

Date: 20080212

Docket: T-699-06

Citation: 2008 FC 177

Ottawa, Ontario, February 12, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**HARI S. NESATHURAI AND
1322901 ONTARIO LIMITED**

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an application by a tax lawyer and the corporation responsible for the management aspects of his law practice to cancel or vary Requests for Information (RFIs) issued by the Minister of National Revenue (MNR) under s. 289(1) of the *Excise Tax Act* (ETA).

[2] In *Canada (Minister of National Revenue – M.N.R.) v. Welton Parent Inc.*, 2006 FC 67, another case involving a challenge to RFIs in which Mr. Nesathurai was also involved, Justice Gauthier held that similar, if not identical, records to the ones at issue in this case were covered by solicitor-client privilege. Welton Parent Inc. was the actuarial company retained by Nesathurai. The RFIs are now directed at Nesathurai and his management company rather than the actuarial firm.

II. BACKGROUND

[3] The Applicant, 1322901 Ontario Ltd. (the management company), applied for a GST refund. This request triggered a desk audit which turned into a more complete audit.

[4] Canada Customs and Revenue Agency (now known as CRA) requested a number of documents from Nesathurai's accountant. In response, the Applicants supplied certain information but redacted Nesathurai's client information.

[5] On June 15, 2004, the Minister issued RFIs (the 2004 RFIs) to the Applicants requesting:

- all electronic records created, maintained or updated using the PC Law software program;
- all billings to clients in the relevant years (2001-2003);
- all bank statements and cancelled cheques for all bank accounts; and
- income statements for the relevant years.

[6] The Applicants asserted a claim of privilege in respect of electronic and billing records as they pertained to clients and the advice they were seeking and had been given. Nesathurai forwarded his personal bank records as covered by the RFIs but the Applicants otherwise maintained that all other business records had previously been provided. The correspondence in regards to the 2004 RFIs seems to have ended in December 2004.

[7] On February 28, 2006, the Minister issued a second set of RFIs (the 2006 RFIs) on the grounds that the response to the 2004 RFIs was not responsive. In large measure, the 2006 RFIs mirrored the ones from 2004.

[8] Nesathurai had sought the advice of the Law Society of Upper Canada before first asserting the clients' privilege. He had also received instructions from the clients to assert this privilege.

[9] The Minister's actions in issuing the sets of RFIs must be viewed in context. Nesathurai is a lawyer practising in the tax field. He (along with other lawyers) had been "promoting" to employers tax-advantageous offshore "health and welfare trusts" for the benefit of their employees.

[10] In the *Welton Parent* case, CRA was aware that Welton Parent had provided valuations for these trusts to three lawyers, including Nesathurai. In fact, Welton Parent's work was to communicate with the lawyers, not the employer-clients. CRA issued RFIs which had as their aim to obtain information concerning the lawyer's clients by means of obtaining Welton Parent's records.

[11] Justice Gauthier found, among other matters, that the information sought in respect of the lawyers' clients was covered by solicitor-client privilege. Following the *Welton Parent* decision, CRA issued the 2006 RFIs against Nesathurai and the management company. The client information sought, if not precisely the same as in *Welton Parent* (because of issues of timing), was of exactly the same nature and type.

[12] The Applicants, in this judicial review, raise a number of issues beyond that of solicitor-client privilege. These include whether the RFIs were issued for a proper purpose; the significance of a two-year delay in responding to the Applicants' submissions; whether the Minister can continually issue RFIs; the obligation on CRA officials to review the materials filed with them; and the delay in payment of the GST refund.

[13] This judicial review can be resolved to the greatest extent by the conclusion as to whether the information outstanding is subject to solicitor-client privilege.

III. ANALYSIS

[14] On the principal issue of solicitor-client privilege, it is my view that the principle of issue estoppel ought to be applied.

[15] Issue estoppel is available where (1) the same question has been decided in another proceeding, (2) the judgment said to create the estoppel is final, and (3) the parties to the judgment

and their privies are the same parties or their privies to the proceedings in which the estoppel is being raised.

[16] In addition to determining whether the three conditions have been met, the Court must exercise its discretion as to whether issue estoppel ought to be applied.

[17] The critical issue is whether the same question in this case has been decided in Justice Gauthier's judgment. As to the other two conditions, I note that Justice Gauthier's judgment has not been appealed. Furthermore, there is sufficient connection between the Applicants (particularly Nesathurai) and Welton Parent Inc. to make them privies. I base this conclusion on the fact that Welton Parent Inc. was retained by Nesathurai to provide expert actuarial assistance on a specific issue that Nesathurai, as counsel, was advising upon in a broader context. Welton Parent Inc. was provided with client information for the purpose of assisting counsel and Welton Parent Inc. brought its litigation to protect solicitor-client privilege on behalf of Nesathurai as instructed by Nesathurai's clients.

[18] The facts leading to Justice Gauthier's conclusion are summarized as follows:

- CRA was conducting audits for the taxation years of 1997 to 2003 inclusive of various unnamed Canadian employers who claimed expenses for salaries and wages incurred in respect of contributions to what they claim to be offshore "health and welfare trusts" (Plans) for the benefit of their employees;

- CRA found an actuarial valuation prepared by Welton Parent Inc. and was aware that Welton Parent Inc. was providing such valuations to three lawyers in Ottawa, including Nesathurai;
- the lawyers were retained by the unnamed taxpayers to provide legal advice;
- Welton Parent Inc. did not deal directly with the clients, but was retained by the lawyers to perform actuarial valuations of the liabilities and funding requirements of their Plans and to make recommendations based on each employer's ability to pay;
- Welton Parent Inc. was not serving as a channel of communication between the three lawyers involved and their clients and it never communicated with anybody other than the lawyers;
- the RFI originally authorized by Justice Gauthier sought from Welton Parent Inc. the names of the unnamed employers contained in its files;
- when the RFI was delivered to Welton Parent Inc., it immediately contacted the three lawyers, who in turn sought to obtain instructions from the unnamed employers as to whether or not they were authorized to waive solicitor-client privilege, with respect to their names and the other information in the files of Welton Parent Inc.; and
- the lawyers were instructed to file the motion to preserve privilege and they did so through Welton Parent Inc.

[19] Justice Gauthier then reviewed in detail the legislation and authorities on the issue of solicitor-client privilege, particularly as it applied to bills of accounts. On the facts before her, Justice Gauthier concluded that the disclosure of the names and addresses of employers would disclose sufficient information about the legal advice itself. This finding turned on the circumstances of the work being done and the type of Plans being established by counsel.

[20] In the case at bar, the only difference in the information sought is the source, not the contents. In Justice Gauthier's case, the information had been supplied to Welton Parent Inc. by counsel and CRA had pursued the agent of counsel for that information. Here, CRA went directly to counsel for the same information.

[21] This change in the person subject to the RFI does not change the legal quality of the information itself – it remains covered by solicitor-client privilege.

[22] Although it is not absolutely clear that the same clients who were being audited in *Welton Parent* (for the taxation years 1997-2003) would necessarily be the same clients affected by the audit in this case (for the taxation years 2001-2003), it is evident that there is significant overlap and that the nature of the information and the legal relationships are the same.

[23] I do not see a conflict between Justice Gauthier's decision and that of Justice Snider in *Canada (Minister of National Revenue – M.N.R.) v. Cornfield*, 2007 FC 436, that accounting records are not subject to solicitor-client privilege. The distinction between the cases is on the facts.

Accounting records may, but do not necessarily, contain solicitor-client information – it depends on the contents of the records or other circumstances relevant to disclosure of a privilege.

[24] Having concluded that issue estoppel arises in this case, the Court must consider whether the application of the principle would work an injustice. In my view, it would not. Indeed, to not allow the principle to operate would create an injustice.

[25] The Court is struck by the proximity of time of the *Welton Parent* decision denying information from Nesathurai's agent for actuarial advice and the RFIs which seek to obtain essentially the same type of information from the principal.

[26] Most importantly, the clients were entitled to have their information protected. In the event of doubt, the Court should err on the side of protecting the privilege.

[27] Even if issue estoppel did not apply, on the facts of this case, I would have concluded that the privilege exists for largely the same reasons as Justice Gauthier.

[28] I would note, however, that the procedure followed by CRA did not permit a Court review of the documents by way of a confidential proceeding where the records are sealed before this Court.

[29] As to the other issues in this matter, I do not intend to deal with them as I have concluded that the RFIs cover solicitor-client information and I am not prepared to sever the offending parts of the RFI. However, I would note that I fail to see how it can be legitimate for CRA to demand documents which the Applicants say have been produced or do not exist just because CRA does not think the response is complete. The Minister has other remedies in such instances.

IV. CONCLUSION

[30] I will grant this judicial review and quash the RFIs without prejudice to the Respondent to serve new RFIs without the requirement to produce privileged materials. If there is anything to be seriously re-litigated, it can be done without the distraction of the issue of privilege.

[31] I am not prepared to order solicitor-client costs at this juncture, although it is arguably appropriate given the timing of the RFIs and the other concerns noted above.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted and the RFIs quashed without prejudice to the Respondent to serve new RFIs without the requirement to produce privileged materials.

“Michael L. Phelan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-699-06

STYLE OF CAUSE: HARA S. NESATHURAI AND
1322901 ONTARIO LIMITED

and

THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 15 and 16, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: February 12, 2008

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