

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: **British Columbia (Attorney General) v.
Christie,**
2006 BCCA 120

Date: 20060310
Docket: CA032731

Between:

The Attorney General of British Columbia

Appellant
Respondent by Cross Appeal

And

Dugald E. Christie

Respondent
Appellant by Cross Appeal
(Petitioner)

And

**The Attorney General of Canada and
Her Majesty the Queen in Right of Canada**

Respondents
(Respondents)

Before: **The Honourable Mr. Justice Smith**
(In Chambers)

G.H. Copley, Q.C. and J. Penner

Counsel for the Appellant

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Counsel for the Respondent

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Canada

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D.E. Gruber

Counsel for the Intervenor,
Law Society of British Columbia

Place and Date of Hearing:

Vancouver, British Columbia
2 March 2006

Place and Date of Judgment:

VANCOUVER

Vancouver, British Columbia
10 March 2006

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**COURT OF APPEAL
REGISTRY**

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] The Attorney General of British Columbia (the "AGBC") applies for an order staying the effect of the following order made by this Court on 20 December 2005 pending appeal of the order to the Supreme Court of Canada:

THIS COURT DECLARES that the *Social Service Tax Amendment Act (No. 2)*, 1993, S.B.C. c. 24 is unconstitutional to the extent that it purports to tax legal services related to the determination of rights and obligations by courts of law or independent administrative tribunals.

[2] This Court's reasons for judgment are indexed as 2005 BCCA 631.

[3] The AGBC has filed an application for leave to appeal to the Supreme Court of Canada.

[4] The application is opposed by the respondent Dugald E. Christie. The Attorney General of Canada and Her Majesty the Queen in Right of Canada take no position on the application. At the hearing of this application, I granted leave to the Law Society of British Columbia (the "LSBC") to intervene. The LSBC supports Mr. Christie in his opposition to a stay.

[5] The first objection to the application is an allegation that it is simply an application to suspend the declaration of invalidity, which this Court has already refused to do so in its supplementary reasons for judgment: 2006 BCCA 59. I cannot agree. The Court expressly left open the possibility of a stay: see ¶¶ 7-8 of the supplementary reasons.

[6] The AGBC relies on s. 65.1(1) of the ***Supreme Court Act***, R.S.C. 1985, c. S-26 and on s. 18(2) of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77. Section 65.1(1) of the ***Supreme Court Act*** provides,

65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

Section 18(2) of the ***Court of Appeal Act*** states,

18 (2) After an appeal has been decided, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal was taken are stayed and the justice may make any other order to preserve the rights of the parties pending further proceedings.

[7] It is common ground that the criteria to be satisfied by the AGBC in order to succeed on the application are those set out in ***American Cyanamid Co. v. Ethicon Ltd.***, [1975] A.C. 396, adopted in ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110, and applied in ***RJR – MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311 at 334:

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[8] In the context of an application for leave to appeal to the Supreme Court of Canada, the first branch of the test will be satisfied if the applicant for a stay shows a reasonable possibility of success on the leave application: *I.U.O.E., Local 115 v. C.A.I.M.A.W., Local 19* (1990), 21 C.P.C. (3d) 121, 1990 CarswellBC 495 at para. 5 (B.C.C.A., Chambers), Legg J.A.

[9] The questions in issue in the AGBC's leave application are:

(a) To what extent, if at all, may the principle of the rule of law be relied on by the courts to strike down otherwise constitutionally valid legislation?

(b) To what extent, if at all, is legislation levying taxes on the provision of legal services, enacted by the Parliament of Canada and the Legislatures of every province except Alberta and Ontario, *ultra vires* as infringing on a right of access to justice?

[10] That these questions raise issues of public and national importance is not disputed, and it is conceded that the AGBC has satisfied the first criterion for the requested stay.

[11] In *RJR – MacDonald*, the court commented on irreparable harm at 341, stating,

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[12] The court said further, at 348,

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

[13] Here, there is evidence that the Province raised approximately \$115 million per year from the tax on lawyers' fees in past years. There is also evidence that, in the last year, receipts averaged approximately \$10 million per month and that, following this Court's decision, receipts dropped to approximately \$2.5 million in January 2006. Thus, the order has apparently created a substantial reduction in current and ongoing Provincial tax revenues.

[14] Under the statutory scheme, the tax is levied on clients, and the lawyers are constituted agents of the Province for the purpose of collecting and remitting the tax. The AGBC submits that, if lawyers stop collecting and remitting the tax on the basis of this Court's judgment, the practical difficulties the Province will face in attempting to recover any substantial portion of unpaid taxes from individual clients would be daunting should the appeal be successful. Solicitor-client privilege would present serious obstacles to identifying the individuals liable and the cost of pursuing a large number of individual taxpayers for recovery would be prohibitive, even if they could be identified.

[15] Counsel for Mr. Christie submits that the losses suffered by the Province can be readily made up by, for example, reducing or eliminating tax cuts proposed in the

current budget or by increasing other taxes to make up the shortfall. The AGBC contends that this would not be possible in the current budget, given that all tax revenues have already been allocated. Whether that is so or not, it cannot be said that there is no irreparable harm simply because the government has the ability to make up any losses from other sources. The irreparable harm flows not from the loss of tax revenue generally, but from the loss of this particular tax revenue. It is no answer that the revenue losses can be shifted to other classes of taxpayers.

[16] The onus of demonstrating irreparable harm to the public interest is less in this case than it would be on a private applicant for a stay: ***RJR – MacDonald*** at 349. It is not clear that the loss of the taxes on legal services can be recouped if the AGBC ultimately succeeds in the Supreme Court of Canada. Accordingly, I am satisfied that the AGBC has satisfied the requirement of demonstrating irreparable harm if the stay is not granted.

[17] This application therefore turns on the balance of inconvenience.

[18] I have already noted that, if the stay is not granted and if the AGBC should succeed in the appeal, the Province will have lost substantial sums in valid taxes that could not effectively be recovered. Such a result is contrary to the public interest. On the other hand, this Court found the legislation unconstitutional on the basis that it infringes or denies the rights of citizens to access to justice, one of the elements of the rule of law. As counsel for the LSBC points out, a price cannot be put on the infringement of these rights and, if the declaration of invalidity is sustained in the Supreme Court of Canada, the constitutional rights of a large number of

citizens will be adversely affected so long as a stay is in place. That is not in the public interest, either.

[19] I have concluded that the balance can best be adjusted in this case by a partial stay.

[20] During the oral hearing of the application, counsel for Mr. Christie submitted that, if a stay is to be granted, it be a partial stay that would enable lawyers to continue to collect the tax from their clients but would not require them to remit the tax.

[21] Counsel for the LSBC expanded on that concept in his submission. As he pointed out, s. 102 of the **Social Service Tax Act**, R.S.B.C. 1996, c. 431 provides,

102 If a person collects an amount of tax under this Act or collects an amount as if it were tax under this Act,

(a) the person is deemed to hold the amount in trust for the government and for the payment of the amount to the government in the manner and at the time required under this Act and the regulations, and

(b) the amount collected is deemed to be held separate from and does not form a part of the person's money, assets or estate, whether or not the amount collected has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount.

[22] Thus, lawyers hold the legal services tax collected from their clients on a deemed trust. Subsections 96(6) and (7) of this statute provide for remitting of the tax by the lawyers to the government:

96 (6) Amounts to be collected under this Act, when collected, must be remitted to the commissioner at the prescribed times and in the prescribed manner.

(7) If a person collects an amount as if it were a tax imposed under this Act, the person must remit to the commissioner the amount collected at the same time and in the same manner as a tax collected under this Act.

[23] If the stay requested by the AGBC is granted and he subsequently fails in his appeal, individual taxpayers will face serious and perhaps insurmountable difficulties should they attempt to recover taxes paid in the meantime. For example, whether there is a right to recover taxes paid under a mistake of law has not been definitively settled: see *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1203-08 (*per* LaForest J.); *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 561 at ¶¶ 35, 77; *Kingstreet Investment Ltd. v. New Brunswick (Department of Finance)* (2005), 254 D.L.R. (4th) 715, 2005 NBCA 56 at ¶ 27. However, a partial stay on the basis that the taxes would be collected by lawyers but not remitted to the government would leave the taxes collected in the hands of the lawyers in trust and would ensure that individual taxpayers will be able to recover taxes they have paid if the appeal should fail. In addition, a partial stay on this basis would protect the government to the extent that, if it should succeed on the appeal, taxes paid in the meantime will be readily recoverable.

[24] The AGBC opposes a partial stay on this basis on two grounds.

[25] First, in his submission, the jurisdiction of a single justice of this Court acting under s. 18(2) of the *Court of Appeal Act* is not so broad as to permit the imposition of a term of a stay that affects persons other than the immediate parties. He relies

on *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)* (1999), 19 Admin. L.R. (3d) 169, 1999 BCCA 468 (Chambers), Ryan J.A. in support of that submission. In that case, the Court set aside a decision of the Liquor Appeal Board on the ground that there had not been a fair hearing since the tribunal was not independent because it held office at pleasure. The Province sought leave to appeal and, pending the result of the leave application, a stay of this Court's order that would permit the continued operation of the Liquor Appeal Board and, as well, "all other tribunals, boards and commissions operating under the laws of the Province of British Columbia whose chairpersons, directors, commissioners or members are appointed at the pleasure of the Lieutenant Governor in Council or a Minister of the Crown". It is clear that Ryan J.A. doubted her jurisdiction to make an order that would include proceedings to which none of the litigants before her were parties. However, without answering that question definitively, she refused to make the broad order requested and granted a stay limited to permitting the Liquor Appeal Board to continue to operate pending the appeal.

[26] The question before Ryan J.A. in that case was quite different than the question posed here. In her case, each of the many tribunals may or may not have been affected indirectly by the order under appeal, depending upon the particular facts in each case, and their decisions would remain valid unless and until discrete proceedings were taken to set them aside on the basis that they lacked independence. Here, there is no need for separate proceedings to determine the effect on persons within the purview of this application of either the declaration that

the legislative provisions are constitutionally invalid or of a stay. The effect is direct. Accordingly, I do not find the decision in the *Ocean Port Hotel Ltd.* case to be helpful.

[27] Whether I grant a complete stay, a partial stay, or no stay at all, the direct effects will be felt by the same parties – the government, the lawyers of this Province, and their clients. It cannot be right that I can order a stay that will result in all clients continuing to pay legal services tax and all lawyers to remit taxes collected, as the AGBC requests, but I cannot order a partial stay that will relieve lawyers of the obligation to remit the taxes. The power to do the first includes the power to do the second. It follows that, in my view, I have the power to grant a partial stay in this case.

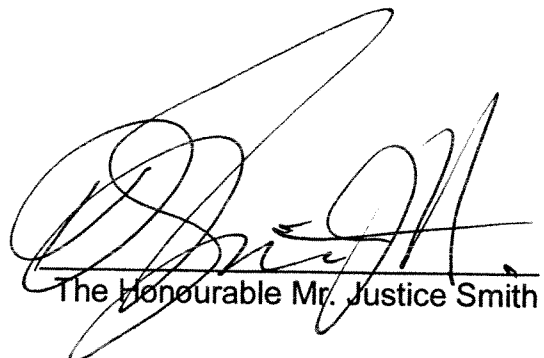
[28] The AGBC's second point of opposition to a partial stay is that it will result in an administrative nightmare for the lawyers of this Province. He contends that they will have to continue to collect the tax and to retain taxes collected "in separately constituted trust funds" and, as well, to identify and record the type of work for which the fees were billed. Then, if his appeal fails, "they would have to engage in the process of administering the refund process, which could involve many thousands of clients, many thousands of files, and in many cases fairly modest sums of money." He suggests that the administrative costs would be passed on to the lawyers' clients and that the process "would be enormously expensive likely wiping out any savings in tax."

[29] However, the lawyers of the province were represented at the hearing by counsel for the LSBC, their governing body. He took care to present a partial stay on this basis as a workable alternative. I would therefore reject the AGBC's submission on this point.

[30] Accordingly, the application is allowed in part. The declaration of invalidity is stayed to the limited extent of maintaining the statutory obligation of the lawyers of this province to collect the taxes on legal services and to hold them in trust pending the appeal.

[31] Counsel for Mr. Christie submitted that, if a stay should be granted, there should be an order that exempts him and his clients from its effects. He represents primarily poor clients and it was through his efforts that the judgment under appeal was obtained. At one level it may seem only just that he and his clients be permitted to enjoy the fruits of his victory pending appeal. However, I can think of no principled basis, and none was suggested, upon which he and his clients should be treated differently than all other lawyers and clients in the Province. Accordingly, I decline to exempt Mr. Christie and his clients from the stay.

[32] There will be liberty to apply to vary the stay if the AGBC fails to proceed with the appeal with all due expedition.



The Honourable Mr. Justice Smith