Date: 20000802

Docket: T-167-00

BETWEEN:

BELGRAVIA INVESTMENTS LIMITED, 3438644 MANITOBA LTD., SPACE FUEL GAS PRODUCTS LTD., RES RESOURCES LTD., SUPREME GRAPHICS LTD., J.E. BOWES INVESTMENTS INC., 409707 ALBERTA LTD., BEACH AVENUE HOLDING COMPANY LTD., BAYOU DEVELOPMENTS (1996) LTD., NLK CONSULTANTS INC. and TRICONTINENTAL DISTRIBUTION LIMITED

Applicants

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER

TEITELBAUM, J.

[1] On the 18th of May 2000, the applicants filed into the Federal Court Registry a Notice of Motion for an Order directing the respondent to amend the affidavit of Walter Wong sworn April 25, 2000 "so as to delete paragraphs 3, 6, 7 and 8 thereof, and further, directing the Crown (respondent) to amend the Wong affidavit so as to delete or amend all references to the defined phrase "Tax Shelter Corporations" as contained therein."

[2] As grounds for the present application, the applicants state, on page 3 of the Notice of Motion:

1. Paragraphs 3, 6, 7 and 8 of the Wong Affidavit depose to matters which are clearly irrelevant to the Sole Issue to be determined by this Honourable Court at the Application, the inclusion of which may prejudice or delay the fair hearing of the Application.

2. Portions of paragraphs 3, 6, 7 and 8 of the Wong Affidavit improperly purport to interpret statute law, the inclusion of which may prejudice or delay the fair hearing of the Application.

3. Portions of paragraphs 3, 6, 7 and 8 of the Wong Affidavit improperly contain legal opinions, legal argument and/or draw conclusions of law, the inclusion of which may prejudice or delay the fair hearing of the Application.

4. The contents of paragraphs 3, 6, 7 and 8 of the Wong Affidavit have been included for the purpose of unfairly and improperly attempting to characterize the conduct of the Applicants as contrary and/or improper to the provisions of the *Act*, the inclusion of which may prejudice or delay the fair hearing of the Application.

5. The definition of Taseko Resources Inc., Taseko Mines Ltd., Pacific Sentinel Resources Inc. and Pacific Sentinel Gold Corp. as the "Tax Shelter Companies" in paragraph 2 of the Wong Affidavit, and the continued use of which phrase throughout the remaining paragraphs of the Wong Affidavit, is prejudicial, inflammatory and abusive to the stated purpose of the Application, the inclusion of which may prejudice or delay the fair hearing of the Application.

[1] The applicants state, as Background Information, the following:

1. On February 1, 2000, the Investor Group filed a Notice of Application pursuant to Part 5 of the *Federal Court Rules*, 1998, SOR/98-106, as amended (the "Federal Court Rules, 1998), with the Registry (the "Registry") of the Federal Court - Trial Division, requesting an Order pursuant to section 232 of the *Income Tax Act* , R.S.C. 1985, c. 1 (5th Supp.), Chapter 63, as amended (the "*Act*"), for the determination of whether there exists a solicitor-client privilege in respect of certain documents (the "Privileged Documents")

which are the subject of a requirement (collectively, the "Requirements") under paragraph 231.2(1)(a) and (b) of the Act, served on each of the eleven members of the Investor Group by Canada Customs and Revenue Agency on December 10, 1999 (December 22, 1999 in respect of Tricontinental Distribution Limited (the "Application"). The grounds for the Application are that the Privileged Documents are not producible pursuant to the Requirements because they are properly clothed with solicitor-client privilege.

2. The only issue to be determined by this Honourable Court at the Application is the determination of whether there exists a solicitor-client privilege in respect of the Privileged Documents (the "Sole Issue").

3. On or about April 25, 2000, the Crown filed with the Registry a copy of the Wong Affidavit sworn in opposition to the Application.

[2] In the written submissions filed by the respondent, the respondent states that for the purposes of the present motion, the respondent "does not take exception with the accuracy of the facts as set out in paragraphs 1 to 4 of the Written Representations of the Applicants" which follows the Background Information above cited.

[3] The legal issue to be determined pursuant to the present application is, assuming that the allegations or statements made by Mr. Wong in his affidavit sworn April 25, 2000 in paragraphs 3, 6, 7 and 8 are not necessarily relevant to the issue of determining whether there exists a solicitor-client privilege in respect of alleged privileged documents, whether the respondent should be ordered to have the affidavit amended before the issue is determined (privileged documents) on the merits.

[4] The parties to these proceedings have, in great detail, stated the current state of the law on the striking of affidavits. After reading their submission, both appear to agree that the general rule that the determination of the admissibility of portions of an affidavit should be determined by the judge hearing the application on the merits. In the case of *Home Juice Co. v. Orange Maison Ltd.* [1968] Ex. C.R. 163 at page 2, Jackett P. states that there are two exceptions to the above general rule:

> The two exceptions to that general rule that I contemplate at the moment are
>
> (a) where a party has to obtain leave to admit evidence and it is obvious, in the view of the Court, that it is inadmissible, and
>
> (b) where the Court can be convinced that, as a practical matter, the admissibility of the affidavits filed by one of the parties should be considered some time before the hearing so that the hearing can proceed in an orderly manner.

[5] Subparagraph (a) is not applicable to the facts of the present case.

[6] In the case of *L"Hirondelle v. Canada* [2000] F.C.J. No. 192 (F.C.T.D.), Mr. Justice Hugessen, in a decision where he had to decide whether to strike out an affidavit filed in support of a main motion, states, at pages 2 and 3, paragraphs 5 and 6:

5. Dealing first with the motion brought by the interveners that the affidavit of Clara Midbo should be struck out as it is an improper affidavit within the meaning of the Rules, I may say that upon examination of that affidavit, I have no doubt whatever that it is improper. It is replete with conclusory and argumentative allegations, almost all of them being on matters of law as to which the deponent is not apparently qualified. I set out below, simply by way of example, paragraphs 3 and 4 of the affidavit in which the deponent attempts to interpret the pleadings, the Rules and various orders that have been made in this case, something which she is eminently unqualified to do and something which is clearly not a matter for evidence in any event:

"3. The issue in this case is who has the constitutional authority and jurisdiction to determine band membership. I am advised by counsel, and verily believe, that although the original trial interveners" (i.e. NCC (now CAP), NCC(A) and NSIAA representatives have made public comments and court submissions to the contrary, this case, as defined by the parties" pleadings, is clearly not about whether the Indian status provisions of the Indian Act are valid. Attached hereto as Exhibit A is a copy of a newspaper report from the Lakeside Leader dated July 16, 1986. The issue to be decided in this case is whether Parliament or Canada"s First Nations communities have the power to determine their memberships, requiring the Court to determine the aboriginal and treaty rights of the plaintiffs in the context of s. 35. The case does not, and properly should not in any way involve the Court in examining how First Nations or Parliament might exercise their jurisdiction to determine membership in any particular case or in the future.

4. The proposed interveners rely on rule 369. I am advised by counsel that while this rule is designed to serve the Court"s and parties" common interest in promoting practicality and efficiency, and reducing expense, it does not dispense with the fundamental requirement that applications to the Court require a proper evidentiary record before they can be treated as procedurally correct or substantively meritorious. In connection with the participation herein of the trial interveners, they have been granted quasi-party status without any application or evidentiary record describing the appropriateness or scope of their intervention in these proceedings as presently constituted by the parties" pleadings. Moreover, NWAC has been accorded what amounts to quasi-party status without any application or evidentiary record, and despite failing to apply for intervener status in the first trial. A review of the history of the participation of the interveners serves to illustrate the plaintiffs" complaints."

6. That said, I have not been persuaded that the affidavit should be struck. In my view, in a sane modern procedure, irregularities in proceedings should not be made the subject of motions and should not require the Court to give orders striking out or correcting such irregularities unless the party attacking the irregularity can show that it suffer some sort of prejudice as a result thereof. I put that point squarely to counsel for the interveners and the only prejudice he was able to suggest to me that his clients might suffer was that the Court, when it hears the main motion, might be induced to believe that these highly tendentious allegations in the affidavit were uncontested matters of fact. I

think that counsel is ascribing to the Court a degree of gullibility which I hope he is not justified in doing. Accordingly, absent any showing of prejudice and notwithstanding that almost all of the affidavit is irregular and should not be before the Court, I have no grounds that would justify me in striking it out. Counsel for the interveners admits readily that virtually every paragraph of the affidavit is proper argument and can properly be made by counsel for plaintiffs and indeed has been made by counsel for plaintiffs in his written submissions in support of the main motion. I am therefore going to dismiss the motion to strike the affidavit.

[7] Counsel for the parties submitted other cases for my consideration. I do not believe it necessary to quote from these other cases as they suggest the same considerations as stated by Jackett P. and Hugessen J. in the above two cases.

[8] I take from the above cases that the Court should not strike an affidavit or a part of an affidavit on a preliminary motion to strike unless, and exceptionally, the applicant asking for same can clearly show a prejudice.

[9] In paragraphs 3, 6, 7 and 8 of his affidavit sworn April 25, 2000, Mr. Walter Wong states:

3. The Applicants investment with the Tax Shelter Companies permitted the flow-through of exploration expenses incurred by the Tax Shelter Companies to the Applicants, which expenses could be utilized to offset other income of the Applicant.

6. One of the issues in my audit is whether the investment of the Applicants in the Tax Shelter Companies is a "tax shelter" as that term is defined in the *Act* . Basically, subsection 237.1(1) of the Act provides that an investment is a "tax shelter" where statements or representations have been made or proposed to be made that deductions or losses available from the investment would exceed the cost of the investment. One of the consequences of making a "tax shelter" investment is that an investor will not be permitted to deduct his share of losses or make any deductions with respect to the investment unless they file a prescribed form which contains the identification number of the tax shelter.

7. All of the Applicants claimed deductions with respect to their investment in the "Tax Shelter Companies" in excess of the cost of their investment. None of the Applicants filed a prescribed form containing an identification number with respect to their investment in the Tax Shelter Companies.

8. All of the Applicants have taken the position at the audit stage that their investment with the Tax Shelter Companies was not a "tax shelters" as defined in subsection 237.1(1) of the Act, and further, that no statements or representations as contemplated by subsection 237.1(1) were made or proposed to be made to them or their advisors or agents by any of the Tax Shelter Companies or their agents.

[10] I am satisfied, for the purpose of this application, that it appears that the references to "Tax Shelter Companies" or to the reference that certain companies are a "tax shelter" is not relevant to the issue on the merits, that is, whether documents are privileged or not. I am also satisfied that the statement made by Mr. Wong in attempting to state what the law is as it applies to subsection 237.1(1) of the *Income Tax Act* is not relevant to the main issue before the Court as it relates to the issue of whether certain documents can be considered privileged documents.

[11] As Mr. Justice Hugessen states in *L"Hirondelle, supra*, the applicant must show it would suffer some prejudice if the affidavit or a portion of the affidavit were not struck.

[12] The applicants believe that the paragraphs which they wish to have struck have been included for the purpose of unfairly and improperly attempting to characterize the conduct of the applicants and to cause the Court to somehow be taken in by these statements and thus cause the applicants a prejudice.

[13] I do not agree with this submission.

[14] When the application on the merits (privileged documents) is heard, the applicants can attempt to make their submission that paragraphs 3, 6, 7 and 8 of the Wong affidavit are not relevant and should not be given any consideration.

[15] I am satisfied that if the said paragraphs are not struck at this time, there is nothing to prevent the hearing from proceeding in an orderly manner.

[16] The application is dismissed with costs.

"Max M. Teitelbaum"

J.F.C.C.

Ottawa, Ontario

August 2, 2000