Federal Court of Appeal  Cour d'appel fédérale

Date: 20191216

Docket: A-73-19

Citation: 2019 FCA 313

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

IAN N. ROHER

Appellant

And

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 4, 2019.

Judgment delivered at Ottawa, Ontario, on December 16, 2019.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The appellant, Mr. Ian Roher, participated in an "art donation program". The program, which operated from 1998 to 2003, was a vehicle marketed to Canadians to reduce their taxes.

[2] Between taxation years 1998 and 2004, Mr. Roher paid $383,937 into the program, but claimed $2.3 million in donation tax credits.

[3] Between 2002 and 2007, the Minister of National Revenue reassessed Mr. Roher's 1998-2004 taxation years, determining that Mr. Roher was entitled to donation tax credits based on the amount he paid into the program, $383,937. That amount, according to the Minister, represented the fair market value of the donated art.

[4] Mr. Roher appealed the Minister's reassessment to the Tax Court of Canada (TCC). He was not the only one. Starting in December 2002, several other participants in the program also appealed the Minister's reassessment of their tax donation credits. A group of about 16 lead litigants was chosen while other tax payers agreed to be bound by the TCC decision. I also understand that as many as 300 to 400 tax payers' assessments were held in abeyance pending the resolution of the lead appeals (Transcripts Volume 1, AB pages 99-101). Those appeals were to be decided on common evidence before a single trial Judge, Chief Justice Rossiter (the Trial Judge).

[5] The decision of the Trial Judge is the subject of the present appeal (2019 TCC 17). The sole issue before him was the fair market value of the art that was purchased and subsequently donated on the same day or shortly thereafter by the lead litigants as part of the art donation program pursuant to subsection 118.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[6] Except for Mr. Roher, all the other lead litigants have either abandoned or settled their appeals before the TCC.

[7] Mr. Roher appeals to this Court, arguing that the Trial Judge erred:

i) in excluding his two experts' reports and certain documentary evidence (working papers); and

ii) in finding that the market value of the donated art was not the individual retail value of each donated art print and that he had not destroyed the Minister's assumptions.

I. Factual Background

[8] The history of the litigation related to this particular art donation program is long and complex. I do not intend to enter into the details—they were well-known to the Trial Judge—except to say this. Although Mr. Roher only became a lead litigant in 2013, he was represented by four lawyers from two law firms. These lawyers had been involved in the litigation since 2004. In fact, originally, the trial was set to begin in September 2004, for a period of two weeks. That was more than twelve years before the trial actually took place.

[9] Between September 2004 and some time in 2006, all the proceedings were held in abeyance at the request of the appellants, pending decisions of this Court and the Supreme Court in *Canada (Attorney General) v. Nash*, 2005 FCA 386 (Rothstein J.A.), leave to appeal to SCC refused, 31291 (20 April 2006) [*Nash*] and *Klotz v. Canada*, 2005 FCA 158 (Sexton J.A.), leave to appeal to SCC refused, 30981 (20 April 2006) [*Klotz*].

[10] *Nash* and *Klotz* involved similar, though not identical, "art-flipping schemes" (a term used by CCRA in their news release of November 15, 2002, AB page 1674). In both cases, the respondent was successful. In those cases the individual retail market value of the art prints

purchased and donated by each tax payer as part of groups of prints was found not to be the appropriate value of the donations.

[11] With *Nash* and *Klotz* in hand, the lead litigant ought to have known what the appellants had to prove and that they had a difficult case to make.

[12] When this matter came to trial, several years after *Nash* and *Klotz*, the appellants attempted to adduce expert reports prepared by two art appraisers, Ms. Edith Yeomans and Mr. Charles Rosoff.

[13] In contrast to the case in *Nash* for example, these were the only expert reports served by the appellants. Both Ms. Yeomans and Mr. Rosoff had been directly involved for several years in the art donation program. Specifically, they were hired by the promoters of the program to appraise individual prints to be used in the donation program. Such appraisals were an integral part of the service offered by the promoters (*Reasons* at para. 24). As soon as trial began, the respondent objected to these expert reports.

[14] On October 21, 2016, the Trial Judge ruled that Mr. Rosoff's expert report could not be accepted because it did not meet the mandatory requirement of Rule 145, *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the Rules). Mr. Rosoff failed to include the literature and other materials he relied on to support his opinion (Transcripts Volume 2, AB pages 201-202).

[15] As for Ms. Yeomans, the Trial Judge determined that she did not meet the threshold of impartiality, objectiveness and independence set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*]. The Trial Judge reviewed her proposed report. He listened to her evidence in a *voir dire*. And he determined that Ms. Yeoman's had a personal interest at stake. Ms. Yeomans' proposed report gave an opinion on the validity of her own appraisals that she supplied to the program. In short, she essentially proposed to give an expert opinion on her own professional opinions. If her report to the Court contradicted her prior appraisals, or even if it did not and the Court rejected her contemporaneous appraisals, Ms. Yeomans' ability to market herself as an art appraiser could be seriously jeopardized. As a result, the Trial Judge held that this was a clear case; Ms. Yeomans would clearly be unable to carry out her duty to the Court to be objective, impartial, and independent (Transcripts Volume 7, AB page 969 and *Reasons* at para. 66).

[16] After ruling on the admissibility of these reports, the Trial Judge gave the appellants time to consider how they wished to proceed. They chose to file a motion seeking a preliminary ruling as to whether Ms. Yeomans and later on Mr. Rosoff could testify as participant experts. It appears from their oral submissions on the first day of trial, that this was an alternative that the appellants were already aware of (Transcripts Volume 1, AB page 154, lines 17-20).The Trial Judge granted their motion (*Kaul v. The Queen*, 2017 TCC 55 at para. 26 [*Participant Expert Reasons*] and Transcripts Volume 10, AB page 1294).

[17] This meant that both Ms. Yeomans and Mr. Rosoff could testify as to their observations and participation in the underlying events and the opinions they gave at the relevant time on the

basis of their ordinary skill, knowledge, training and experience (*Participant Expert Reasons* at para. 29, *Reasons* at paras. 4-5).

[18] That said, in his *Participant Expert Reasons* in response to concerns raised by the respondents, the Trial Judge stated at paragraph 64 that:

> in the particular circumstances of this case, the opinion testimony of the Appraiser would be limited to the content of the Appraisal Reports, which had long been disclosed to the Respondent. To that extent, the Respondent's concerns about disclosure regarding the original opinions are certainly more theoretical than real. On the other hand, to the extent that the Appellants have failed to produce the relevant supporting documents, such as invoices, literature, upon which the Appraiser relied in compiling her Appraisal Reports in the list of documents and the Respondent has not had a chance to ask any questions about them on discovery, procedural fairness dictates that these documents cannot be now admitted just because the Appraisal Reports are allowed.
>
> (My emphasis)

[19] Finally, as concerns the evidentiary rulings at issue, on December 8, 2017, the Trial Judge excluded sixteen volumes of working papers which the appellants tried to use as exhibits during the examination in chief of Ms. Yeomans (*Reasons* at para. 36 and Transcripts Volume 9, AB page 1127). These documents, dating from 1998-2003, had never been included in the appellants' list of documents (Rule 89 and Order of Chief Justice Rossiter dated June 1, 2015, [AB page 15061-15067]). And this even after the appellants had been put on notice in paragraph 64 of the *Participant Expert Reasons*, that to the extent that these documents were not included in the list of documents and no examination for discovery had taken place in respect of them, they would not be allowed to be used by the appellants at trial. At no time between the *Participant Expert Reasons* dated April 20, 2017 and December 2017, did the appellants inform the respondent that they intended to file the working papers as exhibits at trial. Nor did they put

the respondent on notice that they considered that she had waived her right to an examination for discovery in respect of those documents.

[20] Of note, during the examinations for discovery, the respondent had asked for the production of all Ms. Yeomans' and Mr. Rosoff's working papers relating to their appraisal reports. All the lead litigants refused to disclose these documents. Mr. Roher refused because he considered them irrelevant to the appeal. All other lead litigants refused based on litigation privilege. I further note that pursuant to Rule 89, the working papers, if they had otherwise been obtained by the respondent, could only be used in cross-examination. Last, Rule 96, provides that leave of the TCC was required to introduce any information that was refused when properly sought during discovery or on the ground that it was privileged. Such leave is not required if the information is nevertheless furnished no later than 10 days after the proceedings is set down for hearing.

[21] On January 18, 2019, the Trial Judge issued his decision dismissing the appeal. As mentioned, the Trial Judge rejected Mr. Roher's arguments that *Nash* and *Klotz* should be distinguished. He found that the evidence that the prints at issue were to be valued as groups as opposed to individual prints was particularly compelling (*Reasons* at paras. 70-71). He also found the appraisals by Ms. Yeomans and Mr. Rosoff were not particularly credible, and therefore attributed little weight to their evidence (*Reasons* at paras. 79-93). Last, he held that "the information extracted by the respondent, either through cross-examination of witnesses such as Messrs. Sloan, Pearlman or Cornell, plus their transactional documents as well as the other documents, indicated that the fair market value of the art was certainly not the fair market value

presented by the appellant" (*Reasons* at para. 95). Thus, on the whole of the evidence, he concluded that Mr. Roher had not met the burden of destroying the relevant assumptions relied upon by the respondent.

II. Analysis

[22] I will first review the evidentiary rulings that Mr. Roher challenges before dealing with the ultimate findings relating to the fair market value of the donated art. Respecting all the issues before us, the parties agree that Mr. Roher must establish that the Trial Judge made a palpable and overriding error. I also agree. Determining the market value of the property at issue is a question of fact or at best of mixed fact and law that is predominantly fact-based. No extricable errors of law were raised before us in respect of this issue or the evidentiary rulings.

A. *The expert reports of Ms. Yeomans and Mr. Rosoff*

[23] Mr. Roher argues that the Trial Judge erred by rejecting Ms. Yeomans as an independent expert. He submits that in *White Burgess*, the Supreme Court of Canada limited the rule excluding experts to only the clearest cases and that a mere employment relationship does not rob an expert of impartiality and independence. Mr. Roher points out that Ms. Yeomans was open about her involvement in the art donation program during cross-examination on the *voir dire* to qualify her as an expert. Mr. Roher reasons that the Trial Judge could not have excluded Ms. Yeomans' report without the respondent asking her directly whether she could be impartial and independent in the circumstances of this case. I disagree.

[24] This is not a case of a mere employment relationship. The Trial Judge fully understood the principles set out in *White Burgess* (Transcripts Volume 7, AB page 964). He found that this was a clear case where he should exercise his discretion. It is the trier of facts who acts as gatekeeper in these matters, not the experts.

[25] I am not persuaded that the Trial Judge misconstrued the facts when he noted the following:

> … [N]ow the court expert's report, as per her evidence, it is essentially the same as her short-form report with some expansion and explanation on the appropriate market used determine the fair market value and more research in the current value of the art in question. (Transcripts Volume 7, AB page 965, lines 20-25).
>
> (My emphasis)

[26] It was clearly open to the Trial Judge to conclude as he did on the facts before him.

[27] I now turn to Mr. Rosoff's report. The Trial Judge excluded Mr. Rossof's report because it did not comply with Rule 145. However, before examining the Trial Judge's reasoning, I note that even if this report did comply with Rule 145 or the Trial Judge had been willing to disregard Mr. Rossof's failure in that respect, Mr. Rossof may still have been confronted with the issue that led the Trial Judge to exclude Ms. Yeomans' report. Thus, even if the Mr. Roher had persuaded me that the Trial Judge made a palpable error in excluding Mr. Rosoff's report under Rule 145, it is unlikely that I could conclude that this was an overriding error. Indeed, it is not clear why this report would not have also been excluded based on the threshold set out in *White Burgess*.

[28] Concerning Rule 145, Mr. Roher argues that the Trial Judge should have adjourned trial to allow Mr. Rosoff to correct his mistake, and comply with Rule 145. Mr. Roher reasons that excluding Mr. Rosoff's report would prejudice him far more than adjourning the trial would prejudice the respondent. Alternatively, Mr. Roher argues that the Trial Judge should have accepted any part of the report that did not rely on supporting materials.

[29] As I understand it, Mr. Roher makes a similar argument respecting Rules 7, 8, 89 and 96. The Trial Judge should have exercised his discretion in favour of Mr. Roher, notwithstanding Mr. Roher's disregard of the Rules because deciding otherwise would seriously prejudice Mr. Roher's case. I disagree as none of these arguments provides a basis for intervention by this Court.

[30] Appellate courts owe deference to trial courts respecting the admission of experts or any other evidence. In the absence of a legal error, determining whether to exclude evidence is case and fact-specific. It was clearly open to the Trial Judge to find that adjourning this matter would have prejudiced the administration of justice. Further, I am not convinced that excluding Mr. Rosoff's report caused a very serious prejudice to Mr. Roher. Mr. Rosoff's report was substantially to the same effect as his appraisal reports, which were included in the evidence.

[31] Mr. Roher ignored the Rules in respect of experts and a Court Order. The litigation had been going on for years. Mr. Roher had enough time to understand the issues, strategize how to prove his case, collect his evidence and disclose it to the other side (Transcripts Volume 2, AB pages 207-208). The Trial Judge found that in the circumstances of this case, to allow further

adjournments would go against the very purpose underlying the expert evidence Rules, thereby promoting delay and expense. Mr. Roher cannot simply rely on prejudice arising from his own conduct. In the particular circumstances, I agree with the Trial Judge that this would undermine the spirit and object of the Rules.

[32] Mr. Roher also claims that the testimony of Mr. Rosoff and Ms. Yeomans as participant experts was too little too late. I disagree. After Mr. Rosoff and Ms. Yeoman's expert reports were rejected, the Trial Judge gave Mr. Roher time to strategize. He sought to include Mr. Rosoff and Ms. Yeomans as participant experts.

[33] Further, Ms. Yeomans, as a participant expert, could fully present her views on the value of the art at the relevant time, and why she considered the individual retail market as the appropriate market in the circumstances. This was exactly what is discussed in the appraisal reports she issued for the promoters of the art donation program. Mr. Roher's suggestion that she would have been able to say more about what he calls the "donation market" is not persuasive. He did not take us to any specific part of her testimony, even though the respondent submitted that she was allowed to testify as to why she thought the market should choose was the appropriate one in the circumstances.

[34] As recently reiterated by the Supreme Court of Canada in *Salomon v. Matte‑Thompson*, 2019 SCC 14 at para. 33, a palpable and overriding error is an error that is determinative of the case. It is "in the nature not of a needle in a haystack, but a beam in the eye." I discern no such error in the Trial Judge's findings on these issues that would warrant this Court's intervention.

B. *The Exclusion of the Working Papers*

[35] Mr. Roher next argues that the Trial Judge erred by excluding sixteen volumes of working papers that Mr. Roher sought to introduce when Ms. Yeomans testified as a participant expert.

[36] As mentioned, Mr. Roher refused to produce these documents during discovery. Later, he did not include them in his list of documents. He had been expressly advised that the respondent would object to him introducing these documents. Yet Mr. Roher took no steps to get the consent of the respondent or leave of the Court before trying to introduce them. (See para. 17, above, citing *Participant Expert Reasons* at para. 64).

[37] Mr. Roher responds that he delivered the documents to the respondent on October 14, 2016. Having taken several steps in the proceedings since then, the respondent was now precluded from objecting to their introduction into evidence. Mr. Roher viewed his aforementioned failures as an irregularity, which the Trial Judge should have tolerated, considering the prejudice Mr. Roher might suffer if the documents were excluded.

[38] Of note, Mr. Roher did not deliver the documents to the respondents voluntarily. Rather, he did so in answer to a request to accept service of a subpoena *duces tecum* without leave of the Court (Transcript of Proceedings dated January 31, 2017, AB page 1039).

[39] Mr. Roher further argues that this error is overriding because the documents would have bolstered the testimony, and thus the credibility, of his participant experts. In his memorandum at paragraph 73, Mr. Roher states, "had [the Trial Judge] reviewed the sale receipts from the work file, he might have concluded differently" (my emphasis). At the hearing, Mr. Roher added that this would have enabled him to destroy the Minister's assumptions.

[40] The respondents, on the other hand, argued that even if this error was palpable as submitted by Mr. Roher (which I am not persuaded of), it was not overriding. The respondent reasons as follows:

i. The Trial Judge was well aware that Ms. Yeomans had invoices for the sale of the individual art prints from some galleries, including the Roe Gallery, as this was clearly mentioned in her appraisals.

ii. The Trial Judge found many flaws in the methodology of the appraisal report submitted by the participant experts. These flaws were unrelated to the existence of invoices for the retail sale of individual pieces of art (*Reasons* at paras. 79-93).

iii. Most importantly, the Trial Judge found the evidence particularly compelling that the art in question was to be valued as groups as opposed to individual pieces (*Reasons* at paras. 70-71). There was no basis to distinguish the decisions of *Nash* and *Klotz* as to the assets to be valued.

[41] Having carefully reviewed the various passages of the *Reasons* underlined by Mr. Roher's new counsel and considering them in context, I agree that Mr. Roher has not met his

burden of establishing that this error would be determinative. When the *Reasons* are read as a whole, this is no more than a mere possibility.

C. *Did the Trial Judge err in his findings with respect to the fair market value of the art donated by Mr. Roher?*

[42] In his memorandum, Mr. Roher described this issue as, "did the Trial Judge err in finding that the donor market and the Sloan wholesale market were identical?"

[43] I have reformulated the issue considering that, on a proper reading of the decision, the Trial Judge never made a finding that the donor market was identical to the Sloan wholesale market. He simply concluded on the evidence before him—including the information extracted by the respondent through cross-examination of the witnesses (including Messrs. Sloan and Pearlman) and all the documentation produced—that the fair market value of the art was not the fair market value presented by the appellants.

[44] The Trial Judge did not make a finding that the stated market values assumed by the Minister were appropriate. He only stated that Mr. Roher had not met his burden of destroying the relevant assumptions relied upon by the Minister.

[45] Mr. Roher essentially asks us to reweigh the evidence relying, among other things, on "bits" of Messrs. Sloan and Pearlman's evidence. This is not the role of an appellate court. I have not been persuaded that the Trial Judge erred in his evaluation of the evidence as a whole.

III. Conclusion

[46] Mr. Roher has not persuaded me that the Trial judge made a palpable and overriding error. The appeal should be dismissed with costs, set at an all inclusive amount of $5,500.00 as agreed by the parties.

"Johanne Gauthier"
J.A.

“I agree
Yves de Montigny J.A.”

“I agree
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-73-19
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PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	DECEMBER 16, 2019

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