Federal Court of Appeal | Cour d'appel fédérale

Date: 20100927

Docket: A-320-09

Citation: 2010 FCA 244

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

CITY OF BRANDON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on June 3, 2010.

Judgment delivered at Ottawa, Ontario, on September 27, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20100927

Docket: A-320-09

Citation: 2010 FCA 244

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

CITY OF BRANDON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] The City of Brandon (the City), the Province of Manitoba and Maple Leaf Meats Inc. (Maple Leaf) agreed that the latter would establish a hog processing plant (the Plant) within the City. The Plant would produce wastewater in quantities that could not be accommodated by the City's existing wastewater treatment facilities. As a result, it was agreed that the City would construct a new wastewater treatment facility, at no cost to Maple Leaf, to process the wastewater produced by the Plant. The operating costs (plus a fee for overhead and administration) would initially be borne by the City, to be charged back to Maple Leaf on a cost recovery basis.

[2] The City paid Goods and Services Tax (GST) on the materials and services which it acquired for the purpose of constructing the wastewater treatment facility. It applied for and obtained the public service body rebates provided for at section 259 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act), which allowed it to recover 57.14% of the GST it had paid. This appeal arises because the City subsequently applied for input tax credits (ITCs) equal to the difference between the GST paid on those material and services and the amount of the rebates received, a difference of approximately $388,000. The Minister refused the claim for ITCs on the basis that the GST was paid for property and services used to provide an exempt supply, the operation of a sewage treatment facility. The City appealed to the Tax Court of Canada which confirmed the Minister's assessment in a decision reported as *City of Brandon v. Her Majesty the Queen*, 2009 TCC 369, [2009] T.C.J. No. 289 (Reasons). The issue raised by this appeal is whether the operation of the wastewater treatment facility was an exempt supply under either of sections 21 or 22 of Part VI of Schedule V to the Act.

[3] For the reasons which follow, I would dismiss the appeal.

THE FACTS

[4] In March 1999, Maple Leaf, the Province of Manitoba, and the City of Brandon entered into a letter of understanding with respect to the construction of the Plant in Brandon. It was known at the time that the quality and quantity of the wastewater produced by the Plant would exceed the capacity of the City's existing facilities and so the City and the Province agreed to share

the cost of constructing a new facility (the Facility) to treat the waste produced by the Plant. The City's share of the cost was approximately $7 million.

[5] The initial understanding between the parties was that Maple Leaf would operate the Facility. The City's evidence before the Tax Court was that the proponents of an industrial project such as the Plant could either construct and operate their own wastewater treatment facilities, they could contract with a third party to do so for them, or they could come to some arrangement with the City, as Maple Leaf did: Appeal Book, pp. 453-454. The City and Maple Leaf entered into an agreement dated March 31, 1999, entitled "Agreement for Wastewater Treatment Services" (the Agreement).

[6] For the purposes of this appeal, the principal terms of the Agreement were as follows. The City agreed to design, construct, and operate, in accordance with the applicable environmental legislation, a wastewater treatment facility which would accept for treatment the wastewater effluent of the Plant, so long as Maple Leaf ensured that the effluent did not exceed certain parameters. The City would own the Facility, staff it and operate it and recover the costs of doing so from Maple Leaf on a cost recovery basis plus an administration fee. Maple Leaf agreed that the effluent which it provided to the Facility would not exceed the parameters stipulated by the City. The City had the right to permit other users to access the Facility and, in such a case, the costs of operating the plant would be borne proportionately by such other users.

[7] The Agreement also provided that Maple Leaf could assign its interest in the Agreement under certain conditions. If Maple Leaf sold the Plant before it went into operation, it agreed to repay the City the entire cost of construction of the Facility. If Maple Leaf sold the facility within 10 years of its start-up, it would be relieved of all obligations under the Agreement provided the purchaser was approved by the City. If the purchaser was not approved by the City, Maple Leaf would remain liable to pay the City a portion of the costs of construction of the Facility if the purchaser did not operate the Plant for the balance of the 10 year period following start-up.

[8] At any time during the term of the Agreement, Maple Leaf could elect to take over the operation of the Facility provided it could reasonably substantiate that it could operate the facility more cheaply or efficiently than the City while maintaining the same standards.

[9] The City billed Maple Leaf monthly for the amounts due to it under the Agreement. It charged Maple Leaf GST with respect to the administration fee but not with respect to the costs of operating the Facility: Appeal Book, pp. 525-526.

THE DECISION UNDER APPEAL

[10] The Tax Court Judge identified the issue before him as whether the GST paid by the City was paid in the course of its commercial activities which, by definition, exclude the making of exempt supplies. Exempt supplies are defined in Schedule V to the Act and, in this case, in sections 21 and 22 of Part VI of Schedule V:

21. A supply of a municipal service, if

(a) the supply is
(i) made by a government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area, or

(ii) made on behalf of a government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area and that is not the government or municipality;

(b) the service is
(i) one which the owner or occupant has no option but to receive, or
(ii) supplied because of a failure by the owner or occupant to comply with an obligation imposed under a law; and

(c) the service is not one of testing or inspecting any property for the purpose of verifying or certifying that the property meets particular standards of quality or is suitable for consumption, use or supply in a particular manner.

22. A supply of a service, made by a municipality or by an organization that operates a water distribution, sewerage or drainage system and that is designated by the Minister to be a municipality for the purposes of this section, of installing, repairing, maintaining or interrupting the operation of a water distribution, sewerage or drainage system.

[My emphasis.]

21. La fourniture d'un service municipal si, à la fois :

a) la fourniture est effectuée :
(i) soit par un gouvernement ou une municipalité au profit d'un acquéreur qui est le propriétaire ou l'occupant d'un immeuble situé dans une région géographique donnée,

(ii) soit pour le compte d'un gouvernement ou d'une municipalité au profit d'un acquéreur, autre que le gouvernement ou la municipalité, qui est le propriétaire ou l'occupant d'un immeuble situé dans une région géographique donnée;

b) il s'agit d'un service, selon le cas :
(i) que le propriétaire ou l'occupant ne peut refuser,
(ii) qui est fourni du fait que le propriétaire ou l'occupant a manqué à une obligation imposée par une loi;

c) il ne s'agit pas d'un service d'essai ou d'inspection d'un bien pour vérifier s'il est conforme à certaines normes de qualité ou s'il se prête à un certain mode de consommation, d'utilisation ou de fourniture, ou pour le confirmer.

22. La fourniture d'un service, effectuée par une municipalité ou par une administration qui exploite un réseau de distribution d'eau ou un système d'égouts ou de drainage et que le ministre désigne comme municipalité pour l'application du présent article, qui consiste à installer, à réparer ou à entretenir un tel réseau ou système ou à en interrompre le fonctionnement.

[Je souligne.]

[11] The Tax Court Judge began his analysis by considering the application of section 21. He found that while municipal services were not defined, it was clear that the services in issue here were provided by a municipality to an owner or occupant of property within a particular geographical area. The only question was whether the services were services which the owner or occupant had no option but to receive.

[12] The City argued that since Maple Leaf had a choice as to whether to treat its own wastewater or to contract with the City, the services provided by the City were not services which Maple Leaf had no option but to receive. The Minister argued that the City's position was based on the assumption that the services in issue had to be received from the City. It was enough, according to the Minister, if Maple Leaf was required to have its wastewater treated (this was conceded) and that the City provided the water treatment services.

[13] The Tax Court Judge rejected the Minister's argument. He found that the Minister's position assumed the existence of a class of services known as municipal services whose identification as such did not depend on the identity of the entity providing the services. The Tax Court Judge rejected the existence of such a class of services. In his view, wastewater treatment was not inherently a municipal service. He found that since Maple Leaf could have chosen a private supplier of wastewater treatment services, those services were not services which Maple Leaf had no option but to receive.

[14] In a footnote, the Tax Court Judge also rejected the Minister's argument that the Agreement required Maple Leaf to receive wastewater treatment services from the City. In his view, the Agreement was irrelevant because the issue under section 21 was not whether the property owner or occupant had assumed an obligation to receive services but whether the obligation existed independently of any agreement.

[15] The Tax Court judge then turned to section 22. The City's argument before the Tax Court Judge was that the supply made by the City was the operation of the wastewater treatment facility. The exempt supply described in section 22 has to do with a sewerage system, which is a network of pipes collecting sewage, and does not include wastewater treatment.

[16] The Tax Court Judge referred to the definition of sewerage system in the *Water Works, Sewerage and Sewage Disposal Regulation*, Man. Reg. 331/88R, which provides as follows:

> "sewerage system" means all sewers, appurtenances, pumping stations, treatment works and all physical properties of the system but does not include extensions to the collection system."

[17] In the Tax Court Judge's view, the definition found in this regulation is "reflective of the contemporary meaning of sewerage" so that wastewater treatment fell within the scope of a sewerage system.

[18] The Tax Court Judge then turned to the question of whether the operation of the Facility fell within the meaning of the phrase "installing, repairing, maintaining or interrupting the operation of a water distribution, sewerage or drainage system." After setting out the positions of the parties, the

Tax Court Judge rejected the City's argument that the operation of a sewerage system did not fall within "maintaining" such a system. While conceding that the operation of a system did not, strictly speaking, fall within the meaning of "installing, repairing or maintaining or interrupting", he was of the view that it fell within the "wider sense" of "maintain", as in ""cause to continue" or "support by work" so that section 22 could be read as applying to the whole operation of a water or sewerage system.

[19] The Tax Court Judge found support for his position in the Department of Finance May 1990 Technical Bulletin, which states:

> Section 22 exempts basic water and sewerage system charges to residents, including installation or hook-up fees. However, where a municipality charges a separate fee to a property owner to repair or maintain a part of an existing line which is for the sole use of the property owner, GST applies.

[20] The Tax Court Judge took this passage to exempt the usual sewer and water charges billed to property owners by municipalities which suggested, in turn, that section 22 covers the operation of a sewerage system. Given that the Technical Notes were before Parliament, the Tax Court Judge was of the view that they should be given more weight than a document prepared by the Canada Revenue Agency which appeared to take the contrary position.

[21] The Tax Court Judge found further support for his conclusion in the original wording of section 22 which would have had an unacceptably narrow scope if the City's position were adopted. In the result, the Tax Court Judge dismissed the City's appeal.

ANALYSIS

Standard of review

[22] This is an appeal from the decision of a judge after a trial. Accordingly, the standard of review is defined by the Supreme Court's decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Accordingly, questions of law are to be assessed on a standard of correctness while questions of fact and mixed fact and law are to be assessed on the standard of reasonableness. The construction of sections 21 and 22 of Part VI of Schedule V of the Act is a question of law, while the application of that interpretation to the facts of the case is a question of mixed fact and law.

Section 21

[23] As noted, the Tax Court Judge found that there is no category of services which constitutes municipal services regardless of the entity by whom they are provided. Consequently, sewer and water services were not inherently municipal services.

[24] The fact that the wastewater treatment services in issue here may not have been municipal services if provided by someone other than a municipality does not mean that they are not municipal services if they are provided by the City. The expression "municipal services" is sufficiently broad to include sewer and water services when they are provided by the City. As a result, the issue was whether Maple Leaf had no option but to receive those services.

[25] The expression “had no option but to receive” used in section 21 is somewhat curious but it must mean that the supply was one which the recipient was obliged to receive. That obligation can only have two sources, the applicable legislation or the contract in force between the City and Maple Leaf. On this question, the Tax Court Judge summarized the evidence before him as follows:

> 14 Mr. Snure [the City Engineer] testified that originally Maple Leaf was going to own and operate the new wastewater treatment facility. Ultimately, Maple Leaf decided that they were not in the business of wastewater treatment and it was agreed that the City would build, own and operate the facility.
>
> 15 There was no evidence that Maple Leaf could not have chosen to set up its own wastewater treatment system or that Maple Leaf could not have chosen to contract with a private company to treat its wastewater.

[26] It was common ground that the provincial environmental legislation required that the effluent from the Plant be treated so that it met provincial standards. Mr. Snure’s evidence was that Maple Leaf had three choices in that regard: it could treat the wastewater itself, it could contract with a third party to do it, or it could come to some agreement with the City. The Tax Court Judge accepted this evidence and the Minister does not appear to have objected to it. As a result, I shall proceed on that basis, subject to the following observation.

[27] Maple Leaf’s rights and obligations under provincial and municipal legislation is a legal question, not a factual one. The legal effect of domestic legislation is not a matter of evidence: it is the Court’s role to interpret the legislation. In this case, Mr. Snure was called as a fact witness. Even if he had been called as an expert witness, his evidence as to the effect of domestic law would not have been admissible: see *Eco-Zone Engineering Ltd. v. Grand Falls (Town)*, 2000 NFCA 21, [2000] N.J. 377, at paragraphs 15 and 16.

[28] In any event, the Minister appears to have conceded that Maple Leaf had a choice as to how its wastewater was to be treated. This is apparent from the fact that he argued before the Tax Court, and before this Court, that since the treatment of wastewater was required under provincial legislation, Maple Leaf had no option but to receive wastewater treatment services and thus the supply was exempt, no matter who provided the services. The Minister's argument is based upon the distinction drawn in section 21 between a supply and a service. The material portions of section 21 are reproduced below for ease of reference:

21. A *supply* of a municipal *service*, if	21. La *fourniture* d'un *service* municipal si, à la fois :
(a) the *supply* is	a) la *fourniture* est effectuée :
(i) made by a government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area, or	(i) soit par un gouvernement ou une municipalité au profit d'un acquéreur qui est le propriétaire ou l'occupant d'un immeuble situé dans une région géographique donnée,
…	[…]
(b) the *service* is	b) il s'agit d'un service, selon le cas :
(i) one which the owner or occupant has no option but to receive, or	(i) que le propriétaire ou l'occupant ne peut refuser,
…	[…]

[29] The Minister's position is that section 21 only requires that the supply be made by the municipality, the service need not be. This is a misreading of section 21. The supply is the supply of *municipal* service. Given that this section appears in Part VI of Schedule V (Public Sector Bodies),

it is unlikely that the legislator contemplated that the person making the supply of a municipal service could be someone other than a municipal body or other body designated as such.

[30] In the end result, the Tax Court was correct in concluding that Maple Leaf was not in the position of having “no option but to receive” wastewater treatment services from the City.

[31] The second aspect of the analysis under section 21 is whether, under the Agreement, Maple Leaf had no option but to receive wastewater treatment services from the City. As noted earlier, the Tax Court Judge disposed of this point summarily by holding that the issue was not Maple Leaf’s obligations under the Agreement but whether Maple Leaf had a choice as to wastewater treatment service provider prior to entering into the Agreement with the City: see Reasons at footnote 16.

[32] The Tax Court Judge did not justify this conclusion, which is not self evident. In my view, it is not necessary to decide this question as it is clear from the terms of the Agreement that it did not require Maple Leaf to receive wastewater treatment services from the City. The Agreement required the City to provide such services and gave Maple Leaf the right to use them. Nothing in the Agreement required Maple Leaf to provide the City with any amount of effluent at any time. The termination provisions in the Agreement relate to the sale or closure of the Plant and not to the failure to provide effluent for the Facility. Maple Leaf may have had an ongoing obligation to pay for the operation of the Facility but it had no obligation to accept the wastewater treatment services which the City offered. As a practical matter, it would have made no sense for Maple Leaf not to

use those services but the fact remains that the City did not choose to include in its contract with Maple Leaf a clause which required it to to make use of the Facility.

[33] Consequently, the Tax Court Judge was correct in holding that section 21 did not apply so as to make the operation of the Facility an exempt supply.

[34] This leaves the question of the application of section 22. The City does not challenge the Tax Court Judge's conclusion that "sewerage system" includes the operation of a wastewater treatment plant. Consequently, the only question left is whether the provision of wastewater treatment services falls within "installing, repairing, maintaining or interrupting the operation of a …sewerage…system".

[35] The Tax Court Judge, after having been referred to various dictionary definitions of "maintain", concluded that the words "installing, repairing, maintaining or interrupting" do not appear to include "operation": see Reasons at paragraph 45. However, he concluded that, reading section 22 as a whole, and bearing in mind the wider senses of "maintain", section 22 could be read as covering the whole operation of a municipal water or sewerage system.

[36] An important point to note is the grammatical structure of the operative parts of section 22. I reproduce it below with the extraneous elements stripped out, so as to make this point clearer:

> 22. A supply of a service, made by a municipality …, of installing, repairing, maintaining or interrupting the operation of a water distribution, sewerage or drainage system.

[37] The sentence contains four verb forms -- installing, repairing, maintaining and interrupting -- all of which are transitive, that is, they take a direct object. The direct object of installing and repairing is “a system”. For the sake of argument, let us assume that maintaining has the same direct object. System is modified by “water distribution, sewerage or drainage”. The direct object of interrupting is a phrase, i.e., “the operation of … a system”. Grammatically, one expects a series of verbs to have a common object, so the presence of a second direct object comes as a surprise. As a result, the sentence structure is flawed because it incorporates a list of verbs having different objects. The flaw could have been corrected by putting commas around the phrase “interrupting the operation of” so that that verb phrase “interrupting the operation of “, refers to “a … system”, like the three preceding verbs. In that case, the sentence would read:

> A supply of a service made by a municipality, of installing, repairing, maintaining, or interrupting the operation of, a water distribution, sewerage or drainage system.

[38] If maintaining was intended to have the same object as interrupting, that is, “the operation of a …system”, the structure of the sentence is flawed for a different reason: it requires a conjunction between installing, repairing, on the one hand, and maintaining and interrupting, on the other. Properly constructed, the sentence would read:

> A supply of a service made by a municipality, of installing, repairing, and maintaining or interrupting the operation of, a water distribution, sewerage or drainage system.

[39] As a result, no matter how one reads the sentence, it is ungrammatical and ambiguous.

[40] Can this ambiguity be resolved by reference to the French version of the text? In fact, the French version is structurally unambiguous. I repeat it below for ease of reference:

> 22. La fourniture d'un service, effectuée par une municipalité ou par une administration qui exploite un réseau de distribution d'eau ou un système d'égouts ou de drainage et que le ministre désigne comme municipalité pour l'application du présent article, qui consiste à installer, à réparer ou à entretenir un tel réseau ou système ou à en interrompre le fonctionnement.

[41] It is clear from the French version that the service supplied by the municipality is that of installing, repairing or maintaining a water distribution network or a sewer or drainage system, or interrupting the operation of such a network or system. Maintaining refers to the network or system and not to the operation of such a network or system.

[42] What, then, is encompassed by the expression 'maintaining" a "system" or, in the French version, "entretenir un tel réseau ou système"? As noted earlier, the Tax Court Judge felt that while the individual words "installing, repairing, maintaining" did not cover the operation of a sewerage system, when the words were read in the context of section 22 and having regard to the extended meaning of "maintaining", section 22 could be read as extending to the whole operation of a municipal water or sewerage system. He came to this conclusion without considering the French version of the text. When one consults *Le Petit Robert*, a standard reference work, the primary definition of « entretenir » is given as:

> Tenir dans le même état, faire durer, faire persévérer.

This means "to maintain in the same condition, to cause to last, to cause to persist". The example given is « entretenir un feu » which is "to maintain a fire".

[43] The fourth definition given for « entretenir » is:

> Maintenir en bon état (en prenant toutes les measures appropriés)

This means to maintain in a good condition by taking all appropriate measures. One of the examples given is “entretenir une installation industrielle” which is to maintain an industrial installation.

[44] The conclusion which I draw from this is that the verb « entretenir », which is used in the French version of the text of section 22, goes strongly in the direction taken by the Tax Court Judge. The French version draws a distinction between to maintain in the sense of “to see to the continuation of” and to maintain in the sense of “to maintain in good condition.” The primary sense of the verb is sufficiently broad to include and, in my view, does include, the operation of a thing or a system.

[45] The interpretation of bilingual legislation is a search for the shared meaning of the two texts: see *R v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675, at paragraph 14. Where one version of a text is ambiguous and the other is plain and unequivocal, the shared meaning will be that of the version that is plain and unequivocal: *R v. S.A.C.*, at paragraph 15. In this case, the French version is plain and unequivocal as to the object of the verb maintain. As for the meaning of the verbs “to maintain” and « entretenir », there is an overlap between the two versions, with the French verb emphasizing a meaning which is present in English, though not as the primary meaning. The overlapping meaning is the shared meaning. As a result, I would conclude, as did the Tax Court Judge, that section 22 is broad enough to include the “operation” of the wastewater disposal facility by the City.

CONCLUSION

[46] As a result, I am of the view that the Tax Court Judge was correct in concluding that section 22 of Part VI of Schedule V of the Act included the City's activities in operating a wastewater treatment plant to service Maple Leaf's plant. As a result, that operation was not a commercial activity which gave rise to an entitlement to ITC's. I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-320-09
STYLE OF CAUSE:	CITY OF BRANDON and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 3, 2010
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	LÉTOURNEAU7 J.A. STRATAS J.A.
DATED:	SEPTEMBER 27, 2010

APPEARANCES:

KIMBERLEY L. COOK TERRY G. BARNETT	FOR THE APPELLANT
LYNN BURCH CHRISTA AKEY	FOR THE RESPONDENT

SOLICITORS OF RECORD:

THORSTEINSSONS LLP VANCOUVER, BRITISH COLUMBIA	FOR THE APPELLANT
MYLES J. KIRVAN DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT