Docket: 2003-1899(IT)G

BETWEEN:

NEVIO CIMOLAI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on January 25, 2005 at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Susan Wong

ORDER

Upon motion made by the Appellant for an Order:

(a) allowing the appeal in the absence of the Respondent's fulfilment of the written discovery process; or

(b) in the alternative, for an Order compelling the Respondent to answer questions on written discovery; or

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(c) in the alternative for an Order compelling the Respondent to attend oral discovery; and

(d) to pay the Appellant's costs for this motion and lost wages.

And upon motion made by the Respondent for an Order:

(a) terminating the Appellant's written examination for discovery of the Respondent pursuant to section 117 of the *Tax Court of Canada Rules (General Procedure)*;

(b) directing the Appellant to provide the Respondent with copies of the complete legal invoices, including the particulars of each invoice, to support a disallowed deduction;

(c) setting the appeal down for hearing; and

(d) awarding costs to the Respondent pursuant to section 70 of the *Tax Court of Canada Rules (General Procedure)*.

And upon reading the Affidavits and submissions filed and hearing the parties it is ordered, for and in accordance with the reasons set out in the attached Reasons for Order, that:

(1) The Appellant's motions are denied;

(2) The Respondent's motion to terminate the Appellant's examinations for discovery pursuant to section 117 of the *Rules* is granted in accordance with and on the terms set out in paragraphs [13] and [14] of the attached Reasons for Order;

(3) The Respondent's motion directing the Appellant to provide legal invoices to support the disallowed deduction that is the subject-matter of the appeal is denied;

(4) A status hearing be arranged if and as required in or about 30 days from the date of this Order for the purpose of setting the appeal down for hearing; and

(5) Each party shall bear their own costs in respect of these motions.

Signed at Ottawa, Canada, this 3rd day of February 2005.

"J.E. Hershfield"

Hershfield J.

Citation: 2005TCC93
20050203
Docket: 2003-1899(IT)G

BETWEEN:

NEVIO CIMOLAI,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hershfield J.

[1] Each of the parties has brought motions under section 65 of the *Tax Court of Canada Rules (General Procedure)*. Each motion relates to the discovery process which is currently at a standstill. Before setting out the motions a brief background would be helpful.

[2] The Appellant appeals an income tax assessment of his 2001 taxation year which denied the deduction of certain legal fees. The legal expenses pertain to two proceedings allegedly arising out of the Appellant's termination from employment as a medical microbiologist. The first proceeding is a juridical review of a suspension made by a hospital board which action is still pending before the Court of Appeal of British Columbia. The second proceeding seeks damages in tort for acts relating to and arising from wrongful dismissal.

[3] By Order of this Court dated February 25, 2004 the parties were ordered to conduct examinations for discovery by way of written questions in accordance with sections 113 to 118 of the *Rules.*

[4] The Appellant submitted the first set of questions, 43 in total, on April 14, 2004. On May 28, 2004 a designated officer of the CRA served an affidavit of answers to the written questions following which the Appellant submitted on

June 14, 2004 a further set of written questions containing 396 questions. The second set of questions is based on the Appellant's dissatisfaction with the answers to the first set of questions and in this regard he presumably relies on subsection 116(1) of the *Rules*.

[5] The Respondent has refused to answer the second set of questions and the Appellant has brought a motion for an Order:

(a) allowing the appeal in the absence of the Respondent's fulfilment of the discovery process; or

(b) alternatively, compelling the Respondent to answer the second set of questions submitted on written discovery; or

(c) alternatively, compelling the Respondent to attend oral discovery.

[6] The Respondent has moved for an Order:

(a) terminating the Appellant's examinations for discovery pursuant to section 117 of the *Rules*;

(b) directing the Appellant to provide legal invoices to support the disallowed deduction that is the subject-matter of the appeal; and

(c) setting down the appeal for hearing.

[7] In order to put the nature of the second set of questions in context it is necessary to set out, summarily at least, the factual background that has led up to the current situation which is that the Respondent is frustrated by the Appellant's unwillingness to provide particulars of his legal fees and the Appellant is of the belief that the CRA and its lawyer from the Department of Justice have acted inappropriately.

[8] The Appellant has come armed with voluminous materials illustrative of what he asserts to be misconduct on the part of the Respondent's agents. He has accused the CRA of non-disclosure of documents before and during discovery, editing documents disclosed, taking contradictory positions and not being honest and forthright in their dealings with him. Further, he has accused the Justice lawyer of conflict of interest and misrepresenting settlement communications. I will refer to these areas of concern as the procedural issues.

[9] In a nutshell what seems to have happened is that the assessment denies all legal expenses claimed by the Appellant in respect of his 2001 taxation year. The CRA based such denial on its then assessing practice relating to paragraph 8(1)(*b*) of the *Income Tax Act*. The CRA later took the position that it would allow deductions under that paragraph for the portion of his legal expenses that related to his first action. This position required that the Respondent be satisfied as to the quantum of legal expenses related to each of the two actions.

[10] The Appellant insists he has provided the necessary invoices and somehow believes that the CRA and its legal counsel are falsely denying that he has complied with their request. Based on the exhibits submitted by the Appellant himself, it is clear that the Appellant has not provided the particulars requested.[1] Indeed, the Appellant acknowledged that the reason he would not provide particulars is because they are solicitor-client privileged. Respondent's counsel acknowledged that she could not then, or would not, pursue her motion to compel the Appellant to provide particulars. Clearly the Appellant may withhold such particulars at his peril.

[11] I turn now to the issue of terminating the discoveries versus requiring the Respondent to answer the second set of questions. I note that the Respondent relies solely on section 117 of the *Rules*, paragraph (*a*) of which allows termination of or limiting the scope of the written examination where the right to examine is being abused by an excess of improper questions.

[12] I have reviewed the 396 questions in the second set of questions and found virtually none of them relevant to the issue under appeal. They relate to or would have relevance to the procedural issues raised by the Appellant. As I will comment on momentarily, these are improper questions, which is to say that there is clearly an overwhelming excess of improper questions. Accordingly the Respondent properly invokes and relies on section 117 of the *Rules*. As well, I note that the second set of questions include a series of 21 questions asked of 13 different federal government employees. This alone is not allowed under the *Rules*. Subsection 93(3) of the *Rules* allows for the examination of only one officer of the

[1] None of the asserted facts and exhibits tendered by the Appellant as a submission prior to the hearing were given as evidence by affidavit as required by section 71 of the *Rules.* This would, in itself, be sufficient cause to dismiss the Appellant's motion. However the Respondent made no objection to my considering the exhibits tendered which, in any event, have proven to be of no assistance to the Appellant.

Crown subject to the naming of a different officer on application being made to the Court. Subsection 93(3), which would apply to discoveries by written questions, requires the Crown, when it is the party to be examined, to select a knowledgeable officer to be examined on behalf of that party. However, under subsection 95(2) of the *Rules* the person to be examined is required, prior to the examination, to make all reasonable inquiries regarding the matters in issue. Such inquiries are to be made of all of the CRA's officers, servants, agents and employees, past or present, and if necessary the person being examined for discovery may be required to become better informed and for that purpose the examination may be adjourned. Failure to meet the requirements of this *Rule* would invoke subsection 116(1) of the *Rules* permitting further written questions or subsection 93(1) of the *Rules* permitting a further examination of the party.

[13] On listening to the Appellant's concerns, one concern appears to have some validity. That concern is that the CRA officer responding to the first set of written questions submitted by the Appellant did not, on the face of certain answers, evidence that she had made any inquiries of other officers of the CRA in relation to questions the answers to which were or could be material to the issues under appeal. I have identified three such questions in the first set of questions and the Appellant is entitled to be satisfied that the answers to such relevant questions comply with subsection 95(2) of the *Rules*. Accordingly, I will grant the motion of the Respondent to close discoveries subject to the Respondent causing the officer of the CRA, the affiant who answered the first set of questions, to respond again to questions 5, 6 and 9 of the first set of questions in a manner more clearly consistent with her obligation set out in subsection 95(2) of the *Rules*. This is to limit the scope of written examinations as contemplated in section 117 of the *Rules*. As well I note that the answer to question 31 of the first set of questions has an undertaking which as at the date at the hearing had not been satisfied. Accordingly my Order will include by reference the stipulation that the answers to the redirected questions (5, 6 and 9 of the first set of questions) and the undertaking made in answer to question 31 of the first set of questions shall be completed within 30 days of the date of this Order.

[14] I note here that the Appellant has asked whether on receiving the answers to the redirected questions he may then serve a further list of written questions pursuant to subsection 116(1) of the *Rules*. That section of the *Rules* is clearly not intended to allow a further list of written questions *ad infinitum*. It would be an abuse of the *Rule* in situations like this to suggest that the Appellant continue with his present course of action. Under the *Rules* a party gets to examine an adverse

party only once.[2] Subsection 116(1) must be applied so as not to abuse this governing principle. I can envision no circumstances under which a further list of written questions would be allowed. Accordingly, subject to subsection 93(1) of the *Rules*, examinations for discovery are to be closed upon the Respondent complying with its obligations as set out in paragraph 13 above.

[15] Needless to say, the Appellant's motion for an Order allowing the appeal in the absence of the Respondent's fulfilling of the discovery process is denied as is his request to compel the Respondent to attend oral discoveries.

[16] As to the Respondent's motion to set this matter down for hearing of the appeal, I repeat some general observations I made at the end of the hearing of the motions. The purpose of discoveries is to gather information related in a relevant way to the issues under appeal. While it appears that the Appellant has a claim to solicitor-client privilege in relation to the particulars sought by the Respondent, and while I have denied the Respondent's motion for an Order directing the Appellant to provide complete legal invoices to support the disallowed deduction, I note that the information requested by the Respondent is relevant to the issues. While this may put the Appellant in a difficult position vis-à-vis his claim of privilege, it does not justify his current disputes over the conduct of the officers of the CRA or the Justice lawyer involved. The Appellant is on a bit of a witch hunt and believes he has caught these parties in practices that abuse the process of his appeal. For example, he has, through access to information, discovered more documents than were listed under section 82 of the *Rules* or provided to him in response to his written questions. He also notes that some documents have been edited by the deletion of handwritten observations evident on the copies received from access to information and not evident on copies received in respect of answers to his written questions. However, as pointed out to the Appellant at the hearing, nothing in these so-called discrepancies were material to issues in this appeal. If the CRA determines that a document is not relevant to an issue under appeal it need not be embarrassed about its non-disclosure. Further, to clean up copies is not necessarily offensive if what is being cleansed is of no relevance to the issues under appeal or are solicitor-client notations (even if privilege claims are subsequently waived through access to information). The Appellant has convinced himself that there is a conspiracy of sorts here to cover up facts that would disclose that the CRA had taken inconsistent and inappropriate positions. He has a number of complaints about the entire process and he is on a fishing trip for full disclosure

[2] Subsection 93(1) of the *Rules*.

of that process in order to establish the veracity of his beliefs and convictions. His pursuits along this path are not relevant to the issue under appeal and are beyond the jurisdiction of this Court. Although it is open for the Appellant to seek legal advice on the merits of considering other forums to pursue, this Court's jurisdiction in these circumstances is simply and only to determine the correctness of the assessment on the facts that bear directly to the legal issues in question. The issues here appear to be straightforward. There is clearly no need to extend pre-trial procedures further other than as directed above. Accordingly, the parties should expect that a status hearing will be arranged by the Court in or about 30 days from the date of this Order to set a trial date subject to the parties' joint request that the matter not be set down for hearing until mutually satisfactory arrangements have been made to accommodate both the Respondent's request for particulars respecting the legal invoices in question in this appeal and the Appellant's concerns respecting the privileged nature of such evidence.

Signed at Ottawa, Canada, this 3rd day of February 2005.

"J.E. Hershfield"

Hershfield J.

CITATION:	2005TCC93
COURT FILE NO.:	2003-1899(IT)G
STYLE OF CAUSE:	Nevio Cimolai and Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 25, 2005
REASONS FOR ORDER BY:	The Honourable Justice J.E. Hershfield
DATE OF ORDER:	February 3, 2005

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Susan Wong

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada