Federal Court of Appeal  Cour d'appel fédérale

Date: 20170223

Docket: A-61-16

Citation: 2017 FCA 39

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

CANADIAN FOREST NAVIGATION CO. LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 20, 2017.

Judgment delivered at Toronto, Ontario, on February 23, 2017.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

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

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] Canadian Forest Navigation Co. Ltd. (the appellant or CFN) appeals the Tax Court of Canada (TCC) Associate Chief Justice Lamarre's (the Associate Chief Justice) decision dated February 12, 2016 (2016 TCC 43) pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (TCC Rules). The Associate Chief Justice found that two foreign orders, which rectified resolutions that initially declared dividends to the appellant to be

loans, did not bind the Minister of National Revenue (the Minister) because the foreign orders were not homologated by a competent tribunal in the province of Quebec.

[2] The facts before the TCC were the subject of an agreed statement of facts. The relevant facts are as follows.

[3] The appellant is a Canadian controlled private corporation with its head office in Montréal. Prior to the relevant period, its primary business was operating ships for "transporting goods in international traffic", though it no longer exercised those activities during the relevant period.

[4] The appellant incorporated affiliate corporations in Cyprus and Barbados in 2000 and 2004 respectively (Foreign Affiliates). The appellant was the sole shareholder in both companies.

[5] In 2005 and 2006, the Foreign Affiliates, through resolutions by their respective boards of directors, issued a series of dividends to the appellant totalling approximately $250 million (CDN). Both Foreign Affiliates' boards of directors were composed of the same entities who own the appellant.

[6] The appellant declared these transfers as dividends. It claimed corresponding deductions under paragraph 113(1)(*a*) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA).

[7] On June 22, 2010, the Barbadian Foreign Affiliate filed an Application for Rectification in the Supreme Court of Barbados in the High Court of Justice. It requested the Court retroactively rectify the corporate resolutions authorizing the dividend payments to the appellant, transforming them into resolutions noting indebtedness in the Foreign Affiliate's favour. The application was heard on August 5, 2010 and granted on August 13, 2010. The Cypriot Foreign Affiliate also undertook and was successful in similar proceedings in early 2011. Its application was granted on March 28, 2011. In both proceedings, the appellant was named as defendant, was represented by the same lawyers as its Foreign Affiliates, and consented to the relief sought. Although the Minister was not given notice of these proceedings, the appellant informed the Minister of the outcome subsequent to each proceeding.

[8] By notice of reassessment dated December 29, 2010, the Minister reassessed the appellant for the 2005 and 2006 taxation years. The Minister disallowed the deductions claimed under paragraph 113(1)(*a*) of the ITA. The appellant objected on March 28, 2011 on the basis that the Minister erred in treating the sums in issue as dividends.

[9] The Minister modified its reassessment by notice dated July 29, 2011, but did not reverse her decision to disallow the claimed deductions. The appellant filed a notice of objection to this reassessment as well on October 25, 2011.

[10] On October 2, 2012, the appellant filed a Notice of Appeal with the TCC. On March 6, 2014, the TCC ordered the appeal held in abeyance so the Court may first determine the question

of law posed by the appellant (on consent) pursuant to Rule 58 of the TCC Rules. The question was framed as follows:

> Is the Minister required to not treat the transfers as dividends, or to not take the position that the transfers are dividends in this [a]ppeal, by virtue of the foreign rectification orders, but rather to treat the transfers as resulting in indebtedness by the [a]ppellant to the foreign affiliates in the amount of the transfers?

[11] The Associate Chief Justice answered the question in the negative. She noted that the only Canadian province with which the appellant shares a nexus is the province of Quebec and thus the Civil Code of Québec, CQLR c. CCQ-1991 (C.c.Q.) was relevant to the matter.

[12] The Associate Chief Justice explained that rectification orders do not issue as a matter of course in Canada, and further observed that rectification is narrower under civil law than common law. The Associate Chief Justice acknowledged that pursuant to article 2822 C.c.Q., a foreign judgment constitutes a fact which domestic courts cannot ignore, even if the judgment is not homologated. However, the Associate Chief Justice reasoned that homologation was required to render the judgment enforceable in Quebec under article 3155 C.c.Q. and concluded that the appellant would have to homologate the foreign judgments for them to bind the Minister (Associate Chief Justice's decision at paras. 9-10).

[13] The relevant article of the C.c.Q. for the purpose of this appeal is article 2822:

2822. An act purporting to be issued by a competent foreign public officer makes proof of its content against all persons and neither the quality nor the signature of the officer need be proved. Similarly, a copy of a document of which the foreign public officer is the	**2822.** L'acte qui émane apparemment d'un officier public étranger compétent fait preuve, à l'égard de tous, de son contenu, sans qu'il soit nécessaire de prouver la qualité ni la signature de cet officier. De même, la copie d'un document dont l'officier public étranger est

depositary makes proof of its conformity to the original against all persons and substitutes for the original, if it purports to be issued by that officer.	dépositaire fait preuve, à l'égard de tous, de sa conformité à l'original et supplée à ce dernier, si elle émane apparemment de cet officier.

[14] Essentially, the appellant argues that pursuant to article 2822 C.c.Q.: (i) foreign judgments are facts that cannot be disregarded; and (ii) foreign judgments have direct effects that the Minister cannot ignore in assessing CFN.

[15] On the first point, I agree with the appellant that foreign judgments must be taken as facts, even in the absence of homologation. Indeed, pursuant to article 2822 C.c.Q. "[a]n act purporting to be issued by a competent foreign public officer makes proof of its content against all persons …". As such, factual findings contained within those judgments are facts that cannot be disregarded by a Court.

[16] The appellant's submission is also supported by the author Henri Kélada. In *Reconnaissance et exécution des jugements étrangers* (Cowansville: Éditions Yvon Blais, 2013) at p. 37, Mr. Kélada clearly states that foreign judgments are facts that Quebec Courts cannot ignore:

> [Unofficial translation]
>
> A foreign decision constitutes a fact whose effects cannot be ignored by Quebec courts, even in the absence of an enforcement order.
>
> As an instrument, a foreign judgment can also be used as evidence (art. 2822 C.C.Q.). A Quebec judge will be required to consider the fact that the foreign judgment has been rendered.

[17] Hence, both orders from Barbados and Cyprus are proof that the corporate resolutions have been rectified to authorize the dividend payments and to transform them into indebtedness, no more, no less.

[18] Moreover, since these foreign orders involve the appellant and its Foreign Affiliates and not the Minister, a third-party to the foreign proceedings, there is nothing to enforce against the Minister; homologation is therefore a non-issue. It follows that on the basis of the record, I cannot endorse the Associate Chief Justice's reasoning on homologation as it was not pertinent to decide this matter.

[19] However, I cannot agree with the appellant on the second point, namely that pursuant to article 2822 C.c.Q. these foreign orders are dispositive and that the Minister has no choice under the ITA but to accept the dividends are actually loans because the orders from Barbados and Cyprus say so.

[20] In the end, what remains to be determined is the foreign orders' effect vis-à-vis the Minister. The answer will necessarily depend on the evidence adduced by the parties, and the weight ascribed to the foreign orders as facts pursuant to article 2822 C.c.Q. These determinations are for the Tax Court judge to make, with a full evidentiary record at his or her disposal.

[21] Therefore, it does not appear as though the answer given by the Associate Chief Justice to the question pursuant to Rule 58 of the TCC Rules will resolve anything in the context of the

underlying appeal. Instead, the answer can best be provided by the Tax Court judge. On the basis of all the evidence adduced by the parties, the Associate Chief Justice should not have answered the question.

[22] For these reasons, I would allow the appeal, set aside the judgment of the TCC and decline to answer the question under Rule 58. I would also dismiss the Rule 58 motion before the TCC.

[23] The parties should assume their respective costs in this appeal and in the TCC.

"Richard Boivin"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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