

An Act to facilitate the payment of support: an update (R.S.Q., c.P-2.2)

By Ann-Marie Caron



What Is The Origin Of This Automatic Collection Regime?

On May 11, 1995, the National Assembly passed the *Act to facilitate the payment of support* (AFPS) (hereinafter, the “Act”), which was assented to on May 16, 1995 and came into force in stages.

The new regime instituted by the Act ensures the execution of a court judgment awarding support by automatic collection and payment of the awarded support.

To Whom Does The Act Apply?

The Act applies to persons who should receive or are receiving, for the first time, support payments awarded by a judgment rendered **on or after December 1st, 1995**. The Act also applies to judgments rendered outside Quebec to the extent that such judgments are enforceable in Quebec. Consequently, the payment is subject to the Act wherever the obligation originated from, provided that support is awarded in virtue of a judgment enforceable in Quebec. It must be noted that the Act applies to all judgments – final, provisional or interim.

As for judgments rendered prior to December 1st, 1995, the Act only applies in the three following situations:

- where the collector of support payments is already charged with compulsory execution of a judgment awarding support (Sec. 97 AFPS);
- on the application of the creditor, where a support payment is not made when due (Sec. 99 AFPS);
- on the joint application of the parties (Sec. 99 AFPS).

Moreover, since June 24, 2002, the date of coming into force of the *Act instituting civil unions and establishing new rules of filiation* (S.Q. 2002, c. 6), the Act also applies to “support payable under a transaction made upon a joint declaration dissolving a civil union executed before a notary where the transaction and the declaration are notified to the Minister or where the Minister ascertains, upon an application by the creditor and notification of the documents, that the debtor of support is in default” (Sec. 1 par. 2 AFPS).

How Is One Exempted From The Application Of The Act?

The court may exempt a debtor of support from his^{*} obligation to make support payments, including arrears, directly to the Minister of Revenue in the following situations:

- where the debtor of support establishes a trust guaranteeing the payment of the support within thirty (30) days after the judgment is rendered;
- or
- where the parties file a joint application therefor and the court is satisfied that they have given their free and enlightened consent, and the debtor provides the Minister of Revenue with sufficient security to guarantee support payments for one (1) month, within thirty (30) days after the judgment is rendered.



* Words importing gender include the masculine, feminine and neuter genders.

What Is The Term Of The Exemption?

The exemption thus granted by the court ceases to have effect for the duration of the obligation of support:

- where it is ascertained by the Minister that the debtor of support has failed to establish the trust or furnish and maintain the security;
- where it is ascertained by the Minister, on application by the creditor of support, that the debtor of support has failed to make a support payment when due;
- where the parties make a joint application therefor.

Therefore, if the debtor loses the benefit of the exemption, such exemption ceases to have effect for the entire duration of support. The exemption may be granted only once to a debtor of support in respect of the same support obligation (Sec. 5 AFPS)

How Is The Automatic Collection Of Support Put Into Effect?

As of December 1st, 1995, any judgment **awarding** support or **revising** a judgment awarding support is entered by the clerk of the court as well as any other relevant information in the support register and filed, together with sworn statements as provided for in Art. 827.5 of the *Code of Civil Procedure*, with the Minister of Revenue (Sec. 6 AFPS and 9 RRCS).

The sworn statement required for each party must be filed with the Court and contain the following information:

1. file number at the Superior Court;
2. name of the applicant and name of the respondent;
3. name at birth;
4. sex;
5. preferred language of communication;
6. residential address and telephone number where the party can be reached at home and/or at work;
7. date of birth;
8. social insurance number;
9. employment status: salaried employee or self-employed;
10. work address;
11. salary and other income;
12. file number at the *ministère de l'Emploi, de la Solidarité sociale et de la Famille*, if the party is receiving benefits under the *Act respecting income support, employment assistance and social solidarity* (R. S. Q., c. S-32.001);
13. name at birth of the declarant's mother;
14. other names used by the declarant;
15. the nature and date of the application in support of which the statement is attached;

16. file number of the Superior Court judgment, or if it is an application for revision of support, date of original judgment and file number, if necessary.

The ministry enforces the Act upon receipt of this document.

How To Collect Support?

The Act provides for two collection procedures, which are applicable concurrently: deduction at source and payment order.

Deduction at source will be preferred where all the conditions set out in Section 11 of the Act are met.

What Is Collection By Deduction At Source?

Where an amount is paid periodically to the debtor of support by a person, a general partnership, limited partnership, joint venture or an association, the Minister may collect support payments by means of a deduction at source from the following amounts and in the following order:

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1. salary, wages or other remuneration;
2. fees or advances on remuneration, fees or profits;
3. benefits granted under an Act respecting a pension plan or compensation plan;
4. other amounts provided for under regulation.

From What Other Amounts Can Support Be Deducted At Source?

The *Regulation respecting the collection of support* also provides for a deduction at source from the following:

- employment insurance benefits or benefits from a supplementary unemployment benefit plan;
- disability benefits payable under a health or accident insurance contract;
- benefits payable under a private pension plan;
- amounts payable under a profit-sharing plan;
- retirement allowances or severance pay;
- payments of an annuity constituted by contract, judgment or will, including an annuity issued by an insurer.

However, deduction at source may not be made for the above-listed amounts if paid to the debtor of support less than once a month nor for any amount which is, by law, totally exempt from seizure.

How Does The Deduction At Source Work?

Any person who pays a periodic amount to a debtor of support must, at the request of the Minister, communicate to him any information with regard to that amount allowing the portion that may be deducted at source to be determined. If a person declares that the debtor of support works for him without remuneration or if the remuneration declared is clearly less than the value of the services rendered, the Minister may value those services and fix an adequate remuneration.

What Is The Responsibility Of The Person Making The Deduction At Source?

The debtor and his employer or any person paying an amount periodically to the debtor of support is jointly and severally responsible for the deduction at source, as for income taxes. A deduction at source is binding for as long as the periodical amount from which it is made is paid to the debtor.

For example, an employer or an insurance company failing to remit the amount deducted at source to the Minister of Revenue becomes liable to seizure in respect of such amounts due.

Moreover, any person who receives a deduction notice must notify the Minister of Revenue of any seizure by garnishment that is binding with respect to the debtor of support or any other seizure by garnishment served on him after receipt of the deduction notice.

What Is Collection By Payment Order?

The Minister of Revenue collects support by means of payment order:

- in the absence of an amount from which a deduction at source may be made;
- for the balance owing, if the amount deducted at source is less than the amount of support;
- at the request of the debtor of support receiving an amount periodically, provided that there are no arrears.

In all cases, the debtor of support must pay the support payments to the *Fonds des pensions alimentaires* as well as provide and maintain a security except where he receives employment insurance benefits from the federal government or an employment-assistance allowance from *Emploi-Québec*. The security must be sufficient to guarantee the support payments or, as the case may be, the payment of the balance owing, for one (1) month. Prior to December 20, 2001, the surety had to be sufficient to guarantee the support payments for three (3) months.

Such reduction of the surety amount from three (3) to one (1) month since December 20, 2001 applies to a surety pertaining to a payment order that was effective at the time of the coming into force of the amendment.

What Does The Security Consist Of?

The *Regulation respecting the collection of support* stipulates that security may be provided in the form of:

- a sum of money;
- a security contract issued by a financial institution having its head office or a place of business in the province of Quebec;
- a certificate of deposit with a financial institution having its head office or a place of business in the province of Quebec;
- a bond, note or other similar title issued or guaranteed by the State, by another government in Canada or by a legal person established in the public interest;
- a written undertaking given by a financial institution having its head office or a place of business in Quebec to pay such security to the Minister upon request;
- a written undertaking given by an advocate or a notary who irrevocably holds the security in trust to pay such security to the Minister upon request.

The securities provided for in paragraphs 3 and 4 above shall be free of any encumbrance or charge with respect to a third party.

A debtor of support who fails to furnish or maintain the required security is deemed not to have made a support payment when due. He then becomes subject to the collection by deduction at source, if such collection procedure is possible in the circumstances, and to the recovery measures provided for in chapter V of the Act.

When Will The Creditor Of Support Receive Support Payments?

The Minister of Revenue pays amounts of support to the creditor of support twice (2) a month from the *Fonds des pensions alimentaires* established at the *ministère du Revenu*.

Until the mechanism is in force, the Minister may, in the cases and on the conditions prescribed by regulation, pay to the creditor, for a period not exceeding three (3) months, sums of money up to a maximum amount of \$ 1 500 to stand in lieu of support payments.

Who Is Responsible For Recovering Support Amounts And Arrears?

Any person owing an amount under the Act must pay the amount within ten (10) days after receipt of a demand for payment from the Minister.

The recovery measures available to the Minister are quite extensive. The Minister may, by written notice, require a person who is bound to make a payment to a person owing an amount under the Act within one (1) year from the date of such notice, that he pays to the Minister all or part of the amount to be paid to his creditor, such payment to be made at the time at which the amount becomes payable to his creditor.

The same applies in the case of a payment to be made to a creditor holding a security furnished by the debtor of support or to the assignee of a claim assigned by such debtor of support where the payment would, but for the security or assignment of claim, be made to the debtor.

The Minister of Revenue may also require a financial institution to which the debtor of support has provided a security for his debt, and which has not yet paid its consideration of the debt to pay all or part of the consideration to the Minister, upon written request.

The Minister may also serve written notice requiring a person other than a financial institution who, within one (1) year from the date of such notice, must lend or advance an amount to a debtor of support or pay an amount for the debtor to pay all or part of the amount to the Minister.

Also, in order to recover an amount owing by the debtor of support, the Minister may acquire and alienate any property belonging to the debtor and offer it for sale or charge it with a legal hypothec in favour of the creditor of support, in accordance with the provisions of Art. 2730 of the *Civil Code of Québec*. It must be noted that under Section 10 of the Act, the Minister may publish a legal hypothec only where the debtor is in default whereas Article 2730 C.C.Q. grants such right to every creditor in whose favour a judgment awarding a sum of money has been rendered.

Moreover, where the debtor of support is also the creditor or recipient of an amount payable by a public body, the Minister may apply all or part of the amount payable to the payment of support owed by such person.

In practice, an income tax refund payable to a defaulting debtor of support may automatically be applied by the Minister of Revenue to the payment of support.

Can The Application Of These Collection Measures Be Challenged?

When a debtor of support obtains the permission of the Court to be exempted from the application of the Act, by either creating a trust to guarantee the payment of support or, with the consent of the creditor of support, furnishing sufficient security to guarantee support payments for one (1) month and the Minister of Revenue notifies him that the Act henceforth applies to him

on the grounds that he failed to furnish or maintain the security or make a support payment when due, section 60 of the Act allows the debtor of support to contest the Minister's decision before the Superior Court. Under Section 99 of the Act, such remedy is also available in situations where the Act applies to a debtor of support whose support obligation resulted from an order rendered prior to December 1st, 1995, that is to say, with the consent of the parties.

The Act introduced another contestation mechanism, which is set out in Section 61, namely, the "administrative opposition". Such opposition is possible in three (3) specific situations:

- where the Minister fixed a sum to be deducted at source under Section 14 of the Act and the person who must make such deduction declared that the employee was without remuneration or the remuneration declared was clearly less than the value of the services rendered;
- where the debtor receives a deduction notice under Section 28 of the Act. This is the situation where the debtor of support requested to pay support by payment order instead of by means of a deduction at source, even where he receives periodic amounts and fails to make a support payment. In such a situation, the exemption from the application of the deduction at source ceases to be effective and the Minister of Revenue then determines the amount of such a deduction;

- lastly, where a demand for payment under Section 46 of the Act is sent to a person owing an amount required thereunder.

In these three situations, the concerned person may oppose the demand by notifying the Minister of Revenue by registered or certified mail, within twenty (20) days after receipt of the notice or demand, a notice of contestation setting out the reasons for the contestation and all relevant facts.

A person may, within 30 days after an administrative decision rendered by the Minister under section 62 of the Act, file an appeal from the decision to the Superior Court (Sec. 63 AFPS).

It should also be noted that the *Act respecting labour standards* (S.R.Q., ch. N-1.1) provides that no one, under penalty of damages, may refuse to employ a debtor of support on the ground that he is subject to the provisions of the AFPS.

Indeed, this Act has important ramifications not only for debtors of support, but for any employer, financial institution, lender or any person owing an amount to a debtor of support.

The Authority To Collect Support – Is It The Sole Preserve Of The *ministère du Revenu*?

The Court of Appeal, in the case of *J.H. v. W.F.* (C.A. Montréal 500-09-012361-028) by a unanimous decision rendered on September 2, 2003 by Justices Rothman, Rousseau-Houle and Dalphond, ended a legal controversy on the issue of the exclusive authority of the *ministère du Revenu* to collect support.

The Court of Appeal had to decide whether:

[Translation] “under the *Act to facilitate the payment of support*, only the *ministère du Revenu* is authorized to take compulsory execution measures in cases where a debtor fails to pay support. In other words, did the creditor of support lose his right to seize his debtor’s assets where the latter fails to pay support?”

In the first instance, the honourable Suzanne Courteau, S.C.J., ruled that the *ministère du Revenu* had, under the *Act to facilitate the payment of support*, a monopoly on compulsory execution respecting support.

According to the Court of Appeal, it is correct to say that the *ministère du Revenu* has sole authority to collect and distribute support. However, such monopoly does not force the creditor of support to remain passive and does not prevent him to take measures that may facilitate collection by the Minister of Revenue. The Court was therefore of the opinion that the Act does not deal with collection of support in the same way as it does with compulsory execution.

The Court of Appeal particularly addressed the following subjects: the objectives and scope of the Act, the system it creates and the definition of the Minister’s status thereunder. In this respect, the Court of Appeal found that the *ministère* is entrusted with a statutory mandate, as opposed to the conventional mandate provided for in the Civil Code of Québec:

[translation] This mandate pertains to the collection of support (Sec. 2), which generally results from an administrative measure, a notice of deduction at source or a payment order (Sec. 7) and sometimes more drastic measures, such as seizures (Sec. 47). Except for exempted support (Sec. 3), such collection mandate is not set out as being expressly revocable by the Act. Further, I fail to see anything in the Act that would implicitly indicate a possible revocation of such mandate. [...] the amounts pertaining to periodic support must always transit through the *ministère* whenever the Act applies.”

As concerns the status of the creditor under the Act, the Court of Appeal indicated the following:

[Translation] “Once the Act is applicable, the creditor is neither excluded from the collection process nor reduced to passiveness and silence. On the contrary, the Act provides that the *ministère* must keep him informed of the actions undertaken on his behalf [...]”

At paragraph 58 of the judgment, the Court of Appeal indicated that when the *ministère* enters into an agreement with the debtor of support, the creditor must not only be informed of the terms of the agreement but must also consent to them where such agreement would result in allowing a debtor not to pay immediately or within a short period of time the total due to him.

[Translation] “Only the creditor may transact regarding amounts that are due to him and nothing in the Act authorizes the *ministère* to transact of his behalf without his express consent. To favour a contrary interpretation of Section 46 of the Act would be tantamount to recognize that the *ministère* has the authority to modify the judgment by allowing the debtor, without the consent of the creditor, to pay at times others than those specified in the judgment. The agreement provided for in Section 46 must aim at compliance with the judgment as it is, rather than seeking to modify it.”

The Court of Appeal concluded, at paragraph 61 of its judgment, that the irrevocable mandate of the *ministère* pertains to collection of support, including arrears, whether such collection results from administrative measures or compulsory execution under the *Code of Civil Procedure*.

However, as acknowledged by the *ministère*, this does not prevent the creditor from carrying out actions that may facilitate collection, such as publishing a judicial hypothec, examining the debtor under Section 543 C.P.C. and instituting a Paulian action.

The Court of Appeal added that nothing prevents the creditor of support [Translation] “notified by the *ministère du Revenu* that support ceased to be collected and that compulsory execution will be pursued, to seize the debtor’s assets where, in the creditor’s opinion, the *ministère* fails to act in a sufficiently diligent manner and that there is a risk of loss of the assets to be seized”.

The Court of Appeal unequivocally stated that the proceeds from the seizure by the creditor of support must be remitted to the *ministère* by the garnishee, the clerk or any other person as if such seizure had been carried out by the *ministère*. It must be noted that the Deputy Minister of Revenue may at any time intervene in the proceedings initiated by the creditor of support.

Indeed, the creditor of support would be well advised to implead the Deputy Minister of Revenue where he carries out a seizure or any other measure pertaining to the payment of support.

Lastly, with respect to the confidentiality of information held by the *ministère du Revenu* and its practice of refusing to give communication of the agreements concerning the payment of support and arrears, the Court of Appeal ruled that Section 75 of the Act protects the confidentiality of information obtained from third parties. It “cannot result in authorizing the *ministère* to hide from the creditor the terms of an agreement entered into with the debtor in respect of instalment for the amounts then due under a judgment.

The debtor who fails to pay support but does not contest the validity of its amount before the Superior Court cannot invoke against the creditor his right to confidentiality regarding the information that he provides to the *ministère* in the context of the collection of such support and even less the terms of the agreement entered into with the *ministère* who, I remind you, acts on behalf of such creditor.”

This decision of the Court of Appeal clarifies the opportunities that a creditor of support has to remain active in the matter that concerns him. The Court of Appeal therefore rejected the interpretation whereby the *ministère du Revenu* is the only party having the legal authority to carry out compulsory execution pertaining to support. The judgment also confirms the *ministère*’s status as an intermediary.

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