Federal Court of Appeal Decisions

Camp Mini-Yo-We Inc. v. Canada

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CORAM: **LINDEN J.A.**
EVANS J.A.
MALONE J.A.

BETWEEN:

CAMP MINI-YO-WE INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 29, 2006.

Judgment delivered at Ottawa, Ontario, on December 18, 2006.

REASONS FOR JUDGMENT BY: MALONE J.A.

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CONCURRED IN BY: LINDEN J.A.

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REASONS FOR JUDGMENT

MALONE J.A.

I. Introduction

[1] This is an appeal from a judgment of Bonner J., a judge of the Tax Court of Canada (the Judge) dated September 9, 2005 (reported as 2005 TCC 601). In his reasons, the Judge determined that goods and services tax (GST) must be collected under subsection 165(1) of the *Excise Tax Act*, R.S.C. 1985, E-15 (the Act) on fees charged by the appellant, a registered charity, to persons attending its summer camps for children and youth.

[2] As a general rule, the Act exempts most supplies made by charities. This appeal deals with an exception to that rule: namely, the supply by a charity of any "service involving supervision or instruction in any recreational or athletic activity." The appellant contends that because of the evangelical Christian character of the camp and its programs it is not within this exception.

II. Legislative Background

[3] Subsection 165(1) of the Act requires a service supplier to collect GST on the consideration paid for that service. This is subject to a number of exemptions based on variables such as the nature of the supplier, the nature of the goods or services supplied, the nature of the consumer or purchaser of the services and where the goods or services are consumed. An exempt supply is defined in subsection 123(1) to mean a supply that is included in Part V.1 of Schedule V of the Act.

[4] Section 1 of Part V.1 specifically exempts a supply made by a charity of any property or service. However, there are exceptions, and the exception relevant to this appeal is paragraph 1(f) of Part V.1, which provides:

1. A supply made by a charity of any property or service, but not including a supply of ... (*f*) a service involving, or a membership or other right entitling a person to, supervision or instruction in any recreational or athletic activity....	**1.** La fourniture de biens ou de services par un organisme de bienfaisance, à l'exclusion des fournitures suivantes : ... *f*) la fourniture d'un service de supervision ou d'enseignement dans le cadre d'une activité récréative ou sportive, ou un droit d'adhésion ou autre droit permettant à une personne de bénéficier d'un tel service, sauf si,...

[5] A charity is defined at section 123(1) of the Act as a registered charity within the meaning of section 248 of the *Income Tax Act*. There is no dispute that the appellant is a registered charity and that its purposes and activities are charitable so as to potentially qualify for the GST exemption under paragraph 1(f).

III. Factual Background

[6] The appellant pursues its charitable purposes by operating programmes in various religious fields, such as missionary organizations, publishing and broadcasting, seminars and camps. During the taxation years under review, the appellant operated camps at four locations in Ontario which were aimed at children of various age groups. There were four types of camps to choose from: a girl's camp, a boy's camp, a junior camp and a camp known as Discovery. These first three camps were for children aged six through fifteen while the Discovery camp was a religious leadership training programme for those aged sixteen through eighteen. During the winter, the appellant follows up with its young volunteer staff and also trains them for the upcoming summer camp season.

[7] At the children's camps, the appellant supplied services to boys and girls, which included supervision, religious instruction, and instruction in recreational and athletic activities. The services also involved overnight supervision of each child throughout the entire duration of the child's stay. The camp offered a full range of typical summer camp activities, such as canoeing, kayaking and swimming.

[8] The Appellant advertised the role and function of all its camps as follows:

> Mini-Yo-We is a Christian Camp whose mission is to present Jesus Christ and His message from the Word of God through an excellent camping programme balancing spiritual teaching, fun and physical activity and year round discipleship of Staff and Campers in association with evangelical churches and ministries.

[9] Its senior camp staff and counsellors were selected on the basis of their religious training credentials. Other than its volunteer counsellors, the majority of the staff operating the camps was Commended Workers of Plymouth Brethren denominations, who are equivalent to clergy or ministers in other denominations. Notwithstanding its character as a Plymouth Brethren camp, the camps were open to campers of all other religion faiths.

[10] The children arrived at the camps on Sunday afternoons and remained there for a week. Schedules for each camp were adhered to on a daily basis. Typically, the children wake up at around 7:30 am and eat breakfast at 8:30 am. Following breakfast, the children were involved in a forty-five minute 'impact period' which involved worship and teaching. The rest of the morning was spent on instruction periods involving recreational and athletic activity. The afternoon included periods of rest, clean-up and about an hour was allocated for children to choose their own activity, such as swimming or kayaking. After dinner, the children were often involved in group activities, such as baseball or soccer, and for about forty-five minutes at the end of the day, religious devotions.

[11] A single fee was charged to cover the cost of the entire camping programme. The cost of sporting and recreation instruction was five to ten per cent of the total cost of the camp. The remainder covered expenses such as accommodation, meals, upkeep of the installations, insurance, utilities and labour.

[12] In the year 2000, the appellant, along with a number of other registered charities, stopped collecting GST on fees paid in respect of their programmes after the Minister of National Revenue (Minister)

discontinued the appeal to this Court of the decision in *Camp Kahquah v. The Queen*, [1998] 4 C.T.C. 2882 [*Camp Kahquah*]. In that case, the Tax Court judge had determined that *Camp Kahquah's* sole purpose was to conduct a Christian camp and that the recreational facilities and instruction were incidental to its purpose. Accordingly, he held that *Camp Kahquah* was not subject to paragraph 1(f).

[13] Nevertheless, the Minister assessed the appellant under Part IX of the Act for the period of October 1, 1999 to December 31, 2001 on the basis that GST was eligible on the fees it charged for attendance at its camp. The appellant objected and appealed to the Tax Court of Canada.

IV. TAX COURT DECISION UNDER APPEAL

[14] The Judge found as a fact that the appellant's program involved supervision or instruction in recreational and athletic activities and that, in addition to the times devoted exclusively to religious activities, religion was also interwoven with all aspects of daily life at the camp (reasons at paragraph 12). However, the predominant element of the service provided was supervision and teaching in recreation and sports; an element not altered either by the camp's religious purpose or by periods of prayer and reflection (reasons at paragraph 20). In attempting to distinguish the *Camp Kahquah* decision from the present case, Bonner J. stated at paragraph 50:

> In my view *Kahquah* is distinguishable. It appears to rest on findings that the provision of recreational facilities and instruction was part of and incidental to the taxpayer's religious purpose and that the supply was therefore not a supply of supervision of instruction in the field of recreation or sports as required by the legislation there under consideration.

[15] The Judge therefore concluded that the appellant's fee for services was subject to GST under the Act.

V. Standard of Review

[16] In appellate review, the nature of the questions at issue determines the applicable standards of review. Questions of law are reviewable on a standard of correctness, while findings of fact or of mixed law and fact will be set aside only if it is determined that the trial judge has committed a palpable and overriding error (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

[17] This case deals with questions of mixed law and fact; however, issues arise where a question of mixed fact and law is, in essence, more legal than factual and vice versa. Accordingly, where the issue deals with a question of the Judge's interpretation of a legal test, then his decision on that issue will be reviewed on a

question of the Judge's interpretation of a legal test, then his decision on that issue will be reviewed on a standard of correctness. Where the Judge applied the proper legal test to the facts before him, then more deference is warranted and his decision will be reviewed on a palpable and overriding standard unless a question of more general law can be readily extricated.

VI. Issues on Appeal

[18] Three specific issues must be decided:

1. Did the Judge commit a reversible error in his interpretation and application of paragraph 1(f)?

2. Did the Judge err in determining that the incidental supplies rules in section 138 did not apply? And

3. Should the Judge have followed the earlier Tax Court's decision in *Camp Kahquah*?

VII. Analysis

Issue 1: Did the Judge commit a legal error in his interpretation and application of paragraph 1(f)?

[19] The Judge considered the nature of the services supplied by the camps rather than their purpose. At paragraph 23 he stated:

> As I see it, the charitable (religious) purpose which underlies the Appellant's activities cannot be considered to remove the activities from the ambit of paragraph (f) unless the purpose and measures adopted to carry it out are all so pervasive that the nature of the service supplied is changed from that of a children's summer camp to something else. The purpose does not effect such a change here. The service supplied was that of a summer camp, and not, for example, that of a religious school offering a period or two of gymnastics.

[20] The appellant argues that the Judge erred in not considering the actual purpose of the recreational activities offered by the camp in his interpretation of paragraph 1(f). It relies on the Supreme Court of Canada's decision in *Vancouver Society of Immigrant & Visible Minority Women v. MNR*, [1999] 1 S.C.R. 10 to support this position. Paragraph 152 states:

> ... it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature. ... inquiry must focus not only on the activities of an organization but also on its purposes.

[21] This passage, however, was advanced by Gonthier J. in order to determine if activities were charitable for the purpose of establishing eligibility of an applicant for registration as a charity under the *Income Tax Act*.

That is not our case. Here, the Minister admitted that the appellant's underlying charitable purpose is the advancement of religion. It seems to me that if the purpose test was to apply to paragraph 1(f), the answer would always be that the activity is charitable, and the exception would never apply. In my analysis, the Judge was correct in focusing on the nature of the activities rather than their purpose.

[22] In this case, the Judge began his analysis by examining both the English and French versions of paragraph 1(f) and concluded that although, in his view, there is a discrepancy between the two versions, both are applicable. The appellant argues that the Judge erred in reaching this conclusion, reasoning that the general exemption is not lost merely because a service includes some instruction or supervision in athletic or recreational activities.

[23] The English version of paragraph 1(f) speaks of a service "involving" supervision or instruction in any recreational or athletic activity. The French version states: la fourniture d'un service de supervision ou d'enseignement dans le cadre d'une activité récréative ou sportive. This translates as a service of supervision or teaching in the context of recreational or sporting activity. The appellant suggests that in reconciling differences between the English and French versions of a statute their shared meaning should be sought (*Perrier Group of Canada v. Her Majesty the Queen*, [1996] 1 FC 586), which in this case is the narrower, French version.

[24] In my view, Bonner J. was correct to conclude that in this case any differences between the English and French texts are insignificant. The services here fall squarely within the language of both the French and English versions of paragraph 1(f) and there is no need to reconcile the two versions. The English version excludes from the exemption any service by a charity, which involves supervision or instruction in any recreational or athletic activity. The appellant's programme is one that involves the supervision or instruction of religious, athletic and recreational activities and therefore, is caught by the English version of paragraph 1(f). The text does not require that the recreational and athletic activity constitute the major component.

[25] Similarly, the services offered by the appellant fall squarely within the French version of the text: religious instruction in the context of recreational and athletic activities. Accordingly, any discrepancy between the English and French versions of paragraph 1(f) does not render the appellant exempt from GST as both versions apply to the service supplied.

versions apply to the service supplied.

Issue 2: Did the Judge err in determining that the 'incidental supplies' rule in section 138 did not apply?

[26] One of the issues before the Judge was whether this transaction consisted of a single supply composed of two intertwined and interdependent elements or whether it was multiple supplies; two services supplied for one consideration with one dominant and the other subservient. The Judge found this transaction to be one of single supply; the fees were paid for the overall camping experience.

[27] The appellant now argues that the Judge erred by in failing to apply the 'incidental supplies' rule found in section 138 of the Act:

138. For the purposes of this Part, where (*a*) a particular property or service is supplied together with any other property or service for a single consideration, and (*b*) it may reasonably be regarded that the provision of the other property or service is incidental to the provision of the particular property or service the other property or service shall be deemed to form part of the particular property or service so supplied.	**138.** Pour l'application de la présente partie, le bien ou le service dont la livraison ou la prestation peut raisonnablement être considérée comme accessoire à la livraison ou à la prestation d'un autre bien ou service est réputé faire partie de cet autre bien ou service s'ils ont été fournis ensemble pour une contrepartie unique.

[28] In my analysis, section 138 only applies in the context of multiple supplies. If there is only a single supply (with several components) then that section does not come into play. In order to determine whether multiple services were supplied, I refer to Sharlow J.A.'s analysis in *Hidden Valley Golf Resort Assn. v. Canada* (2000), 257 N.R. 164 at paragraph 17:

> In each case it is useful to consider whether it would be possible to purchase each of the various elements separately and still end up with a useful article or service. For if it is not possible then it is a necessary conclusion that the supply is a compound supply which cannot be split up for tax purposes.

[29] In this case, based on the evidence, it was not possible to charge separate fees for the religious, and recreational and athletic services supplied by the appellant. The activities were too closely integrated. Thus, the Judge correctly found that section 138 was inapplicable to the present case.

Issue 3: Should the Judge have followed the earlier Tax Court decision in *Camp Kodiak*?

Issue 3: Should the Judge have followed the earlier Tax Court's decision in *Camp Kahquah*?

[30] The appellant argues that the Judge had a duty to afford the judge in *Camp Kahquah* judicial comity in his decision given that these cases are legally and factually almost identical. It is said that Bonner J. should have been able to provide an understandable and credible explanation for his differing reasons, which he did not do. Moreover, that the *Camp Kahquah* decision is well-reasoned has stood since 1998 and therefore should have been followed by the Judge.

[31] Because of the principle of comity among judges of the Tax Court, a Judge will not lightly decide not to follow a previous decision of that court. However, failure to follow a prior decision is not a ground of appeal in this Court. Faced with conflicting decisions of the Tax Court, the function of this Court on appeal is to decide which of the decisions, if either, correctly states the law.

[32] With respect, I do not think that the *Camp Kahquah* reasons should have been followed. In that case, in determining whether the supply was exempt the judge accepted evidence that was lead regarding the purpose of the camp, instead of the nature of services it supplied. At paragraph 27 he stated:

> I accept the extensive evidence of the Appellant's witnesses who emphasized the stated purpose and actual operation of the camp to that end. In particular, I accept the evidence that the camps in question would not exist if it were not for the religious component and the opportunity of extending evangelical exposure and the conversion of campers. ... Further, it is understandable, as the evidence stated, that children would not be particularly interested in going to a religious camp which lacked some of the summer sports opportunities available at this camp.

[33] The central flaw in this reasoning is that the analysis is based on the underlying purpose of the camp. As I have already determined, it is not the purpose but the nature of the supply that must be examined. It should not matter that the taxpayer's underlying purpose was charitable. It also should not matter that recreational activity is necessary in order to make the camp more attractive to children. The fact is that both Camp Kahquah and Camp Mini-Yo-We involved supervision or instruction in the context of various recreational or athletic activities, which is enough to remove it from the general exemption afforded to charities.

[34] Finally, the appellant's assertion that the *Camp Kahquah* decision has stood since 1998 is of no consequence. The fact that the Crown commenced and then discontinued an appeal of that decision means only that this Court has not yet considered whether it is correct in law. Nor would it have mattered if the Crown had decided not to commence an appeal at all. The Crown is not obliged to commence or continue an

appeal, or to offer a public explanation as to why it decides to take any particular course of action.

VIII. COLLATERAL ISSUE

[35] One collateral issue must be resolved. The Canadian Council of Christian Charities and the Christian Sunday School Missions sought leave to intervene in this appeal. That request was denied on the basis that they had not demonstrated that their proposed intervention would assist the court as appellant counsel was fully

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