Federal Court of Appeal | Cour d'appel fédérale

Date: 20171211

Dockets: A-66-16
A-73-16

Citation: 2017 FCA 243

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

CONOCOPHILLIPS CANADA RESOURCES CORP.

Respondent

Heard at Toronto, Ontario, on June 12, 2017.

Judgment delivered at Ottawa, Ontario, on December 11, 2017.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] These consolidated appeals concern an application to the Minister of National Revenue (Minister) by ConocoPhillips Canada Resources Corp. (ConocoPhillips) for a waiver to file a document pursuant to subsection 220(2.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

(Act). ConocoPhillips seeks the waiver for a notice of objection relating to a reassessment issued to it for its taxation year ended November 30, 2000.

[2] The Minister refused to grant the waiver on the ground that subsection 220(2.1) did not apply to notices of objection.

[3] Subsection 220(2.1) of the Act provides:

220(2.1) Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister's request.	220(2.1) Le ministre peut renoncer à exiger qu'une personne produise un formulaire prescrit, un reçu ou autre document ou fournisse des renseignements prescrits, aux termes d'une disposition de la présente loi ou de son règlement d'application. La personne est néanmoins tenue de fournir le document ou les renseignements à la demande du ministre.

[4] ConocoPhillips applied for judicial review of the Minister's decision. The Federal Court (*per* Justice Boswell) allowed the application and set aside the Minister's decision on the basis that it was an unreasonably narrow interpretation of subsection 220(2.1) (2016 FC 98). The matter was accordingly remitted to the Minister to exercise the discretion granted by subsection 220(2.1).

[5] The Minister has appealed the Federal Court decision to this Court. As discussed below, I have concluded that the Federal Court did err and accordingly would allow the appeal.

A. Factual background

[6] The relevant factual background, which is in ConocoPhillips' waiver application dated August 15, 2011 and the Minister's decision dated August 29, 2012, is summarized below.

[7] ConocoPhillips and other corporations are involved in the Syncrude oilsands project in Northern Alberta.

[8] The Syncrude project participants, including ConocoPhillips, instituted a judicial review in the Federal Court of an amount determined by the Minister under a remission order, the *Syncrude Remission Order*, which affected the 2000 taxation year. ConocoPhillips' application was held in abeyance pending the resolution of lead cases involving Imperial Oil Resources Limited and Imperial Oil Resources Ventures Ltd. (together, Imperial Oil).

[9] If the Syncrude project participants were successful in the litigation, ConocoPhillips would have additional consequential income under the Act for its taxation year ended November 30, 2000.

[10] If the Imperial Oil litigation were protracted, a reassessment of ConocoPhillips' consequential income could become statute barred. ConocoPhillips declined to provide a waiver to overcome the statute bar issue, and as a result the Minister issued a reassessment for the 2000 taxation year on a protective basis prior to the resolution of the litigation. The reassessment increased ConocoPhillips' taxable income by approximately $17,000,000.

[11] ConocoPhillips paid the amount of the reassessment as required by law. It also served a notice of objection.

[12] The Imperial Oil litigation was resolved on May 13, 2010 when the Supreme Court of Canada denied leave to appeal a decision of this Court (reported as *Attorney General of Canada v. Imperial Oil Resources Limited*, 2009 FCA 325, 2009 D.T.C. 5193, leave to appeal to SCC refused, 33539).

[13] The Syncrude project participants were ultimately unsuccessful and therefore ConocoPhillips should have been entitled to a refund of the overpayment of tax that it made pursuant to the protective reassessment.

[14] However, the Minister refused to issue a refund on the ground that a further reassessment had been issued for the 2000 taxation year on November 7, 2008 against which no notice of objection was served. This reassessment made other adjustments that ConocoPhillips had agreed to, but the reassessment also included the consequential income that was assessed earlier on a protective basis.

[15] ConocoPhillips asserts that it only became aware of this reassessment on April 14, 2010. Accordingly, it attempted to serve a notice of objection on June 7, 2010 after a copy of the notice of reassessment was sent to it on May 3, 2010.

[16] The Minister refused to consider the notice of objection on the ground that it was out of time. According to the Minister, the time limit for serving a notice of objection, or for requesting an extension of time, expired on February 5, 2010. It is not in dispute that the new reassessment invalidated the original protective assessment and also the notice of objection that related to it.

[17] ConocoPhillips applied to the Federal Court for judicial review of the Minister's refusal to consider the notice of objection. ConocoPhillips submitted that the notice of objection was served on time because the notice of reassessment was not properly issued until the copy thereof was received on May 3, 2010.

[18] ConocoPhillips was successful in the judicial review application in the Federal Court (2013 FC 1192). However, the decision was reversed on appeal to this Court on the ground that only the Tax Court of Canada had jurisdiction to decide this issue (*Minister of National Revenue v. ConocoPhillips Canada Resources Corp.*, 2014 FCA 297, 2015 D.T.C. 5022, leave to appeal to SCC refused, 36304 (8 October 2015)).

[19] At the hearing, counsel for ConocoPhillips provided background as to other potential avenues for relief. One option is a remission order pursuant to the *Financial Administration Act*, R.S.C. 1985, c. F-11. Such orders are intended to provide relief only for exceptional circumstances. ConocoPhillips applied for this relief some time ago, and the Minister has yet to reply as of the hearing date. Another option is to apply to the Tax Court, as suggested by this Court in the prior ConocoPhillips' decision described above.

B. Nature of the waiver

[20] Before discussing the decisions of the Minister and the Federal Court, it is useful to describe the nature of ConocoPhillips' waiver application. According to counsel for ConocoPhillips, it is not clear from the Federal Court's decision whether the Court understood all the nuances of its application.

[21] By way of background, the service of a notice of objection pursuant to subsection 165(1) of the Act engages a review process in which the Minister is required to consider the objection with all due dispatch and either vacate, confirm or vary the assessment or reassess (subsection 165(3)). The Minister is permitted to reassess under subsection 165(3) even if the usual limitation periods for reassessing have expired (subsection 165(5)).

[22] ConocoPhillips seeks to engage this review process without having to serve a notice of objection. It submits that a notice of objection is not required for this purpose, although it acknowledges that once a waiver has been granted the Minister may request a notice of objection to be filed in accordance with subsection 220(2.1) of the Act.

[23] ConocoPhillips' ultimate goal is to receive a new reassessment under the objection procedures which reduces its tax payable.

C. The Minister's decision

[24] In response to ConocoPhillips' request for a waiver, the Canada Revenue Agency (CRA) (*per* Manager, Resources and First Nations, Tax & Charities Appeals Directorate) informed the company by letter dated August 29, 2012 that the Minister did not have the authority under subsection 220(2.1) of the Act to waive a notice of objection.

[25] Three reasons were given:

- The scheme of the objections and appeal provisions in Part I of the Act is a complete code.

- Subsection 220(2.1) of the Act is a general provision that does not override subsections 165(1) and 166.1(7), which are more specific.

- Different language is used in subsection 165(1) and subsection 220(2.1), which suggests that different meanings were intended. Reference was made to the terms "may" and "serve" in subsection 165(1) and to the terms "file" and "requires" in subsection 220(2.1).

D. The Federal Court decisions

[26] In its main judgment, the Federal Court concluded that the Minister's decision was unreasonable and it remitted the waiver application back to the Minister to exercise the discretion provided by subsection 220(2.1).

[27] The Federal Court first considered the standard of review and concluded that a reasonableness standard applied, notwithstanding that the parties agreed that it should be correctness.

[28] In the Court's view, a deferential standard of reasonableness should apply based on jurisprudence applicable where a tribunal interprets its home statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654).

[29] Turning to the substantive issue, the Court noted the differences in the statutory language that were relied on by the Minister, and determined that the differences were not sufficient to restrict the scope of subsection 220(2.1).

[30] In addressing the argument of the Minister that a notice of objection is necessary to have a valid objection to a reassessment and to give it the power to issue a new reassessment, the Court stated that it was in the discretion of the Minister under subsection 220(2.1) whether to subsequently request that a notice of objection be filed. According to the Court, if the Minister did not request a notice of objection, this was "an outcome whereby ConocoPhillips would be

unable to advance the matter further," unless the Minister's action was successfully challenged on judicial review (Federal Court decision at paragraph 59).

[31] In a supplementary judgment dealing with costs, costs were awarded to ConocoPhillips. This is the subject of a discrete appeal by the Minister (File No. A-73-16).

E. Standard of Review

[32] In this appeal from a judicial review, the Court is to determine whether the Federal Court determined the appropriate standard of review of the Minister's decision, and also applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47).

[33] The Federal Court determined that the reasonableness standard of review applies. ConocoPhillips submits that this deferential standard is not appropriate in this case because the Minister is not an objective decider and she does not have greater expertise on the matter than the courts.

[34] The Federal Court's decision to apply a reasonableness standard to the Minister's decision makes sense for the reasons that the Court gave. However, my conclusion in this appeal does not depend on the standard of review. In my view, the Minister's decision is both reasonable and correct.

F. Interpretation of Act

[35] Fundamentally this appeal is about statutory interpretation: Is the general waiver provision in subsection 220(2.1) intended to apply to notices of objection?

[36] The general approach to statutory interpretation is well established and was articulated at paragraphs 39 and 40 of the decision of the Federal Court:

> [39] In addressing the question of whether the Minister's interpretation of her authority under subsection 220(2.1) of the *ITA* is reasonable, I begin by noting that it is trite law that statutes should be read according to Driedger's modern rule of statutory interpretation, namely that:
>
> > …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > as cited in Ruth Sullivan, *Statutory Interpretation*, 2ed edition (Toronto: Irwin Law, 2007) at 41 [Sullivan]. Also see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 154 DLR (4^{th}) 193 at para 21.
>
> [40] The *ITA*, like any other federal statute, must also be read in view of section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, such that subsection 220(2.1) must be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In addition, the Supreme Court has specifically stated in *Stubart Investments Ltd. v Canada*, [1984] 1 SCR 536, [1984] CTC 294 at paras 57-61, that, in tax cases, the modern rule of statutory interpretation should be followed rather than the traditional strict approach to statutory interpretation (see also: David G Duff et al., *Canadian Income Tax Law*, 5th ed (Lexis Nexis: Markham, 2015) [Duff] at 107, 116-117).

[37] In my view, the Federal Court erred in not correctly applying Driedger's modern rule, as described above. It properly considered a purposive interpretation of subsection 220(2.1), which it identified as "to blunt the unfairness that sometimes arises by strict application of the filing and

notice requirements" (Federal Court decision at paragraph 56). However, the Court failed to give due consideration to the purpose of other provisions, and in particular subsection 166.1(7) of the Act. If it had done so, it could not have reached the conclusion that it did because it did not read subsection 220(2.1) in accordance with the Driedger's rule: "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[38] In the next section, I discuss the objections regime in sections 165 to 166.2 of the Act.

G. The legislative scheme for objections

[39] A notice of objection under section 165 of the Act instigates a formal dispute process under which the Minister is required to reconsider an assessment. Subsection 165(1) provides:

165 (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,	165 (1) Le contribuable qui s'oppose à une cotisation prévue par la présente partie peut signifier au ministre, par écrit, un avis d'opposition exposant les motifs de son opposition et tous les faits pertinents, dans les délais suivants :
(*a*) if the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a graduated rate estate for the year, on or before the later of	*a*) s'il s'agit d'une cotisation, pour une année d'imposition, relative à un contribuable qui est un particulier (sauf une fiducie) ou une succession assujettie à l'imposition à taux progressifs pour l'année, au plus tard au dernier en date des jours suivants :
(i) the day that is one year after the taxpayer's filing-due date for the year, and	(i) le jour qui tombe un an après la date d'échéance de production qui est applicable au contribuable pour l'année,

(ii) the day that is 90 days after the day of sending of the notice of assessment; and	(ii) le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de cotisation;
(*b*) in any other case, on or before the day that is 90 days after the day of sending of the notice of assessment.	*b*) dans les autres cas, au plus tard le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de cotisation.
…	[…]

[40] The objection scheme is very detailed, and includes specific time limits for objecting. A taxpayer generally has 90 days to make an objection in writing. If this time limit has expired, the taxpayer may apply to the Minister for an extension of time pursuant to subsection 166.1(1) of the Act. This provision reads:

166.1 (1) Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.	166.1 (1) Le contribuable qui n'a pas signifié d'avis d'opposition à une cotisation en application de l'article 165 ni présenté de requête en application du paragraphe 245(6) dans le délai imparti peut demander au ministre de proroger le délai pour signifier l'avis ou présenter la requête.

[41] Upon receipt of an application under this provision, the Minister is required to consider it (subsection 166.1(5) of the Act). It is significant that the Minister's authority to grant an extension of time is not open ended. The Minister is prohibited by the statute from granting an extension unless the conditions specified in subsection 166.1(7) have been satisfied. Subsection 166.1(7) provides:

166.1(7) No application shall be granted under this section unless	166.1(7) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :

(*a*) the application is made within one year after the expiration of the time otherwise limited by this Act for serving a notice of objection or making a request, as the case may be; and	*a*) la demande est présentée dans l'année suivant l'expiration du délai par ailleurs imparti pour signifier un avis d'opposition ou présenter une requête;
(*b*) the taxpayer demonstrates that	*b*) le contribuable démontre ce qui suit :
(i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, the taxpayer	(i) dans le délai par ailleurs imparti pour signifier l'avis ou présenter la requête, il n'a pu ni agir ni charger quelqu'un d'agir en son nom, ou il avait véritablement l'intention de faire opposition à la cotisation ou de présenter la requête,
(A) was unable to act or to instruct another to act in the taxpayer's name, or	
(B) had a *bona fide* intention to object to the assessment or make the request,	
(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and	(ii) compte tenu des raisons indiquées dans la demande et des circonstances de l'espèce, il est juste et équitable de faire droit à la demande,
(iii) the application was made as soon as circumstances permitted.	(iii) la demande a été présentée dès que les circonstances le permettaient.

[42] I would note in particular that the Minister may not extend the time under this provision unless the application has been made within one year. This condition is strict, and it could lead to unfairness, but it is clear from the detailed language of the provision that this is intentional.

[43] A legislative history of these provisions referred to by counsel for the Minister reinforces the view that the strict time period is not an oversight. The relevant legislation since 1917

illustrates that Parliament from time to time has put its mind to the issue of extensions of time to object, and the conditions imposed have usually been strict.

[44] If the Minister refuses to grant the extension, the taxpayer may apply further to the Tax Court for an extension of time pursuant to subsection 166.2(1) of the Act. The circumstances in which the Tax Court may grant an extension are limited by subsection 166.2(5), which generally parallels the restrictions on the Minister in subsection 166.1(7), including the one year time limit.

[45] Applications for extensions of time come before the Tax Court routinely, and invariably the Court applies the one year time limitation strictly, as clearly required by the statute. Considerations of fairness do not enter into the equation.

[46] In these provisions, Parliament has set out a detailed regime that applies to all taxpayers who wish to dispute assessments of tax. The clear statutory intent of the scheme is to provide conditions on the ability of taxpayers to invoke the objection process, including strict time limits for serving objections and seeking extensions of time.

H. Interplay between the waiver and the objections regime

[47] The relief that ConocoPhillips seeks is to use the general waiver provision in subsection 220(2.1) of the Act in order to engage the objection process without having to comply with its statutory conditions. The effect of the application of subsection 220(2.1) in this manner would

give the Minister a power that the Minister has been denied in a detailed provision in subsection 166.1(7).

[48] The general waiver provision cannot be applied in this manner to override a more specific provision. This is referred to as the "implied exception" rule of statutory interpretation in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. at 363-367 (Markham: LexisNexis Canada Inc., 2014).

[49] The principle was described in *James Richardson & Sons, Ltd. v. Minister of National Revenue*, [1984] 1 S.C.R. 614, 84 D.T.C. 6325 at 6329, where the Court referred to the English decision of *Pretty v. Solly* (1859), 53 E.R. 1032:

> The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

[50] This principle applies in this case, and the Minister was right to rely on it.

[51] ConocoPhillips suggests that even if subsection 220(2.1) is not intended to override subsection 166.1(7), there is still a role for waivers of notices of objection in subsection 220(2.1) because a waiver may be appropriate in situations that are outside the scope of objections and appeals. ConocoPhillips suggests that its waiver request fits this category because there is no substantive need for a notice of objection. Subsection 220(2.1) acts as an appropriate safety valve in this case, it is suggested.

[52] With respect, this argument must be rejected. Parliament did not intend that subsection 220(2.1) act as a safety value for objections. A taxpayer is intended to be either in or out of the objections regime. ConocoPhillips suggests that it is outside the scope of objections and appeals. However, it does not want to be outside the regime – it seeks to be in it. The specific limitation periods provided for in the objections regime must be applied in this case.

[53] Finally, I would mention that several other arguments were raised by the parties. I have considered these, and in the end it is not necessary to discuss them in these reasons.

I. Conclusion

[54] For the reasons above, I conclude that subsection 220(2.1) does not apply to notices of objection. The Minister's decision was reasonable, and correct.

[55] I would allow both appeals, set aside the judgments of the Federal Court, dismiss ConocoPhillips' application for judicial review, and award costs to the Minister here and below.

"Judith Woods"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-66-16 and A-73-16
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BOSWELL DATED JANUARY 27, 2016 and FEBRUARY 8, 2016, NO. T-1811-12	
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v. CONOCOPHILLIPS CANADA RESOURCES CORP.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 12, 2017
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	GAUTHIER J.A. DE MONTIGNY J.A.
DATED:	DECEMBER 11, 2017

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