Docket: 2015-3474(IT)I

BETWEEN:

CHRIS E. LAWSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 21, 2017, at Hamilton, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Amit Ummat

JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* (the "*Act*") for the 2013 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to the Tax Credits pursuant to sections 118(1)(b) and 118(1) (*b.1*) of the *Act* for the 2013 taxation year.

Signed at Ottawa, Canada, this 6th day of July 2017.

"Campbell J. Miller"

C. Miller J.

Citation: 2017 TCC 131
Date: 20170706
Docket: 2015-3474(IT)I

BETWEEN:

CHRIS E. LAWSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] Mr. Chris Lawson appeals by way of the informal procedure the reassessment by the Minister of National Revenue (the "Minister") of his 2013 taxation year in which the Minister denied him the wholly dependent person credit pursuant to section 118(1)(*b*) of the *Income Tax Act* (the "*Act*") and the child amount credit pursuant to section 118(1)(*b.1*) of the *Act* (the "Tax Credits"). It is helpful at the outset to reproduce those provisions, as well as sections 118(5) and 118(5.1) of the *Act*, and the definition of "support amount" found in section 56.1(4) of the *Act* to be clear as to exactly on what basis Mr. Lawson appeals. Those provisions are as follows:

> 118(1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted an amount determined by the formula
>
> …
>
> (*b*) in the case of an individual who does not claim a deduction for the year because of paragraph (a) and who, at any time in the year,
>
> (i) is
>
> (A) a person who is unmarried and who does not live in a common-law partnership, or

(B) a person who is married or in a common-law partnership, who neither supported nor lived with their spouse or common law-partner and who is not supported by that spouse or common-law partner, and

(ii) whether alone or jointly with one or more other persons, maintains a self-contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is

(A) except in the case of a child of the individual, resident in Canada,

(B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,

(C) related to the individual, and

(D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,

an amount equal to the total of …

(*b.1*) (i) a child, wo is under the age of 18 years at the end of the taxation year, of the individual ordinarily resides throughout the taxation year with the individual together with another parent of the child, the total of

(A) $2,131 for each such child, and …

118(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual

(a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or

(b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a

> deduction under paragraph (b) or (b.1) of the description of B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.
>
> …
>
> 56.1(4) The definitions in this subsection apply in this section and section 56.
>
> 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 common-law partner or former spouse or common-law partner of the payer or who is a parent of a child of whom the payer is a legal parent.
>
> 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 common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or
>
> (b) the payer is a legal 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.

[2] The import of these provisions is that in the situation of a person, such as Mr. Lawson, who is required to pay a support amount (as defined), he is not eligible to claim the Tax Credits, unless he can show that his situation falls within the purview of section 118(5.1) of the *Act*: that is, if both he and his ex-wife would otherwise not be entitled to credits under sections 118(1)(*b*) or 118(1)(*b.1*) of the *Act* because both of them were "required to pay a support amount". In such a case section 118(5) of the *Act* is not applicable and one of them can indeed claim the Tax Credits.

[3] Mr. Lawson appeals on two fronts:

1) That his separation agreement is to be interpreted as requiring both he and his ex-wife to pay supports amounts, thus making him eligible for the Tax Credits; and

2) The Canada Revenue Agency ("CRA") violated his rights pursuant to section 8 of the *Canadian Charter of Rights and Freedoms* under the *Constitution Act, 1982* (the "*Charter*") by "demanding my entire separation agreement when they only need the relevant sections," thus invading his right to privacy of very personal details: he claims the remedy pursuant to section 24.2 of the *Charter* which would exclude the production of the separation agreement. Mr. Lawson, at trial, had no hesitation in producing the separation agreement. (I assured him it would remain sealed on file until returned to him.)

This strikes me as rendering his *Charter* argument somewhat moot at this point. I will, however, address the *Charter* argument first.

[4] The following are the pertinent provisions of the *Charter*:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> …
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> …
>
> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[5] Initially, Mr. Lawson's argument appeared to be that the unlawful CRA demand for his separation agreement, plus misleading commentary[1] and correspondence from the CRA, as well as what he referred to as "systemic failure" within the CRA to recognize the possibility of the applicability of section 118(5.1) of the *Act* to taxpayers' circumstances, should result in his Appeal being allowed. It is clear from the jurisprudence of this Court that the behaviour of the CRA has

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[1] CRA publication entitled "Shared Custody and the Amount for an Eligible Dependant".

never been and should not be the reason for determining the correctness of an assessment. It is certainly unfortunate that a taxpayer may feel he or she is being misguided by the taxing authorities, especially in situations such as this, where the CRA has attempted in its commentary to clarify this somewhat murky area of the law for the taxpayer's benefit. Whether they have failed or succeeded in this regard has no bearing on this Court's determination as to whether the circumstances of Mr. Lawson's separation qualify as eligible to claim the Tax Credits.

[6] Having said that, I still do wish to address several of Mr. Lawson's concerns, as perhaps some lessons are to be learned.

[7] First, with respect to his concern that a request for his separation agreement is an unlawful seizure, his argument is based on the form the demand from the CRA took. He maintains he was given no choice but to provide the full and complete separation agreement, which he and his ex-wife had executed on April 12, 2012, or the CRA would disallow the Tax Credits. It is clear from Mr. Lawson's argument that had the CRA simply requested such parts of the separation agreement that are pertinent to the issue of who pays support to whom, he would not be objecting to the demand as infringing on his section 8 *Charter* rights.

[8] As was elaborated by the Supreme Court of Canada in the case of *R v Mckinlay Transport Ltd.*,[2] it is a balancing act between the state interest and an individual's privacy, when determining what is an appropriate exercise of the taxing authorities to obtain an individual's documents. The words of the Supreme Court of Canada are instructive:

> 4. … At the beginning of my analysis I noted that the *Income Tax Act* was based on the principle of self-reporting and self-assessment. The Act could have provided that each taxpayer submit all his or her records to the Minister and his officials so that they might make the calculations necessary for determining each person's taxable income. The legislation does not so provide, no doubt because it would be extremely expensive and cumbersome to operate such a system. However, a self-reporting system has its drawbacks. Chief among these is that it depends for its success upon the taxpayers' honesty and integrity in preparing their returns. While most taxpayers undoubtedly respect and comply with the system, the facts of life are that certain persons will attempt to take advantage of the system and avoid their full tax liability.

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[2] [1990] 1 SCR.

> Accordingly, the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation.
>
> This is not to say that any and all forms of search and seizure under the *Income Tax Act* are valid. The state interest in monitoring compliance with the legislation must be weighed against an individual's privacy interest. The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.
>
> In my opinion, s. 231(3) provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production of records which may be relevant to the filing of an income tax return. A taxpayer's privacy interest with regard to these documents *vis-à-vis* the Minister is relatively low. The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them. At the same time, the taxpayer's privacy interest is protected as much as possible since s. 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies.

[9] To qualify for the Tax Credits, the *Act* requires reliance on either a court order or written agreement. It is not unreasonable in the implementation of the *Act* and in the state interest for the CRA to ask to see such documents to determine if a taxpayer is eligible. The taxpayer has a choice: i) not to provide the agreement and, not surprisingly, face the consequence of the claim for the credits being denied, and then appealing to this Court, and ii) providing a redacted copy of the agreement revealing only those provisions relevant to the issue of support. I can appreciate Mr. Lawson’s reaction that he did not believe this latter choice was an option. It was, though again it might leave the authorities with questions as to what has not been disclosed that might be of some relevance. So, should the CRA, in their request, provide the option to the taxpayer to submit only the portions of the agreement dealing with support? Frankly, I do not believe that is necessary. The taxpayer has the protection of section 241 of the *Act*, and the CRA did indicate in

their request that the taxpayer information is confidential. An agreement is always better construed in context.

[10] There is a third option and that is to simply provide the agreement, which is what Mr. Lawson did. In doing so, along with his explanation that both he and his ex-wife considered the wording to create mutual obligations to pay, he expected a positive response from the CRA. He did not get it. He now believes this is because the CRA's objective is primarily, if not solely, revenue generation.

[11] Mr. Lawson raised a couple of points in this regard to support his view. The first was that the CRA, repeatedly, in their correspondence to him, declared he was not eligible because he was obligated to make support payments. What he claims the CRA did not go on to advise was that he would be eligible if his ex-wife was also obligated to make support payments (in effect reliance on section 118(5.1) of the *Act*). According to Mr. Lawson, this repeated declaration was wrong and misleading. He believed from a review of CRA commentary that both parties could be obliged to make payments, yet there need be only one cheque going one-way for convenience sake.

[12] Mr. Lawson also pointed to an internal CRA "Notepad" that indicates the following headings, "Tax year, Year of separation, Type/Date of document received, Custody arrangements, Child support payable "Yes ___ No ___", Child support start date, Payer, Recipient, Child support payable for …," none of which appear to provide opportunity for the possibility of both spouses being obliged to make payments, thus bringing section 118(5.1) of the *Act* into play. He argues this was misleading and did not allow for him to provide an informed consent to the release of his agreement.

[13] Mr. Lawson concludes that this behaviour is not a full, frank and fair disclosure, in violation of sections 1 and 8 of the *Charter*. With respect, I fail to see how such behaviour engages section 8 or section 1 of the *Charter*. I find the CRA's actions do not constitute a breach of section 8. Section 1 is an overriding provision that is engaged if rights under other provisions of the *Charter* are in jeopardy. Mr. Lawson has not identified what other rights this behaviour has trampled upon. I agree with him there is an expectation our Government will get it right when dealing with an aggrieved taxpayer, but such expectation is not always met. And that does not necessarily result in *Charter* rights being abused. When dealing with a taxpayer, the CRA should be as clear as possible, especially in such emotionally charged areas as rights under separation agreements. What is

unfortunate in this area, as I pointed out in the case of *Ochitwa v R*,[3] is that a flick of the pen can either grant or deny the credits to taxpayers in entirely similar circumstances. One couple can reference the Federal Child Support Guidelines (the "Guidelines") and conclude with one payment of $100 for example only being required – and be denied the credits. Another couple can make no reference to the Guidelines but one is required to pay $400 and the other to pay $300 and conclude with one payment of $100 only being required – and get the credits. This, I respectfully suggest, is problematic, but it is not a *Charter* issue.

[14] In summary on the *Charter* argument, in demanding a document upon which the *Act* itself stipulates credits are based, coincidentally advising the taxpayer such information will be kept confidential, the CRA has recognized the delicate balance between state interest and privacy rights. I see no breach of Mr. Lawson's *Charter* rights. Further, the behaviour of the CRA in not bringing attention to the impact of the section 118(5.1) of the *Act* in its correspondences with Mr. Lawson cannot affect this Court's finding as to the correctness of the assessment, which I now turn to.

[15] Does Mr. Lawson's separation agreement create just the one requirement to make support payments or two requirements to make support payments?

[16] The agreement, in part, reads as follows:

> 4. FINANCIAL MATTERS
>
> (a) Child Support
>
> The husband and wife agree that in the transition period the husband will pay to the wife $600.00 per month for the support of two children. The amount is based on his annual gross income of $117,041.00 for the year 2011, the actual time the children will spend at the husband's place, and the wife's calculation of the monthly expenses for the children. They agree that the above amount will be divided into two payment of $300.00 and will be paid twice a month by cheque payable to the wife, on pay dates (husband and wife are paid from their employment the same day, which is every other Thursday), commencing July 5th, 2012 and ending once the children start spending equal or almost equal amounts of time at their two residence, (i.e., the distribution of time between their two residences being at least 40% at the husband's house and no more than 60% at the wife's house), or at the end of the transition period.

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[3] 2014 TCC 263.

> They further agree that when the children start spending equal or almost equal amounts of time at their two residences (when the $600 per month stops), that the husband, as the part with a greater income, will pay to the wife $100.00 per month. This amount is in accordance with the applicable tables in the Federal Child Support Guidelines, and represents the difference between the child support payments they would otherwise pay to each other for two children. This amount is subject to change, in accordance with the applicable table in the Federal Child Support Guidelines, if either party earnings significantly change in the event of a promotion, demotion, or unemployed. … [emphasis added]
>
> …
>
> (d) Child Tax Benefit and Income Tax Deductions
>
> The husband and wife agree that for income tax claims and deductions, where actual payments of expenses could be claimed by each parent in accordance with the provision of the *Income Tax Act* (i.e. line 305, line 365 and line 214 in the Income Tax Return Form) they will be split in the following way: the wife will claim such expenses in even numbered years, and the husband will claim such expense in odd numbered years for income tax purposes. However, they agree that in the cases where only one party can claim the actual payment of expenses for the children (i.e. Line 367 in the Income Tax Return Form), it will be alternated in the following way: the wife will claim such expenses in even numbered years, and the husband will claim such expense in odd numbered years.
>
> The husband and wife agree that with respect to issuing the day care receipts in accordance with this paragraph they will give the following instructions to day care institutions: that the receipts are issued with both party names, so that each can claim 50%, or as close to 50% as possible, of the total amount for day care expenses as income tax deductions.

[17] Mr. Lawson testified that the $100 payment referred to in the agreement does not, in fact, reflect the Guidelines setoff amount, as his ex-wife had agreed to contribute towards his travel expenses which increased the amount she owed him thereby decreasing the net amount to $100.

[18] Mr. Lawson provided a letter to the CRA from his ex-wife that indicated, in referring to the underlined portion of the agreement above:

> It is my recollection that the intent of this statement in the agreement, meant that when the children started spending equal or almost equal months of time at the two residences, that Chris and I are obligated to pay each other child support, and the $100 represents the difference between the two amounts. However, for the sake of convenience he provides me with a cheque, rather than each of us writing a cheque.

[19] Mr. Lawson testified that the agreement written by himself and his ex-wife was based on their understanding that the CRA allowed just a one-way cheque. They presumed an entitlement to the credits, thus the insertion of subparagraph (d) above in the separation agreement.

[20] In minutes of settlement signed in December 2015, the parties were absolutely clear on the intentions including the following provisions:

> 1. The custody, access, child support, and life insurance provisions contained in the Separation Agreement April 12, 2012 ("the Separation Agreement") shall be superseded by these final Minutes of Settlement. The provisions dealing with Spousal Support and the Division of Property contained in the Separation Agreement shall remain in full force and effect.
>
> …
>
> To satisfy each party's obligation to pay child support in accordance with the Guidelines, the Applicant and the Respondent shall pay to the other as follows:
>
> (a) Commencing September 1, 2015, the Applicant shall pay child support to the Respondent in the amount of $1,810.00 per month and the Respondent shall pay child support to the Applicant in the amount of $1,469.00 per month for the children of the marriage namely, [redacted] born [redacted] and [redacted] born [redacted] which is in accordance with the parties' respective incomes and section 9 of the *Child Support Guidelines*.
>
> (b) The parties shall advise the Canada Revenue Agency that they equally share custody of the children, and the Canada Revenue Agency will set the amount of the Canada Child Tax Benefit to be payable to each as well as the HST credits.
>
> (c) The Respondent shall claim the eligible dependent credit for [redacted] and the Applicant shall claim the eligible dependent credit for [redacted]. The parties shall re-evaluate the eligibility for the dependent credit when [redacted] is no longer eligible to be claimed with a view to equally sharing any credit through the Canada Revenue Agency.

[21] For 2015, Mr. Lawson was allowed the Tax Credits by the CRA.

[22] In these circumstances, can the agreement be interpreted to require payments both ways?

[23] The Respondent argues no, the Federal Court of Appeal made it clear in *Verones v R.*,[4] that a setoff amount based on the Guidelines imposes a one-way liability only, that is, support payments are only required by one party. The Lawson separation agreement does not state that one party is required to pay x and the other is required to pay y and, therefore, there is no mutual requirement to pay.

[24] Mr. Lawson argues:

1) The intent was a mutual obligation.

2) The payment was not just based on the Guidelines.

3) The inclusion of paragraph (d) presumed the credits were available.

4) The agreement states the $100 represents the difference between the child support payments they would otherwise pay to each other.

[25] Added to this, is the parties' adjustment in their minutes of settlement to exactly reflect the wording the CRA notes is deemed to be acceptable. Is this sufficient to distinguish this case from the Federal Court of Appeal decision in *Verones* where the court stated:

> 3. … The appellant pays monthly support for the children in the amount of $1,763. This amount represents a set-off between the total amount the appellant is required to contribute to his children's needs ($2,202), and the amount his former spouse is required to contribute ($439), as set out in the *Federal Child Support Guidelines*, SOR/97-175 (the "Federal Guidelines").
>
> …
>
> 6. The whole discussion about the concept of set-off is a mere distraction from the real issue, i.e. whether or not the appellant is the only parent making a "child support payment" in virtue of "an order of a competent tribunal or an agreement", as defined under the Act.
>
> 7. In *Contino v. Leonelli-Contino*, 2005 SCC 63 (CanLII); [2005] 3 S.C.R. 217 [*Contino*], Bastarache J. clearly articulated that the underlining principle relating to child support in the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (s. 26.1(2)), and the Federal Guidelines (s. 1), consists of the parents' "joint financial obligation to maintain the children of the marriage in accordance with

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4 2013 FCA 69.

> their relative abilities to contribute to the performance of that obligation" (at paragraph 32).
>
> 8. Once each parent's obligation vis-à-vis the children is determined, the higher income parent may be obligated to make child support payments to the lower income parent as part of his or her performance of said obligation. However, in the end, the set-off concept does not translate the parents' respective obligation to contribute to child rearing into a "support payment" as defined in the Act.

[26] The court appears to distinguish between obligations to contribute (not a support amount) and legal requirements to pay (a support amount). The Guidelines establish the obligations to contribute but only one person is required to pay. Unlike the minutes of settlement which explicitly creates two requirements to pay, the separation agreement does not explicitly do so.

[27] But does the testimony of Mr. Lawson and the information received by the CRA from Ms. Lawson that their understanding of their agreement, drawn up by them, was that each had an obligation to pay impact on this interpretation? Are the terms of the contract limited to the four corners of the written agreement? It is well accepted that while parol evidence may rarely be relied upon to alter the terms of a contract, it can be relied upon for purposes of interpreting a contract. Mr. Lawson is in effect suggesting that the wording "represents the difference between child support payments they would otherwise pay to each other" should be interpreted as "representing the difference between child support payments they are required to pay to each other."

[28] I find this interpretation is not an alteration of the contract, but is indeed a clarification by the very two parties to the contract, who wrote the contract. I further accept Mr. Lawson's testimony that a strict adherence to the Guidelines would not simply yield $100 difference, but something further was at play, and that was the consequence of Ms. Lawson's recognition of Mr. Lawson's travel expenses. Finally, I also accept that the wording in the minutes of settlement, found acceptable by the CRA, does reflect the understanding of the Lawsons from the outset. In summary, where a separated couple rely on CRA commentary suggesting there can be one cheque for convenience sake, where the couple draft their agreement with the intention to create mutual requirements to pay, where the net payment is not based solely on the Guidelines but represents an obligation of one side to make payments towards travel expenses of the other and where a subsequent written agreement is accepted by the CRA while not altering the prior agreed-upon arrangement, I am prepared to interpret the separation agreement as

creating two obligations and not simply a means of calculating one support payment. I am prepared, therefore, to allow the Appeal on the basis that there were two requirements to pay pursuant to their written separation agreement, which brings into effect section 118(5.1) of the *Act* and allows Mr. Lawson to claim the Tax Credits.

[29] As indicated earlier, I have previously expressed concerns about these provisions. There is a fine line between one net support payment requirement versus one cheque of convenience representing two support payment requirements. I recognize this case skates close to that line.

[30] The Appeal is allowed and referred back to the Minister for reconsideration and reassessment on the basis that Mr. Lawson is entitled to the Tax Credits for the 2013 taxation year.

Signed at Ottawa, Canada, this 6th day of July 2017.

"Campbell J. Miller"

C. Miller J.

CITATION:	2017 TCC 131
COURT FILE NO.:	2015-3474(IT)I
STYLE OF CAUSE:	CHRIS E. LAWSON AND HER MAJESTY THE QUEEN
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REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	July 6, 2017

APPEARANCES:

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