

Docket: 2001-3264(IT)I

BETWEEN:

CORNELIUS PIEPER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on April 23, 2004 at Windsor, Ontario

Before: The Honourable Justice T. O'Connor

Appearances:

Counsel for the Appellant                      Gary McLister

Counsel for the Respondent:                      Ifeanyi Nwachukwu

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JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1998 taxation year is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of May 2004.

\_\_\_\_\_  
"T. O'Connor"  
O'Connor, J.

Citation: 2004TCC335  
Date: 20040514  
Docket: 2001-3264(IT)I

BETWEEN:

CORNELIUS PIEPER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **O'Connor, J.**

[1] The issue in this appeal is whether the Appellant in the 1998 taxation year is entitled to deduct certain support payments paid to his wife for the support of their three children. The Notice of Appeal mentioned also the 1997 taxation year but it was agreed at the hearing that the 1997 year was no longer an issue as the Minister had allowed the deduction as claimed by the Appellant. The appeal also mentioned the 1999 taxation year but the appeal for that year is not properly before the Court as no Notice of Objection was filed on time with respect to that year.

[2] The appeal was heard on the basis of a Partial Agreed Statement of facts and on the basis of a Joint Book of Documents which reads as follows:

#### **PARTIAL AGREED STATEMENT OF FACTS**

The Appellant and the Respondent, by their solicitors agree to the following facts provided:

- a) such admissions are made for the purpose of this proceeding; and
- b) the parties are permitted to adduce additional evidence to supplement, but not to contradict, the facts herein stated.

1. On April 3, 1995, the Appellant's former spouse Helen Catarina Pieper ("Helen"), was awarded interim custody of the three children of her marriage with the Appellant pursuant to an Order of the Ontario Court (General Division) (the "Interim Order").<sup>1</sup>
2. In accordance with the Interim Order, the Appellant was required to pay Helen child support of \$2,490 per month for the interim support and maintenance of the children ceasing on April 3, 1998.<sup>2</sup>
3. On April 28, 1997, Helen and the Appellant entered into Minutes of Settlement ("Minutes") to finally resolve outstanding issues between them arising from the breakdown of their marriage. The Minutes provided that the Appellant pay child support in the amount of \$535 per month in respect of each of the three children of the marriage. The Minutes also expressly provided that the agreement between the parties was "SUBJECT TO THE APPROVAL OF [THE] COURT".<sup>3</sup>
4. On October 17, 1997, the Ontario Court (General Division) issued an Order in respect of the matrimonial dispute between the Appellant and Helen (the "Final Order"). The Final Order recited that Helen and the Appellant had applied for judgment in accordance with the terms of the Minutes of Settlement.<sup>4</sup>
5. The Final Order provided for payments of child support in the amount of \$535 per month per child in accordance with the Minutes agreed to by the Appellant and Helen. However, the Final Order and the Minutes differed from each other as follows:

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<sup>1</sup> Interim Order of the Ontario Court (General Division), **Joint Book of Documents**, Tab 1, p.2, para. 1.

<sup>2</sup> Interim Order of the Ontario Court (General Division), **Joint Book of Documents**, Tab 1, p.2, para. 3.

<sup>3</sup> Minutes of Settlement, **Joint Book of Documents**, Tab 2, p.1, para. b

<sup>4</sup> Final Order of the Ontario Court (General Division), **Joint Book of Documents**, Tab 3, p.1.

d	Minutes provide for full and final release of all claims with no right to vary	4	Parties release each other, but reference to waiver of right to variation is excluded
k			
P	Each party entitle to personal property in his/her possession except items in garage, which are to be removed	14	Each party liable for own debts and liabilities
	Not in Minutes	15	Trail bike to be sold and proceeds payable to Appellant
	Not in Minutes	16	No further equalization
	Not in Minutes	17-22	Provisions dealing with Appellant's pension
	Not in Minutes	23	Retroactive Order deeming payments made prior to Interim Order to be made pursuant to Final Order to be includible and deductible for ITA purposes.

**1997 Taxation Year**

6. The Appellant, in computing income for the 1997 taxation year deducted the amount of \$23,725.35 as support payments.<sup>5</sup> In assessing the Appellant for the 1997 taxation year, by Notice of Assessment dated June 8, 1998, the Minister of National Revenue (the "Minister") allowed the deduction for support payments in the amount of \$23,725.35 as claimed by the Appellant.
7. The Minister has not reassessed the Appellant's tax liability in the 1997 taxation year. The Appellant did not file a Notice of Objection at any time on or before September 8, 1998<sup>6</sup>
8. The Appellant failed to apply to the Minister to extend the time to file a Notice of Objection on or before September 8, 1999.

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<sup>5</sup> 1997 T1 Tax Return of Cornelius Pieper, **Joint Book of Documents**, Tab 4.

<sup>6</sup> Affidavit of Dennis Jenkinson, **Joint Book of Documents**, Tax 13

9. In computing income for the 1997 taxation year, Helen included the amount of \$23,725.35 on account of support payments received.<sup>7</sup> The Minister by Notice of Assessment dated June 8, 1998, assessed Helen's tax liability as filed.<sup>8</sup> The Minister has not reassessed Helen's tax liability in the 1997 taxation year.

### **1998 Taxation Year**

10. The Appellant in computing income for the 1998 taxation year deducted the amount of \$26,520 as support payments.<sup>9</sup> In assessing the Appellant for the 1998 taxation year, by Notice of Assessment dated June 10, 1999, the Minister allowed the deduction of \$26,520 for support payments as claimed by the Appellant.
11. By Notice of Reassessment dated November 22, 1999, the Minister reduced the deduction initially allowed for support payments from \$26,520 to \$6,600 the difference being child support payments paid to Helen in the amount of \$19,260 as specified in both the Minutes and the Final Order. The amount of \$6,600 allowed by the Minister was in relation to support payments made to Geeske Maan, the Appellant's former common-law spouse, which is not in dispute in this appeal.
12. The Appellant duly filed a Notice of Objection for the 1998 taxation year. By Notice of Confirmation dated December 8, 2000, the Minister confirmed the reassessment of the Appellant's tax liability in the 1998 taxation year.
13. In computing income for the 1998 taxation year, Helen included the amount of \$20,160 on account of support payments received.<sup>10</sup> The Minister by Notice of Assessment dated June 3, 1999, assessed Helen's tax

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<sup>7</sup> 1997 T1 Tax Return of Helen Pieper, **Joint Book of Documents**, Tax 7

<sup>8</sup> 1997 Notice of Assessment of Helen Pieper, **Joint Book of Documents**, Tab 8

<sup>9</sup> 1998 T1 Tax Return of Cornelius Pieper, **Joint Book of Documents**, Tab 5

<sup>10</sup> 1998 T1 Tax Return of Helen Pieper, **Joint Book of Documents**, Tab 9

liability as filed.<sup>11</sup> The Minister has not reassessed Helen's tax liability in the 1998 taxation year.

**1999 Taxation Year**

14. The Appellant, in computing income for the 1999 taxation year deducted the amount of \$30,000 as support payments.<sup>12</sup>In assessing the Appellant's tax liability for the 1999 taxation year, by Notice of Assessment dated June 8, 2000, the Minister reduced the allowable deduction for support payments from \$30,000 to \$13,2000 the difference being child support payments paid to Helen in the amount of \$16,800 pursuant to the Minutes and the Final Order. The amount of \$13,200 allowed by the Minister was in relation to support payments made to Geeske Maan, the Appellant's former common-law spouse which is not in dispute in this appeal.
15. The Minister has not reassessed the Appellant's tax liability in the 1999 taxation year. The Appellant did not file a Notice of Objection at any time on or before September 8, 2000.<sup>13</sup> The Appellant failed to apply to the Minister to extend the time to file a Notice of Objection on or before September 8, 2001.
16. In computing income for the 1999 taxation year, Helen included the amount of \$16,800 on account of support payments received.<sup>14</sup> The Minister by Notice of Assessment dated June 3, 1999, assessed Helen's tax liability as filed.<sup>15</sup> The Minister has not reassessed Helen's tax liability in the 1999 taxation year.

AGREED to by the parties to be the facts of their dispute, as represented by their respective counsel.

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<sup>11</sup> 1998 Notice of Assessment of Helen Pieper, **Joint Book of Documents**, Tab 10

<sup>12</sup> 1999 T1 Tax Return of Cornelius Pieper, **Joint Book of Documents**, Tab 6.

<sup>13</sup> Affidavit of Dennis Jenkinson, **Joint Book of Documents**, Tab 13.

<sup>14</sup> 1999 T1 Tax Return of Helen Pieper, **Joint Book of Documents**, Tab 11

<sup>15</sup> 1999 Notice of Assessment of Helen Pieper, **Joint Book of Documents**, Tab 12

Date: April 23, 2004

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[3] The Respondent's Written Submissions read as follows:

**PART I – STATEMENT OF FACTS**

1. The Statement of Facts is setout in the Partial Agreed Statement of Facts jointly filed by the parties with the Court and dated April 23, 2004.

**PART II – POINTS IN ISSUE**

2. Were the child support payments made in the 1998 taxation year made pursuant to the Final Order or the Minutes?
3. If the payments were payable pursuant to the Final Order, what, if any, is the commencement day of the Final Order?
4. If the payments were payable pursuant to the Minutes, what, if any, is the commencement day of the Minutes?

**PART III – SUBMISSIONS**

5. The Respondent's submissions are as follows:
  - (a) The payments in question were made pursuant to the Final Order and not pursuant to the Minutes;

- (b) The Final Order was a stand alone Order; it did not vary the pre-existing Interim Order or Minutes;
- (c) The Commencement Date of the Final Order was October 17, 1997;
- (d) Even if the payments had been made pursuant to the Minutes, the Minutes themselves had a Commencement Date of May 31, 1997.

### **Legislative Framework**

- 6. Prior to May 1, 1997, child support payments were deductible from the income of the payor and taxable in the hands of the recipient. However, in 1997, new child support guidelines were introduced by Parliament along with new income tax legislation that was intended to bring to an end the system of inclusion and deduction. That legislation included a series of transitional provisions that were intended to exempt pre-existing child support arrangements but govern all new arrangements and all variations of existing arrangements. The relevant provisions of the *Income Tax Act* as they apply to the Appellant are the following:

56.1(4) Definitions – The definitions in this subsection apply in this section and section 56.

**"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"** 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 date of the first such subsequent agreement or order, and
- (iv) the day specified in the agreement or order, or any variation thereof, as the commencement day of the agreement or order for the purposes of this Act.

**"support amount"** means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and

(a) the recipient is the spouse or 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 the competent tribunal in accordance with the laws of a province.

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

(b) **[spousal or child] support** – the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

A is the total of all amounts each of which is a support amount paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,

B is the total of all amounts each of which is a child support amount that became payable by the taxpayer to the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and

C is the total of all amounts each of which is a support amount paid by the taxpayer to the particular person after 1996 and deductible in computing the taxpayer's income for a preceding taxation year;

***Income Tax Act, R.S.C. 1985 (5th Supp) as amended, subsection 56.1(4) and paragraph 60(b), Respondent's Book of Authorities, TAB 1***

7. The requirement for deductibility that apply to this case can be summarized as follows:
  - (a) In order to have a support amount, there must be an amount payable under an agreement or court order;
  - (b) The amount cannot become payable under the agreement or court order, on or after the commencement day of the agreement or order;
  - (c) The commencement day of an agreement or order made after April 1997 is the day that it is made;

- (d) An agreement or order made before the end of April 1997 may have a commencement day if the child support payment are varied or if the agreement or order is subject to a subsequent agreement or order or if the agreement or order specifies a commencement day.

***Income Tax Act, s.56.1(4), par. 60(b),  
Respondent's Book of Authorities, TAB 1***

- 8. In this case, the Appellant argues that he was obliged to make payments pursuant to the Minutes; the Minutes were made before the end of April 1997 and do not specify a commencement day; the amount in item "B" of paragraph 60(b) is therefore nil and the amount in item "A" is fully deductible.

**Payments in 1998 were made pursuant to the Final Order**

- 9. The payments in question were made pursuant to the Final Order and not pursuant to the Minutes. The Appellant was obliged by the Interim Order to pay child support of \$2,490 per month for the three children of the marriage until April 3, 1998. The Interim Order remained in force until October 17, 1997 and any reduction in child support payments made without judicial sanction would have constituted a breach of the Interim Order. Thus the approval of the Ontario Court was a condition precedent to the coming into existence of a binding obligation to pay the child support amount in dispute.

***Family Law Act, R.S.O. 1990, c. F.3 as  
amended s.33, 34, 37, Respondent's Book  
of Authorities, TAB 2.***

***Nature and Effect of a Condition Precedent***

- 10. The essential features of a true condition precedent are the following:
  - (a) The condition is fundamental to the existence of the agreement between the parties; until the condition is satisfied there is no binding agreement;

(b) The condition is contingent on the will of a third person who is not a party to the contract;

(c) A true condition precedent cannot be waived by either party, even if it exists for the sole benefit of a party, because, without the fulfilment of that condition, there can be no enforceable agreement between the parties.

***Turney v. Zilka*, [1959] S.C.R. 578, Respondent's Book of Authorities, TAB 13**

***See also Barnett v. Harrison*, (1975), 57 D.L.R. (3d) 225 (S.C.C.) at page 230, Respondent's Book of Authorities, TAB 9.**

***See also G.H.L. Friedman, The Law of Contract in Canada, 4th ed.* (Scarborough: 1999, Carswell) pages 457-471 Respondent's Book of Authorities, TAB 3.**

11. In *Imperial General Properties Ltd. v. R.*, the taxpayer argued that a sale of land took place in 1968, when the closing occurred. However, the taxpayer was assessed on the basis that no sale took place until 1970 when the last of the conditions precedent were satisfied. The Federal Court of Appeal for the Crown on the basis that at least one of the conditions, obtaining consent under the *Planning Act*, for a sale of the subject lands was a true condition precedent that was not fulfilled until 1970. Until that condition was fulfilled, it was legally impossible to have a conveyance of the subject property.

***Imperial General Properties Ltd. v. R.*, [1985] 1 C.T.C. 40 (F.C.A.) reversing [1983] C.T.C. 42 (FCTD), Respondent's Book of Authorities, TABS 10 and 11.**

12. The facts in this case are even more compelling than those in *Imperial*. In *Imperial* third party approval was necessary but not sufficient to create an enforceable obligation to sell the subject property. That is, the parties still looked to their agreement to define and enforce the obligations. In this case, the Final Order not only approves of the agreement between the parties, it becomes the enforceable instrument

that defines the obligations of the parties. Thus, the Minutes are not the legal authority requiring the Appellant to pay child support, much less to reduce the amount of those payments.

13. Alternatively, even if the Minutes rather than the Final Order could be construed as authority for the payment of child support, it is submitted, that the Final Order was sufficiently different from the Minutes so as to rescind those Minutes. As a result, the Final Order became the document that provided the authority for the payment of child support.

***Mossman v. R.*, [2002] 4 C.T.C. 2101 (TCC) at para. 19 and 21, Respondent's Book of Authorities, TAB 7**

***Katsoras v. R.* [2002] CarswellNat 1091 (TCC) at para. 9, Respondent's Book of Authorities, TAB 4**

14. Since the payments were made under the authority of the Final Order and not the Minutes, it is the commencement day, if any, of the Final Order, that governs the Appellant's entitlement to deduct the payment in dispute. This follows from item "B" of paragraph 60(b) which bars the deduction of all child support amounts that became payable under an agreement or order, after its commencement day.

#### **Determining the Commencement Day of the Order**

15. The Final Order was made on October 17, 1997 and paragraph (a) of the definition of "commencement day" defines commencement day as the day on which an Order is made, if it is made after April 1997. The Final Order was a stand-alone order made on October 17, 1997. Therefore, the commencement day of the Final Order is October 17, 1997.
16. Subparagraph (b)(ii) of the definition of commencement day does not apply to the Final Order. The Final Order does not vary the Interim Order, it is a stand alone Order that rescinds the Interim Order (and Minutes). In any event, the commencement day of the Final Order under paragraph

(b)(ii) would be the date that the first varied payment is made or May 31, 1997. A commencement day of May 31, 1997 does not assist the Appellant.

***Income Tax Act, Respondent's  
Book of Authorities, TAB 1***

*Mossman, supra.*

17. Subparagraph (b)(iii) of the commencement day definition applies when a subsequent order such as the Final Order has the effect of changing the total child support payments made under the Interim Order. This applies to the case at bar but is unhelpful to the Appellant because paragraph (b)(iii) defines the commencement day in such circumstances as the commencement day of the first such subsequent order or agreement. This effectively refers back to paragraph (a) of the definition of commencement day, being the day the subsequent agreement or order is made. That is, the date of the Final Order being October 17, 1997.

**Determining the Commencement Day of the Minutes**

18. In the alternative, if the Minutes are the authority under which child support was paid in this case, it is submitted that the commencement day of the Minutes is after April 30, 1997.
19. According to subparagraph (b)(iv) of the definition of commencement day, the commencement day set out in the agreement or order for the purposes of the *Income Tax Act* is the commencement day. There is some case law to suggest that an agreement or order that uses the word "commencing" rather than "continuing" triggers a commencement day. However, there is contrary authorities that require an express reference to the *Income Tax Act* to create a commencement day.
20. In this case, the Minutes do not expressly refer to a commencement day for the purpose of the Income Tax Act. However, the Minutes do provide for child support to be paid "commencing" on May 31, 1997. The Minutes do not use the word "continues". As such, it is submitted that the use of the word "commencing" in the Minutes is sufficient to create a commencement day in accordance with the

definition of commencement day found in subparagraph (b)(iv).

***Krutko v. R.*, [2003] CarswellNat (TCC) at para. 14 and 16, Respondent's Book of Authorities, TAB 5.**

***Mossman, supra***

***Taylor v. Taylor* [1998] CarswellNat (Ont. Gen. Div) at para. 38, Respondent's Book of Authorities, TAB 8**

***Lack v. R* [2003] CarswellNat (TCC) at para. 20, Respondent's Book of Authorities, TAB 6**

#### **PART IV – ORDER SOUGHT**

1. The Respondent respectfully requests that the Appeal be dismissed.

[4] Reference was also made to a Respondent's Book of Authorities which was filed. In fact it is a Joint Book of Authorities as some of the cases support the position of the Appellant and some support the position of the Respondent.

[5] Counsel for the Appellant submitted that the governing instrument was the Minutes of Settlement signed on April 28, 1997. He pointed out that the Appellant and his wife having learned and or having been advised of the change in the law which is analyzed in the Respondent's Written Submissions entered into the Minutes of Settlement so that the inclusion deduction treatment of support payments would continue. He argued further that the Order of October 17, 1997 was not a stand-alone Order and in fact the gist of that Order was to ratify the minutes of settlement of April 28, 1997. He stated that the changes in the final Order were not substantive and were merely in the nature of resolving other issues not dealt with in the Minutes of Settlement. He adds that the Minutes of Settlement governed the support payments and the Final Order did not change anything with respect to support payments. He states that none of the four possible commencement days provided for in subsection 56.1(4) are contemplated in

Minutes of Settlement. Consequently, the 'B' in section 60 is nil and consequently all of the support payments made in 1998 are deductible to the Appellant. He adds that the parties clearly intended to have the previous inclusion deduction regime apply to them and they filed their income tax returns for 1998 on that basis.

### ANALYSIS AND DECISION

[6] In my opinion the appeal should be allowed for the following principal reasons:

1. A dramatic change was made in 1997 in the law governing support payments and the critical date is something defined as the commencement day. The Appellant and his wife were aware of the change in the law and clearly wished the existing regime between them of inclusion deduction to continue. To find that the commencement day was after April 30, 1997 would not only frustrate the intentions of the Appellant and his wife, it would also result in tax payable by the Appellant and tax refundable to the wife, a result clearly not intended and one which would be justified only by a very strict interpretation of the relevant provisions of the Act.
2. I do not find that the October 1997 Order was a stand-alone Order. In my view it merely ratified and echoed the support payment provisions in the Minutes of Settlement and added other provisions not dealing with those support provisions.
3. It is further my view that stipulating a payment date in the Minutes of Settlement as being May 31, 1997 is not sufficient to establish that as the commencement day. There is nothing in the *Act* that dictates that. The obligation to make the support payments arose with the Minutes of Settlement and the Final Order in my opinion merely ratified the Minutes of Settlement. In other words the obligation to make the payments arose upon execution of the Minutes of Settlement.



4. With respect to the original Interim Order of 1995, I do not find that the April 1998 date was sufficient to cause a new regime of no inclusion and no deduction to govern when the law was dramatically changed in 1997. The parties were free to change that April 1998 date and they did so in the Minutes of Settlement of April 28, 1997.

[7] In conclusion the appeal is allowed with costs.

Signed at Ottawa, Canada, this 14th day of May 2004.

"T. O'Connor"

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O'Connor, J.

CITATION: 2004TCC335

COURT FILE NO.: 2001-3264(IT)I

STYLE OF CAUSE: Cornelius Pieper v.  
Her Majesty The Queen

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: April 23, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor

DATE OF JUDGMENT: May 14, 2004

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