

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20090619

Docket: A-524-08

Citation: 2009 FCA 210

**CORAM: LINDEN J.A.
EVANS J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

ROBBIN HODGE

Applicant

and

**MINISTER OF NATIONAL REVENUE and
ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Toronto, Ontario, on June 3, 2009.

Judgment delivered at Ottawa, Ontario, on June 19, 2009.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

**LINDEN J.A.
LAYDEN-STEVENSON J.A.**

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REASONS FOR JUDGMENT

EVANS J.A.

[1] This is an application by Robbin Cruise Hodge under subsection 147.1(13) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“Act”) to vary the date when the revocation of an employee pension plan becomes effective.

[2] On his retirement in June 2001 from his employment as a teacher and a school principal, Mr Hodge was advised by a financial planner to set up an employee pension plan, which was called the “Pension Plan for Presidents of 1474626 Ontario Inc.” (“Plan”). Mr Hodge was the president and

sole director of the numbered company, and the only member of the Plan. The numbered company was the administrator of the Plan and, Mr Hodge said, his employer.

[3] On November 14, 2001, Mr Hodge was advised by the Director General, Registered Pension Plan Directorate, Canada Customs and Revenue Agency (“CCRA”) that the Plan had been accepted for registration under section 147.1 of the Act. However, in a separate letter of the same date, CCRA expressed a concern that, like other such plans, the Plan might not satisfy the statutory criteria, namely, that its primary purpose is to provide lifetime retirement benefits to its members in respect of their service as employees, and that there is a *bona fide* employer/employee relationship. The letter also spelled out the serious consequences of non-compliance and the subsequent retroactive revocation of registration, namely, that all the assets of the Plan would become taxable, and noted that it could take “a year or two” before it became apparent that the primary purpose test was not met.

[4] Despite this clear warning, Mr Hodge accepted the advice of his financial planner and requested the Teachers’ Pension Plan to transfer to the Plan an amount representing the locked-in commuted value of his deferred pension benefits. Accordingly, on December 24, 2001, Teachers’ Pension Plan sent a cheque for \$776,241.17 to MRS Trust Company payable to the Plan for Mr Hodge. Because the Plan was registered as an employee pension plan under section 147.1 of the Act, no tax was payable on the transfer, and subsequent increases were sheltered from tax: see *Boudreau v. Canada (Minister of National Revenue)*, 2005 FCA 304, 2005 D.T.C. 5580, at para. 6 (“*Boudreau*”).

[5] In a letter dated April 2, 2008, the Minister of National Revenue notified the applicant that he was considering issuing a notice of intent to revoke the Plan effective June 1, 2001, for non-compliance with paragraph 8502(a) of the *Income Tax Regulations*, C.R.C., c. 945 (“Regulations”), on the ground that its primary purpose was not to provide lifetime retirement benefits to its members in respect of their service as employees. Rather, the Minister found, its primary purpose was to enable Mr Hodge to transfer his pension money from the Teachers’ Pension Plan without incurring tax liability.

[6] On July 17, 2008, the Minister issued a notice of intent to revoke the registration of the Plan as of June 1, 2001, the date of its initial registration, since there was no evidence that the Plan had ever complied with paragraph 8502(a). Mr Hodge did not appeal the notice of intent to revoke.

[7] On August 13, 2008, the administrator of the Plan, 1474626 Ontario Inc., wrote to the Minister requesting the revocation of the Plan as of August 31, 2008. The Minister refused, on the ground that, since the Plan had never complied with the “primary purpose” requirement of the Regulations, there was no basis for selecting a revocation date other than that of the Plan’s initial registration. Accordingly, the notice of revocation, issued by the Minister on September 16, 2008, specified that the registration of the Plan was revoked effective June 1, 2001.

[8] The present application is for a variation of the date of revocation as specified in the notice of revocation. Retroactive revocation has potentially severe tax consequences for Mr Hodge, since

the amount transferred into the Plan from the Teachers' Pension Plan could be considered income for the taxation year 2001: see *Boudreau* at para. 7.

[9] This application turns on a narrow question of statutory construction. The relevant provisions of the Act are as follows.

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,

(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

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

give notice (in this subsection and subsection 147.1(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.

(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

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

(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

determination of an appeal pursuant to subsection 172(3), orders otherwise.

sur tout appel interjeté selon le paragraphe 172(3).

[10] Mr Hodge has made this application under subsection 147(13), which applies when the Minister has given a notice of revocation, as happened here, and has specified a date when the revocation takes effect, which, in this case, is June 1, 2001. The question for the Court to decide is whether it should order that the revocation take effect at a later date.

[11] Mr Hodge says that once the administrator has applied for the revocation of a plan and specified a date for revocation, subsection 147(12) provides that the notice of revocation issued by the Minister may not specify that the plan is revoked as of an earlier date. He submits that the fact that the Minister had already given a notice of intent to revoke at an earlier date is irrelevant. Accordingly, he argues, since it is not open to the Minister under subsection 147(13) to specify in the notice of revocation a date of revocation earlier than that specified in the plan administrator's application to revoke, the Court may exercise its discretion to fix the date of revocation.

[12] On the facts of this case, Mr Hodge says, the effective date of revocation should be 90 days from the date of the Order of the Court in this matter. This would enable the plan to be properly wound up, and the funds transferred to another tax sheltered vehicle, before the Plan's registration is revoked. If this were done, Mr Hodge would avoid the potentially serious tax consequences of a retroactive revocation.

[13] Despite the ingenuity of counsel's argument, I do not accept it. However, I do agree that the drafting of section 147.1 poses problems.

(i) subsection 147.1(12)

[14] Mr Hodge builds his argument on a selective reading of the text of subsection 147.1(12):
“... where the plan administrator applies ... for the revocation of the plan's registration, the Minister may ... give notice ... that the registration of the plan is revoked as of a date specified in the notice of revocation, which date may not be earlier than the date specified in ... the administrator's application ...”.

[15] He argues that because August 31, 2008, was the date specified in the administrator's application for the revocation of the Plan's registration, it was not open to the Minister to specify in the notice of revocation that registration would be revoked as of an earlier date, namely, June 1, 2001. He submits that the French text of subsection 147(12) is even clearer on this point than the English.

[16] Whether based on the English or French text of subsection 147.1(12), the problem with this argument is that subsection 147.1(12) also provides that when the Minister gives a notice of intent to revoke, as happened here, the Minister may give notice of the revocation of the registration of the plan as of the date specified in the notice of revocation, which shall not be earlier than the date specified in the notice of intent, which, as I have already noted, was, in this case, June 1, 2001.

[17] Subsection 147.1(12) makes no provision for the situation that has occurred here: the Minister's issue of a notice of an intent to revoke as of a specified date, *and* an application to the Minister by the administrator of a plan for the revocation of the plan's registration as of a later date. In all probability, the drafter of the subsection contemplated that either the Minister would give notice of an intent to revoke or the administrator would apply for a revocation. This is suggested by the fact that the English version of the text provides that the date of the notice of revocation shall not be earlier than the date specified in the Minister's notice of intent *or* the administrator's application "as the case may be."

[18] Thus, the question is, which date takes priority under section 147.1(12) when the Minister issues a notice of intent to revoke as of one date, *and* the administrator applies for revocation as of a later date? This issue seems not to have been raised before. However, in *Boudreau* at para. 52, Justice Sharlow, writing for the Court, said in the course of considering subsection 147.1(13):

But if the administrator requests a revocation and the Minister agrees that revocation is appropriate, they may still have different views as to the choice of effective date. The Minister's view will necessarily prevail unless the administrator is entitled to use subsection 147.1(13) to seek an order for a different date.

Justice Sharlow concluded that the Act permitted the administrator to ask the Court to fix a different revocation date from that specified in the notice of revocation.

[19] *Boudreau* is distinguishable from the present case since, while the Minister had given notice of an intent to revoke, the administrator had not applied for revocation. Nonetheless, the view that, subject to the Court's discretion under subsection 147.1(13), the "Minister's view will necessarily

prevail” is, in my view, applicable where, as here, the Minister and the administrator have both started down the paths to revocation laid down by subsection 147.1(12).

[20] Giving priority to the Minister in this respect recognizes the Minister’s responsibility for administering the Act. This includes taking measures to, in effect, close down employee pension plans that do not meet, and may never have met, the statutory criteria defining eligibility for the favourable tax treatment afforded by Parliament to plans that do. It would hinder the due administration of the statutory scheme if, by applying for the revocation of registration as of a certain date, a plan administrator could prevent the Minister from specifying an earlier date on which registration will be revoked, which is normally the date from which the plan failed to comply.

[21] Hence, in my opinion, the Minister was acting within the statutory power conferred by subsection 147.1(12) when the date of June 1, 2001 was specified in the notice of revocation as the date from which the Plan’s registration would be revoked.

(ii) subsection 147.1(13)

[22] Having decided that subsection 147.1(12) authorizes the Minister to specify June 1, 2001, as the date from which the Plan’s revocation would be effective, the next question is whether the Court should exercise its discretion under 147.1(13) to vary that date.

[23] It has been decided in this Court that the Minister may revoke the registration of a pension plan as of a date before the issuing of the notice of intent to revoke. Thus, in the sequel to *Boudreau*,

Justice Pelletier, writing for the Court, said that the “date of revocation is tied to the event giving rise to the revocation”: *Boudreau v. Canada (Minister of National Revenue)*, 2007 FCA 32, 2007 D.T.C. 5116, at para. 14.

[24] Given the Minister’s conclusion, which Mr Hodge has not challenged, that the Plan never met the statutory requirements for registration, we see no basis for varying the date of revocation specified by the Minister in the notice of revocation, namely, June 1, 2001: see *Anglehart v. Canada (Minister of National Revenue)*, 2008 FCA 282 at para. 3.

[25] I am not unsympathetic to the position in which Mr Hodge now finds himself. However, he took a calculated risk in transferring his pension funds into a scheme that, on its face, was questionable, even though he had received the clearest warning from the Minister of the Plan’s dubious eligibility and of the potentially serious tax consequences for him if it were found to be non-compliant with the Regulations. If there were no adverse tax consequences on the revocation of the registration of employee pension plans that never complied, there would likely be many more such schemes.

[26] For these reasons, I would dismiss the application with costs.

“John M. Evans”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-524-08

STYLE OF CAUSE: Robbin Hodge

and

Minister of National Revenue and
Attorney General of Canada

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR JUDGMENT BY: Evans J.A.

CONCURRED IN BY: Linden J.A.
Layden-Stevenson J.A.

DATED: June 19, 2009

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