Docket: 2003-106(IT)G, 2003-107(IT)G
2003-110(IT)G, 2003-111(IT)G
2003-112(IT)G

BETWEEN:

BATHURST MACHINE SHOP LTD.,
MANDATE ERECTORS & WELDING LTD.,
KENNETH PITRE, LEOPOLD THERIAULT
and GERALD PITRE,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on June 20, 2006 at Fredericton, New Brunswick,

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellants:	David R. Oley
Counsel for the Respondent:	Cecil Woon and Ted R. Sawa

ORDER

Upon motions by counsel for the Appellants, pursuant to *Rule* 93(3) of the *Tax Court of Canada Rules (General Procedure)* for Orders that:

1. Mr. John Landry be produced by the Respondent for examination for discovery; and

2. That the Respondent provide answers to undertakings 55, 56, 57 and 58 given at the discovery of Ms. Claudette Miller on January 17-20, 2005.

And upon reading the material filed herein;

And upon hearing counsel for the parties;

It is ordered that:

1. The motions to require the Respondent to produce Mr. John Landry for discovery are dismissed.

2. The Respondent shall provide the answers to undertaking 55, 56, 57 and 58 given at the discovery of Ms. Claudette Miller on January 17-20, 2005.

3. The Respondent will be entitled to one set of costs of the motions, in the cause.

Signed at Ottawa, Canada, this 30th day of June 2006.

"E.A. Bowie"

Bowie J.

Citation: 2006TCC378
Date: 20060630
Docket: 2003-106(IT)G, 2003-107(IT)G
2003-110(IT)G, 2003-111(IT)G
and 2003-112(IT)G

BETWEEN:

BATHURST MACHINE SHOP LTD.,
MANDATE ERECTORS & WELDING LTD.,
KENNETH PITRE, LEOPOLD THERIAULT
and GERALD PITRE,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowie J.

[1] The Appellants bring these motions for Orders requiring that

> … Mr. John Landry … be produced by the Respondent, Her Majesty the Queen, for examination at Discovery [*sic*] in the within Tax Appeals.

and for Orders requiring the Respondent to provide answers to four questions in accordance with undertakings given upon the examination for discovery of Claudette Miller as the Respondent's nominee that took place from January 17 to 20, 2006. After the examination of Ms. Miller, counsel for the Respondent had second thoughts about four of the many questions that had given rise to undertakings; instead of providing answers, he took the position that the questions were not relevant to the issues before the Court, and he declined to fulfill the undertakings that had been given. At the hearing before me, counsel for the Respondent conceded this second

issue, and renewed the undertakings to provide answers to these four questions. He was clearly correct to do so; once an unqualified undertaking has been given, it is too late to refuse to provide an answer on grounds of relevance: see *Towne v. Miller*.[1] The Appellants are entitled to have answers to those four questions, and an Order to that effect will go. For the reasons that follow, I am of the view that the remainder of the Appellants' motions must fail. My reasons will be brief, because much of the argument that I heard will necessarily be repeated when the Appellants dispute the admissibility of certain evidence at the trial.

[2] The income tax reassessments that are under appeal in these cases go back as far as the 1989 taxation year. They result from inquiries made by officials of Revenue Canada — Taxation,[2] beginning almost 15 years ago. These inquiries began as the result of a telephone call received by Mr. John Landry, an official of Revenue Canada. In addition to Mr. Landry, several other Revenue Canada personnel, including Ms. Miller, took part in these inquiries. The Appellants' contention before me was that the inquiries were conducted in a way that was contrary to section 8 of the *Canadian Charter of Rights and Freedoms*, and their position at trial will certainly be that much of the evidence that they expect to see tendered by the Respondent should be excluded for that reason. While all this was argued by Mr. Oley with his usual vigour, there has not yet been any judicial determination at all under section 8 in respect of any of the evidence.

[3] It is in this context that Mr. Mockler, senior counsel for the Appellants, made a specific request to counsel for the Respondent, by a letter dated December 10, 2004, that Mr. Landry be nominated by the Deputy Attorney General of Canada under *Rule* 93(3) to be examined on behalf of the Crown. The Respondent declined to produce Mr. Landry, and instead produced Ms. Miller. Counsel for the Appellants examined Ms. Miller for four days in January 2005, and again on March 13, 2006. According to counsel for the Respondent, she was asked 2,410 questions, and 112 undertakings were given in the course of her examination. These numbers are not disputed by the Appellants. What the Appellants do dispute is that Ms. Miller was satisfactorily prepared to be examined, and that she effectively answered the questions asked of her. Indeed, Mr. Oley takes the position that Ms. Miller was, as he put it, inserted "to draw a veil" between Mr. Landry and counsel for the Appellants.

---

1 (2001) 56 O.R. (3d) 177 (S.C.J.). See also Beverly G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book Ltd., 1998) at c. 9, para. 40 ff.

2 Since renamed Canada Customs and Revenue Agency, and more recently Canada Revenue Agency. For simplicity I will refer to it as Revenue Canada throughout.

[4] All that said, an examination of the record before me does not reveal that the Appellants have been denied an effective discovery of the Respondent. Many of the answers that are now objected to as being incomplete and unhelpful could have been, but were not, made the subject of additional undertakings. Counsel who accepts an answer without asking follow-up questions or requesting an undertaking to provide a more complete reply cannot later complain that the reply given was inadequate.

[5] In my view, the applicable principle was correctly stated by Swinton J. in *Baylis Estate v. Attorney General of Canada*,[3] at paragraphs 9 and 10, where she said:

> [9] For an examination of an additional representative of a corporation to be ordered, the moving party must demonstrate that it cannot otherwise obtain the discovery to which it is entitled. One of the purposes of a discovery is to obtain information about the case to be met. A second is to obtain admissions from the opposing party. The fact that the person whom the moving party seeks to examine may be an important witness at trial is not sufficient grounds for ordering an additional examination. It is only where the representative can not or will not satisfactorily inform himself that an additional representative will be ordered to be produced. [authorities omitted]
>
> [10] Therefore, the fact that Mr. Wilson had to give undertakings in order to answer questions related to the Glen Report does not lead to the conclusion that an additional representative should be produced for discovery, as it is inevitable that a representative of the Crown or a corporation will not be able to answer all questions posed on discovery. The usual process followed is to give an undertaking to obtain the information from the appropriate sources, as was done in this case.

With the exception of the four undertakings that are the subject of these motions, I was not referred to a single unsatisfied undertaking. There are, however, a number of answers given that might usefully have been, but were not, followed up. My review of the record satisfies me, however, that the Appellants have had an effective discovery of the Respondent. What the Appellants really want to achieve by these motions is the right to take a deposition from Mr. Landry, who will certainly be an important witness at a later stage in these cases. Such depositions are not any part of the procedure in this Court. As Strayer J. said in *Champion Truck Bodies Ltd. v. The Queen*,[4]

---

3 [2000] O.J. No. 2531; leave to appeal refused, [2000] O.J. No. 4931.

4 [1986] 3 F.C. 245 at 247.

> The purpose of the examination [for discovery] is not to obtain disclosure of the intended evidence of the particular examinee but rather of facts relevant to the pleadings which are within the knowledge of the other party.

There is no need for further discovery in this case; what is needed is to move the matter forward towards a resolution of the issues on the merits without any further delay.

[6] There is a further reason to dismiss the motions to have Mr. Landry produced as a representative of the Crown under *Rule* 93(3). That provision reads:

> 93(3) The Crown, when it is the party to be examined, shall select a knowledgeable officer, servant or employee, nominated by the Deputy Attorney General of Canada, to be examined on behalf of that party, but if the examining party is not satisfied with that person, the examining party may apply to the Court to name some other person.

Mr. Landry retired on April 1, 2006, and is therefore no longer an "officer servant or employee" of the Crown. I should perhaps point out that the news of Mr. Landry's retirement apparently came as a surprise to counsel on both sides. He had been transferred to Hamilton, Ontario some time ago, and apparently had been on leave of some sort from the fall of 2005 until his retirement in April. Counsel for the Appellants had made no enquiry concerning the possible retirement of Mr. Landry; if they had they would perhaps have brought the motions sooner. Nor did Mr. Oley attempt to cast any blame on counsel for the Respondent for the fact that they too had made no such inquiries; as he put it, "things happen".

[7] Mr. Oley does take the position, however, that his retirement does not preclude Mr. Landry from being named by the Court as "some other person" to be examined as a representative of the Crown. He argues that those concluding words of *Rule* 93(3) are not limited by what goes before them, and that if I am persuaded that it is appropriate to name a second person to be discovered, then I need not name an officer, servant or employee — I can name any other suitable person who is knowledgeable about the subject matter.

[8] Mr. Woon argues that the matter has been settled by the Supreme Court of Canada's decision in *The Queen v. CAE Industries Ltd*.[5] The Supreme Court there

---

5 [1977] 2 S.C.R. 566.

reversed a decision of the Federal Court of Appeal that had required the Crown to produce the Honourable James Richardson, a former Minister of the Crown, to be examined for discovery, holding that the words "departmental or other officer of the Crown" did not include Mr. Richardson, even though he had been a Minister at the time the Court of Appeal's Order was made, because:

> … those words can only refer to a person who is such an officer at the time that the discovery is to take place. We say this having regard to the fact that admissions would ordinarily be elicited to bind the Crown on issues arising in the litigation.[6]

The text of *Federal Court Rule* 465, as it stood at the relevant time, was significantly different from that of *Rule* 93(3), however. The relevant part of it read:

> 465(1) For the purposes of this Rule, a party may be examined for discovery, as hereinafter in this Rule provided,
>
> …
>
> (*c*) if the party is the Crown, by questioning any departmental or other officer of the Crown nominated by the Attorney-General of Canada or Deputy Attorney-General of Canada or by order of the Court, …

The words on which Mr. Oley relies — "… some other person …" — are conspicuously absent.

[9] Does that lead to a different result? I think not.

[10] It is trite that at common law the Crown was, by prerogative, immune from discovery.[7] It follows that the limit of the right to examine the Crown for discovery is fixed by the statute that abolishes that prerogative. In the present case the prerogative is abolished by section 20 of the *Tax Court of Canada Act*,[8] the relevant part of which reads:

---

6 Per Laskin C.J. at p. 567 for a unanimous Court.

7 P. W. Hogg and P. J. Monahan, *Liability of the Crown*, 3rd Ed., (Toronto, Carswell, 2000) at p. 65.

8 R.S.C. 1985, c. T-2.

20(1) Subject to the approval of the Governor in Council, rules for regulating the pleadings, practice and procedure in the Court shall be made by the rules committee.

(1.1) Without limiting the generality of the foregoing, the rules committee may make rules

(*a*) for oral examinations for discovery of officers of Her Majesty in right of Canada;

(*b*) for discovery and production, and supplying of copies, of documents by Her Majesty in right of Canada;

20(1) Sous réserve de leur approbation par le gouverneur en conseil, les règles concernant la pratique et la procédure devant la Cour sont établies par le comité des règles.

(1.1) Sans qu'il soit porté atteinte à l'application générale de ce qui précède, le comité des règles peut prendre des règles sur les objets suivants :

a) les interrogatoires préalables oraux des agents de Sa Majesté du chef du Canada;

b) la production de documents, la communication de leur teneur ainsi que la fourniture de copies de documents, par Sa Majesté du chef du Canada;

It is evident that the intent of Parliament was that Her Majesty should be subject to examination for discovery in this Court, but that such examinations should be "of officers of Her Majesty" ("des agents de Sa Majesté"). The words "some other person" standing alone indeed might bear the interpretation that Mr. Oley would have me put on them. Read in the context of the authorizing statute, however, they can only mean some other officer of Her Majesty. The rationale for this is implicit in the passage from the Reasons of Laskin C.J. in *CAE* that I have reproduced above. One would hardly expect that the Crown, in surrendering its immunity to discovery, would agree to be bound at trial by admissions of fact made by persons who were not "officers of Her Majesty".

[11] I must read *Rule* 93(3) in a way that is *intra vires* the powers given by Parliament to the Rules Committee: see *McKay v. The Queen*.[9] That can only be done by reading the words “some other person” as being limited by the expression that precedes it — “… a knowledgeable officer, servant or employee …”. Section 20 does not confer on the Committee the power to make a rule that would cause the Crown to be bound by answers given on an examination of someone who is not, at least in a broad sense, an officer of Her Majesty in right of Canada.

[12] The applications to require that Mr. John Landry be produced to be examined for discovery as a nominee of the Respondent are dismissed. An Order will go requiring the Respondent to furnish to the Appellants answers to undertakings numbered 55, 56, 57 and 58 on the examination of Ms. Miller. One set of costs of the motions will be to the Respondent, in the cause.

Signed at Ottawa, Canada, this 30th day of June 2006.

"E.A. Bowie"

Bowie J.

9 [1965] S.C.R. 798.

CITATION:	2006TCC378
COURT FILE NOS.:	2003-106(IT)G, 2003-107(IT)G, 2003-110(IT)G, 2003-111(IT)G, 2003-112(IT)G,
STYLE OF CAUSE:	BATHURST MACHINE SHOP LTD., MANDATE ERECTORS & WELDING LTD., KENNETH PITRE, LEOPOLD THERIAULT & GERALD PITRE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Fredericton, New Brunswick,
DATE OF HEARING:	June 20, 2006
REASONS FOR ORDER BY:	The Honourable Justice E.A. Bowie
DATE OF ORDER:	June 30, 2006

APPEARANCES:

Counsel for the Appellants:	David R. Oley
Counsel for the Respondent:	Cecil Woon and Ted R. Sawa

COUNSEL OF RECORD:

For the Appellants:

Name:	David R. Oley
Firm:	Mockler Peters Oley Rouse & Williams

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada