Federal Court of Appeal  Cour d'appel fédérale

Date: 20140911

Docket: A-171-13

Citation: 2014 FCA 196

CORAM: **NADON J.A.**
TRUDEL J.A.
BOIVIN J.A.

BETWEEN:

IMMUNOVACCINE TECHNOLOGIES INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on September 9, 2014.

Judgment delivered at Fredericton, New-Brunswick, on September 11, 2014.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] The appellant appeals from a decision of Lamarre J. (the Judge) of the Tax Court of Canada, dated April 10, 2013.

[2] The Judge upheld the decision of the Minister of National Revenue that the payments the appellant received from the Atlantic Canada Opportunities Agency (ACOA) for the tax years 2005, 2006, 2007, and 2008 were "government assistance" pursuant to subsection 127(9) of the

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (the Act). As government assistance, these sums reduce the amount of scientific research and experimental development expenses that the appellant can claim for the tax years in question.

[3] The appellant, a research and development company, develops vaccines against infectious diseases. ACOA is a federal agency established to support the economic development of the Atlantic region.

[4] On December 31, 2004, the appellant concluded an agreement with ACOA for close to $3,8 million in funding over the years 2005-2008 (the Agreement). Altogether, the appellant received $3,786,474 from ACOA under this Agreement.

[5] In March 2008, the Minister of National Revenue determined that the above amounts constituted government assistance.

[6] The Judge found that ACOA, in entering into the Agreement with the appellant, was carrying out its object and exercising its powers under the *Atlantic Canada Opportunities Agency Act* (R.S.C., 1985, c. 41 (4th Suppl.)). Hence, based on the evidence and the context, the contribution by ACOA constituted "government assistance" within the meaning of subsection 127(9) of the Act and was not a regular loan advanced on reasonable terms for business purposes.

[7] The appellant contends that the Agreement entered into with ACOA does not amount to a "forgivable loan" pursuant to subsection 127(9) of the Act but constitutes instead a "regular loan" which is not part of the definition in subsection 127(9) of the Act. The appellant thus argues that the Judge erred in law by interpreting the term "government assistance" as defined in subsection 127(9) of the Act and then applying this interpretation in respect of the Agreement between the appellant and ACOA.

[8] Finding of facts and mixed fact and law of the Judge are reviewable under the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[9] In the present case, the Judge thoroughly reviewed the facts and the parties' arguments. After careful consideration of the record and of counsel's written and oral submissions, I propose to dismiss the appeal. The appellant has not convinced me that the Judge committed a reviewable error which would warrant the intervention of this Court.

[10] In *Canada v. CCLC Technologies Inc.*, 139 D.L.R. (4th) 765, 96 D.T.C. 6527 [*CCLC Technologies*], this Court adopted a test which determines whether payments made by a public authority, akin to ACOA and pursuant to an agreement, have the attributes of a commercial venture. In other words, the key question becomes: is the public authority in question acting in a business rather than a governance capacity?

[11] The Judge made reference to and applied the test developed in *CCLC Technologies* as to whether the government body acted "in exactly the same way for exactly the same reasons as

payments made by private business, that is, for the purpose of advancing the [business] interests of the payor" (Judge's reasons at para. 46).

[12] The Judge further considered the line of jurisprudence that resulted in *CCLC Technologies*, namely *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60, [1987] 1 C.T.C. 79 (FCA) [*Consumers' Gas*] and *Ottawa Valley Power Co. v. Minister of National Revenue*, [1969] 2 Ex.C.R. 64, 69 D.T.C. 5166, confirmed on appeal to the Supreme Court in *Ottawa Valley Power Company v. Minister of National Revenue*, [1970] S.C.R. 941, [1970] C.T.C. 305.

[13] I note that the appellant does not dispute that the *CCLC Technologies* test has been adopted to determine whether a payment constitutes "government assistance" for purposes of the Act. Rather, the appellant argues that it does not need to satisfy this test as it is in essence a "judge-made-rule". Relying heavily on the *ejusdem generis* rule of statutory interpretation, the appellant urges the Court to interpret the text of subsection 127(9) as limiting the scope of "assistance" instead of applying the existing *CCLC Technologies* test. However, I am of the opinion that the appellant's proposed textual interpretation of subsection 127(9) must fail for the following reasons.

[14] Subsection 127(9) of the Act is a definitions provision. Amongst other terms, it defines "government assistance" as follows:

"government assistance" means assistance from a government, municipality or other public authority whether as a grant, subsidy, forgivable loan, deduction from tax, investment allowance or as any other form of	« aide gouvernementale » Aide reçue d'un gouvernement, d'une municipalité ou d'une autre administration sous forme de prime, subvention, prêt à remboursement conditionnel, déduction de l'impôt ou

assistance other than as a deduction under subsection 127(5) or 127(6).	allocation de placement ou sous toute autre forme, à l'exclusion d'une déduction prévue au paragraphe (5) ou (6).

[15] It is worthy of note that the phrase "assistance from a government" precedes an enumeration: grant, subsidy, forgivable loan, deduction from tax, investment allowance. However, the words "or as any other form of assistance" immediately follow this enumeration. Contrary to the appellant's contention – and as the Judge found at paragraph 45 of her reasons – such phrasing does not restrict the form of assistance included in subsection 127(9). Instead, it provides a broad meaning to the word "assistance," capable of encompassing a variety of forms of government assistance not necessarily limited to the said enumeration. Accordingly, this definition can include agreements which are not purely gratuitous and unilateral.

[16] Finally, I agree with the Judge that the language of the Agreement entered into by the parties indicates that their intention was to consider the contribution as "government assistance" and not as an ordinary business arrangement. Indeed, several substantive provisions in the Agreement and the schedules clearly point in that direction: the Agreement contains reporting requirements; the appellant is required to pay the contribution but only to the extent and as a percentage of gross income earned; the Agreement ends in 2017 whether or not there has been repayment; and the most ACOA can expect is the return of its contribution without interest.

[17] I cannot detect any error in the Judge's interpretation of the Agreement.

[18] For these reasons, the appeal should be dismissed with costs.

"Richard Boivin"

J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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