Federal Court of Appeal | Cour d'appel fédérale

Date: 20190130

Dockets: A-171-17
A-172-17

Citation: 2019 FCA 19

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

Docket: A-171-17

BETWEEN:

MADISON PACIFIC PROPERTIES INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-172-17

AND BETWEEN:

MP WESTERN PROPERTIES INC.
1073774 PROPERTIES INC.

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on November 7, 2018.

Judgment delivered at Ottawa, Ontario, on January 30, 2019.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellants appeal from the Tax Court of Canada's interlocutory orders in *MP Western Properties Inc. v. The Queen*, 2017 TCC 82 (*per* V.A. Miller J.), requiring the Minister of National Revenue to produce certain documents and declining to compel the production of others. The appeals of these two orders were joined for hearing; a copy of these Reasons will therefore be placed in each Court file.

[2] For the reasons that follow, I would dismiss these appeals with costs.

I. Background

[3] The appellants are all part of the same corporate group. Through a series of transactions, they acquired the unused non-capital losses, net capital losses, scientific research and experimental development expenses and/or investment tax credits (collectively, the tax attributes) of two insolvent publicly-traded corporations. The appellants applied the tax attributes to reduce the income tax otherwise payable in respect of their profitable business activities. The Tax Court described the transactions undertaken to effect this result as follows at paragraph 7 of its Reasons:

> While the precise mechanisms and the entities involved in the two sets of transactions were different, the end result of the transactions share the following common elements:
>
> a) The Purchasers obtained either on their own or collectively, less than 50% of the voting shares of the target public companies […] but more than 90% of the non-voting participating shares. […]

b) The non-voting shares had "coattail provisions" so they could be converted to voting shares, at the option of the shareholder, if a specified takeover bid was made to the holders of the voting shares.

c) The predecessors to the Appellants, after changing their corporate names to their current names, carried on the existing profitable businesses of the Purchasers using the business assets that were transferred to them pursuant to the asset vend-in agreements.

[4] The Minister of National Revenue reassessed the appellants, denying the credits and losses they claimed in respect of the tax attributes and preventing them from claiming them in future. The Minister based the reassessments on three alternative grounds.

[5] The primary assessment position was that, by reason of the transactions, the appellants acquired "control" of the predecessor corporations within the meaning of subsections 111(1), (4) and (5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA), which would restrict the appellants' use of the tax attributes. In the alternative, the Minister concluded that the "coattail provisions" on the non-voting shares gave rise to a right that was deemed to be exercised under paragraph 251(5)(*b*) and subsection 256(8) of the ITA, which would restrict the utilization of the tax attributes. In the final alternative, the Minister concluded that the transactions attracted the application of the general anti-avoidance rule (GAAR) set out in section 245 of the ITA, with the consequence that the Minister was entitled to deny the tax benefit that would have resulted from the transactions but for the application of the GAAR.

[6] The appellants appealed the reassessments to the Tax Court under section 169 of the ITA. They also made requests under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the ATIP requests), seeking communications between the legislative policy divisions of the Canada

Revenue Agency (the CRA) and the Department of Finance relating to loss utilization or loss trading under the ITA. In response, the appellants received a considerable number of documents, including some where portions were redacted in accordance with exemptions in the *Access to Information Act*.

[7] The appellants listed the documents received in response to the ATIP requests in their respective affidavits of documents. During the oral examination for discovery of the respondent's representatives, the appellants requested production of the unredacted versions of the documents that had been disclosed as well as additional documents. The respondent objected, so the appellants brought motions before the Tax Court seeking to compel production. The orders under appeal were rendered in respect of these motions.

II. The Orders and Reasons of the Tax Court

[8] In one of the orders under appeal, the Tax Court required the Minister to disclose to the appellant, MP Western Properties Inc. (Western), a memo dated March 8, 2004 from the CRA's Deputy Assistant Commissioner, Income Tax Rulings Directorate, Policy and Planning Branch to the Department of Finance's Director General, Tax Legislation (with the exception of the portions of the memo that identify another taxpayer). In this memo, the CRA set out its concerns regarding the scope of the restrictions on the deductibility of non-capital losses under subsection 111(5) of the ITA and requested the Department of Finance to amend the ITA to "deem an acquisition of control to occur where a person or group of persons acquire, as part of a series of transactions, a certain level of equity in a corporation […] and one of the main purposes of the series of transactions is to avoid any limitation of the deductibility of non-capital losses".

The Tax Court held that the respondent was required to disclose this memo to Western because it had been placed in the CRA's audit file for Western.

[9] The Tax Court further ordered that draft proposal letters prepared by the CRA and several emails regarding them internal to CRA, all of which were also contained in the audit file for Western, had to be produced, but declined to order further production of any of the disputed documents.

[10] The other documents the appellants sought that remain in dispute fall into two broad categories: first, the redactions from various documents produced in response to the ATIP requests and, second, a general request for all correspondence between the legislative policy division, income tax rulings directorate and/or the GAAR Committee of the CRA and the legislative division of the Department of Finance for the period 2001 through 2012 "with respect to the legislative scheme dealing with so-called corporate loss trading, tech wrecks, transfer of corporate losses, whatever the colloquial terms might be".

[11] The Tax Court commenced its reasoning in support of the foregoing conclusions by outlining the principles generally applicable to pre-hearing disclosure in tax appeals, stating as follows at paragraphs 21 to 22 of its Reasons:

> The Appellants' request for disclosure is supported by the following general principles:
>
> a) Relevancy on discovery ought to be "broadly and liberally construed and wide latitude should be given": *Baxter v Canada*, 2004 TCC 636 at paragraph 13.
>
> b) Relevancy at discovery is a lower threshold than that at trial: *4145356 Canada Ltd v R*, 2010 TCC 613. In fact, Rule 90 of the *Rules* expressly

provides that the production of a document at discovery is not an admission of its relevance or admissibility.

c) All documents relied on or reviewed by the Minister in making his assessment must be disclosed to the taxpayer: *Amp of Canada v R*, [1987] 1 CTC 256 (FCTD).

d) Documents that lead to an assessment are relevant: *HSBC v The Queen*, *(supra)* at paragraph 15.

e) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request: *HSBC (supra)* at paragraph 15.

f) The examining party is entitled to have any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party: *Lloyd M. Teelucksingh v The Queen*, 2010 TCC 94 at paragraph 15.

Whereas, the Respondent's refusal to disclose the documents is supported by the following general principles:

a) An indiscriminate request for the production of documents in the hope of uncovering helpful information or the hope of it leading to a train of inquiry is not permitted: *Harris v The Queen*, 2001 DTC 5322 (FCA) at paragraph 45; *Fluevog (supra)* at paragraph 18.

b) Earlier drafts of a final position paper do not have to be disclosed. The mental process of the Minister or his officials in raising the assessments is not relevant: *Rezek (supra)* at paragraph 16.

c) A party is entitled to know the position of the other party with respect to an issue of law, but it is not entitled to have access to either the legal research or the reasoning by which that position is arrived at: *Teelucksingh (supra)* at paragraph 15.

d) Even where relevance is established, the Court has a residual discretion to disallow the production of documents. […]

[12] The Tax Court noted that these principles provide for broader disclosure in a GAAR appeal than might be appropriate in non-GAAR cases. Relying on the decisions of this Court in *Canada v. Lehigh Cement Limited*, 2011 FCA 120, 417 N.R. 342 (*Lehigh*) and *Canada v.*

Superior Plus Corp., 2015 FCA 241, 477 N.R. 385 (*Superior Plus*), the Tax Court stated that documents not specific to a taxpayer but relating to the policy of the ITA may be ordered to be disclosed in certain circumstances in a GAAR case. The Tax Court referred to the circumstances in *Lehigh* as an example of when such broader disclosure is warranted (Reasons, para. 29). The Tax Court also noted at paragraph 32 of its Reasons that, while draft documents prepared by the Minister or considered by officials in the context of a taxpayer's audit are not normally producible in a non-GAAR case, they should be disclosed in a GAAR appeal as they inform the Minister's mental process leading up to an assessment and reflect the Minister's understanding of the policy at issue. The Tax Court noted that such documents may lead to a train of inquiry that meets the lower threshold for disclosure in a GAAR case.

[13] Applying these principles to the documents requested, the Tax Court held that the above-mentioned documents in Western audit file had to be produced but that no further production of the disputed documents was warranted, including those documents that referred to or followed up on the March 8, 2004 memo from the CRA to the Department of Finance. As I read the Tax Court's Reasons, it refused disclosure of these additional documents because it concluded they were not relevant and offered as an additional reason the fact that the documents contained information of other taxpayers which is protected from disclosure by section 241 of the ITA. The Tax Court also refused the broad request for all correspondence between the legislative policy division, income tax rulings directorate and/or the GAAR Committee of the CRA and the legislative division of the Department of Finance for the period 2001 through 2012 with respect to the legislative scheme in the ITA dealing with transfer of corporate losses, finding such

request to be “a fishing expedition of vague and far-reaching scope”, “overly broad” and an “onerous task to satisfy” (Reasons, para. 35).

III. Issues

[14] The appellants submit that the Tax Court made two errors of law and an error of mixed fact and law in refusing to order production of the disputed documents.

[15] Insofar as concerns the first alleged error of law, the appellants say that the Tax Court erred in law in concluding that only documents considered in the course of the audit of Western were producible and allege that broader disclosure was required. More specifically, the appellants assert that because the disputed documents containing the redactions related to or followed up on the CRA’s March 8, 2004 memo to the Department of Finance that was ordered to be disclosed, the redactions also needed to be disclosed. The appellants submit that this case is similar to *Lehigh*, where this Court affirmed that, in a GAAR case, documents that relate to a disclosed document need to be produced, even if they were not consulted or prepared in respect of the audit of the taxpayer. As in *Lehigh*, the appellants say that the redactions from the disputed documents relate to the March 8, 2004 memo, which has been produced, and similar to the situation in *Lehigh*, might lead to a relevant train of inquiry in their appeals.

[16] Insofar as concerns the second alleged error of law, the appellants say that the Tax Court erred in relying on section 241 of the ITA as a basis for non-disclosure, submitting that subsection 241(3) of the ITA governs the situation. That subsection provides in relevant part that the prohibition on disclosing taxpayer information does not apply in legal proceedings relating to

the administration and enforcement of the ITA. The appellants therefore say that the Tax Court erred in relying on section 241 of the ITA as a reason for non-disclosure.

[17] Finally, with respect to the broader disclosure request for documents exchanged between the CRA and the Department of Finance, the appellants say that the Tax Court made a palpable and overriding error in characterizing the appellants' request as an overly broad fishing expedition that it would be difficult for the Minister to satisfy in the absence of any evidence from the Minister capable of supporting such a conclusion.

IV. Analysis

[18] In my view, none of the foregoing arguments warrants intervention.

[19] The final two arguments may be disposed of quickly. As concerns the final argument, given the nature of the impugned disclosure request, which sought correspondence between the CRA and the Department of Finance on loss trading over a period in excess of a decade, it was open to the Tax Court to conclude that the request was a fishing expedition that would be difficult to satisfy. Similar requests in the oral discovery context have been refused for similar reasons: see, for example, *Kossow v. The Queen*, 2008 TCC 422 at para. 63, 2008 DTC 4408, aff'd 2009 FCA 83, 392 N.R. 1, leave to appeal to SCC dismissed 33163 (September 17, 2009), where somewhat similar questions and production requests were disallowed; see also *General Electric Capital Canada Inc. v. The Queen*, 2008 TCC 668 at paras. 13, 15, 2009 DTC 1186. Moreover, it seems to me that the characterization of a disclosure request of this nature as a fishing expedition will generally be a self-evident conclusion. Accordingly, evidence is not

necessarily required to support the denial of such a vague, broad and ill-defined production request. Thus, the Tax Court did not make a reviewable error in concluding that this disclosure request was a fishing expedition that would be difficult to satisfy.

[20] With respect to the error alleged to flow from reliance on section 241 of the ITA, as noted, as I read the reasons of the Tax Court, it did not refuse production based on section 241 of the ITA but rather principally because it concluded that the disputed documents were not relevant. It merely referred to section 241 of the ITA as an additional reason for refusing the requested disclosure. Although I do not necessarily endorse the Tax Court's reasoning on the applicability of section 241 of the ITA, because I believe that the Tax Court did not make a reviewable error in finding that the disputed documents were not relevant, it is not necessary to address the section 241 issue further.

[21] Turning, then, to the appellants' first argument, contrary to what the appellants assert, I am of the view that the alleged error raises a question of mixed fact and law, reviewable for palpable and overriding error.

[22] In *Lehigh*, this Court indicated that an argument asserting that the Tax Court erred in a disclosure order involves a question of mixed fact and law, stating as follows at paragraphs 24 and 25 (*per* Dawson J.A.):

> The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. See *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379, 162 A.C.W.S. (3d) 911 at paragraph 35. In the words of this Court in *Eurocopter v. Bell Helicopter Textron Canada Ltd.*, 2010 FCA 142, 407 N.R. 180 at paragraph 13, while "the general principles established in the case law are useful,

> they do not provide a magic formula that is applicable to all situations. In such matters, it is necessary to follow the case-by-case rule."
>
> It follows from this that the determination of whether a particular question is permissible is a fact based inquiry. On appeal a judge's determination will be reviewed as a question of mixed fact and law. Therefore, the Court will only intervene where a palpable and overriding error or an extricable error of law is established. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Bristol-Myers Squibb Co. v. Apotex Inc.*, as cited above, at paragraph 35.

[23] In *Lehigh*, this Court held that the Tax Court had applied the correct legal test for disclosure in a case such as this, which defines relevance on discovery as requiring that the disputed question or production request give rise to a reasonable likelihood that it might lead to a train of inquiry that may advance a party's case or damage that of its opponent. This Court found that the Tax Court had applied this test in determining that the disputed documents were relevant and therefore did not intervene.

[24] This Court has similarly applied the palpable and overriding error test to determining whether the court below erred in production, refusal or similar discovery-related rulings in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79 and in *684761 B.C. Ltd. v. Canada*, 2015 FCA 123 at paras. 3-4. In the latter case, Gauthier J.A. noted at paragraph 3 that:

> The determination of whether a particular question is permissible or relevant is typically a question of mixed fact and law. Unless an extricable error of law is established (such as using the wrong test in respect of relevance), this Court will only intervene where a palpable and overriding error is established (*Canada v. Lehigh Cement Ltd.*, 2011 FCA 120, [2011] F.C.J. No. 515 at paragraphs 24-25, *Grenon v. Canada*, 2011 FCA 147, [2011] F.C.J. No. 637 at paragraph 2, *Reddy v. Canada*, 2012 FCA 85, [2012] F.C.J. No. 336 at paragraph 6).

[25] Here, the Tax Court accurately set out the applicable legal principles governing disclosure in paragraphs 21 and 22 of its Reasons, cited above. Thus, the question for this Court is whether the Tax Court committed a palpable and overriding error in applying those principles to the disputed documents.

[26] I cannot conclude that the Tax Court made any such error in light of the deference to be accorded under the palpable and overriding standard. As this Court explained in *Cherevaty v. Canada*, 2016 FCA 71 at para. 14 (*per* Webb J.A.), "[j]udges have a broad discretion to determine relevancy at the discovery stage". Moreover, a palpable error is an obvious error: *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46, 431 N.R. 286 (*per* Stratas J.A.); *University Hill Holdings Inc. (589918 B.C. Ltd.) v. Canada*, 2017 FCA 232 at para. 18, 2017 DTC 5131 (*per* Boivin J.A.).

[27] The Tax Court did not make such an error. Contrary to what the appellants assert, the present case is not on all fours with *Lehigh*. There, unlike here, the Minister determined that a memo somewhat like CRA's March 8, 2004 memo to the Department of Finance was a document which it was required to disclose and so produced it. As the respondent rightly notes, the reasoning of both the Tax Court and of this Court was premised at least in part on the Minister's concession that the memo in that case was a producible document. In the absence of a similar concession in the instant case, I cannot conclude that the Tax Court erred in reaching a different conclusion from that reached in *Lehigh*.

[28] I also note that, in any event, the documents in issue are of limited relevance and likely inadmissible at trial as, under the GAAR analysis, the question of the policy in the ITA that the taxpayer is alleged to have avoided is ultimately a question of law. The Supreme Court of Canada noted in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 44, the "textual, contextual and purposive interpretation of specific provisions of the Income Tax Act" for the purpose of discerning their underlying policy is "essentially a question of law". Thus, while it may well be incumbent on the Minister to set out the disputed policy in the Minister's pleadings as a matter of fairness, as was held in *Birchcliff Energy Ltd. v. Canada*, [2013] 3 C.T.C. 2169, [2012] T.C.J. No. 354 (*per* C. Miller J.), cited with approval in *Superior Plus Corp. v. The Queen*, 2015 TCC 132 at paras. 20-21, it does not follow that evidence on the policy will be admissible at trial as matters of law are for a court to determine.

[29] Given the limited relevance of the disputed documents and the differences between this case and *Lehigh*, I would not interfere with the Tax Court's orders.

V. Proposed Disposition

[30] In light of the foregoing, I would dismiss these appeals with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-171-17
STYLE OF CAUSE:	MADISON PACIFIC PROPERTIES INC. v. HER MAJESTY THE QUEEN
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 7, 2018
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CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
DATED:	JANUARY 30, 2019

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