

Date: 20080508

Docket: A-378-07

Citation: 2008 FCA 177

**CORAM: LINDEN J.A.
NOËL J.A.
RYER J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

**JEFFREY SACKMAN
AND ARTISTIC IDEAS INC.**

Respondents

Heard at Toronto, Ontario, on May 6, 2008.

Judgment delivered at Toronto, Ontario, on May 8, 2008.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**LINDEN J.A.
RYER J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Bowman C.J., which, *inter alia*, dismissed the Crown's motion for permission to examine for discovery a representative of a third party, Artistic Ideas Inc. ("Artistic"), pursuant to section 99 of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688, as amended (the "Tax Court Rules"). The motion sought leave to examine a knowledgeable nominee of Artistic on a wide variety of questions – 86 in total – having to do with the art donation program through which the respondent, Jeffrey Sackman, purchased art and made the charitable donations that are in issue in the main appeal.

[2] In challenging Bowman C.J.'s refusal to grant leave, the Crown has departed significantly from the motion as it was originally presented. It now proposes to limit the scope of the examination which it wishes to conduct to a single issue, thereby reducing the number of questions which it seeks to explore from 86 to 6.

RELEVANT FACTS

[3] Artistic ran an art donation program whereby individual taxpayers, described as "investors" would purchase prints in bulk for a low price. Commencing in 1998, Artistic offered these investors groups of 11 prints, appraised at a value of at least \$1000, for \$3,500. The investors would then donate 10 of the 11 prints and receive a tax receipt of \$10,000. Using the Ontario and federal tax rates, each investor was said to achieve tax savings of \$5,029 on a \$3,500 investment. Through its program, Artistic acted as agent for the investors in acquiring the prints from one of two vendors – Coleman Fine Arts Inc. and later in 2000, Silver Fine Arts Ltd - and finding one or more charities to accept donations and issue charitable receipts.

[4] Jeffrey Sackman bought several groups of prints and donated a total of 447 prints in 2000 through Artistic's art donation program. For the 2000 taxation year, he reported total charitable gifts of \$802,031 and claimed the corresponding tax credit (Appellant's Memorandum, para. 7).

[5] The Minister of National Revenue (the "Minister") reassessed Mr. Sackman for the 2000 taxation year on the basis that the fair market value of the prints donated could not exceed the amount he paid for them. As Mr. Sackman produced no evidence of payment, the Minister

assumed that the cost of the prints, and consequently their fair market value, was nil. The Minister nevertheless conceded that the prints must have had some value. Mr. Sackman appealed this reassessment and the main issue before the Tax Court in the appeal (the “Sackman Appeal”) concerns the fair market value of the donated prints. Artistic, although it appears as a respondent in the present appeal, is not a party to the Sackman Appeal. [Artistic is currently awaiting a decision of the Tax Court on an appeal from a notice of assessment for Goods and Services Tax (the “G.S.T. appeal”). As part of the G.S.T. appeal, a representative of Artistic, Mark Pearlman, was examined and cross-examined for discovery.]

[6] This Court has twice considered similar appeals involving the fair market value of prints purchased and donated by taxpayers through promoters such as Artistic (see *Klotz v. Canada*, 2004 TCC 147, aff’d in *Klotz v. Canada*, 2005 FCA 158 (“*Klotz*”) and *Nash v. Canada*, 2005 FCA 386 (“*Nash*”). In both cases, the determination of the fair market value for the prints was based on evidence establishing the volume and details of the transactions by the promoters.

[7] In August of 2004, several years prior to the commencement of the examinations for discovery in the Sackman Appeal, the Crown formally requested information and documents from Artistic. Artistic advised that the request was inappropriate and refused to respond (Tringali Affidavit, No.2, paras. 18-20 and Exhibits “B”, “C” and “D” thereto, Appeal Book, Vol. I. Tab 6, p.77).

[8] During the examination for discovery of Mr. Sackman, the Crown asked for information concerning Artistic's art donation program, including whether Mr. Sackman would undertake to make inquiries of Artistic about the prints sold and donated through the program. Some of the questions were directed at establishing the volume and details of the transactions in the Artistic's art donation program in order to determine the market created by the donation program and the fair market value of the prints. Mr. Sackman refused to make the requested undertakings. He also refused to admit the accuracy of certain facts contained in a report (the "Navigant Report") prepared for the Crown regarding certain of the transactions in Artistic's art donation program.

[9] Subsequently, on February 13, 2007, the Crown wrote to Artistic's counsel and again requested the information and documents. A list of 86 questions subdivided under a number of topics was attached as Schedule A to the letter (Exhibit "G" of Tringali Affidavit No.2, Appeal Book, Vol.1, Tab 6(g), p. 160). The Crown also asked whether Artistic would consent to an order for third-party discovery. Artistic refused to answer the Crown's questions or consent to an order for third-party discovery.

[10] In light of Mr. Sackman's refusal to make inquiries and Artistic's refusal to informally provide information and documents, the Crown brought a motion under rule 99 of the *Tax Court Rules*, for leave to examine Artistic for discovery as a non-party through a knowledgeable nominee with respect to the 86 questions which Artistic had refused to respond to (the questions are set out at Appendix A of the decision under review). Rule 99 provides:

99. (1) The Court may grant leave, on **99.** (1) La Cour peut accorder, à des

such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the appeal, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.

(2) Leave under subsection (1) shall not be granted unless the Court is satisfied that,

(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person sought to be examined,

(b) it would be unfair to require the moving party to proceed to hearing without having the opportunity of examining the person, and

(c) the examination will not,

(i) unduly delay the commencement of the hearing of the proceeding,

(ii) entail unreasonable expense for other parties, or

(iii) result in unfairness to the person the moving party seeks to examine.

(3) A party who examines a person orally under this section shall, if requested, serve any party who attended or was represented on the examination with the transcript free of charge, unless the Court directs otherwise.

conditions appropriées, notamment quant aux dépens, l'autorisation d'interroger au préalable une personne, à l'exception d'un expert engagé en prévision d'un litige ou en instance par une partie, ou en son nom, si elle a des raisons de croire que cette personne possède des renseignements pertinents sur une question importante en litige.

(2) La Cour n'accorde l'autorisation selon le paragraphe (1) que si elle est convaincue :

a) que le requérant n'a pas été en mesure d'obtenir ce renseignement de l'une des personnes qu'il a le droit d'interroger au préalable ou de la personne qu'il désire interroger;

b) qu'il est injuste d'exiger que l'instance soit instruite sans que le requérant de la requête ait la possibilité d'interroger cette personne;

c) que l'interrogatoire n'aura pas pour effet, selon le cas :

(i) de retarder indûment le début de l'instruction de l'instance,

(ii) d'entraîner des dépenses injustifiées pour les autres parties,

(iii) de causer une injustice à la personne que le requérant désire interroger.

(3) Sauf directive contraire de la Cour, la partie qui interroge oralement une personne en application du présent article signifie, sur demande, une transcription gratuite de l'interrogatoire à toute partie qui y a assisté ou qui s'y est fait représenter.

(4) The examining party is not entitled to recover the costs of the examination from another party unless the Court expressly directs otherwise.

(5) The evidence of a person examined under this section may not be read into evidence at the hearing under subsection 100(1).

(4) Sauf directive expresse contraire de la Cour, la partie interrogatrice n'a pas le droit de recouvrer d'une autre partie les dépens de l'interrogatoire.

(5) La déposition d'une personne interrogée en application du présent article ne peut être consignée en preuve à l'audience aux fins du paragraphe 100(1).

[11] The motions judge denied the Crown's motion on the basis that the 86 questions with respect to which discovery was being sought were oppressive, excessive and aimed at the improper purpose of impeaching Mr. Pearlman.

POSITION OF THE PARTIES

[12] On appeal, the Crown has narrowed down the questions with respect to which it seeks to examine Artistic from 86 to 6. Those which remain in issue are questions 41-44; 46 and 49, as summarized at paragraph 22 of the Crown's memorandum:

- **Composition of Groups:** A listing of the composition of the groups of prints and the number of each particular group sold in 1998, 1999 and 2000.
- **Dates of Sale and Donation and Prices Paid:** A listing by name of donor showing the date of purchase, the number of groups purchased, the price paid per groups and the date of the gift for 1998, 1999 and 2000.
- **Details by Donor:** A report for each donor showing the print titles acquired and charity selected for 1998, 1999 and 2000.
- **Details by Title:** A report by print title showing the names of the donors and the number of each title purchased for 1998, 1999 and 2000.
- **Details by Charity:** A report by charity showing the print titles and number of each title donated for 1998, 1999 and 2000.

- If Artistic cannot provide the above reports, what reports can be generated?

[13] These questions are aimed at identifying the precise market into which the prints were sold with a view of establishing their fair market value. The position of the Crown, as I understand it, is that having regard to the 6 questions which they wish to pursue and their limited scope, all the conditions precedent for ordering a third party discovery under subsection 99(1) of the Tax Court Rules are met and the concerns raised by Bowman C.J. in dismissing the original application are no longer present.

[14] In response, both Mr. Sackman and Artistic take the position that there was nothing in the original 86 questions that can assist the Crown in advancing its case and that the information sought was already in the possession of the Minister. Otherwise, they contend that Bowman C.J. properly dismissed the Crown's application for the reasons that he gave.

ANALYSIS AND DECISION

[15] The gist of the reasoning of Bowman C.J. for rejecting the appellant's motion as it was originally framed is as follows:

[24] On February 3, 2007, counsel for the respondent wrote to the solicitors for the appellant asking that Artistic provide answers to 86 questions which are attached as Schedule A to the letter. That schedule is attached as Appendix A. These are the questions that the Crown wants to put to the representative of Artistic. That representative (Mark Pearlman) has already been examined and cross-examined in Artistic's own appeal to the Tax Court of Canada [the G.S.T. appeal]. The transcript of a third party's examination cannot be used at trial in the same way as the discovery of a party is used. The questions have to do with the promotional activity of Artistic in selling the program. It may be that the Crown wants to have the transcript of the representative of Artistic on the off chance that he is called as a

witness. The transcript might be useful as a means of impeaching him. This is not a proper use of section 99. There is absolutely nothing in the questions in Appendix A that can assist in determining fmv. I regard the 86 questions in Schedule A as a case of overkill.

[16] I believe it can safely be said that in rejecting the appellant's motion, Bowman C.J. was not putting his mind to the issue as it is now presented before us. His assessment of the 86 questions placed before him is that they had to do with Artistic's promotional activities. I do not dispute this general assessment. However, the six questions now being pursued, when looked upon on their own, do not come within that description. When regard is had to the remaining questions and the information that they seek, the Crown's motion can no longer be labelled as a case of "overkill".

[17] The first question to address on a motion under subsection 99(1) of the *Tax Court Rules* is relevance. In this respect, there is no doubt that the information sought by the six questions is relevant to the determination of the market in which the artwork (i.e., the group of prints) is sold for the purpose of determining its fair market value (*Klotz, supra; Nash, supra*). To the extent that Bowman C.J. held otherwise, he was in error.

[18] The second issue is whether the moving party has established that the information sought cannot otherwise be obtained either from persons whom it is entitled to examine for discovery, or from the person sought to be examined. In this respect, neither Mr. Sackman nor Artistic question the Crown's allegation that they have both refused, and continue to refuse, to provide the information sought. Furthermore, given that Artistic is not willing to confirm the accuracy of the facts underlying the Navigant Report, there is no basis for the respondents' assertion that the Crown already has the information being sought.

[19] As to the third issue, an argument can be made that the Crown can defend its case on the basis of the fair market value of the artwork that it has so far assumed and that accordingly, no unfairness would result from the fact that the Crown is not in a position to establish a more precise valuation. However, the Crown, like the respondent, is entitled to put its best foot forward in this litigation and to the extent that it needs information from Artistic in order to place a more accurate figure on the value of the artwork, it should have access to it before trial.

[20] Counsel for Artistic further argued that granting the motion would create unfairness for its client. In support of this contention, counsel expressed the concern that the information sought could be used against Artistic in the G.S.T. appeal before the Tax Court. In so stating, counsel recognized that the G.S.T. appeal has now been heard and that the matter is under advisement, so that there is no longer any practical likelihood of prejudice. However, counsel argues that in the event of an appeal, additional evidence can exceptionally be admitted. He adds that in some instances, matters are remitted back by the Court of Appeal, with directions that new evidence be allowed. That is the context in which counsel claims that the examination sought could be prejudicial and hence unfair, to his client.

[21] The concern so expressed is based on an unlikely scenario that is far too speculative to support a conclusion of unfairness. Furthermore, the argument ignores the implied undertaking imposed on parties to a civil litigation not to use answers obtained for any other purpose than securing justice in the proceeding in which the answers were compelled (*Juman v. Doucette*, [2008] S.C.J. No. 8, para. 27). I should add that it is difficult to see how the information being sought,

which pertains to the identification of the market into which the artwork was sold, could be relevant to the G.S.T. appeal as it was described to this Court.

[22] Finally, counsel for Artistic argued that responding to the questions would entail unreasonable expenses. These expenses were estimated at \$15,000 before Bowman C.J. at a time when 86 questions were in play. Counsel for the Crown has reiterated his undertaking to reimburse Artistic for reasonable counsel fees up to \$10,000. Given the limited number of questions which are outstanding, this is sufficient to address Artistic's costs concerns.

[23] For these reasons, I would allow the appeal, set aside the decision of Bowman C.J., insofar as the six questions set out in paragraph 12 above are concerned, and giving the decision which ought to have been given, I would issue an order granting the Crown leave to examine a knowledgeable nominee of Artistic as a third party so that the Crown can obtain an answer to the said questions. The Crown should have its costs against both respondents.

“Marc Noël”

J.A.

“I agree

A.M. Linden”

J.A.

“I agree

C. Michael Ryer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-378-07

(APPEAL FROM AN ORDER OF BOWMAN C.J. OF TAX COURT OF CANADA DATED AUGUST 17, 2007, AND SUBSTITUTED BY AMENDED ORDER DATED AUGUST 27, 2007, IN TAX COURT FILE NO 2002-4824(IT)G).

STYLE OF CAUSE: Her Majesty the Queen v.
Jeffrey Sackman and Artistic
Ideas Inc.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 6, 2008

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Linden J.A.
Ryer J.A.

DATED: May 8, 2008

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