Docket: 2005-1974(IT)G

BETWEEN:

KATHRYN KOSSOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on May 11, 2010, at Toronto, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	A. Christina Tari
Counsel for the Respondent:	Arnold H. Bornstein and Craig Maw

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ORDER

UPON motion by the Respondent for an Order:

a) dismissing the Appellant's Motion for, among other things, further oral discovery and a further *Rule* 82 affidavit of documents as set out in her Notice of Motion dated September 3, 2008;

b) setting this Appeal down for trial to be heard on common evidence with the Appeals in *Gould v. Her Majesty the Queen*, court file numbers 2004-4449(IT)G and 2006-2188(IT)G, and *Fiorante v. Her Majesty the Queen*, court file number 2005-3091(IT)G;

c) in the alternative, setting down this Appeal for trial on its own; and

d) in the further alternative, dismissing the appeal.

IT IS ORDERED THAT:

1. The matter be set down for a two-week trial at the Tax Court of Canada, 180 Queen Street, 6th floor, Toronto, Ontario, the weeks of January 17 and 24, 2011;

2. The Court shall not hear any further motions in connection with discovery of documents or examinations for discovery.

3. The costs of this Motion shall be in the cause.

4. A case management teleconference be held with the Parties in October 2010, at a time to be arranged.

Signed at Ottawa, Canada, this 21st day of May 2010.

"Campbell J. Miller"

C. Miller J.

Citation: 2010TCC279
Date: 20100521
Docket: 2005-1974(IT)G

BETWEEN:

KATHRYN KOSSOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

C. Miller J

[1] The Respondent brings a Motion for:

a) an order dismissing the Appellant's Motion for, among other things, further oral discovery and a further *Rule* 82 affidavit of documents as set out in her Notice of Motion dated September 3, 2008;

b) an order setting this Appeal down for trial to be heard on common evidence with the Appeals in *Gould v. Her Majesty the Queen*, court file numbers 2004-4449(IT)G and 2006-2188(IT)G, and *Fiorante v. Her Majesty the Queen*, court file number 2005-3091(IT)G;

c) in the alternative, an order setting down this Appeal for trial on its own; and

d) in the further alternative, an order dismissing the appeal.

[2] This litigation for the years 2000, 2001 and 2002 concerns what the Respondent calls a leveraged-donation scheme, by which a taxpayer borrows, on favourable terms, 80% of funds used to make a donation to Ideas Canada Foundation.

The Respondent claims that, given the circumstances of the loan, the taxpayer cannot be said to have made a gift. In the alternative, if there was a valid gift, the General Anti-Avoidance Rules ("GAAR") is engaged to deny the credit that would otherwise flow from the donation.

[3] The Appellant objects to the Motion, firstly on the basis that it would deny the Appellant fair and full disclosure, and, secondly, on the basis that it would be unfair to ask the Appellant to incur any further costs in this matter, especially the cost of a two-week trial, when the Federal Court of Appeal has before it an appeal in the *Maréchaux v. R.*[1] case. Justice Woods in the Tax Court of Canada decision in Maréchaux dealt with the issue of whether a donation is a gift in circumstances of using borrowed funds. After referring to the definition of a gift in the *Friedberg v. R.*[2] case she concluded:

> …
>
> 32. In applying the above definition to the facts of this appeal, it is clear that the appellant did not make a gift to the Foundation because a significant benefit flowed to the appellant in return for the Donation.
>
> 33. The benefit is the financing arrangement. The $80,000 interest-free loan that was received by the appellant, coupled with the expectation of the Put Option, was a significant benefit that was given in return for the Donation. The financing was not provided in isolation to the Donation. The two were inextricably tied together by the relevant agreements.
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> …
>
> 35. I would also comment that, even without the Put Option, the financing provided a significant benefit. It is self-evident that an interest-free loan for 20 years provides a considerable economic benefit to the debtor. I would also note that the $8,000 security deposit could not reasonably be expected to accrete to anywhere near $80,000 in 20 years. The evidence of Mr. Johnson clearly showed this, even taking into account differences of opinion regarding some of his assumptions.
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> …

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1 2009 TCC 587.

2 92 DTC 6031.

[4] The Appellant's counsel, while not prepared to be bound by the result in *Maréchaux*, acknowledged that the Federal Court of Appeal's decision could have a serious impact on Ms. Kossow's Appeal. Likewise, the Respondent was not prepared to be bound by the Federal Court of Appeal decision.

[5] It will be helpful to provide a brief overview of the history of this litigation. Ms. Kossow filed her Appeal with the Tax Court of Canada in June 2005. There are well over a thousand taxpayers who made donations to the Ideas Canada Foundation in similar circumstances to Ms. Kossow, and who have an interest in the outcome of this Appeal. The taxpayers are spread across the country. In November 2007, I had a teleconference with counsel from Toronto representing Ms. Kossow and counsel from Vancouver representing Messrs. Gould and Fiorante who had also brought appeals in connection with the Ideas Canada Foundation's donation arrangement. I ordered that the Kossow matter should proceed expeditiously and set a two-week trial date in mid-June 2008. I was satisfied at the time that the Kossow matter was further advanced vis-à-vis discoveries and pre-trial matters. All related appeals would await the outcome in Kossow. At the same time, I ordered full disclosure pursuant to *Rule* 82 by January 31, 2008.

[6] One month before trial, Justice Valerie Miller adjourned the trial to September 8, 2008, allowing the Appellant to bring a Motion in mid-June to strike parts of the Reply, to direct the Respondent to bear the burden with respect to certain assumptions, to direct the Respondent to satisfy certain undertakings given at the Examination for Discovery and to provide a further *Rule* 82 affidavit of documents, and to have the Respondent's nominee re-attend examinations. The nominee had already attended two weeks of examination. Justice Valerie Miller, by Order dated July 18, 2008, directed the Respondent to provide written answers to certain refusals and to provide certain documents by August 8, 2008. She also ordered the Appellant had until August 15, 2008 to provide written questions regarding the additional documents which the Respondent was to answer by August 29, 2008. Justice Valerie Miller described the Appellant's success on the Motion as minor and ordered costs to the Respondent payable forthwith.

[7] By letter dated June 24, 2008 the Respondent served upon the Appellant written responses to certain questions conceded by the Respondent at the hearing of the Motion. As a result of Justice Valerie Miller's Order, the Respondent provided close to 200 additional documents. In keeping with Justice Valerie Miller's Order, the Appellant provided written questions in connection with each document: many of the questions were identical. Using document 590 and questions 286 to 292 by way of example, the following are representative of the general questions asked:

…

286 When did you obtain this document? If an exact date is not available, was it obtained before or after the position paper was approved?

287 From whom did you obtain this document?

288 Who authored the document?

289 Did you or any member of your team, review this document in the course of your audit? If not, why not?

290 Did you rely on this document in making any of the assumptions of facts pleaded at paragraphs 9, 10 and 31 through 41, including the Schedule "A" of the Reply?

291 If the answer to the previous question is yes, which assumption or, if more than one, which assumptions?

292 Do you admit the authenticity of this document?

…

[8] The Respondent provided a written response to all 1546 questions, though objected to answering written questions 1424 to 1546 arising from undertakings, on the basis that Justice Valerie Miller did not order such, notwithstanding the Appellant's motion before her.

[9] The Appellant appealed Justice Valerie Miller's Order to the Federal Court of Appeal and brought a Motion before me in August 2008 to adjourn the September trial. I denied the Motion. On August 25, 2008 the Appellant sought from the Federal Court of Appeal a stay of the Tax Court of Canada trial scheduled for September, which Justice Ryer granted stating: "In the circumstances, I am of the view that Kossow must do her part to ensure an expeditious disposition of the appeal in this Court."

[10] In the meantime, the Appellant served on the Respondent:

a) a Notice of Motion dated August 29, 2008, which Motion was made returnable in the Tax Court of Canada on September 8, 2008. The Appellant sought an Order striking certain paragraphs in the Respondent's pleadings, and in the alternative directing that the

Respondent bear the burden of proof with respect to certain assumptions of fact made by the Minister. …; and

b) a Notice of Motion dated September 3, 2008, which Motion was made returnable to the Tax Court of Canada on September 8, 2008. The Appellant sought an Order directing the Respondent to answer certain examination questions posed by the Appellant, directing the Respondent to file a supplementary *Rule* 82 affidavit of documents, adjourning the trial and compelling further oral examinations.

[11] On March 16, 2009, the Federal Court of Appeal dismissed the Appellant's Appeal of Justice Valerie Miller's Order and Justice Létourneau stated:

> "As for the Appellant's request that the discovery process continue, the Judge noted that there had been extensive discovery. "At some point in time", she writes at paragraph 66 of her Reasons for Judgment, "discoveries must end so that the parties can get ready for the trial in this matter. That time has arrived". In the exercise of her discretion, she was entitled to put an end to the discovery process: see Canada v. Aventis Pharma Inc. 2008 FCA 316."

The Federal Court of Appeal ordered costs of $3,000 payable forthwith to the Respondent.

[12] On May 15, 2009, the Appellant filed an Application for Leave to Appeal the Federal Court of Appeal decision to the Supreme Court of Canada. From a review of the Appellant's Notice of Application for Leave and Written Memorandum, it appears the Appellant concentrated exclusively on the issue of the burden of proof at trial. The Supreme Court of Canada denied leave on September 17, 2009. Both at the Tax Court of Canada and the Federal Court of Appeal it was decided that the issue of burden of proof shall be left to the trial judge.

[13] In November 2009, the Respondent contacted the Appellant requesting a Joint Application for Trial be made. In December, Appellant's counsel responded that the matter was not ready for trial and preferred a case management conference.

[14] It is clear the Respondent is ready to go to trial and sees no need for further Affidavits of Documents or Examinations. The Respondent's Application to have the Appellant's Motion in that regard dismissed is akin to a request to end the discovery process. The Respondent relies on *Rule* 53 to seek the dismissal of the Appellant's Motions, as well on relying on Justice Létourneau's comments in the Federal Court of Appeal decision in this matter, as quoted earlier.

[15] I will first address *Rule* 53 and then look at the broader picture of simply ending the discovery process. *Rule* 53 of the *Tax Court of Canada Rules (General Procedure)* reads as follows:

> …
>
> **53.** The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (*a*) may prejudice or delay the fair hearing of the action,
>
> (*b*) is scandalous, frivolous or vexatious, or
>
> (*c*) is an abuse of the process of the Court.
>
> …

There are three areas to this *Rule* that would justify the Court dismissing the Appellant's Motion, without her being heard. First, would allowing the Appellant's Motion to be heard cause delay in the fair hearing of the action? Given that the Appellant does not want to proceed with the Motion until after the Federal Court of Appeal decision in *Maréchaux*, then certainly it causes a delay of the hearing. But is the delay necessary to ensure a "fair" hearing? There are two elements to this issue of the fairness of the hearing. First, the hearing may not be fair as the Judge would not have the benefit of the Federal Court of Appeal decision if the hearing precedes that decision. That is readily resolved by the Judge simply reserving, or setting a trial date sufficiently in the future to minimize the risk of not having received the Federal Court of Appeal decision. Second, the hearing may not be fair because, according to the Appellant, without success on her Motion for further disclosure and discovery, she will not have had a fair and full disclosure. I asked the Appellant's counsel to help me out with this aspect of the argument. What were the documents the Appellant believed she had not received from the Government, notwithstanding a number of updates on the *Rule* 82 Affidavit for full disclosure of documents? I needed to appreciate the significance of what the Appellant believed was missing to weigh that against prolonging litigation, or, as succinctly put by Justice Létourneau in the case of *Yacyshyn v. R.*[3] – "justice delayed is justice denied, especially where it is unjustifiably delayed."

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[3] 1999 CarswellNat 158 (FCA).

[16] The Appellant's counsel identified three areas from the examination of Mr. Tringali, the Respondent's nominee, which suggested there were documents that should have been part of the Respondent's *Rule* 82 disclosure, but were not. First, documents in connection with evaluation of Bronzes cast from the same plasters as the Bronzes in issue in this matter; second, documents that were similar to documents already provided, which the Respondent was of the view were redundant; third, photos of the Bronzes the Respondent's officers may have seen at the MacLaren Art Centre. The Appellant also wants the right to continue examinations regarding these documents and also to have further discovery beyond the written questions and answers on the previous bundle of documents provided as a result of Justice Valerie Miller's Order of July 18, 2008.

[17] While not deciding the merits of the Appellant's Motion for disclosure of these types of documents and for further discovery, this information assists me in deciding whether it is in the best interests of justice to allow the Appellant to even bring the Motion, as only by doing so can she have a fair hearing. This is indeed a fine balancing act.

[18] On one side of the balance, in support of the position that the matter is ready now for a fair hearing and that the Appellant's Motion would only delay that fair hearing, I see:

- eight to 10 years having passed since the events leading to the litigation;

- two previous orders in 2008 setting the matter for trial on the basis it was ready for a fair hearing at that point;

- extensive examinations and affidavits over the last three years;

- compliance with Justice Valerie Miller's Order for written discoveries on the additional disclosed documents.

[19] On the other side of the balance, in support of the position the Appellant's Motion will not delay a fair hearing, I see:

- the Appellant's concern that written responses with respect to the additional documents are inadequate;

- acknowledgement by the Respondent's nominee that certain documents may not have been disclosed.

[20] With respect to the inadequacy of the Respondent's written responses to the Appellant's written questions regarding the additional documents ordered produced by Justice Valerie Miller, the Appellant submits that Justice Valerie Miller would not have made such an Order had she known of the extent of the documents. But she did make the Order and the Parties have complied with it. This factor does not sway me in support of the Appellant's position.

[21] With respect to the Appellant's position that there remain documents to be disclosed, I have considered the nature of those documents and concluded that even if the Appellant was successful in her Motion, the potential marginal knowledge that might be unearthed is insufficient to justify any further delay. The issues in this matter are clear. The extensive documentation surrounding the Ideas Canada Foundation program is known to both sides. I recognize that there is an awkwardness in a situation such as this when the taxpayer is a small cog in a larger wheel, of which the taxpayer has minimal knowledge and limited access to the extensive surrounding documentation. But that is something for the trial judge to address. The preliminary process of disclosure of documents and examinations is meant to put both sides on an equal footing as far as knowing the case each has to meet. I find the Parties are there, and that any delay at this stage is a delay of a fair hearing.

[22] The Respondent went on to argue that I could also rely on *Rule* 53(c) that the Appellant's Motion should be dismissed as an abuse of process, as she has not brought her Motion since March 2009 when the stay of the proceedings in this Court was effectively lifted. The Respondent referred me to the decision of *R. v. Special Risks Holdings Inc.*[4] wherein Justice Walsh stated:

> …
> 12. Plaintiff quite properly objects to the present motion, contending that it is a further last minute attempt to delay the trial of the action, and moreover to introduce material the production of which would certainly be objected to, which is probably irrelevant, and which in any event was not required in order to comply with the precise terms of the order of the Court of Appeal which related only to allegations in paragraphs 13, 15 and 17 of the statement of claim. Rules i of the court must be strictly followed, and the

[4] 1983 CarswellNat 362.

> Crown is in no more favoured position than any other litigant in this connection, and no proceeding should be entertained, even if it might be found to have some relevance, when it seeks the introduction of material, which the parties could have sought to introduce many months earlier, and which if granted would have the effect of preventing the action from proceeding. For this reason alone therefore the motion is an abuse of the process of the Court and cannot be entertained.

While it is unnecessary for me to rely on *Rule* 53(c) given my view of *Rule* 53(a), the fact the Appellant has not, since March 2009, brought her Motion before the Court is troubling. The Appellant raises the Supreme Court of Canada Leave Application as some justification. I disagree. There was no reason to wait for the Supreme Court of Canada's decision. There is a responsibility on litigants to move their litigation along, and I find the Appellant has not done so. I would not go so far however, as the Respondent contends, that the Appellant's behaviour demonstrates an intention to not take this matter to trial.

[23] I wish now to look at the broader issue – the setting of a trial date and the steps, if any, to get there. There are two major concerns in this regard. First, what impact should the *Maréchaux* appeal have on setting this matter down for trial? Second, should the discovery process be put to an end?

[24] The *Maréchaux* appeal does address the issue of the effect of favourable financing arrangements on the determination of a gift. Clearly that is an important element in this case. Yet that was a decision in a very fact specific arrangement. This case involving Ideas Canada Foundation is not the same arrangement as in *Maréchaux*, notwithstanding the particular issue may be the same. The determination of a gift can involve many factors (see my comments in my recent decision of *Coleman v. R.*[5]). It is critical the trial judge scrutinize all of them, as while it is to a large degree an objective examination, there will always be a subjective element. The trial judge needs to appreciate the very specific facts of these types of arrangements, especially, in a case such as this, where there are over 1000 other taxpayers waiting to see the results of this case. The facts of the matter need to be heard.

[25] Further, neither side provided me with any assurance that this litigation would resolve itself based on the Federal Court of Appeal decision in *Maréchaux*. This is not surprising, but it certainly satisfies me there is no need to hold off getting the trial heard. I recognize that the Federal Court of Appeal's decision will be of some

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5 2010 TCC 109.

considerable assistance to the trial judge, but he or she can always reserve pending that decision, if it has not already been released.

[26] Finally, as Justice Bowie put it in the case of *Loewen v. R.*[6]:

> …
>
> 24. … Case law is always in a state of flux; the trial courts are not required to refrain from hearing cases because they involve legal issues that may be affected by the outcome of appeals that are proceeding elsewhere.
>
> …

I agree.

[27] The Appellant raises the issue of having to incur costs unnecessarily by proceeding. Given the extensive litigation to date on this matter and my view that this case is very likely to proceed in any event, I place little emphasis on the question of costs.

[28] The Court is not available for a two-week trial until late October or November. Ms. Tari has indicated she is in the process of scheduling another matter for a three-week trial in November. Given that, and given expectations of a decision in *Maréchaux* before the end of the year, January is the most appropriate time for a two-week trial.

[29] Finally, I turn to the question of the remaining steps in preparation for trial. I harken back to Justice Létourneau's comments in the Federal Court of Appeal's decision in this matter quoted in paragraph 11 of these reasons. Two years ago I was of the view the matter was ready for trial. There have been additional disclosures since then. My view has not changed, and, if anything, is stronger. Further delays are simply not warranted.

[30] I am aware the Appellant is of the view that there needs to be a decision regarding the burden of proving certain assumptions. This Court and the Federal Court of Appeal have indicated that issue is best left to the trial judge. As case management Judge, I would like to discuss this issue with the Parties in the fall to establish how best to proceed before the trial judge in that regard; that is, leaving it to the first day of trial or considering an earlier conference with the trial judge. This,

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6 2007 TCC 703.

and the question of experts, on which I presume the Parties will simply comply with the *Tax Court of Canada Rules* (indeed I believe the Respondent has already filed the expert's report) are the only matters I find remain to be addressed before the trial in January 2011.

[31] I have not addressed the question of a joint trial with the cases of *Gould* and *Fiorante* as little emphasis was put on that at the Motion, and I see no need to go down that path.

[32] In summary, the time has come to end the procedural skirmishes and to get this matter to trial. Certainly we have rules and procedures in our system to ensure both Parties approach a trial on a level playing field. If one side believes the other is not playing by the rules, then, yes, they can come to Court to seek a resolution to the impasse so the litigation can move on its steady course to the fair hearing. But, at the same time, the Court should be able to say, as the impartial arbiter – enough. Time, expense, extensive disclosure and fairness dictates an end to the process. I do not share Ms. Tari's view that doing so denies fair process at this stage. By setting a trial date in January 2011, I hope to accomplish the following: to ensure the availability of counsel and the Court, to provide time for the release of the Federal Court of Appeal decision in *Maréchaux*, to minimize the risk of delay by further motions, to minimize further costs other than trial and to provide some certainty, not just to Ms. Kossow, but to all taxpayers with an interest in this matter arising from donations to Ideas Canada Foundation.

[33] I grant the Respondent's Motion and set the matter down for a two-week trial in Toronto, the weeks of January 17 and 24, 2011. The costs of this Motion shall be in the cause. I would also like to have a case management teleconference with the Parties in October 2010, at a time to be arranged. As well, I expect the Parties to be ready for trial in January 2011, and I expect them to afford each other the ongoing courtesies of a reasonable exchange of information without further recourse to the Court. I therefore also order that the Court will not hear any further motions in connection with discovery of documents or examinations for discovery.

Signed at Ottawa, Canada, this 21st day of May 2010.

"Campbell J. Miller"

C. Miller J.

CITATION:	2010 TCC 279
COURT FILE NO.:	2005-1974(IT)G
STYLE OF CAUSE:	KATHRYN KOSSOW AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 11, 2010
REASONS FOR ORDER BY:	The Honourable Justice Campbell J. Miller
DATE OF ORDER:	May 21, 2010

APPEARANCES:

Counsel for the Appellant:	A. Christina Tari
Counsel for the Respondent:	Arnold H. Bornstein and Craig Maw

COUNSEL OF RECORD:

For the Appellant:

Name:	A. Christina Tari and
Firm:	Richler and Tari

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