Docket: 2005-1914(IT)I

BETWEEN:

LINDA HUSKINSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 30, 2005 at Belleville, Ontario

Before: The Honourable Justice T. O'Connor

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Cheryl Cruz

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2003 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 19th day of December, 2005.

"T. O'Connor"

O'Connor, J.

Citation: 2005TCC798
Date: 20051219
Docket: 2005-1914(IT)I

BETWEEN:

LINDA HUSKINSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

[1] This appeal was scheduled for hearing at Belleville, Ontario on November 30, 2005. As appears from the Notice of Appeal and the Reply the substantive issue ("merits") is whether in the 2003 taxation year the Appellant must, under the *Income Tax Act* ("*Act*") include in her taxable income, child support payments totalling $24,000 received from her former spouse. This will depend upon whether the Appellant received such payments pursuant to a written agreement as contemplated in paragraph 56(1)(*b*) of the *Act*, all other relevant conditions for taxation being present, namely the payments representing an allowance payable on a periodic basis for the maintenance of the children of the marriage and the Appellant living apart from her former spouse.

[2] At the outset of the hearing counsel for the Respondent raised by way of a preliminary motion the proposition that this Court should not hear the appeal on the merits because the Appellant was subject to issue estoppel, the merits issue having already been decided against the Appellant by Mogan J. of this Court in a judgment dated April 14, 2004 (That judgment is unreported. It is referenced at 2004 UDTC 78

and 2004TCC233 and a certified copy was filed as part of counsel's Casebook). Said judgment was appealed to the Federal Court of Appeal and dismissed by that Court (2004 DTC 6677). See also the order of the Federal Court of Appeal dated November 24, 2004. Moreover, the same issue was heard and decided against the Appellant by a judgment of Hamlyn J. of this Court reported at 1999 DTC 3510.

[3] Counsel for the Respondent referred to *Wierbicki v. Canada*, 2000 DTC 6243 (F.C.A.) and *Sokolowska v. Canada* [2002] T.C.J. No. 32, judgments of the Federal Court of Appeal and of this Court respectively, where the principle of issue estoppel was applied.

[4] I asked the Appellant to address the motion and explain the differences between the present appeal on the merits and the issue decided by Mogan J. The Appellant indicated that this would probably necessitate a discussion on the merits. She filed three Notices of Confirmation by the Minister. The first is dated March 10, 2003 and concerns the 1996 taxation year. The second is dated July 17, 2003 and concerns the 2001 and 2002 taxation years. The third is dated March 15, 2005 and concerns the 2003 taxation year. (Mogan J. dealt with the years 1996, 2000, 2001 and 2002.) The Appellant explained that the terms used in the said Notices and in other correspondence and documentation provided by the Minister were confusing and did not clearly explain the reason why her claim was being denied. I could not however readily discern, from examining the said Notices of Confirmation nor from examining the Appellant's Notice of Appeal and the documents attached thereto, what were the exact differences between the merits issue in 2003 raised in this appeal and the merits issue determined by Mogan J. in the years before him.

[5] I decided to adjourn the hearing on the merits and proceed to determine the preliminary motion, advising that if the motion were granted the appeal would be dismissed and if the motion were denied the parties would be notified and a new future date for hearing on the merits would be set.

[6] The question on the motion is: Is the Appellant precluded from arguing the merits issue by reason of the principle of issue *estoppel* and/or its sister principle, *res judicata*?

[7] The Appellant stated in her Notice of Appeal:

> I am approaching this appeal to the Canada Revenue Agency's dismissal of my Objection for the 2003 taxation year from the premise that the Canada Revenue

Agency is obliged to honour what it commits to print. I am referring to the page titled "Your Rights" which appears on the back cover of the General Income Tax and Benefit Guide published by the Canada Revenue Agency for Canadian Taxpayers. Hereafter, the Canada Revenue Agency will be referred to as the CRA.

1. Given what is printed under "Information" on the page "Your Rights", the CRA is obliged to provide the taxpayer with complete, accurate and clear information about the taxpayer's rights, entitlements and obligations.

...

4. Given what is printed under "Fair Treatment" on the page "Your Rights", the CRA is obliged to apply the law fairly and impartially. The key words are "expect us to <u>apply the law fairly and impartially</u>".

Throughout the rest of this appeal I shall demonstrate how the CRA has not applied the law fairly and impartially to reach their decision to dismiss my Objection for the 2003 taxation year.

5. The CRA has based its dismissal of my Objection of the 2003 taxation year on the basis that there is a written agreement according to Paragraph 56(1)(b) and 56.1(4) of the Income Tax Act which is the only legal source the CRA has named.

6. The CRA finally identified the written agreement as the June 8, 1993 Minutes of Settlement from my file. This is the only document.

7. Section 56(1)(b) names the terms "written agreement" and "court order" as representing the only two documents which allow the CRA to make periodic payments named as child support taxable and deductible for the recipient and payor respectively.

8. Section 56(1)(b) itself does not define "written agreement" and the term "written agreement" is not defined anywhere in the Income Tax Act as Ms. Brown from the CRA Appeals confirmed. She has written in two letters dated May 19, 2005 (**EXHIBIT 3**) and June 3, 2005 (**EXHIBIT 4**) "There is no definition of "written agreement" in the Income Tax Act that we can copy and provide to you."

9. Since the term "written agreement" is not defined in tax law, the decisions Justice Mogan and the CRA have made are not based on law, they are based on their own interpretations of the term "written agreement". Since interpretations are strictly personal, they are therefore subject to being unfair and biased. Therefore, the law has not been applied as the CRA has promised taxpayers on its page titled "Your Rights" and my *Charter of Rights and Freedoms* right to be treated fairly and equally under the law has been denied.

10. So far in my case alone five different interpretations of the term "written agreement" have been used, each of them contradicting the next. Justice Mogan in

> his 2004 Judgment made the following interpretations of "written agreement" in an attempt to make something stick so my 1993 Minutes of Settlement would qualify as a written agreement.

[8] The Appellant goes on to quote various paragraphs from the judgment of Mogan, J.

[9] Paragraph 26 of the Notice of Appeal states as follows:

> **26.** Given the information I have received from the CRA and its inability to show that it has applied the law and has been fair and impartial in coming to its decision to dismiss my Objection for the 2003 taxation year and my other preceding objections regarding the same issues and the same documents, I have concluded that from 1989 to the present the CRA made the money I received from my ex-husband taxable to me and deductible for him without a court order or written agreement being in place. Calling the money I received from my ex-husband "child support" is unfounded in law as according to Section 56(1)(b) of the Income Tax Act and therefore not taxable to me or deductible for my ex-husband. In light of what has been provided and said by the CRA I believe all the assessments from taxation years from 1989 to the present have a right to be and need to be reopened by the Minister.

[10] The position of counsel for the Respondent is succinctly set forth in paragraph 11 of the Reply. It reads:

> In arguing *issue estoppel* ... regarding the Appellant's position that a signed contract does not exist between the Appellant and the Former Spouse, the Minister relies on the following facts:
>
> a) the Appellant has already appealed to the Court from reassessments by the Minister pertaining to income child support amounts received from the Former Spouse for the 1996, 2000, 2001 and 2002 taxation years;
>
> b) in his January 28, 2004 decision denying the appeal, the presiding Judge Mogan ruled that the Appellant and the Former Spouse had a signed separation agreement, that these payments were made pursuant to that agreement and therefore the amounts were correctly included in the Appellant's income;
>
> c) the Appellant appealed the ruling of his Honour Judge Mogan to the Federal Court of Appeal and her appeal was dismissed by the Federal Court of Appeal;

d) other than the year under review being different, the issues brought before the Court in this action are the same as those previously litigated before His Honour Judge Mogan;

e) the January 28, 2004 decision of Judge Mogan was final; and

f) the parties to both previous actions before the Court, as well as the present action are the same.

[11] Counsel for the Respondent referred to the decision of the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, where the Supreme Court analyzed *issue estoppel* and *res judicata* as follows:

> 23 Issue estoppel is a branch of res judicata ..., which precludes the relitigation of issues previously decided ... in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same; ...

[12] The Supreme Court of Canada referred to a decision of Goudge J.A. of the Ontario Court of Appeal as follows:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute".

[13] The Court concluded:

> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. ...

Analysis and Conclusion

[14] Is the Appellant precluded from presenting her case of the merits issue? In answering this question I am to be guided by the three elements discussed above in the decision of the Supreme Court of Canada.

[15] Mogan, J. has decided that the Minutes of Settlement constituted a written agreement. That decision was appealed to the Federal Court of Appeal by the Appellant and the appeal was dismissed. Admittedly the dismissal was on a procedural ground related to a default of the Appellant, but the fact is the appeal was dismissed. The decision of Mogan, J. was a final decision and his analysis was thorough and exhaustive. He reviewed the lengthy and protracted litigation which gave rise to the Minutes of Settlement and every relevant paragraph of the Minutes of Settlement and the factual background resulting in its signature. He analyzed the signatures themselves. He examined the four corners of the document and concluded as follows:

> [12] The Minutes of Settlement were a written agreement. I do not have any trouble reaching that conclusion. Indeed, on the basis of all the evidence given by the Appellant and the documents produced, I cannot reach any conclusion other than the fact that the Minutes of Settlement were an agreement in writing. ...
>
> [23] There is no merit to these appeals. The evidence is overwhelming that the Appellant and her former husband signed a written agreement (Exhibit R-1, Tab 2). It was not called a separation agreement. It was not called a written agreement, but it was a document in writing, four pages long, which had been laboured over by somebody with all the crossing out and writing in of provisions. It was signed by the Appellant, her former husband, and her mother in June 1993. They were the three people with the most at stake from a property point of view in settling what their relationship should be financially in the future.
>
> [24] The evidence is that, ultimately, with or without further court action, they had to comply with what was decided in the Minutes of Settlement. Therefore, the Minutes of Settlement is the written agreement. It is the agreement under which the child support was in fact paid in the years under appeal and the amounts are to be included in computing the Appellant's income in the 1996, 2000, 2001 and 2002 taxation years. The appeals are dismissed.

[16] The Appellant has explained why she is not satisfied with the position of CRA and with the judgment of Mogan, J. The Notices of Confirmation and other correspondence sent to her by CRA may have caused her confusion and may not have been a complete and satisfactory explanation of the reason for the reassessment. However the question is whether the reassessment is correct and not whether the CRA has clearly explained the reasons for the reassessment. The sole issue on the merits is whether the Minutes of Settlement in question constituted a written agreement within the meaning of paragraph 56(1)(*b*) of the *Act*. This issue has already been clearly determined by a judgment of this Court. That judgment is final. Applying the principles set forth by the Supreme Court of Canada analyzed above, I

have no doubt in concluding that the principles of *issue estoppel* and *res judicata* apply in this case and that the matter cannot be relitigated with respect to the 2003 taxation year. The appeal is dismissed.

Signed at Ottawa, Canada, this 19th day of December, 2005.

"T. O'Connor"

O'Connor, J.

CITATION:	2005TCC798
COURT FILE NO.:	2005-1914(IT)I
STYLE OF CAUSE:	Linda Huskinson v. Her Majesty the Queen
PLACE OF HEARING:	Belleville, Ontario
DATE OF HEARING:	November 30, 2005
REASONS FOR JUDGEMENT BY:	The Honourable Justice T. O'Connor
DATE OF JUDGMENT:	December 19, 2005

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Cheryl Cruz

COUNSEL OF RECORD:

For the :

Name:

Firm:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada