Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110502

Docket: A-255-10

Citation: 2011 FCA 147

CORAM: **BLAIS C.J.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

JAMES T. GRENON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta on March 23, 2011.
Judgment delivered at Ottawa, Ontario, on May 2, 2011.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: BLAIS C.J.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The appellant James Grenon is appealing an interlocutory order of Justice Campbell Miller of the Tax Court of Canada (2010 TCC 364). The order dismissed Mr. Grenon's motion to compel answers to certain questions posed in his examination for discovery of a Crown witness, and to require the Crown to present a different person for further examination. For the reasons that follow, I would dismiss the appeal with costs.

Standard of review

[2] The standard of review of a decision granting or dismissing a motion to compel answers on discovery is well explained by Justice Dawson, writing for the Court in *Canada v. Lehigh Cement Ltd.*, 2011 FCA 120, at paragraphs 24 and 25:

> 24. The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. See *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379, 162 A.C.W.S. (3d) 911 at paragraph 35. In the words of this Court in *Eurocopter v. Bell Helicopter Textron Canada Ltd.*, 2010 FCA 142, 407 N.R. 180 at paragraph 13, while "the general principles established in the case law are useful, they do not provide a magic formula that is applicable to all situations. In such matters, it is necessary to follow the case-by-case rule."
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> 25. It follows from this that the determination of whether a particular question is permissible is a fact based inquiry. On appeal a judge's determination will be reviewed as a question of mixed fact and law. Therefore, the Court will only intervene where a palpable and overriding error or an extricable error of law is established. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Bristol-Myers Squibb Co. v. Apotex Inc.*, as cited above, at paragraph 35.

[3] This is essentially the standard of review proposed by Mr. Grenon in this case. The Crown, on the other hand, relies on *Kossow v. Canada*, 2009 FCA 83. In that case Justice Létourneau, writing for the Court, said this at paragraph 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.).

[4] I do not read *Kossow* as stating a different standard of review than *Lehigh* or the cases cited in *Lehigh*. A decision on a motion to compel an answer to a discovery question usually requires a determination of relevance (a question of mixed fact and law), but it may also involve the exercise

of the judge's residual discretion not to order a question to be answered even if the relevance test is met. This is also explained by Justice Dawson in *Lehigh*, at paragraphs 34 and 35:

> 34. The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.
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> 35. Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3. These are the principles to be applied to determine the propriety of the appellant's requests.

[5] In this case, Justice Miller refused to order the disputed questions to be answered because he concluded that the answers would not meet the test of relevance. Therefore, his decision must stand unless it is based on an error of law or a palpable and overriding error of fact.

Background

[6] In 1999 and 2000, Mr. Grenon incurred legal expenses in litigation about child support obligations arising after the breakdown of his marriage. In computing his income for those years under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), he deducted those legal expenses. The

deductions were disallowed on reassessment. Mr. Grenon objected to the reassessment without success, and in 2002, he appealed to the Tax Court.

[7] There is no specific provision in the *Income Tax Act* permitting the deduction of legal expenses incurred in child support litigation. A claim for such a deduction is based on the combined operation of general charging provisions of the *Income Tax Act*, sections 2, 3 and 9.

[8] Broadly speaking, the effect of those provisions is that in determining a taxpayer's income for income tax purposes, any income from a business or property must be included, but any loss from a business or property may be deducted. Income is the amount by which revenue exceeds the expenses incurred to earn it. If expenses exceed revenue, the difference is a loss.

[9] The *Income Tax Act* contains numerous rules governing the computation of income or loss from property. Many limitations on the deductibility of expenses are found in section 18 of the *Income Tax Act*. For example, the provision in issue in this case, paragraph 18(1)(*a*), establishes a purpose test for the deductibility of expenses. It reads as follows:

18. (1) In computing the income of a business or property no deduction shall be made in respect of	**18**. (1) Dans le calcul du revenu du contribuable tiré d'une entreprise ou d'un bien, les éléments suivants ne sont pas déductibles :
(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property….	*a)* les dépenses, sauf dans la mesure où elles ont été engagées ou effectuées par le contribuable en vue de tirer un revenu de l'entreprise ou du bien […].

[10] According to the pleadings filed in the Tax Court, the Crown accepts that Mr. Grenon incurred the legal expenses in issue in the amounts and in the years claimed, and also accepts that the legal expenses were incurred to pay for litigation involving child support. However, the Crown maintains that the legal expenses were not incurred by Mr. Grenon for the purpose of gaining or producing income from property, with the result that paragraph 18(1)(*a*) bars his claim.

[11] The pleadings disclose a dispute as to purpose of the child support litigation. In the 3rd Amended Notice of Appeal dated May 14, 2008, Mr. Grenon alleges that he is the joint custodial parent of his children and that he incurred the legal expenses in obtaining a court order for child support. Paragraph 11 of the 3rd Amended Notice of Appeal sets out Mr. Grenon's allegation of a factual connection between the child support litigation and the *Federal Child Support Guidelines*, SOR/97-175, enacted under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.):

> 11. The Appellant was required to incur these legal fees to establish the proper amount and obtain an order for child support in relation to the joint financial obligation of the Appellant and his former spouse to financially support their children both generally and under the provisions of the *Divorce Act* and the *Federal Child Support Guidelines* (the "*Guidelines*"). The Order granted by the Court provided for an amount less than that sought by the Appellant's spouse.

[12] In paragraph 7 of the Crown's Reply to the 3rd Amended Notice of Appeal dated July 10, 2008, the Crown alleges that the Minister assumed when issuing the disputed reassessments that Mr. Grenon was the non custodial parent of the children, and that he incurred the legal expenses to defend an action commenced by his former spouse in which she sought spousal and child support.

[13] The Crown relies on a line of jurisprudence, most recently summarized in *Nadeau v. M.N.R.*, [2004] 1 F.C.R. 587; 2003 FCA 400, establishing that a deduction for legal expenses incurred to defend against a claim for child support is barred by paragraph 18(1)(*a*) because such legal expenses are not incurred for the purpose of earning income from property. Mr. Grenon challenges the Crown's application of paragraph 18(1)(*a*), and in the alternative asserts a number of constitutional arguments stated in his pleadings (every element of which is contested by the Crown).

[14] Before describing Mr. Grenon's constitutional arguments, it is necessary to mention a previous Tax Court decision in relation to this matter. In June of 2006, Justice Beaubier disposed of three motions by Mr. Grenon relating to the conduct of the Tax Court appeal (2006 TCC 342). One motion was for "advice and directions respecting the Court's jurisdiction as to the constitutionality of the *Federal Child Support Guidelines*." Justice Beaubier's comment on that point is as follows:

> This is answered by stating that in this appeal of an assessment under the *Income Tax Act* ("the *Act*"), this Court may rule as to matters affected by that assessment under the *Act*. But in and of themselves, the *Federal Child Support Guidelines* ("the *Guidelines*") are outside of the jurisdiction of this Court as set forth in the *Tax Court of Canada Act*.

[15] The second motion was for an adjournment of the Tax Court proceedings until Mr. Grenon could have another court determine the constitutionality of the *Guidelines*. That motion was dismissed, in part on the basis that the deductibility of the legal expenses in issue would be determined by the *Income Tax Act*, not the *Guidelines*. The third motion was for leave to file the 3rd Amended Notice of Appeal, which was granted in part.

[16] Mr. Grenon appealed Justice Beaubier's decision on a number of grounds, including reasonable apprehension of bias. The Crown also cross-appealed. The appeal was dismissed and the cross-appeal was allowed to correct an obvious mistake in the form of the 3rd Amended Notice of Appeal approved by Justice Beaubier (2007 FCA 239). Mr. Grenon's application for leave to appeal to the Supreme Court of Canada was dismissed on December 6, 2007 (S.C.C. Bulletin, 2007, p. 1795).

[17] I note parenthetically that Mr. Grenon commenced an action in the Alberta Court of Queen's Bench to challenge the constitutionality of the *Guidelines*. His action was dismissed on the basis that he had no standing, and also on the basis that his action was a collateral attack on his divorce judgment and was an abuse of process because Mr. Grenon could have raised his constitutional challenge in his divorce proceedings but chose not to do so: *Grenon v. Canada (Attorney General)*, 2007 ABQB 403. He did not appeal that decision.

[18] What remains of Mr. Grenon's constitutional argument after the decision of Justice Beaubier is stated at length in the 3rd Amended Notice of Appeal. Mr. Grenon argues that if paragraph 18(1)(*a*) is applied to bar the deduction of the legal expenses in issue, then that provision, or its application in the circumstances of this case, infringes Mr. Grenon's right to equal protection and equal treatment under the law pursuant to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* because it imposes differential treatment on him based on an enumerated ground (sex) or an analogous ground (marital or custodial status), or creates an unconstitutional effect by subsidizing the legal fees of one sex in child support disputes, but not the other. I summarize as

follows the key arguments in support of Mr. Grenon's constitutional challenge (from paragraph 25 of the 3rd Amended Notice of Appeal):

a. A deduction permitted for a legal expense is a public subsidy of that expense. The tax authorities have adopted a policy of applying paragraph 18(1)(a) of the *Income Tax Act* in a manner that permits a deduction for the legal expenses incurred by a person asserting a claim for child support (the vast majority being women) but not by a person defending such a claim (the vast majority being men). That differential treatment is contrary to subsection 15(1) of the *Charter*, and it is not saved by section 1 of the *Charter* because it is not a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

b. The discriminatory application of paragraph 18(1)(*a*) in the context of legal expenses incurred in child support litigation is based on incomplete, biased and ill-informed assumptions with no basis in fact or appropriate analysis.

c. The *Guidelines* are a central contextual factor in the systematic discrimination against men in the field of family law. They create an inherent inequality between women as support recipients and men as support payers, creating an unconstitutional discriminatory effect on men. The particular deficiencies in the *Guidelines* leading to this unconstitutional discrimination include:

i. failing to implement the principle in section 26.1 of the *Divorce Act* that spouses have a joint financial obligation to support their children;

ii. arbitrarily focusing on the income of the paying parent without an actual or reasonable assessment of the needs or actual costs of children;

iii. failing to account for the costs of having custody at any level less than 40%;

iv. imposing onerous factual presumptions and financial reporting obligations on paying parents only;

v. applying an unfairly simplistic linear formula connected to the paying parent's income without recognizing that the actual cost of raising children does not rise proportionally as income increases;

vi. arbitrarily dictating that a non-custodial parent (or a parent with less than 40% custody in terms of time) is the paying parent, even where financial circumstances indicate that the opposite should be ordered.

[19] Mr. Grenon's income tax appeal is governed by the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a. Those rules require Mr. Grenon to submit to an examination for discovery conducted by the Crown. They also give him the right to conduct an examination for discovery of a Crown witness who is, in the words of Rule 93(3), a "knowledgeable current or former officer, servant or employee" (« *un officier, un fonctionnaire ou un employé – actuel ou ancien – bien informé* ») chosen by the Deputy Attorney General of Canada.

[20] The scope of the examination for discovery is described in Rule 95(1) as follows:

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that	**95**. (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants :
(*a*) the information sought is evidence or hearsay,	*a*) le renseignement demandé est un élément de preuve ou du ouï-dire;
(*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or	*b*) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;
(*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined.	*c*) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée.

[21] In Mr. Grenon's examination, the Crown witness was asked to undertake to provide certain information and documents. The witness objected to 16 of those requests on the advice of Crown counsel. The disputed questions are as follows (with numbering added for ease of reference):

1. Inquire of the Department of Justice and inquire into any records kept of the federal\provincial territorial family law committee regarding the development of the child support *Guidelines*, to what extent that this concept was considered, in terms of Martin Browning's position that child support costs were not linear.

2. Produce the document or documents relating specifically to the delivery of this mandate to the family law committee or the FLC.

3. Advise why the assessment or inclusion of section "Subsequent Family Situations" was not included in the child support *Guidelines*.

4. Advise why this consideration of subsequent spouses was not included in the eventual child support *Guidelines*.

5. Advise why this particular issue of costs associated with the noncustodial parent was not addressed in the child support *Guidelines* and if it is, to what extent it is.

6. Advise to what extent the child support *Guidelines* take into consideration the nonmonetary costs of custodial parents.

7. Advise why the issue of the age of children in respect to child support orders was not addressed in the child support *Guidelines*.

8. Advise as to why a national study to determine the cost of children was not undertaken by the federal government and to produce any documentation with respect to a decision not to proceed with any type of survey on what the actual cost of children are.

9. Produce the minutes that may exist with respect to the proceedings of the federal/provincial territorial family law committee on the development of the child support *Guidelines*.

10. Provide the three proposals referenced on page 3 that were received by the economists who are identified in Footnote Number 1.

11. Advise what the Department of Justice document referred to is in this paragraph 4 in Document 38. Also, provide the documents which might

have been received from these consultants that the Department of Justice sought opinions from and any additional analysis of those opinions by the Department of Justice.

12. Provided any documents related to the point you've referenced in the possession of the Crown and whether there was any related analysis by the family law committee.

13. Produce the background information documentation regarding the analysis of this and other models regarding the issue of linearity.

14. Advise what information the Crown had with respect to developing the child support *Guidelines* that suggested that child costs remain constant over their lifetime or over their childhood.

15. Advise what information or analysis was done on that issue and a production of any written documentation with respect to that issue.

16. Advise whether or not the Crown conducted any analysis with respect to the proportionality of child costs in relation to income. And if it did, produce any analyses or any associated documents with that, including any expert opinions provided to the Crown on that issue.

[22] The committee mentioned in question 1 and in some of the other questions is the "Federal/Provincial/Territorial Family Law Committee," comprised of representatives of the federal Department of Justice and the equivalent departments of the provinces and the territories. In 1995, the Committee prepared a report entitled "*Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support*", which was published by the federal Department of Justice. Mr. Grenon alleges that this report was the basis for the *Guidelines*. Most of the disputed questions relate in one way or another to the 1995 Committee report, or related research reports and other documents.

[23] An underlying premise of Mr. Grenon's constitutional argument is that because women are far more likely than men to be the recipients of child support, any legal advantage they are given in asserting a claim for child support necessarily results in a disadvantage to men, who are far more likely to be the payers of child support. One objective of the disputed questions was to elicit evidence or admissions that support that premise, directly or indirectly, because such evidence could help establish the "contextual factors" that are an essential element of any allegation of discrimination on an analogous ground. Another objective was to arm Mr. Grenon against any attempt by the Crown to adduce evidence that the *Guidelines* are not discriminatory, or that they can be justified under section 1 of the *Charter*.

Decision of Justice Miller

[24] Justice Miller characterized the disputed questions as relating to the development, comprehensiveness and adequacy of the *Guidelines*. Based on his understanding of the pleadings, he concluded that the alleged deficiencies in the *Guidelines* are not facts in issue, and therefore Mr. Grenon is not entitled to an order compelling the production of evidence tending to prove or shed light on those alleged deficiencies. He also concluded that Mr. Grenon's attempts to discover the evidentiary foundation of the *Guidelines*, even in the context of supporting his allegation of pre-existing disadvantage or stereotyping, would effectively put in play the constitutionality of the *Guidelines*, contrary to the decision of Justice Beaubier.

[25] Justice Miller did not determine that the *Guidelines* themselves are irrelevant to the constitutional challenge in this case. On the contrary, he confirmed that it is open to Mr. Grenon to

discover and adduce evidence that the *Guidelines* have the alleged discriminatory effect. However, he concluded that Mr. Grenon's attempt to discover evidence relating to the development of the *Guidelines* was a step too far, because the pleadings do not make a clear connection between the evidentiary foundation for the *Guidelines*, which is the subject of the disputed questions, and the disallowance of the legal expense deduction pursuant to paragraph 18(1)(*a*) of the *Income Tax Act*.

Analysis

[26] The root of this appeal is Mr. Grenon's assertion that Justice Miller misconstrued the pleadings when he found that the *Guidelines* are not facts in issue, and when he concluded that paragraphs 25 and 26 of the 3rd Amended Notice of Appeal contain only argument, and not factual allegations that are relevant and material to the appeal.

[27] As I read Justice Miller's reasons, he did not find that the *Guidelines* are not "facts in issue". Indeed, he said that "the *Guidelines* themselves are a fact", but the alleged deficiencies in the *Guidelines* referred to in paragraph 25 of the 3rd Amended Notice of Appeal are argument (see paragraph 13 of his reasons). I see no error in Justice Miller's interpretation of the pleadings, or in his specific finding that the pleadings do not allege a connection between the scope and application of paragraph 18(1)(*a*) and the analytical foundations of the *Guidelines*.

[28] I have not disregarded Mr. Grenon's criticism of the part of Justice Miller's reasons in which he seems to favour the Crown's argument that, in interpreting pleadings, one looks to the section on facts to discern the material facts, and to the section on submissions to discern the legal

arguments. Mr. Grenon argues that an allegation of a material fact should be so recognized even if it is imbedded within a submission, and that including factual allegations within the submissions is at most an error of form that can be cured by amending the pleadings. In my view, Justice Miller's interpretation of the pleadings is not based merely on a preference for form over substance in pleadings. As I read Justice Miller's reasons, he considered the pleadings in their entirety in an attempt to discern whether the disputed questions met the test of relevance. Mr. Grenon cannot complain if what he now says is a material factual allegation was not clearly identified as such in the pleadings (wherever they appear). That is especially so where the factual allegations, on any reasonable analysis, are many steps removed from the main issues in the appeal, which are necessarily limited by the decision of Justice Beaubier.

[29] Mr. Grenon challenges Justice Miller's characterization of paragraph 26 of the 3rd Amended Notice of Appeal as argument only. He suggests that such a characterization could preclude Mr. Grenon from adducing at trial evidence about the factual allegations imbedded within paragraph 26 (such as, for example, the allegation that men are the payees of child support in 92.8% of cases before the courts). In my view, that concern is unfounded. I reach that conclusion for two reasons. First, the disputed discovery questions do not involve anything stated in paragraph 26, so that whatever Justice Miller said about paragraph 26 is *obiter*. Second, Justice Miller clearly accepted the propriety of Mr. Grenon's attempts to determine whether the *Guidelines* have had discriminatory effects. For example, in paragraph 16 he noted with approval that the Crown did not object when Mr. Grenon asked the Crown witness whether the Crown accepts that in 92.8% of cases men are the payers of child support.

[30] For these reasons, I conclude that there is no basis for appellate intervention in Justice Miller's refusal to order answers to the disputed questions. As for Mr. Grenon's motion to compel the Crown to produce a more knowledgeable Crown witness, Mr. Grenon does not contest Justice Miller's conclusion that this motion cannot succeed in the face of the dismissal of the motion to compel answers.

Conclusion

[31] The Crown has asked for costs in this Court and in the Tax Court. In the Tax Court, Justice Miller dismissed Mr. Grenon's motion with "costs in the cause". The record discloses no basis for the intervention of this Court in Justice Miller's order on costs in the Tax Court, and the Crown has suggested none.

[32] I would dismiss the appeal and award costs to the Crown in this Court only.

"K. Sharlow"
J.A.

"I agree
Pierre Blais C.J."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-255-10
(APPEAL FROM AN INTERLOCUTORY ORDER OF THE HONOURABLE JUSTICE MILLER DATED JULY 2, 2010, NO. 2010 TCC 364)	
STYLE OF CAUSE:	James T. Grenon v. Her Majesty the Queen
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	March 23, 2011
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	BLAIS C.J. STRATAS J.A.
DATED:	May 2, 2011

APPEARANCES:

Ronald Robinson	FOR THE APPELLANT
Carla Lamash Rob Neilson	FOR THE RESPONDENT

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