Docket: 2013-1620(IT)G

BETWEEN:

MARTIN OBERKIRSCH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on common evidence with the motions of
Marc Dupuis (2011-2761(IT)G) on March 21, 2016 at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Joel Allan Sumner
Counsel for the Respondent:	H. Annette Evans Rishma Bhimji

ORDER

Upon motion made by the Respondent for:

1. an order dismissing the appeal for delay or failure to comply with the *Tax Court of Canada Rules (General Procedure)* with respect to the examination for discovery process;

2. in the alternative, an order compelling the Appellant to answer the written questions served on January 8, 2016;

Upon motion for summary judgment made by the Appellant;

And upon submissions made by the parties;

This Court orders the following:

1. The Appellant's motion is dismissed.

2. This appeal is adjourned *sine die*.

3. The parties are to communicate in writing with the hearings coordinator no later than April 25, 2016 to provide a status report on the three McCarthy appeals to the Federal Court of Appeal of this Court's orders.

4. Costs are reserved at this time to be dealt with in accordance with the reasons for order.

Signed at Québec, Quebec, this 8th day of April 2016.

"Patrick Boyle"

Boyle J.

Docket: 2011-2761(IT)G

BETWEEN:

MARC DUPUIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on common evidence with the motions of
Martin Oberkirsch (2013-1620(IT)G) on March 21, 2016 at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Joel Allan Sumner
Counsel for the Respondent:	H. Annette Evans Rishma Bhimji

ORDER

Upon motion made by the Respondent for:

1. an order dismissing the appeal for delay or failure to comply with the *Tax Court of Canada Rules (General Procedure)* with respect to the examination for discovery process;

2. in the alternative, an order compelling the Appellant to answer the written questions served on January 8, 2016;

Upon motion for summary judgment made by the Appellant;

And upon submissions made by the parties;

This Court orders the following:

1. The Appellant's motion is dismissed.

2. This appeal is adjourned *sine die*.

3. The parties are to communicate in writing with the hearings coordinator no later than April 25, 2016 to provide a status report on the three McCarthy appeals to the Federal Court of Appeal of this Court's orders.

4. Costs are reserved at this time to be dealt with in accordance with the reasons for order.

Signed at Québec, Quebec, this 8th day of April 2016.

"Patrick Boyle"

Boyle J.

Citation: 2016 TCC 84
Date: 20160408
Dockets: 2013-1620(IT)G
2011-2761(IT)G

BETWEEN:

MARTIN OBERKIRSCH,
MARC DUPUIS,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] These motions arise out of appeals that Mr. Oberkirsch and Mr. Dupuis have brought with respect to the penalties assessed in respect of their claims for Fiscal Arbitrators business losses. They are not appealing the denied Fiscal Arbitrators losses.

[2] Mr. Dupuis' appeal also contests the denial of expenses, and hence losses, related to his rental properties on Lorne Street in Ottawa. Mr. Oberkirsch's amended notice of appeal is not entirely clear but appears to only be contesting penalties assessed with respect to his Fiscal Arbitrators loss; however, there is also a possibly stray reference to incurring expenses associated with his rental property. In both notices of appeal, the material facts relating to the Fiscal Arbitrators loss include: "The Appellant was also advised by his tax professional that he, since a person was an agent there was a fictional principal/agent relationship." This was followed by: "The Appellant believed and followed the logic of the tax professional."

[3] These motions result from the failures of the Appellants to attend and/or answer questions on examination for discovery as required under the *Tax Court of Canada Rules (General Procedure)*. Apparently, Mr. Oberkirsch attended a scheduled examination but refused to answer questions. Mr. Dupuis did not attend

an examination and no communication or reason was given to the Respondent for his failure.

[4] Both appeals were scheduled to be heard on March 11, 2016. Shortly before the hearing date, these motions were received. The hearings were adjourned.

[5] Mr. Sumner filed a motion for summary judgment on behalf of each of these two taxpayers. The Respondent brought motions to dismiss. All four motions were heard together in Toronto last month.

[6] These motions were all brought after my reasons in *McCarthy v. The Queen*, 2016 TCC 45 ("*McCarthy No. 1*") and in *McCarthy v. The Queen*, 2016 TCC 49 ("*McCarthy No. 2*").

The Appellants' Motions

[7] The taxpayers' motions raise the same torture arguments advanced in *McCarthy No. 1*. In addition, they add three new arguments:

(a) In addition to the *McCarthy No. 1* arguments on torture, the Appellants in these motions maintain that the Respondent bears the onus to satisfy the Court that an examination for discovery of the Appellants would not constitute torture.

(b) In addition to the contextual *Bill of Rights* arguments made in *McCarthy No. 1*, the Appellants in these motions are requesting relief for the alleged *Bill of Rights* violation.

(c) The Appellants in these motions further ground their requested relief in the United Nations' *Universal Declaration of Human Rights*.

[8] While *Charter* arguments are set out in the notices of appeal, counsel confirmed that the *Charter* was not being advanced to defend his clients' failures to attend and/or answer questions on examinations for discovery.

[9] Mr. Sumner did not explain why he thought these were appropriate cases for summary judgment. Neither did he explain why he thought this Court had jurisdiction to grant summary judgment given that is not provided for in the rules of this Court. Justice Campbell rightly raises the question of whether this Court has jurisdiction to grant summary judgment in *Alan W. Cockeram and E. Anne*

Cockeram Trustees of the Cockeram Family Trust v. The Queen, 2003 TCC 510. Given the paucity of thought or authority in the motions before me, I hesitate to conclude that this Court would not have inherent jurisdiction to grant summary judgment in an appropriate case. These, however, are clearly not such cases. Nonetheless, I will continue to decide the arguments Mr. Sumner put forward as his substantive arguments.

Torture

[10] Counsel acknowledged that his torture arguments, aside from his position regarding the burden of proof, are the same as he advanced in *McCarthy No. 1*. I decided *McCarthy No. 1* against the taxpayer and that decision has been appealed to the Federal Court of Appeal. I remain of the view that this line of argument is devoid of any possible merit whatsoever. As I said in *McCarthy No. 1*, enough said.

[11] Mr. Sumner argued at the hearing that case law on evidentiary burden of proof was clear that in torture cases, once a party complains of torture, the onus shifts to the other party to prove that the act complained of was not torture. When asked, he did not have any case law developed for the hearing so I agreed to allow him to file written submissions on this point. They were received and reviewed. These submissions and the authorities put forward do not persuade me at all that the Respondent should bear the burden of proving that an examination for discovery would not be torture.

[12] Mr. Sumner puts forward two basic general principles of evidence. Firstly, a party seeking to introduce evidence must satisfy the Court that it is admissible. Secondly, in order to be admissible into evidence, information must be shown by the party putting it forward to be both reliable and appropriate.

[13] In these two appeals, and in *McCarthy No. 1*, the Appellants refused to attend pretrial examinations for discovery or have attended and refused to answer questions.

[14] The examination for discovery process is a pretrial process. It is concerned with gathering information, learning about the other side's case, narrowing or eliminating issues, and avoiding surprises at trial. The party conducting the examination for discovery is not seeking to introduce evidence before this Court. While I hesitate to be seen as encouraging counsel to make this argument again at the hearing of the appeals if the Respondent seeks to introduce evidence of the

Appellants' answers on discovery, I must conclude that the Appellants' arguments on this point, as put forward by Mr. Sumner, cannot succeed at this stage.

The *Canadian Bill of Rights*

[15] As in *McCarthy No. 1*, the Appellants herein maintain they have been deprived of their property without due process in violation of the *Bill of Rights* upon the reassessments being issued by the Canada Revenue Agency. As in *McCarthy No. 1*, counsel for the Appellants found it easier to describe and identify the deprivation than to identify and describe the property of which the Appellants were deprived. He agreed that I described his position accurately in *McCarthy No. 1* that the property was each Appellant's right to not be legally obligated to pay money to the government, which obligation resulted in law from the reassessment.

[16] That is simply not a property right of the Appellants. There is no recognized property in what counsel is describing. The position of counsel for the Appellants is that property includes rights and choses in action. He goes on that a debt is property. The problem that he cannot surmount is that, with respect to a debt, the holder of the right that could be considered property is the creditor. The debtor is not the holder of the right under the debt, the debtor bears the burden of the debt. No authority was put forward for the proposition that the debtor's obligation is a property, an interest in property or a property right of the debtor.

[17] Under the *Income Tax Act*, appellants in these circumstances cannot be required to pay their tax debt resulting from the reassessments until they have been given the prescribed time to exercise their administrative objection rights and their judicial appeal rights.

[18] The Appellants' *Bill of Rights* argument is therefore baseless.

Universal Declaration of Human Rights

[19] The United Nations' *Universal Declaration of Human Rights* provides that no one shall be arbitrarily deprived of their property. The Appellants' position under this U.N. Declaration must also fail as, for the reasons given above with respect to the *Canadian Bill of Rights*, the reassessments did not deprive the Appellants of property, nor could they be said to be arbitrary given the scope of the objection and appeal rights granted in the same legislation in respect of the reassessments in issue.

[20] In his original written submissions in support of his motions, counsel for the Appellants wrote two paragraphs under the heading "Conclusion". They read as follows:

> Providing notice and an opportunity to contest a tax assessment before a Court or tribunal is required by the due process clause of the Bill of Rights. It is not impossible, as in the United States, except with jeopardy and termination assessments and some minor other exceptions like assessing interest, they provide taxpayers with a notice of deficiency, which is quite literally a taxpayer's ticket to tax court.
>
> In addition, providing Canadians with due process before an assessment is made would put Canada as a leader amongst Western nations for providing a robust tax system that listens to taxpayer's concerns before they are deprived of their property.

[21] Conclusions that a different approach to providing due process would not be impossible and would make Canada a leader amongst Western nations clearly fall short of a persuasive argument to a court that a judicial remedy is available or required under existing Canadian law.

[22] The Appellants' motions will be dismissed for the above reasons.

The Respondent's Motions

[23] The Respondent's motions are to dismiss the appeals as a result of the failures to attend and/or answer questions on discovery on the grounds of torture which this Court has already ruled was not a valid reason to not complete the pretrial discovery process. In the alternative, the Respondent asks that the hearings of the appeals be adjourned and the time within which to complete discoveries extended.

[24] While I am obviously sympathetic to the Crown's position, I must also consider the proper administration of justice. My decision in *McCarthy No. 1* has been appealed to the Federal Court of Appeal. (The two previous McCarthy orders of the prior case management judge, former Chief Justice Rip, are also pending before the Federal Court of Appeal.) If I were to dismiss these two appeals relying upon my earlier decision in *McCarthy No. 1* while it is still pending before the Federal Court of Appeal, these two taxpayers can reasonably be expected to appeal my dismissal orders to the Federal Court of Appeal. Similarly, if I extend the time within which the discoveries are to be completed, there is virtually no reason to think that order will be complied with by the Appellants before the Federal Court of Appeal disposes of *McCarthy No. 1*.

[25] It appears to me that the more appropriate disposition of the Respondent's motions is to issue orders similar to those in *McCarthy No. 2*, adjourning the Dupuis and Oberkirsch appeals *sine die*, and requiring the parties to communicate with the Court regularly on the status of all three of the McCarthy appeals from orders of this Court to the Federal Court of Appeal. Such status reports shall be on the same timetable as those required in *McCarthy No. 2*.

[26] It also appears to me that costs on these motions should most appropriately be dealt with as in *McCarthy No. 2* and for similar reasons. Written submissions on costs are to be filed within 30 days of the date of the order herein, including submissions from counsel for the Appellants with respect to the possible application of Rule 152.

Signed at Québec, Quebec, this 8th day of April 2016.

"Patrick Boyle"

Boyle J.

CITATION:	2016 TCC 84
COURT FILE NOS.:	2013-1620(IT)G 2011-2761(IT)G
STYLE OF CAUSE:	MARTIN OBERKIRSCH, MARC DUPUIS, v. THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 21, 2016
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	April 8, 2016

APPEARANCES:

Counsel for the Appellant:	Joel Allan Sumner
Counsel for the Respondent:	H. Annette Evans Rishma Bhimji

COUNSEL OF RECORD:

For the Appellant:	Joel Allan Sumner
Firm:	Sumner Law Toronto, Ontario
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada