Docket: 2015-2417(IT)I

BETWEEN:

MAREK SHEVCHYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 23, 2016, at Toronto, Ontario.
Before: The Honourable Justice Guy R. Smith

Appearances:

Agents for the Appellant:	Michael Ding
	Osnat Nemetz
Counsel for the Respondent:	Sebastian Budd
	Laurent Bartleman

JUDGMENT

The appeal from the re-determinations made under the Income Tax Act for the Appellant's 2011 base taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant was an eligible individual within the meaning of section 122.6 of the *Income Tax Act* with respect to his three children during the period May 2013 to June 2013.

Access to the file in this appeal, 2015-2417(IT)I, is restricted in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 22nd day of March 2016.

"Guy Smith"

Smith J.

Citation: 2016 TCC 64
Date: 20160322
Docket: 2015-2417(IT)I

BETWEEN:

MAREK SHEVCHYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

[1] This is an appeal from a decision of the Minister of National Revenue ("**Minister**") with respect to the Appellant's entitlement to the Canada Child Tax Benefit ("**CCTB**") for the 2011 Base Year.

[2] The Appellant also refers in his Notice of Appeal to consequential determinations made for benefits arising under provincial legislation, over which this Court has no jurisdiction. While consequential adjustments to provincial taxes owing may occur as a result of this appeal, the issue over which the Court has jurisdiction is the application of the relevant federal tax credit to the facts of this case.

[3] In her decision, the Minister denied the Appellant's entitlement to the CCTB for the months of May and June 2013, and did so primarily on the basis that the Appellant's three children were not residing with him. This appeal concerns that period of time only.

[4] In support of its decision to deny the CCTB benefits, the Minister made a number of assumptions that I would paraphrase as follows:

1. The Appellant is the father of three children, namely:

   M, a son who at the time was about 12 years old;

V, a daughter who at the time was about 13 years old; and
M, a daughter who at the time was about 17 years old.

2. The Appellant and the mother have been living separate and apart since at least 2004 as a result of the breakdown of their marriage;

3. At all relevant times until May 2013, the three children resided with the Appellant in the family home located in the City of Barrie;

4. In April 2013, the eldest daughter moved out of the family home and the 2 other children were removed by the Children's Aid Society of Simcoe County;

5. None of the 3 children lived in a settled and regular way of life with the Appellant at any time during May and June 2013;

And finally:

6. At all relevant times during the months of May and June 2013, the Appellant did not perform a primary role in fulfilling the responsibility for the care and upbringing of the three children.

The assumptions set out at points 4, 5 and 6, above, are in dispute.

Factual Background

[5] The Appellant testified at the hearing and there were no other witnesses.

[6] By way of background, he explained that he was in receipt of a disability pension as a result of a serious fire accident that took place in 2010. He had undergone various treatments, including skin grafts and those treatments were ongoing in 2013.

[7] In January 2013, he slipped on an icy surface at a bus stop and broke his right ankle. He required an operation and was hospitalized for a week. He suffered a loss of mobility and required crutches.

[8] Turning to the relevant period (May and June 2013), the Appellant explains that in mid-April 2013 he was involved in a dispute with his eldest daughter. The dispute escalated, the eldest daughter pushed him and he broke his right ankle again. She left the family home.

[9] A short time later, as a result of a complaint made by his eldest daughter, a case worker from the local Children's Aid Society ("**CAS**") attended the family home, accompanied by two constables.

[10] According to the Appellant, the complaint filed by his eldest daughter lead to an investigation. When asked if the CAS had removed his children at that time, he maintained that it was only an investigation.

[11] The Appellant's evidence is that, with a fresh injury to his right ankle, he realized he would not be able to properly care for his two youngest children and decided to ask a family friend to take care of them. He had known DR for the last 10 years or so. She was familiar with the Appellants' children since her own children attended the same school and they shared activities together.

[12] According to the Appellant's testimony, DR took care of his two youngest children for the latter part of April as well May and June 2013. As a result of his ongoing physical difficulties including surgery, they remained in her care for July and August 2013.

[13] For the months of September through to December 2013, the Appellant's son returned to live with him at the family home while the youngest daughter chose to remain with DR. As indicated above, the eldest daughter moved out of the family home following the incident in April 2013, eventually moving in with her mother over the summer months but not returning to the family home.

[14] According to the Appellant's testimony, he saw his children as often as he could during the subject period, sometimes as often as 2-3 times a week. When possible, he would prepare meals or lunches for school, to be picked up by DR or another friend, described as DJ. He paid for a family membership at the local YMCA. As often as possible, he would take the children to the movies. Asked whether the children, including the eldest daughter, had moved their furniture and personal effects out of the family home, he indicated that they had not since the move was temporary. There was no change to their school. He indicated that the children were well taken care of and that were it not for his medical condition, he would have taken care of them. He also maintained contact with his eldest daughter and gave her money.

[15] Although I am not without some doubts as to the Appellant's credibility, on balance I found him to be honest and forthright. His testimony was consistent even when challenged in cross-examination.

Documentary Evidence

[16] The Appellant produced copies of two receipts for $600, dated May 17 and June 20, 2013, signed by DR as well as three receipts for $300, dated April 19, May 17 and June 20, 2013, purportedly signed by his eldest daughter, though the signature is illegible. All receipts bear the notation "Child Tax Benefit Support" and the Appellant's evidence was that the money was to be used by DR for the support of his two children and by his eldest daughter for her support.

[17] While the receipts are the most cogent evidence presented to the Court, other documents were produced. Some pre-date the subject time period, while others are dated several months later. While they provide context, none provide any direct evidence on the time period in question.

[18] With respect to the son M, the Appellant produced a hand-written note (the "**note**") from a staff lawyer at the Ontario Legal Aid. It refers to Minutes of Settlement and a draft CAS Order. Also attached is a draft Order from the Ontario Superior Court of Justice, Family Court.

[19] A review of the note suggests that the Minutes of Settlement were likely completed in May 2014, while the CAS Order, presumably implementing that settlement, was prepared in November 2014, almost 18 months after the incident in question.

[20] Attached to the note is a draft Order dated May 7, 2014 from the Superior Court of Justice, Family Court. It is unsigned and incomplete but clearly refers to the Appellant's youngest son M. It suggests that M is to be placed in the care and custody of his mother. There is no effective date.

[21] The Appellant also produced a final signed Order of the Superior Court of Justice, Family Court dated January 23, 2015, that grants care and custody of M to him. The Order notes that he has had primary care and custody of M for all of 2014. There is no mention of 2013.

[22] The Crown challenged the Appellant's credibility insofar as he did not produce the Minutes of Settlement, which would have confirmed the apprehension of the children by the CAS. The Appellant denied this and explained that it took a long time to obtain any documents from either the CAS or his Legal Aid lawyer. In any event, I have already concluded that the Minutes of Settlement were likely

prepared in May 2014, a full year after the incident in question. As such, they are not directly relevant to the time period in question.

[23] With respect to the youngest daughter V, the Appellant produced what purports to be a final Order of the Superior Court of Justice, Family Branch dated December 13, 2013. The Order grants custody of V to DR subject to access by the parents upon request.

[24] Similarly, with respect to the eldest daughter M, the Appellant produced what purports to be a final Order of the Superior Court of Justice, Family Court dated December 13, 2013. The Order declares that M shall be made a Ward of the Crown and placed in the care and custody of the Children's Aid Society subject to access by the parents upon request.

[25] It is important to note that both draft Orders are not actually signed by the judge though a hand-written notation indicates they were approved as to form and content by the Appellant's lawyer on August 8, 2014.

[26] Since both draft Orders are dated December 13, 2013, it is apparent that legal proceedings relating to V and M had been instituted by the CAS sometime in 2013. However, without further evidence, I am unable to reach any conclusion as to the commencement date of those proceedings.

[27] During cross-examination, the Appellant was shown a type-written letter (the "**letter**") from DR dated October 19, 2011 and addressed "to whom it may concern". It reviews the Appellant's family situation, the connection between their respective children and paints a rather glowing picture of the Appellant's role and dedication as a father while acknowledging his physical challenges.

[28] The letter also refers to the due diligence required for a placement and suggests that if the two youngest children were allowed to return to live with their father, DR would be available for short stays should that be necessary. This suggests to me that the CAS has been involved with the Appellant since at least October 2011, the date of the letter.

[29] However, the letter refers to a situation that predates the subject period by well over 18 months, and the Minister has admitted that the Appellant had care and custody of his three children until at least April 2013.

[30] In terms of probative value, the letter certainly confirms the Appellant's description of DR as a good family friend and provides context as to why the children would have moved with her after the incident of 2013.

[31] The next document that was put before the Appellant during his cross-examination was his hand-written Notice of Objection prepared in June 2014. It refers to the incident with his eldest daughter in April 2013 and states:

> . . . Although I did the right thing, I am being punished by arrogant and conceited people at the Children's Aid Society who upper-handed [*sic*] my children without proof and evidence and they did not even talk to me to ask what had happened between me and my oldest daughter. They put the case to the court.

[32] The Crown has taken the position that the word "upper-handed" must be taken to mean "apprehended" and that this is an admission that the children were in fact removed by the CAS. The Appellant denied this interpretation, maintaining that at that point it was only an investigation.

[33] The Appellant has no legal training and I am reluctant to conclude on the basis of the wording used in the Notice of Objection, that there was an actual removal order. At that point, it could have been an intervention by the CAS as opposed to an actual apprehension and removal.

[34] The Appellant was badly injured. He realized that he would have difficulty attending to all the children's needs. Did the CAS case worker insist or even strongly insist that the children be temporarily placed with DR or elsewhere? Was he given any choice?

[35] On the basis of the letter of October 19, 2011, I am able to conclude that DR had an existing relationship with the Appellant and his children and that she was known to CAS. A temporary placement with her would likely have been acceptable to the CAS. There is no evidence that it was not acceptable.

What conclusions can I draw from the above?

[36] Although it is clear that the complaint lodged by the eldest daughter lead to an intervention by CAS, I am unable to conclude that the children were apprehended or that there was an actual removal order at that time.

[37] As a result of his injury and likely at the prodding of the CAS, the two youngest children were placed in the temporary care of a good family friend during at least the relevant period. The Appellant gave her money and remained as involved as he could despite his physical impairments.

[38] The eldest daughter, who was 17 years old at the time, left the family home in April 2013 following the dispute with the Appellant. She lived elsewhere, either with her boyfriend or with her mother, but there was nothing permanent about her situation. The Appellant remained as the custodial father and provided money directly to her, as evidenced by the receipts provided.

[39] On the basis of the above, I conclude that the Appellant has established a prima facie case that the two youngest children had not been removed by the CAS and that, while the eldest daughter had left the family home, she was still in his care and custody during the relevant period. The Appellant had not given up legal guardianship of his three children, even on a temporary basis.

What are the legal issues?

[40] The Minister asserts that the Appellant is not entitled to the CCTB for the relevant period since he is not an "eligible individual".

[41] Subsection 122.6 of the *Income Tax Act* ("**ITA**") provides as follows:

> **eligible individual** in respect of a qualified dependant at any time means a person who at that time
>
> (*a*) resides with the qualified dependant,
>
> (*b*) is the parent of the qualified dependant who
>
> (i) is the parent who primarily fulfills the responsibility for the care and upbringing of the qualified dependant and who is not a share-custody parent in respect of the qualified dependant, or
>
> (ii) is a shared-custody parent in respect of the qualified dependant.

[42] Since there is no suggestion that the Appellant was a shared-custody parent, only two issues need to be determined. In *Loyer v. Canada*, [2002] 3 CTC 2304, Justice Lamarre (as she then was) explained (at paragraph 14):

> To satisfy the definition of "eligible individual", a taxpayer must meet two cumulative conditions: namely residing with the qualified dependent and primarily fulfilling the responsibility for the care and upbringing of the qualified dependent.

[43] The Minister referred to the recent decision of *Jhanjii v. R*. 2014 TCC 126, where Justice Hogan found that a child who was attending a boarding school in India and remained there to complete his schooling after his mother's unexpected death and his father's relocation to Canada, was nonetheless still deemed to reside with his father for purposes of subsection 122.6 of the ITA.

[44] Justice Hogan reviewed several other cases involving different factual situations and the definition of "reside", and stated (at paragraph 22):

> The CCTB regime was designed to support families in their efforts to meet their basic needs and improve their economic circumstances. **I do not believe that the legislative intent behind the residency requirement was to exclude otherwise eligible families who have had to adapt to unfortunate circumstances.**
>
> [My emphasis.]

[45] In this particular instance, it is clear that the Appellant and his family had to adapt to unfortunate circumstances resulting from his most recent physical injury. Even the dispute with his oldest daughter and her decision to leave the family home should be viewed in that context until it became clear that her departure was permanent.

[46] Justice Hogan also referred to the decision of *Bouchard v. R*., 2009 TCC 38, where Justice Woods awarded the CCTB to a single father while he was incarcerated. In reaching that decision, she stated the following:

> 18. In my view, **the child tax benefit provisions should be interpreted in a compassionate way** in these types of circumstances **so as not to frustrate the obvious intention of Parliament to assist low income families**.
>
> 19. **Where there is one parent who has custody of the child** and takes care of the child, generally **that parent should be entitled to the child tax benefit even though the parent may not be physically under the same roof as the child for a period of time**.
>
> 20. The circumstances in which the daughter found herself in here are tough for a 17 year old. **To deny the benefit to her custodial parent who took care of her**

> **would be the antithesis of what Parliament had in mind in enacting the family benefit regime**.
>
> [My emphasis.]

[47] On the basis of the above and on the particular facts of this case, I find that the three children were residing with the Appellant during the relevant period and that he was the parent who primarily assumed responsibility for their care and upbringing.

[48] In other words, I conclude that the Appellant was an eligible individual in relation to the three children for the months of May and June 2013 and therefore that he is entitled to the CCTB benefits for that period.

[49] For the reasons indicated above, I would allow the appeal and refer this matter back to the Minister on the basis that the Appellant was an eligible individual within the meaning of section 122.6 of the ITA with respect to his three children during the period May 2013 to June 2013.

[50] At the request of the Crown, I would seal the Court file with access restricted to the Crown, the designated representatives of the Crown, the Appellant, and judges and registry officers of the Tax Court of Canada.

Signed at Ottawa, Canada, this 22nd day of March 2016.

"Guy Smith"

Smith J.

CITATION:	2016 TCC 64
COURT FILE NO.:	2015-2417(IT)I
STYLE OF CAUSE:	MAREK SHEVCHYK v. HER MAJESTY THE QUEEN
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REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
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APPEARANCES:

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