Docket: 2011-2286(IT)I

BETWEEN:

MICHELLE D'ELIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 16, 2012, at Edmonton, Alberta

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Paige Atkinson

JUDGMENT

The Appellant's appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that the Appellant has not been overpaid Canada Child Tax Benefit (the "CCTB") payments made during the period from February 2007 to June 2008 and that the Appellant has not been overpaid Goods and Services Tax Credit ("GSTC") payments made for the quarters beginning April 2007 and July 2008 to April 2009. The Respondent shall pay costs to the Appellant which are fixed in the amount of $250.

Signed at Halifax, Nova Scotia, this 31st day of May 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC180
Date: 20120531
Docket: 2011-2286(IT)I

BETWEEN:

MICHELLE D'ELIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the Appellant is the eligible individual in respect of her son for the purposes of the Canada Child Tax Benefit (the "CCTB") for the period from February 2007 to June 2008 (the "CCTB period under appeal") and whether her son was a qualified dependant of the Appellant at the beginning of the months of April 2007, July 2008, October 2008, January 2009 and April 2009 for the purposes of the Goods and Services Tax Credit (the "GSTC"). The Appellant was notified that she was not entitled to CCTB payments during the CCTB period under appeal and that she was not entitled to a portion of the GSTC amounts paid to her for the months identified above as her son was no longer in her care.

[2] The Appellant and Arturo D'Elia were married and they had one child – a son. They separated in January 2007 and have been living separate and apart as a result of a breakdown of their marriage since then.

[3] Under the *Income Tax Act* (the *"Act"*) the CCTB is treated as an overpayment of the person's liability under the *Act* and hence, if the individual is eligible, such amount is paid to the eligible individual as a refund of this overpayment. Under subsection 122.61(1) of the *Act* the overpayment amount is calculated on a monthly basis. This subsection provides, in part, as follows:

122.61(1) Where a person ... [has] 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

1/12 [(A - B) + C + M]

where

A is the total of

(*a*) the product obtained by multiplying $1,090[1] by the number of qualified dependants in respect of whom the person was an eligible individual at the beginning of the month, and

…

C is the amount determined by the formula

F – (G × H)

where

F is, where the person is, at the beginning of the month, an eligible individual in respect of

(a) only one qualified dependant, $1,463[2], and

…

[4] Because the overpayment is deemed to have arisen during a month for which a person is an eligible individual in respect of a qualified dependant *at the beginning of the month*, this requires a determination of whether any particular person was an eligible individual at the beginning of each month in respect of that qualified dependant. As a result, it does not necessarily follow that because one particular person was the eligible individual in respect of a qualified dependant at the beginning of a particular month, that the same person would then be the eligible individual at the beginning of the following month in respect of that qualified dependant. The definitions of “eligible individual” and “qualified dependant” in section 122.6 of the *Act* provide that:

[1] This amount is adjusted annually as provided in subsection 122.61(5) of the *Act*.

[2] This amount is adjusted annually as provided in subsection 122.61(5) of the *Act*.

> "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,
> >
> > ...
>
> and, for the purposes of this definition,
>
> > (*f*) where a 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 (*f*) does not apply in prescribed circumstances, and
> >
> > (*h*) prescribed factors shall be considered in determining what constitutes care and upbringing;
>
> "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;

[5] The GSTC is only determined for eligible individuals in relation to specified months. Subsection 122.5(3) of the *Act* provides in part as follows:

> 122.5 (3) ***An eligible individual in relation to a month specified for a taxation year*** who files a return of income for the taxation year and applies for an amount under this subsection is deemed to have paid during the specified month on account of their tax payable under this Part for the taxation year an amount equal to ¼ of the amount, if any, determined by the formula

A – B

where
A is the total of

(a) $213[3],

(b) $213 for the qualified relation, if any, of the individual in relation to the specified month,

(c) if the individual has no qualified relation in relation to the specified month and is entitled to deduct an amount for the taxation year under subsection 118(1) because of paragraph (b) of the description of B in that subsection in respect of a qualified dependant of the individual in relation to the specified month, $213,

(d) $112 times the number of qualified dependants of the individual in relation to the specified month, other than a qualified dependant in respect of whom an amount is included under paragraph (c) in computing the total for the specified month,

(emphasis added)

[6] Subsection 122.5(4) of the *Act* provides that:

(4) For the purposes of this section, the months specified for a taxation year are July and October of the immediately following taxation year and January and April of the second immediately following taxation year.

[7] The definitions of "eligible individual[4]", "qualified dependant" and "qualified relation" are in section 122.5 of the *Act* and these are as follows:

"eligible individual", in relation to a month specified for a taxation year, means an individual (other than a trust) who

(a) has, before the specified month, attained the age of 19 years; or

(b) was, at any time before the specified month,

---

[3] This amount and the other amounts of this section are adjusted annually as provided in subsection 117.1(1) of the *Act*.

[4] Although the terms "eligible individual" and "qualified dependant" are used for both CCTB and GSTC, the expressions are assigned different meanings for GSTC (in section 122.5) and CCTB (in section 122.6).

(i) a parent who resided with their child, or

(ii) married or in a common-law partnership.

"qualified dependant" of an individual, in relation to a month specified for a taxation year, means a person who at the beginning of the specified month

(a) is the individual's child or is dependent for support on the individual or on the individual's cohabiting spouse or common-law partner;

(b) resides with the individual;

(c) is under the age of 19 years;

(d) is not an eligible individual in relation to the specified month; and

(e) is not a qualified relation of any individual in relation to the specified month.

"qualified relation" of an individual, in relation to a month specified for a taxation year, means the person, if any, who, at the beginning of the specified month, is the individual's cohabiting spouse or common-law partner.

[8] Subsection 122.5(6) of the *Act* provides that:

(6) If a person would, if this Act were read without reference to this subsection, be the qualified dependant of two or more individuals, in relation to a month specified for a taxation year,

(a) the person is deemed to be a qualified dependant, in relation to that month, of the one of those individuals on whom those individuals agree;

(b) in the absence of an agreement referred to in paragraph (*a*), ***the person is deemed to be, in relation to that month, a qualified dependant of the individual, if any, who is, at the beginning of that month, an eligible individual within the meaning assigned by section 122.6 in respect of the person***; and

(c) in any other case, the person is deemed to be, in relation to that month, a qualified dependant only of the individual that the Minister designates.

(emphasis added)

[9] There are two conditions that must be met for a person to be an eligible individual in respect of a qualified dependant for the purposes of the CCTB:

a. the person must reside with the qualified dependant; and

b. the person must be "the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of the qualified dependant".

[10] CCTB payments are made monthly and these conditions must be met at the beginning of each month to receive a CCTB payment in that month. GSTC payments are made four times a year and the applicable conditions need only be satisfied at the beginning of certain months – January, April, July and October – to receive the GSTC payment for that calendar quarter. For both the CCTB and the GSTC the Appellant's son must be residing with her. If the child was residing with the Appellant and with his father, the issue, for both CCTB and GSTC purposes, will be which parent was the person who primarily fulfilled the responsibility for the care and upbringing of the child. This is a requirement of the definition of eligible individual for the purposes of the CCTB. For the purposes of the GSTC (if the child is a qualified dependant of more than one person) the person who is eligible for the GSTC is the person who is the eligible individual in respect of the child for the purposes of the CCTB (since the Appellant and Arturo D'Elia did not agree that their son would be a qualified dependant of one of them).

[11] The result of the foregoing definitions and requirements for CCTB and the GSTC mean that, for the purposes of this appeal, the issues are as follows:

(a) Was the Appellant's son residing with her at the beginning of any of the months during the CCTB period under appeal for the purposes of the CCTB and the GSTC payment for April 2007, and if so, for which months; and, since the month of April 2007 is during the CCTB period under appeal, was her son residing with her at the beginning of any of the months of July 2008, October 2008, January 2009 and April 2009 for the purposes of the GSTC?

(b) If the child was residing with the Appellant at the beginning of any of these months, was he also residing with Arturo D'Elia at the beginning of the same month or months?

(c) If the child was residing at the beginning of any particular month or months with both the Appellant and Arturo D'Elia, which parent, at the beginning of such month or months, was the parent

> who primarily fulfilled the responsibility for his care and upbringing at that time?

[12] The only witness at the hearing was the Appellant. The first issue that has to be determined is whether the child resided with the Appellant at the beginning of any of the relevant months referred to above. In addressing this issue, the issue of whether the child was residing with Arturo D'Elia at the beginning of any of these months will also be addressed.

[13] Justice Rand of the Supreme Court of Canada in *Thomson* v. *M.N.R.*, 1945 CarswellNat 23, [1946] C.T.C. 51, made the following comments on "residing" and "ordinarily resident":

> 47 The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.
>
> 48 The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

[14] Justice Bonner in *S.R.* v. *The Queen*, 2003 TCC 649, [2004] 1 C.T.C. 2386, made the following comments:

> 12 The word "reside" with as used in the section 122.6 definition of the term "eligible individual" must be construed in a manner which reflects the purpose of the legislation. That legislation was intended to implement the child tax benefit. That benefit was introduced in 1993 with a view to providing a single nontaxable monthly payment to the custodial parent of a child. That payment was intended to benefit the child by providing funds to the parent who primarily fulfilled the responsibility for the care and upbringing of the child. The threshold test is whether the child resides with the parent. Physical presence of the child as a visitor in the residence of a parent does not satisfy the statutory requirement. The word "resident" as used in s. 122.6 connotes a settled and usual abode. …

[15] In *Lapierre* v. *The Queen*, 2005 TCC 720, 2008 DTC 4248, Justice Dussault stated that:

> 13 Although residence is the fundamental concept applied to determine if a person is subject to income tax under the *Act*, that term is nonetheless not defined therein and it is the courts that have attempted to establish its scope. Essentially a question of fact, a person's residence in a given place is determined by a certain number of criteria of time, object, intention and continuity that do not necessarily always carry the same weight and which can vary according to the circumstances of each case. (see *Thomson v. M.N.R.*, [1946] S.C.R. 209). All things considered, residence implies a certain constancy, a certain regularity or else a certain permanence according to a person's usual lifestyle in relation to a given place and is to be distinguished from what might be called visits or stays for specific purposes or of a sporadic nature. When the *Act* sets as a condition to reside with another person, I do not consider it appropriate to attribute to the verb "to reside" a meaning which deviates from the concept of residence as it has been developed by the courts. To reside with someone is to live or stay with someone in a given place with a certain constancy, a certain regularity or else in an habitual manner.

[16] As a result it is necessary to determine whether the child lived with the Appellant and / or Arturo D'Elia on a settled and usual basis. It is not simply a question of which house the child was at on the first day of any given month. Did he have a settled and usual abode with the Appellant or Arturo D'Elia? Did he live with either or both of them regularly during this period?

[17] The assumptions made by the Respondent in relation to this issue were the following:

> 19. In so redetermining the Appellant's CCTB for the 2005 and 2006 base taxation years and GSTC for the 2005 and 2007 base taxation years, the Minister made the following assumptions of fact:
>
> (a) The Appellant and Arturo D'Elia (the "Spouse") were married;
>
> (b) The Appellant and the Spouse began living separate and apart in January 2007, due to a breakdown of their marriage;
>
> (c) The Appellant and the Spouse have one child, SD'E, …;
>
> (d) Pursuant to the February 1, 2007 Separation Agreement (the "Agreement"):
>
> (i) The Appellant and the Spouse have joint custody of SD'E;
>
> (ii) SD'E primarily resides with the Spouse; and

(iii) The Appellant is given fair and reasonable access to SD'E;

(e) During the period January 2007 to August 2008, during each two week period, SD'E resided with:

(i) the Appellant for 48 hours; and

(ii) the Spouse for 288 hours;

as detailed in Schedule C attached to and forming part of the Reply to the Notice of Appeal ("Schedule C");

(f) During the period from August 2008, during each two week period, SD'E resided with:

(i) the Appellant for 129 hours; and

(ii) the Spouse for 207 hours;

as detailed in Schedule C;

[18] It seems to me that there is more than one concern in relation to the wording of the assumptions. The first concern is that the assumptions are made with respect to where the child "resided". Where a person is "residing" can only be determined by applying the law to the facts. It seems to me, as I had noted in *Nadalin* v. *The Queen*, 2012 TCC 48, that it is not proper to assume where a person is "residing" as this is the conclusion that must be drawn after reviewing all of the relevant facts and then applying the law to those facts. The particular facts which would lead to a conclusion that a person is residing at a particular location or with a particular person should be identified in the assumptions, not the conclusion (which must be made by applying the law to the facts). Therefore it seems to me that the assumptions with respect to the child residing with the Appellant or Arturo D'Elia are not proper assumptions.

[19] As well, the assumptions refer to the child *primarily* residing with Arturo D'Elia. Whether the Appellant will be an eligible individual in respect of her son for the purposes of the CCTB or her son will be a qualified dependant of the Appellant for the purposes of the GSTC will depend on whether her son was residing with her, not whether her son was *primarily* residing with her. The word "reside" is not modified by any words and in particular it is not modified by the word primarily in the definition of eligible individual in section 122.6 of the *Act* or the definition of qualified dependant in section 122.5 of the *Act*.

[20] The evidence was clear that the Appellant and Arturo D'Elia had joint custody of their son throughout the period under appeal. The separation agreement between the Appellant and Arturo D'Elia provided that they would have joint custody of their son. While the Separation Agreement provides that Arturo D'Elia will have "primary residency" of their son, the applicable provisions of the *Act* only require that the child reside with the Appellant, not that he primarily reside with the Appellant. As well, the issue is where the child was actually residing which may differ from what the parties had agreed upon.

[21] The Appellant submitted copies of monthly calendars for 2007 and 2008 which clearly indicated a settled rotation of time that their son would be with each parent. The calendars submitted indicate a significant difference in the number of hours that the child would be with the Appellant or during which she was responsible for the child from the number of hours as set out in the Reply. The percentage of time for which the Appellant was responsible for the child, as stated in the calendars submitted, ranged from 40% to 69%, excluding the month of December 2007 when the child was in Argentina with his father. There was no indication that this pattern changed in 2009. It seems to me that the child had a settled and usual abode with the Appellant and with Arturo D'Elia throughout 2007, 2008 and 2009. The fact that the child went on an extended trip to Argentina with his father in December 2007, does not change this finding that he had a settled and usual abode with both the Appellant and Arturo D'Elia.

[22] As a result it seems to me that the child was residing with both the Appellant and Arturo D'Elia at the beginning of each of the months during the CCTB period under appeal and also during the beginning of each of the months of July 2008, October 2008, January 2009 and April 2009.

[23] The next question is whether the Appellant was the parent who primarily fulfilled the responsibility for the care and upbringing of her son during the period under appeal.

[24] Paragraph (*f*) of the definition of "eligible individual" in section 122.6 of the *Act* (for CCTB) provides a presumption if the child resides with the female parent. This paragraph provides that the female parent is presumed to be "the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant," if the child resides with that parent. This presumption does not apply in prescribed circumstances. The prescribed circumstances (in which the presumption would not be applicable) are set out in subsection 6301(1) of the *Income Tax Regulations* ("*Regulations*") and include, as one of these circumstances, the

situation where "more than one notice is filed with the Minister under subsection 122.62(l) 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".

[25] The "facts" upon which the Minister relied in making the determination that the Appellant was not entitled to the CCTB and the GSTC payments made in relation to her son were set out in paragraph 19 of the Reply:

> 19. In so redetermining the Appellant's CCTB for the 2005 and 2006 base taxation years and GSTC for the 2005 and 2007 base taxation years, the Minister made the following assumptions of fact:
>
> (a) The Appellant and Arturo D'Elia (the "Spouse") were married;
>
> (b) The Appellant and the Spouse began living separate and apart in January 2007, due to a breakdown of their marriage;
>
> (c) The Appellant and the Spouse have one child, SD'E, …;
>
> (d) Pursuant to the February 1, 2007 Separation Agreement (the "Agreement"):
>
> (i) The Appellant and the Spouse have joint custody of SD'E;
>
> (ii) SD'E primarily resides with the Spouse; and
>
> (iii) The Appellant is given fair and reasonable access to SD'E;
>
> (e) During the period January 2007 to August 2008, during each two week period, SD'E resided with:
>
> (i) the Appellant for 48 hours; and
>
> (ii) the Spouse for 288 hours;
>
> as detailed in Schedule C attached to and forming part of the Reply to the Notice of Appeal ("Schedule C");
>
> (f) During the period from August 2008, during each two week period, SD'E resided with:
>
> (i) the Appellant for 129 hours; and
>
> (ii) the Spouse for 207 hours;

as detailed in Schedule C;

(g) In respect of the CCTB, the 2005 and 2006 base taxation years means the months of:

Base Taxation Year	Months
2005	July 2006 to June 2007
2006	July 2007 to June 2008

(h) The Appellant received CCTB benefits as follows, as detailed in Schedule A:

Year	Received	Months Paid For
2005	$1,923.02	July 2006 to June 2007
2006	$3,083.19	July 2007 to June 2008

(i) The Appellant's entitlement for CCTB benefits for SD'E were as follows, as detailed in Schedule A:

Year	Entitlement	Months	Marital Status
2005	$634.71	July 2006 to Jan 2007	Married
	$ 0.00	Feb 2007 to June 2007	Separated
2006	$ 0.00	July 2007 to June 2008	Separated

(j) The Appellant was overpaid CCTB benefits in the amounts of $1,288.31 and $3,083.19 for the 2005 and 2006 base taxation years, respectively, as detailed in Schedule A;

(k) In respect of the GSTC, the 2005 and 2007 base taxation years means the quarters beginning:

Base Taxation Year	Quarters Beginning
2005	July 2006 to April 2007
2007	July 2008 to April 2009

(l) The Appellant received GSTC benefits as follows, as detailed in Schedule B:

Year	Received	Quarters Paid For	Paid For
2005	$99.99	July 2006 to Jan 2007	Appellant, Spouse & SD'E

	$146.48	April 2007	Appellant & SD'E
2007	$394.00	July 2008 to April 2009	Appellant & SD'E

(m) The Appellant was entitled to GSTC benefits as follows, as detailed in Schedule B:

Year	Entitlement	Quarters	Entitled For
2005	$99.99	July 2006 to Jan 2007	Appellant, Spouse & SD'E
	$57.98	April 2007	Appellant
2007	$321.80	July 2008 to April 2009	Appellant

(n) The Appellant was overpaid GSTC benefits in the amounts of $88.50 and $72.20 for the 2005 and 2007 base taxation years, respectively.

[26] The assumptions set out in subparagraphs (h) to (n) relate to the amounts paid to the Appellant as CCTB and GSTC, the amounts that the Respondent is alleging that she should have been paid and the amount that the Respondent is alleging that she was overpaid.

[27] In *The Queen* v. *Anchor Pointe Energy Ltd.*, 2003 FCA 294, [2004] 5 C.T.C. 98, Justice Rothstein (as he then was) in writing on behalf of the Federal Court of Appeal stated that:

> 8 In the Reply to the Notice of Appeal, the Minister's assumptions are set forth, including assumptions arising as a result of the Global decision. Specifically, the Reply states at paragraph 10:
>
> In reassessing, the Minister assumed the following facts:
>
> ...
>
> (q) API, APII, APIII, APIV and APV did not purchase the seismic data for the purpose of determining the existence, location, extent or quality of an accumulation of oil or gas;
>
> (r) the seismic was not used for exploration purposes;
>
> …
>
> (z) the seismic data purchased by API, APII, APIII, APIV and APV does not qualify as a Canadian Exploration Expense ("CEE") within the meaning of s. 66.1(6)(*a*) of the *Income Tax Act* (the "*Act*").

> …
>
> 24 Paragraph 10(z) was struck by Rip J. for an additional reason. He considered it to be a conclusion of law "that has no place among the Minister's assumed facts".
>
> 25 I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.
>
> 26 However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(a) involves the application of the law to the facts. Paragraph 66.1(6)(a) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.

[28] The assumptions made in relation to the Appellant's entitlement to CCTB payments and GSTC payments and the amount that she was allegedly overpaid for these are not proper assumptions of fact. The amount that she was entitled to receive can only be determined by applying the facts to the law and therefore the amount that she was entitled to receive for CCTB and GSTC and the amount of any overpayment are conclusions of mixed fact and law. These are not proper assumptions. The relevant facts that would lead to this conclusion should have been extracted and clearly identified.

[29] No assumptions were made with respect to whether Arturo D'Elia had filed the notice contemplated by subsection 122.62(1) of the *Act* in relation to the Appellant's son nor was there any evidence during the hearing that he had filed this notice. In *The Queen* v. *Loewen*, 2004 FCA 146, Justice Sharlow, on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of

> proof lies with the Crown**.** This is well explained in *Schultz* v. *R.* (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).

[30] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused ([2004] S.C.C.A. No. 298).

[31] In paragraph 8 of the Reply it is stated that "another person had applied for the CCTB benefits from January 1, 2007" for the child. This was not, however, one of the facts that were set out in the paragraph outlining the assumptions that had been made. As well, this is not a fact that would be within the knowledge of the Appellant but is a fact that would be within the knowledge of the Respondent. The Respondent therefore had the burden of proving this fact. As no evidence was called to establish this fact, it was not proven.

[32] There was no suggestion that any of the other prescribed circumstances as set out in subsection 6301(1) of the *Regulations* were applicable in this case. As a result, if her son resided with her during any part of the period under appeal, the presumption that she was "the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant" during this period will be applicable.

[33] Paragraph (*h*) of the definition of "eligible individual" (for CCTB) in section 122.6 of the *Act* provides that:

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

[34] These prescribed factors are set out in section 6302 of the *Regulations* and are as follows:

> 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.

[35] No assumptions were made with respect to any of the factors listed above[5]. Justice Rothstein (as he then was) writing on behalf of the Federal Court of Appeal in *The Queen* v. *Anchor Pointe Energy Ltd.*, 2003 DTC 5512 stated that:

> [23] The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.

[36] Failing to plead any assumptions related to any of the factors related to care and upbringing as set out in section 6302 of the *Regulations*, means that the Appellant does not know what case she has to meet in relation to these factors or that the Minister would be challenging the presumption that the Appellant was the person who was primarily responsible for the care and upbringing of the child. Counsel for the Respondent had submitted that the assumptions related to the number of hours that the child was residing with each parent should be construed as assumptions related to which parent was primarily responsible for the care and upbringing of the child. However, assumptions of fact (not assumptions of conclusions of mixed fact and law) must be "precise and accurate". Assumptions related to the number of hours that the child was residing with each parent cannot be construed as precisely and accurately making any assumptions of any facts related to any of the factors enumerated in section 6302 of the *Regulations*. There are several factors listed in section 6302 of the *Regulations* and none of the assumptions address any of these factors.

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[5]While there was a Separation Agreement, there was no indication that there was a court order in respect of the child.

[37] The only evidence during the hearing in relation to any of the factors enumerated in section 6302 of the *Regulations* were the statements of the Appellant that the parent who had the responsibility for the child at a particular time would look after any emergency medical needs that arose during such time and that both parents would have to agree if the child was to participate in a particular activity. This evidence is not sufficient to rebut the presumption that the Appellant was the person who was primarily responsible for the care and upbringing of the child.

[38] Counsel for the Respondent also referred to an alternative argument related to joint custody arrangements. However, since the provisions of the CCTB and GSTC related to "shared-custody parents" were only added to the *Act* with respect to CCTB or GSTC payments made for months after June 2011, these provisions are not applicable in this case.

[39] Since the Appellant's son was residing with her during the period throughout 2007 to 2009 and since there was no evidence that Arturo D'Elia had filed the relevant notice for CCTB in respect of their son, the presumption in paragraph (*f*) of the definition of "eligible individual" referred to above is applicable. As a result the Appellant is presumed to be "the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant." The little evidence that addressed the factors as set out in section 6302 of the *Regulations* was clearly not sufficient to rebut this presumption and therefore the Appellant has satisfied both conditions that are necessary for her to be the eligible individual in respect of her son for CCTB purposes for the period from February 2007 to June 2008 – he was residing with her and she was the parent who was primarily responsible for his care and upbringing during this time. The child was also a qualified dependant of the Appellant at the beginning of the months of April 2007, July 2008, October 2008, January 2009 and April 2009 for the purposes of the GSTC.

[40] As a result the Appellant's appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that the Appellant has not been overpaid CCTB payments made during the period from February 2007 to June 2008 and that the Appellant has not been overpaid GSTC payments made for the quarters beginning April 2007 and July 2008 to April 2009. The Respondent shall pay costs to the Appellant which are fixed in the amount of $250.

Signed at Halifax, Nova Scotia, this 31st day of May 2012.

"Wyman W. Webb"

Webb J.

CITATION:	2012TCC180
COURT FILE NO.:	2011-2286(IT)I
STYLE OF CAUSE:	MICHELLE D'ELIA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 16, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	May 31, 2012

APPEARANCES:

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