Dockets: 2007-3627(GST)G,
2007-3628(GST)G, 2007-3629(GST)G,
2007-3630(GST)G, 2007-3631(GST)G

BETWEEN:

STANLEY J. TESSMER LAW CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on December 15, 2011, at Vancouver, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Craig C. Sturrock
Counsel for the Respondent:	David Jacyk
	Darren McLeod

ORDER

UPON motion by counsel for the Appellant for an Order to have the Court determine the following question pursuant to subsection 310(1) of the *Excise Tax Act* ("*ETA*"):

> Whether, based on the facts set out in the Agreed Statement of Facts filed herewith, the goods and services tax (GST) imposed by s. 165 of the *Excise Tax Act* infringes or is inconsistent with the rights of the Appellant's clients guaranteed by ss. 10(b) of the *Charter of Rights and Freedoms* such that s. 165 of the *Excise Tax Act* is, to the extent of any such inconsistency and, subject to s.1 of the *Charter*, of no force and effect by reason of s. 52(1) of the *Constitution Act*.

AND UPON reading the material filed in support of the motion;

AND UPON hearing the parties;

The question is answered as follows:

Based on the facts set out in the Agreed Statement of Facts filed by the parties, the goods and services tax (GST) imposed by s. 165 of the *Excise Tax Act* does not infringe and is not inconsistent with the rights of the Appellant's clients guaranteed by ss. 10(b) of the *Charter of Rights and Freedoms.*

The Respondent is awarded costs of the motion on a party and party basis.

Signed at Ottawa, Canada, this 28th day of January 2013.

"B.Paris"

Paris J.

Citation: 2013 TCC 27
Date: 20130128
Dockets: 2007-3627(GST)G,
2007-3628(GST)G, 2007-3629(GST)G,
2007-3630(GST)G, 2007-3631(GST)G

BETWEEN:

STANLEY J. TESSMER LAW CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Paris J.

[1] The parties in these five related appeals have referred the following question to the Court for determination pursuant to subsection 310(1) of the *Excise Tax Act*[1] ("*ETA*"):

> Whether, based on the facts set out in the Agreed Statement of Facts filed herewith, the goods and services tax (GST) imposed by s. 165 of the *Excise Tax Act* infringes or is inconsistent with the rights of the Appellant's clients guaranteed by ss. 7 and ss. 10(b) of the *Charter of Rights and Freedoms* such that s. 165 of the *Excise Tax Act* is, to the extent of any such inconsistency and, subject to s.1 of the *Charter*, of no force and effect by reason of s. 52(1) of the *Constitution Act*.

---

[1] R.S.C., 1985, c. E-15.

[2] Although the question put to the Court refers to both sections 7 and 10(b) of the *Canadian Charter of Rights and Freedoms*[2] (the "*Charter*"), the appellant's counsel advised the Court at the hearing that he was now only relying on section 10(b). The question is therefore amended accordingly.

[3] The parties have agreed that the determination in relation to section 1 of the *Charter* would proceed at a later date if this Court finds that the appellant has shown that there has been a breach of *Charter* rights.

FACTS

[4] The following is a summary of the relevant facts taken from the Agreed Statement of Facts submitted by the parties.

[5] The appellant's business is the provision of legal services, through Stanley J. Tessmer and two other lawyers. The appellant specializes in criminal law.

[6] During the period July 1, 1999 to December 31, 2006, the appellant did not collect GST in respect of legal services for criminal defence work charged to some of its clients who had been arrested or detained and who were either charged with a criminal offence or who had been arrested with criminal charges pending.

[7] The amount of GST that was to be collected by the appellant, if GST was exigible on those criminal defence services without breaching the *Charter*, was $228,440.97.

[8] The appellant did not conduct an independent review of the financial circumstances of its clients to independently establish the ability of its individual clients to afford its fees and any GST exigible on those fees.

[9] No financial records of any individual clients of the appellant were produced at the hearing of this matter.

[10] Pursuant to a series of five notices of assessment covering, in all, the period from July 1, 1999 to December 31, 2006, the appellant was assessed for GST in the amount of $228,440.97 as well as penalties and interest thereon.

Legislation

---

[2] Part I of the *Constitution Act*, 1982.

[11] Section 10(b) of the *Charter* provides that:

> Everyone has the right on arrest or detention
>
> . . .
>
> to retain and instruct counsel without delay and to be informed of that right;
>
> . . .

[12] Section 52(1) of the *Charter* reads:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[13] For the period in issue up to July 2006, section 165(1) of the *ETA* read:

> Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 7% on the value of the consideration for the supply.

[14] For the period in issue between July 1, 2006 to December 31, 2006, the rate of GST was 6%.

[15] The phrase "taxable supply" and "supply" are defined in section 123(1) of the *ETA* as follows:

> "taxable supply" means a supply that is made in the course of a commercial activity;
>
> "supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

Background

[16] The appellant previously filed an appeal to this Court from an assessment of GST for a period prior to the period covered by the subject appeals. In the earlier appeal, the appellant also argued that the requirement to pay GST on criminal defence counsel fees infringed its clients' rights under section 10(b) of the *Charter* to retain and instruct counsel. That appeal was dismissed: *Stanley J. Tessmer Law Corporation v. The Queen*.[3]

[17] The appellant was subsequently assessed for the period from July 1, 1999 to December 31, 2006, as set out in paragraph 10 above. The five subject appeals were brought by the appellant from those assessments.

[18] The respondent, by motion, challenged the appellant's standing to raise alleged breaches of its clients' *Charter* rights in relation to the GST exigible on criminal defence counsel fees. This Court held that the appellant does have standing to raise the alleged *Charter* breaches[4]. The respondent has appealed that decision to the Federal Court of Appeal. The appeal is being held in abeyance pending the determination of the question submitted by the parties in this proceeding.

Previous *Charter* decisions regarding taxes imposed on legal services

[19] In *John Carten Personal Law Corporation v. British Columbia (Attorney General)*[5], the British Columbia Court of Appeal upheld the constitutionality of a British Columbia tax on legal services. The appellant had challenged the validity of the tax on several grounds, including that the tax infringed sections 7, 10(b), 11(d) and 15 of the *Charter*. The Court of Appeal dismissed the appeal because the appellant had not provided evidence sufficient to show that the effect of the tax was unconstitutional. Writing for the majority of the Court, Lambert J.A. said:

> All that being said, in my opinion Mr. Carten's arguments on those issues cannot be sustained in this Court because of lack of proof that rights of access to the courts, to justice, or to legal services, have been denied because of this 7 per-cent tax on the amount paid or payable for legal services.
>
> There are many reasons why the cost of legal services, or a lack of funds, may restrict, hamper, or even prevent a person from exercising rights of access to the courts or rights of access to other legal services. What would be required in order to find this Act wholly unconstitutional, or even unconstitutional in its application in a particular case, would be proof that people, or a class of people, in general, or

---

3 [1999] T.C.J. No. 220.

4 *Stanley J. Tessmer Law Corporation v. The Queen*, 2009 TCC 104.

5 (1998) 40 B.C.L.R. (3d) 181.

> some person in particular, who would have been able to exercise the legal rights in question if this tax were not in effect, were or was prevented by this tax from exercising those rights. It would not be sufficient to found an argument that the Act was unconstitutional in concept or in application merely to show that the tax operated as an impediment or a discouragement to the exercise of a protected right. What would be required would be proof that the right was denied, or its exercise was prevented, by the existence or operation of this tax. In other words, that a right which would have been exercised but for this tax could not be exercised because of this tax.
>
> In my opinion the evidence in this case is insufficient to provide a basis for a conclusion that the Act is unconstitutional. Mr. Carten's affidavit is the only evidence. It indicates that the tax gives rise to inconvenience and expense to him in his law practice. But, of course, that is not the point.
>
> …
>
> That evidence is, in my opinion, insufficient to provide a basis of constitutional facts adequate to support the constitutional arguments made in Mr. Carten's first seven points. And we are not entitled to speculate, in the absence of any sufficient proof, that surely the very existence of the tax would prevent someone, somewhere, from going to court. If we were tempted to engage in any such speculation we would immediately have to confront the fact that legal aid is widely available to those who are financially challenged and that the tax does not apply to legal aid services.
>
> The Supreme Court of Canada has established that there have to be proven constitutional facts to support a constitutional argument. A constitutional question cannot be approached in a factual vacuum. See Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086 at 1099. In my opinion, no sufficient basis of constitutional facts has been proven in this case.[6]

[20] In a dissenting opinion in that case, McEachern C.J.B.C. stated that the tax, "by increasing the cost of litigation, impairs or hinders effective access to counsel and therefore to *Charter* rights and remedies"[7] and that "the state cannot burden effective access to counsel with a tax."[8] He concluded that "a tax on the legal bill for services in connection with the enforcement or protection of civil or criminal law constitutional rights is inconsistent with the *Charter*"[9] and therefore that the legislation which imposed the tax was *ultra vires* the province to that extent.

---

6 *Ibid*, at paragraphs 12-15.

7 *Ibid*, at paragraph 84.

8 *Ibid*, at paragraph 90.

9 *Ibid*, at paragraph 105.

[21] Leave to appeal the decision of the B.C. Court of Appeal was denied by the Supreme Court.[10]

[22] In *British Columbia (Attorney General) v. Christie*[11], the Supreme Court dealt with another constitutional challenge to the British Columbia tax on legal services. In that case, the respondent, Mr. Christie, asserted the existence of a general constitutional right to legal services in determining and interpreting legal rights before courts and tribunals. The B.C. Court of Appeal accepted that such a constitutional right existed and held that the legal services tax breached that right and declared the tax to be unconstitutional. On appeal from that decision, the Supreme Court set aside the order of the B.C. Court of Appeal on the basis that there was no general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations. The Court also noted the lack of a sufficient evidentiary record to show that the effect of the tax was unconstitutional:

> This conclusion makes it unnecessary to inquire into the sufficiency of the evidentiary basis on which the plaintiff bases his claim. However, a comment on the adequacy of the record may not be amiss, in view of the magnitude of what is being sought — the striking out of an otherwise constitutional provincial tax. Counsel for Mr. Christie argued before us that the state cannot constitutionally add a cost to the expense of acquiring counsel to obtain access to justice when that cost serves no purpose in furthering justice. This assumes that there is a direct and inevitable causal link between any increase in the cost of legal services and retaining a lawyer and obtaining access to justice. However, as the Attorney General of British Columbia points out, the economics of legal services may be affected by a complex array of factors, suggesting the need for expert economic evidence to establish that the tax will in fact adversely affect access to justice. Without getting into the adequacy of the record in this case, we note that this Court has cautioned against deciding constitutional cases without an adequate evidentiary record: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at pp. 762 and 767-68, *per* Dickson C.J.; *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357, at p. 361; *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086, at p. 1099.[12]

[23] In *R. v. Yung*[13], the accused challenged the constitutionality of both the B.C. provincial tax and the GST on legal services. Mr. Yung and his co-accused were defendants in criminal proceedings before the British Columbia Supreme Court and

---

10 [1998] 8 2 S.C.R. viii.

11 [2007] 1 S.C.R. 873.

12 *Ibid*, at paragraph 28.

13 2010 BCSC 1023.

were represented by Stanley Tessmer. It was argued that the tax on legal services was inconsistent with their right to retain and instruct counsel under section 10(b) of the *Charter*, with their right to a fair trial under section 11(d) and with their right to life, liberty and security of the person under section 7. In dismissing the application for a declaration that the relevant sections of the federal and provincial legislation were of no force and effect, Brooke J. held that the defendants had failed to adduce evidence to show that the taxes prevented them from retaining counsel. The judge relied on the decision of the British Columbia Court of Appeal in *John Carten Personal Law Corporation*, and stated that:

> There is a paucity of evidence before me that a right which would have been exercised but for these taxes could not be exercised because of these taxes.[14]

[24] Brooke J. also held that the decision of the Supreme Court in *Christie* was "entirely dispositive of the issue."[15]

[25] In *Stanley J. Tessmer Law Corporation v. The Queen*[16], referred to in paragraph 15 above, the appellant argued that the GST on the legal fees it charged to its clients infringed those clients' section 10(b) *Charter* rights. McArthur J. of this Court dismissed the appeal, finding that "subsection 10(*b*) does not support a constitutional guarantee of an accused person to have counsel of his choice" and that the appellant "did not introduce any evidence to prove that anyone was prevented from exercising the right to counsel."[17]

Appellant's Position

[26] The appellant submits that a tax on criminal defence legal services provided to a person who has been arrested or detained is inconsistent with that person's right under section 10(b) of the *Charter* to retain or instruct counsel of choice. The appellant says that the tax is an infringement and impediment to the exercise of that right and is therefore unconstitutional with respect to both purpose and effect.

[27] The appellant maintains that it is not required to provide evidence that any of its clients were denied counsel of their choice as a result of the tax imposed on the services of counsel. It says that it is only required to show that the general effect of

---

14 *Ibid*, at paragraph 7.
15 *Ibid*, at paragraph 23.
16 *Supra*, at note 3.
17 *Ibid*, at paragraphs 7 and 11

the tax is unconstitutional under reasonably hypothetical circumstances: *R. v. Mills*[18], *R. v. Goltz*[19], *R. v. Seaboyer; R. v. Gayme*[20], *R. v. Big M Drug Mart Ltd.*[21]. The appellant says therefore that it is irrelevant whether the section 10(b) *Charter* rights of any of *its* clients were infringed.

[28] The appellant also maintains that these Supreme Court decisions (except *Mills* which was decided subsequently) were not brought to the attention of the B.C. Court of Appeal in *John Carten Personal Law Corporation*, and therefore that that case and those which followed it (i.e. *Yung* and *Tessmer*) are not determinative of the issue of the need for an evidentiary record in cases of this kind.

[29] The appellant maintains that, by its nature, a tax on criminal defence legal fees will, at some level, be prohibitive or at the very least act as an impediment to or will interfere with the right to counsel since the additional cost of the tax to an accused will interfere with the financial resources available to mount a defence to the charges brought against him or her: *Stein I* (*United States v. Stein*)[22] .

Analysis

[30] The appellant asserts that the GST imposed on criminal defence services provided to a person who has been arrested or detained is unconstitutional both in purpose and effect. As stated by Dickson J. in *R. v. Big M Drug Mart Ltd.*[23]:

> Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation

[31] The appellant contends that the general purpose of the GST legislation imposing the tax is to raise revenue but that it also has a specific purpose to tax an accused with respect to the provision of legal services in defence of a State-sponsored prosecution. Its only submission regarding the unconstitutionality of the *purpose* of the tax was that it is patently inconsistent to prosecute a person and at the same time tax the legal services that the person requires in order to defend against the prosecution.

---

18 [1999] 3 S.C.R. 668.
19 [1991] 3 S.C.R. 485.
20 [1991] 2 S.C.R. 577.
21 [1985] 1 S.C.R. 295.
22 SI 05 Crim. 0888 LAK United States District Court, Southern District of New York June 26, 2006).
23 *Supra*, note 7, at page 331.

[32] I am unable to ascribe the specific purpose suggested by the appellant to subsection 165(1) of the *ETA*, which I reproduce again here for ease of reference:

> Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 7% on the value of the consideration for the supply.

[33] Subsection 165(1) is a provision of general application and covers an infinite variety of transactions. I do not believe that it can be said that a specific purpose of subsection 165(1) is to tax legal services in defence of a State-sponsored prosecution since Parliament has not singled out those particular services for different treatment under that provision. Therefore I find that the appellant has not shown that subsection 165(1) of the *ETA* has an invalid purpose.

[34] The appellant also maintains that the *effect* of section 165 breaches section 10(b) *Charter* rights.

[35] In light of the decisions in *John Carten Personal Law Corporation*, *Christie* and *Yung*, the first question to be addressed is whether the appellant must provide evidence of the effect of the GST on any of its clients after their arrest or detention. The failure to provide an evidentiary foundation was fatal to the challenge brought in *John Carten Personal Law Corp.* and *Yung*, and was the subject of *obiter* comment in *Christie*.

[36] As noted in *Christie*, the requirement for an evidentiary record in *Charter* cases has been highlighted many times by the Supreme Court. For example, in *MacKay v. Manitoba*[24], Cory J. wrote:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion

---

24 [1989] 2 S.C.R. 357.

> as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.[25]

[37] And in *Danson v. Ontario (Attorney General)*[26], Sopinka J. wrote:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack. For example, in *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at pp. 767-68, this Court declined to hold that the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, infringed the s. 2(*a*) *Charter* rights of Hindus or Moslems in the absence of evidence about the details of their respective religious observance. Similarly, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, 1987 CanLII 72 (SCC), [1987] 2 S.C.R. 59, at p. 83, this Court declined to consider a s. 2(*b*) *Charter* challenge to certain provisions of the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, in the absence of evidence on the nature of the conduct that was claimed to constitute "expression" within the meaning of s. 2(*b*).[27]

[38] It does appear, however, that in certain cases the requirement for evidence concerning the effects of impugned legislation may be dispensed with. In *Danson*, Sopinka J. went on to say:

> This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof).[28]

[39] In two *Charter* cases cited by the appellant, *R. v. Mills*[29] and *R v. Goltz*[30], the Supreme Court explicitly relied on reasonable hypotheticals or imaginable circumstances in place of facts relating to the accused.

---

25 *Ibid*, at pages 361-362.
26 [1990] 2 S.C.R. 1086.
27 *Ibid*, at page 1099.
28 *Ibid*, at page 1099.
29 *Supra*, at note 5.
30 *Supra*, at note 6.

[40] In *Mills*, the Supreme Court had to determine whether it was possible to challenge the constitutionality of impugned legislation in the absence of evidence that the rights of the accused had *in fact* been violated. In that case, the accused challenged the validity of amendments to the *Criminal Code* dealing with the production of records in sexual offence proceedings, on the basis that the amendments violated his rights guaranteed under sections 7 and 11(d) of the *Charter*. The trial judge concluded that they did and that they were not saved by section 1 of the *Charter*.

[41] Before the Supreme Court, the Attorney General for Alberta submitted that the finding of constitutional invalidity "was premature and lacked an adequate factual foundation" because no records had yet been denied to the accused. In answer to this submission, McLachlin and Iacobucci JJ. wrote:

> The mere fact that it is not clear whether the respondent will in fact be denied access to records potentially necessary for full answer and defence does not make the claim premature. The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. Establishing that the legislation is unconstitutional in its general effects would suffice, as s. 52 of the Constitution Act, 1982, declares a law to be of no force or effect to the extent that it is inconsistent with the Constitution.
>
> However, accepting that the respondent may challenge the general constitutionality of the impugned legislation does not answer the question of whether the respondent must first apply for, and be denied, the production of third party records before bringing a constitutional challenge. The question to answer is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised. As Sopinka J. stated for the Court in R. v. DeSousa, [1992] 2 S.C.R. 944, at p. 955, when discussing the general rule that constitutional challenges should be disposed of at the end of a case: "An apparently meritorious Charter challenge of the law under which the accused is charged which is not dependent on facts to be elicited during the trial may come within this exception to the general rule" (emphasis added).
>
> This Court has often stressed the importance of a factual basis in Charter cases. See, for example, MacKay v. Manitoba, [1989] 2 S.C.R. 357, at p. 361; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at pp. 762 and 767-68, per Dickson C.J.; Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board), [1987] 2 S.C.R. 59, at p. 83; Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, at p. 1099; Baron v. Canada, [1993] 1 S.C.R. 416, at p. 452; DeSousa, supra, at p. 954; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 15. These facts have been broken into two categories: legislative and adjudicative. In Danson, supra, at p. 1099, Sopinka J., for the Court, outlined these categories as follows:

> These terms derive from Davis, Administrative Law Treatise (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., Charter Litigation (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how, and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., Re Anti-Inflation Act, [1976] 2 S.C.R. 373, per Laskin C.J., at p. 391; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, per Dickson J. (as he then was), at p. 723; and Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297, per McIntyre J., at p. 318.

The argument that the present appeal is premature rests on the contention that there are few adjudicative facts before the Court. Two points may be made in response.

First, it is not clear what further adjudicative facts would arise if the respondent had gone through the impugned procedure and been refused production. Although, pursuant to s. 278.8(1) of the Criminal Code, the trial judge must provide reasons for refusing to order production of any record, or part of any record, presumably these reasons could not divulge much about the content of the records in question for that would defeat the very purpose of the new provisions.

Second, the record contains sufficient facts to resolve the issues posed by the present appeal. Indeed, no argument was made that the adjudicative facts, sparse as they may be, are insufficient. Moreover, a determination that the legislation at issue in this appeal is unconstitutional in its general effect involves an assessment of the effects of the legislation under reasonable hypothetical circumstances. In R. v. Goltz, [1991] 3 S.C.R. 485, Gonthier J. stated, for the majority, at pp. 515-16:

> It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the Charter (Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, at p. 1099, and MacKay v. Manitoba, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life. [Emphasis added.]

Likewise, given the nature of the statutory framework, where the accused and the Court remain unaware of the contents of the records sought, many of the arguments by necessity focus upon such "imaginable circumstances".[31]

---

31 *Supra*, note 5 at paragraphs 36-41.

[42] In *Mills*, it appears to me that the willingness of the Supreme Court to consider imaginable circumstances as part of the factual foundation for a *Charter* challenge hinged on the fact that it was not possible to bring actual facts to support the allegation that a *Charter* right had been infringed. In *Mills*, the Court considered that the ability to show an actual breach of an accused's rights would have been limited by a lack of knowledge of the contents of the records for which production was refused even if he had made a request. It was on this basis that the Supreme Court, in *Mills* was prepared to consider imaginable circumstance in evaluating the constitutionality of the impugned legislation.

[43] In *Goltz*, the issue was whether a mandatory minimum sentence of seven days in jail for driving while prohibited violated the accused's right under section 12 of the *Charter* to not be subjected to any cruel and unusual treatment or punishment. The current test for determining whether a law prescribes a cruel and unusual punishment is whether a sentence is grossly or excessively disproportionate to the wrongdoing.[32] In *Goltz*, the Supreme Court explained that there are two aspects to an analysis of gross disproportionality. First, an assessment of the penalty from the perspective of the actual offender is carried out. If no finding of gross disproportionality is made on the facts of the particular case, a consideration based on reasonable hypothetical circumstances will be conducted.

[44] The standard of review described by the Court in *Goltz* is particular to section 12 *Charter* challenges. That case does not appear to mandate the use of hypotheticals in general in measuring legislation against other sections of the *Charter*. In explaining its use of hypotheticals, the Court in *Goltz* said:

> It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the Charter (Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, at p. 1099, and MacKay v. Manitoba, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life.[33]
>
> [Emphasis added.]

[45] Apart from the circumstances found in the *Mills* and *Goltz* cases, the Supreme Court has also indicated that an evidentiary foundation establishing a *Charter* breach may not be required at all if the question of constitutionality is a pure question of law.

---

32 *R.v.Smith* [1987] 1 S.C.R. 1045.

33 *Supra*, note 6 at page 515.

This appears from the reasons of Beetz J. in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*:[34]

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter*, and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.[35]
>
> [Emphasis added.]

[46] The example given by Beetz J. in this passage was referred to by Sopinka J. in *Danson* as follows:

> The unconstitutional purpose of Beetz J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out.[36]

[47] In addition to *Mills*, *Goltz* and *Metropolitan Stores Ltd.*, the appellant also relied on the Supreme Court decisions in *Seaboyer/Gayme*[37], *Big M Drug Mart*[38], and *R. v. Ferguson*[39] in support of its proposition that reasonable hypotheticals may be used as the factual foundation in a *Charter* challenge.

[48] The issue in *Seaboyer/Gayme* was whether sections 276 and 277 of the *Criminal Code* (the "rape-shield" provisions) infringed the accused's rights under sections 7 and 11(d) of the *Charter*. Those provisions restricted the right of the defence on a trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on previous occasions. In *Seaboyer/Gayme*, the accused had been prevented at the preliminary enquiry from cross-examining the complainant on her sexual conduct on other occasions. The majority of the Supreme Court determined that section 276 was inconsistent with sections 7 and 11(d) and was not saved by section 1 of the *Charter* because it had the potential to exclude evidence

---

34 [1987] 1 S.C.R. 110.
35 *Supra*, note 34 at page 133.
36 *Supra*, note 27 at page 110.
37 *Supra*, note 20
38 *Supra*, note 21
39 2008 SCC 6

relevant to the defence and whose probative value was not substantially outweighed by its potential prejudicial effect. The Court does not address the question of using reasonable hypotheticals, but obviously took into account the potential of the legislation to cause a particular result, i.e. the exclusion of relevant evidence. However, in my view, this is a further example of considering imaginable circumstances in a situation where there was no evidence available and could be no evidence available of the actual effect on the accused of the denial of the right to cross-examine because he had been prevented from cross-examining the complainant. There was no way of knowing what the complainant's evidence would have been and what the effect of that evidence would have been on the defence.

[49] In *Ferguson*, the issue was whether the four year minimum sentence set out in the *Criminal Code* for the offence of manslaughter with a firearm constituted cruel or unusual punishment and therefore offended section 12 of the *Charter*. In that case, the Supreme Court concluded that it had not been shown either on the facts as they pertained to the accused or on the basis of the reasonable hypotheticals submitted by him that the sentence amounted to cruel or unusual punishment. It is clear though that the Supreme Court considered the reasonable hypotheticals within the context of the section 12 analysis, which has a particular standard of review. McLachlin C.J. writing for the Court said:

> I conclude that there is no basis for concluding that the four-year minimum sentence prescribed by Parliament amounts to cruel and unusual punishment on the facts of this case.
>
> Ordinarily, a s. 12 analysis for a mandatory minimum sentence requires both an analysis of the facts of the accused's case and an analysis of reasonable hypothetical cases: *Goltz*, at pp. 505-6. At his sentencing hearing and in the Court of Appeal, however, Constable Ferguson did not rely on reasonable hypotheticals to contest the constitutionality of s. 236(*a*). He contended simply that s. 236(*a*) was unconstitutional as applied to the facts of his case. The reasonable hypotheticals not having been argued, there was no basis for the sentencing judge or the Court of Appeal to reach a conclusion on whether s. 236(*a*) was unconstitutional on a reasonable hypotheticals analysis. Constable Ferguson offers an alternative argument based on reasonable hypotheticals for the first time in this Court. In my view, Constable Ferguson has not pointed to a hypothetical case where the offender's minimum level of moral culpability for unlawful act manslaughter using a firearm would be less than that in the reasonable hypotheticals considered in *Morrisey*.[40]

---

40 *Supra*, note 34 at paragraphs 29-30.

[50] Finally, in *Big M Drug Mart*, the Supreme Court held that legislation requiring businesses to close on Sunday infringed the guarantee of religious freedom found in section 2(a) of the *Charter*. One of the arguments raised by the respondent Attorney General of Alberta was that the appellant corporation had no standing to raise the question of infringement of religious freedom because a corporation could have no religion. The Supreme Court held that the respondent had standing, saying:

> Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion--if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s. 2(*a*) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(*a*) in this case.
>
> The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(*a*) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(*a*) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.[41]
>
> (Emphasis added.)

[51] The appellant relies on this last statement of the Supreme Court (that "[i]t is the nature of the law, not the status of the accused, that is in issue") to support its argument that it does not have to show evidence of actual effects of charging GST on its services in order to make out a breach of section 10(b).

[52] The appellant in my view is taking that statement out of context. The Court was dealing at that point with the issue of the respondent's standing to bring the *Charter* challenge, not to the question of whether it had shown that either the purpose or effect of the legislation was unconstitutional. The Court dealt with those issues later on in its decision. This Court has already found that the appellant has standing to argue the constitutionality of the GST on the legal services in issue. It is a separate question whether the appellant has proved that the legislation, either in purpose or effect breaches section 10(b).

---

41 *Supra*, note 7 at paragraphs 40-41.

[53] Ultimately, in *Big M Drug Mart*, the Court found that since the *purpose* of the legislation was to compel religious observance, it offended section 2(a) and it was not necessary to consider the *effects* of the legislation. The purpose of the legislation was dealt with as a question of law and therefore one that did not require evidence in support. Dickson J. said:

> A finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country.[42]

[54] From my review of the Supreme Court decisions on point, it appears that a party may only rely on hypotheticals to establish a factual foundation for a *Charter* challenge where actual facts are not available to that party. In such cases, the Court has been willing to consider imaginable circumstances which could easily arise in day-to-day life. The use of hypotheticals in those cases amounts to the Court taking judicial notice of facts or circumstances, which then form the evidentiary foundation for the *Charter* challenge. These hypotheticals are accepted as true because they could commonly arise in day-to-day life or are indisputable on their face.

[55] A party will also be relieved from presenting *any* factual foundation at all in cases where the unconstitutionality of the impugned legislation is apparent on the face of the legislation.

[56] Apart from these limited exceptions, a party challenging legislation will be required to bring evidence of the effects of the legislation. Therefore, I reject the appellant's contention that in <u>any</u> *Charter* challenge the Court may rely on imaginable circumstances to establish the effects of impugned legislation.

[57] Furthermore, since the appellant does not take the position that evidence of the effect of the GST on the ability of its clients who were detained or arrested to afford its services is unavailable, I find that this case does not fall within the exception set out in *Mills* and implicitly recognized in *Seaboyer/Gayme*.

[58] It is also obvious that the section 12 *Charter* standard of review which was applied in *Goltz* and *Ferguson* is not relevant to this case.

[59] Even if I had been satisfied that the appellant was excepted from presenting actual facts relating to the application of the GST to legal fees for criminal defence

---

42 *Supra*, note 7 at paragraph 78.

services provided to the appellant's clients who had been detained or arrested, I would still have found that the appellant had not provided the Court with any reasonably imaginable circumstances or hypotheticals that would demonstrate a breach of section 10(b) rights.

[60] In its written argument, the appellant stated that:

> . . . the degree of infringement will depend upon the set of variables such as the applicable tax rate, the financial status of the accused and the fees, both actual and potential, which in turn will relate to the length of the trial, the mode of trial elected, whether one or more voir dires are held, whether experts are called, the amount of preparation, the extent of legal research, the calling of witnesses, the entering of a pleas and the filing of an appeal. A fee of $30,000 at the current HST rate of 12% will impose upon the accused a tax liability of $3,600. That additional cost will, depending on the financial capabilities of the accused, interfere with the financial resources available to mount a defence to the charges including the cost of legal fees plus taxes.[43]

[61] The hypothetical case described in this example, though, involves fees incurred for legal representation well beyond the point of arrest or detention which triggers section 10(b) *Charter* rights. The right to counsel under section 10(b) is not an ongoing right throughout the preparation and hearing stages. It is limited by the words of the provision to the time surrounding arrest or detention. In *Christie*, the Supreme Court said that the right as expressed in section 10(b) arises in "one specific situation", and in *R. v. Willier*[44], the Supreme Court said:

> … s. 10(*b*) provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy. The purpose of s. 10(*b*) is to provide detainees an opportunity to mitigate this legal disadvantage.[45]

[62] While a right to counsel at trial may arise in certain circumstances under sections 7 or 11(d) of the *Charter*, which guarantee a person a fair trial in accordance with the principles of fundamental justice[46], at the outset of this hearing the appellant abandoned its reliance on section 7 of the *Charter* and focused its arguments solely

---

43 Appellant's Written Argument, at paragraph 22.

44 2010 SCC 37.

45 *Ibid*, at paragraph 28.

46 *R. v. Rowbotham* (1988) 41 C.C.C. (3d) (Ont. C.A.).

on section 10(b). Therefore the example provided by the appellant is not illustrative of a hypothetical breach of section 10(b) rights.

[63] Similarly, the *Stein*[47] case to which the appellant referred is an American case involving interference by government with the resources available to the defendants to mount a defence to the charges brought against them. This went to the fairness of the trial and to the issue of fundamental justice. In the Canadian constitutional context, those are aspects of rights guaranteed by sections 7 and 11(d) of the *Charter* and not by section 10(b).

[64] In response to the appellant's submission that prejudice to a person's section 10(b) rights must be *presumed* in this case, I can only say that I am unable to easily imagine that a person who has been arrested or detained would be prevented or even deterred from retaining and instructing counsel in that situation by the additional GST payable on counsel fees.

[65] Finally, I do not accept the appellant's contention that the constitutionality of the GST on criminal legal defence services is a question of law alone and therefore that it is not required to produce any evidence because it is apparent on its face that the tax will impede access to counsel.

[66] I have already held that the appellant has not shown that the purpose of the tax is specifically directed at those services, and since it is a tax of general application, this case is not analogous to the example used by Beetz J. in *Metropolitan Stores Ltd.* and cited by Sopinka J. in *Danson* of a law imposing a state religion. It is also not analogous to the example provided by counsel at the hearing, of a tax on entry to a church. As in the example of a law imposing a state religion, a tax on church entry would have a patently unconstitutional purpose.

Conclusion

[67] For these reasons and in the absence of evidence that any of the appellant's clients were unable to retain counsel as a result of the GST payable on legal services, I find that the question put to the Court for determination, amended to delete the reference to section 7 of the *Charter*, must be answered as follows:

> Based on the facts set out in the Agreed Statement of Facts filed by the parties, the goods and services tax (GST) imposed by s. 165 of the

---

47 *Supra*, note 9.

> *Excise Tax Act* does not infringe and is not inconsistent with the rights of the Appellant's clients guaranteed by ss. 10(b) of the *Charter of Rights and Freedoms.*

[68] The Respondent is awarded costs of the motion on a party and party basis.

Signed at Ottawa, Canada, this 28th day of January 2013.

"B.Paris"

Paris J.

CITATION:	2013 TCC 27
COURT FILE NO.:	2007-3627(GST)G
STYLE OF CAUSE:	STANLEY J. TESSMER LAW CORPORATION AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 15, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	January 28, 2013

APPEARANCES:

Counsel for the Appellant:	Craig C. Sturrock
Counsel for the Respondent:	David Jacyk Darren McLeod

COUNSEL OF RECORD:

For the Appellant:

Name:	Craig C. Sturrock
Firm:	Thorsteinsson LLP Vancouver, British Columbia

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada