

Date: 20100115

Docket: A-406-08

Citation: 2010 FCA 14

**CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

**1398874 ONTARIO INC. ON BEHALF OF THE
PENSION PLAN FOR PRESIDENTS OF 1398874 ONTARIO INC.**

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on January 13, 2010.

Judgment delivered at Ottawa, Ontario, on January 15, 2010.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

**LÉTOURNEAU J.A.
NOËL J.A.**

Date: 20100115

Docket: A-406-08

Citation: 2010 FCA 14

**CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

**1398874 ONTARIO INC. ON BEHALF OF THE
PENSION PLAN FOR PRESIDENTS OF 1398874 ONTARIO INC.**

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is yet another case where our Court is asked to rescind a Notice of Intent to Revoke an Individual Pension Plan (IPP or Plan) previously registered under section 147.1(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the *Act*) (See *1346687 Ontario Inc. v. Canada (Minister of National Revenue - M.N.R.)*, 2007 FCA 262, leave to appeal to S.C.C. refused, 32270 (September 28, 2007); *Jordan Financial Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, 2007 FCA 263, leave to appeal to S.C.C. refused, 32271 (September 28, 2007); *Loba Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, 2004 FCA 342, leave to appeal to S.C.C. refused, 30664 (December

10, 2004) [*Loba*]. This notice was issued by the Registered Plans Directorate of the Canadian Revenue Agency (RPD or CRA), on behalf of the Minister of National Revenue (the Minister).

[2] Mr. Richard Adderson (or the member) worked for many years as a police officer for the City of Toronto, entitling him to a pension from the Ontario Municipal Employees Retirement System (OMERS). Upon retirement, Mr. Adderson intended to have the commuted value of his pension transferred into an IPP.

[3] To achieve this goal, he saw first to the incorporation of 1398874 Ontario Inc. (Ontario Inc.), a corporate entity of which he is the President and sole employee. Then, Ontario Inc. passed a resolution establishing an IPP (The Pension Plan for Presidents of 1398874 Ontario Inc.), Mr. Adderson being the sole member of this Plan.

[4] Upon initial review of the documentation regarding the IPP, the Plan was registered with an effective date of February 1, 2000. The RPD later accepted an amendment to the IPP to credit Mr. Adderson with past service benefits. This allowed for the transfer of \$622,657.02 from Mr. Adderson's previous OMERS pension to the IPP on April 30, 2001.

[5] Between the initial review, which led to the registration (letter of July 11, 2000, appeal book, volume 1 at page 240), and the Notice of Intent to Revoke of April 15, 2008 (letter of April 15, 2008, appeal book, volume 1 at page 27), there were many communications between the CRA and Mr. Adderson, as President of the appellant, or the actuary from ActuBen Consulting Inc. who

was instrumental in the formation of the IPP and its registration. The gist of these communications, and at times warnings from the RPD, was the concern of the CRA that the IPP did not satisfy the requirements of the *Act* and relevant *Income Tax Regulations*, C.R.C., c. 945 (the *Regulations*). The most pressing issue was whether the IPP's primary purpose was "to provide periodic payments to individuals after retirement and until death in respect of their employment service", as prescribed by paragraph 8502 (a) of the *Regulations*.

[6] The appellant, as well as Mr. Adderson, had represented that the company had been created to provide internet web design services and that its President would be in charge of obtaining contracts, supervising and doing some of the hands-on work, therefore establishing a *bona fide* employer-employee relationship. Moreover, it was advanced that the member would receive earnings of a level comparable to those gained with the previous employer (see letter of Mr. Adderson of June 13, 2000, appeal book, volume 1 at page 242).

[7] Following an audit and a thorough review of the Plan, the CRA concluded that the IPP had been registered "merely to effect a transfer of the member's total entitlement from the previous employer's pension plan and furthermore, to allow the member access to the surplus funds" (Audit Summary, appeal book, volume 2 at page 391). The impugned notice of revocation and the present appeal ensued.

[8] The appellant submits that the Minister misinterpreted the expression "primary purpose" leading to an incorrect application of the *Regulations*. For the appellant, the term "purpose" involves

a planning element, as well as a subjective element, both clearly defined in Mr. Adderson's statements, but ignored by the CRA (appellant's memorandum of fact and law at paragraphs 48, 54-56). The appellant also argues that the Minister misread the *Regulations* when considering the periodic payments of surplus amounts to Mr. Adderson (*ibidem* at paragraph 63).

[9] I disagree. Whether or not an IPP meets the "primary purpose" requirement has been determined to be a question of fact (*Loba, supra*, at paragraph 2). The factual findings, which lead to the notice, should therefore be reviewed on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[10] The record before the Minister related a story quite different from the one told by the appellant and Mr. Adderson. It showed that the appellant was incorporated on January 28, 2000, soon followed by the establishment of the Plan by resolution of the Board of Directors. Neither the appellant nor Mr. Adderson ever made contributions to the Plan. In 2001, the Plan's activities were limited to accepting the transfer from OMERS and issuing, the very next day, a surplus payment of \$70,000 to the member.

[11] Starting January 2002, the member received a combination of monthly pension and surplus payments of \$2,941. By December 31, 2002, the member had received total surplus payments of \$105,300. Meanwhile, Mr. Adderson had only worked for Ontario Inc. for a period of three months in 2001 earning revenues of \$15,000, with respect to which Mr. Adderson was unable to provide documentation showing that the amount was earned as a salary (see Audit Summary, appeal book,

volume 2 at page 384). As a matter of fact, this income was first reported as business income (*Ibidem* at page 382). Then, for the rest of the year, Mr. Adderson was on leave of absence. In 2002, a T-4 showed income of \$7,068 received from Ontario Inc. which was reported after the commencement of the audit (*Ibidem* at page 382). Other reported revenues at the relevant time were received from other sources unrelated to the appellant.

[12] There was also evidence provided by Ontario Inc., by way of affidavit sworn by Mr. Adderson, as Director and Officer of the corporation, which could not reasonably support the appellant's representations to RPD. Paragraphs 11 to 14 of this affidavit are worth reproducing:

11. This Company was initially set up to do web design, labels, graphics and distribution for small businesses. A considerable amount of intensive work was done for their first client, a small company that dealt with specialty coffees, teas, soaps and branded clothing accessories. Much of this work was done at a very low margin to provide a showcase of the Company's work to attract future business. At the completion, the client company took the finished products of the Company and refused the payments due on completion and refused to pay the on going fees agreed upon. Our time and costs were lost.
12. The Company sought additional work in the field but given the economic downturn at the time, and without an initial success to build a reputation, it did not manage to attract any new contracts of substance.
13. We sought contracts for the Company beyond the scope of the Company – including counselling and private detective work – but did not manage to secure any reasonable contracts. The initial shareholder was losing interest. The company paid the initial 3 months of salary out of capital and had then run out of funds with little sight of a source of new funds.
14. The stress aggravated my back problems to the point I was unable to work standing or sitting. Due to two previous unsuccessful back surgeries, a growing dependence on pain medications, and poor prospects for income from the business in 2002 I decided to retire and to commence collecting my pension.

(letter of May 6, 2008, appeal book, volume 1, page 11 at paragraph 14)

[13] Ontario Inc.'s business plan, if a plan at all, is devoid of any seriousness. The "small company", for which work would have been done, is unidentified; there is no evidence showing that Ontario Inc. sought additional contracts from anyone; there is no evidence, either, of the total disability of the member.

[14] I see no merits in this appeal as I conclude that this whole scheme constituted, as stated by the respondent, mere window dressing designed to create the appearance that the real purpose was something other than to shelter the member's commuted value of his OMERS pension (respondent's memorandum of fact and law at paragraph 53).

[15] The burden was on the appellant to provide credible and verifiable evidence which, in the Minister's view, it failed to do. It was not unreasonable for the Minister, bearing in mind all the other circumstances surrounding and characterizing the transfer of funds, to give little or no weight to that self-serving evidence.

[16] Therefore, I can detect no error of law in the decision of the Minister to issue to the appellant a Notice of Intent to Revoke the registration of its pension plan; nor any other error justifying the intervention of this Court.

[17] On the basis of the record, as a whole, it was reasonable for the Minister to conclude that the conditions in paragraph 8502 (a) of the *Regulations* were not met as of the date of intended revocation.

[18] For these reasons, I would dismiss this appeal with costs.

"Johanne Trudel"

J.A.

"I agree

Gilles Létourneau J.A."

"I agree

Marc Noël J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-406-08

STYLE OF CAUSE: 1398874 Ontario Inc. on behalf of
the Pension Plan for Presidents of
1398874 Ontario Inc. v.
Minister of National Revenue

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 13, 2010

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: LETOURNEAU J.A.
NOËL J.A.

DATED: January 15, 2010

APPEARANCES:

Eric Fournie FOR THE APPELLANT

Pascal Tétrault FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fournie Mickleborough LLP FOR THE APPELLANT
Toronto, Ontario

John H. Sims Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada