issues that have not been made the subject of the appeal. For example, the notice of appeal seeks no relief against the judge's refusal to direct the respondent to file a further affidavit of documents pursuant to Rule 82 of the *Tax Court of*

Canada Rules (General Procedure). Any material in the appellant's motion record relating to this issue is irrelevant.

[11] In any event, the appellant has failed to convince us that the new material she wants to file is necessary to dispose of the interlocutory appeal or would even be of any assistance in determining the merit of this appeal.

[12] For these reasons, the motion will be dismissed with costs in the amount of $3,000 payable forthwith to the respondent. The costs are fixed at this amount because of the late filing of voluminous material by the appellant which required counsel for the respondent to incur additional costs to appraise themselves of this material over the weekend and produce a timely response to the appellant's motion.

Motion to amend the notice of appeal

[13] At the close of her submissions on appeal, counsel for the appellant made an unannounced motion to amend the notice of appeal so as to include therein as relief an order from this Court directing the respondent to produce a new and better list of documents pursuant to Rule 82 of the *Tax Court of Canada Rules (General Procedure).*

[14] The effect of this late amendment was to add a new ground of appeal for which there are neither a supporting motion record nor submissions in the appellant's memorandum of fact and law

(paragraph 87 of the memorandum is a mere reference to the motion to adduce new evidence which was dismissed).

[15] Counsel for the respondent properly objected to this motion alleging surprise and prejudice. For that reason and in view of the conclusion that this Court comes to on the merit of the appeal, the motion will be dismissed.

The judge's refusal to strike the pleadings

[16] The judge concluded that the impugned pleadings were irregularities under Rule 7 of the *Tax Court of Canada Rules (General Procedure)* which did not mandate that they be declared a nullity.

[17] Furthermore, she found that the appellant pleaded over the reply and implicitly accepted the irregularities. As a matter of fact, the appellant did not bring a motion to strike until two and a half years after obtaining knowledge of these irregularities. The appellant's counsel required production of documents and later made a demand for particulars in relation to the very subparagraphs of the pleadings that she now seeks to strike out. She also conducted the examination for discovery of the respondent's nominee. She took fresh steps which covered the irregularities.

[18] I see no error in the judge's exercise of her discretion pursuant to Rule 8 of the *Tax Court of Canada Rules (General Procedure)* to deny leave to attack the pleadings in these circumstances.

The judge's refusal to shift the burden of proof on the assumptions of fact

[19] The appellant argued before the judge that the onus of proof with respect to the allegations in many of the assumptions of fact made by the Minister should shift to him because she alleges that she does not know or have control over the third parties involved in the Minister's assumptions about the existence of a scheme. Alternatively, she contends that the assumptions are irrelevant and should be stricken because they do not pertain to her. Another avenue would be for us, she says, to order that these allegations be removed from the assumptions of fact and be put as allegations in a different location in the pleadings, the effect of which would be to place the onus of proof on the Minister.

[20] After analyzing the submissions of the parties, the evidence before her and the case law, the judge came to the conclusion that the trial judge would be in a much better position to appreciate whether the burden of proof should be shifted to the Minister in relation to some of the assumptions of fact.

[21] At paragraph 45 of her reasons from judgment, she quotes the following excerpt from Bowman A.C.J.T.C.C. in *Mungovan v. The Queen*, 2001 TCC 568, at paragraphs 10, 12 and 14:

> [10] Assumptions are not quite like pleadings in an ordinary lawsuit. They are more in the nature of particulars of the facts on which the Minister acted in assessing. It is essential that they be complete and truthful. The conventional wisdom is they cast an onus upon an appellant and as Mr. Mungovan observes with some considerable justification they may force him to endeavour to disprove facts that are not within his knowledge. Superficially this

> may be true, but this is a matter that can be explored on discovery. The trial judge is in a far better position than a judge hearing a preliminary motion to consider what effect should be given to these assumptions. The trial judge may consider them irrelevant. He or she might also decide to cast upon the respondent the onus of proving them. The rule in *M.N.R. v. Pillsbury Holdings Ltd.*, 64 DTC 5184, is a rule of general application but it is not engraved in stone. …
>
> …
>
> [12] It is entirely possible, as Mr. Mungovan points out, that some of the impugned assumptions are irrelevant. This is a matter for the trial judge to determine after the evidence has been presented. It is not a matter that can or should be determined on a preliminary motion to strike. It may well be that the paragraphs contain allegations that lie exclusively within the respondent's knowledge. It is a matter for the trial judge to determine whether the onus should be cast upon the respondent to establish them. …
>
> …
>
> [14] The trial judge may well decide that the Crown has some onus that goes beyond the mere recitation of a bald assumption. The weight to be put on these paragraphs is a matter for the trial judge, as is the onus of proof. This is not, however, a reason for striking the paragraphs before trial.
>
> [Emphasis added]

[22] In a subsequent case bearing much similarity with the appellant's case, *Gould v. The Queen*, 2005 TCC 556, at paragraphs 21 and 22, Chief Justice Bowman wrote:

> [21] With respect, I am unable to ascribe to either the Status-One decision or the case which it followed, The Queen v. Global Communications Limited, 97 DTC 5194, the effect contended for by counsel for the appellant. A central component in the assessment which disallowed the charitable donations is the existence of a "scheme" in which it is alleged that the appellant participated and which enabled the participants to obtain what the Crown sees as artificial or inflated charitable tax credits. It of necessity involved third parties and if the existence of a scheme is essential to the Crown's case it should be able to plead and prove all of the components of the scheme. To say, as the appellant does, that Global and Status-One preclude any reference to third party transactions unless the appellant knows of or is privy to those transactions goes too far. If the existence of a scheme is germane to the disallowance it cannot be ignored whether or not the Minister assumed that the appellant knew about or was a party to the third party transactions that, according to the Reply, were an integral part of the scheme. If any of the facts assumed are truly within only the Crown's knowledge the Crown probably has the onus of proving them although this is ultimately for the trial judge to decide.

> [22] I might observe that the complaint that is usually made is that the Crown has not pleaded all of the material assumptions or has not pleaded assumptions that assist the appellant. Here the reverse is true. The appellant is complaining that too many assumptions are pleaded. It would seem to me that if an assessment is based on assumptions that are irrelevant, contradictory or illogical, as the appellant alleges, this could arguably form a cogent basis for attacking the assessment. If those assumptions are removed from the Reply the appellant has deprived himself of one of the weapons in his arsenal. Why he would wish to do so escapes me. There is a danger that one can, in getting too engrossed in technical minutiae, lose sight of the substantial tactical advantage of forcing the Crown to live with its own pleadings. There is much to be said for the venerable rule about not educating your opponent.
>
> [Emphasis added]

See also *Stanfield v. The Queen*, 2007 TCC 480.

[23] Having the benefit of all the evidence, the trial judge will be able to appreciate the fairness of the assumptions and provide the necessary relief should it turn out that they work unfairly to the detriment of the appellant: see *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, at paragraph 36; *Transocean Offshore Ltd. v. Canada*, 2005 FCA 104, at paragraph 35. I agree with the judge that it is premature to shift the onus of proof.

The judge's refusal to direct the respondent to answer a number of identified questions and undertakings and the respondent's nominee to re-attend at the respondent's expense for a continuation of the discovery

[24] Before proceeding to a review of the questions submitted for discovery, the judge laid down the legal principles that should govern this review, supported by the applicable legislation and jurisprudence. I see no error in her approach. It is not the role of this Court to second guess her

appreciation of the relevancy of the questions, the appropriateness of allowing follow-up questions and the adequacy of the answers given unless there has been a misuse of her discretion or an error in principle on her part: *Beloit Canada Ltd. v. Valmet Oy* (1992), 45 C.P.R. (3d) 116 (F.C.A.).

[25] As for the appellant's request that the discovery process continue, the judge noted that there had been extensive discovery. "At some point in time", she writes at paragraph 66 of her reasons for judgment, "discoveries must end so that the parties can get ready for the trial in this matter. That time has arrived". In the exercise of her discretion, she was entitled to put an end to the discovery process: see *Canada v. Aventis Pharma Inc.*, 2008 FCA 316.

Conclusion

[26] For these reasons, I would dismiss the appeal with costs. The motion to amend the notice of appeal will be dismissed. The motion to obtain leave to file new evidence on appeal will be dismissed with costs fixed at $3,000 payable forthwith to the respondent.

"Gilles Létourneau"

J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	NADON J.A. TRUDEL J.A.
DATED:	March 16, 2009

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