Federal Court of Appeal | Cour d'appel fédérale

Date: 20160125

Docket: A-456-14

Citation: 2016 FCA 19

CORAM: **NADON J.A.**
SCOTT J.A.
RENNIE J.A.

BETWEEN:

GERRY HEDGES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on November 18, 2015.

Judgment delivered at Ottawa, Ontario, on January 25, 2016.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] This is an appeal from a decision of the Tax Court of Canada per Justice Miller dated September 9, 2014 (2014 TCC 270) wherein the judge dismissed the appellant's appeal of the reassessments made by the Minister of National Revenue under the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the Act) for the period from October 1, 2007 to December 31, 2009.

[2] In that decision, the judge concluded that therapeutic marihuana sold by the appellant was not zero-rated under the Act. I would dismiss the appeal.

II. Background

[3] The issue in this appeal is whether the marihuana sold by the appellant was a zero-rated supply pursuant to Schedule VI-I-2(d) of the Act. It reads:

Schedule VI – Zero-Rated Supplies	Annexe VI - Fournitures détaxées
2. A supply of any of the following drugs or substances:	2 La fourniture des drogues ou substances suivantes :
[…]	[…]
d) a drug that contains a substance included in the schedule to the *Narcotic Control Regulations*, other than a drug or mixture of drugs that may be sold to a consumer without a prescription pursuant to the *Controlled Drugs Substances Act* or regulations made under that Act.	d) les drogues contenant un stupéfiant figurant à l'annexe du Règlement sur les stupéfiants, à l'exception d'une drogue et d'un mélange de drogues qui peuvent être vendus au consommateur sans ordonnance conformément à la *Loi réglementant certaines drogues et autres substances* ou à ses règlements d'application;

[4] For supplies made after February 26, 2008 this provision was amended slightly to read:

d) a drug that contains a substances included in the schedule to the *Narcotic Control Regulations* other than a drug or mixture of drugs that may, pursuant to the *Controlled Drugs and Substances Act* or regulations made under that Act, be sold to a consumer with neither a prescription nor an exemption by the Minister of Health in respect of the sale.	d) les drogues contenant un stupéfiant figurant à l'annexe du *Règlement sur les stupéfiants*, à l'exception des drogues et des mélanges de drogues qui peuvent être vendus au consommateur sans ordonnance ni exemption accordée par le ministre de la Santé relativement à la vente, conformément à la *Loi réglementant certaines drogues et autres substances* ou à ses règlements d'application;
[Emphasis added]	[Je souligne]

[5] The appellant has been growing marihuana since 1969 for his own use to control pain. Starting in 1999, he supplied dried marihuana, which he calls "Po-Chi" to the British Columbia Compassion Club Society ("BCCCS"), a dispensary whose members were sufferers of various ailments. He never collected and remitted the Good and Services Tax ("GST") on those sales. He was reassessed $14,968.43 (including interests and penalties) for failing to do so.

[6] The *Medical Marihuana Access Regulations* (SOR/2001-227) ("MMARs") allow a person to obtain an Authorisation to Possess (ATP). An ATP authorizes the possession of dried marihuana (subject to the decision of the Supreme Court of Canada in *R. v. Smith*, 2015 SCC 34, discussed below) in accordance with the terms of the ATP. While the MMARs require a doctor's note to obtain an ATP, an applicant's doctor does not provide a prescription (at least in the traditional, uncontroversial sense). An ATP can only be granted by the Minister of Health.

[7] The appellant was not a licensed producer under the MMARs nor were the BCCCS's sales of marihuana to its members in accordance with the MMARs. At no point did he obtain an ATP. With the exception of two of the members, none of the members of the BCCCS had ATPs. However, membership in the BCCS did require a doctor's note. Similar to the sanctioned ATP process, this note was not a prescription, but simply a confirmation of diagnosis and symptoms.

III. The Decision Below

[8] The trial judge affirmed that there were four questions to be answered. Only his conclusion on the final issue is under appeal, but the entire chain of reasoning remains relevant.

1) What is Po-Chi?

2) Is dried marihuana a drug as that term is used in Schedule VI-I-2(d) of the Act?

3) Does it contain cannabis or Tetrahydrocannabinol (THC)?

4) Is it a drug that can be obtained without a prescription or exemption from the Minister of Health?

[9] The judge concluded that the Po-Chi product sold by the appellant was dried marihuana, that dried marihuana sold for use in therapeutic treatment was a drug, that it contained cannabis or THC, and that it could be obtained without a prescription or exemption. Accordingly, it was carved out of the category of drugs that are zero-rated.

[10] The answers on the first three questions placed Po-Chi in a group of supplies that are presumptively zero-rated. However, there is an exception: drugs in this group are not zero-rated if they can be obtained without a prescription or a Ministerial exemption. This category includes, for instance, over-the-counter drugs. The crucial fourth question is whether Po-Chi is such a drug, and thus falls into the carve-out exception, and is therefore taxable. The judge found that it is.

[11] The judge first examined how this carve-out category operates. He found that what are carved-out are drugs that can be bought with no government control, regulation, or intervention. He also noted that all instances of the supply of a drug have their classification tied together – either all of them are zero-rated, or all of them are carved-out from the zero-rating (the latter occurring even if the drug is sold without regulation only in some but not all circumstances).

[12] The judge decided that a medical declaration necessary to obtain an ATP under the MMARs was not a prescription since it was neither an order to a pharmacist nor an authorization by itself. Rather, it constituted a document supporting an individual's application for an ATP, which indicates the amount of marihuana that can be possessed by the individual but not the dosage to be taken. The judge then went on to decide that ATPs were not "exemptions by the Minister of Health." According to him, ATPs pursuant to the MMARs are "authorizations" rather than "exemptions".

[13] Because the mode through which marihuana was available – the MMARs – was not a prescription or exemption, the judge found that marihuana was carved-out of the category of drugs that are zero-rated.

IV. The Positions of the Parties

[14] The appellant argues that the MMARs do not trigger the carve-out on the basis that the carve-out is only triggered when a drug is available to consumers in general (not just a subset like ATP holders) without a prescription or exemption. In the alternative, he submits that the MMARs constitute an exemption, and therefore the supplies after February 27 2008 were zero-rated. The appellant no longer argues that MMARs are a prescription.

[15] The respondent does not dispute that the first three questions, which the judge answered in the appellant's favour, were answered correctly. The respondent limits itself to the position that the judge correctly decided that marihuana was carved-out from Schedule VI-I-2(d)'s

general zero-rating. The respondent argues that the MMARs are neither a prescription nor an exemption.

V. Analysis

A. *Preliminary Observations*

[16] As a matter of statutory interpretation, this appeal concerns a question of law on which the standard of review is correctness.

[17] The judge observed that the language of the section has been "twisted out of shape" by the amendments. As noted by the judge, the language is oblique and awkward. That subsection 2(d) is not a model of legislative drafting is made patently clear by the reliance of both the appellant and respondent on the Department of Finance's technical notes accompanying the addition of the exemption in April of 2008 in support of their respective positions. The judge noted that the ambiguity led to uncertainty and confusion and concluded that the legislation "needs work." I agree.

B. *Whether an ATP is an exemption*

[18] In these circumstances, resort must be made to first principles of interpretation to discern the intention of Parliament: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. The first task of a court is to determine in light of the text, context and purpose, the object and spirit of the of tax measure in question and to consider whether the transaction in question falls within its intent.

[19] A textual analysis requires that the words in question must be read in their entire context and considered in light of the scheme of the act as a whole. As the judge noted, many of the arguments advanced, by both the appellant and the respondent, departed from this guidance, such that he concluded, again, with considerable understatement, that the forest could not be seen from the trees.

[20] In my view, applying these principles to subsection 2(d), and in particular, reading the words and phrases both individually and collectively, the zero-rated supply was intended to apply to certain drugs that could be legally sold to a consumer. The entire construct of subsection 2(d) is predicated on the tax treatment of drugs that are lawfully available. The drugs must be drugs that "may be sold to a consumer." The word "may" in this context, is informed by its proximity and reference to the *Narcotic Control Regulations* (C.R.C., c. 1041), the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19) (CDSA), prescriptions from a medical doctor, or an exemption by the Minister of Health. Each of these references contemplates, either through interdiction or exemption, a means of lawful access to a drug, the possession of which would otherwise be unlawful.

[21] Headings may be considered as part of the search for parliamentary intention, particularly in the case where the language is obscure, as it is in this case. The chapeau of section 2 "Prescription Drugs and Biologicals" does not contemplate any and all drugs, rather it contemplates drugs that may be obtained through a recognized channel – a prescription.

[22] Further, the definition section of Schedule VI indicates that the scope and purpose of section 2 was directed to the tax treatment of lawful supply. The terms "authorized individual"; "medical practitioner", "pharmacist" and "prescription" are all precisely defined by their status as licenced professionals and legal authority to possess and distribute marihuana. If the legality of the means of access were not a consideration, then the words "without a prescription" would be redundant. It would suffice that the drugs could be sold.

[23] This interpretation is also consistent with subsection 2(a) of the *Food and Drugs Act* (R.S.C., 1985, c. F-27) which defines a drug as that which "may be sold to a consumer without a prescription." The "may" in this section is permissive; it does not contemplate the "sale" of illicit drugs.

[24] It would be illogical to tax a drug that may be lawfully sold to a consumer, (i.e., all the drugs captured by the carve out) but to exempt from taxation a drug that is not lawfully sold. This is the consequence of the appellant's argument. It would require clearer language than the existing text of subsection 2(d) before a court could conclude that that was the intention of Parliament.

[25] I turn next to the appellant's argument that an ATP is an exemption by the Minister of Health. In my view, this argument cannot succeed. First, the MMAR's do not refer to an ATP as an exemption. An ATP is an authorization. On the plain and literal reading of the provision, the ATP is not an exemption. This is sufficient to dispose of this argument.

[26] While I appreciate the appellant's argument that the MMARs' generically speaking "exempt" holders of an ATP from the provisions of the CDSA, they are not exemptions as contemplated by subsection 2(d). In my view, the "exemption by the Minister of Health" in subsection 2(d) contemplates an administrative action in the form of permit, licence or authorization. The MMARs, in contrast, are subordinate legislation, promulgated by the Governor in Council, on the recommendation of the Minister of Health.

[27] The appellant relies on *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602 and in particular the characterization of the MMARs as an exemption.

[28] The issue in *Smith* was whether the limitation in the MMARs to the possession of dried marihuana as opposed to other derivatives or formulations of the cannabis resin, such as in a gel, cream or cookie, infringed section 7. The Supreme Court of Canada held that it did, upholding the findings of the trial court that the prohibition on non-dried forms of marijuana was not rationally connect to the protection of the health of and safety of patients who qualify for legal access to medical marijuana. The Supreme Court concluded that under the MMARs the exemption ought to include cannabis derivatives.

[29] While the Supreme Court uses the language of exemption, it does so in the context of being "exempt from the criminal law." While holding an ATP may exempt one from the application of the criminal law, it is not an "exemption" as contemplated by fiscal legislation such as the Act. As the judge noted, had the legislators intended to create an exemption for all dried marihuana, on the authority of sections 55 or 56 of the CDSA, then "something similar to

the Marihuana Exemption Regulations under the FDA would have been in order." The decision in *Smith* is far removed from the question whether marijuana is subject to taxation, and I do not read it to be a determination that the MMARs are an exemption for the purpose of the Act.

[30] I would dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

"I agree
M. Nadon J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED SEPTEMBER 9, 2014, NO. 2011-2703(GST)G

DOCKET:	A-456-14
STYLE OF CAUSE:	GERRY HEDGES v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 18, 2015
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	NADON J.A. SCOTT J.A.
DATED:	JANUARY 25, 2016

APPEARANCES:

David M. Sherman Alistair G. Campbell	FOR THE APPELLANT
Lynn M. Burch Christa Akey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David M. Sherman Toronto, Ontario Legacy Tax + Trust Laywers Vancouver, British Columbia	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT