

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1164708 B.C. Ltd. v. British Columbia*,
2025 BCCA 76

Date: 20250307
Docket: CA49483

Between:

1164708 B.C. Ltd.

Appellant
(Petitioner)

And

His Majesty the King in Right of the Province of British Columbia

Respondent
(Respondent)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Horsman
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated
September 22, 2023 (*1164708 B.C. Ltd. v. British Columbia*, 2023 BCSC 1863,
Vancouver Docket S229819).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia
March 5, 2025

Place and Date of Judgment:

Vancouver, British Columbia
March 7, 2025

Summary:

The petitioner purchased residential property in Burnaby in 2018, paying property transfer tax at the general rate. The Minister of Finance investigated, and ultimately issued an additional assessment in the amount of \$6,000,000, finding that the petitioner was a “foreign entity” or “taxable trustee” under the Property Transfer Tax Act by virtue of being wholly owned by a parent company whose sole shareholder was a company incorporated in China. The petitioner appealed the assessment to the Supreme Court of British Columbia, arguing that the parent company’s incorporation in China did not make the petitioner a “foreign entity” because the parent company’s shareholders were permanent residents of Canada. The appeal was dismissed, and the petitioner takes a further appeal to this Court. Held: Appeal dismissed. The language of the section supports the Minister’s assessment, as does the context. The purpose of the statute (cooling the housing market by making residential property in British Columbia less attractive to foreign buyers) is not inconsistent with an interpretation that includes foreign corporations owned by citizens or permanent residents of Canada as “foreign entities”.

[1] **GROBERMAN J.A.:** In 2018, the petitioner purchased a 38-unit apartment building in Burnaby. The purchase price was \$30,000,000, which was the fair market value of the property. The general property transfer tax under s. 2 of the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [“Act”] was \$1,418,000.

[2] Section 2.02 of the *Act* establishes an “Additional Property Transfer Tax” (“the ATT”), sometimes colloquially referred to as the “foreign homebuyers’ tax”. It applies to transfers of residential property in certain areas of the Province in cases where the transferee is a “foreign entity” as defined in the *Act*. The ATT is substantial: s. 2.02(4)(b) of the *Act* and s. 17.02 of the *Property Transfer Tax Regulation* set the rate at 20%.

[3] When it registered the transfer, the petitioner paid the general property transfer tax. It did not pay the ATT, and it appears that it was of the view that it was not required to do so. By letter dated October 7, 2020, representatives of the Ministry of Finance advised the petitioner that they had investigated the transfer, and reached the tentative conclusion that the petitioner owed an additional \$6,000,000 for the ATT. On December 3, 2020, the Ministry issued a Notice of Assessment in respect of the ATT. Its position was that the petitioner was a “foreign entity” under

the *Act* by virtue of the fact that it is controlled by a corporation that is neither incorporated in Canada nor listed on a Canadian stock exchange.

[4] The petitioner appealed the assessment to the minister under s. 19(1) of the *Act*. On September 22, 2022, the Deputy Minister of Finance rendered a decision affirming the assessment. The petitioner appealed that decision to the Supreme Court of British Columbia under s. 21 of the *Act*. The Supreme Court judge dismissed the appeal, and the petitioner has taken a further appeal to this Court.

The Ownership and Control Structure

[5] Title to the Burnaby property was formally transferred to the petitioner, which holds the property in trust for another numbered company, 1162509 B.C. Ltd. (the “Beneficial Owner”). Both the petitioner and the Beneficial Owner are corporations incorporated in British Columbia. At the time of the transfer, all shares in those two corporations were owned by a third corporation, Global Dingye Capital Ltd. (“Global”), also a corporation incorporated in British Columbia. The sole shareholder in Global was Nanjing Dingye Investment Real Estate Group Co. Ltd. (“Nanjing”), a corporation incorporated under the laws of the People’s Republic of China. The majority shareholder of Nanjing was Mailin Chen, and the minority shareholder was Yongjin Yong. Both Mr. Chen and Ms. Yong had permanent resident status in Canada.

[6] The sole question on this appeal is whether, under the statutory regime, Nanjing’s status as a foreign corporation serves to make the petitioner a “foreign entity” or “taxable trustee”. If the petitioner is a foreign entity or taxable trustee, or both, the assessment of the ATT must be upheld. Only if the petitioner is neither a foreign entity or taxable trustee can it succeed in this appeal.

The Statutory Provisions and *de facto* Control

[7] There are several definitions in s. 2.01 of the *Act* that must be considered. I begin with the definition of “foreign entity”, which includes a “foreign corporation”. “Foreign corporation” is defined as:

- (a) a corporation that is not incorporated in Canada
- (b) unless the shares of the corporation are listed on a Canadian stock exchange, a corporation that is incorporated in Canada and controlled by one of more of the following:

...

- (ii) a corporation that is not incorporated in Canada

[8] Nanjing is clearly a foreign corporation under definition “(a)”. Neither the petitioner nor the Beneficial Owner are listed on a Canadian stock exchange, so they are “foreign corporations” under definition “(b)” if (and only if) they can be said to be “controlled” by Nanjing.

[9] The word “controlled” is defined as follows:

“controlled”, in relation to the control of a corporation, means controlled, directly or indirectly in any manner whatever, within the meaning of section 256 of the *Income Tax Act* (Canada).

[10] On the face of it, complete ownership of all shares in a corporation (at least in the absence of some very special restrictions on the corporation in its constating documents) would seem to come within this definition.

[11] Section 256 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), provides a comprehensive description of various ways in which a corporation will be found to control another corporation. Several of its provisions appear to confirm that where a corporation holds all of the shares in another corporation, the first corporation “controls” the second one. For example, s. 256(1.2) provides:

256(1.2) For the purposes of this subsection and subsections 256(1), 256(1.1) and 256(1.3) to 256(5),

...

- (c) a corporation shall be deemed to be controlled by another corporation, a person or a group of persons at any time where:
 - (i) shares of the capital stock of the corporation having a fair market value of more than 50% of the fair market value of all the issued and outstanding shares of the capital stock of the corporation, or
 - (ii) common shares of the capital stock of the corporation having a fair market value of more than 50% of the fair market

value of all the issued and outstanding common shares of the capital stock of the corporation
are owned at that time by the other corporation, the person or the group of persons, as the case may be....

[12] The petitioner takes the position that sections such as s. 256(1.2) are irrelevant to determining the meaning of the phrase “controlled, directly or indirectly in any manner whatever”, and that in defining that phrase we are required to look only to sections that use that precise formulation. In my view, this cannot be the case. Section 256(1.2) specifically says that it applies to s. 256(1), but s. 256(1) only uses the word “control” in the context of the phrase “controlled, directly or indirectly in any manner whatever”. To give meaning to s. 256(1.2), therefore, we must take “control” to be something that is included in the (perhaps broader category) of “controlled, directly or indirectly in any manner whatever”. That same conclusion, it seems to me, can be drawn from the textual meaning of the words.

[13] Section 256(1.2)(b)(ii) is also relevant to this case:

(b) for greater certainty,

...

(ii) a corporation may be controlled by a person or a particular group of persons notwithstanding that the corporation is also controlled by another person or group of persons.

[14] Despite these provisions of the statute, the petitioner contends that “controlled, directly or indirectly in any manner whatever” should be interpreted more restrictively, and to depend on the concept of “*de facto*” control. The concept of “control in fact” is described in s. 256(5.1) of the *Income Tax Act*:

256 (5.1) For the purposes of this Act, where the expression “controlled, directly or indirectly in any manner whatever,” is used, a corporation shall be considered to be so controlled by another corporation, person or group of persons (in this subsection referred to as the “controller”) at any time where, at that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation ...

[15] The petitioner treats this section as if the words “and not otherwise” were added at the end of this excerpt. There is, however, no textual or contextual reason to add those words.

[16] On its face, s. 256(5.1) is designed to *expand* the concept of control to include situations where a person, while not having the legal right to control a corporation, is able to exercise control through the exertion of moral, economic or contractual influence. The history of the section is also consistent with that interpretation. The explanatory notes that accompanied the amendments enacting s. 256(5.1) are consistent with the idea that the section was designed to expand, not restrict, the concept of control:

Under subsection 256(1), the essential test which determines association relies on control. The new rules extend the use of the concept of control to control *directly or indirectly in any manner whatever*. Under the existing rules, control of a corporation generally exists by reason of the ability to elect a majority of the directors of the corporation. Under the new rules, in addition to being able to exercise control in such manner, it is intended that corporations will be associated when control can be exercised in any manner whatever, including circumstances where control in fact exists by reason of a person having any direct or indirect influence, as provided for under new subsection 256(5.1). Such manner of control is sometimes referred to as *de facto* or actual control ...

...

New subsection 256(5.1) expands the concept of control for certain provisions of the Act to include what is often referred to as *de facto* control. Under the existing rules, control of a corporation generally exists by reason of the ability to elect a majority of the directors of the corporation—*de jure* control.

[Italic emphasis in original; underline emphasis added.]

[17] Even within s. 256(5.1), it is difficult to understand how *de jure* control of a corporation would not imply *de facto* control (keeping in mind that the fact that one person or group of person has control does not preclude other persons from also having control). Section 256(5.1) provides that a person can have control of a corporation even if they do not use their influence, as long as their influence, *if exercised*, would result in control in fact of the corporation.

[18] The petitioner has directed us to a considerable volume of case law outlining the scope of the concept of *de facto* control of a corporation, including *Avotus Corp. v. The Queen*, 2006 TCC 505, *Lyrtech RD Inc. v. The Queen*, 2014 FCA 267, *McGillivray Restaurant Ltd. v. The Queen*, 2016 FCA 99 and *Mimetix Pharmaceuticals Inc. v. Canada*, 2001 CanLII 787 (TCC), 2001 D.T.C. 1026, appeal dismissed 2003 FCA 106. None of these cases support the proposition that a test of *de facto* control of a corporation has supplanted the test of *de jure* control in determining whether a person or corporation has “control directly or indirectly in any manner whatever”. Rather, all the cases indicate that the *de facto* control test supplements the *de jure* control test.

Alleged Errors in Applying Statutory Interpretation Principles

[19] At every stage of this proceeding, the petitioner has had a statutory right of appeal. Given the nature of that procedure, and the fact that the issue in this case is a pure question of law, the standard of review is correctness. Accordingly, this Court is entitled to consider the interpretation of the legislation without deferring to the analyses of the Ministry of Finance and of the chambers judge. The result is that, while we are able to adopt persuasive reasoning from the decisions below, we are also free to consider the interpretation of the statute with fresh eyes.

[20] In my view, the chambers judge’s reasons were cogent and persuasive. The petitioner points to individual passages in which the chambers judge suggested that the context and purpose of legislation play a less important role in statutory interpretation of tax legislation than does the text itself. I do not read the decision, as a whole, as suggesting that the judge relied on the statutory language to the exclusion of context and purpose.

[21] Nonetheless, on this appeal, the petitioner emphasizes that statutory interpretation requires a court to consider, in addition to the language of a provision, the statutory and social context, and the purpose of the legislation.

[22] It seems to me that both context and statutory purpose support, rather than detract, from the interpretation of the legislation applied by the Ministry and by the chambers judge.

[23] I have already discussed statutory context and indicated why the petitioner's contention that the phrase "control directly or indirectly in any manner whatever" must be interpreted exclusively by reference to s. 256(5.1) of the statute cannot be correct.

[24] Turning to social context and purpose of the legislation, it is clear that the high-level purpose of the legislation is to cool off the residential housing markets in areas of the province where they are considered to be overheated. The legislation attempts to do that by making it significantly more expensive for foreign investors to purchase such housing stock.

[25] The petitioner suggests that where foreign corporations are owned or controlled by persons who live in Canada, the concerns addressed by the legislation do not apply. As the respondent points out, that is by no means clear. Where foreign corporations are involved in the chain of ownership, difficulties in obtaining foreign-based information can occur. Often, it will be difficult to ascertain where the foreign actor's funds come from.

[26] The petitioner postulates that:

[T]he legislation was intended to discourage 'foreign nationals' from increasing housing prices by buying B.C. real estate. The legislation was not intended, through levying Additional PTT, to discourage the purchase of B.C. real estate by Canadian citizens, permanent residents of Canada, and Canadian-controlled corporations.

[27] I am not convinced that the petitioner is entirely correct in this assertion. The express purpose of the legislation is to reduce pressure on the local housing market by discouraging foreign investment. It is not at all clear that investment by foreign corporations, even if controlled by Canadian citizens or permanent residents, falls outside of this purpose, particularly where it is difficult or impossible to obtain

information on the corporations' operations. I see nothing in the statutory purpose that precludes applying the ATT to such corporations.

[28] Even, however, if it could be said that the mechanisms chosen in the legislation do not fit perfectly with a postulated statutory objective, it will not necessarily negate a straightforward interpretation of the statute. Statutes have many purposes, at many levels of specificity and abstraction (see Mark Mancini "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 Alta. L. Rev. 920). Compromises may be necessary in order to make a legislative scheme workable and efficient, even where the mechanisms chosen do not perfectly accommodate the statute's higher-level purposes.

[29] In my view, the interpretation reached by the Ministry and by the chambers judge are the best fit for the language of the statutory provisions, and for the statutory, historical and social context. Nothing in the petitioner's arguments convinces me that their interpretations are inimical to the purpose of the legislation.

Conclusion

[30] Nanjing is a foreign corporation as that phrase is used in the *Act*. Because it is the sole shareholder in Global, it directly controls that company, and indirectly controls the petitioner and the Beneficial Owner. That makes both of those corporations "foreign entities" for the purposes of the *Act*, despite the fact that they may also be controlled by permanent residents of Canada.

[31] The definition of taxable trustee in the *Act* is as follows:

"taxable trustee", in relation to a taxable transaction, means a trustee of a trust in respect of which

(a) any trustee is a foreign entity, or

(b) no trustee is a foreign entity but, immediately after the registration of the taxable transaction, a beneficiary of the trust who is a foreign entity holds a beneficial interest in the residential property to which that taxable transaction relates.

[32] Because the petitioner was a foreign entity, it met the test under paragraph “(a)” of the taxable trustee definition. It would also appear that if it had not met that test, then it would have met the test under paragraph “(b)”.

[33] The Minister and the chambers judge were correct in holding that the petitioner was liable to the ATT both as transferee who is a foreign entity and as a taxable trustee. I would, therefore, dismiss the appeal.

[34] **HORSMAN J.A.:** I agree.

[35] **WINTERINGHAM J.A.:** I agree.

[36] **GROBERMAN J.A.:** The appeal is dismissed.

“The Honourable Mr. Justice Groberman”