Date: 20090223

Docket: A-428-07

Citation: 2009 FCA 53

CORAM: **DESJARDINS J.A.**
NADON J.A.
BLAIS J.A.

BETWEEN:

MICHAEL SYREK

Appellant

and

HER MAJESTY THE QUEEN and CHARLENE FERGUSON

Respondents

Heard at Toronto, Ontario, on December 4, 2008.

Judgment delivered at Ottawa, Ontario, on February 23, 2009.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DESJARDINS J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a Judgment of Mr. Justice Little of the Tax Court of Canada, 2007TCC470, dated August 17, 2007, which dismissed the appellant's appeals from the Minister of National Revenue's (the "Minister") reassessments of his 2001, 2002, 2003 and 2004 taxation years.

[2] More particularly, the Minister, in reassessing the appellant's income for the taxation years at issue, disallowed certain deductions from his taxable income, i.e. amounts claimed by the appellant to be "support amounts" under subsection 56.1(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (the "Act").

[3] At issue in this appeal is whether the "support amounts" paid by the appellant, pursuant to a Separation Agreement, to his common-law spouse Charlene Ferguson, a respondent in these proceedings, can be deducted from his income for the years at issue. The answer to that question depends, in part, on the determination of the following question: whether the appellant was obligated under the Separation Agreement to pay to Ms. Ferguson the amounts which he claims were "support amounts".

THE FACTS

[4] A brief summary of the facts will be helpful in understanding the issues raised by the appeal.

[5] The appellant and his former common-law spouse separated in September 2001 after having lived together for over 15 years. The children issuing from their relationship, Ashley and Danielle, were respectively 15 and 10 years old at the time of their parents' separation.

[6] On November 21, 2001, the appellant and Ms. Ferguson executed an Interim Agreement (the "Agreement") pursuant to which they sought to determine, *inter alia*, custody of their children, child and spousal support and family residence.

[7] Clauses 6 and 7 and of the Agreement are at the heart of the appeal. Clause 6 provides that the appellant shall pay to Ms. Ferguson "for her support" a sum of $2,000 per month. As to clause 7, it provides that both the appellant and Ms. Ferguson "acknowledge that the execution of this

Agreement shall not be construed as any indication that the appellant is able or liable to pay spousal support in the amount set out herein, or at all".

[8] On the basis of his understanding of the Agreement, the appellant claimed a deduction from his taxable income for the payments made to Ms. Ferguson between December 6, 2001 and December 31, 2004. The amounts claimed were $1,846 for the 2001 taxation year and $23,998 for each of taxation years 2002, 2003 and 2004.

[9] The Minister disallowed these deductions because of his view that they did not constitute "support amounts" within the meaning of the Act. More particularly, the Minister's view was that by reason of clause 7 of the Agreement, the appellant was not obligated to make the aforesaid payments to Ms. Ferguson and that, as a result, the payments did not meet the definition of spousal support.

[10] The Minister's position is made perfectly clear at paragraphs 17 and 20 of his Reply to the Notice of Appeal (Appeal Book, pages 34 and 35):

> 17. In so reassessing the Appellant's income tax returns for the 2001, 2002, 2003 and 2004 taxation years and in confirming said reassessments, the Minister relied on the following assumptions of fact:
>
> (a) The Appellant and his former common-law spouse, namely Charlene Ferguson (the "Former Common-Law Spouse") separated in 2001;
>
> (b) At all relevant times, the Appellant and Former Common-Law Spouse had two children – Ashley Syrek born on April 27, 1986 and Danielle Syrek born on January 1, 1991;
>
> (c) Pursuant to paragraph 6 of the Agreement referred to in paragraph 2 herein, the appellant "shall pay" the Former Common-Law Spouse $2,000 a month, payable bi-weekly in the amount of $923.00 commencing on December 6, 2001; and

> (d) Notwithstanding the condition as outlined in paragraph 6 of the Agreement, said Agreement in paragraph 7 further stipulated that the "execution of this agreement shall not be construed as any indication that Syrek is able or liable to pay spousal support in the amount set out herein, or at all".
>
> …
>
> 20. He submits that the Appellant is not entitled to claim a deduction for spousal support paid with respect to the 2001, 2002, 2003 and 2004 taxation years within the meaning of paragraph 60(b) of the Act as the appellant was not required under the terms of the Agreement as stated in subparagraph 17(d) herein to pay said support and consequently, the spousal support does not meet the definition of a "support amount" in accordance with subsection 56.1(4) of the Act.

[11] Following the filing of Notices of Objection by the appellant to his reassessments for the years at issue, the Minister, on January 20, 2006, confirmed the reassessments for the appellant's taxation years 2001, 2002, 2003 and 2004. Hence, the appeals by the appellant to the Tax Court of Canada. I now turn to the Judgement under appeal.

THE JUDGMENT OF THE TAX COURT OF CANADA

[12] After reviewing the relevant facts and the relevant provisions of law, namely, subsection 56.1(4) and paragraph 60*(b)* of the Act, the learned Judge stated the Minister's position in denying the deductions sought by the appellant:

> [15] The Minister has determined that for the purposes of subsection 60(b) of the Act that the Separation Agreement is not a binding legal agreement.

[13] In order to determine the validity of the Minister's position, the Judge first turned to the testimony of Ms. Andrea Ashenbrenner, the lawyer who represented the appellant when the

Agreement was executed. The Judge's review of her testimony appears to have led him to the conclusion that the Agreement was not enforceable. Specifically, he drew attention to that part of Ms. Ashenbrenner's testimony where she indicated that she did not believe that "the spousal support component of this Agreement through the Family Responsibility Office" was enforceable (see Transcript of Ms. Ashenbrenner's cross examination on June 29, 2007, at page 67, lines 2 to 6).

[14] The Judge then referred to section 7 of the Agreement and concluded that under the terms thereof, the appellant was not liable to pay to Ms. Ferguson the amounts described as "spousal support" in the Agreement. In the Judge's words, "the Separation Agreement was not binding on the Appellant" (see paragraph 19 of his Reasons).

[15] The Judge then stated that in concluding as he did that the appellant was not liable to make any spousal support payment to Ms. Ferguson, he had "referred to a number of Court decisions". In fact, the only decision cited by the Judge is that of Mr. Justice Rowe, Deputy Judge of the Tax Court of Canada, in *Hock v. Canada*, [2003] T.C.J. No. 547 (QL), which decision this Court upheld in *Hock v. Canada*, 2004 FCA 336.

[16] The Judge concluded his Reasons by saying, at paragraph 24:

> [24] Since the Separation Agreement was not a binding legal document compelling the Appellant to pay spousal support payments to Ferguson I have concluded that the Appellant is not entitled to claim a deduction for spousal support paid in the 2001, 2002, 2003 and 2004 taxation years within the meaning of subsection 60(b) of the Act. It also follows that the spousal support does not meet the definition of "support amount" in accordance with subsection 56.1(4) of the Act.

RELEVANT LEGISLATION

[17] For ease of reference, I reproduce the relevant provisions of the Act:

56.1 [4] The definitions in this subsection apply in this section and section 56.

"child support amount"
«pension alimentaire pour enfants »
"child support amount" means any support amount that is not identified in the agreement or order under which it is receivable as being solely for the support of a recipient who is a spouse or common-law partner or former spouse or common-law partner of the payer or who is a parent of a child of whom the payer is a legal parent.

"commencement day"
«date d'exécution »
"commencement day" at any time of an agreement or order means
(a) where the agreement or order is made after April 1997, the day it is made; and
(b) where the agreement or order is made before May 1997, the day, if any, that is after April 1997 and is the earliest of
(i) the day specified as the commencement day of the agreement or order by the payer and recipient under the agreement or order in a joint election filed with the Minister in prescribed form and manner,
(ii) where the agreement or order is varied after April 1997 to change the child support amounts payable to the recipient, the day on which the first payment of the varied amount is required to be made,
(iii) where a subsequent agreement or order is made after April 1997, the effect of which is to change the total child support amounts payable to the recipient by the payer, the commencement day of the first

56.1 [4] Les définitions qui suivent s'appliquent au présent article et à l'article 56.

«date d'exécution »
"commencement day"
«date d'exécution » Quant à un accord ou une ordonnance :
a) si l'accord ou l'ordonnance est établi après avril 1997, la date de son établissement;
b) si l'accord ou l'ordonnance est établi avant mai 1997, le premier en date des jours suivants, postérieur à avril 1997:
(i) le jour précisé par le payeur et le bénéficiaire aux termes de l'accord ou de l'ordonnance dans un choix conjoint présenté au ministre sur le formulaire et selon les modalités prescrits,
(ii) si l'accord ou l'ordonnance fait l'objet d'une modification après avril 1997 touchant le montant de la pension alimentaire pour enfants qui est payable au bénéficiaire, le jour où le montant modifié est à verser pour la première fois,
(iii) si un accord ou une ordonnance subséquent est établi après avril 1997 et a pour effet de changer le total des montants de pension alimentaire pour enfants qui sont payables au bénéficiaire par le payeur, la date d'exécution du premier semblable accord ou de la première semblable ordonnance,
(iv) le jour précisé dans l'accord ou l'ordonnance, ou dans toute modification s'y rapportant, pour l'application de la présente loi.

such subsequent agreement or order, and (iv) the day specified in the agreement or order, or any variation thereof, as the commencement day of the agreement or order for the purposes of this Act.

"support amount"
«pension alimentaire »
"support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and
(a) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or
(b) the payer is a legal parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

…

«pension alimentaire »
"support amount"
«pension alimentaire » Montant payable ou à recevoir à titre d'allocation périodique pour subvenir aux besoins du bénéficiaire, d'enfants de celui-ci ou à la fois du bénéficiaire et de ces enfants, si le bénéficiaire peut utiliser le montant à sa discrétion et, selon le cas :
a) le bénéficiaire est l'époux ou le conjoint de fait ou l'ex-époux ou l'ancien conjoint de fait du payeur et vit séparé de celui-ci pour cause d'échec de leur mariage ou union de fait et le montant est à recevoir aux termes de l'ordonnance d'un tribunal compétent ou d'un accord écrit;
b) le payeur est légalement le père ou la mère d'un enfant du bénéficiaire et le montant est à recevoir aux termes de l'ordonnance d'un tribunal compétent rendue en conformité avec les lois d'une province.

«pension alimentaire pour enfants »
"child support amount"
«pension alimentaire pour enfants » Pension alimentaire qui, d'après l'accord ou l'ordonnance aux termes duquel elle est à recevoir, n'est pas destinée uniquement à subvenir aux besoins d'un bénéficiaire qui est soit l'époux ou le conjoint de fait ou l'ex-époux ou l'ancien conjoint de fait du payeur, soit le parent, père ou mère, d'un enfant dont le payeur est légalement l'autre parent.

[…]

60. There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:
…

60. Peuvent être déduites dans le calcul du revenu d'un contribuable pour une année d'imposition les sommes suivantes qui sont appropriées :

[…]	
(b) the total of all amounts each of which is an amount determined by the formula A - (B + C) where	*b)* le total des montants représentant chacun le résultat du calcul suivant : A - (B + C) où :
A is the total of all amounts each of which is a support amount paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,	A représente le total des montants représentant chacun une pension alimentaire que le contribuable a payée après 1996 et avant la fin de l'année à une personne donnée dont il vivait séparé au moment du paiement,
B is the total of all amounts each of which is a child support amount that became payable by the taxpayer to the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and	B le total des montants représentant chacun une pension alimentaire pour enfants qui est devenue payable par le contribuable à la personne donnée aux termes d'un accord ou d'une ordonnance à la date d'exécution ou postérieurement et avant la fin de l'année relativement à une période ayant commencé à cette date ou postérieurement,
C is the total of all amounts each of which is a support amount paid by the taxpayer to the particular person after 1996 and deductible in computing the taxpayer's income for a preceding taxation year;	C le total des montants représentant chacun une pension alimentaire que le contribuable a payée à la personne donnée après 1996 et qui est déductible dans le calcul de son revenu pour une année d'imposition antérieure;
[Emphasis added]	[Non souligné dans l'original]

THE APPELLANT'S SUBMISSIONS

[18] The appellant submits that Little J. erred in concluding that he was not bound by clause 6 of the Agreement. More particularly, the appellant says that the Judge erred in relying solely on the testimony of Ms. Ashenbrenner. Expanding on this proposition, the appellant argues that Ms.

Ashenbrenner's opinion to the effect that paragraph 6 of the Agreement was unenforceable is incorrect, adding that she was not an expert in family law and therefore not in a position to provide an opinion on this issue.

[19] The appellant also submits that another witness, Mr. Raymond Bachinski, the lawyer who succeeded Ms. Ashenbrenner as the appellant's family law lawyer, testified that he was unable to say whether the Agreement was enforceable under the Family Responsibility Office.

[20] The appellant further submits that *Hock, supra*, upon which the Judge relied, was clearly distinguishable from the present case and that, in any event, the Agreement was clearly enforceable under the *Ontario Family Law Act*, R.S.O. 1990, c. F.3, and under the *Family Responsibility and Support Arrears Enforcement Act*, 1996, S.O. 1996, c. 31.

THE RESPONDENT'S SUBMISSIONS

[21] The respondent submits that the Judge clearly did not rely solely on the evidence of Ms. Ashenbrenner for his conclusion that the Agreement was not binding on the appellant. In support of that view, she refers us to paragraphs 18, 19 and 24 of the Judge's Reasons and says that the Judge based his decision on the wording of the Agreement.

[22] The respondent further says that since the terms of the Agreement are explicit and unambiguous, i.e. that clause 7 states that the appellant is not liable for spousal support, the Agreement must be given effect.

[23] The respondent also says that the *Ontario Family Law Act* is not applicable in the present matter because the Agreement was never filed with the Ontario courts, as required by that Act.

[24] Additionally, the respondent says that since the payments at issue were not designated solely for the use of the recipient, Ms. Ferguson, they do not meet the requirements of subsection 56.1(4) of the Act which requires that the amounts paid be identified as solely for the support of the former spouse, adding that it is clear from clause 5 of the Agreement that the payments made to Ms. Ferguson were also intended for the needs of the children and, therefore, not solely for her use.

[25] As a last point, the respondent says that since Ms. Ferguson did not have "discretion as to the use" of the amounts paid to her by the appellant, the payments did not meet the definition of "support amount" found at subsection 56.1(4) of the Act.

[26] Thus, in the respondent's view, the payments made by the appellant to Ms. Ferguson were not deductible from his income.

ANALYSIS

[27] I commence with the criticism directed at the Judge for having relied solely on the testimony of Ms. Ashenbrenner. In my view, that issue can be easily disposed of. The testimony of Ms. Ashenbrenner which the Judge relied on, at least in part, pertained to the question of whether or not clause 6 of the Agreement was binding on the appellant. Specifically, the Judge relied on that part of

Ms. Ashenbrenner's testimony where she was asked for her opinion with regard to the enforceability of the "spousal support" component of the Agreement "through the Family Responsibility Office" (see Transcript of Ms. Ashenbrenner's cross-examination on June 29, 2007, at p. 67, lines 2 to 6). In that context, it is rather surprising that the Judge did not refer to that part of her testimony where she gave her opinion that clause 7 of the Agreement "did not affect the enforceability of the Agreement or the appellant's liability thereunder" (see Transcript of Ms. Ashenbrenner's cross examination on June 29, 2007, at page 51, lines 18 to 23).

[28] The questions asked of Ms. Ashenbrenner and the answers she provided in regard thereto were clearly directed, in my respectful view, to an issue of law which the Judge had to decide. It is trite law that questions of law are not questions in respect of which courts will admit opinion evidence. In *The Law of Evidence in Canada*, John Sopinka & Sidney N. Lederman & Alan M. Bryant, 2d ed. (Toronto and Vancouver: Butterworths) at page 640, paragraph 12.83, the learned authors say:

> Questions of domestic law as opposed to foreign law are not matters upon which a court will receive opinion evidence.

[29] In support of the above proposition, the learned authors refer to the decision of the Ontario Court of Appeal in *R. v. Century 21 Ramos Realty Inc.* (1987), 58 O.R. (2d) 737 at 752, where the Court stated the principle as follows:

> It was a question of law for the judge as to what constitutes an appropriation. It was for the judge to determine, in compliance with the legal definition, if and when an appropriation took place. This was not something on which an expert witness could give evidence.

[30] Consequently, it was wrong for the Judge to rely, even if only in part, on the opinion of Ms. Ashenbrenner with respect to whether the Agreement was enforceable or whether the appellant was bound by its terms.

[31] What is relevant, however, is that part of Ms. Ashenbrenner's testimony where she explains why clause 7 was inserted in the Agreement. At page 51 of the Transcript, she gives the following explanation at lines 8 to 17:

> … The purpose of paragraph seven is so that a status quo wasn't being established with respect to that two thousand dollars a month. I didn't want a situation where later on the house is sold and Ms. Ferguson is working and that she could be raising an argument that well, he has been paying me two thousand dollars a month. There is a status quo for two thousand dollars a month so he should continue to be paying me two thousand dollars a month.
>
> [Emphasis added]

[32] Ms. Ashenbrenner also testified that the type of provision found in clause 7 was commonly included in interim agreements. At page 53 of the Transcript, the following question and answer appear:

> Q. Could I ask you about your understanding about the inclusion of paragraphs such as seven in the interim agreement? Is paragraph seven a common inclusion in interim agreements?
>
> A. Yes, that type of a paragraph would be put in an agreement. Particularly an interim agreement where we were waiting for an event to occur. In this case it was waiting for the house to sell just so that we weren't establishing a status quo going on into the future because the amount of money Ms. Ferguson would need would be higher while she remained in occupation of the residence.
>
> [Emphasis added]

[33] With that testimony in mind, I now turn to clause 7 of the Agreement.

[34] The Judge, on the basis of Ms. Ashenbrenner's testimony and his reading of clause 7, concluded that the appellant did not have a legal obligation to pay $2,000 per month to Ms. Ferguson. In my view, the Judge erred in so concluding.

[35] First, as I have just determined, the Judge ought not to have considered Ms. Ashenbrenner's testimony. Second, I am satisfied that his interpretation of clause 7, in the light of all the other provisions of the Agreement, cannot be reasonably supported.

[36] In order to properly construe clause 7, it is necessary to set out a number of clauses of the Agreement so as to place it in its proper context. In other words, it is necessary to examine the contract as a whole in order to determine the intention of the parties. As the Supreme Court of Canada said in *W.J. Hopgood & Son v. Feener*, [1921] 62 S.C.R. 534 at p. 540:

> The object of the Court in construing a contract must be to ascertain and give effect to the intention of the parties gathered from the contract as a whole – not from a consideration of a single provision divorced from its context.

[37] I begin with the preamble to the Agreement which reads, in part, as follows:

> AND WHEREAS the parties have agreed to enter into an Interim Agreement to have effect during their negotiation of a Separation Agreement or pending an Order of a Court of competent jurisdiction, or pending the closing of a sale transaction with respect to the family residence municipally known as 2240 15th Side Road, Thunder Bay, Ontario, which ever shall first occur;

[Emphasis added]

[38] I also reproduce clauses 6, 7 and 8, which are found under the heading SPOUSAL SUPPORT:

> 6. Syrek shall pay to Ferguson for her support, the sum of $2,000.00 per month, payable in bi-weekly installments of $923.00, commencing on the 6th day of December, 2001, and continuing on a bi-weekly basis thereafter, to coincide with Syrek's pay periods.
>
> 7. Syrek and Ferguson acknowledge that the execution of this agreement shall not be construed as any indication that Syrek is able or liable to pay spousal support in the amount set out herein, or at all.
>
> 8. Syrek and Ferguson agree that this agreement is entered into without prejudice to the rights of Syrek or Ferguson to have the issue of spousal support determined in judicial proceedings, and that this agreement regarding spousal support shall not be referred to by Syrek or Ferguson personally or through their solicitors, or any agent in any proceedings for spousal support instituted by either of them, in any Court pursuant to any statute as a result of the breakdown of the relationship of Syrek and Ferguson, provided that this agreement regarding spousal support may be disclosed to Canada Customs and Revenue Agency or any tribunal constituted under the provisions of the Income Tax Act.

[39] Finally, clause 12 of the Agreement is relevant and it reads as follows:

> 12. <u>This Agreement shall remain in full force and effect until</u>:
> (a) The parties negotiate a Separation Agreement which provides that this Agreement is terminated or;
> (b) Either of the parties obtains an Order from a Court of competent jurisdiction fixing the amounts of support to be paid between Syrek and Ferguson for the support of Ferguson; or
> (c) A sale transaction closes with respect to the family residence located at 2240 15th Side Road, Thunder Bay, Ontario;
>
> whichever shall first occur;

[Emphasis added]

[40] As is made clear in the preamble to the Agreement and in clause 12 thereof, the Agreement is to "have effect" and "remain in full force and effect", until the happening of the earlier of the following events: (i) a Separation Agreement providing that the Agreement is at an end; (ii) a Court of competent jurisdiction makes an Order fixing the amount of support payable by the appellant to Ms. Ferguson; (iii) the sale of the family residence. I should say here that no other separation agreement was reached by the parties, nor was a Court order ever made. However, in March 2007, the family residence was sold.

[41] On the basis of these provisions, leaving aside clause 7 for the moment, there can be no doubt that the parties clearly intended that the appellant would be bound to pay Ms. Ferguson the sum of $2,000 per month until the happening of one of the aforementioned events.

[42] The Judge did not give much of an explanation in support of his view of clause 7, limiting himself, in effect, to paragraphs 18 to 20, where he says immediately after reviewing Ms. Ashenbrenner's testimony:

> [18] Section 7 of the Separation Agreement provides that "… this agreement shall not be construed as any indication that Syrek is able or liable to pay spousal support in the amount set out herein, or at all".
>
> [19] In reviewing the wording contained in paragraph 7 of the Separation Agreement I have concluded that the Appellant was not liable to pay the spousal support in the amounts as outlined above. In other words the Separation Agreement was not binding on the Appellant.
>
> [20] In reaching my conclusion that the Separation Agreement did not create a legal obligation on the Appellant to pay spousal support to Ferguson I have referred to a number of Court decisions.

[43] In attempting to determine the meaning of clause 7, it is also useful to have regard to clause 8 of the Agreement and to the testimony of Ms. Ashenbrenner, reproduced at paragraphs 31 and 32 above, where she explains why clause 7 was inserted in the Agreement, i.e. so as to avoid "establishing a status quo". In my view, clauses 7 and 8 must be read together in the light of the preamble and clause 12.

[44] Clause 8 clearly provides that the Agreement is made without prejudice to the parties' right to have the question of spousal support determined by a competent Court and that the Agreement ought not to be disclosed by them in such proceedings, "provided that this agreement regarding spousal support may be disclosed to Canada Customs and Revenue Agency [the "CCRA"] or any tribunal constituted under the provisions of the Income Tax Act".

[45] Thus, in the closing words of clause 8, the parties recognize the right, in effect, of the appellant to disclose the documents to the CCRA for the purpose of his income tax declaration and, hence, his possible entitlement to deductions from his taxable income.

[46] As to the preamble and clause 12, which I have already reproduced, they make it clear that the parties intended the Agreement to remain in full force and effect until one of the events specified therein occurred. In other words, the parties were bound by the terms of the Agreement until the the happening of the earlier of these events.

[47] In *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888, the Supreme Court of Canada explained the approach which a Court should take in interpreting a contract. First, the Court should seek to determine the intention of the parties by looking at the words which they have used. Should those words turn out to be unclear or ambiguous, the Court should then seek an interpretation which, in the light of the whole of the contract, recognizes the intent of the parties when they entered into the contract.

[48] Although the Court, in *Consolidated Bathurst, supra*, was dealing with an insurance contract, the words of Estey J., who wrote for the Court at pages 901-02, are entirely apposite to the matter before us:

> Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.
>
> [Emphasis added]

[49] In *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson-Carswell, 2006), at pages 455-456, the author G.H.L. Fridman says that the rule whereby the words of a contract must be given their plain and ordinary meaning will not be followed where "adherence to the rule would involve consistency or repugnancy between different parts of the contract". In effect, although clause 6 provides in clear and unambiguous terms that the appellant must pay to Ms. Ferguson $2,000 a month, by clause 7 of the Agreement, in the Judge's view, the appellant has repudiated the undertaking found at clause 6. In my view, the interpretation adopted by the Judge makes different clauses of the Agreement inconsistent or repugnant.

[50] In my view, considering the Agreement as a whole and the evidence of Ms. Ashenbrenner referred to at paragraphs 31 and 32 of these Reasons, the most reasonable interpretation of clause 7 is that the provision was meant to prevent Ms. Ferguson from relying, in judicial proceedings pertaining to spousal support, on the fact that the appellant had agreed to pay the sum of $2,000 to her every month. In other words, the clause was inserted in the Agreement to prevent Ms. Ferguson from arguing that the appellant's undertaking in the Agreement to pay her a sum of $2,000 per month constituted evidence of his ability and, hence, his liability to pay her spousal support in the future, i.e. after the happening of the earlier of the events mentioned in clause 12 of the Agreement.

[51] I therefore conclude that clause 7 of the Agreement does not support the conclusion reached by the Judge. It is clear, in my respectful view, that the appellant was bound by the terms of the Agreement and, more particularly, that he was bound, pursuant to clause 6 thereof, to pay to Ms. Ferguson the sum of $2,000 per month.

[52] There remains one final matter to be dealt with. At paragraph 17 of his Reply to the Notice of Appeal, the Minister stated the assumptions of fact on which he relied to reassess the appellant. Specifically, relying on the fact that by reason of clause 7 of the Agreement the appellant was not liable to pay spousal support to Ms. Ferguson, the Minister indicated, at paragraph 20 of his Reply, that the payments made by the appellant did not meet the definition of "support amount" found at subsection 56.1(4) of the Act.

[53] However, before the Tax Court and before this Court, it was argued by counsel for the respondent that there were other grounds which supported the Minister's refusal to allow the deductions claimed by the appellant. Specifically, and I have already alluded to this at paragraphs 24 and 25 above where I have set out the respondent's submissions in this appeal, the respondent says that because the payments made by the appellant were not designated solely for the use of Ms. Ferguson and that she did not have discretion with respect to the use of the payments, they do not meet the definition of "support amount" found at subsection 56.1(4) of the Act.

[54] I should point out that although these submissions were made by the respondent before the Tax Court, they were not addressed by the Judge, presumably because of his conclusion with regard to clause 7 of the Agreement.

[55] In my view, the respondent's submissions are without merit. First, on my reading of the Agreement and, in particular, of clauses 5 and 6 thereof, I cannot see how it can be said that the

amounts at issue were not identified as solely for the support of Ms. Ferguson. Clause 6 is under the heading SPOUSAL SUPPORT and states that the appellant "shall pay" to Ms. Ferguson "for her support" the sum of $2,000 per month. As to clause 5, it says that each party to the Agreement will provide "for the support of the children from the relationship while in their care, without any contribution to such support from the other". Consequently, on the clear words of that provision, that sum of $2,000 payable to Ms. Ferguson by the appellant was not intended for the needs of the children.

[56] Thus, the amounts at issue were not, as the respondent submits, "child support amounts" as defined in 56.1(4) of the Act.

[57] The respondent's last argument is that Ms. Ferguson did not have discretion with respect to the use of the payments and, therefore, the payments made by the appellant do not meet the definition of "support amount". Again, I see no merit to this submission.

[58] In making that argument, the respondent relies on clause 10(a) of the Agreement, which reads as follows:

> 10. Pending the sale of the family residence, the parties agree that Ferguson shall be entitled to remain in and enjoy use and possession of the said family residence, subject to the following terms and conditions:
>
> (a) Ferguson covenants and agrees to pay all sums which fall due or become payable for principal, interest and taxes, under any existing mortgage registered against the family residence, or any other encumbrance thereon, and to pay municipal taxes, insurance for fire and supplemental perils, and other carrying charges, including charges for heating, hydro, and water and any and all utilities associated with the said family

> residence. Upon any sale of the said family residence, Ferguson is to receive no credit for having made such payments and Syrek is to receive no credit for occupation rent.

[59] According to the respondent, because Ms. Ferguson was obliged to make the above payments, she did not have discretion as to the use of the $2,000 monthly payment. That, in my view, is not a proper reading of clause 10(a). Nowhere does the Agreement provide that the payments made to Ms. Ferguson are conditional on her making the payments which are set out at clause 10(a). Rather, what clause 10(a) makes clear is that should Ms. Ferguson "remain in and enjoy use and possession of the said family residence", she shall be under the obligation of making the payments which are set out thereat. However, it is my view that had Ms. Ferguson decided not to live in the family residence, she would not have been obliged to make the payments that are set out at clause 10(a). I therefore conclude that Ms. Ferguson had discretion as to the use of the amounts paid to her by the appellant.

[60] As a result, the amounts claimed by the appellant as deductions for taxation years 2001, 2002, 2003 and 2004 are "support amounts" pursuant to subsection 56.1(4) and paragraph 60(1)*(b)* of the Act.

DISPOSITION

[61] For these reasons, I would allow the appeal with costs against the respondent Her Majesty the Queen, I would set aside the decision of the Tax Court dated August 17, 2007, I would allow the appellant's appeal from the Minister's reassessment of his 2001, 2002, 2003 and 2004 taxation years with costs and I would refer the matter back to the Minister for reconsideration and

reassessment on the basis that the amounts claimed by the appellant as deductions meet the definition of “support amount” under subsection 56.1(4) and paragraph 60(b) of the Act.

“M. Nadon”

J.A.

“I concur.
Alice Desjardins J.A.”

“I agree.
Pierre Blais J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-428-07
STYLE OF CAUSE:	MICHAEL SYREK v. H.M.Q. and CHARLEN FERGUSON
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	December 4, 2008
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	DESJARDINS J.A. BLAIS J.A.
DATED:	February 23, 2009

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