

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20091217**

**Docket: A-219-09**

**Citation: 2009 FCA 373**

**CORAM: SEXTON J.A.  
EVANS J.A.  
SHARLOW J.A.**

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Appellant**

**and**

**ROBERT M.O. MORRIS AND NEVILLE LEROY SMITH,  
TRUSTEES OF THE RCI TRUST**

**Respondents**

Heard at Toronto, Ontario, on December 9, 2009.

Judgment delivered at Ottawa, Ontario, on December 17, 2009.

**REASONS FOR JUDGMENT BY:**

**SHARLOW J.A.**

**CONCURRED IN BY:**

**SEXTON J.A.  
EVANS J.A.**

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**Respondents**

**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] The Minister of National Revenue is appealing a judgment of the Federal Court that requires the Minister to provide the RCI Trust with a written decision as to whether or not certain property of the RCI Trust is “treaty exempt property”, based on the conclusion of the judge that for income tax purposes the RCI Trust is a resident of Barbados and not a resident of Canada. The judgment under appeal has been stayed pending the disposition of this appeal.

[2] The facts are not in dispute and are fully described in the reasons for the Federal Court judgment (*Morris v. Canada (Minister of National Revenue – M.N.R.)*, 2009 FC 434). For the purposes of this appeal only a summary is necessary.

[3] Mr. Morris and Mr. Smith, the trustees of the RCI Trust, provided evidence to the Federal Court that the RCI Trust was settled under the laws of Barbados, and that in 2006 the RCI Trust disposed of certain shares of a taxable Canadian corporation, RCI Environnement Inc. (the “RCI shares”) for proceeds of disposition of \$145,000,000, resulting in a capital gain of \$144,999,800. The purchaser was said to be Les Investissements Historia Inc. (“Historia”), a Canadian corporation.

[4] On May 4, 2006, the RCI Trust applied to the Minister under section 116 of the *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), c. 1, for a certificate that would have the effect of relieving Historia of its obligation under subsection 116(5) to withhold part of the proceeds of disposition and remit the withheld amount on behalf of the RCI Trust to the Receiver General.

[5] Subsection 116(2) requires the RCI Trust, as the applicant for the certificate, either to pay the Minister a specified percentage of the capital gain as or on account of tax payable by the RCI Trust under Part I of the *Income Tax Act*, or to provide security acceptable to the Minister. The RCI Trust did not pay any money or provide any security. It is worth noting that Part I of the *Income Tax Act* imposes tax on all income and capital gains for a taxation year. Thus, an amount that a non-resident vendor of taxable Canadian property pays under subsection 116(2) as a condition to obtaining a section 116 certificate is intended to be applied against *any* Part I tax liability of the

vendor, whether it relates to the capital gain on the disposition of property or something else. (Such a payment may also be applied against other fiscal obligations in certain circumstances, but a discussion of that subject is not necessary for the purposes of this appeal.)

[6] Nothing in the *Income Tax Act* relieves a person of the obligation to make a payment or provide security when applying for a section 116 certificate. However, the Minister has adopted a policy of providing discretionary relief where a non-resident person claims a treaty exemption and provides specified documentation. The policy is set out in Canada Revenue Agency Information Circular 72-17R5, dated March 15, 2005, paragraphs 25 to 29. It is clear from the Information Circular that a person seeking this discretionary relief must satisfy the Minister as to certain elements of the claimed exemption including, as in this case, details of the establishment of the trust, the transactions by which the RCI shares were acquired by the RCI Trust, and the proposed disposition.

[7] The Minister considered the request of RCI Trust for a section 116 certificate, and in that connection has asked for further information about the RCI Trust and the relevant transactions. Some information has been provided, but the Minister is not yet satisfied that a certificate should be issued. To date the Minister has declined to issue a certificate without receiving the payment or security required by subsection 116(2).

[8] Mr. Morris and Mr. Smith take the position that, by virtue of paragraph 4 of Article XIV of the *Agreement between Canada and Barbados for the Avoidance of Double Taxation and the*

*Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital* (the “Canada-Barbados Convention”), enacted by the *Canada-Barbados Income Tax Agreement Act, 1980*, S.C. 1980-81-82-83, c. 44, Part IX, Canada cannot impose tax on the capital gain realized by the RCI Trust on the disposition of the shares of RCI Environnement Inc. They argue that it follows that the Minister does not have the discretion to refuse to provide the RCI Trust with the subsection 116(2) certificate.

[9] In an effort to establish that point, Mr. Morris and Mr. Smith commenced an application in the Federal Court for judicial review of the Minister’s delay in granting the certificate. I paraphrase as follows the relief sought from the Federal Court:

- (a) a declaration that subsections 116(1) to (5) do not apply to a disposition of taxable Canadian property if the Canada-Barbados Convention prevents Canada from taxing the resulting capital gain;
- (b) in the alternative, a declaration that where such an exempt gain arises, the Minister must issue a subsection 116(2) certificate without requiring any payment because the payment contravenes the Canada-Barbados Convention;
- (c) a mandatory order requiring the Minister to issue the subsection 116(2) certificate sought in this case;
- (d) in the alternative, a declaration that the Minister has withheld the subsection 116(2) certificate for an improper purpose and a mandatory order that the Minister issue the certificate forthwith;

(e) in the alternative, a declaration that the Minister has delayed, unduly and for an improper purpose:

- (i) delivering his decision as to whether or not to issue the certificate; and
- (ii) his decision as to the applicability of Article XIV of the Canada-Barbados Convention,

and a mandatory order requiring the Minister to render both decisions forthwith.

[10] Mr. Morris and Mr. Smith rely on a treaty exemption that would apply if the fiscal domicile of the RCI Trust is Barbados, that is, if the RCI Trust is a person who, under the laws of Barbados, is liable to taxation in Barbados by reason of its “domicile, residence, place of management or any other criterion of a similar nature” (in French, « *en raison de son domicile, de sa résidence, de son siège de direction ou de tout autre critère de nature analogue* »), and is NOT liable to taxation in Canada by reason of any of those criteria. If the RCI Trust is liable to taxation in both Barbados and Canada, there are tie-breaker rules that may apply to establish fiscal domicile, failing which the matter is settled by the competent authorities.

[11] The Minister argues that it is for the Minister to determine in the first instance whether the RCI Trust is resident for Canadian income tax purposes, and whether and to what extent the RCI Trust is taxable in Canada or is entitled to the benefit of the Canada-Barbados Convention. If the RCI Trust does not agree with that determination, the RCI Trust may have the matter judicially determined by filing an income tax return for 2006 and appealing the resulting assessment to the Tax Court of Canada, which has the exclusive original jurisdiction to deal with such appeals.

[12] The Minister argues that the Federal Court should not have intervened in the exercise of the Minister's discretionary power to provide relief from the preconditions for a section 116 certificate, and in particular should not have attempted to resolve the question of the fiscal domicile of the RCI Trust before the Minister had done so in the context of assessing an income tax return filed by the RCI Trust.

[13] I agree with the Minister. In my view, while the Federal Court has the jurisdiction to entertain an application for judicial review of a refusal by the Minister to issue a section 116 certificate, the Federal Court should not exercise that jurisdiction in a situation where the person seeking the section 116 certificate may have recourse to the Tax Court of Canada by filing an income tax return. This conclusion is consistent with a line of decisions that includes *Addison & Leyen Ltd. v. Canada*, [2007] 2 S.C.R. 793, 2007 SCC 33 (at paragraph 11), *Ogden Palladium Services (Canada) Inc. v. Canada*, [2001] 2 C.T.C. 2404, 2001 D.T.C. 345 (at paragraph 20, affirmed 2002 FCA 336) and *Domtar Inc. v. Canada*, 2009 FCA 218.

[14] Mr. Morris and Mr. Smith argue that the RCI Trust is not required by law to file an income tax return. In my view this is a point that need not be determined. It is enough to say that the RCI Trust may file an income tax return, and if it does so it will have the right to appeal any assessment the Minister may make in response.

[15] The judgment under appeal is based on the premise that the statutory scheme in section 116 is a context in which the Minister must determine a person's tax liability for tax on capital gains

under Part I of the *Income Tax Act*. In my respectful view, that premise is incorrect. Section 116 is a statutory device for requiring the withholding of tax at source or the provision of security, so that if a Part I tax liability arises, collection is facilitated. As inconvenient and costly as that may be for the RCI Trust, that is the procedure Parliament has established, and it must be respected.

[16] For these reasons, I would allow the appeal, set aside the judgment under appeal and, making the judgment that should have been made by the Federal Court, I would dismiss the application for judicial review. I would grant the Minister his costs in this Court and in the Federal Court.

“K. Sharlow”

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J.A.

“I agree.  
J. Edgar Sexton J.A.”

“I agree.  
John M. Evans J.A.”



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-219-09

**(AN APPEAL FROM THE ORDER OF MADAM JUSTICE SIMPSON, DATED APRIL 29, 2009, OF THE FEDERAL COURT, IN FEDERAL COURT FILE NO.: T-1899-07)**

**STYLE OF CAUSE:** THE MINISTER OF NATIONAL  
REVENUE v. ROBERT M.O.  
MORRIS ET. AL.

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 9, 2009

**REASONS FOR JUDGMENT:** SHARLOW J.A.

**CONCURRED IN BY:** SEXTON J.A.  
EVANS J.A.

**DATED:** December 17, 2009

**APPEARANCES:**

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