Federal Court of Appeal  Cour d'appel fédérale

Date: 20150612

Docket: A-559-14

Citation: 2015 FCA 143

CORAM: **NOËL C.J.**
TRUDEL J.A.
RENNIE J.A.

BETWEEN:

CAMECO CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on June 1, 2015.

Judgment delivered at Ottawa, Ontario, on June 12, 2015.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: TRUDEL J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal from an interlocutory order of Pizzitelli J. of the Tax Court of Canada (the Tax Court judge) dismissing Cameco Corporation's (Cameco) motion to strike certain paragraphs from the Crown's Amended Reply to the Amended Notice of Appeal filed with respect to its 2003 taxation year and to have the Crown's nominee answer specified questions

arising during discovery. The Tax Court judge further ordered that Cameco pay the Crown's costs on a solicitor-client basis.

[2] The hearing of the appeal was expedited on Cameco's motion because of the commercial uncertainty which results from the monetary importance of the underlying reassessment – some 43 million dollars in additional income – and its impact for subsequent taxation years which are proposed to be reassessed on the same basis.

[3] In support of its appeal, Cameco contends that the Crown cannot invoke paragraph 247(2)(*a*) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the Act) in its Amended Reply without providing a factual basis for its reliance on this provision. It further submits that it is entitled to know the factual basis on which the sham doctrine is invoked. In both cases, Cameco argues that the Tax Court judge erred in holding that the answers given in the course of the examination on discovery allow it to know the case which it has to meet. Regardless of the outcome of the appeal, Cameco contends that there was no basis for an award of solicitor-client costs against it.

[4] The relevant provisions of the Act and the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the Rules) are appended to these reasons.

BACKGROUND

[5] Cameco is a Canadian resident corporation and one of the world's largest producers of uranium. In 1999, Cameco's Swiss subsidiary, Cameco Europe Ltd. (CEL), was established to

purchase uranium both from Cameco and from arm's length sellers located in countries other than Canada, and to sell uranium to Cameco's United States subsidiary for resale to purchasers located in countries other than Canada. For income tax purposes, Cameco and its subsidiaries are deemed not to deal with one another at arm's length (paragraphs 251(1)(*a*) and 251(2)(*b*) of the Act).

[6] Cameco characterizes CEL as an aggregator and its U.S. subsidiary as a distributor and marketer (Amended Notice of Appeal at para. 8, Appeal Book, Vol. I, Tab 6D). The Crown disagrees with this characterization (Amended Reply at para. 5, Appeal Book, Vol. I, Tab 6E). Specifically, the Crown contends that the purpose of the 1999 restructuring was to reduce Cameco's Canadian income taxes in circumstances where Cameco continued to make all decisions, perform all functions, and assume all risks related to the uranium business – effectively treating the business as its own (Crown's Memorandum at para. 6(b)).

[7] The underlying reassessment was issued pursuant to paragraphs 247(2)(*a*) and (*c*) of the Act. The Minister of National Revenue (the Minister), relied on these provisions to attribute to Cameco all of the revenue generated by CEL for the 2003 taxation year.

[8] Subsection 247(2) sets out two bases for modifying the tax consequences where non-arm's length parties transact. The first is by relying on the terms and conditions on which arm's length parties would have transacted (paragraph 247(2)(*a*)); and the second is by demonstrating that arm's length parties would not have entered into the transaction in issue (paragraph

247(2)(*b*)). Paragraph 247(2)(*c*) provides for consequential adjustments where "only" paragraph 247(2)(*a*) applies and paragraph 247(2)(*d*) does the same where paragraph 247(2)(*b*) applies.

[9] Further details about the Crown's position in defending the aforesaid reassessment were provided in the Reply and the Amended Reply filed before the Tax Court. The Crown's pleadings reveal that both branches of subsection 247(2) are relied upon as well as subsection 56(2). The CEL structure is further alleged to be a sham intended to conceal the fact that all income earning activities were performed by Cameco.

[10] This is not the first time that the Crown's pleadings are challenged in this case. The Crown's original Reply contained two factual assumptions which were intended to bring into play paragraph 247(2)(*a*). They read:

> 14(bbb) the transfer prices for uranium on the sales by [Cameco] to [CEL] and the purchases by [Cameco] from [CEL] were not consistent with an arm's length price;
>
> 14(fff) the terms and conditions made or imposed in respect of the sale and purchase of uranium between [Cameco] and [CEL] differ from those that would have been made between persons dealing at arm's length.

[11] As the Tax Court judge recounts (Reasons at paras. 7 to 9), Chief Justice Rip, as he then was, struck both of these paragraphs with leave to amend some years ago (2010 TCC 636). His reasons for doing so are as follows (*idem* at paras. 48 and 49):

> [48] Subject Paragraph 14(bbb) is another key allegation in this appeal alleging that the transfer prices on the sales and purchases in issue were not consistent with an arm's length price. [Cameco] is entitled to know what prices are consistent with an arm's length price to the extent that such prices cannot be determined by reference to the amount of tax assessed. This paragraph will be struck with leave to amend.

> [49] Subject Paragraphs 14(fff), (ggg) and (jjj) will be struck with leave to amend. The contents of these paragraphs are mixed fact and conclusions of law, in particular a paraphrase of paragraph 247(2)(*a*) of the Act.

[12] The Crown filed an Amended Reply. However, the wording proposed was identical to the paragraphs struck. The matter came back before Chief Justice Rip who again, on July 29, 2011, ordered these paragraphs struck (2011 TCC 356 at paras. 20 and 23):

> [20] Subparagraph 14(bbb) was ordered struck from the [R]eply because [Cameco] was entitled to know how the prices for uranium transferred between [Cameco] and [CEL] differed from those that would have been agreed upon by arm's length parties. … once the Minister assumed that the transfer prices for uranium contracts differed from those that would have been made between persons dealing at arm's length, [Cameco] was entitled to know exactly how they differed. In principle, this may apply to subparagraph 14(fff) of the [R]eply as well.
>
> …
>
> [23] When a court orders a provision of a pleading to be struck the provision in question must be struck. If leave to amend is granted, the struck provisions may be replaced by amendment. In principle, leave to amend does not anticipate the struck provisions will remain in the pleadings even if, on amendment, further provisions are inserted to clarify or address the concerns of the Court in the first place. …

[13] Also contained in the Amended Reply but not referred to by Chief Justice Rip are the four paragraphs which form the subject matter of the present appeal (the Paragraph 247(2)(*a*) Statements). They read (Reasons at para. 3):

> **C. ISSUES TO BE DECIDED**
>
> 31. The issues to be determined in respect of transactions or series of transactions or arrangements described in paragraphs 14 and 17 are:
>
> a) whether the provisions of paragraphs 247(2)(*a*) and (*c*) apply to the said transactions; …

D. STATUTORY PROVISIONS, GROUNDS RELIED ON, AND RELIEF SOUGHT

36. [The Deputy Attorney General of Canada] respectfully submits that the terms or conditions made or imposed in respect of the sale and purchase of uranium between [Cameco] and [CEL] and the services to be provided by [Cameco] to [CEL] in respect of the Mining Agreements differed from those that would have been made between persons dealing at arm's length within the meaning of paragraph 247(2)(*a*) of the [Act]. [Cameco] performed all the functions and undertook all the risks and [CEL] undertook no functions and assumed no risks. Arm's length parties, in such circumstances, would give [CEL] negligible or nil consideration and provide [Cameco] with all the income, commensurate with each parties' functions and risks in the transactions. The Minister properly reassessed as such by adding all of [CEL]'s profits into [Cameco]'s income pursuant to paragraph 247(2)(*c*) of the [Act].

37. He further submits that with respect to Tenex, Urenco and other transactions with third parties whereby [CEL] executed contract(s) and /or amendment(s) or had them assigned to it by Luxco, [Cameco] guaranteed the performance and payment by [CEL] for a guarantee fee, created a Service Agreement whereby [Cameco] performed all substantive functions and all necessary functions, and undertook all the risks. The terms or conditions between [Cameco] and [CEL] in respect of those transactions differ from those that would have been made between persons dealing at arm's length within the meaning of paragraph 247(2)(*a*) of the [Act]. At arm's length, the terms and conditions would:

> a) reflect compensation to [CEL] only in respect of the functions and risks it undertook, which were limiting [sic] to executing contracts and maintaining [CEL] as a legal entity; and
>
> b) the party undertaking all the remaining functions and assuming all the risks would earn all the profits, either through the Guarantee Agreements and the Service Agreement or other arrangements.

38. Pursuant to paragraph 247(2)(*c*), the Minister properly reassessed in accordance with the terms and conditions that would exist between arm's length parties, namely all the profit would be earned by [Cameco] and [CEL] would not earn any profit.

[Emphasis added]

[14] During the examination on discovery of the Crown's nominee, Cameco attempted to elicit answers with respect to the above plea. Specifically, the Crown's nominee was asked to

state the terms and conditions according to which arm's length parties would have transacted for each transaction involving the purchase and sale of uranium.

[15] In the course of providing answers to follow-up undertakings, Cameco was advised by the Crown as follows (Reasons at para. 26):

> The Crown's primary position is [sic] in this appeal is that the structure is a sham. In the alternative, our position is that at arm's length, CEL … would not have been a party to these transactions as CEL did not perform any functions nor did it assume any risks. An arm's length party would not have entered into these series of transactions with CEL in these economic circumstances. An arm's length party would not have paid anything to CEL as CEL did not contribute anything of value to the series of transactions. At arm's length, [Cameco] would be a party to all transactions where CEL (or CSA) were signatories and CEL's compensation, if any, would be commensurate with the minimal functions it performed.
>
> [Emphasis added]

[16] Also provided as a follow-up answer by letter dated November 18, 2014 were the following clarifications which the Crown highlights at paragraph 17 of its Memorandum of Fact and Law (Appeal Book, Vol. II, Tab 9):

> … the Minister determined that at arm's length, [CEL] would not receive any profit. From this conclusion, a price for uranium can be calculated. The Minister concluded that the arm's length price for uranium was the price unrelated third parties paid Cameco … for the purchase of uranium and the price that [CEL] paid unrelated third parties for the purchase of uranium. In other words, the Minister assumed that the price the ultimate purchaser paid the Cameco Group was the arm's length price for uranium but that the Cameco Group was not allocating its profits in accordance with the arm's length principle.
>
> [Emphasis by the Crown]

[17] With respect to the sham theory, the Crown's nominee was asked to identify the factual basis on which it was alleged that the structure was a sham and specifically how the actual legal

relationship between CEL and Cameco differed from the written agreements which they had entered into (Reasons at para. 33).

[18] The answer given in each instance was that "[Cameco] treated CEL's business as its own" (Reasons at para. 33).

[19] Not satisfied by these answers. Cameco brought a motion seeking a variety of remedies (Reasons at para. 1). With respect to the Paragraph 247(2)(*a*) Statements, it took the position that the answer did not provide the information sought and that attempting to keep paragraphs 247(2)(*a*) and (*c*) in play without providing a factual basis for their application was contrary to the orders issued by Chief Justice Rip as well as scandalous, frivolous and vexatious pursuant to Rule 53 of the Rules. It asked that the Paragraph 247(2)(*a*) Statements be struck and that the Crown be precluded from relying on this provision. The motion also sought further and better answers to the questions relating to the sham theory.

DECISION UNDER APPEAL

[20] The Tax Court judge denied Cameco's motion and awarded costs on a solicitor-client basis. As to the Paragraph 247(2)(*a*) Statements, he found that the plea itself as well as the answer quoted at paragraph 15, above, could provide a sufficient factual basis for invoking paragraphs 247(2)(*a*) and (*c*) for a number of reasons.

[21] In his words, the Paragraph 247(2)(*a*) Statements "… clearly indicated that the arm's length price is 0" (Reasons at para. 12). Furthermore, (Reasons at para. 14):

> … [The Paragraph 247(2)(*a*) Statements] contain sufficient detail and information … for [Cameco] to know exactly the price [which the Crown considers] due in an arm's length situation, nil and thus allow [Cameco] to know and deal with it properly at trial. …

[22] He went on to add that the assumptions relied upon by the Minister support the Paragraph 247(2)(*a*) Statements that "[CEL] is in effect entitled to nil consideration in the transfer pricing regime" (Reasons at para. 18). Beyond this, the answer given (quoted at paragraph 16, above) could not be clearer (Reasons at para. 27):

> … The Question is answered and the answer, like in the Paragraph 247(2)(*a*) Statements [Cameco] sought to have struck, is nil. …

[23] Even if he had found that Chief Justice Rip's earlier striking orders had been directed at the Paragraph 247(2)(*a*) Statements, the Tax Court judge held that this last answer would have satisfied the earlier shortfalls. As the nil price could be a basis upon which the Crown can invoke the application of paragraph 247(2)(*a*), this plea has not been shown to be without any chance of success (Reasons at para. 27).

[24] Relying on the same reasoning and after noting that Cameco had failed to pursue less drastic remedies, the Tax Court judge held that there was no basis for precluding the Crown from disputing the price at which Cameco and CEL transacted pursuant to paragraphs 247(2)(*a*) and (*c*) (Reasons at para. 31).

[25] Finally, with respect to the sham allegation, the Tax Court judge held that the answer provided during discovery was adequate (Reasons at para. 39). He emphasized that the detailed assumptions relied upon by the Minister, while consistent with the transfer pricing argument,

also support the sham argument (Reasons at para. 40). According to the Tax Court judge, Cameco knows exactly the case which it has to meet on the sham theory (Reasons at para. 40).

POSITION OF THE PARTIES ON APPEAL

[26] With respect to the Paragraph 247(2)(*a*) Statements, Cameco submits that a nil price is not a basis on which this provision can be invoked. Paragraph 247(2)(*a*) envisages that arm's length parties in the same position as Cameco and CEL would have transacted and arm's length parties would not transact for a nil price (Cameco's Memorandum at paras. 39 and 54). The Crown's position that CEL was entitled to nothing is consistent with the application of paragraph 247(2)(*b*), but it cannot support the application of paragraph 247(2)(*a*) (*idem* at para. 51).

[27] The only basis for invoking paragraph 247(2)(*a*) is that CEL contributed something of value and was entitled to be compensated. While the Crown wants to preserve its reliance on that provision, it has steadfastly refused to state the arm's length price at which it believes Cameco and CEL ought to have transacted uranium (*idem* at paras. 54 and 55).

[28] According to Cameco, the procedural history shows that it has taken all reasonable steps to obtain this information, and the Tax Court judge acted unreasonably in holding that it ought to have undertaken further steps towards that end (*ibidem*).

[29] In short, Cameco submits that the Tax Court judge misapprehended the basis of its motion and misunderstood the substantive legal differences between the first and the second branch of subsection 247(2) (*idem* at para. 53). It asks that the Paragraph 247(2)(*a*) Statements

be struck and that the Crown be barred from relying on paragraph 247(2)(*a*) (*idem* at para. 68(c)). In the alternative, it asks that the Crown be given a last opportunity to provide timely and informative answers to the related questions put to the Crown's nominee on discovery (*idem* at para. 68(d)).

[30] As to the Tax Court judge's refusal to order further and better answers with respect to the sham allegation, Cameco essentially argues that it is entitled to responsive answers on all questions. Merely stating that "[Cameco] treated CEL's business as its own" is not a responsive answer (*idem* at para. 64). Again, it seeks an order compelling the Crown's nominee to provide further and better answers (*idem* at para. 68(e)).

[31] Finally, Cameco takes issue with the award of costs on a solicitor-client basis. It submits that such costs are only justified on the ground of reprehensible behaviour and that the record reveals no such misconduct on its part (*idem* at para. 67).

[32] The Crown for its part supports the conclusions reached by the Tax Court judge, including the award of costs, relying essentially on the reasons that he gave.

[33] As to the Paragraph 247(2)(*a*) Statements, the Crown adds that "[n]o court has determined where paragraphs 247(2)(*a*) and (*c*) end and paragraphs 247(2)(*b*) and (*d*) begin" (Crown's Memorandum at para. 19). It submits that the two provisions are not mutually exclusive and both can apply to the same set of facts, citing the decision of the Tax Court in

General Electric Canada v. The Queen, 2011 TCC 564 at paragraphs 87 and 88 [*General Electric*] (*ibidem*).

[34] It follows that a nil price, while consistent with the application of paragraph 247(2)(*b*), can also give rise to the application of paragraph 247(2)(*a*). The fact that the parties disagree on how these provisions work is an indication that they best be left for determination in the course of a full trial (*idem* at para. 20, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at paras. 18, 28 and 43 [*Hunt*] and *General Electric* at para. 94).

[35] The Crown therefore submits that the Tax Court judge properly found that the plea embodied by the Paragraph 247(2)(*a*) Statements has not been shown to be without any chance of success, and that a full and complete answer has been given to all related questions posed on discovery (*idem* at paras. 23-32).

[36] Finally, the Crown takes the position that the paragraphs 247(2)(*a*) and (*c*) questions which were put to its nominee on discovery have all been fully answered. In this respect, the Tax Court judge properly found that the answer given "clearly addressed the issue of price in all transactions" and that Cameco knows "exactly the price that the [Crown] feels [CEL] is entitled to in an arm's length situation" (*idem* at para. 38).

[37] As to the sham allegation, the Crown submits that all proper questions were answered and that the Tax Court judge has not been shown to have proceeded on improper principle or to have improperly exercised his discretion in coming to this conclusion (*idem* at paras. 42-45).

ANALYSIS

[38] A decision not to grant a motion to strike, or declining to order further and better answers is discretionary in nature. As to the former, the question which the Tax Court judge had to address is whether it is plain and obvious that the impugned plea cannot succeed. As to the latter, the question was whether the information disclosed by the Crown's pleadings and the answers given by its nominee on discovery allow Cameco to know the case which it has to meet.

[39] As this Court has recently held, discretionary decisions reached at the interlocutory stage ought henceforth to be reviewed within the general appellate framework set out in *Housen v. Nikolaisen*, 2002 SCC 33 [*Housen*] (*Imperial Manufacturing Group Inc. v. Décor Grates Incorporated*, 2015 FCA 100 at paras. 18 and 19). The two issues which the Tax Court judge had to address give rise to questions of mixed fact and law, and his decision can therefore only be set aside if he can be shown to have erred on an extricable question of law or if he committed a palpable and overriding factual error (*Housen* at para. 36).

[40] No authority need be given for the proposition that in an income tax appeal, the taxpayer like the Crown is entitled to know the facts on which the other party's positions rest. In order to invoke a provision of the Act or a jurisprudential theory in support of an assessment, the Crown must assume or have knowledge of facts which, if proven, are capable of giving rise to their application.

The sham allegation

[41] This question insofar as it relates to the sham allegation can be quickly resolved. The Crown has now disclosed through its nominee that its primary position rests on the theory that the CEL structure is a sham. As was observed by the Tax Court judge, the facts assumed in support of the transfer pricing adjustment, *i.e.* – that CEL did nothing, contributed nothing, assumed no risks and is therefore entitled to nothing – also support the sham allegation.

[42] I agree with the Tax Court judge that when regard is had to the assumed facts asserted in the Crown's Amended Reply, it cannot be said that Cameco is not in a position to know the case which it has to meet on this aspect of the case.

[43] The decision of the Tax Court in *Smartcentres Realty Inc. v. The Queen*, 2013-4468(IT)G, brought to our attention during the week prior to the hearing, is of no assistance to Cameco. The issue in that case was whether the Crown's sham allegation allowed the appellant to know the nature of the deception alleged. In the present case, there is no question that the alleged deception lies in the interposition of CEL in appearance only.

The Paragraph 247(2)(a) Statements

[44] The further question whether the Crown is entitled to rely on paragraph 247(2)(*a*), based on the facts stated to have been assumed in the Amended Reply and the nil price answer given on discovery, requires more elaboration.

[45] Although there appears to have been some confusion in this regard, the Crown's position is that CEL would not have been entitled, in an arm's length setting, to the amounts that it received, a fact which, in its view, gives rise to the application of paragraph 247(2)(*b*), but can also trigger the application of paragraph 247(2)(*a*).

[46] In response, Cameco contends that paragraphs 247(2)(*a*) and (*b*) envisage distinct situations and that only paragraph (*b*) can apply if CEL is shown to have been entitled to nothing. In order to trigger the application of the second branch of the test (paragraph 247(2)(*b*)), the Crown must advance facts – assumed or known – which are capable of showing that the transaction is such that arm's length parties would not have entered into it. In this case, however, the facts asserted by the Crown in support of the application of paragraph 247(2)(*a*) are to the same effect, *i.e.* Cameco performed all the functions and CEL is entitled to nothing. While these facts are consistent with the contention that an arm's length party in the place of Cameco would not have transacted with CEL, Cameco contends that they provide no basis for applying paragraph 247(2)(*a*). Specifically, arm's length parties would not transact if one of the parties contributes nothing.

[47] I agree that based on its wording paragraph 247(2)(*a*) would in the normal course envisage a transaction where something of value is contributed by both parties and the issue to be determined is the terms and conditions under which arm's length parties would have transacted in the same circumstances. The Supreme Court in *Canada v. GlaxoSmithKline Inc.*, 2012 SCC 52 [*Glaxo*] confirmed that former subsection 69(2) – the predecessor to paragraph 247(2)(*a*) – contemplates the existence of objective benchmarks compiled by reference to arm's length data

capable of being used as a proxy for testing the terms and conditions of the transaction in issue. Where possible, this is done by way of comparable transactions or adjusted comparable transactions. If not, reliance must be placed on a constructed price based on a recognized pricing methodology involving arm's length data as construed by experts (see Circular IC 87-2R as amended by TPM-14) (for a review of the methods applicable in the context of the pharmaceutical industry in Canada, see *Glaxo* at paras. 19-27).

[48] Based on the factual assumption advanced by the Crown in support of the application of paragraph 247(2)(*a*) – *i.e.* that CEL did nothing and is entitled to nothing – it is difficult to see how such transactions or data would be obtainable as arm's length parties do not transact under those circumstances. To the extent that paragraph 247(2)(*a*) plays a role similar to former subsection 69(2), the assumption that CEL was entitled to nothing may not be capable of giving rise to its application.

[49] Further support for Cameco's view can be found in the appearance of the word "or" at the end of paragraph 247(2)(*a*) and before paragraph 247(2)(*b*). Based on its wording, paragraph 247(2)(*a*) contemplates that arm's length parties would have entered into the transaction (or series) which forms the subject matter of the assessment, but under different terms and conditions, whereas paragraph 247(2)(*b*) contemplates that arm's length parties would not have transacted at all.

[50] However, the Crown contends that paragraph 247(2)(*a*) is capable of being applied in a context other than the one which I have described. Specifically, it points out that in construing the scope of paragraphs 247(2)(*a*) and (*b*), regard must also be had to paragraphs 247(2)(*c*) and (*d*). In this respect, it is noteworthy that paragraph 247(2)(*c*) begins with the words "where only paragraph 247(2)(*a*) applies". According to the Crown, this use of the word "only" indicates that there may be circumstances in which both paragraphs 247(2)(*a*) and (*b*) can apply, such as where one party contributes nothing. The decision of the Tax Court in *General Electric* at paragraphs 87 and 88 is cited in support of that proposition.

[51] No court has determined where paragraphs 247(2)(*a*) and (*c*) end and where 247(2)(*b*) and (*d*) begin and I agree with the Crown that it would be inappropriate to attempt to resolve this issue on a motion to strike (*Hunt* at paras. 18, 28 and 43). The question whether a nil price can give rise to the application of paragraphs 247(2)(*a*) and (*c*) – in addition to paragraphs 247(2)(*b*) and (*d*) – is best left to be decided by the trial judge in the fullness of the evidence (Reasons at para. 27).

[52] It follows that the Tax Court judge has not been shown to have erred in refusing to strike the Paragraph 247(2)(*a*) Statements as they have not been shown to be devoid of any chance of success.

[53] I also accept the Tax Court judge's further conclusion that the second order issued by Chief Justice Rip was not directed at the Paragraph 247(2)(*a*) Statements. Specifically, I agree that had Chief Justice Rip intended his striking order to extend to the Paragraph 247(2)(*a*)

Statements, he would have said as much (Reasons at para. 11). There is no basis for inferring that such a drastic remedy extended beyond the paragraphs to which he referred.

[54] This is not the end of the matter.

Motion to introduce new evidence

[55] Shortly prior to the hearing, Cameco brought a motion seeking leave to introduce new evidence. The new evidence it sought to introduce was a Request to Admit, which it had served on the Crown on May 8, 2015, and the response it had received from the Crown, dated May 25, 2015.

[56] The motion was made presentable at the beginning of the hearing of the appeal, and the Court after hearing the parties' respective submissions indicated that it would decide on the admissibility of the new evidence in disposing of the appeal.

[57] The motion is based on a statement made by the Crown in its letter dated November 18, 2014, reflected by the underlined portion of the paragraph quoted at paragraph 16 of these reasons. Based on the position taken by the Crown in that passage, Cameco calculated the average price which it realized on sales of uranium to arm's length parties in 2003 and the average price paid by CEL for uranium purchased from arm's length parties during the same period.

[58] The Request to Admit seeks the Crown's admission that the average figure arrived at (*i.e.* $13.52 per pound) is the arm's length price of uranium sold by Cameco to CEL under the eight contracts pursuant to which they transacted during the 2003 taxation year (Cameco's Motion Record, Tabs A and B).

[59] In refusing to make this admission, the Crown recognized that the arm's length price for uranium at which Cameco and CEL ought to have transacted can be calculated, but made the point that this calculation depends on many factors. According to the Crown, Cameco's calculation does not reflect these factors, nor does it take into account the fact that there is no single arm's length price for uranium.

[60] Cameco takes the position that the new evidence which it seeks to introduce meets the jurisprudential test for introducing new evidence (*i.e.* it is credible, practically conclusive of an issue on appeal and could not, with due diligence, have been produced earlier (*Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10 at para. 17; *R. v. General Electric Capital Canada Inc.*, 2010 FCA 290 at para. 3)) and therefore ought to be admitted. The Crown for its part takes the position that none of the three elements of the test have been met.

[61] It is not necessary to address the question whether the above test has been met and whether this new evidence should be admitted because, regardless of the outcome, the submissions of the parties have made clear that there remains, as between the parties, a live controversy which the Tax Court judge did not resolve, specifically, whether the Crown has the

obligation to inform Cameco of its position as to the arm's length price which applies to uranium transactions between CEL and Cameco.

[62] The Tax Court judge did not address the question. He rendered his judgment on the basis that Cameco has all the information that it needs in order to prepare for trial (Reasons at para. 14). Based on the limited record which the parties have placed before us – neither the transcript nor the submissions before the Tax Court judge were included – it is difficult to explain why this issue was not addressed. It may be that he considered the nil price advanced by the Crown to be a full answer or that he was of the view that the matter had been resolved by Chief Justice Rip's prior orders.

[63] The reason why the issue is unresolved is that although paragraphs 14(bbb) and (fff) of the Crown's Reply which challenged the arm's length nature of the price applicable to uranium transactions between Cameco and CEL have been struck, the Crown's pleadings still contain an allegation that the terms and conditions in respect of the sale of uranium between Cameco and CEL differ from those that would have been agreed to between arm's length persons.

[64] The allegation in question is embodied in paragraph 36 of the Amended Reply (reproduced at paragraph 13 above). For ease of reference, the relevant sentence is reproduced again:

> [The Deputy Attorney General of Canada] respectfully submits that the terms or conditions made or imposed in respect of the sale and purchase of uranium between [Cameco] and [CEL] and the services to be provided by [Cameco] to [CEL] in respect of the Mining Agreements differed from those that would have been made between persons dealing at arm's length within the meaning of paragraph 247(2)(*a*) of the [Act]….

[65] This allegation is part of the Paragraph 247(2)(*a*) Statements and for the reasons already given, is a proper pleading. However, as counsel for Cameco pointed out during the hearing, because the price is one of the terms underlying the transactions, the pleadings not only put Cameco to the task of proving that the price at which it transacted uranium with CEL is an arm's length price but they also allow the Crown to advance its own position as to what this arm's length price should be.

[66] In response, counsel for the Crown made the point that the arm's length price between Cameco and CEL is irrelevant to her client's position which is based on the premise that arm's length parties would not have entered into these transactions. However, the arm's length price of uranium is relevant to Cameco's case and counsel for the Crown did not abandon or in any way resile from her client's entitlement based on the pleadings to take a distinct position at trial as to the arm's length price at which Cameco and CEL ought to have purchased/sold uranium transacted between them. To the extent that the Crown contemplates taking such a position at trial, it has the obligation to disclose that distinct arm's length price before the trial, as has already been held by Chief Justice Rip on two occasions.

[67] Turning to a concern of a different nature, counsel insisted on the fact that from the Crown's perspective there is no single arm's length price for uranium, that such prices can only be arrived at by way of a complex formula which the Canada Revenue Agency has devised (Appeal Book, Vol. II at pp. 502 to 547) and that consultation with experts may be required in order to identify the precise figures.

[68] Keeping these difficulties in mind, and despite the fact that this information has been the subject of two previous orders, I would grant the Crown a full sixty (60) days to communicate to Cameco its distinct position as to the arm's length price or prices at which Cameco and CEL ought to have purchased/sold uranium transacted between them during the 2003 taxation year or a formula which allows Cameco to identify this price or these prices.

Solicitor-client costs

[69] The Tax Court judge explains at the end of his reasons why he views Cameco's behaviour to be objectionable (Reasons at para. 44). In his view, Cameco was solely responsible for delaying the proceedings. As is apparent from the position of the Crown taken on the motion to introduce new evidence, both parties are being strategic in their approach.

[70] I am aware that cost awards result from an exercise of discretion and should not be overturned lightly. In this case however, I am satisfied that the Crown can equally be blamed for side-stepping the prior order of Chief Justice Rip, and resisting Cameco's entitlement to have before trial access to the information which these prior orders address.

[71] Exercising the discretion in light of the parties' respective behaviour, I would set aside the solicitor-client cost order and provide that the parties should bear their own costs.

DISPOSITION

[72] For these reasons, I would allow the appeal in part, set aside the award of solicitor-client costs, and order the Crown to communicate to Cameco within sixty (60) days from the date of this judgment its position as to the arm's length price or prices at which Cameco and CEL ought to have purchased/sold uranium transacted between them during the 2003 taxation year or a formula which allows Cameco to identify this price or these prices. Given the divided result, the parties should assume their respective costs here and below.

"Marc Noël"
Chief Justice

"I agree
Johanne Trudel J.A."

"I agree
Donald J. Rennie J.A."

APPENDIX

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.):

56. (2) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to another person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension under section 65.1 of the Canada Pension Plan or a comparable provision of a provincial pension plan as defined in section 3 of that Act) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.

56. (2) Tout paiement ou transfert de biens fait, suivant les instructions ou avec l'accord d'un contribuable, à une autre personne au profit du contribuable ou à titre d'avantage que le contribuable désirait voir accorder à l'autre personne — sauf la cession d'une partie d'une pension de retraite conformément à l'article 65.1 du Régime de pensions du Canada ou à une disposition comparable d'un régime provincial de pensions au sens de l'article 3 de cette loi — est inclus dans le calcul du revenu du contribuable dans la mesure où il le serait si ce paiement ou transfert avait été fait au contribuable.

247. (2) Where a taxpayer or a partnership and a non-resident person with whom the taxpayer or the partnership, or a member of the partnership, does not deal at arm's length (or a partnership of which the non-resident person is a member) are participants in a transaction or a series of transactions and

247. (2) Lorsqu'un contribuable ou une société de personnes et une personne non-résidente avec laquelle le contribuable ou la société de personnes, ou un associé de cette dernière, a un lien de dépendance, ou une société de personnes dont la personne non-résidente est un associé, prennent part à une opération ou à une série d'opérations et que, selon le cas :

(*a*) the terms or conditions made or imposed, in respect of the transaction or series, between any of the participants in the transaction or series

a) les modalités conclues ou imposées, relativement à l'opération ou à la série, entre des participants à l'opération ou à la série

differ from those that would have been made between persons dealing at arm's length, or

(*b*) the transaction or series

(i) would not have been entered into between persons dealing at arm's length, and

(ii) can reasonably be considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit,

any amounts that, but for this section and section 245, would be determined for the purposes of this Act in respect of the taxpayer or the partnership for a taxation year or fiscal period shall be adjusted (in this section referred to as an "adjustment") to the quantum or nature of the amounts that would have been determined if,

(*c*) where only paragraph 247(2)(*a*) applies, the terms and conditions made or imposed, in respect of the transaction or series, between the participants in the transaction or series

diffèrent de celles qui auraient été conclues entre personnes sans lien de dépendance,

b) les faits suivants se vérifient relativement à l'opération ou à la série :

(i) elle n'aurait pas été conclue entre personnes sans lien de dépendance,

(ii) il est raisonnable de considérer qu'elle n'a pas été principalement conclue pour des objets véritables, si ce n'est l'obtention d'un avantage fiscal,

les montants qui, si ce n'était le présent article et l'article 245, seraient déterminés pour l'application de la présente loi quant au contribuable ou la société de personnes pour une année d'imposition ou un exercice font l'objet d'un redressement de façon qu'ils correspondent à la valeur ou à la nature des montants qui auraient été déterminés si :

c) dans le cas où seul l'alinéa *a*) s'applique, les modalités conclues ou imposées, relativement à l'opération ou à la série, entre les participants avaient été celles qui auraient été

had been those that would have been made between persons dealing at arm's length, or

conclues entre personnes sans lien de dépendance;

(*d*) where paragraph 247(2)(*b*) applies, the transaction or series entered into between the participants had been the transaction or series that would have been entered into between persons dealing at arm's length, under terms and conditions that would have been made between persons dealing at arm's length.

d) dans le cas où l'alinéa *b*) s'applique, l'opération ou la série conclue entre les participants avait été celle qui aurait été conclue entre personnes sans lien de dépendance, selon des modalités qui auraient été conclues entre de telles personnes.

251. (1) For the purposes of this Act,

251. (1) Pour l'application de la présente loi :

related persons shall be deemed not to deal with each other at arm's length;

a) des personnes liées sont réputées avoir entre elles un lien de dépendance;

...

[…]

(2) For the purpose of this Act, "related persons", or persons related to each other, are

(2) Pour l'application de la présente loi, sont des « personnes liées » ou des personnes liées entre elles :

…

[…]

(*b*) a corporation and

b) une société et :

a person who controls the corporation, if it is controlled by one person,

(i) une personne qui contrôle la société si cette dernière est contrôlée par une

	personne,
a person who is a member of a related group that controls the corporation, or	(ii) une personne qui est membre d'un groupe lié qui contrôle la société,
any person related to a person described in subparagraph 251(2)(*b*)(i) or 251(2)(*b*)(ii); and	(iii) toute personne liée à une personne visée au sous-alinéa (i) ou (ii);

Tax Court of Canada Rules (General Procedure), SOR/90-688a:

53. (1) The Court may, on its own initiative or on application by a party, 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	**53.** (1) La Cour peut, de son propre chef ou à la demande d'une partie, radier un acte de procédure ou tout autre document ou en supprimer des passages, en tout ou en partie, avec ou sans autorisation de le modifier parce que l'acte ou le document :
(*a*) may prejudice or delay the fair hearing of the appeal;	*a*) peut compromettre ou retarder l'instruction équitable de l'appel;
(*b*) is scandalous, frivolous or vexatious;	*b*) est scandaleux, frivole ou vexatoire;
(*c*) is an abuse of the process of the Court; or	*c*) constitue un recours abusif à la Cour;
(*d*) discloses no reasonable grounds for appeal or opposing the appeal.	*d*) ne révèle aucun moyen raisonnable d'appel ou de contestation de l'appel.
(2) No evidence is admissible on an application under paragraph (1)(*d*).	(2) Aucune preuve n'est admissible à l'égard d'une demande présentée en vertu de l'alinéa (1)d).
(3) On application by the respondent, the Court may	(3) À la demande de l'intimé,

quash an appeal if

(*a*) the Court has no jurisdiction over the subject matter of the appeal;

(*b*) a condition precedent to instituting an appeal has not been met; or

(*c*) the appellant is without legal capacity to commence or continue the proceeding.

la Cour peut casser un appel si :

a) elle n'a pas compétence sur l'objet de l'appel;

b) une condition préalable pour interjeter appel n'a pas été satisfaite;

c) l'appelant n'a pas la capacité juridique d'introduire ou de continuer l'instance.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-559-14
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE PIZZITELLI OF THE TAX COURT OF CANADA, DATED DECEMBER 2, 2014, DOCKET NUMBER 2009-2430 (IT)G.	
STYLE OF CAUSE:	CAMECO CORPORATION v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 1, 2015
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	TRUDEL J.A. RENNIE J.A.
DATED:	JUNE 12, 2015

APPEARANCES:

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