Federal Court of Appeal Cour d'appel fédérale

Date: 20141127

Docket: A-438-13

Citation: 2014 FCA 279

CORAM: **NOËL C.J.**
GAUTHIER J.A.
BOIVIN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAISSE DESJARDINS DE QUÉBEC

Respondent

Heard at Montréal, Quebec, on November 4, 2014.

Judgment delivered at Ottawa, on November 27, 2014.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal from a decision by Justice Archambault of the Tax Court of Canada (the TCC judge) allowing the appeal from the Caisse Desjardins du Québec (the Caisse) from an assessment made under subsection 317(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act).

[2] This assessment arose from the fact that the Caisse did not comply with a requirement to

pay (requirement) relating to the goods and services tax owing by the tax debtor, Café de la paix (1980) inc. (the tax debtor) and resulted in making the Caisse liable for this tax debt up to the amount owed to the Caisse by the tax debtor.

[3] Subsection 317(3) of the Act reads as follows:

> **317.** (3) Despite any other provision of this Part, any other enactment of Canada other than the *Bankruptcy and Insolvency Act*, any enactment of a province or any law, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment
>
> (*a*) to a tax debtor, or
>
> (*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
>
> the Minister may, by notice in writing, require the particular person to pay without delay, if the moneys are payable immediately, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under this Part, and on receipt of that notice by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, despite any security interest in those moneys, become the property of Her Majesty in right of Canada to the extent of that liability as assessed by the Minister and shall be paid to the

> **317.** (3) Malgré les autres dispositions de la présente partie, tout texte législatif fédéral à l'exception de la *Loi sur la faillite et l'insolvabilité*, tout texte législatif provincial et toute règle de droit, si le ministre sait ou soupçonne qu'une personne est ou deviendra, dans les douze mois, débitrice d'une somme à un débiteur fiscal, ou à un créancier garanti qui, grâce à un droit en garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal, il peut, par avis écrit, obliger la personne à verser au receveur général tout ou partie de cette somme, immédiatement si la somme est alors payable, sinon dès qu'elle le devient, au titre du montant dont le débiteur fiscal est redevable selon la présente partie. Sur réception par la personne de l'avis, la somme qui y est indiquée comme devant être versée devient, malgré tout autre droit en garantie au titre de cette somme, la propriété de Sa Majesté du chef du Canada, jusqu'à concurrence du montant dont le débiteur fiscal est ainsi redevable selon la cotisation du ministre, et doit être versée au receveur général par priorité sur tout autre droit en garantie au titre de cette somme.

> Receiver General in priority to any
> such security interest.

[4] The issue is whether the TCC judge was correct in concluding that the amounts payable by the Caisse to the tax debtor had already been subject to legal compensation (set-off) under article 1673 of the Civil Code of Québec (C.C.Q.) at the time the requirement was received meaning that it was not liable for any amount to the tax debtor at the time the requirement was received.

[5] For the reasons explained below, it is my view that the TCC judge correctly concluded that compensation had already been effected between the amounts payable by the Caisse to the tax debtor and those payable by the tax debtor to the Caisse and that, consequently, the requirement was moot. However, my reasons for this conclusion are not quite the same as those of the TCC judge.

[6] The facts are undisputed, and I refer in this regard to the summary of the facts provided by the TCC judge at paragraphs 5 to 9 of his reasons. The only issue is whether legal compensation was effected in a timely manner. Paragraphs 4 and 6 of the variable credit contract between the Caisse and the tax debtor are at the heart of the problem:

> [TRANSLATION]
>
> **4. REQUEST FOR REPAYMENT**
>
> The Caisse reserves the right to demand at any time the immediate repayment of any balance owed in principal, interest, costs and accessories. The Caisse will then have the option to cancel the contract, without prejudice to all its other rights and recourses.
>
> **6. DEFAULT**

> If the Borrower draws a cheque that brings the line of credit balance to an amount higher than the amount authorized hereunder, if it goes bankrupt, if it transfers its property or becomes insolvent or fails to meet any of the conditions and obligations stipulated herein, any balance then owing in principal, interest, costs and accessories shall become immediately exigible.
>
> [Emphasis added.]

[7] It is also useful to mention clause 2, which provides that as soon as the tax debtor's current account is supplied with funds over $10,000, the Caisse will debit the account by this amount in payment of the balance of the tax debtor's variable line of credit.

[8] As stated by the TCC judge, the following two provisions provide for legal compensation:

Article 1673 of the Civil Code of Québec, LRQ, c C-1991:

1673. Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.	**1673.** La compensation s'opère de plein droit dès que coexistent des dettes qui sont l'une ou l'autre certaines, liquides et exigibles et qui ont pour objet une somme d'argent ou une certaine quantité de biens fongibles de même espèce.
A party may apply for judicial liquidation of a debt in order to set it up for compensation.	Une partie peut demander la liquidation judiciaire d'une dette afin de l'opposer en compensation.

Section 69 of the *Act Respecting financial Services Cooperatives*, CQLR c C-67.3:

69. A financial services cooperative may, to obtain payment of any specific, liquid and exigible claim it has against a member or depositor, withhold any sum of money it owes to the member or depositor and use it to compensate its claim, except in the	**69.** Une coopérative de services financiers peut retenir, pour le remboursement de toute créance certaine, liquide et exigible qu'elle détient contre un membre ou un déposant, les sommes qu'elle lui doit et en faire la compensation, sauf lorsqu'il s'agit du remboursement des

case of the redemption of qualifying shares issued by it.	parts de qualification qu'elle a émises.

[9] Of the five conditions required by legal compensation, namely, the reciprocity of two debts, their fungibility, their certainty, their liquidity and their exigibility, only the last one is in dispute. More specifically, the Crown accepts that the sums deposited by the tax debtor in the bank account it held with the Caisse were exigible at any time. It submits, however, that the corresponding amount payable by the tax debtor to the appellant under the variable credit contract was not.

[10] According to the Crown, clauses 4 and 6 of the variable credit contract have to be harmonized, and the wording of these provisions makes it clear that in situations not anticipated in clause 6, the debt of the Caisse is not exigible unless notice is provided.

[11] The TCC judge recognized that these two clauses, when read according to the principles of interpretation set out in the C.C.Q. (that is, according to standard practices), have the effect suggested by the Crown (reasons at paragraph 14). He found, however, that clause 6 was the result of a drafting error (reasons at paragraphs 16 and 20). Disregarding clause 6 and citing clause 4, the TCC judge concluded that the balance owed, that is, the "principal, interest and accessories", were exigible at any time (reasons at paragraph 15).

[12] The TCC judge set aside clause 6 of the contract on the ground that the parties had never intended to subscribe to it. He drew this conclusion even though neither party claimed to have suffered as a result of such an error. Indeed, the tax debtor did not appear before the court, and

the Caisse maintained before the TCC judge (reasons at paragraph 18), and continues to maintain, that clause 6 is part of the contract. Indeed, counsel for the Caisse confirmed at the hearing that clause 6 was part of a standard contract, which, for all intents and purposes, excludes the idea that clause 6 was the result of an error.

[13] In these circumstances, the TCC judge could not resolve the contractual interpretation issue before him by disregarding the awkward clause. As submitted by the parties, he had to rely on the principles of interpretation set out in the C.C.Q., specifically article 1428, which provides that a clause is given a meaning that gives it a practical effect rather than one that gives it no effect. He also had to interpret each clause in the light of the others so that each is given the meaning derived from the document as a whole (article 1427 C.C.Q.).

[14] The interpretation advanced by the Crown applies this principle. According to this interpretation, the amounts described in clause 4 are not exigible unless a requirement for payment is issued, except in the three situations anticipated in clause 6—bankruptcy, insolvency or non-compliance with the contract—which make the amounts exigible without notice.

[15] In turn, the Caisse bases its interpretation on the relevant case law, such as the decision of the Quebec Court of Appeal in *Syndicat d'épargne des épiciers du Québec (In re)*, (1975) C.A. 599, SOQUIJ AZ-75011180. According to this case, a debt that is payable on demand is exigible at any time and a demand for payment is only needed to require the debtor to pay (to the same effect see *Re Hil-A-Don Ltd.: Bank of Montreal c. Kwiat*, [1975] C.A. 157). According to the Caisse, it is from this perspective that clauses 4 and 6 of the variable credit contract must be read.

[16] I recognize that a debt payable on demand is exigible at any time. The fact remains, however, that the parties to a contract can agree to depart from this rule if this is their intention and they express it clearly (*Société canadienne des postes c. Morel*, [2004] 2 JQ 2405 [*Morel*]).

[17] The issue here is whether this is what the parties intended to do in stipulating in clause 6 that the balance referred to in clause 4 "shall become immediately exigible" only in the three cases provided therein. As pointed out by the Crown, some meaning must be given to these words.

[18] In my opinion, a reading of the contract as a whole and of these two clauses in particular leads to the conclusion that the parties anticipated that the balance in question would be exigible without notice or a requirement in the event of one of the three situations listed in clause 6. It follows that, otherwise (i.e. except in these three situations), notice or a requirement is required in order to make the balance exigible. This is a clear departure as per the doctrine of *Morel* since the contract cannot be read differently.

[19] Consequently, the Caisse cannot avoid its liability under subsection 317(3) of the Act solely on the ground that the sums referred to in clause 4 were exigible at any time.

[20] The TCC judge also offered an alternative reason to justify his conclusion. This time relying on clause 6, he concluded that the tax debtor became insolvent before the service of the requirement on January 24, 2011, thus making the debt to the Caisse exigible before this date under the clause (reasons at paragraphs 21 to 27).

[21] The Crown is also challenging this conclusion as part of this appeal. In the Crown's opinion, the documents on which the TCC judge relied to conclude that the tax debtor was insolvent do not demonstrate this [TRANSLATION] "clearly" (Crown's memorandum at paragraph 53). Better evidence would have been required to conclude that the tax debtor was insolvent.

[22] With respect, the question of whether the tax debtor was insolvent before January 24, 2011, is one of fact. The conclusion drawn by the TCC judge in response to this question cannot be set aside in the absence of a palpable and overriding error. No such error was shown.

[23] The Crown's main argument against the conclusion drawn by the TCC judge is based on the fact that the Caisse continued to advance credits after January 24, 2011. However, as pointed out by the TCC judge, under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (subsection 50.4(1)) the Caisse was bound to continue complying with the terms and conditions governing the credit line even though the tax debtor was insolvent as of January 25, 2011, the date on which the tax debtor filed a notice of intention to make a proposal (reasons at paragraph 24).

[24] Moreover, the reasons set out by the TCC judge, and the supporting evidence, points to the existence of a serious, precise and concordant inference that the tax debtor was insolvent on January 24, 2011. No error has been shown in this respect.

[25] I would therefore dismiss this appeal with costs.

"Marc Noël"

Chief Justice

"I agree
Johanne Gauthier J.A. "

"I agree
Richard Boivin J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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