Docket: 2011-465(IT)I

BETWEEN:

HARVEY CHADWICK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 13, 2012, at Regina, Saskatchewan

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Ian McKay
Counsel for the Respondent:	Bryn Frape
	Katie Lalani (Student-At-Law)

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2008 and 2009 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 31st day of August 2012.

"B.Paris"

Paris J.

Citation: 2012TCC311
Date: 20120831
Docket: 2011-465(IT)I

BETWEEN:

HARVEY CHADWICK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] These are appeals from reassessments of the Appellant's 2008 and 2009 taxation year by which the Minister of National Revenue (the "Minister") disallowed the deduction of child support payments of $5,400 per year.

[2] A succinct overview of the treatment of child support payments under the *Income Tax Act* ("*ITA*") is found in the decision of the Federal Court of Appeal in *Warbinek v. Canada*, 2008 FCA 276:

> **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. . .

[3] The issue in the case before me is which of the two regimes is applicable to the child support payments made by the Appellant to his ex-spouse in 2008 and 2009.

Facts

[4] The Appellant and his ex-spouse separated in June 1996. They entered into a separation agreement (the "Agreement") on August 27, 1996. That Agreement required the Appellant to pay his ex-spouse child support of $450 per month for their two children commencing September 1, 1996. The relevant portions of the Agreement read as follows:

> CHILD MAINTENANCE
>
> 1. The Husband shall pay to the Wife for the support, maintenance and education of the children, the sum of $**450.00** dollars per month subject to the following:
>
> a. The payments shall commence on the 1st day of the month following the date of the signing of this Contract and shall continue until the child reaches the age of sixteen (16) years or over, and under the Wife's care but unable by reason of illness, disability, full-time attendance at an educational institution or other cause to withdraw herself from her charge or provide herself with necessaries of life or sooner dies or marries.
>
> b. The payments shall be made in advance on the 1st day of each and every month hereafter.
>
> c. The Parties acknowledge that the aforesaid payment of maintenance is contingent on the Wife retaining full time employment, as she currently has. In the event of the loss of employment by the Wife, through illness or disability, the Parties agree to review the amount of maintenance required to meet the children's month to month needs.
>
> d. The Parties agree that the Husband shall provide to the Wife 12 post dated cheques on or before September 1, 1996, and on or before September 1st of each and every year thereafter.

[5] The Agreement also provided that:

> . . . all the terms, conditions and provisos of this Contract shall survive and continue in full force and effect and this Contract shall be presented to the Queen's Bench

> Court of Moose Jaw as a full and final settlement satisfaction and discharge of all claims to maintenance, alimony or financial support and the division of the matrimonial property present and future of the Parties hereto.

[6] Subsequent to the Agreement, the Appellant and his ex-spouse filed for divorce and a Divorce Judgment was issued by the Saskatchewan Court of Queen's Bench on June 16, 1998. The portions of the Divorce Judgment dealing with child support read as follows:

> . . .
>
> (c) HARVEY DAVID CHADWICK shall pay to DIANE LOUISE CHADWICK, for the support of the said children the sum of $450.00 per month, the first of such payments to be paid on the first day of July, A.D. 1998, and a like amount to continue to be paid on the first day of each and every month thereafter, for so long as the children remain children within the meaning of *The Divorce Act*:
>
> (d) The above Child Maintenance is based on the Respondent having gross annual income of **$31,403.00** in 1994, **$33,062.00** in 1995, **$26,715.61** in 1996, and **$26,070.69** in 1997. The basic Child Maintenance payable pursuant to the Federal Child Support Guidelines for Saskatchewan is $374.00, and the Parties are consenting to a monthly Child Maintenance payment in the amount of $450.00 as this figure represents reasonable support for the Children as contemplated by Section 15.1(7) of The Divorce Act, and this was the figure agreed to in an Interspousal Contract dated August 27, 1996.

[7] The Appellant made child support payments of $450 per month from September 1, 1996 on and deducted them each year. These deductions were allowed by the Minister until the 2008 and 2009 taxation years.

Legislative Provisions

[8] Paragraph 60(*b*) of the *ITA* permits the deduction of child support payments. It reads:

> 60. There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:
>
> . . .
>
> (*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.

[9] The definition of "commencement day" is set out in subsection 56.1(4) as follows:

"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.

Position of the Parties

[10] The Respondent argued that the Divorce Judgment issued on June 16, 1998 varied the amount of child support payable by the Appellant under the Agreement, and therefore according to subparagraph (*b*)(ii) of the definition of "commencement day" the agreement had a commencement day of June 15, 1998. Since the payments in issue were made under an agreement with a commencement day after April 1997, those payments were excluded from the amount that could be deducted by the Appellant under paragraph 60(*b*) of the *ITA*.

[11] At the hearing, the Respondent also argued, in the alternative, that the obligation in the Divorce Judgment to pay child support was a new obligation on the Appellant and was not a continuation of the existing obligation under the Agreement. The Respondent argued that the Divorce Judgement terminated that obligation and from July 1, 1998 on the child support payments were made pursuant to the Divorce Judgment. According to paragraph (*b*)(i) or the definition of "commencement day" the commencement day of the Divorce Judgment would be the day it was made and the payments made by the Appellant under the Judgment were paid after the commencement day of the Divorce Judgment. Therefore those payments are excluded from the calculation of the support amount deductible under paragraph 60(*b*).

[12] The Appellant takes the position that since the child support payments he made under the Agreement were deductible, and since the Divorce Judgment did not change the amount of child support that he was required to pay, the tax treatment of the support payments should not change subsequent to the Divorce Judgment. The Appellant relied on the decision of the Federal Court of Appeal in *Kennedy v. The Queen*, 2004 FCA 437.

[13] In that case the taxpayer and her ex-spouse separated in 1991. An interim child custody and support order was made in March 1991, and Minutes of Settlement were entered into by the taxpayer and her ex-spouse in December 1991. The Minutes of Settlement required the taxpayer's ex-spouse to pay her the same amount of child support as set out in the interim order, but also provided for cost of living adjustments to the support amounts. In September 1997 the taxpayer obtained a Court order providing for the payment of child support in the same amounts and on

the same terms as in the Minutes of Settlement. The taxpayer stated that the 1997 Order was necessary to enable her to have the child support obligation enforced through the Family Responsibility Office at no cost to her.

[14] The taxpayer took the position that she was not required to include the child support payments she received after September 1997 in her income because they were paid under an order made after April 1997.

[15] The Federal Court of Appeal held that the 1997 Order did not create a commencement day, and that the taxpayer was still required to include the payments in her income because the support payments continued to be made under the 1991 Order and the Minutes of Settlement. The Court stated at paragraphs 12 and 13:

> **12** . . .The obligation to pay the support payments was created by the Order of the Court in 1991. The obligation to pay the cost of living increases was created by the Minutes of Settlement which were signed in 1991. The 1997 Judgment did not alter either of those obligations. It may have made collection procedures simpler for Ms. Kennedy but the obligations themselves existed well prior to April 1997. Ms. Kennedy did not need to obtain the 1997 Judgment to enforce payment. She could have obtained relief in the Ontario Court by bringing an action to enforce the terms of the Minutes of Settlement.
>
> **13** It seems to me that, although the statutory definition of "commencement day" in subsection 56.1(4) might be more clearly drafted, the intention of the legislation is that orders or agreements made after April 1997 which actually create new obligations will be subject to the new regime. Obligations created under the old regime will remain subject to the old provisions. This intention is borne out by subparagraph (b)(ii) which specifies that agreements or orders which are varied after April 1997 so as to change child support amounts payable, will qualify as creating a commencement day. In such a case, a new obligation will have been created by the variance after April 1997. The same can be said of subparagraph (b)(iii) which provides that a subsequent agreement or order made after April 1997 which changes the total amount of child support payments creates a commencement day.

[16] In the case before me, the Appellant submitted that the June 1998 Divorce Judgment did not change the child support amount the Appellant was required to pay to his ex-spouse, and argued that the obligation to pay that amount was created by the Agreement and the Divorce Judgement simply recognized the continuation of that obligation. Therefore, as in *Kennedy*, the post-April 1997 Court Order did not create any new obligation to pay child support, and the payments remain subject to the old regime and deductible by the Appellant.

Analysis

[17] In *Holbrook v. The Queen*, 2007 FCA 145, the Federal Court of Appeal set out when child support payments are subject to the new regime under the *ITA* and when they are subject to the old regime:

> **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.
>
> . . .

[18] Those four exceptions are the ones found in paragraph (*b*) of the definition of "commencement day". The Court went on to consider the situation where, as in this case, a pre-May 1997 agreement or order and a post-April 1997 agreement or order both require the payment of the same amount of child support. The Court stated:

> **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 . . .

[19] The Court in *Holbrook* found that *Kennedy* did not stand for the principle that, where the amount of a child support obligation is established in a pre-May 1997 agreement or order, the new regime can never apply unless there is an agreement or order that changes the total child support amounts payable. The Court was of the view that in *Kennedy* the post-April 1997 order confirmed rather than replaced the obligation created by the pre-May 1997 minutes of settlement, and therefore that the child support payments in issue in that case continued to be made under the pre-May 1997 minutes of settlement. The Court said at paragraph 17:

> In *Kennedy*, there was an interim order for child support in 1991, followed by minutes of settlement entered into in 1991 stipulating the same payments plus a cost of living adjustment. In September of 1997, a final order was made incorporating the terms set out in the minutes of settlement. *Not only were the amounts unchanged, the obligation itself continued to be grounded in the 1991 minutes of settlement*. That obligation was confirmed by the court order, not replaced.
>
> (Emphasis added.)

[20] The Court concluded that where a post-April 1997 agreement or order terminates the child support obligation in a pre-May 1997 agreement or order and replaces it with a new child support obligation, the pre-May 1997 order or agreement ceases to have effect. In such a case, it is not relevant to ask whether there has been a change to the child support amount payable. The Court found that the issue to be determined was whether the later order or agreement terminates and replaces the child support obligation established in the previous order or agreement, or continues it.

[21] The issue in this case, then, is one of construction of the Agreement and Divorce Order.

[22] I am unable to agree with the Appellant's contention that the Divorce Judgment should be construed as continuing the support obligation contained in the Agreement on the basis that it did not vary the amount of support payable.

[23] The Divorce Judgment does not order or state that the support obligation created by the Agreement was continued or was incorporated into it. In fact the language of the Divorce Judgment supports the opposite view that the support obligation was a new one. Paragraph 2(c) of the Divorce Judgment stated that "the first of such payments [is] to be paid on the first day of July, A.D. 1998". The Federal Court of Appeal in *Holbrook* noted at paragraph 14 of that decision that if an agreement or order was intended to recognize and continue the obligations created by

a previous order that there would be no need to stipulate that monthly payments under the agreement or order would commence on a certain date.

[24] The provision for child support in the Divorce Judgment differs in at least one significant respect, as well, from the support obligation under the Agreement. The Agreement provided that the support payments would continue until the children reached the age of sixteen (16) years, or over if they were unable to withdraw from the ex-spouse's care due to education, illness or disability. The Divorce Judgment ordered that the support payments continue "for so long as the children remain children within the meaning of the *Divorce Act*." Under section 2 of the *Divorce Act* a child remains a "child of the marriage" until he or she reaches the age of majority as determined by the laws of the province where the child ordinarily resides and has not withdrawn from the parent's charge, or is over the age of majority but is unable to withdraw from their charge.

[25] Under section 2 of the Saskatchewan *Age of Majority Act*, R.S.S. 1978 c. A-6 the age of majority in that province is 18 years.

[26] Therefore, support was payable under the Divorce Judgment for two years longer than under the Agreement.

[27] In addition, the Divorce Judgment contained no limitation similar to the one found in paragraph 1(c) of the Agreement that the amount of support was contingent on the Appellant's ex-spouse maintaining full-time employment.

[28] The Appellant maintains that the Agreement provided that the support obligation would be incorporated in the Divorce Judgment upon presentation of the Agreement to the Court as a full and final settlement of all claims. However, by consenting to the Divorce Judgment terms, it appears to me that the parties consented to the replacement of support obligation contained in the Agreement with that found in the Divorce Judgment. As I have noted above, the Divorce Judgment differed in material respects from the obligation contained in the Agreement. While the Court in the Divorce Judgment states that the Appellant and his ex-spouse agreed to the $450 *amount* in the Agreement, it does not purport to incorporate the remaining terms of the Agreement relating to support.

[29] For these reasons, I find that the order for child support in the Divorce Judgment superseded the obligation found in the Agreement despite the fact that the amount of support payable did not change. Therefore it is the commencement day of the Divorce Judgment that is relevant and it is determined by paragraph (*a*) of the

definition of "commencement day" in the *ITA*. Since the support payments in issue were made after the commencement day of the Divorce Judgment, they are excluded from the amount deductible under paragraph 60(*b*) of the *ITA*.

[30] Having reached this conclusion, it is not necessary for me to address the Respondent's argument that the June 15, 1998 Order varied the total amount of child support payable by the Appellant, thus triggering a commencement day under paragraph (*b*)(ii) of the definition of "commencement day".

[31] The appeals are dismissed.

Signed at Vancouver, British Columbia, this 31st day of August 2012.

"B.Paris"

Paris J.

CITATION:	2012TCC311
COURT FILE NO.:	2011-465(IT)I
STYLE OF CAUSE:	HARVEY CHADWICK AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	July 13, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	August 31, 2012

APPEARANCES:

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