

Docket: 2007-3200(IT)I

BETWEEN:

HAROLD D. McINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 7, 2007 at Fredericton, New Brunswick

Before: The Honourable Justice T. O'Connor

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Deanna M. Frappier

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is dismissed. There shall be no costs.

Signed at Ottawa, Canada this 14th day of December, 2007.

"T. O'Connor"
O'Connor, J.

Citation: 2007TCC754
Date: 20071214
Docket: 2007-3200(IT)I

BETWEEN:

HAROLD D. McINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

[1] This appeal was heard in Fredericton, New Brunswick on December 7, 2007.

[2] The basic facts are as follows:

1. The Appellant, Harold D. McIntyre, had been making child support payments to his ex spouse, Anola Kathleen McIntyre in respect of their son, Adam.
2. The Appellant took legal proceedings to have the child support payments eliminated on the ground that Adam had become independent in 2004. The Appellant succeeded in his legal proceedings and the Court of Queen's Bench, New Brunswick, by a Judgment dated October 25, 2004, confirmed that the Appellant was no longer required to make the said child support payments.
3. The Appellant incurred legal fees of \$22,600 in respect of those legal proceedings and sought to deduct the said legal fees of \$22,600 in his 2005 taxation year.

4. The Minister of National Revenue (“Minister”) denied the deduction on the ground that the said legal fees were not incurred to earn income from a business or property, the Minister relying on section 3 and paragraph 18(1)(a) of the *Income Tax Act* (“Act”).

[3] The issue is whether the Minister was correct in denying the said deduction.

[4] This issue as to when a person is entitled to deduct legal expenses incurred in respect of support payments to a consort or for the benefit of a child of the marriage has resulted in much litigation, some of which has perhaps not been consistently decided.

[5] The Appellant, who represented himself, submitted considerable material, both legal and factual, demonstrating the apparent lack of clarity in some of the decisions. The difficulty he had was understanding the rationale behind most of the decisions which, in the main, denied the deduction of legal expenses in situations similar to that of the Appellant. The Appellant was obviously in good faith contending that the Minister was incorrect in denying the deduction of the legal expenses.

ANALYSIS

[6] In my opinion, the most succinct and correct summary of the current state of the law was set forth by Chief Justice Bowman of this Court in *Loewig v. The Queen*, 2006 D.T.C. 3500.

[7] In that case, Chief Justice Bowman stated as follows:

1 This appeal is from an income tax assessment for the appellant's 2003 taxation year. Although other issues were raised in the notice of appeal and the reply to the notice of appeal, Mr. Loewig proceeded with only one issue, the deductibility of \$1,391.00 in legal fees incurred in connection with a court proceeding in which he sought to have stopped the continued deduction of support payments by the Family Responsibility Office ("FRO").

2 The facts are quite straightforward. The appellant and his first wife are the parents of one child, Alessandra, born March 7, 1989. They separated and under the separation agreement of January 7, 1992, the spouse had custody of Alessandra. The appellant was obliged to pay to his spouse support payments in respect of Alessandra until one of several events, the relevant one here being if Alessandra ceased to live principally with the spouse. She moved out of the spouse's home in May 2003. ...

[8] The Chief Justice went on to explain that Mr. Loewig had to obtain a Court Order to enable him to stop the said support payments in respect of Alessandra, which he succeeded in doing, incurring certain legal fees in so doing. The Chief Justice stated further:

5 The legal fees for obtaining the court order were \$1,389.00. The appellant claimed them and they were disallowed.

6 The question of the deductibility of legal fees to obtain support payments has a long history. It is comprehensively reviewed by Noël J. of the Federal Court of Appeal in *Nadeau c. R.* (2003), [2004] 1 C.T.C. 293 (F.C.A.). For forty years the judges of this court had held that the legal costs of establishing or maintaining a right to maintenance were deductible on the basis that the right to support income was property and therefore amounts laid out to obtain support income were deductible and were not provided by paragraph 18(1)(a) which prohibits the deduction of amounts not laid out for the purpose of gaining or producing income from a business or property. Justice Archambault refused to follow this long established line of authority. The Federal Court of Appeal held that he was wrong but affirmed his conclusion that the expenses of the payor were not deductible. At paragraph 18, the Federal Court of Appeal said:

18 Conversely, the expenses incurred by the payer of support (either to prevent it from being established or increased, or to decrease or terminate it) cannot be considered to have been incurred for the purpose of earning income, and the courts have never recognized any right to the deduction of these expenditures (see, for example, *Bayer, supra*).

7 The reasoning is that while the recipient of support payments may be incurring the cost of receiving income, the same cannot be said of the payor.

8 Mr. Loewig, in a very thorough and carefully reasoned argument, asserted that he was seeking to establish a pre-existing right and he was seeking to recover amounts that had wrongly been deducted from his salary. He relies upon paragraph 18 of Interpretation Bulletin IT-99R5 (Consolidated) which reads:

18. Legal costs incurred to enforce pre-existing rights to interim or permanent support amounts are deductible. A pre-existing right to a support amount can arise from a written agreement, a court order or legislation such as sections 11 and 15.1 of the *Divorce Act* with respect to child support, or Part III of the *Family Law Act* of Ontario, and enforcing such a right does not create or establish a new right; see *The Queen v. Burgess*, [1981] C.T.C. 258, 81 D.T.C.

5192 (F.C.T.D.). In addition, legal expenses incurred to defend against the reduction of support payments are deductible since the expenses do not create any new rights to income; see *The Attorney General of Canada v. Norma McCready Sembinelli*, [1994] 2 CTC 378, 94 DTC 6636 (FCA.).

9 I have great sympathy for his position which strikes me as consistent with fairness and common sense. Nonetheless, the cost of the recovering amounts paid in excess of his obligations under the separation agreement and which, when recovered by him are not income in his hands (he did not deduct the amounts paid after July 1, 2003) cannot be said to be the cost of gaining or producing income.

10 While interpretation bulletins are not the law, nonetheless the statement in paragraph 21 of IT-99R5 is, in my view, a correct statement of the law and is consistent with the *Nadeau* decision. It reads:

21. From the payer's standpoint, legal costs incurred in negotiating or contesting an application for support payments are not deductible since these costs are personal or living expenses. Similarly, legal costs incurred for the purpose of terminating or reducing the amount of support payments are not deductible since success in such an action does not produce income from a business or property. Legal expenses relating to obtaining custody of or visitation rights to children are also non-deductible.

[9] I agree with the decision of Chief Justice Bowman which follows the decision of the Federal Court of Appeal which is binding on this Court.

[10] Consequently, for the above reasons, the appeal is dismissed but there shall be no costs.

Signed at Ottawa, Canada this 14th day of December, 2007.

"T. O'Connor"

O'Connor, J.

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APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Deanna M. Frappier

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