Docket: 2010-1860(IT)G

BETWEEN:

THE BRENT KERN FAMILY TRUST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 19, 2012 at Winnipeg, Manitoba

Before: The Honourable Mr. Justice Randall Bocock

Appearances:

Counsel for the Appellant: Jeff D. Pniowsky

Counsel for the Respondent: Bonnie F. Moon

ORDER

UPON receiving submissions from the Respondent addressing the need of this Court to consider new argument of the Respondent arising from the recently pronounced decision of the Federal Court of Appeal in *Canada v. Sommerer*, 2012 FCA 207, 2012 DTC 5126;

AND UPON considering the position adopted by counsel for the Appellant in opposing the request made by counsel for the Respondent on the basis of prejudice, costs and the Appellant's need to reassess the Agreed Statement of Facts;

AND UPON considering the matter in detail;

IT IS HEREBY ORDERED THAT the Court will hear the further submissions of the Respondent and Appellant on the following basis:

1. the Respondent shall pay to the Appellant the sum of $5000.00 in respect of costs thrown away within thirty (30) days of the date of this Order;

2. the Appellant, if it wishes, shall be entitled to one additional day of examination for discovery of the Respondent to be completed within sixty (60) days of the date of this Order;

3. the parties shall be entitled, if either wishes, to one additional day of hearing for the purposes of providing supplementary or reply argument to the Court in light of the Court's pronounced need to consider the *Sommerer* decision's applicability in the matter before it; and

4. the parties shall advise the Hearings Coordinator on or before December 3, 2012 of agreeable dates for the reopening of the Hearing for the purposes described in paragraph 3 above.

Signed at Toronto, Ontario, as of this 15th day of October 2012.

"R.S. Bocock"

Bocock J.

Citation: 2012 TCC 358
Date: 20121015
Docket: 2010-1860(IT)G

BETWEEN:

THE BRENT KERN FAMILY TRUST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bocock J.

[1] The hearing of this matter occurred at Winnipeg, Manitoba on June 19, 2012.

[2] In an otherwise laudatory step, both counsel shortened the proceedings by filing a complete Statement of Agreed Facts and a Joint Book of Documents. Therefore, the Court heard only argument at the Hearing.

[3] Simply put, this matter involves the engagement by the Appellant of the deeming provisions of subsection 75(2) of the *Income Tax Act* ("*Act*") in order to attribute certain dividend income to a deemed recipient. In turn, section 112 of the *Act* permits the statutorily reallocated intercorporate dividend to flow, through the use of an offsetting deduction, to a non-arm's length party on a tax free basis.

[4] The bulk of argument and submissions by both parties centred on the applicability of the GAAR to the conjunctive effect of subsection 75(2) and section 112 of the *Act*.

[5] At the conclusion of the Respondent's argument, cursory reference was made to the case of *Canada v. Sommerer*, 2012 FCA 207, 2012 DTC 5126, identified as a pending judgment before the Federal Court of Appeal. That trial decision precluded the application of the deeming provision in subsection 75(2) where a preceding transfer of shares had occurred at fair market value. Respondent's counsel argued that the case at bar was materially identical to *Sommerer*, the reallocation of dividend income under subsection 75(2) was precluded and, accordingly, the Minister's reassessment remained correct.

[6] In reply, at the Hearing, the Appellant briefly, but adamantly argued that it was not for this Court to concern itself with *Sommerer*. Among other things, Counsel argued that the Respondent was precluded from submitting that subsection 75(2) of the *Act* does not apply since such an argument was exactly opposite to the Minister's pleadings, factual assumptions and the agreements contained in the Statement of Agreed Facts.

[7] On July 13, 2012 several weeks after the Hearing ended, but before judgment was pronounced, the Federal Court of Appeal rendered judgment in *Sommerer* by rejecting the appeal and upholding the trial finding that the deeming provisions of subsection 75(2) do not apply where fair market value is paid for the applicable shares acquired within the tax structure. On July 26, 2012, Respondent's counsel wrote to the Court, provided a copy of *Sommerer*, and requested that the Court advise as to whether additional written submissions on *Sommerer* were required.

[8] In turn, counsel for the Appellant wrote and argued that subsequent submissions were not necessary (nor permissible) since the Respondent had failed in its pleadings and during the Hearing (at least in any substantive way) to put forward the arguments necessary to support the application of the decision in *Sommerer* to the present matter.

[9] On August 29, 2012, the Court wrote to the parties and advised that the parties were invited, prior to September 28, 2012, to submit further submissions on both the appropriateness of considering the Federal Court of Appeal's decision in *Sommerer* and on the impact of that case on the matter before the Court. Both parties submitted written submissions which somewhat expanded upon, but did not materially alter their opposing views on the appropriateness of considering *Sommerer* nor its application to the matter before the Court.

[10] Courts have before considered the issue of reopening a hearing after trial.

[11] The relevant rule applicable to this matter is Rule 138 of the *Tax Court of Canada Rules (General Procedure)* which reads as follows:

> **138(1)** The judge may reopen a hearing before judgment has been pronounced for such purposes and upon such terms as are just.
>
> (2) The judge may, at any time before judgment, draw the attention of the parties to any failure to prove some fact or document material to a party's case, or to any defect in the proceeding, and permit a party to remedy the failure or defect for such purposes and upon such terms as are just.

[12] The Federal Court of Appeal in *Toronto-Dominion Bank v. Canada*, 2011 FCA 221, [2011] 6 C.T.C. 19, stated as follows at paragraphs 27, 28 and 29:

> **27** Before this Court, TD argued that the Judge had acted unfairly in permitting the Crown to advance arguments different from those on which it had based its case in the Tax Court during discoveries and at the hearing itself.
>
> **28** It is clear from subsection 152(9) of the Act that the Minister has broad discretion to advance alternative arguments in support of an assessment. The Tax Court Judge has an equally broad discretion under rule 138 of the *Tax Court of Canada Rules (General Procedure)* to reopen a trial at any time before rendering judgment. In my view, the Judge's exercise of his discretion to permit the Crown to make written submissions after the close of the hearing did not deprive TD of its right to procedural fairness.
>
> **29** The Judge permitted TD to make a full reply in writing to the Crown's submissions, which did not require additional evidence. Counsel for TD did not request further discoveries when served with the Crown's written submissions. The Judge's decision did not therefore deprive TD of the opportunity to participate in the Tax Court's proceeding: it was able to put its own case before the Tax Court and to respond to the Crown's. Whether the Crown took a position on a question of law in its written submissions different from that taken earlier in the proceeding is, in the circumstances of this case, irrelevant to the fairness of the procedure.

[13] Given this authority, this Court cannot refuse to hear submissions where new and possibly binding authority has been pronounced by an appeal court during the period between trial and this Court's judgment. To refuse to do so would lack jurisprudential logic. Provided that both parties are afforded a fair opportunity to reorganize their factual emphasis and submissions and provided that any prejudice suffered has been addressed by additional process and costs, new arguments and submissions should be heard in an appropriate manner.

[14] As to the mentioned issue of costs, the Court estimates, as best as it can, that at least one day at discoveries and one day in total for both trial preparation and the trial itself have been thrown away by the Appellant in marshalling a case against assumptions and submissions recently abandoned (or at least supplanted) by Respondent's counsel and by not having the opportunity then to respond to the case it now faces from the Minister. In fairness to the Respondent, the Court has also taken into consideration the fact that the timing and outcome of the decision (which is a matter of altered law and not fact) of the Federal Court of Appeal are beyond the control of either party. However, the Court also observes that had the Respondent highlighted her intention to rely upon *Sommerer* to the Appellant or to the Court sooner (at least as a preliminary matter at the outset of the Hearing) then the Court might well have adjourned the matter in order to await the pending decision of the Federal Court of Appeal and not have otherwise allowed the costs thrown away to have occurred.

[15] Therefore, the Court will hear the further submissions of the Respondent and Appellant on the following basis:

a) the Respondent shall pay to the Appellant the sum of $5000.00 in respect of costs thrown away within thirty (30) days of the date of this Order;

b) the Appellant, if it wishes, shall be entitled to one additional day of examination for discovery of the Respondent to be completed within sixty (60) days of the date of this Order; and

c) the parties shall be entitled, if either wishes, to one additional day of Hearing for the purposes of providing supplementary or reply argument to the Court in light of the Court's pronounced need to consider the *Sommerer* decision's applicability in the matter before it.

Signed at Toronto, Ontario, as of this 15th day of October 2012.

"R.S. Bocock"

Bocock J.

CITATION:	2012 TCC 358
COURT FILE NO.:	2010-1860(IT)G
STYLE OF CAUSE:	THE BRENT KERN FAMILY TRUST AND THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	June 19, 2012
REASONS FOR ORDER BY:	The Honourable Mr. Justice Randall Bocock
DATE OF ORDER:	October 15, 2012

APPEARANCES:

Counsel for the Appellant:	Jeff D. Pniowsky
Counsel for the Respondent:	Bonnie F. Moon

COUNSEL OF RECORD:

For the Appellant:

Name:	Jeff D. Pniowsky
Firm:	Thompson Dorfman Sweatman LLP Winnipeg, Manitoba

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada