Docket: 2006-2923(IT)G

BETWEEN:

BRIAN C. BRADLEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 17, 2009 and Reasons for Judgment
delivered orally by teleconference on June 19, 2009 at Calgary, Alberta

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kim Palichuk

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is dismissed, without costs.

Signed at Ottawa, Canada this 26th day of June 2009.

"J.E. Hershfield"

Hershfield J.

Citation: 2009TCC341
Date: 20090626
Docket: 2006-2923(IT)G

BETWEEN:

BRIAN C. BRADLEY,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] This is an appeal under the General Procedure of a reassessment of the Appellant's 2005 taxation year.

[2] The appeal raises two deduction issues that arise out of the Appellant's battle with the Veterans Review and Appeal Board ("the Board or VRA Board") to acknowledge his entitlement to a disability pension. Some minor unreported amounts were also assessed but the Appellant did not take issue at the hearing with those inclusions.

[3] The battle with the VRA Board has, according to the Appellant's testimony, been going on for more than a decade which included four judicial reviews of the Board's refusal to recognize a disability pension entitlement. In all review cases, I am told that the Federal Court Trial Division sent the matter back to the Board for reconsideration.

[4] One certainly has the impression listening to the Appellant that he has not been properly dealt with by the VRA Board and that his fight to establish his

disability pension rights has resulted in his losing his home and become economically ruined.

[5] His submissions reflect a genuine plea for justice which he feels can only be achieved by someone rectifying the treatment he has had to endure. He wants the Federal government departments that he holds responsible for the burdens he has suffered made accountable. He seeks compensation and includes in his plea for it, just and fair treatment from the Canada Revenue Agency ("CRA") taxation.

[6] This leads me to direct myself to the taxation issues that have drawn the CRA into the Appellant's line of vision as one the government agencies responsible for his financial regression, as he puts it.

[7] In 2005, the Appellant launched his fourth action for judicial review of the VRA Board's refusal to award him a disability pension. He retained the services of a prominent law firm. He paid a retainer and was quoted substantial fees, namely, fees in excess of $40,000. His only source of funds was a modest RRSP (currently valued at some $16,000 which includes a contribution that is at issue in this appeal).

[8] To fund the litigation he withdrew $44,000 from his RRSP. That was in 2005. However, his legal fees that year only came to $21,095. Realizing the withdrawal was excessive, he returned $24,000 to his plan and claimed $23,000 on his 2005 tax return as a deduction in calculating his net income for the year on the basis that it was an innocent mistake to have taken it out. In effect, he sought to treat the excess withdrawal as a non-event. I will note here, as well, that he claimed the legal fees of $21,095 as a deductible expense on the advice, apparently, of his legal advisor.

[9] The reassessment being appealed denied both deductions.

[10] Given that the most recent Federal Court review of the VRA Board's refusal to award the Appellant a disability pension has resulted in the matter being referred back once again to the Board and given his hope of finally having his entitlement to a disability pension confirmed, one might think that the Appellant will finally be allowed to deduct his legal fees. However, that is not the case, at least not in respect of the 2005 taxation year. The Appellant has repeatedly acknowledged that he never received one cent of income from the pension source in respect of which he incurred the legal expenses at issue. The relevant provision of the *Income Tax Act* (the "*Act*") allows that deduction only against the source of income in respect

of which the legal expense at issue is incurred. This leaves the Appellant in the unfortunate circumstance that his legal expense deduction cannot be taken, at least not yet.

[11] The provision of the *Act* that governs the deduction of legal expenses in this situation is paragraph 60(o.1) which reads as follows:

> 60(o.1) **legal expenses** -- the amount, if any, by which the lesser of
>
> (i) the total of all legal expenses … paid by the taxpayer in the year or in any of the 7 preceding taxation years to collect or establish a right to an amount of
>
> (A) a benefit under a pension fund or plan …
>
> (ii) the amount, if any, by which the total of all amounts each of which is
>
> (A) an amount described in clause (i)(A) or (B) …
>
> (II) in respect of which legal expenses described in subparagraph (i) were paid, …
> (III) that is included in computing the income of the taxpayer for the year or a preceding taxation year, or …

[12] The lesser amount in this case, which is the deductible amount, is the subclause (ii)(A)(III) amount which is zero in 2005. The provision does, however, allow the deduction of legal expenses 7 years back so the Appellant will have further opportunities to deduct this expense even though it was incurred in 2005.

[13] This takes me to consider the RRSP deduction. Once again, the relevant provisions of the *Act* are drafted in such a way that leaves little doubt that the Appellant is not allowed the deduction he seeks.

[14] There is no provision in the *Act* that increases, in a case like this, one's RRSP deduction limit beyond the limit defined in subsection 146(1) of the *Act*. That defining limitation on the annual contribution amount that is deductible, does not make any allowance for re-contributions of previous withdrawals. There is no accommodation for withdrawals made in error and then returned, save one.

[15] The exception is found in subsection 146(6.1) of the *Act* dealing with re-contributions of certain prescribed premiums.

[16] Subsection 8307(7) of the *Income Tax Regulations*, C.R.C., c. 945 provides the conditions that need to be met in order for a withdrawal to be prescribed as one that can be re-contributed without falling off-side the RRSP deduction limit. That exception permits a re-contribution where there has been a withdrawal as a result of a reasonable error of the amount needed to be withdrawn for certification respecting past service events that presumably impact a taxpayer's past service pension adjustments which in turn impact RRSP deduction limits.

[17] In the case at bar, the requirements of Regulation 8307(7) are clearly not met. The withdrawal here may have been a reasonable error but errors in one's budget needs, as reasonable and understandable as they may be, have simply not been given a second chance by Parliament. Parliament put its mind to second chances and correcting errors in respect of past service events and in doing so must be presumed to have intentionally declined allowing such corrections in other circumstances.

[18] While I said that there was only one exception to the scheme of the RRSP provisions that do not allow returns of excess withdrawals on a deductible basis, there is another relieving provision respecting excess contributions which are subjected to Part X.1 tax. Pursuant to section 204.1 of the *Act*, over contributions are taxed at one percent per month. The Minister of National Revenue can waive the tax if he is satisfied the excess arose as a consequence of reasonable error and reasonable steps have been taken to eliminate the excess. Again this underlines that Parliament put its mind to second chances and correcting errors in respect of certain consequences that flow from such errors and in doing so must be presumed to have intentionally declined allowing such corrections in respect of other consequences in other or even similar circumstances.

[19] It is not for me to suggest whether Parliament should go further to relieve errors of the type made by the Appellant by allowing re-contributions in certain cases. However, there is one clear situation where this Court, if not Parliament, might, in applying common law principles, permit what might be seen as an allowable re-contribution.

[20] Arguably at least, there could be cases where a withdrawal is made in error and corrected on discovery of the error without what I might refer to as effective receipt of the withdrawn amount. A trust company might send money out of an RRSP account in error and on discovery it is returned. Arguably there has been no "withdrawal" at all and the two transactions, the second being a return of the funds

to the registered account, are a wash. The payment out is not taxed and the payment back is not deductible.

[21] In the case at bar, there is no evidence of this type of error. While I do not know when in 2005 the withdrawal was made, I do know the retainer letter from the lawyer dealing with the VRA Board's decision to deny the Appellant his disability pension is dated November 15, 2005. That letter sets out an hourly rate of $170 and requests only a $5,000 retainer.

[22] I am neither questioning how his legal fees on this matter came to exceed $20,000 in 2005, nor the use, or the intended use, of the funds withdrawn from the RRSP. I am suggesting however that no matter how I feel about the ruinous circumstances that the Appellant finds himself in, I have absolutely no evidence that suggests that a reasonable case might be made that there was no receipt of the funds returned by him to his registered account. Even if he withdrew the money after November 15, the return of the funds was not until January 24, 2006, at least 24 days after he must have paid the $21,095 legal bill claimed in 2005. He had access to it, used some of it, and, there is no evidence that it was not commingled with other funds in such a way as to suggest that, in law, he should be regarded as never having received it.

[23] Still, this aspect of the case troubles me somewhat. The Respondent never brought into question the quantum of the legal expense nor its use as it would relate to the source rule in paragraph 60(o.1) of the *Act*. This raises the question as to whether the Respondent will raise that question in a future year and argue that the issue is not issue estopped or res judicata.

[24] This would not be a laudable practice in my view. The audit here should not put the Appellant through ongoing burdens by dealing with one issue at a time, years apart. It is inefficient and can do little else than continue to harass this Appellant in a way that many would find to be objectionable. Since, there were no assumptions made that the expense was not incurred in the amount, and for the purpose claimed, the burden to prove otherwise falls on the Respondent. I do not believe that burden should shift back to the Appellant simply because the Respondent may have the opportunity to have the issue retried in a future year.

[25] I make this comment even in light of some further confusion caused by the Appellant's testimony that the legal expense in question may have only been in part in respect to the VRA Board matter. He suggested there were other legal expenses in respect of other matters such as obtaining income support for the

severely handicapped from an Alberta assistance program pursuant to which he was now getting benefits, and, such as appealing the commencement date of benefits from the Canada Pension Plan. On the other hand, he seemed to acknowledge that these claims may have been made later when he was eligible for legal aid. Since then, his legal expenses were admitted as being relatively small disbursement amounts.

[26] Since the evidence was confused on this point, I asked Respondent's counsel if there was room for her client to look into this on the basis that some legal expenses might now be allowed in respect of other pension income receipts. In relation to 2005, the only year before me, I accept her position that it is far too late to open that can of worms. She pointed out that the Appellant's Notice of Appeal (amended), his Answer to the Respondent's Reply to that Notice (amended) and his sworn answers to written discovery questions, all maintained that the legal expenses claimed were in respect of the VRA Board matter. She and her client accepted this assertion and the discovery evidence maintaining it, and I do as well. That suggests perhaps that that issue is now resolved.

[27] At this point, I also make mention of the fact that the Appellant was self-represented. According to Canadian Judicial Council principles I have tried to assist him in understanding the law and have relaxed rules of evidence. Counsel for the Respondent was helpful in this regard and I admitted considerable amounts of evidence where challenges of authenticity and hearsay would not have been inappropriate in a General Procedure appeal. Still, weighing the evidence, I must admit that my role is made more difficult – much of the evidence becomes almost anecdotal and has led to unanswered questions. Some of this might have been avoided if the audit enquiries had gone beyond singular reliance on the Appellant's admission that he received no pension income in 2005.

[28] As to the Appellant's view that the relevant provisions of the *Act* are being unfairly interpreted and applied, I note simply that my hands are tied. I must say, however, I do find the legislation relating to the deduction of legal fees paid to collect or establish a right to pension income, somewhat draconian. That is only a personal view.

[29] That view, however, is drawn from a consideration of paragraph 8(1)(b) of the *Act* in respect of employment income which allows legal expenses paid to collect or establish a right to employment income to be deducted against *any* employment income and a net loss is permitted to shelter any other source of

income. Why are pensioners or the disabled, who can ill-afford to be treated so differently, given such a tough source rule?

[30] As I said, this is just my personal view. Parliament's view is all that matters. This is not a Court of equity. I have no jurisdiction to rectify unfair treatment real or imagined. If the Appellant wants some Government department or agency to take responsibility for the perpetration of the injustices he has suffered, he must look to another forum. As well, and in response to a plea made by the Appellant, I can add that it is not an abdication of this Court's responsibility when what it does is ensure that the Appellant calculates his tax liabilities as all others must: in accordance with how Parliament has said it must be calculated. Nonetheless, I will add that this matter appears ripe for interest and collection relief.

[31] Accordingly the Appellant's appeal is dismissed, without costs.

Signed at Ottawa, Canada this 26th day of June 2009.

"J.E. Hershfield"

Hershfield J.

CITATION:	2009TCC341
COURT FILE NO.:	2006-2923(IT)G
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APPEARANCES:

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