

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190327

Docket: A-356-16

Citation: 2019 FCA 56

**CORAM: NADON J.A.
NEAR J.A.
GLEASON J.A.**

BETWEEN:

SHERRI ANN MORRISSEY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at St. John's, Newfoundland and Labrador, on October 2, 2018.

Judgment delivered at Ottawa, Ontario, on March 27, 2019.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

**NEAR J.A.
GLEASON J.A.**

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] This is an appeal of a decision of Sommerfeldt J. (the Judge) of the Tax Court of Canada (TCC) dated July 27, 2016 (2016 TCC 178) whereby he dismissed the appellant's appeal of redeterminations by the Canada Revenue Agency (CRA) on behalf of the Minister of National Revenue (the Minister) in respect of her taxation years 2012 and 2013 (the years at issue).

[2] More particularly, the Minister was of the view that the appellant was a shared-custody parent of her son, LM, during the period from July 1, 2013 to June 30, 2015 (the Benefit Period), 24 months in respect of which the years at issue were the base taxation years, as defined in section 122.6 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (the Act). Hence, she was only entitled to 50% of the Canada Child Tax Benefit (CCTB) for the years at issue.

[3] In dismissing the appellant's appeal, the Judge held that since the appellant and LM's father, Denis Patrick Murphy (Mr. Murphy), resided with their son, during the Benefit Period, on a near equal basis, they were shared-custody parents. As a result, the Judge confirmed the Minister's reassessments.

[4] The issue raised by this appeal concerns the meaning of the words "reside with the qualified dependant on an equal or near equal basis", found in section 122.6 of the Act under paragraph *b*) of the definition of "shared-custody parent".

II. Applicable legislation

[5] Because section 122.6 of the Act is at the heart of this appeal, it will be useful to reproduce immediately that part of the provision which is relevant:

122.6 Definitions

eligible individual in respect of a qualified dependant at any time means a person who at that time

122.6 Définitions

Particulier admissible S'agissant, à un moment donné, du particulier admissible à l'égard d'une personne à charge admissible, personne qui répond aux conditions suivantes à ce moment :

(a) resides with the qualified dependant,

a) elle réside avec la personne à charge;

(b) is a parent of the qualified dependant who

b) elle est la personne — père ou mère de la personne à charge — qui :

(i) is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or

(i) assume principalement la responsabilité pour le soin et l'éducation de la personne à charge et qui n'est pas un parent ayant la garde partagée à l'égard de celle-ci,

(ii) is a shared-custody parent in respect of the qualified dependant,

(ii) est un parent ayant la garde partagée à l'égard de la personne à charge;

(c) is resident in Canada or, where the person is the cohabiting spouse or common-law partner of a person who is deemed under subsection 250(1) to be resident in Canada throughout the taxation year that includes that time, was resident in Canada in any preceding taxation year,

c) elle réside au Canada ou, si elle est l'époux ou conjoint de fait visé d'une personne qui est réputée, par le paragraphe 250(1), résider au Canada tout au long de l'année d'imposition qui comprend ce moment, y a résidé au cours d'une année d'imposition antérieure;

...

[...]

and for the purposes of this definition,

Pour l'application de la présente définition :

(f) where the qualified dependant resides with the dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent,

f) si la personne à charge réside avec sa mère, la personne qui assume principalement la responsabilité pour le soin et l'éducation de la personne à charge est présumée être la mère;

(g) the presumption referred to in paragraph 122.6 eligible individual (f) does not apply in prescribed circumstances,

g) la présomption visée à l'alinéa f) ne s'applique pas dans les circonstances prévues par règlement;

(h) prescribed factors shall be

h) les critères prévus par règlement

considered in determining what constitutes care and upbringing, and

(i) an individual shall not fail to qualify as a parent (within the meaning assigned by section 252) of another individual solely because of the receipt of a social assistance amount that is payable under a program of the Government of Canada or the government of a province for the benefit of the other individual;

qualified dependant at any time means a person who at that time

(a) has not attained the age of 18 years,

(b) is not a person in respect of whom an amount was deducted under paragraph (a) of the description of B in subsection 118(1) in computing the tax payable under this Part by the person's spouse or common-law partner for the base taxation year in relation to the month that includes that time, and

(c) is not a person in respect of whom a special allowance under the Children's Special Allowances Act is payable for the month that includes that time.

shared-custody parent in respect of a qualified dependant at a particular time means, where the presumption referred to in paragraph (f) of the definition eligible individual does not apply in respect of the qualified

serviront à déterminer en quoi consistent le soin et l'éducation d'une personne;

i) un particulier demeure le père ou la mère (au sens de l'article 252) d'un autre particulier même si une prestation d'assistance sociale est versée dans le cadre d'un programme fédéral ou provincial au profit de l'autre particulier.

personne à charge admissible

S'agissant de la personne à charge admissible d'un particulier à un moment donné, personne qui répond aux conditions suivantes à ce moment :

a) elle est âgée de moins de 18 ans;

b) elle n'est pas quelqu'un pour qui un montant a été déduit en application de l'alinéa 118(1)a) dans le calcul de l'impôt payable par son époux ou conjoint de fait en vertu de la présente partie pour l'année de base se rapportant au mois qui comprend ce moment;

c) elle n'est pas quelqu'un pour qui une allocation spéciale prévue par la Loi sur les allocations spéciales pour enfants est payable pour le mois qui comprend ce moment

parent ayant la garde partagée

S'entend, à l'égard d'une personne à charge admissible à un moment donné, dans le cas où la présomption énoncée à l'alinéa f) de la définition de particulier admissible ne s'applique

dependant, an individual who is one of the two parents of the qualified dependant who

(a) are not at that time cohabitating spouses or common-law partners of each other,

(b) reside with the qualified dependant on an equal or near equal basis, and

(c) primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors.

pas à celle-ci, du particulier qui est l'un des deux parents de la personne à charge qui, à la fois :

a) ne sont pas, à ce moment, des époux ou conjoints de fait visés l'un par rapport à l'autre;

b) résident avec la personne à charge sur une base d'égalité ou de quasi-égalité;

c) lorsqu'ils résident avec la personne à charge, assument principalement la responsabilité pour le soin et l'éducation de celle-ci, ainsi qu'il est déterminé d'après des critères prévus par règlement.

[6] I also reproduce subsections 122.61(1) and 122.61(1.1):

122.61(1) If a person and, if the Minister so demands, the person's cohabiting spouse or common-law partner at the end of a taxation year have filed a return of income for the year, an overpayment on account of the person's liability under this Part for the year is deemed to have arisen during a month in relation to which the year is the base taxation year, equal to the amount determined by the formula

...

122.61(1.1) Notwithstanding subsection (1), if an eligible individual is a shared-custody parent in respect of one or more qualified dependants at the beginning of a month, the overpayment deemed by subsection (1) to have arisen during the month is equal to the amount determined by the

122.61(1) Lorsqu'une personne et, sur demande du ministre, son époux ou conjoint de fait visé à la fin d'une année d'imposition produisent une déclaration de revenu pour l'année, un paiement en trop au titre des sommes dont la personne est redevable en vertu de la présente partie pour l'année est réputé se produire au cours d'un mois par rapport auquel l'année est l'année de base. Ce paiement correspond à la somme obtenue par la formule suivante :

[...]

122.61(1.1) Malgré le paragraphe (1), si un particulier admissible est un parent ayant la garde partagée à l'égard d'une ou de plusieurs personnes à charge admissibles au début d'un mois, le paiement en trop qui est réputé, en vertu du paragraphe (1), s'être produit au cours du mois

formula	correspond à la somme obtenue par la formule suivante :
...	[...]
[My emphasis].	[Mon soulignement].

[7] It will also be useful to provide a brief explanation of the statutory framework for the CCTB. In doing so, I have freely borrowed from paragraphs 17 to 20 of the respondent's Memorandum of Fact and Law.

[8] Subsection 122.61(1) of the Act sets out a formula for the calculation of the amount of the CCTB payable to a person determined to be an "eligible individual" in any particular month within a "base taxation year" and, for the purpose of subsection 122.6, an "eligible individual" includes a "shared-custody parent".

[9] The amount of the annual CCTB to which a person is entitled is based on a notional overpayment of taxes by the person and such a person's entitlement to a refund of the notional overpayment is deemed to arise during each month within the base taxation year when the person "was an eligible individual at the beginning of the month". In cases where an "eligible individual" is a "shared-custody parent" in respect of one or more qualified dependants at the beginning of the month, subsection 122.61(1.1) provides for an alternate calculation for the CCTB.

[10] Section 6302 of the *Income Tax Regulations*, C.R.C. 1977, c. 945 (the Regulations) sets out a number of factors that are relevant to a determination of the words "for the care and

upbringing of a qualified dependant” found in the definitions of both “eligible individual” and “shared-custody parent”.

III. The Facts

[11] The facts relevant to the determination of this appeal are uncomplicated and they are as follows.

[12] LM, whose parents are the appellant and Mr. Murphy, was born in 2004 and is now approximately 14 years of age. However, at the time of the Benefit Period at issue, he was not yet in his teens. As to LM’s parents, at the relevant time, they were neither cohabiting spouses nor common law partners.

[13] From July 1, 2013, to June 30, 2015, *i.e.* the Benefit Period in respect of which the years at issue were the base taxation years, the appellant received a CCTB in its entirety. However, at some point in time, Mr. Murphy applied to the Minister to receive half of the CCTB for the Benefit Period which led the Minister, on August 20, 2014, to issue a Notice of Redetermination for the CCTB for the 2012 base taxation year to the effect that the appellant was a shared-custody parent. Further, on September 19, 2014, the Minister issued a similar Notice of Redetermination for the CCTB for the 2013 base taxation year.

[14] On January 20, 2015, the appellant filed a Notice of Objection in regard to the Minister’s redeterminations and, on May 28, 2015, the Minister confirmed his redeterminations that the appellant was a shared-custody parent.

[15] The Minister's confirmation of his redeterminations led the appellant to commence an appeal before the TCC. On July 27, 2016, as already indicated, the Judge dismissed her appeal for the reasons that I shall shortly explain.

[16] Finally, on September 30, 2016, the appellant commenced an appeal before this Court.

IV. The Decision of the Tax Court of Canada

[17] The Judge began his Reasons by setting out the issue which he had to determine, namely whether the appellant was entitled to 100% or only 50% of the CCTB for the Benefit Period. As section 122.6 of the Act was crucial to the determination of the issue before him, the Judge summarized the conditions necessary for a finding of "shared-custody parent". At paragraph 3 of his Reasons, he set out those conditions in the following words:

The definition of "shared-custody parent" is set out in section 122.6 of the ITA. An individual will be a shared-custody parent in respect of a qualified dependant only if certain conditions are met. For the purposes of this Appeal, the relevant conditions may be summarized as follows:

- a) the individual must be one of the two parents of the qualified dependant;
- b) the two parents must not be cohabiting spouses or common-law partners of each other;
- c) the individual and the other parent must reside with the qualified dependant on an equal or near equal basis; and
- d) the individual and the other parent must primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors.

[18] The Judge then referred to the Regulations and more particularly to section 6302 thereof which prescribes the factors that are to be considered in determining whether a particular individual primarily fulfills the responsibility for the care and upbringing of a qualified dependant. After a careful review of the aforementioned factors, in the light of the evidence, the Judge concluded that both the appellant and Mr. Murphy primarily fulfilled the responsibility for the care and upbringing of their son when LM resided with them.

[19] The Judge then turned to the definition of “equal or near equal basis” found in section 122.6 of the Act. He commenced his inquiry with the dictionary meaning of the words “equal” and “near”. At paragraphs 48 and 49 of his Reasons, he enunciated his understanding of the definitions of the above words:

[48] The above definition confirms that the word “equal” has a quantitative element, as indicated by the references to being identical in amount, size, number or value. However, the definition also suggests that, in some contexts, the word “equal” can have a more qualitative meaning, as evidenced by the references to being evenly proportioned or balanced, having the same status, or being uniform in operation, application or effect. Accordingly, there may be situations where non-numerical or unmeasurable factors should be considered in determining whether parents reside with a child on an equal or near equal basis. However, an analysis of those factors should not preclude a consideration of numerical or measurable factors, in particular the amount of time spent by each parent with the child.

[49] The same dictionary defines the word “near,” when used as an adverb (which it is in the phrase “equal or near equal basis”), as meaning “1 ... to or at a short distance in space or time.... 2 closely.... 3 ... almost, nearly....”. Thus, in the statutory definition of the term “shared-custody parent,” the phrase “near equal” presumably means a short amount of time from being equal, closely equal, almost equal or nearly equal.

[20] At paragraph 51 of his Reasons, the Judge remarked that the expression “near equal” could not be restricted “to only a very slight variation from a 50%/50% split” but that, however, “the statutory provision does not encompass a very wide variation from equal residence.”

[21] The Judge then turned to a review of his Court’s decisions on point, namely: *Brady v. The Queen*, 2012 TCC 240 at paras. 16 and 33 [*Brady*]; *B. (C.P.) v. The Queen*, 2013 TCC 118 at para. 14; *Van Boekel v. The Queen*, 2013 TCC 132 [*Van Boekel*]; *Hrushka v. The Queen*, 2013 TCC 335; *Mitchell v. The Queen*, 2014 TCC 66; *Fortin v. The Queen*, 2014 TCC 209 at paras. 18 and 28 [*Fortin*]; *Reynolds v. The Queen*, 2015 TCC 109 at para. 19 [*Reynolds*] and *Levin v. The Queen*, 2015 TCC 117 [*Levin*].

[22] At paragraph 61 of his Reasons, the Judge emphasized the fact that in making a determination with regard to the expression “equal or near equal basis”, his colleagues had considered the amount of time spent by each parent with their children and in doing so, they had expressed the time spent by each parent on a percentage basis. The Judge summarized these findings as follows:

a) *Brady*: A 55%/45% split (which, more precisely, may have been a 54.17%/45.83% split) was a near equal basis.

b) *Fortin*: A 57%/43% split was a near equal basis.

c) *Levin*: An historical 57%/43% split, which related to a period that was not in issue before the Court, was apparently a near equal basis.

e) *Van Boekel*: No decision was made as to whether an alleged 60%/40% split was a near equal basis.

f) *Reynolds*: A 65%/35% split was not a near equal basis.

[Not in italic in the original].

[23] The Judge then made the point that in *Brady*, *Van Boekel* and *Reynolds*, the parties had produced before the Court charts, tables, schedules or calendars in order to prove the amount of time spent by the children with their respective parents, but that in the matter before him, neither the appellant nor the respondent had provided him with similar documentary evidence, other than a working paper prepared by an auditor employed by the CRA.

[24] After indicating that the appellant had submitted that her son had resided with her during the Benefit Period for more than 60% of the time, the Judge held, at paragraph 63 of his Reasons, that he could not “determine precisely the proportionate amount of time that Ms. Morrissey [the appellant] resided with LM.”, saying that the best that he could do in the circumstances was to find that the appellant had resided with LM somewhere between 57.14% and 59.38% of the time. That determination stems from the Judge’s careful examination of the evidence which is set out at paragraph 26 of his Reasons.

[25] The Judge then made a comparative assessment of the percentages at which he had arrived with the percentages found by his colleagues in *Brady*, *Fortin* and *Levin*. This led him to say, at paragraph 64 of his Reasons, that the split which he found to exist, *i.e.* 57.14%/42.86% and 59.38%/40.62% “was sufficiently close to the splits in *Brady*, *Fortin* and *Levin*” and that, as a result, he was bound to conclude that the appellant and Mr. Murphy resided with their son on a near equal basis.

V. The Issue

[26] The sole issue before us on this appeal is whether the Judge made a reviewable error in finding that the appellant and Mr. Murphy resided with their son on a near equal basis during the Benefit Period. For the reasons that follow, I conclude that the Judge erred.

VI. Analysis

[27] The respondent says that the issue before us is subject to the palpable and overriding error test. More particularly, the respondent submits that the application of the Judge's percentage allocation to determine whether the appellant and Mr. Murphy resided with LM on an "equal or near equal basis" constitutes a question of mixed fact and law.

[28] In my view, it does not matter whether the Judge's determination is subject to the palpable and overriding error test or to the correctness standard because there can be no doubt that the percentages found by the Judge, *i.e.* somewhere between 57.14%/42.86% and 59.38%/40.62%, do not fall within the meaning of the words "near equal". Hence, on the Judge's findings of fact regarding the time spent by the appellant and Mr. Murphy with LM when he resided with them, I am satisfied that the appellant and Mr. Murphy were not shared-custody parents.

[29] In so concluding I adopt and make mine the Reasons of my colleague Webb J.A. in *Alexey Lavrinenko v. Her Majesty the Queen* (2019 FCA 51) (A-410-17) [*Lavrinenko*] which I have had the occasion of reading in draft and with which I am in entire agreement. More

particularly, I agree entirely with paragraphs 37 and 41-42 of Webb J.A.'s reasons wherein he states that "near equal" means "almost equal" and hence that "any percentage of time that cannot be rounded off to 50% would not qualify as near equal" (para. 41). As Webb J.A. explains, at paragraph 42 of his reasons, any rounding of percentages should be to the nearest whole number that is a multiple of 10 and another whole number. Specifically, any percentage between 45% and 49% should be rounded upwards to 50%, while any percentage between 41% and 44% should be rounded downwards to 40%. This approach addresses the concern that, due to a lack of precise data, "it is not always possible to accurately quantify the number of hours that the child resides with each parent and, therefore, arrive at a precise determination of the percentage of time that the child resides with each parent" (para. 42).

[30] Like in *Lavrinenko*, the concern relating to a lack of precise data arises in this case. However, as I have already indicated, since the Judge concluded as a matter of fact that Mr. Murphy resided with LM at most 42.86% of the time, it is clear that, when this percentage is properly rounded down to 40% in accordance with Webb J.A.'s reasons, the appellant and Mr. Murphy did not reside with LM on a "near equal" basis. Accordingly, the appellant is not a shared-custody parent as defined under section 122.6 of the Act, and is entitled to receive the full amount of the CCTB for the years at issue.

[31] The appeal in *Lavrinenko*, which raises a question identical to the one before us in the present appeal, was heard by a different panel of this Court in Toronto during the same week that this appeal was heard by this panel in St. John's, Newfoundland. Consequently, the decisions are being released together by the Registry on this day.

VII. Conclusion

[32] For these reasons, I would allow the appeal with costs, I would set aside the decision of the Tax Court of Canada, I would allow the appellant's appeal from the Minister's reassessments of her 2012 and 2013 taxation years with costs and I would return the matter to the Minister for redetermination in the light of these reasons.

"M Nadon"

J.A.

"I agree.

D.G. Near J.A."

"I agree.

Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-356-16

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DATED: MARCH 27, 2019

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