Federal Court of Appeal | Cour d'appel fédérale

Date: 20250602

Docket: A-333-23

Citation: 2025 FCA 102

CORAM: **GLEASON J.A.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

S. ROBERT CHAD

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on January 14, 2025.

Judgment delivered at Ottawa, Ontario, on June 2, 2025.

REASONS FOR JUDGMENT BY: GOYETTE J.A.

CONCURRED IN BY: GLEASON J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

[1] Mr. S. Robert Chad appeals the decision of the Federal Court (*per* St-Louis J.): 2023 FC 1481. The Federal Court struck Mr. Chad's Notice of Application for judicial review, without leave to amend.

[2] As the outcome of this appeal falls to be determined on its facts, it bears reviewing them first.

I. Facts

[3] Mr. Chad and other individuals were clients of two lawyers: Tom Olson and Bruce Lemons. They were also clients of Timothy Hodgins, John Hodgins and/or HFX Markets Ltd. Mr. Chad does not say what services or goods Messrs. Hodgins or HFX Markets provided to him and the other individuals.

[4] The Canada Revenue Agency conducts tax audits on behalf of the Minister of National Revenue: subsection 220(2.01) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and section 8 of the *Canada Revenue Agency Act*, S.C. 1999, c. 17. At an unspecified time, the Agency audited Messrs. Hodgins and HFX Markets. During the audit, Messrs. Hodgins handed documents to the Agency.

[5] Apparently around the same time, the Minister assessed Mr. Chad for income taxes. Mr. Chad disagreed with the assessment and appealed to the Tax Court of Canada. Mr. Chad became aware that the Agency had in its possession a document that he asserts is protected by solicitor-client privilege when the Minister included it in the amended list of documents that the Minister filed with the Tax Court. After Mr. Chad received the list, he raised the issue of the document being privileged. It is not clear from the record whether the Minister agrees that the

document is privileged. Nevertheless, for the sake of simplicity, these reasons will refer to the document as the "privileged document".

[6] Mr. Chad does not claim to be the holder of the privilege attached to the document in the Agency's possession. And to date, Mr. Chad has provided no information regarding the identity of the privilege holder of the document in question, the nature of the document, or the existence of marks or signs on the document that would have alerted the Agency to the document's privileged nature.

[7] Because the Agency has the privileged document in its possession, Mr. Chad says that he has reasonable grounds to believe that the Agency possesses more documents protected by solicitor-client privilege. On this basis, Mr. Chad filed an application for judicial review, which he sought to be certified as a class proceeding, seeking an order in the nature of *mandamus*. To be more precise, Mr. Chad applied to the Federal Court to compel what he alleges to be the Agency's "positive legal obligations" to:

1) review the documents obtained during the audit of Messrs. Hodgins and HFX Markets and identify the documents with respect to Mr. Chad and the other individuals that "contain or make reference, directly or indirectly, to communications with a solicitor or any agent, employee or associate of a solicitor";

2) notify Mr. Chad and the other individuals so that they may assert privilege over these documents; and

3) refrain from using or inspecting the documents until any claims of privilege have been determined by a court of competent jurisdiction.

[8] After Mr. Chad filed his application for judicial review, the Federal Court held a case management conference. At the conference, issues arose regarding the content of the Notice of Application. The parties agreed that Mr. Chad would amend his Notice of Application.

[9] Following the conference, Mr. Chad provided the Minister—and seemingly the Federal Court—with two drafts of his "Amended Notice of Application–Proposed Class Proceeding". The two drafts included no additional particulars regarding the issue of privileged documents. Rather, the drafts clarified that Mr. Chad and the other individuals would be the members of a "Class", and that a motion would be made to certify Mr. Chad's application as a class proceeding.

[10] The Minister brought a motion before the Federal Court for an order striking Mr. Chad's Notice in its entirety without leave to amend.

[11] The parties agreed that the applicable test on a motion to strike is the test set out in *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250 at para. 47: a notice of application for judicial review will be struck where it is so clearly improper as to be bereft of any possibility of success. Applying that test, the Federal Court ruled Mr. Chad's application to be bereft of any possibility of success because the Agency has no public legal duty to act in the manner Mr. Chad requested.

[12] Although this conclusion was sufficient to strike the application, the Federal Court gave two additional reasons in support of its decision. First, section 18.5 of the *Federal Courts Act*,

R.S.C. 1985, c. F-7 ousts the Federal Court's jurisdiction where there exists an adequate alternative remedy. The Federal Court found there were two remedies: the Tax Court of Canada appeal and the *Access to Information Act*, R.S.C. 1985, c. A-1 process. Second, Mr. Chad's Notice of Application failed to meet the requirements of Rule 301(e) of the *Federal Courts Rules*, SOR/98-106. Rule 301(e) requires a notice of application for judicial review to set out a complete statement of the grounds intended to be argued.

II. Standard of Review

[13] An order made on a motion to strike is discretionary. It can only be set aside if the Federal Court committed a palpable and overriding error or an error of law: *Michaels of Canada, ULC v. Canada (Attorney General)*, 2023 FCA 243 at para. 2; *Tuquabo v. Canada (Attorney General)*, 2024 FCA 111 at para. 5.

[14] In my view, the Federal Court did not commit an error that warrants setting aside its order.

III. Analysis

A. *Public Legal Duty*

[15] For relief in the nature of *mandamus* to be granted, there must exist a public legal duty to act: *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742 (FCA) at 766, aff'd [1994] 3 SCR 1100. Mr. Chad says that the duty in this case comprises the "positive legal obligations"

described in paragraph [7] above. He further says that the duty is a statutory duty that stems from the Supreme Court of Canada's decision in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 and its progeny, most notably the Federal Court's decision in *Canada (National Revenue) v. Thornton*, 2012 FC 1313.

[16] *Lavallee* addressed the constitutionality of section 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. Section 488.1 sets out a procedure to be followed when an officer acting under the authority of any Act of Parliament is "about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document". The Supreme Court found that procedure, and therefore section 488.1, to be unconstitutional because it more than minimally impaired solicitor-client privilege. Justice Arbour, writing for the majority, emphasized that solicitor-client privilege is a principle of fundamental justice with the consequences that (a) any information protected by the privilege is out of reach of the state, unless the holder of the privilege consents to the disclosure of the information; and (b) the privilege is protected under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11: *Lavallee* at paras. 24, 34–46; Mahmoud Jamal & Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003) 20 Supreme Court Law Review (2d) 213 at 226. Section 7 provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. As for section 8, it provides that everyone has the right to be secure against unreasonable search or seizure.

[17] The Minister does not deny that solicitor-client privilege is a principle of fundamental justice with the consequence, highlighted in *Lavallee,* that any information protected by the privilege is out of the state's reach if privilege has not been waived: *Lavallee* at para. 24. Hence, the Minister has no issue with the third step of the "positive legal obligations" argued by Mr. Chad, that is, to refrain from using or inspecting documents over which privilege is claimed or that appear on their face to be privileged until any claims of privilege have been determined by a court of competent jurisdiction.

[18] However, the Minister takes issue with the first two steps which would require the Canada Revenue Agency, in the face of vague assertions of possibly privileged documents, to search its records for documents that "contain or make reference, directly or indirectly, to communications with a solicitor or any agent, employee or associate of a solicitor" and report back to Mr. Chad and the other individuals on the results of that search. The Minister says that nothing in the case law supports the existence of these obligations.

[19] I agree.

[20] For one, *Lavallee* does not support the existence of these obligations.

[21] *Lavallee* concerned documents seized from a law firm, thus, in a context where it was reasonable to assume that the documents were privileged. Here, the Agency obtained documents from third parties without any indication that some could be privileged. As well, Mr. Chad has

provided no fact, other than the existence of one privileged document, to lend credence to his belief that the Agency may have other privileged documents.

[22] Moreover, *Lavallee* provides ten guidelines consistent with the constitutional protection of solicitor-client privilege to govern both the search authorization process and the way a search must be carried out in law offices: *Lavallee* at para. 49. In essence, guidelines number 1 to 3 describe the conditions that must be met for the issuance of a search warrant with regard to law firms; guideline number 4 says that all documents in the possession of a lawyer must be sealed before being examined or removed from the lawyer's possession; guidelines number 5 to 7 detail the efforts that must be made to contact the lawyers, clients and privilege holders and give them a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided; guideline number 8 provides that the Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand; guideline number 9 says that where sealed documents are found not to be privileged, they may be used in the normal course of the investigation; and guideline number 10 says that where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court. Guidelines number 1 to 9 cannot apply here because the Agency already has access to the documents. As for guideline number 10—to return privileged documents to the privilege holder—it is part of the third step of the "positive legal obligations" argued by Mr. Chad, with which the Minister agrees. As the review of the guidelines confirms, *Lavallee* does not support the existence of the public legal duty that Mr. Chad articulates.

[23] Equally, *Thornton* is of no assistance to Mr. Chad. In that case, the Federal Court stated that when an investigating authority comes into possession or becomes aware of documents that may be protected by solicitor-client privilege, every effort should be made to contact the privilege holder, provide them with the opportunity to assert privilege and, if necessary, have the issue of privilege judicially decided: *Thornton* at para. 24. However, this statement was made in a context that greatly differs from the context here. In *Thornton*, the Agency asked an accounting firm to provide documents related to a reorganisation undertaken by the firm's client. The accounting firm provided the documents but told the Agency that its client was asserting privilege in respect of three documents marked "privileged".

[24] By contrast, Messrs. Hodgins handed documents to the Agency without any mention of someone asserting privilege. Even more, Mr. Chad provides no particulars that would enable the Agency to identify the documents in respect of which privilege may be claimed. Indeed, Mr. Chad does not even know if the documents that Messrs. Hodgins handed to the Agency included privileged documents, other than the one that the Minister included in her list of documents. Yet Mr. Chad knows better than anyone what privileged communications (written or otherwise) he had with his solicitors. Similarly, Mr. Chad knows which of these privileged communications were shared with third parties and which—he claims—remain privileged by virtue of common interest. He could ask Messrs. Hodgins which documents they handed to the Agency and from there, identify the privileged documents and advise the Agency that he wants to claim privilege in respect of these documents. The same is true for the other individuals who would be members of the proposed class proceeding.

[25] Instead, Mr. Chad wants the Agency to sift through the documents it obtained and search for "[documents] that contain or make reference, directly or indirectly, to communications with a solicitor or any agent, employee or associate of a solicitor". These criteria are so broad that they practically serve no purpose. How is the Agency supposed to know who is an "agent" of the solicitors, Messrs. Olson and Lemons? How is the Agency to identify a communication that "make[s] reference … indirectly" to a communication with a solicitor? Why should the Agency pull out all documents that "make reference" to communications with a solicitor when some of these could be non-privileged communications between a solicitor and the Agency? These questions and others demonstrate that the Agency cannot possibly have the obligations that Mr. Chad puts forward.

[26] Perhaps a situation will arise where a person who cannot identify potentially privileged documents with precision may nevertheless request the Agency to search its records. It is not Mr. Chad's situation.

[27] In the absence of a public legal duty to act in the circumstances of this case, there is no error in the Federal Court's conclusion that the Notice of Application raised no justiciable issue and so was bereft of any possibility of success.

B. *Leave to Amend*

[28] As revealed by the analysis above, Mr. Chad's Notice of Application does not support his argument that the Agency has the "positive legal obligations" that he has put forward and, by the same token, does not support an order in the nature of *mandamus*.

[29] The *Federal Courts Rules* require a notice of application to "set out a 'precise' statement of the relief sought and a 'complete' and 'concise' statement of the grounds intended to be argued": *JP Morgan* at para. 38, citing *Federal Courts Rules*, paragraphs 301(d) and (e). And according to this Court, "[a] 'complete' statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought": *JP Morgan* at para. 39.

[30] To cure the deficiencies in his Notice of Application, Mr. Chad seeks leave to further amend it. He says that the Federal Court erred by refusing leave and asks this Court to fix that error. There is no error to fix. Hence, leave to amend should not be granted by this Court.

[31] Mr. Chad was provided with three opportunities to file a Notice of Application compliant with the *Federal Court Rules*. Still, his twice Amended Notice of Application-Proposed Class Proceeding shared with the Minister and the Federal Court, just like his original Notice of Application, did not satisfactorily disclose the grounds intended to be argued in that it did not disclose a public legal duty supporting a relief in the nature of *mandamus*. Likewise, in his memorandum of fact and law filed with this Court, Mr. Chad provided no information or explanation regarding the amendments that he would make were this Court to grant him leave to amend. At the hearing, whenever the Court pointed to deficiencies in the Notice of Application, Mr. Chad said that he would cure them with amendments, but he did not provide any basis for these amendments. This lack of particulars shows that there are no facts that he can plead that would allow the Notice of Application to survive a motion to strike.

[32] There comes a time when the straw breaks the camel's back, and a court should not grant another opportunity for a proceeding to be amended. This happens when a party has been granted many chances to amend and the court concludes that they are unable to adequately disclose the grounds to be argued: *Michel v. Canada (Attorney General)*, 2025 FCA 58 at para. 79.

C. *Alternate Remedies*

[33] Finally, Mr. Chad argues that the Federal Court erred in law when it determined that section 18.5 of the *Federal Courts Act* ousted its jurisdiction because there exist adequate alternative remedies in the Tax Court of Canada and through the *Access to Information Act*.

[34] Mr. Chad says that a taxpayer cannot rely on the discovery process of an appeal to the Tax Court to obtain privileged documents in the Agency's possession if those documents are not relevant to the appeal. He adds that he never alleged that the other privileged documents that the Agency may have in its possession are relevant to an appeal. And so, he says, the Federal Court erred when it determined that he could rely on the Tax Court's discovery process and that this process constitutes an alternate remedy.

[35] It is true that the Tax Court's discovery process is not an alternate remedy to judicial review in situations where the possibly privileged documents in the Agency's possession are not relevant to a tax appeal.

[36] Likewise, a request for documents under the *Access to Information Act* is not—on its own—an alternate remedy to judicial review. A request under the *Access to Information Act* is a

means to obtain documents in the possession of a governmental organization like the Agency, but it is not a means to have the organization remove the privileged documents from its files as could be sought in a judicial review application. That said, by requesting documents under the *Access to Information Act*, one can determine if a governmental organization has possession of possibly privileged documents and, if so, take the necessary action.

[37] For instance, in the present case, Mr. Chad and the other individuals who were clients of Messrs. Hodgins and HFX Markets can make a request under the *Access to Information Act* for the documents that the Agency obtained from Messrs. Hodgins and HFX Markets and review these documents. If the review reveals that the Agency has in its possession documents in respect of which Mr. Chad and the other individuals want to claim privilege, they can notify the Agency of their intention to claim privilege. If the Agency agrees that the documents are privileged, it will return the documents and wipe its records accordingly. If the Agency challenges the privilege claim and refuses to return the documents, Mr. Chad and the other individuals will be able to seek a judicial review of the Agency's decision.

[38] Mr. Chad says that a request under the *Access to Information Act* is inadequate because it would result in the Agency remitting to him potentially privileged documents without first sealing them as required by the Supreme Court in *Lavallee*. This argument is devoid of merit and at odds with Mr. Chad's underlying claim. First, and as mentioned, the *Lavallee* guidelines—including the requirement to seal documents seized in a law firm—apply where a government officer is *about to* examine, copy or seize a document. Here, the Agency already has possession of the documents. Second, and more importantly, Mr. Chad is before this Court precisely

because he wants the Agency to review—and therefore read—the documents obtained from Messrs. Hodgins and HFX Markets to see if they include privileged documents.

IV. Conclusion

[39] For the above reasons, I would dismiss the appeal with costs to the Minister.

"Nathalie Goyette"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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