

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131212

Dockets: A-104-09

A-50-13

A-51-13

A-52-13

A-53-13

A-54-13

Citation: 2013 FCA 290

**CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.**

Docket: A-104-09

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

STANLEY J. TESSMER LAW CORPORATION

Respondent

Dockets: A-50-13

A-51-13

A-52-13

A-53-13

A-54-13

AND BETWEEN:

STANLEY J. TESSMER LAW CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on December 10, 2013.

Judgment delivered at Vancouver, British Columbia, on December 12, 2013.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

DAWSON J.A.
NEAR J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131212

**Dockets: A-104-09
A-50-13
A-51-13
A-52-13
A-53-13
A-54-13**

Citation: 2013 FCA 290

**CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.**

Docket:A-104-09

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

STANLEY J. TESSMER LAW CORPORATION

Respondent

**Dockets:A-50-13
A-51-13
A-52-13
A-53-13
A-54-13**

AND BETWEEN:

STANLEY J. TESSMER LAW CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] Her Majesty the Queen is appealing the Amended Order of Miller J., dated March 4, 2009, in which she found that Stanley J. Tessmer Law Corporation (Tessmer) had standing “to raise and rely on the alleged breaches of the *Charter* rights of its clients in challenging the validity of the *Excise Tax Act*, [R.S.C. 1985, c. E-15] [*ETA*] as it applies to impose Goods and Services Tax (“GST”) on legal fees charged for criminal defence services supplied by [Tessmer]” (Miller J.’s reasons are indexed as 2009 TCC 104). The Crown argues that Justice Miller erred in finding that Tessmer has standing in accordance with the exception set out in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 [*CEMA*].

[2] By order of this Court dated March 18, 2013, this appeal is being heard at the same time as five consolidated appeals commenced by Tessmer concerning an Order of Paris J. from January 28, 2013, in which he held that the GST imposed by s. 165 of the *ETA* did not infringe and was not inconsistent with the rights of the Appellant’s clients guaranteed by s.10(b) of the *Canadian Charter of Rights and Freedoms*, [Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11] [the *Charter*] (Paris J.’s reasons for order are indexed as 2013 TCC 27). Paris J. drew his final conclusion after having noted the absence of evidence that any of Tessmer’s

clients were unable to retain counsel as a result of the GST payable on legal services and Tessmer's concession that this type of evidence was available (Paris J.'s reasons at paragraphs 57 and 67).

[3] Tessmer maintains that Justice Paris erred in requiring that it adduce evidence to demonstrate that this provision violates its clients' constitutional rights. Tessmer argues that the unconstitutionality of the impugned provision is apparent on its face. As a result, it only has to show that the tax is inconsistent with the right being exercised under s. 10(b) of the *Charter*. On appeal to this Court, Tessmer also brought a notice of constitutional question, which is expressed as follows:

Whether, based on the facts set out in the Agreed Statement of Facts filed herewith, the goods and services tax (GST) imposed by s. 165 of the *Excise Tax Act* infringes or is inconsistent with the rights of the Appellant's clients guaranteed by s. 7 and ss. 10(b) of the *Charter of Rights and Freedoms* such that s. 165 of the *Excise Tax Act* is, to the extent of any such inconsistency and, subject to s.1 of the *Charter*, of no force and effect by reason of ss. 52(1) of the *Constitution Act* (A-50-13 Tessmer Memorandum of Fact and Law at paragraph 1).

[4] This same question was originally in front of the Tax Court of Canada. At the hearing of the consolidated appeals, Tessmer was reminded that Paris J. had amended this question after counsel for Tessmer had advised that he was now only relying on s. 10(b). It was agreed that Tessmer would only refer to s. 7 of the *Charter* as it informed the interpretation of s. 10(b).

Analysis

The Issue of Standing

[5] With regard to the issue of standing, I agree with Justice Miller that the exception set out in *CEMA* applies to accord Tessmer standing. In *CEMA*, the Supreme Court of Canada held that while typically a party does not have standing to challenge the constitutionality of a statute where its own

Charter rights are not infringed, a corporation may have standing “to attack what it regards as an unconstitutional law when it is involuntarily brought before the courts pursuant to a regulatory regime set up under an impugned law” (*CEMA* at paragraph 44).

[6] Under ss. 221 and 225 of the *ETA*, Tessmer is an agent of the Crown. It is required, as a "person who makes a taxable supply," to collect from its clients the GST payable on legal fees and to remit to Her Majesty in right of Canada the appropriate GST net tax amount. Although Tessmer technically initiated the appeals to the Tax Court of Canada, it did so because, as Miller J. found, "the onus is placed on the taxpayer to show an error in the Minister's assessment" (Miller J.'s reasons at paragraph 20). This, Justice Miller wrote, is a "nuance of our self-assessing system" (*ibidem*). As a result of its decision not to collect or remit, Tessmer was assessed GST, interest and penalties totalling approximately \$360,000. Faced with the five above-mentioned assessments, it could either pay the amounts notwithstanding its belief that collecting GST from its clients violates their constitutional rights, or appeal the assessments to the Tax Court of Canada.

[7] On this basis, I see no error in Justice Miller's finding that Tessmer was brought to the Court involuntarily or with the result that Tessmer was granted standing based on the exception set out in *CEMA*. Having found that Tessmer has standing, I turn now to the appeal on the merits.

The Constitutional Challenge

[8] First, I note that Tessmer accepts Paris J.'s finding that s. 165(1) of the *ETA* does not have an invalid purpose. Consequently, Tessmer is left with a challenge of the legislation on the basis of its effect on the rights of its clients pursuant to s. 10(b) of the *Charter*.

[9] I agree with Justice Paris that Tessmer failed to establish that s.165 of the *ETA* violates s.10(b) of the *Charter*. On the facts of this case, Tessmer was required to produce evidence to demonstrate the effect of GST on the rights of its clients but did not. The Supreme Court of Canada has made clear that "*Charter* decisions should not and must not be made in a factual vacuum" (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at page 361). As well, in *Danson v. Ontario (Attorney General)* [1990] 2 S.C.R. 1086, at p. 1099 [*Danson*], the Supreme Court of Canada affirms that it has been vigilant "to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack" (my emphasis).

[10] As discussed in *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997) 40 B.C.L.R. (3d) 181 (BCCA), leave to appeal denied, [1998] S.C.C.A. No. 205, there are many reasons why the cost of legal services, or a lack of financial means may restrict, hamper or even prevent someone from exercising rights of access to courts or to other legal services (at paragraph 33). This accords with the Supreme Court of Canada's decision in *British Columbia (Attorney General) v. Christie* 2007 SCC 21, [2007] 1 S.C.R. 873 [*Christie*] in which the Court cited with approval the position of the Attorney General of British Columbia who was arguing that

"the economics of legal services may be affected by a complex array of factors, suggesting the need for expert economic evidence to establish that the [provincial] tax [on the purchase price of legal services] will in fact adversely affect access to justice" (*ibidem* at paragraph 28). Once again in *Christie*, the Supreme Court cautioned against deciding constitutional cases without an adequate evidentiary record (at paragraph 28).

[11] Here, there is a total lack of evidence and counsel for Tessmer was unable to point to any authority justifying our Court to depart from the teachings of the Supreme Court of Canada in *Danson* or *Christie*. On the facts of this case, this complete lack of evidence is fatal to the constitutional challenge launched by Tessmer.

[12] As a result, I need not address Tessmer's argument regarding the scope of s. 10(b) of the *Charter*. My silence, however, should not be interpreted as an endorsement of Paris J.'s reasons on this issue (see in particular paragraphs 61 and ff. of Paris J.'s reasons).

[13] Consequently, I propose to dismiss the appeal in file A-104-09 with costs. I also propose to dismiss the appeals in files A-50-13, A-51-13, A-52-13, A-53-13 and A-54-13 with one set of costs.

[14] Finally, I would respond to the constitutional question, as amended by Paris J., as follows:

Based on the facts set out in the Agreed Statement of Facts filed by the parties, the goods and services tax (GST) imposed by s. 165 of the *Excise Tax Act* does not infringe and is not inconsistent with the rights of the Appellant's clients guaranteed by s. 10(b) of the *Charter of Rights and Freedoms*.

[15] A copy of these reasons shall be filed in appeal A-104-09 and in each of the five consolidated appeals.

"Johanne Trudel"

J.A.

"I agree

Eleanor R. Dawson J.A."

"I agree

D.G.Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-104-09

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
STANLEY J. TESSMER LAW
CORPORATION

AND DOCKETS: A-50-13 A-51-13 A-52-13 A-53-13
A-54-13

STYLE OF CAUSE: STANLEY J. TESSMER LAW
CORPORATION v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: DECEMBER 10, 2013

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DAWSON J.A.
NEAR J.A.

DATED: DECEMBER 12, 2013

APPEARANCES:

Elizabeth (Lisa) McDonald
Darren McLeod

FOR THE APPELLANT
HER MAJESTY THE QUEEN

Craig C. Sturrock, Q.C.

FOR THE RESPONDENT
STANLEY J. TESSMER LAW
CORPORATION

Craig C. Sturrock, Q.C.

FOR THE APPELLANT
STANLEY J. TESSMER LAW
CORPORATION

Elizabeth (Lisa) McDonald
Darren McLeod

FOR THE RESPONDENT
HER MAJESTY THE QUEEN

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE APPELLANT
HER MAJESTY THE QUEEN

Thorsteinssons LLP, Tax Lawyers
Vancouver, British Columbia

FOR THE RESPONDENT
STANLEY J. TESSMER LAW
CORPORATION

Thorsteinssons LLP, Tax Lawyers
Vancouver, British Columbia

FOR THE APPELLANT
STANLEY J. TESSMER LAW
CORPORATION

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT
HER MAJESTY THE QUEEN