It remains to be seen how the CCRA will adapt its investigative practices and procedures to the guidelines set down by the Supreme Court of Canada.

James Warnock

THE TAX COURT OF CANADA

THAT'S NOT A RETIRING ALLOWANCE; IT'S A TAX-FREE TORT

Ahmad v. The Queen
2002 DTC 2065; [2002] 4 CTC 2497

KEYWORDS: DAMAGES ■ CONSTRUCTIVE DISMISSAL ■ RETIRING ALLOWANCE ■ PRE-JUDGMENT INTEREST

This recent case in the Tax Court of Canada adds to the small body of tax jurisprudence on two questions: the taxation of pre-judgment interest and the scope of the definition of "retiring allowance" in the Act. Since the case involves a set of facts that is in some respects unique, it may have limited application to other taxpayers. Nevertheless, Judge Miller's decision presents some interesting points of interpretation.

The taxpayer, Dr. Ahmad, was a scientist employed by Atomic Energy Canada Limited ("AECL"). In 1984, he was demoted as a result of the interference of Ontario Hydro, a third-party customer of AECL. Dr. Ahmad went from being the head of an AECL engineering branch to sitting at a desk in a corner. He put up with these conditions for two years before commencing an action against Ontario Hydro claiming damages for the tort of inducing a breach of contract. Dr. Ahmad's employment was terminated when he sued AECL by adding them to his Ontario Hydro lawsuit. AECL settled the civil action against it by paying an amount that Dr. Ahmad reported as a retiring allowance in the year of payment.

Seven years after starting his lawsuit against Ontario Hydro, Dr. Ahmad was awarded damages for the inducement tort. He was also awarded substantial pre-judgment and post-judgment interest.[15] The Ontario Court of Appeal confirmed the award of damages and interest.[16]

The issues to be decided by Judge Miller in the tax case were whether the tort damages should be taxed as a retiring allowance and whether the pre-judgment interest should be brought into income under paragraph 12(1)(c) of the Act. Judge Miller found in favour of the taxpayer on both issues.

Concerning the damages, Judge Miller held that the amount was not paid in respect of the taxpayer's loss of employment. The damages arose from the tortious

15 *Ahmad v. Ontario Hydro* (1993), 1 CCEL 2d 292.

16 *Ahmad v. Ontario Hydro* (1997), OJ no. 3047 [unreported].

conduct of Ontario Hydro. Ontario Hydro had meddled in the affairs of AECL and its employee, and had convinced AECL to demote Dr. Ahmad. The demotion was a breach of Dr. Ahmad's employment contract. The damages arose from that breach and from Ontario Hydro's inducement of the breach.

Judge Miller tested his conclusion by applying a "but for" test; that is, but for the loss of employment, would the taxpayer have been eligible to receive an award of damages? The answer was "yes." The damages arose from the separate tort of inducing breach of contract. Judge Miller determined that had Dr. Ahmad not lost his employment, there would still have been damages.

Using his chosen analytical path, Judge Miller avoided the net created by the definition of "retiring allowance" in subsection 248(1) of the Act—a net cast very wide through the use of the inclusive phrase "in respect of." It has been well established by the courts that the connective tissue of the phrase "in respect of" gives the broadest possible scope to a definition.[17] A retiring allowance is defined to include "an amount received . . . in respect of a loss of an office or employment . . . whether or not received as, on account of or in lieu of payment of damages." To give the phrase its widest meaning would expand the retiring allowance concept to include an award in any case where there is only the most tenuous connection to a loss of employment. Judge Miller found this interpretation unacceptable:

> This takes the expression well beyond what I believe the context of the definition of retiring allowance supports. To be "in respect of the [sic] loss of [. . .] employment" suggests to me a primary purpose test. What is the first answer that leaps to mind when asked why did the injured employer [sic] receive damages? It is not, I would suggest, because he lost his job. It is because someone injured him in a car accident. Likewise, why did Dr. Ahmad receive damages from Ontario Hydro? It is not because he lost his job. It is because Ontario Hydro wronged him in stripping him of the ability to ever conduct nuclear research.[18]

The fact that damages were calculated by reference to salary projections was not sufficient to bring the award within the definition of a retiring allowance.

The taxpayer was also successful in keeping the pre-judgment interest out of his income. The minister's assessment of the pre-judgment interest as income under paragraph 12(1)(c) appears to be contrary to published administrative positions of CCRA.[19]

In the *Ahmad* case, Judge Miller goes beyond the simplistic approach of treating the "interest" component of an award in the same manner as the award itself. In his

17 See *Nowegijick v. The Queen et al.*, 83 DTC 5041; [1983] CTC 20 (SCC).

18 *Ahmad v. The Queen*, 2002 DTC 2065; [2002] 4 CTC 2497, at paragraph 15 (TCC).

19 For example, see CCRA document nos. 5-8444, October 18, 1989; 9203975, March 25, 1992; and 9816075, September 25, 1998, where the CCRA takes the position that pre-judgment interest awarded or agreed upon in respect of wrongful dismissal need not be included in income.

words, Judge Miller "delve[s] somewhat deeper into the true nature of the pre-judgement interest in the case before me."[20] The resulting analysis focuses on whether there is a debt or "liquidated amount" that can be said to be the principal to which the interest is related. The concept that an amount can be characterized as interest only where there is a related or referable principal amount is firmly established in Canadian jurisprudence.[21]

Because the amount in question relates to a period of time before the court judgment establishes the amount of damages (hence the term "pre-judgment interest"), the question is whether there was a right or obligation that can be said to be the principal amount. Judge Miller held that Dr. Ahmad did not have a quantifiable right to an amount of money before the court's decision in his action for tort damages:

> There must be a relational structure between the interest and the principal amount. The Respondent suggests that the relationship existed from the time of the cause of action as Dr. Ahmad had a right at that point. But what right did he have? He had a right to bring an action, but I am not satisfied that prior to the judgment it can be said he had a right to compensation for his loss. Until the judgment, it had not been determined whether he had even been wronged let alone whether he had suffered a loss from such wrong, and how much that loss was worth. I harken back to Justice Thurlow's statement cited earlier suggesting there must be a right to a principal amount.[22]

Dealing with this aspect of the case, Judge Miller distinguished the recent case *Coughlan v. The Queen*,[23] in which pre-judgment interest was determined to be taxable. In *Coughlan*, the nature of the taxpayer's claim, which gave rise to a payment of damages, was one of indemnity. That is, the taxpayer had a right to an indemnity from the defendant with the result that his damages were a quantifiable, or "liquidated," amount. Thus, it could be said that there was a principal amount or obligation on which interest could be calculated in the period before the judgment. In the *Ahmad* situation, the claim for damages in tort (inducing breach of contract) required a judge to assess the amount of the plaintiff's entitlement on the basis of the judge's impression of the evidence, not the mere addition of contractual obligations.

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20 Supra note 18, at paragraph 27.

21 See the Supreme Court of Canada decision in *Reference as to the Validity of Section 6 of the Farm Security Act, 1944, of the Province of Saskatchewan*, [1947] SCR 394, at 411-12, per Rand J:

> Interest is, in general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another. . . .
>
> But the definition, as well as the obligation, assumes that interest is referable to a principal in money or an obligation to pay money. Without that relational structure in fact and whatever the basis of calculating or determining the amount, no obligation to pay money or property can be deemed an obligation to pay interest.

22 Supra note 18, at paragraph 28.

23 2001 DTC 719; [2001] 4 CTC 2004 (TCC).

For Dr. Ahmad, the pre-judgment interest had the character of being part of his damages in tort, rather than a separate income item.

The case has not been appealed.

At the outset, we described Dr. Ahmad's case as being unique in certain aspects. An unusual aspect of the case is that Dr. Ahmad appears to have accepted the conditions of his demotion by staying in the employment of AECL for some three years after being removed as branch head. This fact would likely lead employment lawyers to say that Dr. Ahmad had condoned the new terms of his employment relationship. Had Dr. Ahmad quit AECL after the three years and brought a claim for constructive dismissal against AECL, the defence of acceptance or condonation might very well have been successful. It is highly unusual for a constructive dismissal claim to be brought so long after the occurrence of a unilateral change to the conditions of employment. What made Dr. Ahmad's case unique was the third-party involvement of Ontario Hydro. This created the opportunity to sue for tort damages arising from the actions of Hydro that induced the demotion (or breach of contract).

Had Dr. Ahmad quit AECL shortly after his demotion, claiming constructive dismissal against AECL in addition to his tort claim against Hydro, Judge Miller might have found a sufficient nexus to the loss of employment to bring the tort damages within the retiring allowance definition.

David Wentzell

ARGUABLY A NEW BASIS

Anchor Pointe Energy Limited v. The Queen
2002 DTC 2071; [2002] 4 CTC 2633

KEYWORDS: REASSESSMENTS ■ NOTICES OF OBJECTION ■ BASIS ■ LIMITATION PERIOD

At one time, the general wisdom was that during a tax dispute the minister could adopt a new basis to support an assessment without being fettered by the limitation period set out in subsection 152(4) of the Act. This position was founded on the theory that an assessment of tax merely set the quantum of tax liability, and the focus of any subsequent dispute was simply whether or not the amount of tax assessed was excessive. The minister's ability to argue a new basis to support an assessment was subject to the general rule of fairness that the taxpayer must be allowed to introduce evidence in response. Therefore, the minister was rarely allowed to argue a new basis after the close of evidence at an initial hearing. This limitation is not unique to tax litigation and has nothing to do with the subsection 152(4) limitation period.

The minister's right to argue a new basis has been questioned by the courts on only a few occasions. However, the Supreme Court of Canada put the cat among the pigeons in *The Queen v. Continental Bank of Canada*.[24] In that case, Continental Bank was in the process of winding down its leasing business, which was carried on

24 98 DTC 6501; [1998] 4 CTC 77 (SCC).