

CANADA / JUDGMENT

The Aldo Group Inc. v. British Columbia

2010 BCSC 87

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 87 The Aldo Group Inc. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Aldo Group Inc. v. British Columbia,

2010 BCSC 87

Date: 20100125

Docket: S068354

Registry: Vancouver

Between:

The Aldo Group Inc.

Petitioner

And:

Her Majesty The Queen in Right of

the Province of British Columbia

Respondent

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

S. Eljarrat

Counsel for the Respondent:

A.H. Dalmyn

Place and Date of Hearing:

Vancouver, B.C.

December 18, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 25, 2010

I. Introduction

- [1] This is an application by the Crown, Respondent in the cause, seeking to determine certain preliminary questions in a tax appeal under the Social Services Tax Act, R.S.B.C. 1996, c. 431 ("SSTA"). The Petitioner, The Aldo Group Inc. ("Aldo") opposes most of the relief sought, saying it is unnecessary or premature. The Crown brings its motion pursuant to Rule 52(8) and Rule 52(11) of the Supreme Court Rules.
- [2] The Prayer for Relief in the Crown's Notice of Motion seeks to strike an affidavit sworn by an expert for the Petitioner. Alternatively, the Crown seeks an order that it be entitled to cross-examine the expert, seeks a ruling on a point of law, and seeks ancillary directions.

II. Background

- [3] Aldo owns and operates a number of retail shoe stores under different chain or brand names.
- [4] The SSTA requires purchasers to pay PST on all purchases of tangible personal property unless an exemption applies. The term "purchaser" is defined to include purchasers of tangible personal property in section 1 of the SSTA.
- [5] Section 5 of the SSTA provides:
- 5 (1) At the time of making a purchase, the purchaser must pay to the government a tax at the applicable rate under section 6.
- [6] Section 93 of the SSTA requires vendors to charge and collect PST as agents of the government:
- 93 (1) Every person, other than a person described in section 92.2 (3), who
- (a) sells tangible personal property at a retail sale in British Columbia,
 - (b) leases, as lessor, tangible personal property in British Columbia, or

- (c) maintains a place of business or has a representative in British Columbia

is deemed to be an agent for the minister, and as such must levy and collect the tax imposed by this Act on the purchaser, user or lessee.

- [7] Section 70 (f) of the SSTA provides that children's footwear is exempt, and reads as follows:

70 The following are exempted from taxes imposed by sections 5 to 25 and 112.3:

...

- (f) children's footwear, as determined by regulation, and children's clothing, as determined by regulation, but not including disposable diapers that are designed for babies or young children.

- [8] The SSTA requires, by section 97, that persons who are required to collect tax, also keep records in the "form and substance" required by the regulations:

97 Every vendor and lessor, and every person who is required to collect tax under section 93(1.1), must

- (a) make returns to the commissioner, and
(b) keep records in the form and substance prescribed by the regulations made by the Lieutenant Governor in Council.

- [9] Although children's footwear is exempt from taxation, the SSTA Regulations, BC Regulation 84/58 ("SSTAR") requires that vendors keep records of exemptions:

5.11 (1) Every vendor or lessor shall keep books of account, records and documents sufficient to furnish the commissioner with the necessary particulars of:

...

- (c) non-taxable sales of tangible personal property, including sales for resale, non-taxable leases, discounts, refunds and exemptions;

....

- [10] The Crown says that Aldo has no records to support the non-taxable sales of children's footwear. In the result, the Crown says Aldo could be assessed an amount for the uncollected tax by a procedure that the commissioner considers "adequate and expedient":

115 (1) If it appears that an amount of tax should have been but was not paid by a purchaser, lessee or other person liable for tax under this Act, the commissioner may assess the purchaser, lessee or other person for the amount of tax payable.

- (2) If it appears from an inspection, audit or examination of the books of account, records or documents that this Act or the regulations have not been complied with,

- (a) the person making the inspection, audit or examination must calculate the tax collected or due in a manner and form and by a procedure the commissioner considers adequate and expedient, and
- (b) the commissioner must assess the person for the amount of the tax calculated.

[11] The Crown's expectations and procedures for dealing with retail vendors are published in an Audit Manual which is a public document. It states that a "Certificate of Exemption" is required to support exempt sales, to allow for testing to match sales of adult-sized clothing to the exemption certificates.

[12] The Crown did not assess Aldo for the exact amount of PST which was not collected and for which there are no supporting records. Instead, Aldo was assessed based on an error rate derived from a block sample. The results of the block sample were extrapolated for the whole period for which records were not kept.

[13] Aldo petitions this Court appealing the assessment pursuant to section 119 of the SSTA, which reads as follows:

119 (1) A decision of the minister under section 118(4) may be appealed to the Supreme Court by way of an originating application.

- (2) The Rules of Court relating to originating applications apply, but Rule 49 does not apply.
- (3) A petition commencing an appeal under this section must be filed in the court registry within 90 days after the date on the minister's notification of decision.
- (4) Within 14 days after the filing of the petition under subsection (3), the petition must be served on the government in accordance with section 8 of the Crown Proceeding Act and the government must be designated "Her Majesty the Queen in right of the Province of British Columbia".

(4.1) An appeal under this section is a new hearing that is not limited to the evidence and issues that were before the minister.

- (5) The court may
 - (a) dismiss the appeal,
 - (b) allow the appeal,
 - (c) vary the decision from which the appeal is made, or
 - (d) refer the decision back to the commissioner for reconsideration.
- (6) An appeal lies from a decision of the court to the Court of Appeal with leave of a justice of the Court of Appeal.

III. Application of Section 116.1 - SSTA

[14] As noted above, one of the legal issues that arise is whether section 116.1 of the SSTA has retrospective effect. Section 116.1 creates a statutory presumption. It reads as follows:

116.1 (1) Evidence that an assessment or estimate has been made or a penalty has been imposed under this Act is proof, in the absence of evidence to the contrary, that the amount stated in the assessment or estimate or imposed as a penalty is due and owing, and the onus of proving otherwise is on the person liable to pay the amount estimated, assessed or imposed.

(2) Subject to being amended, changed or varied on appeal or by reassessment, an assessment, estimate or penalty made or imposed under this Act is valid and binding despite any error, defect or omission in the assessment, estimate or penalty or in procedure.

[15] The issue over whether section 116.1 has retrospective effect arises because this section of the SSTA was enacted by an amendment to the SSTA in 2003, S.B.C. c. 23, s. 86, effective April 10, 2003. The periods for which tax is being collected, occurred prior to the amendment, although the ministerial decision, assessments and petition occurred after the amendment.

[16] As I understand Aldo's oral submission, which differs from the position it took in the written outline, it did not take issue with the retrospective effect of section 116.1. Aldo's main argument was that, regardless of section 116.1, the case does not fall to be determined based on the onus of proof imposed by section 116.1(1).

[17] In any event, in my opinion section 116.1 is procedural, dealing, as it does, with evidentiary burdens. It thus operates as an exception to the presumption against retrospectivity, which is codified in s. 36(1)(b) and (c) of the Interpretation Act, R.S.B.C. 1996, c. 238. This provision of the British Columbia Act is similar to section 44 of the Interpretation Act, R.S.C. 1985, c. I-21. See also Sullivan & Driedger on the Construction of Statutes, 4th Ed. (Markham: Butterworths, 2002), at p. 582-3, *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403, and *British Columbia v. Bolster*, 2007 BCCA 65.

[18] In the circumstances, to the extent that it can have application, the presumption and onus of proof provided for in section 116.1 applies to this proceeding. Whether this case falls to be decided based on the presumption and onus of proof is a question that is premature at this stage.

IV. Striking of Affidavit

[19] The Crown seeks to strike out the affidavit and report of Claude Pilote, which report has been tendered to impugn the validity of the assessment. It says, amongst other things, that the material filed by Aldo is incapable of producing an assessment, and thus should be struck, referring to such decisions as *Trac v. British Columbia*, 2007 BCCA 60, [2007] B.C.J. No. 173, *Johnston v. Canada (Minister of National Revenue - M.N.R.)*, [1948] S.C.R. 486, *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, *Webster v. Canada*, 2003 FCA 388, [2003] F.C.J. No. 1569, and *Main Rehabilitation Co. v. Canada*, 2004 FCA 403,

[2004] F.C.J. No. 2030.

- [20] The Crown relies on decisions of the Courts under the Income Tax Act and decisions regarding appeals under some other provincial taxation statutes. For example, in *Main Rehabilitation Co.*, Rothstein J.A., (as he then was) noted that what is in issue in an appeal under the Income Tax Act is not the process by which an assessment was created but the validity of the assessment.
- [21] In *Main Rehabilitation Co.* case the court sought to disentangle arguments about whether CCRA officials exercised their powers properly, which is not an issue in an appeal under the Income Tax Act, from the question of whether the amounts assessed can be shown to be owed under the Act. It is that sense in which "process" is not germane.
- [22] In my view, the decision of Lowry J.A., for the Court of Appeal in *Trac* is instructive. In that case the court held that the onus was on *Trac* to demolish the assumptions on which the assessment was based, following long standing authority, including the decision of the Supreme Court of Canada in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336.
- [23] The Court applied the re-articulation of the law in the area of onus and ministerial assumptions referenced in the decision of L'Heureux-Dubé J. in *Hickman Motors*. Madam Justice L'Heureux-Dubé said at paras. 92-95:

92 It is trite law that in taxation the standard of proof is the civil balance of probabilities and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter:... The Minister, in making assessments, proceeds on assumptions and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment. ... The initial burden is only to "demolish" the exact assumptions made by the Minister but no more:...

93 This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case:... The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions:...

94 Where the Minister's assumptions have been "demolished" by the appellant, "the onus shifts to the Minister to rebut the *prima facie* case" made out by the appellant and to prove the assumptions:...

95 Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed:... Refer also to *Zink*, [Zink v. M.N.R., 87 D.T.C. 652 (T.C.C.)], at p. 653, where, even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's appeal was allowed as the Minister failed to present any evidence as to the source of income. I note that, in the case at bar, the evidence contains no such "gaps". Therefore, in the case at bar, since the Minister adduced no evidence whatsoever, and no question of credibility was ever raised by anyone, the appellant is entitled to succeed.

- [24] On the other hand, in *Trac* the court allowed the appeal and upheld an assessment, when it found that it was no answer to simply stand by a denial and offer no explanation, when the taxpayer bore the onus of demolishing the assumption.
- [25] The position of Aldo is that the application is premature. The matter should be decided at the hearing of the petition on its merits. In any event, Aldo argues that it should be entitled to attack one or more of the components of the assessment, or its methodology, to attempt to persuade the court that the assessment should be either reduced, or set aside: *Huyen v. Canada*, [1997] T.C.J. No. 319, [1997] G.S.T.C. 42, and *Hickman Motors Ltd.*
- [26] In my view the position of Aldo has merit, and is not inconsistent with *Trac*. It is also supported by the appeal provision in question:
- (4.1) An appeal under this section is a new hearing that is not limited to the evidence and issues that were before the minister.
- (5) The court may
- (a) dismiss the appeal,
 - (b) allow the appeal,
 - (c) vary the decision from which the appeal is made, or
 - (d) refer the decision back to the commissioner for reconsideration.
- (6) An appeal lies from a decision of the court to the Court of Appeal with leave of a justice of the Court of Appeal.
- [27] As this is a statutory appeal, the court must attend the statutory language in considering the scope and nature of the appeal. The appeal provision specifies that the court may do a number of things. The court may dismiss or allow the appeal, vary the decision from which the appeal is made, or refer the decision back to the commissioner for reconsideration.
- [28] On its face this statutory appeal provision contemplates it being open to an appellant, knowing the assessment complained against, to simply attack the assessment, with a view to having the matter referred back to the commissioner for reconsideration. While this may not be the most prudent course, because, if the attack on the assessment fails, the appellant is left with the reassessment, it is a course which appears to be contemplated by the statutory language.
- [29] If the attack succeeds, the commissioner, on reconsideration is not limited to a reassessment in the amount of the original assessment. It could be higher. As pointed out by the Crown, it could simply have assessed Aldo based on the amount of undocumented exemptions, although whether the commissioner would consider this adequate and expedient is a further question. So while an attack on the assessment is open, based on the statutory language, it may not produce the result the petitioner seeks.

- [30] The appeal provision also contemplates the court varying an assessment. Such might come about, in my view, where it is asserted that some part of the assessment, or some component of the methodology of the assessment, is in error but there is no overall challenge to the method of assessment. In such case the court may provide a remedy on appeal which changes the assessment but such change is limited to a variation on the original assessment.
- [31] That said, in my opinion, the affidavit of Claude Pilote, which is characterized as simply attacking the methodology used in creating the assessment, may not be irrelevant to the issues before the court. It may provide the basis for a variation or for referring the matter back to the commissioner for reassessment. Or it may fail at doing these things. Regardless, it should not, at this stage, be struck on the basis that it does not provide a basis for creating an assessment either alone, or in conjunction with the assessment of the minister.
- [32] In the circumstances I would not strike the affidavit.

V. Cross Examination on Affidavit

- [33] The Crown seeks an order for the cross-examination of Claude Pilote. It says there are unstated assumptions and that it cannot relate the conclusions given to the analysis provided. As I read the submissions of Aldo, it did not take issue with the cross-examination of Claude Pilote.
- [34] There will be an order that Claude Pilote attend cross-examination on his affidavit and report, and that, at some point reasonably in advance of the cross-examination, he list any facts, documents, learned articles or opinions on which he relies. In default of any agreement, he shall provide such list at least two weeks prior to the cross-examination.

VI. Discovery & Other Issues

- [35] The matter of whether there should be discovery and other cross-examination was not fully argued before me, although there is reference to it in the application materials.
- [36] If there are any remaining issues in this application following these reasons, I remained seized of the application. Both parties are a liberty to seek further directions.

VII. Summary

- [37] To the extent that it can have application, the presumption and onus of proof provided for in section 116.1 applies to this proceeding.
- [38] The application to strike the affidavit of Claude Pilote is dismissed.
- [39] The application to cross-examine Claude Pilote on his affidavit and report is allowed. In default of any agreement, Claude Pilote shall provide a list of any facts, documents, learned articles or opinions on which he relies at least two weeks prior to the cross-examination.

[40] If there are any remaining issues on this application following these reasons, I remained seized of the application. Both parties are a liberty to seek further directions.

VIII. Costs

[41] Costs of this application shall be costs in the cause.

"The Honourable Mr. Justice Savage"

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