

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140404

Docket: A-556-12

Citation: 2014 FCA 92

Present: STRATAS J.A.

BETWEEN:

DAVID BRACE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 4, 2014.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR ORDER

STRATAS J.A.

[1] The respondent moves for an order under Rule 351 permitting it to present new evidence on appeal.

[2] To understand the anticipated role of the new evidence in this appeal, it is necessary to set out some background.

[3] The appellant appeals from a Tax Court order dated June 25, 2012. The Tax Court dismissed the appeal for failure to prosecute it in a timely fashion. In the course of its reasons for order, the Tax Court made a key factual finding: the appellant consistently refused to provide any contact information such as a residential address.

[4] The appellant delayed in filing his notice of appeal in this Court. As a result, he had to bring a motion in this Court for an extension of time (which this Court granted). In his motion, he submitted that he was not made aware of the Tax Court's order when it was rendered and only became aware of it roughly four months later. He offered an affidavit in support of that motion. Attached as an exhibit to the affidavit was an undated letter from the appellant to the Tax Court. In that undated letter, the appellant informed the Tax Court of his address. The appellant says he sent this letter to the Tax Court in mid-January 2012.

[5] The appellant has filed the appeal book. The undated letter appears in the appeal book.

[6] It should not have appeared in the appeal book. The undated letter was not before the Tax Court. Normally, only documents that were before the Tax Court should appear in the appeal book.

[7] Sitting in the appeal book, the undated letter tends to undercut the Tax Court's key factual finding that the appellant consistently refused to provide contact information.

[8] The respondent has now discovered this problem.

[9] Faced with this problem, the respondent had two options. The respondent could have moved for removal of the undated letter from the appeal book. Or it could have moved for the admission of fresh evidence related to the undated letter. The respondent has chosen to pursue the latter option. Although the former option has the virtue of potentially simplifying the issues on appeal, I shall deal with this motion as the respondent has framed it.

[10] The fresh evidence is a letter dated January 7, 2014 from Lucie Pilon of the Tax Court of Canada to Tokunbo Omisade of the Department of Justice. In this letter, the Tax Court states that “the Court has no record of an undated letter that the appellant says he provided to the Court sometime in mid-January 2012.”

[11] The test for the admission of new evidence is stringent: *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10. In my view, all parts of the test are met in this case:

- (1) *The evidence should not be admitted if, by due diligence, it could have been adduced at trial.* This is met. The January 7, 2014 letter postdates the trial.

- (2) *The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.* This is met. The January 7, 2014 letter relates to the appellant’s undated document, which document formed a key part of the factual finding that that the appellant consistently refused to provide contact information.

- (3) *The evidence must be credible in the sense that it is reasonably capable of belief.*

This is met. Written by a court official in the ordinary course of business, the January 7, 2014 letter is reasonably capable of belief.

- (4) *The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.* This is met.

If the panel hearing the appeal believes and gives weight to the January 7, 2014 letter, the letter may lead the panel to form conclusions regarding the appellant's undated letter. This, as I have said, relates to the trial judge's key finding that the appellant consistently refused to provide contact information.

[12] I further note that even when the *Palmer* test for the admission of fresh evidence has not been met, this Court has a residual discretion to admit new evidence on appeal in the interests of justice. But this is a residual discretion to be exercised only "in clearest of cases" and "with great care": *Shire, supra* at paragraph 18; see also *R. v. J.A.A.*, 2011 SCC 17, [2011] 1 S.C.R. 628 where the Supreme Court itself admitted fresh evidence despite the *Palmer* test not being met, suggesting that this residual discretion does exist.

[13] Were the *Palmer* test not met here, I would exercise my residual discretion in favour of admitting the January 7, 2014 letter. This case is unusual. The fresh evidence is being adduced to address other fresh evidence that was placed improperly into the appeal book. It is only one letter. I see no likelihood that its admission will set in train a series of complicated factual disputes in the

appeal. If that does not turn out to be the case, the panel hearing the appeal may make any order it sees fit concerning the admissibility of evidence before it, including the fresh evidence mentioned in these reasons.

[14] Therefore, for the foregoing reasons, I grant the respondent's motion. The January 7, 2014 letter shall be included in a supplementary appeal book along with my Order, these reasons, and a table of contents. The respondent shall prepare this supplementary appeal book and file it within four days.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-556-12

STYLE OF CAUSE:

DAVID BRACE v. HER MAJESTY
THE QUEEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

STRATAS J.A.

DATED: APRIL 4, 2014

WRITTEN REPRESENTATIONS BY:

David Brace

ON HIS OWN BEHALF

John Bodurtha
Tokunbo Omisade

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT