Docket: 2010-2909(IT)I

BETWEEN:

DANIEL ROY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on May 3, 2011, at Edmundston, New Brunswick.

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the appellant:	Michel Dumont
Counsel for the respondent:	Stéphanie Côté

JUDGMENT

The appeals of the reassessments made under the *Income Tax Act* for the 2003, 2004, 2005, 2006 and 2007 taxation years are dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, on this 7th day of November 2011.

"Paul Bédard"

Bédard J.

Translation certified true
on this 14th day of December 2011
Sarah Burns, Translator

Citation: 2011 TCC 511
Date: 20111107
Docket: 2010-2909(IT)I

BETWEEN:

DANIEL ROY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] By a Notice of Reassessment dated June 18, 2009, the Minister of National Revenue (the "Minister") disallowed the equivalent-to-spouse credit for a wholly dependent person (provided for by paragraph 118(1)(*b*) of the *Income Tax Act* [the "Act"]) for the 2003, 2004, 2005, 2006 and 2007 tax years. The Minister disallowed the credit on the basis of subsection 118(5) of the Act, being of the opinion that, for the tax years in issue, the appellant was required to pay child support for his son.

Facts

[2] The appellant was separated from the mother of his son during the tax years in issue.

[3] The New Brunswick Court of Queen's Bench (the "Court of Q.B.") made an order on December 18, 1996 (the "Order"), directing the appellant to pay child support for his son, as of January 1, 1996, (see Exhibit I-1).

[4] According to Exhibit A-1 filed in evidence at trial, Brenda Dumont (the appellant's former spouse) filed, on May 24, 2007, in the Court of Q.B., a

document entitled [TRANSLATION] "Form 5 – WITHDRAWAL OF SUPPORT ORDER".

[5] On May 24, 2007, Ms. Dumont also filed in the New Brunswick Court of Q.B. a waiver of arrears on support payments owing for the period from July 1, 2002, to May 1, 2007 (see Exhibit A-1).

[6] Ms. Dumont, whose credibility is not in doubt, testified that she had waived her child's right to support payments, granted by the Order as of July 2002, because she and the appellant had gotten back together, which had lasted for about a year. Ms. Dumont stated that she had given the waiver verbally.

Issues

[7] The only issues were the following:

> (a) Is the agreement between the appellant and Ms. Dumont, by which Ms. Dumont waived her son's right to the support payments granted by the Order, (the "Agreement") valid? In other words, can the Agreement between the appellant and his former spouse, contemplating the waiver of an order for support, extinguish the appellant's obligation imposed by the Court of Q.B. to pay child support for his son?
>
> (b) If not, does Form 5 (Exhibit A-1) have the effect of relieving the appellant of his support obligation?

Appellant's position

[8] The relevant part of the appellant's written representations merits being reproduced in full:

> [TRANSLATION]
> II. APPELLANT'S POSITION
>
> [4] The appellant's position is that the documents presented by Michel Dumont (see tab 4 of the respondent's book of exhibits), his own testimony, supported by the testimony of Brenda Dumont and the facts and actions taken, shows that the appellant Daniel Roy and Brenda Dumont had reached an out-of-court agreement on child support and that the appellant Daniel Roy was not required to pay child support as the respondent contends, unless the matter is

viewed from a "technical" perspective (there is an order, so despite the waiver, he did have an obligation).

[5] Consequently, the appellant should be eligible to claim personal exemptions from Frederick.

III. ARGUMENT

[6] To begin, the first rule learned in law school is that EACH CASE TURNS ON ITS OWN FACTS, and the Court has complete discretion to determine what THE FACTS are that it will accept to support its decision, on the basis of, among other things, the documentation and the witnesses' credibility.

[7] It should be noted that all of the case law referenced by the respondent pertains to cases where there was no agreement between the parties and the courts were called upon to decide the issues and make the orders.

[8] In this case, the documentation and the facts seem to indicate almost the opposite since, first, there is the support order withdrawal signed by Brenda Dumont and filed in the Court of Queen's Bench of New Brunswick in Edmundston and, second, there is the letter from Brenda Dumont signed before the enforcement officer, Mr. Jean-Claude Durepos, cancelling the arrears in the Court file (number FDE-0063-1994) retroactively to July 1, 2002.

[9] As conveyed by the latter two exhibits, the parties' intention was clearly not to subject the appellant, Daniel Roy, to an order of the Court requiring him to pay child support, but rather to form a mutual agreement between them.

[10] It must be borne in mind that the Family Division of the Court of Q.B. of New Brunswick only has jurisdiction over cases submitted to it by way of motion filed, and, where that is so, in which at least one of the parties is requesting that the Court decide an issue or enforce the performance of an agreement. Yet, in this case, the support order withdrawal signed by Brenda Dumont removed the file from the court's jurisdiction, and neither party objected to it, not even a third party (for example, social services could have filed an objection if they had found negligence or a situation placing the children at risk) **and not even the respondent**.

Analysis and conclusion

[9] Regarding the first issue, I am of the opinion that the Agreement is absolutely void. In fact, it would be contrary to public order for a parent to be able to waive his or her child's right to receive child support. At least, so we are taught by the Supreme Court of Canada at paragraphs 14 and following of its decision in *Richardson v. Richardson*, [1987] 1 S.C.R. 857, which read as follows:

> 14 . . . Child maintenance, like access, is the right of the child: *Re Cartlidge and Cartlidge*, [1973] 3 O.R. 801 (Fam. Ct.) For this reason, a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child: *Malcovitch v. Malcovitch* (1978), 21 O.R. (2d) 449 (H.C.); *Hansford v. Hansford*, [1973] 1 O.R. 116 (H.C.), at pp. 117-18; *Dal Santo v. Dal Santo* (1975), 21 R.F.L. 117 (B.C.S.C.); *Mercer v. Mercer* (1978), 5 R.F.L. (2d) 224 (Ont. H.C.); *Collins v. Collins* (1978), 2 R.F.L. (2d) 385 (Alta. S.C.), at p. 391; *Krueger v. Taubner* (1974), 17 R.F.L. 86 (Man. Q.B.) Further, because it is the child's right, the fact that child support will indirectly benefit the spouse cannot decrease the quantum awarded to the child.
>
> 15 The obligation to provide spousal support arises from different bases and therefore has different characteristics. As discussed in *Pelech*, the courts in making an award of spousal maintenance are required to analyze the pattern of financial interdependence generated by each marriage relationship and devise a support order that minimizes as far as possible the economic consequences of the relationship's dissolution. Financial provision may be temporary or permanent. Spousal maintenance is the right of the spouse and a spouse can therefore contract as to the amount of maintenance he or she is to receive. Where this happens the court will be strongly inclined to enforce that contract: see *Pelech v. Pelech*, *supra*.
>
> 16 Given these differences between spousal and child maintenance, if the court's concern is that the child is being inadequately provided for, then that concern should be addressed by varying the amount of child support. This approach has several advantages. First, it explicitly identifies the area of the court's concern. Second, the benefit accrues to the individual whose legal right it is. The duty to support the child is a duty owed to the child not to the other parent. Third, the traditional characteristics of the child maintenance order better reflect the court's concern for the child's welfare than do the traditional characteristics of the spousal maintenance order. . . .

[10] Only a court of competent jurisdiction may rule on a child's right to support. In New Brunswick, that court is the Court of Q.B., as provided by subsection 2(4) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.).

[11] In New Brunswick, in addition to the provisions of the *Divorce Act*, the legislation governing applications for support and establishing entitlement to support is Part VII of the *Family Services Act*, S.N.B. 1980, c. F-2.2 ("FSA").

[12] The FSA uses the expression "support of a dependant" to refer to the support obligation towards a dependent, and the expression "order for support" to refer to orders by the Court of Q.B. establishing an obligation to pay support.

[13] According to subsection 113(1) of the FSA, parents have the obligation to provide support for their children. Subsections 115(1) and (2) of the same statute provide that the Court of Q.B. may, upon application by a child or the other parent, order a parent to provide support for his or her child.

[14] According to subsection 116(1) of the FSA, an order for support ends at the time set out in the order or upon the death of the person required to provide support. However, under subsection 118(2) of the FSA, only the Court of Q.B. has jurisdiction to vary or discharge orders for support if it is satisfied that a change in circumstances has occurred since the making of the order currently in effect. The change in circumstances must be one prescribed by regulation.

[15] There are no regulations made under subsection 118(2) of the FSA. However, at paragraph 9 of its decision in *A.C. v. R.R.*, 2006 NBCA 58, the Court of Appeal of New Brunswick stated the following:

> Under subsection 118(2) of the *Family Services Act*, S.N.B. 1980, c. F-2.2, the court may discharge, vary or suspend an order of support and may relieve a party from the payment of part or all of the arrears if "the court is satisfied that a change of circumstances as provided for in the regulations respecting orders for child support has occurred since the making of the order." This change of circumstances must be material. The following remarks made by Sopinka J. in *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, at para. 21, are equally applicable whether one is seeking to vary a support order under the *Family Services Act* or a support order under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 . . .

[16] In the case of married persons, the *Divorce Act* applies in parallel with the FSA and also provides that the Court of Q.B. has jurisdiction. Indeed, subsection 15.1(1) and paragraph 17(1)(*a*) of the *Divorce Act* state the following:

> 15.1(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.
>
> . . .
>
> 17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively:

> (*a*) a support order or any provision thereof on application by either or both former spouses;

[17] In summary, a person who has the obligation to provide support for his or her child under an order for support for an indefinite period made by the Court of Q.B. must, for his or her obligation to cease, apply to that court to discharge the order on the basis of a change in circumstances since it was made. In fact, under subsection 118(2) of the FSA, only the Court of Q.B. has jurisdiction to discharge its own orders. In this case, the appellant has failed to show that the order for support was discharged by the Court of Q.B. The Agreement could not extinguish the appellant's obligation as set out in the Order because that is contrary to public order.

[18] We will now consider whether Form 5 has the effect of extinguishing the appellant's support obligation.

[19] Since I concluded that only the Court of Q.B. could extinguish the appellant's support obligation as set out in the Order, I must therefore determine the effect of the Order's withdrawal upon the application by Ms. Dumont on May 24, 2007. The answer to this question is found in the *Support Enforcement Act*, S.N.B. 2005, c. S-15.5 ("SEA"), which concerns the enforcement of support orders made by the Court of Q.B.

[20] Under section 5 of the SEA and subsection 122(1) of the FSA, the administrator of the Court of Q.B. must, and a beneficiary or payer of a support order may, file a support order to have it enforced.

[21] The effect of this "filing" is that it becomes the duty of the Director of Support Enforcement (the "Director") to take the necessary measures to enforce the order (see sections 2 and 7 of the SEA). Furthermore, a support order filed with the Director is deemed to include provisions requiring the Director to enforce the order. The Director will cease enforcing the support order if it is withdrawn. The Director may, of his or her own accord, withdraw an order if, among other circumstances, the Director finds that the beneficiary is accepting payments directly from the payer (see section 9 of the SEA). This shows that the support obligation ordered by the Court of Q.B. survives the end of enforcement measures taken by the Director.

[22] The beneficiary or the payer of a support order may also apply to the Director to withdraw a support order, in which case the Director will immediately cease enforcing it. The order may be re-filed for enforcement, with the Director's permission (see subsections 9(4) and (5) of the SEA). None of the provisions of the SEA require that a new order be filed. This is further evidence that the support order, as previously made, still exists at that time.

[23] The appellant must understand that an obligation may exist, but not be subject to enforcement measures. I am of the opinion that the only effect of Form 5 is to apply to the administrator of the Court of Q.B. and to the Director to withdraw the support order. Furthermore, the following is stated on Form 5:

> [TRANSLATION]
> By this notice, you are required to withdraw the support order filed for enforcement.

[24] In summary, only an order by the Court of Q.B. could put an end to the appellant's obligations under the Order. The evidence shows that the Order was not discharged; instead, certain enforcement measures were merely terminated. The appellant's obligation survives independently of the measures aimed at procuring its performance. Consequently, the appellant was not entitled, during the years in issue, to the equivalent-to-spouse tax credit for a wholly dependent person set out at paragraph 118(1)(*b*) of the Act, since during the tax years in issue he was required to pay child support for his son.

[25] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 7th day of November 2011.

"Paul Bédard"

Bédard J.

Translation certified true
on this 14th day of December 2011
Sarah Burns, Translator

CITATION:	2011 TCC 511
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STYLE OF CAUSE:	DANIEL ROY v. HER MAJESTY THE QUEEN
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REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
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APPEARANCES:

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Counsel for the Respondent:	Stéphanie Côté

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