

Docket: 2006-3032(IT)I

BETWEEN:

AJODA POORAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on July 12, 2007 at Toronto, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Martin Beaudry

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**JUDGMENT**

The appeal is dismissed.

Signed at Ottawa, Canada, this 1<sup>st</sup> day of October 2007.

“Patrick Boyle”

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Boyle J.

Citation: 2007TCC584  
Date: 20071001  
Docket: 2006-3032(IT)I

BETWEEN:

AJODA POORAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Boyle J.

[1] The sole issue in this case is whether the child support amounts paid by the taxpayer are subject to the pre-May 1997 inclusion/deduction regime or subject to the post-April 1997 regime of being not deductible by the payer parent and not taxable to the recipient parent. This turns entirely upon the correct interpretation and application of the term “commencement day” in subsection 56.1(4) of the *Income Tax Act* (the “Act”).

#### Background

[2] Prior to May 1997, child support and spousal support payments were generally deductible by the payer and taxable to the recipient. The conventional wisdom at the time the deduction/inclusion regime was introduced was that as a matter of tax policy and social policy the regime should make more after-tax dollars available to the family in total to subsidize its new found need to maintain two households<sup>1</sup>. This would always be the result if the payer were in a higher tax

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<sup>1</sup> See, for example: Peter W. Hogg, Joanne E. Magee & Jinyan Li, "Principles of Canadian Income Tax Law", 4<sup>th</sup> ed. (Toronto: Carswell, 2002) at 382; and David G. Duff, "Canadian Income Tax Law", (Toronto: Emond Montgomery and Canadian Tax Foundation, 2003) at 1129.

bracket than the recipient. It did, of course, require that the tax regime and results be considered in agreeing to or setting the amount of support payments.

[3] The constitutionality of the deduction/inclusion regime as it related to child support payments was challenged in *Thibaudeau v. M.N.R.*, 95 DTC 5273 (SCC). The Supreme Court of Canada upheld the regime as constitutional and not a *Charter* violation. Nonetheless, in 1997 Parliament announced that as regards child support payments the deduction/inclusion regime would change to a non-deductible/non-taxable regime. The original deduction/inclusion regime was not changed and continues to apply to support payments made to a spouse or former spouse.

[4] As a result, the *Act* now has two completely opposite regimes applicable to child support payments and spousal support payments that appear to be based upon somewhat conflicting tax policy analysis. Since the original deductible/taxable regime was established at a time when marriage breakdown was only just becoming more common place and at a time when fewer women worked so much outside the home, some have queried whether the older deductible/taxable regime should continue to apply to spousal support payments or whether they too should become subject to a new non-deductible/non-taxable regime like that which has been applicable to child support payments for the last decade.<sup>2</sup>

[5] I write the above for background only. It is not relevant to the interpretation or application of the relevant provisions of the *Act* to Mr. Pooran or to my decision. The tax policy historical context helps to understand the need for 1997 transitional rules to determine whether the old regime or the new regime applies to particular child support payments made after April 1997. Those transitional rules are largely set out in the texts of paragraph 56(1)(b), paragraph 60(b) and the definitions in subsection 56.1(4). The only issue before this Court is to properly interpret and apply the words of those transitional rules in the *Act*.

[6] This is an appeal under the informal procedure of this Court brought by the payer father. At the end of the hearing, the facts were not at all in dispute and had been sufficiently well presented by the taxpayer with sufficient clarity that Crown counsel agreed that none of the relevant facts were in issue. He agreed that the sole issue is whether the child support payments were payable under an agreement that has a commencement day for purposes of paragraph 60(b).

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<sup>2</sup> See, for example; John W. Durnford and Stephen J. Toope, "Spousal Support a Family Law and Alimony in the Law of Taxation" (1994) 42 Can. Tax. J. 1.

[7] The recipient mother and former spouse is not a party to these proceedings even though the system presumes mirror treatment of child support payments. That is, paragraphs 60(b) and 56(1)(b) are drafted to ensure that, if a particular child support payment is not deductible to the payer, it is not taxable to the recipient and that, if it is deductible by the payer, it is taxable to the recipient. Unfortunately, without both parties before the courts, and since the same child support payment “commencement day” issues can arise to a payer or a recipient, this gives rise to the issue of conflicting or difficult to reconcile decisions resulting from different decision makers or from the fact that an appealing taxpayer has the burden of proof in appeals to this Court.

### Relevant Facts

[8] The taxpayer and his then wife separated in 1988 and later divorced. They are the parents of two sons. The sons lived with their father for the first several years after separation.

[9] The sons began living with their mother sometime in 1992. Child support payments were set by order of an Ontario court in March 1993 (“Court Order No. 1”). Payments were made under Court Order No. 1 although at times the taxpayer fell into arrears as a result of changes in personal circumstances. At times the parties also made adjustments resulting from a child choosing, as they are wont to do, to move from one parent’s home to the other’s for a period. The taxpayer testified that, beginning in 1996, he and the boys’ mother had reached an understanding that, as one child was living with each of them, they would each look after one child and no child support would be paid. This was never the subject of a written agreement or court order.

[10] In August 2000, an Ontario court ordered (“Court Order No. 2”) that “any support arrears incurred in this action pursuant to [Court Order No. 1], be and the same are hereby rescinded or expunged.” Court Order No. 2 went on to order that “unless [Court Order No. 1] is withdrawn from the Office of the Director of the Family Responsibility Office, it shall be enforced by the Director and that amounts owing under [Court Order No. 1] shall be paid to the Director, who shall pay them to whom they are owed.”

[11] According to the recitals in Court Order No. 2, the parties had filed consents. Neither the terms of those consents nor the taxpayer’s affidavit referred to in the recital to Court Order No. 2 were before the Court. It is noted that Court Order

No. 2 does not appear to determine whether or not there were support arrears to be rescinded or expunged by its judicious use of the word “any”. Mr. Pooran explained that there were arrears under Court Order No. 1 which resulted from the understanding between him and his ex-wife described above.

[12] In the years in question, 2003 to 2005, the taxpayer made child support payments comprised of his regular monthly payments for each year. In 2003, the taxpayer also paid arrears that had accrued subsequent to Court Order No. 2. Virtually all of these were paid through the Ontario Family Responsibility Office.

[13] The Crown agreed that all of the payments made by the taxpayer in question were child support amounts in the amounts claimed and that they were payable under Court Order No. 1.

### Relevant Legislation

[14] Set out below are the relevant portions of the English and French versions of paragraph 60(b), paragraph 56(1)(b) and subsection 56.1(4).

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 each 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

56. (1) Sans préjudice de la portée générale de l'article 3, sont à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition :

[...]

b) le total des montants représentant chacun le résultat du calcul suivant :

$A - (B + C)$

où :

A représente le total des montants représentant chacun une pension alimentaire que le contribuable a reçue après 1996 et avant la fin de l'année d'une personne donnée dont il vivait séparé au moment de la réception

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  
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  
received after 1996 by  
the taxpayer from the  
particular person and  
included in the  
taxpayer's income for a  
preceding taxation year;

de la pension,  
B le total des montants  
représentant chacun une  
pension alimentaire  
pour enfants que la  
personne donnée était  
tenue de verser au  
contribuable aux termes  
d'un accord ou d'une  
ordonnance à la date  
d'exécution ou  
postérieurement et  
avant la fin de l'année  
relativement à une  
période ayant  
commencé à cette date  
ou postérieurement,  
C le total des montants  
représentant chacun une  
pension alimentaire que  
le contribuable a reçue  
de la personne donnée  
après 1996 et qu'il a  
incluse dans son revenu  
pour une année  
d'imposition antérieure;

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

"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

56.1(4) Les définitions qui  
suivent s'appliquent au présent  
article et à l'article 56.

«date d'exécution» Quant à  
un accord ou une ordonnance  
:

a) si l'accord ou  
l'ordonnance est établi  
après avril 1997, la date de  
son établissement;

b) si l'accord ou  
l'ordonnance est établi  
avant mai 1997, le premier  
en date des jours suivants,  
postérieur à avril 1997:

(i) le jour précisé par le  
payeur et le bénéficiaire  
aux termes de l'accord

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.

ou de l'ordonnance dans un choix conjoint présenté au ministre sur le formulaire et selon les modalités prescrits,  
(ii) si l'accord ou l'ordonnance fait l'objet d'une modification après avril 1997 touchant le montant de la pension alimentaire pour enfants qui est payable au bénéficiaire, le jour où le montant modifié est à verser pour la première fois,  
(iii) si un accord ou une ordonnance subséquent est établi après avril 1997 et a pour effet de changer le total des montants de pension alimentaire pour enfants qui sont payables au bénéficiaire par le payeur, la date d'exécution du premier semblable accord ou de la première semblable ordonnance,  
(iv) le jour précisé dans l'accord ou l'ordonnance, ou dans toute modification s'y rapportant, pour l'application de la présente loi.

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

[...]

60. Peuvent être déduites dans le calcul du revenu d'un contribuable pour une année d'imposition les sommes suivantes qui sont appropriées :

[...]

(b) the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

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

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

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

b) le total des montants représentant chacun le résultat du calcul suivant :

$$A - (B + C)$$

où :

A représente le total des montants représentant chacun une pension alimentaire que le contribuable a payée après 1996 et avant la fin de l'année à une personne donnée dont il vivait séparé au moment du paiement, B le total des montants représentant chacun une pension alimentaire pour enfants qui est devenue payable par le contribuable à la personne donnée aux termes d'un accord ou d'une ordonnance à la date d'exécution ou postérieurement et avant la fin de l'année relativement à une période ayant commencé à cette date ou postérieurement, C le total des montants représentant chacun une pension alimentaire que le contribuable a payée à la personne donnée après 1996 et qui est déductible dans le calcul de son revenu pour une année d'imposition antérieure;

Subsection 60.1(4) provides that the definitions in section 56.1 apply for purposes of paragraph 60(b).



## Analysis

[15] The specific question which arises is whether the proper application of subparagraph (b)(iii) of the definition of “commencement day” has the effect of Court Order No. 2 giving Court Order No. 1 a commencement day such that post-Court Order No. 2 payments under Court Order No. 1 were in the new non-deductible/non-taxable regime or whether those payments continued or remained in the deductible/taxable regime. Specifically, the question within subparagraph (b)(iii) is whether the “effect” of Court Order No. 2 “is to change the total child support amounts payable to the recipient by the payer”.

[16] The definition of “commencement day” and its application can be troubling in some circumstances. It is clear that somewhat harsh and starkly different conclusions on whether the old regime continues to apply or the new regime has become applicable can arise at times in the case of interim orders, subsequent divorce orders, and when one of several children ceases to be in need of support.

[17] The starting point for determining whether the old regime or the new regime applies to payments after April 1997 is to determine under which agreement or order the child support amounts became payable. See the recent Federal Court of Appeal decision in *Holbrook v. Canada*, [2007] F.C.J. No. 508, 2007 FCA 145, which considered the recipient’s position under paragraph 56(1)(b). The same language is used in paragraph 60(b) except that the word receivable is changed to the word payable. If the child support amount became payable or receivable, as the case may be, under an agreement or order after April 1997, paragraph (a) of the definition of “commencement day” provides that the new regime will apply.

[18] If, as is the case here, the child support amounts became payable under the pre-1997 Court Order No. 1, the question is whether paragraph (b) of the definition of “commencement day” applies to give the earlier agreement a commencement day. This can arise under four circumstances. Under subparagraph (i), the parties can jointly elect to assign a commencement day to the earlier agreement and hence opt into the new non-deductible/non-taxable regime. Under subparagraph (iv), the later agreement or order can specify a commencement day for the earlier agreement. Neither of these is relevant in the taxpayer’s circumstances. Under subparagraph (ii), an earlier agreement can have a commencement day, resulting in the application of the new regime, if the earlier agreement or order is “varied after April 1997 to change the child support amounts payable”. In such a case the commencement day of the earlier agreement is the day on which the first payment of the varied amount is required to be made. Given the wording of Court Order

No. 2, this is also not applicable in the taxpayer's circumstances. Under subparagraph (iii), a subsequent agreement or order can give the earlier agreement or order a commencement day as of the date of the second agreement or order if the "effect" of the later agreement or order "is to change the total child support amounts payable".

[19] The Federal Court of Appeal wrote in *Holbrook* of subparagraph 56.1(4)(b)(iii) (at paragraph 8):

"This provision may cover a number of different situations. Generally, it is intended to ensure that where there is an increase in the total child support amounts payable, the new regime cannot be avoided by having the original amount governed by pre-May 1997 agreement or order and the increase governed by a post-April 1997 agreement or order."

[20] In *Kennedy v H.M.Q.*, 2005 DTC 5039, the Federal Court of Appeal wrote (at paragraph 13):

"It seems to me that, although the statutory definition of "commencement day" in subsection 56.1(4) might be more clearly drafted, the intention of the legislation is that orders or agreements made after April 1997 which actually create new obligations will be subject to the new regime. Obligations created under the old regime will remain subject to the old provisions. This intention is born out by subparagraph (b)(ii) which specifies that agreements or orders which are varied after April 1997 so as to change child support amounts payable, will qualify as creating a commencement day. In such a case, a new obligation will have been created by the variance after April 1997. The same can be said of subparagraph (b)(iii) which provides that a subsequent agreement or order made after April 1997 which changes the total amount of child support payments creates a commencement day."

[21] As acknowledged in *Holbrook*, the example given in that case of the general situation to which subparagraph (b)(iii) applies is not the only situation to which it could be applied as drafted. Clearly it would apply if parties sought to have their original child support amounts continue under the old regime and only have post-April 1997 increases in child support under the new regime by keeping such increases in a separate agreement or order. However, the language of subparagraph (b)(iii) does not speak of increases but rather changes to the total child support amounts payable.

[22] In contrast, the Federal Court of Appeal in *Kennedy* speaks of whether or not the post-April 1997 agreement or order "actually creates new obligations"; it does not speak of whether it removes old ones.

[23] The Crown's position in this case is, simply put, that the forgiveness of the arrears under Court Order No. 2 did have the effect of changing the total child support amounts payable by removing the accrued but unpaid child support amounts that accrued before the date of Court Order No. 2 but remained unpaid.

[24] The particular issue of whether the extinguishment of arrears that accrued under the old deduction/inclusion regime can give the original order or agreement a later "commencement day", in circumstances where the monthly child support payment obligations are not changed or varied in any manner and continue to be payable under the original agreement, appears not to have been directly decided previously.

[25] The issue did come up in the case of *McNeil v. H.M.Q.*, 2003 DTC 3997, in this Court in *obiter*. In that case, the first court order was an interim order and the trial judge concluded that the payments in question were made under the later final order which was post-April 1997. However, the judge went on to say that a change in arrears under an earlier order granted by a later order is likely sufficient to satisfy subparagraph (b)(iii). However, he expresses this in carefully couched language and acknowledges that it would raise questions around disputed arrears that he did not fully consider.

[26] In *Pilon v. Canada*, [2003] T.C.J. No. 690, 2003 TCC 846, this Court was asked to consider whether changes to arrears of child support amounts in a subsequent agreement could have the effect, for purposes of subparagraph (b)(iii), of changing the total child support amounts payable that resulted in a commencement day. However, in that case the Court concluded that the later order did not change the child support obligations or arrears.

[27] In this case there were arrears under Court Order No. 1. I must therefore decide the more difficult question of whether child support arrears under a pre-1997 agreement or order that were under the old regime when they accrued, but were neither taxable nor deductible because they were unpaid, are child support amounts payable that should be considered under subparagraph (b)(iii) of the definition of "commencement day" in determining if the effect of the post-April 1997 Court Order No. 2 is to change the total child support amounts payable by the payer. While it appears the wording in question may fit, one wonders whether such a broad scope was intended.

[28] The *Holbrook* example of subparagraph (b)(iii) bringing payments under an old agreement or order under the new regime if a later agreement or order provides for an additional amount to also be payable appears to be the clear example of what subparagraph (b)(iii) is aimed at. However, subparagraph (b)(iii) does not speak of increases but changes to the total child support amounts payable. A subsequent agreement that provides for a downwards adjustment in total child support amounts payable as the result of one or several children no longer being in need of support might be the most clear example of a downwards adjustment. A reduction of arrears accrued under an earlier agreement can be said to be a similarly reasonable example of a downward change in total child support amounts payable.

[29] The Crown's position is that, read together, the transitional positions in sections 56, 56.1 and 60 relating to "commencement day" are, in effect, clear that Parliament wanted all post-April 1997 agreements or orders regarding child support payments to be presumed to have considered the new rules which would apply. In the present case the Crown suggests, Mr. Pooran's former spouse, in providing her consent to, and the judge in making, Court Order No. 2 can be presumed to have considered the effect of the new regime. It may well be that, in their minds, the consideration for foregoing any accrued arrears entirely may have been the knowledge that receipts thereafter would be non-taxable under the new regime.

[30] The contra view on behalf of the taxpayer is to ask what do arrears that accrued clearly under a pre-1997 order, prior to the subsequent order, have to do with whether payments thereafter in the same amounts as provided for in the original order should continue to be deductible. Clearly, had the arrears been paid prior to Court Order No. 2 when they were due, they would have been subject to the old deduction/inclusion regime. A conclusion that Court Order No. 2 did not give Court Order No. 1 its commencement day would be consistent with the Court of Appeals' language in *Kennedy* speaking of creating new obligations, not reducing or removing old ones. The taxpayer's position is further advanced by the argument that generally, whether or not a decision-maker under the agreement or order in a family law matter has properly considered and understands the tax consequences of support payments may often be a legal fiction. On the facts of this case, it is the taxpayer's position that his former spouse did not give up any arrears in exchange for not being taxable on subsequent receipts but that the alleged arrears were wiped out because of the pre-1997 understanding between them that payments would cease to accrue in particular circumstances.

[31] I was referred to the French version of the legislation and conclude that it is in all material respects worded the same and provides no further guidance to this issue. I have reviewed the Department of Finance's explanatory notes accompanying the 1997 changes and they do not appear to provide any further insight either.

[32] Canada Revenue Agency's Interpretation Bulletin IT-530R "Support Payments" does not address the issue of whether changes to the amount of arrears in child support amounts are considered changes to the total child support amounts payable. However, the Canada Revenue Agency has issued a technical interpretation that is publicly available on this issue. Neither of the parties referred me to it. It fully supports the taxpayer's position. The CRA technical interpretation<sup>3</sup>, dated July 1997, addresses precisely a situation where a subsequent Court order reduces the arrears but does not change the amount of child support. CRA concludes "it is also our view that the Second Order would not trigger a commencement day as defined in subsection 56.1(4) of the *Act* in respect of the First Order. Thus, the periodic amounts would continue to be deductible by [the payer] and subject to tax in the hands of the recipient." Admittedly, this CRA technical interpretation was issued shortly after the new regime was introduced and, in any event, cannot bind the CRA or the Crown if it is wrong in law. However, it does not appear that CRA has subsequently reversed its position publicly prior to this proceeding.

### Conclusion

[33] It appears to be inescapable that the effect of Court Order No. 2 expunging arrears of child support amounts payable had the effect of changing the total child support amounts payable under Court Order No. 1 and Court Order No. 2. The intentional choice of the word "change" clearly contemplates decreases as well as increases to the total child support amounts payable. It is also clear from the definition of "commencement day" that no child support amounts have to become payable under the subsequent agreement or order in order for it to have a commencement day which it can give to the earlier order. CRA's 1997 technical interpretation was incorrect in law.

[34] The application or non-application of transitional rules may not provide for perfect fairness and, as referred to above, these particular rules have previously

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<sup>3</sup> CRA Document No. 9717896

been shown to be capable of producing somewhat harsh and inconsistent results in the areas of interim orders, divorce orders and when one child ceases to be in need of support. Mr. Pooran may feel his case is another example of an inappropriate result from the application of these rules and the definition of “commencement day”.

[35] Unfortunately for Mr. Pooran, the definition of “commencement day” makes it clear that where a court orders, or where the parties agree to, a variance of the child support amount payable under a pre-May 1997 agreement, or where the parties enter into a second agreement or a court issues a second order which has the effect of changing the total child support amounts payable under either or both orders or agreements, subparagraphs (b)(ii) and (b)(iii) will apply as clearly as if they had elected, agreed or been ordered into the new regime under subparagraph (b)(i) or (iv), or had knowingly provided that the child support payments would thereafter be payable under a later post-April 1997 agreement or order described in paragraph (a) of the definition of “commencement day”.

[36] I should also point out that, had the evidence been that there were in fact no arrears under Court Order No. 1 at the time Court Order No. 2 was issued because Mr. Pooran’s understanding with his former spouse constituted a legal written agreement, it appears that a commencement day would result from subparagraph (b)(ii) of the definition from the fact that the post-1997 Court Order No. 2 reinstated the child support payments under Court Order No. 1 that had been reduced to zero by the terms of the understanding of Mr. Pooran and his former spouse after Court Order No. 1 was issued and before 1997.

[37] Since the taxpayer is unsuccessful and his child support payments in 2003, 2004, and 2005 are not deductible by him, it follows directly as a result of the structure of these provisions in the *Act*, that his former spouse should not have been subject to tax on such amounts when received. Mr. Pooran’s former spouse is not before the Court nor do I know how she has been assessed by CRA on those payments. However, I trust that CRA will ensure that Mr. Pooran’s loss is not the Crown’s windfall.

Signed at Ottawa, Canada, this 1<sup>st</sup> day of October 2007.

“Patrick Boyle”

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Boyle J.



CITATION: 2007TCC584

COURT FILE NO.: 2006-3032(IT)I

STYLE OF CAUSE: AJODA POORAN AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 12, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: October 1<sup>st</sup>, 2007

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Martin Beaudry

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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