

Docket: 2013-1383(IT)G

BETWEEN:

DOUGLAS MCCARTHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**ORDER**

This Court orders as follows:

1. The hearing of this appeal scheduled for February 26, 2016 is adjourned *sine die*.
2. Counsel for the Appellant shall communicate in writing with the hearings coordinator within 60 days of the date of this order to provide a status report on the appeals to the FCA of this Court's orders in this appeal.
3. Costs are reserved at this time to be dealt with in accordance with the reasons for order.

Signed at Ottawa, Canada, this 25th day of February 2016.

“Patrick Boyle”

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Boyle J.

Citation: 2016 TCC 49  
Date: 20160225  
Docket: 2013-1383(IT)G

BETWEEN:

DOUGLAS MCCARTHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

#### **Boyle J.**

[1] Counsel for the Appellant requested a stay of Mr. McCarthy's appeal on the Wednesday before the Friday upon which that appeal is set down for hearing. Mr. Sumner did so in response to communication to the Court by the Respondent that the Appellant was again in breach of an order of this Court to complete documentary and oral discoveries, being my order of February 15, 2016. Counsel for the Appellant acknowledges that they had not filed their list of documents as ordered, but maintains that this was a mistake which has been remedied. The Respondent disagrees. Counsel for the Appellant says the Appellant did attend the examination for discovery as requested by the Respondent, identified himself and objected to most of the Respondent's questions on the grounds of torture. The Respondent adjourned the examination and intends to bring a further motion. I will not be resolving the parties' concerns with discoveries at this stage, only the issue of the Appellant's request of yesterday for a stay of tomorrow's hearing.

[2] This is an appeal being case managed by me as part of a Fiscal Arbitrators group. Up until his retirement last December, former Chief Justice Rip had been case management judge for Fiscal Arbitrators appeals.

[3] The Appellant in this case has, in his further amended notice of appeal, appealed from the penalty assessed in respect of Fiscal Arbitrators claimed losses. The Respondent bears the burden of proof with respect to that penalty. In addition,

the Appellant is appealing the denial of his claim for a so-called northern residents deduction. It is the Appellant who bears the burden of proof with respect to that claim.

[4] The appeal is scheduled to be heard this Friday by Justice Hershfield in Toronto. The appeal had previously been set down for hearing on November 27, 2015. That hearing had to be adjourned at the last minute because the Appellant had failed, without notice to the Court or the Respondent, to attend to the pretrial discovery ordered by Justice Rip notwithstanding the appointment taken out by the Respondent after consulting with Mr. Sumner. The Appellant had decided not to attend because he had appealed that interlocutory order of Justice Rip, along with another order of Justice Rip of the same day, to the Federal Court of Appeal. Those appeals have not yet been heard by the Federal Court of Appeal.

[5] The Court set down this Friday's new hearing date last November. The prior order of Justice Rip scheduling discovery fixed dates by reference to the trial date. Therefore, new dates for documentary and oral discovery were automatically triggered by Justice Rip's prior order. The Appellant failed to meet those dates.

[6] Counsel for the Appellant wrote a two-sentence letter to the Court in December 2015 requesting Mr. McCarthy's appeal be held in abeyance pending the appeals to the Federal Court of Appeal and informing the Court that discussions had opened up with the Respondent to resolve the matter. This led to a case management conference at the Respondent's request being heard by me by telephone on January 19, 2016. In that case management call, the Respondent sought new dates for discovery given the Appellant's default. The parties were both clearly interested in having the right to appeal any order I made on those two issues during that case management call. I therefore sought the parties' agreement to treat their requests as formal motions. That was not forthcoming. Mr. Sumner was initially unsure about making a motion about his request that the hearing be stayed pending decisions from the Federal Court of Appeal. He expressed concern that a formal motion gave rise to the risk of costs if unsuccessful. He asked for, and was given, time to resume the case management conference later during the day after he had time to consider whether he wished to make such a motion. Mr. Sumner ultimately decided that the Appellant did not want to bring that motion, and that he would not consent to hearing a Crown motion for new discovery dates at that time.

[7] We ended the January case management call without dealing with these matters in order that each side could file whatever motions they wished in accordance with the *Tax Court of Canada Rules (General Procedure)*.

[8] The Respondent filed a motion to order discoveries. No motion was filed by the Appellant. The Respondent's motion was heard by me in Toronto, and decided with oral reasons, on February 11, 2016. My order was signed on February 15, 2016, along with a copy of my oral reasons allowing the Respondent's motion and rejecting Mr. Sumner's position that this Court's Judicial Administrator was an extrajudicial tyrant and that Court-ordered discovery constituted criminal torture and coercion given the anguish it is causing Mr. McCarthy as he is aware the Crown has the burden of proof with respect to his Fiscal Arbitrators penalty.

[9] Mr. Sumner was given the opportunity at the hearing of the Respondent's motion to bring a motion to stay or to have the Appellant's hearing of this Friday adjourned *sine die* to await decisions from the Federal Court of Appeal on his appeals of Justice Rip's orders. He indicated he did not wish to do so. It was again evident that one of his considerations was his desire to minimize the risk of a cost award against the Appellant if his request was turned down. That was his decision to make on behalf of the Appellant.

[10] On February 23, 2016, three days before the rescheduled trial date, and the last day for completion of discovery set out in my order of February 15, 2016, the Respondent wrote to the Court informing the Court that the Appellant was in breach of the order and requesting a further case management call. It was not entirely clear what relief the Respondent hoped for, however she did inform the Court that its order of February 15, 2016 had been appealed by the Appellant to the Federal Court of Appeal.

[11] On February 24, 2016 the Appellant's written position on the Respondent's request for a case management call was received. Mr. Sumner confirmed that the Appellant did not complete discovery as described above. He indicated that the Appellant appealed that order to the Federal Court of Appeal. He indicated he had asked the Federal Court of Appeal for a stay of my order in the interim. He also asked in his response for a stay from this Court. In response to a request for clarification from the Court, Mr. Sumner confirmed that he was asking the Court to have Mr. McCarthy's appeal stayed until the Federal Court of Appeal has decided the appeals before it of the three orders of this Court and that he did not think an adjournment would suffice.

[12] In the circumstances, the stay requested by counsel for the Appellant will not be granted. However, the Court will be adjourning this Friday's hearing of the appeal *sine die*. The Appellant will be ordered to communicate with the Court within 60 days in respect of the status of each of his appeals of this Court's orders involving Mr. McCarthy to the Federal Court of Appeal. Similar 90-day orders can be expected to follow.

[13] This is no longer a case in which I believe costs will be best left to the trial judge. The Court is particularly concerned with the following:

1. The Appellant has twice not complied with the Court's orders for the completion of discoveries without coming back to the Court until after the Respondent returned to the Court.
2. While the Appellant's decision whether to, and how to, complete discoveries is his own, Mr. Sumner is counsel of record and an officer of the Court and did not inform the Court promptly of Mr. McCarthy's refusal to appear at the previously scheduled examination, either immediately following his failure, much less when it was probably earlier clear to Mr. Sumner that his client would not be attending.
3. The Appellant, having decided that he would not bring a motion for a stay, instead again asked for a stay two days before the hearing date. This need not have been a last minute request for a stay as there were two clear opportunities to make this request earlier, one of which would even have allowed the Court to schedule another appeal in its place in an efficient use of public resources.
4. The last minute further stay request tactic by the Appellant, after not bringing a motion, has had the result of effectively forcing the Court to deal with the request by formal order as if it was a motion in order to not deprive the Respondent of her full right to appeal which she had made known in January would be important.

[14] This Court has the inherent jurisdiction to regulate its processes from abuse and costs awards may be used to do that. See, for example, *Fournier v. Canada*, 2005 FCA 131.

[15] I am asking the parties for their written submissions on costs within 30 days.

[16] Further, this Court has the power to order that costs be payable personally by counsel in appropriate circumstances under Rule 152 of the *Tax Court of Canada Rules (General Procedure)* “where a counsel for a party has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay, misconduct or other default”. I am asking Mr. Sumner to make written submissions within 45 days on why this Court should not consider an order under Rule 152 in respect of some portion or all of any costs awarded against the Appellant in favour of the Respondent.

Signed at Ottawa, Canada, this 25th day of February 2016.

“Patrick Boyle”

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Boyle J.

CITATION: 2016 TCC 49

COURT FILE NO.: 2013-1383(IT)G

STYLE OF CAUSE: DOUGLAS MCCARTHY v. THE QUEEN

REASONS FOR ORDER BY: The Honourable Justice Patrick Boyle

DATE OF ORDER: February 25, 2016

REPRESENTATIVES:

Counsel for the Appellant: Joel Allan Sumner

Counsel for the Respondent: H. Annette Evans  
Rishma Bhimji  
Victoria Iozzo

COUNSEL OF RECORD:

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