

Docket: 2006-2492(IT)I

BETWEEN:

DANIEL BOURRET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

MARJORIE TALBOT,

Third Party.

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Appeal heard on August 29, 2007 at Sherbrooke, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Simon-Nicolas Crépin
Counsel for the Third Party:	Kay Falaise

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[OFFICIAL ENGLISH TRANSLATION]

**JUDGMENT**

The appeal from the determinations by which the Minister of National Revenue disallowed payment of the Canada Child Tax Benefit to the appellant during the periods from July 1, 2004 to June 30, 2005 and from July 1, 2005 to June 30, 2006, for the 2003 and 2004 base taxation years, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of March 2008.

“Alain Tardif”

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Tardif J.

Translation certified true  
on this 18th day of April 2008.  
Stefan Winfield, reviser

Docket: 2006-3334(IT)I

BETWEEN:

MARJORIE TALBOT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

DANIEL BOURRET,

Third Party.

---

Appeal heard on August 29, 2007 at Sherbrooke, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant:	Kay Falaise
Counsel for the Respondent:	Simon-Nicolas Crépin
For the Third Party:	Daniel Bourret

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[OFFICIAL ENGLISH TRANSLATION]

**JUDGMENT**

The appeal from the determinations by which the Minister of National Revenue disallowed payment of the Canada Child Tax Benefit to the appellant during the periods from July 1, 2004 to June 30, 2005 and from July 1, 2005 to June 30, 2006, for the 2003 and 2004 base taxation years, is allowed, and the determinations are referred back to the Minister of National Revenue for reconsideration and redetermination taking into account the fact that the appellant was the eligible individual within the meaning of section 122.6 of the *Income Tax Act*, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of March 2008.

“Alain Tardif”

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Tardif J

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on this 18th day of April 2008.  
Stefan Winfield, reviser

Citation: 2008TCC108  
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2006-3334(IT)I

BETWEEN:

DANIEL BOURRET,  
MARJORIE TALBOT

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent,

MARJORIE TALBOT,  
DANIEL BOURRET,

Third Parties.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

Tardif J

[1] Before this Court are appeals with regard to the Canada Child Tax Benefit (“the CCTB”) in which the two parents of the three children concerned are the appellants.

[2] The appeal relates to the 2003, 2004 and 2005 base taxation years. The periods to which the benefits apply are from July 1, 2004 to June 30, 2005 and from July 1, 2005 to June 30, 2006.

[3] Ms. Talbot initially received the benefits during the period from July 2004 to June 2005 for the 2003 base taxation year, and during the period from July 2005 to June 2006 for the 2004 base taxation year.

[4] Starting on September 8, 2006, the Minister of National Revenue (“the Minister”) stopped paying the benefits owing, given the dispute between the parents with regard to eligibility to receive the benefits.

[5] In the appeal brought by the female appellant, Daniel Bourret expressed his intention to intervene. Following the intervention, an order pursuant to section 174 of the *Income Tax Act* (“the *Act*”) was issued, under which the two parents became parties to the instant cases.

[6] First of all, I salute the wisdom of the Minister’s decision to stop the tax benefit payments on the basis of the disagreement as to eligible parent status.

[7] CCTB benefits are payable to the eligible parent who primarily fulfills the responsibility for the care, upbringing and place of residence of the children concerned; in cases of joint custody, they are payable to the parent identified in a written agreement or in an order issued by the court of competent jurisdiction in the matter, namely, in the province of Quebec, the Superior Court.

[8] In recent years there has been a marked increase in the number of these cases, the effects of which are simply disastrous both for the parents and, most importantly, for the children in respect of whom these tax benefits are paid.

[9] In practical terms and in terms of effectiveness, in the best interests of the children concerned, a great deal of energy and resources could be saved and tension avoided if only all the stakeholders worked together to set up a practice that would prevent any misunderstanding in this regard while still respecting the provisions of the *Act*.

[10] Indeed, when the Superior Court has before it a case involving minor children that calls for an order for custody of the children and possibly support, the parties usually come to an agreement on these matters.

[11] Obviously this agreement provides for the children’s place of residence, which, increasingly, is the residences of both parents under a joint custody arrangement. Regarding support, as a rule, the amount is determined on the basis of finding a balance between needs and the ability to pay.

[12] Now, tax benefits are often a significant financial factor; indeed, they are specifically designed to provide financial support, to be a sort of financial contribution to help the parent or parents who must assume responsibility for the children’s care and upbringing in a context of their best interests.

[13] That said, it appears that the amount of tax benefits is not taken into account in the process of setting the amount of support, on the ground that the Superior Court does not have jurisdiction to determine which of the two parents is the eligible parent within the meaning of the *Act*.

[14] I find it regrettable that, because of certain jurisdictional limitations, parents eligible for CCTB benefits must go through further proceedings, most often detrimental to the restoration of ideally harmonious relations in the best interests of the children for whom the parents are financially responsible.

[15] In a recent decision, I wrote about the Superior Court's jurisdiction in this regard; my decision was upheld by the Federal Court of Appeal in *Laurin v. Canada*, 2007 FCA 44, [2007] F.C.J. No. 53.

[16] This case clearly illustrates the nature of the problem. Indeed, in strictly economic terms, it could be advantageous for a parent who is eligible to receive the tax benefits to waive them in favour of the other parent, who does not meet the criteria set out in the *Act*, since the former parent's high income would have the effect of reducing the amount of benefits payable to zero; in such a case, it is easy to understand the generosity of the parent who is eligible under the *Act* toward the non-eligible parent.

[17] In practice, the Minister is often held hostage by pettiness on the part of one parent or the other. I refer in particular to the case in which one parent takes action in order to receive benefits without the knowledge of the parent who is already receiving the benefits.

[18] Following such action, changes may occur with respect to the beneficiary. Unfortunately, these decisions are often made on the basis of incomplete files or details, or often deliberate misinformation, hence the difficulties in determining who is the eligible parent.

[19] Such action is taken for all sorts of reasons ranging from vindictiveness to pettiness, or on the advice of various stakeholders, but rarely in the interests of the children. Sometimes these decisions result in a claim or an assessment being issued to the parent who has wrongfully received the benefits.

[20] Since these benefits very often provide essential financial support, any such claim has consequences that are simply disastrous, and—what is still more tragic—

the entire situation has repercussions or effects on the children, who are innocent victims.

[21] In the instant case, counsel for the female appellant stated that the Superior Court systematically refused to intervene or even to ratify any agreement with regard to eligibility for CCTB benefits, on the ground of lack of jurisdiction.

[22] Indeed, the determination of eligibility for tax benefits does not fall within the jurisdiction of the Superior Court; essentially, it is within the purview of this Court, simply because of the tax repercussions for one parent or the other.

[23] What we have here then is a situation where, because of a lack of harmonization, the children are the ones who get the short end of the stick in a financial support program that is often essential to their well-being.

[24] In light of the situation, it appears to me that the Minister should recognize the jurisdiction of the Superior Court in this regard, since that Court has the jurisdiction, the expertise and the resources to rule on any issues related to the interests and the well-being of the children and, most importantly, is most capable of assuming the significant responsibility of determining which of the parents is most qualified to fulfill the responsibility for the care and upbringing of the children. For thousands of family units, tax benefits constitute very meaningful supplementary income that makes it possible to meet crucial needs.

[25] Since the amount of support is set on the basis of a balance between the children's needs and the ability to pay, I see no reason why the amounts of CCTB benefits payable should not, just because of a jurisdictional problem, form part of the available data analyzed in setting the amount of support. Since the criteria and conditions taken into account in determining eligibility for benefits are specific, all the stakeholders involved at the time of separation could plan for it.

[26] In the instant case, I must determine which of the two parents, to whom custody has been jointly granted, should receive the CCTB benefits.

[27] One thing is obvious from the outset: the fact that the court granted joint custody demonstrates that both parents were sufficiently qualified and competent to assume the responsibility for the well-being of the children subject to the joint custody arrangement.



[28] The evidence, consisting of the testimony of both parents, enables me to find with certainty that both parents are interested, concerned, serious and responsible with regard to their responsibility for the well-being and upbringing of their three daughters.

[29] It seems clear that the father's and the mother's roles are assumed quite differently. In other words, the overall aim of each of the parents is the most ideal outcome and an exceptional future for their children.

[30] In order to achieve the desired objective, the parents may each have their own plan or strategy. When parents live together, the discussions—or indeed the negotiations—most often result in a consensus, and that is likely the best scenario.

[31] On the other hand, following separation, reaching such a consensus obviously becomes more difficult and less realistic; as a result, conflicts often arise.

[32] In those situations, does the Tax Court of Canada have the background, the knowledge, the expertise and, most importantly, the resources to determine that one parent's approach is better than or superior to the other, particularly when both parents are deeply concerned about the well-being of their children, as in the instant case? I think not.

[33] In the case at bar, the parents have expressed and shown a marked and keen interest in rather different ways. The Court must determine which of the two parents is the eligible parent on the basis of the following question:

Which of the two primarily fulfills the responsibility for the care and upbringing of the children?

[34] In helping me to answer this question, Parliament in its wisdom instructs that the criteria set out in sections 6301 and 6302 of the *Income Tax Regulations* should be taken into consideration:

#### 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 fulfills 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.

[35] As formally worded, the applicable legislative provision is the following:

"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 fulfills 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 purposes of this definition,

(f) where the qualified dependant resides with the dependant's female parent, the parent who primarily fulfills 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;

[36] In the instant case, this Court reiterates that the conduct of both parents is beyond reproach, given all the constraints facing them in their respective settings as well as their professional obligations—and taking for granted that perfection in this regard does not exist.

[37] The parents, each in their own way and with very different personalities, availability, constraints and professional obligations, contribute to meeting the numerous needs of their three daughters.

[38] The female appellant is more disciplined, more meticulous, more sensitive and perhaps more protective than the male appellant, who, for his part, is more easygoing, less rigid and more tolerant. The children have an absolute need for

both approaches if they are to develop the balance they will need in order to become mature, responsible adults.

[39] If the parties were hoping that I would grade them individually on how well they assume their parental responsibilities, they will be sorely disappointed: as far as I am concerned, the joint custody order is irrefutable evidence that they both get very high marks.

[40] Nevertheless, I must make a determination, basically in order to free up certain significant amounts withheld as a result of the misunderstanding. To that end, I shall refer solely to the parents' approach at the time of the divorce proceedings.

[41] These mature, responsible adults discussed, negotiated and reached an agreement, both being represented by counsel. The outcome of that exercise was that the mother received the benefits for a time.

[42] According to the parents' testimony, the matter of the tax benefits was raised during those proceedings. The mother did not agree to shared benefits, and the father has had to live with this ever since.

[43] In other words, the parents were both represented by counsel and they both took part in negotiations that led to an agreement.

[44] Although it is not written down or specifically provided for anywhere, I have to believe that the amount of the tax benefits, which represents a very high monthly income because there are three children, was taken into account.

[45] For that reason and that reason alone, I find that the mother was the eligible individual for the periods during which the Minister did not pay the benefits.

[46] The appeal brought by the female appellant is allowed, and the appeal brought by the male appellant is dismissed.

Signed at Ottawa, Canada, this 4th day of March 2008.

“Alain Tardif”

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Tardif J

Translation certified true  
on this 18th day of April 2008.  
Stefan Winfield, reviser

CITATION: 2008TCC108

COURT FILE NO.: 2006-2492(IT)I  
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STYLE OF CAUSE: Daniel Bourret v. Her Majesty the Queen  
Marjorie Talbot v. Her Majesty the Queen

PLACE OF HEARING: Sherbrooke, Quebec

DATE OF HEARING: August 29, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENTS: March 4, 2008

APPEARANCES:

Counsel for the female appellant:	Kay Falaise
For the male appellant:	The Appellant himself
Counsel for the Respondent:	Simon-Nicolas Crépin
For the Third Parties:	Kay Falaise, Counsel, and Daniel Bourret

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