

Docket: 2007-2654(IT)I

BETWEEN:

NEVILLE GALE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on common evidence with the appeal of Victoria (Weber) Deveau  
(2007-2779(IT)I) on April 9, 2008 at Toronto, Ontario

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: Gregory P. Jones

Counsel for the Respondent: Brandon Siegal

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### **JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 2004 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 24th day of April 2008.

“L.M. Little”

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Little J.

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Appeal heard on common evidence with the appeal of Neville Gale  
(2007-2654(IT)I) on April 9, 2008 at Toronto, Ontario

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For the Appellant: The Appellant herself

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### **JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 2004 taxation year is allowed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 24th day of April 2008.

“L.M. Little”

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Little J.

Citation: 2008TCC226  
Date: 20080424  
Docket: 2007-2654(IT)I

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Docket: 2007-2779(IT)I

BETWEEN:

VICTORIA (WEBER) DEVEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Little J.**

##### A. The Facts

[1] The parties agreed that due to the similar facts involved, the appeals should be heard together on common evidence.

[2] The Appellant, Neville Gale (hereinafter “Gale”), had a long-term common-law relationship with the Appellant, Victoria (Weber) Deveau (hereinafter “Weber”).

[3] Two children were born:

- Daughter born March 29, 1985
- Daughter born December 30, 1986.

[4] Gale and Weber discontinued their common-law relationship in July 1993.

[5] Pursuant to a Court Order dated May 16, 1996, Justice Whalen of the Ontario Court (General Division) ordered that Gale pay Weber child support of \$400.00 per month per child commencing May 1, 1996.

[6] Pursuant to a Court Order dated March 27, 1997 Justice Caputo of the Ontario Court (General Division) ordered as follows:

7. THIS COURT ORDERS that paragraph 7 of the existing Order of Justice W.L. Whalen shall be varied to read as follows:

7. THIS COURT ORDERS that the Appellant Neville Gale shall pay child support in the amount of \$200 per month per child commencing May 1, 1997.

(Note: The ORDER issued by the Court on March 27, 1997 refers to the effective date in type as May 1, 1996. However, the evidence before the Tax Court indicated that the Order of Justice Caputo was apparently altered by an official of the Ontario Court (General Division) and the effective date was shown in hand writing as May 1, 1997. It was suggested by the Appellants in the Tax Court that the different date shown on the Order was a “typo”. Gale and Weber both agree that the effective date of the Order of Justice Caputo was May 1, 1997).

[7] When the Appellant Gale filed his income tax return for the 2004 taxation year he claimed that he had paid Weber child support payments in the amount of \$6,977.

[8] When the Appellant Weber filed her income tax return for the 2004 taxation year, she did not report any of the child support payments that Gale had made.

[9] By Notice of Reassessment dated October 30, 2006 the Minister of National Revenue (the “Minister”) reassessed the Appellant Gale and disallowed the child support payments that the Appellant Gale had claimed for the 2004 taxation year.

[10] By Notice of Reassessment dated March 16, 2006 the Minister reassessed the Appellant Weber for the 2004 taxation year to include the child support payments in the amount of \$6,977.00 in the income of the Appellant Weber.

B. Tax Issue For the Appellant Gale

[11] Is the Appellant Gale allowed to deduct child support payments of \$6,977.00 in determining his income for the 2004 taxation year?

C. Tax Issue for the Appellant Weber

[12] Is the Appellant Weber required to include the amount of \$6,977.00 of child support payments in determining her income for the 2004 taxation year?

D. Child Support Payments

[13] Subsection 56.1(4) of the *Income Tax Act* (the “Act”) defines “child support amount”, “commencement day” and “support amount”. Subsection 56.1(4) reads as follows:

“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 former spouse of the payer or who is a parent of a child of whom the payer is a natural parent.

“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” 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 former spouse of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage and the amount receivable under an order of a competent tribunal or under a written agreement; or
- (b) the payer is a natural 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.

[14] “Support” in paragraph 60(b) of the *Act* reads as follows:

(b) **Support** – 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;

[15] Under the former rules in the *Act* (pre-May 1997) a spouse making child support payments for the support of children could deduct those payments and the recipient was required to include the payments as income. Following the decision of the Supreme Court of Canada in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, the legislation was amended. So long as a pre-May 1997 agreement remained unchanged the deduction/inclusion system under the former legislation applied.

[16] If a new agreement was entered into or an old agreement was changed in a particular way, the deduction/inclusion regime ceased and only payments made up to the "commencement day" as defined, were deductible by the payer and included in the income of the payee.

[17] The legislation dealing with child support payments made under Court Orders or agreements made after May 1, 1997 is referred to as the new regime. The legislation dealing with child support payments made under Court Orders or agreements before May 1, 1997 is referred to as the old regime.

[18] In considering the questions before the Court I have referred to a number of Court decisions dealing with the amended legislation. I refer in particular to the decision of Madame Justice Sharlow in *Holbrook v. Canada*, [2007] F.C.A. 145.

[19] In *Holbrook* the facts were that the Appellant and her husband separated after 20 years of marriage. By virtue of an Interim Order made in 1994 the husband was required to pay the Appellant child support in the amount of \$1,000.00 per month.

[20] On April 28, 1998 the Appellant and her husband entered into a separation agreement which required the husband to pay the Appellant child support payments in the amount of \$1,000.00 per month with the first payment to be made on May 1, 1998.

[21] On May 28, 1999 the Appellant and her husband obtained a divorce judgment which required the husband to pay the Appellant child support of \$1,000.00 per month with the first payment to be made on May 1, 1998.

[22] When the Appellant filed her income tax return she did not report any of the child support payments in her income.

[23] The Minister reassessed the Appellant to include the child support payments in her income.

[24] The Appellant appealed to the Tax Court of Canada and her appeal was dismissed.

[25] The Appellant appealed to the Federal Court of Appeal and her appeal was allowed.

[26] Madam Justice Sharlow of the Federal Court of Appeal allowed the appeal. Sharlow, J. said that the commencement day contained in the separation agreement was April 28, 1998 and therefore all child support payments payable on or after May 1, 1998 were subject to the new regime and were not taxable to the Appellant.

[27] In reaching her conclusion, Madam Justice Sharlow said at paragraphs [7], [8] and [9]:

[7] Child support amounts are subject to the new regime only if they are payable under an agreement or order with a commencement day of May 1, 1997 or later. The commencement day of an agreement or order made after April 1997 is determined by paragraph (a) of the definition of “commencement day”. Paragraph (a) says that the commencement day of an agreement or order made after April 1997 is the day it is made. It follows that a child support amount payable under an agreement or order made after April 1997 is subject to the new regime.

[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.

[9] The four exceptions in paragraph (b) do not expressly deal with the situation where there is a pre-May 1997 agreement or order and a post-April 1997 agreement or order, both requiring the payment of the same amount of child support, where the later agreement or order does not expressly stipulate a commencement day and the parties do not make a joint election. In that situation, the later agreement or order may be construed as merely recognizing the continuation of the obligation set out in the earlier agreement or order, in which case the child support amounts would be payable under the earlier agreement or order and the old regime would apply even after the later agreement or order is made because the later agreement or order would not be relevant. Alternatively, the later agreement or order may be construed as terminating the child support obligation in the previous agreement or order, and replacing it with a new child support obligation, in which case the child support amounts paid after the later agreement or order is made would be payable under that later agreement or order, which would have a post-April 1997 commencement day pursuant to paragraph (a) of the definition of “commencement day”. Therefore, the new regime would apply after the later agreement or order is made. ...

[28] In my opinion Justice Sharlow’s reasoning in *Holbrook* would apply in this situation.

[29] It will be noted that the definition of “commencement day” quoted above is very broad and it would apply to “new agreements” or variations of agreements

where the child support amount payable to the recipient is changed. In this situation the Order of Justice Caputo reduced the child support payments to be made by the Appellant Gale from \$400.00 per month per child to \$200.00 per month per child commencing on May 1, 1997.

[30] I have concluded that the Appellant Gale comes within the new regime in section 56.1 of the *Act*. He is therefore not allowed to deduct the child support payments that he made in computing his income for the 2004 taxation year.

[31] The appeal filed by the Appellant Gale is dismissed without costs.

[32] I have also concluded that the Appellant Weber is impacted by the new legislation since the Court Order of Justice Whalen was varied by the Court Order of Justice Caputo. The commencement day of the Caputo Order is May 1, 1997. It therefore follows that the Appellant Weber comes within the new regime and she is not required to include the child support payments in her income.

[33] The appeal filed by the Appellant Weber is allowed without costs.

[34] Before concluding my comments I wish to state that the Appellant Gale is to be commended for continuing to assist his daughters financially in spite of the fact that he stated in Court that he has lost all contact with his daughters.

Signed at Vancouver, British Columbia, this 24th day of April 2008.

“L.M. Little”

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Little J.

CITATION: 2008TCC226

COURT FILE NO.: 2007-2654(IT)I

STYLE OF CAUSE: Neville Gale and  
Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 9, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: April 24, 2008

APPEARANCES:

    Counsel for the Appellant: Gregory P. Jones

    Counsel for the Respondent: Brandon Siegal

COUNSEL OF RECORD:

    For the Appellant:

        Name: Gregory P. Jones

        Firm: Gregory P. Jones  
Toronto, Ontario

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

CITATION: 2008TCC226

COURT FILE NO.: 2007-2779(IT)I

STYLE OF CAUSE: Victoria (Weber) Deveau and  
Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 9, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: April 24, 2008

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Brandon Siegal

COUNSEL OF RECORD:

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