Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20100602

Docket: A-624-08

Citation: 2010 FCA 146

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

JAMES BROAD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on May 31, 2010.

Judgment delivered at Vancouver, British Columbia, on June 2, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

Date: 20100602

Docket: A-624-08

Citation: 2010 FCA 146

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

JAMES BROAD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of Justice Campbell of the Tax Court of Canada, rendered orally on November 26, 2008. The Tax Court ruled that the appellant was not able to deduct support payments that he paid in 2005 to the appellant's former common law spouse, Ms. Randall.

[2] In order for the appellant to be able to deduct the support payments under paragraph 60(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), among other things, they must be "receivable…under a written agreement": subsection 56.1(4) of the Act, made applicable to

paragraph 60(*b*) by subsection 60.1(4). The Tax Court found that the payments made in 2005 were not receivable under a written agreement.

[3] The facts giving rise to this issue can be simply stated. The appellant cohabited with Ms. Randall from April 1, 1989 until July 1, 1990. During that time, they had a son. On July 1, 1990, the appellant and Ms. Randall separated. They later signed a written separation agreement, dated as of July 1, 1990. That separation agreement contained the following non-termination clause:

> If James and Laurie hereafter by mutual consent cohabit as man and wife, this Agreement and all the covenants herein contained shall remain in force unless and until James and Laurie mutually agree in writing to terminate or amend this agreement.

[4] In August 1993, the appellant and Ms. Randall attempted a reconciliation and resumed cohabitation. The appellant did not make support payments during that time. In February 1995, the reconciliation ended and the parties separated permanently. After that time, except for a very brief period during which the parties were engaged in a custody and access dispute, the appellant made, and Ms. Randall accepted, support payments in the exact amounts specified in the earlier written separation agreement.

[5] Did the brief period of reconciliation from 1993 to 1995 and the appellant's failure to make support payments during that period terminate the earlier written support agreement, such that any later payments made were not "receivable…under a written agreement"? The Tax Court answered that question in the affirmative. As a result, according to the Tax Court, the support payments paid

by the appellant in 2005 were not "receivable…under a written agreement," and so the appellant could not deduct the payments under subsection 56.1(4) of the *Income Tax Act*.

[6] In support of its decision that the separation agreement had terminated, the Tax Court relied upon the following proposition:

> The general common law rule is that a reconciliation, such as occurred in these facts, will terminate a prior separation agreement between the parties.

[7] This was an error of law. As the Minister conceded in oral argument before us, that "general common law rule" is not as absolute as that – case law qualifies it significantly.

[8] The precise nature of the qualification appears to be uncertain. In British Columbia, where a separation agreement contains a non-termination clause, such as the agreement here, the parties' intentions and subsequent conduct are examined in order to ascertain whether the separation agreement remains in force and to what extent: *Aitken v. Aitken*, 1999 BCCA 734. However, in Ontario, the Court of Appeal has gone further and has held that "the separation agreement is void upon reconciliation, subject to a specific clause in the agreement that would override the common law": *Sydor v. Sydor* (2003), 178 O.A.C. 155 (C.A.).

[9] In developing a proper approach to this issue, it must be remembered that the question before us is whether, for the purposes of subsection 56.1(4) of the *Income Tax Act*, the appellant was making support payments receivable under a written agreement. In determining this, we must also bear in mind the purpose of this subsection and the mischief that Parliament was attempting to

address: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54 at paragraphs 10 and 13. The purpose of this subsection is to avoid the problem of "loose and indefinite structure[s]" between parties, "open[ing] the door to colourable and fraudulent arrangements and schemes for tax avoidance": *Hodson v. The Queen*, [1988] 1 C.T.C. 2 at page 5 (F.C.A.).

[10] In addition, in another one of its statutes, Parliament has stated repeatedly a very strong public policy in favour of encouraging reconciliation: *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), subparagraph 8(3)(b)(ii), subsection 9(1), section 10 and subsection 11(3). An attempt at reconciliation – consistent with Parliament's public policy – should not work detrimental consequences. Insofar as it is possible to be consistent with the text and scheme of the *Income Tax Act*, the wording of subsection 56.1(4) of the *Income Tax Act* should be interpreted in a manner consistent with that public policy.

[11] These considerations suggest that a taxpayer in the appellant's circumstances need not show a "clear and specific intent that [the] agreement was a continuing and binding agreement," which was the burden imposed on the appellant by the Tax Court in this case. That is too high a burden. Instead, the taxpayer need only show that the parties continued to act under the earlier written agreement, without material variation, such that the agreement still describes their relationship. When that is shown, the support payments received by the payee are not receivable under a colourable, fraudulent or gratuitous arrangement. Rather, they are receivable under an earlier written agreement that still describes the parties' relationship.

[12] In this case, there are many facts that support a finding that the parties continued to act under the earlier written separation agreement, without material variation, such that the agreement still describes their relationship. Three of the more significant facts are as follows:

(a) In 2000, the appellant brought proceedings in the British Columbia Supreme Court against Ms. Randall. In his statement of claim, he pleaded that the July 1, 1990 written separation agreement still existed. Ms. Randall did not admit or deny that allegation. This means that the Ms. Randall is deemed to have admitted the allegation: see *Supreme Court Rules*, B.C. Reg. 221/90, rule 19(19). In effect, in 2000, well after the end of the reconciliation, the parties have formally agreed in court proceedings that the earlier written separation agreement still existed.

(b) After the failed reconciliation, the appellant continued to make, and Ms. Randall continued to receive, support payments in the exact amounts specified in the earlier written separation agreement, except for a very brief period of protest by the appellant during a custody and access dispute.

(c) There was an exchange of correspondence between counsel for the parties that confirmed the support arrangements; although it is not necessary to decide the matter, by themselves, this exchange of correspondence might itself qualify as a written agreement under subsection 56.1(4) of the *Income Tax Act*: *Foley v. Canada*,

[2000] 4 C.T.C. 2016 (T.C.C.); *Burgess v. The Queen* (1991), 91 D.T.C. 5076 (T.C.C.).

[13] From this evidence, I conclude that the appellant's support payments made in 2005 were receivable by Ms. Randall under an earlier written agreement that still describes the parties' relationship. Therefore, the appellant was entitled to deduct these support payments from his income in the 2005 taxation year.

[14] I am aware that this result creates an inconsistency. The Tax Court has ruled that the support payments in Ms. Randall's hands were not included in her income. But I have found that the support payments paid by the appellant are deductible. This inconsistency is unfortunate. This would not have happened had the Minister appealed the decision in Ms. Randall's case. Instead, the Minister chose to reassess the appellant. Perhaps the Minister had some reason for proceeding in the manner that he did, but the Minister's manner of proceeding has caused an unnecessary loss of tax revenue.

[15] Therefore, I would allow the appeal with costs and set aside the decision of the Tax Court. Rendering the judgment that should have been rendered by that court, I would allow with costs the appellant's appeal to the Tax Court and refer the matter back to the Minister for a new assessment

on the basis that the appellant's support payments for the 2005 taxation year were deductible from his income.

"David Stratas"

J.A.

"I agree
Gilles Létourneau J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-624-08
APPEAL FROM THE JUDGMENT RENDERED BY THE HONOURABLE MADAM JUSTICE CAMPBELL OF THE TAX COURT OF CANADA, DATED NOVEMBER 24, 2008, DOCKET NO. 2008-161(IT)I	
STYLE OF CAUSE:	James Broad v. The Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 31, 2010
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. PELLETIER J.A.
DATED:	June 2, 2010

APPEARANCES:

Richard E. Rhodes	FOR THE APPELLANT
Christa Akey Ron D.F. Wilhelm	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard E. Rhodes Barrister and Solicitor White Rock, BC	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT