

**Date: 20071214**

**Docket: A-581-06**

**Citation: 2007 FCA 402**

**CORAM: NADON J.A.  
SEXTON J.A.  
PELLETIER J.A.**

**BETWEEN:**

**GABE BIONDO**

**Appellant**

**and**

**HER MAJESTY THE QUEEN  
and DONNA M. APPLEBEE**

**Respondents**

Heard at Toronto, Ontario, on December 13, 2007.

Judgment delivered at Ottawa, Ontario, on December 14, 2007.

**REASONS FOR JUDGMENT BY:**

**NADON J.A.**

**CONCURRED IN BY:**

**SEXTON J.A.  
PELLETIER J.A.**

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**REASONS FOR JUDGMENT**

**NADON J.A.**

[1] This is an appeal from a decision of Mr. Justice Campbell Miller of the Tax Court of Canada, dated November 2, 2006 who allowed, in part, the appellant's appeal from the Minister's decision refusing his application for the Canada Child Tax Benefits (CCTB) for the period of July 2003 to May 2004 in regard to two of his children, namely Matthew and Daniel.

[2] The Judge concluded that the appellant was the “eligible individual”, within the meaning of sections 122.6 and 122.61 of the *Income Tax Act* (the “Act”), entitled to the CCTB for Matthew and Daniel for three months only within the relevant period, ie. November 2003, February 2004, and May 2004. In the Judge’s view, it was only in those months that the appellant had primarily fulfilled his responsibility in respect of the care and upbringing of Matthew and Daniel as contemplated by section 122.6 and subsection 122.61(1) of the *Act*.

[3] For all other months of the relevant period, the Judge found that the appellant’s spouse, Donna Applebee, was the “eligible individual” entitled to the CCTB.

[4] The appellant’s contention in this appeal is that he is the “eligible individual” entitled to the CCTB for Matthew and Daniel for the entire period from July 2003 to May 2004. He argues that the Judge made an erroneous finding of fact in determining that he did not have Matthew and Daniel in his care for at least 45% of the time during the entire relevant period. He further argues that the Judge erred in his application of section 122.61 of the Act to his finding of fact and, as a result, erred in determining that he was not entitled to the CCTB for the entire period on the basis that he did not primarily fulfill the responsibility for the care and upbringing of Matthew and Daniel.

[5] The appellant also says that it was wrong for the Judge to consider and accept, as more credible, the evidence of his spouse, her mother, and of her friend Carol Beaulieu.

[6] In my opinion, the appellant has not shown any error on the part of Campbell Miller J. The Judge made no error of law and his findings of fact were made after a careful review of the totality of the evidence before him. In particular, he preferred the evidence of Ms. Applebee and of her mother, which he found “more compelling”, over that of the appellant.

[7] I see no basis whatsoever to disturb the Judge’s assessment of the evidence. It is trite law that a Court of Appeal cannot interfere with a Judge’s assessment of the evidence and in particular with regard to his findings of credibility unless it can be shown that in making his findings the Judge made an overriding and palpable error. The appellant has not persuaded me of any error on the part of the Judge in his assessment of the evidence.

[8] For these reasons, I would dismiss the appeal. Although the crown is seeking costs, I am not prepared to make such an order other than in regard to its disbursements.

“M. Nadon”

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J.A.

“I agree.  
J. Edgar Sexton J.A.”

“I agree.  
J.D. Denis Pelletier J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-581-06

**STYLE OF CAUSE:** GABE BIONDO v. HER  
MAJESTY THE QUEEN AND  
DONNA APPLEBEE

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 13, 2007

**REASONS FOR JUDGMENT BY:** NADON J.A.

**CONCURRED IN BY:** SEXTON J.A.  
PELLETIER J.A.

**DATED:** December 14, 2007

**APPEARANCES:**

Mr. Gabe Biondo THE APPELLANT ON HIS OWN  
BEHALF

Mr. Perry Derksen FOR THE RESPONDENT HER  
MAJESTY THE QUEEN

Ms. Donna Applebee THE RESPONDENT ON HER OWN  
BEHALF

**SOLICITORS OF RECORD:**

John H. Sims, Q.C.  
Deputy Attorney General of Canada FOR THE RESPONDENT HER  
MAJESTY THE QUEEN