Citation:	Vision Avant-Garde Inc. v. Superintendent of Financial Institutions 2000 BCSC 423	Date:	20000308
		Docket:	A992493
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

VISION AVANT-GARDE INC.

PETITIONER

AND:

SUPERINTENDENT OF FINANCIAL INSTITUTIONS

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SIGURDSON

Counsel for the Petitioner:	Timothy J. Delaney and Stacey Boothman, articled student
Counsel for the Respondent:	Harvey Groberman, Q.C.
Date and Place of Hearing:	February 4, 2000 Vancouver, BC

INTRODUCTION

[1] Should the court grant a declaration when there is a legal question concerning a product that a party intends to market in the future? That very issue arises in this case.

[2] The petitioner seeks to introduce a product into British Columbia that would be sold by automobile dealers to purchasers of new automobiles. It is called a “No Depreciation Replacement Program”. Under the No Depreciation Replacement Program, if a purchaser’s vehicle is rendered a total loss or stolen during the term of the program, the purchaser can return to the same dealership, assign the insurance proceeds to the dealer and receive a new car at no extra charge. The petitioner submits that this program would not constitute as “insurance” under the relevant legislation.

[3] If the product is considered to be “insurance”, it can only be sold by licensed insurance agents and is otherwise subject to the regulatory review of the Superintendent of Financial Institutions (the “Superintendent”). Although the petitioner has not yet introduced this program into the marketplace, the Superintendent provided the petitioner with a preliminary opinion that the program was insurance and, as a result may only be sold by licensed insurance salespeople, which automobile salespeople generally are not.

[4] Consequently, the petitioner seeks a declaration that the No Depreciation Replacement Program is not “insurance” nor “insurance business” within the meaning of those terms in the ***Financial Institutions Act***, R.S.B.C. 1996, c. 141 (the “***Act***”).

PRELIMINARY OBJECTION

[5] Before the question of whether this product is “insurance” can be considered, I must decide a preliminary objection made by the respondent.

[6] The respondent submits that the court should decline to grant declaratory relief on the ground that there is no lis or live dispute between the parties. Further, the Superintendent argues that the court should decline to grant a declaration when the petition is presented in a factual vacuum or where some facts are unknown. Moreover, he argues that Rule 10 of the *Rules of Court*, the rule under which the declaration is sought, should not be used when there is an existing administrative regime, which possesses expertise and jurisdiction to determine such an issue.

[7] On the other hand, the petitioner claims that there is a live dispute between the parties or enough of a lis in the circumstances, given the preliminary opinion of the Superintendent, that the court should not decline to grant declaratory relief. The petitioner submits that the Superintendent has clearly stated his position. Rather than having the petitioner wait to be charged with a breach of the ***Act*** and/or fined, the court, if it determines that the product is not "insurance" under the ***Act***, should grant the declaration sought.

DISCUSSION

[8] I have concluded that the respondent's preliminary objection should be upheld.

[9] Although the court has a wide discretion when granting declaratory relief, it will not grant a declaration unless there is a true lis between the parties. In ***Solosky v. Canada*** (1981), 105 D.L.R. (3d) 745, Dickson J. said at 753:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> The principles which guide the Court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of ***Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.***, [1921] 2 A.C. 438, in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 488):
>
> > The question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

[10] Applications for declarations are frequently dismissed where there is not a true lis between the parties: ***Re Delta Corp.,*** [1992] B.C.J. No. 2983 (Q.L.) (B.C.S.C.)(Catliff J.); ***Langley (Township) v. Personal Alternative Funeral Services Ltd.*** (1994), 25 M.P.L.R. (2d) 157 (B.C.S.C.) (Huddart J.); ***Hu Enterprises Ltd. v. The Corporation of the City of White Rock*** (11 May 1995), Vancouver Registry, A950783 (B.C.S.C.) (Williamson J.).

[11] The petitioner, however, maintains that there is a real dispute in this case and thus, the court should exercise its discretion to hear the application for declaratory relief. Further, the petitioner submits that the court should consider the issue in light of the serious potential penalties that could be imposed. The petitioner points to ***Dyson v. Attorney General***, [1911] 1 K.B. 410 (C.A.) as support for the proposition that a declaration can be obtained by a member of the public aggrieved without first putting himself in the invidious position of being sued for a penalty.

[12] However, I think the authorities show that the question here is really academic and presently there is no actual lis between the parties. In such hypothetical circumstances, the court should not entertain the granting of a declaration. The petitioner does not yet sell the product in the marketplace. Moreover, although expressing the preliminary view that the product is "insurance", the Superintendent has not and perhaps even could not take steps to prevent or penalize the petitioner before the product is even marketed.

[13] In ***Re Delta Corp.*** *supra,* the petitioner, the council of the municipality, sought a declaration that the ***Municipal Act,*** R.S.B.C. 1979, c. 290, authorized an annual expenditure of $250,000 for drainage and irrigation improvements. Catliff J. dismissed the application on the grounds that the application was premature, namely that a resolution, proposing such expenditures, had not yet been passed. At para. 5, he noted that:

> It is almost trite law that the court is not here to indulge in the giving of legal opinions so that applicants may govern themselves in the future. The court is here to decide the existence of what is called a lis between the parties, that is, a live issue that exists between litigants.

[14] In ***Langley (Township)***, *supra*, the petitioner municipality commenced a proceeding to confirm its interpretation of a zoning by-law that a funeral home containing a crematorium was a

permitted use in a certain zone. Huddart J., as she then was, stated at 158-9 that:

> This court gives opinions only when there is a lis between the parties...Except in unusual circumstances, this court generally refuses to exercise that discretionary authority to give what amounts to a legal opinion to a municipality, even if the potential consequences for the municipal council may be serious.

[15] In that case, Huddart J. declined to follow a decision of this court, ***Re Slinger Realty Ltd.*** (19 May 1978), Vancouver Registry, A780753, where, over the objection of the Superintendent, the court gave an opinion that the petitioner could not use an abbreviated name in advertising. Huddart J. distinguished ***Re Slinger Realty*** because, in that case, the court did not appear to have the benefit of full argument on the scope of the court's capacity to make declaratory orders and there was no element of fact at issue. I also decline to follow ***Re Slinger Realty*** for the same reasons.

[16] In this particular case, there is no actual lis between the parties. Rather, the petitioner is asking this court to act like a law firm and provide advice about possible future business activities. The cases to which the petitioner refers, I think, are distinguishable.

[17] In ***Dyson***, *supra,* there was a real lis between the parties. The Commissioners of Inland Revenue under the ***Finance (1909-1910) Act*** were authorized to make demands on landowners for information. They had made a demand for an annual statement as to the value of the land, a demand that was not authorized under the statute. Even though the court stated that citizens did not have to wait for enforcement proceedings to be brought against them for non-compliance, it seems to me that, as the demand was made, there was an existing or live dispute, not a hypothetical one.

[18] The petitioner relies on a number of authorities as support for its position that the court has jurisdiction to grant declaratory relief, even if that was the sole relief sought: ***Longley v. Minister of National Revenue*** (1992), 66 B.C.L.R. (2^{nd}) 238 (B.C.S.C.); ***Whitechapel Estates Ltd. v. British Columbia (Ministry of Transportation and Highways)*** (1998), 57 B.C.L.R. (3^{rd}) 130 (B.C.S.C.); ***Surrey (City) v. Holden*** (1995), 27 M.P.L.R. (2^{nd}) 99 (B.C.S.C.).

[19] In ***Longley***, *supra,* the issue was whether the plaintiff's plea that certain legislation was of no force and effect should be dismissed under the summary dismissal rule. In that matter, the issue concerned the validity of the legislation and whether the plaintiff had the standing to challenge it. The court applied ***Canada (Minister of Justice) v. Borowski*** (1981), 130 D.L.R. (3^{rd}) 588 where Martland J. noted at 606 that:

> ...to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Here the petitioner does not attack the validity of the legislation but rather seeks an interpretation of the legislation in what are still hypothetical circumstances. It is not a question of standing but whether there is a live or real issue between the parties.

[20] Further, unlike the case at hand, in ***Whitechapel Estates Ltd. v. British Columbia (Ministry of Transportation and Highways)***, *supra,* as well as in ***Surrey (City) v. Holden***, *supra,* there was an actual lis inter partes. Thus, in the former, the Court exercised its discretion and granted declaratory relief, while in the latter, the Court dismissed a preliminary motion to refuse to hear an application for declaratory relief.

[21] I think that in these circumstances the application for a declaration should not be entertained because even if I found that there was a real lis between the parties, there are uncertainties as to the factual circumstances underlying the matter in dispute: ***Three Stars Investments v. Narod Developments Ltd.*** (1981), 33 B.C.L.R. 165 (B.C.S.C.) (Skipp L.J.S.C. as he then was). Although the proposed No Depreciation Replacement Program that the petitioner plans to implement is in evidence, some facts remain uncertain. For instance, will the new car purchaser have to pay for the program or will the dealership absorb the cost and what effect, if any, does that have on the question of whether it is "insurance"? When the factual matrix in which a legal issue arises is unclear that is a further reason why the court might appropriately decline to entertain an application for declaratory relief.

[22] The petitioner suggests that it will be burdensome to introduce the No depreciation Replacement Program to the market and run the risk of substantial fines. I think the petitioner's concern is unrealistic. If the petitioner believes it to be too great a risk to run in the circumstances, it perhaps could sell the product on the test case basis. If the Superintendent took action, the issue could then be resolved.

[23] The respondent argued that even if I concluded that there was a real lis and a certain factual underpinning, I should nevertheless decline to consider granting a declaration because the

dispute should be resolved under the administrative scheme in the ***Act***. Given that I find that there is presently no lis between the parties, I think it is inappropriate to decide how the actual dispute, if it arises, ought to be determined. As a result, I decline to comment or that further argument.

[24] For the above reasons, the preliminary objection is upheld.

[25] The petition is dismissed with costs.

"J.S. Sigurdson, J."
The Honourable Mr. Justice J.S. Sigurdson