

Citation: 2007TCC578

Date: 20070928

Docket: 2007-543(IT)I

BETWEEN:

MARK WARBINEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Bowie J.

[1] This case raises once more the question whether an order made by a judge relating to the payment of child support has the effect of creating a commencement day within the definition of that expression found in subsection 56.1(4) of the *Income Tax Act* (the *Act*), with the result that child support payments made after that time are governed for tax purposes by the *Act* as it was amended by S.C. 1997 c. 25. The appellant accepted at the hearing that his purported appeals for 2005 and 2006 were not properly before the Court, and that the only properly constituted appeals were those for the 2003 and 2004 taxation years. The appeals for 2005 and 2006 will therefore be quashed.

[2] There is no dispute about the facts of the case. The Appellant and his spouse separated in 1994, and under a written separation agreement (“the agreement”) executed in May 1994 he was obliged to pay support for their three children in the amount of \$450 monthly for each child, a total of \$1,350 per month. On March 14, 1997, a judge of the Supreme Court of British Columbia granted a divorce and ordered the appellant to pay child support of \$125 per month for each child, a total of \$375 per month (“the March Order”).

[3] The next relevant order was made on July 23, 1997 (“the July Order”). The appellant was temporarily unemployed at that time, and unable to make the

payments required by the agreement as amended by the March Order. The relevant part of the July Order for present purposes reads:

THIS COURT ORDERS that *[the March Order]* shall be varied with respect to *interim child maintenance*, such that the Petitioner shall be excused from his obligation to pay interim child maintenance and *[sic]* for a one year period from the 1st day of May, 1997 until the 1st day of April, 1998 inclusive subject to the Respondent's right to claim maintenance on behalf of the children of the marriage relating to any income the Petitioner receives during that one-year period, BY CONSENT; *(emphasis added)*

[4] The appellant now finds himself reassessed under the *Act*, the Minister of National Revenue having taken the position that the July Order created a “commencement day” on the day it was made — July 23, 1997. The effect of creating a commencement day is to bring the payments of child support made by the appellant after that date under the post-April 1997 statutory regime whereby payments of child support amounts are neither taxable in the hands of the recipient nor deductible by the payor in computing income.

[5] The child support payments made by the appellant are not deductible in computing his income for the year in question (and are not included in the income of his former spouse) if they became payable 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. That is the effect of paragraph 60(b) of the *Act*, as amended. As was pointed out in *Holbrook v. The Queen*,¹ there are two questions to be considered:

Under what agreement or order was the amount payable?

Does that agreement or order have a commencement day?

[6] Initially, the payments of child support were required to be paid by reason of the 1994 agreement. The March Order provided as follows:

THIS COURT FURTHER ORDERS that the child maintenance payable pursuant to the Separation Agreement *shall be varied such that the Petitioner shall pay to the Respondent towards the interim support and maintenance of the children of the marriage the sum of \$125 per month per child commencing the 1st day of*

¹ 2007 FCA 145.

February, 1997 and continuing on that 1st day of each and every month thereafter;
(*emphasis added*)

[7] The July Order varied the March Order in the following way:

THIS COURT ORDERS that [*the March Order*] shall be varied with respect to *interim child maintenance*, such that the Petitioner shall be excused from his obligation to pay interim child maintenance and [*sic*] for a one year period from the 1st day of May, 1997 until the 1st day of April, 1998 inclusive subject to the Respondent's right to claim maintenance on behalf of the children of the marriage relating to any income the Petitioner receives during that one-year period, BY CONSENT;
(*emphasis added*)

The answer to the first question, therefore, is that in 2003 and 2004, the payments were required to be made by the agreement, as varied by the March and July Orders.

[8] Did the 1994 agreement, in 2003 and 2004, have a commencement day?

[9] The definition of "commencement day" is found in subsection 56.1(4) of the *Act*, and by reason of subsection 60.1(4) it applies as well to section 60 of the *Act*.

"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*.

« date d'exécution » Quant à un accord ou une ordonnance:

- a) si l'accord ou l'ordonnance est établi après avril 1997, la date de son établissement;
- b) si l'accord ou l'ordonnance est établi avant mai 1997, le premier en date des jours suivants, postérieur à avril 1997:
 - (i) le jour précisé par le payeur et le bénéficiaire aux termes de l'accord ou de l'ordonnance dans un choix conjoint présenté au ministre sur le formulaire et selon les modalités prescrits,
 - (ii) si l'accord ou l'ordonnance fait l'objet d'une modification après avril 1997 touchant le montant de la pension alimentaire pour enfants qui est payable au bénéficiaire, le jour où le montant modifié est à verser pour la première fois,
 - (iii) si un accord ou une ordonnance subséquent est établi après avril 1997 et a pour effet de changer le total des montants de pension alimentaire pour enfants qui sont payables au bénéficiaire par le payeur, la date d'exécution du premier semblable accord ou de la première semblable ordonnance,
 - (iv) le jour précisé dans l'accord ou l'ordonnance, ou dans toute modification s'y rapportant, pour l'application de la présente loi.

Clearly paragraph (a) has no application as the agreement was made before 1997. Did a subsequent event create a commencement day under subparagraph (b)(i), (ii), (iii) or (iv)?

[10] Subparagraph (b)(i) does not apply, as there has been no joint election filed. Nor can subparagraph (b)(iv) apply, as none of the agreement, the March Order or the July Order has specified a commencement day.

[11] Subparagraph (b)(ii) cannot apply. The March Order varied the agreement to change the support amounts from \$1,350 to \$375, but it did so before, not after,

April 1997. The July Order varied the agreement by varying the March Order, but it did not “change the child support amounts payable to the recipient”. I understood Ms. Sit to submit that the July Order changed the child support amounts payable for one year to \$0, but that is not a change in the amount payable within the meaning of subparagraph (b)(ii). No commencement day could arise from that variation by reason of subparagraph (b)(ii), because there is no date that could satisfy the concluding words “the day on which the first payment of the varied amount is required to be made”. There is no date on which a payment of an amount other than \$375 is required to be made.

[12] Subparagraph (b)(iii) specifies a number of elements that, if present, will create a commencement day.

- (i) There must be an agreement or order that is subsequent in time to that under which the payments are required to be made;
- (ii) That agreement or order must have been made after April 1997;
- (iii) That agreement or order must have the effect of changing the total child support amounts payable to the recipient by the payer.

The July Order was made subsequent to the agreement by which the appellant was obliged to make the payments, and it was made after April 1997. Counsel for the Respondent argues that its effect is to change the “total child support amounts payable”, because it changes the number of payments to be made over the life of the agreement, thereby reducing the “total child support amounts payable” by 12 months x \$375 per month = \$4,500. Since the July Order is the first subsequent agreement or order after April 1997 to vary the “total child support amount payable”, the commencement day of the July Order becomes the commencement day of the agreement. The commencement day of the July Order is the day it was made, July 23 1997, pursuant to paragraph (a) of the definition of “commencement day”. The commencement day of the agreement then, by operation of the definition, is July 23, 1997, as that is “... the commencement day of the first such subsequent agreement or order ...”.

[13] As I understood the appellant, his position is that the expression “total child support amounts payable” (le total des montants de pension alimentaire pour enfants qui sont payables) refers only to the total amounts payable per month. He argued that as the amount of the monthly payments to be made after the one year period ended on April 1, 1998 remained unchanged from that payable before, it

could not be said that the July Order had the effect of changing the total child support amounts payable. In my opinion the **former** interpretation is the correct one.

[14] The purpose of the amendments to the *Act* in 1997, as is well known, is to put in place a system of taxation that will treat child support payments as neither includable in income by the recipient nor deductible by the person paying them. At the same time, the *Federal Child Support Guidelines*² were put in place pursuant to the *Divorce Act*³ to regulate the amount of child support. The *Guidelines*, of course, were established having regard to the new rules of non-taxation and non-deduction of the payments. Obviously it would not have been fair to apply the new rules to payments to be made under pre-May 1997 agreements and orders, because they were the product of negotiations and adjudications that assumed the former taxation regime. Parliament therefore grandfathered those payments under a transitional provision that is embodied in the “commencement day” definition, with the intention that they be treated under the old law for tax purposes until either the parties elect in writing to bring them under the new law, or there is a post-April 1997 agreement or order, including a post-April 1997 variation of the pre-May 1997 agreement or order, the subject matter of which is, or includes, child support payments, at which time the effect of the transitional provisions is to bring all future payments of child support under the new provisions. It is, of course, implicit in the transitional scheme that when a new or an amending agreement or order comes into being the parties in negotiating, or the judge in adjudicating, will have taken into account both the change in the incidence of taxation and the *Guidelines*. Unfortunately, in many cases that does not happen.

[15] For these reasons, the appeals must be dismissed.

Signed at Ottawa, Canada, this **30th day of October, 2007.**

“E.A. Bowie”

² S.O.R./97-175.

³ R.S.C. 1985, c. 3 (2nd Supp.).

Bowie J.

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COURT FILE NO.: 2007-543(IT)I

STYLE OF CAUSE: MARK WARBINEK and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Kelowna, British Columbia

DATE OF HEARING: August 21, 2007

AMENDED REASONS
FOR JUDGMENT BY: The Honourable Justice E.A. Bowie

DATE OF JUDGMENT: September 28, 2007

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Selena Sit

COUNSEL OF RECORD:

For the Appellant:	
Name:	N/A
Firm:	N/A
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada