Docket: 2008-2213(IT)G

BETWEEN:

ENVISION CREDIT UNION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 23, 2010 at Vancouver, British Columbia

With written submissions dated April 30, 2010, May 7, 2010
and May 14, 2010

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Joel Nitikman Michelle Moriartey
Counsel for the Respondent:	Lynn Burch John Gibb-Carsley

ORDER

The Respondent's motion to read-in excerpts from the discovery examination of Gordon Huston is denied. Costs shall be in the cause.

Signed at Toronto, Ontario, this 29th day of June, 2010.

"Wyman W. Webb"

Webb, J.

Citation: 2010TCC353
Date: 20100629
Docket: 2008-2213(IT)G

BETWEEN:

ENVISION CREDIT UNION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Webb, J.

[1] At the conclusion of the evidence portion of the hearing, counsel for the Respondent asked to read-in excerpts from the discovery evidence given by Gordon Huston, one of the Appellant's witnesses. Mr. Huston had testified during the hearing. Counsel for the Appellant objected to this request by counsel for the Respondent. Since neither counsel was specific in relation to their arguments for or against the admission of such discovery transcripts and since this arose late in the day on a Friday afternoon, I requested that the parties submit written representations in support of their positions. These submissions were subsequently received.

[2] A copy of the extracts from the discovery transcript that the Respondent is proposing to read-in was attached to the written submissions provided by counsel for the Respondent but there is no indication of the reason why the Respondent wants to introduce these excerpts. The facts as set out in the Respondent's submissions are as follows:

> 5. Huston was examined by the respondent on September 29, 2009.
>
> 6. Pursuant to *Practice Note 8* of the Rules, on April 16, 2010, the respondent provided the appellant with notice of the specific portions of Huston's examination for discovery that the respondent intended to read-in to evidence at the trial.

> 7. The appellant did not indicate that it objected to the respondent's read-ins prior to doing so at the close of the respondent's evidence at the hearing. Appellant's counsel first made known its objection at the hearing of this matter on April 23, 2010, when the respondent attempted to hand up the read-ins in accordance with Rule 100(1). As a result, the Court asked the parties to provide their positions in writing.

[3] The remainder of the submissions of the Respondent are general statements in relation to the application of Rule 100(1) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") with no indication of the purpose for which these particular extracts would be introduced. When the issue first arose at the hearing counsel for the Respondent did not indicate the reason why the proposed excerpts were to be read-in. She only indicated that the excerpts were not being introduced to impeach the witness.

[4] In the Appellant's written representations (which were only 10 paragraphs – 2 pages), it is stated in paragraph 3 that:

> 3. The essence of the Appellant's submission is this: Mr. Huston was called as a witness and was both examined and, more importantly, cross-examined, extensively. By the Appellant's clock he was cross-examined for approximately for approximately 4 to 4 ½ hours over two days. In those particular circumstances, no Discovery should be handed in. There are really only two possibilities: either his answers on Discovery merely duplicate those given on cross, in which case the Discovery is unnecessary and repetitive,* or *[sic]* the his answers on Discovery contradict those given on cross, in which case they should have been put to Mr. Huston under the rule in *Browne* v. *Dunn* (1893), 6 R. 67 (HL), at Tab 4. In either case the Discovery should not be handed in.
>
> (* denotes a footnote reference that was in the original text but which has not been included)

[5] The essence of the Respondent's position is simply that the provisions of Rule 100(1) of the *Rules* allow the Respondent to read-in excerpts from the discovery examination of Mr. Huston even though he testified during the hearing.

[6] Rule 100(1) of the *Rules* provides as follows:

> 100. (1) At the hearing, a party may read into evidence as part of that party's own case, after that party has adduced all of that party's other evidence in chief, any part of the evidence given on the examination for discovery of
>
> (*a*) the adverse party, or

> (*b*) a person examined for discovery on behalf of or in place of, or in addition to the adverse party, unless the judge directs otherwise,
>
> if the evidence is otherwise admissible, whether the party or person has already given evidence or not.

[7] Neither the Appellant nor the Respondent focused on the words "***if the evidence is otherwise admissible***" which, it seems to me, is an important qualification to the introduction of the discovery evidence. The Appellant submitted that there were two possibilities – either the discovery evidence was consistent with the evidence at the hearing or it was contradictory. It seems to me that this does not take into account the possibility that the discovery evidence deals with matters that were not addressed during the testimony of the witness at the hearing.

[8] I would prefer to characterize the possibilities in relation to the introduction of excerpts from the discovery examination of a witness who has testified during the hearing, as follows:

Either:

(a) the discovery excerpts deal with matters that were dealt with by the witness during his or her testimony at the hearing; or

(b) the discovery excerpts deal with matters that were not dealt with by the witness during his or her testimony at the hearing.

[9] If the discovery excerpts deal with matters that were dealt with by the witness during his or her testimony at the hearing, then it seems to me, as noted by the Appellant, that the answers given at discovery would either confirm the evidence of the witness given at the hearing or would contradict or cast doubt on the evidence of the witness given at the hearing.

[10] If the discovery excerpts reflect the same questions that are asked during the hearing and reflect the same answers, then there is no probative value in admitting the excerpts and the excerpts should be excluded on the same basis that prior consistent statements would be excluded. In most cases it would be the party whose witness testified during the hearing who would be trying to introduce a prior consistent statement of that witness, not the opposing party. If the proposed read-in questions and answers from the discovery examination of Mr. Huston reflect prior consistent statements then it would be the Respondent who would be attempting to

show that the Appellant's witness gave a prior consistent statement. An unusual procedure but it seems to me that the rule against allowing prior consistent statements should still apply.

[11] In *The Law of Evidence in Canada* (Third Edition) by Justices Bryant, Lederman and Fuerst of the Superior Court of Justice for Ontario, (2009, LexisNexis), the rule against the admission of prior consistent statements is described as follows:

> 7.1 There is a general exclusionary rule against the admission of self-serving evidence to support the credibility of a witness unless his or her credibility has first been made an issue.* The rule is generally applied to prior consistent statements of the witness. Although contradictory statements may be used against a witness,* "you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony.*
>
> 7.2 The rule is not limited to statements, but is applicable to any out-of-court evidence which is entirely self-serving and would shed no light on the material issues in the case. Polygraph evidence tendered by the accused would be precluded on this basis.*
>
> 7.3 Two different rationales have been given for the exclusion of such evidence. The one most commonly relied on is that, due to the risk of fabrication, no person should be allowed to create evidence for him or herself.* That is a hearsay danger inherent in such out-of-court statements. ***The other view emphasizes the valuelessness of such evidence*** since a witness' story is not made more probable or trustworthy by any number of repetitions of it.* ***Moreover, it would take needless trial time in order to deal with a matter that is not really in issue, for it is assumed that the witness is truthful until there is some particular reason for assailing his or her veracity.****
>
> **II. EXCEPTIONS**
>
> **A. General Explanation of Exceptions**
>
> 7.4 A number of exceptions to the rule have developed in common law permitting the introduction of a witness' prior consistent statement when credibility has been impeached. The purpose of such evidence is generally limited to bolstering the witness' credibility by showing consistency with his or her testimony, and is not evidence of the truth of the earlier assertion.*
>
> (* denotes footnote references that are in the original text but which have not been included)
>
> (emphasis added)

[12] Assuming that the Respondent would not be intending to introduce prior consistent statements of Mr. Huston to bolster his credibility, it seems to me that if the discovery read-ins proposed by the Respondent contain prior consistent statements of Mr. Huston, that such statements would not be admissible on the basis that there is no value in such statements. As stated in *The Law of Evidence in Canada, supra,* "***it would take needless trial time in order to deal with a matter that is not really in issue, for it is assumed that the witness is truthful until there is some particular reason for assailing his or her veracity.***" It seems to me that this rationale still applies even though the discovery read-ins were submitted as copies of the typed transcript from the discovery examination and not actually read. It would take needless time to read questions and answers from a previous discovery that simply confirm the evidence of the witness given during the hearing.

[13] If the discovery excerpts are being introduced to impeach the witness, then the question and answer must be brought to the attention of the witness. Rule 100(2) of the *Rules* provides that:

> (2) Subject to the provisions of the *Canada Evidence Act*, the evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

[14] Subsection 10(1) of the *Canada Evidence Act* provides that:

> 10. (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, ***if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness***, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.
>
> (emphasis added)

[15] In *Cholakis* v. *Cholakis,* [2006] 2 W.W.R. 229, Justice Beard of the Manitoba Queen's Bench dealt with the provisions of Rule 31.11 of the Queen's Bench Rules, which is the rule that permits a party to read-in any part of a discovery examination. Justice Beard stated that:

> 7 When an examination for discovery is used to impeach the credibility of the witness who was examined and who subsequently testifies during the trial, rule 31.11(2) states that the examination for discovery is used in the same manner as any other previous inconsistent statement. The use of a previous inconsistent statement to impeach the credibility of a witness is codified in s. 20 of the MEA, which requires that the witness be referred to those parts of the prior statement that are to be used for the purpose of contradicting him.
>
> …
>
> 11 To the extent that questions and answers from Paul's examination are being read in to impeach his credibility and were used for that purpose during cross-examination, they have already been read into the record and form part of the evidence on the issue of his credibility. Reading them in again would be unnecessarily repetitive and add nothing to the proceeding. To the extent that the questions and answers were not brought to Paul's attention on cross-examination, they cannot now be read in as they do not comply with the requirements of s. 20 of the MEA for use as a contradictory statement.

[16] In *International Corona Resources Ltd.* v. *LAC Minerals Ltd.,* [1986] O.J. No. 68, Justice Holland stated that:

> By reason of the provisions of the Evidence Act, set out above, it appears that counsel for Lac can only read in those parts of the examination for discovery of Mr. Bell and Miss Dragovan which are admissions and those parts that go to credibility so long as the provisions of the Evidence Act were complied with when the witness was in the box in connection with such parts.

[17] In *The Law of Evidence in Canada, supra,* it is stated at page 1150 that:

> 16.153 A transcript of an examination for discovery is a special species of a previous statement. In civil cases, Rules of Court generally permit questions and answers to be read by a party adverse in interest as an admission.* When used as previous inconsistent statements to impeach the credibility of a party, it would appear that the statutory requirements must be complied with. Accordingly, if a party testifies, the opposite party is obliged to put the relevant passages from the examination for discovery to the party -- witness.*
>
> (* denotes footnote references that are in the original text but which have not been included)

[18] Therefore it seems clear that since Mr. Huston's attention was not drawn to the excerpts prior to the proposal of the Respondent to read-in such excerpts, these excerpts cannot be read-in for the purpose of impeaching the witness.

[19] The other possibility is that the excerpts from the examination for discovery deal with matters that were not addressed during the testimony of the witness. It seems to me that this would be the most logical use of the rule permitting the read-in of discovery examinations. If a party has obtained admissions from a witness during discovery examination it could shorten the hearing by reading in the questions and answers instead of asking the same questions again at the hearing.

[20] In this case the Respondent is seeking to read-in approximately 108 questions (with the answers) from the discovery. The witness, Gordon Huston, was examined and cross-examined over two days. Counsel for the Respondent, during the cross-examination of Mr. Huston asked approximately 320 questions (which when transcribed cover approximately 106 pages). There were several objections to various questions so the actual number of questions for which there was an answer would be less than 320. Since the Respondent is seeking to submit approximately 108 additional questions, this would bring the total number of questions to over 400 questions. These are just the questions that were posed by counsel for the Respondent and do not include the questions that were asked of Mr. Huston by the Appellant's counsel.

[21] It seems to me that there are three issues in this appeal:

1. Whether the reassessment of the Appellant's 2001 taxation year, which was issued after the end of the normal reassessment period for this year, is valid? This seems to me to turn on the question of whether the Appellant made any misrepresentation that is attributable to neglect, carelessness or wilful default in filing the return or in supplying any information under this *Act* (there being no suggestion of fraud in this case);

2. Whether the merger of First Heritage Savings Credit Union and Delta Credit Union was an amalgamation to which section 87 of the *Income Tax Act* applies, and if not, what are the implications under the *Income Tax Act*?

3. Does the general anti-avoidance rule ("GAAR") in section 245 of the *Income Tax Act* apply?

[22] One would have thought that in the more than 300 questions that were asked (which would mean, on average, 100 questions per issue) that any and all relevant questions that the Respondent would have wanted to ask, would have been asked.

[23] The first series of questions and answers from the discovery examination that the Respondent seeks to read-in are the following:

Q. All right. And don't think anything- - or, there's certainly no dispute about this. But, in a nutshell, my understanding is that FICOM would be the body responsible for approving an amalgamation of the Delta and First Heritage Credit Unions, and that there was a fair bit of correspondence going back and forth with respect to how it was going to take place, and various terms in the agreements. And that this was the type of correspondence, that it would have been useful or helpful for both Delta and First Heritage to cooperate on; is that a fair summary?

A. It is, yes.

Q. Okay. So on page 2 of that document under paragraph 3. I'm going to take you to the second paragraph of that numbered paragraph. It says:

> "Our tax lawyers, Fraser Milner, and our tax accountants, Grant Thornton and KPMG, have extensively researched" - -

I guess that should be just "tax treatment", but whatever.

> "Fraser Milner provided the exact wording of section 8 of the amalgamation agreement in order to achieve this tax outcome."

Do you see that?

A I do.

Q And does that refresh your memory with respect to my question about section 8 in the amalgamation agreement?

A. No, actually, it doesn't.

I understand what these words say. And I don't recall that Fraser Milner drafted the exact wording of section 8, but I accept the wording here.

Q Okay. Well, did you draft this letter or did Peter?

A Well, it was likely drafted with the help of Peter and I and others in the organization who would have put this together for our signature.

Q Okay. So is it fair to say that others in the organization, such as Tom Webster, for example, may have had more dealings with FICOM directly, and may have participated in drafting this letter, for example?

A The second part of your question, yes. The first part, not *[sic]* necessary.

Q But, in any event, you don't quarrel with the phrase or the paragraph that I just read to you?

A No.

Q. And, as far as you know, that must be true; is that right?

A. Yes, I accepted this to be true.

[24] It seems to me that the point that the Respondent was trying to make with these questions was that FICOM's approval was required in order for the credit unions to merge and that Fraser Milner drafted section 8 of the amalgamation agreement.

[25] During the cross-examination of Mr. Huston, the following exchange took place:

Q A credit union can't amalgamate without FICOM's blessing, is that true?

A Yes, that's true.

…

Q If I could have you please turn to Volume 1 of Exhibit 1, thank you, and specifically tab 65. This is again the amalgamation agreement that we've had you look at a little bit yesterday. Now, I'll just turn you, please, to Part 8, the transfer of assets. Now, it's true that Fraser Milner drafted the exact wording of Part 8, correct?

A I don't know.

Q Okay, if I could turn you to, perhaps keep your hand there, turn to Tab 31, and this is a letter to FICOM, I believe we also looked at this briefly yesterday, June 5th, 2000, in response to some of FICOM's questions. If I could turn you to page 2, paragraph 3, and you'll see in the second paragraph of number 3:

> "Our tax lawyers, Fraser Milner, and our tax accountants, Grant Thornton and KPMG, have extensively researched its tax treatment. Fraser Milner provided the exact wording of Section 8 of the amalgamation agreement in order to achieve this tax outcome."

And this is a letter from you, correct?

A Right.

Q So you'd agree with me that Fraser Milner drafted the exact wording?

A Yes, I would.

Q Did you have anything to do with the drafting of Part 8?

A Of the drafting? No.

Q Were you asked for your input?

A I don't recall.

[26] It seems to me that the additional questions that the respondent is seeking to read-in from the discovery do not add anything to the answers provided during the hearing and simply duplicate the questions that were asked and answered during the hearing. The statements made by Mr. Huston at discovery are consistent with his evidence at the hearing and should be excluded as prior consistent statements. It is unusual that the Respondent would be seeking to introduce prior consistent statements of the Appellant's witness.

[27] The second group of questions related to the identity of the accounting/auditing firms for each of the two credit unions that merged. The following are the questions that the Respondent seeks to read-in with the answers given at discovery:

Q Okay. Perhaps you could tell me or- - Grant Thornton is a chartered accounting firm in the city of Vancouver; right?

A Yes.

Q And they do audited financial statements and other similar engagements?

A. Um-hmm. They do.

Q And they also are tax planners; is that correct?

A Tax planners? I guess - - yes, I guess that's a fair description.

Q Okay. Prior to the amalgamation, discussions were commenced. Let's just say in mid-1999, did First Heritage use Grant Gordon to prepare their financial statements or to file their tax returns?

A No.

Q Did Delta?

A Yes.

Q Who did First Heritage use?

A KPMG.

Q And had that *[sic]* be a long-standing relationship?

A Yes.

Q For as long as you can recall?

A. For as long as I can recall, yes.

[28] During the cross-examination of Mr. Huston, the following exchange took place:

Q Grant Thornton was the tax preparer of Delta, correct?

A Correct.

Q And KPMG was First Heritage's tax preparer and advisor?

A Auditing firm, in both cases.

Q Pardon me, I missed the --

A Auditing firm.

Q Auditing firm.

A Yeah.

Q And when you say "in both cases", what do you mean, in both cases?

A Well, Grant Thornton in the case of Delta, KPMG in the case of First Heritage.

Q Their relationship is that of auditing firm.

A Yes.

Q And First Heritage and KPMG had a long-standing relationship? And the time I'm speaking of is around the 2000 time, up to that time there was a long-standing relationship.

A Yes.

Q How many years?

A Certainly before my time, so at least from '96 through 2000. I know it was well before my time.

[29] This time counsel for the Respondent had correctly matched the accounting firms with the credit unions. There is nothing of substance that is added by the questions that the Respondent is seeking to read-in from the discovery examination. Again the statements made by Mr. Huston at the discovery are simply prior consistent statements and would be excluded.

[30] The third group of questions relate to retaining Fraser Milner. These questions, that the Respondent seeks to read-in, are as follows:

Q Did the predecessors retain Fraser Milner to produce this tax opinion?

A Yes.

Q And do you recall when that retainer was given?

A Not precisely.

Q Approximately?

A My estimate would be sometime in early 2000.

[31] It is impossible to discern what opinion is being referenced since the question simply refers to “this opinion”. The opinion itself would presumably be protected by solicitor-client privilege. It is clear from the evidence (even the excerpt quoted above) that Fraser Milner were directly involved in the planning and implementation of the merger. On what basis would questions and answers related to an unidentified opinion from this firm be admissible? It does not seem to me that these questions and answers would be admissible since they do not identify the tax opinion.

[32] During the cross-examination of Mr. Huston, the following exchange took place:

Q Tab 25, which is in Volume 1, which is was our first book. Would you please turn to that. Now this is a memo to Doug Graham from Tom Webster and it says "for discussion". And it says "to Delta". On the first

page it's a memorandum, "Delta Credit Union's board of directors and senior management". Subject is "Merger Taxation". Is this something you've seen?

A Yes, I have seen this.

Q If I could take you please to the second paragraph from the bottom of that first page. And what this says was:

> "Additionally, Canada Customs Revenue Agency, (CCRA) could disagree with our interpretation of the *Income Tax Act* Canada (the *Act*) and disallow the disappearance of FHA's preferred rate, thereby eliminating our gain of 4.1756 million. Howard Kellough of Fraser Milner is currently examining this GAAR issue."

Now the phrase "disappearance" -- well, first I should say FHS, First Heritage. Is that --

A That's First Heritage Savings, yes.

[33] Perhaps the opinion that is referred to during the discovery examination is the opinion of Howard Kellough of Fraser Milner, in which case it was established during the hearing that Fraser Milner was examining the GAAR issue. In any event, it seems to me that it is not appropriate to admit the discovery questions that refer to an unidentified opinion.

[34] Perhaps buried within the approximately 90 remaining questions from the discovery of Mr. Huston that the Respondent is seeking to read-in there are some questions that were not asked in the more than 300 questions posed by counsel for the Respondent during the cross-examination of Mr. Huston. However it does not seem to me that the job of ferreting out these questions from the transcript for the discovery (which would mean that each of the proposed read-in questions would have to be compared to the more than 300 questions posed by counsel for the Respondent during the cross-examination of Mr. Huston) should fall to the Judge who was not present during the discovery examination. Counsel for the Respondent who is seeking to read-in questions from the discovery and therefore who knows (or ought to know) what questions were asked during the discovery examination and what questions were asked during the examination and cross-examination of the witness, is the person who should, prior to submitting questions in bulk for read-in, edit the list so that the read-in questions only deal with questions that were not asked of the witness during the hearing. To read in questions that are the same questions as were asked at the hearing with the same answers being given is not, in my opinion,

appropriate. Such questions and answers would not be admissible as they simply repeat the evidence of the witness and therefore would be excluded as prior consistent statements. They add no value.

[35] As a result, the Respondent's motion is dismissed. Costs shall be in the cause.

Signed at Toronto, Ontario, this 29th day of June, 2010.

"Wyman W. Webb"

Webb, J.

CITATION:	2010TCC353
COURT FILE NO.:	2008-2213(IT)G
STYLE OF CAUSE:	ENVISION CREDIT UNION AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING OF THE MOTION:	April 23, 2010 With written submissions dated April 30, 2010, May 7, 2010 and May 14, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF ORDER:	June 29, 2010

APPEARANCES:

Counsel for the Appellant:	Joel Nitikman Michelle Moriartey
Counsel for the Respondent:	Lynn Burch John Gibb-Carsley

COUNSEL OF RECORD:

For the Appellant:

Name:	Joel Nitikman Michelle Moriartey
Firm:	Fraser Milner Casgrain Vancouver, British Columbia
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada