Federal Court of Appeal Cour d'appel fédérale

Date: 20240325

Docket: A-146-22

Citation: 2024 FCA 62

Present: LOCKE J.A.

BETWEEN:

SHELLEY ANNE HUDSON

Appellant

and

HIS MAJESTY THE KING

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 25, 2024.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

I. Background

[1] In the present appeal from a judgment of the Tax Court of Canada, the appellant moves for an Order that:

1. The Court grant the appellant leave to adduce fresh evidence pursuant to Rule 351 of the *Federal Courts Rules*, S.O.R./98-106, as follows:

a. The appellant's personal tax returns and the respondent's assessments thereof for the relevant taxation years 2007, 2008, 2009, 2010 and 2011;

b. The derivative corporate taxpayer's tax returns and the respondent's assessments thereof for the relevant taxation years 2007 and 2008;

c. The letter of Dr. L. Raynor dated April 29, 2021;

d. The medical certificate from Dr. L. Raynor dated April 21, 2011;

e. The B.C. Minister of Finance document in the possession of the respondent's counsel which confirms that Factory Marine Distribution was, in fact, owned by Western Import Manufacturing Distribution Group Ltd.;

f. Canada Revenue Agency circular T4001 (E) entitled Employers Guide - Payroll Deductions and Remittances;

g. Canada Revenue Agency *GST/HST Policy Statement P-237*;

2. The respondent amend and supplement the appeal book by including:

a. The transcripts of the Tax Court trial held on February 19, 2019, October 25, 2019 and March 22, 23 and 24, 2022;

b. The omitted Tax Court Exhibits R-2 and R-3;

c. All documents and exhibits provided to the court during Tax Court trial proceedings;

d. Any or all of the documents that the Court deems admissible;

3. The parties to this appeal be accorded a reasonable opportunity to amend their respective memoranda of fact and law accordingly;

4. The appellant's previously disqualified court support person, Mr. Tinkham, be reinstated.

[2] The respondents consents to the motion to the following extent:

1. Including the Tax Court hearing transcripts and Exhibits R-2 and R-3 in a supplemental appeal book;

2. Preparing the supplemental appeal book (while leaving the appellant responsible for ordering and paying for the transcripts); and

3. Permitting the parties to amend their memoranda of fact and law.

[3] The respondent opposes the introduction of fresh evidence, as well as the reinstatement of Mr. Tinkham. The respondent adds a request for an Order that regularizes the fact that a single notice of appeal was filed in respect of two different matters that were before the Tax Court.

[4] I have also received and considered the appellant’s reply to the respondent’s submissions on the motion, as well as a letter requesting an extension of time to file an amended reply and permission to file an additional affidavit on this motion. I understand that letter request to be in response to an argument by the respondent that the appellant’s affidavit #2 in support of her motion contains argument and irrelevant facts, and should be disregarded. Having considered this argument, I have concluded that the appellant’s affidavit #2 should not be disregarded. To the extent that that affidavit contains argument, I will treat it is as such. Accordingly, I understand that there is no need to act on the appellant’s letter request, and the motion is now ready to be decided.

[5] Before examining the issues in dispute in this motion, a little background may be helpful. The Tax Court decision under appeal was rendered on May 30, 2022, and the notice of appeal was filed in this Court on June 30, 2022. Because of the lack of progress in the appeal by the following March, the Court sought input from the parties on advancing it. By Order dated May 12, 2023, having received and considered the parties’ input, the Court put in place a timetable of steps in the appeal, and ordered the respondent to prepare the appeal book. The

respondent prepared and filed the appeal book, but the appellant felt that some documents were missing. By Direction dated February 1, 2024, again noting the lack of progress in the appeal, the Court directed that, if the appellant felt any documents were missing from the appeal book, she should make a formal motion in that regard. This is the motion currently before the Court.

II. Fresh Evidence

[6] The parties agree that a party seeking to adduce fresh evidence must 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; and that, if the evidence fails to meet the foregoing criteria, the Court still 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 (see *Coady v. Canada* (*Royal Mounted Police*), 2019 FCA 102 at para. 3).

[7] The respondent argues that the proposed fresh evidence should be refused for the following reasons:

1. In respect of the tax returns, the appellant and Mr. Tinkham were made aware of the importance of these documents during the evidence phase of the trial before the Tax Court, but made no attempt to introduce them into evidence until the stage of closing arguments;

2. In respect of Dr. Raynor's letters (which appear to be dated April 21, 2011 and February 8, 2019), the Tax Court excluded them as inadmissible hearsay, and the appellant did not call Dr. Raynor as a witness; the respondent also argues that the

February 8, 2019 letter lacks credibility in that it went beyond medical opinion into advocacy;

3. In respect of the B.C. Minister of Finance document, it could have been adduced at trial with the exercise of due diligence;

4. In respect of the CRA publications, these are authorities, not evidence.

[8] The respondent argues that the appellant has not met the requirements for the introduction of any of the proposed fresh evidence, and this is not one of the clearest of cases where the Court should exercise its residual discretion in the interests of justice.

[9] With regard to the tax returns, the appellant cites difficulties finding them. She adds that she attempted to adduce them as evidence prior to the commencement of closing arguments. With regard to Dr. Raynor's letters, the appellant argues that she was unable to call Dr. Raynor as a witness because she (Dr. Raynor) went on an extended vacation shortly after providing her February 8, 2019 letter, and then retired upon her return. The appellant also alleges that the Tax Court judge initially indicated that Dr. Raynor's letters could be introduced through the appellant's testimony. With regard to the B.C. Minister of Finance document, the appellant disagrees that it could have been adduced at trial with the exercise of due diligence. With regard to the CRA publications, the appellant appears to accept that she can refer to them as authorities rather than evidence.

[10] I agree with the respondent that fresh evidence pursuant to Rule 351 should not be allowed. The appellant was aware of the importance of the tax returns and Dr. Raynor's letters and has not convinced me that she exercised due diligence in introducing them into evidence. She points to a trial exhibit as evidence of Dr. Raynor's vacation, but she does not point to any

exchange with the Tax Court in which she asserted the necessity of relying on Dr. Raynor's letters as hearsay evidence because of her unavailability. The appellant also does not adequately document her allegation that the Tax Court initially indicated that she could introduce Dr. Raynor's letters through her testimony. Finally, I am also not convinced by the appellant's bald allegation that she could not have introduced the B.C. Minister of Finance document as evidence at trial with the exercise of due diligence.

[11] Nevertheless, the appellant alleges in her notice of appeal that the Tax Court erred in refusing to accept at least the tax documents and Dr. Raynor's letters as evidence. In order for this Court to be in a position to determine whether the Tax Court erred in this respect, it will be necessary to have reference to these documents. Therefore, though they will not be accepted as fresh evidence, they should be included in the appeal book.

III. Supplemental Appeal Book

[12] In view of the respondent's consent mentioned above, the only issue remaining in dispute in relation to the supplemental appeal book is the responsibility for ordering and paying for the transcripts. The respondent relies on the general rule that the appellant is responsible for arranging for the production of transcripts if necessary for the appeal. The respondent also notes that the appellant provides no support for her statement that she cannot afford to pay for the transcripts.

[13] I agree with the respondent. The appellant's evidence is insufficient to convince me that she cannot afford to pay for the transcripts. In any case, I am not convinced that the respondent should be required to bear the cost of the transcripts to support the appellant's appeal.

[14] However, it would appear that the appellant does not need transcripts. The website of the Tax Court indicates that audio recordings of hearings before that court are made available on request of a party for the purposes of appeal. Obtaining such recordings would avoid the high cost of transcripts.

[15] I will order that the transcripts or audio recordings be included in the appeal book, but the appellant will remain responsible for obtaining them.

IV. Amended Memoranda of Fact and Law

[16] As indicated above, the parties agree that the parties should be allowed to submit amended memoranda of fact and law to reflect the content of the supplemental appeal book. That is appropriate. I will make a timetable for the exchange of amended memoranda of fact and law. That table will recognize the appellant's expressed concern about the limited time she was given for bringing the present motion.

[17] At paragraph 46 of her written representations in support of the present motion, the appellant suggests that she might want an increase to the usual 30-page limit for memoranda of fact and law. However, she makes no argument in this regard, and I see no need to increase the page limit.

V. Mr. Tinkham

[18] The respondent opposes the reinstatement of Mr. Tinkham to represent the appellant in Court because this Court already refused this request in its Order dated May 12, 2023. In reply, the appellant simply disagrees.

[19] I agree with the respondent that Mr. Tinkham should not be reinstated. The Court addressed this question in its Order dated May 12, 2023, and decided that Mr. Tinkham should not be allowed to make representations on behalf of the appellant at the hearing of this appeal. I see no reason to revisit that decision.

VI. Consolidation

[20] The respondent notes that a single notice of appeal was filed in respect of a Tax Court decision that addressed two proceedings in that court. The respondent argues therefore that the proceeding before this Court concerns two appeals, which should be consolidated as was done in *Canada v. Microbjo Properties Inc.*, 2023 FCA 157 at para. 2 (*Microbjo*).

[21] In my view, the circumstances in this appeal are distinguishable from those in *Microbjo*. There, a single set of reasons was prepared in respect of five distinct judgments for the five proceedings before that court. Five separate notices of appeal should have been filed to address the five judgments. Here, the Tax Court issued a single judgment in respect of the two Tax Court proceedings, which single judgment is the object of the present appeal. A single notice of appeal was appropriate in this case.

VII. Conclusion

[22] For the foregoing reasons, the appellant's motion will be granted in part. Neither party seeks an award of costs on this motion, and I will not award any

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-146-22
STYLE OF CAUSE:	SHELLEY ANNE HUDSON v. HIS MAJESTY THE KING

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES:

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	MARCH 25, 2024

APPEARANCES:

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Spencer Landsiedel	FOR THE RESPONDENT HIS MAJESTY THE KING

SOLICITORS OF RECORD:

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