

Docket: 2005-4115(IT)G

BETWEEN:

JACINTHE BOUCHARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of
Danielle Bouchard (2005-4116(IT)G) and
Jacques Bouchard (2005-638(IT)G)
on January 24, 2008, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Basile Angelopoulos
Counsel for the Respondent: Anne Poirier

JUDGMENT

The appeal from the notice of reassessment made under the *Income Tax Act* and dated February 26, 2004, in respect of the 2002 taxation year, and from the notice of reassessment made under the *Income Tax Act* and dated January 6, 2005, in respect of the 2003 taxation year, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of August 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 2nd day of October 2008.

Brian McCordick, Translator

Docket: 2005-4116(IT)G

BETWEEN:

DANIELLE BOUCHARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of
Jacinthe Bouchard (2005-4115(IT)G) and
Jacques Bouchard (2005-638(IT)G)
on January 24, 2008, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Basile Angelopoulos
Counsel for the Respondent: Anne Poirier

JUDGMENT

The appeal from the notice of assessment made under the *Income Tax Act* and dated May 29, 2003, in respect of the 2002 taxation year, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of August 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 2nd day of October 2008.

Brian McCordick, Translator

Docket: 2005-638(IT)G

BETWEEN:

JACQUES BOUCHARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of
Jacinthe Bouchard (2005-4115(IT)G) and
Danielle Bouchard (2005-4116(IT)G)
on January 24, 2008, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Basile Angelopoulos
Counsel for the Respondent: Anne Poirier

JUDGMENT

The appeal from the notice of assessment made under the *Income Tax Act* and dated January 26, 2004, in respect of the 2002 taxation year, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of August 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 2nd day of October 2008.

Brian McCordick, Translator

Citation: 2008 TCC 462
Dockets: 2005-4115(IT)G
2005-4116(IT)G
2005-638(IT)G

BETWEEN:

JACINTHE BOUCHARD,
DANIELLE BOUCHARD,
JACQUES BOUCHARD,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] These three appeals were instituted by the Bouchard family of Saint-Lambert. They were heard on common evidence. Danielle Bouchard is appealing from the notice of assessment dated May 29, 2003, in respect of the 2002 taxation year. Jacques Bouchard is appealing from the notice of reassessment dated January 26, 2004, in respect of the 2002 taxation year. Their daughter Jacinthe Bouchard is appealing from the notice of reassessment made on February 26, 2004, in respect of the 2002 taxation year, and from the notice of reassessment dated January 6, 2005, in respect of the 2003 taxation year.

[2] The dispute is about the tax treatment of \$1,000,000 that the Appellants received from National Bank Financial (NBF) upon the Bouchard couple's retirement on September 1, 2002.

[3] The Bouchard couple began working in the securities brokerage field in 1969. From 1969 to 1973, they were investment advisors with the firm of René T. Leclerc. From 1973 to 2002, they were investment advisors with the National Bank, the National Bank of Canada and Lévesque Beaubien (now NBF). Jacinthe Bouchard worked in the securities brokerage field for more than eight years with her parents, and, in July 2002, she was an investment advisor with NBF as well.

[4] On July 2, 2002, as part of the retirement component of NBF's Relay Program, Danielle Bouchard and Jacques Bouchard each signed a service agreement in which they agreed to retire on September 1, 2002, and receive a retirement allowance payable on that date. The amount of Danielle Bouchard's allowance was \$450,000, and the amount of Jacques Bouchard's allowance was \$100,000. In addition, from July 1 to September 1, 2002, NBF agreed to readjust the net commission rate to 55% of both Appellants' gross commissions. In consideration of these monetary benefits, both Appellants agreed to take all measures necessary to ensure that their respective clients transitioned smoothly to NBF-employed investment advisors Jacques Angers and Glen Cooper; to refrain, for a term of five years, from working in the securities field within a 200-kilometre radius of the boundaries of the city in which their former branch was located; and not to solicit their former clients or otherwise compete with NBF.

[5] Danielle Bouchard's \$450,000 retirement allowance was paid by NBF in the form of a cheque dated August 30, 2002; the net amount of the cheque was \$249,501, which was the amount left after a deduction of \$44,799 eligible for transfer to a registered retirement savings plan, plus federal and provincial taxes.

[6] In her 2002 income tax return, Danielle Bouchard reported \$450,000 on account of proceeds of disposition of goodwill. Based on an adjusted cost base of \$1.00, the amount of \$224,999.50 was included as a taxable capital gain. On May 29, 2003, the Minister of National Revenue ("the Minister") issued a notice of assessment in which a \$450,000 retiring allowance was included in computing Danielle Bouchard's income for the 2002 taxation year. The reported \$224,999.50 capital gain was cancelled, and the deduction for RRSP contributions was allowed based on a \$34,000 eligible retiring allowance. In issuing this notice of assessment, the Minister relied in part on the T4A form issued by NBF, which showed a \$34,000 eligible retiring allowance and a \$416,000 non-eligible retiring allowance.

[7] Jacques Bouchard's \$100,000 retiring allowance was paid by NBF in the form of a cheque dated August 30, 2002; the net amount of the cheque, after federal and provincial tax, was \$77,000.

[8] In his 2002 income tax return, Jacques Bouchard reported \$100,000 on account of proceeds of disposition of goodwill. Based on an adjusted cost base of \$1.00, a taxable capital gain of \$49,999 was included. On January 26, 2004, the Minister issued a notice of reassessment in which a \$100,000 retiring allowance was included in computing Mr. Bouchard's income for the 2002 taxation year. The reported \$49,999 taxable capital gain was cancelled. In issuing this notice of reassessment, the Minister relied in part on the T4A form issued by NBF, which showed a \$100,000 non-eligible retiring allowance. Mr. Bouchard's 2002 taxation year was also the subject of notices of reassessment issued August 9, 2004, and November 28, 2005.

[9] On July 2, 2002, Jacinthe Bouchard signed a service agreement under the NBF's Relay Program (career reorientation) in which she agreed to take all necessary measures to ensure that her clients transitioned smoothly to NBF-employed investment advisors Jacques Angers and Glen Cooper. In addition, Jacinthe Bouchard agreed to refrain, for a term of five years, from assisting any other business operating in the field of securities, life insurance, financial planning, tax shelters or tax havens, within a 200-kilometre radius of the boundaries of the city or municipality in which the branch where she worked was located, and, generally, to refrain from soliciting her former clients on behalf of such a business, causing such clients to terminate their business relationships with NBF, or doing anything else that might constitute competition with NBF. In consideration of these commitments, NBF agreed to readjust the net commission rate to 55% of Jacinthe Bouchard's share of the gross commissions, and to grant her a \$450,000 bonus payable as follows:

- \$225,000 on September 1, 2002; and
- \$225,000 on September 1, 2003.

[10] Jacinthe Bouchard did indeed receive the two instalments of \$225,000 on September 1, 2002, and September 1, 2003, respectively. In her 2002 and 2003 income tax returns, she reported \$225,000 on account of proceeds of disposition of goodwill. Based on an adjusted cost base of \$1.00, a \$112,499.50 taxable capital gain was included for each of the years 2002 and 2003.

[11] On February 26, 2004, the Minister issued a notice of reassessment in order to include a retiring allowance of \$225,000 in computing Jacinthe Bouchard's income for the 2002 taxation year. The \$224,999.50 capital gain and the \$4,196 deferred capital loss that she had claimed were cancelled. In issuing this notice of reassessment, the Minister relied in part on the T4A slip issued by NBF, which showed an eligible retiring allowance of \$4,000 and a non-eligible retiring allowance of \$221,000.

[12] On January 6, 2005, the Minister issued a notice of reassessment in order to include a retiring allowance of \$225,000 in computing Jacinthe Bouchard's income for the 2003 taxation year. The \$224,999.50 capital gain was cancelled. In issuing this notice of reassessment, the Minister relied in part on the T4A slip issued by NBF, which showed a non-eligible retiring allowance of \$225,000.

[13] On February 18, 2004, NBF sent a letter confirming that Jacinthe Bouchard was still an employee of NBF, and that the amounts of \$225,000 that she was paid in 2002 and 2003 were employment income that was erroneously reported as a retiring allowance. Further to this letter, NBF cancelled the T4 and T4A slips that had initially been issued for 2002 and 2003, and replaced them with new T4 slips that included the employment income of \$225,000 per year.

[14] Although the agreements that the Appellants signed in 2002 contemplated the smooth transition of their clients to Jacques Angers and Glen Cooper, those advisors were not parties to the agreements. However, as the new investment advisors, Mr. Angers and Mr. Cooper signed an agreement with FBN, also dated July 2, 2002, under which they agreed to submit a business plan in connection with the management of the assets that the Appellants would transfer to them, and under which they accepted a \$1,000,000 reduction of their net commissions, by means of 60 monthly payments of \$16,666.67, plus interest at NBF's prime rate less 0.5%, applicable to the balance of the advance, effective September 1, 2002. In the event of a cessation of employment, the balance of the money advanced by NBF was repayable within 20 days.

[15] Effective September 1, 2002, Jacinthe Bouchard continued to work for NBF as an investment advisor on the Angers/Cooper team and to serve her clients and those of her parents. According to Danielle Bouchard, it was very important that Jacinthe be able to continue her investment advising work within the new investment advisor team for at least two years in order to secure her future and thereby facilitate the clients' transition. Danielle Bouchard also stated that, in 2002, the Bouchard team had 400-500 clients and roughly \$150 million in assets under management. The transition of clients from the Bouchard team to the Angers/Cooper team was more difficult than expected and, as a result, Jacinthe Bouchard had to extend her employment within the Angers/Cooper team until April 1, 2005, at which time she replaced Jacques Angers within the team. In order to do so, she entered into new agreements with NBF and assumed Jacques Angers' debt to NBF and one-half of the lump-sum payment that NBF had allocated to Mr. Angers, that is to say, \$408,059.40 repayable in 60 equal consecutive monthly commission reductions of \$6,800.99.

The Appellants' position

[16] The Appellants make the following arguments in support of the taxation of the amounts received from NBF as capital gains from the disposition of a capital asset:

- (a) The term "retiring allowance" in the service agreement signed in connection with NBF's Relay Program (retirement) is not consistent with the definition of the term in section 248 of the Act.
- (b) The right to serve clients and manage their assets constitutes "capital property" within the meaning of section 54 of the Act and "property" within the meaning of subsection 248(1) of the Act, the disposition of which property resulted in a capital gain.
- (c) According to *Gifford v. Canada*, [2004] 1 S.C.R. 411, the amounts paid to the Appellants are capital in nature.
- (d) The amounts received by the Appellants are actually from Messrs. Angers and Cooper, not NBF, because NBF simply acted as financial intermediary (i.e. a no-risk lender).
- (e) NBF structured the acquisition of a capital property in such a manner that it could deduct the amounts paid to the Appellants and recover them from a deduction from the commissions earned by the new investment advisors.
- (f) According to *Manrell v. Canada*, 2003 FCA 128, payments in exchange for non-competition clauses do not constitute income.

Respondent's position

[17] The Respondent makes the following arguments in support of the taxation of the amounts that the Appellants received from NBF as a retiring allowance in the Bouchard couple's hands, and as employment income in Jacinthe Bouchard's hands.

(a) The amounts received constitute a "retiring allowance" within the meaning of subsection 248(1) and subparagraph 56(1)(a)(ii) of the Act because:

- (i) The amounts of \$450,000 and \$100,000 were received in recognition of the Bouchard couple's long service at the time that they retired from their employment with NBF.
- (ii) Danielle Bouchard and Jacques Bouchard each signed an agreement with NBF stating that they would receive a retiring allowance on the date they retired.
- (iii) If the Bouchard couple and NBF had wanted the amounts paid by NBF to be in consideration of their clientele, a clear provision to that effect would have been included in the agreement.
- (iv) The amounts were paid by NBF in its capacity as Danielle Bouchard and Jacques Bouchard's employer.
- (v) On the T4A slips, NBF reported the amounts paid to the Bouchard couple as a retiring allowance.

(b) The amounts paid to the Appellants were not in consideration of the disposition of eligible capital property within the meaning of section 54 of the Act, because the Appellants did not report business income in their 2002 tax returns; rather, their income consisted almost exclusively of commissions paid by NBF as an employer.

(c) Under the agreements with the Appellants, they did not dispose of capital property as defined in section 54 of the Act because

- (i) there was no agreement concerning the disposition of any property by the Appellants to Mr. Angers and Mr. Cooper, and
- (ii) Mr. Angers and Mr. Cooper paid no amounts to the Appellants for the acquisition of clientele or a client list; and

(d) the amounts received by the Appellants from NBF are not chiefly attributable to the signing of a non-competition clause as they were in *Manrell, supra*, because there are no contractual relations between the Appellants and the new investment advisors.

[18] The Respondent further submits that if the amounts received by the Bouchard couple are not retiring allowances, they are nonetheless taxable as employment income under sections 5 and 6 of the Act.

[19] In Jacinthe Bouchard's case, the Respondent submits that the \$225,000 payments that she received constitute employment income within the meaning of subsection 5(1) of the Act for the following reasons:

- (a) The agreement with NBF specifically refers to a bonus payable as part of a career reorientation within NBF.
- (b) A bonus is normally considered remuneration from employment, or a benefit received in the course of, or by virtue of, an office or employment.
- (c) The employer issued T4 slips reporting the \$225,000 payments as employment income.
- (d) The amounts in question were to assist with the transfer of the right to manage the clients that she shared with her parents, and were therefore received on account of, in the course of, or by virtue of her office or employment.

Analysis

[20] The term "retiring allowance" is defined as follows in subsection 248(1) of the Act:

"retiring allowance" means an amount (other than a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(a)(iv)) received

(a) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer's long service, or

(b) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal

by the taxpayer or, after the taxpayer's death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer;

[21] An amount that qualifies as a retiring allowance must be included in the recipient's income under subparagraph 56(1)(a)(ii) of the Act, which reads:

56. Amounts to be included in income for year

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

Pension benefits, unemployment insurance benefits, etc.

- (a) any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,

...

- (ii) a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement,

[22] At this stage, it is important to ascertain the exact legal nature of NBF's payments to the Appellants. The aim of NBF's Relay retirement program is to facilitate the transition of the clients who are served by advisors who wish to retire to the next generation of advisors. Client retention is NBF's main objective. In fact, the addition of the non-solicitation and non-compete clause to the service agreements signed as part of the Relay retirement program clearly confirms that client retention is NBF's priority. Under the terms of the service agreements signed by the Bouchard couple, each of them agreed to take all measures necessary to ensure that their respective clients would be able to make a smooth transition to the Angers/Cooper team.

[23] In practice, the Bouchard couple's commitment was reflected in a letter dated July 24, 2002, in which the Bouchard couple notified their clients and friends that they would be retiring on August 31, 2002, and that their daughter Jacinthe Bouchard and Jacques Angers and Glen Cooper would be replacing them in a spirit of continuity of approach and philosophy. The letter also referred to future contact with the recipients with a view to ensuring a smooth and efficient transition.

[24] The announcement of future contact with the clients did indeed lead to meetings in which the Bouchard couple met with important clients in the company of Mr. Angers and Mr. Cooper.

[25] Even though the service agreements signed by the Bouchard couple describe the amounts payable to each as retiring allowances, they contain no statements to the effect that the payments were being made in consideration of the Bouchard couple's long service or the loss of the Bouchards' respective employments with NBF.

[26] The amounts payable under the service agreements are not based on the number of years of service with NBF; rather, they are calculated based on the efforts needed to ensure that clients can make a smooth transition considering, *inter alia*, the transition time, the amount of assets under management, the revenue potential and the anticipated client retention rate (based on the testimony of Louis Bérard, NBF's Relay Programs director since 2003).

[27] The fact that the Bouchard couple's daughter obtained \$450,000 after just eight years of service, while Danielle Bouchard obtained the same amount after 33 years of service, aptly shows that the amounts payable under the service agreements were not based on the length of the recipients' service.

[28] The concept of retiring allowance is obviously not applicable to Jacinthe Bouchard's case because she continued to work for NBF after September 1, 2002. The payments that she received were characterized as bonuses.

[29] Counsel for the Appellants alleged that the Appellants disposed of their clients, or their right to serve their clients and manage their clients' assets, as part of a transaction that was capital in nature. Moreover, he submitted that the amounts received by the Appellants were from the new investment dealers, not NBF, since the dealers are unconditionally liable to repay the amounts to NBF. In his submission, NBF did not acquire anything under the agreements signed by the Appellants, and did not pay anything either; the bank was merely a financial intermediary that assumed no risk in the transaction. Consequently, he submits that the amounts paid to the Appellants are not from their employer and cannot be taxed as income from employment. In support of his submissions, counsel referred to the following decisions:

- *Financière Banque Nationale Inc. v. Jean*, EYB 2004-80404 (QCCS);
- *Valeurs mobilières Banque Laurentienne Inc. v. Lefrançois*, 2004 CanLII 10447 (QCCQ);
- *Cumberland Investments Ltd. v. The Queen*, 75 D.T.C. 5309 (F.C.A.);
- *The Queen v. Farquhar Bethune Insurance Limited*, 82 D.T.C. 6239 (F.C.T.D.);

- *The Queen v. Baine Johnstone & Company Limited*, 77 D.T.C. 5394 (F.C.T.D.);
- *Manrell v. The Queen*, [2003] 3 F.C. 727 (C.A.);
- *Gifford v. Canada*, [2004] 1 S.C.R. 411;
- *Canada v. Gifford*, 2002 FCA 301;
- *Desmarais v. The Queen*, 2006 TCC 417;
- *Morissette v. Canada*, 2007 FCA 16
- *Linseman v. M.N.R.*, 2007 TCC 97; and
- *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

[30] The service agreements signed by the Appellants make no reference to any asset transfer, but some of the other documents relevant to the transaction specifically do so. For example, an item of correspondence dated June 19, 2002, from Marc Lauzier to the parties involved in the transaction, concerning the sale of the Bouchards' clients, contains such references. At that time, Mr. Lauzier was a regional director of individual investor services at NBF and was responsible for negotiating the amount of the agreement with the Bouchards. The following excerpt from the document is also relevant:

[TRANSLATION]

This is to inform you that, following my hesitation about the dollar amount of the clientele transfer agreement with the Bouchard family, I met with Mr. Carrière to discuss whether the transaction would be suitable. In light of recent experiences involving the price of transferring clients, it appears that the amount of \$1.2 million, representing 1.85 times the Bouchard family's estimated income for the year, is well above what we usually finance for our agreements. . . .

[31] Another relevant document is the service agreement with Mr. Angers and Mr. Cooper under the Relay Program (retirement) dated July 2, 2002. In the agreement, Mr. Angers and Mr. Cooper agreed to [TRANSLATION] "submit a business plan concerning management of the assets that will be transferred to us by Danielle Bouchard, Jacinthe Bouchard and Jacques Bouchard, investment advisors employed by National Bank Financial."

[32] I find it very difficult to accept that the payments contemplated in the service agreements entered into by the Bouchard family can be considered to have been received in consideration of the disposition of the clientele that was under their management as part of their employment with NBF, or in consideration of the disposition of some right of management in respect of that clientele.

[33] The agreements signed by the Bouchard family make no reference to a sale of assets, and the agreements are even described as service agreements, the services being the measures necessary to ensure that their clients make a smooth transition to the new investment advisors. Even though certain documents refer to the sale of clientele or other types of assets, the evidence does not disclose that the parties involved in the transaction had a clear and common intent to carry out a sale of assets.

[34] Since the agreements involved contain covenants not to solicit clients under the Appellants' management, as well as covenants not to compete with NBF, we must consider whether the amounts paid to the Appellants constitute consideration or partial consideration for those commitments, as opposed to consideration for a sale of assets.

[35] Another important factor is that the purported transferees of the Appellants' clientele were not parties to the agreements made with the Appellants, contrary to the situation in *Gifford, supra*, where the two employees of the brokerage firm had entered into an "Agreement to Purchase Client Base of Financial Advisor" with each other. In the absence of a clear and unambiguous contract between the investment advisors, the Appellants bear the onus of proving that the new investment advisors were the true recipients of the clientele and that NBF was a mandatary acting on behalf of and for the benefit of those advisors when it financed the transaction. Unfortunately for the Appellants, nothing in the evidence supports such a finding, and if NBF had been such a mandatary, it would not have been able to issue the T4 and/or T4A slips. Moreover, it should be emphasized that the Appellants did not contest the validity of the service agreements that they entered into with NBF; the Appellants were content to state that the agreements did not reflect the true nature of the transaction.

[36] Contrary to the submissions by counsel for the Appellants, I do not believe that the amounts paid by NBF can be considered to have come from the new investment advisors. If I understand the transaction correctly, NBF gets repaid from the portion of the commissions that would otherwise be payable to the new investment advisors. The new advisors incur no acquisition costs, for taxation purposes, in respect of the clientele, because, in practice, they paid nothing to acquire the clientele, assuming that they acquired it at all. My understanding of the way in which the transaction is structured is that, in the event that the commission rate is reduced, only such part of the commissions as is actually received by the new investment brokers is to be included in their income. The portion of the commissions left to NBF, in repayment of the amounts advanced to the Appellants, is a non-taxable shortfall that cannot be deducted by the new investment advisors.

[37] I would close my remarks on this point by stating that I wonder how the Appellants can claim to have disposed of their clientele when it is settled law that an investment broker's or a professional's clients belong to no one, or, at best, to the brokers and brokerage firm that employs him or her (see *Financière Banque Nationale Inc. v. Jean, supra*; *Gifford v. Canada, supra*; and *Desmarais v. The Queen, supra*). It seems clear to me that NBF did not have to make any payment whatsoever to the Appellants in order to acquire their clientele.

[38] Based on my analysis of the evidence, I find that the payments received by the Appellants are in consideration of services rendered as part of their employment with NBF and are therefore taxable as employment income under subsections 5(1) and 6(3) of the Act, which read as follows:

5. Income from office or employment

- (1) Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.

6(3) Payments by employer to employee

An amount received by one person from another

- (a) ...
- (b) on account, in lieu of payment or in satisfaction of an obligation arising out of an agreement made by the payer with the payee immediately prior to, during or immediately after a period that the payee was an officer of, or in the employment of, the payer,

shall be deemed, for the purposes of section 5, to be remuneration for the payee's services rendered as an officer or during the period of employment, unless it is established that, irrespective of when the agreement, if any, under which the amount was received was made or the form or legal effect thereof, it cannot reasonably be regarded as having been received

(c) ...

(d) ...

(e) in consideration or partial consideration for a covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment.

[39] In my opinion, the service agreements entered into with the Appellants did indeed specify what the Appellants were to do, i.e. take the measures necessary to ensure that their clients made a smooth transition to the new investment advisors, and what they were not to do, i.e. solicit their former clients or otherwise compete with NBF either before or after the termination of employment.

[40] In *Morissette, supra*, the Federal Court of Appeal confirmed that a non-solicitation covenant, "when exchanged for cash in the context of an employment termination, gives rise to employment income." It seems obvious to me that a positive covenant to take measures necessary to ensure that the Appellants' clientele make a smooth transition should be treated in the same manner.

[41] In Jacinthe Bouchard's case, the amounts received from NBF as part of the service agreement that she entered into are taxable as employment income under subsection 5(1) of the Act because they were not obtained on her retirement.

[42] For these reasons, I would dismiss the appeal, with costs.

Signed at Ottawa, Canada, this 27th day of August 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 2nd day of October 2008.

Brian McCordick, Translator

CITATION: 2008 TCC 462

COURT FILE NOS.: 2005-4115(IT)G, 2005-4116(IT)G,
2005-6389(IT)G

STYLES OF CAUSE: Jacinthe Bouchard and Her Majesty the Queen
Danielle Bouchard and Her Majesty the Queen
Jacques Bouchard and Her Majesty the Queen

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 24, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: August 27, 2008

APPEARANCES:

Counsel for the Appellants: Basile Angelopoulos
Counsel for the Respondent: Anne Poirier

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