“CRA’s case against client thrown out after court accepted argument that CRA had acted improperly.” [COMMENTS BY RICHARD NEARY]

R. v. P

Between
Regina, and
C R P

[2005] B.C.J. No. 2120

2005 BCPC 406

[2006] 1 C.T.C. 37

68 W.C.B. (2d) 535

Victoria Registry No. 126779

British Columbia Provincial Court
(Criminal Division)
Victoria, British Columbia

Neal A.C.J. Prov. Ct.

Heard: September 21, 2005.
Oral judgment: September 21, 2005.

(23 paras.)

Taxation — Income tax — Enforcement — Offences — Failure to provide requested information — Production of information — Income Tax Act — Application — Taxpayer found not guilty of failing to comply with demands for production pursuant to the Income Tax Act.

Criminal law — Regulatory offences — Strict liability — Taxpayer found not guilty of failing to comply with demands for production pursuant to the Income Tax Act.

Taxpayer charged with 11 strict liability counts of failing to comply with demands for the production of specified documents and information properly served upon him pursuant to s. 231.2(1)(a) of the Income Tax Act -- The demands were made to determine if tax returns should have been filed, to address the disposition of companies controlled by the taxpayer and previously dissolved by him, and to determine what assets those companies had on dissolution and their disposition -- Taxpayer found not guilty -- The Minister's agents were simply attempting to ensure filling compliance -- As such, the court could not satisfy itself beyond a reasonable doubt that the intention of the Minister of National Revenue in serving the demands was to pursue a genuine and serious inquiry into the tax liability of the taxpayer or of the corporations -- The demands were not authorized by any relevant statutory authority.

Statutes, Regulations and Rules Cited:

Income Tax Act, s. 231, s. 231.2(1), s. 231.2(1)(a), s. 231.5(2)

Counsel:

Counsel for the Crown: M. Mark

Counsel for the Defendant: R. Neary

---

1 NEAL A.C.J. PROV. CT. (orally):-- The accused is charged with 11 counts of failing to comply with demands for the production of specified documents and information, pursuant to s. 231.2(1)(a) of the Income Tax Act, on our about October 1st of 2003. Section 231.2(1)(a) provides as follows:

> Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice, (a) any information or additional information, including a return of income or a supplementary return ...

2 There were three Crown witnesses called in connection with this matter. They were all credible, reliable and trustworthy. No defence evidence was called.

3 I have considered all of the evidence at trial and find as follows. The accused, Mr. P, was at all material times engaged in the property development business in Greater Victoria. He did so through several corporate vehicles. Many of those companies encountered severe financial difficulties with the result that their operations ceased or were dissolved.

4 Specifically, Mr. P was, until dissolution, a director of H C D L., and _____. On May 27th, 2003, Mr. P was served with 29 notices of requirements to be issued, pursuant to s. 231.2(1) (a) of the Income Tax Act. Eleven of the notices relate to matters currently before the court on Information 126779. The notices were served on him at his home in Sooke, B.C.

5 Four of the notices related to personal obligations on Mr. P to file income tax returns for 1999 through 2003. The notices demanded that he provide statements of self employed earnings for the taxation years 1999 to 2002. The remaining notices relate to H C D L., and _____. Those notices did not require the filing of an income tax return, but rather the copies of balance sheets and income statements for 1995 through 1997, for _____., and 1995 to 1998, for Helmcken, be provided as demanded.

6 There is no dispute, however, that before the notices referred to above were issued, both Helmcken and _____. had been dissolved. Helmcken was dissolved March 6th, 1998, and _____, on December 19th, 1997. Again, here there is no dispute that Mr. P was the sole director of both corporations immediately prior to dissolution.

7 The notices in question were served by Ms. Sandra Ouellette, an employee of the Canada Revenue Agency. There is no issue as to the service. They required that the specified materials be provided on or before September 30th, 2003. There is also no dispute arising from the form of notice or service of Mr. P. There is also no dispute that Mr. P did not comply with the notices of demand, nor did Mr. P ever contact Ms. Ouellette seeking more time to comply.

8 Following delivery of the notices, Ms. Ouellette determined that some corporate documents for the corporations listed in the notices served on Mr. P, and others in which he had an interest, had, in fact, been transferred to the custody of Mr. Glover, a trustee in bankruptcy, as the person responsible for the dissolution of the companies. There was no evidence before me of a comprehensive list of any of the records held by Mr. Glover. I am satisfied, however, that some of these records were, in fact, destroyed by the trustee in bankruptcy once he determined they were no longer necessary for the trustee's purposes. Again, there was no specific evidence before me as to precisely what was destroyed.

9 Whatever those records were, however, they were therefore not available to Mr. P, or anyone else. Ms. Ouellette considered the actions taken by the trustee and decided that she would not proceed with 18 of the original 29 notices, and limited her actions in submitting this report to Crown Counsel for the matters before me to the 11 matters in counts 1 through 11. At no time did she advise Mr. P, however, of this change in her position. There is no evidence, however, what specific corporate records for either H C D L. or _____., were part of the records destroyed by the trustee in bankruptcy. It is common ground that the offences disclosed by counts 1 through 11 are strict liability offences within the meaning of the Supreme Court of Canada decision in R. v. The City of Sault Ste. Marie (1978) 40 C.C.C. (2d) 353. At page 374 of that decision, Dickson J described the offences as follows:

> ... offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

10 This is a similar test to that set out in section 231.5(2) of the Income Tax Act. That section provides:

> ... and every person shall, unless the person is unable to do so, do everything that the person is required to do by or under subsection (1) or sections 231.1 to 231.4 [of the Income Tax Act.]

The notice in question here, of course, was issued under 231.2(1)(a).

11 On the facts of this case, Mr. P has not satisfied either threshold under the test in Sault Ste. Marie or s. 231.5(2). There is simply no evidence beyond a balance of probabilities that Mr. P took all reasonable steps to comply with the demands served by Ms. Ouellette, nor that he was unable to do so. There are inferences that might lead to suspicion about Mr. Glover's destruction of the records, but nothing more. On neither test is a defence made out on Mr. P's behalf.

12 However, prosecutions under the Income Tax Act such as that before me, also must consider the effect of another test set out by the Supreme Court of Canada, articulated in the decision of Canadian Imperial Bank of Commerce v. The Attorney General of Canada, [1962] S.C.R. 729, and as applied in a subsequent decision of James Richardson and Sons v. Canada, [1984] 1 S.C.R. 614. Those authorities considered the scope of s. 231, with particular emphasis on the words in s. 231.2(1):

> ... for any purpose related to the administration or enforcement of this Act, including the collection of any amount payable [under this Act] by any person ...

13 At page 8 of the Richardson decision, the court wrote that:

> The language of s. 231(3) of the Income Tax Act is unquestionably very broad and on its face would cover any demand for information made to anyone having knowledge of someone else's affairs relevant to that other person's tax liability. It would, in other words, if construed broadly, authorize an exploratory sortie into any taxpayer's affairs and require anyone having anything to contribute to the exploration to participate. It would not be necessary for the Minister to suspect non-compliance with the Act, let alone to have [the suspicion that] the Act was being violated as required under s. 231(4). Provided the information sought had a bearing (or perhaps even could conceivably have a bearing) on a taxpayer's tax liability it could be called for under the subsection.
>
> The Canadian Bank of Commerce case, however, makes it clear that the subsection is not to be construed that broadly. It establishes through the majority judgment written by Mr. Justice Cartwright (as he then was) that:
>
> a) the test of whether the Minister is acting for a purpose specified in the Act is an objective one and has to be decided on the proper interpretation of the subsection and its application to the circumstances disclosed;
>
> b) the obtaining of information relevant to the tax liability of some specific person or persons whose liability to tax is under investigation is a purpose related to the administration or enforcement of the Act;

c) it is not necessary that the person from whom the information is sought be one whose liability to tax is under investigation;

d) the fact that giving of the information may disclose private transactions involving persons who are not under investigation and may not be liable to tax does not invalidate the requirement.

14 Again, at page 9 of the reported decision, the court notes further again with respect to Mr. Justice Cartwright:

The purpose of the requirement, then, is to obtain information relevant to the tax liability of some specific person or persons whose liability to tax is under investigation; this is a purpose related to the administration or enforcement of the Act.

Accordingly, while I agree with Le Dain J. that the Court in the Canadian Bank of Commerce case did not say that the purpose in that case, namely the obtaining of information relevant to someone's tax liability, was the only purpose for which a requirement could validly be made under s. 231(3), it did nevertheless insist on a prerequisite to that particular purpose, namely that the site to that particular purpose, namely that the someone's tax liability be the subject of investigation, and it is that prerequisite which the appellant submits is missing in this case.

In the CIBC case, it was acknowledged that neither the appellant nor its customers were under investigation.

15 The court found at page 10 of the decision:

Having obtained such a regulation [the Minister is] in a position to demand such returns at large without [having] regard to whether or not any specific person or persons are ... under investigation.

The very essence of those provisions in the Act serves, in my view, to support the approach taken in the CIBC case, that s. 231(3) is only available to the Minister to obtain information relevant to the tax liability of some specific person or persons, if the tax liability of such person or persons is the subject of genuine and sincere inquiry.

16 There can be no doubt that the subject of the 11 notices served by Ms. Ouellette, noted as Information 126779, were clearly identified as Mr. P, _____. and Helmcken Centre. The issue therefore is whether or not the tax liability of any or all of those three was subject of a genuine and serious inquiry by the Minister of National Revenue. The only evidence of those intentions was found in the evidence of Ms. Ouellette and Ms. Crow. I have considered that evidence, in particular the candid observations of Ms. Ouellette at page 35 of the transcript of her evidence and the pages following.

17 I have considered the evidence and confirm that I am satisfied and able to find the reasons for making the demand on Mr. P were twofold. Firstly, to determine if tax returns should be filed to address the disposition of the companies, and secondly, to determine what assets the companies had on dissolution and their disposition. No referral had been made to the Investigations Division of the Canada Revenue Agency.

18 It is my finding, based on the facts before me, there was no genuine and serious inquiry by the Minister of National Revenue into the potential tax liability of either Mr. P or the two subject corporations. Ms. Ouellette's purpose, and that of the Minister of National Revenue, was simply to secure filing compliance. Ms. Ouellette, as the duly authorized representative of the Minister, had no idea whether or not there was any tax liability. She merely wanted to insure compliance and seeing the filing of the appropriate documents.

19 I cannot be satisfied, even beyond a balance of probabilities, much less a reasonable doubt, that the Minister's intention serving such notices, as set out in counts 1 to 11, was to pursue a genuine and serious inquiry into the tax liability of Mr. P or either of the two named corporations. In the circumstances, I must find that the notices were issued and served by Ms. Ouellette in circumstances where they were not authorized by any relevant statutory authority, and therefore must find the accused not guilty as charged on all counts.

20 THE COURT: Mr. Mark.

21 MR. MARK: Thank you, Your Honour.

22 THE COURT: Mr. Neary.

23 MR. NEARY: Thank you.

(EXCERPT CONCLUDED)