

Case In Point

Appellate Court Affirms the Importance of Clearly Drafted Minutes of Settlement

Date: November 11, 2016

In a recent decision of the Ontario Court of Appeal, [RJM56 Investments Inc v Kurnik](#), the Court supported an employer's reasonable conduct in withholding and remitting amounts owing to the Canada Revenue Agency (CRA) in the face of ambiguous minutes of settlement, and in so doing emphasized the need for carefully drafted minutes of settlement.

In this case, an employer and former employee had entered into minutes of settlement providing for payment to the employee of the sum of \$1,500,000 in full satisfaction of all of his claims. The employer then obtained accounting advice that it was required to withhold and remit to CRA on account of the full settlement amount. The employee objected to this. At issue before the application judge and the Court of Appeal was the meaning to be attributed to a particular clause of the minutes as regards the employer's withholding and remittance obligations.

The clause at issue provided in part as follows:

- a) \$250,000 towards KK's costs of the actions;
- b) \$1,250,000 less withholding taxes payable to CRA

in the following payments:

- i) \$250,000 for costs inclusive of HST on July 4, 2015 (with no deductions) payable to Kestenberg Siegal Lipkus In Trust;
- ii) \$250,000 toward the settlement on July 4, 2015 payable to Kevin Kurnik;
- iii) \$1,000,000 towards the settlement on February 14, 2016 payable to KK; each of the payments in (ii) and (iii) above represent a bonus due to KK resulting from his employment with RJM56 Investments Inc. and are subject to withholding tax by said co.

The employer sought to simultaneously comply with its *Income Tax Act* (ITA) obligations to withhold and remit taxes in respect of the full settlement amount and its obligations under the minutes to pay the first \$250,000 without deduction, and so it determined that the withholding and remittance that would otherwise be applied to the payment to the lawyers would be made instead against the second \$250,000 payment.

The motion judge disagreed, finding that the portion of the settlement paid to the employee's lawyers in trust was compensation for legal costs, not employment income, and that deductions had therefore been improperly made.

By contrast, the Court of Appeal held that the minutes were ambiguous as they were capable of supporting both the employer's reasonable interpretation, that the phrases "with no deduction" and "withholding" were distinct, and the employee's reasonable interpretation that these phrases were interchangeable.

Ultimately, the Court did not need to determine whether the employer was allowed to withhold and remit taxes on account of the \$250,000 payment to the employee's lawyers because the employee suffered no damages from this action. If the withholding and remittance was made in error, the payment to CRA stood to the credit of the employee and would be reimbursed or used to reduce taxes owing. Damages could only result from the employee's inability to use the funds pending reimbursement from the CRA, which was not pleaded.

In entering into settlements with employees, employers must ensure that the minutes of settlement will withstand scrutiny under the ordinary principles of contractual interpretation and are carefully drafted so that the employer's obligations under the ITA can be satisfied from the settlement amount. The Court of Appeal's decision provides some comfort that in instances of ambiguity, reasonable action by employers in compliance with their ITA obligations and consistent with a reasonable interpretation of the minutes of settlement will provide protection from liability.

Where an employee disputes an employer's withholding and remittance actions, the employer can encourage the employee to file Form T1213 to seek CRA approval of a reduction of the amount withheld or to provide it with an indemnity bond and legal opinion that withholding is not required.