

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110609

Docket: A-399-10

Citation: 2011 FCA 196

**CORAM: NOËL J.A.
PELLETIER J.A.
MAINVILLE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

9005-6342 QUÉBEC INC.

Respondent

Heard at Montréal, Quebec, on June 8, 2011.

Judgment delivered at Montréal, Quebec, on June 9, 2011.

REASONS FOR JUDGMENT:

NOËL J.A.

CONCURRED IN BY:

**PELLETIER J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal of an interlocutory decision by Justice Hogan of the Tax Court of Canada (TCC judge) ordering the Minister of National Revenue (the Minister) to produce certain documents and information before trial.

[2] The background of this dispute is an appeal of an assessment made by the Minister under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA), disallowing certain input tax credits (ITCs) claimed by 9005-6342 Québec Inc. (hereafter Québec Inc.) for supplies of property and services

which it alleges having received from four subcontractors. According to the Minister, no such property or services were supplied, and the invoices issued by the subcontractors and filed by Québec Inc. in support of the ITC claim were false.

[3] In bringing its motion before the TCC, Québec Inc. emphasized that it bears the burden of demonstrating that the assessment is without merit. In its motion, Québec Inc. submits that it did indeed retain the services of the four subcontractors in issue, that it intended to subpoena the representatives and employees of these four subcontractors as witnesses in order to establish this fact and that, despite having made reasonable inquiries, it was unable to locate them. In his order, the TCC judge directed the Minister to disclose the following documents and information:

(a) all files of audits conducted by Revenu Québec, as agent of the [Crown], involving Construction Pro-Dal (9114-0566 Québec Inc.), Les Constructions Vimont Inc., Construction P. Bourget Inc. and Construction Nikita (9125-9853 Québec Inc.);

(b) the last known contact information for the aforementioned companies and their shareholders, directors and employees, as well as the records of employment issued by the companies to their employees during the relevant period.

[4] The Crown does not object to disclosing the audit reports concerning the four subcontractors. Only part (b) of the TCC judge's order is under appeal.

[5] The only evidence filed in support of the motion is the solemn affirmation of one of the lawyers of the firm representing Québec Inc., who states having conducted searches on the

Internet to try to track down the subcontractors, to no avail. At the hearing of the motion, the Notice of Appeal, the Minister's reply and the list of documents were also adduced.

[6] In this regard, it is useful to reproduce paragraph 10 of the Notice of Appeal, in which Québec Inc. alleges that it is

[TRANSLATION]

. . . able to show that the services were supplied, identify the persons who supplied the services for and on behalf of the subcontractors and even, in some cases, adduce evidence of pay statements and of the involvement of named individuals in the subcontracts.

[Emphasis added.]

[7] The Crown asked that the motion be dismissed, arguing primarily that the requested information contained confidential information on third parties. The TCC judge found that the information requested nonetheless could and had to be disclosed, given its relevance and the fact that Québec Inc. could not otherwise have access to it.

[8] In support of its appeal, the Crown submits that the TCC judge usurped the Minister's discretion under section 295 of the ETA and exceeded his jurisdiction. Furthermore, the Crown submits that it is during the examination for discovery stage under Rule 107 of the *Tax Court of Canada Rules (General Procedure)* (S.O.R./90-688a) that the issue concerning the information requested should be addressed. Since that stage has not taken place, Québec Inc.'s motion is premature and, as such, had to be dismissed.

[9] The Crown submits that, in any event, it was not appropriate for the trial judge to make the order requested and that the judge could not order the disclosure of the information in the absence of evidence from an authorized representative of Québec Inc. stating the inquiries made by Québec Inc. to find the directors, shareholders and employees of the four subcontractors.

ANALYSIS AND DECISION

[10] In my humble opinion, the TCC judge made no error in principle in ordering the disclosure of the information requested. Any information of any kind, including information on third parties, may be disclosed in an appeal before the TCC if that information is found to be relevant to the dispute (see subsection 295(4) of the ETA).

[11] The Crown acknowledges that the information requested, if found to be relevant to the dispute, may be the subject of a production order even if it contains third party information deemed confidential. However, the Crown submits that the relevance of the information requested can only be established on examination for discovery (Memorandum of the Crown, paragraphs 18 to 21).

[12] Although the issues in dispute often may be clearly established at that stage in proceedings, it is not always the case. In the case at bar, a plain reading of the proceedings shows that the subcontractors and employees who allegedly supplied services on behalf of Québec Inc. have information that is relevant to the dispute. It is clear that Québec Inc. would normally have access to this information, but it states having been unable to obtain it despite reasonable efforts.

[13] To address the motion as it was drafted, it follows that subject to Québec Inc.'s demonstrating that it tried to no avail to obtain the information requested, it was open to the TCC judge to order that the information be produced. However, in this last regard, the only evidence before the TCC judge was the solemn affirmation of a lawyer of the firm representing Québec Inc., who states having conducted searches on the Internet using various search engines, to no avail. This attempt to find the subcontractors was allegedly done during the day of April 7, 2010. On the basis of this evidence alone, the TCC judge found as follows (Reasons, paragraph 47):

. . . Despite research that on its face seems reasonable, [Québec Inc.] was unable to track down any of the subcontractors, directors or employees. . . .

[14] In my humble opinion, it was not open to the TCC judge to make this finding in the absence of evidence from the principal interested party (i.e., Québec Inc.) of the inquiries it made by means of a representative who has personal knowledge or is well informed of those inquiries and may be cross-examined upon the inquiries and the results obtained.

[15] The directors of Québec Inc. have the best knowledge of anyone of the four subcontractors they dealt with between March 1, 2003 and February 28, 2006. Only they can state the nature of Quebec Inc.'s association with these subcontractors. To go by the pleadings entered in the record, the directors have known, since January 15, 2007, the date on which the assessment was issued, of the Minister's contention that no work had been done by the subcontractors and that the invoices that Québec Inc. had produced in support of its ITC claim

were false. Therefore, since at least 2007, Québec inc's directors have been aware that the information referred to in their motion is essential to their case.

[16] In the absence of any evidence from a director of Québec Inc. or a well-informed person, it was not open to the TCC judge to find that Québec Inc. made reasonable efforts to obtain the information in issue and was unable to obtain it.

[17] For these reasons, I would allow the appeal with costs and set aside the TCC judge's decision with respect to part (b) of his order, without prejudice to Québec Inc.'s right to file a new motion supported by evidence showing the inquiries made and the results obtained.

“Marc Noël”

J.A.

“I agree.

J.D. Denis Pelletier J.A.”

“I agree.

Robert M. Mainville J.A.”

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-399-10

**APPEAL OF AN ORDER BY THE HONOURABLE JUSTICE HOGAN OF THE
TAX COURT OF CANADA DATED OCTOBER 12, 2010, FILE 2008-1945(GST)G.**

STYLE OF CAUSE: HER MAJESTY THE QUEEN
and
9005-6342 QUÉBEC INC.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 8, 2011

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
MAINVILLE J.A.

REASONS DATED: June 9, 2011

APPEARANCES:

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