Federal Court of Appeal | Cour d'appel fédérale

Date: 20130710

Docket: A-408-12

Citation: 2013 FCA 181

CORAM: **BLAIS C.J.**
MAINVILLE J.A.
NEAR J.A.

BETWEEN:

HARVEY CHADWICK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Regina, Saskatchewan, on June 27, 2013.

Judgment delivered at Ottawa, Ontario, on July 10, 2013.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: BLAIS C.J.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] The appellant ("the taxpayer") appeals from the August 31, 2012 judgment of the Tax Court, in which the judge dismissed his appeals from reassessments made under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) ("the ITA") for the 2008 and 2009 taxation years. In his reasons, the judge determined that the taxpayer's child support payments were not deductible from his income for the relevant years.

[2] The ITA was amended in 1997 to neutralize the tax treatment of child support payments. Prior to the amendments, child support payments were generally includable in the income of the

recipient and deductible from the income of the payer. Following the amendments, such payments are neither includable in nor deductible from the income of either party. The ITA includes transitional rules to cover situations such as that before us.

[3] The taxpayer and his ex-spouse entered into an inter-spousal contract ("the Agreement") in September 1996, specifying that the taxpayer would pay $450 per month to his ex-spouse in support of their two children. The couple petitioned for divorce in 1997 and, in uncontested and on-consent proceedings in 1998, a divorce judgment ("the Divorce Judgment") was issued that incorporated, for the most part, the terms of the Agreement, including the monthly child support payment amount of $450. The Agreement was thus entered into prior to the amendments, and the Divorce Judgment was issued following the amendments.

[4] While a child support amount payable under an agreement or order made prior to May 1997 is generally subject to the old regime, there are four exceptions to this rule: *Holbrook v. Canada*, 2007 FCA 145 at paragraph 8; subsection 56.1(4) of the ITA (definition of "commencement day"). As set out in *Holbrook*, the exceptions essentially attribute a post-April 1997 commencement day to a pre-May 1997 agreement or order when: (i) the parties file a joint election; (ii) the pre-May 1997 agreement or order is varied; (iii) another agreement or order is made after April 1997, the effect of which is to change the total child support amounts payable; or (iv) the pre-May 1997 agreement or order specifies a particular day after April 1997 as the commencement day of the agreement or order.

[5] The sole issue in this case is whether the Divorce Judgment terminates and replaces the child support obligation established in the Agreement, or continues it: *Holbrook* at paragraph 19; see also sections 60(*b*) and 56.1(4)(*b*)(iii) of the ITA.

[6] The Tax Court judge determined that the Divorce Judgment differed in material respects from the obligation contained in the Agreement, and thus that it terminated and replaced the Agreement. Consequently, the child support payments were not deductible from the taxpayer's income for the 2008 and 2009 taxation years. With respect, I cannot agree.

[7] On the specific facts of this case, the parties demonstrated a clear intention to incorporate the provisions of their Agreement in the uncontested and on-consent Divorce Judgment that followed. The fact that a relatively minor item was not in the Divorce Judgment and that the length of the obligation to pay child support was prolonged due to the operation of the *Divorce Act* is not, in my view, sufficient to negate the clear intention of the parties. In this regard, the findings in *Warbinek v. Canada*, 2008 FCA 276 and *Whelan v. Canada*, 2006 FCA 384 support both this analysis and this conclusion. I thus find that the judge erred in holding that the Divorce Judgment was intended to vary or replace the Agreement.

[8] I would allow the appeal, set aside the judgment of the Tax Court and, rendering the judgment that should have been rendered, allow the taxpayer's appeals from the 2008 and 2009 reassessments. The taxpayer is entitled to his costs in both this Court and the Tax Court.

"D.G. Near"
J.A.

"I agree
Pierre Blais C.J."

"I agree
Robert Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-408-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE B. PARIS DATED AUGUST 31, 2012, DOCKET NO. 2011-465(IT)I	
STYLE OF CAUSE:	Harvey Chadwick v. Her Majesty the Queen
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	June 27, 2013
REASONS FOR JUDGMENT BY:	Near J.A..
CONCURRED IN BY:	Blais C.J. Mainville J.A.
DATED:	July 10, 2013

APPEARANCES:

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