

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110308

Docket: A-166-10

Citation: 2011 FCA 85

**CORAM: EVANS J.A.
DAWSON J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

TERRY LONG

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 3, 2011.

Judgment delivered at Ottawa, Ontario, on March 8, 2011.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

**DAWSON J.A.
LAYDEN-STEVENSON J.A.**

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by Terry Long from an interlocutory decision of the Tax Court of Canada (2010 TCC 197) in which Justice Campbell (Judge) denied his motion seeking full disclosure under rule 82(1) of the *Tax Court of Canada Rules (General Procedure)* (Rules).

[2] The Judge also denied Mr Long's request that partial disclosure not be ordered against him because documents relevant to his appeal against reassessment by the Minister of National Revenue could be used against him in criminal proceedings.

[3] Instead, the Judge directed the parties to produce and serve a list of documents pursuant to rule 81 (partial disclosure), on which they intend to rely in Mr Long's appeal against reassessment, together with a timetable for the completion of the remaining pre-hearing steps.

[4] The motion before the Judge arose from Mr Long's appeal against a reassessment for amounts owing as unreported business income in the taxation years 1999 to 2003, allegedly arising from an electrical contracting business and a marijuana growing operation. Mr Long proposes to pursue his appeal by arguing questions of constitutional law, including a challenge to the validity of the post-assessment processes, particularly because they prevent him from challenging the Minister's reassessment without incriminating himself. To challenge the quantum of the reassessment, he says, would force him to produce documents that could be used to prosecute him for criminal offences.

Partial or full disclosure?

[5] The Judge stated that it is normal practice in the Tax Court to order the partial disclosure of documents under rule 81 of the Rules, in order to avoid unwarranted expense and delay. However, a party may be granted full disclosure under rule 82 on satisfying the Court that there is a reasonable basis for believing that full disclosure will assist in the expeditious resolution of the issues arising from the reassessment, and in either advancing a party's case or damaging that of the opposing party.

[6] The Judge regarded the timing of Mr Long's motion, namely at the close of the pleadings and before other pre-hearing steps had been taken, as the most compelling reason for denying full disclosure. In her view, the motion was premature. It was more appropriate for Mr Long to move for full disclosure, or the disclosure of particular documents not included in the partial disclosure, at a time when he could argue that the documents disclosed by the Minister pursuant to the partial disclosure order, and produced through undertakings given on discovery or otherwise, were inadequate to ensure a fair and efficient hearing of his appeal.

[7] In reaching this conclusion, the Judge emphasized the importance of considering requests for full disclosure within a specific factual context, so as to enable the Court to assess the relevance of documents sought, but not included in the partial disclosure.

[8] This Court may only interfere on appeal with a trial judge's exercise of discretion if the appellant demonstrates that it was based on some error of law or a wrong principle. I am not persuaded that the Judge did so err in refusing in her discretion to grant Mr Long's motion for full disclosure.

[9] Mr Long argues that partial disclosure is inadequate because the Minister will not rely on documents that assist him as Appellant. However, the logical conclusion of this argument is that full disclosure is always required, and that is clearly not what the Rules contemplate.

[10] Mr Long also submits that full disclosure is needed because of the breadth of the ground of his appeal, namely the fundamental unfairness of the assessment process, and the Minister's stated intention of relying only on documents relevant to the quantum of the reassessment. The Minister may have decided to so limit himself because he is of the view that the Tax Court's statutory jurisdiction is confined for the most part to determining the amount of tax owing and not the constitutional validity of the post-assessment process established by Parliament.

Unilateral disclosure

[11] Mr Long argues that the Judge erred in not exempting him from having to disclose any documents on the ground that this would compel him to incriminate himself. In 2002, the RCMP had investigated Mr Long in connection with an illegal marijuana growing operation, charges were laid against him, but subsequently stayed. While he maintains his innocence with respect to these offences, he remains concerned that disclosing the documents relating to his business income that would enable him to pursue his appeal against the quantum of the reassessment would provide material that could be used against him in criminal proceedings.

[12] To put him to the choice of either incriminating himself by disclosing these documents or abandoning his appeal against the merits of the reassessment would, he says, violate his rights under section 7 of the *Canadian Charter of Rights and Freedoms*.

[13] The Judge held that, despite the absence of authority, there may be circumstances in which the Tax Court would exercise its discretion to order unilateral disclosure by the Minister, in order to

prevent a breach of a taxpayer's Charter rights. However, she was not satisfied that the facts of the present case warranted such an exceptional order.

[14] There has been no finding as of yet that disclosure would lead to an imminent violation of Mr Long's Charter rights. Moreover, the implied undertaking that information disclosed in discovery will not be used for the purposes of other litigation, and his right to refuse to answer specific questions put to him at his examination for discovery that may incriminate him, provide additional protections against the possibility of any Charter infringement.

[15] Again, I am not persuaded that the Judge made any error that would warrant the intervention of this Court when, in the exercise of her discretion, she refused the relief sought by Mr Long at this early stage of the appeal. His concerns can be more appropriately dealt with as discovery proceeds and in fact-specific contexts.

[16] I would only add that the Minister's reassessment includes unreported income alleged to have arisen from Mr Long's electrical contracting business. He does not say that making partial disclosure with respect to this would cause him to incriminate himself.

Conclusion

[17] For these reasons, I would dismiss the appeal with costs.

“John M. Evans”

J.A.

“I agree.

Eleanor R. Dawson, J.A.”

“I agree

Carolyn Layden-Stevenson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-166-10

(APPEAL FROM A JUDGMENT OF THE HONOURABLE CAMPBELL MILLER OF THE TAX COURT OF CANADA DATED APRIL 14, 2010, DOCKET NO. 2009-1011(IT)G)

STYLE OF CAUSE: Terry Long and Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 3, 2011

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: DAWSON AND LAYDEN-STEVENSON JJ.A.

DATED: March 8, 2011

APPEARANCES:

Terry Long

SELF-REPRESENTED

David Everett
Elizabeth (Lisa) McDonald

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan
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FOR THE RESPONDENT