

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140924

Docket: A-334-13

Citation: 2014 FCA 210

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

BETWEEN:

WINSTON BLACKMORE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on September 22, 2014.

Judgment delivered at Vancouver, British Columbia, on September 24, 2014.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**PELLETIER J.A.
STRATAS J.A.**

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The issue in this appeal is whether section 143 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), applies to the community known as Bountiful, led by the appellant Mr. Winston Blackmore. Section 143 is entitled “Communal Organizations”. It applies to a “congregation”, defined in subsection 143(4) as follows:

143. (4) For the purposes of this section,

...

“congregation” means a community, society or body of individuals, whether or not incorporated,

(a) the members of which live and work together,

(b) that adheres to the practices and beliefs of, and operates according to the principles of, the religious organization of which it is a constituent part,

(c) that does not permit any of its members to own any property in their own right, and

(d) that requires its members to devote their working lives to the activities of the congregation.

143. (4) Les définitions qui suivent s’appliquent au présent article.

[...]

« congrégation »
Communauté, association ou assemblée de particuliers, constituée ou non en société, qui répond aux conditions suivantes :

a) ses membres vivent et travaillent ensemble;

b) elle adhère aux pratiques et croyances de l’organisme religieux dont elle fait partie et agit en conformité avec les principes de cet organisme;

c) elle ne permet pas à ses membres d’être propriétaires de biens de leur propre chef;

d) elle exige de ses membres qu’ils consacrent leur vie professionnelle aux activités de la congrégation.

[2] Subsection 143(4) also includes a definition of “religious organization”, which reads as follows:

143. (4) For the purposes of this section,

...

“religious organization” means an organization, other

143. (4) Les définitions qui suivent s’appliquent au présent article.

[...]

« organisme religieux »
Organisme, autre qu’un

than a registered charity, of which a congregation is a constituent part, that adheres to beliefs, evidenced by the religious and philosophical tenets of the organization, that include a belief in the existence of a supreme being.

organisme de bienfaisance enregistré, dont une congrégation est une partie constituante, qui adhère à des croyances qui comprennent la croyance en un être suprême et qui se manifestent dans les principes religieux et philosophique de l'organisme.

[3] Section 143 is a relieving provision. It is an exception to the general principle that tax is imposed separately on the income of each taxpayer, whether an individual, corporation or trust. Broadly speaking, section 143 abrogates that principle by deeming the income earning property of a congregation, or a congregation-owned corporation, to be the property of an *inter vivos* trust. The deemed trust is then taxed on any income derived from the property. The applicable rate of tax is the highest marginal rate applicable to individuals. In determining the income of the deemed trust, no deductions are permitted for salaries, wages or other benefits paid to community members. However, if a special election is made, the income may be attributed to the members of the congregation. Such an election generally would result in a lower overall tax burden for the community, assuming the members are subject to marginal tax rates that are lower than the maximum.

[4] An advantage that may result from the operation of section 143 is that it eliminates the risk that a member of the congregation will be taxed on a benefit received or derived from a congregation-owned corporation in circumstances where the corporation would be entitled to no tax relief. This is illustrated most clearly by considering the effect of subsection 15(1) of the *Income Tax Act* (taxable shareholder benefits). Generally, if a corporation confers or is deemed to confer on a shareholder a benefit to which subsection 15(1) applies, the amount of the benefit

is taxed in the hands of the shareholder but there is no corresponding tax relief for the corporation, potentially resulting in a form of economic double taxation. If a congregation to which section 143 applies owns a corporation that carries on a business, the property of the corporation is deemed to be property of the deemed *inter vivos* trust and subsection 15(1) cannot apply.

[5] The question of the application of section 143 to the Bountiful community arose from a tax audit. After the audit, the Minister of National Revenue concluded that Mr. Blackmore and certain members of the Bountiful community underreported the income they derived from certain corporations controlled by Mr. Blackmore and others. Notices of reassessment reflecting the Minister's determination of the underreported income were issued, including shareholder benefits to which subsection 15(1) was applied. Objections to those reassessments were made, and appeals were filed in the Tax Court of Canada. Mr. Blackmore's appeal proceeded first as a test case on the issue of the application of section 143.

[6] Justice Campbell heard the appeal. After a lengthy hearing, and based on extensive oral testimony (including factual evidence and the evidence of experts), a voluminous documentary record, and a legal analysis that included consideration of the language, context and legislative history of section 143, Justice Campbell concluded that section 143 does not apply to the Bountiful community because it is not a "congregation" within the definition quoted above. That conclusion must stand unless it is based on an error of law or a palpable and overriding error of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[7] I summarize as follows the key conclusions in Justice Campbell's analysis (2013 TCC 264):

- a) To correctly interpret the word "congregation" as defined for the purpose of section 143, it is necessary to consider not only the words used, but also the statutory context and the purpose of section 143, informed by its legislative history.
- b) The definition of "congregation" in subsection 143(4) is exhaustive because the operative word is "means" rather than "includes". The four conditions stated in paragraphs (a) through (d) of the definition are conjunctive, because the paragraphs are joined by "and" rather than "or". Therefore, a community meets the definition of "congregation" for the purposes of section 143 only if it meets each of the four statutory conditions.
- c) Whether a particular statutory condition is met is a question of mixed fact and law. The Bountiful community meets none of the four statutory conditions for the following reasons:
 - (i) Paragraph (a) of the definition – "the members of which live and work together". This condition requires that the members of the community actually live and work in the same geographic location most of the time.

The evidence is that while many members of the Bountiful community live and work in the community's principal location in British Columbia, some of them do not. In fact, the members' residences and workplaces include locations in British Columbia, Alberta and in one instance the United States. Some members work for employers located outside the Bountiful community and unconnected with it. Such outside employment is permitted and encouraged.

- (ii) Paragraph (b) of the definition – “that adheres to the practices and beliefs of and operates according to the principles of, the religious organization of which it is a constituent part”. This condition requires that the community be a constituent part of an organization that meets the statutory definition of “religious organization” in subsection 143(4). That necessarily excludes a stand-alone or independent community that is not part of a larger religious group. It also excludes a single community that has broken away from a religious organization of which it was once a constituent part.

Based on the preponderance of the evidence, including the expert evidence, the Bountiful community is a group of independent Mormon fundamentalists and not a constituent part of any religious organization. The Bountiful community adheres to its own particular understanding of the Mormon faith and does not accept the authority of any larger Mormon group or organization.

The argument of Mr. Blackmore that the community is a constituent part of a religious organization known as Mormonism, or alternatively the Church of Jesus Christ of Latter-day Saints (the “LDS”), or alternatively the Fundamentalist Church of Jesus Christ of Latter-day Saints (the “FLDS”) is rejected for the following reasons:

- 1) “Mormonism” is a religious tradition, not a religious organization.
- 2) The LDS is a religious organization but the Bountiful community is not a constituent part of the LDS because it does not adhere to the principles of the LDS (in particular the principle that polygamy is prohibited).
- 3) The FLDS is not a religious organization, but a loose association of divergent groups whose leaders are not within the line of priesthood recognized by the LDS. Although Mr. Blackmore considers the Bountiful community to be a fundamentalist Mormon group, the Bountiful community operates independently of the FLDS, and it has never become or agreed to become a constituent part of any organization that shares the practices, beliefs and principles that are common to those claiming to follow the FLDS.

- iii) Paragraph (c) of the definition – “that does not permit any of its members to own any property in their own right”. This condition is met only by a community that does not permit its members to own their own property, whether the prohibition against private ownership is found in articles of incorporation or in the religious doctrine or practices of the community.

The Bountiful community does not in any way prohibit its members from owning their own property. On the contrary, the evidence is that members of the Bountiful community are permitted to own property and to exercise their property rights, and that they do so. Members of the Bountiful community may accept directives from Mr. Blackmore as to the disposition of some of their property, and members are expected to tithe (donate 10% of their income to the community). However, that is not inconsistent with the private ownership of property by members. Indeed, the practice of tithing assumes that members own their own property. A community does not need to ask or require its members to tithe if the members do not own their own property, or if all property is owned communally.

- iv) Paragraph (d) of the definition – “that requires its members to devote their working lives to the activities of the congregation”. This condition is met only by a community that explicitly requires its members to commit their working lives to the community on a regular, consistent and customary basis.

The members of the Bountiful community are generally expected to contribute work to the community and they do so, but there is no evidence that the community explicitly or formally requires them to do so.

[8] It is common ground that if the Bountiful community fails to meet even one of the four conditions stated in the statutory definition of “congregation”, it cannot meet that definition. Therefore, it is necessary to focus on only one of the four conditions.

[9] In my view, the analysis and conclusion of Justice Campbell with respect to paragraph (c) of the definition – “that does not permit any of its member to own any property in their own right” – is particularly strong. I conclude that Justice Campbell interpreted paragraph (c) of the definition correctly, and that she made no palpable and overriding factual error in applying that provision to the evidence that was before her. It follows this appeal cannot succeed.

[10] Mr. Blackmore made a number of arguments challenging Justice Campbell’s general approach to the issues of statutory interpretation raised before her. I make the following comments on those arguments.

[11] Mr. Blackmore argues that Justice Campbell’s interpretation fails to give effect to the purpose of section 143, which in Mr. Blackmore’s view is to provide tax relief for a community that, for religious reasons, has adopted the kind of shared or communal property regime that exists in the Bountiful community which, according to Mr. Blackmore, espouses communal property as an ideal although the ideal is not fully practiced. I do not accept this argument. I see

no basis for concluding that the purpose of section 143 is as general or as generous as Mr. Blackmore contends, given the relatively specific and narrow language chosen by Parliament. In my view, paragraph (c) of the definition of “congregation” cannot reasonably bear the broader interpretation for which Mr. Blackmore contends.

[12] That conclusion also disposes of an alternative argument asserted by Mr. Blackmore for the first time in this Court. He argues that the statutory definitions are so ambiguous as to engage the principle that statutory provisions must be interpreted consistently with the values of the *Canadian Charter of Rights and Freedom* (specifically, freedom of religion and equality). The requisite ambiguity exists only if the provision in issue can reasonably bear more than one interpretation (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 20, [2002] 2 S.C.R. 559, at paragraphs 28 and 29). In my view, that cannot be said of paragraph (c) of the definition of “congregation”. (Mr. Blackmore did not challenge the constitutionality of section 143 in this Court or in the Tax Court.)

[13] Mr. Blackmore argued that Justice Campbell erred in adopting an interpretation of section 143 that fits only traditional Hutterite communities. I see no merit to this argument. As I read the reasons of Justice Campbell, she expressly and properly rejected the argument of the Crown that the traditional Hutterite communities should be considered the “gold standard” for the application of section 143. She correctly noted that section 143 was enacted in response to the decision of the Federal Court in *Wipf v. Canada*, [1973] F.C. 1382 (affirmed by this Court, [1975] F.C. 162, and the Supreme Court of Canada, (1976) 7 N.R. 549). In her discussion of paragraph (c) of the definition of “congregation”, she compared certain characteristics of the

Bountiful community to the characteristics of traditional Hutterite communities as described in those cases. However, she did not say or imply that only a traditional Hutterite community could meet that statutory condition.

[14] For these reasons, I would dismiss the appeal with costs.

“K. Sharlow”

J.A.

“I agree
J.D. Denis Pelletier J.A.”

“I agree
David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-334-13

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE CAMPBELL OF THE TAX COURT OF CANADA, DATED AUGUST 21, 2013, DOCKET NO. 2008-101(IT)G.)

STYLE OF CAUSE: WINSTON BLACKMORE v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 22, 2014

REASONS FOR JUDGMENT BY: SHARLOW J.A.

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

DATED September 24, 2014

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