Docket: 2014-3977(IT)I

BETWEEN:

MICHAEL HARDER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 27, 2016, at North Bay, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Gregory DuCharme
Counsel for the Respondent:	Gabrielle White

JUDGMENT

IN ACCORDANCE with the Reasons for Judgment attached, the appeal from the Notice of Confirmation dated July 15, 2014 and relating partially to a Notice of Assessment dated August 29, 2013 made under the *Income Tax Act* for the taxation year 2012 is hereby dismissed.

Signed at Ottawa, Canada, this 14th day of September 2016.

"R.S. Bocock"

Bocock J.

Citation: 2016 TCC 197
Date:20160914
Docket: 2014-3977(IT)I

BETWEEN:

MICHAEL HARDER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bocock J.

I. Introduction

[1] The Appellant, Michael Harder, appeals the Minister's disallowance of claimed non-refundable tax credits of $10,882.00 and $2,191.00 claimed in 2012 and relating to an eligible dependent and eligible child ("dependent deductions"), respectively.

[2] The undisputed facts are as follows:

(1) Mr. Harder and his wife separated in 2011;

(2) They had two children of the marriage under 18 years;

(3) They resolved all of the outstanding issues concerning support, joint custody (joint parenting), child-rearing and care, all reflected in a written consent filed in the Ontario Superior Court of Justice (Family Court) in August, 2012 (the "Consent");

(4) The Consent was approved by the Court and, based upon the yearly income of both spouses, Mr. Harder was required to pay his spouse child

support in the months of September through December of 2012 and beyond;

(5) Specifically, relevant excerpts from the Consent provide as follows:

5. …The child support guideline amount for two children at the Applicant's income is $356.00 per month as per Schedule A attached.

6. …The child support guideline amount for two children at the Respondent's income is $894.00 per month as per Schedule A attached.

7. Under the shared parenting arrangement, the Applicant has an obligation to pay child support to the Respondent for both children and the Respondent has an obligation to pay child support to the Applicant for both children. The parties agree that the given shared parenting arrangement that 49% of the net disposable income should be in the Applicant's home and 51% of the net disposable income should be in the Respondent's home.

…

10. The Applicant shall claim the child tax credit for both children for the period of January 1st until June 30th of each year and the Respondent shall claim the child tax credit for both children for the period of July 1st until December 31st each year in accordance with Canada Revenue Agency guidelines.

11. The Applicant shall be entitled to claim Y as her equivalent to dependent spouse each year for so long as she is eligible to do so pursuant to Canada Revenue Agency guidelines.

12. The Respondent shall be entitled to claim X as his equivalent to dependent spouse each year for so long as he is eligible to do so pursuant to Canada Revenue Agency guidelines.

13. On a final basis, no spousal support is payable from either party to the other.

The parties to this document acknowledge the following:

a. They have had independent legal advice before agreeing to this order.

b. The terms of this document respecting custody, access and support will be incorporated into an Order of the Court and will be enforced by the Court in the event of default.

Schedule A

Cautions/Overrides

Child Support (Table) - CSG Table Table Amount overridden: $750/month specified

Child Support Guidelines (CSG) ***Monthly $***

	Michael	Spouse
Annual Guidelines Income	59,523	23,574
CSG Table Amount	894	356
CSG Table Amount Offset	538	0
Child Support (Table)	**750**	**0**

Support Scenarios ***Monthly $*** **A. 49.0% Recipient NDI**

	Michael	Spouse
Gross Income	4,390	1,858
Taxes and Deductions	(672)	37
Benefits and Credits	232	460
Spousal Support	**0**	**0**
Child Support (Table)	**(750)**	**750**
Net Disposable Income (NDI)	3,200	3,105

[3] All of the usual stressful, difficult and emotional issues for this couple relating to child custody, financial support and raising a family within the constraints of marriage breakdown were resolved in a laudatory, sensible and agreeable fashion. Mr. Harder testified all issues settled amicably. Lawyers were involved to prepare all documents, undertake court proceedings and ensure all details complied with the parties' wishes and the law. All seemed to unfold accordingly until the Minister's reassessment disallowing the 2012 dependent deductions. Understandably, Mr. Harder's child support commitment was predicated upon his use of the dependent deductions to reduce his taxable income. In submissions, Mr. Harder's lawyer requested that the Court view the applicable sections of the *Income Tax Act* ("*ITA*") and the case law in an expansive and more balanced way given of the express declaration of distinct child support obligations of both Mr. Harder and his spouse in the Consent.

[4] The following analysis leaves this Court with no alternative but to dismiss this appeal, however sympathetic it may be.

[5] The parties do not dispute their common views of the definitions for "support amount", "wholly dependent person", "child support", or the quantum of

the dependent deductions in this appeal. The sole issue is whether Mr. Harder is factually the only spouse to pay a "support amount" within the meaning of subsection 118(5) and therefore fails to engage the exception contained in subsection 118(5.1).

[6] The relevant excerpts of the provisions from the *Act* provide as follows [underscoring added]:

> Support
>
> 118(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual
>
> (a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or
>
> (b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.
>
> Where subsection (5) does not apply
>
> 118(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a deduction under paragraph (b) or (b.1) of the description of B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.

[7] In terms of jurisprudence, both this Court and the Federal Court of Appeal have interpreted the above subsections without variance or waiver. The baseline logic is that utilization of the Federal Child Support Guidelines constitutes a commencement point which evolves, through further considerations, to an agreement between the spouses regarding conclusive "support amount(s)." Utilization of a setoff mechanism does not render, memorialize or transform each distinct value entered along that evolving path into a support amount under the *Act*: *Contino* v *Leonelli-Contino*, 2005 SCC 63 at paragraph 32. In this appeal, the calculations contained in the Schedule A chart entitled "Child Support Table" plainly show a mathematical calculation entirely reflective of such a process.

[8] In terms of a process, a starting point was selected. The parties' lawyers utilized a computer software programme to introduce various offsetting inputs and devise a final unilateral payment from one spouse to the other: *Ladell* v *R.*, 2011 TCC 314 at paragraph 11, itself referencing *Contino, supra.* This is a case of shared parenting, as agreed and enumerated by the spouses in the Consent (as in *Perrin* v *Her Majesty the Queen*, 2010 TCC 331 at paragraph 16). Additionally, Mr. Harder's spouse was not required under the Consent, or otherwise, to pay support payments in the form of a support amount to Mr. Harder: *Cunningham* v *Her Majesty the Queen*, 2012 TCC 279 at paragraph 14. The support amounts solely and unilaterally paid by Mr. Harder are not made opaque or lessened by any circuity of the intermediary arithmetic calculations: *Verones* v *R.*, 2013 FCA 69 at paragraph 6. Similarly, subsection 118(5.1) engages and prevents the loss or non-utilization of a dependent deduction, but only where both parents factually pay to the other an amount of child support: *Verones, supra* at paragraph 9.

[9] What constitutes actual or factual payment by both parents to each other has been enunciated to include child support, in the case of split custody (as opposed to shared parenting), where each parent paid a support amount when the child was in that parent's care (*Rabb* v *R.*, 2006 TCC 140). Implicitly, it likely also occurs in shared parenting arrangements where the court order references actual payments to be made by each parent to the other (by way of *obiter dictum* in *Ochitwa* v *R.*, 2014 TCC 263 at paragraph 14). Lastly, the dependent deductions are available where the parents adjust child support payments based upon further arising expenses, then distinctly pay the moneys to the other and reflect these amounts in a clear, written agreement mandatorily obligating such payment (the subject of an oral decision of Justice Lyons, delivered April 27, 2016 and to be published shortly in redacted format as *AB* v *Her Majesty the Queen*).

[10] All of these decisions or situations involve a mandatory requirement for each parent to pay an amount reflected in a court order or formal agreement marching along with conclusive evidence of actual payment being made. It does not include the expeditious use of a computer software programme, the culmination of which is a unilateral payment of a support amount by only one parent to the other.

[11] The practising family law Bar should take note. The engagement of the combined effect of subsections 118(5) and 118(5.1), at a minimum, requires a comprehensive documentary and evidentiary record. If separating spouses, seeking joint custody, wish to avail themselves of a dependent deduction for both spouses in such situations, surely family law lawyers can deploy their usual flexible skills to ignore the set off provisions within the paradoxically named "Divorce Mate" for

a brief moment and mandate and effect actual periodic payments by both spouses to each other in cases of shared parenting of two or more children. Surely cheques, or even their more modern replacement of recurring e-transfers, may evidence a clearly enumerated, reciprocal and mandatory support amount paid by each spouse to the other.

[12] Regrettably, until this factual scenario is placed before the Court, sympathetic appellants, like Mr. Harder, shall have their appeals dismissed. That result will continue to be both unfortunate generally and purposively defeating of the child benefit programme specifically; dependent deductions for a second child shall remain legally unavailable to a unilateral support paying parent.

Signed at Ottawa, Canada, this 14th day of September 2016.

"R.S. Bocock"

Bocock J.

CITATION:	2016 TCC 197
COURT FILE NO.:	2014-3977(IT)I
STYLE OF CAUSE:	MICHAEL HARDER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	North Bay, Ontario
DATE OF HEARING:	June 27, 2016
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF JUDGMENT:	September 14, 2016

APPEARANCES:

Counsel for the Appellant:	Gregory DuCharme
Counsel for the Respondent:	Gabrielle White

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