

Docket: 2019-1826(IT)G

BETWEEN:

STÉPHAN BELVAL,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on September 25, 2023, at Montreal, Quebec

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant: Mathieu R. Poissant

Counsel for the Respondent: Olivier Charbonneau-Saulnier

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**JUDGMENT**

For the reasons attached, the appeal from the assessment made under the *Income Tax Act* for the 2012, 2013 and 2014 taxation years is dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 18th day of October 2023.

“Robert J. Hogan”

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Hogan J.

Citation: 2023 TCC 149  
Date: 20231018  
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### **REASONS FOR JUDGMENT**

Hogan J.

### **INTRODUCTION**

[1] On September 22, 2017, the Court of Québec, Criminal and Penal Division, convicted the appellant of producing cannabis in the residence located at 224 De la Marine Boulevard between January 19 and February 12, 2015, possessing cannabis for the purpose of trafficking on February 12, 2015, and stealing electricity from Hydro-Québec on that date. The appellant has exhausted all his appeals from that judgment, which is therefore final. In accordance with the doctrines of abuse of process and *res judicata*, the conclusions of that judgment may not be questioned by this Court.<sup>1</sup>

[2] That is the background against which the Minister of National Revenue (the Minister) conducted a tax audit of the appellant for 2012, 2013 and 2014. Given the illegal nature of the appellant's business, he did not keep any books or records relating to it. The Minister therefore had no choice but to use the net worth method in his audit, which revealed major inconsistencies between the income reported by the appellant for the years in issue and the appellant's lifestyle in those years.

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<sup>1</sup> *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35–55.

[3] Once that process was completed, the Minister established the appellant's unreported income to be \$65,932 for 2012, \$65,486 for 2013, and \$55,081 for 2014.

[4] In the course of the audit, the Minister also found that the appellant received dismissal benefits from his union in the amounts of \$6,110, \$11,970 and \$12,610 for the years in issue without reporting them to the Minister. The Minister therefore added those amounts to the appellant's income under subparagraph 56(1)(a)(ii) of the *Income Tax Act*<sup>2</sup> (the "ITA") and the definition of "retiring allowance" provided in section 248 of the ITA.

[5] The Minister also imposed penalties under subsection 163(2) of the ITA for the years in issue, but only on the amounts referred to in paragraph 3 above.

[6] The appellant argues that the amounts established by the Minister for the years in issue were incorrect because the Minister failed to consider that the dismissal benefits received from the union were paid in the form of a loan and were therefore not taxable. He submits that the Minister also erred by failing to take into account the \$10,000 that the appellant had in cash before 2012 in calculating his net worth. He also disputes the penalties imposed by the Minister. In his view, the failure to report his income was attributable to the symptoms of depression he experienced as a result of personal problems. Apart from those issues, the appellant is not disputing the amounts that were determined by the Minister in the analysis of his assets and that were attached to the respondent's reply to the notice of appeal.

[7] At the start of the hearing, the parties filed documents jointly, including a request to admit to which the appellant had not replied.<sup>3</sup> According to counsel for the appellant, three issues remain to be determined:

[8] Did the appellant have \$10,000 in cash before 2012, which he used for a portion of the purchase price of an F-150 vehicle?

[9] Were the union benefits the appellant received taxable income under subparagraph 56(1)(a)(ii)?

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<sup>2</sup> R.S.C. 1985, c. 1 (5th Supp.).

<sup>3</sup> The request to admit was served on the appellant by the respondent under section 130 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a. The appellant did not reply to the request within the time limit. Consequently, under section 131 of the Rules, the appellant is deemed to have admitted the truth of the facts in the request. The request contained all the facts considered by the Minister in the calculation of the taxpayer's income using the net worth method. The calculation is attached to the Minister's reply to the notice of appeal.

[10] Can the appellant's symptoms of depression and personal situation be taken into consideration and, if so, are they sufficient in this case to waive the penalties imposed by the Minister?

[11] I will now consider each of the remaining issues.

### **THE \$10,000 IN CASH**

[12] The appellant submits that, in calculating his income by the net worth method, the Minister failed to take into account the \$10,000 in cash that he had before the taxation years in issue. The appellant says that he kept that money at his home and that he had saved it up before 2012 from tips he earned from the various doorman jobs he held while he was also employed at the Casino de Montréal. The appellant says that he ultimately used the money for a down payment to purchase a pickup truck in 2013.

[13] The respondent first submits that the appellant made an admission on this issue in the context of the request to admit and therefore objects to the appellant's testimony on the subject. He claims that the appellant admitted all the amounts determined by the Minister in the calculation of the appellant's net worth, which did not include the \$10,000.

[14] The respondent also told the Court that the appellant's testimony on this point is implausible. I share that opinion.

[15] First, the evidence shows that the appellant was suspended from his employment as a security guard at the Casino de Montréal in about June 2011 and ultimately dismissed from that job on December 6, 2011. That event, combined with his responsibility to support his spouse and his young children, put considerable pressure on the appellant, who found himself in a precarious financial situation. It is hard to believe that the appellant would have chosen not to use his cash savings at that point to cover his family's expenses.

[16] I also accept the respondent's argument that it would be particularly surprising for the appellant to have had that kind of money in his possession on July 25, 2011, when he bought a minivan with enough room for his spouse and children. He financed the purchase of the vehicle with a loan payable over 84 months, without making a cash down payment. Logically, the appellant paid quite a hefty amount of interest on that loan. If he actually did have \$10,000 in cash in his possession, why did he not use it then to make a down payment on the vehicle and thus reduce interest

expenses? Why did he wait until he bought the pickup truck in 2013 to do that? This seems implausible to the Court.

[17] In light of the foregoing, it is my opinion that the appellant was not in possession of \$10,000 in cash before 2012. That amount should therefore not be considered to modify the net worth calculation done by the Minister.

[18] Since I have not accepted the appellant's testimony on this point, I do not need to consider the respondent's objection to the evidence.

### **THE CHARACTERIZATION OF THE UNION BENEFITS**

[19] The appellant admits that he received money from his union during the years in issue. The parties disagree, however, on the characterization of the money he received, and that is the issue the Court will now address.

[20] In the testimony given by the appellant and the CSN representative, certain facts relevant to the characterization of the benefits were established. The funds came from the union's "Professional Defence Fund". The type of benefits the appellant received are reserved for workers presumed to have been subjected to reprisals by the employer because of union involvement and are used to contest such measures in the courts or otherwise. They are essentially intended to help workers support themselves during the difficult time that often follows dismissal.

[21] Every week, the appellant received a cheque from a union representative. Upon receipt, he had to sign a document entitled [TRANSLATION] "Acknowledgement of Debt". The purpose of the document was to have the employee acknowledge that, if the contestation of the reprisals resulted in money being paid to the worker, the benefits received would have to be repaid. The CSN representative explained that the CSN sometimes determines that repayment should be partial. In any case, where the worker is unsuccessful in contesting the measure, there is no requirement to repay the benefits.

[22] In light of these facts, the appellant's position is that the benefits paid by the union are loans. In his opinion, the repayment obligation takes effect immediately once the money is paid, but the CSN does not require repayment until a final decision is made in the worker's case contesting the reprisals. From this perspective, the CSN could theoretically require repayment of the benefit by a worker who receives nothing from the employer from the contestation but, out of solidarity, it does not do so. If the money paid is characterized as a loan, it is not taxable.

[23] With regard to the document signed, the respondent is of the view that the benefits were “retiring allowances” within the meaning of the ITA. The money the worker received should be included in the taxpayer’s income on that basis. The respondent is also of the view that the obligation to repay is conditional and arises only if the worker wins the case and receives money from the employer. Therefore, the contract between the appellant and his union cannot be characterized as a loan. For the following reasons, I find that this position must be accepted.

[24] Subparagraph 56(1)(a)(ii) of the ITA reads as follows:

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

**(a)** any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,

...

**(ii)** a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement, ... [Emphasis added.]

[25] At first glance, it may seem surprising to characterize the benefits received by the appellant as a retiring allowance since he is not retired at all, within the ordinary meaning of the term. However, we must refer to the definition of “retiring allowance” in section 248 of the ITA to understand the full scope of this term:

***retiring allowance*** means an amount (other than a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(a)(iv)) received

**(a)** on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer’s long service, or

**(b)** in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,

by the taxpayer or, after the taxpayer’s death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer; ... [Emphasis added.]

[26] The Act thus characterizes any payment received in respect of a loss of employment as a retiring allowance. In *Overin v. R.*, Chief Justice Rip, as he then was, established the following regarding the scope of the term “retiring allowance”:

15 The appellant submitted that since the payment originated with the Province and consideration did not flow from employment or from the employment contract the receipt is not caught by the definition of “retiring allowance”. I cannot agree. The definition of “retiring allowance” in subsection 248(1) is unequivocal, words should not be imported into the provision when Parliament has not seen fit to use them. The language of the provision is clear and does not impose the requirement that the payment originate with the employer.

16 The use of the words “in respect of” in the definition of retiring allowance has been recognized as conveying a connection between a taxpayer’s loss of employment and the subsequent receipt. In order for the retiring allowance provision to have real meaning, however, some limit must be placed on the ambit or scope of the required connection between a receipt and a loss of employment. In this regard two decisions may be of some assistance. First, in *Merrins*,<sup>4</sup> *supra*, Pinard, J. observed at 6670:

There is no doubt that the amount was received by the plaintiff in respect of the loss of his employment with AECL. Had there been no loss of employment, there would have been no grievance, no settlement, no award and, therefore, no payment of the sum to the plaintiff.

What is implied from Pinard, J.’s analysis is that in determining the limit to be placed on the connection between a payment and a loss of employment, the appropriate test is to ask “but for the loss of employment would the amount have been received?” If the answer to that question is in the negative, then a sufficient nexus exists between the receipt and the loss of employment for the payment to be considered a retiring allowance.<sup>5</sup>

[27] I find that in this case, it is obvious that there is a connection between the money the appellant received from his union and the loss of his employment. What remains to be determined is whether the money received constituted loans or some form of debt or whether it can be more properly characterized as allowances.

[28] Article 2314 of the *Civil Code of Québec* establishes the obligation to repay as an essential condition of a loan contract. Accordingly, if I determine that the obligation to repay does not arise until some sort of decision is made in the

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<sup>4</sup> *Merrins v. Minister of National Revenue*, 94 D.T.C. 6669.

<sup>5</sup> *Overin v. R.*, 98 D.T.C. 1299; 1997 CarswellNat 3542 (WL).

taxpayer's favour that entitles the taxpayer to compensation from the employer, the contract cannot be characterized as a loan.

[29] On reading the CSN document that the appellant signed when he received his cheques, it seems clear to me that the obligation to repay did not arise until compensation for loss of the worker's employment was received. It is my opinion that the CSN could not demand repayment of the benefit unless the worker received compensation. The fact that the CSN does not demand repayment if the challenge to the dismissal is unsuccessful is therefore not merely a matter of solidarity.

[30] The possibility that the appellant might have had to repay the money received from his union is not sufficient for the benefits to lose their characterization as income. In *Lessard v. R.*, this Court summarized the case law on this point as follows:

[17] ... The fact that a received amount must ultimately be reimbursed has no effect on the quality of income, [if] at the time that the person receives the amount in question, the person may dispose of it, use it or enjoy it. An earning constitutes taxable income when the person who receives it immediately derives from it an easily realisable economic value.<sup>6</sup> [Emphasis added.]

[31] Accordingly, I find that the benefits that the appellant received from his union are retiring allowances within the meaning of the ITA and not loans or another form of debt. I therefore find that the Minister was right to include these benefits in the taxpayer's income as retiring allowances within the meaning of the ITA.

[32] Because the appellant never had to repay the benefits received, I do not need to examine the mechanism in the Act allowing deductions in this kind of situation.

### **PENALTIES FOR GROSS NEGLIGENCE**

[33] Chief Justice Bowman, as he then was, held that two conditions must be met for a penalty to be imposed under subsection 163(2) of the ITA: (1) a misstatement or omission in a return and (2) a requisite mental state.<sup>7</sup> The first element is not disputed; it is the second the appellant calls into question.

[34] In his testimony, the appellant spoke about a trying personal situation during the years in issue, including losing his employment, experiencing marital problems, and caring for young children. He claimed he experienced symptoms of depression

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<sup>6</sup> *Lessard v. The Queen*, 2006 TCC 45.

<sup>7</sup> *Cox v. R.*, 2002 D.T.C. 1515; 2002 CarswellNat 5887 (WL).

as a result of these problems. The Court has no difficulty in finding this part of his testimony credible.

[35] As unfortunate as the situation may have been, and regardless of the sympathy the Court may have, these considerations are far from sufficient to waive the penalties imposed under subsection 163(2) of the ITA. The appellant may have been feeling depressed, but he was still sufficiently organized and able to reason logically enough to carry on relatively significant criminal activity.

[36] The appellant failed to report substantial taxable income to the Minister. I am of the opinion that he deliberately chose not to report that income because it was derived from an illegal source. The amounts not reported by the appellant account for a large majority of the income he earned in the years in issue and are significantly higher than the income declared for that period.

[37] In these circumstances, the Court has no choice but to conclude that the penalties imposed by the Minister were justified.

[38] For these reasons, the appeal is dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 18th day of October 2023.

“Robert J. Hogan”

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Hogan J.

CITATION: 2023 TCC 149

COURT FILE NO.: 2019-1826(IT)G

STYLE OF CAUSE: STÉPHAN BELVAL v. HIS MAJESTY  
THE KING

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: September 25, 2023

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: October 18, 2023

APPEARANCES:

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