

Docket: 2007-3974(IT)G

BETWEEN:

PETER BARRY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER

Upon reading the Notice of Motion filed by the Appellant on April 28, 2008 requesting an Order that the cross-examination of the Appellant on May 2, 2008 be dispensed with and upon reading the affidavit of the Appellant filed with this Notice of Motion;

And upon reading the Respondent's written representations opposing the Appellant's Motion;

It is ordered that the Appellant's motion is dismissed.

Signed at Halifax, Nova Scotia, this 30th day of April 2008.

“Wyman W. Webb”

Webb J.

Citation: 2008TCC272
Date: 20083004
Docket: 2007-3974(IT)G

BETWEEN:

PETER BARRY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

[1] The Appellant filed an appeal to this Court. The Respondent filed a Notice of Motion requesting an Order striking out the Notice of Appeal on the basis that for most of the years under appeal, the Appellant had waived in writing his right to appeal and that for one of the years under appeal no notice of objection had been filed. The Appellant filed a response to this Notice of Motion, including an affidavit of the Appellant. This motion is scheduled to be heard in Hamilton on June 3, 2008.

[2] The Appellant has filed a Notice of Motion requesting an Order that cross-examination of the Appellant on May 2, 2008 be dispensed with. It appears from the affidavit of the Appellant that the Respondent served the Appellant with a Notice of Examination requiring the Appellant to attend at an examination on May 2, 2008 at which the Respondent will cross-examine the Appellant on his affidavit filed in relation to the Respondent's Motion.

[3] The Appellant, in his Notice of Motion, requested that his Motion be disposed of upon consideration of written representations and without appearance of the parties. The Respondent has filed written representations in opposition to the Appellant's Motion. Paragraph 69 of the *Tax Court of Canada Rules (General Procedure)* ("Rules") provides as follows:

69. (1) A party filing a notice of motion may, at the same time, or subsequently, file a written request that the motion be disposed of upon consideration of written

representations and without appearance by the parties.

(2) A copy of the request and of the written representations shall be served on all parties served with the notice of motion.

(3) A party served with a request shall within twenty days,

(a) file and serve written representations in opposition to the motion, or

(b) file and serve a written request for a hearing

(4) When all parties served with the request have replied to it or the time for doing so has expired, the Court may,

(a) grant judgment without a hearing,

(b) direct a hearing, or

(c) direct that written representations be filed

[4] Paragraph 74 of the *Rules* provides as follows:

74. A deponent whose affidavit has been filed may be cross-examined on it by a party who is adverse in interest on the motion, and the evidence adduced may be used at the hearing of the motion.

[5] This paragraph is clear and therefore, as requested by the Appellant, judgment will be granted in this matter without a hearing. Since the Appellant has filed his affidavit he may be cross-examined on it by the Respondent in this matter. As a result, the Appellant's Motion for an Order that cross-examination of the Appellant be dispensed with is dismissed.

[6] It should be noted that paragraph 74 of the *Rules* applies to both parties. Therefore if the Appellant should wish to cross-examine the deponent of the affidavit filed by the Respondent, then the Appellant has the right to do so under paragraph 74 of the *Rules*. The procedural fairness issue referred to in the Appellant's Notice of Motion that it would be unfair to allow the Respondent to cross-examine the Appellant without the Respondent producing the deponent of her affidavit for cross-examination, is addressed by paragraph 74 of the *Rules* which permits any party who is adverse in interest on the motion to cross-examine a deponent of an affidavit that has been filed. Therefore, as noted above, the Appellant has the right to cross-examine the deponent of the affidavit filed by the Respondent, if the Appellant should choose to do so.

Signed at Halifax, Nova Scotia, this 30th day of April 2008.

“Wyman W. Webb”

Webb J.

CITATION: 2008TCC272
COURT FILE NO.: 2007-3974(IT)G
STYLE OF CAUSE: PETER BARRY AND THE QUEEN
REASONS FOR ORDER BY: The Honourable Justice Wyman W. Webb
DATE OF ORDER AND REASONS FOR ORDER: April 30, 2008
COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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