

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170201

Docket: A-249-15

Citation: 2017 FCA 22

**CORAM: STRATAS J.A.
WEBB J.A.
SCOTT J.A.**

BETWEEN:

REVCON OILFIELD CONSTRUCTORS INCORPORATED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Edmonton, Alberta, on February 1, 2017.
Judgment delivered from the Bench at Edmonton, Alberta, on February 11, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Edmonton, Alberta, on February 1, 2017).

STRATAS J.A.

[1] The appellant appeals from the Order dated April 23, 2015 of the Federal Court (*per* Mosley J.): 2015 FC 524. Before the Federal Court was an application under section 231.7 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for an order that the appellant comply with certain requests for documents and information issued against it during an audit. The appellant had

refused to comply with the requests on the ground that the documents and information requested were subject to legal professional privilege. The Federal Court found that some of the requested information and documents were not subject to legal professional privilege and must be disclosed in response to the requests. On this, the appellant submits in this Court that the Federal Court committed reviewable error.

[2] For this Court to intervene, the appellant must demonstrate that the Federal Court erred in law or on extricable legal principles, here the law and principles relating to legal professional privilege, or that the Federal Court committed palpable and overriding error on a question of fact or a question of mixed law and fact where there is no extricable legal principle: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215. Palpable and overriding error is a high standard for the appellant to meet: *Benhaim v. St-Germain*, 2016 SCC 48 at paras. 38-39, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46 and *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77.

[3] In our view, the Federal Court did not commit any reviewable error. Indeed, we agree with it, substantially for the reasons it gave.

[4] In this Court, the appellant offers a new argument, one that was not raised in the Federal Court. Appropriately, the respondent does not object to us considering it. The new argument is purely legal in nature, based on two Supreme Court authorities postdating the Federal Court's

order. As well, further evidence is not needed to raise the argument. Thus, we can entertain it: see, e.g., *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712.

[5] In this new argument, the appellant submits that the Federal Court did not have the authority to make a compliance order under section 231.7. It relies upon the decisions of the Supreme Court of Canada in *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336 and *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381.

[6] We reject the appellant's new argument. These two decisions do not apply to section 231.7 as applied in this case. In these two decisions, the Supreme Court declared section 231.7 to be of no force or effect only insofar as it relates to lawyers and notaries: see *Chambre des notaires*, at paras. 92-93; *Thompson* at para. 36. Thus, the Supreme Court read down section 231.7 to exclude lawyers and notaries. But section 231.7 otherwise remains in force.

[7] In this case, the requirements under the *Income Tax Act* were issued against the appellant. The appellant is neither a lawyer nor a notary. Therefore, in this case, section 231.7 still authorized the Federal Court to make the order it did.

[8] The appellant also submitted that the Federal Court's order cannot stand because it directly or indirectly ordered the appellant's law firm to disclose material, contrary to the Supreme Court's two decisions. It says that the Federal Court's order is an order against its law firm.

[9] We disagree. The Federal Court’s order is directed only against the appellant and, in effect, requires it to disclose all documents in its power, possession and control, wherever located. The order remains an order against the appellant and falls outside of the concern of the Supreme Court—that certain requirements issued against lawyers and notaries might subvert the client’s legal professional privilege. Here, the client had a full opportunity to contest issues relating to legal professional privilege and legal professional privilege was fully respected in this case.

[10] Accordingly, we shall dismiss the appeal with costs. The parties agreed, and we accept, that costs shall be fixed in the amount of \$1,730, all-inclusive.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-249-15

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MOSLEY
DATED APRIL 23, 2015, DOCKET NO. T-1272-14**

STYLE OF CAUSE:

REVCON OILFIELD
CONSTRUCTORS
INCORPORATED v. THE
MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING:

EDMONTON, ALBERTA

DATE OF HEARING:

FEBRUARY 1, 2017

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.
WEBB J.A.
SCOTT J.A.

DELIVERED FROM THE BENCH BY:

STRATAS J.A.

APPEARANCES:

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