Date: 20081009

Docket: A-142-08

Citation: 2008 FCA 302

CORAM: **RICHARD C.J.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

HEATHER M. WOOD

Respondent

Heard at Ottawa, Ontario, on October 7, 2008.

Judgment delivered at Ottawa, Ontario, on October 9, 2008.

REASONS FOR JUDGMENT BY: RICHARD C.J.

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

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REASONS FOR JUDGMENT

RICHARD C.J.

[1] This is an appeal from the judgment of the Tax Court of Canada dated February 22, 2008 (2008TCC105) by which the respondent's appeal from the reassessment of tax made under the *Income Tax Act* for the 2004 taxation year was allowed.

[2] The issue in the appeal before the Tax Court was whether the taxpayer's withdrawal from her registered retirement savings plan qualified as an eligible amount under section 146.02 of the *Income Tax Act*. Under the Lifelong Learning Plan a taxpayer may make a tax-free withdrawal from

a registered retirement savings plan to finance full-time training for the taxpayer or the taxpayer's spouse in a qualifying educational program at a designated educational institution.

[3] The issues raised on the appeal before our Court are:

a) whether the trial judge failed to observe principles of natural justice and procedural fairness that he was required by law to observe; and
b) whether the trial judge erred in law in refusing to permit the Crown to call evidence.

[4] The appellant requests that the appeal be allowed and the matter be referred back for hearing before a different judge of the Tax Court of Canada.

[5] The background facts are as follows:

a) The Minister of National Revenue reassessed the taxpayer's 2004 taxation year to include in income $10,000 withdrawn from her registered retirement savings plan. The reassessment was subsequently confirmed by the Minister;
b) The taxpayer filed an appeal of the reassessment to the Tax Court of Canada, electing that the appeal proceed under the informal procedure;
c) The Crown then filed a reply on July 3, 2007. In the reply, the Minister relied on the following assumptions of fact:
    i) the appellant withdrew $10,000.00 from her RRSP;
    ii) the money was used to finance her spouse's education;
    iii) the appellant's spouse was enrolled in a real estate course;
    iv) the real estate course was provided by OREA Real Estate College (OREA); and
    v) OREA is not a designated educational institution.
d) At the opening of the hearing on February 15, 2008, the representative of the Crown informed the Court that the Crown had sent an amended reply to the Tax Court of Canada and to Mr. Wood on January 23, 2008. Mr. Wood was acting as agent for the appellant Ms. Wood;
e) In the proposed amended reply, the Crown now admitted that the institution was a designated educational institution, but it was asserted that the program was not a full-time program and the appellant's husband, Ronald Wood, was not a full-time student in accordance with the conditions set out in subsections 118.6(1) and 146.02(1) of the *Income Tax Act*;

f) The agent for the appellant objected to the production of the revised reply; and
g) The trial judge ruled that he would not allow the reply to be amended and to take the new facts as assumptions but that did not deprive the Crown from bringing evidence concerning the number of hours or whether the program was full-time.

[6] The transcript of the hearing on February 15, 2008, indicates that the proceeding commenced at 9:35 a.m. and concluded at 9:48 a.m. The transcript also confirms that Heather M. Wood and her husband, Ronald Wood, were present, as was a representative of the Crown.

[7] At the hearing, the following exchange took place:

> JUSTICE HERSHFIELD: They have to prove the entire case. You don't have to prove anything, is basically what I have said. If you don't have to prove anything, what do you want to do?
>
> MR. WOOD: Nothing.
>
> JUSTICE HERSHFIELD: Nothing. Okay. So you don't need a lawyer. That is what a lawyer might have said.
>
> What evidence do you have here this morning?
>
> MS. HALPAPE: We have evidence of the nature of the course, the hours that it took to take -
>
> JUSTICE HERSHFIELD: How are you going to present that evidence?
>
> MS. HALPAPE: Through the career guide as well as through the appellant's –
>
> JUSTICE HERSHFIELD: I don't take anything except through a witness. Who is your witness?
>
> MS. HALPAPE: We don't have an additional witness –
>
> JUSTICE HERSHFIELD: There is no witness?

MS. HALPAPE: No.

JUSTICE HERSHFIELD: So you cannot prove anything.

MS. HALPAPE: We can – if we called the appellant to the stand –

JUSTICE HERSHFIELD: You cannot call the appellant. The appellant rested her case. You cannot call the opposite side. Did you subpoena her?

MS. HALPAPE: We don't have any witnesses here.

JUSTICE HERSHFIELD: So you cannot prove your case. The appeal is allowed. Thank you. – Whereupon the proceedings concluded at 9:48 a.m.

[8] In his written reasons for judgment dated February 22, 2008, the trial judge added:

> Allowing the Respondent to examine the Appellant would have the effect of allowing an ill-fated last gasp attempt to avoid the inevitable consequence of being less than fully prepared for a ruling that reversed the burden of proof. Allowing the Respondent to examine the Appellant, who lacked legal sophistication and acumen and was without counsel, would, in my view, have inevitably required the intervention of the Court. Acquiescing to the application of a Rule that would have allowed an attempt to have the Appellant attest to the Respondent's evidence is not something this Court should encourage. For these reasons, I did not allow the Respondent to call the Appellant. [para. 12]
>
> …
>
> In this case the interests of justice are better served by disallowing the calling of evidence that in my view could not meet the best evidence standards that are set to help ensure reliable findings. [para. 13]
>
> …
>
> Accordingly, the hearing ended without evidence being brought by the Respondent, the party with the burden to bring evidence to support its new assertions. The parties were advised that the appeal would thereby be allowed. [para. 14]

[9] This court has made it clear that while the rules of evidence in informal procedure trials in the Tax Court are relaxed, nevertheless, the rules of natural justice must be observed (*Muszka v. Her Majesty the Queen*, [1993] F.C.J. No. 1346 at para. 6 (FCA)).

[10] The trial judge took the trial into his own hands and did not allow the Crown to present her evidence. His reasons for refusing to permit the Crown to call witnesses are insufficient to justify the departure from the fundamental rule of natural justice.

[11] In his Reasons for Judgment, the trial judge recognized that the Crown intended to call the taxpayer and her husband as witnesses (para. 8). Both were in the courtroom and the husband was acting as agent for the taxpayer, was the student enrolled in the educational program in issue and had personal knowledge of the matters in dispute. However, the trial judge concluded that the husband was not a compellable witness because the Crown did not subpoena him. A subpoena merely compels a person to attend court proceedings.

[12] The trial judge also erred in law in refusing to permit the Crown to call the appellant. He stated: “You cannot call the appellant. The appellant rested her case. You cannot call the opposite side. Did you subpoena her?” (para. 15). It appears from the Reasons for Judgment that even the trial judge subsequently appreciated that he was wrong in excluding the testimony of the taxpayer. He stated: “As the adverse party, the Appellant could have been compelled to testify” (para. 10).

[13] Having conceded in his Reasons for Judgment that the taxpayer, who was present in the courtroom, was compellable, the trial judge attempted to support his oral ruling by invoking the best evidence rule. He states: “However, clearly she [the taxpayer] could not attest to the Respondent’s documents. She could not give the best evidence as to any of the points in issue” (para. 10). Since the trial judge did not give the Crown an opportunity to lead any evidence, he could not know what evidence the Crown intended to rely on nor the appropriateness of the witnesses the Crown intended to call. As applied today, the best evidence rule relates only to documentary evidence and, in particular, to whether a copy of a document may be entered in substitution for an original. Relevant evidence ought not to be excluded based on a concern that better evidence might come from another witness. Such concerns go to weight, not admissibility.

[14] Accordingly, the appeal will be allowed and the matter will be referred back for hearing before a different judge of the Tax Court of Canada.

[15] Pursuant to section 18.25 of the *Tax Court of Canada Act*, the respondent, Heather M. Wood, will be allowed her reasonable and proper costs in respect of this appeal.

"J. Richard"
Chief Justice

“I agree
J.D. Denis Pelletier J.A.”

“I agree
C. Michael Ryer J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-142-08
(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED FEBRUARY 22, 2008 (2008TCC105))	
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PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 7, 2008
REASONS FOR JUDGMENT BY:	RICHARD C.J.
CONCURRED IN BY:	PELLETIER J.A. and RYER J.A.
DATED:	October 9, 2008

APPEARANCES:

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Robert McMechan	FOR THE RESPONDENT

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