
CANADA / JUDGMENT

Fraser Valley Refrigeration Ltd. v. British Columbia

2009 BCCA 422

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 422 Fraser Valley Refrigeration Ltd. v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Fraser Valley Refrigeration Ltd. v. British Columbia,

2009 BCCA 422

Date: 20091007

Docket: CA037308

Between:

Fraser Valley Refrigeration Ltd.

Respondent

(Petitioner)

And

Her Majesty The Queen In Right Of

The Province Of British Columbia

Appellant

(Respondent)

Before:

The Honourable Chief Justice Finch

(In Chambers)

On appeal from: Supreme Court of British Columbia, June 26, 2009

(Fraser Valley Refrigeration (Re), S088587)

Counsel for the Appellant:

T.P. Leadam, Q.C.

Counsel for the Respondent:

K.L.D. Cook

Place and Date of Hearing:

Vancouver, British Columbia

September 4, 2009

Place and Date of Judgment:

Vancouver, British Columbia

October 7, 2009

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

- [1] Fraser Valley Refrigeration Ltd. [FVR] applies to quash the Province of British Columbia's [Province] Notice of Appeal for lack of standing. The Province appeals from the judgment of Mr. Justice Masuhara of the Supreme Court of British Columbia granting rectification: In the Matter of Fraser Valley Refrigeration, 2009 BCSC 848.
- [2] Two issues are raised on this motion. First, does a single justice of this Court have jurisdiction under s. 10(2) of the Court of Appeal Act, to dismiss an appeal for want of standing? And second, does the Province have standing to appeal the decision of Masuhara J.?
- [3] For the reasons that follow, I conclude that a single justice does not have jurisdiction under s. 10(2) of the Court of Appeal Act to dismiss an appeal for want of standing. The jurisdiction to make such an order lies with a division of this Court.

II. Facts

- [4] FVR is in the business of selling and installing refrigeration equipment in the Lower Mainland of British Columbia. During the period of 1 October 1997 through 30 June 2002, FVR entered into a series of transactions to sell and install equipment to various customers who operated farms.

- [5] The Consumer Taxation Audit Branch conducted an audit and issued an assessment against FVR for social service tax that arose as a result of the sales agreements between FVR and its purchasers. These agreements were seen as incompatible with s. 73(1)(b) of the Social Services Tax Act, R.S.B.C., 1996, c. 431, and s. 2.21 of the Social Service Tax Act Regulations, B.C. Reg. 84/85, under which purchasers of tangible personal property who are bona fide farmers are entitled to purchase certain items and equipment exempt from the payment of social services tax provided the items are being purchased for a farm purpose.
- [6] FVR paid the assessment and appealed to the Minister. The Minister confirmed the assessment and FVR appealed the Minister's decision to the Supreme Court of British Columbia.
- [7] FVR also applied under R. 10 of the Rules of Court for rectification of the sale agreements so that they would reflect what FVR alleged was the primary intention of taking advantage of the social service tax exemption. FVR served the Province with a copy of the rectification application. The Province filed a response pursuant to R. 10(5) in Form 124.
- [8] The Province subsequently advised FVR that it would apply to have the rectification application and the tax appeal heard together.
- [9] Counsel for FVR and the Province then engaged in discussion concerning the Province's proposed motion and the Province's participation in the rectification action.
- [10] In those discussions, FVR maintained that "the Rectification Action is a matter between Fraser Valley Refrigeration Ltd. (FVR) and its customers," and that the Province is not a party to the contractual relationships in issue, nor is it a party to the rectification action.
- [11] Counsel for the Province responded that he "simply want[ed] the opportunity to stand up in Court at some stage in [the] rectification application and argue why the rectification order should not be granted."
- [12] In the result, the Province agreed not to seek to consolidate the two proceedings, provided FVR agreed not to object should the Crown wish to appear at the hearing of the rectification action and make submissions.
- [13] Masuhara J. heard the rectification application on 24 March 2009. The Province appeared at the hearing and made submissions concerning the rectification issue. As agreed, FVR did not object to the Province's participation.
- [14] At the hearing, the issue of the Province's standing arose. The issue was not, however, formally resolved because all concerned agreed that the Province could make submissions on the rectification issue.
- [15] The Province did not apply to be added as a party under R. 15(5)(a) of the Rules of Court, and the Province was never formally added as a party.
- [16] Masuhara J. released reasons for judgment on 26 June 2009. He found that:

- [13] When the Purchasers purchased Equipment from FVR, it was a fundamental pre-condition to the terms of sale that the Farmers Exemption would apply to the purchase.
- [17] He said that he accepted:
- [14] ... the petitioner's submission that the subject invoices do not reflect the true agreement and contract that was formed between FVR and each of the Purchasers: that the transaction was to be SST exempt.
- [18] After applying the law of rectification to these findings, Masuhara J. granted the rectification order.
- [19] On 22 July 2009, the Province filed a notice of appeal of Masuhara J.'s decision. On 28 July 2009, FVR filed an appearance in the appeal together with a notice of motion to quash the appeal on the basis that the Crown has no standing to appeal the order of Masuhara J.
- [20] That motion is the subject of these reasons.

III. Position of the Parties

FVR's Position

- [21] FVR's position on this motion is that the Province lacks standing to appeal the decision of Masuhara J. because it was not a formal party to the proceeding in the court below. It argues that it is well-settled law, on the basis of *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 [Kitimat], that only parties to the proceeding enjoy a right of appeal.
- [22] In any event, FVR argues that the Province could not be a proper party. FVR argues that rectification actions involve issues related solely to the parties to the contract - in this case FVR and the purchasers. It cites *Snow White Productions Inc. v. PMP Entertainment, Inc. et al*, 2004 BCSC 604 [Snow White] for the proposition that the Province is not in a privileged position qua the contract.
- [23] FVR argues that it served the Province with the rectification application not because it is a proper party but because of the principle in *Snow White*, at para. 2, that states that it is an "appropriate procedure" to notify the government "where rectification of an instrument is requested where the parties to the instrument have entered into a transaction in order to be entitled to arrange their affairs to avoid the payment of tax or to take advantage of tax incentives available to them."
- [24] Furthermore, FVR cites *Kitimat* for the proposition that the mere fact that the Province filed a Form 124 does not automatically make it a party.
- [25] FVR argues that on the basis of *Snow White* the Province has no interest in tax that is an accidental windfall arising as a result of an error in a contractual instrument. While the Province may receive less tax because of the rectified document, the Province's interest is only a consequence of the central rectification dispute between contracting parties. FVR

cites *Oliver v. Ellison* (1996), 70 B.C.A.C. 114 for the proposition that it is often the case that a lawsuit will have an economic impact on persons who are not parties to the litigation, but that fact does not provide standing to the persons thus affected.

- [26] FVR argues that despite knowing that it was not named as a party, the Province did not avail itself of the option it had to seek to be added as a party pursuant to R. 15(5)(a). FVR cites *Kristian Equipment Ltd. v. Urano Rentals Ltd.*, [1989] S.J. No. 110 (Sask. C.A.), in which the Court considered this in its determination to deny standing.
- [27] Finally, FVR argues that even if the Province had brought a R. 15(5)(a) application, it is not clear whether the Province would have been successful.
- [28] Two subsections of R. 15(5)(a) are applicable to the addition of parties. First, R. 15(5)(a)(ii) authorizes an order for the addition or substitution of parties in two situations: (1) where the proposed party ought to have been joined as a party because the proposed party has a direct interest in or is directly affected by the precise outcome of the existing proceeding; or (2) where the proposed party's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon. Second, R. 15(5)(a)(iii) authorizes the addition of a party where the court is satisfied that (1) there is a question or issue between the parties relating to the relief, remedy or subject matter of the suit, and (2) that it is just and convenient to determine the issue in the proceedings in question.
- [29] FVR argues that it is far from clear that the Province would succeed on a R. 15(5)(a) motion "given the Crown's inherently limited interest in the Rectification Application." This argument appears to go to whether or not the Province has a sufficient interest in the existing proceeding to warrant standing under either the first branch of R. 15(5)(a)(ii) or under R. 15(5)(a)(iii).
- [30] FVR does not directly address the second branch of R. 15(5)(a)(ii) and whether or not the Province's participation in the rectification proceeding is necessary, in light of the statements in *Snow White* to ensure that all matters in the proceeding may be effectually adjudicated upon. FVR does argue, however, that the Province's "presence was not required to permit the full settlement of the matter" and that its interests were that of a bystander not a party: *La Procureur Générale Du Canada v. Gestion R.F.*, [2001] Q.J. No. 8087 (Que. Superior Ct).

Province's Position

- [31] The Province raises the preliminary question of whether a single justice has the jurisdiction under s. 10(2) of the Court of Appeal Act to dismiss an appeal for want of standing. The Province argues that the order to quash is not incidental to the appeal but would involve making a determination of the appeal on its merits.

- [32] On the standing issue, the Province argues that having conceded that it would not object to the standing of the Province in the court below, FVR cannot now say that the Province ought not to be granted standing in this Court to contest the finding of the learned chambers judge.
- [33] The Province cites *Snow White* for the proposition that the taxing authority has standing to appear to provide the court with relevant information and, in essence, to oppose the relief sought. It suggests that the right to appeal follows from this. In *Snow White*, the court noted that the government's participation:
- [2] appears to ensure that the Court has all relevant information before it before determining whether or not this is an appropriate case to issue an Order for rectification.
- [34] The Province argues that its participation is necessary in cases such as this because "invariably these transactions are not opposed by the parties to the transaction because there is usually a lack of negative consequences to the parties." Similar statements concerning the government's role in rectification actions were made by Master Dash in *Aim Funds Management Inc. v. Aim Trimark Corporate Class Inc.*, [2009] O.J. No. 2408 (Ont. S.C.J.) [Aim Funds].
- [35] Finally, the Province says that "[i]f necessary, the Province would apply to be added as a party pursuant to the Court of Appeal Act, s. 9(1)." Under s. 9(1) the Court has the jurisdiction to make any order the Lower Court could have made, including adding parties pursuant to R. 15(5)(a) of the Rules of Court. As noted above, to succeed on such a motion, the Province would have to meet the burden of establishing that it has a direct interest in the rectification action or that its participation, on the basis of *Snow White* and *Aim Funds*, is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon.

IV. Analysis

Jurisdiction

- [36] The threshold question is whether a single justice has jurisdiction under s. 10(2) of the Court of Appeal Act to dismiss an appeal for want of standing.
- [37] In the *Civil Appeal Handbook* (Holly Brinton, Vancouver, Continuing Legal Education Society of B.C. 2008-) the author notes that:
- [5.42] Many justices take the view that only the full Court has the jurisdiction to dismiss an appeal for want of standing.
- [38] The learned author cites *Mahood v. High Country Holdings Inc.*, 2001 BCCA 713 [Mahood] for this proposition. In *Mahood*, Ryan J.A. (in Chambers) said:

- [31] Finally the respondents submitted that Mr. Mahood has no standing to bring the appeal on behalf of the appellants High Country Holdings, Britannia Beach, and Makin Pulp and Paper. I need not explore the foundation for this submission. It is enough to say that the Court of Appeal Act does not give a justice in Chambers the authority to dismiss an appeal on that basis. This is a matter for the Court to determine on a preliminary motion brought, if appropriate, before the hearing of the full appeal.
- [39] For the reasons that follow, I respectfully agree with that conclusion.
- [40] Rule 10(2) of the Court of Appeal Act states:
- (2) In an appeal or other matter before the court, a justice may do one or more of the following:
- (a) make an order incidental to the appeal or matter not involving a decision of the appeal on the merits;
- [41] The jurisdiction of a single justice is limited to making orders incidental to the appeal. Only a division of the Court has jurisdiction to decide the merits of a case, such as making an order to quash an appeal for lack of merit: *Kaiser (Re)*, 2007 BCCA 253.
- [42] The meaning of "an order incidental to the appeal" was discussed in *Strata Plan 1229 v. Trivantor Investments International Ltd.* (1996), 24 B.C.L.R. (3d) 292 (C.A.), where Legg J.A. said:
- [24] The limitations on jurisdiction under s. 10(2)(a) are that the order must be incidental to the appeal or matter and must not involve a decision of the appeal on the merits. I have examined a number of dictionary meanings of the word "incidental" including the definition in the *Oxford Dictionary of Current English*, 2d ed. (Oxford University Press 1992) relied upon by counsel for the appellant. In that dictionary, "incidental" is defined as meaning:
1. Small and relatively unimportant, minor; supplementary.
 2. Not essential minor detail, expense, event, etc.
- [25] That dictionary meaning and other dictionary meanings of the word "incidental" are of some assistance. After considering them, I construe the words "an order incidental to the appeal" to apply to an order that has a minor or subordinate role in relation to the outcome of the appeal.
- [43] Legg J.A.'s statements were cited with approval by Frankel J.A. in *Eilers v. British Columbia (Executive Director, Securities Commission)*, 2009 BCCA 295 [Eilers].
- [44] In *Eilers*, Frankel J.A. had to determine whether a single justice had jurisdiction to make an order allowing someone to take the place of a deceased appellant for the purposes of appeal. Frankel J.A. said:

- [11] In my view, whether to allow someone to step into the shoes of a deceased appellant/applicant can hardly be a minor or subordinate matter. To the contrary, it goes to the threshold issue of whether a controversy even exists before this Court.
- [45] In *Eilers*, if the husband of the deceased was not permitted to take the place of his deceased wife, then no appeal would exist. Frankel J.A. therefore found that he did not have the jurisdiction to make such an order.
- [46] A similar consequence arises in the determination of this issue. If the Province is denied standing, there will be no appeal. As noted by the Province in its written argument, "[i]nvariably these transactions are not opposed by the parties to the transaction because there is usually a lack of negative consequences to the parties." As a result, granting or denying standing to the Province effectively determines whether or not there will be an appeal.
- [47] In my view, the determination of the Province's standing cannot be described as a minor or subordinate matter. The standing issue goes to the threshold question of whether a controversy even exists for decision by this Court.

Disposition

- [48] For these reasons, I hold that the standing issue is fundamental, rather than incidental to the appeal. The jurisdiction to make such an order rests with a division of this Court. I would dismiss FVR's motion to quash the Province's notice of appeal, without prejudice to FVR's right to make the same application before a division of the Court.

"The Honourable Chief Justice Finch"

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