Date: 20020807

Docket: A-490-01

Neutral citation: 2002 FCA 299

CORAM: LÉTOURNEAU J.A.

**ROTHSTEIN J.A.**

**SHARLOW J.A.**

BETWEEN:

PETER J. OSTROWSKI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, B.C. on June 26, 2002

Judgment delivered at Ottawa, Ontario, August 7, 2002

REASONS FOR JUDGMENT
BY: SHARLOW J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.

ROTHSTEIN J.A.

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REASONS FOR JUDGMENT

**SHARLOW J.A.**

[1] When the appellant Peter J. Ostrowski filed his income tax returns for 1995 and 1996, he claimed deductions for child and spousal maintenance totalling $44,400 for 1995 and $44,400 for 1996. His income tax returns for those years have been reassessed to disallow those deductions, except for $11,100 in 1995. His appeal to the Tax Court was dismissed. That decision is reported as *Ostrowski* v. *Canada*, 2001 D.T.C. 217, [2001] 1 C.T.C. 2773, [2001] T.C.J. No. 66 (T.C.C.). Mr. Ostrowski now appeals to this Court.

[2] Mr. Ostrowski is entitled to succeed in this appeal if the payments described below fall within the scope of paragraph 60(b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as it read in 1995. Paragraph 60(b) read as follows at the relevant time:

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| 60. There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable: [...] (b) an amount paid by the taxpayer in the year as alimony or other allowance payable on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children, if the taxpayer, because of the breakdown of the taxpayer's marriage, | 60. Peuvent être déduites dans le calcul du revenu d'un contribuable pour une année d'imposition les sommes suivantes qui sont appropriées : [...] b) un montant payé par le contribuable au cours de l'année, en vertu d'un arrêt, d'une ordonnance ou d'un jugement rendus par un tribunal compétent ou en vertu d'un accord écrit, à titre de pension alimentaire ou autre allocation payable périodiquement pour subvenir aux besoins du |

was living separate and apart from the spouse or former spouse to whom the taxpayer was required to make the payment at the time the payment was made and throughout the remainder of the year and the amount was paid under a decree, order or judgment of a competent tribunal or under a written agreement.

bénéficiaire, d'enfants de celui-ci ou à la fois du bénéficiaire et de ces enfants, si le contribuable, pour cause d'échec de son mariage, vivait séparé de son conjoint ou ancien conjoint à qui il était tenu d'effectuer le paiement, au moment où le paiement a été effectué et durant le reste de l'année;

[3] The facts of this case are not in dispute, although they are unusual. Mr. Ostrowski and his wife have four children. They separated in 1993 and divorce proceedings were commenced. Certain interim applications were made relating to custody, maintenance and the division of property, resulting in a number of court orders, including orders relating to child and spousal maintenance. The Tax Court Judge concluded, correctly in my view, that the resolution of this matter depends upon the correct interpretation of these orders.

[4] The first order was made on November 18, 1994 by Justice O'Connell of the Ontario Court (General Division). In addition to dealing with interim custody and access, the O'Connell order contains these provisions:

6. THIS COURT ORDERS THAT Peter Ostrowski shall pay interim support for the children in the amount of $800.00 per month per child (for a total of $3,200.00 per month) commencing 1 December 1994.

7. THIS COURT ORDERS THAT Peter Ostrowski shall pay interim support for Carla Ostrowski in the amount of $500.00 per month.

[5] Thus, Mr. Ostrowski's total maintenance obligations were $3,700 per month, or $44,400 per year. The Court was told at the hearing of this appeal that Mr. Ostrowski has now provided the Crown with evidence that he paid maintenance totalling $11,100 in respect of January, February and March of 1995 pursuant to the O'Connell order. Therefore, regardless of the resolution of the issues under appeal, his appeal should be allowed by consent to permit Mr. Ostrowski a deduction of $11,100 for those payments.

[6] On March 29, 1995, Justice Clarke of the Ontario Court (General Division) made an order that, among other things, transferred the divorce proceedings to the Supreme Court of British Columbia in Victoria. That order also includes this provision:

2. THIS COURT FURTHER ORDERS that, on consent, the monies currently in Court to the credit of this action be paid out as follows forthwith:

a) To Thomas H. Marshall, Q.C., on behalf of the Respondent, Carla Ostrowski, the sum of $11,100.00 for three months support for the months of April, May and June, 1995.

[7] The Crown has not taken the position that this order was not complied with. However, the Crown argues that Mr. Ostrowski is not entitled to a deduction in 1995 for the $11,100 payment to which the Clarke order refers.

[8] On September 22, 1995, Justice Drake of the Supreme Court of British Columbia was called upon to deal with a number of matters, including the division of the proceeds of sale of the family home. Justice Drake apparently gave reasons for his order, but those reasons are not included in the record of this appeal. The Drake order contains these provisions (I have added paragraph numbering for ease of reference):

(1) THIS COURT ORDERS that the Petitioner [Peter Ostrowski] and Respondent [Carla Ostrowski] are entitled each to one-half of the net sale proceeds, inclusive of accumulated interest, from the sale of the matrimonial home and which funds are being held in trust by solicitor Thomas Marshall, Q.C. of Oakville, Ontario;
(2) AND THIS COURT FURTHER ORDERS that the said Thomas Marshall pay to the credit of the Respondent Carla Ostrowski the said one-half of the net sale proceeds with accumulated interest;
(3) AND THIS COURT FURTHER ORDERS that from the Petitioner's net sale proceeds, the sum of $88,800.00 be secured as a lump sum payment for maintenance and support for a period of two years for the Respondent and the children of the marriage (namely Nicholas Peter Ostrowski, born December 8, 1979, Raimund Joseph Ostrowski, born March 27, 1982, Jan Paul Ostrowski, born July 27, 1984, and Simone Johanne Ostrowski, born July 3, 1986) which maintenance was originally ordered by the Honourable Mr. Justice O'Connell on the 18th day of November, 1994;
(4) AND THIS COURT FURTHER ORDERS that Thomas Marshall, Q.C. pay to the credit of the Respondent, Carla Ostrowski, the said sum of $88,800.00;
(5) AND THIS COURT FURTHER ORDERS that the Petitioner's application for variation of maintenance and support be dismissed;

[9] Paragraph (3) of the Drake order apparently was intended to cover Mr. Ostrowski's maintenance obligations for the twenty-four month period from October, 1995 to September, 1997. Again, the Crown has not taken the position that this order was not complied with, but the Crown argues that Mr. Ostrowski is not entitled to a deduction for any part of the $88,800 paid pursuant to paragraph (3) of the Drake order.

[10] On October 12, 1995, Master McCallum made an order correcting the Drake order. The McCallum order reads as follows:

THIS COURT ORDERS that the Order of The Honourable Mr. Justice Drake granted on September 22, 1995, and entered in the Registry's Order Book on September 25, 1995, be corrected pursuant to Rule 41(24) by inserting the following clauses:
" AND THIS COURT ORDERS that from the Petitioner's net sale proceeds the sum of $11,100.00 be secured for the Respondent and the said children of the marriage as payment for the $15,000.00 arrears of spousal maintenance and the $9,600.00 arrears of child maintenance owing by the Petitioner for the months of July, August and September, 1995;

AND THIS COURT ORDERS that Thomas Marshall, Q.C. pay to the credit of the Respondent, Carla Ostrowski, the said sum of $11,100.00;"

[11] The Crown accepts that the $11,100 referred to in the McCallum order was paid, and that Mr. Ostrowski is entitled to a deduction of that amount. Thus, the maintenance obligations of Mr. Ostrowski in respect of July, August and September of 1995 were not in issue before the Tax Court and are not in issue in this appeal.

[12] In 1997, Mr. Ostrowski made an application to the Supreme Court of British Columbia for an order terminating spousal support and varying child support. That motion was heard by Justice Sigurdson. The application was adjourned. That proceeding is of importance to this case only because paragraph 3 of Justice Sigurdson's memorandum of reasons contains comments about the Drake order. That paragraph reads in part as follows:

... In September 1995, Mr. Justice Drake of this court ordered that the sum of $88,800 be held as lump sum security for the maintenance obligations under the order of Mr. Justice O'Connell. That payment secured maintenance payable to the end of September 1997. It appears from Mr. Justice Drake's reasons for judgment that he made the order securing the maintenance from, in essence, a portion of the house sale proceeds because Mr. Ostrowski has been unreliable in paying periodical maintenance.

[13] On May 1, 1998 Mr. Ostrowski filed a notice of motion in the Supreme Court of British Columbia to request:

(a) an Order to terminate spousal support as of 30 September 1997.
(b) an Order to vary child support to comply with the Federal Child Support Guidelines section 26 of the Divorce Act as of 30 September 1997; or in the alternative, to suspend child support for one year from making of the order.
(c) an Order that the Respondent provide travel costs as per Section 10(2)(b) of the Child Support Guidelines.
(d) an Order that all arrears of child and spousal support existing on and after 30 September 1997 be cancelled.
(e) an Order that the Family Maintenance Enforcement Program be restrained from taking any enforcement action until such time as the Petitioner, Peter Ostrowski, becomes regularly employed.
(f) An Order that the Order of The Honourable Mr. Justice Drake granted on September 22, 1995 and entered in the Registry's Order Book on September 25, be corrected pursuant to Rule 41(24) by inserting the word "prepaid periodic" and deleting the word "lump" in the third clause.
(g) An Order that the Order of The Honourable Mr. Justice Clarke granted on the 29th March, 1995 be corrected pursuant to Rule 41(24) by inserting the word "prepaid periodic" before the word "support" in clause 2(a).

[14] This motion was heard by Justice Melvin. He also commented on the Drake order. The transcript of his oral reasons for judgment reads in part as follows:

[2] [...] in terms of an application before Mr. Justice Drake on the 25th of -- I'm sorry, 22nd of September, 1995, at which time he was dealing both with access and with maintenance. Insofar as access is concerned, he said he made the same order in terms of Mr. Justice O'Connell, so I have nothing further at this time to say about that.

[3] But in reference to maintenance, he said this -- I'm reading from page 3 of his oral reasons:

Mr. Ostrowski's share is to be subject to the deduction of a lump sum by way of maintenance for Mrs. Ostrowski and the children for the next two years at the rate set by Mr. Justice O'Connell in his original order in Ontario. I think that he -- Ostrowski -- is an unreliable payer of periodical maintenance. That is my main reason for making this position, [sic] as he is in considerable arrears now, these are to be calculated and recouped in the lump sum. The formal order of the Court that was entered consequent upon those reasons orders that from that sale proceeds the sum of eighty-eight thousand be secured as a lump sum payment for maintenance and support for a period of two years for the respondent and the children.

[4] And he goes on to name them.

Which maintenance was originally ordered by the Honourable Mr. Justice O'Connell on the 18th day of November, 1994.

[5] And there was a further provision:

This Court further orders that the petitioner's application for variation and maintenance and support be dismissed.

[6] I interpret all that to mean simply this: that the Court was satisfied that there was a periodic maintenance order made in Ontario. The Court was equally satisfied that there were some difficulties in payment of the periodic maintenance, and thirdly that the Court was made aware that there was a sum of some eighty-eight thousand eight hundred odd dollars available to satisfy, in whole or in part, the outstanding arrears as of the date of the application on the 22nd of September, 1995, and that there might be in addition more funds available over and above the arrears out of that sum which could be utilized as maintenance. It stood as security for maintenance. It may very well be that the arrears were calculated in such an amount - and I don't know the amount as of September, 1995 - that it would absorb -.

[There follows a discussion with counsel in which it was established that the arrears was $11,100, as reflected in the order of Master McCallum.]

[17] [...] All I'm saying is that this lump sum was there as security for payment of periodic maintenance. Some of it was allocated towards arrears and insofar as the future was concerned, it's a sum there available for payment of periodic maintenance. It's still no different than that sum being in a bank account and being -- and thirty-seven hundred dollars drawn from it monthly, as each month goes by, until such time as it is exhausted. It does not mean that Mr. Justice O'Connell's order terminated two years from the date that Mr. Justice Drake spoke in September of 1995. That is not the interpretation that I put on either the O'Connell order, Mr. Justice Drake's reasons or Mr. Justice Drake's order.

[15] Justice Melvin's order reads as follows (I have added paragraph numbering for ease of reference):

(1) THIS COURT ORDERS that the application to terminate spousal maintenance as of September 30, 1997 is granted.
(2) THIS COURT FURTHER ORDERS that the suspension of child maintenance made by Mr. Justice Sigurdson on November 12, 1997 shall continue indefinitely until such time as there is evidence before the Court that Peter Ostrowski, the Petitioner, is in receipt of income. The Petitioner is to provide the Respondent in writing of when he has obtained some form of employment. Whether it is contract employment or otherwise, the Petitioner is to provide the Respondent the details of that employment, the details of the income generated by that employment and what the Petitioner feels is the appropriate amount of monthly maintenance for the children based on the Federal Support Guidelines. If the Respondent agrees with the figures as advanced, the parties need not come back to court. The parties are at liberty to apply to return to court to seek further direction if problems concerning amount, concerning duration of payment, or problems concerning the fact that the Petitioner may be out of the country.
(3) THIS COURT FURTHER ORDERS that in the event the Petitioner becomes regularly employed, or there is a further order of the Court, then such steps as are necessary to be taken by the Enforcement Program may be taken by it.
(4) THIS COURT FURTHER ORDERS that there will be no accumulation of arrears as of Mr. Justice Sigurdson's [sic] memorandum.
(5) THIS COURT FURTHER ORDERS there will be no interest accumulating on arrears.
(6) THIS COURT FURTHER ORDERS that travel costs of the children between Victoria and the Lower Mainland are to be shared equally by the Petitioner and the Respondent. In the event there is a change of location by either party which may have an impact on those travel costs, then, unless the parties can agree, the parties have liberty to apply on that issue.
(7) THIS COURT FURTHER ORDERS the memorandum of Mr. Justice Sigurdson dated November 12, 1997 is backdated to November 1, 1997 and the obligation to pay arrears of child and spousal support is suspended as of November 1, 1997 insofar as the child support is concerned.
(8) THIS COURT FURTHER ORDERS that the Family Maintenance Enforcement Program are precluded from taking any enforcement action until such time as the Petitioner becomes regularly employed.

[16] To summarize, the Crown has previously accepted that Mr. Ostrowski is entitled to a deduction in 1995 for the $11,100 paid in 1995 in respect of July, August and September of 1995 (the amount referred to in the McCallum order), and the Crown now accepts that Mr. Ostrowski's appeal should be allowed in part, in respect of 1995, to permit him a further deduction for the $11,100 paid in 1995 in respect of January, February and March of 1995 pursuant to the O'Connell order.

[17] However, the Crown does not accept that Mr. Ostrowski is entitled to a deduction for the $11,000 paid in 1995 in respect of April, May and June of 1995 (the amount referred to in the Clarke order), or any part of the $88,800 paid in 1995 in respect of the twenty-four month period from October, 1995 to September, 1997 (the amount referred to in paragraph (3) of the Drake order). The Crown's argument, which was accepted by the Tax Court Judge, is based on

*McKimmon* v. *M.N.R.* (1989), [1990] 1 F.C. 600, 104 N.R. 195, [1990] 1 C.T.C. 109, 90 D.T.C. 6088, 25 R.F.L. (3d) 120 (F.C.A.).

[18] It is argued for Mr. Ostrowski that Justice Drake intended only to provide security for the payment of future maintenance obligations, and that notionally the payment obligation was discharged at the rate of $3,700 per month. This argument is said to be supported by the words of the Drake order, and the subsequent interpretations of the Drake order by Justice Sigurdson and Justice Melvin. Counsel for Mr. Ostrowski said that the legal effect of the $88,800 payment under the Drake order was to impose upon Ms. Ostrowski's spouse an obligation akin to that of a trustee, so that if an event occurred that terminated the maintenance obligation before the end of the twenty-four month period to which it related (such as her death or the death of one or more of her children), she or her estate would have an obligation to repay the "unused" portion.

[19] I am unable to accept the characterization of the Drake order propounded by counsel for Mr. Ostrowski. Although the Drake order contains the word "secured", I see no basis for concluding that Justice Drake intended to create only a security interest in favour of Ms. Ostrowski. He could presumably have done so by ordering a payment out of the funds held in court of $3,700 per month, or perhaps by imposing a trust obligation on Ms. Ostrowski in respect of the $88,800, to be discharged at the rate of $3,700 per month. He did neither. Instead, he placed no restrictions on Ms. Ostrowski as to the use of the funds and no express obligation to repay any part of it in any circumstances It seems to me that Justice Drake was using the word "secured" in its more colloquial sense, so that the payment of maintenance for the next two years would be assured by the advance payment. Having said that, the question is whether such an advance payment, in the circumstances of this case, brings this case within the reasoning of *McKimmon*.

[20] *McKimmon* dealt with the deductibility of payments required by a consent decree in a divorce action. Prior to the pronouncement of the divorce, Mr. McKimmon had paid his wife $600 per month as interim alimony. The decree required Mr. McKimmon to pay his former spouse $130,000, to be satisfied by the transfer of certain property, and a further $115,000 as "periodic maintenance", in satisfaction of all financial relief for alimony and maintenance, in annual instalments of $25,000 for four years and a final payment of $15,000 in the fifth year. The $115,000 payment obligation was secured by a mortgage and bore interest at 10%, compounded half-yearly. Mr. McKimmon had the right to pay the unpaid balance at any time, but if he defaulted, then the entire unpaid amount, with interest, could be declared due and payable.

[21] The payment in *McKimmon*, although given the name "periodic maintenance" in the consent decree, was held not to be maintenance payable on a periodic basis, but a capital amount payable in instalments. The Court in *McKimmon* suggested eight factors that could be taken into account in making that determination. In the context of those factors, the characteristics of the payment in *McKimmon*, as described in the previous paragraph, marked it conclusively as a capital sum.

[22] The Tax Court Judge concluded that this case was similar to *McKimmon*. He said this at paragraphs 11 and 12 of his reasons:

[11] The Appellant's situation is similar to that of the husband's in *McKimmon*. One lump sum was transferred outright to his wife's lawyer from the house proceeds; it was very substantial; it was paid by Court Order; it was from capital and the amount in dispute was not respecting arrears; it was a one time payment; the wife could dispose of it as she wished; and it released the Appellant from future payments to the total of the lump sum.

[12] As in *McKimmon*, most of the indications point strongly to the payment being a lump sum settlement and virtually none point the other way.

[23] I am unable to agree with this analysis. In my view, despite the similarities noted by the Tax Court Judge, the facts in *McKimmon* are quite different from the facts in this case.

[24] The fundamental distinction, which the Tax Court Judge did not recognize, is that in *McKimmon*, the foundation of the payment obligation was the consent decree, which established simultaneously the payment obligation and the terms and conditions under which it would be paid. Thus, the nature of the payment and its existence depended upon the same decree. In this case, the foundation of the payment obligation was the O'Connell order, which clearly was an order for the payment of maintenance on a monthly basis The O'Connell order was never amended. It remained in force throughout all of the subsequent proceedings, until the maintenance obligation was finally terminated by the Melvin order as of September 30, 1997.

[25] All of the orders made after the O'Connell order were intended to enforce the maintenance obligation imposed by the O'Connell order because Mr. Ostrowski had proven to be unreliable in meeting that obligation. The Clarke order and the Drake order in particular dictated a practical solution to the problem of unreliability. That solution was made possible because both judges had it within their power to dictate the disposition of certain funds then being held in court. Does the character of Mr. Ostrowski's maintenance obligation change merely because, by virtue of the Drake order and the Clarke order, the monthly maintenance was required to be paid in advance? I do not think so.

[26] The Court was referred to only one reported case dealing with an advance payment of maintenance: *Sanders* v. *Canada* (2001), 22 R.F.L. ($5^{th}$) 207, [2001] T.C.J. No. 704 (T.C.C.). In that case a judge of the Ontario Court of Justice, General Division had rendered an order on October 8, 1996 providing for the sale of the matrimonial home. The order included this provision:

4. THIS COURT ORDERS THAT, in the meantime, a lump sum payment on account of support shall be made by the Husband to the Wife in the amount of $3,500.00 within two weeks hereof to cover the period October 8, 1996 to December 9, 1996.

[27] On December 20, 1996, a further order was made for child and spousal support of $1,750 per month, effective December 9, 1996. Judge Bonner held that the $3,500 referred to in the October 8, 1996 order was paid as an allowance payable on a periodic basis, notwithstanding the use of the term "lump sum", which he said was neither conclusive nor an accurate description of the nature of the payment. The Crown has not sought judicial review of this decision, and in my view it is based on sound reasoning.

[28] As this Court pointed out in *The Queen* v. *Sills*, [1985] 2 F.C. 200, [1985] 1 C.T.C. 49, 85 D.T.C. 5096 (F.C.A.), maintenance that is payable on a periodic basis does not cease to be payable on a periodic basis merely because it is paid in arrears. Similarly, where there is an existing obligation to pay maintenance on a periodic basis, and a judge is satisfied on the evidence that there is a serious risk of non-payment in the future, an order that accelerates the payment obligation for a stipulated period does not by itself change the nature of the underlying obligation.

[29] There are situations where a single payment represents a commutation or replacement of all future maintenance obligations, as in *Minister of National Revenue* v. *Armstrong*, [1956] S.C.R. 446, [1956] C.T.C. 93, 56 D.T.C. 1044, 3 D.L.R. (2d) 140 or *Trottier* v. *Minister of National Revenue*, [1968] S.C.R. 728, [1968] C.T.C. 324, 68 D.T.C. 5216, 69 D.L.R. (2d) 132. Such a payment is not within the scope of paragraph 60(b) because it is not payable on a periodic basis. However, this case is quite different from *Armstrong* and *Trottier*. Here, Mr. Ostrowski's maintenance obligations were established in 1994 at $3,700 per month and never changed during the period covered by the prepayment. Justice Drake's order recognized that obligation without altering it, and required twenty-four such payments to be made in advance while ready cash was at hand. Similarly, the payment required by the Clarke order was simply an advance payment of maintenance for three months.

[30] I conclude, therefore, that the $88,800 payment referred to in paragraph (3) of the Drake order and the $11,100 payment referred to in the Clarke order are deductible as maintenance payable on a periodic basis. It remains only to consider how much the deduction should be in each of the two years under appeal. Paragraph 60(b) permits a deduction in any year only for amounts paid in that year.

[31] The position of Mr. Ostrowski is that his maintenance obligations for all of 1995 and all of 1996 were fulfilled, and that he is entitled, in each of 1995 and 1996, to a deduction of $44,400, representing $3,700 maintenance for each month. Presumably that would leave an amount relating to the period from January to September of 1997 to be deducted in 1997 (that year is not before the Court).

[32] The payments for January, February and March of 1995 (now conceded by the Crown to have been paid in 1995), the payments for April, May and June of 1995 (the amount referred to in the Clarke order), and the payments for July, August and September of 1995 (the

amount referred to in the McCallum order, which has already been allowed as a deduction) were paid in 1995 and therefore are deductible in 1995.

[33] The payment referred to in paragraph (3) of the Drake order, which relates to maintenance for October, November and December of 1995, all twelve months of 1996, and nine months of 1997, was also paid in 1995. Therefore, it is deductible in its entirety in 1995 and not in 1996 or any subsequent year.

[34] It follows that Mr. Ostrowski's is entitled to a paragraph 60(b) deduction for 1995 in the amount of $112,200, which is the total of the $11,100 already allowed (maintenance for July, August and September, 1995, referred to in the McCallum order), plus the $11,100 to which the Crown has consented (maintenance for January, February and March, 1995), plus the $11,100 referred to in the Clarke order (maintenance for April, May and June, 1995), plus the $88,800 referred to in paragraph (3) of the Drake order. He is entitled to no subsection 60(b) deduction for 1996.

[35] As this disposition of the dispute is not one sought by either party, and results in a greater deduction that Mr. Ostrowski has claimed, the Court asked the parties to make submissions with respect to the jurisdiction of the Court to make an order requiring Mr. Ostrowski's deduction for 1995 to be increased from $11,100 to $112,200. Those submissions were received and reviewed.

[36] The power of this Court, on an appeal from the Tax Court, is to dismiss the appeal or give the decision that should have been given, or to refer the matter back to the Tax Court for determination in accordance with such directions as are considered appropriate (paragraph 52(c) of the *Federal Court Act*, R.S.C. 1985, c. F-7). In effect, this Court may make any order that the Tax Court could have made.

[37] The Tax Court may dispose of an appeal by dismissing it, or by allowing it and vacating the assessment, varying the assessment, or referring the assessment back to the Minister for reconsideration and reassessment (subsection 171(1) of the *Income Tax Act*). Nothing in the *Income Tax Act* precludes the Tax Court from referring an assessment back to the Minister for reconsideration and reassessment on the basis of directions that would give the appellant a greater deduction than originally claimed. If the Tax Court has the authority to make such an order, this Court may do the same in an appeal from a Tax Court judgment.

[38] I conclude that Mr. Ostrowski's appeal should be allowed with respect to 1995 and dismissed with respect to 1996. His 1995 assessment should be referred back to the Minister for reassessment on the basis that his paragraph 60(b) deduction for 1995 should be increased from $11,100 to $112,200. As Mr. Ostrowski was substantially successful, he should be entitled to his costs in this Court and in the Tax Court.

"K. Sharlow"

J.A.

"I agree

Gilles Létourneau J.A."

"I agree

Marshall Rothstein J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-490-01 |
| **STYLE OF CAUSE:** | Peter J. Ostrowski v. Her Majesty the Queen |
| **PLACE OF HEARING:** | Vancouver, B.C. |
| **DATE OF HEARING:** | June 26, 2002 |
| **REASONS FOR JUDGMENT :** | Sharlow, J.A. |
| **CONCURRED IN BY:** | Létourneau, J.A. |
| | Rothstein, J.A. |

**DATED:** August 7, 2002

APPEARANCES:

| | |
|---|---|
| Lori Mathison | FOR THE APPELLANT |
| David Jacyk | FOR THE RESPONDENT |

SOLICITORS OF RECORD:

| | |
|---|---|
| Fraser Milner Casgrain | FOR THE APPELLANT |
| Vancouver, B.C. | |
| Morris Rosenberg | FOR THE RESPONDENT |
| Deputy Attorney General of Canada | |