

Docket: 2021-859(IT)I

BETWEEN:

DELIA O'BRIEN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on January 16, 2023, at Windsor, Ontario

Before: The Honourable Justice Bruce Russell

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Ian Moffatt

JUDGMENT

The appeal is allowed, with fixed costs of \$2,500 payable within 30 days of the date of this judgment, and I direct that:

- (a) the appealed Canada Child Benefit entitlement re-determinations be themselves re-determined on the basis that the “eligible individual’s income” per subsection 122.62(5) of the federal *Income Tax Act* means the Appellant’s assessed income for the 2018 base taxation year less all income allotted to her per subparagraph 56(1)(u)(i), i.e. that she herself had not generated, thereby excluding the total of the Ontario Disability Support Plan payments generated by her late husband, which payments permanently ceased upon his passing in January 2020;
- (b) the same be done with respect to the appealed re-determinations of Canada Child Benefit entitlement pertaining to the 2019 base taxation

year and the relevant Canada Child Benefit payment period of July 2020 to June 2021; and

- (c) substantially the same be done with respect to the appealed GST/HST credit entitlements for the same payment periods of February to June 2020 and July 2020 to June 2021.

Signed at Halifax, Nova Scotia, this 7th day of September 2023.

“B. Russell”

Russell J.

Citation: 2023 TCC 132

Date: 06112023

Docket: 2021-859(IT)I

BETWEEN:

DELIA O'BRIEN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

FURTHER AMENDED REASONS FOR JUDGMENT

Russell J.

I. Overview:

[1] The appellant, Ms. Delia O'Brien, with two children, is a recipient of the Canada Child Benefit (CCB). The CCB is a non-taxable monthly payment to assist qualifying families with child expenses, provided for in the federal *Income Tax Act* (Act).

[2] As a result of the January 2020 death of Ms. O'Brien's husband, the Minister of National Revenue per subsection 122.62(5) of the Act re-determined Ms. O'Brien's CCB entitlement amount. In so doing the Minister utilized Ms. O'Brien's income as assessed under the Act for the 2018 taxation year. 2018 is the "base taxation year" for the CCB payment period of February 2020 to June 2020 incl., as further referenced below.

[3] Throughout 2018 and until his January 2020 death Ms. O'Brien's husband received monthly disability payments under the *Ontario Disability Support Program Act, 1997* (ODSP payments). These ODSP payments annually totalled approx. \$24,000. (Of note, this income was not taxable, per para. 110(1)(f) of the Act.) However, it was his spouse Ms. O'Brien who reported his 2018 ODSP payments as income of hers.

[4] This odd twist was due to subparagraph 56(1)(u)(ii), which requires that social assistance payments made on a means, need or income test (as were these ODSP payments) received by one spouse, is to be allotted as income to the spouse with otherwise the higher income. In 2018 Ms. O'Brien was the higher income spouse. Her income otherwise was approx. \$27,000 from employment, while her husband's was approx. \$7,000 of Canada Pension Plan payments.

[5] This approx. \$24,000 added to Ms. O'Brien's 2018 income almost doubled her otherwise income of approx. \$27,000 (from employment). Ms. O'Brien appeals on the basis that the Minister wrongly included in her income, for purposes of subsection 122.62(5) (i.e., re-determining CCB entitlement upon the death of a cohabiting spouse) the approx. \$24,000 of ODSP payments her late husband had received in the 2018 base taxation year. These ODSP payments permanently ceased upon her husband's passing.

[6] This near doubling of Ms. O'Brien's income (approx. \$27,000 + \$24,000) by adding the approx. \$24,000 of income generated by her husband, per subparagraph 56(1)(u)(ii), caused the Minister's subsection 122.62(5) re-determination of Ms. O'Brien's CCB entitlement to be markedly less than otherwise.

[7] Consequently Ms. O'Brien has appealed the inclusion of the ODSP payments in her income in re-determining her CCB entitlement per subsection 122.62(5). Ms. O'Brien also appeals the re-determination of her GST/HST credit, also provided for by the Act, which likewise was based on her assessed net income for relevant base taxation years. The respondent's position is that subsection 122.62(5) required the Minister to consider Ms. O'Brien's income as including the approx. \$24,000 of ODSP payments made to her late husband, on top of her own approx. \$27,000 of income. This Court does not have jurisdiction with respect to the appealed Ontario Child Benefit, as it is provided for by an Ontario statute – the *Taxation Act, 2007*, S.O. 2007.

II. Relevant Statutory Provisions:

[8] The relevant statutory provisions are subsection 122.62(5) and subparagraph 56(1)(u)(ii), see below:

122.62(5) – Death of cohabiting spouse – If the cohabiting spouse or common-law partner of an eligible individual in respect of a qualifying dependent dies,

(a) the eligible individual shall notify the Minister in prescribed form of that event before the end of the first calendar month that begins after that event; and

(b) subject to subsection 8, [not applicable here], for the purpose of determining the amount deemed under subsection 122.61(1) or (1.2) to be an overpayment arising in that first month and any subsequent month on account of the eligible individual's liability under this Part for the base taxation year in relation to that first month, the eligible individual's adjusted income for the year is deemed to be equal to the eligible individual's income for the year. [underlining added]

56(1) Amounts to be included in income for year – Without restricting the generality of section 3, there shall be included in computing the income of the taxpayer for a taxation year...

(u) a social assistance payment made on the basis of a means, needs or income test and received in the year by

...

(ii) the taxpayer's spouse or common law partner, if the taxpayer resided with the spouse or common-law partner at the time the payment was received and if the spouse's or common-law partner's income for the year is less than the taxpayer's income for the year, [underlining added]

except to the extent that the payment is otherwise required to be included in computing the income for a taxation year of the taxpayer, or the taxpayer's spouse, or a common-law partner.

III. Issue:

[9] The issue is whether in re-determining Ms. O'Brien's CCB entitlement per subsection 122.62(5) following her husband's early 2020 death, the Minister was correct in including in her income the approx. \$24,000 total of her husband's ODSP payments that he received during the 2018 base taxation year.

IV. Background:

[10] In determining CCB entitlement, a key factor where applicable is the total income of cohabiting spouses/common-law partners. The Act identifies this as

“adjusted income”.¹ Obviously the greater the adjusted income (i.e., family income), the less would be the CCB entitlement amount, and vice versa.

[11] The adjusted income is with respect to a “base taxation year”. A base taxation year is a recent year which is looked to for financial information of the parties to be considered in respect of a current CCB payment period. Accordingly, 2018 is the base taxation year for the July 2019 to June 2020 CCB payment period, and likewise the 2019 is the base taxation year for the July 2020 to June 2021 CCB payment period.

[12] As stated, Ms. O’Brien’s husband’s January 2020 death triggered application of subsection 122.62(5), set out above. It requires a re-determination of CCB entitlement upon the death of a cohabiting spouse/common-law partner. This provision provides that the re-determination is to be on the basis that “the eligible individual’s [i.e., Ms. O’Brien’s] adjusted income for the [base taxation] year is deemed to be equal to the eligible individual’s income for the year.” That is, upon a spouse having died, the adjusted income for purpose of CCB entitlement redetermination is deemed to be the amount of the income of the surviving spouse for the year.

[13] Thus, the intent of subsection 122.62(5) is that upon a spouse’s death, the income of that deceased spouse is no longer to be included in the adjusted income for the base taxation year. Solely the income of the surviving spouse is to constitute the adjusted income.

[14] So, in light of the approx. \$24,000 of 2018 ODSP payments made to the now deceased husband, but added to her (not his) income, this squarely raises the question of whether for subsection 122.62(5) purposes the surviving spouse’s base taxation year income should include such income.

[15] Pursuant to subparagraph 52(1)(u)(ii) the ODSP payments, made to Ms. O’Brien’s husband, were deemed to be her income rather than his, simply because her otherwise total income exceeded his. Additionally, these ODSP payments to the husband permanently ended with his death in January 2020.

[16] For subsection 122.62(5) purposes, income of the deceased spouse is not to be included in the calculation of adjusted amount. The wording of the provision

¹ Act, s. 122.6

makes this clear. As well, the federal Department of Finance's Explanatory Note explaining subsection 122.62(5) states:

Subsection 122.62(5) applies for the purpose of determining an eligible individual's adjusted income, which is relevant for the determination of the Canada Child Tax Benefit, when the cohabiting spouse or common-law partner of an eligible individual has died. Subsection 122.62(5) is amended to provide that, applying the death of an eligible individual's cohabiting spouse or common-law partner, the individual must notify the Minister of National Revenue, in prescribed form, of the death before the end of the first calendar month following the month of death. The deceased person's income and earned income will *not* be taken into account in determining the individual's adjusted income for the relevant taxation year for the purpose of computing the Canada Child Tax benefit for each month subsequent to the month of death.² [italics and underlining added]

[17] Note the Explanatory Note's statement that, "[t]he deceased person's income...will not be taken into account in calculating the individual's adjusted income for the relevant [base] taxation year for...computing the [CCB] for each month subsequent to the month of death."

[18] The subparagraph 56(1)(u)(ii) stipulation that the social assistance payment be added to the income of the cohabitant spouse with higher income is explained in the relevant 1982 Explanatory Notes:

Certain types of social assistance were previously excluded from income under subparagraph 56(1)(a)(i). Paragraph 56(1)(u) is added to the Act to require that social assistance payments received by a person or his spouse be included in the income of the spouse with the higher income for the year. Thus, the spouse with the higher income will maintain his or her entitlement to the married exemption under paragraph 109(1)(a) in respect of the other spouse. The amount included in income under paragraph 56(1)(u) is deductible in computing taxable income under paragraph 110(1)(f). This change places social assistance payments on the same basis as the guaranteed income supplement and the spouse's allowance under the Old Age Security Act.³ [underlining added]

[19] The above extract from the Department of Finance's Explanatory Notes in 1982 shows that the purpose of allotting one spouse's income to the other where the other otherwise has the greater income is simply to better allow entitlement to the

² Canada, Department of Finance, *Explanatory Notes Relating to the Income Tax Act and Related Regulations* (Ottawa: Department of Finance, October, 2011) at 82.

³ Canada, Department of Finance, *Explanatory Notes to a Bill Amending the Income Tax Act* (Ottawa: Department of Finance, December 1982) at 50.

then married exemption in respect of that other spouse. The extract also notes, as noted above, that the social assistance income is not taxable.

[20] This helps to clarify that allotment of social assistance income per subparagraph 56(1)(u)(ii) from the lesser income spouse to the higher income spouse is without any intended effect upon the latter spouse's CCB entitlement, upon the death of the lesser income spouse who had generated the social assistance income in the first place.

[21] Should subsection 122.62(5) be read as not including in the surviving spouse's income amounts of income that had been generated by the deceased person, which income permanently ended with the death of that spouse?

[22] To add the income generated by the subsequently deceased spouse to the income of the surviving spouse, for subsection 122.62(5) purposes, adds, in my view, "ghost" income (because the payments have permanently ceased).

[23] That income artificially increases the otherwise income of the surviving spouse, directly resulting in the lessening of that spouse's otherwise CBB entitlement amount.

[24] With respect to the doctrine of absurdity, the respondent principally cites *R. v. McIntosh*, [1995] 1 S.C.R. 686, wherein at para. 34 a split (5/4) Court, per Lamer, C.J., wrote (in a *Criminal Code* context):

I would adopt the following proposition: where, by use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however hard or absurd or contrary to common sense the result may be (*Maxwell on the Interpretation of Statutes, supra*, at p. 29).

[25] This is the basis for the respondent's position that the statutory wording is clear so it must be applied, "however hard or absurd or contrary to common sense".

[26] Nevertheless, some three years later the same court – the Supreme Court of Canada - rendered its decision in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, dealing with a bankruptcy matter. Iacobucci, J. for a unanimous five-member bench wrote (para. 27):

In my opinion, the consequences or effects which result from the [Ontario] Court of Appeal's interpretation of ss. 40 and 40a of the [Employment Standards Act (Ontario)] are incompatible with both the object of the Act and with the object of

the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with the provisions or with the object of the legislative enactment (at p. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p.88). [underlining added]

[27] Additionally in chapter 10 of the 2022 edition of *The Construction of Statutes*,⁴ Professor Ruth Sullivan discusses, “Consequential Analysis - Avoiding Absurdity”. She notes that the Supreme Court of Canada has acknowledged the concept of statutory absurdity on various occasions, including:

- a. in 1998 in *Re Rizzo and Rizzo Shoes Ltd.* the Supreme Court of Canada held - “It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.”⁵
- b. in 1995 in *Ontario v. Canada Pacific Ltd.*, the Supreme Court of Canada held – “Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoids such results.”⁶
- c. also, in *Morgentaler v. The Queen*, the Supreme Court of Canada in 1976 held – “We must give sections a reasonable construction and try to make sense and not nonsense of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.”⁷

[28] Moreover, Sullivan discusses several recognized categories of absurdity.⁸ Two such categories are “irrational distinctions” and “frustrated purpose”. Regarding “irrational distinctions”, the author notes, “[a] proposed interpretation is likely to be labeled absurd if it would result in persons or things receiving different treatment for inadequate reasons, or for no reason at all.”⁹

⁴ Sullivan R., *The Construction of Statutes*, 7th ed. (Toronto, LexisNexis, 2022)

⁵ *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 43

⁶ *Ontario v. Canada Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 65

⁷ *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 at 676

⁸ Sullivan, *supra*, p. 303

⁹ *Ibid*, p. 304-305

[29] In respect of the “frustrated purpose” category, Professor Sullivan writes that, “[a]n interpretation that would tend to frustrate legislative purpose, or undermine the legislative scheme is likely to be labeled absurd.”¹⁰

[30] Recently in *Canada v. Villa Ste-Rose Inc.*, 2021 FCA 35, the Federal Court of Appeal (FCA) recognized an absurdity, resulting from an irrational distinction. The FCA considered whether the Minister could properly assess interest and late filing penalties on a taxpayer who owed GST of \$736,864 but was also owed a rebate of \$860,665 (i.e., the taxpayer was in a net positive position). The taxpayer ran a residential complex for seniors. Due to a fire, the taxpayer was required to build a new complex. Upon completion of the new complex the taxpayer was deemed to have made and received a taxable supply by way of sale of the complex pursuant to subsection 191(3) of the *Excise Tax Act* (ETA). As a result the taxpayer was required to file a return for its tax owing by December 31, 2014 and was also entitled to file for and claim a GST rebate.

[31] However, the taxpayer failed to file a return in respect of its GST owing or in respect of the rebates it was owed, until September 2015. The Minister thus assessed the taxpayer interest and late filing penalties.

[32] The Crown argued that the penalties were justified as the words “to be remitted or paid” per subsection 280(1) and section 280.1 of the ETA (i.e., the provisions that dealt with interest and late filing penalties) do not require the Minister to consider any offsets from rebates the taxpayer was owed.

[33] In dismissing the Crown’s appeal (and upholding this Court), the FCA stated:

As Justice D’Auray noted, it is well settled that a literal interpretation which may produce illogical or absurd results must be set aside (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, paragraph 27). The interpretation advanced by the appellant [Crown] that the interest and the GST late - filing penalty that may be assessed must, in all circumstances, be calculated on the amount of net tax, without taking into consideration rebates payable, is, as we have seen, likely to produce absurd results.¹¹ [underlining added]

[34] Analogously, in the present case there is “a literal interpretation which may produce illogical or absurd results [and so] must be set aside”. I have referenced above the illogical or absurd results as to the post spousal death re-determination of

¹⁰ *Ibid*, p. 304

¹¹ *Her Majesty v. Villa Ste.-Rose Inc.*, 2021 FCA 35, para. 65

Ms. O'Brien's CCB entitlement. These absurd results arise from reading the word "income" in subsection 122.62(5) literally as meaning Ms. O'Brien's 2018 assessed income - without deducting from the same ODSP payments that her husband had been paid (albeit allotted to her as income), which payments permanently ceased upon his passing.

[35] Further, the literal interpretation of the word "income" as meaning Ms. O'Brien's income as assessed for the 2018 taxation year, being prior to her husband's early 2020 passing and the consequential cessation of the subject ODSP payments, results from an irrational distinction (in this CCB entitlement context), being that Ms. O'Brien happened to otherwise have greater income in 2018 than her subsequently deceased husband.

[36] If Ms. O'Brien had otherwise made, i.e. generated, less income than her subsequently deceased spouse then this whole situation would have been avoided. This is because, in such circumstances subparagraph 56(1)(u)(ii) would not have added the ODSP payment amounts to her own income. Thus, proper relief as to CCB entitlement would be available per subsection 122.62(5).

[37] I conclude that this absurdity exists, irrespective of the unrelated legislative intent of distinguishing between spouses as to whom of the two had the higher income. I do not say that there is no merit to allotting income on such a basis per subparagraph 56(1)(u)(ii). That is not the intent of this decision. What I do say is that this aspect of subparagraph 56(1)(u)(ii) does have, unintentionally, a profoundly detrimental affect upon subsection 122.62(5), frustrating both purpose and proper application of that provision as discussed above, as to allowing proper re-determination of CCB entitlement.

[38] As cited above, "an interpretation that would tend to frustrate legislative purpose or undermine the legislative scheme is likely to be labeled absurd". Above, the respective purposes and contexts of section 122.62(5) and subparagraph 56(1)(u)(ii) have been identified.

[39] The intent as clearly expressed in the above cited Explanatory Notes re subsection 122.62(5) is that, "the deceased 's person's income... will not be taken into account in calculating the individual's adjusted income for the relevant [base taxation] year for...".

[40] However, here the deceased person's income has in effect been taken into account, through allotment to Ms. O'Brien of income that had been generated by the

subsequently deceased person per subparagraph 56(1)(u)(ii), simply and irrelevantly (in this context) because her income otherwise was greater than his.

[41] The intent of subsection 122.62(5) is completely stymied by subparagraph 56(1)(u)(ii) as shown here. This substantially and detrimentally affects the pocketbook of a bereaved family, from the perspective of re-determining appropriate CCB entitlement.

[42] Accordingly, I will allow the appeal with fixed costs of \$2,500 payable within 30 days of the date of this judgment and I direct that:

(a) the appealed re-determinations be themselves re-determined on the basis that the “eligible individual’s income” per subsection 122.62(5) means Ms. O’Brien’s assessed income for the 2018 base taxation year less all income allotted to her per subparagraph 56(1)(u)(i), i.e. that she herself had not generated, thereby excluding the total of the ODSP payments generated by her late husband, which payments permanently ceased upon his passing in January 2020;

(b) the same be done with respect to the appealed re-determinations of CCB entitlement pertaining to the 2019 base taxation year and the relevant CCB payment period of July 2020 to June 2021;

(c) the same be done with respect to the appealed GST/HST credit entitlements for the same payment periods of February to June 2020 and July 2020 to June 2021.

These Further Amended Reasons for Judgment are issued in substitution for the Amended Reasons for Judgment dated September 7, 2023, to correct the figures underscored in paragraphs 16 and 41.

Signed at Halifax, Nova Scotia this 6th day of November 2023.

“B. Russell”

Russell J.

CITATION: 2023 TCC 132

COURT FILE NO.: 2021-859(IT)I

STYLE OF CAUSE: DELIA O'BRIEN AND HIS MAJESTY
THE KING

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: January 16, 2023

FURTHER AMENDED
REASONS FOR JUDGMENT BY: The Honourable Justice Bruce Russell

DATE OF FURTHER AMENDED
JUDGMENT: November 6, 2023

APPEARANCES:

For the Appellant: The Appellant herself

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