

BETWEEN:

KEVIN KURNIK

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on common evidence on July 5, 2019 at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

|                             |                       |
|-----------------------------|-----------------------|
| For the Appellant:          | The Appellant himself |
| Counsel for the Respondent: | Sébastien Budd        |

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**AMENDED JUDGMENT**

WHEREAS the Court has issued its Reasons for Judgment on this date.

NOW THEREFORE the appeal from reassessment made under the *Income Tax Act* in respect of the 2015 taxation year is allowed with costs awarded to the Appellant in accordance with the Tariff.

**The matter is referred back to the Minister of National Revenue for reconsideration and reassessment.**

**The amended Judgment is issued in substitution for the Judgment dated October 3, 2019. The Reasons for Judgment have not been amended.**

Signed at **Ottawa**, Ontario, this 4<sup>th</sup> day of October, 2019.

“R.S. Boccock”

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Boccock, J.

Citation: 2019TCC206  
Date: 20191004  
Dockets: 2018-2239(IT)I

BETWEEN:

KEVIN KURNIK,

Appellant,

and

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### **REASONS FOR JUDGMENT**

Bocock, J.

#### I. Introduction and Facts

[1] This appeal concerns the deductibility of legal fees from income purportedly incurred to collect or retain employment income and benefits.

[2] Kevin Kurnik, the Appellant, had a long history with one Martin McCarthy. Mr. McCarthy and Mr. Kurnik were previously close business associates. Mr. McCarthy was the primary shareholder of a well-known Canada-wide school uniform supplier. Mr. Kurnik was the chief financial officer. Like many Canadian businesses, the allure of a lucrative acquisition by a venture capital fund presented itself. To retain Mr. Kurnik during the transaction and transition, Mr. McCarthy offered him a \$1.5 million closing bonus once the sale was completed. Closing occurred in 2009. By 2010, the agreement was disavowed by Mr. McCarthy. In 2011, Mr. Kurnik sued the new company for the bonus.

[3] The new company, bearing the less than euphonious name RJM56 Investments Inc. (“RJM56”), resisted the lawsuit. In addition to suing Mr. Kurnik, it also sued his family trust. It did so in a manner to maximize strategic advantage. It did not simply issue a counterclaim against Mr. Kurnik and a third party claim against the trustees and beneficiaries. Instead, it commenced an entirely new action against Mr. Kurnik personally, and against him in his capacity as a trustee of his family trust. The family trust had been a shareholder along with the Martin McCarthy family trust in a previous related business venture in British Columbia.

[4] The long reach of litigation was also directed towards the entire Kurnik family through the family trust. Spouse, siblings and children of Mr. Kurnik, all were named in their legal capacity as trustees and in their entitled capacity as beneficiaries. This included Mr. Kurnik's daughter, who, as a minor, when dragged into the litigation required her own litigation guardian. The amended statement of claim, instituting this distinct proceeding by RJM56, was introduced into evidence by the Respondent at the hearing.

[5] Trust combined with employment litigation is messy, arcane and expensive. Mr. Kurnik was a trustee and, as such, could be held to account on such basis for the damages and diminution suffered by trust as a result of the distinct lawsuit. Therefore, the family trust required separate counsel and looked to Mr. Kurnik directly for indemnification for any and all losses suffered by virtue of the litigation.

[6] This litigation quagmire ultimately ended for Mr. Kurnik with a full release of all claims against all his related parties and a cheque paid to him for the full \$1.5 million initially sought. However, there was a big price: \$364,442.00 in legal fees. Of that, the legal fees of trust counsel in defending the RJM56 claim were \$55,552. Mr. Kurnik contends that he paid those fees to trust counsel in order to procure the payment of his bonus, not otherwise possible without the cessation of all litigation. This included the co-defendant status of the trust, its other trustees and beneficiaries. The evidence in the form of a letter written by the family trust's separate counsel supports the contention that conditions of settlement required dismissal of the action, consent of the Children's Lawyer and a full indemnity by Mr. Kurnik for legal costs. In short, full restitution to the family trust for all costs and expenses of the litigation.

[7] The Minister allowed Mr. Kurnik to deduct the sum of \$309,920 paid directly to his lawyers as amounts paid "to collect, or to establish a right to collect, an amount owed to the taxpayer" which when received would be taxable income. The Minister denied the \$ 55,552 on the basis that the sum was:

- (i) incurred by the trust and not Mr. Kurnik;
- (ii) related to legal fees not directed to the recovery of salary or a right to claim or retain same; and
- (iii) disbursed to fund distinct lawsuits with multiple parties.

## II. The Law

### a) The statute

[8] The relevant excerpted provision of the *Income Tax Act*, RSC 1985, c.1, as amended (the “Act”) provides as follows:

#### *Section 8(1)(b)*

#### Deductions

#### **Deductions allowed**

**8(1)** In computing a taxpayer’s income for a taxation year from an office or employment, there may be deducted [...]

(a) [Repealed, 2001, c.17, s.3(1)]

#### **Legal expenses of employee**

(b) amounts paid by the taxpayer in the year as or on account of legal expenses incurred by the taxpayer to collect, or to establish a right to, an amount owed to the taxpayer that, if received by the taxpayer, would be required by this Subdivision to be included in computing the taxpayer’s income.

### b) The authorities

[9] Where pleadings instituting a legal claim do not reflect a complaint against the employee for accepting remuneration which the employer paid out, then such legal fees are not deductible: *Fenwick v. HMQ*, 2008 TCC 243 at paragraph 37. Further, even where a claim is made for tracing and unjust enrichment, a lack of evidence of the employee’s exposure to an equitable claim will be fatal to deductibility: *Fenwick, supra* at paragraph 43 and 44. On appeal, which upheld the trial decision, the additional limitation was pronounced that “... paragraph 8(1)(b) is not intended to permit legal expenses to be deducted when they are incurred in litigation involving disputes other than those arising from the terms of employment, merely because the [employee’s] entitlement to particular remuneration is part of the claim”: *Fenwick v. HMQ*, 2008 FCA 370 at paragraph 8.

[10] However, where the claim relates to payments arising from property or entitlements otherwise arising or accruing from the employee’s status as such and

the legal defence is raised to retain such proceeds, deductibility is allowed: *Chagnon v. HMQ*, 2011 TCC 268 at paragraphs 17 and 18.

### III. Analysis

[11] The wording of 8(1)(b) is directed towards the legal procurement of employment income owed or the right to claim or retain it. The defence or commencement of a claim by an employee cannot relate to a broader claim against the employee isolated to alleged wrongdoing coincidentally occurring during the currency of employment. So, as directed by the Federal Court of Appeal in *Fenwick*, the question remains: what is the essential nature of the claim involving the taxpayer? This is to be discerned through a review of the pleadings: *Chagnon, supra*, at paragraph 14; the issue being the expenditure of legal fees to establish the right to salary or wages or other taxable income: *Fenwick* at paragraph 27.

[12] The review of the scope of the litigation involving employee remuneration in this appeal does not simply involve a single proceeding, but two proceedings. Factually, the first step in this litigation involved the statement of claim by Mr. Kurnik. There is no dispute concerning this; the legal fees directly related to this, in excess of \$309,000 or 85% of the total, were allowed and deductible. That litigation was fully successful.

[13] That success however was not to be had without a bigger fight. The employer launched a collateral attack on the family trust, which was in receipt of some of the bonuses paid to Mr. Kurnik during his employment. In a strange way, Mr. Kurnik necessitated the distinct, subsequent proceeding because he refused to make it easy; Mr. Kurnik would not consent to the addition of the trust to the main action, when requested. His consent was necessary because the time for adding the family trust without consent had passed under the applicable rules of Court. Had he consented, the Minister's assessing position may have been different.

[14] Other rights and obligations became part of the embattled landscape. The amended statement of claim is extensive and full throated. Several paragraphs are particularly relevant to understanding the primary subject matter and the reason for the claim's collateral strategic value. These are the first and the last three paragraphs of the 22 page statement of claim.

#### 1. The Plaintiff claims:

(a) An accounting, for the benefit of the Plaintiff [RJM56] for the return of funds with regard to all amounts paid as purported bonus payments, and directed by Kevin Kurnik to be paid to the Kurnik Family Trust, during the time period from 1999 to the present, and a determination of the correct amount to which Kevin Kurnik was entitled pursuant to the terms and the procedures required to be followed as set out in the Bonus Clause or, such other determination on the accounting as this Honourable Court deems just.

[...]

### **Payments to the Employee and the Employee's family**

66. Furthermore, the Employer assisted the Employee in reducing the Employee's tax by making payments on behalf of the Employee to members of his family.

[...]

68. Furthermore, as a result of the conduct of the Employee, the Employer claims damages for breach of the obligation to act in good faith or, in alternative, punitive damages for the wrongful conduct being the bad faith conduct referred to herein. These damages are claimed in the Counterclaim in the Lawsuit.

69. The Defendants refused to consent to an amendment of the pleading in the Lawsuit to allow for the addition of the Trustees and Beneficiaries of the Kevin Kurnik Family Trust as added defendant parties to the Counterclaim in that Lawsuit. As a result, this proceeding had been commenced and the Plaintiff will seek to have this proceeding tried together with the Lawsuit and seek an Order for common production and common examinations for discovery in the Lawsuit, to avoid duplication of any damages and in accordance with Rule 1.04(1) of the *Rules of Civil Procedure*.

[15] The facts in this appeal are distinct from *Fenwick* and *Chagnon*. The present case involves two lawsuits. The first by the employee to recover an unpaid performance bonus. The second defended by the employee, Mr. Kurnik, and the family trust and all its players, to resist the lawsuit to repay bonuses and emoluments paid to or for the benefit of Mr. Kurnik also arising from his employment.

[16] Factually, there is no question that the initial lawsuit spawned the subsequent one. The collateral pleadings are replete with references and terminology defining and describing Mr. Kurnik as the employee and RJM56 as the successor employer. The primary issue within that second lawsuit is the entitlement and quantum of remuneration payable by the employer to the

employee. This falls squarely within the wording of paragraph 8(1)(b) of the *Act* and within the category of expenses incurred in defending a right to retain compensation: *Fenwick, supra* at paragraph 27; *Chagnon* at paragraph 15.

[17] The suggestion that Mr. Kurnik did not expend the moneys is also factually not correct. He had an obligation as a condition of settlement and a matter of law, as the primary target trustee of the lawsuit, to pay the legal fees, which he did. He did so from the only moneys received from the employer: the \$1.5 million which was the subject of the lawsuit and comprised his bonus, in turn, remuneration arising and to be received from employment.

#### IV. Summary and Costs

[18] The policy based integrity of paragraph 8(1)(b) is protected. Its breadth has not been extended. The initial lawsuit logically and expressly cascaded into the second. There was no stand-alone, singular action for alleged behaviour unassociated with or too remote from remuneration arising from employment. Both lawsuits were litigated together, resolved contemporaneously and funded by the employee directly from the proceeds of the settlement from which Mr. Kurnik was fully successful in receiving his promised, but unpaid bonus. No-one received further amounts or benefits. Mr. Kurnik was still required to pay all legal fees expended to recoup that bonus. As such, he should be entitled to the deduction for the legal fees which were “paid by the taxpayer to collect, or establish a right to, an amount owed ... that would ... be included in ... income”.

[19] For these reasons, the appeal is allowed with costs.

Signed at **Ottawa**, Canada, this **4<sup>th</sup>** day of October, 2019.

“R.S. Boccock”

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Boccock, J.



CITATION: 2019TCC206

COURT FILE NOs.: 2018-2239(IT)I

STYLE OF CAUSE: KEVIN KURNIK AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 5, 2019

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.  
Bocock

DATE OF **AMENDED**  
JUDGMENT: **October 4, 2019**

APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Sébastien Budd

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin  
Deputy Attorney General of Canada  
Ottawa, Canada