Date: 20080619

Docket: T-2059-01

Citation: 2008 FC 768

Ottawa, Ontario, June 19, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ROCHELLE MOSS

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] For many years, Ms. Moss has been at issue with the Minister of National Revenue [Minister] respecting the payment of tax. The present disagreement concerns a jeopardy order obtained by the Minister and its use to attach funds on deposit in insurance policies belonging to Ms. Moss. Ms. Moss argues that the actions of the Minister constitute a wrong suffered by her. For the reasons which follow, I do not agree.

[2] Ms. Moss' entire Statement of Claim dated November 1, 2002, reads as follows:

The Plaintiff is a taxpayer who lives in the city of Winnipeg in the province of Manitoba and is employed by the Federal Government:

1. The Plaintiff claims:
   (a) Damages equal to the tax assessments issued to the plaintiff for the years 1998 to present.
   (b) The cost of this action; and
   (c) Such further and other relief that this Honourable Court may allow.

2. CCRA caused a Jeopardy Order to be issued pursuant to the provisions of the Income Tax Act. This Jeopardy Order was served on the following insurance companies who held funds to the benefit of the Plaintiff:
   (a) Equitable Life;
   (b) NN Life Insurance Company of Canada;
   (c) Manulife Financial

3. CCRA caused the plaintiff's insurance policies not only to be frozen but rendering the plaintiff unable to move the funds to a policy and a vehicle that would not attract tax liability, which the plaintiff was in the process of doing, thereby forcing upon her unnecessary tax liability.

4. By virtue of the actions of the CCRA, the Plaintiff was unable to transfer assets of the Plaintiff in the hands of the aforementioned insurance companies to non-taxable investments and as a result, was prevented from organizing her affairs in a manner advantageous to the Plaintiff with respect to her tax matters. The Plaintiff says that as a result of the actions of CCRA, the Plaintiff has been assessed tax on income which would otherwise attract no tax, further particulars of which the Plaintiff craves leave to refer to at the trial of this action.

5. As a consequence of the actions of the Defendant, the Plaintiff has suffered damages.

[Emphasis added]

[3] The evidence produced at the hearing of the present simplified action by Ms. Moss and the Minister is only documentary. The evidence includes findings of fact and law in judicial decisions

that have considered Ms. Moss' various tax questions, and are accepted on the record of the present action as binding.

[4] The essential uncontested facts at the heart of the present claim were summarized by Justice Dawson in *Moss (Applicant) v. The Minister of National Revenue and Canada Customs and Revenue Agency,* 2001 FCT 49, 2001 DTC 5123 [*Moss #1*] at paragraphs 2 to 5 and 8 as follows:

> In January of 1997, the applicant was assessed under the provisions of the [*Income Tax*] *Act* and the *Excise Tax Act*, R.S.C. 1985, c.E-15 both in her personal capacity and for the tax obligation of her husband arising from a number of non-arm's-length transactions whereby property was transferred from her husband to her. The total tax assessed against the applicant was $301,956.21.
>
> The Minister of National Revenue ("Minister") obtained what is known as a "jeopardy order" pursuant to section 225.2 of the Act [dated February 5, 1997]. This order permitted the Minister to pursue collection action against the applicant prior to the completion of the tax appeals process.
>
> Pursuant to the jeopardy order, Requirements to Pay were issued by the Minister to three insurance companies, NN Life, Manulife, and Equitable Life, all of which held contracts in the applicant's name.
>
> The applicant applied to this Court pursuant to subsection 225.2(8) of the Act to review the jeopardy order. By order dated November19, 1997, the Court dismissed her application and confirmed the original jeopardy order.
>
> […]
>
> As to the Requirements to Pay, initially each insurance company took the position that the contracts were annuities and as such were exempt from seizure or execution. Each company therefore took the position that it would not pay to Revenue Canada the amount shown in the Requirement to Pay served upon it but would instead hold the contract, not allowing the applicant to withdraw any funds therefrom,

> pending determination of either the status of the annuity contracts or the applicant's tax liability.
>
> (Respondent's Book of Documents, Tab 8*)*

[5] The perceived wrong which Ms. Moss identifies as actionable is the tax liability which arose after the Requirements to Pay were issued on the insurance companies pursuant to the jeopardy order. In fact, four insurance policies were attached: two NN Life policies (#5037678 and #1119986); a Manulife policy; and an Equitable Life policy. At the time of the attachments, Ms. Moss believed that benefits accruing to her under the NN Life policy #1119986 were not taxable. A central feature of the present action is that Ms. Moss requested to be allowed to transfer funds from the other policies to the NN Life policy #1119986 to avoid tax liability. The transfers did not take place, and, as a result, Ms. Moss claims that she was wrongly taxed on benefits which accrued on the un-transferred funds. The essential preliminary issue for determination is whether the Minister caused this tax liability to occur. In my opinion, this causation has not been proved.

[6] The jeopardy order was not issued by the Minister; the Court granted the order *ex parte* and later confirmed that the order was warranted on the evidence. There is no question that the Minister was obliged in law to collect tax from Ms. Moss. Therefore, I find that no wrong was committed by the Minister in applying to the Court for the jeopardy order.

[7] Justice Muldoon presided over Ms. Moss' motion to review the *ex parte* jeopardy order, and delivered a detailed analysis of the actions which lead to the granting of that order, and, indeed, confirmed that sufficient evidence was provided to confirm the order *(Canada (Minister of National*

Revenue) v. Moss [1997] F.C.J. No. 1583, 98 D.T.C. 6016) (Plaintiff's Evidence, Exhibit 1).

Paragraph 24 of that decision constitutes findings with respect to Ms. Moss' conduct placed before Justice Tremblay-Lamer who granted the *ex parte* order:

> The evidence is clear that the respondent's spouse [Mr. Moss], the transferor, has made no voluntary payment of tax due since around 1990. The respondent [Ms. Moss] herself has to be threatened with or subjected to litigation, garnishment or other attachment procedures before back tax can be realized by the department. The respondent and her husband evince a willingness to shelter or hide their assets from legitimate creditors. While Canada's income tax system is based on self-reporting - the honour system - the respondent always has to be threatened, garnished, proceeded against. Of course she, in common with all others, is entitled to engage in lawful avoidance of taxation although there is very little lawful scope to the avoidance of lawful collection of taxes. In any event, it is a factor, this proclivity demonstrated by conduct to avoid collection of taxes, which raises a solid inference that collection is in jeopardy because of delay in invoking lawful collection enforcement mechanisms.

With respect to attaching the insurance policies, at paragraph 26, Justice Muldoon made this finding:

> So, it appears that the insurance investments with NN Life, Manulife and Equitable Life evince one characteristic of a bank chequing account: funds can be withdrawn from time [sic] for family living expenses or anything else. That fact raises an inference of jeopardy of collection. Further, these investments which are like chequing accounts, are held in what the respondent believes is immunity from garnishment or other seizure pursuant to section 173 of The Insurance Act of Manitoba, R.S.M. 1987, Chap.I-40. Although the respondent's belief is not conclusively shown to be correct in law, the inference of the purpose to place collection in jeopardy is a clear one.

As a result, I find that: it is Ms. Moss' conduct that caused the jeopardy order to be issued; as stated, no wrong was committed by the Minister in applying for the order; and no wrong was committed by the Minister in attaching the insurance policies.

[8] It is not contested that after being served, the insurance companies sought an opinion from the Minister concerning the action that should be taken respecting the policies attached, and Counsel for the Department of Justice, Winnipeg Regional Office, responded as Counsel for the Minister. Three such responses are tendered as part of the Plaintiff's evidence, and are accepted in the present action as representative of the Minister's position with respect to each of the insurers and the attached policies. The letter of March 25, 1997, to NN Life sets out the Minister's general position as follows:

> Re: Rochelle Moss
> Policy No.: 1119986
> Writ of *Fieri Facias* dated February 5, 1997
>
> Please be advised that our Department represents Revenue Canada in the matter listed above. In response to your letter of March 19, 1997 which enclosed a copy of an Investment Option Change request and a Change of Beneficiary form, it is Revenue Canada's position that the tax debtor cannot now take steps to change specifics of the investment in a manner which would be prejudicial to Revenue Canada.
>
> The Writs of Fieri Facias were executed by a sheriff on February 5, 1997. The sheriff was acting on the instructions of the creditor of Revenue Canada, and specifically as its agent. I am now advised that both your client and the policyholder have taken the position that the assets which were subject of the seizure are exempt pursuant to the relevant provisions of the *Insurance Act*.
>
> As you would certainly be aware in determining if an asset is indeed exempt under the provisions of the *Insurance Act*, the specifics of the individual contract are important. Given the fact that the sheriff as Revenue Canada's agent has executed the writs on these assets, and in so doing has asserted control and legal possession on its behalf, any act or instruction by the debtor which purports change [sic], alter or affect the nature of the holdings and/or the terms of the contract governing the asset and which would potentially prejudice Revenue Canada's claim thereto would, in our opinion, be void.

> I would note, as an example that the holder has requested a change of beneficiary on policy number 1119986. It is our understanding that the named beneficiaries as it currently stands, and at the time of the seizure, is and was the policyholder herself and her spouse. It would therefore seem that given that one of the beneficiary [sic] is the policyholder herself, this may bring into question the application or the extent of any exemption under s. 173(2) of the *Insurance Act*, even if one was to assume that it would otherwise apply to this type of contract. The policyholder cannot purport to have the capacity to make changes to the contract to better conform with a statutory exemption after the seizure has taken place.
>
> Given the nature of the assets, and the fact that they are currently under seizure, it would appear that the policyholder does not have the capacity to alter the contractual terms under which these assets are held, particularly if they could potentially have the effect of prejudicing the creditor.
>
> I trust this clarifies our position.
>
> (Plaintiff's Evidence, Exhibit 3)

The letter of May 16, 1997 to Equitable Life sets out the Minister's wish to be consulted respecting any investment changes:

> Re: Moss Equitable Life Policy and Revenue Canada
>
> Please be advised that our Department represents Revenue Canada in the matter relating to the policy listed above. I am writing in response to your letter of April 25, 1997. I can advise that Revenue Canada takes the position that the named annuitant no longer has the ability to make the changes to the investment options or beneficiaries given the fact that she is no longer in legal possession of the asset. I would therefore advise that Revenue Canada takes the position that it should be consulted with any investment changes which the annuitant purports to make. In the event that the changes merely related to the volatility of the stock market, I would suspect that Revenue Canada would have no difficulty in consenting to any such changes.

I trust this meets with your satisfaction.

(Plaintiff's Evidence, Exhibit 5)

The letter of July 21, 1997, to NN Life, sets out the Minister's clarified position:

> Re: Rochelle Moss
> Policy Nos. 5037678 & 1119986
>
> Further to our past correspondence, this letter will serve to clarify Revenue Canada's position with respect to the investment vehicles which are the subject to the two policies listed above. Revenue Canada's position is that the holders cannot exercise any option under those policies which would have the effect of prejudicing Revenue Canada's claim thereto. Of particular concern is the portion of the contracts referred to as settlement options which deal with the types of benefits which can be paid to the holder upon maturity. In our view, the nature of these options are important as to whether or not an exemption could apply in the circumstances thereby effecting Revenue Canada's seizure action.
>
> At this point Revenue Canada is not opposing the movement of monies within the policy from fund to fund, to address any fluctuations in the market, and/or to prevent any unnecessary losses in the value of the policy to the extent that monies actually remain in the policy. Revenue Canada takes this position on a without prejudice basis, on an interim basis, and will provide you with notice if and when this position changes.
>
> As indicated in the recent letter from Gil Desroches, Revenue Canada nevertheless takes the position that the monies from one of the two plans is to be remitted as per Mr. Desroches [sic] instructions and pursuant to the Requirement to Pay. Revenue Canada has put you on notice of this position and will reserve its right to assess NN Life for a refusal pursuant to s. 224(4) for a failure to comply. Obviously its position on the movement between investment vehicles applies only to the policy and/or portion of the policy for which no remission is made to Mr. Desroches. I understand that at this point, he has requested the remission of only one of the policies. The extent of the remission required would furthermore depend on whether or not Revenue Canada is successful in any other collection action initiated. I would refer you to Mr. Desroches [sic] letter dated

> June 13 and to his request for you to contact him prior to remitting any monies.
>
> For further clarification this should in no way be interpreted as a consent allowing the holder to withdraw or transfer any monies from the policy, or to initiate any change in beneficiaries or to exercise any settlement options, or any other options, which would affect the nature of the benefits, or which would otherwise prejudice the position of Revenue Canada.
>
> If you require any further clarification or have any questions or concerns, please do not hesitate to contact Mr. Desroches at (204) 984-5200 or myself at the phone number listed above.
>
> (Plaintiff's Evidence, Exhibit 4)

On this evidence, I find that, while Counsel for the Minister stated opinions with respect to the management of the policies in question, the Minister had no control over the management of the policies.

[9] As confirmed in the letter of July 21, 1997, pursuant to the Requirements to Pay served, the Minister demanded that the monies being held in the policies be paid into Court. As Justice Dawson describes, the insurance companies refused to do so for a reason:

> While the Requirements to Pay were not in evidence before the Court, it was conceded that each was validly issued for what was then the amount of the monies assessed to be owing. The fact that the entire proceeds held in what are alleged to be annuity contracts were frozen resulted not from any impropriety in the Requirements to Pay or their issuance, but because in each case the insurer took the position that the insurance contracts were exempt from seizure or execution. It is the result of that position that, as noted by the applicant [Ms. Moss] in her affidavit, the insurers would "not pay over to Revenue Canada the amount of the Requirements to Pay but

> would instead hold the contracts and refuse to permit" any withdrawal of funds.
>
> (*Moss # 1,* at para. 15)

There is no question that the proximate cause of the "freezing" of the policies was based on a decision taken by the insurance companies to protect themselves from liability.

[10] Therefore, on the evidence, on a balance of probabilities, I cannot find: that the "CCRA caused the plaintiff's insurance policies not only to be frozen but rendering the plaintiff unable to move the funds to a policy and a vehicle that would not attract tax liability"; or that "by virtue of the actions of the CCRA, the Plaintiff was unable to transfer assets of the Plaintiff in the hands of the aforementioned insurance companies to non-taxable investments"; or that "as a consequence of the actions of the Defendant, the Plaintiff has suffered damages", as claimed by Ms. Moss.

[11] In addition, on the evidence on the record, I am unable to find that NN Life policy #1119986 is an investment vehicle that would not attract tax liability. The only direct evidence tendered by Ms. Moss in favour of such a finding is the following provision from the policy:

> EXEMPTION FROM INCOME TAX ON ACCRUAL
> FOR THE GENERAL INTEREST OPTION:
>
> For non-RRSP Contracts, we will determine the tax status of that part of this Contract represented by the General Interest Option (the "Exempt Portion") on each anniversary of the Issue Date. If it is determined that the Exempt Portion would be currently subject to income taxation in your hands on an accrual basis, we will increase the Sum Insured (subject to a total maximum increase as determined by us from time to time) and, if necessary, also provide a surrender of a portion of the Account Value so as to maintain the Exempt Portion's accrual income tax exempt status, provided that it is reasonably possible for us to do so under income tax and other

> legislation then in force. Any such increase in the Sum Insured will not require further evidence of insurability. Any such surrender of a portion of the Account Value will not result in the reduction of the Amount At Risk. The Market Value Adjustment and the Surrender Charge will not be applied.
>
> (Plaintiff's Evidence, Exhibit 13, pp. LS-39L..6 – LS-39L..7)

As I expressed during the course of the trial, given the complexity of this "exemption" provision, without expert evidence, and which was not provided, it is not possible to make the finding that the policy constitutes an investment vehicle that would not attract tax liability as claimed by Ms. Moss.

[12] For the reasons provided, I find that the claims advanced in the Statement of Claim have not been proved, and, as a result, I dismiss the present action.

[13] Given that Ms. Moss is an unrepresented litigant and the present litigation proceeded as a simplified action, I find that a fair and just award of costs in favour of Minister be limited to the all encompassing amount of $1,000.

JUDGMENT

The present action is dismissed. I award costs in the sum of $1,000 to the Defendant to be paid by the Plaintiff.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2059-01
STYLE OF CAUSE:	ROCHELLE MOSS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	WINNIPEG, MANITOBA
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DATED:	JUNE 19, 2008

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Julien Bédard	FOR THE DEFENDANT

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