Date: 20071114

Docket: A-196-07

Citation: 2007 FCA 362

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

MARC FOREST

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on November 1, 2007.

Judgment delivered at Ottawa, Ontario, on November 14, 2007.

REASONS FOR JUDGMENT BY: NOËL J.A.

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

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of the Tax Court of Canada, which dismissed the appellant's appeal of an assessment issued by the Minister of National Revenue (the Minister) under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act), for the 2003 taxation year. In so doing, the Tax Court judge concluded that the amount of $152,969 paid by the Ville de Shawinigan to the appellant during his 2003 taxation year constituted a retiring allowance within the meaning of

subsection 248(1) of the Act that must be included in computing income under section 56 of the Act.

[2] The appellant, who is representing himself, is asking this Court to set aside the judgment of the Tax Court of Canada on the ground that the payment was received as damages and is not a retiring allowance under the Act.

RELEVANT FACTS

[3] From January 2000 to December 2003, the appellant, who is a lawyer, was employed by the Ville de Shawinigan-Sud. He held the position of Clerk and Director of Human Resources from January 2000 to the end of 2001.

[4] In January 2002, when towns and cities were amalgamated, the new city of Shawinigan was formed, comprising seven municipalities including Shawinigan-Sud. The transition committee, responsible for executive appointments for the new city, declared the appellant to be a surplus executive and assigned him the position of Assistant Clerk. His applications for the positions of Director of Human Resources, Clerk and Legal Advisor were not successful.

[5] Following this reclassification, on May 9, 2002, the appellant filed a remedy for unjust dismissal before the Commission des relations du travail, but it declined jurisdiction. On June 5, 2002, the appellant filed an application for judicial review of this decision with the Québec Superior Court.

[6] Along with that application, the appellant brought an accessory motion for an order that the Ville de Shawinigan pay his lawyer's fees and disbursements. On November 29, 2002, the Québec Superior Court granted the accessory motion. On February 26, 2003, the Québec Court of Appeal set aside the judgment of the Superior Court. On June 26, 2003, the Supreme Court of Canada dismissed Mr. Forest's application for leave to appeal. On October 22, 2003, the Supreme Court of Canada rendered a decision on the taxation of the bill of costs in favour of the Ville de Shawinigan.

[7] As a result of the numerous proceedings commenced by the appellant against the Ville de Shawinigan, he contends that his managers began harassing him. In 2003, the appellant, who was still working for the Ville de Shawinigan, brought an action in the Québec Superior Court against the Ville de Shawinigan for $240,000 in moral damages and $100,000 in exemplary damages, as well as extra-judicial professional fees and other professional disbursements in the order of $40,000 (Amended motion to institute proceedings, at para. 14, Appeal Book, at p. 67).

[8] At the end of December 2003, the appellant and the Ville de Shawinigan signed a Settlement and Release ("the settlement") discontinuing the action in damages before the Québec Superior Court (File No. 410-17-000175-039). According to the settlement, the Ville de Shawinigan, without admitting liability, agreed

- to pay the sum of $165,000 to the appellant in accordance with the following terms and conditions:

> (a) $12,031 directly to his lawyers as judicial and extra-judicial fees; and

> (b) $152,969 less the requisite statutory deductions, to the order of Charles-Grenon & Dion, solicitors in trust (Settlement para. 2, Appeal Book at p. 14);

- to waive its claim against the appellant for memoranda of costs due pursuant to the decisions of the Court of Appeal and the Supreme Court (Settlement para. 3, Appeal Book at p. 14);

- to pay the allowances for vacation and other days owed to the appellant (Settlement para. 4, Appeal Book at p. 14).

[9] In consideration of the undertakings given by the Ville de Shawinigan, the appellant agreed

a. to tender his resignation from his position as Assistant Clerk, thus terminating the employment relationship with the Ville de Shawinigan effective as of the date of signing the settlement; (Settlement para. 5, Appeal Book at p. 14);

b. to give a full, final and definitive release from any past, present or future action or cause of action before any court, quasi-judicial tribunal or administrative tribunal by reason of his employment with the Ville de Shawinigan or such other circumstances as are contemplated in the proceedings referred to and from his conditional CSST claim filed on or about November 6, 2003, [and] from any claim for principal, interest and costs of any salary, vacation pay, severance pay, pay in lieu of notice, notice, overtime . . . (Settlement para. 6, Appeal Book at p. 15);

c. to waive any right to reinstatement, and [he] confirms that all proceedings, complaints and claims referred to in the preamble hereof are completely discontinued, without costs, and that counsel for the parties are mandated to declare that they are settled out of court (Settlement para. 8, Appeal Book at p. 15).

[10] Federal income tax of $22,945.31 was deducted from the payment of $152,969, as indicated in the T4A form issued by the Ville de Shawinigan.

[11] In issuing the impugned assessment, the Minister assumed that the $152,969 that was paid to the appellant was a retirement allowance and, as such, was taxable.

[12] After objection and confirmation, the assessment was appealed to the Tax Court of Canada, and on April 3, 2007, judgment was rendered confirming the Minister's assessment. This is the decision under appeal.

DECISION OF THE TAX COURT OF CANADA

[13] The Tax Court judge began his analysis by indicating that if the evidence established that the settlement amount was paid so that the appellant would discontinue his harassment action, he would find that the settlement amount did not constitute a retiring allowance and was not taxable. On the other hand, if the settlement amount was paid to convince the appellant to resign from his position as Assistant Clerk, he would make the opposite finding on both these points (Reasons, at para. 9).

[14] The Tax Court judge then dismissed the appellant's argument that the entire payment was made in settlement of his harassment action. According to the judge, the settlement probably had two purposes, i.e., to indemnify the appellant for the loss of his employment and to obtain a discontinuance of his harassment action (Reasons, at para. 12).

[15] In saying this, the Tax Court judge acknowledged that the settlement was reached in the Superior Court file and ended the action for psychological harassment that the appellant had filed in that court. At the same time, however, the judge noted the wording of the settlement, which provided expressly that "in consideration of the fulfilment of the commitments made . . . by the City, Forest tenders his resignation" (section 5) and that "in consideration of the fulfilment of the

commitments made by the City, Forest acknowledges that he shall no longer have any employment relationship with the City" (section 8). According to the judge, these provisions show that at least part of the settlement amount was paid in consideration for the appellant resigning from his employment.

[16] Despite this, the judge concluded that the entire amount should be treated as a retiring allowance, since the appellant had failed to establish which part of the settlement amount was related to the discontinuance of his harassment action (Reasons, at para. 12):

> Since the Appellant has not satisfied me that the entire Settlement Amount that he was paid was related solely to his dropping of the harassment lawsuit, and since the evidence that he has presented to me does not enable me to determine clearly which part of the allowance is related to this commitment, I find that the entire Settlement Amount is a retiring allowance within the meaning of subsection 248(1) of the Act and must therefore be included in computing the Appellant's income for his 2003 taxation year under subparagraph 56(1)(*a*)(ii) of the Act.

ALLEGED ERRORS IN THE DECISION UNDER APPEAL

[17] The appellant submits that the Tax Court judge erred in fact and in law in not considering his testimony according to which the entire amount related to the settlement of his psychological harassment action.

[18] To the extent that only part of the amount related to the settlement of the psychological harassment file, the appellant contends that it is incumbent on the Minister to allocate this amount. In the absence of evidence on this point, the entire amount must be considered to have been paid as

damages. On this point, the appellant relies on the Supreme Court of Canada decision in *Schwartz v. the Queen*, [1996] 1 S.C.R. 254 (*Schwartz*).

[19] Last, the appellant submits that the judge wrongly interpreted the term “retiring allowance”. In order to constitute a retiring allowance, a sum must be paid after long years of service and must be intended to compensate for a loss of income. According to the appellant, the amount in question here does not meet these requirements because he was employed by the Ville for only a short period of time and lost nothing as a result of losing his employment.

STATUTORY FRAMEWORK

[20] Subsection 248(1) of the Act reads as follows:

248. (1) "retiring allowance" means an amount (other than a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(*a*)(iv)) received	**248.** (1) «allocation de retraite » Somme, sauf une prestation de retraite ou de pension, une somme reçue en raison du décès d’un employé ou un avantage visé au sous-alinéa 6(1)*a*)(iv), reçue par un contribuable ou, après son décès, par une personne qui était à sa charge ou qui lui était apparentée, ou par un représentant légal du contribuable:
(*a*) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer’s long service, or	*a*) soit en reconnaissance de longs états de service du contribuable au moment où il prend sa retraite d’une charge ou d’un emploi ou par la suite;
(*b*) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,	*b*) soit à l’égard de la perte par le contribuable d’une charge ou d’un emploi, qu’elle ait été reçue ou non à titre de dommages ou conformément à une ordonnance ou sur jugement d’un tribunal compétent.
by the taxpayer or, after the taxpayer’s death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer;	

[Emphasis is mine.]

[21] Subparagraph 56(1)(*a*)(ii) of the Act reads as follows:

56. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,	**56.** (1) Sans préjudice de la portée générale de l'article 3, sont à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition:
Pension benefits, unemployment insurance benefits, etc.	Pensions, prestations d'assurance-chômage, etc.
(*a*) any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,	*a*) toute somme reçue par le contribuable au cours de l'année au titre, ou en paiement intégral ou partiel:
(ii) a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement,	(ii) d'une allocation de retraite, sauf s'il s'agit d'un montant versé dans le cadre d'un régime de prestations aux employés, d'une convention de retraite ou d'une entente d'échelonnement du traitement,

ANALYSIS AND DECISION

[22] As can be seen from reading the definition in section 248, a "retiring allowance" includes not only amounts paid in recognition of long service but also amounts paid in respect of a loss of employment of a taxpayer. In this case, despite the fact that the appellant had only been employed by the Ville for three years, there is no doubt that he was entitled to an indemnity on leaving his employment. This type of payment, whether or not paid as damages, constitutes a "retiring allowance" within the meaning of subsection 248(1) of the Act. The Tax Court judge did not err in his interpretation of the term "retiring allowance".

[23] The appellant also placed considerable emphasis on the fact that his testimony that the payment had only one purpose was not contradicted by any other witness. That is no doubt the case. But, as we indicated several times at the hearing, that was not the only evidence before the trial judge and, considering the wording of the settlement, we can only conclude that the payment had at least two purposes.

[24] Nor does *Schwartz, supra,* have the effect that the appellant attributes to it. In that case, because the Minister had advanced an alternative argument with respect to which he had to exceptionally bear the burden of proof (*Schwartz, supra,* at paragraphs 1, 17). That is why the Minister had to suffer the consequences of the absence of evidence as to apportionment of the payment in that case. In the case before us, this onus is on the appellant since the only argument advanced in support of the assessment is that the entire settlement amount is a retiring allowance.

[25] However, *Schwartz* also teaches us that once it has been established that a payment has a dual purpose, the bar for determining apportionment must not be set too high. As Mr. Justice La Forest explains (*Schwartz, supra*, at paragraph 41), the party that has the burden (in that case, the Minister)

> . . . should not have the burden of presenting, in every case where the apportionment of a general award is at issue, specific evidence amounting to an explicit expression of the concerned parties' intention with respect to that question. However, there must be <u>some</u> evidence, in whatever form, from which the trial judge will be able to infer, on a balance of probabilities, which part of that general award was intended to compensate for specific types of damages.

[26] I conclude from this passage that, to the extent that there is some evidence from which the trial judge can reasonably identify what a global amount is composed of, that evidence should be accepted. This result, if supported by the evidence, is clearly preferable to the situation where, as in this case, it is acknowledged that part of the money received—most of it, if we consider the fact that the appellant was employed by the Ville for only three years—is not taxable but tax is imposed on the entire amount because it cannot be apportioned.

[27] In the present matter, the Tax Court judge found that the appellant's evidence did not enable him to "clearly" determine this apportionment (see the excerpt from the reasons cited in paragraph 16, above). In saying this, the Tax Court judge, in my view, set the bar too high. As the Supreme Court explains, the evidence should be examined to see whether there is some evidence on which the judge can identify which part of the amount relates to each of the purposes referred to in the settlement.

[28] The evidence before the Tax Court included a document from the Ville de Shawinigan indicating how compensation was determined for the municipal employees who left their employment following the 2002 amalgamation. This program, which was available to the employees of the new Ville who agreed to leave their employment and to waive any right to reinstatement, established the scale of amounts that the new Ville was prepared to pay as severance pay. Under this program, an employee was entitled to a severance payment equivalent to one month of salary for each year of service, with a minimum of three months and a maximum of eighteen months (Voluntary Leave Program, Appeal Book, at p. 97).

[29] The benchmark salary for purposes of this calculation was the salary for the last year of service (specifically, the salary that was payable on the first day of the sixth month prior to the departure) excluding premiums, bonuses or other remuneration (Voluntary Leave Program, *idem*). The T-4 slip issued by the Ville de Shawinigan for 2003 indicates that the appellant's salary was $104,691 during his last year of service, which would include the seven weeks' vacation that had to be paid to him under paragraph 4 of the settlement. Excluding the amounts attributable to those seven weeks (i.e., $1,773 per week or a total of $12,411), the appellant's annual salary was approximately $92,200, and, therefore, under the compensation policy established by the Ville, he was entitled to severance pay of $23,050.

[30] This evidence constitutes an objective basis from which it is possible to reasonably allocate the amount that the appellant received, and the Tax Court judge should have taken this into consideration. In my opinion, the fact that the Ville was prepared to pay only $23,050 to obtain the appellant's voluntary departure suggests, by deduction and on the balance of probabilities, that this was the approximate amount that was paid to the appellant so that he would agree to leave his employment and that the balance was paid in consideration of the appellant discontinuing his harassment action.

[31] The conclusion that I have arrived at takes into account not only the short period of time that the appellant was employed by the Ville but also the numerous proceedings underlying the

psychological harassment action, its apparent seriousness and the seemingly compelling interest that the Ville had in having the appellant discontinue it.

[32] For these reasons, I would allow the appeal, set aside the judgment of the Tax Court of Canada and, rendering the judgment that it should have given, I would allow the appellant's appeal before the Tax Court of Canada in part, and I would refer the assessment to the Minister for re-assessment on the basis that only the amount of $23,050 received by the appellant pursuant to the settlement negotiated in December 2003 constitutes a retiring allowance. I would grant the appellant his disbursements before us and before the Tax Court of Canada.

"Marc Noël"

J.A.

"I concur.
Gilles Létourneau J.A."

"I concur.
Johanne Trudel J.A."

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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