Federal Court of Appeal  Cour d'appel fédérale

Date: 20160304

Docket: A-247-15

Citation: 2016 FCA 71

CORAM: **RYER J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

LOUISE E. CHEREVATY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 8, 2016.

Judgment delivered at Ottawa, Ontario, on March 4, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RYER J.A.
RENNIE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160304

Docket: A-247-15

Citation: 2016 FCA 71

CORAM: **RYER J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

LOUISE E. CHEREVATY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the Amended Order of Favreau J. of the Tax Court of Canada dated May 11, 2015 (Tax Court of Canada Docket 2012-4171(IT)G) compelling Louise Cherevaty to answer certain questions at the discovery stage of the Tax Court process.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] Ms. Cherevaty was assessed pursuant to the provisions of section 160 of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the *Act*) for amounts payable under the *Act* by her spouse, Anthony M. Speciale. Ms. Cherevaty is only liable under section 160 of the *Act* for such amounts payable by her spouse if her spouse transferred property to her. In this case, since there is no indication that paragraph 160(1)(d) of the *Act* is applicable, the amount for which Ms. Cherevaty may be assessed is the lesser of:

(a) the fair market value of the property transferred to her minus the amount of any consideration given for that property; and

(b) the amount payable under the *Act* by her spouse for the taxation year in which the property was transferred or any previous taxation year.

[4] Ms. Cherevaty was assessed under section 160 of the *Act* for $113,374. This amount was determined based on a series of payments made by Ms. Cherevaty's spouse on a line of credit that was secured by a mortgage on a property owned by Ms. Cherevaty. It is the position of the Crown that the amounts borrowed under the line of credit were not provided to Ms. Cherevaty's spouse.

[5] Ms. Cherevaty's spouse is a lawyer and he signed the Notice of Appeal dated October 17, 2012 related to her assessment under section 160 of the *Act*. Paragraph 6 of that Notice of Appeal stated that:

> The Appellant states that Section 160 of the Act is not applicable in the circumstances of this Appeal for at least the following;
>
> (a) no transfer of property has occurred;

(b) the parties involved are by agreement dealing at arms [sic] length;

(c) consideration has flowed between the transferor ("Speciale") and transferee;

(d) the transferor was not liable to pay under the Act at the time of the transfer related to the specific taxation years.

[6] The Appellant also alleged other arguments in support of her position that section 160 of the *Act* was not applicable including an argument that "the amounts alleged to have been advanced to her represent the cost of occupancy for her and/or Speciale in respect of the subject property…" (paragraph 13 of the Notice of Appeal).

[7] The Crown filed a Reply dated January 14, 2013. Following the close of pleadings, a discovery examination of Ms. Cherevaty was held on April 29, 2014. At that discovery examination, Ms. Cherevaty provided certain undertakings. By a letter from her counsel dated June 30, 2014 she provided her response to those undertakings. As a result of the responses that were provided, a number of questions were posed by the Crown by letter dated July 11, 2014. Ms. Cherevaty refused to answer most of these questions and it is this refusal that prompted a motion by the Crown to compel her to answer these questions that were posed by the Crown.

[8] The unanswered questions relate to the Personal Loan/Mortgage Application in relation to the line of credit on which certain payments had been made by Ms. Cherevaty's spouse and to amounts that Ms. Cherevaty had stated were paid as her income. Ms. Cherevaty refused to answer these questions on the basis that an Amended Notice of Appeal had been filed on or shortly after July 15, 2014. In this Amended Notice of Appeal she alleged that the amounts borrowed under the line of credit were advanced to Mr. Speciale and therefore, when he made

payments on the line of credit, he was simply repaying what he had borrowed. As a result, Ms. Cherevaty's position was that the questions posed by the Crown in relation to the accuracy of the statements made in the application for the line of credit or the appraisal on the house pledged as security for the line of credit were no longer relevant. As well, Ms. Cherevaty's position is that the questions related to amounts that Ms. Cherevaty had previously claimed were her income (that she had directed be paid to 715866 Ontario Limited) were also no longer relevant.

II. Order of the Tax Court

[9] The Tax Court Judge issued a very brief Amended Order which provided as follows:

> UPON motion by the Respondent, pursuant to section 110 of the Tax Court of Canada Rules (General Procedure), for an Order directing the Appellant to answer follow-up questions 1(a), 1(b), 1(d), 2(a), 2(b), 2(c), 2(d), 2(e), and 2(f) put to her by the Respondent, which arose from undertakings given at the Examination for Discovery of the Appellant, held on April 19, 2014;
>
> AND UPON having heard the parties;
>
> AND UPON being satisfied that questions 1(a), 1(b), 1(d), 2(a), 2(b), 2(c), 2(d), 2(e), and 2(f) are relevant since one of the purposes of discovery is to enquire about all matters that may have some bearing on the issues at trial and since the questions put to the Appellant are clearly not abusive, do not form part of a delaying tactic and are not clearly irrelevant;

IT IS ORDERED THAT the motion filed by the Respondent is allowed with costs and the Appellant is compelled to answer questions 1(a), 1(b), 1(d), 2(a), 2(b), 2(c), 2(d), 2(e), and 2(f) in writing before June 8, 2015.

III. Issues

[10] The Appellant raises two issues in this appeal:

(a) Whether the Tax Court Judge erred by failing to provide adequate reasons for his decision; and

(b) Whether the Tax Court Judge erred by finding that the questions in issue were relevant.

IV. Adequacy of Reasons

[11] In *R. v. R.E.M.*, [2008] SCC 51, [2008] 3 S.C.R. 3, McLachlin C.J., writing on behalf of the Supreme Court of Canada, referred to several cases dealing with the issue of the sufficiency of reasons and then stated that:

> **35** In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see Sheppard, at paras. 46 and 50; Morrissey, at p. 524).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of Sheppard for a more comprehensive list of the key principles.

[12] In this appeal, in my view, the purpose or function for which the reasons are being delivered by the Tax Court Judge is critical. The reasons are being delivered to support a decision to compel a person to answer certain questions at the discovery stage. The reasons are not being provided in relation to the final determination of the appeal on its merits.

[13] The requirement to compel a witness to answer a question could arise in two situations – one, as here, where the issue arises during or following discovery examinations and the other where the issue arises in the course of a hearing. If counsel for one party during a hearing should pose a question to a witness and counsel for the opposing party should object on the basis that the question is not relevant, the Judge would not be expected to halt the hearing while he or she prepares detailed reasons to explain why the witness should be compelled to answer the question or why the question is irrelevant. The Judge will simply rule whether the witness is to answer the question.

[14] In my view, there should not be any greater requirement to give detailed reasons when the issue of whether a witness should answer a question arises during or following discovery examinations. Judges have a broad discretion to determine relevancy at the discovery stage and any requirement for a Judge to provide a detailed explanation of why a Judge should consider a particular question to be relevant or not relevant, particularly at this stage when the Judge has only limited exposure to the case, would not be in the interests of the efficient determination of pre-trial matters.

[15] In this case the Tax Court Judge stated what he had decided (that the witness should answer the question) and why (because it is relevant). The Tax Court Judge should not be required to provide any further explanation of why he concluded, in this case, that the question was relevant just as no further explanation would be required of a trial Judge who concludes that a question posed during a hearing is relevant.

V. Relevancy of the Questions

[16] In *684761 B.C. Ltd. v. Canada*, 2015 FCA 123, [2015] F.C.J. No. 626, this Court stated that:

> **3** The determination of whether a particular question is permissible or relevant is typically a question of mixed fact and law. Unless an extricable error of law is established (such as using the wrong test in respect of relevance), this Court will only intervene where a palpable and overriding error is established (*Canada v. Lehigh Cement Ltd.*, 2011 FCA 120, [2011] F.C.J. No. 515 at paragraphs 24-25, *Grenon v. Canada*, 2011 FCA 147, [2011] F.C.J. No. 637 at paragraph 2, *Reddy v. Canada*, 2012 FCA 85, [2012] F.C.J. No. 336 at paragraph 6).

[17] The onus is on Ms. Cherevaty to show that either the Tax Court Judge used the wrong test for relevancy or that he committed a palpable and overriding error.

[18] In *HSBC Bank Canada v. Her Majesty the Queen*, 2010 TCC 228, [2010] T.C.J. No. 146, C. Miller J. summarized the principles that had been applied by that Court in relation to discovery examinations:

> **13** Both parties provided useful summaries of how this Court has in the past addressed the question of the scope of examinations for discovery. Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R* [2008 D.T.C. 4408]:

1. The principles for relevancy were stated by Chief Justice Bowman and are reproduced at paragraph 50:

    a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;

    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.

2. The threshold test for relevancy on discovery is very low but it does not allow for a "fishing expedition": *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] F.C.J. No. 1564.

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he had to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen*, [2005] T.C.J. No. 28.

4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel: SmithKline Beecham Animal Health Inc. v. R., [2002] F.C.J. No. 837.

5. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use to be made of documents: *SmithKline Beecham Animal Health Inc. v. The Queen*.

6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment: *Amp of Canada Ltd., v. R.*, [1987] F.C.J. No. 149.

7. Informant privilege prevents the disclosure of information which might identify an informer who has assisted in the enforcement of the law by furnishing assessing information on a confidential basis. The rule applies to civil proceedings as well as criminal proceedings: *Webster v.R.*, [2002] T.C.J. No. 689.

8. Under the *Rules* a party is not required to provide to the opposing party a list of witnesses. As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses: *Loewen v. R.*, [2006] T.C.J. No. 384.

9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada*, [2000] O.J. No. 1431.

10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: *Webster v. The Queen*.

14 The following additional principles can be gleaned from some other recent Tax Court of Canada case authority:

1. The examining party is entitled to "any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party": *Teelucksingh v. The Queen* [2010 TCC 94]

2. The court should preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic; or (3) clearly irrelevant": *John Fluevog Boots & Shoes Ltd. V. The Queen* [2009 TCC 345]

15 Finally in the recent decision of *4145356 Canada Limited v. The Queen* [2009 TCC 480] I concluded:

(a) Documents that lead to an assessment are relevant;

(b) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request;

(c) Files reviewed by a person to prepare for an examination for discovery are *prima facie* relevant; and

> (d) The fact that a party has not agreed to full disclosure under section 82 of the Rules does not prevent a request for documents that may seem like a one-way full disclosure.

[19] In this case, the first group of questions relate to the application for the line of credit and the appraisal of the property pledged as security for this line of credit. In my view, Ms. Cherevaty has failed to demonstrate that the Tax Court Judge committed any error in compelling her to answer these questions as relevancy is to be interpreted broadly and liberally at the discovery stage and the line of credit is at the centre of the dispute between the parties.

[20] The follow-up questions related to her income arose because her counsel, in the letter dated June 30, 2014, stated that "[t]he Appellant was paid income from Anthony's law practice of $75,000, $75,000 and $25,000 for 2006, 2007, and 2008 taxation years, respectively. T4A slips were issued in respect of such. The funds were not paid to the Appellant as she directed them to be deposited to 715866 Ontario Limited and treated as a payable to her."

[21] In my view the follow-up questions related to her income are intended to clarify the response provided by the counsel for Ms. Cherevaty. According to the letter from the Crown dated July 11, 2014, the T4A slips for Ms. Cherevaty indicated a significantly lower amount of income for 2006 and 2007 than the $75,000 that she had stated was her income in the letter from her counsel. This train of inquiry related to amounts that may have been her income started before the Amended Notice of Appeal was filed. The Appellant has failed to establish that the Tax Court Judge committed any error in allowing this train of inquiry to continue in this case where the answers to the undertakings raise more questions as a result of the discrepancies between her answers and documents that had been filed with the Canada Revenue Agency.

[22] As a result, I would dismiss the appeal, with costs.

"Wyman W. Webb"

J.A.

“I agree.
C. Michael Ryer J.A.”

“I agree.
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-247-15
(APPEAL FROM AN AMENDED ORDER OF THE HONOURABLE MR. JUSTICE FAVREAU OF THE TAX COURT OF CANADA DATED MAY 11, 2015, DOCKET NO. 2012-4171(IT)G)	
STYLE OF CAUSE:	LOUISE E. CHEREVATY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 8, 2016
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RYER, RENNIE JJ.A.
DATED:	MARCH 4, 2016

APPEARANCES:

Duane R. Milot	FOR THE APPELLANT
Katie Beahen Samantha Hurst	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Milot Law Toronto, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT