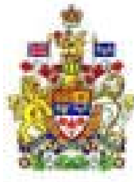
Federal Court of Appeal



Cour d'appel fédérale

Date: 20100518

Docket: A-263-09

Citation: 2010 FCA 129

CORAM: **EVANS J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

GEORGE BONAVIA JR.

Appellant

and

HER MAJESTY THE QUEEN

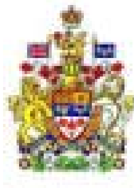
Respondent

Heard at Ottawa, Ontario, on May 18, 2010.

Judgment delivered from the Bench at Ottawa, Ontario, on May 18, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20100518

Docket: A-263-09

Citation: 2010 FCA 129

CORAM: EVANS J.A.
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

GEORGE BONAVIA JR.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on May 18, 2010)

EVANS J.A.

[1] This is an appeal by George Bonavia Jr. from a judgment of Justice Favreau (Judge) of the Tax Court of Canada, dated May 28, 2009 (2009 TCC 289), dismissing his appeal from a notice of reassessment dated April 28, 2005. In that reassessment, the Minister of National Revenue (Minister) added $118,097.14 to the appellant's income for the 2001 taxation year, on the basis that it was a benefit to him out of or under a registered retirement savings plan pursuant to paragraph 56(1)(*h*) and subsection 146(8) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act).

[2] However, prior to the hearing of the appeal before the Tax Court, the Minister changed the basis of the reassessment because the fund established by Mr Bonavia had been registered as a retirement income fund within the meaning of subsection 146.3(1) of the Act, and not as a retirement savings plan. In the reply to Mr Bonavia's amended notice of appeal, the Minister relied on subsections 146.3(5) and 56(2) of the Act to justify the reassessment.

[3] We are not persuaded that the Judge committed any reviewable error in dismissing Mr Bonavia's appeal. For substantially the reasons that he gave, the appeal will be dismissed. Counsel for Mr Bonavia advanced four arguments in his oral submissions before us.

[4] First, the amended pleadings did not accurately state the basis on which the Minister sought to justify the reassessment, because they described Mr Bonavia's retirement fund as a "registered retirement <u>investment</u> fund", not a "registered retirement <u>income</u> fund", the term used in section 146.3 of the Act. However, in the agreed statement of facts, the parties correctly describe the fund, and the argument before the Tax Court proceeded on that basis.

[5] In our view, the Minister's failure to request an amendment to the pleadings to correct this mistake in no way prejudiced Mr Bonavia. The Minister's misdescription of the fund in the notice of reply is no more than a clerical slip, and does not warrant the intervention of this Court.

[6] Second, the documents produced by NBI in Trust Inc. (NBI) and Canadian Corporation Creation Centre (CCCC) constituted a sham because they contained a fundamental

misrepresentation by the principals of NBI and CCCC about the nature of the transactions, without which the Royal Bank of Canada (RBC) would not have transferred to CCCC the retirement income fund that it was administering for Mr Bonavia, and the Minister would not have registered the purported retirement income plan under the Act. Accordingly, counsel says, the Minister cannot rely upon these documents as the basis for concluding that Mr Bonavia's retirement income fund was transferred from RBC to CCCC.

[7] We disagree. In our view, this was nothing other than a fraudulent misrepresentation, of which Mr Bonavia, among others, was the victim. Since Mr Bonavia was not a party to the misrepresentation it was not a "sham" within the meaning attributed to that term by the Supreme Court of Canada in *Stubart Investments Ltd.* v. *The Queen*, [1984] 1 S.C.R. 536 at 545 and 572, which precluded the Minister from relying upon the documents as effecting a transfer of the funds from RBC to CCCC.

[8] Third, amounts from the retirement income fund were not "received" by Mr Bonavia for the purpose of subsection 146.3(5) of the Act. The only money that Mr Bonavia "received", counsel said, was the approximately $82,000 that he thought was paid to him by NBI as a loan.

[9] We do not accept this argument. The Judge found as a fact (at para. 27(*b*)) that the retirement income fund was transferred from RBC to CCCC at the direction of Mr Bonavia. In our opinion, there was sufficient evidence before him to support this factual finding. Counsel conceded

in oral argument that if a direction to transfer the funds to a third party had been given by Mr Bonavia, he had “received” them for the purpose of subsection 146.3(5) of the Act.

[10] Fourth, the Judge erred in applying subsection 56(2) to the facts of this case because this is essentially an anti-avoidance provision. We disagree. In our view, the Judge correctly identified (at paras. 26 and 27) the four criteria of the legal test referred to in *Neuman* v. *The Queen*, [1998] 1 S.C.R. 770 at para. 25, and made no reviewable error in applying them to the facts before him.

[11] For these reasons, the appeal will be dismissed with costs.

“John M. Evans”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-263-09

(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA, DATED MAY 28, 2009, DOCKET NO. 2006-3535(IT)G)

STYLE OF CAUSE:	George Bonavia Jr. v. Her Majesty The Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 18, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	(EVANS, TRUDEL, STRATAS JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

Robert McMechan	FOR THE APPELLANT
Daniel Bourgeois Pascal Tétrault	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert McMechan Professional Corporation Ottawa, Ontario	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT