

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190306

Docket: A-57-18

Citation: 2019 FCA 45

**CORAM: RENNIE J.A.
WOODS J.A.
LASKIN J.A.**

BETWEEN:

FRANK MAMMONE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 27, 2018.

Judgment delivered at Ottawa, Ontario, on March 6, 2019.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**RENNIE J.A.
LASKIN J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada (*per* Justice Graham) which dismissed an appeal regarding a reassessment issued to Frank Mammone under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for the 2009 taxation year (2018 TCC 24).

[2] The appeal mainly concerns the limitation period for reassessing in subsection 152(4) of the Act. Specifically, the question is whether the Minister impermissibly relied on a new factual basis for the reassessment after the normal reassessment period had expired.

I. Background

[3] The relevant factual background is set out in detail in the Tax Court decision. A brief summary will suffice for purposes of the appeal.

[4] Mr. Mammone was employed in Toronto as a mechanic from 1981 to 2009 and was a member of the Ontario municipal employees pension plan (OMERS).

[5] In his year of retirement, Mr. Mammone established a new pension plan in which he was the sole member. The plan was registered under the Act effective January 1, 2009.

[6] On June 23, 2009, the commuted value of Mr. Mammone's OMERS pension was transferred to the new plan. A total of \$640,080.91 was transferred.

[7] On November 14, 2013, the Minister sent a notice of an intention to revoke the registration of the new pension plan retroactively as of January 1, 2009 on the basis that the plan did not satisfy registration requirements.

[8] Twenty-eight days later, on December 12, 2013, the Minister provided notice of revocation, which purported to revoke the registration of the new pension plan effective January 1, 2009.

[9] On the same day, the Minister issued a notice of reassessment for the 2009 taxation year, which included the amount transferred to the new plan in Mr. Mammone's income. The notice was sent on the last day before the expiry of the time period that the Minister was able to assess this amount (the "normal reassessment period" as defined in the subsection 152(3.1) of the Act).

[10] Mr. Mammone pursued rights of appeal, including an appeal to the Tax Court which was instituted in July 2016.

[11] In 2017, three and one-half years after the revocation notice was sent, the Minister concluded that the notice was ineffective because it was sent two days earlier than was permitted by the Act. Upon realizing the defect, the Minister sent a second revocation notice on June 26, 2017. The new notice stated that it superseded the earlier one and was being issued to correct a timing error. It also stated to be effective on a retroactive basis to January 1, 2009.

[12] The Minister reflected the change in position in an amended reply filed in the Tax Court on September 22, 2017. It stated that the Minister was relying on the second revocation notice for purposes of the reassessment issued on December 12, 2013.

[13] A useful summary of key dates for purposes of this appeal is provided in the Crown's memorandum as follows:

<u>Date</u>	<u>Event</u>
January 1, 2009	The Plan is registered under the <i>Act</i>
June 23, 2009	Transfer of \$640,080.91 from OMERS Plan to the Plan
November 14, 2013	Mailing of notice of intent to revoke the Plan
December 12, 2013	Initial notice of revocation of the Plan, effective January 1, 2009
December 12, 2013	Notice of reassessment
December 12, 2013	Last day of the normal reassessment period
June 2017	Second notice of revocation of the Plan, effective January 1, 2009

II. Tax Court decision

[14] The Tax Court considered two issues.

[15] First, the Tax Court considered whether the reassessment should be vacated on the ground that the factual basis for the reassessment relied on by the Minister did not exist at the time it was issued. The Tax Court determined that the basis did exist: “[t]he facts necessary to support the reassessment did exist when the reassessment was issued because subsection 147.1(12) caused them to exist retroactively” (Tax Court reasons at para. 14).

[16] The second issue was similar to the first, namely, whether the Minister's reliance on the second revocation notice was impermissible as a new basis of reassessment raised after the limitation period had expired. The Court rejected this argument for the same reason: "there has been no change to the factual basis of the reassessment" (Tax Court reasons at para. 27). Further, "[t]he basis for reassessment is and always has been that the commuted value of the OMERS pension plan was transferred to a non-registered pension plan" (Tax Court reasons at para. 22).

III. Analysis

A. *Introduction*

[17] The central issue to be decided in this appeal is whether the Tax Court erred in its conclusion that the factual basis of the reassessment had not changed and always was that the commuted value of Mr. Mammone's OMERS pension was transferred to a non-registered plan.

[18] Mr. Mammone submits that the factual basis for the reassessment did change. He points out that it changed in 2017 when the Minister no longer relied on the ineffective revocation notice issued in 2013 and instead relied on a new revocation notice issued in 2017.

[19] The Crown submits that the Tax Court made no reviewable error and that the retroactive effect of the revocation meant that the factual basis of the reassessment did not change.

B. *Applicable legislative scheme*

[20] The relevant provisions of the Act are reproduced in an appendix.

[21] As a general rule, a taxpayer is required to include in income an amount received “on account or in lieu of payment of, or in satisfaction of ... a superannuation or pension benefit” (subparagraph 56(1)(a)(i) of the Act). This includes indirect payments, such as payments that the taxpayer directs to someone else for the taxpayer’s benefit (subsection 56(2) of the Act).

[22] However, there is no income inclusion with respect to amounts transferred between registered pension plans that are defined benefit plans (subsections 147.3(3) and (9) of the Act).

[23] The term “registered pension plan” is defined in the Act. It includes a pension plan that has been registered by the Minister and whose registration has not been revoked (subsection 248(1) of the Act).

[24] The revocation of a pension plan’s registration by the Minister involves a two-step process under the Act. First, the Minister gives notice to the plan administrator of a proposal to revoke the registration. The notice is to include a proposed effective date of the revocation, which may be on a retroactive basis (subsection 147.1(11) of the Act). In the second step, the Minister provides notice to the plan administrator of the actual revocation. The notice of revocation must be provided after a period of 30 days of the mailing of the notice of intent to revoke. It must also specify the effective date of revocation (subsections 147.1(12) and (13) of

the Act). Once the revocation notice is issued, the registration of the pension plan is revoked as of the date specified, unless this Court orders otherwise (subsection 147.1(13) of the Act).

[25] This Court has recognized that such revocations can be retroactive, including for purposes of determining the tax consequences to members of the transferee pension plan (*Hodge v. Canada (National Revenue)*, 2009 FCA 210, 2009 D.T.C. 5124 at paras. 23-25).

[26] Although a notice of revocation may be issued on a retroactive basis, the limitation periods for reassessing also need to be considered. In this case, the reassessment was issued before the limitation period expired. However, this is not the end of the matter as courts have developed jurisprudence aimed at preventing the Minister from avoiding a limitation period by raising a new basis of assessment after the limitation period has expired.

[27] Chief Justice Noël of this Court described this principle in *Gramiak v. Canada*, 2015 FCA 40, 2015 D.T.C. 5042, as follows:

[33] A further restriction is that an alternative argument cannot be advanced when it would result in a reassessment being made outside the normal reassessment period set out in subsection 152(4) (*Walsh v. Canada*, 2007 FCA 222 at para. 18). This restriction which is central to the present appeal acknowledges the fact that allowing the Minister to raise an argument based on a legal and factual basis that is different from the one underlying the assessment after the normal reassessment period has expired would in effect do away with the limitation period.

[28] It is also necessary to take into account subsection 152(9) of the Act. This provision permits the Minister to raise a new argument after the relevant limitation period has expired,

within certain specified limitations. The principle as set out in *Gramiak* takes this provision into account.

[29] It is also worth mentioning that a legislative amendment to subsection 152(9) appears to expand the scope of the new arguments that the Minister may make after the expiry of the limitation period. The amendment is not in force for purposes of this appeal and the appendix includes the version of subsection 152(9) which is applicable.

C. *Application to facts*

[30] The question is whether the Minister's change in position, which was first set out in 2017, "is within or outside the legal and factual basis underlying the reassessments" (*Gramiak* at para. 35). Accordingly, it is necessary to consider both the legal and factual basis for the reassessment.

[31] The legal basis underlying the reassessment issued to Mr. Mammone on December 12, 2013 was that the amount transferred to the new pension plan is required to be included in Mr. Mammone's income because the new pension plan was never registered. I agree with the Tax Court that the legal basis did not change over time due to the retroactive nature of the revocation.

[32] However, the factual basis underlying the reassessment did change. When it was issued on December 12, 2013, the reassessment was based on the revocation notice sent on December

12, 2013. This basis was abandoned in 2017 because the notice was of no effect and the Minister then relied on a new notice of revocation.

[33] This change in position is reflected in the amended reply filed by the Minister in 2017. Paragraph 16 of the amended reply acknowledges that the Minister's factual assumptions do not support the reassessment and are no longer being relied on (appeal book at p. 25).

[34] It is clear from the legislative scheme described above, and subsection 147.1(13) in particular, that a revocation notice is a necessary step which must be taken to revoke a pension plan's registration. Without the notice, the new pension plan would be a "registered pension plan" that qualifies for a tax-free transfer of funds between plans. Therefore, the revocation notice was a factual element that was necessary in order to support the legal basis of the income inclusion, namely that the amount transferred from the OMERS pension plan should be included in Mr. Mammone's income because it was transferred to an unregistered plan.

[35] In this case, the applicable revocation notice was sent in 2017, which is long after the limitation period had expired. Clearly, this was not a factual basis on which the reassessment was based when it was issued, or when the limitation period expired.

[36] The Tax Court failed to take this into account. According to the Tax Court, the factual basis of the reassessment was always that the pension plan was revoked as of January 1, 2009. This is a conclusion based on subsection 147.1(13) of the Act. However, the conclusion itself relies on a new factual basis. This is an error of mixed fact and law which attracts the palpable

and overriding error standard of review (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 37). The error made meets that standard.

[37] In my view, this is a clear case in which the Minister’s position impermissibly avoids the limitation period for the 2009 taxation year. The Minister’s reliance on the 2017 revocation notice was a new factual basis underlying the reassessment raised long after the limitation period had expired. Moreover, this was more than a “new basis” to support the reassessment. It was also a new fact that did not materialize until after the limitation period had expired, when the Minister issued the second notice.

[38] The importance that limitation periods play in providing finality to disputes has been well established. In *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, Justice Côté of the Supreme Court of Canada stated:

[57] This Court has generally recognized that limitation periods have three purposes known as the certainty, evidentiary and diligence rationales: *Novak v. Bond*, [1999] 1 S.C.R. 808, at paras. 64-67, per McLachlin J.; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-31, per La Forest J. Limitation periods serve “(1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion”: P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at p. 123.

[58] Clearly, it is desirable that litigation be accurate and certain, given that the passage of time dims memories and erodes evidence, and also that the risk of error grows as an adjudicator is further removed from the cause of action. Furthermore, after a certain time, possible defendants may be unaware of the need to preserve potentially enlightening or even exonerating pieces of evidence. Finally, it is appropriate to expect plaintiffs to assert their claims diligently and to be cognizant of their circumstances and of the extent of their control over them.

Modern limitations legislation is therefore based on a recognition that limitation periods, in order to be effective, need to be final. This is the other side of the coin, the practical consequence of limitation periods that can make the application of a limitations statute seem harsh: *Novak*, at para. 8, per Iacobucci and Major JJ., dissenting.

[39] In my view, Mr. Mammone was entitled to rely on the expiry of the normal reassessment period to finalize his tax payable for the 2009 taxation year. In issuing the second revocation notice, and relying on it for purposes of the reassessment, the Minister was in effect seeking to do away with the limitation period.

[40] I would accordingly allow the appeal, with costs, and order that the reassessment for the 2009 taxation year be referred back to the Minister for reconsideration and reassessment to delete the income inclusion relating to the transfer of funds between pension plans.

“Judith M. Woods”

J.A.

“I agree
Donald J. Rennie J.A.”

“I agree
J.B. Laskin J.A.”

APPENDIX

Income Tax Act, R.S.C. 1985, c.1 (5th Supp.)

56. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

(a) any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,

(i) a superannuation or pension benefit including, ...

...

56. (2) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to another person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension under section 65.1 of the Canada Pension Plan or a comparable provision of a provincial pension plan as defined in section 3 of that Act) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.

...

147.1 (11) Where, at any time after a pension plan has been registered by the Minister,

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 :

(a) toute somme reçue par le contribuable au cours de l'année au titre, ou en paiement intégral ou partiel :

i) d'une prestation de retraite ou de pension, y compris, [...]

[...]

56. (2) Tout paiement ou transfert de biens fait, suivant les instructions ou avec l'accord d'un contribuable, à une autre personne au profit du contribuable ou à titre d'avantage que le contribuable désirait voir accorder à l'autre personne — sauf la cession d'une partie d'une pension de retraite conformément à l'article 65.1 du Régime de pensions du Canada ou à une disposition comparable d'un régime provincial de pensions au sens de l'article 3 de cette loi — est inclus dans le calcul du revenu du contribuable dans la mesure où il le serait si ce paiement ou transfert avait été fait au contribuable.

[...]

147.1 (11) Lorsque l'une des situations suivantes se produit après que le ministre a agréé un régime de pension :

(a) the plan does not comply with the prescribed conditions for registration,

a) le régime n'est pas conforme aux conditions d'agrément réglementaires;

...

[...]

the Minister may give notice (in this subsection and subsection (12) referred to as a "notice of intent") by registered mail to the plan administrator that the Minister proposes to revoke the registration of the plan as of a date specified in the notice of intent, which date shall not be earlier than the date as of which,

le ministre peut informer l'administrateur du régime par avis — appelé « avis d'intention » au présent paragraphe et au paragraphe (12) —, envoyé en recommandé, qu'il entend retirer l'agrément du régime à la date précisée dans l'avis d'intention, qui ne peut être antérieure aux dates suivantes :

(j) where paragraph (a) applies, the plan failed to so comply,

j) si l'alinéa a) s'applique, la date où le régime cesse d'être conforme;

...

[...]

147.1 (12) Where the Minister gives a notice of intent to the administrator of a registered pension plan, or the plan administrator applies to the Minister in writing for the revocation of the plan's registration, the Minister may,

147.1 (12) Le ministre peut, s'il envoie un avis d'intention à l'administrateur d'un régime de pension agréé ou si celui-ci lui demande par écrit de retirer l'agrément, informer l'administrateur par avis — appelé « avis de retrait » au présent paragraphe et au paragraphe (13) —, envoyé en recommandé, du retrait de l'agrément du régime à compter de la date précisée dans l'avis de retrait, qui ne peut être antérieure à celle précisée dans l'avis d'intention ou dans la demande de l'administrateur. L'avis de retrait est envoyé aux dates suivantes :

(a) where the plan administrator has applied to the Minister in writing for the revocation of the plan's registration, at any time after receiving the administrator's application, and

a) si l'administrateur demande au ministre par écrit de retirer l'agrément du régime, une date donnée postérieure à la réception de la demande de l'administrateur;

(b) in any other case, after 30 days after the day of mailing of the notice of intent,

b) dans les autres cas, 30 jours après la mise à la poste de l'avis d'intention.

give notice (in this subsection and subsection (13) referred to as a "notice of revocation") by registered mail to the plan administrator that the registration of the plan is revoked as of the date specified in the notice of revocation, which date may not be earlier than the date specified in the notice of intent or the administrator's application, as the case may be.

147.1 (13) Where the Minister gives a notice of revocation to the administrator of a registered pension plan, the registration of the plan is revoked as of the date specified in the notice of revocation, unless the Federal Court of Appeal or a judge thereof, on application made at any time before the determination of an appeal pursuant to subsection 172(3), orders otherwise.

147.1 (13) L'agrément d'un régime de pension agréé est retiré à compter de la date précisée dans l'avis de retrait, sauf ordonnance contraire de la Cour d'appel fédérale ou de l'un de ses juges sur demande formulée avant qu'il ne soit statué sur tout appel interjeté selon le paragraphe 172(3).

...

[...]

147.3 (3) An amount is transferred from a registered pension plan (in this subsection referred to as the "transferor plan") in accordance with this subsection if the amount

147.3 (3) Un montant est transféré d'un régime de pension agréé donné conformément au présent paragraphe si les conditions suivantes sont réunies :

(a) is a single amount;

a) il s'agit d'un montant unique;

(b) consists of all or any part of the property held in connection with a defined benefit provision of the transferor plan;

b) le montant représente tout ou partie des biens détenus relativement à une disposition à prestations déterminées du régime donné;

(c) is transferred directly to another registered pension plan to be held in connection with a defined benefit provision of the other plan;

c) le montant est transféré directement à un autre régime de pension agréé pour qu'il soit détenu relativement à une

and

disposition à prestations
déterminées de ce régime;

(d) is transferred as a consequence of benefits becoming provided under the defined benefit provision of the other plan to one or more individuals who were members of the transferor plan.

d) le montant est transféré du fait que des prestations sont prévues par la disposition à prestations déterminées de l'autre régime pour un ou plusieurs particuliers qui participent au régime donné.

...

[...]

147.3 (9) Where an amount is transferred in accordance with any of subsections (1) to (8),

147.3 (9) Les montants transférés conformément à l'un des paragraphes (1) à (8) ne peuvent :

(a) the amount shall not, by reason only of that transfer, be included by reason of subparagraph 56(1)(a)(i) in computing the income of any taxpayer;

a) de ce seul fait, être inclus dans le calcul du revenu d'un contribuable en application du sous-alinéa 56(1)a)(i);

...

[...]

152. (3.1) For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

152. (3.1) Pour l'application des paragraphes (4), (4.01), (4.2), (4.3), (5) et (9), la période normale de nouvelle cotisation applicable à un contribuable pour une année d'imposition s'étend sur les périodes suivantes :

(a) if at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends four years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year; and

a) quatre ans suivant soit la date d'envoi d'un avis de première cotisation en vertu de la présente partie le concernant pour l'année, soit, si elle est antérieure, la date d'envoi d'une première notification portant qu'aucun impôt n'est payable par lui pour l'année, si, à la fin de l'année, le contribuable est une fiducie de fonds commun de placement ou une société autre qu'une société privée sous contrôle canadien;

(b) in any other case, the period that ends three years after the

b) trois ans suivant celle de ces dates qui est antérieure à l'autre,

earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year.

dans les autres cas.

...

[...]

152. (9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act

152. (9) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi :

(a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and

a) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;

(b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

b) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

...

[...]

248. (1) ...

248. (1) [...]

“**registered pension plan**” means a pension plan (other than a pooled pension plan) that has been registered by the Minister for the purposes of this Act and whose registration has not been revoked;

« **régime de pension agréé** » Régime de pension, sauf un régime de pension collectif, que le ministre a agréé pour l'application de la présente loi et dont l'agrément n'a pas été retiré.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-57-18

APPEAL FROM A JUDGMENT OF MR. JUSTICE DAVID G. GRAHAM OF THE TAX COURT OF CANADA DATED JANUARY 18, 2018 IN DOCKET NUMBER 2016-2834 (IT)G

STYLE OF CAUSE: FRANK MAMMONE v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 27, 2018

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

DATED: MARCH 6, 2019

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