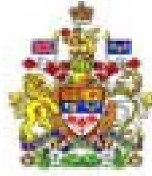
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110331

Docket: A-334-10

Citation: 2011 FCA 121

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

GRAND RIVER ENTERPRISES SIX NATIONS LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

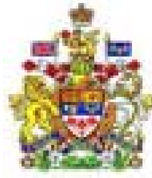
Heard at Toronto, Ontario, on March 16, 2011.

Judgment delivered at Ottawa, Ontario, on March 31, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from an interlocutory order of the Tax Court of Canada (Tax Court) rendered in respect of a motion brought by Grand River Enterprises Six Nations (Grand River). Grand River moved for an order requiring Her Majesty the Queen (the Crown) to provide a list of certain tobacco manufacturers (the requested list) and to answer a question objected to on discovery (the requested answer). The requested list was a list of “First Nations manufacturers of tobacco who are located on reserves situated in the Province of Ontario” and who are “licensed as tobacco

manufacturers under the Excise Act 2001." The requested answer was, if the requested list was not provided, to "advise us as to whether any of the First Nation licensees are incorporated entities."

[2] The issue raised on this appeal is whether the Judge of the Tax Court erred by dismissing the motion.

The Facts

[3] In every case, 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 this case, the factual and procedural context may be summarized as follows:

1. Grand River is a federally incorporated entity. It manufactures and sells tobacco products under a federal license at its business premises on the Six Nations of the Grand River Reserve (Reserve). The federal license is issued under the *Excise Act, 2001*, S.C. 2002, c. 22 (Act).

2. Since 1998, Grand River has possessed an Ontario Provincial Wholesale Dealer's Permit and a Registration Certificate. The Registration Certificate is subject to a condition that restricts Grand River to selling its tobacco products on the Reserve.

3. In this proceeding, Grand River appeals from 23 assessments of excise duty plus interest relating to a 23 month period commencing in September, 2005 and continuing to July, 2007.

4. During the period under assessment, Grand River only remitted partial excise duty on its tobacco products. This is said to reflect Grand River's belief that significant quantities of tobacco products were being manufactured and offered for sale on Indian reserves in Ontario, including on the Reserve, by persons who did not possess federal tobacco manufacturing licenses and who did not pay excise duty in respect of these tobacco products.

5. In its Fresh as Further Amended Notice of Appeal Grand River defends the assessment of excise duty against it by submitting that excise duty never became payable. Grand River argues that its tobacco products were not "packaged" within the meaning of paragraph 42(1)(*a*) of the Act and subsection 2(*b*) of the *Stamping and Marking of Tobacco Products Regulations*, SOR/2003-288 (Regulations) so that no excise duty was imposed upon it or payable by it.

6. Paragraph 42(1)(*a*) of the Act states:

42. (1) <u>Duty</u> is imposed on tobacco products manufactured in Canada or imported and on imported raw leaf tobacco at the rates set out in Schedule 1 and <u>is payable</u>	42. (1) <u>Un droit</u> sur les produits du tabac fabriqués au Canada ou importés et sur le tabac en feuilles importé est imposé aux taux figurant à l'annexe 1 et <u>est exigible</u> :
(*a*) in the case of tobacco products manufactured in Canada, by the tobacco licensee who manufactured the tobacco products, <u>at the time they are packaged</u>; and [emphasis added]	*a*) dans le cas de produits du tabac fabriqués au Canada, du titulaire de licence de tabac qui les a fabriqués, <u>au moment de leur emballage</u>; [Non souligné dans l'original.]

7. Subsection 2(*b*) of the Regulations provides:

2. For the purpose of paragraph (*a*) of the definition “packaged” in section 2 of the Act,	2. Pour l’application de l’alinéa *a*) de la définition de « emballé » à l’article 2 de la Loi, est un emballage réglementaire :
[…]	. . .
(*b*) a tobacco product is packaged in a prescribed package when it is packaged in the smallest package — including any outer wrapping that is customarily displayed to the consumer — in which it is normally offered for sale to the general public. [emphasis added]	*b*) dans le cas d’un produit du tabac, le plus petit emballage dans lequel il est normalement offert en vente au public, y compris l’enveloppe extérieure habituellement présentée au consommateur. [Non souligné dans l’original.]

8. On discovery, the Crown refused to provide the names of First Nation tobacco manufacturers who were licensed as tobacco manufacturers under the Act and were located on reserves in the Province of Ontario. The Crown also refused to advise whether any of the First Nation licensees were incorporated.

9. The Crown did provide the following answer in response to a request that it verify that all licensed manufacturers pay excise duties on their products.

> Answer: Yes. All licensed tobacco manufacturers pay excise duty on their tobacco products at the time their products are packaged in the smallest packages in which they are normally offered for sale to the consumers. To address more specifically the concern of the appellant, all licensed tobacco manufacturers pay excise duty on their tobacco products at the time their products are packaged in similar packages as those of the appellant. [emphasis added]

The Decision of the Judge

[4] The Judge concluded that the information sought was irrelevant and that the requests were in the nature of a fishing expedition. To reach this conclusion the Judge indicated during the hearing that:

1. The Minister's treatment of other taxpayers cannot be determinative and is irrelevant to the tax liability of a taxpayer.

2. Any complaint of an arbitrary use of the Minister’s discretionary power must be challenged by way of judicial review in the Federal Court.

The Issues

[5] In my view, the issues raised on this appeal are:

1. What principles delineate the permissible scope of discovery under Rule 95(1) of the *Tax Court of Canada Rules (General Procedure)* (the Rules)?

2. What is the applicable standard of review?

3. Did the judge err by finding the requested list and the requested answer to be irrelevant?

Consideration of the Issues

1. What principles delineate the permissible scope of discovery under Rule 95(1)?

[6] The scope of oral discovery is governed by Rule 95(1) which states:

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that	95. (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants :
(*a*) the information sought is evidence or hearsay,	*a*) le renseignement demandé est un élément de preuve ou du ouï-dire;
(*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or	*b*) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;
(*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined. [emphasis added]	*c*) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée. [Non souligné dans l'original.]

[7] In *Her Majesty the Queen v. Lehigh Cement Limited*, 2011 FCA 120, this Court considered what it means for a question to be "relevant" within the contemplation of Rule 95(1). At paragraphs 34 and 35 the Court wrote:

> 34. The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.,* 2008 FCA 287, 381 N.R. 93 at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.
>
> 35. Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might

> disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

These are the principles to be applied to determine the propriety of the appellant's requests.

2. The Standard of Review

[8] As noted above, to determine whether a question is proper requires consideration of the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. 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. The Court, therefore, will only intervene where a palpable and overriding error or an extricable error of law is established. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Bristol-Myers Squibb Co. v. Apotex Inc.*, cited above.

[9] Absent an extricable error of law, any exercise of the trial court's residual discretion would also be reviewed on the standard of palpable and overriding error.

3. Did the Judge err in finding the requested list and the requested answer to be irrelevant?

[10] In my view, the Judge committed no error in finding the requested list and the requested answer to be irrelevant and the inquiries to be in the nature of a fishing expedition. I reach this

conclusion by a different route from that taken by the Judge during the hearing. My reasons for this conclusion are as follows.

[11] The basis for Grand River's request is that it "suspects, but does not know" that there are First Nation tobacco manufacturers who are licensed under the Act but who do not pay excise duty on all their tobacco products. Grand River submits that in consequence:

a. It is entitled to test the Crown's assertion that all licensed First Nation tobacco manufacturers in Ontario are paying excise duty on their tobacco products; and

b. It wishes to know the names of all licensed First Nation tobacco manufacturers in Ontario in order to obtain product samples for each licensee, examine the packaging of their products and determine their customer base so as to assist in Grand River's analysis and interpretation of the Act.

[12] It is here that the factual and procedural context of this case becomes especially significant. As this Court noted in *Eurocopter v. Bell Helicopter Textron Canada Ltd.*, 2010 FCA 142, 407 N.R. 180 at paragraph 13, it is necessary to follow a case-by-case rule.

[13] As a matter of general principle, it is not objectionable to test a witness' evidence on discovery (see Rule 95(1)(*b*)). Nor as a matter of general principle is it objectionable to ask a question that may lead to a train of inquiry that may either advance the questioning party's case or

damage its adversary's case. At the same time, questions in the nature of a fishing expedition are objectionable.

[14] In *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 at paragraphs 61 and 62, the Court quoted with approval the following description of a fishing expedition:

> 61. […]
> 19. […] To say that a document might conceivably lead to other documents, which, although not in themselves relevant, might then conceivably lead to useable information, is not enough. It is precisely the type of fishing expedition which the jurisprudence of this Court consistently refused to sanction. That is not to say that the moving party must establish that the document sought will necessarily lead to useable information: a reasonable likelihood will suffice; an outside chance will not. [emphasis added]

[15] The requested list is said by the appellant to be necessary in order to lead it to product samples and packaging from other tobacco manufacturers and to information about the other manufacturers' customer base. Such evidence is not sought for the purpose of arguing any differential treatment of similarly situated taxpayers, but to inform the interpretation of the governing legislation, particularly whether Grand River's cigarettes and fine cut tobacco are "packaged" within the meaning of the Act. Assuming that to be a proper purpose in this case, in the absence of some evidence from Grand River in support of its suspicion, the requested list has not been shown to be likely to advance Grand River's case or to damage the Crown's case. This is because the only relevant evidence before the Court is the Crown's unequivocal evidence on discovery that "all licensed tobacco manufacturers pay excise duty on their tobacco products at the time their products are packaged in similar packages as those of the Appellant." In the absence of

some evidence from which an inference may be drawn that some licensed manufacturers are not paying excise duty on their tobacco products at the time their products are packaged in packages similar to those of the appellant, the Judge correctly considered Grand Rivers' requests to amount to a fishing expedition.

[16] This stands in contradistinction to the factual context before the Court in *Lehigh*, where the existence of a memorandum produced by the Crown on discovery supported an inference that other relevant memoranda may well exist. A party's unsupported suspicion or hunch is unlikely to provide a proper basis for a train of inquiry that may advance its case or damage its opponent's case.

[17] There is one further consideration. Even where relevance is established, the Tax Court retains discretion to disallow a question. One circumstance where a question may be disallowed is where there are other means of obtaining the information sought. See *Apotex Inc. v. Wellcome Foundation Ltd.*, cited above.

[18] In Ontario, the Ontario Ministry of Finance issues provincial permits to sell tobacco products on and off Indian reservations. The names and addresses of Provincial registrants are available online. Grand River has not explained how this is not an appropriate source of information for it to pursue. Nor has it shown that it could not have obtained relevant information about the meaning of "packaging" by asking questions on discovery directed at what the Minister of National Revenue considers to be "packaging", and what standards are applied when deciding whether in a particular case the "packaging" test is met.

[19] For these reasons, I have concluded that the Judge did not err in finding the requested list and the requested answer to be irrelevant. I would, therefore, dismiss the appeal. In the circumstances, it is not necessary to consider the Crown's alternative argument that the requested information is protected from disclosure on grounds of confidentiality.

Costs

[20] Following the conclusion of the oral hearing the parties each provided *pro forma* bills of costs in respect of the motion in the Tax Court and the appeal in this Court. However, the Judge left the issue of the costs of the motion in the Tax Court to the trial judge, and no appeal was taken from that finding. Accordingly, this Court should deal only with the costs of the appeal.

[21] The respondent was successful in resisting the appeal and I would award the respondent the costs in this Court, in any event of the cause. Consistent with the *pro forma* bills of costs, I would fix the costs in this Court in the lump sum of $2,250.00 all inclusive, in lieu of assessed costs.

"Eleanor R. Dawson"
J.A.

"I agree
Carolyn Layden-Stevenson J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-334-10
STYLE OF CAUSE:	GRAND RIVER ENTERPRISES SIX NATIONS LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 16, 2011
REASONS FOR JUDGMENT BY:	Dawson J.A.
CONCURRED IN BY:	Layden-Stevenson J.A. Mainville J.A.
DATED:	March 31, 2011

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