Federal Court of Appeal  Cour d'appel fédérale

Date: 20201218

Docket: A-250-20

Citation: 2020 FCA 221

Present: **LOCKE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

POMEROY ACQUIRECO LTD.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 18, 2020.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

I. Background and Legal Test

[1] The appellant (the Crown) moves for:

1. An order pursuant to Rule 351 of the *Federal Courts Rules*, S.O.R./98-106, granting leave to present fresh evidence; and

2. An order pursuant to Rules 343(3) to determine the content of the appeal book as proposed.

[2] Because the parties' disagreement on the content of the appeal book concerns only the fresh evidence that the appellant proposes to present, the only issue in dispute on the motion concerns said fresh evidence.

[3] Rule 351 provides as follows:

New evidence on appeal	**Nouveaux éléments de preuve**
351 In special circumstances, the Court may grant leave to a party to present evidence on a question of fact.	**351** Dans des circonstances particulières, la Cour peut permettre à toute partie de présenter des éléments de preuve sur une question de fait.

[4] The parties cite different authorities for the legal test applicable to a motion to adduce fresh evidence. However, they agree that:

1. Leave to adduce fresh evidence is granted exceptionally; there must be special circumstances;
2. Generally, the proposed fresh evidence should meet the following three requirements:
    a. It could not, with reasonable diligence, have been presented before the end of the hearing before the lower court;
    b. It is credible; and
    c. It is practically conclusive of an issue on the appeal; and
3. Evidence that does not meet these three requirements may still be admitted if the interests of justice require it.

[5] Because I find it better reflects the jurisprudence that binds this Court, I prefer the definition of the legal test for adducing fresh evidence as set out in *Coady v. Canada (Royal Mounted Police)*, 2019 FCA 102 at para. 3 (*Coady*):

> […] The test governing such requests is well-established and requires that the party seeking to adduce fresh evidence establish that the evidence: (1) could not have been adduced at trial with the exercise of due diligence; (2) is relevant in that it bears on a decisive or potentially decisive issue on appeal; (3) is credible in the sense that it is reasonably capable of belief; and (4) is such that, if believed, could reasonably have affected the result in the court below: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775, (1979) 30 N.R. 181; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 107. […] If the evidence fails to meet the foregoing criteria, the Court still possesses a residual discretion to admit the evidence on appeal. However, such discretion should be exercised sparingly and only in the "clearest of cases", where the interests of justice so require[…]

[6] The parties also both cite the following passage from *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1992] S.C.J. No. 110 at para. 6 (*Amchem*), concerning how the requirements should be applied on appeals of interlocutory matters, such as this appeal:

> […] In my view, in exercising the discretionary power in respect of an application relating to an appeal from an interlocutory order, these rules should not be applied strictly. Regard must be had for the fact that there is not the same opportunity for putting forward all the material as at trial[…]

II. Relevant Facts

[7] The decision under appeal in this matter was rendered on September 30, 2020 by Justice Sommerfeldt of the Tax Court of Canada. He dismissed the appellant's motion to amend its reply to the notice of appeal to add new allegations and arguments. The motion to amend was filed on August 24, 2020. The appeal before the Tax Court had been ongoing since 2017. One of the proposed amendments was to add an argument that a loan in issue in that appeal was a sham (the Sham Argument).

[8] The respondent, Pomeroy Acquireco Ltd., opposed the introduction of the Sham Argument on the basis that it would require evidence of subjective intentions and purpose at the time of the transactions in question, and the primary person with such knowledge, Robert Pomeroy, had died on June 11, 2020. The respondent filed its responding motion materials on September 3, 2020, and support for its opposition to the amendment included excerpts from the transcript of a 2018 examination for discovery of Mr. Pomeroy. The motion was heard on September 9, 2020, and decided on September 30, 2020. In his reasons dismissing the appellant's motion to amend its reply, Justice Sommerfeldt agreed that Mr. Pomeroy's testimony would be important to the Sham Argument, and that allowing the amendment to add that argument after Mr. Pomeroy's death would be unjust to the respondent.

[9] In the present appeal from Justice Sommerfeldt's decision, the appellant now moves for leave to introduce the entirety of the transcript of Mr. Pomeroy's 2018 discovery (the New Evidence). The appellant argues that the New Evidence is important to demonstrate that Mr. Pomeroy had little knowledge of the transactions in question, and therefore he could not have given evidence of importance to the appeal before the Tax Court. The appellant wishes to rely on the New Evidence to overcome Justice Sommerfeldt's finding that the respondent would suffer an injustice if the amendment were allowed.

III. Analysis

[10] Because the parties cite different authorities for the legal test on the present motion, they have not addressed each of the four requirements as they are enumerated in *Coady*. The respondent's opposition to the motion focuses on two points. First, the respondent argues that the

appellant fails to meet the requirement that the New Evidence could not have been adduced before the Tax Court with the exercise of due diligence. Second, the respondent argues that the New Evidence is not "practically conclusive of an issue" in this appeal. This second requirement does not match precisely any of the enumerated requirements in *Coady*. I will consider this argument in relation to the requirements that the proposed evidence (i) be relevant in that it bears on a decisive or potentially decisive issue on appeal, and (ii) if believed, could reasonably have affected the result in the court below.

[11] The credibility of the New Evidence is not in dispute.

A. *Whether the New Evidence Could, with the Exercise of Due Diligence, have been Adduced before the Tax Court*

[12] The appellant argues that this requirement is satisfied because, when it submitted its motion materials before the Tax Court, it could not have anticipated that the New Evidence would become necessary. The appellant argues that the need for this evidence did not become clear until September 3, 2020 when the respondent filed its motion materials. At that point, there was no rule that would permit the filing of the New Evidence before the Tax Court.

[13] The respondent notes that September 3, 2020, the date the relevance of the New Evidence became clear, was six days prior to the hearing of the motion before the Tax Court. The respondent argues that the appellant could have argued before Justice Sommerfeldt that Mr. Pomeroy's testimony would not be important to the Sham Argument and/or it could have cross-examined the respondent's affiant on the subject. The respondent argues also that, despite the

absence of a specific rule permitting the appellant to place the New Evidence before Justice Sommerfeldt, it could have sought leave to do so. The respondent argues that the appellant's failure to take any of the foregoing steps was a strategic decision that is beyond the scope of Rule 351 to cure.

[14] I agree with the respondent that the appellant does not meet this requirement. I am not convinced that, with the exercise of diligence, the New Evidence could not have been put before the Tax Court. I accept that the appellant learned of the relevance of the New Evidence by September 3, 2020. The absence of a specific rule entitling the appellant to adduce that evidence after that date certainly presented a hurdle. But I am not convinced that the appellant could not have sought, and possibly obtained, leave to put the evidence before the Tax Court.

[15] I will address this point further in the discussion below of the interests of justice.

B. *Whether the New Evidence is Practically Conclusive of an Issue*

[16] As indicated above, the appellant argues that the New Evidence shows that Mr. Pomeroy had little knowledge of the transactions in question, and thus Mr. Pomeroy's evidence would not be important to the Sham Argument. From this, the appellant argues it can show that the respondent would not be prejudiced if the amendment sought before the Tax Court was granted, and hence the Tax Court erred in its ruling.

[17] The respondent argues that the New Evidence cannot be practically conclusive on the issue on appeal – the Tax Court's finding that it would be prejudicial to the respondent to permit

the proposed amendment. The respondent notes that the New Evidence concerns an examination for discovery that took place before the Sham Argument was proposed, and hence nothing therein was directed to Mr. Pomeroy's subjective intentions and purpose at the time of the transactions in question, which the parties agree are key to the argument. The respondent argues that Mr. Pomeroy's ignorance of certain details of the transactional mechanics is distinct from the issues relevant in the Sham Argument.

[18] At this point, I must recall that the legal test I favour does not require that the New Evidence be practically conclusive of an issue. Rather, I must consider whether (i) the New Evidence is relevant in that it bears on a decisive or potentially decisive issue on appeal, and (ii) if believed, it could reasonably have affected the result in the court below. In my view, the wording of these two requirements represents a lower threshold than the wording cited by the parties. These requirements depend not on practical conclusiveness, but rather on the potential for decisiveness in the present appeal and for effect on the Tax Court's decision.

[19] I am satisfied that the New Evidence bears on an issue that is potentially decisive on the present appeal. In my view, the content of the transcript that constitutes the New Evidence could support the appellant's submission that Mr. Pomeroy would have little to contribute on the Sham Argument. Therefore, the New Evidence could be determinative on the issue of whether Justice Sommerfeldt erred in finding prejudice to the respondent. Similarly, I am satisfied that the New Evidence could reasonably have affected Justice Sommerfeldt's decision.

[20] It follows that I side with the appellant on this requirement.

C. *Interests of Justice*

[21] Of the requirements for adducing fresh evidence as enumerated in *Coady,* I find that all are met except the first. As indicated above, I am not convinced that the New Evidence could not have been adduced at the Trial Court with the exercise of due diligence. That said, I am conscious that the motion before the Tax Court was an interlocutory matter, and the respondent's opportunity to adduce this evidence was limited because of the absence of a clear procedural mechanism for doing so. Leave might have been sought at, or shortly before, the hearing before the Tax Court to adduce the New Evidence, but such a request would have been irregular and might well have been unsuccessful.

[22] As indicated in *Coady*, the Court possesses a residual discretion to admit the evidence on appeal, though "such discretion should be exercised sparingly and only in the 'clearest of cases', where the interests of justice so require."

[23] Though the present situation may not amount to the clearest of cases, I am mindful of the guidance in *Amchem*: in exercising this discretion in an appeal of an interlocutory decision, the requirements should not be applied strictly. Regard must be had for the limited opportunity for putting forward all the material as at trial.

[24] On balance, and having regard for the limited opportunity the respondent had for putting forward the New Evidence before the Tax Court, I find that the interests of justice require that the Court exercise its discretion to admit the New Evidence.

[25] I will grant the appellant's motion.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-250-20
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. POMEROY ACQUIRECO LTD.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	DECEMBER 18, 2020

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