Docket: 2009-177(IT)G

BETWEEN:

BRADMAN LEE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals called for hearing and preliminary matter heard
and Reasons for Order delivered from the Bench
on June 29, 2011 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Darren Prevost

ORDER

Having heard the parties on the question of the validity of a subpoena purportedly served on Ms. Shakela Mohamed and having quashed same and restricted the further service of any subpoena on her for, and as set out in, the attached Reasons for Order;

IT IS ORDERED that:

1. the hearing of the appeals is adjourned *sine die*;

2. the subpoena purportedly served on Ms. Shakela Mohamed is quashed and any further service of a subpoena on her shall only be

made in accordance with the terms and conditions set out in the attached Reasons for Order; and

3. the Respondent shall report back to the Court when the Supreme Court of Canada renders its decision in respect of the Application for Leave to Appeal filed by the Appellant in the matter of a criminal conviction relating to matters at issue in his appeals to this Court.

Signed at Ottawa, Canada this 6th day of July 2011.

"J.E. Hershfield"

Hershfield J.

Citation: 2011 TCC 337
Date: 20110706
Docket: 2009-177(IT)G

BETWEEN:

BRADMAN LEE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER
(Delivered from the Bench on June 29, 2011 at Toronto, Ontario)

Hershfield J.

[1] The matter called for hearing today is being adjourned *sine die*, however two preliminary matters raised were heard.

[2] The first matter dealt with whether a subpoena served by the Appellant on a Ms. Shakela Mohamed should be quashed on the basis that it was not served on her personally, it did not include conduct money and it was not served in a timely manner.

[3] Questions were also raised as to whether Ms. Mohamed, as a witness, could provide any evidence relevant to the proceedings before this Court. Further still, there was a question as to her health which may be such as to effectively prevent her from testifying.

[4] Ms. Mohamed was not in Court at the time the hearing was called.

[5] In order to permit me to decide whether or not the subpoena ought to be quashed, evidence was presented. Mr. Ferouz Mohamed, Ms. Mohamed's husband, spoke to the issues concerning the subpoena purportedly served on his wife.

[6] He testified that on Saturday, June 25th at approximately 12:15 p.m. the Appellant personally served him with two subpoenas, one that subpoenaed him to attend at Court as a witness today and the other that subpoenaed his wife to attend at this hearing. He testified that neither subpoena included conduct money, that is, witness fees and expenses calculated in accordance with a tariff set out under the *Tax Court of Canada Rules (General Procedure).* As to conduct money the requirement that same be paid or tendered is provided in subsection 141(4) of such *Rules*. It is subsection 141(1.1) that provides that service on the person whose attendance is required be at least five days before the day on which that person is required to appear. That subsection together with subsection 141(4) make it clear that the service must be personal. The Respondent's counsel has contended that service on such day, June 25th, does not meet the five day requirement under the said *Rules*. As well, it is submitted that since it was not served personally and with conduct money there is ample ground to quash the subpoena. Perhaps most importantly, however, is the submission that this person has no material or relevant evidence to give.

[7] The Appellant testified that he had tried to effect personal service much earlier and felt that both Mr. Mohamed and his wife could have been served earlier if they were not avoiding service. He said he had attended at Mr. Mohamed's office on several occasions and it was always closed and, as well, he had attended at the residence of Mr. and Mrs. Mohamed and that persons there refused to open the door to him. Mr. Mohamed testified, on the other hand, that the address that the Appellant stated was the address that he had essentially staked out for service purposes was not their address at all. He acknowledged that his office had been frequently closed but he explained that it was after tax season and, as a tax preparer, which was his profession, there was less need to keep the office open.

[8] The Appellant also testified that there was a cheque for $75 appended to each of the subpoenas. Mr. Mohamed denied that there was any cheque attached.

[9] As to the medical circumstances relating to Ms. Mohamed's ability to appear as a witness, I note that there were exhibits tendered confirming that she had suffered two strokes as a result of an aneurism and notations in those medical reports that there were memory issues. However, in his testimony, Mr. Mohamed indicated that if she was required to appear as a witness in the future, she would be able to attend. He suggested that her problem was not memory loss but rather nausea and the like, which I take it was to suggest that there may be issues such as the length of time which she could testify.

[10] On the question of the relevance of his wife's testimony, Mr. Mohamed testified that he, not his wife, was the person who had prepared tax returns for the Appellant for the subject years and that his wife was not trained at all in respect of the preparation of such returns. She was his receptionist at the time that the Appellant came to the office in February of 2003 to have his returns prepared. Mr. Mohamed testified that he alone prepared those returns and that they were completed in June, 2003. He said she did see the returns, or at least the first page of them, that were given to the Appellant after they were completed, as Mr. Lee had insisted that the front page be changed to more properly reflect his full name. He acknowledged that it would have been his wife that made that change to the front page and handed Mr. Lee the returns. The Appellant testified that the returns were done in February, not June, and that he believes that she knew much more about the returns and had relevant information concerning matters that were important to his appeal.

[11] As near as I could tell from the Appellant's testimony, the concern that he had was that a compliance officer with the Canada Revenue Agency ("CRA") (to whom he referred to as a non-filing officer and who had requested that he file returns for the subject years) had, unknown to him (the Appellant), received completely different returns than the returns that he believed were the returns that were originally prepared for him based on the proper and accurate information provided by him to Mr. Mohamed. At the very least, it seemed that the Appellant was convinced that Ms. Mohamed could shed some light on the returns prepared and given to him at the offices of Mr. Mohamed and/or on the returns that ultimately landed on the desk of the compliance officer. The suggestion was ultimately made, or so it seemed to me, that the Appellant believed that Ms. Mohamed was some sort of informer that fed false information to the CRA or at least that she knew of facts related to his theory that false information was fed to the CRA. I take it, as well, that it was these alleged false returns that he believes ultimately led to the criminal charges and a conviction for what I assume was tax evasion. That is, he contends that it was the returns that landed on the desk of the compliance officer in June (which he asserts were not the proper ones prepared in February) that started all his problems and that he needs to question her to get that information out there for the Court to hear in the context of these civil law tax appeals.

Submissions

[12] The Crown referred the Court to Justice Webb's 2009 decision in *Obonsawin v. Canada*.[1] Justice Webb, in my view, wrote very instructive reasons on the subject of quashing subpoenas on the basis of the relevance of the testimony sought. Respondent's counsel had two volumes of additional authorities to which I need not refer. Mr. Lee argued his need for Ms. Mohamed's testimony to find the source of, and shed light on, wrong information relied on by the CRA.

Analysis

[13] Given Mr. Mohamed's appearance, and willingness to testify, at the hearing, I make no comment on the validity of the subpoena served on him although Respondent's counsel did suggest that subpoenas such as this may, if not quashed, survive until the hearing of the appeals. Since the hearing date is not yet set and there will likely be a further hearing required to set a new trial date, it is my view that the status of the effectiveness of the existing subpoena served on Mr. Mohamed can be resolved at a future time.

[14] Accordingly, I will deal only with the subpoena concerning Ms. Mohamed.

[15] As to the timing of the service of the subpoena, the Appellant did not deny that actual service, in spite of numerous prior attempts, took place as asserted by Mr. Mohamed.

[16] As to the conduct money, I have two different versions as to whether or not it was provided as required under the *Rules*. In this regard, I note that the testimony of both parties who gave evidence on this question is not disinterested. It is fairly clear to me that the Appellant accuses Mr. Mohamed and/or his wife as being a source of his tax problems and they would both likely be hostile witnesses in respect of the Appellant's case. I also take it, given remarks that Respondent's counsel made at the hearing of this preliminary matter, that Mr. Mohamed gave evidence at the criminal trial. Those remarks inferred that such evidence was harmful, or at least not helpful, to the Appellant's case. That leaves me with an issue as to whose evidence to prefer in respect of conduct money. However, I do not find it necessary, in any event, to make a finding as to whether or not conduct money was paid.

[1] 2009 TCC 485, [2009] T.C.J. No. 380.

[17] The Appellant admitted that there was no personal service of the subpoena on Ms. Mohamed as required under subsection 141(1.1) of the *Rules* and as underlined in subsection 141(4) of that *Rule*.

[18] To be more specific, subsection 141(1.1) provides that a subpoena "must be served on a person whose attendance is required at the hearing". Subsection 141(4) provides that "no person is required to attend at a hearing unless the subpoena has been served on that person personally in accordance with subsection (1.1)".

[19] Notwithstanding the Appellant's difficulty in serving the subpoena, I find that this, in itself, is reason to quash the subpoena although I am more inclined to come to that resolve on the basis of the materiality of her evidence or rather the lack of it. Quashing the subpoena for this latter reason relieves me of considering my discretion under section 7 of the *Rules* which confirms that failure to comply with a rule is an irregularity and does not render a step in a proceeding a nullity and that ultimately the interests of justice must prevail. Considering that rule, I might have refused to quash the subpoena based on technical deficiencies alone. Same might easily be rectified or simply not applied in a case like this.

[20] The real question is whether or not the subpoena in question was issued to a proper person for the proper reasons. The Court has inherent jurisdiction to protect and administer its own processes including refusing to compel a witness to testify where there is no likelihood that the witness has relevant information or where compelling the witness is a vexatious action or done for a purpose that appears to be nothing other than a delay tactic or a tactic to frustrate the prosecution of the appeal. Further, the compelling of a witness for the purposes of fishing for information on speculation that it may have some ultimate bearing on an argument is not sufficient reason to compel the calling of a witness. These considerations are dealt with in Justice Webb's decision referred to above and other authorities cited by Respondent's counsel.

[21] In *Obonsawin*, Justice Webb considered the question of quashing a subpoena. He referred to the case of *Zündel (Re)*,[2] which set out grounds for quashing a subpoena. Questions to be asked must concern whether the evidence from the witness subpoenaed is relevant and significant in regard to the issues the Court must decide. It is said that Courts should not allow subpoenaing of witnesses that are merely reflective of fishing expeditions. Further, it is not sufficient for the party

[2] 2004 FC 798.

calling the witness to simply state that the witness might have material evidence. Rather, the party has to establish that it is likely that the witness would give material evidence.

[22] Justice Webb also refers to the difference between questions of law and questions of fact. In this regard, it would be necessary to determine whether there would be any basis to suggest that Ms. Mohamed could provide any testimony that bears to the calculations made by the Minister of National Revenue in determining the correctness of the assessments. The basis of those actual assessments would be in the knowledge of the CRA, and even if they were based on false returns prepared by someone other than the Appellant or without his input, I am not satisfied that Ms. Mohamed would have anything relevant to say about those returns. The hearing of appeals before this Court pursuant to section 169 of the *Income Tax Act*, relate to determining the correctness of the assessment and not, generally, the process by which it came to be. How the CRA got the information in order to make the calculation it made in making the assessment is not a subject over which this Court would generally have jurisdiction.

[23] Lastly, I note that Justice Webb, referring to *R. v. Harris*[3] stated that the burden was on the parties seeking to impose a subpoena to establish that it was likely or would probably give rise to evidence material to the issues raised. I would add to that, that the burden is on the Appellant in this case to establish that the evidence would relate to matters within the jurisdiction of this Court. I am not satisfied that the Appellant has satisfied either of these requirements. It strikes me as more likely than not that requiring Ms. Mohamed to appear would constitute an abuse of process.[4]

---

[3] [1994] O.J. No. 1875 (Ont. C.A.).

[4] I note here that Respondent's counsel suggested the possibility that evidence of someone with information of the sort Mr. Lee was fishing for could bear on the question of penalties which were also assessed and are at issue in these appeals. I commend Mr. Prevost for reflecting on such possibility given that Mr. Lee is self-represented and thereby possibly unable to assert any relevant aspect of the evidence he hopes to obtain. However, the question of penalties arises from failures to report or supplying wrong information. The information return that Mr. Lee wants to cast doubt on is the one that he asserts purported to falsely increase his income. His task is to establish what the right information is. If that gives rise to less income than that "reported" on returns used by the CRA, it strikes me that there would be no basis to impose penalties for returns that overstated income, whether they were forged returns or not. In any event, in respect of penalties, the Crown has the burden of proof not the Appellant.

[24] At the risk of being somewhat repetitive, I still ask myself: "What information is it that the Appellant wants to obtain from Ms. Mohamed that is relevant to the appeal before this Court?" The reassessment referred to in the Reply to the Notice of Appeal asserted unreported real estate commissions and disallowed expenses.[5] The Appellant has the task of showing the asserted amounts earned were not earned by him and that the expenses were incurred to earn income. Who the CRA relied on for information relating to the assessment might be gotten from a CRA officer and even then the relevance of that information is likely none at all. What is relevant to this Court is information directly related to amounts properly reportable as income, not where asserted wrong information came from. The Appellant just has to bring evidence of the amount he actually earned. That is his task. It is not his task to uncover an informer who may have provided false information. That is the fishing trip that the Appellant is on. He has a burden to discharge in this preliminary matter and that is to satisfy me that Ms. Mohamed likely has evidence material to his appeals. The Appellant has failed to satisfy this burden in this case. The subject subpoena is therefore quashed.

[25] The question now arises as to whether I should include in my Order a direction that no further subpoenas be issued by the Court at Mr. Lee's request that would seek to compel Ms. Mohamed to appear at any hearing of these appeals without prior Court approval. The matter is *res judicata* as far as I am concerned and I fear, as well, that Mr. Lee's determination to bring her forward stems from an attitude and mindset that smacks of being vexatious. Still, I cannot purport to tie the hands of another judge by finding a proceeding that is yet to happen, as being *res judicata*. Accordingly, direction will be given to the Court either not to issue blank subpoenas or to ensure in some other manner or by some other means that a subpoena against Ms. Mohamed shall not be effectively served without a prior Court order.

[26] With respect to the conduct of the hearing itself, as I said, it is adjourned *sine die*.

[27] Respondent's counsel has acknowledged that the criminal prosecution of the Appellant in respect of matters relating to subject years for the tax owing in those years is still before the Courts. He was convicted at the criminal trial and the

[5] If the criminal convictions stand up, I do not believe there could be a question that the assumptions of unreported income and the personal nature of the expenses incurred would be sufficient to place a burden on the Appellant to disprove. This does not suggest that the issue of the correctness of the assessments is *res judicata* or issue estopped. That is a different issue that the Respondent has not asserted.

conviction was upheld by the Court of Appeal but an application for leave to appeal to the Supreme Court of Canada has been filed. Accordingly, it is not in accordance with the longstanding practices of the CRA and this Court to proceed with the civil matter until the criminal matters have been finally disposed of. Accordingly, I will direct that the Respondent advise this Court as to the status of this matter once the Supreme Court of Canada has ruled on the leave application.

Signed at Ottawa, Canada this 6th day of July 2011.

"J.E. Hershfield"

Hershfield J.

CITATION:	2011 TCC 337
COURT FILE NO.:	2009-177(IT)G
STYLE OF CAUSE:	BRADMAN LEE AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 29, 2011
REASONS FOR ORDER BY:	The Honourable Justice J.E. Hershfield
DATE OF ORDER:	July 6, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Darren Prevost

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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