

Docket: 2018-3204(IT)I

BETWEEN:

JOHN A. WACHAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 10, 2019, at Calgary, Alberta

Before: The Honourable Justice B. Russell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Andrew Lawrence

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**JUDGMENT**

This appeal is allowed and the matter is referred back to the Minister for reconsideration and further redeterminations on the bases that the Appellant is entitled to the denied CCTB benefit payments for the beginning of each month within the period July 2013 through to and including March 2015, and also that the Appellant is entitled to the denied GSTC benefit payments for the beginning of each July, October, January and April within the said period July 2013 through to and including March 2015.

Signed at Halifax, Nova Scotia, this 30<sup>th</sup> day of July 2020.

“B.Russell”

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Russell J.

Citation: 2020TCC78  
Date: 20200810  
Docket: 2018-3204(IT)I

BETWEEN:

JOHN A. WACHAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **AMENDED REASONS FOR JUDGMENT**

Russell J.

#### I. Introduction:

[1] The Appellant, John Anthony **Wachal**, has appealed, electing the Court's "informal procedure", various redeterminations that the Minister of National Revenue (Minister) made under the federal *Income Tax Act* (ITA), denying the Appellant certain child tax benefits provided by the ITA. These redeterminations were made October 20, 2016 and November 4, 2016. Those made October 20, 2016 were in respect of the Appellant's applications for Canada Child Tax Benefit (CCTB) monthly benefits for the 2011, 2012, 2013 and 2014 base taxation years, and for Canada Child Benefit (CCB) monthly benefits for the 2015 base taxation year. Those made November 4, 2016 were in respect of the Appellant's application for Goods and Services Tax Credit (GSTC) quarterly payments for the 2012, 2013, 2014 and 2015 base taxation years.

[2] As detailed in the Respondent's Reply, the appealed redeterminations reversed determinations the Minister had made, allowing CCTB, CCB and GSTC payments to the Appellant. The redeterminations resulted in the Minister requesting of the Appellant repayment of child tax benefits as follow:

- a. \$2,890 (CCTBs) for the 2012 base taxation year (monthly periods July 2013 to June 2014);

- b. \$3,428 (CCTBs) for the 2013 base taxation year (monthly periods July 2014 to June 2015);
- c. \$2,034 (CCTBs) for the 2014 base taxation year (monthly periods July 2015 to June 2016);
- d. \$1,350 (CCBs) for the 2015 base taxation year (monthly periods July to September, 2016);
- e. \$265 (GSTCs) for the 2012 base taxation year (quarterly periods July 2013 to June 2014);
- f. \$268 (GSTCs) for the 2013 base taxation year (quarterly periods July 2014 to June 2015);
- g. \$272 (GSTCs) for the 2014 base taxation year (quarterly periods July 2015 to June 2016);
- h. \$190 (GSTCs) for the 2015 base taxation year (quarterly periods July and October 2016).

## II. Issues:

[3] In appealing these redeterminations the Appellant identified in his Notice of Appeal that the Minister had wrongly considered an Alberta Court of Queen's Bench Order dated April 1, 2015. In the Respondent's Reply (para. 30) the issue was identified very generally as whether the Appellant's entitlement to the subject benefits had been "properly calculated" for the 2011 through 2015 base taxation years. However, the Respondent's post-hearing written submissions specified and addressed the following four issues:

- a. is the Appellant eligible for the CCTB for any months prior to January 2013 of the 2011 base taxation year, insofar as the Appellant first applied for that benefit February 27, 2014;
- b. is the Appellant the parent primarily responsible for the care and upbringing of his child JCW from January 2013 onward, and if so is he eligible for receipt of the CCTB, or the CCB, for any period after January 2013 of the 2011 base taxation year;

- c. is the Appellant eligible for the CCTB for the 2011 base taxation year, insofar as he did not file a return for his 2011 taxation year;
- d. is JCW a "qualified dependent" of the Appellant, and if so was the Appellant eligible for the quarterly GSTC benefit for his 2012 through 2015 taxation years.

### III. Factual and Legal Backgrounds:

[4] The evidence establishes that the male Appellant and his now former female spouse (herein identified by her former initials, SLW), are the parents of a son, JCW, born October 1, 1999. At all material times these two formerly married parents lived separate and apart, due to personal discord. The Appellant's marital status was either separated or single throughout the 2011, 2012, 2013, 2014 and 2015 "base taxation years".

[5] The term "base taxation year" in respect of the months January through June means the second preceding year, and in respect of the months July through December means the immediately preceding year. For example, the year 2012 is the base taxation year for July through December, 2013 and continuing for January through June, 2014. The base taxation year is the year for which an individual's "adjusted income" (noted below) is determined, for purposes of establishing the entitlement and (if entitled) quantum of the monthly CCTB/CCB payment to be paid for each particular month.

[6] The CCTB and CCB are referenced at sections 122.6 to 122.63 of the ITA. The CCB replaced the CCTB effective July 1, 2016, although the eligibility criteria for the CCB and CCTB are the same. The calculation of the monthly benefit is based on the "adjusted income" of an "eligible individual" for the base taxation year, in relation to a "qualified dependant". Per section 122.5 a qualified dependant is an individual's (or the individual's cohabiting or common-law partner's) child or dependant who resides with the individual, is under 19 years of age and in relation to the specified month is neither an eligible nor qualified individual. The term "adjusted income" means personal income in the pertinent base taxation year including if any the income of a cohabiting spouse or common law partner. The benefit amount payable is reduced if the adjusted income exceeds a threshold amount. A person may be an "eligible individual" in respect of a qualified dependent at the beginning of a month provided per subsection 122.62(1) that that person had filed a notice in prescribed form with the Minister no later than 11

months after the end of that month. Moreover, per section 122.6, an eligible individual must at the relevant time reside with the qualified dependent (*i.e.*, providing habitual and usual abode), and be the parent who primarily fulfils the responsibility for the "care and upbringing" of the qualified dependent, or is a "shared-custody parent" of the qualified dependant.

[7] Determining "care and upbringing" requires consideration of eight factors listed in section 6302 of the *Income Tax Regulations* (Regulations). Summarized, they are, supervision of the qualified dependent's daily activities and needs; maintenance of a secure environment in which the qualified dependant resides; arrangement and transportation for the qualified dependent's medical needs as required; arrangement, participation, transportation re the qualified dependant's educational, recreational, athletic or similar activities; attendance to the qualified dependant's needs when ill or otherwise in need of attendance of another person; attendance on regular basis to the qualified dependant's hygienic needs; provision generally of guidance and companionship to the qualified dependant; and existence of a court order re the qualified dependant valid in the jurisdiction in which the qualified dependant resides.

[8] Also, per clause (f) of the "eligible individual" definition, where the qualified dependant resides with the female parent, that parent is presumed to be the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant.

[9] Parents who are "shared custody parents" can divide the benefit between them. Each parent must reside with the qualified dependent on a "near equal" basis and be the primary caregiver when the child relies with that parent. This was not claimed in this appeal. Details respecting the GSTC are set out in section 122.5 of the ITA. These GSTC requirements are similar to those of the CCTB and CCB. Likewise, when the qualified dependent is such for both parents, the parent eligible for the CCTB/CCB payments is eligible also for the GSTC in respect of the same qualified dependent. GSTC payments are issued quarterly rather than monthly.

A. Is the Appellant eligible for CCTB for months prior to January 2013?

[10] The first issue is whether the Appellant is eligible for monthly CCTB payments for any months prior to January 2013. The Respondent pleaded in the Reply (para. 29(f)) the assumption that the Minister received on February 27, 2014 the Appellant's notice (application) for CCTB/CCB. The Appellant offered at the

hearing no evidence to contradict this assumption. Accordingly that assumption of fact is accepted as correct.

[11] Subsection 122.62(1) of the ITA specifies that an eligible individual must have filed the required notice with prescribed information not later than 11 months after any month for which CCTB payments are sought. There was no evidence that the Minister had extended the time for the notice as permitted by subsection 122.62(2). It appears the Minister was correct in denying CCTB benefits for all months prior to January 2013, the end of all such months each being more than 11 months prior to the February 27, 2014 filing date. Thus, the Minister correctly denied the CCTB payments that the Appellant sought for months within the calendar years 2011 and 2012.

B. Was the Appellant the parent who primarily fulfilled responsibility for the care and upbringing of JCW from January 2013 onward?

[12] The second issue is, was the Appellant the parent primarily responsible for the care and upbringing of his child JCW from January 2013 to and including June 2017, and thus eligible for receipt of CCTB/CCB monthly payments for some or all of that 54 month total period.

[13] In the Reply are pleaded the following assumptions of fact (para. 29) in support of the Minister's redeterminations:

- a. the Appellant was married to [SLW] on August 9, 2003;
- b. at all material times, the Appellant and SLW lived separate and apart;
- c. throughout the 2011, 2012, 2013, 2014 and 2015 base taxation years, the Appellant's marital status was either separated or single;
- d. by Judgment of the Court of Queen's Bench of Alberta dated February 7, 2016 the Appellant and SLW were divorced effective on the 31st day after the date of the Judgment unless it was appealed before that 31st day;
- e. the Appellant and SLW are the parents of a son born in October 1999 whose initials are JCW;

- f. on February 27, 2014, the Minister received the Appellant's application to receive CCTBs;
- g. the Appellant was not the parent primarily responsible for the care and upbringing of JCW from January to June 2013 of the 2011 base taxation year;
- h. the Appellant was not the parent primarily responsible for the care and upbringing of JCW throughout the 2012, 2013, 2014 and 2015 base taxation years;
- i. the Appellant did not file an income tax return for the 2011 taxation year; and
- j. the Appellant's "adjusted income" was ..... for the 2012, 2013, 2014 and 2015 taxation years, respectively.

[14] The Minister's assumptions pleaded in the Reply, in respect of the redeterminations that the Appellant was not the parent primarily responsible for the care and upbringing of JCW during the subject periods, as set out immediately above, are seriously lacking. The Respondent pleads merely (paragraphs 29(g) and (h)) that the Appellant, "was not the parent primarily responsible for the care and upbringing of JCW from January to June 2013 of the 2011 base taxation year"; nor was he, "throughout the 2012, 2013, 2014 and 2015 base taxation years".

[15] These pleaded assumptions are not at all sufficiently specific or comprehensive to have provided the Appellant appropriate notice of the case he had to meet. There were no assumptions pleaded in the Reply as to why the Minister concluded that for the many months covered by these several base taxation years the Appellant was not the parent primarily responsible for the care and upbringing of JCW.

[16] In *The Queen v. Anchor Pointe Energy Ltd.*, 2003 DTC 5512 (FCA), Rothstein JA, then of the Federal Court of Appeal stated:

[23] The pleading of assumptions give 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.

[17] In *D'Elia v. Her Majesty*, 2012 TCC 180, Webb J, then of this Court, cited the above statement of Rothstein JA, and continued:

[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...

[18] Nor are there any specific references elsewhere in the Reply to illuminate the conclusion that the Appellant was not the parent primarily responsible. The closest the Reply gets to addressing this is to cryptically and repetitiously state, for each relevant base taxation year, that while previously the Minister had found the Appellant "had one eligible child (his son)", now "there was a change to [the Appellant's] eligible children". (In the paragraphs referring to the GSTC claims the adjective "qualified" instead of "eligible" was used.) See Reply, paras. 4, 6(c), 7(c), 8(c), 10(c), 11(c), 12(c), 13(c), 14(c), 15(c), 16(c), 17(c), 18(c), 19(c), 20(c), 21(c), 22(c), 23(c) and 24(c).

[19] In this informal procedure appeal, the Appellant represented himself. He was not a person trained in law, accounting or tax. The statutory regime for these CCTB, CCB and GSTC child tax benefits is of some complexity. In the lead-up to the hearing there was to my knowledge no attempt by the Respondent to amend the Reply so that it would fully and specifically set out the factual assumptions underpinning the appealed redeterminations so as to clearly show why the Appellant was no longer considered the parent primarily responsible for care and upbringing of the dependent, JCW. Conversely, if the Respondent considers that the Minister had made no further or other assumptions than those pleaded, notwithstanding silence as to the specific factors respecting what constitutes "care and upbringing" of a qualified dependent, specified in section 6302 of the Regulations, then I must say that the assumptions as pleaded simply are insufficient to justify the impugned redeterminations.

[20] At the hearing the Appellant testified and filed a few documents including letters from the child's school and baseball league tending to show that the only address they had for JCW's home address was the Appellant's home address. The Appellant testified to the effect that during these periods he had had primary responsibility for the care and upbringing of JCW. The Respondent called no *viva voce* evidence but entered into evidence through cross-examination certain Alberta Queen's Bench certified orders, acknowledged by the Appellant. These had not been earlier produced to the Appellant although he was generally aware of them as he was shown as a party in each.



[21] No judicial orders were mentioned in the Reply – apart from the above-**referenced** divorce order. I note that court orders is one only of the eight criteria for determining if an individual has primary responsibility for the care and upbringing of a qualified dependent. The collection of orders filed by both parties (Appellant and Respondent) do not include all orders issued during the relevant period. An Alberta Queen's Bench order particularly relied on by the Respondent is one issued April 1, 2015 stating that SLW being JCW's mother "shall continue to have the primary day to day care and control of the Child [JCW]...". One dated February 28, 2012 provides that the Appellant, "shall have sole custody and primary care and control of the child [JCW]".

[22] I am reluctant to be critical of the layman Appellant's case. Although entitled to, what he lacked was a Reply from the Respondent that clearly set out the case the Appellant had to meet.

[23] As noted court orders are but one of the eight factors for actually determining primary responsibility. In view of that, and the Respondent's deficient pleadings, and the Appellant's own testimony and documentation as at least slight evidence tending to support that during at least certain relevant periods he was the parent with primary responsibility for care and upbringing, not directly challenged in cross-examination, I find for the Appellant respecting this issue of whether he was the person primarily responsible for the care and upbringing of JCW throughout the period of January 2013 to and including March 2015. I formed the impression from the Appellant's testimony that at least from April 2015 forward, he did not particularly challenge that his former spouse, SLW, carried the primary responsibility for the care and upbringing of JCW.

C. Was the Appellant eligible for CCTB for 2011 base taxation year (July 2012 – June 2013)?

[24] The third issue is, was the Appellant eligible for applied for CCTB monthly payments for the 2011 base taxation year (being for the monthly periods July 2012 to and including June 2013), given that he had not filed his 2011 income tax return?

[25] As noted above, the Respondent pleaded at paragraph 29(1) of the Reply the Minister's assumption of fact that the Appellant had not filed an income tax return for the 2011 taxation year. No evidence to the contrary was provided at the hearing of this matter. Accordingly the assumption is accepted as a proven fact.

[26] Subsection 122.61(1) of the ITA provides in relevant part:

If a person...at the end of a taxation year [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...

[27] I note that the mechanism of deemed tax overpayment as referred to in the above provisions is utilized to characterize CCTB/CCB payments. This ensures that these benefit payments are treated as non-taxable. The provision makes clear that the filing of a tax return for the pertinent base taxation year is a necessary precondition to the deeming of the tax overpayment. As no income tax return was filed by the Appellant for the 2011 taxation year, he is ineligible for any monthly CCTB payments referable to the months falling within the July 2012 to June 2013 period. This of course is in addition to the above conclusion that the Appellant is not entitled to CCTB payments for any periods preceding the month of January 2013.

D. Was JCW a "qualified dependant" for GSTC purposes for the 2012 - 2015 taxation years?

[28] The fourth and final issue is, was JCW a "qualified dependent" in respect of the Appellant, and thus was the Appellant eligible for receipt of associated GSTC quarterly payments for the 2012 through 2015 taxation years.

[29] Per paragraph 122.5(6)(b) of the ITA provides in respect of the GSTC,

...[a] person is deemed to be 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.

[30] Thus, the Appellant's eligibility for the quarterly paid GSTC is the same criteria as for CCB eligibility. If the individual is an "eligible individual" per section 122.6 then that serves to likewise entitle the eligible individual to receipt of the GSTC paid quarterly each year.

[31] I have found above that the Appellant does fit that section 122.6 category for the period July 2013 through to and including March 2015. The GSTC entitlement should be likewise.

IV. Conclusion:

[32] The appeal is allowed and the matter is referred back to the Minister for reconsideration and further redeterminations on the bases that the Appellant is entitled to the denied CCTB benefit payments for the beginning of each month during the period July 2013 through to and including March 2015, and also that the Appellant is entitled to the denied GSTC benefit payments for the beginning of each July, October, January and April within the period July 2013 through to and including March 2015. Per subsection 10(1) of the *Tax Court of Canada Rules (Informal Procedure)*, due to the Respondent's pleading deficiencies, costs are ordered against the Respondent in the fixed amount of \$300, payable to the Appellant within 30 days of the issuance date of the judgment in this matter.

**This Amended Reasons for Judgment is issued in substitution for the Reasons for Judgment dated July 30, 2020.**

Signed at Halifax, Nova Scotia, this **10<sup>th</sup>** day of **August** 2020.

“B. Russell”

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Russell J.

CITATION: 2020 TCC 78

COURT FILE NO.: 2018-3204(IT)I

STYLE OF CAUSE: JOHN A. WACHAL AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: October 10, 2019

**AMENDED REASONS FOR  
JUDGMENT BY:** The Honourable Justice B. Russell

DATE OF JUDGMENT: July 30, 2020

**DATE OF AMENDED REASONS  
FOR JUDGMENT:** **August 10, 2020**

APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Andrew Lawrence

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

Nathalie G. Drouin  
Deputy Attorney General of Canada  
Ottawa, Canada