

Dockets: 2021-1350(IT)G
2022-3000(IT)G

BETWEEN:

NEWFOUNDLAND BROADCASTING COMPANY LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

ORDER

In accordance with the attached reasons:

- a. the two above named appeals are consolidated; and
- b. the parties shall file with the Court a new timetable.

Costs will be in the cause.

Signed at Toronto, Ontario, this 4th day of May 2023.

“G. Jorré”

Jorré D.J.

Citation: 2023 TCC 56
Date: 2023 05 04
Dockets: 2021-1350(IT)G
2022-3000(IT)G

BETWEEN:

NEWFOUNDLAND BROADCASTING COMPANY LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Jorré J.

I. INTRODUCTION

[1] The appellant has filed a motion seeking to have the two above-named appeals consolidated pursuant to Rule 26 of the *Tax Court of Canada Rules (General Procedure)*. In the alternative, they seek an order that the matters proceed on the same timetable and be heard together on common evidence.

[2] The respondent opposes consolidation but agrees that the two matters should proceed on the same timetable.

II. THE LAW

Rule 26

[3] Rule 26 states:

26 Where two or more proceedings are pending in the Court and

(a) they have in common a question of law or fact or mixed law and fact arising out of one and the same transaction or occurrence or series of transactions or occurrences, or

(b) for any other reason, a direction ought to be made under this section,

the Court may direct that,

(c) the proceedings be consolidated or heard at the same time or one immediately after the other, or

(d) any of the proceedings be stayed until the determination of any other of them.

Effect of Consolidation

[4] Consolidation has the effect of merging the appeals from a procedural point of view. The consolidated appeals will proceed as if they were a single appeal for the purpose of all the procedural steps in the appeal.

[5] However, the underlying appeals are not consolidated. Each appeal of an assessment remains a separate appeal in relation to the merits of the assessment.

[6] This is clearly explained by Justice Webb of the Federal Court of Appeal in *3488063 Canada Inc. v. Canada*¹ where he says:

[52] However, the *Rules* can operate to consolidate or merge the appeals in relation to the procedural steps that will be applicable to all of the appeals that are the subject of a consolidation order. As a result, any appeals that are consolidated will proceed as if they are one appeal for the purposes of the *Rules* and each procedural step under the *Rules* will apply equally to each appeal that is part of the consolidated proceedings so that, for example, one list of documents would apply to all of those appeals.

[53] However, the underlying assessments are not consolidated. Therefore, each appeal of a particular assessment (or reassessment) remains as a separate appeal in relation to the merits of the assessment (or reassessment), although the procedural steps, as provided in the *Rules*, apply concurrently to all of the appeals that are consolidated.

¹ 2016 FCA 233 (CanLII), see paragraphs 49 to 53.

Purpose of Consolidation

[7] The purpose of a consolidation order is “the avoidance of a multiplicity of proceedings and the promotion of expeditious and inexpensive determination of those proceedings.”²

Threshold for Considering Consolidation and Factors to Consider

[8] The preconditions to consideration of an order under Rule 26 are relatively modest. There must be (under Rule 26(a)):

- i. a common question of fact or
- ii. a common question of fact of law or
- iii. a common question of fact and law

or (under Rule 26(b)):

- iv. some other reason why a direction ought to be made.

[9] If the threshold is met the Court will consider the merits of issuing an Order, or not, pursuant to Rule 26.

[10] In *Apotex Inc. v. Bayer Inc.*³, Justice Nadon of the Federal Court of Appeal explains:

[46] In determining whether an order sought under rule 105 [the Federal Court rule for Consolidation] should be made, the Court must consider a number of factors, namely, the commonality of parties, issues, facts and remedies. The Court must also consider whether prejudice will result from the making of the order ... In a number of decisions, the Federal Court has held that no order of consolidation should be made where prejudice would result from the order. It is also well established that the onus rests with the moving party to show that it would not be abusive or prejudicial to make the order sought ... Thus, it is clear that, while prejudice is not the only consideration relevant to a determination under rule 105, it carries great weight. To this, I would add that the nature and severity of the prejudice are of obvious relevance.

(Citations omitted)

² *Apotex Inc. v. Bayer Inc.* 2020 FCA 86 (CanLII) at paragraph 45.

³ 2020 FCA 86 (CanLII) at paragraph 46.

[47] In my view, the above principles are not restricted to orders for consolidation but also apply to other rule 105 orders like the one under appeal where it is determined that two or more proceedings are to be heard together on all issues or on common issues only. I see no basis for distinguishing between consolidation orders and orders like the impugned order in this regard.

(Citations omitted)

[11] What factors are relevant and what weight they are to be given may vary in the circumstances.

III. ANALYSES

[12] In these appeals:

- a. The parties are the same and counsel are the same.
- b. The ultimate issues are different in the appeals. In one appeal, the issues relate to the deductibility of certain expenses whereas the other appeal relates to whether or not withholding tax and related penalties were properly assessed. The remedies, if any, will relate to different kinds of assessments.
- c. There will likely be a fair amount of overlap in the testimonial and documentary evidence, given that, based on the allegations in the pleadings, it appears that in two of the years in issue a majority of the disputed expenses are also the subject of the dispute with respect to withholding on the related payments. Much of the background information will be common to both appeals.

[13] Rule 26(b) is disjunctive. It is not obligatory that all, most, or even any of the questions be common to the appeals for which consolidation is sought. Indeed, given Rule 26(b) substantial overlap in the evidence alone may be sufficient to justify consolidation in circumstances, where the benefits clearly outweigh the disadvantages.

[14] Given the identity of the parties and the overlap in evidence, it will be efficient to have the appeals proceed as if they were one for all procedural purposes. Consolidation would not create add any significant complexity to pre-trial stages of the appeal or to the hearing. Further, consolidation would not cause any prejudice to the Respondent.

[15] This is an appropriate case for consolidation.

IV. CONCLUSION

[16] Accordingly, the appeals will be consolidated and the parties shall file a new timetable for both appeals.

[17] Costs will be in the cause.

Signed at Toronto, Ontario, this 4th day of May 2023.

“G. Jorré”

Jorré D.J.

CITATION: 2023 TCC 56
COURT FILE NO.: 2021-1350(IT)G 2022-3000(IT)G
STYLE OF CAUSE: NEWFOUNDLAND BROADCASTING
COMPANY LIMITED AND HIS
MAJESTY THE KING

REASONS FOR ORDER BY: The Honourable Justice Gaston Jorré,
Deputy Judge

DATE OF ORDER: May 4, 2023

COUNSEL OF RECORD:

For the Appellant:

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