B.C. court sides with accounting firm

By GEOFF KIRBYSON

The B.C. Court of Appeal has sided with a major accounting firm despite one of its professionals providing "erroneous" advice that led to a client getting a tax bill of more than $500,000 US.

Justice Mary Newbury dismissed an appeal by Anita Felty, who sued Ernst & Young for negligence for the tax advice she received in her divorce settlement with former husband Tim Delesalle.

Her lawyer, Fiona Robin, had signed an agreement with Ernst & Young that contained a limitation of liability clause, restricting damages for negligence or other reasons to the total fees paid to the defendant.

The trial judge found Felty was bound by the clause, which limited her damages to slightly more than $15,000 (Canadian).

The critical issue was the tax treatment of 10 shares that Felty held in a Delesalle family holding company, called "DHL," and the fact that she was a U.S. citizen who had moved to Canada following her marriage. (They separated in 2002).

The shareholders agreement spelled out an option for DHL to acquire all company shares from anybody who wasn't a member of the family at fair market value. In her divorce, Felty fell into that category.

During the summer of 2004, Delesalle's side proposed a "global settlement" of $4 million, which was designed to take care of the shares issue as well any future spousal support.

Robin, a partner in Vancouver-based family law firm, Schuman Daltrop Basran and Robin, wanted professional advice concerning the value of various assets so she entered into a retainer agreement with Ernst & Young Corporate Finance Inc. and dealt with a tax attorney in its California office.

You'd never see a lawyer providing legal advice and putting a limitation of liability clause on it. It's illegal, you can't limit liability under the Legal Professions Act. Obviously, accountants can."

Catherine Brown, University of Calgary

He informed her that Felty did not have to be concerned about paying any U.S. tax on the transfer of her 10 shares to her ex-husband. He pointed to section 1041 of the U.S. Internal Revenue Code of 1986 which stipulated "no gain or loss is to be recognized on the transfer of property from an individual to or in trust for a spouse or former spouse if the transfer is incident to a divorce."

Based on the tax attorney's advice, Robin determined Felty didn't need to make a minority share claim in order to discount the value of her shares for sale to Delesalle for the purpose of reducing her U.S. taxes.

Unfortunately, the attorney overlooked a "special rule" that said section 1041 "did not apply if the spouse of the transferor was a 'non-resident alien,' which Delesalle was.

In her decision, Newbury said Felty was bound as a disclosed principal to the entire agreement. She found the trial judge erred by failing to consider whether the limitation clause should be unenforceable on public policy grounds, but said the giving of erroneous advice in this case was not so "reprehensible" that it would be contrary to the public

BROWN

interest to refuse to enforce the clause.

"As desirable as it might be to hold the accounting profession to a high standard of care, I am not persuaded that an error in the giving of erroneous tax advice in the circumstances of this case rises to the level of conduct that is so reprehensible that it would be contrary to the public interest to allow [the defendant] to avoid liability," Newbury wrote in her decision.

"If the legislature took a different view, it could, of course, enact a provision in the Chartered Professional Accountants Act similar to that contained in the Legal Profession Act. Thus far, it has chosen to prohibit the use of limitation clauses only by lawyers and law firms."

Catherine Brown, a professor of law at the University of Calgary, says the Felty case should serve as a cautionary tale.

"[Felty] should have gotten legal advice from a lawyer. You'd never see a lawyer providing legal advice and putting a limitation of liability clause on it.

"It's illegal, you can't limit liability under the Legal Professions Act. Obviously, accountants can," she says.

"The case law is pretty clear. When the courts have overturned a limitation of liability clause in the past, the conduct has been pretty egregious," she says.

Brown notes the judge pointed to a manufacturer of baby food, which poisoned its products, as an example of when a limitation of liability clause might be overturned.

"The accountant made a mistake but it wasn't behaviour that was so reprehensible that you would be overriding the limitation clause," Brown says.

David Asper, a businessman and lawyer who will be teaching law at Arizona State University this winter, agrees with Newbury because the decision provides certainty for the public.

"If the public interest demands that the law be different, then the legislature can intervene as it has done in other areas," he says.

Asper believes the B.C. Court of Appeal wasn't interested in "riding the unruly horse" of what is or isn't contrary to public policy.

Asper says it's hardly unusual for accountants to provide tax advice but he believes there is a difference between accounting and legal advice even though it overlaps.

"The reality is that whether it's a lawyer or an accountant, sometimes mistakes happen," he says.

Brown says Felty could consider suing her own lawyer for negligence but her chances would have been better if advice had been sought from a fly-by-night firm.

"There's nothing negligent in using one of the top five accounting firms in the country," she says.

"I think in this case, Ms. Robin met the standard of care to Ms. Felty by consulting with Ernst and Young."

There are a number of steps accountants and their firms can take to protect themselves from major lawsuits, says Cedric Wong, Calgary-based senior manager of U.S. Tax at BDO Canada. The language used in the terms and conditions in the engagement letter is one way. Including protective disclosure in the cover letter when delivering the final product to the client is another.

"I believe the current process should give enough protection to the accountant. However, given that the U.S. is getting more aggressive in going after the position taken by the taxpayer, we may see this kind of lawsuit more often," he says.

"However, accountants may not be able to get 100 per cent away from this if they know their tax advice is aggressive and may be violating the law. The accountant will be liable in those cases."

Not everyone on same financial planner page

By JEFF BUCKSTEIN

The long-standing clarion call for Ontario to introduce new regulations to protect people against unqualified financial planners has received a shot in the arm from the provincial government itself.

A committee struck by Ontario's Ministry of Finance has sought advice from a multitude of industry stakeholders on what changes need to be made. While there seems to be agreement that tighter regulations are necessary, how to go about it with so many existing organizations and oversight channels clearly remains a key challenge.

"I think the time is right for the Ontario government to be looking into this. This is sort of the build-up of a few years of discussion in this area," said Michelle Alexander, a vice-president with the Investment Industry Association of Canada (IIAC) in Toronto.

A mixture of people now provide financial planning, including many who are highly regulated and qualified, but also a small yet significant percentage who are not.

The IIAC, along with the Investment Funds Institute of Canada (IFIC), have asked the Ontario government to enact a legislative framework for financial planners, in a joint submission in response to the hearing committee's request for comments.

"I think it's important that when consumers seek out a financial planner, you'd expect them to be subject to regulatory oversight," said Jon Cockerline, the Toronto-based director of research with IFIC.

"If there is a required designation or designations whereby the standards are common and harmonized, and requiring a sufficient level of proficiency, there's a much greater assurance that there will be harmonized service," he added.

ALEXANDER

The IFIC and IIAC have proposed that a general legal framework for financial planners be developed by Ontario's Ministry of Finance, in consultation with the Financial Services Commission of Ontario (FSCO), the Ontario Securities Commission (OSC), and a newly established Financial Planning Authority (FPA).

Under this plan, the authority of the existing regulators would remain. The FSCO would continue to regulate insurers and manage general agents. The OSC would continue to oversee the Mutual Fund Dealers Association (MFDA) and Investment Industry Regulatory Organization of Canada (IIROC), both of whom are self-regulatory organizations. The MFDA and IIROC would continue to be responsible for creating financial planning rules applicable to their respective members.

Their proposed new FPA would oversee all financial planners who are now operating outside of regulated channels. This body would also develop rules about how to qualify for the title 'financial planner.'

"If you're a financial planner and you want to call yourself a financial planner, whether you're licensed to sell insurance, licensed under the MFDA, licensed under IIROC, or not licensed at all — it shouldn't matter. You should be held to the same standard. I think there's tremendous agreement there," said Cary List, president and chief executive officer of the Financial Planning Standards Council (FPSC) in Toronto.

But List questioned the need for establishing the FPA as a new regulatory authority.

See List on page 9

List sees no need for another regulatory body

Continued from page 8

"We [the FPSC] already regulate the members of the profession. We already regulate CFP professionals, and as such would continue to do so. We wouldn't support the creation of a new body, particularly when it's really unclear as to what that body would do differently than what FPSC already does," he said.

List said the FPSC sets standards for financial planning, and requirements for qualifying. It sets and administers uniform examinations and professional development. It also holds qualified CFP professionals accountable for their conduct, including ethics, he said.

"Currently the FPSC is not recognized by law as an SRO nor are individuals required to be member of the FPSC. It is a voluntary organization," responded Alexander, who explained why she thought the newly proposed organization would be best suited to handle the additional regulatory responsibilities.

"A new FPA authority would be recognized under law and have the same types of powers as the OSC and/or IIROC — it would have oversight over both financial planning firms and individuals and be responsible for registration, compliance conduct and examinations to ensure adherence to the rules, enforcement and complaint handling, as well as collect registration fees," she added.

The FPSC noted in its own submission to the hearing committee that it currently has oversight of more than 19,000 professionals across Canada, 10,000 of whom are in Ontario — individuals that have voluntarily stepped up to become certified as financial planners.

But, warned the FPSC, "there are many more advisors holding themselves out as financial planners without meeting any required qualifications, and who are not accountable for their conduct as financial planners. The fact that certification is strictly voluntary poses too great a risk to the financial well-being of Canadians.

"We recognize and respect the authority and work of the existing regulators and self-regulatory organizations; however, our concerns lie in the gap that currently exists as a result of the absence of a single set of mandated standards and common oversight for those who claim, either through title or advertising, to be financial planners or to offer financial planning as a core service," their report added.

In order to fill that gap, the FPSC called on the Ontario government to adopt a harmonized set of standards for financial planners consistent with those already established for CFP certification. Only those individuals who have demonstrated their competence by meeting unified standards, and have also demonstrated they are committed to professional ethics and continuing education should be permitted to use the title or hold out as a 'financial planner,' they say.

In contrast to the IFIC/IIAC proposal which contains three regulating bodies, the FPSC wants to make all financial planners in Ontario accountable to a single professional oversight body that understands financial planning and professional obligations, and that represents the public interest.

"We strongly recommend a single professional body, as we believe that multiple competing bodies is not in the consumer's interest, as it puts the onus of responsibility on the consumer to figure out the difference between multiple credentials," List said, drawing an analogy to the evolution of accounting designations in the past few years.

"Currently the FPSC is not recognized by law as an SRO nor are individuals required to be member of the FPSC. It is a voluntary organization."

Michelle Alexander, IIAC

"The accounting profession recognized that multiple competing credentials was not in anybody's interest, and thus the merger of the CGA, CMA and CA bodies under one," he said.

List said he believed the FPSC is qualified to be that oversight body by virtue of the work it already does.

Scott Blodgett, a spokesperson with Ontario's Ministry of Finance in Toronto, said all of the submissions to the committee are under review. "Because of this, it would be inappropriate for the Ministry of Finance to comment on any individual submission," he added.

The committee is expected to submit its final report in 2016, said Blodgett.