Docket: 2012-4731(IT)G

BETWEEN:

RONALD VAN DER STEEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

The Honourable Justice Don R. Sommerfeldt

Counsel for the Appellant:	Alec McLennan
Counsel for the Respondent:	Nadine Taylor-Pickering

ORDER AND DIRECTION

UPON counsel for the Respondent having called Lakhwinder Saran as a witness to provide similar fact evidence at the hearing of this Appeal;

AND UPON the trial judge having been advised only at the conclusion of Mr. Saran's testimony that his appeal in respect of a reassessment issued against him by the Minister of National Revenue had not yet been settled or otherwise resolved and was still pending before this Court;

AND UPON counsel for the Appellant having objected to the admissibility of the evidence adduced by Mr. Saran during his testimony;

AND UPON counsel for the Respondent having called Shellen Leung as a witness at the hearing of this Appeal;

AND UPON the direct examination of Ms. Leung having concluded on March 10, 2016, at which time the hearing of this Appeal was adjourned;

AND UPON the cross-examination of Ms. Leung not having yet commenced;

AND UPON a question arising as to whether counsel for the Respondent may communicate with Ms. Leung between the conclusion of the direct examination of Ms. Leung and the commencement of the cross-examination of Ms. Leung;

AND UPON counsel for the Respondent inquiring whether, before the continuation of the hearing of this Appeal on October 24, 2016, she may provide Ms. Leung with a transcript of her testimony during her direct examination so as to enable her to refresh her memory;

AND UPON reading the written submissions of counsel for the Appellant dated March 14, 2016, April 4, 2016 and July 15, 2016 and the written submissions of counsel for the Respondent dated March 30, 2016, May 20, 2016 and July 15, 2016;

AND UPON hearing the oral submissions of counsel for the Appellant and counsel for the Respondent during a telephone conference on May 24, 2016;

IT IS HEREBY ORDERED AND DIRECTED that:

1. The testimony of Mr. Saran is admissible, but only for the purpose of providing evidence of the state of affairs or context (including the existence, workings, scope, extent and duration of a donation arrangement) in which donations were made to the Canadian Literacy Enhancement Society ("CLES") by Mr. Saran and by other donors in similar circumstances.

2. The testimony of Mr. Saran is not relevant or admissible for the purpose of implying or proving that the Appellant made a donation to CLES in circumstances similar to those of Mr. Saran.

3. The testimony of Mr. Saran shall be given such weight (if any) as the trial judge may consider appropriate to be given to it, recognizing that the circumstances in respect of Mr. Saran's donations to CLES were not necessarily the same as the circumstances in respect of the Appellant's donation to CLES.

4. Given the insufficient notice provided to counsel for the Appellant that counsel for the Respondent intended to call Mr. Saran as a witness and the resultant lack of sufficient time to prepare a proper cross-examination, counsel for the Appellant may, as contemplated by subsection 144(3) of the *Tax Court of Canada Rules (General Procedure)*, apply for a direction that Mr. Saran be recalled for further cross-examination.

5. Between the conclusion of the direct examination of Ms. Leung and the conclusion of her re-examination, counsel for the Respondent shall not communicate with Ms. Leung in respect of the evidence provided by Ms. Leung during her direct examination or the evidence that will be provided by Ms. Leung during her cross-examination or re-examination.

6. Subject to paragraph 5 above, between the conclusion of the direct examination of Ms. Leung and the conclusion of her re-examination, counsel for the Respondent may communicate with Ms. Leung in respect of:

a) travel arrangements pertaining to the continuation of the hearing of this Appeal and other administrative matters that do not touch on the evidence that has been provided or will be provided by Ms. Leung;

b) any settlement offers that might be contemplated or that might arise; and

c) the appeals of taxpayers other than the Appellant.

7. Before the conclusion of the cross-examination of Ms. Leung, counsel for the Respondent shall not provide Ms. Leung with a transcript of her direct examination, except as permitted by the Court during the course of her cross-examination if it becomes necessary at that time for her to refresh her memory by referring to the transcript.

Signed at Ottawa, Canada, this 19th day of September 2016.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2016 TCC 205
Date: 20160919
Docket: 2012-4731(IT)G

BETWEEN:

RONALD VAN DER STEEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER AND DIRECTION

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to three interlocutory issues that arose in respect of the hearing of this Appeal, which began on March 7, 2016, which was adjourned on March 10, 2016, and which is scheduled to resume on October 24, 2016.

[2] The subject of this Appeal is the donation in 2004 by the Appellant of $65,000 to Canadian Literacy Enhancement Society ("CLES"), the federal tax credit and the provincial tax credit claimed by the Appellant on his 2004 return in respect of that donation and the subsequent disallowance of those credits by the Canada Revenue Agency (the "CRA") on behalf of the Minister of National Revenue (the "Minister"). The Appellant was one of numerous individuals who made donations to CLES in a variety of circumstances, which the CRA categorized into three arrangements, described by the CRA as Scheme I, Scheme II and Scheme III. The Minister assumed that the Appellant participated in Scheme II.

II. ISSUES

A. Similar Fact Evidence

[3] The first witness called by counsel for the Respondent was Lakhwinder Saran, who is unknown to the Appellant, who had no relationship of any nature with the Appellant and whose only connection (if it may be called that) to the Appellant is that Mr. Saran made several donations to CLES in circumstances that, according to the Respondent, came within the arrangement described by the Respondent as Scheme II. The purpose for which Mr. Saran testified was to provide evidence of the context and manner in which Scheme II operated from the perspective of a donor. Counsel for the Appellant objected to the admissibility of Mr. Saran's evidence. I permitted Mr. Saran to testify, but indicated that the use of his evidence would be restricted to providing a general context in respect of donations made to CLES under Scheme II, and that I would determine what weight (if any) should be given to his evidence. When two other interlocutory issues arose, subsequent to the adjournment of the hearing on March 10, 2016, counsel for the Appellant reiterated his objection to the admissibility of Mr. Saran's evidence.

B. Communication with Witness during Adjournment

[4] The second witness called by counsel for the Respondent was Shellen Leung, who is an auditor employed by the CRA. The direct examination of Ms. Leung concluded late in the afternoon on March 10, 2016, which was the last of the four days for which the hearing of this Appeal had been scheduled. It thus became necessary to adjourn the hearing of this Appeal until additional hearing dates could be arranged. Counsel for the Respondent has inquired whether she may communicate with Ms. Leung during the adjournment, and counsel for the Appellant has objected to such communication taking place, except insofar as it pertains to administrative matters such as travel arrangements.

C. Use of Transcript to Refresh Memory

[5] Knowing that there will be a lengthy interval between the conclusion of Ms. Leung's direct examination and the commencement of her cross-examination, counsel for the Respondent requested permission to provide Ms. Leung with a transcript of her direct examination in order that she may read it and refresh her memory before the commencement of her cross-examination. Counsel for the Appellant objected to Ms. Leung being provided with a transcript of her direct examination.

III. ANALYSIS

A. Similar Fact Evidence

(1) General

[6] In two previous decisions of this Court, *Abinader* and *Kiwan*, the Crown introduced similar fact evidence in respect of a donation arrangement involving a large number of donors. In both of those cases, the evidence was found to be relevant and admissible.

[7] In the first case, *Abinader*, Angers J stated:

> 115. I agree with counsel for the appellant that the fact that a group of people was involved in an alleged scheme does not mean that the appellant was involved in it. On the other hand, if the evidence in question serves to establish the existence of such a scheme, its workings, its scope, the name of the participants, the persons who signed the receipts, the extent or duration of the scheme and the number of people who were involved in it, it is my opinion that this makes the evidence relevant and therefore admissible…. Thus, this evidence is relevant and admissible.[1]

[8] In the other case, *Kiwan*, Dussault J stated:

> 195. … Four taxpayers testified as to the procedure for obtaining their receipts…. This was all within a context that is impossible to ignore. It does not, however, mean that all donors were issued fake receipts. As counsel for the Appellants maintained, we cannot blame the Appellants nor other taxpayers, for that matter, for the reprehensible activities of third parties and conclude that they too were involved in the scheme. We need not refer to many decisions to recognize that the evidence of the activities of third parties is neither admissible nor relevant to decisions concerning the activities of the Appellants. However, in my opinion, evidence of the state of affairs or the context, such as, in the case at hand, the existence of a large-scale scheme carried out over a number of years, is both admissible and relevant.[2]

[9] The principles set out above have been applied in other decisions of this Court. For instance, most of the above excerpt from paragraph 195 of *Kiwan* was

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1 *Abinader v The Queen*, 2007 TCC 111, ¶115.

2 *Kiwan v The Queen*, 2004 TCC 136, ¶195; aff'd [*subnom*. *Nassar v The Queen*], 2006 FCA 58, ¶2.

quoted by Bédard J in *Drouin*, after stating that *Kiwan* allows similar fact "evidence of the state of affairs or context, and not only [similar fact] evidence of a scheme."[3]

[10] Based on the above principles, I confirm my earlier ruling that the evidence of Mr. Saran is admissible, but only for the purpose of providing evidence of the state of affairs or context (including the existence, workings, scope, extent and duration of Scheme II), and not for the purpose of implying or proving that the Appellant made his donation to CLES in circumstances similar to those of Mr. Saran. As I listened to Mr. Saran's testimony, it seemed to me that the circumstances of Mr. Saran's donations to CLES were not the same as the circumstances of the Appellant's donation to CLES. For instance, Mr. Saran learned of CLES by attending a seminar, whereas the Appellant learned of CLES in a casual conversation with a business acquaintance, who referred the Appellant to a representative of CLES. As I review the notes which I made during the hearing and as I read the transcript of Mr. Saran's testimony, I will determine what weight (if any) should be given to that testimony.

(2) Reasonable Notice

[11] The hearing of this Appeal began on Monday, March 7, 2016. During a pre-trial telephone conference on Friday, March 4, 2016, counsel for the Respondent advised counsel for the Appellant and the Court that she intended to call Mr. Saran as a witness to provide similar fact evidence. Until then, counsel for the Appellant was not aware that Mr. Saran would be called as a witness. As counsel for the Respondent provided counsel for the Appellant with very little notice that she intended to call Mr. Saran as a witness, several comments made by Bédard J in *Drouin* are applicable:

> 77. The case law has also recognized the importance of giving the opposing party reasonable notice so it can refute the similar fact evidence. It is a major element to take into consideration when assessing prejudicial effects….
>
> 79. … notice given five days prior to the start of the hearing is certainly not reasonable notice. I therefore find that the appellant did not have a reasonable amount of time to properly prepare for this evidence….

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[3] *Drouin v The Queen*, 2012 TCC 94, Amended Reasons for Order [No. 3], ¶57.

> 83. … I interpret the … words [of the Federal Court of Appeal in *Kajat v Arctic Taglu (The)*, [2000] 3 FC 96] to mean that a lack of notice is not sufficient to qualify the admission of similar fact evidence as unfair or oppressive. I also understand that in the absence of notice, the judge must provide for an adjournment in order to provide the opposing party with time to prepare….
>
> 95. Moreover, regarding the lack of notice, I understand from *Kajat v. Arctic Taglu (The)* that an adjournment can suffice to remedy a lack of notice, and I am inclined to allow an adjournment if the appellant makes such a request.[4]

[12] In paragraph 1 under the subheading "Bullet #3" on page 3 of his written submission of July 15, 2016, counsel for the Appellant submitted that improper notice of Mr. Saran's proposed testimony had been given, without full disclosure. As explained in the next paragraph, it is my view that the procedural principles set out in the above quotation from *Drouin* should assist us in addressing the concern raised by counsel for the Appellant.

[13] Subsection 144(3) of the *Tax Court of Canada Rules (General Procedure)* (the "*TCC Rules*") provides that a judge may, at any time, direct that a witness be recalled for further examination. Accordingly, if counsel for the Appellant so desires, he may apply for a direction that Mr. Saran be recalled for further cross-examination. If such an application is made, we will need to consider the timing, logistics, expense and other similar factors in respect of Mr. Saran's further cross-examination.

B. Communication with Witness during Adjournment

[14] The *TCC Rules* do not address this issue. Rather, one must turn to rules of professional conduct, as explained by Bourgard and McMechan:

> Commentary 18 of Chapter IX of the Code of Professional Conduct of the Canadian Bar Association provides guidance as to when a lawyer may communicate with a witness during the course of the witness' evidence and reads:
>
> > Communicating with Witnesses
> >
> > 18. When in court the lawyer should observe local rules and practices concerning communication with a witness about the witness' evidence or any issue in the proceeding. Generally, it is considered improper for counsel who called a witness to

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4 *Ibid.*, ¶77, 79, 83 and 95.

> communicate with that witness without leave of the court while such witness is under cross-examination.

One example of local rules are those in the Law Society of Upper Canada's Rules of Professional Conduct [the "LSUC Rules"], effective October 1, 2014, giving detailed direction to Ontario lawyers[5] in Section 5.4-2 – Communication with Witnesses Giving Evidence, which reads:

> 5.4-2 Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:…
>
> > (a.2) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;
> >
> > (b) during cross examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;…
> >
> > (c.1) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;…

Another recent example of local rules on communicating with witnesses giving evidence is Rule 4.04(2) found in the Law Society of Alberta's Code of Conduct of November 2011. Alberta's new Code was developed from the Federation of Law Societies Model Code of Conduct.

> Communication with Witnesses Giving Evidence
>
> 4.04(2) A lawyer must observe the following rules respecting communication with witnesses giving evidence:…
>
> > (b) during cross-examination of the lawyer's own witness, the lawyer must not, without the direction of the tribunal, discuss with the witness the evidence given in

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[5] The office of counsel for the Appellant is in Ontario, and the hearing of this Appeal is being held in Ontario.

> chief or relating to any matter introduced or touched on during the examination-in-chief;…[6]

[15] The corresponding rule from British Columbia[7] is set out in subsection 5.4-2 of the *Code of Professional Conduct for British Columbia*, as follows:

> 5.4-2 Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:…
>
> > (b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;…[8]

[16] It is notable that the Ontario rules contain a provision, paragraph 5.4-2(a.2), which specifically addresses the period between the completion of examination-in-chief and the commencement of cross-examination, whereas the Alberta and British Columbia codes do not contain such a provision. If there is an inconsistency between the Ontario rule and the BC Code, I prefer to resolve that inconsistency in accordance with the principles underlying section 137 of the *TCC Rules* and those enunciated in the *Garber* case. Section 137 of the *TCC Rules* states that "A judge may … adjourn a hearing … on such terms as are just." In *Garber*, Bowman CJ stated that this Court "has an inherent jurisdiction to control its own processes."[9]

[17] In *Scavuzzo*, Bowman ACJ (as he then was) presided over a hearing that commenced in April 2004, and then was adjourned for a number of months, after a particular witness, who was also the Appellant, had been cross-examined but before the Appellant had been re-examined. The lawyer for the Appellant withdrew from the case due to a potential conflict of interest, which necessitated the Appellant retaining a new lawyer to conduct the re-examination. The new lawyer applied for the approval of the Court to communicate with the Appellant before the re-examination. In 2004, the *Rules of Professional Conduct of the Law Society of Upper Canada* were not identical to the current rules. At that time, the applicable rule was in paragraph 4.04(e), which read as follows:

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6 Gordon Bourgard & Robert McMechan, *Tax Court Practice*, vol. 1, p. 4-585 & 4-586 (dated 2016-1), being in respect of subsection 144(1) of the *TCC Rules*.

7 The office of counsel for the Respondent is in British Columbia.

8 The Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (January 1, 2013), subsection 5.4-2.

9 *Garber v. The Queen*, 2005 TCC 635, ¶31; *aff'd*, 2006 FCA 177.

> 4.04 Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:…
>
> (e) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination….[10]

Bowman ACJ stated that, "The rule [in paragraph 4.04(e)] is a salutary one and should be observed in the vast majority of cases."[11] Although Bowman ACJ was dealing with the interval between cross-examination and re-examination and although he found that the case before him was not an ordinary one (prompting him to make an exception to the rule), I am of the view that the present case is one of "the vast majority of cases" in which the corresponding rule concerning communication between direct examination and cross-examination should be observed.

[18] As the hearing of this Appeal is being held in Ontario, and as I am of the view, as was Bowman ACJ in *Scavuzzo*, that the rule precluding communication between a lawyer and a witness between direct examination and cross-examination or between cross-examination and re-examination is a salutary rule, it is my view that paragraph 5.4-2(a.2) of the LSUC Rules should be followed.

[19] Counsel for the Appellant and counsel for the Respondent have each made concessions which have narrowed the issue to be determined. In the second paragraph of her written submission of March 30, 2016, counsel for the Respondent stated, "… to preclude any suggested negative inference, we confirm that we will not discuss with Ms. Leung our direct examination of her or her evidence given." In paragraph 5 on page 3 of her submission of July 15, 2016, counsel for the Respondent stated:

> The respondent has made representation by way of letter dated March 30, 2016 to not discuss with Ms. Leung her examination-in-chief in order to preclude any suggested negative inference. The respondent will limit communication with Ms. Leung to travel arrangements and the administrative matters regarding the other project appeals currently under case management with the Tax Court of Canada.

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[10] Law Society of Upper Canada, *Rules of Professional Conduct of the Law Society of Upper Canada*, section 4.04, as quoted in *Scavuzzo v The Queen*, 2004 TCC 806, ¶14.

[11] *Scavuzzo*, ¶15.

Counsel for the Appellant stated in the fourth paragraph of his written submission of April 4, 2016 that "…there is no concern respecting the limited topic of travel arrangements," and in paragraph 1 under the subheading "Bullet #1" on page 1 of his written submission of July 15, 2016 that, "No one objects to discussions between Counsel for Justice and her own witness respecting identified administrative matters not touching on the appeal."

[20] Ms. Leung is the auditor in respect of a large number of reassessments issued by the CRA against numerous taxpayers, one of whom is the Appellant. Counsel for the Respondent and Ms. Leung are working together in respect of various appeals filed by many of the reassessed taxpayers. Counsel for the Appellant has objected to counsel for the Respondent communicating with Ms. Leung about the appeals of those other taxpayers. However, counsel for the Appellant has not persuaded me that a communication between counsel for the Respondent and Ms. Leung in respect of an appeal brought by a taxpayer other than the Appellant would have a prejudicial impact on the Appellant's Appeal. I am of the view that it would seriously impede the ability of the Respondent to deal with the appeals of those other taxpayers if counsel for the Respondent were to be prohibited from communicating with Ms. Leung in respect of those appeals.

[21] In view of the foregoing, it is my order and direction that, between the conclusion of the direct examination of Ms. Leung and the conclusion of her re-examination, counsel for the Respondent shall not communicate with Ms. Leung in respect of the evidence provided by Ms. Leung during her direct examination or the evidence that will be provided by Ms. Leung during her cross-examination or re-examination. I also order and direct that, subject to the provisions set out in the previous sentence, between the conclusion of the direct examination of Ms. Leung and the conclusion of her re-examination, counsel for the Respondent may communicate with Ms. Leung in respect of:

a) travel arrangements pertaining to the continuation of the hearing of this Appeal and other administrative matters that do not touch on the evidence that has been provided or will be provided by Ms. Leung;

b) any settlement offers that might be contemplated or that might arise; and

c) the appeals of taxpayers other than the Appellant.

C. Use of Transcript to Refresh Memory

[22] The reason for which counsel for the Respondent would like to provide Ms. Leung with a transcript of her direct examination is set out in paragraph 8 on page 4 of her submission of July 15, 2016, as follows:

> … it is the respondent's position that providing Ms. Leung with a copy of the Transcript is not for the purpose of reviving her memory regarding the audit of the Thill donation Schemes and the reassessment of the appellant; rather it is to put Ms. Leung in the position she would have otherwise been in had her cross-examination proceeded immediately or soon after completion of the examination-in-chief.

In addition, counsel for the Respondent also stated the following in paragraph 15 on page 6 of that same submission:

> It is unfair to Ms. Leung to be subjected to a memory test of the audit or a memory test of her testimony which lasted for two days. Ms. Leung's memory of the audit will, and should, come from her notes and documents taken during the time of the audit, adhering to the principle of contemporaneity of record. However, she should be allowed the equivalent of notes from her testimony, i.e., the Transcript. Unlike the parties' counsel and the Court, Ms. Leung did not take notes of her March 2016 testimony to remind herself of her testimony. [footnote omitted]

[23] While there are several cases which have considered whether a witness may refresh his or her memory by reference to a transcript of evidence given by the witness in a previous proceeding (such as a prior trial or an examination for discovery), there is relatively little jurisprudence concerning the use by a witness of a transcript of his or her direct examination in order to refresh his or her memory in preparation for cross-examination in the same proceeding.

[24] Counsel for the Respondent referred me to *R. v Coffin*,[12] in which, during a trial, counsel for the Crown asked his own witness (the common law wife of the accused) to refresh her memory by referring to a transcript of evidence given by her at a preliminary inquiry a year previously.[13] It is notable that the transcript was presented to the witness during the trial, after she had given evidence that was inconsistent with the evidence that she had given at the preliminary inquiry. The witness was not given the transcript prior to the trial to enable her to prepare for

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12 *R. v Coffin*, [1956] SCR 191.

13 *Ibid.* See the comments by Taschereau J at page 209 and the comments by Kellock J at pages 210-211.

the trial. As well, Cartwright J stated the following in respect of the use of the transcript:

> It was argued before us that, whether or not counsel was entitled to cross-examine his own witness, he was entitled to have her refresh her memory by reading inaudibly to herself the evidence which she had given at the preliminary inquiry. In *Lizotte v. The King* …, the question whether a witness may refresh his memory by referring to the transcript of his evidence at the preliminary hearing was left open after attention had been called to the views expressed by eminent writers and I do not find it necessary to decide that question in this case, as it seems clear from reading the record that the transcript of the preliminary hearing was used not for the purpose of refreshing the memory of the witness, who had already without assistance testified as to her conversations with Coffin, but for the purpose of endeavouring to have her admit, (i) that at the preliminary inquiry she had not referred to any statement by Coffin that he had left the three deceased with two other Americans, and (ii) that she must have been mistaken or untruthful in her evidence at the trial in saying that Coffin had made such statement to her.[14]

[25] Counsel for the Respondent referred me to a second decision of the Supreme Court of Canada, *R. v Fliss*,[15] in which an undercover police officer wore a wire and (after obtaining judicial authorization) made a surreptitious recording of a confession by the accused. At the trial of the accused, the officer used an edited 49-page transcript of the recording to refresh his memory of the details of the conversation. Much of the evidence given by the officer in respect of the conversation between him and the accused was a *verbatim* recitation of the transcript. While Binnie J stated that "the officer was entitled to refresh his memory by any means that would rekindle his recollection,"[16] in my view it is significant that the officer was rekindling a recollection of a conversation to which he was a party, and was not endeavouring to rekindle a recollection of testimony that he had previously given.

[26] The above-quoted statement by Binnie J was referred to in *Gray v ICBC*,[17] another case to which I was referred by counsel for the Respondent. The issue in that case was whether a police officer who was a breathtesting supervisor could refresh his memory, by referring to his inspection records, of the set-up steps taken by him to prepare the breathalyzer machine used to test a sample of the accused's

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14 *Ibid.* See the comments of Cartwright J at page 242.

15 *R. v Fliss*, 2002 SCC 16, [2002] 1 SCR 535.

16 *Ibid.*, [2002] 1 SCR 553 (*per* Binnie J).

17 *Gray v Insurance Corporation of British Columbia et al*, 2010 BCCA 459, ¶28.

breath. This was not a case of a witness using a transcript of his prior testimony to refresh his memory of that testimony.

[27] Counsel for the Respondent also referred me to *Brown v The Wawanesa Mutual Insurance Company*.[18] In that case, a fire destroyed the plaintiffs' home in 1992, and the insurer refused to pay out under the policy, alleging that a member of the plaintiffs' family had deliberately set the fire. The plaintiffs commenced an action against the insurer in 1993. A trial was held in 1995, and the plaintiffs were unsuccessful. They appealed, and in 2000 the Saskatchewan Court of Appeal ordered a new trial. The insurer sought leave to appeal to the Supreme Court of Canada, but was denied leave. Due to a variety of factors, including a change of counsel, the effect of debilitating mental illness and various procedural steps, the new trial had not yet occurred by 2013, when the insurer applied to dismiss the plaintiffs' action for want of prosecution. The insurer claimed that it would be prejudiced, by reason of the lengthy delay, if the appeal were to be held, given that some witnesses were no longer available and the memories of the other witnesses had faded. In dismissing the insurer's application, the Court of Queen's Bench stated that the prejudice of fading memories could be "significantly offset by the fact that examinations for discovery were held and transcripts of the testimony presented at the first trial and before the Court of Appeal are available."[19] This was a case dealing with unique facts, and not a situation where a witness, in preparation for cross-examination, was seeking to refresh his memory of the testimony given by him in direct examination.

[28] The case which is the closest to being on point and which I have found to be the most helpful is *R. v Rutigliano*, a decision of the Ontario Superior Court of Justice.[20] In that case, the trial of an accused was adjourned midway through the cross-examination of a police officer. In anticipation of the resumption of the trial and the continuation of the police officer's cross-examination more than five months later, counsel for the Crown applied for leave to provide the officer with transcripts of her earlier testimony so that she could refresh her memory prior to the resumption of the interrupted cross-examination.

[29] In dismissing the Crown's application, Hill J suggested that the proposed communication between Crown counsel and the police officer (by means of an email with attached electronic copies of the transcripts) could be viewed as being

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18 *Brown v The Wawanesa Mutual Insurance Company*, 2013 SKQB 443.

19 *Ibid.*, ¶49.

20 *R. v Rutigliano*, 2013 ONSC 2514.

subject to the then applicable rule of professional conduct prohibiting (without leave of the court) a conversation between a witness and the witness's own lawyer during the cross-examination of the witness. Hill J went on to state the following:

> 15. While, in the experience of the court, five months is on its face an atypical gap in a cross-examination, providing transcripts to Constable Winter inviting reading of that material may not be essential to her recall of committed positions in her prior testimony. To some degree the application to have the witness refresh her memory before resuming cross-examination is both speculative and premature. Largely on the basis of the passage of time, the nature of the witness' evidence, and the real prospect of a revisiting of earlier subjects already addressed in cross-examination, the application presumes the potential for pervasive lack of recall on the part of the witness.
>
> 16. Given the constable's notes as well as emails and other relevant documents as the predominant source of tracking her activities, it cannot be said that it is likely that the witness will be unable to recall her prior evidence. Put differently, while the exercise might well be helpful to the witness and the flow of the continued proceedings, it is by no means clear that it is sufficiently necessary to support the application.
>
> 17. In these circumstances, the safer course is to maintain the *status quo*. Should Constable Winter express a lack of recall respecting an earlier exchange with counsel, she will be permitted to refresh her memory from a relevant transcript.[21]

[30] I am of the view that similar principles apply here. Like Hill J, I think that the safer course would be not to provide a transcript to Ms. Leung before the commencement of her cross-examination. During Ms. Leung's direct examination, she struck me as being well prepared and very familiar with the working papers that she had prepared and the other documents that she had compiled. I am confident that she will be able to refresh her memory of the audit by reference to the documents already in her possession. If it becomes apparent, during her cross-examination, that there is a need for her to refresh her memory of her direct-examination by reference to the transcript of that examination, appropriate steps can be taken at that time.

[31] During the teleconference on May 24, 2016, counsel for the Appellant advised the Court that he would not be ordering a transcript of Ms. Leung's direct examination. Accordingly, it is my understanding that counsel for the Appellant will not be using such a transcript in formulating the questions that he intends to

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[21] *Ibid.*, ¶15-17.

put to Ms. Leung during her cross-examination. In keeping with the principle enunciated in *Rutigliano*, counsel for the Appellant "will be held to a standard of fairness" in his cross-examination and his closing submissions.

IV. OTHER ISSUE

[32] At the conclusion of Mr. Saran's testimony, and prior to the teleconference on May 24, 2016, I raised a concern about protecting Mr. Saran and inquired whether this Court could or should grant an order or direction that the evidence given by him in the hearing of this Appeal may not be used to cross-examine him or to impugn his credibility during the hearing of his own appeal. As this issue does not affect the Appellant or the Respondent (at least insofar as this Appeal is concerned), it was not discussed to any significant extent during the teleconference on May 24, 2016. Having subsequently considered the comments made by Bédard J in respect of a similar issue in *Drouin*,[22] I have now determined that this is an issue with which I should not concern myself in the context of this Appeal.

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[22] *Drouin*, *supra* note 3, ¶85.

V. CONCLUSION

[33] If counsel have questions concerning these Reasons or the accompanying Order and Direction, they may communicate those questions to me through the Registry.

[34] No order or direction is made at this time as to costs.

Signed at Ottawa, Canada, this 19th day of September 2016.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2016 TCC 205
COURT FILE NO.:	2012-4731(IT)G
STYLE OF CAUSE:	RONALD VAN DER STEEN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	n/a
DATE OF HEARING:	n/a
REASONS FOR ORDER AND DIRECTION BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF ORDER AND DIRECTION:	September 19, 2016

APPEARANCES:

COUNSEL OF RECORD:

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