

CITATION: Ontario (Travel Industry Council of Ontario) v. Gray, 2010 ONCA 518

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COURT OF APPEAL FOR ONTARIO

Weiler, Goudge and Simmons JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario (Travel Industry Council of Ontario)

Respondent

and

David Thomas Gray o/a All Sport Accommodations

Appellant

Ted A. Kalknins, for the appellant

Alexandra Lev-Farrell, for the respondent

Heard: April 9, 2010

On appeal from the decision of the Ontario Court of Justice appeal court dated July 8, 2009 by Justice Gregory A. Pockele, allowing the appeal from the acquittal entered on October 21, 2008 by Justice of the Peace Patricia Hodgins of the Ontario Court of Justice.

Goudge J.A.:

INTRODUCTION

[1] The appellant, David Gray, is a sole proprietor who carries on business as All Sports Accommodations (ASA). ASA arranges hotel accommodations for sports teams. In doing so, it is paid commissions by the hotels where the teams stay.

[2] On February 19, 2007, the appellant was charged with acting as a travel agent without first being registered as a travel agent, contrary to s. 4(1)(a) of the *Travel Industry Act 2002*, S.O. 2002, c. 30, Sched. D (“the Act”). He was found not guilty by a Justice of the Peace. On appeal to the Ontario Court of Justice, this was reversed and a conviction entered. Because the case raises the interpretation of the term “travel agent” in s. 1(1) of the Act, MacPherson J.A. granted leave to appeal to this court.

[3] For the reasons that follow, I conclude that, properly interpreted, “travel agent” encompasses the appellant’s activities. I would therefore uphold the conviction and dismiss the appeal.

THE FACTS

[4] The facts are not in dispute. At trial, the appellant explained how his business works and acknowledged that he is not registered as a travel agent under the Act.

[5] ASA has contracts with various hotels, pursuant to which it is authorized to offer rooms to sports teams at the lowest group rate. In return, ASA receives a ten percent commission from the hotel on all booked rooms that are occupied.

[6] Typically, a sports team contacts ASA with information about the municipality it is to visit, the number of hotel rooms it needs, the dates of its visit, and the approximate price range it seeks. ASA then supplies the team with a list of appropriate hotels together with their cancellation policies. Once the team makes a selection, ASA sends the team an agreement form setting out the details of the reservations to be made. When the agreement is accepted by the team, it supplies ASA with a list of credit card numbers from the team members in order to hold the reservation. ASA then forwards that list to the hotel. ASA subsequently supplies each team member with information about the hotel, including rules of the premises and a map to the hotel location. On occupancy, the team members pay the hotel for their rooms with the credit cards used to secure the reservation or by other means. Ultimately, ASA receives a fee from the hotel equal to ten percent of the value of the rooms occupied. ASA receives no remuneration from the team or its members.

[7] At trial, representatives of hotels that ASA has contracts with testified that they deal with registered travel agents in the same way as they deal with ASA, and pay those travel agents the same commission on the same basis.

THE JUDGMENTS BELOW

[8] Section 1(1) of the Act defines “travel agent” as follows:

“travel agent” means a person who sells, to consumers, travel services provided by another person.

[9] Section 4(1)(a) of the Act makes it an offence for a person to act as a travel agent who is not registered as such under the Act.

[10] At first instance, the Justice of the Peace concluded that because ASA receives no consideration from the teams or their members, it has no contract with them and therefore is not engaged in selling travel services to them. He therefore acquitted the appellant.

[11] On appeal, the Ontario Court of Justice also focused on whether the appellant contracted as principal to sell travel services to the sports teams and their members. The court found that the commission flowing from the hotel to ASA constitutes sufficient consideration to support the conclusion that ASA sells travel services to consumers. Accordingly, the appeal was allowed and the appellant was convicted.

ANALYSIS

[12] I would dismiss the appeal. While I reach the same conclusion as the Ontario Court of Justice, I do so by a somewhat different route.

[13] The fundamental issue is the interpretation of “travel agent” in the Act. To review, it is defined in s. 1(1) this way:

“travel agent” means a person who sells, to consumers, travel services provided by another person.

[14] Also relevant is the definition of “travel services” in s. 1(1):

“travel services” means transportation, sleeping accommodation or other services for the use of a traveller, tourist or sightseer.

[15] There is no doubt that, in the context of this case, the “consumers” are the sports teams and their members. Nor is there any doubt that the hotels are providing “travel services” to them. The question is whether, as a matter of statutory interpretation, the appellant can be said to be selling those services.

[16] Both courts approached this question implicitly assuming that the statutory definition of “travel agent” is limited to circumstances in which the person sells as a principal. In other words, only one who contracts on his own behalf to sell travel services to consumers meets the definition.

[17] With respect, I think that is too narrow an approach. In my view, the definition also encompasses one who sells travel services to consumers not as principal, but as an agent for the provider of those services. I say this for several reasons.

[18] First, the clear purpose of the Act is to regulate the travel industry in the interest of the travelling public. In that sense, it is consumer protection legislation. Pursuant to companion legislation - *The Safety and Consumer Statutes Administration Act 1996*, S.O. 1996, c. 19 - the Travel Industry Council of Ontario has been designated by the Crown to carry out the regulation of the travel industry.

[19] The scope of the regulatory regime is significant. The Act prohibits anyone from acting as a travel agent unless the person meets the prescribed requirements and is properly registered under the Act. It sets up a mechanism for receiving and addressing complaints about a travel agent. It regulates the advertising done by those in the travel

industry, and prohibits the making of false or deceptive statements relating to the provision of travel services. Regulations pursuant to the Act specify the information that the travelling public must receive before paying for travel services.

[20] The Act also establishes and requires participation in the Travel Industry Compensation Fund, which is designed to protect the travelling public against travel agents defaulting on their obligations. Although it is true that a travel agent who does not receive payments from the travelling public presents no risk to this fund, the fund is but one part of a broader set of regulations.

[21] In my opinion, to confine such a comprehensive regulatory regime to the sale of travel services by a person acting as a principal and to exclude the sale of such services by a person acting on behalf of the service provider is to interpret the statutory language too narrowly to achieve its intended purpose. Put another way, since the evidence was clear that many travel agents engage in both kinds of sales, a narrow reading of the statutory definition would provide, at best, only a partial regulation of the travel industry. This would fall short of the legislative intention. It would exclude sales of travel services to consumers by persons acting on behalf of the service provider, in the course of which those persons would perform the very activities that the Act seeks to regulate.

[22] Second, there is the statutory language itself. The Act defines a travel agent as a person who sells “travel services provided by another person”. This language is consistent with the travel agent selling those services on behalf of the provider of those

services. In addition the very description of the seller as a “travel agent” suggests a legislative intention to encompass within the definition a person who sells travel services as agent for the service provider.

[23] Finally, the task of statutory interpretation can be assisted by examining O.Reg 26/05, which was made pursuant to the Act. The Regulation complements the legislative regime by, for example, detailing the kind of information that must be supplied to a customer before payment for travel services can be accepted. The Act and the Regulation form an integrated scheme for the regulation of the travel industry in the interests of the travelling public. In such circumstances, the Regulation can assist in ascertaining the legislature’s intention with regard to a particular matter: see *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, at para. 35. In this case, that matter is what is meant by “selling travel services”.

[24] Section 1 of the Regulation defines “sales in Ontario” of travel services by a registered travel agent as “the amount paid or to be paid through the travel agent for all travel services sold in Ontario.” This clearly includes both sales where the travel agent sells as a principal and receives payment from the consumer in return, and sales where the travel agent effects the sale on behalf of a service provider, where payment is made later to the service provider. The broader interpretation of the statutory definition of “travel agent” ensures conformity between the legislation and the regulation that together form this integrated regulatory scheme.

[25] I therefore conclude that the proper interpretation of "travel agent" in the Act includes a person who sells travel services to consumers as agent for the provider of those services.

[26] Turning to the facts of this case, there is no doubt that the appellant meets that definition. When he, as ASA, contracts with a hotel, he is given authority by the hotel to offer its rooms at the lowest group rate. When he does so, the consumer accepts by supplying him with credit card information which he passes on to the hotel, and the sale of the hotel rooms at the specified price for the specified dates is made. The contract includes a cancellation clause under which, if the consumer so chooses, the sale is cancelled. Otherwise, the sale is closed when the rooms are occupied and paid for.

[27] By engaging in this activity, the appellant sells services to consumers as agent for the provider of those services. As such, he was required to be registered as a travel agent under the Act. Since he was not, he was properly convicted.

[28] The appeal must be dismissed.

RELEASED: JUL 22 2010

