

**Date: 20080922**

**Docket: A-473-07**

**Citation: 2008 FCA 276**

**CORAM: DÉCARY J.A.  
BLAIS J.A.  
RYER J.A.**

**BETWEEN:**

**MARK WARBINEK**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on September 16, 2008.

Judgment delivered at Ottawa, Ontario, on September 22, 2008.

**REASONS FOR JUDGMENT BY:**

**RYER J.A.**

**CONCURRED IN BY:**

**DÉCARY J.A.  
BLAIS J.A.**

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**BETWEEN:**

**MARK WARBINEK**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**REASONS FOR JUDGMENT**

**RYER J.A.**

[1] This is an appeal from a decision of Bowie J. (the “Tax Court Judge”) (2007 TCC 578) dismissing the appeal of Mr. Mark Warbinek against reassessments of his 2003 and 2004 taxation years, pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “ITA”), that disallowed his claims for deductions of certain child support payments that he made in those taxation years. Unless otherwise indicated, all statutory references in these reasons are to the corresponding provisions of the ITA for the taxation years in issue.

[2] Prior to the enactment of certain amendments to the ITA in 1997, child support payments were generally deductible in computing the income of the payor for the year of payment and includable in computing the income of the payee for the year of receipt. As a consequence of those amendments, such payments are generally no longer deductible expenses to the payor or income inclusions to the payee.

[3] These profound changes are subject to transitional rules that, in certain circumstances, preserve the prior regime with respect to child support payments made after the time that the changes became effective where those payments are made pursuant to child support arrangements that were put in place before that time. The issue in this case is which of the two regimes is applicable to the child support payments that were made by Mr. Warbinek in 2003 and 2004.

## **BACKGROUND**

[4] Mr. Warbinek and his spouse separated in 1994. In that year, they entered into a separation agreement (the “Separation Agreement”) that provided, among other things, for the payment by Mr. Warbinek of child maintenance of \$450 per month for each of their three children.

[5] On March 14, 1997, pursuant to an order of the British Columbia Supreme Court (the “March Order”), Mr. Warbinek and his spouse were divorced and the child maintenance payments provided for in the Separation Agreement were reduced. The portion of the March Order that pertains to child maintenance payments reads 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 \$125.00 per month per child commencing the 1st day of February, 1997 and continuing on the 1st day of each and every month thereafter;

[6] On July 23, 1997, pursuant to an order of the British Columbia Supreme Court (the “July Order”), Mr. Warbinek was excused from his obligation to make child maintenance payments, in the amounts specified in the March Order, for a one year period commencing on May 1, 1997. At the time of the July Order, the appellant was temporarily unemployed, and unable to make the payments required by the Separation Agreement, as amended by the March Order. The relevant portions of the July Order read as follows:

THIS COURT ORDERS that the Order of the Honourable Mr. Justice Preston made the 14th day of March, 1997 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 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;

...

THIS COURT FURTHER ORDERS that clauses 44, 46, 47 and 49 of the Separation Agreement dated the 5th day of May, 1994 shall be suspended for a one year period from the 1st day of May, 1997 until the first day of April, 1998 inclusive subject to the Respondent’s right to rely upon these provisions on behalf of the children of the marriage relating to any income the Petitioner receives during that one year period, BY CONSENT;

[7] Mr. Warbinek made child maintenance payments of \$5,289 in 2003 and \$9,416 in 2004. In his income tax returns for those years, he claimed a deduction of those amounts pursuant to paragraph 60(b). That provision and certain related definitions, which are contained in subsection 56.1(4) and by virtue of subsection 60.1(4) are applicable to section 60, read:

60(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 paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,

B is the total of all amounts each of which is a child support amount that became payable by the taxpayer to 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 paid by the taxpayer to the particular person after 1996 and deductible in computing the taxpayer's income for a preceding taxation year;

60 b) le total des montants représentant chacun le résultat du calcul suivant :

$$A - (B + C)$$

où :

A représente le total des montants représentant chacun une pension alimentaire que le contribuable a payée après 1996 et avant la fin de l'année à une personne donnée dont il vivait séparé au moment du paiement,

B le total des montants représentant chacun une pension alimentaire pour enfants qui est devenue payable par le contribuable à la personne donnée aux termes d'un accord ou d'une ordonnance à la date d'exécution ou postérieurement et avant la fin de l'année relativement à une période ayant commencé à cette date ou postérieurement,

C le total des montants représentant chacun une pension alimentaire que le contribuable a payée à la personne donnée après 1996 et qui est déductible dans le calcul de son revenu pour une année d'imposition antérieure;

#### 56.1(4) ... definitions ...

"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

«pension alimentaire pour enfants »  
Pension alimentaire qui, d'après l'accord ou l'ordonnance aux termes duquel elle est à recevoir, n'est pas destinée uniquement à subvenir aux besoins d'un bénéficiaire qui est soit l'époux ou le

partner of the payer or who is a parent of a child of whom the payer is a legal parent.

conjoint de fait ou l'ex-époux ou l'ancien conjoint de fait du payeur, soit le parent, père ou mère, d'un enfant dont le payeur est légalement l'autre parent.

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

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

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

a) si l'accord ou l'ordonnance est établi après avril 1997, la date de son établissement;

(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

b) si l'accord ou l'ordonnance est établi avant mai 1997, le premier en date des jours suivants, postérieur à avril 1997:

(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,

(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) 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,

(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) 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

(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) 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.

(iv) le jour précisé dans l'accord ou l'ordonnance, ou dans toute modification s'y rapportant, pour l'application de la présente loi.

"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.

«pension alimentaire » Montant payable ou à recevoir à titre d'allocation périodique pour subvenir aux besoins du bénéficiaire, d'enfants de celui-ci ou à la fois du bénéficiaire et de ces enfants, si le bénéficiaire peut utiliser le montant à sa discrétion et, selon le cas :

a) le bénéficiaire est l'époux ou le conjoint de fait ou l'ex-époux ou l'ancien conjoint de fait du payeur et vit séparé de celui-ci pour cause d'échec de leur mariage ou union de fait et le montant est à recevoir aux termes de l'ordonnance d'un tribunal compétent ou d'un accord écrit;

b) le payeur est légalement le père ou la mère d'un enfant du bénéficiaire et le montant est à recevoir aux termes de l'ordonnance d'un tribunal compétent rendue en conformité avec les lois d'une province.

[8] The Minister of National Revenue (the "Minister") agreed that the amounts paid by Mr. Warbinek in 2003 and 2004 were support amounts, as defined in subsection 56.1(4), for the purposes of variable A in the formula in paragraph 60(b). However, the Minister determined that those amounts also constituted child support amounts, for the purposes of variable B in the formula, which effectively reduced the amount determined under the formula, and therefore the amount deductible to Mr. Warbinek in 2003 and 2004, to nil.

[9] The basis for that determination by the Minister was that the July Order had the effect of establishing a commencement day of July 23, 1997 for the agreement or order under which child

support amounts were payable by Mr. Warbinek in 2003 and 2004 and the payments in question were made by him after that commencement day. Accordingly, the Minister reassessed Mr. Warbinek, denying the support payment deductions that he claimed in his 2003 and 2004 income tax returns.

[10] Mr. Warbinek objected to the reassessments, the Minister confirmed them and Mr. Warbinek appealed to the Tax Court of Canada.

#### **THE DECISION OF THE TAX COURT OF CANADA**

[11] The Tax Court Judge stated that the child support payments made by Mr. Warbinek are not deductible for the taxation year in question if they became payable under an agreement or order on or after its commencement day and before the end of the particular year. Citing the decision of this Court in *Holbrook v. R.*, 2007 FCA 145, 361 N.R. 258, he then stated that it was necessary to identify the particular agreement or order under which the amounts were payable and to determine whether the identified agreement or order had a commencement day.

[12] The Tax Court Judge found that the payments made by Mr. Warbinek in 2003 and 2004 were payable under the Separation Agreement, as varied by the March Order and the July Order.

[13] Next, the Tax Court Judge considered the question of whether the Separation Agreement has a commencement day. While not specifically stated in the reasons of the Tax Court Judge, it is clear that he understood that if the Separation Agreement did not have a commencement day, the amount



determined under variable B of the formula in paragraph 60(b) in respect of the taxation years in question, would be nil, and as a result, Mr. Warbinek would be entitled to the deductions for the child support amounts that he paid in those taxation years.

[14] Because the Separation Agreement was made in 1994, the Tax Court Judge held that paragraph (a) of the definition of commencement day has no application. He also held that subparagraphs (b)(i) and (iv) were factually inapplicable.

[15] The Tax Court Judge found that sub-paragraph (b)(ii) could not apply because, although the July Order varied the Separation Agreement by varying the March Order (which also varied the Separation Agreement), the July Order did not change the child support amounts payable by Mr. Warbinek. In particular, the Tax Court Judge rejected the argument of the Crown that the reduction of the child support amounts to zero for a year was sufficient to result in the application of subparagraph (b)(ii). At paragraph 11, he stated:

[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.

[16] The Tax Court Judge held that the July Order established a commencement day of July 23, 1997 (the date of that order) for the Separation Agreement by virtue of sub-paragraph (b)(iii). He accepted the Crown's argument that by excusing Mr. Warbinek from his obligation to make child support amount payments for twelve months, the effect of the July Order was to reduce and thereby change the total child support amounts payable by Mr. Warbinek over the life of the Separation Agreement. Having so held, it followed that the payments of child support amounts made by Mr. Warbinek in 2003 and 2004 were made after that commencement day. As a result, the amounts of those payments became amounts determined under variable B of the formula in paragraph 60(b) that effectively reduced the amount deductible to Mr. Warbinek in those years to nil. Accordingly, the Tax Court dismissed Mr. Warbinek's appeal.

## **ISSUE**

[17] The issue in this appeal is whether the agreement or order pursuant to which Mr. Warbinek was required to make payments of child support amounts in 2003 and 2004 has a commencement day.

## **ANALYSIS**

### **Introduction**

[18] The amount of the child support payments made by Mr. Warbinek in 2003 and 2004 that is deductible to him in computing his income for those years is the amount determined by the application of the formula in paragraph 60(b), namely:

$$A - (B + C)$$

In the circumstances of this appeal, variable C of the formula is not relevant, so the amount of the deduction is the difference, if any, between variable A and variable B of the formula which read as follows:

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

A représente le total des montants représentant chacun une pension alimentaire que le contribuable a payée après 1996 et avant la fin de l'année à une personne donnée dont il vivait séparé au moment du paiement,

B is the total of all amounts each of which is a child support amount that became payable by the taxpayer to 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,

B le total des montants représentant chacun une pension alimentaire pour enfants qui est devenue payable par le contribuable à la personne donnée aux termes d'un accord ou d'une ordonnance à la date d'exécution ou postérieurement et avant la fin de l'année relativement à une période ayant commencé à cette date ou postérieurement,

[19] It is uncontested that the amounts paid by Mr. Warbinek to his former spouse in 2003 and 2004 constitute “support amounts paid”, for the purposes of variable A of the formula, and “child support amounts that become payable ... under an agreement or order” for the purposes of variable B of the formula. However, the parties disagree as to whether, for the purposes of variable B, the agreement or order has a commencement day. If it does, the parties agree that the amount determined under variable B will be an amount equal to the amount determined under variable A, and therefore Mr. Warbinek will not be able to deduct any child support amounts paid by him in 2003 and 2004. If there is no commencement day, then the amount determined under variable B

will be nil and Mr. Warbinek will be entitled to the full amount of the child support deductions he claimed for those years.

[20] As instructed by this Court in *Holbrook*, resolution of the issue is to be approached by identifying the agreement or order that contains the obligation to make the payments in question and then determining whether the identified agreement or order has a commencement day.

**Under what Agreement or Order was the Amount Payable?**

[21] The Tax Court Judge found that the 2003 and 2004 payments of child support amounts were made by Mr. Warbinek pursuant to an obligation contained in the Separation Agreement as varied or modified by the March Order and the July Order. This finding is not challenged by either of the parties and I accept it as the answer to this question.

[22] The import of this conclusion is that the Separation Agreement cannot be said to have been terminated or superseded by either of the orders and, in particular, the July Order. The significance of this will be apparent in the consideration of whether the Separation Agreement has a commencement day.

**Does the Separation Agreement Have a Commencement Day?**

[23] The Separation Agreement will have a commencement day if the conditions contained in either paragraph (a) or (b) of the definition of that term are met.

*Paragraph (a)*

[24] Paragraph (a) of the definition of commencement day reads as follows:

(a) where the agreement or order is made after April 1997, the day it is made;	a) si l'accord ou l'ordonnance est établi après avril 1997, la date de son établissement;
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[25] The Separation Agreement cannot be said to have a commencement day under this provision because it was entered into in 1994, a date that is prior to April of 1997. The fact that the Separation Agreement has been varied by the July Order, which was made after April of 1997, does not change the date upon which the Separation Agreement was made, for the purposes of paragraph (a) of the definition of commencement day.

*Sub-paragraphs (b)(i) and (iv)*

[26] It is uncontested that the factual requirements of these provisions are not met in the circumstances of this appeal. As such, neither of them requires consideration.

*Sub-paragraph (b)(ii)*

[27] Sub-paragraph (b)(ii) reads as follows:

(b) (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,	b) (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,
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[28] The Tax Court Judge held that while the July Order varied the Separation Agreement, the variance did not result in any change to the amount that was required to be paid by Mr. Warbinek. As such, the Tax Court Judge held that this provision did not establish a commencement day for the Separation Agreement.

[29] The Crown contends that the Tax Court Judge erred in this finding, arguing that the July Order should be construed as reducing the amount payable by Mr. Warbinek to nil on May 1, 1997, and increasing the amount payable to him from nil to \$375 per month on April 1, 1998.

[30] In my view, this construction of the July Order cannot be accepted as it is inconsistent with the language of that order. While it is possible to conceive of the July Order as having the effect urged by the Crown, the language of the order, which stipulates that Mr. Warbinek is to be “excused from his obligation to pay interim child maintenance” for one year indicates, in my view, that the existing payment obligation of \$375 per month was simply suspended for a one year period, at the end of which that same child support amount was once again payable. On that basis, the child support amount that Mr. Warbinek was required to pay on April 1, 1998 – \$375 per month – was the same amount that he was required to pay from and after the effective date of the March Order and was not a “varied amount” as contemplated by sub-paragraph (b)(ii).

[31] This conclusion that the Crown’s contention must be rejected is bolstered by the fact that the July Order did not eliminate Mr. Warbinek’s obligation to pay child maintenance during the period that commenced on May 1, 1997. Under the July Order, Mr. Warbinek’s payment obligation

continued to exist even though it could only be enforced against him to the extent of any income that he received during that period.

[32] Accordingly, I am of the view that the Tax Court Judge was correct in concluding that sub-paragraph (b)(ii) of the definition of commencement day did not result in the Separation Agreement having a commencement day.

*Sub-paragraph (b)(iii)*

[33] Sub-paragraph (b)(iii) of the definition of commencement day reads as follows:

(b) (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,

*b) (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,*

[34] The Tax Court Judge determined that the July Order established a commencement day for the Separation Agreement under sub-paragraph (b)(iii) because that order had the effect of changing the total child support amounts payable by Mr. Warbinek over the life of the Separation Agreement. In my view, this determination is based upon an erroneous interpretation of sub-paragraph (b)(iii) and cannot be sustained.

[35] While the provisions of paragraph (b) of the definition of commencement day are not as precise as one might like, they have been the subject of judicial comment. In *Holbrook*, Sharlow J.A. provided, at paragraph 8, the following guidance with respect to the interpretation of subparagraphs (b)(ii) and (iii):

[8] Generally, a child support amount payable under an agreement or order made before May 1997 is subject to the old regime. However, there are four exceptions to that general rule. The four exceptions operate by attributing a post-April 1997 commencement day to a pre-May 1997 agreement or order.

- 1) The first exception applies if the parties to an agreement or order file a joint election specifying a post-April 1997 commencement day for a pre-May 1997 agreement or order (subparagraph (b)(i) of the definition of “commencement day”). Because of this provision, it is always open to parties to agree to be subject to the new regime.
- 2) The second exception applies if a pre-May 1997 agreement or order is varied after April 1997 to change the child support amounts payable. In that case, the commencement day of the pre-May 1997 agreement as varied is the day on which the first varied amount is payable (subparagraph (b)(ii) of the definition of “commencement day”).
- 3) The third exception applies if there is a pre-May 1997 agreement or order under which child support amounts are payable, and another agreement or order is made after April 1997, the effect of which is to change the total child support amounts payable (subparagraph (b)(iii) of the definition of “commencement day”). This provision may cover a number of different situations. Generally, it is intended to ensure that where there is an increase in the total child support amounts payable, the new regime cannot be avoided by having the original amount governed by pre-May 1997 agreement or order and the increase governed by a post-April 1997 agreement or order.
- 4) The fourth exception applies if a pre-May 1997 agreement or order (or a variation of a pre-May 1997 agreement or order), specifies a particular day after April 1997 as the commencement day of the agreement or order (subparagraph (b)(iv) of the definition of “commencement day”). In that case, the commencement day is the specified day. Whether that condition is met in a particular case turns on the interpretation of the agreement or order, which may in certain cases require consideration of extraneous evidence. This condition may be met by any variation of an old agreement or order, whether or not there is a change to total child support amounts payable, as long as a commencement day is specified in the agreement or order in which the variation is made.



[36] These statements demonstrate a clear distinction between the scope of sub-paragraphs (b)(ii) and (iii). The former applies to or in respect of changes to the pre-May 1997 agreement or order, which remains in effect as modified by such changes. The later contemplates the making of a post-April 1997 agreement or order, which is separate and distinct from the pre-May 1997 agreement or order but co-exists with such pre-May 1997 agreement or order, and which provides for the payment of an additional child support amount. In this context, the word “total” as used in sub-paragraph (b)(iii), may generally be taken to mean the aggregate of the child support amounts payable under the pre-May 1997 agreement or order and the post-April 1997 agreement or order.

[37] Examples of situations that are consistent with my interpretation of sub-paragraph (b)(iii) of the definition of commencement day may be found in paragraph 19 of Interpretation Bulletin IT-530R, which reads as follows:

19. If a payer and recipient are parties to a court order or written agreement made before May 1997, and they enter into a subsequent order or agreement after April 1997 with the result that the total child support payable by the payer to the recipient is changed, the commencement day of the original order or agreement is the same as the commencement day of the first subsequent order or agreement. The result is that child support amounts that become payable on or after the commencement day (under both the original and subsequent orders or agreements) are not deductible (see Example 1 below). This applies even if the child support payable under the subsequent order or agreement is for a different child or children (see Example 2 below).

*Example 1*

Svend and Lyne separated in July 1994. Under a written agreement made on August 1, 1994, Svend is required to pay Lyne \$200 a month for the maintenance of their child. Under a subsequent written agreement made on August 1, 1997, Svend agrees to pay Lyne an additional \$150 a month in child support. The effect is that the total child support has been changed from \$200 to \$350 a month. The child support amounts (i.e., the monthly total of \$350) payable under both agreements on or after their commencement days, which in this case is August 1, 1997, are not deductible.

*Example 2*

When Ron and Debbie signed their separation agreement on September 15, 1996, Ron had custody of their son and Debbie had custody of their daughter. The agreement requires Ron to pay Debbie \$300 a month for the maintenance of their daughter. In 1998, the son moves in with his mother. Under a separate written agreement made on August 15, 1998, Ron agrees to pay Debbie \$200 a month for the maintenance of their son starting immediately. The commencement day of the two agreements is August 15, 1998. The child support amounts payable for both the son and the daughter on or after August 15, 1998, are not deductible.

[38] Consistent with the interpretation of sub-paragraph (b)(iii) of the definition of commencement day in *Holbrook*, I am of the view the July Order could only establish a commencement day for the Separation Agreement under that provision if the July Order could be said to be a separate order that co-exists with the Separation Agreement and only then if that order could be said to provide for the payment of an additional child support amount that had the effect of changing the total child support amounts payable by Mr. Warbinek. In the present circumstances, the scope and operation of the July Order was to vary the Separation Agreement and nothing more. This is acknowledged by the Tax Court Judge when he accepted the argument that the July Order changed the number of payments to be made “over the life of” the Separation Agreement. Accordingly, because variations of existing agreements and orders are covered by sub-paragraph (b)(ii) and the July Order provides a variation of the Separation Agreement, rather than a separate and distinct payment obligation in an order that co-exists with the payment obligation in the Separation Agreement, it follows, in my view, that the July Order cannot establish a commencement day for the Separation Agreement under sub-paragraph (b)(iii). Accordingly, I conclude, with respect, that the Tax Court Judge erred when he found that, by virtue of sub-paragraph (b)(iii) of the

definition of commencement day, the July Order resulted in the Separation Agreement having a commencement day of July 23, 1997.

**DISPOSITION**

[39] For the foregoing reasons, I would allow the appeal, set aside the decision of the Tax Court Judge and replace it with a judgment allowing the appeal, and refer the matter back to the Minister for reassessment in accordance with these reasons. The appellant, who is self-represented, should be entitled to his disbursements in this Court and in the Tax Court of Canada.

“C. Michael Ryer”

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J.A.

“I agree.  
Robert Décary J.A.”

“I agree.  
Pierre Blais J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-473-07

**(APPEAL FROM A JUDGMENT OF BOWIE J. OF THE TAX COURT OF CANADA  
(2007 TCC 578), DATED SEPTEMBER 28, 2007, NO. 2007-543(IT)I)**

**STYLE OF CAUSE:** Mark Warbinek Appellant  
and  
Her Majesty the Queen Respondent

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** September 16, 2008

**REASONS FOR JUDGMENT BY:** RYER J.A.

**CONCURRED IN BY:** DÉCARY J.A.  
BLAIS J.A.

**DATED:** September 22, 2008

**APPEARANCES:**

Mark Warbinek SELF-REPRESENTED APPELLANT  
Selena Sit FOR THE RESPONDENT  
Lisa MacDonnell

**SOLICITORS OF RECORD:**

N/A SELF-REPRESENTED APPELLANT  
John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada