

Federal Court of
Appeal



Cour d'appel
fédérale

Date: 20101101

Docket: A-1-10

Citation: 2010 FCA 290

**CORAM: NOËL J.A.
PELLETIER J.A.
MAINVILLE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

GENERAL ELECTRIC CAPITAL CANADA INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 1, 2010.

REASONS FOR ORDER BY:

NOËL J.A.

CONCURRED IN BY:

PELLETIER J.A.
MAINVILLE J.A.

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REASONS FOR ORDER

NOËL J.A.

[1] The Crown moves pursuant to Rule 351 of the *Federal Courts Rules*, SOR/98-106, for leave to file new evidence in the appeal, which is scheduled to be heard on November 16, 2010. Rule 351 provides that the Court may, in special circumstances, allow evidence to be produced on a question of fact. General Electric Capital Canada Inc. (the respondent) opposes the motion.

[2] The motion is brought in the context of the Crown's appeal from the judgment of Hogan J. of the Tax Court of Canada (the Tax Court Judge) (2009 TCC 563) allowing the appeal of the

respondent, a subsidiary of General Electric Capital Corporation (GECUS) from the assessments made under Parts I and XIII of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.).

[3] New evidence may exceptionally be presented on appeal if it can be shown that it could not have been discovered before the end of the trial, and that it is otherwise credible and practically conclusive of an issue on appeal: see *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)*, [1992] S.C.J. No. 110, 192 N.R. 390 at paragraph 6 (*Amchem*); and *Franck Brunckhorst Co. v. Gainers Inc. et al.*, [1993] F.C.J. No. 874 (C.A.) at paragraph 2.

[4] The Crown seeks to introduce eight documents on appeal:

- GE Capital Finance Limited Information Memoranda dated 4 March 1997 regarding an A\$50,000,000 unguaranteed floating rate note issue due March 2000;
- Standard & Poor's publication dated November 10, 1998, titled "S&P Rates GE Capital Finance A\$250mm MTN Program 'A'";
- Standard & Poor's publication dated January 12, 2001, title "GE Capital (Hong Kong) Ltd.";
- Standard & Poor's publication dated December 20, 2001, titled "GE Capital (HK) Ltd. HK\$200 Mln Note 'A-' Rtg Withdrawn on Early Redemption";
- Standard & Poor's publication dated June 25, 2002, titled "GE Capital (Hong Kong) Ltd. A\$50 Mil. FRN Upgraded to 'AAA' from 'A'";
- Standard & Poor's publication dated July 15, 2002, titled "GE Capital (Hong Kong) Ltd.";
- Standard & Poor's publication dated September 5, 2003, titled "GE Capital (Hong Kong) Ltd. 'A/A' - Ratings Withdrawn"; and
- GE Capital Finance Limited Offering Circular dated December 18, 1996, regarding a HK\$200,000 subordinated floating rate notes du 2006.

[5] The Crown asserts that it only recently became aware of the new evidence as a result of an information exchange made pursuant to the Canada-Australia Tax Treaty.

[6] According to the Crown, the new evidence is significant in three ways. Firstly, it demonstrates that the testimony of Mr. Werner, who testified on behalf of the respondent, was contradicted on a key point, that is, that the respondent was one of only two GE financial companies (the other being GE Capital Australia) that issued debt in its own name which was guaranteed by GECUS, the parent company. The new evidence establishes that GE Capital (Hong Kong) Limited (GECHK) also issued debt in its name.

[7] Second, Mr. Werner's testimony, because it was not fully responsive to the questions asked, prevented counsel for the Crown from pursuing evidence of potential comparable transactions involving GECUS subsidiaries. According to the Crown, the new evidence provides the Court with a tangible point of reference. Furthermore, it demonstrates that the Tax Court Judge should, in evaluating the respondent's credit rating, have given greater weight to the fact that it is owned 100% by GECUS as well as the implicit support of and its integration with triple "A" GECUS. According to the Crown, the new evidence establishes that the respondent's credit rating is as high as GECHK's, if not higher.

[8] Third, the new evidence establishes the unreliability of Mr. Chambers' opinion as to how Standard & Poor's (S&P) would rate an unguaranteed debt issued by the respondent as it was not based on factors which the actual S&P ratings from GECHK took into account. Had the Tax Court Judge been aware of this evidence, he would have been bound to dismiss Mr. Chambers' opinion as unreliable.

DECISION

[9] The respondent has emphasized the fact that it would be entitled to adduce evidence of its own as to the method used and the context in which the credit reports were compiled. While the Crown asserts that the new evidence speaks for itself, it remains that the respondent would be entitled to produce evidence in response for the purposes which it asserts. This goes to the credibility of the new evidence and tends to show that it is not of a conclusive character.

[10] In my view, the Crown has failed to show that the evidence sought to be adduced is practically conclusive of the issue raised on appeal. It certainly is an element which the Tax Court Judge would have had to address and weight in the context of the mass of evidence which he was called upon to review. However, it has not been shown that it would have altered the conclusion that he reached.

[11] When the test for introducing fresh evidence on appeal is not met, it remains open to an appellate Court to allow new evidence if it is in the interest of Justice to do so (*Amchem*, para. 6). In this respect, the Crown suggests that the testimony of Mr. Werner was misleading, and that as a result it was prevented from pursuing the line of questioning which would have led to the disclosure of the existence of unguaranteed debt issues.

[12] I have carefully reviewed the relevant portions of his testimony and a fair reading falls short of establishing that Mr. Werner's testimony was misleading. His testimony was that only the respondent and one other GE subsidiary issued guaranteed debts on the capital market in their own

name. This was responsive to the question asked. If the Crown wanted information about unguaranteed debts, it was incumbent upon it to ask the appropriate question.

[13] I would dismiss the motion with costs. I specifically decline making a special award.

“Marc Noël”

J.A.

“I agree

J.D. Denis Pelletier J.A.”

“I agree

Robert M. Mainville J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-1-10

STYLE OF CAUSE: Her Majesty the Queen v.
General Electric Capital Canada Inc.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
MAINVILLE J.A.

DATED: November 1, 2010

WRITTEN REPRESENTATIONS BY:

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