Docket: 2010-3389(IT)I

BETWEEN:

MAURICE NAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 6, 2011 at Winnipeg, Manitoba

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Rosanna Slipperjack-Farrell

JUDGMENT

The Appellant's appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 15th day of September, 2011.

"Wyman W. Webb"

Webb, J.

Citation: 2011TCC428
Date: 20110915
Docket: 2010-3389(IT)I

BETWEEN:

MAURICE NAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The issue in this appeal is whether the Appellant is entitled to claim a tax credit pursuant to paragraph 118(1)(*b*) of the *Income Tax Act* (the "*Act*") for 2008 in relation to P.N. who is a son of the Appellant. In particular the issue is whether the Appellant has established that he is the only person who is entitled to claim this tax credit in relation to P.N. for this year

[2] Paragraph 118(1)(*b*) of the *Act* provides, in part, as follows:

> 118. (1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted an amount determined by the formula
>
> A × B
>
> where
>
> A is the appropriate percentage for the year, and
>
> B is the total of,
>
> …

(b) in the case of an individual who does not claim a deduction for the year because of paragraph (*a*) and who, at any time in the year,

(i) is

(A) a person who is unmarried and who does not live in a common-law partnership, or

(B) a person who is married or in a common-law partnership, who neither supported nor lived with their spouse or common-law partner and who is not supported by that spouse or common-law partner, and

(ii) whether alone or jointly with one or more other persons, maintains a self-contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is

(A) except in the case of a child of the individual, resident in Canada,

(B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,

(C) related to the individual, and

(D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,

…

[3] In *Geddes* v. *The Queen*, [2000] 2 C.T.C. 2577, Justice Porter stated as follows:

24 In the final analysis, I adopt the approach taken by Hamlyn, J. in the case of *Issac v. Her Majesty the Queen*, [1994] 95 D.T.C. 859 (T.C.C.) where he said:

> I conclude from the case at law and from a reading of the paragraph that the phrase "at any time in the year" can be intermittent periods during the year, and that the phrase "wholly dependent" can relate to those intermittent periods. Thus in any period during the year where a person is wholly dependent on the taxpayer and the other paragraph 118(1)(*b*) elements and other requirements are present, the taxpayer is entitled to the "equivalent-to-married" credit.

25 In my view, the child Kyle was totally dependent upon his father, the Appellant, during the time he spent with him during the taxation years 1994, 1995 and 1996. These were more than visits. The child lived with his father during these times. The father maintained a year-round accommodation for the child in his home. He attended to all his living needs whilst the child was with him. The child was wholly dependent upon the Appellant during those periods. The statute does not

> limit the length of the period. It says "at any time in the year". Thus, the Appellant is entitled to the credits for the years in question.

[4] As a result it is possible that a child could be wholly dependent for support on one person during part or parts of a year and be wholly dependent for support on another person during another part or parts of the same year. Subsection 118(4) of the *Act* provides in part as follows:

> (4) For the purposes of subsection (1), the following rules apply:
>
> …
>
> > (b) not more than one individual is entitled to a deduction under subsection (1) because of paragraph (*b*) or (*b.1*) of the description of B in that subsection for a taxation year in respect of the same person or the same domestic establishment and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them;

[5] Therefore if two individuals should each satisfy the requirements in relation to a claim for a tax credit pursuant to paragraph 118(1)(*b*) of the *Act* for a particular taxation year in relation to one particular person, then unless those two individuals can reach an agreement with respect to which one of them will claim the credit, neither one of them will be permitted to claim the credit.

[6] The Appellant and Margaret Bonekamp were married in 1987. They have seven children and they separated in 1998. When they separated Margaret Bonekamp moved out of the house and the children moved with her. The children would spend time with the Appellant but they primarily resided with Margaret Bonekamp. Neither party questioned or raised any issue with respect to whether the Appellant or Margaret Bonekamp satisfied the conditions as set out in the opening part of paragraph 118(1)(*b*) or in subparagraph 118(1)(*b*)(i) of the *Act*. It is more likely than not that the Appellant and Margaret Bonekamp each satisfied these conditions. The focus of the hearing was on the conditions as set out in subparagraph 118(1)(*b*)(ii) of the *Act*.

[7] The particular person for whom the Appellant is attempting to claim the credit as provided in paragraph 118(1)(*b*) of the *Act* is P.N., who is a son of the Appellant and Margaret Bonekamp. P.N. would have been 15 years old at the beginning of 2008, which is the relevant taxation year in this appeal.

[8] The Appellant clearly stated during his testimony that P.N. lived with him throughout 2008. The following is an excerpt from his testimony:

> And one of the children stayed with me from 2000 on and the other ones came periodically, I'd say, for a period of three years. And [P.N.], the one that we're questioning now, was with me from October 2006 to October 2009, except for two months in 2009 where he stayed at my daughter's place and I brought the groceries and everything over there, supporting him. Then he come back in at home, then finally moved back in with his mom.

[9] The following is an excerpt from the questions and answers provided during the cross-examination of the Appellant:

> Q So you're saying, okay, [P.N.] left Margaret's and came to live with you in 2006?
>
> A Yes.
>
> Q So just to bring us back, the year at issue we're speaking of today is 2008.
>
> A Yes.
>
> Q In 2008 you're saying that [P.N.] lived with you the whole time?
>
> A Completely.
>
> Q … did [P.N.] live with Margaret around 2008?
>
> A I don't believe he went back even for any weekends. In 2009 though I know that he did, but I can't -- I would say no in 2008, but because it's a while back, I'm -- I would say no. I don't want to be lying under oath here, so --
>
> …
>
> A All I'm saying is that he lived with me and, as far as I know, he had ties with his mother and everything like that, but he just chose to come … home and live at home.
>
> Q So he never -- again so living with you means 100 percent, every night spent at your house?
>
> A Yes. So let's say if -- I would say if he did sleep at his mother's in 2008, not more than five nights, if that happened.

[10] According to the Appellant's testimony P.N. spent five nights or less at Margaret Bonekamp's house in 2008. This testimony directly conflicts with the testimony of Margaret Bonekamp. The following is an excerpt from the questions that were posed and the answers that were provided during Margaret Bonekamp's direct examination by counsel for the Respondent:

Q Again we're speaking about the child [P.N.] and the year 2008. In 2008 where did [P.N.] live?

A With me.

Q Can you explain or --

A At 26 Bay Caron in St. Georges.

Q Did [P.N.] live with you primarily?

A Yes.

…

Q But let's say during the school year, who, during the week who did he live with?

A Well, definitely from January to August he lived with me, and then August to about November or so, the majority of the time he did stay with his dad. That's hunting season.

Q Okay. So would you agree that it seemed to be a joint custody --

A H'mn, h'mn.

Q -- situation?

A H'mn, h'mn.

Q When he was with you, were you responsible to take care of all of [P.N]'s needs when he was there?

A Absolutely, yes.

Q In terms of did you provide meals for him?

A Yes.

Q Looked after anything he needed?

A Yes, meals -- sorry.

…

Q Could you estimate in the year 2008 how many total days or in terms of fractions how many, how much time he was with you and how much time he was with his father?

A I would say approximately two-thirds with me and a third with his father.

[11] Clearly the testimony of the two witnesses cannot be reconciled. It is impossible for [P.N.] to have spent five nights or less with Margaret Bonekamp in 2008 and, in the same year, to also have spent two-thirds of his days (and presumably his nights) with Margaret Bonekamp. The assumption that was made in the Reply was that [P.N.] resided with each parent in 2008.

[12] In *Wiens* v. *The Queen*, 2011 TCC 152, I reviewed the decision of Justice L'Heureux-Dubé of the Supreme Court of Canada in *Hickman Motors Ltd.* v. *Her Majesty the Queen*, [1997] S.C.J. No. 62, and the subsequent decision of the British Columbia Court of Appeal in *Northland Properties Corp.* v. *British Columbia*, 2010 BCCA 177, 319 D.L.R. (4th) 334. As I had stated in *Wiens*, it seems to me that the conclusion to be drawn is simply that the Appellant has the initial onus of proving on a balance of probabilities (i.e. that it is more likely than not), that any of the assumptions that were made by the Minister in assessing (or reassessing) the Appellant with which the Appellant does not agree, are not correct.

[13] Therefore the Appellant had the onus to establish on a balance of probabilities that the assumption that P.N. resided with each parent in 2008 was incorrect. In my opinion the Appellant has failed to satisfy this onus.

[14] P.N. had lived with Margaret Bonekamp from the time of the separation in 1998 to 2006. At the time of the separation P.N. would have been five years old. The Appellant could not identify any significant change or reason to explain why in 2006 P.N. would have ceased to live with his mother (with whom he would have lived, without his father living in the same house, from the time he was five years old until he was thirteen years old) and for the next three years, live only with his father, except for the two months in 2009 when he was living with his sister. It seems unlikely that this would have occurred in the absence of any rationale explanation.

[15] In relation to the onus of proof, Justice Rothstein, writing on behalf of the Supreme Court of Canada, in *F.H.* v. *McDougall*, [2008] 3 S.C.R. 41 stated that:

> (4) The Approach Canadian Courts Should Now Adopt
>
> 40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. …
>
> …
>
> 44 …. As Lord Hoffmann explained in *In re B* at para. 2:
>
> > If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. ***There is no room for a finding that it might have happened.*** The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.
>
> In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.
>
> 45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

> 47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:
>
> > Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.
>
> 48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:
>
> > Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.
>
> It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.
>
> (5) Conclusion on Standard of Proof
>
> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.
>
> (emphasis added)

[16] It seems to me that, with no rationale explanation, it was improbable that P.N. would have ceased to live with Margaret Bonekamp in 2006 and commenced to live exclusively with the Appellant for the next three years. As a result it seems to me that the Appellant would need more than simply his testimony which was in direct contradiction to the testimony of Margaret Bonekamp. In particular, it seems to me that [P.N.], who would have been 15 years old at the beginning of 2008 and 18 years old as of the time of the hearing, would know whether he was living with his father or his mother or both in 2008. The Appellant chose to not call P.N. as a witness as he did not want to place him in the middle of this dispute. Unfortunately, failing to call P.N. as a witness means that the Appellant has failed to satisfy his onus of proof to establish that P.N. only lived with him in 2008.

[17] It seems to me that P.N. would be wholly dependent for support on the Appellant during the period when he was living with the Appellant and wholly dependent for support on Margaret Bonekamp during the period when he was living with her. Neither parent paid any amount as support to the other parent in 2008[1]. Since the Appellant has not established that P.N. only lived with the Appellant (and was wholly dependent only on the Appellant) in 2008, both the Appellant and Margaret Bonekamp would be entitled to claim the tax credit in relation to P.N. for 2008. It was clear that the Appellant and Margaret Bonekamp do not agree with respect to which one of them would make the claim for the tax credit. As a result, neither one of them is entitled to claim the tax credit as provided in paragraph 118(1)(*b*) of the *Act* for 2008 as a result of the provisions of paragraph 118(4)(*b*) of the *Act*.

[18] The Appellant had also claimed an additional credit pursuant to paragraph 118(1)(*b.1*) of the *Act* in respect of P.N. However this credit would only be available to the Appellant if he could also claim the credit under paragraph 118(1)(*b*) of the *Act* in respect of P.N. Since the Appellant is not entitled to claim the credit under paragraph 118(1)(*b*) of the *Act* in respect of P.N., the Appellant is not entitled to claim the credit under paragraph 118(1)(*b.1*) of the *Act* in respect of P.N.

[19] As a result the Appellant's appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 15th day of September, 2011.

"Wyman W. Webb"

Webb, J.

[1] In paragraph 9(e) of the Reply it was assumed that "neither the Appellant nor the Former Spouse paid support in the 2008 taxation year" and this assumption was not challenged or questioned.

CITATION:	2011TCC428
COURT FILE NO.:	2010-3389(IT)I
STYLE OF CAUSE:	MAURICE NAULT AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	February 7, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	September 15, 2011

APPEARANCES:

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