

Docket: 2007-3176(IT)I

BETWEEN:

DENISE BONIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on January 15, 2008, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances

Counsel for the Appellant: Bertrand Forget

Counsel for the Respondent: Alain Gareau

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**JUDGMENT**

The appeal from the reassessments pursuant to the *Income Tax Act* for the 2003, 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of April 2008.

"Paul Bédard"

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Bédard J.

Translation certified true  
on this 21st day of May 2008.  
Carole Chamberlin, Translator

Citation: 2008TCC164  
Date: 20080414  
Docket: 2007-3176(IT)I

BETWEEN:

DENISE BONIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

**REASONS FOR JUDGMENT**

Bédard J.

[1] The Minister of National Revenue (the "Minister") added the sums of \$3,460, \$3,900 and \$2,775 to the Appellant's income for the 2003, 2004 and 2005 taxation years respectively as support amounts, in accordance with paragraph 56(1)(b) of the *Income Tax Act* (the "Act"). The appeal from this decision alleges that the Appellant and her ex-husband had come to a verbal agreement that, starting in 1998, they would neither report nor deduct the payments of the support amount for tax purposes.

[2] At the hearing, all the assumptions of fact on which the Minister had relied in making the assessments appealed were admitted. They read as follows:

[TRANSLATION]

[...]

(a) the Appellant and Claude Ouellette married on June 21, 1986;

- (b) a child, Marie-Ève, was born to the Appellant and Claude Ouellette on May 4, 1987;
- (c) on March 28, 1991, the Appellant and Claude Ouellette were granted a divorce effective on the thirty-first day following the date of the decree;
- (d) as a result of the decree dated March 28, 1991, by the Honourable Justice Nicole Moreau of the Superior Court of Quebec granting the Appellant and Claude Ouellette a divorce, Madam Justice Moreau ordered Mr. Ouellette, among other things, to pay the Appellant a support amount of \$100 a week for the child, Marie-Ève;
- (e) in a judgment rendered on January 12, 2007, on a motion to have arrears of the support amount for the child, Marie-Ève, cancelled, the Honourable Justice Marie-Christine Laberge of the Superior Court of Quebec accepted, based on the testimony of the parties, that the said parties had expressed their wish in a mutual verbal agreement apparently arrived at in 1998 to have the new tax treatment rules for support payments apply to them;
- (f) in a judgment rendered on January 12, 2007, on a motion to have arrears of the support amount for the child, Marie-Ève, cancelled, the Honourable Justice Marie-Christine Laberge of the Superior Court of Quebec calculated that Mr. Ouellette had paid the Appellant \$3,640, \$3,900 and \$2,775 in support for the child, Marie-Ève, for the 2003, 2004 and 2005 taxation years respectively;
- (g) the Appellant and Claude Ouellette did not elect to have the measures that would render payments of the support amount under the divorce decree dated March 28, 1991, non-reportable and non-deductible for tax purposes apply to them by filing form T1157;
- (h) the Appellant and Claude Ouellette did not submit any written agreement to the Minister to render the support amount non-reportable and non-deductible for tax purposes as of a specific commencement date.

[3] At the hearing, no witnesses were heard and all that was introduced into evidence, as A-1, was a copy of the Quebec Superior Court judgment dated January 12, 2007, and transcript of the judgment delivered from the bench (the "judgment").

#### Appellant's position

[4] The Appellant's position according to counsel's written submissions is as follows:

[TRANSLATION]

1. A first ruling was made in this case when a divorce decree in 1991 ordered Claude Ouellette, the support payer, to pay a support amount of \$100 a week for his child, Marie-Ève;
2. According to the rules at that time, this support amount was subject to taxation and, consequently, could be reported as a deduction by the payer and had to be reported as income by the creditor of the support, the Appellant;
3. Following the coming into force in May 1997 of the new legislation that ended the reporting and deduction of child support amounts for tax purposes, the Appellant and her spouse, Claude Ouellette, came to an agreement that, starting in 1998, the child support amount payable by Claude Ouellette for his child, Marie-Ève, would be reduced to \$50 per week and, as a consequence, the parties would neither report nor deduct the support amount for tax purposes;
4. Obviously, the parties did not report their agreement to the Department of Revenue at that time or obtain an order at the time to attest to the termination of the reporting and deduction of the child support amount for tax purposes;
5. However, at the hearing, the Appellant, through her counsel, filed the transcripts of the judgment rendered on January 12, 2007, by the Honourable Justice Marie-Christine Laberge, JSC, in which, at paragraph 10, the Superior Court officially acknowledged the parties' agreement, effective in 1998, to terminate the reporting and deduction for tax purposes of the said child support amount payable by Claude Ouellette to the Appellant for Marie-Ève;
6. The Honourable Justice Laberge, JSC, also noted at paragraph 11 of that judgment that [TRANSLATION] "the Court also finds that, in regard to child support amounts, the parents may not waive support amounts, as this is a matter of children's rights";
7. Accordingly, the Honourable Justice Laberge deemed that she had full jurisdiction to retroactively set the amount of non-taxable, non-deductible child support that should be payable by the support payer, Claude Ouellette, starting in 1998;
8. Might it be deemed, then, that this order by the Superior Court was binding on the Department of Revenue with respect to the tax treatment agreement;
9. We very respectfully submit that the answer to that question is provided by the following provisions of the Act, that is, the definition of "commencement day at any time of an agreement or order", subparagraph (b)(ii), which reads:

(ii) where the agreement or order is varied after April 1997 to change the child support amounts payable to the recipient, the day on which the first payment of the varied amount is required to be made.

10. The Honourable Justice Laberge's order recognizes that the varied amounts were first paid at the start of 1998 and continued to be paid until the Honourable Justice Laberge cancelled the said child support amount for the child, Marie-Ève, deeming the child to have become self-sufficient;
11. Moreover, under subparagraph 56(3)(b), the Act creates presumptions as to what must be deemed to have been paid and received under an agreement or order as follows:
  - b) the agreement or order is deemed, except for the purpose of this subsection, to have been made on the day on which the first such amount was received, except that, where the agreement or order is made after April 1997 and varies a child support amount payable to the recipient from the last such amount received by the recipient before May 1997, each varied amount of child support received under the agreement or order is deemed to have been receivable under an agreement or order the commencement day of which is the day on which the first payment of the varied amount is required to be made.
12. For all of these reasons, we consider that the appeal of the Appellant must be allowed in accordance with the order of the Honourable Justice Marie-Christine Laberge, JSC, dated January 22 [*sic*], 2007;
13. Otherwise, the Appellant would be forced to return before the Superior Court to have the child support amount reset so that the varied child support amount to which the parties agreed could be excluded from reporting and deduction for tax purposes retroactively to 1998;

[...]

[5] The relevant provisions with respect to support amounts to be included in income for a given year are as follows:

**Section 56**

**Amounts to be included in income for year**

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

## Support

**56(1)(b)** the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

A is the total of all amounts each of which is a support amount received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,

B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and

C is the total of all amounts each of which is a support amount received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;

## Section 56.1

[...]

### Definitions

**56.1(4)** The definitions in this subsection apply in this section and section 56.

#### **"commencement day"**

"commencement day" at any time of an agreement or order means

(a) where the agreement or order is made after April 1997, the day it is made; and

(b) where the agreement or order is made before May 1997, the day, if any, that is after April 1997 and is the earliest of

(i) the day specified as the commencement day of the agreement or order by the payer and recipient under the agreement or order in a joint election filed with the Minister in prescribed form and manner,

(ii) where the agreement or order is varied after April 1997 to change the child support amounts payable to the recipient, the day on which the first payment of the varied amount is required to be made,

(iii) where a subsequent agreement or order is made after April 1997, the effect of which is to change the total child support amounts payable to the recipient by the payer, the commencement day of the first such subsequent agreement or order, and

(iv) the day specified in the agreement or order, or any variation thereof, as the commencement day of the agreement or order for the purposes of this Act.

**"support amount"**

"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.

**"child support amount"**

"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.

(Emphasis added.)

[6] The relevant legislative provisions make it clear that a support amount cannot exist within the meaning of the Act without a written agreement or an order of a competent tribunal. In this case, Mr. Ouellette's support-payment obligation for Marie-Ève was created by a divorce decree in 1991. The subsequent agreement between the parties, if it existed, was a verbal agreement and, as such, could not lead to the application of the taxation treatment for support amounts instituted in 1997 whereby child support amounts paid are neither taxable nor deductible for tax purposes.

[7] In regard to the judgment, since it was made after April 1997, what must be determined is whether it creates a commencement day within the meaning of paragraph 56(1)(b) of the Act, and more specifically under subparagraphs (ii) and

(iii), which in the Court's view are the only ones that could lead to an interpretation problem.

[8] An analysis of subparagraphs 56.1(4)(b)(ii) and (iii) of the Act leads the Court to conclude that the Appellant must establish that the judgment (1) varied the child support amount payable to the recipient, or (2) changed the total child support amounts payable to the recipient. The judgment, it must be remembered, was on a motion to have the child support amount cancelled, not varied. Subparagraphs (ii) and (iii) thus cannot apply, as there is no order in this case that varies or changes the child support amount set under the judgment. Even if the terms cancellation and variation were to be considered synonymous, there would still be no commencement day in the Court's view since, as a result of the judgment, there is no longer a varied amount payable to the recipient. In fact, the use of the expressions "payment of the varied amount [...] to be made" and "total [...] support amounts payable" in the definition of "commencement day" implies that the support requirement must exist beyond the pronouncement of the judgment (in this case, January 12, 2007) in order for a commencement date to be set. In this case, since Mr. Ouellette's obligation to pay a given child support amount has been extinguished, the judgment in the Court's view has no "commencement date" within the meaning of the Act.

[9] The Court would add that it is unable to accept the Appellant's contentions, for the following reasons:

- (1) Contrary to what counsel for the Appellant stated in paragraph 3 of his written submissions, the Court considers that the Appellant failed to prove that there was a support amount of \$50 a week. In fact, the transcript of the judgment is silent in this regard. What the transcript does show is that the matter was disputed and conflicting information was given in the testimony. Finally, during the years concerned, the Appellant received \$3,640, \$3,900 and \$2,775 (for six months) in support amounts, meaning she received more than \$50 a week.
- (2) Contrary to what counsel for the Appellant argued, the Court does not find that the Superior Court set the support amount retroactively to 1998, for the following reasons:
  - (i) the disposition of the judgment is silent in this regard;



- (ii) the amounts the Superior Court deemed payable, after adjustments, ranged from \$3,650 to \$5,179 a year; if the court had indeed set the support amount at \$50 a week on a retroactive basis, the amount payable by Mr. Ouellette would have been \$2,600 a year;
- (iii) if the support amount set had been retroactive to 1998, the Superior Court would not have had to compute the arrears;
- (iv) at paragraph 3 of the judgment transcript, the Superior Court, finding that Mr. Ouellette had defaulted on the payment of the support amount of \$100 a week provided for in the divorce decree of 1991, stated:

[TRANSLATION]

There is no useful purpose to be served in going back and analyzing this period, which is now barred.

- (3) Finally, the Court finds that paragraph 56.1(3)(b) of the Act cannot be given application, in view of the lack in this case of an "order of a competent tribunal made at any time in a taxation year [that] provides that an amount received before that time and in the year or the preceding taxation year is to be considered to have been paid and received thereunder", as required under subsection 56.1(3) of the Act.

[10] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 14th day of April 2008.

"Paul Bédard"

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Bédard J.

CITATION: 2008TCCI164

COURT FILE NO.: 2007-3176(IT)I

STYLE OF CAUSE: DENISE BONIN AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 15, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: April 14, 2008

APPEARANCES:

    Counsel for the Appellant: Bertrand Forget

    Counsel for the Respondent: Alain Gareau

COUNSEL OF RECORD:

    For the Appellant:

        Name: Bertrand Forget

        Firm: Forget, Tremblay  
              St-Eustache, Quebec

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