Federal Court of Appeal | Cour d'appel fédérale

Date: 20170331

Docket: A-127-16

Citation: 2017 FCA 65

CORAM: **PELLETIER J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

CBS CANADA HOLDINGS CO.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 15, 2017.

Judgment delivered at Ottawa, Ontario, on March 31, 2017.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] CBS Canada Holdings Co. (CBS) appeals from a decision of Madam Justice Lyons of the Tax Court of Canada, reported as 2016 TCC 85 (Reasons). Justice Lyons (the Tax Court Judge) granted the Minister of National Revenue's (the Minister) motion to strike the affidavit CBS filed in support of its motion to enforce a settlement entered into by its counsel and counsel for the Minister. For the reasons that follow, I would allow the appeal with costs and set aside the order of the Tax Court of Canada.

[2] The essential material facts are not in dispute. The issue giving rise to the dispute between the parties is the ability of CBS to apply certain non-capital losses to its income for certain taxation years. CBS appealed from the Minister's reassessment of its returns for certain taxation years. The issue was whether CBS had non-capital losses to apply to its income for those taxation years.

[3] On April 24, 2014, CBS (by its counsel) made a settlement offer which included a schedule of CBS' losses, Schedule A. Counsel were in touch with each other over a period of 8 months or so, in the course of which various matters were finalized. They concluded minutes of settlement, on behalf of their respective clients, which incorporated Schedule A. On January 7, 2015, counsel advised the Tax Court of Canada that they had reached a settlement and were awaiting the issuance of the notices of reassessment to implement the settlement agreement.

[4] Shortly thereafter, counsel for the Minister advised counsel for CBS that the Minister was having difficulty implementing the minutes of settlement. On February 20, 2015, counsel for the Minister wrote to counsel for CBS to advise that the Minister had determined that there were no non-capital losses available to CBS and that the Minister could not issue a reassessment that was contrary to the provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [the Act].

[5] Following certain case management proceedings in the Tax Court of Canada, counsel for CBS filed a notice of motion and supporting affidavit seeking to have the settlement enforced. The deponent of the supporting affidavit was Ms. Toaze, a lawyer in CBS' counsel's firm. The affidavit sets out the course of events leading up to the filing of the motion by reference to a

series of documents which were made exhibits to the affidavit, together with references to a small number of non-controversial contacts between counsel.

[6] Counsel for the Minister cross-examined Ms. Toaze on her affidavit, an exercise which proved unsatisfactory from counsel's point of view. Ms. Toaze and counsel for CBS took the position that the former was not at liberty to disclose any information which was privileged. In addition, Ms. Toaze would not confirm or deny the existence of the losses claimed in Schedule A or whether or not she was counsel for CBS. As a result of these limitations on her cross-examination, counsel for the Minister moved to have Ms. Toaze's affidavit struck.

[7] The Tax Court Judge allowed the motion. She found that the pivotal or "controversial" issue in the enforcement motion and in the motion before her was the "accuracy, truth and origin of the non-capital losses in Schedule A": Reasons at para. 23.

[8] This led to a consideration of Rule 72 of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688a, (the Rules) which permits the use of statements based on information and belief in an affidavit for use on a motion providing that the source of the information and the fact of the belief are specified in the affidavit. In several paragraphs of the affidavit, this information was missing.

[9] The Tax Court Judge reasoned that Rule 72 was consistent with the principled approach to the admissibility of hearsay evidence, according to which hearsay evidence is admissible if it meets the criteria of necessity and reliability. She found that hearsay evidence in an affidavit

must be capable of being tested so as to allow the court to assess its reliability. The paucity of information surrounding Schedule A as a result of the various objections taken in the course of Ms. Toaze's cross-examination rendered it hearsay: Reasons at para. 36. The limitations placed on cross-examination of the affiant led the Tax Court Judge to conclude that the contents of Schedule A were unreliable.

[10] The Tax Court Judge then considered whether the choice of Ms. Toaze as the affiant with respect to the controversial issue was appropriate given her involvement in the file. In particular, the Tax Court Judge found that Ms. Toaze's reticence as to whether she was counsel for CBS amounted to "obfuscation to straightforward questions that warrant straightforward responses": Reasons at para. 42. After referring to the *Rules of Professional Conduct* of the Law Society of Upper Canada on the propriety of lawyers swearing affidavits on contentious issues in matters in which they are advocates, the Tax Court Judge inferred that the affidavit could have been sworn by a representative of CBS instead of Ms. Toaze.

[11] The Tax Court Judge then considered the scope of cross-examination on an affidavit. She noted that the scope of cross-examination can vary according to the nature of the application. In this case, the Tax Court Judge noted that the information in Schedule A was crucial in the enforcement motion. The Tax Court Judge went on to find that the limitations on the Minister's ability to cross-examine were prejudicial to the Minister's position.

[12] The Tax Court Judge's ultimate conclusion is succinctly summarized in paragraph 67 of her Reasons:

> Applying the principles on a motion to strike based on hearsay and based on the foregoing reasons, I conclude that the Affidavit containing hearsay, sworn by the affiant as CBS counsel on a controversial issue, failed to meet the twin criterion of reliability and necessity to assist me in evaluating the evidence for the CBS motion. In exercising my discretion against allowing the Affidavit, as noted by the Federal Court of Appeal in *Pluri Vox,* the Court should consider if evidence could have been supplied by a person other than counsel. CBS personnel could have done so.

[13] Having decided to strike the CBS affidavit, the Tax Court Judge nonetheless gave CBS leave to file another affidavit.

I. Issues

[14] The issues in this appeal are the following:

1. What is the test for striking an affidavit?
2. Is Schedule A hearsay evidence?
3. What is the proper scope of cross-examination on an affidavit?
4. Was Ms. Toaze a proper affiant?

II. Analysis

[15] The decision of the Tax Court Judge to strike the Affidavit is a discretionary decision reviewable on the standard of palpable and overriding error except in the case of an error in principle, that is an extricable question of law: *Hospira Health Care Corporation v. Kennedy Institute of Rheumatology,* 2016 FCA 215, [2016] F.C.J. No. 943 (QL).

1. What is the test for striking an affidavit?

[16] An affidavit on a motion is tendered for the purpose of providing the evidentiary basis for the relief sought by a party or for the objection raised to the granting of the relief sought by the other party.

[17] An affidavit, or portions of an affidavit, may be struck (as opposed to being accorded little or no weight) in certain circumstances:

> As a general rule, the affidavit must contain relevant information which would be of assistance to the Court in determining the application. As stated by our Court in *Dwyvenbode v. Canada (Attorney General)*, 2009 FCA 120, the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion (*McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389).
>
> *Canada (Attorney General) v. Quadrini*, 2010 FCA 47 at para. 18, 399 N.R. 33.

[18] In this case, it appears that the Tax Court Judge struck the affidavit because it contained hearsay evidence to prove the existence and origin of the losses, evidence whose necessity and reliability was not tested by cross-examination. The Tax Court Judge was also influenced by the fact that an affiant other than a lawyer from CBS' firm could have been found to swear the affidavit.

2. Is Schedule A hearsay evidence?

[19] The definition of hearsay evidence is an out of court statement tendered as proof of its contents. The *locus classicus* of the definition of hearsay is *Subramaniam v. Public Prosecutor (Malaya)*, [1956] UKPC 21, [1956] 1 W.L.R. 965 at 969:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.

[20] Because the determination as to whether a statement is hearsay or not depends on the purpose for which it is tendered, no evidence is, on its face, hearsay: *R. v. Baldree*, 2013 SCC 35 at para. 3, [2013] 2 S.C.R. 520.

[21] The Tax Court Judge was of the view that the issue before her, as well as in the enforcement motion which had not yet been heard, was the "accuracy, truth and origin of the non-capital losses in Schedule A": Reasons at para. 23-24. She went on to find that Schedule A was tendered to prove the truth of its contents, namely to "demonstrate the existence of the non-capital losses" (Reasons at para. 36), not "merely to prove the statements were made" (Reasons at para. 25).

[22] One could reasonably ask how the Tax Court Judge came to that conclusion. Nothing in the affidavit argued that position and the parties' memoranda of fact and law on the enforcement motion had not been filed at the time the Tax Court Judge heard the motion which was before her.

[23] CBS asserted the validity of the settlement and brought a motion to enforce the settlement. In support of that motion, it filed an affidavit which put the settlement agreement and the course of negotiations leading up to the settlement before the Court. In response, the Minister alleged that the settlement it had concluded with CBS was void because it was contrary

to the terms of the Act, a position which was later described as a mistake of fact. Since the Minister was the one asserting that the settlement was entered into under a mistake of fact, that the facts did not permit her to give effect to the settlement, counsel for CBS apparently did not see the need to attempt to negative the Minister's assertion.

[24] The hearsay rule applies to documents as well as to oral statements. The exceptions to the hearsay rule, such as admissions against interest, also apply to statements made in documents. But, documents which are evidence of a settlement are admissible, independently of the hearsay rule, to prove that the undertakings given by each party to the other were indeed given. Such documents are not tendered to prove the truth of their contents but to prove that the words they contain were literally or figuratively spoken: see *Pfizer Canada Inc. v. Teva Canada*, 2016 FCA 161 at para. 89.

[25] To the extent that the documents appended to the Toaze affidavit were tendered to prove the existence and terms of the settlement between the parties, they were admissible subject to being tested by cross-examination, the proper scope of which I will address later in these reasons.

[26] The Tax Court Judge was correct to hold that, to the extent that Schedule A was tendered to prove the truth and origin of the losses to which it referred, it was inadmissible except to the extent permitted by the principled approach to the hearsay rule. But, the Tax Court Judge erred in attributing to CBS an intention which it had not manifested, namely an intention to prove its non-capital losses by tendering Schedule A. The Tax Court Judge could not conclude that Schedule A

was tendered for the proof of its contents on the basis that some paragraphs of the Toaze affidavit were not stated to be on information and belief or that they attested to events as opposed to documents. To the extent that the Tax Court Judge had difficulties with specific paragraphs of the affidavit, those paragraphs stand on their own.

[27] In summary, the Tax Court Judge's conclusions as to the basis on which Schedule A and other documents appended to the Toaze affidavit were tendered was inconsistent with the content of the affidavit which simply asserted the facts leading to the settlement and the proof of settlement in the form of the minutes of settlement. It was not open to the Tax Court Judge to find that CBS was tendering these documents for a wider purpose and then to hold that its contents were inadmissible for that purpose (and liable to be struck) because the affidavit's necessity and reliability were not tested by cross-examination.

3. What is the proper scope of cross-examination on an affidavit?

[28] Even if the Tax Court Judge erred on the issue of the purpose for which Schedule A was tendered, the question which remains is whether counsel for the Minister could nevertheless cross-examine Ms. Toaze on the origin and accuracy of the non-capital losses in Schedule A on the basis that "the cross-examiner has the right to put questions covering all matters relevant to the determination of issues in the motion": Reasons at para. 63.

[29] The scope of cross-examination on an affidavit has been the subject of a number of decisions in which the relevant principles are set out: see *Ontario v. Rothmans Inc*., 2011 ONSC 2504 at para. 143, [2011] O.J. No. 1896 (QL) and *Ottawa Athletic Club Inc. (Ottawa Athletic*

Club) v. Athletic Club Group Inc., 2014 FC 672 at paras. 130-33, [2014] F.C.J. No. 743 (QL) [*Ottawa Athletic Club*]. For the purposes of this motion, I am prepared to accept as correct the following statement taken from paragraph 132 of *Ottawa Athletic Club*:

> However, there seems to be a consensus that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit," and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answers": *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, [1996] F.C.J. No. 1038 at para 9, 69 CPR (3d) 49 [*Merck (1996)*], quoting *Wyeth Ayerst Canada Inc v Canada (Minister of National Health and Welfare)* (1995), 60 CPR (3d) 225 (FCTD).

[30] In this case, Ms. Toaze's affidavit put into evidence the negotiations leading to a settlement and the minutes of settlement which evidence this settlement. Any questions on those subjects would be proper questions that the affiant would be bound to answer. Any collateral matters would, in my estimation, relate to relevant particulars arising from answers given in response to those questions.

[31] Questions seeking to explore the factual basis of the losses set out in Schedule A are not questions about the information set out in the affidavit nor are they collateral matters.

[32] If one takes a wider view of the scope of cross-examination, as the Tax Court Judge did, then the question becomes whether Ms. Toaze's failure to answer questions with respect to the losses in Schedule A goes to a matter in issue in the proceedings. Since the matter has yet to be heard by the Tax Court, I will only say that Ms. Toaze's refusal to answer questions with respect to the losses in Schedule A does not appear to me to have deprived the Minister of a fair hearing. If the losses are an issue in the enforcement motion, then CBS is bound by its choices as to the

evidence it has led. If the issues of necessity and reliability arise, the onus would be on CBS as the party tendering the evidence to establish those factors, and not on the Minister to negate them. On the other hand, if the losses are not the issue then the Minister cannot have been prejudiced by Ms. Toaze's failure to answer questions about them.

[33] In the end, Ms. Toaze's refusal to answer questions about the existence of the losses may have deprived the Minister of a tactical advantage but it does not deprive her of a fair hearing. The tactical advantage would be the possibility of proving her case from the mouth of CBS' affiant (assuming the issue to be existence of the losses). The loss of a tactical advantage is not a breach of procedural fairness: see *Canada v. ACI Properties Ltd.*, 2014 FCA 45 at para. 25, 459 N.R. 184.

4. Was Ms. Toaze a proper affiant?

[34] The Tax Court Judge was critical of the choice of Ms. Toaze as CBS' affiant and of her invocation of solicitor-client privilege in refusing to answer various questions put to her by counsel for the Minister.

[35] A good deal of the Tax Court Judge's criticism was a function of her view that Schedule A was hearsay evidence so that CBS must produce a witness who could answer questions that would address the necessity and reliability of the affidavit evidence. To the extent that CBS has to date only advanced the affidavit to prove the fact of settlement, the Tax Court Judge's criticisms are unfounded.

[36] The objection taken to Ms. Toaze as affiant was that it was not necessary to rely upon her for that purpose as others from CBS would have been able to give the evidence which she put before the Court. Once again, this is a function of the view taken by the Tax Court Judge as to the purpose for which the affidavit was tendered. All settlement negotiations were conducted between counsel. A lay witness would have been in no better position than Ms. Toaze to give evidence as to the circumstances leading to the minutes of settlement.

[37] The Tax Court Judge was also critical of the Ms. Toaze's equivocation on the question of whether she was counsel for CBS. This line of inquiry appears to go to the appropriateness of Ms. Toaze being an affiant on the motion.

[38] Language has a habit of evolving so that distinctions that were once clear may no longer be so. The distinction between counsel and other members of a firm can be seen in the practice of most official court reports, such as the Supreme Court Reports. After the headnote and the list of cases and legislation cited in the reasons, the names of the lawyers who appeared on behalf of the litigants are listed. Following the reasons for judgment, there is a list of the law firms who represent the various litigants. These firms are identified as the parties' solicitors.

[39] To the best of my knowledge, this approach comes to us from the English practice where barristers are all single practitioners and are instructed by a firm of solicitors. To the extent that this distinction still holds, it is incorrect to say, as the lawyer who appeared before us on behalf CBS did, that his firm was counsel for CBS. The firm may be CBS' lawyers, their solicitors if English usage is followed, but CBS' counsel is the lawyer who speaks on their behalf in Court,

their barrister. As a result, the answer to the question as to whether Ms. Toaze was counsel for CBS was self-evident. She was not. She was a witness for CBS.

[40] It may be that the underlying reason for this controversy was solicitor client privilege and Ms. Toaze's right to invoke it. This is a false issue as the privilege is the client's and not the lawyer's though it may be claimed for the client by his counsel.

[41] The Tax Court Judge referred to the Law Society of Upper Canada's *Rules of Professional Conduct* for the proposition that lawyers who appear as advocates should not submit their own affidavits unless the matter is purely formal or uncontroverted. The Tax Court Judge went on to find that Schedule A was controversial, leaving the implication that Ms. Toaze acted contrary to the *Rules of Professional Conduct* in affirming her affidavit.

[42] This was unfortunate slight upon a lawyer's professional reputation. While there was some to and fro as to whether Ms. Toaze was counsel to CBS, no one suggested, nor could they, that Ms. Toaze had appeared or was appearing as an advocate for CBS. It was not necessary for the Tax Court Judge to venture upon this territory in order to deal with the motion before her.

III. Conclusion

[43] To summarize, the Tax Court Judge erred in principle in concluding prematurely that the contents of the Toaze affidavit were tendered in proof of their contents. This error led to further errors as to the scope of cross-examination of Ms. Toaze on her affidavit and the appropriateness of her affirming her affidavit. This combination of errors led the Tax Court Judge to strike the

Toaze affidavit without justification, a palpable and overriding error. As a result, I would allow the appeal with costs, set aside the Tax Court Judge's order, and dismiss the motion to strike the Toaze affidavit, also with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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