

Docket: 2009-3608(IT)I

BETWEEN:

CAROLINE PERRON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on July 7, 2010, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the appellant:	The appellant herself
For the respondent:	Emmanuel Jilwan Mélanie Bélec

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**JUDGMENT**

The appeals from redeterminations and a reassessment:

- the redeterminations dated March 20, 2009, concerning the Canada Child Tax Benefit and the National Child Benefit Supplement for the 2005, 2006 and 2007 base years;
- the redeterminations dated April 3, 2009, for the 2005 and 2006 taxation years and dated April 27, 2009, for the 2007 taxation year for the goods and services tax / harmonized sales tax credit; and
- the reassessment dated April 20, 2009, for the wholly dependent person credit for the 2007 taxation year

are allowed and the matter is referred back to the Minister of National Revenue for redetermination and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of October 2010.

“Réal Favreau”

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Favreau J.

Translation certified true  
on this 13th day of December 2010  
Monica F. Chamberlain, Reviser

Citation: 2010 TCC 547  
Date: 20101028  
Docket: 2009-3608(IT)I

BETWEEN:

CAROLINE PERRON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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### **REASONS FOR JUDGMENT**

Favreau J.

[1] These are appeals from the following redeterminations and reassessment under sections 122.5, 122.6 and 122.61 and subsections 118(1) and 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act):

- redeterminations dated March 20, 2009, concerning the Canada Child Tax Benefit (CCTB) and the National Child Benefit Supplement (NCBS) for the 2005, 2006 and 2007 base years;
- redeterminations dated April 3, 2009, for the 2005 and 2006 taxation years and dated April 27, 2009, for the 2007 taxation year for the goods and services tax / harmonized sales tax credit (GSTC); and
- the reassessment dated April 20, 2009, for the wholly dependent person credit for the 2007 taxation year.

[2] In making and confirming the reassessment and redeterminations that are the subject of this appeal, the Minister of National Revenue (the Minister) relied on the following assumptions of fact, as set out in paragraph 8 of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) When the appellant filed her income tax return for the 2006 taxation year, she stated that on December 31, 2006, Yves Jacob was her common-law partner. Mr. Jacob also stated that the appellant was his partner; **[admitted]**
- (b) when the appellant filed her income tax return for the 2007 taxation year, she stated that she was single and claimed the wholly dependent person credit for her daughter A, who was born in 1994; **[admitted]**
- (c) the appellant also claimed the GST/QST and the CCTB and NCBS for her daughter; **[admitted]**
- (d) Yves Jacob is not the father of the child to whom this appeal relates; **[admitted]**
- (e) in response to a verification request, the appellant and Yves Jacob stated that their marital status since 19/6/2006 was single; **[admitted]**
- (f) during the periods in issue, the appellant lived at the same address as Yves Jacob, 190 rue Fortier, Saint-Eustache, with her daughter; **[admitted]**
- (g) the appellant and Mr. Jacob are co-owner [*sic*] of that property; **[admitted]**
- (h) the appellant and Mr. Jacob have a joint bank account for managing expenses relating to the property and personal expenses; **[admitted]**
- (i) the information collected by the Agency shows that during the periods in issue, the appellant and Yves Jacob were common-law partners. **[denied]**

[3] The only issue is whether, during the periods in issue, the appellant and Yves Jacob were common-law partners.

[4] The appellant, who is a secretary/bookkeeper, testified at the hearing. She explained that she had known Yves Jacob for about 20 years and that she cohabited with him for about 10 years until June 19, 2006, the date they separated.

[5] The appellant also explained that in spite of the fact that they were separated, she and her former common-law partner decided not to sell the family residence at 190 rue Fortier, St-Eustache, and to continue living under the same roof to avoid emotional upsets, since Mr. Jacob suffered from depression and was taking medication, and to avoid the bank charges for repaying the hypothec on the residence before term. The appellant confirmed that she had purchased the family residence with Mr. Jacob in 2004 or 2005 and used a joint bank account to pay personal

expenses and expenses relating to the family residence on an equal basis, even after they separated.

[6] After the separation, the appellant set up her bedroom in the basement, while her daughter A.R., who was then 12 years old, and Mr. Jacob kept their own bedrooms on the main floor. The appellant stated that she did not wash Mr. Jacob's clothes and did not prepare his meals, although they might have eaten a meal together on occasion. She had her own car, while Mr. Jacob did not have a vehicle. He took the train to go to Montréal, but she sometimes lent him her car. She alone looked after her daughter's schooling and sports activities. She often met friends in Montréal on weekends, and Mr. Jacob did not come. Since they separated she had not had sexual relations with Mr. Jacob.

[7] The appellant also stated that she had informed the Régie des rentes du Québec of her change of civil status, that is, that she had been a single mother since June 19, 2006, by letter dated April 30, 2008, and that the Régie des rentes du Québec recognized that civil status in a letter dated May 22, 2008, for the period beginning in January 2007 (Exhibit A-1).

[8] Yves Jacob also testified at the hearing, and his testimony essentially corroborated the appellant's testimony. After they separated, the appellant had her bedroom in the basement; he did his own grocery shopping; she did not wash or mend his clothes or cook his meals. He no longer visited her family with her and he met their mutual friends by himself. He confirmed that he had not had sexual relations with the appellant after they separated. He did not pay A.R.'s expenses and he did not attend parents' meetings at the school.

[9] An uncle of the appellant, Noël Perron, testified at the hearing and confirmed that the appellant and Mr. Jacob had separated to avoid family quarrels.

### Analysis

[10] The definition of the expression "common-law partner" for the purposes of the Act is found in subsection 248(1) of the Act:

"common-law partner", with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

(a) has so cohabited with the taxpayer for a continuous period of at least one year, or

(b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),

and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

[11] For the purposes of the CCTB and the NCBS, section 122.6 of the Act defines “cohabiting common-law spouse or common-law partner” as follows:

"cohabiting spouse or common-law partner" of an individual at any time means the person who at that time is the individual's spouse or common-law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days that includes that time;

[12] There is no doubt that the appellant considered herself to be Mr. Jacob's common-law partner until June 19, 2006. To establish that she was no longer Mr. Jacob's common-law partners, she must prove that after that date she was living separate and apart from Mr. Jacob because of the breakdown of their common-law relationship for a period of at least 90 days. The same rule applies for the purposes of both of the definitions referred to above.

[13] To determine whether the appellant was living separate and apart from Mr. Jacob even though she was living under the same roof as him, we need to refer to the factors stated by Kurisko J. in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), which were approved by the Supreme Court of Canada in *M v. H*, [1999] 2 S.C.R. 3 (S.C.C.) and cited by this Court in, *inter alia*, *Milot v. R.*, 1995 CarswellNat 1987, [1996] 1 C.T.C. 2247 (T.C.C.) at page 2250 and *Aukstinaitis v. Canada*, [2008] T.C.J. No. 64, 2008 TCC 104. See also *Lavoie v. R.* (2000), 2001 D.T.C. 5083 (Fr.) (F.C.A.) which followed *Milot*. The relevant points to be considered are as follows:

## 1. Shelter

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?

(c) Did anyone else occupy or share the available accommodation?

**2. Sexual and personal conduct**

(a) Did the parties have sexual relations? If not, why not?

(b) Did they maintain an attitude of fidelity to each other?

(c) What were their feelings toward each other?

(d) Did they communicate on a personal level?

(e) Did they eat their meals together?

(f) What, if anything, did they do to assist each other with problems or during illness?

(g) Did they buy gifts for each other on special occasions?

**3. Services**

What was the conduct and habit of the parties in relation to:

(a) preparation of meals;

(b) washing and mending clothes;

(c) shopping;

(d) household maintenance; and

(e) any other domestic services?

**4. Social**

(a) Did they participate together or separately in neighbourhood and community activities?

(b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

**5. Societal**

What was the attitude and conduct of the community toward each of them and as a couple?

**6. Support (economic)**

(a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?

- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

## 7. Children

What was the attitude and conduct of the parties concerning the children?

[14] If we apply these factors to the appellant's particular facts, we can draw the following conclusions:

### 1. Shelter

There is no doubt that the appellant and Yves Jacob lived under the same roof, along with the appellant's daughter, A.R. The appellant testified that they each had their own bed and their own bedroom.

The courts have acknowledged that the mere fact of living under the same roof is not sufficient to conclude that two people are common-law partners. In *Kelner v. Canada*, [1995] T.C.J. No. 1130, Judge Bowman (as he then was) in fact stated:

16 I start from the premise that it is possible for spouses, as a matter of law, to live separate and apart even though they are under the same roof.

Rip J. (then Associate Chief Justice) made the following comment in *Aukstinaitis, supra*:

23 The fact that the Appellant lived with Mr. Mongeon under the same roof is not fatal to her case. It is actually only one of the factors to take into account.

### 2. Sexual and personal conduct

The appellant testified that she had not had sexual relations with Mr. Jacob after June 19, 2006. She described their relationship as brother and sister. She acknowledged that she had occasionally eaten at the same time as him and had lent him her car when he needed it. She stated that Mr. Jacob never organized birthday parties for her or gave her Christmas or New Year's presents.



To reiterate what Rip J. said in *Aukstinaitis, supra*, it seems that the contacts and exchanges between the appellant and Mr. Jacob were minimal and limited to what one would expect of anyone who has to live with another person, share certain spaces with that person, and try to live in a civilized manner.

There is nothing that suggests to me that this second factor damages the appellant's position.

### **3. Services**

On this point, only household maintenance tasks seem to have been shared. Mr. Jacob looked after the lawn mowing and the snow shovelling in winter. The appellant testified that she did not prepare Mr. Jacob's meals and did not wash or mend his clothes.

As Rip J. found in *Aukstinaitis, supra*, this factor does not seem to me to be decisive in determining whether the appellant was living separate and apart from her former common-law partner. It seems to me to be entirely reasonable for household maintenance tasks to be shared, given that the residence was co-owned by the appellant and her former common-law spouse.

### **4. Social and**

### **5. Societal**

The appellant testified that she was not involved in any social activities with Mr. Jacob and he no longer visited her family. The testimony of the appellant's uncle confirmed that in the eyes of the family, the appellant and Mr. Jacob were living separate and apart and were no longer a couple.

These factors certainly weigh against a finding that there was a common-law partner relationship.

### **6. Support (economic)**

The evidence is that expenses relating to the house were shared equally, except for electricity, for which the appellant paid two thirds, given that her daughter also lived in the house. A joint bank account was used to pay for expenses relating to the house, such as the hypothec, property and school taxes and insurance.

In her testimony, the appellant stated that she also had a personal bank account into which she deposited the support paid by her daughter's father and which she used to pay for expenses relating to her daughter (food, clothing, sports activities and school supplies).

It seems clear to me that Mr. Jacob contributed financially to the cohabitation with the appellant. The shared expenses related more to expenses relating to the house than to the personal expenses of the appellant and her daughter. In the circumstances, I do not believe that the sharing of expenses relating to the house can serve to show that there was a common-law partner relationship.

## **7. Children**

In her Notice of Appeal, the appellant stated that Mr. Jacob had been the legal tutor of her daughter until June 19, 2006, but that after that date Mr. Jacob no longer had that moral responsibility. That question was not addressed at the hearing, but it would not be unreasonable to think that Mr. Jacob considered the appellant's daughter to be his own daughter, given the length of the conjugal relationship with the appellant.

However, I do not believe that this criterion can have any influence on the nature of the relationship between the appellant and Mr. Jacob after June 19, 2006.

## Conclusion

[15] Several factors weigh in favour of finding that the relationship continued after June 19, 2006, but a majority of the factors support recognizing that the couple lived separate and apart after June 19, 2006.

[16] The appellant's testimony was extremely credible and was corroborated by the testimony of Mr. Jacob and the appellant's uncle.

[17] The most decisive factor, in my view, is the letter dated April 30, 2008, that the appellant sent to the Régie des rentes du Québec to have her civil status as a single mother recognized, in which she acknowledged living at the same address as her former common-law partner until the sale of the house, which in fact took place on May 25, 2009. The letter predated the redeterminations and reassessment by the

Canada Revenue Agency and confirmed that the appellant had terminated her conjugal relationship with Mr. Jacob on June 19, 2006.

[18] I ascribe the statement in the appellant's income tax return for the 2006 taxation year, that on December 31, 2006, Mr. Jacob was her common-law partner, to simple mistake. The 90-day rule used in the definitions of "common-law partner" and "cohabiting spouse or common-law partner" is generally not well known to taxpayers.

[19] Having regard to the factors applied by the courts, I find that the appellant has provided sufficient evidence to satisfy me, on a balance of probabilities, that she was no longer living in a conjugal relationship with Mr. Jacob as of June 19, 2006.

[20] I therefore allow the appeals. The redeterminations and reassessments are referred back to the Minister of National Revenue for redetermination and reassessment, to:

- (a) cancel the claim for \$359.15 for the 2005 base year, \$2,735.56 for the 2006 base year and \$1,652.24 for the 2007 base year that the Minister determined had been overpaid to her for the CCTB and NCBS;
- (b) cancel the claim for \$586 for the 2005 taxation year, \$599 for the 2006 taxation year and \$428.25 for the 2007 taxation year that the Minister determined had been overpaid to her for the GST/HST; and
- (c) allow the wholly dependent person credit for the 2007 taxation year that the appellant claimed for her child.

Signed at Ottawa, Canada, this 28th day of October 2010.

"Réal Favreau"

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Favreau J.

Translation certified true  
on this 13th day of December 2010  
Monica F. Chamberlain, Reviser

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COURT FILE NO.: 2009-3608(IT)I  
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PLACE OF HEARING: Montréal, Quebec  
DATE OF HEARING: July 7, 2010  
REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau  
DATE OF JUDGMENT: October 28, 2010

APPEARANCES:

For the appellant: The appellant herself  
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Mélanie Bélec

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