Docket: 2002-4655(IT)I

BETWEEN:

KENNETH S. COLBERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 23, 2004 at Whitehorse, Yukon

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Bruce Senkpiel

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2000 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 8th day of September 2004.

"D.W. Rowe"

Rowe, D.J.

Citation: 2004TCC571
Date:20040908
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BETWEEN:

KENNETH S. COLBERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] In computing his income for the 2000 taxation year, the appellant claimed a deduction for amounts totalling $6,000 paid to his former spouse for the maintenance of their children. These amounts were payable on a periodic basis under an Order issued by a Court.

[2] Pursuant to an Order of the Supreme Court of Newfoundland - Trial Division – dated February 25, 1992 – the appellant was required to pay his former spouse - for the maintenance of the children - the sum of $1,200 per month, payable by two payments of $600 on the 1st and 15th of each month, commencing March 1, 1992. The Minister of National Revenue (the "Minister") disallowed the said deduction – as claimed – and relied on two subsequent Court Orders, issued March 29, 1999 (dated March 31, 1999) and April 25, 2000, which reduced the support payments to $800 per month and $400 per month, respectively. The support payments made by the appellant during the 2000 taxation year were made in accordance with the Orders dated March 31, 1999 and April 25, 2000.

[3] The position of the Minister is that the Order dated March 31, 1999 and/or a subsequent Order – dated April 25, 2000 – changed the total child support amounts payable by the appellant during the 2000 taxation year and – therefore - a commencement day existed on those dates, as defined in subsection 56.1(4) of the *Income Tax Act* (the "Act") and, as a consequence, the amount of child support the

appellant was entitled to deduct – in 2000 – pursuant to paragraph 60(*b*) of the *Act*, was zero.

[4] Counsel for the respondent – with the consent of the appellant – filed as Exhibit R-1 a binder - tabs 1-3, inclusive – containing the relevant Orders referred to earlier.

[5] The appellant currently resides in Whitehorse, Yukon, and is Manager of Wildfire Operations for the government of Yukon. He testified there are 3 children of the marriage: Miranda Sue, born December 15, 1977; Kenneth Jason, born October 25, 1979; and Andrea Maria, born August 21, 1981. A Judgment of Divorce was issued by the Supreme Court of Newfoundland on February 25, 1992 (tab 1). The appellant stated he had considered the requirement therein to pay child support to have been issued on the basis that the sum of $400 per month was the support amount attributable to each of the three children, for a total of $1,200. Later, he obtained some advice which confirmed his view of the effect of said Judgment. While still residing in Goose Bay, Labrador, the appellant applied for a reduction in support payments and on March 29, 1999 an Order - tab 2 – was issued by the Honourable Mr. Justice O'Regan - Supreme Court of Newfoundland – which stated:

> 1. Support payments for the child of the marriage, Miranda Sue Colbert, are to cease as of today's date;
>
> 2. Support payments are to be reduced by the amount of $400.00 per month;
>
> 3. The Applicant shall pay to the Respondent for the support of the children:
>
> Kenneth Jason Colbert .... and Andrea Maria Colbert ... the sum of $800.00 per month, payable at the rate of $400.00 on the 1st day of each month, and $400 on the 15th day of each month, commencing on the 1st day of April, A.D. 1999.

[6] The appellant's former spouse - Maria Vandijk – is named as Respondent. At the date of this Order, Miranda Sue was 21, Kenneth Jason was 19 and Andrea Maria was 17. Miranda Sue had finished school and was employed. The appellant stated he understood the federal child support guidelines were used by courts to take into account relevant circumstances but were not specifically based on the age of the children. The appellant stated he applied for a further reduction of support payments and – on April 25, 2000 – The Honourable Mr. Justice Robert Hall – Supreme Court

of Newfoundland – issued an Order following a variation hearing at Happy Valley/Goose Bay, Labrador. The relevant portions of that Order are as follows:

> 1. ... the obligation of the Applicant to pay child support for the child of the marriage, Jason Colbert, shall cease, effectively March 31, 2000, thus varying the Order pronounced by Mr. Justice O'Regan on the 29th of March, 1999;
>
> 2. ... the Applicant shall continue to pay child support for the child of the marriage, Andrea Colbert, ... in the sum of $400.00 per month;
>
> 3. ... the Respondent shall have leave to apply for child support for the child of the marriage, Jason Colbert, in an amount and as circumstances will justify, if and when Jason Colbert returns to full-time education or otherwise requires support.

[7] In said Order, the appellant's former wife appears as Maria A. Van Dijk, Respondent. On April 25, 2000, Kenneth Jason Colbert was 20 and had not attended school since January 1, 1999. In calculating his income for the 2000 taxation year, the appellant stated he included 3 monthly payments – each in the sum of $400 – which he attributed to the specific support of Kenneth Jason ($1,200) together with the amounts paid for the ongoing support of Andrea Maria for a total deduction of $6,000. The appellant stated he had always considered his obligation to pay child support continued until each child attained the age of 21 and was not aware of any age limitation imposed by federal legislation pertaining to divorce or as a result of any of his children attaining the age of majority.

[8] Counsel for the respondent did not cross-examine.

[9] The appellant submitted he was entitled to the deduction since the subsequent Orders obtained by him had no greater effect than to confirm – first – that the eldest child – Miranda Sue – no longer required support. The next Order cancelled support payments in respect of Kenneth Jason. The appellant takes the position that the subsequent Orders merely took into account the maturity of the two children and each did not amount to a new Order in the sense it affected his right to claim the appropriate deduction in respect of support payments thereafter, and particularly in respect of the 2000 taxation year.

[10] Counsel for the respondent submitted the appellant's right to deduct support payments was destroyed by the effect of the Order dated March 31, 1999 (tab 2) and the subsequent Order (tab 3) – dated April 25, 2000 – merely varied the Order of

March 31, 1999. Counsel's position is that the March 31, 1999 Order is either a new Order or a subsequent Order within the purview of subsection 56.1(4) of the *Act* with the result that the appellant's payments made pursuant to either Order are no longer deductible since they are affected by the legislative amendment pertaining to support payments after May 1, 1997.

[11] In the course of submissions, I raised the issue as to whether the original Judgment of Divorce (tab 1), pursuant to which the appellant had been ordered to pay a total of $1,200 per month child support for the three children of the marriage, had an automatic expiration date with respect to Miranda Sue when she attained the age of 19 on December 15, 1996 and - on March 29, 1999 – had finished school and found employment. That matter was not at issue, *per se,* in the within appeal since the appellant's deduction of child support for the 1999 taxation year had been allowed and no reassessment was issued by the Minister. However, concerning the 2000 taxation year, until the Order of Mr. Justice Hall was issued on April 25, 2000, the appellant claimed a deduction in respect of 3 payments, totalling $1,200 in respect of Kenneth Jason, who had turned 20 on October 25, 1999. In the event the original Judgment of Divorce, issued pursuant to the terms of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) did not require the appellant to continue to pay child support once any child of the marriage had attained his or her majority or had become self-supporting, then the appellant would not have the right to deduct those three payments in respect of Kenneth Jason because they would no longer have been paid pursuant to an Order. Therefore, if I were to accept the appellant's argument, I was concerned those three payments - made in respect of Kenneth Jason prior to the issuance of the Order dated April 25, 2000 - still might not be deductible. Counsel for the respondent requested time to prepare a response to this issue and the appellant was granted an opportunity to respond.

[12] Subsection 56.1(4) of the *Act* defines "child support amount" and "commencement day" and "support amount". This provision reads as follows:

> Amounts to be included in income for year
>
> 56.(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,
>
> Definitions
>
> (4) The definitions in this subsection apply in this section and section 56.

"child support amount" « pension alimentaire pour enfants »

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

"commencement day" « date d'exécution »

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

(*a*) where the ... 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" « pension alimentaire »

"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 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.

[13] In the case of *Kovarik v. R.*, [2001] 2 C.T.C. 2503, Bowman, A.C.J.T.C. dealt with the case of an appellant - divorced from his spouse on December 20, 1979 - who had entered into a written agreement – dated January 15, 1990 - to increase the amount of child support ordered pursuant to a Decree Nisi of Divorce. On February 12, 1998, the parties entered into a written agreement whereby support for the oldest child could be discontinued on February 1, 1998, because he was almost 25 years of age, had graduated from university, was self-supporting and had withdrawn from parental control. Pursuant to the agreement of January 15, 1990, the appellant paid the sum of $450 per child - for a total of $900 per month - but following the agreement of February 12, 1998, paid the sum of $450 for the one child still requiring support.

[14] Prior to concluding the appeal should be dismissed, Judge Bowman at paragraph 14 and following stated:

> 14 Counsel for the appellant contends that the definition of commencement day in subsection 56.1(4) does not apply and that therefore the limitation in paragraph 60(*b*) does not apply either. He argues that if the appellant and his former spouse had entered into two agreements with respect to their two children the cancellation of one would not have affected the other. I agree but that is not what happened. We have one agreement covering support payments for two children. In 1998 the younger son received an MBA and moved out, becoming self-sufficient. The older, a medical student, continued to need his parents' support. The 1990 agreement was changed and the support payments were reduced to $450 per month.

> 15 The cardinal rule in interpreting statutes is the plain words rule. Numerous aids to construction have been developed: see *Glaxo Wellcome Inc. v. R.* (1996), 96 D.T.C. 1159 (T.C.C.) (aff'd (1998), 98 D.T.C. 6638 (Fed. C.A.), leave to appeal to S.C.C. denied). But these aids to interpretation are not necessary if the words are clear. The definition of "commencement day" in subsection 56.1(4) is not difficult to understand. Whether the February 12, 1998 agreement is a new agreement or simply a variation of the 1990 agreement it clearly changes the child support payments from $900 per month to $450 per month. I do not see how the plain words of the definition can be avoided, however sophisticated the rules of statutory interpretation one may choose to use may be.
>
> 16 The liability for one child - the older one - remains admittedly the same but the total changes.
>
> 17 Counsel contends that the 1998 agreement was unnecessary because the obligation to pay support for Ray Paul Kovarik would have expired upon his moving out. I do not think that the *Divorce Act* supports such an automatic cessation. Without the agreement of the appellant's ex spouse he would have needed a court order or some similar sanction for a variation of the 1990 agreement and this would have brought him into the definition of "commencement day" one way or another.
>
> 18 I do not accept that the agreement of 1998 was simply a confirmation of what the law was all along. It varied the support payments and put a limit on the period when they were to continue - a limitation that was not in the 1990 agreement.

[15] In the case of *Samycia v. R.*, [2002] 2. C.T.C. 2415, Bowman, A.C.J.T.C. heard an appeal involving the issue of taxability of child support received by the appellant from a former spouse. In that case, there had been a number of interim orders issued by a Master of the Supreme Court of British Columbia. One order was appealed to a Justice of the Supreme Court of British Columbia and the presiding Justice reduced the monthly maintenance from $450 per month to $400 per month for each of the four children of the marriage.

[16] At paragraph 7 and following of his reasons, Judge Bowman recited the terms of a consent Order issued by the Supreme Court of British Columbia and its effect on the legal issue before him.

> 7 Finally, on September 26, 1997 a consent order between the appellant as plaintiff and her husband as defendant was issued by the

Supreme Court of British Columbia and entered on September 29, 1997. The portions of the consent order that are relevant to this appeal read:

> THIS COURT ORDERS that the Plaintiff shall have sole custody of the children of the marriage, namely: JACQUELINE-AIMEE SAMYCIA, born March 10th, 1980, SOPHIE-AIMEE SAMYCIA born July 4th, 1982 and QUINCY JAMES SAMYCIA, born July 1st, 1987 (hereinafter called the "Children of the Marriage").
>
> .....
>
> AND THIS COURT FURTHER ORDERS that the defendant shall pay to the Plaintiff for the maintenance and support of each Child of the Marriage the sum of $400.00 per month per Child, on the first day of each month from March 1st, 1997; until that Child:
>
> a. marries;
>
> b. dies;
>
> c. becomes self-supporting; or
>
> d. becomes 19 and is not attending a post secondary educational institution;
>
> whichever shall first occur. Provided that if a Child attends a post-secondary educational institution as a full-time student, the Defendant shall continue to pay maintenance as aforesaid for that Child until that Child:
>
> a. ceases to attend a post-secondary educational institution as a full-time student; or
>
> b. achieves his or her first post-secondary degree;
>
> whichever shall first occur.

> AND THIS COURT FURTHER ORDERS that the payments made pursuant to the preceding paragraph hereof;
>
> a. shall not be included in the Plaintiff's taxable income for the taxation years in which they are received; and
>
> b. shall not be deducted by the Defendant for taxation purposes from the Defendant's income for those years.

8 It is important to note that the consent order of September 26, 1997 refers to only three children and makes detailed provisions for the cessation of payments in respect of each child and for their continuance where the child attends a post-secondary educational institution. This is a significant alteration in the total amount and duration of the support amounts payment.

9 The appellant included the amounts received in 1997 in her income for 1997. She did not include them in 1998 and she was not reassessed. I draw no inference from either her inclusion in 1997 or the CCRA's non-inclusion in 1998. It was no doubt an oversight in both cases.

10 There is one finding of fact that may or may not be relevant but I will set it out in case there is an appeal. In 1997 the parties or their lawyers realized that there had been a change in the law that had hitherto prevailed with respect to the deduction/inclusion of maintenance payments and they intended to ensure by the consent order of September 26, 1997 that they would not be deductible by Mr. Samycia and not includible in income by Mrs. Samycia. Whether they succeeded in achieving this result is of course what this appeal is about.

...

[17] At paragraph 11 and following of his reasons, Judge Bowman stated:

> 11 Paragraph 56(1)(*b*) of the Income Tax Act reads
>
> 56.(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,
>
> .....

(*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 of which is a support amount received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,

B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from the particular person under and 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 received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year.

12 In this formula A is the amount of $10,671 received by the appellant in 1999. B is the amount received after the commencement day. On the appellant's interpretation the commencement day is September 26, 1997 and B should therefore be $10,671 so that the application of the formula would yield nil. C is zero on the interpretation of both parties. The respondent's position is that B is zero because there is no commencement day and accordingly the "old régime" as I described it in *Kovarik v. R.*, [2001] 2 C.T.C. 2503 (T.C.C. [Informal Procedure]), would continue to govern the tax treatment of the support payments.

13. "Commencement day" is defined 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 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.

14 As I mentioned above the appellant's position is that "the agreement or order" is that of September 26, 1997 and that since it was made "after April, 1997" its commencement day is the day it was made.

15 The respondent's position is that the "agreement or order" referred to in the definition of "commencement day" is the order of Mr. Justice Meiklem of August 2, 1994 and so since that day is not after April 1997 the words "if any" in the opening portion of paragraph (*b*) of the definition of commencement day require that I conclude that there is no commencement day.

16 Obviously the "agreement or order" in the definition of commencement day must be the agreement or order under which the child support payments became receivable as contemplated by the component B in the formula in paragraph 56(1)(*b*).

17 Counsel for the respondent argues that since the order of September 26, 1997 did not have the effect of changing the total child support amounts payable under the August 2, 1994 order, I cannot treat the September 26, 1997 order as "the agreement or order" because it did not change the provisions of the earlier order. The appellant argues that the "agreement or order" is that of August 2, 1994.

18 The short answer is that it radically changed them. It effected the final resolution of all of the differences between the spouses. It entirely superseded the August 2, 1994 order and most importantly it changed the total child support payments payable to Mrs. Samycia by her spouse.

[18] Judge Bowman continued as follows:

19 This should be sufficient to dispose of the matter. However, out of deference to Mr. Caux' argument I shall set out the reasoning that was advanced because I am not persuaded that even if the September 26, 1997 order had not changed the total child support amounts from those payable under interim order of August 2, 1994 that a different conclusion would have been justified.

20 Paragraph (*a*) of the definition by itself is perfectly clear:

> (*a*) where the agreement or order is made after April 1997, the day it is made.

21 These words are precisely applicable to the September 26, 1997 order, which is the order under which the payments were made. One need look no further.

22 The respondent however argues that subparagraph (*b*)(iii) constitutes a derogation from (*a*) as follows: where there is an order or agreement made after April 1997 and it is preceded by another order or agreement made before May 1997 the "commencement day" is the day of the later order or agreement if and only if it changes the total of the child support amounts from those payable under the earlier order or agreement.

> 23 Broadly, what the legislation seems to be seeking to achieve is this. If payments are being made under a pre-May 1997 order or agreement the old régime applies after April 1997 unless a new order or agreement is made after April 1997 that varies the total child support amounts payable.
>
> 24 There may be some merit in this position if "the agreement or order" under which the payments are made is a pre-May 1997 agreement or order that acquires a commencement day by reason of a post-April 1997 variation of amounts. Where no such variation or change of the type contemplated by subparagraphs (*b*)(ii) or (iii) and the payment is made under a post-April 1997 order or agreement subparagraphs (*b*)(ii) and (iii) have no application and we are left solely with paragraph (*a*) to determine the commencement day.
>
> 25 Either there was a variation or change as contemplated by subparagraphs (*b*)(ii) or (iii) or there was not, but on either hypothesis the commencement day is September 26, 1997.
>
> 26 Obviously where there is a comprehensive order such as the September 26, 1997 order it supersedes the August 2, 1994 order and the September 26, 1997 order is the one under which the payments in 1999 are made. It is the commencement day of that order that is relevant and it is determined by paragraph (*a*) of the definition. Although the September 26, 1997 agreement has the effect of changing the total amounts payable under the August 2, 1994 agreement, it does not refer to the earlier order. It is a stand-alone order (cf. *Kovarik*, *supra*).

[19] Returning to the within appeal, counsel for the respondent brought to my attention the decision of Mogan, T.C.J in *Miller v. R.*, 2003 CarswellNat 3161, in which the question concerned whether a second Court Order had established a commencement day. In that case, the parties were divorced in 1985 and the appellant was ordered to pay child support to his former wife at the rate of $200 per month per child for a gross amount of $600 per month. In 1996, the former wife made an application to the court to change the amount of the child support and on November 15, 1996, a judge of the Supreme Court of British Columbia issued an Order that the appellant pay the sum of $475 per month per child for a total of $1,425 per month commencing November 1, 1996, and continuing thereafter pending further order. At paragraph 4 of his judgment, Judge Mogan set out the details of the second Order granted by the Court, as follows:

> The Appellant and Lola Marie were back in court on what apparently was a joint application in December 1999 before Judge MacKenzie. I say "apparently" because the order commences:
>
> > THE APPLICATIONS of the Plaintiff, CHARLES WESLEY MILLER, and the Defendant, LOLA MARIE MILLER, coming on for hearing before me at New Westminster, British Columbia on today's date...
>
> The operative part of Judge MacKenzie's order states:
>
> > THIS COURT ORDERS that the order of the Honourable Judge Holmes made November 15, 1996 is varied as follows:
> >
> > > a) by terminating child support payable by the Plaintiff to the Defendant for Heather Mae Miller, born June 30, 1977 effective October 5, 1999; and
> > >
> > > b) the Plaintiff shall pay to the Defendant for the interim support of the children of the marriage, namely Erin Fern Miller, born June 5, 1979 and Sarah Lindsey Miller, born June 1, 1981 (collectively the "Children") the sum of $475.00 per month per child for a total of $950.00 per month commencing October 5, 1999 and continuing monthly thereafter pending further order of the court with the payments being made by the Plaintiff to the Defendant in the sum of $438.48 every two weeks thereafter.

[20] Pursuant to that Order, the appellant made payments at the rate of $475 per month and the issue before Judge Mogan was whether the second Order had changed the appellant's right to deduct the child support payments since October 5, 1999. After referring to the definitions of "commencement day" in the *Act*, Judge Mogan – at paragraph 8 and following – stated:

> 8 There was a significant change to the relevant legislation which took effect on May 1, 1997. Associate Chief Judge Bowman of this Court set out a good description of that change in *Kovarik v. R.*, **[2001] 2 C.T.C. 2503** (T.C.C. [Informal Procedure]):

> 8 Under what I may describe as the old régime (pre May 1997) spouses making payments to separated or ex spouses for the support of children could deduct those payments and the recipient had to include them in income. Following the decision of the Supreme Court of Canada in *Thibaudeau v. R.*, **[1995] 2 S.C.R. 627** (S.C.C.), the legislation changed. So long as a pre May 1997 agreement remained unchanged the deduction/inclusion system under the old régime prevailed.
>
> 9 If a new agreement were entered into, or an old agreement was changed in a particular way, the deduction/inclusion régime ceased and only payments made up to the "commencement day", as defined, were deductible by the payor and includible by the payee.

That change between the old régime and the new régime depended upon whether there was a "commencement day" as defined above.

9 In the definition of "commencement day", this appeal falls under paragraph (*b*) because the basic order was not made after April 1997 but on November 15, 1996 (Exhibit R-1). There are four alternatives under paragraph (*b*). I will consider the first and the last alternative because they are easy to eliminate. If the payor and the payee execute a joint election filed with the Minister in a prescribed form they can elect a commencement day under subparagraph (*b*)(i). The Appellant and Lola Marie did not execute a joint election. Under subparagraph (*b*)(iv), the agreement or order can specify a day as the commencement day for the purpose of the *Income Tax Act*. There is no commencement day specified in the second order. Subparagraphs (*b*)(i) and (*b*)(iv) do not apply.

10 I am left with the two remaining subparagraphs (*b*)(ii) and (*b*)(iii):

> (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 payor, the

> commencement day of the first such subsequent agreement or order, ...

There is an obvious similarity between the provisions in (ii) and (iii) because (ii) states "to change the child support amounts" and (iii) states "to change the total child support amounts". Subparagraph (*b*)(ii) depends on an agreement or order being "varied" whereas subparagraph (*b*)(iii) depends on a subsequent agreement or order. In this appeal, we have what appears to be a variation because, in the second order, Madam Justice MacKenzie states:

> THIS COURT ORDERS that the order of the Honourable Judge Holmes made November 15, 1996 is varied as follows: (emphasis added)

Assuming that the order of November 15, 1996 is only "varied", the Appellant is under subparagraph (*b*)(ii). The second order did not change the child support amounts payable per month per child. The terminology of the two orders is almost the same. The first order of November 1996 used the words "in the sum of $475 per month per child for a total of $1,425 per month". The second order stated "the sum of $475 per month per child for a total of $950 per month". It is perfectly obvious that, if one of the three children has dropped off as no longer a person in respect of whom child support is required, the aggregate amount is going to drop. But that is not what subparagraph (*b*)(ii) of the definition of "commencement day " is aimed at. Subparagraph (*b*)(ii) is aimed at whether the varied order will "change the child support amounts payable to the recipient".

11 In my view, subparagraph (*b*)(ii) applies only if a prior agreement or order is varied to change the amount payable per child. In the second order, because Heather (the oldest child) had reached a certain age, or level of education, or had married, or moved out, or whatever, the Appellant was no longer required to pay $475 per month for her after October 5, 1999. He was, however, required by the second order to continue to pay the precise same amount for each of the two younger children that he was ordered to pay by the prior court order of November 15, 1996. As I read the two court orders of November 15, 1996 and December 16, 1999, there is no commencement day with respect to the Appellant and the payments he made to his former wife in 1999, 2000 and 2001. Because there is no commencement day, his entitlement to deduct the monthly payments continues as it was before December 16, 1999.

[21] Judge Mogan – at paragraph 13 and following of his reasons referred - again - to the decision of Judge Bowman in *Kovarik, supra,* and observed:

> 13 Judge Bowman dismissed Mr. Kovarik's appeal holding that there was a "commencement day " as a result of the February 12, 1998 agreement, and stating at page 2510:
>
> > 16 The liability for one child - the older one - remains admittedly the same but the total changes.
> >
> > 17 Counsel contends that the 1998 agreement was unnecessary because the obligation to pay support for Ray Paul Kovarik would have expired upon his moving out. I do not think that the *Divorce Act* supports such an automatic cessation. Without the agreement of the appellant's ex spouse he would have needed a court order or some similar sanction for a variation of the 1990 agreement and this would have brought him into the definition of "commencement day" one way or another.
>
> In the *Kovarik* case, the agreement of February 12, 1998 was "a subsequent agreement" and therefore fell within subparagraph (*b*)(iii) of the definition of "commencement day". Judge Bowman concluded that he was bound by the plain words of subparagraph (*b*)(iii): "to change the total child support amounts payable to the recipient by the payor" even though the amount payable per child did not change.
>
> 14 I am not inclined to interpret subparagraph (*b*)(ii) of the definition to find a commencement day only because one of two or more children became ineligible for child support payments. In my opinion, a commencement day would be established after April 1997 under subparagraph (*b*)(ii) only if there were a change in the support amount payable per child. When there are two or more children all eligible for child support payments, and when one child becomes ineligible for child support because of age, educational achievement, marriage, moving out, etc., the gross amount payable to the recipient by the payor will, of course, be reduced but such reduction is not, in my view, a "change" in the child support amounts for the purposes of subparagraph (*b*)(ii).
>
> 15 Returning to the facts in this appeal, the second order varied the prior order of Judge Holmes only by terminating the child support payable for Heather. Otherwise, the second order confirmed the former child support amount ($475 per month) as being still payable for the two younger children (Erin and Sarah). On these

> facts, I conclude that there was no "commencement day" established by the second order of December 16, 1999. The appeals for the years 1999, 2000 and 2001 are allowed, without costs.

[22] In *Hill v. Canada*, [1993] T.C.J. No. 317, I decided the appeal of the taxpayer whom the Minister had required to include the full amounts of child maintenance into income. The taxpayer had a written agreement with the father of the children that entitled her to receive the sum of $225 per month. In 1990, she applied to have the amount increased and the Court issued an Order increasing her entitlement to $450 per month, as of June 27, 1990. The payor and recipient had never been married and the applicable provisions of the *Act* were subsections 3(*a*), 56(1)(*c*.1) and 56.1(1) on the basis the payor was the natural father of the children and the payments were received by the appellant in the particular taxation year, pursuant to an order made after February 10, 1988, by a competent tribunal in accordance with the laws of a province, as an allowance payable on a periodic basis for the maintenance of the children while the appellant was living apart from the payor. At paragraphs 7 and 8 of my reasons I commented:

> It is necessary to examine the meaning of the phrase, "pursuant to an order". The Federal Court of Appeal in *The Queen v. Barbara D. Sills*, 85 D.T.C. 5096 at 5098 noted:
>
> > The Shorter Oxford dictionary defines 'pursuant', *inter alia*, as 'in accordance with'. The Fifth Edition of Black's Law Dictionary defines 'pursuant', *inter alia*, as 'to execute or carry out in accordance with or by reason of something'. It also defines 'pursuant to' *inter alia*, as follows: 'pursuant to' means 'in the course of carrying out; in conformance to or agreement with; according to'.
>
> There is little doubt that on the 30th day of each month, following the making of the Order of Judge Barnett on June 27, 1990 that the payor would have good reason to believe that each time he made his payment of $450 that he was doing so "pursuant to" or "in accordance with" that Order. Unlike section 56.1(1) of the *Income Tax Act* which uses the phrase, "or in variation thereof" to modify the preceding reference to "a decree, order, judgment or written agreement", section 56.(1)*c*.1) does not contain any reference to variation. However, there is no particular magic in the term "variation" as it pertains to the making of an order by a competent tribunal. Collier J., of the Federal Court of Canada - Trial Division, in his judgment in *Horkins v. The Queen*, 76 D.T.C. 6043 at 6046 stated:

> ...Without attempting an all-encompassing interpretation, I think 'order' contemplates at least some concrete pronouncement, decree, or direction of the tribunal in question.

[23] The effect of the new Order was considered at paragraph 13 and following:

> 13 It is apparent that the previous orders and the written agreement filed at the Provincial Registry were not affected by the Order of June 27, 1990 with regard to matters of declaration of paternity or custody of the children. The question is whether or not the making of the new Order had the effect of eliminating the entitlement to child maintenance which flowed from the three separate Orders (the agreement being enforceable as though it had originally been an Order of the Court) or did it merely enlarge the amount payable to the appellant without disturbing the basic foundations of those previous orders.
>
> 14 Following the making of the Order of June 27, 1990, if the payor had fallen into arrears and enforcement was necessary, it is reasonable to assume that the application for compliance with the Order would be based on that very document and not on the previous orders, which in combination, entitled the appellant to receive a total of $225 per month. But, having specifically dealt with an application by the appellant to vary those previous orders, and in rejecting an application by the payor to rescind them or to reduce payments to $1 per month, was Judge Barnett, by ordering the payor to make payments to a total of $450 per month, establishing a new, fresh obligation upon the payor?
>
> 15 If one asks the question: what amount did the appellant receive as a result of having obtained the Order of June 27, 1990 - then the answer would be: she received an extra $150 per month. Because of that Order, she doubled her previous maintenance entitlement. Without that Order she would have been able to receive the sum of $225 per month maintenance for the three children on an ongoing basis. An order of a competent tribunal is more than a direction - it is a command, enforceable by that tribunal or another one having jurisdiction. The payor had previously been compelled to pay $225 per month and the new Order reinforced that requirement and superimposed, not a new liability, but a heavier burden. The previous orders were not explicitly rescinded and in fact would not be revoked inasmuch as they dealt with matters other than maintenance. However, having recognized the existence of those orders requiring maintenance to be paid, the new Order commands

> an "increase to the sum of $150 per month for each child". The command to pay that particular sum would be equally as effective had there been no reference whatsoever to the award as representing an "increase". In that sense it can be said to be "subsumptive", as it includes a class or category belonging to it. The contention, then, that the amount payable "pursuant to" the Order of June 27, 1990 is only the amount of the increased maintenance, would require a limitation of the definition of that phrase to embrace only that amount, found to flow as a separate stream, directly as a consequence of the increase commanded by the fresh Order. The jurisprudence, in my view, does not support that narrowing process. The particular charging section 56(1)(*c*.1) requires to be included into income, any amount received by the taxpayer in the year, pursuant to an order made by a competent tribunal in accordance with the laws of a province, as an allowance payable on a periodic basis for the maintenance of the taxpayer, the children of the taxpayer or both the taxpayer and the children of the taxpayer if the order was made after February 10, 1988 and certain other conditions are met, none of which are at issue in this appeal. The section does not provide that the amount to be included into income pursuant to an order made after February 10, 1988 is only that amount which represents an increase to amounts previously received pursuant to pre-existing maintenance orders.

[24] Returning to the circumstances of the within appeal, it is apparent the decision in *Miller* is strongly supportive of the appellant's contention that there were no new obligations created by the two Orders issued after his Judgment of Divorce and they merely ratified his position that one child – and later, another – was no longer in need of child support and the requirement for him to pay should be extinguished. In the within appeal, none of the Orders referred specifically to payments per child per month, followed by a statement of the total amount of the obligation, as in *Miller*. However, the testimony of the appellant and the circumstances surrounding his application on two occasions subsequent to the issuance of the Judgment of Divorce, and the wording of the Orders themselves, render it extremely probable that all minds were attuned to the relationship between the specific sum of $400 per month as an amount attributable to - and for the benefit of - an individual child. The purpose of obtaining the Order - dated March 31, 1999 - was to annul the obligation to pay child support in respect of Miranda Sue, the eldest child who was 21 and self-supporting. Paragraph 1 of that Order directs that support for this child was to cease as at that date. Paragraph 2 thereof declared that "support payments are to be reduced by the amount of $400 per month". However, paragraph 3 – without any reference to the seminal support Order arising from the Judgment of Divorce (tab 1) dated February 25, 1992 - continues as follows:

> The Applicant shall pay to the Respondent for the support of the children:
>
> Kenneth Jason Colbert, born October 25th, 1979 and Andrea Maria Colbert, born August 21st, 1981, the sum of $800.00 per month, payable at the rate of $400.00 on the 1st day of each month, and $400.00 on the 15th day of each month, commencing on the 1st day of April, A.D. 1999.

[25] As one can see from the wording of the Order, the sum of $400 was used to particularize the method of payment concerning the global amount of $800 but no specific amount was attributed to each child. Again, it is reasonable to conclude that this attribution per child had been accepted by the appellant, his former spouse and – probably – the presiding Justice.

[26] On April 25, 2000 - Mr. Justice Hall ordered the obligation of the appellant to pay child support for Kenneth Jason to cease, effective March 31, 2000, "thus varying the Order pronounced by Mr. Justice O'Regan on the 29th of March, 1999". The next paragraph of Mr. Justice Hall's Order directed the appellant to continue to pay child support in respect of Andrea Maria in the amount of $400 per month. In addition, paragraph 3 of said Order granted leave to the appellant's former spouse to apply for child support for Kenneth Jason (age 20) "in an amount and as circumstances will justify, if and when Jason Colbert returns to full-time education or otherwise requires support".

[27] In my view, the Order of Mr. Justice O'Regan issued on March 29, 1999, changed the previous obligation of the appellant by ordering a cessation of payments for the eldest child of the marriage and by reducing total support payments by the sum of $400 per month and – significantly – by ordering the appellant to pay the total amount of $800 per month for the support of two children, commencing on the 1st day of April, 1999. The change was not as significant as the one created by the Orders at issue in *Samycia*, *supra*, which Judge Bowman characterized in this manner at paragraph 18 of his reasons:

> The short answer is that it radically changed them. It effected the final resolution of all of the differences between the spouses. It entirely superseded the August 2, 1994 order and most importantly it changed the total child support payments payable to Mrs. Samycia by her spouse.

[28] As I held in *Hill*, *supra*, it seems to me that an order is an order whether it can be seen in some respects as a variation, amendment, clarification, extension, or re-

casting. As an order of the court, it speaks and has an effect and consequences for a breach thereof. It has a life of its own as of the moment it is declared to be effective. The Order issued March 29, 1999 and dated March 31, 1999 changed the amount of total child support by eliminating maintenance for one child and in ordering support for two children of the marriage in the total amount of $800 per month, commencing April 1, 1999. Perhaps, if the original order to pay child support - within the Judgment for Divorce – had been structured to provide for cessation of payments in respect of a child upon the happening of certain specific events of the sort mentioned by Judge Mogan in *Miller*, the appellant's position would have been stronger. However, the issue of whether one remains "a child of the marriage" in accordance with the *Divorce Act* can be a tricky issue to resolve and will – in most cases, barring consent – require a decision by a competent tribunal. Any decision issued after the inauguration of the new regime will – in my view – establish a commencement day and any prior right to deductibility available to a payor will be lost.

[29] I requested counsel for the respondent to provide me with a brief in respect of whether the appellant may have been paying support after his obligation had expired. The appellant had always taken the position that he had a duty to pay child support until each child attained the age of 21, regardless of the age of majority (19) in Newfoundland and Labrador as established by provincial law. That aspect was significant in that if I were to find in the appellant's favour with respect to payments made for the benefit of Andrea Maria – pursuant to the Order dated March 31, 1999 - there might not be an equivalent right to deduct three payments made by him in 2000 – in respect of Kenneth Jason – if that child had no longer been eligible for support in accordance with the provisions of the *Divorce Act* since the Judgment for Divorce – issued on February 25, 1992 - had not dealt with the ultimate cessation of payments in respect of any of the children. Therefore, I considered it reasonable to inquire into whether the obligation of the appellant continued in respect of Kenneth Jason as the requirement to pay may have been extinguished upon that child having attained the age of majority, leaving school and/or being on his own in the work force. It is understandable the Judgment for Divorce would not have contemplated a cessation of maintenance payments in that the ongoing need to care for adult children - who display a remarkable disinclination to leave the nest - is not only unpredictable but a relatively recent phenomenon which has created enduring obligations on the part of parents to the point where the agony of having endured their passage through puberty is now viewed with a touch of whimsy, much like – years later – looking over the photographs of a really bad vacation.

[30] In *Kovarik*, *supra*, Judge Bowman expressed the opinion the *Divorce Act* does not support unilateral cessation of child support payments once a "child of the

marriage" as defined therein reaches the age of majority. A review of jurisprudence tends to support the view that to accomplish that end, the law requires either an agreement between the spouses or an order of a court of competent jurisdiction. Having perused the brief provided by counsel for the respondent, I am satisfied there was no automatic cessation of the appellant's obligation to continue maintenance payments subsequent to Miranda Sue and/or Kenneth Jason attaining the age of majority – 19 – in Newfoundland and Labrador and/or finishing school and/or obtaining employment. It is apparent the courts will consider many factors in order to determine whether a child remains "a child of the marriage" within the definition (see: *Van de Pol v. Van de Pol*, (1996) 179 A.R. 221; (1996) 20 R.F.L. (4th) 178 and *Kushnir v. Kushnir*, (2001) 21 R.F.L. (5th) 90). Both of these cases stand for the proposition that once a child attains the age of majority, he or she is no longer presumptively a child of the marriage and it will be necessary for the recipient parent to prove the child's dependency. Therefore, I am satisfied the only appropriate course for the appellant to have pursued is the one he chose, namely, to apply to the Supreme Court of Newfoundland – on two separate occasions – in order to obtain an order approving the cessation of maintenance payments in respect of a specific child.

[31] Turning to the Order (tab 2) dated March 31, 1999, it accomplished the purpose intended by the appellant who – as Applicant – sought cessation of support payments for Miranda Sue. As a result, his ongoing commitment was now reduced from $1,200 per month to $800 - for the two children named in that Order – with payments to commence on April 1, 1999. In my view, that Order destroyed the deductibility he had previously enjoyed since it was an order made after April 1997 and was very much a stand-alone order in that it changed the total amount of support payable to the recipient. Further, it did not purport to vary or amend the previous court-ordered obligation arising from the Judgment of Divorce issued on February 25, 1992. It was an order within the definition of " commencement day " pursuant to paragraph 56.1(4)(*a*) of the *Act.*

[32] The Order (tab 3) dated April 25, 2000, in the preamble, refers to the application by the appellant as having come before the Court as a "variation hearing" and paragraph 1 of the Order, specifically refers to "varying the Order pronounced by Mr. Justice O'Regan on the 29th of March, 1999". Therefore, that Order falls within the confines of subparagraph 56.1(4)(*b*)(iii) as a subsequent order, the effect of which was to change the total child support amounts payable to the recipient since it eliminated the need to pay any ongoing maintenance in respect of Kenneth Jason, although specifically preserving the right of the appellant's former spouse to re-apply for child support if circumstances justified. The Order also directed the appellant "to continue to pay child support" for Andrea Maria, in the sum of $400 per month.

[33] It seems to me Parliament decided the new regime – after April 1997 – would apply even though certain apparent inequities might result where a new order was obtained such as destroying deductibility previously available to the payor since the inception of the seminal obligation.

[34] The issue to be decided in the within appeal is whether the appellant is entitled to a deduction - for the 2000 taxation year – for child support payments totalling $6,000 paid to his former spouse. For the reasons expressed herein, I find he is not so entitled. The assessment issued by the Minister is correct and the appeal is hereby dismissed.

Signed at Sidney, British Columbia, this 8th day of September 2004.

"D.W. Rowe"

Rowe, D.J.

CITATION:	2004TCC571
COURT FILE NO.:	2002-4655(IT)I
STYLE OF CAUSE:	Kenneth S. Colbert and H.M.Q.
PLACE OF HEARING:	Whitehorse, Yukon
DATE OF HEARING:	March 23, 2004
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	September 8, 2004

APPEARANCES:

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