

Docket: 2004-122(IT)G

BETWEEN:

CLAUDETTE TREMBLAY,
EXECUTRIX OF THE ESTATE OF MARCEL TREMBLAY,
Appellant,
and
HER MAJESTY THE QUEEN,
Respondent.

Motion held by way of conference call on August 28, 2008
at Ottawa, Canada

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: James Shea
Counsel for the Respondent: Carla Lamash

ORDER

Upon Motion by counsel for the Respondent for an Order compelling the Appellant to provide answers to 12 additional questions;

And upon hearing what was alleged by the parties;

The Motion filed by the Respondent is granted in accordance with the Reasons for Order attached.

Signed at Vancouver, British Columbia, this 10th day of September 2008.

“L.M. Little”

Little J.

Citation: 2008 TCC 500

Date: 20080910

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BETWEEN:

CLAUDETTE TREMBLAY,
EXECUTRIX OF THE ESTATE OF MARCEL TREMBLAY,
Appellant,

and

HER MAJESTY THE QUEEN,
Respondent.

REASONS FOR ORDER

Little J.

[1] This is an application under subsection 116(2) of the *Tax Court of Canada Rules (General Procedure)* to compel the Applicant to disclose further documents in a written examination for discovery.

[2] Counsel for the Respondent filed a Notice of Motion dated the 31st day of July 2008 for an Order compelling the Applicant to provide answers to 12 additional questions.

[3] By letter to the Court dated August 27, 2008 Counsel for the Respondent indicated that the Respondent is satisfied with the answers provided by the Appellant for 10 of the unanswered questions.

[4] In the letter dated August 27, 2008 Counsel for the Respondent indicated that the only questions which the Appellant has refused to answer were question 20(a) and question 29.

[5] Re: Question #20(a):

Provide a copy of the Agreement referred to.

(Note: the Agreement in question is the Non-Competition Agreement referred to in paragraph 9 of the Appellant's Notice of Appeal)

In the written discovery the Respondent replied "The document is subject to confidentiality terms".

[6] Re: Question #29:

Provide copies of all settlement agreements and documents relating to those agreements with respect to the law suit or threatened law suit.

In the written discovery the Respondent said:

The potentially relevant documents are subject to a confidentiality.

[7] A conference call was held with Counsel for the parties on August 28, 2008.

[8] Re: Question #20(a):

During the conference call Counsel for the Respondent maintains that there is no proper ground upon which to refuse production of the documents requested.

[9] During the conference call Counsel for the Appellant said:

... our position is that it is a confidential agreement. It may, to be fair, it may shed light on the circumstances, but the circumstances will be defined by the witnesses in this particular use and we were not arguing stronger than the fact is that there is a confidential agreement between the parties.

[10] In support of her position Counsel for the Respondent referred to the decision of the Tax Court of Canada in *Fink v. The Queen*, [2005] 3 C.T.C. 2474. Ms. Lamash noted that in the *Fink* decision Justice Bonner held that privilege does not attach to situations where the settlement document is relevant in determining the ultimate issue in the tax appeal.

[11] In the *Fink* decision Justice Bonner said at paragraphs 27 and 28:

27 I turn next to settlement privilege. It is invoked by the appellants to justify both the refusal to produce documents and the refusal to answer questions which clearly

do bear or might bear on discussions such as those pleaded in paragraph 22 of the Amended Notice of Appeal. Those and other discussions pleaded by the appellant led to the settlement of the proceedings in court and in the OSC. It was that settlement which generated the payment now in issue. Essentially the appellants wish to produce nothing more than the settlement agreement which is already a matter of public record.

28 Counsel for the appellant asserts that a party to settlement negotiations is neither required nor permitted to disclose the contents of such negotiations in proceedings by or against the third party. He relies on a number of authorities none of which deal with disclosure in the context of tax litigation in which the true substance and nature of the payment and of the injury which the payment is intended to compensate are central to the issue. The settlement privilege is one which is intended to encourage the resolution of a dispute without litigation by permitting the parties to the dispute to discuss their differences frankly and without fear that admissions made by them for the purpose of arriving at a settlement will be used against them later. It does not prevent disclosure in later litigation between persons neither of whom was a party to the litigation in which the offer of settlement was made. Furthermore, in my view, when the ambit of the privilege is properly understood, it is evident that the privilege does not attach to cases where the discussion or settlement document is relevant to establish not the liability of a party to the settlement for the conduct which gave rise to the dispute but rather to arrive at a proper interpretation of the agreement itself. The appellant's reliance on this privilege is in my view wholly unwarranted both as to the production of documents and as to discussions and events.

[12] I paraphrase the words of Justice Bonner and say that the Appellant's reliance on privilege, with respect to the Non-Competition Agreement, is in my view wholly unwarranted both as to the production of the document and as to discussion and events.

[13] In my opinion the Appellant should produce the Non-Competition Agreement because that agreement may contain the information that is necessary to arrive at a proper interpretation of the issue.

[14] Re: Question #29:

I have concluded that the Appellant should produce all settlement agreements and documents relating to those agreements with respect to the threatened law suit for the same reasons as outlined in paragraph [13] above.

[15] The Motion is granted.

Signed at Vancouver, British Columbia, this 10th day of September 2008.

“L.M. Little”

Little J.

CITATION: 2008 TCC 500

COURT FILE NO.: 2004-122(IT)G

STYLE OF CAUSE: Claudette Tremblay, Executrix of the Estate
of Marcel Tremblay
and Her Majesty The Queen

PLACE OF HEARING: Ottawa, Canada

DATE OF HEARING: August 28, 2008

REASONS FOR ORDER BY: The Honourable Justice L.M. Little

DATE OF ORDER: September 10, 2008

APPEARANCES:

Counsel for the Appellant: James Shea
Counsel for the Respondent: Carla Lamash

COUNSEL OF RECORD:

For the Appellant:

Name: James Shea

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For the Respondent:

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