

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20090611**

**Docket: A-497-08**

**Citation: 2009 FCA 200**

**CORAM: SHARLOW J.A.  
RYER J.A.  
TRUDEL J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**HUBERT DECHANT**

**Respondent**

Heard at Edmonton, Alberta on June 9, 2009.

Judgment delivered at Calgary, Alberta, on June 11, 2009.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

RYER J.A.  
TRUDEL J.A.

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**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] This appeal deals with the determination of the monthly guaranteed income supplement (GIS) payable to a pensioner under Part II of the *Old Age Security Act*, R.S.C. 1985, c. O-9. The question is whether the amount of the GIS payable to a pensioner for a particular period must necessarily be based on the amount of income as actually filed or determined for the prior year under the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> supp.). The Tax Court Judge concluded that, in the particular circumstances of this case, the answer is no (2008 TCC 459). The Crown does not agree, and has appealed. The pensioner, Mr. Hubert Dechant, did not file a notice of appearance or file a memorandum of fact and law, but he was given leave to make oral submissions at the hearing.

## Background

[2] A “pensioner” is defined in the *Old Age Security Act* as a person whose application for the basic pension payable under Part I of the *Old Age Security Act* has been accepted. The entitlement of a pensioner to the GIS for a particular period is based primarily on the pensioner’s “income” for the prior year, as defined in section 2 of the *Old Age Security Act*. The definition reads in relevant part as follows:

2. In this Act, [...]

“income”

“income” of a person for a calendar year means the person’s income for the year, computed in accordance with the *Income Tax Act*, except that [...].

2. Les définitions qui suivent s’appliquent à la présente loi. [...]

« revenue »

Le revenu d’une personne pour une année civile, calculé en conformité avec la *Loi de l’impôt sur le revenu*, sous réserve de ce qui suit : [...].

[3] Mr. Dechant is a pensioner who is entitled to the GIS. The amount of the GIS payable to Mr. Dechant for the period relevant to this appeal, July 2005 to June 2006, was required to be based on Mr. Dechant’s income for 2004 “computed in accordance with the *Income Tax Act*”. (The exceptions referred to in the definition quoted above are not relevant to this appeal.)

[4] Mr. Dechant has been a grain farmer for many years. He has always elected for income tax purposes to report his farming income using the cash method, as permitted by section 28 of the *Income Tax Act*. The cash method is comprehensively defined in section 28. For the purposes of

this appeal, it is enough to say that under the cash method a business expense is deductible in computing the income of the business only for the year in which it is actually paid. That is unlike the most common method of income computation, the accrual method, under which a business expense normally is deductible in computing income for the year in which it is incurred.

[5] Mr. Dechant has never sought to change his cash method election, as he could have done under subsection 28(3) with the Minister's consent. He testified in the Tax Court that he did not wish to change his election for the 2004 taxation year.

[6] In the 2004 taxation year, Mr. Dechant incurred an expense of \$31,000 in his farming business. As that expense was not paid until January of 2005, Mr. Dechant could not and did not deduct it in computing his 2004 farming income as reported in his 2004 income tax return. He could and did deduct it in computing his 2005 farming income.

[7] When Mr. Dechant applied for the GIS for the period in issue, the Minister of Human Resources and Social Development followed the ordinary procedure for assessing a GIS claim. That is, he referred to Mr. Dechant's 2004 income tax return for the purpose of determining Mr. Dechant's 2004 income. Based on Mr. Dechant's 2004 income as reported and accepted for income tax purposes, the Minister determined that Mr. Dechant's GIS for the period in issue would be an amount that was \$111 less than his entitlement for the prior period. Mr. Dechant was notified accordingly.

[8] Mr. Dechant appealed to the Minister for relief on the basis that there would be no reduction in his GIS if the \$31,000 expense referred to above were taken into account in computing his income for 2004, rather than 2005, when it was paid. Mr. Dechant's appeal was taken as a dispute over the computation of his 2004 income, and was referred to the Tax Court of Canada pursuant to subsection 28(2) of the *Old Age Security Act*.

[9] The Tax Court Judge concluded that it was open to Mr. Dechant to use the cash method in computing his 2004 income for income tax purposes while using the accrual method in computing his 2004 income for purposes of the GIS. On that basis, he issued a judgment allowing Mr. Dechant's appeal and vacating the decision of the Minister. No costs were awarded because subsection 45 of the *Old Age Security Regulations*, C.R.C. 1246, precludes an award of costs on a reference under subsection 28(1) of the *Old Age Security Act*.

[10] The judgment has the effect of reversing the Minister's decision to reduce Mr. Dechant's GIS by \$111 per month. However, the Tax Court Judge said the following in his reasons at paragraph 21:

If the Appellant [Mr. Dechant] wishes to accept this position, he must approach officials of the Minister of National Revenue and obtain the permission of the Minister to maintain two sets of books – a set of books using the cash basis for the purposes of the *Income Tax Act* and a set of books using the accrual basis for the purposes of the *Old Age Security Act*. If the appellant wishes to follow the approach outlined above, he must finalize his discussions with officials of the Minister on or before December 31, 2008.

[11] The legal effect of the comments in paragraph 21 of the Tax Court Judge's reasons is unclear because they are not reflected in the judgment, which is or should be the only instrument that establishes the legal rights and obligations of the parties at the conclusion of a court proceeding.

[12] It is uncontested that Mr. Dechant has not taken the steps set out in paragraph 21 of the Tax Court Judge's reasons. Nevertheless, the Crown has proceeded on the assumption that, unless and until the Tax Court judgment under appeal is set aside, there is no legally valid decision of the Minister determining the amount of Mr. Dechant's GIS for the period in issue.

#### Discussion

[13] The principal issue in this appeal is whether the judgment of the Tax Court Judge was based on an error of law. As mentioned above, the judgment was based on the premise that it was open to Mr. Dechant to use the cash method in computing his 2004 income for income tax purposes while using the accrual method in computing his 2004 income for purposes of the guaranteed income supplement. Indeed, counsel for the Crown had submitted in argument in the Tax Court that this was a valid principle (Appeal Book, page 83). I assume that counsel's comments on this point were based on the decision of this Court in *Gerstel v. Canada (Minister of Human Resources Development)*, 2006 FCA 93.

[14] As I understand *Gerstel*, it stands for the proposition that a pensioner who is entitled to claim a discretionary deduction (in that case capital cost allowance) in computing income for a

particular year may choose to take that deduction in computing income for the purposes of the *Old Age Security Act* even if no such deduction (or a lesser deduction) is taken for income tax purposes.

[15] In this appeal, the Crown does not argue that *Gerstel* was wrongly decided. Rather, the Crown is arguing that the principle in that case does not apply to Mr. Dechant. I agree with the Crown that *Gerstel* does not assist Mr. Dechant.

[16] Mr. Dechant, having elected to use the cash method in computing his farming income, did not have the legal right to deduct the \$31,000 expense in computing his 2004 income for income tax purposes, because that expense was not paid until 2005. Therefore, in the circumstances as they existed when he applied for GIS for the period in issue, a computation of Mr. Dechant's 2004 farming income that permitted the \$31,000 deduction would not, in the words of section 13 of the *Old Age Security Act*, be "computed in accordance with the *Income Tax Act*."

[17] It is not necessary for the purposes of this appeal to determine whether Mr. Dechant had the right under subsection 28(3) of the *Income Tax Act* to change his cash method election only for 2004, and only for GIS purposes (assuming the Minister concurred). I express no opinion on that point. The fact is that Mr. Dechant has not exercised or attempted to exercise any such right. In my view, the fact that such a change might have been possible was not relevant to the determination of Mr. Dechant's 2004 income.

[18] I conclude that the Minister was correct in law when he determined Mr. Dechant's GIS entitlement for the relevant period on the basis that the \$31,000 expense could not be deducted in computing Mr. Dechant's income for 2004. It follows that the Tax Court Judge erred in law in vacating the Minister's decision.

[19] I would allow this appeal without costs, set aside the judgment of the Tax Court, and dismiss the appeal of Mr. Dechant under subsection 28(2) of the *Old Age Security Act*.

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"K. Sharlow"

J.A.

"I agree  
C. Michael Ryer J.A."

"I agree  
J. Trudel J.A."



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-497-08

**STYLE OF CAUSE:** Her Majesty The Queen  
v. Hubert Dechant

**PLACE OF HEARING:** Edmonton, Alberta

**DATE OF HEARING:** June 9, 2009

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**CONCURRED IN BY:** RYER J.A.  
TRUDEL J.A.

**DATED:** June 11, 2009

**APPEARANCES:**

Belinda Schmid FOR THE APPELLANT  
George Body

Hubert Dechant ON HIS OWN BEHALF

**SOLICITORS OF RECORD:**

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Deputy Attorney General of Canada