Docket: 2003-815(IT)G

BETWEEN:

THE ESTATE OF THE LATE PATRICK MCBANE BY ITS EXECUTRIX AND LEGAL REPRESENTATIVE MARY ANN MCBANE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Application heard on March 16 and 18, 2005 at Ottawa, Canada

Before: The Honourable Justice B. Paris

Appearances:

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|---|---|
| Counsel for the Appellant: | William G.D. McCarthy |
| Counsel for the Respondent: | Steven Leckie |

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**ORDER**

This application under Rule 99 is dismissed. The application to extend the time for completing the examination for discoveries is allowed under Rule 12(1). The parties will have until June 30, 2004 to complete the examinations for discovery, until August 31, 2005 to complete any undertakings and are requested to contact the Court by September 30, 2005 to set a hearing date.

Signed at Ottawa, Canada, this 13th day of April 2005.

"B. Paris"

Paris, J.

Citation: 2005TCC264
Date: 20050413
Docket: 2003-815(IT)G

BETWEEN:
THE ESTATE OF THE LATE PATRICK MCBANE BY ITS EXECUTRIX AND LEGAL REPRESENTATIVE MARY ANN MCBANE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR ORDER

Paris, J.

[1] The Respondent has applied under Rule 99 of the Tax Court of Canada Rules (General Procedure) for leave to examine for discovery a non-party, Michele Potts, in this appeal. The Respondent is also seeking an extension of time to complete examinations for discovery pursuant to Rule 12.

[2] The grounds for the Motion are:

1. The Crown has been unable to examine a knowledgeable nominee on behalf of the Appellant;

2. It would be unfair to require the Crown to proceed to hearing without having the opportunity of examining Michele Potts;

3. The examination will not unduly delay the commencement of the hearing of the proceeding, entail unreasonable expense for other parties or result in unfairness to Michele Potts; and

4. The Appellant consents to this motion.

[3] The Appellant does not oppose the application, but made submissions relating to the payment of Ms. Potts to attend the examination for discovery, if ordered to do so.

[4] The Respondent filed two affidavits in support of the motion as it relates to Rule 99, one from Nancy Turner and one from Wendy Burnham, both of the Tax Law Services Section, Department of Justice, in Ottawa. The affidavits indicate that:

- Counsel for the Appellant advised counsel for the Respondent that he intended to produce Mrs. Mary Ann McBane as the Appellant's nominee for the examination for discovery but that Mrs. McBane was not particularly knowledgeable and had no personal direct knowledge of the matters in issue.

- Counsel for the Appellant suggested that the Respondent bring an application under Rule 99 of the *Tax Court of Canada Rules (General Procedure*) to discover Michele Potts, who was admittedly more knowledgeable about the matters in issue than Mrs. McBane.

- Ms. Potts advised counsel for the Respondent that she was the only person who has knowledge of the transactions in issue in this appeal. Although Ms. Potts agreed to attend a meeting with the Respondent's counsel, she failed to keep the appointment.

- Counsel for the Appellant indicated that he would not oppose such an application, but would seek to have the Court order the Respondent to pay Ms. Potts some compensation for her efforts.

[5] Rule 99 reads:

> (1) The Court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the appeal, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.
>
> (2) Leave under subsection (1) shall not be granted unless the Court is satisfied that,
>
> > (*a*) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person sought to be examined,

> (*b*) it would be unfair to require the moving party to proceed to hearing without the opportunity of examining the person, and
>
> (c) the examination will not,
>
> (i) unduly delay the commencement of the hearing of the proceeding,
>
> (ii) entail unreasonable expense for the other parties, or
>
> (iii) result in unfairness to the person the moving party seeks to examine.

[6] I am satisfied that the Respondent has shown that Ms. Potts has information relevant to a material issue in the appeal. As already indicated, Ms. Potts advised counsel for the Respondent that she was the only person who has knowledge of the transactions in issue in this appeal.

[7] I am not satisfied that the conditions in subsection (2) of Rule 99 have been met.

[8] With respect to paragraph 2(*a*) of Rule 99, I note that the Respondent has not attempted to obtain the information in issue from Mrs. McBane, whom the Respondent is entitled to examine for discovery. The most that can be said is that the Respondent anticipates not being able to obtain the information if a discovery of Mrs. McBane were held.

[9] Similarly, it has not been shown that the Respondent has made any significant effort to obtain the information in question from Ms. Potts, and therefore it cannot be said that the Respondent has been unable to obtain the information from her. The affidavit evidence shows only that Ms. Potts agreed to attend a meeting with the Respondent's counsel, but failed to keep the appointment. There is no indication whether Ms. Potts was contacted again by the Respondent's counsel either to determine why she did not come to the meeting, or to arrange another opportunity to question her about the transactions in issue.

[10] In my view the evidence does not show that there has been either an actual or constructive refusal by Mrs. McBane or Ms. Potts to provide the information that the Respondent is seeking. It is not sufficient that a party anticipates being unable to obtain the information. In *Reichmann v. Vered*[1], the Ontario Court of Appeal set

[1] [1998] O.J. No. 3751 (O.C.A.) rev'd [1997] O.J. No. 2799.

aside an order for the examination for discovery of a non-party given by a Motions Judge under Rule 31.10(2) of the *Ontario Rules of Civil Procedure* (which is identical in all material respects to Rule 99 of the *Tax Court Rules (General Procedure)*) on the basis that the order was premature. The motions judge had found that the moving party would have been unable to obtain the information from the other parties and that refusal of the order would unnecessarily delay and thus increase the cost of the proceedings. In setting aside the order, the Court of Appeal said:

> There may come a time in this litigation when an order to examine a representative of Coopers & Lybrand is appropriate, but at this stage such an order is premature. We observe that Chilcott J. did not find that the responding parties had been unable to obtain the information but only that they will be unable to obtain it, a finding that emphasizes the prematurity of the order. Whatever practical benefit there may be to the order of Chilcott J. must give way to the requirements of r. 31.10(2). Coopers & Lybrand is not a party and an order for discovery of a non-party is an exceptional order which should not be made unless the criteria in r. 31.10(2) have been satisfied. ...

[11] In *Famous Player Development Corp. v. Central Corp.*[2], another case involving Rule 31.10(2), the Ontario Court (General Division) set aside an order of a master permitting the discovery of a non-party, where the master had interpreted the phrase "unable to obtain" as meaning "unable to obtain cheaply and without delay where the costs and delay that would otherwise ensue are large and obvious."[3]

[12] In allowing the appeal from the master's decision, the Court said:

> In so saying the master was applying a different test instead of the test in rule 31.10(2)(*a*) and in so doing he was clearly wrong. The test is inability to obtain the information. While there may be a level of difficulty, delay and/or expense that could, even in the absence of refusals by the defendant to undertake to answer follow-up questions, reasonably be characterized as amounting to an inability to obtain the information, the facts here fall far short of that.[4]...

[13] In the case at bar, I think it is fair to say that the Respondent's counsel, with the encouragement of the Appellant's counsel, brought this motion in the belief that a discovery of Ms. Potts rather than Mrs. McBane would expedite matters and result in cost savings to both parties. Such considerations may be taken into account in deciding whether to exercise the Court's discretion under subsection (1) of Rule 99 once the moving party meets the onus on it under subsection (2).

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[2] [1991] 1 O.R. (3d) 672 aff, [1991] 6 O.R. (3d) 764.
[3] *Supra*, footnote 2 at p. 682.
[4] *Ibid*.

[14] As indicated by the Ontario Court of Appeal, above, an order to examine a non-party is an exceptional order and should only be made where compliance with all of the conditions in Rule 99 has been shown. In this case, the Respondent has not shown that it has been unable to obtain the information it requires either from Mrs. McBane or Ms. Potts, and therefore has not met the onus under paragraph (2)(*a*) of the Rule. Since the conditions in subsection (2) of Rule 99 are conjunctive, it is not necessary for me to make any findings with respect to the conditions set out in paragraphs 2(*b*) and (*c*) of that Rule.

[15] The application under Rule 99 is therefore dismissed. The application to extend the time for completing the examination for discoveries is allowed under Rule 12(1). The parties will have until June 30, 2005 to complete the examinations for discovery, until August 31, 2005 to complete any undertakings and are requested to contact the Court by September 30, 2005 to set a hearing date.

Signed at Ottawa, Canada, this 13th day of April 2005.

"B. Paris"

Paris, J.

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| CITATION: | 2005TCC264 |
| COURT FILE NO.: | 2003-815(IT)G |
| STYLE OF CAUSE: | THE ESTATE OF THE LATE PATRICK MCBANE BY ITS EXECUTRIX AND LEGAL REPRESENTATIVE MARY ANN MCBANE AND HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | OTTAWA, ONTARIO |
| DATE OF HEARING: | March 16, 2005 |
| REASONS FOR ORDER BY: | The Honourable Justice B. Paris |
| DATE OF JUDGMENT: | April 13, 2005 |

APPEARANCES:

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| Counsel for the Appellant: | William G.D. McCarthy |
| Counsel for the Respondent: | Steven Leckie |

COUNSEL OF RECORD:

For the :

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| Name: | William G.D. McCarthy |
| Firm: | William G.D. McCarthy<br>Ottawa, Ontario |
| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Ontario |