Dockets: 2016-2716(IT)G
2016-2717(GST)G

BETWEEN:

COLIN MCCARTIE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Trial Management Conferences held on March 25 and April 16, 2024
at Ottawa, Canada; and

Written submissions filed by the parties on May 24, 2024

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jamie Hansen Eric Brown Nicolas Sigouin

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ORDER

The Court directs that the parties' question to the Court be answered as set out in the attached Reasons for Order. The parties may ask the Court to issue an

amended order and reasons replacing those issued in February on the *voir dire* within 30 days hereof.

Signed at Ottawa, Canada, this 29th day of August 2024.

"Patrick Boyle"

Boyle J.

Citation: 2024 TCC 114
Date: 20240829
Dockets: 2016-2716(IT)G
2016-2717(GST)G

BETWEEN:

COLIN MCCARTIE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] I issued my order and reasons on a *voir dire* in this matter earlier this year (2024 TCC 16). The parties have written to the Court confirming they have settled the issue of the quantum of costs payable by the Crown to Mr. McCartie.

[2] The *voir dire* was held to determine what, if any, remedy was appropriate in this proceeding given a number of breaches of Mr. McCartie's *Charter* rights that had been found by the British Columbia provincial court in the related criminal proceedings. This Court's decision on the *voir dire* found after conducting the required *Grant* analysis that the appropriate remedy in this proceeding for these breaches included the exclusion of evidence of a specified and described nature.

[3] The parties have informed the Court that they are in discussions about settling the appeal and would like the Court to answer the question set out below on the scope of the exclusion of certain evidence to hopefully facilitate a settlement agreement between the parties to finally resolve this proceeding.

[4] Mr. McCartie initially wrote to the Court framing his question in a particular manner. Following the first of two Trial Management Conferences dealing with this, the parties submitted a joint question for the Court answer. The parties' proposed question asked the Court to conduct a further *Grant* analysis of whether the Bank Records obtained by the Production Orders should be excluded as part of

the remedy ordered. At the subsequent second Trial Management Conference, I advised the parties that I had conducted my *Grant* analysis in the Reasons and that it was not open to me to do any further *Grant* analysis, that would be the purview of the Federal Court of Appeal. Dropping that from the parties' question, I understood the parties' remaining question to be best phrased as follows, which I understood from them they wanted answered:

> When the trial resumes, is the Respondent precluded from introducing into evidence, or relying on, the 2005 to 2009 Bank Records obtained from the Production Orders given paragraphs 1 and 2 of the *voir dire* Order and paragraphs 7 and 145-147 of the reasons to (i) establish the amount of tax owing to the Appellant; and/or (ii) justify reassessing the Appellant after the normal reassessment period had expired?

[5] Notwithstanding this, both parties' subsequent written submissions continued to be phrased as though I would be doing a further *Grant* analysis. As stated during the Trial Management Conferences, it is not open to me to conduct a further *Grant* analysis to in any way change the *Grant* analysis already completed and set out in the reasons for the order already issued.

[6] Paragraphs 1 and 2 of the Order in question read:

> 1. The respondent cannot introduce or rely on any evidence that was first collected from the search and seizure at the McCarties' home to establish the amount of tax owing. Further, the respondent's assumptions set out in its reply do not enjoy any presumption of being correct nor impose any initial burden on Mr. McCartie to demolish them.
>
> 2. The respondent cannot introduce or rely on any evidence that was first collected from the search and seizure at the McCarties' home to justify reassessing after the normal assessment period had expired; and
>
> …

[7] Paragraphs 7 and 145-147 of the Reasons read:

> [7] I have concluded that, in Mr. McCartie's particular circumstances, certain evidence will not be able to be used by the respondent in this proceeding for certain purposes, whether by way of tendering it in evidence, using it to impeach credibility, referring to it in any manner that is even implicitly suggestive that an adverse inference might be drawn, or otherwise. The excluded evidence is set out below, and includes evidence subsequently obtained by the respondent as a result of having obtained evidence in breach of Mr. McCartie's Charter rights. Nor can the respondent use the transcript in this *voir dire* or these reasons except, as

> permitted below, with respect to the evidence of the respondent's witnesses on the substantive issues alone.
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> …
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> [145] In the circumstances I conclude that the only evidence that the respondent should be precluded from relying on in this Court to establish the amount of tax (income tax, GST or HST) owing by Mr. McCartie is the evidence, if any, first collected from the search and seizure of the McCarties' home. This is not to suggest such is always or generally expected to be the case in respect of an unlawful search of a home as part of a parallel, related tax evasion proceeding. I find that the particular circumstances of the search of the McCarties' home in this case, combined with the existence of several other Charter breaches in this case, when weighed appropriately, lead to this being the appropriate section 24 remedy in Mr. McCartie's case. I also find it appropriate that the respondent's assumptions of fact when reassessing set out in its reply not have the benefit of being presumed to be correct and to subject the taxpayer to an initial burden to demolish them on a *prima facie* basis, to the extent that *Hickman Motors* principle remains.
>
> [146] A consideration of the *Grant* factors leads me to a similar conclusion with respect to the issue of the respondent's ability to maintain its assessments of otherwise statute-barred years, that it has reassessed after the normal assessment period had expired. The ITA allows such reassessments in circumstances where a taxpayer has made a misrepresentation in their tax return due to carelessness or neglect. The tax consequences of such an assessment being permitted to be made is that the taxpayer is assessed for the taxes, and interest thereon, on the amount that they should have reported correctly in their return. Those are the amounts Canadians are expected to pay, and that Canadians expect their fellow Canadians to pay. This weighing of the *Grant* factors again leads me to the conclusion that only the evidence first collected by the respondent from the search of the McCarties' home should be excluded in this Tax Court proceeding given the particular circumstances of the search of the McCarties' home and the existence of the other Charter breaches. The respondent has the burden of proof with respect to reassessing statute-barred years under the ITA or any comparable GST or HST requirement.
>
> [147] Given the state of the evidence on the *voir dire*, and in particular the absence of Ms. Sundberg's testimony, I am not deciding the issue at this time of what evidence, if any, was first obtained during the search of the McCarties' home. This issue can be dealt with if a dispute arises as this tax appeal moves forward.

[8] The opening words of the Order state that it is to accord with the attached Reasons.

[9] Paragraph 147 makes it clear that the Court has not decided what particular evidence was first obtained or collected from the unlawful search and seizure at the McCarties' home, and left that until the resumption of the trial.

[10] The Respondent notes that paragraphs 1 and 2 of my Order do not expressly state that the excluded evidence extends to and includes any evidence obtained subsequent to the search and seizure as a result of having obtained evidence thereat. This inclusive language in paragraph 7 of the Reasons is also not expressly restated in paragraphs 145 and 146 of the Reasons.

[11] It is correct that paragraphs 1 and 2 of the Order and paragraphs 145 and 146 of the Reasons do no state that the exclusion includes and extends to evidence subsequently obtained by the Respondent as a result of having seized evidence unlawfully at the home in breach of the *Charter*.

[12] However, what is written in paragraph 7 is clearly to be given some meaning. It cannot simply be saying that some of the evidence described later in the Reasons includes evidence obtained after the unlawful search of the home as there is no such evidence later detailed in the Reasons. It was clearly (though perhaps not elegantly) intended to extend the exclusion from what was described later. It can be noted that, similarly, the final sentence of paragraph 7 of the Reasons restricting the use of the transcripts from the *voir dire*, is also not restated later in the Reasons nor does it appear in the Order, but was also intended to mean what it says.

[13] The Court's answer to the parties' question is that, if the Production Orders for the Bank Records were requested and/or issued as a result of, or relying on, information or other evidence obtained in the course of the unlawful search of the McCarties' home by CRA Criminal Investigations and the RCMP, the 2005 to 2009 Bank Records cannot be introduced into evidence or otherwise relied upon by the Respondent when this trial resumes on the merits.

[14] The Respondent acknowledges that in the Information to Obtain (ITOs) to obtain the Production Orders for the Bank Records, CRA Criminal Investigations referred to records that were seized from the home and to the search of the home.[1] The 2005 to 2009 assessments relied on those bank records, and were the only records relied in the 2008 and 2009 assessments.[2]

[1] Paragraph 10 of the Respondent's written submissions.
[2] Paragraphs 12 and 13 of the Respondent's written submissions.

[15] Notwithstanding this, the Respondent argues in its written submissions that the Bank Records would have been discoverable and sought to be obtained whether or not the unlawful search of the home had taken place.[3] Similar arguments were made during the *voir dire*, and my decision did not make any such concession, exclusion or exception in respect of the Bank Records.

[16] Reading such arguments again now, I can do no better than quote from our former Chief Justice Bowman in *O'Neill Motors Ltd. v. HMQ*, 96 DTC 1486 (paragraphs 15-16), to dispose of this:

> Counsel for the respondent based his opposition to this submission on the following grounds:
>
> …
>
> (b) Counsel further argued that the documents could have been obtained without a search warrant by means of a requirement under section 231.2 of the Act. This fact, if true, hardly helps the respondent. Quite the contrary. If the documents and information could have been obtained by the simple expedient of serving a requirement why the extreme tactic of a search and seizure? An unconstitutional act is not saved from the consequences of its own illegality by being unnecessary or by the fact that the same result might have been achieved constitutionally. Indeed, as the Supreme Court of Canada observed in *R. v. Collins*, [1987] 1 S.C.R. 265, 74 N.R. 276, 38 D.L.R. (4th) 508 at page 285 (N.R. D.L.R. 526-527), the fact that the evidence could have been obtained without a violation of the *Charter* tends to render the violation more serious. A search and seizure with its elements of speed, surprise and coercion may well be a more expeditious way of obtaining information necessary for an assessment and a prosecution, but if it constitutes a violation of the rights of the subject its expeditiousness does not justify or excuse it, nor does it erase its illegality.
>
> This of course places the Crown on the horns of a dilemma. Either the evidence could have been obtained legally and without violating the appellant's *Charter* rights, or it could not. If it could have, it should have, and its illegality cannot be ignored because an alternative and legal means was available.

[17] If a party wishes, they may ask the Court within 30 days hereof to issue an amended Order and Reasons incorporating all of paragraph 7 of the Reasons into paragraphs 1 and 2 of the Order and into paragraphs 145 and 146 of the Reasons, as well as changing the first heading Précis in the reasons to Introduction.

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[3] Paragraphs 6, 14, 31, and 44 of the Respondent's written submissions.

[18] The Appellant is entitled to its costs on both Trial Management Conferences.

Signed at Ottawa, Canada, this 29th day of August 2024.

"Patrick Boyle"

Boyle J.

CITATION:	2024 TCC 114
COURT FILE NO.:	2016-2716(IT)G 2016-2717(GST)G
STYLE OF CAUSE:	COLIN MCCARTIE v. HIS MAJESTY THE KING
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DATES OF HEARING:	March 25, 2024 and April 16, 2024
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	August 29, 2024

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jamie Hansen Eric Brown Nicolas Sigouin

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	N/A

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada