

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111109

Docket: A-144-11

Citation: 2011 FCA 306

**CORAM: NOËL J.A.
PELLETIER J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

**TAXPRO PROFESSIONAL CORPORATION
and HARI NESATHURAI**

Appellants

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on November 3, 2011.

Judgment delivered at Ottawa, Ontario, on November 9, 2011.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**PELLETIER J.A.
LAYDEN-STEVENSON J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by Taxpro Professional Corporation and Hari Nesathurai (the appellants) from a decision of the Federal Court wherein Mr. Justice Mandamin (the applications judge) ruled that some of the documents which they were called upon to produce pursuant to a formal demand made under paragraphs 231.2(1)(a) and (b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), were not covered by solicitor-client privilege and therefore had to be produced.

[2] At issue before the applications judge were 31 documents which had been placed in a sealed envelope in order to preserve their confidentiality pending his review. After a thorough analysis of the case law with a focus on the particularities of the documents, he concluded that 27 were subject to solicitor-client privilege and four were not.

[3] The appellants challenge the applications judge's finding with respect to three of these four documents. By order of this Court, the documents have remained sealed pending the disposition of the appeal.

[4] In explaining why he held that the documents in issue were not privileged, the applications judge was careful not to reveal their contents. After having pointed out the difference between facts that have an independent existence and privileged communications, he concluded that the three documents in question were not subject to solicitor-client privilege because they involved "financial matters without any indication or suggestion that legal advice is being sought or given" (reasons, para. 50).

[5] The appellants contend that in so holding the applications judge failed to have regard to context. The suggestion is that although the documents looked upon in isolation might be viewed as unrelated to the legal advice given, this ceases to be the case when the matter is considered in context.

[6] I have carefully reviewed the documents in question, context in mind. The context shows that there exists a solicitor-client relationship between Mr. Nesathurai and his client but it does not put into question the conclusion reached by the applications judge. To the extent that the appellants are of the view that there is a link between the legal advice given and the financial matters revealed by the documents, it was incumbent upon them to point out what it was. I note in this respect that the legal advice given in the course of solicitor-client relationship is part of the sealed record.

[7] The appellants further argued that the applications judge erred in failing to hold that the issuance of the formal requirement in this case was an abuse of process and was barred by the doctrine of issue estoppel. Although these issues were raised before the applications judge, he did not address them in his reasons.

[8] In support of these arguments, counsel for the appellants indicated that this is the third time that clients of Mr. Nesathurai are targeted by the tax authorities. Highlighting these other instances, counsel referred to the decisions of the Federal Court in *Canada (Minister of National Revenue – M.N.R.) v. Welton Parent Inc.*, 2006 FC 67, [2006] F.C.J. No. 117 and *Nesathurai v. Canada (Minister of National Revenue – M.N.R.)*, 2008 FC 177, [2008] F.C.J. No. 220.

[9] The first of these cases involved a requirement to produce information with respect to unnamed persons pursuant to subsection 231.2(2) of the Act. The information sought included the names of the clients of three lawyers who had given legal advice in the context of an offshore plan, one of these lawyers being Mr. Nesathurai. The Court found that providing the names of the clients

would be tantamount to disclosing the nature and contents of the legal advice which the lawyers provided to these clients. It therefore held that the names were privileged and did not have to be disclosed.

[10] In the second instance, Mr. Nesathurai was served with a further request, this time under subsection 289(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-14, seeking information which, if not precisely the same as in the first case, was of the same nature or type. Relying on the doctrine of issue estoppel, the Court quashed the requirement, without prejudice to the Minister to serve a new request without seeking to obtain the names of Mr. Nesathurai's clients.

[11] Turning to the appellants' arguments in the present case, no issue estoppel can arise from these two prior decisions as the issue which they address does not arise in this case. Indeed, the request with which we are concerned does not pertain to unnamed persons and the identity of Mr. Nesathurai's client is common knowledge.

[12] As to the argument that the issuance of the formal demand is an abuse of process, it is noteworthy that this is the third time that clients of Mr. Nesathurai have been the object of formal demands. However, this alone is not a ground for abuse of process. In order to obtain the relief which they claim, it was incumbent upon the appellants to establish that the respondent is resorting to its statutory powers for an improper purpose. No such evidence has been adduced in this case.

[13] I would dismiss the appeal with costs.

“Marc Noël”

J.A.

“I agree

J.D. Denis Pelletier J.A.”

“I agree

Carolyn Layden-Stevenson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-144-11

**APPEAL FROM A JUDGMENT OF THE HONOURABLE Mr. JUSTICE MANDAMIN
DATED FEBRUARY 24, 2011, NO. T-88-09.**

STYLE OF CAUSE: TAXPRO PROFESSIONAL
CORPORATION and HARI
NESATHURAI and MINISTER
OF NATIONAL REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 3, 2011

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Pelletier J.A.
Layden-Stevenson J.A.

DATED: November 9, 2011

APPEARANCES:

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