Docket: 2006-2657(IT)I

BETWEEN:

FRANÇOIS VIGEANT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on June 26, 2007, at Montréal, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant:	The Appellant himself
For the Respondent:	Nadia Golmier, student-at-law

JUDGMENT

The Court dismisses the appeal from the redetermination of February 20, 2006, in which the Minister of National Revenue (the Minister) revised the Appellant's child tax benefits for the periods from September 2004 to February 2005 and from September 2005 to January 2006, and determined that the Appellant was not entitled to the amounts of $2,561.73 for the base taxation year 2003 and $2,028.38 for the base taxation year 2004.

The Court dismisses the appeal from the redetermination of January 27, 2006, in which the Minister revised the Appellant's Goods and Services Tax credit, for the periods from October 2004 to January 2005, and determined that the Appellant was not entitled to the amounts of $171 for the 2003 taxation year and $173.50 for the 2004 taxation year.

Signed at Ottawa, Canada, this 10th day of September 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 24th day of October 2007.
Gibson Boyd, Translator

Citation: 2007TCC492
Date: 20070910
Docket: 2006-2657(IT)I

BETWEEN:

FRANÇOIS VIGEANT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

[OFFICIAL ENGLISH TRANSLATION]

Bédard J.

[1] The Minister of National Revenue (the Minister), by way of a notice of redetermination dated February 20, 2006, revised the Appellant's child tax benefits for the periods from September 2004 to February 2005 and from September 2005 to January 2006, and determined that the Appellant was not entitled to the amounts of $2,561.73 for the 2003 base taxation year and $2,028.38 for the 2004 base taxation year.

[2] The Minister also revised, by way of a notice of redetermination dated January 27, 2006, the Appellant's Goods and Services Tax credit, for the periods from October 2004 to January 2005 and from October 2005 to January 2006, and determined that the Appellant was not entitled to the amounts of $171 for the 2003 taxation year and $173.50 for the 2004 taxation year.

[3] The Appellant appealed these redeterminations under the informal procedure.

[4] On or around March 13, 2006, the Appellant served on the Minister a notice of objection to the redetermination of February 20, 2006, in respect of the 2003 and 2004 base taxation years.

[5] On June 27, 2006, the Minister confirmed the redetermination of February 20, 2006.

[6] I will immediately point out that the Appellant did not serve on the Minister a notice of objection to the redetermination of January 27, 2006, for the 2003 and 2004 taxation years. Therefore, the Appellant could not appeal from the redetermination of January 27, 2006, in respect of the Goods and Services Tax credit.

[7] In this case, the only issue to determine was whether the Appellant was the eligible individual within the meaning of section 122.6 of the *Income Tax Act* (the Act) for the periods from September 2004 to February 2005 and from September 2005 to January 2006.

The Facts

[8] The Appellant and Nina Messier are the parents of Sarah Vigeant, born October 11, 1996 and Maude Vigeant, born March 22, 1999. Since their separation, the Appellant and Ms. Messier have had shared custody of the children. Since September 2004, the children have been with their mother from Monday at 8:30 a.m. to Friday at 8:30 a.m. and with their father from Friday at 8:30 a.m. to Monday at 8:30 a.m. The Appellant and Ms. Messier did not have an agreement on sharing of child tax benefits.

The Law

[9] The definition of "eligible individual" at section 122.6 of the Act at the time was worded 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 primarily fulfils the responsibility for the care and upbringing of the qualified dependant,

(*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,

(*d*) is not described in paragraph 149(1)(a) or 149(1)(b), and

(*e*) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who

> (i) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
>
> (ii) is a temporary resident within the meaning of the *Immigration and Refugee Protection Act*, who was resident in Canada throughout the 18 month period preceding that time, or
>
> (iii) is a protected person within the meaning of the *Immigration and Refugee Protection Act*,
>
> (iv) was determined before that time to be a member of a class defined in the Humanitarian Designated Classes Regulations made under the Immigration Act,

and for the purpose of this definition,

(*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,

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

(*h*) prescribed factors shall be considered in determining what constitutes care and upbringing.

[10] For the purposes of paragraphs (*g*) and (*h*) of the definition of "eligible individual" at section 122.6 of the Act, sections 6301 and 6302 of Part LXIII of the *Income Tax Regulations* (the Regulations) provide as follows:

NON-APPLICATION OF PRESUMPTION

> **6301.** (1) For the purposes of paragraph (*g*) of the definition "eligible individual" in section 122.6 of the Act, the presumption referred to in paragraph (*f*) of that definition does not apply in the circumstances where
>
> (a) the female parent of the qualified dependant declares in writing to the Minister that the male parent, with whom she resides, is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of each of the qualified dependants who reside with both parents;
>
> (b) the female parent is a qualified dependant of an eligible individual and each of them files a notice with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant;
>
> (c) there is more than one female parent of the qualified dependant who resides with the qualified dependant and each female parent files a notice with the Minister under subsection 122.62(1) of the Act in respect of the qualified dependant; or
>
> (d) more than one notice is filed with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant who resides with each of the persons filing the notices if such persons live at different locations.
>
> (2) For greater certainty, a person who files a notice referred to in paragraph (1)(*b*), (c) or (d) includes a person who is not required under subsection 122.62(3) of the Act to file such a notice.

FACTORS

> **6302.** For the purposes of paragraph (*h*) of the definition "eligible individual" in section 122.6 of the Act, the following factors are to be considered in determining what constitutes care and upbringing of a qualified dependant:
>
> (*a*) the supervision of the daily activities and needs of the qualified dependant;
>
> (*b*) the maintenance of a secure environment in which the qualified dependant resides;

> (*c*) the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;
>
> (*d*) the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;
>
> (*e*) the attendance to the needs of the qualified dependant when the qualified dependant is ill or otherwise in need of the attendance of another person;
>
> (*f*) the attendance to the hygienic needs of the qualified dependant on a regular basis;
>
> (*g*) the provision, generally, of guidance and companionship to the qualified dependant; and
>
> (*h*) the existence of a court order in respect of the qualified dependant that is valid in the jurisdiction in which the qualified dependant resides.

[11] It should also be understood from the mode of computation of the benefit payable that is found at section 122.61 of the Act that the minimal period, for the purposes of benefit payments, is one month and that benefits of an amount corresponding with one month must be paid to whomever was the eligible individual at the beginning of the month, i.e. the person who resided with the dependant a the beginning of the month and who, at that date, assumed primary responsibility for the care and upbringing of the qualified dependant.

[12] Although the Act provides that only one of the two parents is the "eligible individual" during a given month, the Canada Customs and Revenue Agency (the Agency) has developed a policy of shared eligibility which acknowledges that there can be, in the case of shared custody, two eligible individuals for the same child. Thus, the Agency allows each parent to be entitled to the benefit for six months alternately, for as long as the two parents agree to share the benefit on a half-yearly basis or as long as one of the parents does not appeal, to the Agency's appeals division, from the Agency's initial determination that the two parents were both eligible individuals for the same child. In such cases, it appears that the Agency's appeals division strictly applies the Act to determine which of the two parents is the "eligible individual."

Analysis and conclusion

[13] It should be pointed out that only the Appellant testified in support of his position and that he did not file any documentary evidence with regard to the condition set out in paragraph (*b*) of the definition of "eligible individual," i.e. the parent of the dependant must be the one who primarily fulfils the responsibility for the care and upbringing of the qualified dependant, at the same time taking into consideration the factors established at section 6302 of the Regulations. The Appellant's testimony was also silent in respect of this. In this matter, the Appellant had the onus of proving that the care and upbringing of the children were not primarily carried out by the female parent of the child, but rather by him. He did not do so. Therefore, I am of the opinion that the Minister was entitled to revise the child tax benefits for the relevant periods and determine that the Appellant was not entitled to the amount of $2,561.73 for the 2003 base taxation year and $2,028.38 for the 2004 base taxation year.

[14] In this case, the Appellant was mostly interested in having me condemn the Agency's administrative policy and declare it illegal. In respect of this, the Appellant argued that only Parliament can provide for the proportional sharing of the child tax benefit. The Appellant explained that his request to the Court to have the Agency's administrative policy declared illegal was aimed, above all, at forcing parliament to make the necessary legislative changes to ensure a fair division of the child tax benefit, in particular when there is acrimony between the parents who have joint custody of children, acrimony which makes the division of the child tax benefit on a half-yearly basis impossible. Indeed, the Appellant is convinced that if the Agency could no longer meet the wishes of parents who agree to share such a benefit on a half-yearly basis, the parents would revolt and put the necessary pressure on parliament to make the legislative changes required so that the child tax benefit could finally be divided fairly by all parents who have shared custody of their children, whether there is acrimony or not.

[15] I must first point out that I do not have jurisdiction to ask the Agency to stop practising such an administrative policy, which, I concede, is contrary to the Act. Basically, when the Court is seized of an appeal under the Act, its jurisdiction is limited to ruling on that appeal,

(a) by dismissing it;

(b) by allowing it and:

(i) cancelling the assessment;
(ii) modifying the assessment;
(iii) referring the assessment back to the Minister for reconsideration and reassessment.

[16] I hesitate to condemn the Agency's administrative practice, because it at least serves the interests of two parents who agree to share the child tax benefit on a half-yearly basis. However, it seems obvious to me that certain legislative changes are necessary. In cases where there is shared or joint custody (which has nothing to do with the reasonable or structured visitation rights of the past), it would not be difficult to provide for the division of the child tax benefit on certain conditions. The division performed by the Minister based on the evidence presented would apply until modified by a court of appeal. These decisions made after consideration of the facts supplied by the parties in questionnaires or other means of communication would probably give rise to very few disputes.

[17] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 10th day of September 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 24th day of October 2007.
Gibson Boyd, Translator

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APPEARANCES:

For the Appellant:	The Appellant himself
Agent for the Respondent:	Nadia Golmier, student-at-law

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