

Date: 20031002

Docket: A-402-02

Citation: 2003 FCA 363

CORAM: LINDEN J.A.

EVANS J.A.

MALONE J.A.

BETWEEN:

NANCI PACH

Applicant

App

and

HER MAJESTY THE QUEEN

and BRUCE ROSENBERG

Respondent

Resp

Heard at Toronto, Ontario, on September 30, 2003.

Judgment delivered at Toronto, Ontario, on October 2, 2003.

REASONS FOR JUDGMENT

BY:

MALONE J.A.

CONCURRED IN

BY:

LINDEN J.A.

NS J.A.

EVA

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REASONS FOR JUDGMENT

MALONE J.A.

[1] This is an application for judicial review of a decision of the Tax Court of Canada, dismissing an appeal by Nanci Pach against a reassessment by the Minister that certain payments made to her by Bruce Rosenberg be included in her income for the tax years 1997 and 1998. The decision is now reported as *Rosenberg v. Canada*, [2002] 3 C.T.C. 2193. In my analysis, the Judge committed no reviewable error and the application for judicial review must fail.

[2] The issue in this application relates to the proper income tax treatment of support payments made directly by Bruce Rosenberg to Nanci Pach in 1997 and 1998 totalling \$36,800.00 and \$34,889.56 respectively (the "Disputed Payments"). The Tax Court Judge found on the evidence presented that the Disputed Payments were made pursuant to a written

separation agreement dated April 17, 1994, that no new agreement had been negotiated and that he was not satisfied on the evidence that the 1994 agreement had ever been amended.

[3] The 1994 agreement provided as follows:

I, Bruce Rosenberg, agree to pay the mortgage payments for 137 Westmorland Ave., Toronto, after separation from Nanci Pach up until a period of five years or until Nanci Pach releases me in writing. I also agree to give \$1000.00 support per month and monthly expenses for 137 Westmorland Ave., including realty taxes, hydro, gas, telephone, insurance, cable, auto expenses (including gas, insurance), domestic help and other expenses not expressly listed.

[4] On the basis of these facts, the question is whether the Tax Court Judge erred in holding that the Disputed Payments are proper deductions for Mr. Rosenberg under paragraph 60(b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("the Act"), and are to be included in the applicant's income under paragraph 56 (1)(b).

[5] The deduction of "support payment" in subsection 56.1(4) of the Act applies to section 56 and reads as follows:

"**support amount**" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient, both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and

« *_pension alimentaire_* » - « pension alimentaire » Montant payable ou à recevoir à titre d'allocation périodique pour subvenir aux besoins du bénéficiaire, d'enfants de celui-ci ou à la fois du bénéficiaire et de ces enfants, si le bénéficiaire peut utiliser le montant à sa discrétion et, selon le cas:

(a) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal under a written agreement; or

a) le bénéficiaire est l'époux ou le conjoint de fait ou l'ex-époux ou l'ancien conjoint de fait du payeur et vit séparé de celui-ci pour cause d'échec de leur mariage ou union de fait et le montant est à recevoir aux termes de l'ordonnance d'un tribunal compétent ou d'un accord écrit;

[6] Pursuant to that subsection, such amounts must be payable or receivable as an allowance on a periodic basis; the badges of such allowance include the following:

- (a) the amount must be limited and predetermined,
- (b) the amount must be paid to enable the recipient to discharge a certain type of expense, namely for the maintenance of the recipient, and
- (c) the recipient must be able to dispose of the amount completely.

(see *Gagnon v. Canada*, [1986] 1 S.C.R. 264)

Issue 1: Did the Judge err in concluding that the amounts payable under the agreement were "limited and predetermined"?

[7] Counsel for the applicant submitted that the amounts payable did not satisfy the first criterion in that they were not "limited and predetermined" by the terms of the agreement, and that the Tax Court Judge had erred in concluding that they were. Counsel advanced two arguments in support of his position.

[8] First, he said that the Judge had applied the wrong legal test because he had decided that an amount could be "limited and predetermined" even if the agreement did not specify the exact dollar amount payable under the agreement. This is a question of the interpretation of a legal rule and thus is a question of law. Whether an agreement must spell out the precise dollar amount payable for it to be "limited and predetermined" is a proposition of some general application and is not limited to the facts of this case. Accordingly, the Judge's determination of this question is reviewable on a standard of correctness: *Jastrebski v. Canada*, [1994], 3 F.C. 466 at 473-74 (C.A.).

[9] In my view, the Judge correctly interpreted the test set out in *Gagnon*. Paragraph 56(1)(b) does not state that an exact dollar amount must be specified as receivable under a written agreement. Amounts payable can be said to be both predetermined and limited if the agreement defines the enumerated expenses in respect of which they are paid to the recipient in a way that renders the amounts certain. To require that an agreement specify the exact amount would put parties to the expense and inconvenience of having continually to amend the agreement whenever the expenses to be covered increased or decreased.

[10] Second, counsel submitted that, even if *Gagnon*, when properly interpreted, does not require the insertion of a dollar figure in the agreement, the expenses enumerated in this agreement were too vague and variable to render them "limited and predetermined". In so arguing, counsel was alleging that the Judge erred in his application of paragraph 56(1)(b), as interpreted by *Gagnon*, to the facts of the case. Absent some discrete error of law, the application of the correct legal test to the facts found by the Tax Court Judge is a question of mixed fact and law and reviewable for unreasonableness, or palpable or overriding error: see for example *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082, 2001 D.T.C. 5505 at paragraph 34. Subject to review for unreasonableness, it is for the Judge to decide if the terms of an agreement are sufficiently precisely described to bring them within the words "limited and predetermined". In my view, the Judge did not commit a legal error when he determined at paragraph 13:

Although the balance of the support payments over and above the \$1000 fixed amount were not specifically quantified in the agreement, the evidence indicates that they were thoroughly

discussed and by the very nature of the expenses were in a general sense predetermined and limited.

[11] The evidence was that the parties had a fairly precise sum in mind when they entered the agreement, namely \$3,200 per month, with some modest variations. Evidence of the parties' intentions at that time is relevant to interpreting the terms of the written agreement, and of reducing possible uncertainties about the precise nature of the expenses covered. Moreover, Mr Rosenberg made some payments to Ms. Pach that he did not seek to deduct from his income.

[12] Nor does the fact that the amounts were paid irregularly prevent them from being support payments. They were still amounts "payable on a periodic basis" under the terms of the agreement: see *Her Majesty the Queen v. Sills* 85 D.T.C. 5096 at page 5098.

[13] I am therefore satisfied the Judge committed no reviewable error when he decided that payments received in excess of \$1,000 per month under the written agreement were taxable in the hands of the applicant pursuant to paragraph 56(1)(b).

Issue 2: Did the Judge err when he held that the agreement had not been varied after April 1997?

[14] Counsel for the applicant alleged that the Tax Court Judge committed a second error when he determined that the child support amounts did not become receivable to Ms. Pach on or after the commencement date of an amended agreement between the parties.

[15] Where support payments are received in a taxation year, the amount to be included in a taxpayer's income is determined by a formula set out in paragraph 56(1)(b) which reads as follows:

56. (1) Amounts to be included in income for year - Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

...

(b) **support** - the total of all amounts each of which is an amount determined by the formula

$A - (B + C)$

ARTICLE 56: Sommes à inclure dans le revenu de l'année.

(1) Sans préjudice de la portée générale de l'article 3, sont à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition:

...

b) Pension alimentaire - le total des montants représentant chacun le résultat du calcul suivant:

$A - (B + C)$

where	où:
A is the total of all amounts each of which is a support amount received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,	A représente le total des montants représentant chacun une pension alimentaire que le contribuable a reçue après 1996 et avant la fin de l'année d'une personne donnée dont il vivait séparé au moment de la réception de la pension,
B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and	B le total des montants représentant chacun une pension alimentaire pour enfants que la personne donnée était tenue de verser au contribuable aux termes d'un accord ou d'une ordonnance à la date d'exécution ou postérieurement et avant la fin de l'année relativement à une période ayant commencé à cette date ou postérieurement,
C is the total of all amounts each of which is a support amount received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;	C le total des montants représentant chacun une pension alimentaire que le contribuable a reçue de la personne donnée après 1996 et qu'il a incluse dans son revenu pour une année d'imposition antérieure;

[16] In accordance with subsection 56.1(4) where the support amounts are also child support amounts and are paid under an agreement on or after its commencement day, these facts give rise to a situation where the total amount of the support amounts to be included in the taxpayer's yearly income can be reduced. Under the Act, "commencement day" is defined in subsection 56.1(4) as:

<u>"commencement day" at any time of an agreement or order means</u>	<u>« date d'exécution » - « date d'exécution »</u> <u>Quant à un accord ou une ordonnance:</u>
(a) where the agreement or order is made after April 1997, the day it is made; and	a) si l'accord ou l'ordonnance est établi après avril 1997, la date de son établissement;
(b) where the agreement or order is made before May 1997, the day, if any, that is after April 1997 and is the earliest of	b) si l'accord ou l'ordonnance est établi avant mai 1997, le premier en date des jours suivants, postérieur à avril 1997:
(i) the day specified as the commencement day of the agreement or order by the payer and recipient under the agreement or order in a joint election filed with the Minister in prescribed form and manner,	(i) le jour précisé par le payeur et le bénéficiaire aux termes de l'accord ou de l'ordonnance dans un choix conjoint présenté au ministre sur le formulaire et selon les modalités prescrit,

(ii) where the agreement or order is varied after April 1997 to change the total child support amounts payable to the recipient by the payer, the commencement day of the first such subsequent agreement or order, and

(ii) si l'accord ou l'ordonnance fait l'objet d'une modification après avril 1997 touchant le montant de la pension alimentaire pour enfants qui est payable au bénéficiaire, le jour où le montant modifié est à verser pour la première fois,

(iii) where a subsequent agreement or order is made after April 1997, the effect of which is to change the total child support amounts payable to the recipient by the payer, the commencement day of the first such subsequent agreement or order, and

(iii) si un accord ou une ordonnance subséquent est établi après avril 1997 et a pour effet de changer le total des montants de pension alimentaire pour enfants qui sont payables au bénéficiaire par le payeur, la date d'exécution du premier semblable accord ou de la première semblable ordonnance,

(iv) the day specified in the agreement or order, or any variation thereof, as the commencement day of the agreement or order for the purposes of this Act.

(iv) le jour précisé dans l'accord ou l'ordonnance, ou dans toute modifications s'y rapportant, pour l'application de la présente loi.

[17] In this case, the written agreement of April 19, 1994 does not have a commencement day since none of the alternatives set out in the sub-paragraphs following subsection 56.1(4) apply. Using the paragraph 56(1)(b) formula, child support amounts received by the applicant under a written agreement that does not have a commencement day do not reduce the total amount of support amounts required to be included in Ms. Pach's income. Accordingly, no legal error was committed by the Tax Court Judge when he decided that the commencement day requirement under subsection 56.1(4) had not been established.

[18] Counsel for the applicant argued that the parties varied the agreement after April 1997 and reduced the amounts payable by Mr. Rosenberg and thus brought the amended agreement within the above-mentioned provisions. It was urged that no written amending agreement was necessary in order to comply with paragraph 60(b) which reads as follows:

60. Other deductions - There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:

ARTICLE 60: Autres déductions.

Peuvent être déduites dans le calcul du revenu d'un contribuable pour une année d'imposition les sommes suivantes qui sont appropriées:

...

...

(b) **support** - the total of all amounts each of which is an amount determined by the formula

b) **Pension alimentaire** - le total des montants représentant chacun le résultat du calcul suivant:

A - (B + C)

A - (B + C)

where

où:

A is the total of all amounts each of which is a support amount paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,

A représente le total des montants représentant chacun une pension alimentaire que le contribuable a payée après 1996 et avant la fin de l'année à une personne donnée dont il vivait séparé au moment du paiement,

B is the total of all amounts each of which is a child support amount that became payable by the taxpayer to the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and

B le total des montants représentant chacun une pension alimentaire pour enfants qui est devenue payable par le contribuable à la personne donnée aux termes d'un accord ou d'une ordonnance à la date d'exécution ou postérieurement et avant la fin de l'année relativement à une période ayant commencé à cette date ou postérieurement,

C is the total of all amounts each of which is a support amount paid by the taxpayer to the particular person after 1996 and deductible in computing the taxpayer's income for a preceding taxation year;

C le total des montants représentant chacun une pension alimentaire que le contribuable a payée à la personne donnée après 1996 et qui est déductible dans le calcul de son revenu pour une année d'imposition antérieure;

[19] In my analysis, this position is untenable for two reasons. First, to satisfy paragraph 60(b) the amendment must be in writing. A contract which varies an earlier agreement must be reduced to writing, if the original contract had to be in writing (see G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at 543-544). Second, the Judge's finding of fact that the evidence did not establish that Ms. Pach agreed to the variation of the agreement is supportable on the record. Her evidence was to the effect that she had the reductions forced upon her unilaterally by Mr. Rosenberg and had no choice but to accept what he paid. In short, she did not voluntarily agree to the reduction. Consequently, the Judge's decision cannot be set aside under paragraph 18.1(4)(d) of the *Federal Court Act* as being based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the Judge.

[20] For these reasons, I would dismiss this application for judicial review with costs.

"B. Malone"

J.A.

"I agree

A. M. Linden"

I agree

John M. Evans"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-402-02

STYLE OF CAUSE: NANCI PACH

Applicant

and

HER MAJESTY THE QUEEN

and BRUCE ROSENBERG

Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 30, 2003

REASONS FOR JUDGMENT: MALONE J.A.

CONCURRED IN BY: LINDEN J.A.

EVANS J.A.

DATED: OCTOBER 2, 2003

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