

TAX COURT OF CANADA

IN RE: the Income Tax Act

BETWEEN:

MARY J. LEDUC

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

HEARD BEFORE MR. JUSTICE E ROSSITER

in the Court Administration Service,

231 Dundas Street, Third Floor

London, Ontario

on Wednesday, June 6, 2007 at 10.00 a.m.

ORAL REASONS FOR JUDGMENT

APPEARANCES:

Ms Mary J. Leduc

for herself

Mr. Roger Leclaire

for the Respondent

Also Present:

Ms Avril Mallows

Court Registrar

Ms Andreena M. Brant

Court Reporter

A.S.A.P. Reporting Services Inc. 8 2007

**200 Elgin Street, Suite 1004
Ottawa, Ontario K2P 1L5
(613) 564-2727**

**130 King Street West, Ste 1800
Toronto, Ontario M5X 1E3
(416) 861-8720**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons delivered orally from the bench at London, Ontario on June 6, 2007)

London, Ontario

--- Upon commencing on Wednesday, June 6, 2007 at 10:00 a.m.

--- Trial proceeds.

--- Court adjourns at 11:26 a.m.

--- Upon resuming at 12:35 p.m.

JUSTICE ROSSITER: This matter comes before this Court as a result of an assessment of March 17th, 2005 in relation to the Appellant, wherein there was a deduction denied for \$14,000 in the 2004 income tax year.

There was an objection filed on March 14th, 2006, confirmation by the Minister August 25th, 2006 and a notice of appeal, November 17th, 2006 and a reply filed by the Minister on February 26th, 2007.

The issue before the Court is whether the payments made in terms of support of \$9,000 and \$5,000, respectively by the Appellant in 2004 were periodic payments as required under section 56(1)(b) and 60(b) and 56.1(4) of the *Income Tax Act*.

1 Some of the facts which are
2 particularly relevant are as follows:

3 The Appellant was married to Mr.
4 Leduc on February 7th, 1970. They separated
5 November the 1st, 1999. They divorced October
6 15th, 2002. There was a trial conducted before Mr.
7 Justice Heeney in January of 2004 which resulted in
8 an endorsement of January 29th, 2004.

9 That endorsement contains four or
10 five paragraphs which have some relevance to the
11 proceedings here and I will review them in detail.

12 Paragraph 55 states as follows:

13 "Spousal support of \$1,250
14 per month, coupled with the
15 income I have imputed to the
16 Husband, will leave him with
17 more than \$2,000 per month in
18 net disposable income after
19 tax, which is sufficient to
20 meet his reasonable needs.

21 The Wife has the means to pay
22 support in that amount.

23 Accordingly, spousal support
24 is ordered to be payable by
25 the Wife to the Husband in

1 the amount of \$1,260 per
2 month."

3 Paragraph 56:

4 "The commencement date will
5 be June 1, 2002, which is the
6 same month when the Husband
7 first put forward his claim
8 for spousal support. It is
9 not appropriate to order
10 retroactive support beyond
11 that date, since the Husband
12 effectively sat on his rights
13 for 2.1/2 years."

14 Paragraph 57:

15 "This order creates arrears
16 up to and including January
17 1, 2004, of \$25,000. As
18 against that, the Wife is
19 credited with the overpayment
20 referred to above of \$9,000,
21 leaving a balance of \$16,000.

22 That balance will be payable
23 at the rate of \$250 per month
24 commencing February 1, 2004
25 until fully paid. Further

1 enforcement proceedings will
2 be stayed so long as these
3 monthly payments remain in
4 good standing."

5 Finally, paragraph 58:

6 "Since periodic spousal
7 support is deductible by the
8 Wife and taxable in the
9 Husband's hands, both parties
10 will, presumably, have to
11 refile their 2002 income tax
12 returns to take account of
13 the support paid relating to
14 that year."

15 This was filed as Exhibit A-1 on
16 behalf of the Appellant and forms part of the
17 evidence of this Court.

18 Exhibit A-2 was an order which
19 followed up from Mr. Justice Heeney's indorsement.

20 A-2 has two dates on it. It is dated January
21 29th, 2004, Mr. Justice Heeney of the Ontario
22 Superior Court of Justice and the signature of the
23 Judge/Clerk of February 9th, 2004.

24 There are a couple of paragraphs
25 in there which are relevant. Paragraphs 3, 4 and

1 5, respectively, as follows:

2 "THIS COURT ORDERS THAT the
3 Applicant Mary James Leduc
4 shall pay spousal support to
5 the Respondent Joseph Thomas
6 Eucher Leduc in the sum of
7 \$1,2500.00 per month
8 commencing June 1, 2002."

9 Number 4:

10 "THIS COURT ORDERS THAT
11 arrears of spousal support
12 shall be set at the sum of
13 \$25,000.00 up to and
14 including January 1, 2004 and
15 the arrears are reduced by
16 \$9,000.00 in periodic support
17 to be credited to the 2002
18 support obligation as a
19 result of the Respondent
20 Joseph Thomas Eucher Leduc
21 receiving all of the proceeds
22 of the sale of the
23 matrimonial home."

24 Paragraph number 5:

25 "THIS COURT ORDERS THAT the

1 Wife shall pay the balance of
2 arrears of \$16,000.00 at the
3 rate of \$250.00 per month
4 commencing February 1, 2004."

5 Finally, Exhibit A-3 is an
6 additional court order of June 2nd, 2004.
7 Paragraph 1, 2 and 3 are relevant.

8 Paragraph 1 states:

9 "THIS COURT ORDERS THAT the
10 respondent, Joseph Thomas
11 Eucher Leduc shall pay to the
12 applicant, Mary James Leduc
13 costs fixed at \$5000.00
14 inclusive of GST.

15 2. THIS COURT ORDERS THAT this
16 amounts shall be credited
17 against the arrears of
18 spousal support owing of
19 \$16,000.00 as fixed in the
20 Judgment of the Honourable
21 Mr. Justice Heeney dated
22 January 29, 2004, reducing
23 the arrear to \$11,000.00 less
24 any monthly payment made in
25 the interim.

1 \$36,000 payment was intended as child support, and
2 that it was made pursuant to a written agreement,
3 the Minutes of Settlement. However, an amount does
4 not come within the scope of paragraph 56(1)(b) and
5 paragraph 60(b) of the *Income Tax Act* unless it is
6 payable on a periodic basis. An amount is payable
7 on a periodic basis if the payment obligation
8 occurs at intervals. Although section 6 of the
9 Minutes of Settlement describes the \$36,000 payment
10 as "periodic", it refers to a single payment in the
11 amount of \$36,000. It does not describe an
12 obligation to make payments on a periodic basis".

13 I have reviewed this decision
14 thoroughly and I agree I am bound by the decision,
15 if it may apply to this particular case with these
16 particular peculiar facts that I am concerned with
17 here.

18 I also refer to the decision of
19 Chief Justice Bowman, Tax Court of Canada, in
20 *Galbraith v. Her Majesty the Queen*, (2006) TCC 536
21 in particular paragraph 18 which was brought to my
22 attention.

23 "Is it payable on a periodic
24 basis? The support amount of \$2,500 per month is
25 obviously payable periodically. The tax amount is

1 calculated and payable annually since the income
2 tax is a phenomenon of annual incidence the
3 requirement of periodicity is therefore met.”

4 Now what a judge or a court may or
5 may not say in any decision or judgment or order in
6 terms of deductibility is really neither here nor
7 there and in many cases amounts to interesting
8 trivia.

9 The fact of the matter is that
10 whatever a judge says, the judge does not have the
11 authority to amend the terms of the *Income Tax Act*.

12 In order for something to be
13 deductible it has to come within the confines and
14 four corners of the *Income Tax Act of Canada*.

15 If it does, it is deductible, if
16 it does not, it is not deductible, regardless of
17 what the judge says or what attempts they have made
18 to make something that is not otherwise deductible
19 - deductible or make something deductible not
20 deductible.

21 They sometimes might say things
22 that are not really in compliance or within the
23 four corners of the *Income Tax Act* or they might
24 not say things which do not necessarily take it
25 outside the *Income Tax Act*.

1 So what I am trying to say is that
2 it is really neither here nor there how a judge
3 classifies the deductibility of something, it still
4 has to come within the four corners of the *Income*
5 *Tax Act* and that is where my hands are tied. I
6 have to deal with it within the four corners of the
7 *Income Tax Act*.

8 Now having said that, I note with
9 interest the comments of the Federal Court of
10 Appeal in the *Tossell* case, particularly paragraph
11 31 where it says:

12 "An amount is payable on a
13 periodic basis if the payment
14 obligation occurs at
15 intervals."

16 It does not say an amount is payable on a periodic
17 basis if the payment obligation is a regular
18 payment obligation recurring at regular intervals.

19 I understand the position of the
20 Respondent to be, that the payments can be
21 different payments but they have to be made with
22 some sort of regularity.

23 I do not see that particularly
24 said in this particular judgement. It just has to
25 be made on a periodic basis and that is what I am

1 bound by.

2 Now, turning to the facts of this
3 particular case, the important documents are
4 documents A-2 and A-3 because they are the court
5 order or the written agreement that any payments
6 are made from and you have to look to those
7 particular documents.

8 I think it is important that what
9 you do is you look to the entire document, not a
10 particular paragraph here or a particular paragraph
11 there, you look at the entire document to get the
12 entire intent of the court and what the directions
13 of the court are.

14 Briefly, what occurred here on the
15 facts of this case, and I emphasize the facts of
16 this case, only is the following.

17 You have a court order of January
18 the 29th, 2004. That court order provides for
19 three types of payments in different periodic
20 manners.

21 Number 1, it provides for \$1,250
22 per month from June 1st, 2002. Number 2, it
23 provides for a \$9,000 payment, deemed payment, a
24 one-shot deal. Number 3, it provides for an
25 additional \$250 per month ongoing from February

1 1st, 2004.

2 Taking those three obligations
3 together I find that the order for maintenance on
4 that aspect is periodic in nature. You have a
5 periodic in nature \$1,250 a month. You have a one-
6 shot \$9,000 and you have an ongoing \$250
7 obligation.

8 All are made pursuant to a written
9 order or agreement. Taken as a whole they are all
10 periodic. Albeit not the same amount. Albeit at
11 different times. Albeit in some cases monthly, in
12 some cases a one-shot deal.

13 There are some aspects of
14 repetitive nature in the entire three aspects. In
15 one single one there is not, but I do not think
16 that takes it outside the periodic nature and the
17 intent.

18 This is coupled with what is
19 basically an amendment to that order. The
20 amendment to that order is found in A-3, paragraphs
21 sub 2 and 3, whereby there is an additional change
22 to the periodic nature of the order by an
23 additional lump sum of \$5,000.

24 So what I find is on the facts of
25 this particular case, unusual as they are, I find

1 that the payments that are in dispute, taken with
2 the other payments provided in the order meet the
3 periodic test and are deductible within the meaning
4 of section 56(1)(b), 60(b) and 56.1(4) of the
5 *Income Tax Act* and as a result I will allow the
6 appeal and have the matter referred back to the
7 Minister for recalculation accordingly.

8 Mr. Leclaire, having said all
9 that, Ms Leduc asked for costs. Can you speak to
10 that for a moment, please?

11 Under the informal rules, I can
12 just refer you to section 10:

13 "Costs on appeal shall be at
14 the discretion of the judge
15 by whom the appeal is
16 disposed of in accordance
17 with section 18.2(6) of the
18 *Act*."

19 Which reads as follows. An appeal is referred to
20 in section 18 is allowed, section 18 of the *Act*.

21 MR. LECLAIRE: It's the informal.

22 JUSTICE ROSSITER: It's the
23 informal.

24 MR. LECLAIRE: That's right.

25 JUSTICE ROSSITER: The informal,

1 there's no costs. Am I right there?

2 MR. LECLAIRE: I think you are
3 correct.

4 JUSTICE ROSSITER: I'm just
5 looking at section 18 because I didn't have the
6 Act. This particular rules is the informal
7 procedure one. I can show you. Do you have it
8 there?

9 MR. LECLAIRE: I am being advised
10 by my colleague that there are no costs to the
11 Crown in the informal procedure.

12 JUSTICE ROSSITER: No costs to the
13 Crown and no costs against the Crown?

14 MR. LECLAIRE: No costs to the
15 Crown but there may be costs granted to the
16 Appellant. Is that correct, Mr. Aitken?

17 JUSTICE ROSSITER: May be costs
18 granted to the Appellant.

19 MR. LECLAIRE: Yes. Well, it's
20 discretionary.

21 MS DEVEAU: Look at the amount --

22 JUSTICE ROSSITER: I'll get to you
23 in a minute.

24 MR. LECLAIRE: I think that you
25 are limited to filing fees. In fact I question

1 whether counsel fees were available for a
2 successful Appellant in the informal division.

3 JUSTICE ROSSITER: I think the
4 costs are specifically limited. I want to fix the
5 amount. If I'm going to award costs I want to fix
6 the amount.

7 MR. LECLAIRE: Filing fees and
8 disbursements, in my submission.

9 JUSTICE ROSSITER: Thank you very
10 much.

11 MR. LECLAIRE: That's my view.

12 JUSTICE ROSSITER: I think if the
13 appeal is successful they receive the filing fee
14 back in any event.

15 MR. LECLAIRE: That's my
16 understanding.

17 JUSTICE ROSSITER: Did you have
18 something to say on the issue of costs?

19 MS DEVEAU: Well, we read that as
20 well and because I have been named as an assistant,
21 not that I'm counsel, but I am an expert witness,
22 that I would be allowed some of the costs, half of
23 what would normally be allowed counsel.

24 MS LEDUC: The document that it's
25 in, it's called the Tax Court of Canada Rules,

1 Informal Procedure.

2 JUSTICE ROSSITER: Yes, I have
3 them here.

4 MS LEDUC: 18.26.

5 JUSTICE ROSSITER: Pardon?

6 MS DEVEAU: 11.1 is the section.

7 JUSTICE ROSSITER: Yes, I have it
8 here.

9 MR. LECLAIRE: Are we looking at
10 section 10. Rule 10, sorry.

11 JUSTICE ROSSITER: Rule 10. Rule
12 11 applies for services of counsel. Then if you
13 look to rule 11.1:

14 "Unless otherwise directed by
15 the court, and the appellant
16 is represented or assisted by
17 an advisor other than
18 counsel, disbursements in
19 respect to the services
20 referred to in section 1."

21 MR. LECLAIRE: Yes. It limits the
22 amount to one half.

23 MS DEVEAU: It does limit the
24 amount.

25 MR. LECLAIRE: The amounts listed

1 in section 11.

2 JUSTICE ROSSITER: Yes, I realize
3 that. The Appellant here, in my view, was not
4 represented but was rather assisted.

5 MR. LECLAIRE: Yes.

6 JUSTICE ROSSITER: Give me a
7 moment, please.

8 MR. LECLAIRE: I'm sorry, Your
9 Honour. Could I ask you to inquire whether Mrs.
10 Leduc obtained any assistance in the preparation of
11 the Notice of Appeal just so that 11(a) is thereby
12 triggered. There is no indication of that so far.

13 JUSTICE ROSSITER: Ms Leduc, what
14 if any assistance did you have in preparation of
15 the Notice of Appeal?

16 MS LEDUC: Actually, Ms Deveau
17 actually filled it out and it's part of the record.

18 JUSTICE ROSSITER: What about for
19 this hearing?

20 MS LEDUC: She also sat down with
21 me and helped me and provided court cases and led
22 me through how I needed to proceed with it.

23 JUSTICE ROSSITER: Just give me a
24 moment then, please.

25 Did you have any disbursements, Ms

1 Leduc? No disbursements?

2 MS LEDUC: No, nothing. Just
3 lunch today but really, no.

4 JUSTICE ROSSITER: We all have to
5 eat.

6 Do you have anything further, Mr.
7 Leclaire, on the issue of costs?

8 MR. LECLAIRE: I make it at eight-
9 ten, Your Honour, half of which, according to 11.1,
10 half of which would be four-oh-five.

11 JUSTICE ROSSITER: Thank you. Do
12 you have anything further, Ms Leduc, on the issue
13 of costs?

14 MS LEDUC: No.

15 JUSTICE ROSSITER: On the issue of
16 costs, the Court awards costs to the Appellant in
17 the following fixed amount, under section 11(a) of
18 the Rules of the Informal Proceedings, considering
19 11.1, under 11(a) the sum of \$92.50. Under 11(b)
20 the sum of \$100. Under 11(c) the sum of \$150. For
21 a total of \$342.50. There being no disbursements.

22 I am not sure if taxes were
23 applicable on top of that, if they are, they would
24 also be payable.

25 Anything else, Mr. Leclaire, in

1 this particular matter?

2 MR. LECLAIRE: Thank you, Your
3 Honour, no.

4 JUSTICE ROSSITER: Ms Leduc?

5 MS LEDUC: Would you mind just
6 going over those, I didn't --

7 JUSTICE ROSSITER: What you have
8 is under 11(a), considering 11.1, \$92.50. Under
9 11(b) \$100. Under 11(c) \$150. For a total of
10 \$342.50.

11 Thank you.

12 --- Whereupon this matter is concluded
13 at 12:58 p.m.

CITATION: 2007TCC367

COURT FILE NO.: 2006-3465(IT)I

STYLE OF CAUSE: Mary J. Leduc and
Her Majesty the Queen

PLACE OF HEARING: London, Ontario

DATE OF HEARING: June 6, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice
Eugene Rossiter

DATE OF ORAL JUDGMENT: June 6, 2007

DATE OF EDITED TRANSCRIPT
OF REASONS FOR JUDGMENT: June 20, 2007

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Roger Leclaire

COUNSEL FOR OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General
of Canada
Ottawa, Canada.