Docket: 2013-1383(IT)G

BETWEEN:

DOUGLAS MCCARTHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 11, 2016 at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Joel Allan Sumner
Counsel for the Respondent:	H. Annette Evans Rishma Bhimji Victoria Iozzo

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ORDER

Upon motion made by the Respondent for an order to extend time to compel the Appellant to complete the examination for discovery;

And upon hearing the parties;

For the attached reasons given orally at the hearing, this Court orders the following:

1. The Appellant shall serve his list of documents on the Respondent no later than Thursday, February 18, 2016.

2. The Appellant shall serve copies of the documents on his list to the Respondent no later than Monday, February 22, 2016.

3. The examination for discovery of the Appellant shall be completed no later than Tuesday, February 23, 2016.

4. Under Rule 100 of the *Tax Court of Canada Rules (General Procedure)* and Practice Note No. 8 (amended), the notice of the Respondent's read-ins from discovery shall be served on the Appellant before 9:30 a.m. on Thursday, February 25, 2016. The notice of any rebuttal read-ins from the Appellant shall be served on the Respondent before 8:30 a.m. on Friday, February 26, 2016.

Signed at Ottawa, Canada, this 15th day of February 2016.

"Patrick Boyle"

Boyle J.

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DOUGLAS MCCARTHY,

Appellant,

and

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Respondent.

EDITED VERSION OF TRANSCRIPT OF ORAL REASONS FOR ORDER

Let the attached edited transcript of the reasons for order delivered orally from the bench at Toronto, Ontario, on February 11, 2016 be filed. I have edited the transcript (certified by the Court Reporter) for style, clarity and to make minor corrections only. I did not make any substantive changes.

Signed at Ottawa, Canada, this 15th day of February 2016.

"Patrick Boyle"

Boyle J.

Citation: 2016 TCC 45
Date: 20160215
Docket: 2013-1383(IT)G

BETWEEN:

DOUGLAS MCCARTHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Motion heard and decision rendered orally at the hearing on February 11, 2016 at Toronto, Ontario)

Boyle J.

[1] This matter has a trial date pending of Friday, February 26, 2016.

[2] I will be ordering that the list of documents from the Appellant be delivered by Thursday, February 18, 2016, which is the timetable Mr. Sumner requested, and that, in addition, the Appellant has until Monday, January 22, 2016 to provide copies of all of the documents on his list of documents to the Respondent. I will be allowing the Respondent's motion to extend the time within which discovery of the taxpayer can be completed to Tuesday, February 23, 2016 which leaves things several days before the hearing date of the trial.

[3] This is one of the cases in one of the groups of Fiscal Arbitrators cases before the Court of which I have taken over case management from former case management judge, Justice Rip, upon his retirement last year.

[4] There is also a northern/residence deduction in issue in this appeal on which the burden remains with the taxpayer.

[5] I turn now to the Respondent's request, the reasons for allowing it and the reasons for not accepting the opposition of the Appellant. This matter was set

down for hearing previously. There was a previous scheduling order requiring discoveries to be completed. They were extended by the prior case management judge and, in spite of an appointment for examination being taken out within the time frame contemplated by the extended scheduling order, the taxpayer did not appear for discovery.

[6] The taxpayer's counsel has opposed the Respondent's motion to extend the time to complete discovery on four grounds. Mr. Sumner's first argument was that the hearing date of November 27, 2015 was adjourned by an order of the Judicial Administrator. This was done in response to requests from both parties and, most recently before her order, a request from the Respondent.

[7] Mr. Sumner argued that the Judicial Administrator's behaviour is that of a tyrant, that she has no basis to issue scheduling orders, or this adjournment order, nor does the Court or the Chief Justice have any power to authorize her to do that. Mr. Sumner points out his concern that an order that is not signed by a judge may not be appealable to a higher court.

[8] He takes the position that since the November 27, 2015 trial was never properly adjourned and, since the onus with respect to the penalties under dispute is on the Respondent, the taxpayer should be considered to have already won his appeal, at least in respect of the penalties.

[9] Mr. Sumner's position on this ground is that, if they have already won the appeal, they should not have to be completing discoveries ahead of another trial date.

[10] As pointed out to counsel by the Court, the *Tax Court of Canada Act*, duly passed by Parliament, provides expressly in section 23:

> 23(1) The Chief Justice may designate an employee of the Courts Administration Service as the Judicial Administrator of the Court.
>
> (2) The Judicial Administrator of the Court shall perform any non-judicial work that may be delegated to him or her by the Chief Justice of the Court, in accordance with the instructions given by the Chief Justice, including
>
> (*a*) the making of an order fixing the time and place of a hearing, or adjourning a hearing; and
>
> (*b*) arranging for the distribution of judicial business in the Court.

[11] For that reason, I am rejecting Mr. Sumner's opposition on that ground.

[12] Taxpayer counsel's second argument was that Mr. McCarthy's right under the *Canadian Bill of Rights* to not be deprived of the enjoyment of his property except in accordance with due process of law is offended if Mr. McCarthy is required to answer questions on discovery.

[13] Mr. Sumner's argument is that the property the enjoyment of which Mr. McCarthy is being deprived is Mr. McCarthy's right to not be legally obligated to pay money to the government and that Mr. McCarthy is deprived of that right when the government assessed him differently than he filed because, following an assessment, he is obligated to pay the amount or have a debt owing.

[14] Mr. Sumner argues that at that point, given the nature of the objection and appeals process under the *Income Tax Act* and the *Tax Court of Canada Act*, there has been an absence of due process that is total; Mr. McCarthy had no hearing before the assessment or reassessment against him was issued.

[15] Mr. Sumner did not wish to argue at today's hearing that the entire assessment is invalid because of this breach of the *Canadian Bill of Rights*.

[16] After a thorough discussion of the Bill of Rights, Mr. Sumner ultimately indicated he was not pursuing the Bill of Rights' property-interest argument against attending discovery, but merely to inform certain aspects of the torture and coercion arguments he advanced.

[17] Mr. Sumner's third argument opposing attending discovery is that, in circumstances where Her Majesty the Queen is a party to the proceedings, being compelled to attend at discovery and provide answers under oath constitutes torture as defined in the *Criminal Code* of Canada.

[18] His position is that Her Majesty seeking to exercise her right to discovery constitutes torture. Mr. Sumner's position is that the Rules of this Court which require the Appellant to provide information on discovery sanction coercion constituting torture given that this is causing Mr. McCarthy mental distress, and since Her Majesty the Queen is a party to this proceeding and Her Majesty the Queen is always behaving coercively.

[19] Similarly, fleshed out, he believes any order of this Court to complete such a discovery, assuming that order also causes further mental distress to Mr. McCarthy, constitutes torture.

[20] Subsection 269.1(4) of the *Criminal Code* dealing with torture provides that, in any proceedings over which Parliament has jurisdiction, any statement obtained as a result of torture is inadmissible in evidence, except as evidence that the statement was obtained as a result of torture. Mr. Sumner's position is that this means that attending discovery would not only constitute torture, but would only provide inadmissible evidence.

[21] I am not at all persuaded by Mr. Sumner's arguments or his authorities that this Court's discovery processes mandated by the Rules, and which form a very integral part of due process and natural justice in this Court, and provide processes to be followed for the better administration of justice, constitute torture. Enough said.

[22] Mr. Sumner's fourth argument is related to torture, and that is that compelling a person to complete discovery constitutes coercion at common law. If coercion is applied, then it is the taxpayer counsel's position that the person being coerced has a reaction to it that it is not voluntary. He then takes the position that if Her Majesty the Queen is a party she is always coercive, in effect assuming the coercion, and concludes that if the result is that the answers on discovery under oath are not voluntary as a result, those answers would be inadmissible because they would not be credible, presumably because the taxpayer, his client, might not be telling the truth.

[23] This argument is very similar to, but different from, the torture argument. It is not being raised with respect to the Rules requiring an appellant to deliver a list of documents and documents on that list; the Appellant is in fact willing to do that within seven days. Mr. Sumner does again state that the Court would be coercive if it issued an order compelling discovery of the Appellant.

[24] I am not persuaded that the Crown is always coercive or should be presumed to always be coercive or always acts in a coercive manner. What was argued before me falls short, far short, of persuading me that such is the case.

[25] For those reasons, I will be signing the order that I outlined at the outset, providing for a list of documents, providing full copies of the documents on that list and extending the time within which discovery is to be completed, which is in

effect ordering the taxpayer to complete discoveries in accordance with the Rules, all as I said at the outset.

[26] The order will provide as well an abridgment of the time for giving notice of the portions, if any, of the discovery to be read in as evidence to the day before the trial, being Thursday, February 25, 2016.

Signed at Ottawa, Canada, this 15th day of February 2016.

"Patrick Boyle"

Boyle J.

CITATION:	2016 TCC 45
COURT FILE NO.:	2013-1383(IT)G
STYLE OF CAUSE:	DOUGLAS MCCARTHY v. THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 11, 2016
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	February 15, 2016

APPEARANCES:

Counsel for the Appellant:	Joel Allan Sumner
Counsel for the Respondent:	H. Annette Evans Rishma Bhimji Victoria Iozzo

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