

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170428

Docket: A-472-15

Citation: 2017 FCA 89

**CORAM: STRATAS J.A.
WEBB J.A.
SCOTT J.A.**

BETWEEN:

BIRCHCLIFF ENERGY LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on January 30, 2017.

Judgment delivered at Ottawa, Ontario, on April 28, 2017.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

SCOTT J.A.

DISSENTING REASONS BY:

STRATAS J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from a judgment rendered by a judge of the Tax Court of Canada who did not hear the appeal before that Court. The appeal in this case was heard on November 18, 19, 20 and 21, 2013 by a particular judge of the Tax Court and judgment was rendered on October 1, 2015 by a different judge of that Court (2015 TCC 232).

[2] The appeal from this judgment was heard shortly after the appeal was heard in *High-Crest Enterprises Limited v. Her Majesty the Queen*, 2017 FCA 88. In both cases a file was removed from the same Tax Court Judge who heard the tax appeals and reassigned to another judge to render judgment.

[3] Even though the parties in this case did not raise the issue of whether the Chief Justice of the Tax Court had the power to remove the file from the Tax Court Judge who heard the matter and reassign it to another judge to render a decision, this is a matter that must be addressed. This Court must first determine if the judgment rendered by the second judge in this case is a nullity, even though this issue was not raised by the parties (*Teva Canada Ltd. v. Pfizer Canada Inc.* 2016 FCA 218, 141 C.P.R. (4th) 165, at paras. 6 and 7). Hence, prior to the hearing, this Court asked for submissions on this issue. The parties also provided additional submissions following the hearing.

[4] In *High-Crest* I concluded that the Chief Justice of the Tax Court did not have the power to remove the file from this particular judge and reassign it to another judge to render judgment. The conclusion and reasons are equally applicable in this case and I would adopt the conclusion that the Chief Justice of the Tax Court did not have the power to remove the file from the judge who heard the tax appeal in this case for the reasons as set out in *High-Crest*. As a result, the decision rendered by the second judge is a nullity and I would refer the matter back to the judge who heard the tax appeal to render judgment.

[5] I would also not provide any comments on the decision that was written in this case. I would only note that any findings of fact are to be made by the judge who heard the tax appeal.

[6] As a result, I would allow the appeal, set aside the judgment that was rendered by the Tax Court and refer the matter back to the Tax Court Judge who heard the tax appeal to render judgment. Given the circumstances of this case, I would not award costs.

“Wyman W. Webb”

J.A.

“I agree.

A.F. Scott J.A.”

STRATAS J.A. (Dissenting Reasons)

[7] In this case, I follow the three-fold analytical framework I set out in my dissenting reasons in *High-Crest Enterprises Limited v. Canada (A.G.)*, 2017 FCA 88.

[8] The parties did not object to the Chief Justice's decision to reassign the case to another judge. In this Court, the appellant did not raise the issue.

[9] This Court raised the issue because it went to the subject-matter jurisdiction of this Court to hear the appeal. If the Chief Justice could not reassign the matter, then the judge who heard this matter could not have heard and rendered judgment on it.

[10] For the reasons I gave in *High-Crest*, I find that the Chief Justice did have the jurisdiction to reassign. As the appellant did not object below, the issue whether the Chief Justice properly exercised his discretion, even if it were raised by the appellant, is a new issue on appeal. I would decline to consider it: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *High-Crest* at paras. 94-95. Similarly, the failure to object to any procedural fairness deficiency below constitutes waiver: *High-Crest* at paras. 102-103.

[11] Were I writing for a majority of this Court in this case, I would now go on to deal with the substantive merits of the appeal. I shall refrain from doing so, just as I did in *High-Crest* at paras. 121 and 123. Even if I were to agree with my colleague's reasoning and conclusions concerning the Chief Justice's decision to reassign the case to a new judge, I would disagree with

his proposed disposition of the appeal. I repeat and rely on my comments in *High-Crest* at paras. 118-120. Overall, the comments I made in *High-Crest* at paras. 125-126 apply here as well.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED
OCTOBER 1, 2015, NO. 2012-1087(IT)G**

DOCKET: A-472-15

STYLE OF CAUSE: BIRCHCLIFF ENERGY LTD. v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: JANUARY 30, 2017

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: SCOTT J.A.

DISSENTING REASONS BY: STRATAS J.A.

DATED: APRIL 28, 2017

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