Federal Court of Appeal | Cour d'appel fédérale

Date: 20120308

Docket: A-132-11
A-133-11

Citation: 2012 FCA 85

CORAM: **BLAIS C.J.**
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

KANNIAPPA (KEN) REDDY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 8, 2012.

Judgment delivered from the Bench at Vancouver, British Columbia, on March 8, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
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LAYDEN-STEVENSON J.A.

[1] The appellant appeals from an interlocutory order of Justice Bowie (the judge) of the Tax Court of Canada (Tax Court). The judge dismissed the appellant's request for an order requiring the respondent's nominee on examinations for discovery (discovery) to answer a number of questions. The judge's reasons are reported at 2011 TCC 161. In our view, the appeals must be dismissed.

[2] This matter relates to income tax and GST reassessments for the 2000, 2002 and 2003 taxation years. The appellant appealed both the income tax and GST reassessments (the

reassessments) to the Tax Court. His appeals to this Court from the judge's interlocutory order were consolidated by order of Nadon J.A. dated June 9, 2011. A copy of these reasons will be placed in each file.

[3] In the Tax Court, the Crown's replies enumerated seven assumptions with respect to the appellant's income tax notice of appeal and thirty-three assumptions with respect to the appellant's GST appeal. At discovery, the Crown objected to a number of questions asked by the appellant. In effect, those questions sought to have the nominee pinpoint where each factual assumption was recorded in the produced documents. Although the Crown objected, it offered an undertaking to answer in writing. The appellant refused and brought his motion.

[4] The judge framed the issue as "whether the questions, as formulated, are fair." He acknowledged that the appellant was entitled to question whether, in fact, each assumption was made because of the potential impact as to which facts the appellant must disprove (judge's reasons at para. 4). The crux of the judge's determination may be succinctly stated. The form of the questions was objectionable since it constituted an unfair memory test that required the nominee to memorize the many assumptions. The judge decided that the sought-after information should be broken down into questions such as asking about each assumption, whether the assumption was made, and where it was recorded in the documents. Since discoveries were ongoing, counsel was free to put the questions in proper form and elicit the information.

[5] The appellant's general theory is that the Crown did not actually make all of the assumptions pleaded. Therefore, through the questions, he sought to obtain admissions in order to avoid bearing the burden of demolishing the assumptions. The appellant alleges that the judge erred: (a) in finding that the questions were compound questions; (b) by failing to give effect to the "liberal approach" to discovery; and (c) by controlling the way counsel conducted discovery by requiring counsel to cross-examine. According to the appellant, the relevant standard is whether the questions are proper, not whether they are fair. Further, since the questions are: (a) not irrelevant or directed solely to credibility; (b) privileged; or (c) asked in bad faith, the judge erred in dismissing the motion.

[6] The applicable standard of review with respect to the judge's determination is palpable and overriding error: *Grand River Enterprises Six Nations Ltd. v. R.*, 2011 FCA 121 (*Grand River*) at para. 8.

[7] In our view, the judge's determination was not based on his characterization of the questions as compound questions and we need not comment further on this issue. The judge's operative finding was that the questions were unfair because they rolled multiple inquiries into one. The Court can decline to compel answers on the basis that the questions are unfair or overly broad. In this respect, the appellant is referred to *Apotex Inc. v. Wellcome Foundation Ltd*., 2008 FCA 131 at para. 3; *Grand River* at para. 18; and *AstraZeneca Canada Inc. v. Apotex Inc*., 2008 FC 1301 at para. 16.

[8] As for the allegation that the judge required counsel to cross-examine, in our view, the judge did nothing other than require the questions to be unpacked, without prescribing a specific form. His

use of the term "*seriatim*" means simply "in a series" as opposed to a particular series. The comment flows from his central conclusion on fairness. The questions, to be fair, must be unpacked, but not necessarily in a particular order.

[9] The appellant has not demonstrated any palpable and overriding error on the part of the judge, nor have we been able to find any. Nor are we persuaded that the judge's decision is so clearly wrong as to amount to an injustice. Consequently, the appeals will be dismissed with costs in the amount of $2,500, inclusive of disbursements and applicable taxes, payable forthwith.

"Carolyn Layden-Stevenson"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.

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