Date: 20080611

Docket: A-439-07

Citation: 2008 FCA 201

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ATTORNEY GENERAL OF QUEBEC

Respondent

Audience held at Montréal, Quebec, on June 2 and 3, 2008.

Judgment delivered at Ottawa, Ontario, on June 11, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] This is an appeal of a judgment by Justice Lemieux of the Federal Court (the judge) dated August 10, 2007 (2007 FC 826).

[2] The judgment arises from a dispute between the Government of Quebec (Quebec) and the Government of Canada (Canada). The dispute was brought before the Federal Court under

section 19 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended. The dispute concerns a rare use of section 19 of that Act, made by Quebec upon Canada's invitation.

[3] Of the six questions at the heart of the dispute between the parties that were submitted for resolution by the Federal Court, only three are under appeal here. By the parties' consent, the three questions were described as follows in an order by Justice Hugessen issued on September 5, 2001, in docket T-2176-95:

> [TRANSLATION]
> Did the Minister of Finance of Canada (the Minister) make a reviewable error in his findings, namely
>
> 1 - that the adoption of the *Act to Amend the Retail Sales Tax Act and other fiscal legislation* to make it possible to apply the QST to the GST is not a change made by Quebec to its tax structure within the meaning of paragraph 6(1)(*b*) of the Act and subparagraph 12(1)(*b*)(i) of the Regulations for the 1991-1992 fiscal year;
>
> 2 - that the increased mark-up of the SAQ for the 1991-1992 fiscal year is not an increase in the mark-up on goods sold to the public by that agency within the meaning of paragraph 6(1)(*b*) of the Act and subparagraph 12(1)(*b*)(viii) of the Regulations for the 1991-1992 fiscal year; and
>
> 3 - that the increased mark-up rate of the Société des loteries et courses du Québec for the 1991-1992 fiscal year is not an increase in the mark-up of goods sold to the public by that agency within the meaning of paragraph 6(1)(*b*) of the Act and subparagraph 12(1)(*b*)(viii) of the Regulations for the 1991-1992 fiscal year.

[4] The question of the nature of the remedy provided by section 19 of the *Federal Courts Act* and of the proceedings applicable to this remedy was also raised before the Federal Court and is being pursued before us. Again, Justice Hugessen described the question in his order, as follows:

> [TRANSLATION]
> What is the standard of review applicable to judicial review of the Minister's decision to reject the application by Quebec for stabilization payments made pursuant to the *Federal-*

> *Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*, R.S.C. 1985, c. F-8, as amended and in effect during fiscal year 1991–1992 (hereafter the Act) and the *Federal-Provincial Fiscal Arrangements Regulations, 1987,* S.O.R./87-240, as modified and in effect during fiscal year 1991–1992, adopted under the Act, (hereafter the Regulations), for the fiscal year 1991–1992?

[5] In respect of these questions, which the parties characterized as preliminary, the appellant argues that the judge erred with regard to the nature of the remedy, the determination of the applicable standard of review and the admissibility of evidence for the exercise of this remedy.

The facts of the dispute between the parties and the proceeding instituted by Quebec

[6] Relying upon section 19 of the *Federal Courts Act*, Quebec brought a declaratory action against Her Majesty the Queen in Right of Canada on October 17, 1995. In the action, it challenged the Minister's decision to reject its application for a stabilization payment for its revenue for the 1991–1992 fiscal year. Quebec filed its application on September 28, 1993, and the Minister's decision was made on November 29, 1994. We are now in June 2008, and the dispute with regard to the principles and the calculation itself of the stabilization payments to which Quebec claims to be eligible has still not been resolved: see appeal record, volume III, at page 427, Minister Martin's letter.

[7] In its amended statement of claim, Quebec's general argument is that the Minister handled the substance of Quebec's application in a manner that is inconsistent with the provisions of the Act and the Regulations. Specifically, the Minister misinterpreted paragraph 6(1)(*b*) of the Act and subparagraphs 12(1)(*b*)(i) and (viii) of the Regulations, which read as follows:

The Act

6. (1) Subject to subsections (8) to (10), the fiscal stabilization payment that may be paid to a province for a fiscal year is the amount, if any, as determined by the Minister, by which

(*a*) the revenue subject to stabilization of the province for the immediately preceding fiscal year

exceeds

(*b*) the revenue subject to stabilization of the province for the fiscal year, adjusted in prescribed manner to offset the amount, as determined by the Minister, of any change in the revenue subject to stabilization of the province for the fiscal year resulting from changes made by the province in the rates or in the structures of provincial taxes or other modes of raising the revenue of the province referred to in paragraphs (*a*) to (*cc*) and (*ee*) of the definition "revenue source" in subsection 4(2), other than revenues received from the Government of Canada pursuant to the *Public Utilities Income Tax Transfer Act*, from the rates or the structures in effect in the immediately preceding fiscal year.

6. (1) Sous réserve des paragraphes (8) à (10), le paiement de stabilisation qui peut être fait à une province pour un exercice est l'excédent, déterminé par le ministre :

a) du revenu sujet à stabilisation de la province pour l'exercice précédent

sur

b) le revenu sujet à stabilisation de la province pour l'exercice, corrigé de la manière prescrite de façon à compenser toute variation, déterminée par le Ministre, du revenu sujet à stabilisation de la province pour l'exercice résultant de changements faits par la province dans les taux ou la structure soit des impôts provinciaux soit des autres mécanismes de prélèvement du revenu de la province qui correspond aux alinéas *a*) à *cc*) et *ee*) de la définition de « source de revenu » au paragraphe 4(2) à l'exception des revenus reçus du gouvernement du Canada conformément à la *Loi sur le transfert de l'impôt sur le revenu des entreprises d'utilité publique* par rapport aux taux ou à la structure applicable à l'exercice précédent.

The Regulations

12. (1) In adjusting the revenue subject to stabilization of a province for a fiscal year pursuant to paragraph 6(1)(*b*) of the Act, the Minister shall:	**12.** (1) Pour corriger le revenu soumis à stabilisation d'une province pour une année financière conformément à l'alinéa 6(1)*b*) de la Loi, le Ministre doit :
…	[…]
(*b*) subtract from the revenue subject to stabilization of the province for the fiscal year as otherwise determined the amount of the increase in revenues in the fiscal year that results from changes either in the rates or in the structures of provincial taxes or other modes of raising revenue, including the following changes:	*b*) d'autre part, soustraire du montant, par ailleurs établi du revenu soumis à stabilisation de la province pour l'année financière, le montant de l'augmentation des revenus au cours de l'année financière qui résulte de changements faits par la province dans les taux ou la structure, soit des impôts provinciaux soit des autres mécanismes de prélèvement de la province, notamment les changements suivants :
(i) the introduction of a new tax, fee, levy, premium or royalty during the fiscal year or during the immediately preceding fiscal year,	(i) l'introduction d'un impôt, d'une taxe, d'un droit, d'une prime ou d'une redevance au cours de l'année financière ou au cours de l'année financière précédente,
…	[…]
(viii) increases, averaged over a year, in the mark-up on goods or services that are sold to the public by the province or its agencies,	(viii) les augmentations, en moyenne pour une année, de la marge de bénéfice sur les biens ou les services vendus au public par la province ou ses organismes,

[8] In less technical terms, Quebec is accusing Canada of, first, not recognizing the changes it has made to the structure of its taxes, particularly, the Quebec Sales Tax (QST), as a result of Canada's introduction of the new Goods and Services Tax (GST) and, second, of challenging the increase in the mark-ups of the Société des alcools du Québec (SAQ) and the Société des loteries et courses du Québec (Loto-Québec) on goods or services sold to the public by Quebec.

The Federal Court judge's decision

[9] With regard to the three points of contention between the parties that are before us in this appeal, the judge found for Quebec, stating as follows:

> JUDGMENT
>
> Quebec is entitled to the following declarations:
>
> 1. THAT the legislative amendment made by Quebec by adoption of the Act to Amend the Retail Sales Tax Act and other fiscal legislation, S.Q. 1990, c. 60, to enable the QST to be applied to the GST, is a change made by Quebec to its fiscal structure within the meaning of section 6(1)(b) of the *Fiscal Arrangements Act* and section 12(1)(b)(i) of the *1987 Regulations*, which the Minister of Finance of Canada should take into account in calculating the stabilization payment application by the Government of Quebec for the 1991–1992 fiscal year;
>
> 2. THAT the increased mark-up of the Société des alcools du Québec (SAQ) for the 1991-1992 fiscal year is an increase in the mark-up on goods sold to the public by that agency within the meaning of section 6(1)(*b*) of the *Fiscal Arrangements Act* and section 12(1)(*b*)(viii) of the *1987 Regulations* which the Minister of Finance of Canada should take into account in calculating the stabilization payment application by the Government of Quebec for the 1991–1992 fiscal year;
>
> …
>
> 4. THAT the increased mark-up of Loto-Québec for the 1991-1992 fiscal year is an increase in the mark-up of goods sold to the public by that agency within the meaning of section 6(1)(*b*) of the *Fiscal Arrangements Act* and section 12(1)(*b*)(viii) of the *1987 Regulations*, which the Minister of Finance of Canada should take into account in calculating the stabilization payment application by the Government of Quebec for the 1991–1992 fiscal year;

[10] As to the preliminary question regarding the jurisdiction of the Federal Court and the nature of the remedy under section 19 of the *Federal Courts Act*, the judge provided a historical review of this section. At paragraphs 90 to 93 of his reasons for judgment, he concluded that this section does not simply confer jurisdiction to the Federal Court. In his view, section 19 confers to the Federal

Court the function to decide a matter on the merits of the dispute and not simply to limit itself to a judicial review, as provided for under section 18 of the same Act. Consequently, a dispute is resolved by "applying principles of law to the facts established by the evidence at trial": *ibidem*, at paragraph 90. He therefore accepted all the new evidence filed by either party, provided such new evidence existed before the Minister's decision: *ibidem*, at paragraph 93.

Analysis of the judge's decision

a) The nature of the remedy under section 19 of the *Federal Courts Act* and the applicable proceedings

[11] The parties correctly pointed out that the Act is silent on the nature of the remedy provided by section 19 and the applicable proceeding to resolve their dispute. The appellant argued that the remedy was in the nature of a judicial review and that it was governed by the rules applicable to judicial reviews, in particular, those relating to the standard of review for administrative decisions and the deference owed to the administrative decision maker. I hasten to point out, and I shall restrict myself to this, that section 19 does not involve administrative disputes between the government and an individual. Instead, it concerns disputes ("controversies") between two political entities under the same indivisible Crown.

[12] The respondent argues that the remedy is *sui generis* and that it is akin to arbitration or a reference.

[13] Although a substantial part of the parties' submissions was devoted to the question of the nature of the remedy, I do not believe that, in the context of this appeal, it is useful, let alone necessary, to generalize on this matter, except to say the following. The proceeding applicable under section 19 is dependent on and a function of the true nature of the dispute between the parties.

[14] In this case, the parties have agreed to identify, define and clarify the dispute around and based on the questions of law they submitted to the Federal Court. They did not ask the Federal Court to rule on the amount to which Quebec would be entitled. All that the Federal Court had to do was to answer the questions, which is what it did, but not without digressing on the nature of the remedy provided by section 19. This was not necessary in the circumstances. The result was a polarization of the parties' positions on this issue as well as a pointless, antagonistic debate, as we shall see hereafter, on the admissibility of new evidence, including exhibits P-12 and P-20 concerning the increased mark-ups of the SAQ and Loto-Québec.

b) Was the judge right to conclude that the Minister erred in law on the three questions under appeal?

[15] The Act, which permits stabilization payments to provinces whose revenue is subject to stabilization, is designed to compensate such provinces for a decrease in eligible revenue resulting from causes other than their own doing or a voluntary action on their part.

[16] As the judge mentioned, the parties do not disagree on the basic principles of the Revenue Stabilization Program. I reproduce, with their respective numbers, five (5) of the ten (10) principles to be found at paragraph 94 of the judge's reasons for judgment:

> 1. The purpose of the Stabilization Program is to compensate provinces that sustain a decrease in revenue from one year to the next as a result of causes beyond their control;
>
> 2. A province will be entitled to compensation if the federal government does anything which causes a province's revenue subject to stabilization to fall;
>
> […]
>
> 6. A province may be entitled to a stabilization payment even if its actual revenue adjusted for the year of the application increased during the year, since a province may have increased its taxes or the increase in its revenue is solely due to the fact that if it had not increased its taxes it would have suffered a decrease in its revenue;
>
> […]
>
> 9. The federal government pays for a drop in a province's revenue subject to stabilization because of economic activity or on account of a factor beyond the province's control;
>
> 10. The adjustments mentioned in section 12 of the Regulations are intended to ensure that a province which has effectively increased its revenue by any measure, compared with what the latter would have been without the measure, is not penalized for its effectiveness, provided the measure was a tax measure.
>
> [Emphasis added]

[17] The federal sales tax (FST) was an indirect tax, included in the purchase price of a good. Its percentage varied depending on the product. It was abolished by Canadian Parliament and replaced by a direct tax, the GST, which is added to the sales price of a good. If Quebec had not amended its *Retail Sales Tax Act*, R.S.Q. c. I-1, it would have suffered a loss in revenue as a result of the disappearance of the FST and the consequent cut in the purchase price of goods.

[18] To avoid such a decrease in revenue resulting from Canada's actions, and therefore out of the province's control within the meaning of the Revenue Stabilization Program, Quebec had to change its "tax component structure" to be able to tax the new amounts added by the GST to the price of goods sold. This is what it did in amending the *Retail Sales Tax Act* so that it would include the new federal tax.

[19] With respect, I believe that the judge was right to conclude at paragraph 127 of the reasons for his decision that this amendment represented a change to the structure of one of the province's modes of levying taxes, that is, the retail sales tax. Furthermore, Canada's counsel did not explain how Quebec's entitlement to a stabilization payment falls outside the compensation principles, in particular, the second, sixth, seventh and tenth principles cited above.

[20] I shall now come to the other two issues, which raise the same problem and which I will therefore deal with together.

[21] As the judge indicated, Canada was of the opinion that the evidence submitted by Quebec did not demonstrate an increase in the mark-up, but merely showed that there was a variation or increase in the mark-up rate: see paragraphs 140 and 162 of the reasons for his decision.

[22] According to the position taken by Canada's senior representative, Mr. Hodgson, the increase in the mark-up could not be expressed as a percentage. It had to be expressed in dollars and indicate that the price of the products sold had increased. This is why he asked Quebec

representatives that, for example, the SAQ provide him with samples of typical bottles of wine sold, the price of which reflected an increase in the mark-up on these products: see volume 6, at pages 995 and 998, Mr. Hodgson's testimony during his examination for discovery.

[23] It must be remembered that, according to the question submitted to the judge, he was to determine whether or not the increase in the mark-up rate constituted an increase in the mark-up on goods sold within the meaning of paragraph 6(*b*) of the Act and subparagraph 12(1)*b*)(viii) of the Regulations.

[24] However, during the hearing on the merits, another Canada representative unexpectedly admitted that the increased mark-up could in fact be expressed as a percentage. This admission put an end to the debate on questions 2 and 4, to be found in the Federal Court's judgment reproduced at paragraph 9 of these reasons. As the judge pointed out at paragraph 149 of his reasons, the admission had a significant impact on the two questions under consideration.

[25] It also had an impact with regard to the evidence. First, the judge no longer had to decide the debate between the expert witnesses. Second, it rendered moot the debate on the admissibility in evidence of the new evidence filed as exhibits P-12 and P-20, given that exhibits P-9, P-2 and P-18 already provided to Canada by Quebec clearly established an increase in the mark-ups of the SAQ and Loto Québec for the 1990–1991 and 1991–1992 fiscal years: see Exhibit P-9 in volume 4 of the appeal record, at pages 576 and 577 and, for Loto-Québec, exhibits P-2 and P-18, respectively in volumes 3, at pages 336 *et seq.*, and 5, at pages 776 *et seq*.

[26] It is true that, as the appellant argues, it is possible that a change in the overall mark-up, such as that of the SAQ for example, can be the result of a change in consumer habits, in which case stabilization payments would not be available. But it is, in my view, inconceivable that the entire increase in the mark-up rate could be due to that fact alone and justifies a complete payment refusal. The evidence reveals that the discussions between Canada and the provinces, including Quebec, addressed, *inter alia*, the need for public institutions to increase their mark-up following the introduction of the GST in order to avoid a decrease in revenue. It is not unreasonable to believe that this is what Quebec did, as did other provinces.

[27] I am satisfied that it is possible to break down Quebec's application based on the increase in the overall mark-up rate to determine the amount of revenue subject to stabilization payments. It is up to the applicant to justify its application and calculations in compliance with the Act and the Regulations. In this area, as in many others, there is no absolute certainty, and it is clear that justificatory proof beyond a reasonable doubt is not required. However, good faith on the part of both parties and reason are essential.

Conclusion

[28] By the own admission of the parties that have appeared before us, Quebec's application for stabilization payments produced a dialogue of the deaf. The proceeding brought under section 19 of

the *Federal Courts Act* only solves some questions of law. It does not resolve the dispute. The parties must now go back to the discussion table to assess Quebec's application.

[29] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"
J.A.

"I concur.
Marc Noël, J.A."

"I concur.
Johanne Trudel, J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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