Federal Court of Appeal | Cour d'appel fédérale

Date: 20110303

Dockets: A-117-10
A-118-10
A-119-10
A-120-10
A-121-10
A-122-10

Citation: 2011 FCA 82

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

Docket: A-117-10

BETWEEN:

GERALD BALLARD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-118-10

BETWEEN:

IRIS HIEBERT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-119-10

BETWEEN:

TITAN CONSTRUCTION CONTRACTORS LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-120-10

BETWEEN:

MONICA NEVILLE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-121-10

BETWEEN:

RICHARD COLEMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-122-10

BETWEEN:

DAVID W. HARDER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 1, 2011.

Judgment delivered at Vancouver, British Columbia, on March 3, 2011.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: DAWSON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

[1] These are consolidated appeals from a decision of the Tax Court of Canada (2010 TCC 109), in which Justice Campbell Miller (Judge) dismissed the Appellants' appeals from their reassessments for their 2002 taxation year. These reasons apply to all the appeals and a copy will be inserted in each file.

[2] The Judge held that the Appellants were not entitled to claim as charitable tax credits money which they had "donated" to a charitable organization, the National Foundation for Christian Leadership (NFCL). The "donations" had been solicited by their children or, in the case of Mr Ballard, a grandchild, who were enrolled as students at Trinity Western University (TWU). I use quotation marks around the words "gifts", "donations" and "donors", instead of the adjectives actual or purported.

[3] Under the program administered by NFCL, nearly all students who solicited "donations" received bursaries for the expenses related to their education at TWU or at other Christian post-secondary institutions in an amount equal to approximately 80% of the lesser of students' eligible expenses and the funds that they had solicited. Some students were awarded scholarships equal to 100% of the lesser of their eligible expenses and the "donations" to NFCL that they had solicited. The value of a student's bursary or scholarship could not exceed the amount of the solicited "donations".

[4] Although a "donation" could not be earmarked by a "donor" for a particular student, the Judge found on the basis of NFCL's pamphlets that the Appellants either knew or ought to have known that, if they made a "donation" to NFCL, their children and grandchild would receive a bursary or scholarship that would defray the expenses of their education at TWU.

[5] The Judge held that a gift is a gratuitous transfer of property owned by the donor in return for which no benefit flows to the donor: *The Queen v. Friedberg,* 92 DTC 6031, 6032 (F.C.A.). He

applied a multi-factor test to determine whether the strength of the link between any benefit to the Appellants and their "donations" was sufficiently strong to disqualify their "donations" from being "gifts" for the purpose of subsections 110.1(1) and 118.1(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act). He concluded that it was. The Minister had allowed charitable gift tax credits for the relatively modest general, unsolicited donations made to NFCL by some of the Appellants.

[6] Counsel for the Appellants agreed that the Judge had correctly selected and formulated the legal definition of a gift for this purpose, but had erred in applying it to the facts. In the absence of a readily extricable question of law, this Court may only interfere with the Judge's application of the law to the facts (a question of mixed fact and law) if satisfied that the Judge committed a palpable and overriding error: *Housen v.Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[7] Counsel advanced three principal arguments in support of the appeals.

[8] First, since the Appellants were not found to be legally obliged to pay for their children's post-secondary education, they received no benefit from the "donation". I do not agree. I see no reason in principle why "benefit" in this context should be so narrowly conceived. Nothing in the case law requires it.

[9] On the basis of the evidence before him, the Judge found as a fact, and the Appellants have not challenged it, that the Appellants either regarded it as their parental or grandparental responsibility to pay for their children's or grandson's Christian post-secondary education, or did in

fact financially support them. He concluded that the Appellants received a material benefit to the extent that their “donations” to NFCL effectively relieved them from paying the educational expenses at TWU of their children and grandson.

[10] It is irrelevant in this context that the students also benefited by receiving bursaries and scholarships from TWU as a result of the donations to NFCL that they had solicited, and that the awards were taxable as income of the students.

[11] Second, counsel argued that the Judge made a palpable and overriding error when he found as a fact (at para. 51) that there was “no uncertainty” that the Appellants’ children and grandson would receive an 80% bursary, although there was, he concluded, some uncertainty about their receipt of a 100% scholarship.

[12] Counsel for the Appellants pointed out that, in fact, 5-10% of students who solicited funds from “donors” either did not receive a bursary or had to repay it to NFCL because they failed to meet the eligibility criteria prescribed by NFCL. For example, some students did not enrol at TWU or another Christian post-secondary education, some did not take a full course load, while others did not maintain the requisite grade point average. About one third of the students who solicited funds did not receive a 100% scholarship. When students failed to qualify for or to retain a bursary, the “donations” that they had solicited were not returned by NFCL to “donors”.

[13] While not entirely accurate, the Judge's statement that there was "no uncertainty" with regard to the students' receipt of a bursary does not, in our opinion, constitute a palpable and overriding error that vitiates the Judge's ultimate conclusion. For one thing, he found on the facts before him that the Appellants knew that the students met the grade point average and course load requirements to qualify for bursaries, and none had had to repay their bursary to NFC. Hence, there was no uncertainty in fact about their receipt of a bursary.

[14] Further, it is clear from the Judge's discussion of the scholarships (at para. 52) that he did not regard the existence of an element of uncertainty as necessarily sufficient to find, for the purpose of determining the strength of the link between a benefit to the Appellants' and their "donations", that the Appellants had no expectation or anticipation of benefit from their "donation". It was, he said, "a question of degree, a matter of balancing the factors." *A priori*, the same must apply to the much smaller possibility that a student who solicited a "donation" to NFCL would not receive or retain a bursary.

[15] Third, the Judge did not deal with the funds "donated" to NFCL by the Appellants that were solicited by students other than their children or grandson. Thus, Mr Coleman caused the Appellant Titan Construction Contractors Ltd. (Titan) to "donate" $2,500 solicited by Carla Ohman, the daughter of his cousin, while the other Appellants, except Ms Neville, "donated" smaller amounts to NFCL solicited by students who were family friends.

[16] Since the Minister allowed a charitable deduction with respect to the donation solicited from Titan by Ms Ohman, because reassessment was statute-barred, it is not necessary for us to say more about it.

[17] It would have been preferable for the Judge to have dealt expressly with the "donations" solicited by family friends. However, despite the absence of a finding of fact by the Judge, we are satisfied that, with the possible exception of a $25 donation by Ms Hiebert solicited by Cheryl Doerksen, the "donors" of money to NFCL solicited by family friends received a benefit from them.

[18] It appears from the Judge's statement of the facts that the family friends' donations were reciprocal, in the sense that a "donation" by the parent of student *A* solicited by student *B* was matched by a donation by the parent of student *B* solicited by student *A*. This enabled the students to enhance their chances of receiving a scholarship by increasing the number of "donors" from whom they had solicited funds.

[19] In addition, counsel also questioned the propriety of the Judge's holding that, if the "donations" by Titan that had been solicited by Mr Coleman's son were not charitable gifts, Titan's donation was a taxable benefit to Mr Coleman by virtue of subsection 246(1) of the Act. Counsel had conceded this point in the Tax Court. Titan Holdings Ltd. is the sole shareholder of Titan, and Mr Coleman owns 51% of Titan Holdings' shares. He is a director of both companies, and president of Titan.

[20] Before this Court, counsel for the Appellants made two arguments that are particular to Titan. First, he said, Titan could not be said to have received any benefit from its “donation” to NFCL. I disagree. By virtue of his shareholdings and positions in the corporations, Mr Coleman could direct Titan to make the payment to NFCL. Titan thereby, in effect, stepped into his shoes by relieving him from paying his son’s educational expenses. In my view, this suffices to ascribe a benefit to Titan from its “donation”.

[21] Second, counsel said that, if Titan’s “donation” were not found to be a gift to NFCL, it would be treated as a taxable benefit to Mr Coleman under subsection 246(1). This, he said, would lead to double taxation, because the bursary awarded to Mr Coleman’s son was taxable in his hands.

[22] For reasons already given, I do not agree with the argument that the Appellants cannot be said to have received a benefit from their “donations” to NFCL because the student-recipients benefited from the bursaries and were liable to pay income tax on them, depending on their other income.

[23] Moreover, in view of counsel’s concession in the Tax Court, it is not open to him to now argue that the application of subsection 246(1) warrants treating Mr Coleman differently from the other Appellants merely because he chose to make his “donation” through a corporation that he controlled.

[24] To conclude, the Appellants have not demonstrated that the Judge committed any palpable and overriding error on a question of either fact or mixed fact and law. For all the reasons given above, the appeals will be dismissed with costs.

"John M. Evans"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-117-10
STYLE OF CAUSE:	GERALD BALLARD v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 1, 2011
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DAWSON J.A. LAYDEN-STEVENSON J.A.
DATED:	March 3, 2011

APPEARANCES:

Blake Bromley Kim Hansen	FOR THE APPELLANT
Lynn Burch Raj Grewal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Benefic Lawyers Vancouver, British Columbia Kim Hansen Law Corporation North Vancouver, British Columbia	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-118-10
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PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 1, 2011
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SOLICITORS OF RECORD:

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Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-119-10
STYLE OF CAUSE:	TITAN CONSTRUCTION CONTRACTORS LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 1, 2011
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DAWSON J.A. LAYDEN-STEVENSON J.A.
DATED:	March 3, 2011

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Lynn Burch Raj Grewal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Benefic Lawyers Vancouver, British Columbia Kim Hansen Law Corporation North Vancouver, British Columbia	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-120-10
STYLE OF CAUSE:	MONICA NEVILLE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 1, 2011
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DAWSON J.A. LAYDEN-STEVENSON J.A.
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Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

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DATE OF HEARING:	March 1, 2011
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CONCURRED IN BY:	DAWSON J.A. LAYDEN-STEVENSON J.A.
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