Citation: 2015 TCC 41
2012-671(IT)G

BETWEEN:

HLP SOLUTION INC.,

APPELLANT,

and

HER MAJESTY THE QUEEN,

RESPONDENT.

2015 TCC 41 (CanLII)

TRANSCRIPT
OF REASONS FOR ORDER

[OFFICIAL ENGLISH TRANSLATION]

Let the attached certified copy of the Reasons for Order delivered orally from the bench at Ottawa, Ontario, on January 12, 2015, with minor corrections made to improve style and clarity, be filed.

"Johanne D'Auray"
D'Auray J.

Signed at Montreal, Quebec, this 18th day of February 2015.

Translation certified true
on this 16th day of July 2015.

Erich Klein, Revisor

Citation: 2015 TCC 41
Docket: 2012-671(IT)G

TAX COURT OF CANADA

BETWEEN:

HLP SOLUTION INC.,

Appellant,

- and -

HER MAJESTY THE QUEEN,

Respondent

2015 TCC 41 (CanLII)

[OFFICIAL ENGLISH TRANSLATION]

REASONS DELIVERED ORALLY BY TELECONFERENCE
BY JUSTICE JOHANNE D'AURAY
at the Tax Court of Canada,
200 Kent Street, Ottawa, Ontario,
on Monday, January 12, 2015, at 2:00 p.m.

APPEARANCES:

Julie Patenaude — Counsel for the appellant

Nathalie Lessard — Counsel for the respondent

Also present:

Estelle Lagacé — Registrar
Antoinette Forcione — Court Reporter

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--- The hearing began on Monday, January 12, 2015,
at 2:00 p.m.

THE REGISTRAR: This teleconference of the Tax Court of Canada in Ottawa has now commenced.

The Honourable Justice Johanne D'Auray is presiding.

Docket number 2012-671(IT)G between HLP Solution Inc. and Her Majesty the Queen.

Appearing for the appellant is Julie Patenaude, and for the respondent, Nathalie Lessard.

Please identify yourselves when you address the Court.

Madam Justice.

JUSTICE D'AURAY: So, good afternoon. In this matter, I will render orally my decision regarding the qualification of the respondent's expert evidence. I heard the motion in Montreal on December 8, 2014.

So, paragraph 1.

[1] The appellant, HLP Solution Inc., is claiming tax credits for scientific research and experimental development (SR&ED) for the taxation year ending on June 30, 2009, with respect to the following two projects:

Project 1: mobile synchronization software;

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Project 2: parallel mail collector.

[2] The Minister of National Revenue (the Minister) disallowed the SR&ED tax credits claimed by the appellant for part of Project 1 and all of Project 2. The appellant filed a Notice of Objection. Since it did not receive a response from the Canada Revenue Agency (CRA) to its objection, the appellant filed an appeal with this Court.

[3] At the hearing, the appellant informed me that it would be challenging the qualification of the respondent's expert witness, Ms. Rosu. I therefore held a voir dire to determine whether Ms. Rosu could testify as an expert in the present appeal.

[4] Ms. Rosu has been working as a research and technology advisor (RTA) for the CRA since February 2009. She has a DSc in computer science from the University of Geneva. She has also worked for various private companies in the field of computer science.

[5] At the audit stage, Ms. Rosu prepared the technical review report in which Project 1 was found to be partially eligible for an SR&ED credit. However, Project 2 was not recognized as an SR&ED project, and therefore no credit was granted.

Appellant's position

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[6] The appellant does not dispute Ms. Rosu’s expertise. Nor does it have any quarrel with the fact that Ms. Rosu is employed by the CRA as an RTA.

[7] However, the appellant submits that Ms. Rosu does not have the necessary impartiality to testify as an expert witness in this appeal. It argues that Ms. Rosu was involved in this file at every stage:

- She wrote the technical review report, that is, the scientific report used in making the assessment at issue.

- She wrote an addendum, that is, a reply to the appellant’s comments on her technical review report. The addendum confirms Ms. Rosu’s initial position, the one she took in her technical review report.

- She attended all the meetings with the appellant regarding the projects at issue.

[8] After receiving the addendum, the appellant asked Mr. Filion, Ms. Rosu’s deputy director, to do a second administrative review of its projects. The correspondence filed on the record reveals that there was some uneasiness between Ms. Rosu and the appellant. The appellant submitted that Ms. Rosu did not understand the projects carried out by the appellant and alleged that Ms. Rosu had acted in bad faith towards the appellant.

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[9] Mr. Filion therefore asked Ted Wierzbica, an information technology specialist at the CRA, to get involved in the administrative review. In collaboration with Ms. Rosu, Mr. Wierzbica prepared a questionnaire to be completed by the appellant. The purpose of the questionnaire was to determine whether there were any technological uncertainties associated with the projects.

[10] The appellant argues that Ms. Rosu's continued involvement at the audit stage means that Ms. Rosu does not have the necessary impartiality to testify as an expert witness.

[11] In this regard, the appellant submits that the opinions expressed by Ms. Rosu at the audit stage are reflected in her expert report filed with this Court. The appellant alleges that, in some instances, Ms. Rosu reproduced word for word in her expert report certain paragraphs from her technical review report. Moreover, according to the appellant, at some places in her expert report, Ms. Rosu confused her role as an RTA for the CRA and her role as an expert witness. The appellant submits that, in both her expert report and her rebuttal report, Ms. Rosu defends the opinion she gave at the audit stage.

[12] The appellant therefore argues that, given Ms. Rosu's involvement and the opinions she expressed regarding

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the appellant's two SR&ED projects, she could hardly change her opinion and thus did not have the necessary impartiality to act as an expert witness in this appeal.

Respondent's position

[13] The respondent for her part submits that it is rare for a court to refuse to hear the testimony of an expert witness. There must be clear evidence of bias, of which there is none in this appeal.

[14] The respondent also argues that Ms. Rosu is an expert and that it is in this capacity that her opinion is sought by the CRA, whether it be at the audit stage, the objection stage or in an appeal before this court. In this regard, she argues that Ms. Rosu has undertaken to respect the Code of Conduct for Expert Witnesses under the rules of this Court.

[15] According to the respondent, this Court must hear the whole of the expert's testimony to determine whether an expert witness has become an advocate for his or her client's position. This should not be done when determining whether the expert may testify.

[16] Ms. Rosu testified that she started afresh in preparing the expert report filed with this Court. In light of the facts she had gathered during the audit, she performed a new review of the literature and did searches on the Internet,

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including user forums, in order to ensure that she had not missed anything.

[17] Thus, during this new research. Ms. Rosu noticed that the activities she had accepted as being SR&ED for Project 1 were standard practice; she had therefore made a mistake at the audit stage when she accepted part of Project 1 as being SR&ED. According to the respondent, this proves that the expert analyzed anew the appellant's SR&ED projects and that if she had found literature in the appellant's favour, she would have reversed her opinion and granted the appellant SR&ED credits. In this regard, she lays emphasis on Ms. Rosu's testimony.

[18] Consequently, the respondent argues that Ms. Rosu is a qualified, impartial expert who is seeking the truth and who will not mislead the Court. She should therefore be qualified as an expert witness in this case.

Applicable law and analysis

[19] First, I would like to mention that an expert witness's main role is to assist the Court in assessing evidence on scientific or technical matters.

[20] The Code of Conduct for Expert Witnesses is to the same effect. Under the heading General Duty to the Court, the first two sections of the Code read as follows:

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1. An expert witness has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.

2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert witness must be independent and objective and must not be an advocate for a party.

[21] It is therefore important to bear in mind that the expert witness's main duty is to assist the Court.

[22] The leading case on the admission of expert evidence is the Supreme Court of Canada's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9, in which Justice Sopinka sets out the following criteria for determining whether expert evidence should be admitted.

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule;

(d) a properly qualified expert.

[23] Only the relevance criterion is being questioned by the appellant in this appeal. I will therefore limit my analysis to that criterion.

[24] At paragraph 18, Justice Sopinka explains what he means by relevance:

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Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as [a] question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence.

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Justice Sopinka goes on to say:

Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact,

particularly a jury, is out of proportion to its reliability.

He then continues:

> While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190).

He further states:

> Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

[25] According to *Mohan*, therefore, the judge, when analyzing relevance, must first make sure that the evidence is related to the fact in issue that this evidence is intended to establish. In other words, the evidence must be relevant to the facts in issue. This is what Justice Sopinka calls the logical relevance of evidence.

[26] Second, still with respect to relevance, Justice Sopinka states that the judge must perform a cost-benefit analysis in order to determine whether the value of the

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testimony is worth what it costs, not in the economic sense but rather in the sense of its impact on the trial process.

[27] Furthermore, in the decision of the Court of Appeal for Ontario in *R. v. Abbey*, [2009] O.J. No. 3534, 246 C.C.C. (3d) 301, Justice Doherty applies the *Mohan* criteria, but distinguishes between the preconditions to admissibility dealt with in *Mohan*, that is, the four criteria, and the judge's exercise of the gatekeeper function, which consists of weighing the benefits or the probative value of evidence against the cost or the prejudice associated with admitting this evidence. According to *Mohan*, this step is performed when the judge is conducting the analysis of the relevance criterion.

[28] Justice Doherty changes the order of the analysis of the criteria set out in *Mohan*. After analyzing the four *Mohan* criteria, he moves on to the second stage, where the judge must take on the role of gatekeeper, which requires the judge to exercise his discretion, that is, to perform a cost-benefit analysis. In this regard, he writes as follows:

> Using these criteria, I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is

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> qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

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Justice Doherty adds:

> It is helpful to distinguish between what I describe as the preconditions to admissibility of expert opinion evidence and the performance of the "gatekeeper" function because the two are very different. The inquiry into compliance with the preconditions to admissibility is a rules-based analysis that will yield "yes" or "no" answers. Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.
>
> The "gatekeeper" inquiry does not involve the application of bright line rules, but

> instead requires an exercise of judicial discretion. . . . This cost-benefit analysis is case-specific . . . . Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.

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[29] It is apparent from these two decisions that the judge must perform an analysis to determine the cost and the benefit of the expert evidence. If the judge finds that the probative value and the reliability of the expert evidence is likely to have little or no probative value, the judge may, in the exercise of his or her discretion, disqualify the expert at the expert qualification stage.

[30] Justice Doherty explains that each case is different, and whether an expert should be disqualified at the qualification stage or not will depend on the outcome of the voir dire or, if there is no voir dire, on the evidence presented at the hearing at the time of the expert qualification inquiry.

[31] In the present appeal, I determined on the voir dire that Ms. Rosu did not have the necessary impartiality to testify. In weighing the probative value of her testimony against the cost of that testimony in terms of its impact on the

trial process, I decided that it was preferable to disqualify Ms. Rosu at the qualification stage.

[32] The following reasons led me to this conclusion:

- Ms. Rosu was involved at every stage of the file.
- Ms. Rosu delivered the opinion (the technical review report) that served as the basis for the assessment.
- Following the appellant's representations, Ms. Rosu also wrote an addendum to her technical review report, in which she still upheld the same position.
- She also participated in every meeting with the appellant as the CRA's representative.

[33] In my view, it is very difficult for a person who has been involved at every stage of a file to have the necessary detachment to give a new opinion that will disregard that person's previous opinions.

[34] Indeed, during the voir dire, she stated that it is difficult to change one's opinion if the facts do not change. Is that not the very difficulty that faces a person who has been involved at every stage of a file and who has given opinions at the various stages of that file?

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[35] Moreover, at different places in her report, Ms. Rosu confused her role as an RTA with that as an expert witness. For example, at page 6 of her rebuttal report, Ms. Rosu refers in the following terms to the requests she made during the audit:

> [TRANSLATION]
>
> I failed to find any comments formulating assumptions in the documents produced with the version control software that were provided by the company. Despite our requests, I never received copies of tests to document the experiments. In that context it is difficult for me to conclude that the procedure adopted complied with the scientific method.
>
> The answer is no.

[36] Furthermore, there are indications in the expert report that Ms. Rosu lacks detachment.

[37] For example, she describes in detail all the work she did on this file as an RTA, the meetings she had with the appellant and the requests for documents made to the appellant during the audit; while not determinative in itself, this is unusual.

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[38] In some parts of her export report, Ms. Rosu reproduces word for word paragraphs from her technical review report.

[39] Furthermore, in her expert report Ms. Rosu uses the pronoun "nous" ("we"), "nous" being the CRA. In this regard, she noted during the voir dire that it was sometimes difficult to hide the fact that she worked for the CRA. She stated, and I quote: [TRANSLATION] "Of course, I have a file that was prepared by the CRA and requests that were made by the CRA." She concluded, however, that the "nous" was a question of style.

[40] In my opinion, these examples and her constant involvement in the file only serve to demonstrate that there was a blurring of the distinction between Ms. Rosu's role as an expert witness and her role as an RTA.

[41] In *Les Abeilles Service de Conditionnement Inc. c. La Reine*, 2014 CCI 313 (*Les Abeilles*), the respondent's expert had, as in the present case, drafted the technical review report leading to the assessment. During the process of qualifying the respondent's expert, counsel for Les Abeilles objected to that witness's testimony. She asked that the expert be disqualified, arguing that he did not have the necessary impartiality.

[42] Justice Jorré took the objection of counsel for Les Abeilles under advisement. After hearing the

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testimony of the respondent's expert, he indicated that, in light of the conclusion he had reached, he did not have to rule on the objection made by counsel for Les Abeilles concerning the admissibility of the testimony of the respondent's expert.

[43] Justice Jorré concluded, however, that the respondent's expert was not impartial and he refused to accept his testimony as that of an expert witness, but he did accept it as that of a fact witness.

[44] According to Justice Jorré, it was clear that the respondent's expert had confused his role as an expert witness for the Court and his role as an RTA. The judge also made the following observation in footnote 36:

> [TRANSLATION]
>
> The serious difficulties I have with the testimony of the respondent's expert, which I express below, illustrate the dangers of having the scientific advisor at the audit stage testify as an expert witness.

[45] In *Gagné v. The Queen*, [2002] T.C.J. No. 61, 2002 CanLII 53, Judge Tardif, in a case involving the fair market value of an immovable property, stated the following with regard to the testimony of the respondent's expert:

> . . . His involvement in the case from the start of the audits disqualified him or,

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at the very least, discredited the value of his work.

[46] The respondent referred me to the line of authorities that treats bias as a question of probative value rather than as one of admissibility. In the decisions that were provided to me, and which I examined, dealing with tax matters, the judges of this Court gave little or no probative value to the testimony of the respondent's experts when these experts had been involved at the audit stage. Consequently, in these cases, the Court did not have the benefit of the testimony of the expert produced by the respondent.

[47] Moreover, in the decisions in which the judges chose to treat bias as a question of probative value rather than as one of admissibility, it is unclear whether a voir dire on the admissibility of the expert's evidence was held.

[48] The cost-benefit analysis I have done in fulfilling in this case my gatekeeper role under *Abbey* or under the relevance criterion in *Mohan* shows that the probative value of the testimony of the respondent's expert is likely to be so low that the testimony would have no impact on the issues. Thus, the testimony would be of no assistance to the Court.

[49] It is important to note that I am not disqualifying Ms. Rosu because she is employed by the CRA. I

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understand the distinction between independence and impartiality. An expert witness does not have to be independent.

[50] I also wish to point out that I do not question Ms. Rosu's competence. She simply found herself in a difficult position.

[51] As I gave the appellant time to allow its expert to write an expert report including the facts on which he relied following the respondent's objection, I am giving the respondent the opportunity to submit a new expert report.

I would like the parties to decide on the submission date for the expert report, bearing in mind the late April hearing dates.

[52] Costs will be in the cause.

Translation certified true
on this 16th day of July 2015.

Erich Klein, Revisor

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