Docket: 2004-4083(IT)G

BETWEEN:

JEANNETTE WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard together with the motion in *The Estate of David G. Walsh* (2004-4085(IT)G) on March 5, 2009, at Toronto, Ontario

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Michael Hunziker
Counsel for the Respondent:	Louis L'Heureux

ORDER

Upon motion by the respondent for Orders pursuant to section 116 of the *Tax Court of Canada Rules* (*General Procedure*) ("*Rules*") directing the appellants "to provide details of every stock option agreement entered into by [each of them] and Bre-X Minerals Ltd. ("Bre-X"), Bresea Resources Ltd. ("Bresea") and Bro-X Minerals Ltd. ("Bro-X") during the period 1993-1996 including production of the agreements and details regarding the timing and number of options exercised, the number of shares purchased and sold and the purchase and sale price of the shares acquired through the exercise of stock options."

It is ordered that:

(1) Share option agreements entered into between either or both of Mr. and Mrs. Walsh and Bre-X and Bresea in 1993 and 1994 that

were subject to exercise of options by Mr. and Mrs. Walsh resulting in the assessments in issue are to be provided to the respondent.

(2) Stock option agreements, if any, entered into by Mr. and Mrs. Walsh in 1995 and 1996 with Bre-X or Bresea are to be produced.

(3) Information requested in Questions 20 and 21 in the examinations for discovery of Jeannette Walsh, paragraph b, subparagraphs i) to iv), paragraphs c) and d) to be provided with respect to stock options that were exercised by Mr. and Mrs. Walsh pursuant to such stock option agreements which eventually resulted in benefits included in the making of the assessments under appeal.

(4) Stock option agreements from Bro-X to the appellants, if any, and any exercise of any options pursuant to such agreements need not be provided to the respondent.

Costs shall be in the cause.

Signed at Ottawa, Canada, this 5th day of June 2009.

"Gerald J. Rip"

Rip C.J.

Docket: 2004-4085(IT)G

BETWEEN:

THE ESTATE OF DAVID G. WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard with the motion in *Jeannette Walsh* (2004-4083(IT)G) on March 5, 2009, at Toronto, Ontario

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Counsel for the Appellant:	Michael Hunziker
Counsel for the Respondent:	Louis L'Heureux

ORDER

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It is ordered that:

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(2) Stock option agreements, if any, entered into by Mr. and Mrs. Walsh in 1995 and 1996 with Bre-X or Bresea are to be produced.

(3) Information requested in Questions 20 and 21 in the examinations for discovery of Jeannette Walsh and on behalf of the Estate of David J. Walsh, paragraph b, subparagraphs i) to iv), paragraphs c) and d) are to be provided with respect to stock options that were exercised by Mr. and Mrs. Walsh pursuant to such stock option agreements which eventually resulted in benefits included in the making of the assessments under appeal.

(4) Stock option agreements from Bro-X to the appellants, if any, and any exercise of any options pursuant to such agreements need not be provided to the respondent.

Costs shall be in the cause.

Signed at Ottawa, Canada, this 5th day of June 2009.

"Gerald J. Rip"

Rip C.J.

Citation: 2009TCC301
Date: 20090605
Docket: 2004-4083(IT)G

BETWEEN:

JEANNETTE WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2004-4085(IT)G

BETWEEN:

THE ESTATE OF DAVID G. WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip, C.J.

[1] Her Majesty the Queen, the respondent, has filed notices of motion in the income tax appeals of Jeannette Walsh for 1996 and the Estate of her late husband, David Walsh for 1995 and 1996, for Orders pursuant to section 116 of the *Tax Court of Canada Rules* (*General Procedure*) ("*Rules*") directing the appellants "to provide details of every stock option agreement entered into by [each of them] and Bre-X Minerals Ltd. ("Bre-X"), Bresea Resources Ltd. ("Bresea") and Bro-X Minerals Ltd. ("Bro-X") during the period 1993-1996 including production of the agreements and details regarding the timing and number of options exercised, the number of shares

purchased and sold and the purchase and sale price of the shares acquired through the exercise of stock options." The motions were heard together.

[2] In assessing Mr. Walsh for 1995 and 1996 and Mrs. Walsh for 1996, the Minister of National Revenue ("Minister") included in income, in accordance with sections 2, 3 and paragraph 7(1)(*a*) of the *Income Tax Act* ("*Act*"), stock option benefits from Bre-X and Bresea on the basis that each appellant resided in Canada during their respective years under appeal. In the alternative, the respondent submits if Mr. and Mrs. Walsh were not resident in Canada as of September 18, 1995, then the amounts of stock option benefits are to be included in computing their income in the relevant taxation years pursuant to sections 3 and 114, subsection 2(3), paragraph 7(1)(*a*) and subparagraph 115(1)(*a*)(i) of the *Act*. The value of the stock option benefits, therefore, according to the respondent, constitutes income from the duties of an office and employment performed by each of the appellants in Canada; the stock options were granted at the times each appellant was an employee of Bre-X and Bresea.

[3] The respondent alleges that the appellants have refused to answer a "proper question" at the examinations for discovery concerning stock option benefits received or enjoyed by each appellant *qua* employees of Bre-X and Bresea during their taxation years in appeal. I assume that with respect to the Estate appeals the purported benefits were received or engaged personally by Mr. Walsh *qua* employee of these corporations.

[4] Examinations for discovery were provided by written questions and answers pursuant to section 92 of the *Rules*. The appellants objected to answer certain questions on the grounds that they were irrelevant to the matters in issue. More specifically, the appellants refused to answer questions 20 and 21 of the Written Questions for Discovery[1]:

> 20. Give full details of every stock option agreement entered into by Mr. Walsh and Bre X, Bresea or Bro X from 1993 to 1996. More specifically:
>
> a) Provide the stock option agreements;
> b) Indicate when the options were exercised;
> i) Indicate how many options were exercised;
> ii) Indicate how many shares were acquired;
> iii) Indicate the price paid to acquire the options;

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[1] Question 20 and 21 are one and the same. Question 20 is in respect of Mr. David Walsh's Written Questions for Discovery and Question 21 is in respect of Mrs. Jeannette Walsh's Written Questions for Discovery.

iv) Indicate the price paid to acquire the shares through the options;

c) Indicate when the shares acquired through the options were sold;

d) Indicate the amount of the proceeds of disposition of the shares.

The respondent says that the questions are relevant.

[5] Correspondence was exchanged between counsel but counsel for the appellants was adamant that the questions were irrelevant to the issues in the appeals and his clients refused to provide answers. As a result, the respondent filed these motions.

[6] In her affidavit, Sarah Stewart, a legal assistant employed by the appellants' solicitors, stated that included in the respondent's list of documents delivered to the appellants was a share option agreement between Bre-X and Mr. Walsh, dated September 19, 1995.

Appellant's Position

[7] The appellants submit that the Minister did not limit its questions concerning the stock option benefits to the options exercised in the relevant period. Rather, the Minister sought "full details" of "every" stock option agreement entered into by the appellants from 1993 to 1996. The request referred to agreements with a corporation, Bro-X, whose securities appear not to be subject to any reassessment in issue.

[8] The appellants contend that the Minister is overreaching given that the request is too broad and encompasses documents and information that do not enable the respondent to advance its case or damage that of the appellants. Accordingly, the appellants want the motions dismissed.

Respondent's Position

[9] Counsel for the respondent argued that the appellants refused to answer a proper question at the discovery stage in respect of stock option benefits received or enjoyed by David Walsh *qua* employee during the 1995 and 1996 taxation years as well as by Jeannette Walsh during the 1996 taxation year. Counsel claims that the question posed is proper seeing as it is relevant to the material issues under appeal.

Rules

[10] The respondent relies on section 116 of the *Rules*. Subsections (2) and (4) of section 116 read as follows:

> (2) Where the person being examined refuses or fails to answer a proper question or where the answer to a question is insufficient, the Court may direct the person to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination.
> …
>
> (4) Where a person refuses or fails to answer a proper question on a written examination or to produce a document which that person is required to produce, the Court may, in addition to imposing the sanctions provided in subsections (2) and (3),
> (*a*) if the person is a party or a person examined on behalf of or in place of a party, dismiss the appeal or allow the appeal as the case may be,
> (*b*) strike out all or part of the person's evidence, and
> (*c*) give such other direction as is just.

> (2) Si la personne interrogée refuse de répondre à une question légitime ou n'y répond pas ou que sa réponse à une question est incomplète, la Cour peut lui ordonner de répondre à la question, de compléter sa réponse ou de répondre à une autre question, au moyen d'une déclaration sous serment ou d'un interrogatoire oral.
> …
>
> (4) Si une personne refuse ou omet de répondre à une question légitime posée dans un interrogatoire écrit ou de produire un document qu'elle est tenue de produire, la Cour peut, en plus d'imposer les sanctions prévues aux paragraphes (2) et (3) :
> *a*) rejeter ou accueillir l'appel, selon le cas, si la personne interrogée est une partie ou une personne interrogée à la place ou au nom d'une partie;
> *b*) radier, en totalité ou en partie, la déposition de la personne interrogée;
> *c*) donner une autre directive appropriée.

[11] Section 95 of the *Rules* applies to examination for discovery by written questions as it does for oral examinations. The relevant portion of the Rule provides that:

> 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 . . .

> 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 [...]

[12] In their notices of appeal, the appellants state that Mr. Walsh and Mrs. Walsh were not residents of Canada since September 18, 1995 when they severed their

personal relationship in Canada and settled permanently in the Bahamas. The notices of appeal do not refer to any stock options in respect of Bre-X and Bresea which would describe the components of the additional income. These matters are also generally raised at the objection level. The allegations of benefits arising out of stock options in respect of Bre-X and Bresea are set out in the respondent's amended replies to the notices of appeal.

[13] The respondent's position in these appeals is simple: at all material times the appellants were residents of Canada and the amounts of the stock option benefits received or enjoyed by each appellant are to be included in income as assessed. The Walshes were also resident of Canada in 1995 or part of the year. It is the respondent’s alternative position, that is, if the appellants were not residents of Canada at all material times, that the amounts of the stock option benefits are to be included in income, as assessed, since, among other things, the appellants were employees or officers of Bre-X and Bresea. The appellants do not refer to the respondent’s alternative position in their pleadings.

[14] Respondent's counsel argues that the stock option agreements are at the heart of the matter as the crux of the appeal is the unreported stock option benefits. Counsel further asserts that the agreements sought may very well contain a preamble, a clause, or a statement that would go to what Mr. and Mrs. Walsh were doing in 1995 or 1996. The respondent is unsure of the contents of the agreements and that is the reason why she seeks to view them.

[15] In addition, the respondent's counsel acknowledges that he must establish, in the event that it is found that the appellants were non-residents during the years under appeal, that the stock option benefits are from duties performed in Canada. Thus, the agreements are relevant given that they may contain clauses, statements, or preambles that state the reason why Mr. and Mrs. Walsh were granted the stock options and whether certain tasks were required to be performed in Canada.

[16] Counsel for the appellants states that while the Minister has pointed out the possibility that there may be preambles or information in the agreements that may go to residency or may go to issues concerning section 115 of the *Act*, that is also true of other documents that the Minister might have asked for that involved either the companies whose securities were traded or anything else in issue. In his view, the Minister has not discharged his onus to satisfy me that there is a reasonable likelihood that the materials in question will advance its case or damage the appellants’ case.

[17] As noted in *SmithKline Beecham Animal Health v. Canada*[2] the scope and application of Rule 95, cited earlier, will depend on the phrase "relevant to any matter in issue in the proceeding". Also, the meaning of the words "relating to any matter in question between ... them in the appeal" in Rule 82(1)[3] may be of some assistance in determining the scope and application of Rule 95. In *SmithKline*, Sharlow J.A., at paragraph 24, cited Brett L.J. about the meaning of the phrase "a document relating to any matter in question in the action":[4]

> The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company (1882)*, 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):
>
> > It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may -- not which must -- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences

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2 [2002] F.C.J. No. 837 (F.C.A.) (QL).

3 Rule 82(1) states that :

82. (1) The parties may agree or, in the absence of agreement, either party may apply to the Court for an order directing that each party shall file and serve on each other party a list of all the documents that are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal.	82.(1) Les parties peuvent convenir ou, en l'absence d'entente, demander à la Cour d'émettre une ordonnance obligeant chaque partie à déposer et à signifier à l'autre partie une liste de tous les documents qui sont ou ont été en la possession, sous le contrôle ou sous la garde de cette partie et qui sont pertinents à toute question en litige entre les parties à l'appel.

4 *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company (1882)*, 11 Q.B.D. 55 (C.A.) at p. 63.

[18] Appellants' counsel also referred to *SmithKline*, at paragraphs 26 and 29, for the proposition that the question of whether a document relates to an issue under appeal depends upon a reasonable interpretation of the pleadings.

[19] The appellants contend that the onus is on the party demanding a document to demonstrate that the information therein may advance his case or damage that of its adversary's. The moving party must show that the document or information sought is one which may fairly lead to a train of inquiry which would enable him to advance his own case or to damage the case of his adversary. Therefore, the Minister must demonstrate that the information and documents sought may fairly lead him to a train of inquiry which would enable him to advance his case or damage that of the appellants. The respondent must demonstrate that the documents and information requested relate to the issue of whether the appellants were residents in Canada during the years under appeal or that the benefits triggered by exercising stock options during the relevant period relates to the duties of offices and employments performed in Canada.

[20] Respondent's counsel referred to *Baxter v. R.*[5] for the proposition that the threshold level of relevancy is quite low. In *Baxter*, the respondent sought an Order compelling the appellant to answer a number of questions which his counsel had instructed him not to answer on discovery. The reason for the objection was that the questions and answers were irrelevant. Bowman A.C.J. (as he then was) made the following comments in respect of relevancy:

> 12 The principles to be applied in allowing or disallowing questions on examination for discovery are fairly well settled. The threshold level of relevancy is quite low. Counsel should not be inhibited in the questions he or she asks simply because the question may, standing alone, seem irrelevant. The tactics on a discovery vary from counsel to counsel and the style of questioning may simply be a reflection of the counsel's own particular style. …

[21] Bowman A.C.J. summarized the principles that should be applied in respect of relevancy in discovery proceedings at paragraph 13:

> 13 From these and other authorities referred to by counsel, I can summarize the principles that should be applied:
>
> (a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;

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5 [2005] 1 C.T.C. 2001 (T.C.C.).

> (b) A motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy;
>
> (c) The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;
>
> (d) Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.

[22] Thus, respondent's counsel stated that the stock option agreements sought may very well be relevant to his theory of the case which is that the appellants were residents of Canada, or in the alternative, if they were non- residents, that the stock option benefits were from duties performed in Canada. The agreements may assist the respondent in establishing residency or the alternative issue under appeal given that the agreements may contain preamble statements or assertions as to what the appellants were doing back in 1995 and 1996 and why the stock options were granted.

[23] Counsel for the appellants argued that the decision rendered in *Baxter* dealt with Oral Examinations for Discovery. He declared that the test set out in *Baxter* refers specifically to oral discovery and issues concerning tactics. He noted that although *Baxter* was decided subsequent to the *SmithKline* case, it did not seem like Bowman A.C.J. had the benefit of the reasons in *SmithKline* given that the parties did not put the case before him. However, counsel for the appellants viewed the test in *Baxter* as not so different from the test adopted in *SmithKline*. Counsel asserted that although Bowman A.C.J. adopted a generous test in *Baxter*, he was not so generous in allowing the questions requested to be answered.

[24] A discovery is a discovery, whether it is oral or in writing. I do not agree with the appellants that Bowman A.C.J.'s comments apply only to oral discovery. The *Rules* relating to Examinations for Discovery, including section 95, apply to Written Examinations for Discovery except where expressed otherwise and in the matters before me there is no contrary expression.

[25] In *AstraZeneca Canada Inc. v. Apotex Inc.*[6], Hughes J. of the Federal Court reviewed the discovery system in Canadian Courts. He cited a paper[7] of

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6 [2008] F.C.J. 1696 (QL), 2008 FC 1301.

James Farley, Q.C., previously Farley J. of the Ontario Superior Court, Commercial Court, who strongly criticized the type of discovery that "itself becomes the objective – to uncover as much as possible from the other side however marginally relevant". The danger in this type of discovery – referred to as "autopsy discovery" – is that one is in danger of losing perspective and becoming enmeshed in the discovery rather than "focusing on obtaining only matters necessary and relevant for the trial on issues as defined by the pleadings".

[26] Appellants' counsel contends that the issues in the pleadings center on the residency of the appellants and whether they performed duties in Canada during the relevant time. He submits that the Minister must satisfy this Court that the agreements “entered into” are relevant to these issues and that there is a reasonable basis for requesting such information. The Minister, he states, cannot satisfy this onus given that there is no reasonable basis to suppose that the stock option agreements, more than any other kinds of agreements or documents, will lead to a train of inquiry that might assist his case.

[27] The questions in issue relate to the pleadings. As mentioned earlier, the facts in the appellants’ notices of appeal relate exclusively to the status of the appellants’ residence during the years in appeal. Essentially, they claim that they were not residents of Canada at the time, and therefore, not subject to income tax under the *Act*. It is the respondent, in her amended replies to the notices of appeal, who alleges the quantum of the stock option benefits from Bre-X and Bresea and how they were determined and calculated. The appellants did not deliver any answers and therefore, in accordance with Rule 50(2), are deemed to have denied the allegations of fact made in the amended replies.

[28] The stock option agreements, the acquisition of the options, the acquisition of the shares as a result of exercising the options, and the prices paid and received all relate to matters in issue in the appeal since, among other things, the reassessments are based on option agreements, the exercise of the options, the acquisition of shares and their costs, whether or not the appellants were residents of Canada. The appellants are deemed to have denied amounts of benefits set out in the amended replies. The stock option agreements may contain information which may enable the respondent to advance her case or damage the case of the appellants. These questions are not irrelevant or elusive nor are they designed to embarrass the appellants or delay the appeals.

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[7] *Efficient Court Administration and Commercial Court Litigation and Dispute Resolution*, delivered in Nassau, Bahamas on December 1, 2006.

[29] The respondent is entitled to ask questions of the appellants relating to the amounts assessed derived from stock options they may have received from Bre-X and Bresea. However, this applies only to production of stock option agreements, the exercise of which, resulted in the benefits included in the appellants' income for tax purposes in each of the years assessed. This would also require answers as to how many options were acquired in accordance with these options and eventually exercised as well as the price paid for the options and the price for which shares in these companies were acquired.

[30] The request for "full details of every stock option agreement entered into by the appellants from 1993 to 1996" is too general. There may be agreements in these years that have nothing to do with the reassessments in issue. The fact that Mr. or Mrs. Walsh may be described as a resident of Canada in an agreement made in 1993 or 1994 does not mean that Mr. Walsh was resident in Canada in 1995 or 1996 or Mrs. Walsh was resident in 1996. Only agreements entered into between either or both of Mr. and Mrs. Walsh and Bre-X or Bresea in 1993 and 1994 that were subject to the exercise of options by Mr. and Mrs. Walsh and relating to the reassessments in issue are to be provided to the respondent. Stock option agreements, if any, entered into by Mr. and Mrs. Walsh in 1995 and 1996 with Bre-X or Bresea are also to be produced. The information requested in Question 20, paragraph b, subparagraphs i) to iv), paragraphs c) and d) are to be provided with respect to stock option agreements, the exercise of which by Mr. and Mrs. Walsh, eventually resulted in benefits included in the making of the reassessments under appeal.

[31] The option agreements from Bro-X, if any, and any exercise of the options are not the subject of the reassessments in issue according to the pleadings and do not appear to be relevant. They need not be provided to the respondent.

[32] Costs shall be in the cause.

Signed at Ottawa, Canada, this 5th day of June 2009.

"Gerald J. Rip"

Rip C.J.

CITATION:	2009TCC301
COURT FILE NO.:	2004-4083(IT)G and 2004-4085(IT)G
STYLE OF CAUSE:	JEANNETTE WALSH v. HER MAJESTY THE QUEEN and THE ESTATE OF DAVID G. WALSH v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 5, 2009
REASONS FOR ORDER BY:	The Honourable Gerald J. Rip, Chief Justice
DATE OF ORDER:	June 5, 2009

APPEARANCES:

Counsel for the Appellants:	Michael Hunziker
Counsel for the Respondent:	Louis L'Heureux

COUNSEL OF RECORD:

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