Federal Court of Appeal | Cour d'appel fédérale

Date: 20151103

Dockets: A-267-15
A-268-15

Citation: 2015 FCA 241

CORAM: **NOËL C.J.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

SUPERIOR PLUS CORP.

Respondent

Heard at Ottawa, Ontario, on November 3, 2015.
Judgment delivered from the Bench at Ottawa, Ontario, on November 3, 2015.

REASONS FOR JUDGMENT OF THE COURT BY: NOËL C.J.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 3, 2015).

NOËL C.J.

[1] These are two appeals brought by Her Majesty the Queen (the Crown) from interlocutory orders of the Tax Court of Canada (2015 TCC 132) wherein Hogan J. (the Tax Court judge) on the basis of a single set of reasons allowed a motion brought by Superior Plus Corp. (Superior Plus) requiring the Crown's representative on discovery to answer specified questions objected

to on discovery (the refused questions) and to produce certain documents or unredacted copies thereof (the refused documents), and dismissed the motion brought by the Crown to compel the disclosure by Superior Plus of portions of documents subject to solicitor-client privilege on the basis of the doctrine of implied waiver.

[2] The appeals were heard together and the reasons which follow dispose of both.

[3] The refused documents as well as the documents on which the solicitor-client privilege was maintained were made available to the Court in sealed envelopes and reviewed by the panel members.

[4] The underlying assessments were issued by the Canada Revenue Agency (CRA) on the basis of the loss streaming rules set out in subsections 111(4), 111(5), 37(6.1) and 127(9.1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the Act) and the General Anti-Avoidance Rule set out in section 245 of the Act. The relevant facts are set out in the decision under appeal at paragraphs 1 to 10 and need not be repeated.

[5] It is now established that discretionary decisions reached at the interlocutory stage are to be reviewed within the appellate framework set out in *Housen v. Nikolaisen*, 2002 SCC 33 (*Cameco Corporation v. Canada (Her Majesty The Queen)*, 2015 FCA 143 at para. 39, citing *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 at paras. 18 and 19). The issues which the Tax Court judge had to address give rise to mixed questions of fact

and law, with the result that his decision must stand in the absence of a legal error on an extricable question of law or a palpable and overriding factual error.

[6] In support of the first appeal (A-267-15), the Crown essentially reiterates the arguments advanced before the Tax Court judge and asks that we come to a different conclusion.

[7] We are satisfied that no legal or factual error has been committed. Specifically, it has not been shown that the Tax Court judge inappropriately expanded the test for relevance at discovery. Rather, his decision to compel the production of the refused documents and answers to the refused questions is attributable to the fact that the General Anti-Avoidance Rule is invoked, in circumstances where a change in the Act's underlying policy is in issue (Reasons at paras. 27 to 35).

[8] As was held by this Court in *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 [*Lehigh*] in like circumstances, information pertaining to the policy of the Act, even where it is not taxpayer specific, can be relevant on discovery. We accept that an important consideration in that case was that the Crown had itself established the relevance of the documents sought by disclosing an internal policy memorandum on the subject (*Lehigh* at para. 41). However, relevance in the present case is no less established by the Tax Court judge's finding that the refused documents were either prepared in the context of the audit of Superior Plus or considered by officials who were involved in the audit (Reasons at para. 19). We can see no basis for distinguishing *Lehigh*. As always, the trial judge will be the ultimate arbiter of information garnered at the discovery stage.

[9] Nor can it be said that the disclosure of this information results in an unjustified intrusion into the CRA's deliberative process, thereby jeopardizing public servants' candour. While the Supreme Court did express similar concerns in *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 43 to 46, they did so in addressing the purpose of access to information legislation. There is no useful analogy to be drawn between access to information and discovery. Reference is made to the decision of Rothstein J. in *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (Fed. T.D.) at paras. 58 to 61 (aff'd [1995] 2 F.C. 110 (Fed. A.D)) for a similar conclusion reached in a different context.

[10] Turning to the second appeal (A-268-15), the Crown claims that although the Tax Court judge purported to assess whether Superior Plus' partial disclosure of privileged information gave rise to unfairness and inconsistency, he in effect determined that there had been no waiver because the additional information sought by the Crown was neither "vital or necessary" to her case.

[11] The underlying issue essentially turns on the link or connection between the legal opinion on which Superior Plus waived the solicitor-client privilege, and the other legal opinions which it received from its legal Counsel and with respect to which the privilege has not been waived. The Crown concedes that when regard is had to the subject matter of the disclosed opinion, the Tax Court judge properly found that it pertains to a distinct issue and that on that account it was a self-standing document.

[12] The Crown contends however that the Tax Court judge did not address her argument that having regard to the reason why the privilege was waived, there exists an obvious link between the respective opinions. Specifically, the Crown maintains that the evidence on record indicates that Superior Plus waived the privilege on the opinion which supports its contention that the transactions in issue were not tax motivated while maintaining it on those pointing the other way (Follow-up Answers dated January 30, 2015, Appeal Book, Vol. 2, Tab 7, p. 473, Question 1). According to the Crown, this offends the principle of fairness and consistency (*Mahjoub (Re)*, 2011 FC 887 at para. 10) as Superior Plus is "attempting to take unfair advantage or present a misleading picture by selective disclosure" (*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 46 C.P.C. (3d) 110 (Ont. Gen. Div.) at para 42). The Crown therefore requests access to those parts of the undisclosed opinions which demonstrate Superior Plus' motivation.

[13] We agree that this argument was squarely before the Tax Court judge (Crown's submissions, Appeal Book, Vol. 2, p. 491 at para. 52; Crown's submissions in reply, Appeal Book, Vol. 2, pp. 509 and 511 at paras. 8 and 14) and that he did not confront it. However, we do not believe that this can alter the outcome given the context in which the privilege was waived.

[14] Superior Plus waived the solicitor-client privilege in answering an undertaking made during discovery (Answers to Undertakings, Appeal Book, Vol. 2, Tab 7, p. 413, U/A 64). Specifically, Superior Plus' representative was asked by Crown Counsel to identify the document or documents on which Superior Plus relies to support its non-tax purpose plea (Answers to Undertakings, Appeal Book, Vol. 2, Tab 7, p. 420, U/A 93). By waiving the

privilege and tendering the disclosed opinion, Superior Plus placed itself in a position to introduce this document in evidence at trial. That is the context in which the Crown is seeking immediate access to selected portions of the opinions with respect to which the privilege has not been waived.

[15] It can be seen that the alleged unfairness and inconsistency which the Crown alleges will only arise if Superior Plus follows through and introduces the disclosed opinion in evidence, in which case it will be up to the trial judge to determine whether the solicitor-client privilege has thereby been waived.

[16] There is no doubt that immediate access to the claimed opinions would allow the Crown to better prepare for trial. However, this is a problem that can easily be addressed by way of an adjournment and Superior Plus should not be exposed to the privilege being lifted in advance of causing the unfairness which the Crown alleges and which the doctrine of implied waiver is intended to address.

[17] Considering the matter from a different perspective, it can be seen that until Superior Plus introduces the disclosed document in evidence, access to the other privileged opinions is neither "vital or necessary" to the Crown's ability to respond (Compare *Procon Mining & Tunnelling Ltd. v. McNeil,* 2009 BCCA 281 [*Procon*] at paras. 15 to 19).

[18] In *Procon*, the British Columbia Court of Appeal came to the conclusion that the legal advice sought did not have to be disclosed because it was not in any way relevant to the state of

mind which had been plead by the plaintiff and which had allegedly given rise to an implied waiver (*Procon* at para. 17). That is the context in which the Court said: "[t]o establish waiver, the disclosure sought must be "vital" or necessary to the [requesting] party's ability to answer an allegation." (*Procon* at para. 19).

[19] To be clear, this test does not operate as a different and more demanding standard for determining whether a disclosure of privileged information has given rise to an implied waiver, but as a way of ensuring that an implied waiver not be pronounced unless and until it becomes necessary to do so in order to prevent the unfairness and inconsistency which the doctrine of implied waiver is intended to guard against.

[20] It follows that the Crown's argument cannot succeed at the stage of the proceedings we are at and that the Tax Court judge's decision refusing access to the privileged documents must accordingly stand.

[21] For these reasons both appeals will be dismissed, with costs in each case.

"Marc Noël"

Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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