

[OFFICIAL ENGLISH TRANSLATION]

2001-3462(IT)I

BETWEEN:

BRIAN LEBRETON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on July 31 and August 2, 2002, at Montréal, Quebec, by

the Honourable Judge Lucie Lamarre

Appearances

For the Appellant: The Appellant himself

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

The purported appeals from the assessments made under the *Income Tax Act* for the 1996, 1997 and 1998 taxation years are quashed.

The appeal from the assessment made under the *Income Tax Act* for the 1999 taxation year is dismissed.

Signed at Ottawa, Canada, this 11th day of September 2002.

"Lucie Lamarre"

J.T.C.C.

Translation certified true
on this 15th day of December 2003.

Sophie Debbané, Revisor

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Date: 20020911
Docket: 2001-3462(IT)I

BETWEEN:

BRIAN LEBRETON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre, J.T.C.C.

[1] These are appeals under the informal procedure from assessments made by the Minister of National Revenue ("Minister") under the *Income Tax Act* ("Act") for the 1996, 1997, 1998 and 1999 taxation years.

[2] From the outset, the respondent disputed the validity of the appeals filed for the 1996, 1997 and 1998 taxation years on the ground that the appellant had not first served on the Minister a notice of objection to the assessments made for each of those years as required by subsection 165(1) of the *Act*. Since the appellant has not shown that he filed such a notice of objection for each of the three years, the appeals for those years are not valid under subsection 169(1) of the *Act* and will accordingly be quashed.

[3] As for the appeal from the assessment made for the 1999 taxation year, the appellant was denied a deduction of \$11,680 that he had claimed for that year as alimony or other allowance payable on a periodic basis.

[4] The facts in evidence are as follows. Under a divorce judgment dated April 1, 1993, the appellant was ordered to pay his former spouse, Marie-Paule Spieser, \$200 a week in support for her maintenance and the maintenance of the two children of the marriage beginning on April 1, 1993, with indexation as of January 1, 1994 (Exhibit I-3).

[5] The appellant explained that he left his job with the Canadian Armed Forces on August 15, 1996, and that, from then on, he could no longer afford to pay the support provided for in the divorce judgment of April 1, 1993. He therefore reached a verbal agreement with his former spouse to reduce the amounts payable to her. He thus paid his children's tuition fees and some other expenses, such as clothing and medication for the children.

[6] The appellant explained that, on April 13, 1999, he found himself forced to sign a new written agreement concerning a motion for a variation order ("agreement"), which was ratified by the Superior Court of Quebec, Family Division (Exhibit I-1), so that he would no longer be held liable for the support payments he had not made under the 1993 divorce judgment.

[7] In the agreement, the parties agreed as follows:

[TRANSLATION]

WHEREAS on April 1, 1993, the Honourable Robert Legris, J.S.C., rendered a judgment granting the parties a divorce;

WHEREAS since that judgment was rendered, significant and important changes have occurred in the parties' general and financial circumstances;

WHEREAS the defendant has been retired since August 15, 1996;

WHEREAS the defendant receives a pension, which this year will give him an annual income of \$13,547;

WHEREAS the applicant's income should amount to \$11,474 according to her balance sheet for 1999 and whereas she has not been an income security recipient since December 1997;

WHEREAS new legislative provisions were established on May 1, 1997, to determine the parental contribution owed in respect of children;

WHEREAS the parties would like to settle the details of the defendant's motion for a variation order by mutual agreement;

THE PARTIES, DULY ASSISTED BY THEIR RESPECTIVE COUNSEL, AGREE AS FOLLOWS:

1. The preamble is an integral part hereof and shall govern the interpretation of the clauses herein;

SUPPORT ARREARS OWED TO THE APPLICANT

2. In full and final settlement of the support arrears accumulated since August 15, 1996, the defendant shall pay the applicant \$6,800 no later than May 1, 1999, by cheque made out to the applicant or by direct deposit in the bank account indicated by the applicant;

3. The parties agree to cancel any payment of support to the applicant for herself as of April 1, 1999;

4. The defendant and the applicant agree to permanently and irrevocably settle the issue of an obligation of support for themselves, waiving any support for himself whatever may happen;

PARENTAL CONTRIBUTION IN RESPECT OF THE CHILDREN

5. As of April 1, 1999, the defendant shall pay the applicant, solely for his two (2) children, Simon and Anne-Sophie, an annual parental contribution of \$2,221.37, established on the basis of Quebec's table for the determination of support payments, to be payable in advance in two (2) equal consecutive bimonthly payments of \$92.56 on the 1st and 15th day of each month by renewable post-dated cheques or, on request, by direct deposit into the bank account indicated by the applicant until automatic collection begins under the Act to facilitate the payment of support;

INDEXATION

6. The said support payments shall be indexed each year in accordance with Quebec's annual Pension Index (art. 590 C.C.Q.) starting on the anniversary date of the signing of this agreement;

SUPPORT ARREARS OWED TO THE DEPARTMENT OF SOCIAL SOLIDARITY

7. In full and final settlement of the support arrears accumulated from September 1996 to December 1997, the defendant shall pay the Department of Social Solidarity \$4,880 starting on May 1, 1999, at the rate of \$200 a month until the amount is paid in full, by cheques made out to the Fonds des pensions alimentaires, Department of Revenue, at 3800 Rue Marly, Sainte-Foy, G1X 4A5;

8. The said judgment to be rendered in respect of this agreement shall be declared enforceable notwithstanding appeal and without security;

9. Each party paying his or her own costs.

[8] It is clear from this agreement that the appellant had to pay his former spouse \$6,800 in full and final settlement of the support arrears accumulated since August 15, 1996, and that the parties thus put an end to any future obligation for the appellant to pay his former spouse support.

[9] It can also be seen from the agreement that the appellant had to pay an additional \$4,880 to the Department of Social Solidarity in full and final settlement of the support arrears accumulated from September 1996 to December 1997. It is the total of these two amounts—\$11,680—that the appellant claimed as a support deduction for 1999.

[10] The agreement also shows that the appellant's parental contribution for his children was henceforth set at \$92.56 every two weeks, for a total annual parental contribution of \$2,221.37. The appellant did not claim that parental contribution he paid for his children as a support deduction.

[11] The amount deductible as support is set out in paragraph 60(b) of the *Act*, which reads as follows:

SECTION 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:

...

(b) Support – the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

- 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,
- 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
- 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;

[12] The expressions "commencement day" and "support amount" are defined in subsections 60.1(4) and 56.1(4) as follows:

▶ 60.1(4) ◀

(4) Definitions. The definitions in subsection 56.1(4) apply in this section and section 60.

▶ 56.1(4) ◀

(4) Definitions. The definitions in this subsection apply in this section and section 56.

...

"commencement day" — "commencement day" at any time of an agreement or order means

- (a) where the agreement or order is made after April 1997, the day it is made; and

- (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
- (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,
 - (ii) where the agreement or order is varied after April 1997 to change the child support amounts payable to the recipient, the day on which the first payment of the varied amount is required to be made,
 - (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
 - (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.

"support amount" — "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 or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and

- (a) the recipient is the spouse or former spouse of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage and the amount is receivable under an order of a competent tribunal or under a written agreement; or
- (b) the payer is a natural parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[13] With respect to the payments made pursuant to the child support obligation provided for in the 1999 agreement, that is, the total annual contribution of \$2,221.37, it is clear that those payments were varied after April 1997 and are not deductible for the appellant under paragraph 60(b) of the *Act*. Nor did the appellant claim them as a deduction.

[14] As for the \$11,680 paid by the appellant in final settlement of unpaid support arrears under the 1993 divorce judgment, it is my view that the payments were established and made under the 1999 agreement for the purpose, *inter alia*, of releasing the appellant once and for all from the obligations that the 1993 divorce

judgment imposed on him in relation to his former spouse. This is clear from the 1999 agreement. Thus, the arrears payments were made not pursuant to the 1993 divorce judgment but rather to release the appellant from the obligation imposed on him by that judgment. This is closer to the situation in *M.N.R. v. Armstrong*, [1956] S.C.R. 446, in which it was found that a lump sum paid to obtain a release from a legal obligation imposed by a divorce decree was not an amount payable pursuant to the decree. Such a payment did not qualify as an allowance payable on a periodic basis pursuant to an order or judgment under legislative provisions analogous to paragraph 60(b).

[15] Moreover, the amounts paid in this case were not paid to implement the terms of the divorce judgment, as was the case in *The Queen v. Sills*, 85 DTC 5096 (F.C.A.), in which payments were made to carry out the terms of a separation agreement. In *Sills*, the consequence and result of the payments was not to release the appellant from any future obligation toward his former spouse as is the case here. The payment by the appellant therefore no longer constitutes a payment made to settle arrears of amounts payable on a periodic basis under the divorce judgment. Rather, it is a final settlement, through the payment of a lump sum, to put an end to any obligation created by the 1993 judgment. The payment therefore cannot qualify as an allowance payable on a periodic basis for the spouse's benefit as required by paragraph 60(b) of the *Act* (see *Groleau v. Canada*, [2002] T.C.J. No. 103 (Q.L.)).

[16] Moreover, even though the same cannot be said with respect to the children, since the purpose of the 1999 agreement was not to release the appellant from his existing and future obligations to support them, the fact remains that the lump sum paid for the support arrears was imposed under the 1999 judgment varying the 1993 judgment.

[17] Accordingly, the amount payable as child support arrears became payable on the commencement day, that is, as of May 1, 1999.

[18] In my opinion, this includes the total arrears of \$11,680, since "child support amount" is defined as follows in subsection 56.1(4) of the *Act*:

"child support amount" — "child support amount" means any support amount that is not identified in the agreement or order under which it is receivable as being solely for the support of a recipient who is a spouse or former spouse of the payer or who is a parent of a child of whom the payer is a natural parent.

[19] Thus, since the support amount provided for in the 1993 divorce judgment was not identified as being solely for the support of the appellant's former spouse, it has qualified since 1997 as a child support amount within the meaning of the *Act*. The new rules applicable after April 1997 therefore apply to the entire amount payable as child support arrears, that is, the lump sum of \$11,680 at issue.

[20] Any child support amount that becomes payable on a commencement day as defined in subsection 56.1(4) of the *Act* (that is, after April 1997) is no longer deductible as a support amount under paragraph 60(b) of the *Act*. This is therefore another argument for concluding that the appellant could not deduct the \$11,680 as alimony or other allowance payable on a periodic basis under the *Act*.

[21] For these reasons, I am obliged to dismiss the appellant's appeal for the 1999 taxation year as well.

Signed at Ottawa, Canada, this 11th day of September 2002.

"Lucie Lamarre"

J.T.C.C.

Translation certified true
on this 15th day of December 2003.

Sophie Debbané, Revisor