Federal Court of Appeal  Cour d'appel fédérale

Date: 20200420

Docket: A-328-18

Citation: 2020 FCA 75

CORAM: **WEBB J.A.**
NEAR J.A.
MACTAVISH J.A.

BETWEEN:

ATLANTIC PACKAGING PRODUCTS LTD./
ATLANTIC PRODUITS D'EMBALLAGE LTÉE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 5, 2020.

Judgment delivered at Ottawa, Ontario, on April 20, 2020.

PUBLIC REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
MACTAVISH J.A.

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PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. The two are identical, there being no confidential information disclosed in the confidential reasons.

WEBB J.A.

[1] This is an appeal from the Judgment rendered by Graham J. of the Tax Court of Canada on September 7, 2018 (2018 TCC 183). The Tax Court Judge found that the requirements of section 54.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) were not satisfied when Atlantic Packaging Products Ltd. (Atlantic Packaging) transferred certain assets to 7228392 Canada Inc. (722), a newly formed corporation. As a result, the Tax Court Judge found

that the shares of 722 were not deemed to be capital property of Atlantic Packaging under this section and dismissed Atlantic Packaging's appeal.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] Atlantic Packaging is a paper products manufacturer. In 2009, it had five divisions. The relevant division, for the purposes of this appeal, is the Tissue Division. This division focused on the manufacturing and sale of toilet paper and paper towels.

[4] By the Purchase and Sale Agreement dated June 11, 2009 between Atlantic Packaging and Cascades Canada Inc., Atlantic Packaging agreed to sell the Tissue Division to Cascades Canada. This agreement contemplated that, prior to the closing date, Atlantic Packaging would transfer certain assets to a new corporation in exchange for 52,000,000 common shares of that corporation.

[5] The Purchase and Sale Agreement provided that Atlantic Packaging would sell the Purchased Assets, which were defined as:

- the shares of the Corporation to which certain assets would be transferred prior to the closing;

- the paper tissue machine and its associated de-inking equipment located in the Progress Mill, which turned recycled white office paper into very large rolls of tissue, and all of the assets and properties (other than real property)

exclusively owned and used by Atlantic Packaging to operate this paper tissue machine and de-inking equipment;

— all the assets and properties (other than real property) exclusively owned and used by Atlantic Packaging to operate the paper tissue machine and its associated de-inking equipment located in the Whitby Mill;

— the quality control system and distribution control system hardware and software;

— certain trailers identified in the schedule attached to the Agreement;

— the inventories used in or produced by the Tissue Division;

— all rights under the customer orders existing as of the Effective Time, the Existing Contracts and New Contracts;

— the intellectual property described in the schedule attached to the Agreement; and

— the other assets of the Tissue Division that were intended to be conveyed to Cascades Canada including the facial tissue converting machine.

[6] In addition to selling the Purchased Assets, Atlantic Packaging also leased to Cascades Canada the paper tissue machine and its associated de-inking equipment located in the Whitby Mill and the part of the building where this equipment was located. In each lease agreement, the annual rent payable was $1. The lease agreement for the paper tissue machine and its associated de-inking equipment included an option to purchase these assets for an amount equal to the greater of: (i) $10 million and (ii) $20 million less all capital modifications made by Cascades

Canada net of all depreciation taken during the term. The Whitby Mill is referred to in the Purchase and Sale Agreement as the Thickson Mill.

[7] 722 was incorporated on August 21, 2009 as the new corporation contemplated by the Purchase and Sale Agreement. On August 26, 2009, Atlantic Packaging transferred certain plant equipment, mobile equipment, office equipment, computer hardware, and goodwill to 722. These assets were used in relation to the operation of a converting mill that turned the large rolls of tissue produced by the Progress Mill and the Whitby Mill into individual rolls of toilet paper and paper towel. An Amended and Restated Purchase and Sale Agreement was dated August 28, 2009. The recitals were amended to reflect the fact that 722 had been incorporated and assets had been transferred to it. The definition of Purchased Assets was not amended.

[8] As a result of the agreement dated June 11, 2009, Atlantic Packaging had agreed to sell the shares of 722 (which was then an unnamed corporation) to Cascades Canada before 722 was incorporated and its shares were acquired by Atlantic Packaging.

[9] The Purchased Assets (including the shares of 722) were sold by Atlantic Packaging to Cascades Canada. In filing its tax return for its year ending May 31, 2010, Atlantic Packaging reported the gain on the shares of 722 as a capital gain. The Minister of National Revenue (Minister) reassessed Atlantic Packaging to treat this gain as an income gain. Atlantic Packaging objected to and later appealed this reassessment.

II. Decision of the Tax Court

[10] The Tax Court Judge identified four issues:

(a) Was the Tissue Division a business?

(b) If the Tissue Division was a business, what assets were used in that business?

(c) Which of those business assets were transferred to 722?

(d) Do the transferred assets represent all or substantially all of the assets used in that business?

[11] All of these issues arise in relation to the requirements of section 54.2 of the Act:

54.2 Where any person has disposed of property that consisted of all or substantially all of the assets used in an active business carried on by that person to a corporation for consideration that included shares of the corporation, the shares shall be deemed to be capital property of the person.	54.2 Dans le cas où une personne dispose de la totalité, ou presque, de l'actif qu'elle utilisait dans une entreprise qu'elle exploitait activement, en faveur d'une société, pour une contrepartie comprenant des actions de cette société, ces actions sont réputées être des immobilisations de cette personne.

[12] In addressing the first issue, the Tax Court Judge noted that he did not need to decide whether the Tissue Division was a separate business. In his view, even if it was a separate business, Atlantic Packaging did not transfer all or substantially all of the assets that would have been used in that business to 722. In paragraph 9 of his reasons, the Tax Court Judge also noted that the inconsistent positions taken by Atlantic Packaging, with respect to whether the Tissue

Division was a separate business, would have made it difficult for him to find that the Tissue Division was a separate business, if he had to make this determination.

[13] The Tax Court Judge then examined the issue of what assets were used in the Tissue Division and what assets were transferred to 722. He compared the fair market value of the assets transferred to 722 with the fair market value of all of the assets that he determined were used by Atlantic Packaging in its Tissue Division. Based on his findings, he determined that the assets that were transferred to 722 only comprised 68% of the total assets of the Tissue Division. He found that this would not represent all or substantially all of the assets of the Tissue Division. Therefore, regardless of whether this division was a separate business, the requirement of section 54.2 of the Act that all or substantially all of the assets of the business be transferred to a corporation was not satisfied.

[14] The Tax Court Judge rejected the other arguments of Atlantic Packaging with respect to the means (other than based on fair market value) by which it should be determined whether all or substantially all of the assets of the Tissue Division were transferred to 722. He concluded that the most reliable method of determining whether all or substantially all of the assets of the Tissue Division were transferred to 722 was by determining what percentage of the assets that were used in the Tissue Division were transferred to 722, based on the fair market value of the assets.

[15] As a result, the Tax Court Judge concluded that the requirements of section 54.2 of the Act were not satisfied in this case and, therefore, the shares were not deemed to be capital

property. He dismissed the appeal based on his findings in relation to the issues that were raised by Atlantic Packaging.

III. Issues and Standard of Review

[16] In this appeal, Atlantic Packaging does not challenge the finding of the Tax Court Judge that the most reliable method of determining whether all or substantially all of the assets of the Tissue Division were transferred to 722 is based on the fair market value of the assets. Rather, Atlantic Packaging submits that the central issue is whether the shares of 722 were capital property of Atlantic Packaging, irrespective of whether section 54.2 of the Act is applicable (which Atlantic Packaging described as whether the shares of 722 were capital property based on common law or general principles). The issue of whether the shares of 722 were capital property of Atlantic Packaging, irrespective of whether section 54.2 of the Act applied, was not raised before the Tax Court. The first question that will need to be addressed is, therefore, whether Atlantic Packaging can raise this issue in this appeal. There is no applicable standard of review for this issue since no decision has yet been made on whether Atlantic Packaging can raise this issue in this appeal.

[17] As an alternative argument, Atlantic Packaging, in very brief and perfunctory submissions at the end of its memorandum, submits that the Tax Court Judge erred in finding that section 54.2 of the Act was not satisfied. Atlantic Packaging submits that the Tax Court Judge found that the fair market value of the Whitby Mill lease was $10 million and that he erred in making this finding. The applicable standard of review for any finding of fact is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

IV. Analysis

[18] The first issue that must be addressed is whether Atlantic Packaging can, in this appeal, raise the issue of whether the shares of 722 acquired by Atlantic Packaging were capital property of Atlantic Packaging, irrespective of whether section 54.2 of the Act is applicable. This argument is premised on the assumption that section 54.2 of the Act does not apply to deem the shares to be capital property.

[19] In filing its notice of objection to the reassessment that was issued by the Minister on the basis that the gain on the sale of the shares of 722 was on income account, Atlantic Packaging identified two issues. The second issue was related to the refundable dividend tax on hand and is not relevant in this appeal. The only issue that Atlantic Packaging raised that is relevant in this appeal is the following:

> 9. Did the transfer of the Tissue Division constitute a disposition of all or substantially all of the assets used in an active business carried on by Atlantic so that the 2010 disposition of the shares of 722 was deemed to be on capital account?

[20] Although section 54.2 of the Act is not specifically identified in this paragraph, the issue of whether all or substantially all of the assets used in an active business carried on by Atlantic Packaging were transferred to 722 is clearly the condition that must be satisfied for section 54.2 of the Act to apply. The reference to "so that the 2010 disposition of the shares of 722 was deemed to be on capital account" also limits the issue to section 54.2 of the Act, which, if applicable, would deem the shares to be capital property. The other paragraphs of the notice of

objection focus on section 54.2 of the Act and whether the requirements of this section were satisfied.

[21] Consistent with this notice of objection, in its Notice of Appeal to the Tax Court dated September 11, 2015, Atlantic Packaging identified the same issue:

> 15. Did the transfer of the Tissue Division constitute a disposition of all or substantially all of the assets used in an active business carried on by the Appellant so that the 2010 disposition of the shares in 722 was deemed to be on capital account?

[22] Also consistent with the notice of objection, the other paragraphs of the Notice of Appeal focus on section 54.2 of the Act and whether the requirements of this section were satisfied.

[23] The Crown filed a Reply dated December 17, 2015. In the Reply, the Crown identified the issue more broadly in paragraph 11 as "whether the Minister properly treated the gain on the sale of the 722 Canada Shares as being on account of income". The Crown then devoted paragraphs 12 to 15 of the Reply to explain why, in the Crown's view, the gain on the shares was properly treated as an income gain. In paragraph 16, the Crown identified, as an additional argument, that the requirements of section 54.2 of the Act were not met in relation to the transfer of assets from Atlantic Packaging to 722.

[24] Following the Reply, Atlantic Packaging filed an Amended Notice of Appeal to the Tax Court dated June 7, 2018. The issue to be decided, as described by Atlantic Packaging in this Amended Notice of Appeal, was exactly the same as described in its original Notice of Appeal.

The only amendment that is identified is made to paragraph 2 in which a typographical error is corrected and the reference to “its Consumer Products Division” is deleted.

[25] Therefore, even though the Crown had identified the broader issue in the Reply filed approximately six months earlier, Atlantic Packaging did not amend its description of the issue in its Amended Notice of Appeal nor did it amend any of its submissions. This indicates that Atlantic Packaging clearly intended to limit the issue to only whether the conditions of section 54.2 of the Act were satisfied when Atlantic Packaging transferred certain assets to 722. It is important to note that it was Atlantic Packaging’s appeal to the Tax Court, not the Crown’s appeal. As the appellant, Atlantic Packaging could choose to (and did) limit the issue to be decided by the Tax Court.

[26] The Tax Court Judge concluded that, assuming the Tissue Division was a separate business, the requirements of section 54.2 of the Act were not satisfied as Atlantic Packaging did not transfer all or substantially all of the assets used in the Tissue Division to 722. The issue of whether the shares of 722 would otherwise qualify as capital property of Atlantic Packaging in the circumstances of this case was simply not raised by Atlantic Packaging as an issue before the Tax Court.

[27] In *Lax Kw'alaams Indian Band* v. *Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, the Supreme Court of Canada made the following general comments on the role of pleadings:

> 43 … Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement.

[28] Atlantic Packaging, in its memorandum, submitted that it is not raising a new issue but rather it is only raising a new argument. However, in my view, Atlantic Packaging is attempting to raise a new issue. The issue as delineated in its notice of objection and in its notices of appeal to the Tax Court is clear. The issue is whether the conditions, as prescribed by section 54.2 of the Act, were satisfied in this case. Atlantic Packaging's new position, that the shares of 722 should be treated as capital property irrespective of whether section 54.2 of the Act applies, is not a new argument that the conditions of section 54.2 of the Act are satisfied. Rather, it is a new and separate issue requiring its own set of facts. This is not a new argument but a new issue.

[29] Atlantic Packaging relies on the decision of the Supreme Court in *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, in support of its argument that it is entitled to raise this new issue in this appeal.

[30] In *Quan v. Cusson*, the defendants at the trial had raised a defence of qualified privilege in an action for defamation. The issue on appeal was whether the defendants should, at that stage, be permitted to also raise a defence of responsible communication on matters of public interest. The Supreme Court noted:

> 36 The general rule, applied by the Court of Appeal, is that a new issue may not be raised on appeal. However, the authorities shed light on the circumstances in which appellate courts should make an exception to the rule. In *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at p. 539, Duff J. (as he then was) observed:

> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also: *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 16, *per* L'Heureux-Dubé J. (dissenting in part); *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at paras. 32-33, *per* Binnie J.

37 Further guidance as to the appropriate test is provided by *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, relied on by Sharpe J.A. below. There, the Ontario Court of Appeal explained the circumstances in which an exception will be made to the rule:

> An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. [para. 102]

[31] In *Quan v. Cusson*, the Supreme Court determined that the defendants should be entitled to raise the new defence and ordered a new trial. It is, however, important to examine the reasons why the Supreme Court, in that case, allowed the defendants to raise a new defence which would require a new hearing. The argument of the plaintiffs in *Quan*, that the defendants should be restricted to the defence that they pled, and the reasons why the Supreme Court declined to accept that argument are set out in paragraphs 46 to 48:

> 46 The plaintiff supports the Court of Appeal's conclusion, arguing that the defendants are not entitled to a new trial on the basis of the new defence of responsible communication on matters of public interest, because they did not raise that defence at the first trial. He argues that the defendants made a strategic decision to rely on traditional qualified privilege, declining to stake their case on the riskier prospect that the trial judge might extend the law to provide a distinct responsible communication defence. Instead, they chose to remain on the more familiar terrain of qualified privilege. On appeal, the plaintiff contends, they should have to lie in the bed they made.

> 47 While this argument is not without force, it does not, in my view, carry the day. First, at the time of trial, it was by no means clear that the new defence of responsible communication would emerge as a "different jurisprudential creature" (*Loutchansky v. Times Newspapers Ltd.*, [2001] EWCA Civ 1805, [2002] 1 All E.R. 652, at para. 35), in English or Canadian law, since *Jameel* had not yet been decided. It was therefore not unreasonable for the defendants to argue qualified privilege at trial, and later, on appeal, to contend for a broader elaboration of a responsible communication defence. A panel of the Court of Appeal was much more likely to undertake a thoroughgoing re-evaluation of the governing jurisprudence than was a single trial judge. It cannot therefore be said that the conduct of the defendants exhibited the absence of due diligence that the "no new issues on appeal" rule is meant to discourage.
>
> 48 Second, had the Court of Appeal and this Court endorsed a broadened defence of qualified privilege as pleaded by the defendants, a new trial would have been required in any event, because the trial judge applied an extremely narrow conception of public interest. The defendants had argued for a broader privilege. That was the bed they sought to make; the trial judge, however, required them to lie in a narrower one. The problem was compounded when the Court of Appeal opted for a new and different defence than the broadened qualified privilege defence pleaded. The trial judge cannot be faulted for failing to undertake a development of the law that the defendants did not ask for – i.e. the establishment of a new responsible communication defence. However, in my view, his restrictive approach to the pleaded defence of qualified privilege occasioned an injustice by effectively removing any realistic prospect that statements on matters of public interest to the world at large could be protected. The defendants deserve an opportunity to make their case to a jury properly instructed on the law as it now stands. A new trial is therefore warranted.

[32] In *Quan v. Cusson*, the law had developed after the conclusion of the trial. In this case, in relation to the argument that the shares should qualify as capital property irrespective of whether section 54.2 of the Act applies, Atlantic Packaging does not refer to any cases that were decided after the hearing before the Tax Court or to any new developments in the law related to the determination of whether a particular property is capital property. Therefore, the decision of the Supreme Court in *Quan v. Cusson* is distinguishable from this case.

[33] Atlantic Packaging also refers to paragraph 4 of the decision of this Court in *Zhu v Canada*, 2016 FCA 113, [2016] F.C.J. No. 388 (QL):

> 4 When an appellant seeks to raise an issue of law which does not require further evidence, and which will not cause prejudice to the respondent, it is an error of law for an appellate court to refuse to consider the argument (*Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at paragraph 51).

[34] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102 (QL), the Supreme Court noted in paragraph 51:

> 51 In any event, the Court of Appeal erred in refusing to consider the appellant's arguments on the grounds they were not raised at trial. The general rule is that an appellant may not raise a point that was not pleaded, or argued in the trial court, unless all the relevant evidence is in the record: John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (1993), at p. 51. In this case, all relevant evidence was part of the record. In fact, all the requisite findings of fact had been made. The point raised by the appellant was purely a question of law.

[35] The critical question that arises is whether all of the relevant evidence to decide the new issue that is now raised by Atlantic Packaging was before the Tax Court. In its memorandum, Atlantic Packaging refers to the six factors that have been considered by the courts in determining whether the gain realized on a disposition of a particular property is an income gain or a capital gain. These are set out in *Happy Valley Farms Ltd. v. The Queen*, [1986] 2 C.T.C. 259, 86 D.T.C. 6421 (FCTD), and are also cited in *Continental Bank of Canada v. The Queen*, [1995] 1 C.T.C. 2135, 94 D.T.C. 1858 (TCC) (affirmed [1996] 3 C.T.C. 14, 199 N.R. 100 (FCA), further affirmed [1998] 2 S.C.R. 358, [1998] 4 C.T.C. 77).

[36] While the evidence that was before the Tax Court would be sufficient to address most of the six considerations, one of the considerations that is listed as a relevant factor is the frequency or number of other similar transactions completed by the taxpayer. While it would be presumed that Atlantic Packaging would not be frequently selling off an entire division, there is no indication of whether Atlantic Packaging followed a similar pattern or similar transactions in disposing of other depreciable property. The question for this Court is not whether the shares should be capital property, despite the lack of any evidence with respect to other transactions of a similar nature, but only whether this matter should be considered at this stage absent such evidence.

[37] In my view, the absence of this evidence is sufficient for this Court to reject Atlantic Packaging's argument that this new issue should be considered by this Court. The Crown has been deprived of any opportunity to explore the facts related to the frequency or number of similar transactions, as a result of Atlantic Packaging framing the issue in a narrow way before the Tax Court. The only issue raised before the Tax Court, as noted above, related to the facts that would be relevant to determine if the conditions in section 54.2 of the Act were satisfied.

[38] As a result, in my view, Atlantic Packaging should not be permitted to raise this new issue in this appeal.

[39] The Crown also raised the argument that since Atlantic Packaging is a large corporation for the purposes of the Act, it would be precluded from raising this issue as a result of the restriction placed on large corporations in subsection 169(2.1) of the Act. This subsection

imposes limitations on large corporations raising new issues in an appeal to the Tax Court. The right to appeal to the Tax Court is set out in subsection 169(1) of the Act. This appeal is brought under section 17.6 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 and section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It is not necessary, however, to consider whether the limitation in subsection 169(2.1) of the Act would be applicable in this case since, in my view, Atlantic Packaging could not raise this issue in this appeal even if it was not a large corporation.

[40] Atlantic Packaging only raised one issue in relation to the determination that was made by the Tax Court Judge. This issue is identified by Atlantic Packaging as a finding that the fair market value of the Whitby Mill lease was $10 million. However, Atlantic Packaging has mischaracterized the finding of the Tax Court Judge. The Tax Court Judge did not find that the fair market value of the Whitby Mill lease was $10 million. Rather, he found that the value of the assets that were leased was $10 million. Since these assets were used in the Tissue Division, their fair market value is a relevant consideration in determining whether all or substantially all of the assets of the business (assuming that it was a business) were transferred to 722. It is important to note that the focus of the inquiry for section 54.2 of the Act is on the assets transferred to 722 and the assets used in the alleged active business. The Tax Court Judge did not commit the error as alleged by Atlantic Packaging.

[41] As noted by the Tax Court Judge in paragraph 33 of his reasons, his calculations of the percentage of the assets of the Tissue Division transferred to 722 do not include any amounts for the portion of the real property located in Scarborough and the portion of the real property located in Whitby where the Tissue Division was operating. These assets would have been used

in carrying on this business (if it would have been a separate business) and these assets were not conveyed to 722. Including an amount for the fair market value of these assets would, as he noted, only reduce the percentage of assets that were transferred to 722. I agree with the Tax Court Judge that conveying 68% of the assets used in the Tissue Division to 722 would not satisfy the requirement that all or substantially all of the assets of the Tissue Division be conveyed to 722. Therefore, it is not necessary to revise the calculation to include an amount for these assets.

[42] As a result, I would dismiss this appeal with costs to be assessed using the mid-range of Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106.

"Wyman W. Webb"
J.A.

“I agree
D. G. Near J.A.”

“I agree
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED SEPTEMBER 7, 2018, CITATION NO. 2018 TCC 183 (DOCKET NO. 2015-4074(IT)G)

DOCKET:	A-328-18
STYLE OF CAUSE:	ATLANTIC PACKAGING PRODUCTS LTD./ATLANTIC PRODUITS D'EMBALLAGE LTÉE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 5, 2020
PUBLIC REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. MACTAVISH J.A.
DATED:	APRIL 20, 2020

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