

Docket: 2012-1698(GST)I

BETWEEN:

SIMON FRASER UNIVERSITY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 19, 2013, at Vancouver, British Columbia

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant: Elizabeth Junkin

Counsel for the Respondent: Zachary Froese

AMENDED JUDGMENT

The Appeal from the reassessment made under the *Excise Tax Act* for the period from April 1, 2003 to May 31, 2005, is allowed, **without costs**, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is not liable to collect and remit Goods and Services Tax on the parking fines as described in these Reasons.

This Amended Judgment is issued in substitution of the Judgment dated April 22nd, 2013.

Signed at Ottawa, Canada, this **27th** day of **May** 2013.

"Campbell J. Miller"

C. Miller J.

Citation: 2013 TCC 121
Date: 20130527
Docket: 2012-1698(GST)I

BETWEEN:

SIMON FRASER UNIVERSITY,

Appellant,

and

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Respondent.

AMENDMENT REASONS FOR JUDGMENT

C. Miller J.

[1] This Informal Procedure Goods and Services Tax ("GST") Appeal deals with whether GST is exigible on fines collected by Simon Fraser University for parking infractions in the period of April 2003 to May 2005. The Director of Parking Services at Simon Fraser University, Mr. Agosti, gave thorough, detailed evidence of the parking arrangements at Simon Fraser University.

[2] Mr. Agosti described the role of Parking Services to provide parking to members of the University community in a fair, cost-effective manner. Mr. Guthrie, Director of Financial Services at Simon Fraser University confirmed that parking is certainly not a business or profit centre, but is there to support the mandate of education, research and community, and notes that is just one of several ancillary services intended to be self-sustaining; that is, to cover direct administrative, operating and debt costs.

[3] There are four types of parking spaces at Simon Fraser University:

- a) permit lots, being parking lots with spaces for students and staff to acquire on a monthly, semester or yearly basis; an actual space can be reserved or simply a specific lot can be identified;

- b) visitor lots, being parking lots for those with reason to be at Simon Fraser University on a short-term basis, where tickets are obtained from a ticket vending machine ("TVM") on an hourly basis;
- c) other areas that are non-paid short-term spots such as loading zones; and
- d) student residential parking, which is not under the control of Parking Services and not at issue before me.

[4] During the period in issue there were approximately 5600 spaces in the permit lots and visitor lots. Interestingly, since the period in issue both the supply and demand for parking spots has significantly decreased. It was clear from both Mr. Agosti's and Mr. Guthrie's testimony that the University encouraged minimizing parking facilities by promoting transit. Mr. Guthrie stated that the University does not see parking as a business but is simply purpose driven by the need to support the University mandate.

[5] With improved transit (for example, the University pass available to all students) combined with the University's plans for developing either University related buildings or residential buildings, the number of spots has fallen by at least 1000, and appears to be set to continue to decline.

[6] Permit lots were identified with a sign indicating permits only or with some additional wording "unauthorized vehicles will be impounded at owners/drivers expenses". Mr. Agosti indicated that impounded meant either a wheel lock or boot on the car or towing, though the latter only in the event the driver had three outstanding fines.

[7] Signs for visitor lots had more information, normally located near the pay station:

Visitors Parking Information

Parking Procedure:

1. Park vehicle first
2. Purchase receipt from machine
3. Display receipt face up on front dash at all times while vehicle is parked

Parking Rate: (in effect 24 hours daily)

\$2.75 per hour (or portion thereof)

Daily Maximum:

\$11.75 Monday – Friday

\$6.00 Weekends & Holidays

Evening Rate (1900 – 0800 hours):

\$2.75 flat rate for period (or portion thereof)

FOLLOW INSTRUCTIONS ON MACHINE

PLEASE NOTE

Vehicles not displaying valid receipts are subject to ticketing and impoundment at the owners/drivers expense. Vehicle and contents left at owners risk. Simon Fraser University does not take custody of vehicles but rents space only.

Contact Campus Security Patrol at 778-782-3100 if further assistance is required.

[8] The University hired one or two people to patrol and enforce the parking regulations, and would issue a ticket to be left on the car for any of the following infractions:

- a) no valid permit displayed;
- b) no valid TVM receipt;
- c) expired TVM receipt;
- d) improperly parked within the lot;
- e) contravention of a sign;
- f) handicap space;
- g) prohibited area or space.

[9] The ticket, identified as a Traffic Offence Notice ("TON") states:

It is alleged that on the date shown the owner (or operator) of the vehicle upon which was displayed the licence number plate described below committed the

following infraction contrary to the traffic and parking regulations of Simon Fraser University.

It goes on to say:

You are required to submit payment within 72 hours to the SFU Campus Security Department...in the amount stated above...

The amounts could be \$30, \$50 or \$100; according to Mr. Agosti they were mainly \$30 tickets. On the reverse of the TON was written:

This Traffic Offence Notice is issued under the authority of section 27 of the University Act of British Columbia.

[10] To be clear, it is only the fines, as I indicated normally \$30, with respect to the first three infractions listed above that are at issue (approximately \$8,484) along with the fines for wheel locks (\$2,849).

[11] It was clear from Mr. Agosti's and Mr. Guthrie's testimony that parking fines were not a revenue tool but a compliance tool. Of the approximate 10000 tickets issued annually, 2500 were waived, 3500 were paid and 4000 were not paid. The collection of approximately \$100,000 is countered by the \$200,000 cost of enforcement. As Mr. Guthrie put it, the University wanted compliance; those who parked without paying anything were in effect stealing from the University.

[12] Finally, Mr. Guthrie made it clear that the Government of British Columbia has significant control over the University by appointing the majority of Board Members, funding a third of their revenue and having certain reporting requirements.

[13] Attached as Appendix A to these Reasons is a copy of section 27 of the *University Act* of British Columbia.

Issue

[14] Is Simon Fraser University liable to collect and remit GST on parking fines as described herein, either as consideration for the taxable supply of a parking spot or pursuant to section 182 of the *Excise Tax Act* (the "ETA")? This issue can be further subdivided into the following issues:

- a) Is there a contract for the supply of a parking space?

- b) Is the payment of the fine consideration for that space?
- c) Is the payment of the fine payment for a breach of an agreement for the supply of that space, bringing section 182 of the *ETA* into play?
- d) If there is no contract, is there a taxable supply, and was the payment of the fine consideration for that supply?

[15] The Appellant argues that the fines were pure fines, levied pursuant to statutory authority (the *University Act*) and therefore not subject to GST. The payment did not flow from any contract, as found in the case of *Imperial Parking Ltd. v. R.*¹. There was no agreement to pay the fine as consideration for the parking spot, nor as payment for the breach of any agreement. As the Appellant's counsel put it, it simply does not fit.

[16] The Respondent argues that one must look to the true nature of what the payment was for. A fine is not defined in the *ETA* and is not therefore specifically excluded from the operation of the GST scheme. The Respondent suggests we go back to basics. Section 165 of the *ETA* imposes GST on a taxable supply at the rate of 5% on the value of the consideration for the supply. Taxable supply is defined in section 123 of the *ETA* as a supply made in the course of a commercial activity. "Supply" has a broad meaning: the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition.

[17] Based on the finding of the Federal Court of Appeal in the *Imperial Parking* case, the Respondent goes on to argue there was an agreement once the non-paying driver left the car in the parking lot. The Respondent argues, given the broad definition outlined above, that the driver either agreed to pay the fine amount as consideration for the supply of the parking spot or alternatively, there was an agreement, which the non-paying driver breached and section 182 of the *ETA* deems the fine amount to be consideration. If I find there is no agreement, the Respondent maintains there is still a taxable supply, the supply of the parking spot in the course of a commercial activity, and that the payment of the fine amount is consideration for that supply. This latter position strikes me somewhat circuitous, as how can there be consideration if there is no agreement.

¹ 99 G.T.C. 3047, (sub nom. *Imperial Parking Ltd. v. Canada*) [1998] G.S.T.C. 129 (Tax Court of Canada).

[18] This is a tricky issue, and I thank counsel for the thorough job of arguing it. The dilemma is that a pure fine, a speeding ticket for example, is not subject to GST. And because the University derives its authority to fine from the *University Act*, at first glance it appears to be more in the nature of a pure fine than consideration for the parking spot itself. But I need to explore that further.

[19] I will first address the question of a university's authority to impose a fine. This is extensively canvassed at trial in the British Columbia Supreme Court² and on appeal at the British Columbia Court of Appeal in *Barbour v. The University of British Columbia*.³ At trial, it was found that the imposition of a parking fine was outside the University's authority. The University of British Columbia had tried to argue that it could contract to impose such a penalty, but again the trial Court said no, as the entity whose very existence arises from statute, if imposing a parking fine is *ultra vires*, then attempting to privately contract to do the same is likewise *ultra vires*.

[20] Before the British Columbia Court of Appeal heard the appeal, the British Columbia Government retroactively amended the *University Act* to give universities the power to impose parking fees (see Appendix A). The British Columbia Court of Appeal then ruled that the power to levy parking fines was *intra vires*. Implicitly it is likewise *intra vires* for a university to contract to impose a parking fine.

[21] Both Parties referred me to the Federal Court of Appeal decision of *Imperial Parking Ltd. v. R.*⁴ where *Imperial Parking*, a private enterprise, had the following sign on their unattended lot:

Please Read Carefully...This is Private Property

Imperial Parking Limited is by this sign, offering space for public parking. You accept this offer by parking on this lot. All requirements of notice and acceptance are hereby waived by Imperial Parking Limited. If you park, but do not display a valid ticket or pass, the rate is \$50.00 per day or portion thereof and you car may be subject to being towed, in either case, if you park here, Imperial Parking Limited considers you to have accepted their offer of a parking space. Do not park on this lot

² 2009 BCSC 425, (2009) B.C.J. No. 617 (QL).

³ 2010 BCCA 425, 2010 BCCA 63.

⁴ [2000] G.S.T.C. 52.

if you do not agree to these terms. Imperial Parking Limited does not by the levy of \$50.00 rate exclude its rights to tow any car parked on this lot without a valid ticket or pass on the dash.

[22] The Tax Court of Canada and the Federal Court of Appeal had little difficulty in finding there is an agreement between *Imperial Parking* and the non-paying driver pursuant to which the non-paying driver agreed to pay \$50.00 for the parking spot. It is how the Federal Court of Appeal determined there was an agreement, which is of significance. I rarely repeat such a major portion of a judgment but Justice Robertson's comments address the very concerns I raised with counsel:

13 Properly construed, the agreement contemplated by the appellant's signage is that a motorist will pay a maximum of \$50 per day for use of a parking space and less if the terms of the contract relating to payment of the lower hourly, daily or evening rates are adhered to. The terms of the contract are clear. If you want to pay less for a parking spot, purchase a ticket for the time needed. If you overstay, then you will pay more than the minimum as well as run the risk of having your vehicle towed. In summary, an overstayer remains contractually bound to the appellant until such time as the latter receives payment in accordance with the terms of the contract.

...

16 First, the appellant's argument proceeds on the mistaken belief that the law is slow to recognize foolish bargains. As a matter of law, this is simply not true. Persons who enter into what some might consider a foolish agreement are contractually bound until such time as they are able to convince a court that they should be relieved of their contractual obligations under one of the equitable doctrines such as unconscionability, duress or incapacity. Even then, there is no guarantee that the court will dissolve the contract *ab initio*. In any event, the person who parks in one of the appellant's lots and intentionally does not purchase a ticket cannot invoke equity to come to his or her aid because of the "clean hands" requirement. Moreover, in the circumstances outlined by the appellant, there is no inequality of bargaining power on the part of those who decide to occupy a parking space without paying. While the appellant characterizes the person who parks without purchasing a ticket as "trespasser", the more appropriate label is that of "gambler".

17 The second ground for rejecting the appellant's submission is that it is premised on the belief that no reasonable person would agree to the contractual terms set out in the appellant's signage. The inference being drawn by the appellant is that the terms of the contract are somehow unreasonable. The fact of the matter is that overstaying a parking meter in the City of Ottawa costs \$25 and the possibility of one's vehicle being

towed remains open. In the present case, the reality is that motorists who overstay in one of the appellant's lots pay a minimum of \$25 and a maximum of \$50 and the same holds true for those who abuse the honour system by failing to purchase a ticket at the outset. Those who remain undeterred and decide to gamble cannot complain if issued with a violation notice or if their vehicle is ultimately towed. Having regard to the legitimate business interests of the appellant when operating a totally automated parking lot, and the inherent difficulty in conducting business on the honour system, it is not obvious to me that the terms set out at the entrance to the appellant's lots are either unconscionable or unreasonable. Arguably, they are intended to serve the legitimate business purpose of encouraging drivers to pay at the outset.

- 18 Thirdly, the appellant is effectively arguing that a refusal to pay is evidence of an intention not to enter into an enforceable contract. This argument ignores the distinction between an intention to create legal relations and an intention to honour one's contractual obligations. The former relates to the formation of a contract, while the latter goes to the issue of its performance. A person who agrees to purchase goods and receives them remains contractually bound to pay for them irrespective of whether there was ever an intention to do so. Thus, it is irrelevant to the issue of contract formation whether those receiving goods or services intended to pay for them.
- 19 The final ground for rejecting the appellant's submission is that proof of contractual intention is an objective one and, thus, even if one person believes that he or she is not bound, the law will recognize the formation of a contract unless the other contracting party knew otherwise. Under the objective theory of contract formation, the law seeks to determine whether there has been unequivocal acceptance of an offer. In the case of the automated parking lot, acceptance must be by *conduct*, for that is the only way in which intention can be ascertained objectively in the circumstances of this case. In my view, the unequivocal conduct which constitutes acceptance of the appellant's offer to provide a parking space occurs when the driver leaves the lot after parking his or her vehicle. This interpretation is reinforced by the text of the large sign posed at the entrance to the appellant's lot. That is the point in time in which an owner can be deemed to have accepted the appellant's offer. Any time before that moment, a driver can demonstrate his rejection of the appellant's offer by driving away. Those who purchase a ticket must be deemed to have accepted the appellant's contractual terms upon leaving their parked vehicle in the appellant's lot. As for those who park their vehicles but fail to pay, the act of non-payment is more consistent with the intention to breach a contract than a refusal to enter into one.

[23] Following this analysis, is there a contract between Simon Fraser University and the non-paying driver? It is hard to suggest otherwise. By the driver's conduct in taking the parking space, knowing there is a requirement of a permit or TVM ticket to prove payment, and leaving without having complied, now with a TON indicating that the driver owes the University \$30, the non-paying driver has, in accordance with the Federal Court of Appeal's reasoning, struck a deal with the University.

[24] Certainly the deal struck in the *Imperial Parking* case was to pay a rather large amount for the parking spot. As the Federal Court of Appeal pointed out, the signage reinforced that interpretation, making it clear what the deal was. But what was the deal between Simon Fraser University and the non-paying driver? When the non-paying driver got out of his or her car all he or she knew was that he or she had not paid, and he or she should have; further, there was some risk of impoundment and ticketing, implying a financial charge of some sort. It was immaterial to such a driver whether such a charge arose from Simon Fraser University's statutory authority, or, given that statutory authority, the implicit right to contract to incur such a charge. Was the customer agreeing to a contract to pay \$30 for the parking spot, for the customer certainly knew before he drove out of the parking lot, by receipt of the TON, that he owed \$30? No, unlike *Imperial Parking*, this notice was not clear that he was agreeing to \$30 for a parking spot. Indeed, it was clear the TON was for an infraction, and it was issued under the authority of section 27 of the *University Act*. This is quite a different contractual term than was set out in the *Imperial Parking* sign, where clearly the payment was consideration for the space. The terms of the agreement between Simon Fraser University and the non-paying driver holding a TON is, if you neither have a permit nor pay the posted hourly charge you will be fined, because we, the University, have the statutory authority to fine you. While, in accordance with the Federal Court of Appeal approach in *Imperial Parking* that a contract is created upon the driver parking and getting out of the vehicle, the terms of the contract are not the same. *Imperial Parking* had no authority to fine the non-paying driver, but could only contractually make him responsible for paying more for the parking spot. Simon Fraser University, however, had an additional and significant arrow in its quiver, being the statutory authority to fine. Such a payment is no longer for the parking spot: the non-paying driver gave up any right to pay the normal hourly charges for a parking spot by leaving the vehicle without doing so. The TON does not say you now have to pay more for the parking spot: it says you must pay for an infraction.

[25] This leads to whether the payment is caught by section 182 of the *ETA*, which is worth repeating:

(1) For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant to a person, an amount is paid or forfeited to the registrant otherwise than as consideration for the supply, or a debt or other obligation of the registrant is reduced or extinguished without payment on account of the debt or obligation,

(a) the person is deemed to have paid, at that time, an amount of consideration for the supply equal to the amount determined by the formula

$$(A/B) \times C$$

where

A

is 100%,

B

is

(i) if tax under subsection 165(2) was payable in respect of the supply, the total of 100%, the rate set out in subsection 165(1) and the tax rate for the participating province in which the supply was made, and

(ii) in any other case, the total of 100% and the rate set out in subsection 165(1), and

C

is the amount paid, forfeited or extinguished, or by which the debt or obligation was reduced, as the case may be; and

(b) the registrant is deemed to have collected, and the person is deemed to have paid, at that time, all tax in respect of the supply that is calculated on that consideration, which is deemed to be equal to

(i) where tax under subsection 165(2) was payable in respect of the supply, the total of the tax under that subsection and under subsection 165(1) calculated on that consideration, and

- (ii) in any other case, tax under subsection 165(1) calculated on that consideration.

[26] This provision is premised on there being a contract for a taxable supply, which is being breached. I have found that the contractual terms of the contract between a non-paying driver and Simon Fraser University do not provide for consideration for a parking spot, but an agreement by the non-paying driver to run the risk of having to pay a fine. There is not an intention to breach an agreement to pay for the taxable supply of parking; the agreement is not to pay consideration for the supply of the parking spot: the agreement is basically, if I get caught I pay a fine. I agree that seems a somewhat, dare I say it, "fine" distinction, but it does recognize the fine, in this case, is indeed just that, a fine, pure and simple, and if there is no term in the agreement for the taxable supply to a non-paying driver other than to be subjected to a fine, there is no breach that would invoke section 182 of the *ETA*.

[27] Perhaps it simply comes down to the essence of a fine. The Respondent's counsel pointed out a definition from the Dictionary of Canadian Law that a fine is a pecuniary penalty or other sum of money. I prefer the Canadian Oxford Dictionary definition of a sum of money exacted as a penalty for an offence. Note that this does not state a payment for a breach of contract. Clearly, Simon Fraser University had statutory authority to invoke a fine for a traffic offence. This is what it did – a classic example of a fine. This is reinforced by the philosophy of Simon Fraser University that parking was not a profit centre. The fines were imposed because the non-paying drivers were effectively stealing. Notwithstanding there may have been a contract, I have concluded that in these circumstances GST is not exigible on the fine.

[28] The Appeal is allowed, **without costs**, and the matter is referred back to the Minister of National Revenue for reassessment on the basis that the Appellant is not liable to collect and remit GST on the parking fines as described in these Reasons.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated April 22, 2013.

Signed at Ottawa, Canada, this **27th** day of **May** 2013.

"Campbell J. Miller"

C. Miller J.

APPENDIX A

University Act [RSBC 1996] Chapter 468

Powers of board

27(1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.

(2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:

...

(s) to enter into agreements on behalf of the university;

(t) to regulate, prohibit and impose requirements in relation to the use of real property, buildings, structures and personal property of the university, including in respect of

(i) activities and events,

(ii) vehicle traffic and parking, including bicycles and other conveyances, and

(iii) pedestrian traffic;

(t.1) to regulate, prohibit and impose requirements in relation to noise on or in real property, buildings and structures of the university;

(t.2) for the purposes of paragraphs (t) and (t.1), to provide for the removal, immobilization or impounding, and recovery, of any property associated with a contravention of a rule or other instrument made in the exercise of a power under this section;

(t.3) to set, determine and collect fees for the purposes of paragraphs (t) to (t.2), including in relation to approvals, permits, security, storage and administration, and expenses related to any of these;

...

- (u) to acquire and deal with
 - (i) an invention or any interest in it, or a licence to make, use or sell the product of an invention, and
 - (ii) a patent, copyright, trade mark, trade name or other proprietary right or any interest in it;

...

- (x) to make rules consistent with the powers conferred on the board by this Act;
- (x.1) to impose and collect penalties, including fines, in relation to a contravention of a rule or other instrument made in the exercise of a power under this section;
- (x.2) to provide for the hearing and determination of disputes arising in relation to
 - (i) the contravention of a rule or other instrument made in the exercise of a power under this section, and
 - (ii) the imposition of a penalty under paragraph (x.1);
- (y) to do and perform all other matters and things that may be necessary or advisable for carrying out and advancing, directly or indirectly, the purposes of the university and the performance of any duty by the board or its officers prescribed by this Act.

CITATION: 2013 TCC 121

COURT FILE NO.: 2012-1698(GST)I

STYLE OF CAUSE: SIMON FRASER UNIVERSITY AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 19, 2013

AMENDED REASONS FOR
JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF **AMENDED**
JUDGMENT: **May 27, 2013**

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