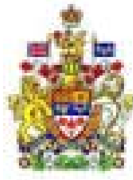
Federal Court of Appeal  Cour d'appel fédérale

Date: 20110408

Docket: A-39-10

Citation: 2011 FCA 128

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JEAN-ROBERT LACROIX
representing CANADEVIM LTÉE,
under subsection 38(1) of the
Bankruptcy and Insolvency Act

Respondent

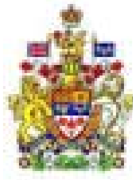
Heard at Ottawa, Ontario, on March 16, 2011.

Judgment delivered at Ottawa, Ontario, on April 8, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal filed by the Crown from a judgment of Justice Lamarre of the Tax Court of Canada (the TCC judge). Justice Lamarre allowed the appeal of Canadevim ltée (Canadevim) and vacated the assessment made by the Minister of Revenue of Québec on behalf of the Minister of National Revenue (the Minister) under the *Excise Tax Act*, R.S.C., 1985, c. E-15 (ETA).

[2] Canadevim was declared bankrupt in a judgment of the Quebec Superior Court dated January 24, 2003. A further judgment by the same Court authorized Jean-Robert Lacroix to institute the present proceeding on Canadevim's behalf.

[3] In issuing the impugned assessment, the Minister assumed that, under paragraph 152(1)(*b*) of the ETA, Canadevim had to issue an invoice at some point during the period covered by the assessment, that is, from May 1, 1998, to October 31, 2001, for the work it carried out as part of a service supply agreement. The TCC judge found that since the work carried out by Canadevim had not been "substantially completed" within the meaning of paragraph 168(3)(*c*) of the ETA, no such invoice had to be issued.

[4] For the reasons that follow, it is my view that the TCC judge erred in law in making the decision and that the appeal should be allowed.

RELEVANT FACTS

[5] The only person to testify for Canadevim at the hearing was Yoland Lacasse (Reasons, para. 4). The following summary is based on his testimony and the documentary evidence filed in the proceedings.

[6] The shareholders and directors of company Canadevim, during the period in question, were Yoland Lacasse and Jean-Robert Lacroix (Appeal Book, Vol. II, pp. 150, 151). In 1989, Yoland Lacasse, acting on his own behalf and for three companies (Yoland Lacasse *in Trust*)

including Canadevim, purchased a parcel of land of about 200 acres (Appeal Book, Vol. II, pp. 152, 153 and 239). A certain Harry Adams owned an adjacent parcel of about 100 acres. In October 1996, the City of Aylmer approved a residential and commercial development project that included the building of a golf course on the two parcels of land.

[7] In spring 1997, Yoland Lacasse and Yoland Lacasse *in Trust* gave Canadevim, the general contractor, the mandate to start building the golf course (Appeal Book, Vol. II, pp. 165 and 240 to 242). As to whether Harry Adams had also given this mandate, Yoland Lacasse replied [TRANSLATION] “it was mostly me” before adding that Harry Adams was on site from the start of and during most of the construction (Appeal Book, Vol. II, at p. 243).

[8] Although the agreement was not in writing, according to Yoland Lacasse, it provided that Canadevim would be paid an hourly rate and that a markup of 10 percent would be added to the cost of the subcontractors (Appeal Book, Vol. II, at p. 250). The work began in spring 1997 and continued until fall 1997, when Harry Adams learned that he had an incurable cancer. The work which had been completed up to 55% was interrupted. The grass was cut in summer 1998, but this work was not done by Canadevim (Appeal Book, Vol. II, at p. 178.

[9] On April 17, 1998, Harry Adams donated his parcel of land to a trust created for the benefit of his spouse, Shirley Goodwin. A few months later, on July 10, 1998, Jean-Robert Lacroix, acting on behalf of Canadevim, registered a notice of legal hypothec on the two parcels of land on which the work had been carried out. According to Yoland Lacasse, Canadevim

feared that the Adams estate would sell his parcel to a third party (Appeal Book, Vol. II, at p. 251.)

[10] The notice of legal hypothec named Canadevim as the creditor and indicated that Canadevim [TRANSLATION] "had provided work and supplied material to Harry Adams, … the Shirley Goodwin Trust, Yoland Lacasse and Yoland Lacasse *in Trust*" in the amount of $1.2 million (Appeal Book, Vol. I, at p. 53). This amount was calculated on the basis of the amount of work that had been carried out when the work was interrupted and the costs incurred according to the invoices paid (Appeal Book, Vol. II, at p. 184.)

[11] In fall 1998, Yoland Lacasse and Jean-Robert Lacroix and two other individuals formed the company Le Club de Golf Les Vieux Moulins Inc. (Société Les Vieux Moulins). This company gave Canadevim the mandate to complete the work required to open the golf course (Appeal Book, Vol. II, at pp. 255 to 257). The golf course was opened to the public in spring 1999 without the work having been entirely completed. According to Yoland Lacasse, the work had still not been completed at the time of the hearing in 2010 (Appeal Book, Vol. II, at p. 210).

[12] On February 1, 1999, Canadevim, still not having been paid, filed in the Superior Court a motion for forced surrender and for taking in payment the parcels of land on which the work had been carried out (Appeal Book, Vol. I, at p. 63). Harry Adams died in July 2000. Six months later, Canadevim settled out of court with the Adams estate. According to that settlement, reached in January 2001, the Adams estate agreed to sell the land on which the work had been

carried out to Société Les Vieux Moulins for $245,000 subject to Canadevim giving up any monetary claims against Harry Adams or his estate (Appeal Book, Vol. I, at p. 57, para. 3(b)).

[13] On August 23, 2002, the Minister assessed the period from May 1, 1998, to October 31, 2001, on the basis of paragraph 152(1)(*b*) of the ETA (Appeal Book, Vol. I, at p. 15, para. 31), relying on, among other things, the assumption that Canadevim had substantially completed building the golf course when it registered the legal hypothec (*idem*, para. 26(h) and (i)). The $1.2 million indicated in the notice of legal hypothec was the basis for the calculation of the Goods and Services Tax (the tax or GST) payable by Canadevim as agent (*idem*, para. 26(i) and 29). The amount owed by Canadevim following the assessment amounted to $135,570.69, including penalties and interest.

LEGISLATIVE FRAMEWORK

[14] Under subsection 168(1) of the ETA, GST in respect of a taxable supply is payable on the earlier of the day the consideration for the supply is paid (inapplicable here) or the day the consideration for the supply "becomes due". In that respect, subsection 152(1) of the ETA specifies that the consideration "shall be deemed to become due" on the earliest of three dates described:

152(1) For the purposes of this Part, the consideration, or a part thereof, for a taxable supply shall be deemed to become due on the earliest of	**152**(1) Pour l'application de la présente partie, tout ou partie de la contrepartie d'une fourniture taxable est réputée devenir due le premier en date des jours suivants :

(*a*) the earlier of the day the supplier first issues an invoice in respect of the supply for that consideration or part and the date of that invoice,

a) le premier en date du jour où le fournisseur délivre, pour la première fois, une facture pour tout ou partie de la contrepartie et du jour apparaissant sur la facture;

(*b*) the day the supplier would have, but for an undue delay, issued an invoice in respect of the supply for that consideration or part, and

b) le jour où le fournisseur aurait délivré une facture pour tout ou partie de la contrepartie, n'eût été un retard injustifié;

(*c*) the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.

c) le jour où l'acquéreur est tenu de payer tout ou partie de la contrepartie au fournisseur conformément à une convention écrite.

[15] The TCC judge relied on paragraph 168(3)(*c*) of the ETA to determine what constituted an "undue delay" for the purposes of paragraph 152(1)(*b*):

168(3) Notwithstanding subsections (1) and (2), where all or any part of the consideration for a taxable supply has not been paid or become due on or before the last day of the calendar month immediately following the first calendar month in which

…

168(3) Par dérogation aux paragraphes (1) et (2), la taxe prévue à la présente section, calculée sur la valeur de tout ou partie de la contrepartie d'une fourniture taxable, est payable le dernier jour du mois qui suit le premier mois où l'un des faits suivants se réalise, dans le cas où tout ou partie de la contrepartie n'est pas payée ou devenue due au plus tard ce jour-là :

[…]

(*c*) where the supply is under an agreement in writing for the construction, renovation or alteration of, or repair to,

c) s'il s'agit d'une fourniture prévue par une convention écrite qui porte sur la réalisation de travaux de construction, rénovation, transformation ou

(i) any real property, or

(ii) any ship or other marine vessel, and it may reasonably be expected that the construction, renovation, alteration or repair will require more than three months to complete,

the construction, renovation, alteration or repair is substantially completed, tax under this Division in respect of the supply, calculated on the value of that consideration or part, as the case may be, is payable on that day.

réparation d'un immeuble ou d'un bateau ou autre bâtiment de mer – étant raisonnable de s'attendre dans ce dernier cas à ce que les travaux durent plus de trois mois – , les travaux sont presque achevés.

[Emphasis added]

TCC DECISION

[16] After summarizing the facts, the TCC judge addressed the issue of when the consideration for the work carried out by Canadevim had become due under section 152 of the ETA. Noting that no invoice had been issued and that there was no written agreement, the TCC judge questioned whether Canadevim should have "issued" an invoice but for an undue delay, as provided for at paragraph 152(1)(*b*) (Reasons, paras. 26 to 32).

[17] To determine what is meant by an undue delay, the TCC judge took guidance from paragraph 168(3)(*c*) of the ETA, which provides that, where the supply is made under an agreement in writing, the consideration becomes due when the work is "substantially completed". In this case, the TCC judge noted that when the golf course opened in June 1999, the construction work had still not been completed. In that respect, she pointed out that contrary to what was alleged in his pleadings, counsel for the Minister admitted at the hearing that the

work had not been completed when the notice of legal hypothec was registered (Reasons, para. 34). The issue to be decided was therefore whether despite the work not having been completed, an invoice had to be "issued" under paragraph 152(1)(*b*).

[18] According to the TCC judge, even though there was no written agreement in this case, the completion test in paragraph 168(3)(*c*) of the ETA is a reasonable one for determining whether the consideration was due (Reasons, para. 35). She went on to state that since the work had not been completed at the time that the notice of legal hypothec was registered, there was no undue delay in "issuing" an invoice under paragraph 152(1)(*b*) of the ETA (Reasons, paras. 35 to 38).

[19] The TCC judge noted that the registration of a notice of legal hypothec does not necessarily mean that the work was substantially completed within the meaning of article 2727 of the *Civil Code of Québec* (C.C.Q.) (Reasons, para. 39). A legal hypothec is merely a measure to preserve a right. According to her, "the notice [of legal hypothec] serves merely to secure the claim that gave rise to added value, not to prove the exact amount of that added value" (Reasons, para. 43). In this regard, she referred to the Quebec Court of Appeal's decision in *Beylerian v. Constructions et rénovations Willico inc.*, REJB 1997-00639 [*Beylerian*].

[20] The TCC judge concluded that the consideration for the work carried out by Canadevim was not due when the notice of legal hypothec was registered and that Canadevim did not have

to "issue" an invoice under paragraph 152(1)(*b*) of the ETA. She therefore allowed the appeal and ordered that the assessment be vacated.

POSITION OF THE MINISTER

[21] The Minister submits that the TCC judge erred in law in relying on the "substantially completed" test in paragraph 168(3)(*c*) of the ETA to determine when the consideration for the work carried out by Canadevim became due for the purposes of paragraph 152(1)(*b*). Paragraph 168(3)(*c*) applies only when there is a written agreement. This is not the case here.

[22] The Minister submits that the undue delay in "issuing" an invoice under paragraph 152(1)(*b*) of the ETA must be determined on the basis of the facts and circumstances of each case.

[23] The Minister submits that the contractual relationship that resulted in the first stage of work ended at some point between November 1997, when the work was interrupted, and July 1998, when the notice of legal hypothec was registered. The Minister submits that an invoice should have been issued after this contractual relationship ended. He points out that Canadevim undertook the second stage of work under a second contractual agreement with another party, namely Société Les Vieux Moulins.

[24] The Minister stated that he was relying on the notice of legal hypothec not to determine the date when Canadevim had to "issue" an invoice under paragraph 152(1)(*b*) of the ETA, but

to establish objectively the amount that should have been invoiced by Canadevim for the work carried out.

POSITION OF CANADEVIM

[25] Canadevim defends the decision of the TCC judge and refers to her reasons. According to Canadevim, it is logical and reasonable for tax in respect of a taxable supply not to become payable before work has been "substantially completed" within the meaning of paragraph 168(3)(*c*) of the ETA.

[26] Canadevim argues that the assessment is based on two assumptions, both of which were found to lack merit. The first is that the date on which the legal hypothec was registered makes it possible to determine when the work was "substantially completed" and, consequently, when the tax became both payable and collectible. The second is that the amount in the notice of legal hypothec can be used to establish the consideration payable for the golf course construction services provided by Canadevim (Canadevim's memorandum, para. 21).

[27] Canadevim argues that the registration of the notice of legal hypothec does not confirm a debt but is intended to protect a contingent debt payable upon completion of the work. Canadevim specifies that article 2728 of the CCQ provides that a construction legal hypothec secures the increase in value added to the immovable by the work, but not the debt. In addition, Canadevim refers to the Quebec Court of Appeal's decision in *Beylerian*, according to which a contractor does not have to prove the amount of the increase in value added to the immovable,

but only the existence of the increase in value. It follows that the amount on the notice of legal hypothec and the consideration payable for the work carried out are not the same.

[28] Canadevim also questions the legal validity of the hypothec it itself registered. It explains that the hypothec covers two immovables, the land owned by Yoland Lacasse *in Trust* and the land owned by Harry Adams. According to Canadevim, a notice of legal hypothec should have been registered for each of the immovables in question.

[29] Canadevim is also attempting to demonstrate that the consideration payable for the work carried out was not $1.2 million. It points out, among other things, that the Adams estate had not paid at all for the work carried out on its land following the out-of-court settlement reached in January 2001 (Canadevim's memorandum, para. 78). It adds, relying on *Rockport Developments Inc. v. The Queen*, 2009 TCC 180 [*Rockport Developments*], that [TRANSLATION] "the value of the consideration for the services rendered was not ascertainable during the assessment period" (Canadevim's memorandum, para. 86).

ANALYSIS AND DECISION

[30] The essential issue is whether the TCC judge could rely on the test provided at paragraph 168(3)(*c*) of the ETA to determine the amount in which the invoice should have been issued despite the fact that the prerequisite for this provision to apply, namely, a written agreement, was not present.

[31] The TCC judge essentially reasoned as follows on this issue:

> [35] … Even though there was no written agreement, it seems to me that the completion test in paragraph 168(3)(*c*) of the ETA is a reasonable one for determining whether consideration was due, and can apply just as well whether there is a written agreement or not.
>
> [36] Indeed, since Parliament has seen fit to specify that, where there is a written agreement, the consideration becomes due only when the work is substantially completed, it seems to me that this is a good reference point for determining when the consideration becomes due in instances where the supplier has issued no invoice for the consideration.
>
> [37] Paragraph 152(1)(b) of the ETA provides that the consideration is deemed to become due on the day the supplier would have issued an invoice, but for an undue delay.
>
> [38] Since the work was far from completed at the time that the notice of legal hypothec was registered (and this is no longer disputed by the Respondent), I do not believe that there had been at that time any undue delay in issuing an invoice.

[32] The difficulty this reasoning raises is that according to the very terms of paragraph 152(1)(*b*), the issuing of an invoice may be unduly delayed even if the work has only partially been completed, since the provision speaks of an invoice “in respect of the supply for that consideration or part”.

[33] It follows that the TCC judge could not settle her analysis on the mere fact that the work had not been substantially completed and thus conclude that an invoice did not have to be issued. She had to question whether, according to the evidence, an invoice had to be issued for the purpose of paragraph 152(1)(*b*) for the part of the work that had been carried out. In my humble

opinion, if the TCC judge had asked herself that question, she could only have concluded that this was the case.

[34] In fact, the evidence demonstrates that the work carried out by Canadevim was stopped from the moment Harry Adams discovered he was sick even though it was only 55% complete. It was when Harry Adams donated his land to his spouse's trust a few months later that Canadevim noticed that the project and the money it had invested were in jeopardy (Reasons, para. 9; Appeal Book, Vol. II, pp. 180, 181). The legal hypothec was registered on July 10, 1998, and the motion for forced surrender and for taking in payment of the land was filed seven months later.

[35] Canadevim did not see fit to adduce this motion into evidence, but it is clear that to file it, Canadevim had to allege the existence of the claim (art. 2765 C.C.Q.), the fact that the claim was exigible (art. 2748 C.C.Q.) and the debtor's default (arts. 2765 and 1748 C.C.Q.). In fact, the judgment of the Superior Court dated May 31, 2001, mentions that Canadevim alleged in this motion that it had not been paid (Appeal Book, Vol. I, p. 63, entire third paragraph), and no one can question the fact that the purpose of the motion was to take the land in payment for the outstanding amount.

[36] This confirms the Minister's position that the initial mandate given to Canadevim ended after the first stage of work and that it was under a separate agreement with another party that the work required to open the golf course was completed. Logically, an invoice for the outstanding amount had to be issued before the motion for forced surrender and for taking in payment was

filed. In fact, this motion could not be filed before a request for payment was made in some form or other. In this context, the failure to issue an invoice cannot be justified. I would add that the decision of the Quebec Court of Appeal in *Beleyrian* has no effect on this reasoning. What arises out of that decision is that the increase in value resulting from the work carried out does not have to be quantified when registering a notice of legal hypothec. No such question arises in the context of this appeal.

[37] As to the amount that should have been invoiced, the legal hypothec registered by Canadevim was calculated on the basis of the actual costs incurred to carry out the work, and Yoland Lacasse, who testified about this on Canadevim's behalf as well as on his own and that of Yoland Lacasse *in Trust*, confirmed that the verbal agreement entitled Canadevim to an amount based on the costs incurred (Appeal Book, Vol. II, p. 250). Except for claiming that the hypothec it registered was unlawful – because it was registered for two plots of land rather than just one – Canadevim has failed to demonstrate that another amount from the one indicated should have been registered or that the amount it claimed in its motion was different from the one it registered.

[38] From this I conclude that had it not been for the undue delay, Canadevim would have issued an invoice for $1.2 million at some point between when the work stopped in fall 1997 and February 1, 1999, when the motion for forced surrender and taking in payment was filed. It follows that under subsection 152(1) of the ETA, the consideration for the taxable supply made by Canadevim "became due" no later than February 1, 1999.

[39] Further, Canadevim claimed that the events following the filing of this motion demonstrate that its debt was not $1.2 million. It argues that the out-of-court settlement reached in January 2001 demonstrates that for the portion of the work carried out on the land belonging to Harry Adams at the time, the consideration was reduced to nil since it gave up any monetary claims against the Adams estate.

[40] The fact that the Adams estate did not pay anything does not establish that Canadevim reduced the consideration owed to it. In fact, there is nothing to explain why Canadevim would have made a present of its debt or decided to give it up. Rather, this suggests that the obligation to pay Canadevim was assumed by those in whose interest it was to move forward with the project. I am thinking here particularly of Société Les Vieux Moulins, which acquired from the estate the land on which the improvements were made.

[41] Lastly, the rule that arises from the decision of the Tax Court of Canada in *Rockport Developments* cannot apply in this case. In that case, the Court had to rule on the liability for GST for extra fees for work on which the parties had not agreed. No such question is raised here, since there was an agreement on the work to be carried out and the consideration to be paid.

[42] For these reasons, I would allow the appeal with costs, set aside the judgment of the TCC judge, and, rendering the judgment that the TCC judge should have rendered, I would dismiss Canadevim's appeal with costs.

"Marc Noël"
J.A.

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

"I agree.
Johanne Trudel J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-10

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE LUCIE LAMARRE OF THE TAX COURT OF CANADA, DATED MARCH 18, 2010, DOCKET NO. 2003-3159(GST)G.)

STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. JEAN-ROBERT LACROIX, representing CANADEVIM LTÉE, under subsection 38(1) of the *Bankruptcy and Insolvency Act*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 16, 2011
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.
DATED:	April 8, 2011

APPEARANCES:

Benoît Denis	FOR THE APPELLANT
Chantal Donaldson	FOR THE RESPONDENT

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