Dockets: 2006-1385(IT)G
2006-1386(IT)G

BETWEEN:

GENERAL ELECTRIC CAPITAL CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 30, 2009, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Al Meghji Neil Paris
Counsel for the Respondent:	Craig Maw Naomi Goldstein

ORDER

Upon motion made by the Appellant for an order under section 7 of the *Canada Evidence Act* and section 65 of the *Tax Court of Canada Rules (General Procedure)* granting leave for the Appellant to examine more than five expert witnesses at the hearing of the appeals, if such leave is required;

And upon hearing the submissions of the parties;

The motion is granted and the Appellant is allowed to call up to eight expert witnesses at the hearing of the appeals.

Signed at Ottawa, Canada, this 7th day of May 2009.

"Robert J. Hogan"

Hogan J.

Citation: 2009 TCC 246
Date: 20090507
Dockets: 2006-1385(IT)G
2006-1386(IT)G

BETWEEN:

GENERAL ELECTRIC CAPITAL CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hogan J.

Factual background

[1] The Appellant brought a motion for an order for leave to allow it to adduce evidence from eight experts at the hearing of its appeals of the assessments issued against it by the Minister of National Revenue. These assessments disallow the Appellant's claims for deductions with respect to guarantee fees paid by the Appellant to its parent corporation for the Appellant's 1996, 1997, 1998, 1999 and 2000 taxation years, and add consequential withholding tax under Part XIII of the *Income Tax Act*.

[2] Mr. Meghji, counsel for the Appellant, argues that the Appellant should be required simply to make a *prima facie* case that it has legitimate reasons to call the three additional expert witnesses and that such expert evidence may be useful for me to hear at trial. Mr. Meghji submits that his client has presented uncontradicted affidavit evidence on both of these points. He argues, rather forcefully, that the Respondent is confusing the Court by raising issues that go to the admissibility of the evidence at trial and not to the merits of the matter now before me. He has undertaken to ensure that the evidence to be given by each witness will not be duplicative and accepts being held to this undertaking. Finally, he notes that the

Respondent, in opposing the motion, alleges prejudice, but, unlike the Appellant, has not proffered any evidence, whether in the form of affidavit evidence or otherwise, to establish the nature of the prejudice it will suffer if I grant the motion. Finally, Mr. Meghji accepts that section 7 of the *Canada Evidence Act* (the "*CEA*") limits each side to five experts for the case and not five experts per issue as suggested by a contradictory line of cases. The former sets a stricter standard to be met.

[3] The Respondent opposes the motion on the grounds that there is only one issue to be decided at trial and that the additional three experts will be called to deal with exactly the same matter. Furthermore, the Respondent argues that it has only recently become aware of the Appellant's intention of calling more than five expert witnesses. The Respondent alleges it will suffer a prejudice if I allow the motion, as counsel for the Respondent would then have to spend the three weeks remaining before trial dealing with the three additional expert reports as opposed to preparing the Respondent's own case. The Respondent alleges that it believed that the Appellant would call only five expert witnesses when it agreed to the trial date and the length of time set aside for the hearing.

Issue

[4] In brief, the issue that I must determine is whether or not this is a proper case in which to exercise the discretion conferred upon me under section 7 of the *CEA* by allowing up to eight expert witnesses to be presented by the Appellant at trial.

Analysis

[5] Section 7 of the *CEA* provides that not more than five expert witnesses may be called on either side without leave of the Court. Section 7 reads as follows:

> Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

[6] In *R. v. D.D.*,[1] the Supreme Court of Canada commented that the accessibility of the judicial system to litigants may be curtailed by the proliferation of expert opinions, as follows:

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[1] 2000 SCC 43, [2000] 2 S.C.R. 275 at paragraph 56.

> . . . expert evidence is time-consuming and expensive. Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties and the resulting strain upon judicial resources cannot be overstated. When the door to the admission of expert evidence is opened too widely, a trial has the tendency to degenerate into "a contest of experts with the trier of fact acting as referee in deciding which expert to accept" . . . .

[7] Against this background, what are the factors that I should consider in order to properly exercise the discretion conferred by section 7? That provision is silent on this matter and therefore I am of the view that Parliament intended that the issue be dealt with on a case-by-case basis. I find useful the criteria proposed by the Federal Court of Appeal and Federal Court Rules Committee (the "Committee") with respect to such motions. The Committee states the following:

> **Federal Courts Rules Committee**
> **Expert evidence in the Federal Courts**
> **UPDATE**
> **March 16, 2009**
>
> **(10) Issue 10: Limiting the number of experts**
>
> Section 7 of the *Canada Evidence Act*[2] limits the number of expert witnesses that may be called by a party to five, unless leave of the Court is granted for the calling of additional witnesses. The Federal Courts Rules Committee has accepted the recommendation that the Court's ability to exercise this discretion and the factors that would be relevant to that decision be made explicit in the Rules. The proposed factors to be considered are:
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> (a) the nature of the litigation, its public significance, and the need to clarify the law,
> (b) the number and complexity or technical nature of the issues in dispute, and
> (c) the likely expense involved in relation to the amount in dispute.
>
> The Committee has also accepted the subcommittee's recommendation that rule 400(3) be amended to explicitly provide cost consequences for the unnecessary tendering of expert evidence at trial.
>
> All of the decisions set out above were made with a view to obtaining a first draft of the proposed amendments to facilitate future consultation with the profession and parties. The proposed amendments will be pre-published in Canada Gazette Part I and comments received on the content of those amendments will be considered by both the subcommittee and the plenary committee.
>
> [2] R.S.C. 1985, c. C-5.

[8] With respect to the first point, this is the first case that I am aware of that will deal with the application of an arm's length standard to related-party guarantee fees. In the financial area, related-party guarantee agreements are often used to mitigate risk for lenders.

[9] On the second point, the parties agree that the comparable uncontrolled price method is not available in the present case. Therefore they may have to rely upon alternate and complex valuation frameworks and perspectives in order to present their case. While there is ultimately one issue to be decided by the Court, each of these different approaches may constitute proper sub-issues for consideration at trial. I used the word "may" because the question of the admissibility of the expert evidence is not a matter to be considered at this stage.

[10] For example, the creditworthiness of the guarantor and of the beneficiary of the guarantee may have an impact on pricing. The credit rating that the beneficiary of the guarantee may secure with, as opposed to without, the guarantee may be relevant. The beneficiary's capital position at the time may also be relevant. This is a complicated technical issue. The financial troubles of AIG Assurance demonstrate that even sophisticated industry players may draw improper inferences regarding the risk that they are taking on and fail to charge the appropriate premium in the circumstances. In recent times, rating agencies have been harshly criticized for their rating methodology, one that has led, in the eyes of many, to inappropriate high rating grades for borrowers who have quickly found themselves in serious financial difficulty.

[11] Counsel for the Appellant provided during the hearing an undertaking that the evidence that will be led by the additional expert witnesses will not be duplicative. He has promised to abide by that undertaking at trial and I will hold the Appellant thereto so as not to waste the Court's time. I expect that the Respondent's counsel will also be vigilant in this regard.

[12] The Respondent's counsel claims that he may be prejudiced in his preparation for the hearing as he learned of the Appellant's intention of perhaps calling up to eight witnesses only four weeks before the commencement of the trial. He was under the impression that the Appellant would be limiting the number of expert witnesses to five.

[13] I agree with counsel for the Respondent that the best practice with regard to seeking leave to produce additional expert witnesses is to present the motion prior to

the setting of the trial date. At the very least, counsel intending to bring such a motion should advise his confrère of this possibility well in advance of setting the trial date. This being said, if the Respondent is, as it alleges, caught by surprise, there is nothing to stop it from bringing a motion, with proper affidavit evidence in support thereof, requesting an adjournment of the hearing of the appeals. If prejudice is established at the hearing of such a motion, then presumably additional time could be granted.

[14] I also find particularly helpful the comments of the Canadian Human Rights Tribunal, in the case of *Public Service Alliance of Canada and Canadian Human Rights Commission v. Minister of Personnel for the Government of the Northwest Territories*,[2] on the question of the proper exercise of judicial discretion in matters such as this:

> 4 The judgment in *Mohan* sets out some of the general principles in the area. The purpose of expert evidence is to assist an adjudicative body in deciding the facts of the case. It does so by providing the trier of facts with knowledge and "ready-made" inferences which stand outside the scope of their experience. It follows that experts have a special role in litigation which relies on statistical and scientific evidence. The issue in each instance is whether the evidence is "necessary" to decide the issues in the case. The standard of necessity is relatively relaxed, however, and should not be overstated. Mr. Justice Sopinka also remarks, at paragraph 24, that a trial should not become "a contest of experts with the trier of fact acting as referee in deciding which experts to accept".
>
> 5 It is important to distinguish between the issues which arise on an application for leave to call witnesses and the issues which arise with respect to the admissibility of their testimony. Although it is inevitable that there will be some blurring of the line between the two areas, issues with respect to the relevance and admissibility of an expert's testimony are more properly decided when the witness is called. The inquiry at the present stage of the proceeding is merely whether the party applying for leave has reasonable grounds for calling the witnesses. In deciding such an issue, a Tribunal must bear in mind that a party is entitled to provide a complete answer to the case against it.
>
> 6 Counsel for the Respondent appeared to take the position that the relevant question is whether the proposed evidence would have a significant bearing on a distinct issue in the case. We agree with this view of the matter. A Tribunal is not in a position to assess the reliability of proposed witnesses at this stage of the proceeding and can merely determine whether their testimony would logically contribute to the defence. It is accordingly sufficient if it can be reasonably said that the expert's testimony is needed to determine one of the factual issues in the case.

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[2] (2001), 41 C.H.R.R. D/177 (C.H.R.T.).

> This excludes testimony which undermines the fairness or expeditiousness of the process.
>
> [Emphasis added.]

[15] If the expert evidence adduced by the Appellant is duplicative, counsel for the Respondent will be entitled to object to the hearing of the witnesses' evidence. Finally, if the evidence is redundant and the trial is needlessly prolonged by it, this is a relevant factor that counsel for the Respondent can present at the hearing regarding costs at the end of the trial.

[16] For all of these reasons, I grant the Appellant's motion and allow it to call up to eight expert witnesses at the hearing of the appeals.

Signed at Ottawa, Canada, this 7th day of May 2009.

"Robert J. Hogan"

Hogan J.

CITATION:	2009 TCC 246
COURT FILE NOS.:	2006-1385(IT)G, 2006-1386(IT)G
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REASONS FOR ORDER BY:	The Honourable Justice Robert J. Hogan
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APPEARANCES:

Counsel for the Appellant:	Al Meghji Neil Paris
Counsel for the Respondent:	Craig Maw Naomi Goldstein

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