Docket: 2004-3220(IT)I

BETWEEN:

GAÉTAN MATHIEU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

CAROLE SMITH,

Added Party.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 14, 2005, at Québec, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Appellant:	Michel Poulin
Counsel for the Respondent:	Marie-Claude Landry
For the Added Party:	Carole Smith herself

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2002 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to the tax credit for severe and prolonged physical impairment for the year in issue.

The Appellant is not entitled to the deduction for support payments, and, in computing her income, the Added Party need not include the amount paid.

The Respondent shall pay one half of the Appellant's costs.

Signed at Ottawa, Canada, this 29th day of March 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 10th day of January 2007
Monica F. Chamberlain, Translator

Citation: 2006TCC204
Date: 20060329
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REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] This is an appeal by Gaétan Mathieu in respect of the 2002 taxation year.

[2] There are two issues in this appeal. The first is whether the Appellant may deduct $22,000 on account of support paid to his ex-wife Carole Smith. With respect to this issue, Ms. Smith was added to Mr. Mathieu's appeal by order of this Court under section 174 of the *Income Tax Act* ("the Act") because, in computing her income, she will have to include the amount paid if the Appellant is entitled to deduct it.

[3] The second issue, which concerns the Appellant only, is whether he is entitled to a tax credit for severe and prolonged physical impairment under section 118.3 of the Act.

[4] The facts on which the Minister of National Revenue ("the Minister") relied in reassessing the Appellant are set out as follows in paragraph 6 of the Reply to the Notice of Appeal ("the Reply"):

[TRANSLATION]

(a) When the Appellant filed his return in respect of the 2002 taxation year, he did not attach a Form T2201 entitled "Disability Tax Credit Certificate" in support of his claim for a tax credit for mental or physical impairment.

(b) Further to a written request by the Minister dated August 27, 2003, the Appellant submitted a Form T2201 entitled "Disability Tax Credit Certificate" filled out by Dr. Alain Bédard, a qualified practitioner, who diagnosed his patient with a chronic post-commotional syndrome, major depression in partial remission, and severe lumbar disc degeneration.

(c) On October 25, 2003, the Minister notified the Appellant in writing that his claim for the disability tax credit was denied because his Form T2201, as filed, did not state that the Appellant required life-sustaining therapy or had a severe and prolonged impairment that markedly restricted a basic activity of daily living.

(d) At the objection stage, the Minister spoke with Dr. Alain Bédard, who confirmed that the Appellant is no longer able to work, but is not disabled, and that none of his basic activities of daily living are markedly restricted.

(e) The marriage of the Appellant and Carole Smith was solemnized on February 9, 1973.

(f) The marriage of the Appellant and Carole Smith was dissolved by a divorce judgment dated November 16, 1992, but effective December 17, 1992.

(g) There are four children of the marriage of the Appellant and Carole Smith:

(i) Michael, born July 16, 1976
(ii) Mary-Ann, born April 13, 1978
(iii) Cathy, born December 23, 1980
(iv) Tammy-Sue, born May 6, 1982

(h) The parties have lived separate and apart since April 1990.

(i) The divorce judgment of November 16, 1992, gave effect to the parties' Consent to Corollary Relief, which was signed the same day and which provided that the custody of the four then minor children was to be granted

to Carole Smith, and that the Appellant would have such access rights as the parties mutually agreed upon.

(j) Clauses 3 and 4 of the Consent to Corollary Relief provide as follows with respect to support for the needs of Carole Smith and the children:

> (i) The Appellant shall pay Carole Smith a non-indexed alimentary pension of $250 per week for each child for as long as that child is regularly and assiduously pursuing full-time studies. This amount, plus the additional costs of the child's higher education, shall be paid each Saturday commencing November 1, 1992.
>
> (ii) The Appellant shall pay Carole Smith, in lieu of any alimentary pension, a lump sum of $150,000 as support within five years of the date of the judgment in these proceedings, plus interest effective the beginning of the fifth year at a rate of 5% per annum.

(k) Clause 6 of the Consent to Corollary Relief granted Carole Smith a 25-year right of habitation in the condominium at 1049 Montée Masson in Laval; further, it provided that the $115,000 hypothec would be borne by the Appellant, and that Carole Smith would pay the taxes, insurance, condo fees and other charges related to the immovable.

(l) The Appellant ceased paying an alimentary pension in March or April 1993, and, at August 2002, had accumulated arrears totalling more than $500,000.

(m) Further to the Appellant's 2002 motion to vary the alimentary pension and annul the alimentary pension arrears, the Honourable Justice Gilles Mercure of the Superior Court rendered a judgment on October 22, 2002, annulling the alimentary pension with respect to the future, fixing at $175,000 the amount of alimentary pension arrears owed to Carole Smith for herself and her children under the divorce judgment of November 16, 1992, and ordering the Appellant to pay Carole Smith $175,000 in arrears.

[5] The grounds of the Minister's position are as follows:

[TRANSLATION]

9. He submits that the Appellant is not entitled to the tax credit for severe and prolonged mental or physical impairment in computing his non-refundable tax credits for the 2002 taxation year because his basic activities of daily living were not markedly restricted by a severe and prolonged mental or physical impairment within the meaning of sections 118.3 and 118.4 of the Act.

10. He submits that the Minister correctly denied any deduction in computing his income, whether it be as support, or as some other allowance payable on a periodic basis, in respect of the 2002 taxation year, because the payments to Carole Smith are considered payments on account of a lump sum under subsection 56.1(4) of the Act.

[6] The Notice of Appeal sets out the grounds with respect to the first issue:

[TRANSLATION]

I wish to contest the assessment because I am entitled to the deduction for the alimentary pension arrears that I paid my wife during the 2002 taxation year. The alimentary pension arrears cover the December 1992 order under which I was to pay support in the amount of $250 per child, for a total of $1,000 per week, according to the agreed schedule, which was ratified by judgment in 1992.

Pursuant to a fall 2002 judgment ordering me to pay $175,000 in support arrears, my disability pension was garnisheed and the alimentary pension arrears owed to my ex-wife are deducted from my total income and collected periodically by Revenu Québec.

My taxable income should therefore read $20,016, not $33,016, since I paid my ex-wife $22,564.10 worth of support arrears in 2002.

Since this is a motion to vary an alimentary pension and annul support arrears, the purpose of my request should be borne in mind when ruling on my eligibility for the support payment deduction.

Moreover, the costs were incurred, and the support payments were made, pursuant to the 1992 judgment, and the 2002 judgment is incidental to the 1992 judgment because I asked for the alimentary pension to be annulled retroactively and the Court reduced the arrears, which would otherwise have been $580,000, to $175,000.

[7] The grounds of appeal with respect to the second issue are as follows:

> [TRANSLATION]
> I suffer from a severe physical impairment that markedly restricts my activities such as walking, sitting, and dressing myself, and this problem is prolonged. In addition, since my work accident, I have been suffering from significant memory loss and a generally depressive state, as a medical certificate attests.
>
> I am also receiving a disability pension from the Régie des rentes du Québec.

[8] The parties tendered various documents in evidence in the course of their testimony. I will quote from the relevant documents. On November 12, 1992, a Consent to Corollary Relief (Exhibit A-1) was signed. Paragraphs 3 and 4 of the Consent state:

> [TRANSLATION]
> 3.- The defendant shall pay the plaintiff a non-indexed alimentary pension of $250.00 per week for each child, as long as that child is regularly and assiduously pursuing full-time studies. This amount, plus the additional costs of the child's higher education, shall be paid each Saturday commencing November 1, 1992.
>
> 4.- The defendant shall pay the plaintiff, in lieu of any alimentary pension, a lump sum of $150,000 as support. This amount shall be payable within five (5) years of the date of the judgment in these proceedings and shall bear interest at a rate of 5% per annum effective the beginning of the fifth year.

[9] The divorce judgment (Exhibit I-2) ratifying the Consent was rendered on November 16, 1992.

[10] Mr. Mathieu went bankrupt in February 1993 (Exhibit A-3).

[11] The Superior Court rendered a judgment on October 22, 2002 (Exhibit A-4). According to paragraph 9 of the judgment, Mr. Mathieu paid the alimentary pension contemplated in the Consent to Corollary Relief until March 1993.

[12] I quote from paragraphs 32, 41 and 44 (in part) of the judgment:

> [TRANSLATION]
> [32] Mr. Mathieu said that these amounts clearly show that was he not making enough income to pay Ms. Smith and the children support from 1993 to 1999, and that he depended on the generosity of his spouse Anne Delisle to survive. By 1999, Ms. Smith had begun her employment, and the four children of the marriage, with whom Mr. Mathieu had had no contact for roughly four years, were financially independent adults. The conclusions that must be made are clear: the Court must

> annul all the support arrears accrued from the date of the divorce judgment. Based on the table prepared by counsel for Ms. Smith, these arrears amount to $517,594, including the lump sum of $150,000 plus the interest on that amount calculated at a rate of 5% per annum effective November 16, 1997.
>
> [41] One has to face the facts. Upon going bankrupt, Mr. Mathieu no longer had the same financial resources and no longer enjoyed the high standard of living that he enjoyed at the time of the divorce. He could no longer pay $1,000 per week for the children plus the $150,000 lump sum that was to become due in 1997.
>
> [44] Based on such incomplete evidence, the Court finds that the support arrears for Ms. Smith and the children should be maintained to the extent of $175,000.
>
> . . .
>
> **ANNULS** the alimentary pension as regards the future; and
>
> **FIXES** at $175,000 the alimentary pension arrears payable to Ms. Smith for herself and her children under the divorce judgment of November 16, 1992.

[13] Here is what the appeals officer wrote in her Report on Objection (Exhibit I-3) with respect to the reasons for denying the deduction for support payments:

> [TRANSLATION]
> . . . With respect to the support deduction, the client owed $517,597 in support on October 22, 2002. The court fixed the amount of support arrears at $175,000. Since the payer was released from a support obligation, we consider this amount a lump sum, and that amount is no longer deductible as an alimentary pension.

[14] The tax credit for severe and prolonged physical impairment is requested in connection with walking.

[15] Two certificates prepared by physician Alain Bédard — one dated October 1, 2003, and the other dated December 9, 2003 — were produced by the Respondent as Exhibit I-1. In both certificates, the physician answered the question "Can your patient walk?" in the affirmative. The question is worded as follows:

[TRANSLATION]

Can your patient walk?		
Answer *no* only if, all or almost all the time, even with therapy, medication or a device, your patient cannot walk 50 metres on level ground, or he or she takes an inordinate amount of time to do so.....	**yes** √	**no**

[16] Here is the physician's diagnosis:

> [TRANSLATION]
> Chronic post-commotional syndrome, major depression in partial remission, severe lumbar disc degeneration, totally disabled.

[17] The last element of the diagnosis, "totally disabled", was added to the second certificate, which is otherwise identical to the first.

[18] In April 2005, the appeals officer contacted the physician to see what he meant by [TRANSLATION] "totally disabled". The physician replied that his patient suffered from a total disability for the purposes of employment, but was not handicapped (Exhibit I-3).

[19] The Appellant stated that he had a work accident in Ontario in February 1999. He fell into a ditch or a well, and sustained a severe back injury.

[20] On November 10, 2004, the physician wrote the following letter (Exhibit A-5):

> [TRANSLATION]
> Dear Madam or Sir:
>
> Gaétan Mathieu's activities of daily living are affected because he cannot stay in the same position (standing, seated, walking or lying down) for more than 10 minutes.
>
> Consequently, I declare that he is physically impaired with a handicap.

[21] On November 7, 2005, the same physician signed another certificate (Exhibit A-7).

[22] Here is how the question with respect to walking, and the physician's answer, are worded:

[TRANSLATION]

Walking

Your patient is considered **markedly restricted** in walking if, all or substantially all the time, he or she:

- is **unable** to walk even with appropriate therapy, medication, and devices; or
- requires an **inordinate amount of time** to walk, even with appropriate therapy, medication, and devices.

Notes:

- Devices for walking include canes, walkers, etc.
- An **inordinate amount of time** means that walking takes **significantly** longer than for an average person who does not have the impairment.

Examples of markedly restricted in walking (examples are not exhaustive):

- Your patient must always rely on a wheelchair, even for short distances outside of his home.
- Your patient can walk 100 metres (or approximately one city block), but only by taking a significant amount of time, stopping because of shortness of breath or because of pain, all or substantially all the time.

Is your patient **markedly restricted** in walking, as described above?

yes	√	**no**	

If yes, when did your patient's marked restriction in walking begin?
..... 1999

[23] The certificate issued by Dr. Alain Bédard contains the following statement with respect to the Appellant's restriction in walking:

> [TRANSLATION]
> Can only walk slowly and for short distances (less than 100 m) and cannot remain in the same position for more than 10 minutes since February 6, 1999.
>
> **Diagnosis (if possible)**: chronic post-commotional syndrome, severe lumbar disc degeneration.

[24] On cross-examination, the Appellant admitted that he came in his own car, met his lawyer, went out for a coffee with him, and could walk. However, he repeated that he could not stay in the same position for more than 10 minutes, that he walked excessively slowly, and that he suffered from constant back pain.

Analysis and conclusion

[25] In *The Queen v. Barbara D. Sills*, [1985] 2 F.C. 200, the Federal Court of Appeal agreed that maintenance arrears were paid in accordance with paragraph 56(1)(*b*) of the Act, could be deducted in computing the payer's income, and were to be included in computing the recipient's income. However, the circumstances in *Sills* involved late payments that were due on a periodic basis under the terms of the separation agreement.

[26] The circumstances in the case at bar are not the same.

[27] I refer to the decision of Dussault J. of this Court in *Bégin v. Canada*, [2003] T.C.J. No. 737 (QL), at paragraph 24:

> 24 In this sense, I feel that the sum of $34,000 is not of the same character and does not reflect the support obligations imposed on the Appellant under the decree of February 22, 1999. It is a capital payment made by the Appellant to obtain release from the support obligations imposed by this decree. Consequently, the partial payment of this amount, that is $7,494, is not deductible as a support amount within the meaning of subsection 56.1(4) and paragraph 60(*b*) of the Act.

[28] Lamarre J. of this Court stated as follows in *Lebreton v. R*, 2002 CarswellNat 2437, at paragraph 14:

> 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*).

[29] The case at bar is similar in that the amounts received by the Appellant's ex-wife were received pursuant to the 2002 judgment, not the 1992 judgment. Paragraph 32 of the 2002 judgment annuls all alimentary pension arrears accrued since the divorce judgment, including the $150,000 lump sum, and paragraph 44 of the judgment fixes, at $175,000, the alimentary pension arrears owed to Ms. Smith for her benefit and that of the children under the divorce judgment of November 16, 1992.

[30] The purpose of the lump sum is to release the Appellant from the amounts due under the divorce judgment. The payment is capital in nature. It is not a support amount within the meaning of subsection 56.1(4) of the Act. It is not a late payment of amounts payable on a periodic basis under the divorce judgment. I repeat that this payment is pursuant to the 2002 judgment, not the 1992 judgment, though the determination of the amount to pay did take certain factors under the 1992 judgment into consideration.

[30] As for the disability tax credit, it is my opinion that in view of the physician's letter dated November 10, 2004, and the certificate of November 2005, the Appellant suffers from a severe and prolonged physical impairment.

[31] The appeal with respect to the tax credit for severe and prolonged physical impairment is allowed. The Appellant is not entitled to the deduction for support payments in computing his income, and the Added Party need not include the amount paid in computing her income.

[32] The Respondent shall pay one half of the Appellant's costs.

Signed at Ottawa, Ontario, this 29th day of March 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 10th day of January 2007
Monica F. Chamberlain, Translator

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COURT FILE NO.:	2004-3220(IT)I
STYLE OF CAUSE:	GAÉTAN MATHIEU v. THE QUEEN AND CAROLE SMITH
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REASONS FOR JUDGMENT BY:	The Honourable Justice Louise Lamarre Proulx
DATE OF JUDGMENT:	March 29, 2006

APPEARANCES:

Counsel for the Appellant:	Michel Poulin
Counsel for the Respondent:	Marie-Claude Landry
For the Added Party:	Carole Smith herself

COUNSEL OF RECORD:

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