Docket: 2019-422(IT)G

BETWEEN:

MARLENE ENNS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on March 23, 2022, at Edmonton, Alberta

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	Chad J. Brown
Counsel for the Respondent:	Courtney Davidson

JUDGMENT

The Appellant's appeal of the assessment raised April 12, 2017 per section 160 of the federal Income Tax Act is dismissed, with costs. Failing the parties' agreement as to quantum of costs, they are directed to file with the Court submissions as to costs within 30 days of the judgment date.

Signed at Halifax, Nova Scotia, this 8th day of March 2023.

"B. Russell"

Russell J.

Citation: 2023 TCC 28
Date: March 8, 2023
Docket: 2019-422(IT)G

BETWEEN:

MARLENE ENNS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Introduction:

[1] The appellant, Marlene Enns (Mrs. Enns) appeals her assessment raised April 12, 2017 in respect of paragraph 160(1)(a) of the federal *Income Tax Act* (Act). Upon objection the assessment was confirmed October 25, 2018.

II. Factual Background:

[2] At the hearing the parties filed an "agreed statement of facts and exhibits" (Exhibit 1). No witnesses were called.

[3] In essence the agreed facts reflect that Mrs. Enns' then husband Peter Enns passed away May 22, 2013, leaving her as his widow. He was the sole annuitant of a registered retirement savings plan (RRSP) and had designated her as sole beneficiary of that RRSP. Mrs. Enns tendered no consideration for this designation.

[4] Accordingly, some time following Mr. Enns' death the $102,789.52 fair market value of the subject RRSP was paid out to Mrs. Enns. (She then transferred the funds into her locked-in retirement account.)

[5] On April 12, 2017 when the appealed assessment was raised, Mr. Enns' estate had an income tax liability of $146,382.05, harkening back to Mr. Enns' 2004 through 2012 taxation years.

III. Statutory Provision:

[6] Paragraph 160(1)(a) of the Act provides in relevant part:

> 160(1) **Tax liability re property transferred not at arm's length** - Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to:
>
> (a) the person's spouse or common law partner or a person who has since become the person's spouse or common law partner…the following rules apply… (underlining added)

IV. Issue:

[7] Mrs. Enns asserts that upon Mr. Enns' death, when entitlement to the RRSP funds transferred to her, she ceased being his "spouse" (instead becoming his widow). The issue in this matter is whether that is so; that is, upon Mr. Enns' death, did Mrs. Enns cease to be his "spouse" for purposes of paragraph 160(1)(a). Re-stated, does the term "spouse" in paragraph 160(1)(a) include the widow(er) of a transferor tax debtor?

[8] The respondent Crown's position is that upon Mr. Enns' death the term "spouse" in paragraph 160(1)(a) did still apply to Mrs. Enns.

V. Analysis:

[9] Two recent decisions of this Court have addressed the meaning of "spouse" in paragraph 160(1)(a). The first is *Kiperchuk v. R.*, 2013 TCC 60.

[10] In *Kiperchuk*, Lamarre, J. as she then was, considered circumstances substantively the same as herein. The learned judge concluded (paras. 25 and 26):

> 25. Assuming that the transferor is the former husband, he was not related to the appellant [wife] by marriage at the time she became entitled to the RRSP. Indeed, the status of marriage is ended by death or by a decree absolute of divorce…

> 26. Therefore, the appellant was not related by marriage to her former husband at the time of the transfer [upon his death], as she was no longer his spouse…. (underlining added)

[11] In *Kiperchuk*, the question as to the meaning of the term "spouse" in paragraph 160(1)(a) was not specifically posed. Nonetheless, as set out above, it was specifically answered – a marriage is ended by death, and the spouse of the husband, upon his death, is no longer his spouse. Thus, with the (former) wife, upon her husband's death and thus the end of their marriage, no longer being his wife/spouse, the section 160 assessment against the former wife was found to be invalid. The decision was not appealed.

[12] The more recent of the two decisions is *Kuchta v. R.*, 2015 TCC 289. In *Kuchta*, again the core facts were substantively the same as in *Kiperchuk*, and herein. In *Kuchta,* colleague Graham J. engaged in a textual, contextual and purposive analysis to interpret the term "spouse" as it is used in paragraph 160(1)(a). That is the statutory interpretation analysis that the Supreme Court of Canada endorsed in *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54.

[13] In *Canada Trustco* the Supreme Court, in introducing this new analytical approach to statutory interpretation, expressed the guiding principles as follows (paras. 10-13):

> 10. It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" [citation]. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases, the court must seek to read the provisions of an Act as a harmonious whole.
>
> 11. There is no doubt today that all statutes, including the [Income Tax] Act, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

> 12. The provisions of the Income Tax Act must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers can manage their affairs intelligently.… See also *65302 British Columbia*, at para. 51, per Iacobucci J. citing P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997) at pp. 475-76:
>
> > It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.
>
> 13. The Income Tax Act remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the Income Tax Act, on the basis that they amount to abusive tax avoidance. (underlining added)

[14] In *Kuchta*, applying the *Canada Trustco* "textual, contextual, purposive" interpretive analysis, Graham J. found as to the textual component that "spouse" in the marital context meant a living person's husband or wife. The Court found also that there was a "colloquial" aspect to the term, insofar as on occasion the term "spouse" was used to refer to persons who through death of their marital partners were widows or widowers of the deceased. The Court concluded, taking into account this colloquial meaning, that textually the word "spouse" was used ambiguously.

[15] Then turning to the contextual component of the *Canada Trustco* analysis, the Court identified four provisions in the Act, dealing with death, that employed the term "spouse" as being inclusive of a deceased's spouse at time of death, i.e. as in the aforesaid colloquial sense. The four provisions were subsections 70(6), 72(2), 146(8.2) and 146(8.91). But other provisions (e.g., subsections 146(1) "refund of premiums", 146(5.1), 248(23.1) and 147.3(7)) meant "spouse" only in the legal or literal sense, i.e. of a living person. Thus the context factor was found indeterminative.

[16] Lastly, turning to the purposive factor, the Court found no legislative intention or policy reason to exclude widows and widowers as RRSP beneficiaries from application of paragraph 160(1)(a). For the Court this broke the textual and contextual "tie" and led to the conclusion that a paragraph 160(1)(a) "spouse" did include widows and widowers; that is, spouses continued to be spouses subsequent to the death of the other spouse.

[17] Additionally, at the conclusion of his *Kuchta* analysis, Graham, J. provided clarifying comments (at para. 78), referring to the above-noted subsections 70(6), 72(2), 146(8.2) and 146(8.91) in which the word "spouse" clearly incorporated the concepts of widow and widower:

> 78. Had Parliament consistently used the legal meaning of the word "spouse" throughout the Act, then, despite existence of the colloquial meaning of the word and the fact that the purposive analysis strongly supports that meaning, I would not have found that the word "spouse" in subsection 160(1) includes widows and widowers. The use of additional language in provisions such as subsection 146(8.8) to specifically include widows and widowers, would have convinced me that there was no textual ambiguity to the word "spouse" in subsection 160(1)… (underlining added)

[18] As Graham J. said, but for the above-referenced four provisions of the Act in which Parliament used the term "spouse" as clearly inclusive of the concepts of widow and widower, he would have stayed with the strict textual interpretation, being the plain and ordinary meaning of the term "spouse", requiring a living partner.

[19] Thus in *Kuchta* the Court concluded that the appellant, being the widow of the deceased husband, also remained his "spouse" for purposes of paragraph 160(1)(a). Accordingly the appealed section 160 assessment was found valid.

[20] There is another aspect of *Kuchta* to be considered. That appeal was originally assigned to and heard by my colleague Jorre, J. After some passage of time without a decision, the Court's Chief Justice re-assigned the matter to Graham, J., who in due course rendered his decision as summarized above, based on the parties' agreement that he do so, utilizing transcripts and the court record, plus at the judge's request hearing supplemental oral submissions of the parties. The *Kuchta* decision was not appealed.

[21] However, subsequently, in *High-Crest Enterprises Ltd. v. R.*, 2017 FCA 88, the Federal Court of Appeal (FCA) addressed a similar judge substitution situation, although in the context of a completely different tax issue. A majority of the appellate panel found the substitute judge's decision to be a "nullity", and that judgment should instead be rendered by the original judge who was seized of the matter and had heard it.

[22] In light of *High-Crest, Kuchta* now is sometimes questioned as to whether it is similarly a nullity. But as the *Kuchta* decision was not appealed, there is no apparent prospect of any like appellate pronouncement.

[23] In the present matter, the respondent Crown relies primarily on *Kuchta*, urging that the analysis is strong and that *Kuchta* has not been labelled a nullity and thus I should apply the principle of judicial comity in accepting and following it. The respondent critiques *Kiperchuk* as it did not address the specific question as to meaning of "spouse" as did *Kuchta* and which likewise is the issue before me.

[24] Also, in oral submissions respondent's counsel confirmed agreement with the appellant that the relevant property, being entitlement to the late Mr. Enn's RRSP funds, was transferred upon Mr. Enns' death, rather than at any earlier or later time.

[25] Appellant's counsel favourably cites *Kiperchuk*, discussed above, in which the Court found that the capacity of "spouse" in the context of subsection 160(1)(a), ends upon death of the marital partner and thus excludes a widow(er) of the deceased marital partner.

[26] Appellant's counsel cited also the 2000 decision of the Supreme Court of Canada in *Will-Kare Paving & Contracting Ltd. v. R.*, 2000 SCC 36. In *Will-Kare*, the Court considered the meaning of the common term "sale" in the Act. The majority (per Major J.) found that term to have an established and accepted legal meaning which should be used as its meaning for purposes of the Act, rather than any broader meaning derived from general usage. The distinction drawn was asphalt sold as a specific item (through contracts for sale of asphalt per se) and asphalt being sold as one of several materials required in the course of completing a paving contract (i.e. a contract for work and materials).

[27] The *Will-Kare* principle, as identified by appellant's counsel, was a 2016 statement by the the Supreme Court of Canada statement (post *Canada Trustco*), which cited *Will-Kare* in stating that, "[w]ords that have a well-understood legal meaning when used in a statute should be given that meaning unless Parliament clearly indicates otherwise."[1]

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[1] *R. v. D.L.W.*, 2016 SCC 22 at para. 20.

[28] Also the appellant quotes from *Will-Kare* regarding the Act, that, "[t]he technical nature of the Act does not lend itself to broadening the principle of plain meaning to embrace popular meaning."[2]

[29] The appellant critiques the "textual, contextual and purposive" interpretive analysis in *Kuchta*. The textual analysis is said to have been overly reaching to include widows and widowers in the "spouse" concept, such references being only metaphorically expressed, such as at funerals.

[30] The *Kuchta* contextual analysis is criticized also for not recognizing any contextual element of paragraph 160(1)(a) itself. That provision extends the "spouse" concept in one direction (i.e., subsequent spouse) while, significantly, not in the other direction (i.e., former spouse). This is said to be indicative of intentional exclusion of the persons who were spouses immediately prior to time of death, i.e. widow(er)s, being Mrs. Enns' situation.

[31] The appellant cites also a Supreme Court of Canada statement in *Friesen v. R*, 1995 CarswellNat 422 (SCC), at para. 41:

> It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording. Reading extra words into a statutory definition is even less acceptable when the phrases which must be read in appear in several other definitions in the same statute.

[32] In citing *Friesen* I understand the appellant to be critiquing *Kuchta* for implicitly inserting extra wording such that the scope of the term "spouse" in subparagraph 160(1)(a) is inclusive of widow(er)s.

[33] The appellant cites also the Supreme Court in *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51 at para. 41, in stating:

> [T]he particularity and detail of many provisions, along with the *Duke of Westminster* principle… lead us to focus carefully on the text and context in assessing the broader purpose of the scheme. This approach is particularly apposite in this case, where the provision at issue is part of the highly detailed and precise FAPI regime. I must emphasize again that this is not a case involving a general anti-avoidance rule. The provision at issue is part of an exception to the definition of "investment business" within the highly intricate, highly defined FAPI regime. If

[2] *Will-Kare*, para. 33

> taxpayers are to act with any degree of certainty under such a regime, then full effect should be given to Parliament's precise and unequivocal words.

[34] I find this *Loblaw* extract not particularly persuasive in respect of the present matter, the statutory complexity of which is not comparable to, as in *Loblaw*, "the highly intricate, highly defined FAPI regime".

[35] The appellant asserts that the respondent Crown's position (extended meaning of "spouse") should be addressed legislatively rather than via the judicial route. The appellant argues also that greater uncertainty is created by *Kuchta* with respect to the meaning of "spouse" elsewhere in the Act, if one has to apply a textual, contextual and purposive analysis test for other "spouse" provisions. The word appears frequently throughout the Act.

[36] In *Kuchta*, Graham, J. rendered an extensive, well-constructed and thought-out analysis in addressing the same legal issue as now before me. The decision with its full analysis exists and is published. I do not think the prospect that the decision could be a nullity (and whether it is, is not for me to say) prevents me from considering it.

[37] Even were *Kuchta* a nullity, the decision itself exists. The decision if a nullity would be of no legal effect, albeit due to circumstances unrelated to the merits of Graham J.'s legal analysis.

[38] Whereas *Kuchta* is a decision of this Court addressing the identical legal issue now before me, I consider that I should have regard for the principle of judicial comity.

[39] The principle of judicial comity would apply in my consideration of a legal issue that a Court colleague has analyzed and pronounced upon.

[40] My colleague Boyle J. addressed the principle of judicial comity in *Houda International Inc. v. Her Majesty*, 2010 TCC 622, writing (paras. 22, 25):

> 22. *Stare decisis* does not apply with respect to decisions of courts of coordinate jurisdiction. That being said, according to the doctrine of judicial comity, reasoned judgments of such courts or judges should be deferred to, in the absence of exceptional circumstances.
>
> 25. In *Singh v. Canada (Minister of Citizenship and Immigration)*, [1999], F.C.J. No. 1008 (F.C.T.D.), it is written:

In *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)*, *supra*, Richard, J. (as he then was) considered whether he was bound by reasons of judicial comity, to apply a decision of Noel, J. (as he then was) on one of the identical issues raised before him. In reviewing the principle of judicial comity and its application, Richard, J. stated as follows:

> The principle of judicial comity has been expressed as follows:
>
> > The generally accepted view is that this court is bound to follow a previous decision of the court unless it can be shown that the previous decision was manifestly wrong, or should no longer be followed: for example, (1) the decision failed to consider legislation or binding authorities which would have produced a different result, or (2) the decision, if followed, would result in a severe injustice. The reason generally assigned for this approach is a judicial comity. While doubtless this is a fundamental reason for the approach, I think that an equally fundamental, if not more compelling, reason is the need for certainty in the law, so far as that can be established. Lawyers would be in an intolerable position in advising clients if a division of the court was free to decide an appeal without regard to a previous decision, or the principle involved in it.
>
> A similar position was taken by Mr. Justice Jackett, President of the Exchequer Court, in *Canada Steamship Lines Ltd. v. M.N.R.,* [1966] Ex.C.R. 972 at p. 976, [1966] C.T.C. 255, 66 D.T.C. 5205:
>
> > I think I am bound to approach the matter in the same way as the similar problem was approached in each of these cases until such time, if any, as a different course is indicated by a higher Court. When I say I am bound, I do not mean that I am bound by any strict rule of *stare decisis* but by my own view as to the desirability of having the decisions of this Court follow a consistent course, as far as possible.
>
> In *R. v. Northern Electric Co.* (1955) 24 C.P.R. 1 at p. 19, [1955] 3 D.L.R. 449, [1955] O.R. 431 (H.C.), McRuer, C.J.H.C. stated:
>
> > Having regard to all the rights of appeal that now exist in Ontario, I think Hogg J. stated the right common law principle to be applied in his judgment in *R. v. ex rel. McWilliam v. Morris*, [1942] O.W.N. 447 where he said: "The doctrine of *stare decisis* is one long recognized as a principle of our law. Sir Frederick Pollock says, in his First Book of Jurisprudence, 6th ed., p. 312: 'The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and, though not absolutely binding on courts of co-ordinate authority nor on that court itself, will be followed in the absence of strong reason to the contrary'."

> I think that "strong reason to the contrary" does not mean a strong argumentative reason appealing to the particular Judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think "strong reason to the contrary" is to be construed according to the flexibility of the mind of the particular Judge. (underlining added)

[41] In considering this judicial guidance respecting judicial comity, I conclude - whether or not *Kuchta* is a nullity, and if it is whether or not the principle of judicial comity applies - that the *Kuchta* analysis does not, "[fail] to consider legislation or binding authorities which would [produce] a different result." Nor would *Kuchta*, if followed, "result in a severe injustice."

[42] I consider that appellant's counsel argued his brief well, including citing several significant Supreme Court of Canada decisions as noted above, in favour of a textual approach in deciding the legal question. Nevertheless, I believe Graham, J. properly and diligently applied the textual, contextual and purposive analysis specified by the Supreme Court of Canada in *Canada Trustco* in construing the meaning to be ascribed the term "spouse" in paragraph 160(1)(a) of the Act.

[43] The guiding principles provided by the Supreme Court in *Canada Trustco* for applying that three part interpretive analysis are set out above at paragraph 13. They recognize the challenge in joining a textual meaning with context and purpose such that the particular statute may be read harmoniously as a whole. Justice Graham provided as well, reflection in his *Kuchta* decision (set out in part at paragraph 17 above), as to how he balanced these three *Canada Trustco* factors, in concluding that an entirely textual and literal meaning of "spouse" ought not to govern.

VI. Conclusion:

[44] The appeal will be dismissed, with costs to the respondent. Failing the parties' agreement as to quantum of costs, they are directed to file with the Court submissions as to costs within 30 days of the judgment date.

Signed at Halifax, Nova Scotia, this 8th day of March 2023.

"B. Russell"

Russell J.

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APPEARANCES:

Counsel for the Appellant:	Chad J. Brown
Counsel for the Respondent:	Courtney Davidson

COUNSEL OF RECORD:

For the Appellant:

Name:	Chad J. Brown
Firm:	Tax Ninja Tax Law
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada