Federal Court of Appeal  Cour d'appel fédérale

Date: 20190327

Docket: A-410-17

Citation: 2019 FCA 51

CORAM: **WEBB J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

ALEXEY LAVRINENKO

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 4, 2018.

Judgment delivered at Ottawa, Ontario, on March 27, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the judgment of Justice Paris (2017 TCC 230) that dismissed Mr. Lavrinenko's appeal to the Tax Court of Canada. He was appealing a determination made by the Minister of National Revenue (Minister) that he was not a shared-custody parent for the relevant period for the purpose of determining his eligibility for the Canada Child Tax Benefit (CCTB) and the GST/HST Credit under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (Act).

The determination was that Mr. Lavrinenko and his ex-spouse did not reside with their son on an equal or near equal basis during this period.

[2] For the reasons that follow I would dismiss this appeal.

I. Background

[3] Mr. Lavrinenko and his ex-spouse are divorced. They shared custody of their son. An order of the Ontario Superior Court of Justice Family Court Branch (Family Court Order) dated June 29, 2011 set out the arrangements with respect to the custody of their son and, in particular, provided various times during the year when the child would reside with one parent or the other.

[4] Under the Act, subject to certain conditions that are not in issue in this appeal, individuals who are shared-custody parents of a child are each entitled to one-half of the CCTB and the GST/HST Credit. The relevant period for the determination of whether Mr. Lavrinenko and his ex-spouse were shared-custody parents is from December 2012 to June 2016. The Minister determined that they were not shared-custody parents of their son during this period and, as a result, Mr. Lavrinenko was not entitled to one-half of the CCTB or the GST/HST Credit.

II. Decision of the Tax Court

[5] Justice Paris reviewed the evidence that was before him and concluded that Mr. Lavrinenko resided with his son somewhat less than 40% of the time for the period in issue.

Justice Paris also concluded that a 60%/40% split would not qualify Mr. Lavrinenko as a shared-custody parent and, therefore, dismissed his appeal.

III. Issue and Standard of Review

[6] The main issue in this appeal is the interpretation of paragraph (*b*) of the definition of shared-custody parent in section 122.6 of the Act. The definition of shared custody parent in section 122.6 is used to determine the eligibility for both the CCTB and the GST/HST Credit. Paragraph (*b*) of section 122.6 of the Act provides that the child must reside with the parents on an equal or near equal basis. The interpretation of this provision is a question of statutory interpretation and, therefore, the applicable standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[7] Mr. Lavrinenko is also disputing the determination that he resided less than 40 % of the time with his son. The standard of review for any finding of fact is palpable and overriding error (*Housen v. Nikolaisen*).

IV. Analysis

[8] Mr. Lavrinenko submits that he and his ex-spouse followed the Family Court Order during the period in issue in this appeal. Mr. Lavrinenko does not agree with the interpretation of the Family Court Order as found by Justice Paris and, according to Mr. Lavrinenko, when the Family Court Order is interpreted correctly the amount of time that he resided with his son increased to almost 41%. For the purposes of this appeal, it is not necessary to resolve this

particular issue since even accepting Mr. Lavrinenko's submission that the child resided with him 41% of the time would not, in my view, result in Mr. Lavrinenko being a shared-custody parent.

A. *Relevant Provisions of the Act*

[9] Under the Act, the CCTB (which after the period under appeal was renamed as the Canada Child Benefit) is treated as an overpayment of an eligible individual's liability under the Act and such amount is paid to the eligible individual as a refund of this overpayment. Under subsection 122.61(1) of the Act, the overpayment amount is calculated on a monthly basis.

[10] Certain amendments were made to the CCTB provisions by S.C. 2010, c.25. The amendments were effective July 2011. These amendments will be referred to herein as the 2010 Amendments.

[11] Prior to the 2010 Amendments, an eligible individual was an individual who resided with a qualified dependant and who was "the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of the qualified dependant" (section 122.6 of the Act, definition of "eligible individual" , as it read prior to the 2010 Amendments). Therefore, only one parent could qualify for the CCTB for any particular month even if the parents shared custody and the responsibility for the care and upbringing of the qualified dependant on an equal basis (*Campbell v. Her Majesty the Queen*, 2010 TCC 67, 2010 D.T.C. 1072).

[12] Similarly the GST/HST Credit is treated as a deemed payment on account of tax payable under the Act (subsection 122.5(3)), although only determined for the particular months identified in subsection 122.5(4) of the Act. Prior to the 2010 Amendments, a child could only be the qualified dependant for one parent for any particular specified month (subsection 122.5(6) of the Act, as it read prior to the 2010 Amendments).

[13] The Canada Revenue Agency (CRA), prior to the 2010 Amendments, had adopted a policy for joint custody arrangements. This policy is set out in *White v. Her Majesty the Queen*, 2010 TCC 394, 2010 D.T.C. 1274:

> **18** The Appellant also filed a CRA document entitled "Shared Eligibility" (2008-11-12) (See Exhibit A-1). In the document the following comment is found:
>
> > 1. What is shared eligibility?
> >
> > Shared eligibility exists where a child lives more or less equally with two separate individuals (whether 4 days with one, and 3 days with the other, on a one week on, one week off basis or some other similar rotation), and each individual is primarily responsible for the child's care and upbringing when the child resides with them. The Canada Child Tax Benefit (CCTB) legislation only allows eligibility to one "eligible individual" in a month. To address this problem, the Canada Revenue Agency (CRA) developed a shared eligibility policy that would recongnize *[sic]* that there could be two eligible individuals for the same child. It was therefore decided to allow eligibility for the child (or children) to each individual on a 6-month on, 6-month off rotation, both for the CCTB and for the child component of the goods and services/harmonized sales tax (GST/HST) credit.

[14] The 2010 Amendments incorporated formal recognition for certain joint or shared custody arrangements into the CCTB provisions of the Act. The definition of "eligible individual" in section 122.6 was amended to provide that a parent of a qualified dependant would be an eligible individual if that parent:

> **(i)** is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or
>
> **(ii)** is a shared-custody parent in respect of the qualified dependant,

[15] The definition of shared-custody parent was also added to section 122.6 of the Act, which read as follows for the period in issue in this appeal:

shared-custody parent in respect of a qualified dependent at a particular time means, where the presumption referred to in paragraph (*f*) of the definition *eligible individual* does not apply in respect of the qualified dependant, an individual who is one of the two parents of the qualified dependant who	***parent ayant la garde partagée*** S'entend, à l'égard d'une personne à charge admissible à un moment donné, dans le cas où la présomption énoncée à l'alinéa *f*) de la définition de *particulier admissible* ne s'applique pas à celle-ci, du particulier qui est l'un des deux parents de la personne à charge qui, à la fois :
(*a*) are not at that time cohabitating spouses or common-law partners of each other,	***a*)** ne sont pas, à ce moment, des époux ou conjoints de fait visés l'un par rapport à l'autre;
(*b*) reside with the qualified dependant on an equal or near equal basis, and	***b*)** résident avec la personne à charge sur une base d'égalité ou de quasi-égalité;
(*c*) primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors,	***c*)** lorsqu'ils résident avec la personne à charge, assument principalement la responsabilité pour le soin et l'éducation de celle-ci, ainsi qu'il est déterminé d'après des critères prévus par règlement.

[16] The only part of the definition of "shared-custody parent" that is in in dispute in this case is paragraph (*b*) and in particular the phrase "on an equal or near equal basis". This part of the definition is used to determine eligibility for the CCTB and the GST/HST Credit. For ease of reference, the analysis will only refer to the eligibility for the CCTB. There was a minor amendment in 2015 to change the spelling of dependent to dependant in the opening part of the definition of "shared-custody parent".

B. *Prior Decisions of the Tax Court*

[17] There have been a number of decisions of the Tax Court that have addressed the interpretation of "an equal or near equal basis" for the purposes of the definition of "shared-custody parent". Most of these decisions were made under the informal procedure. While section 18.28 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 provides that such decisions have no precedential value, they may still be considered (*Mourtzis v. Her Majesty The Queen*, [1994] 1 C.T.C. 2801, at para. 19).

[18] In paragraph (*b*) of the definition of "shared-custody parent", Parliament only specified that the parents must reside on an equal or near equal basis. No range of percentages is specified, nor is there any indication of the basis upon which the determination is to be made that a person resides on an equal or near equal basis. The cases decided by the Tax Court have focused on the amount of time that the parents resided with the child, which is a logical way to determine whether the parents are residing with a child on an equal or near equal basis. No other way to determine this issue has been identified or suggested. As well, since Parliament has chosen the word "equal" it suggests that Parliament intended that whether a parent resides with a child on an

equal or near equal basis must be based on something that is capable of being measured and compared. It seems appropriate, therefore, to continue to use time as the means by which to resolve this issue.

[19] In deciding this issue on the basis of the amount of time that each parent resides with the child, the decisions range from:

(a) "near equal" not encompassing "a very wide variation from equal residence" (*Van Boekel v. Her Majesty the Queen*, 2013 TCC 132, 2013 D.T.C. 1120, at para. 21) to

(b) not believing "that Parliament intended that the line be drawn so strictly at only a 50/50 split, or some very slight variation akin to that" (*Brady v. Her Majesty the Queen*, 2012 TCC 240, 2012 D.T.C. 1204, at para. 27 where a 45%/55% split in the time the child resided with each parent resulted in each parent being a shared-custody parent) to

(c) a proportion that was "somewhere between a 59.38%/40.62% split and a 57.14%/42.86% split" not being "significantly different from the 57%/43% split in the *Fortin* [*Fortin v. Her Majesty the Queen*, 2014 TCC 209, 2014 D.T.C. 1164] and *Levin* [*Levin v. Her Majesty the Queen*, 2015 TCC 117, 2015 D.T.C. 1121] cases and … relatively close to the 55%/45% split in the *Brady* case" resulting in each parent being a shared custody parent (*Morrissey v. Her Majesty the Queen*, 2016 TCC 178, 2016 D.T.C. 1152, at para. 67). This decision has been appealed to this Court and the appeal has been allowed (2019 FCA 56).

[20] There are no decisions of the Tax Court where a person who resided with his or her child less than 40 % of the time was found to be a shared-custody parent.

C. *Approach to be followed in interpreting "equal or near equal basis"*

[21] In *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10, the Supreme Court of Canada set out the approach to be used in interpreting provisions such as the one in issue in this appeal:

> **10** It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[22] Therefore, "on an equal or near equal basis" is to be interpreted based on a textual, contextual and purposive analysis. The meaning of equal is obvious, so the question in this case is how close to equal is "near equal"?

D. *Textual Interpretation*

[23] In my view, based on the text, the word "near" would mean "almost" (*Black's Law Dictionary*, 8th ed.) and therefore "near equal" would mean "almost equal". The text would not support a wide variance from equal.

E. *Context and Purpose*

[24] Mr. Lavrinenko referred to the *Federal Child Support Guidelines*, SOR/97-175, (the Guidelines) that recognize shared custody arrangements. He submitted, in effect, that the Guidelines formed part of the relevant context and since, in his view, he satisfies the test for "shared custody" under the Guidelines, he should also qualify as a "shared-custody parent" for the purposes of the CCTB. For the reasons that follow, the meaning of "shared-custody parent" and, in particular, the meaning of "an equal or near equal basis" for the purposes of the Act is, in my view, to be determined without reference to the Guidelines.

[25] Paragraph 9 of the Guidelines addresses shared custody arrangements:

> **Shared custody**
>
> **9.** Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> **(a)** the amounts set out in the applicable tables for each of the spouses;
>
> **(b)** the increased costs of shared custody arrangements; and
>
> **(c)** the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[26] While both the CCTB and the Guidelines deal with the payment of money for the maintenance of children, they serve different purposes and apply to different payments. The Guidelines provide for the payments that are to be made by one parent to the other parent while the CCTB provides for a payment from the federal government to qualified parents. There are different conditions that are applicable in determining whether an arrangement will be

treated as a shared-custody arrangement for the purposes of determining (1) the amount of child support that is to be paid by one parent to the other parent; and (2) the possible equal sharing of the CCTB paid by the federal government.

[27] The Guidelines provide a specific amount of time (not less than 40%) and provide that this is determined based on the exercise of a right of access to or physical custody of a child. The CCTB provides that the parents must reside with the child on an equal or near equal basis. Not only is the percentage different but also the basis for the calculation is different (the exercise of a right to access to or physical custody of a child versus reside with the child). While the exercise of a right of access may well result in the parent residing with the child, it would not necessarily follow that every time a right of access is exercised the parent resides with the child.

[28] The Guidelines were in existence before the CCTB provisions were amended to add the definition of “shared-custody parent”. The heading for paragraph 9 of the Guidelines refers to “shared custody” but this expression does not appear in the text of paragraph 9. Since Parliament chose a different expression to define in the Act (“shared-custody parent”) and did not adopt the language of paragraph 9 of the Guidelines as part of the definition of “shared-custody parent”, it is to be presumed that Parliament intended that “shared-custody parent” in section 122.6 of the Act not have the same interpretation as “shared custody” in paragraph 9 of the Guidelines. Therefore, the meaning of “shared-custody parent” and, in particular, the meaning of “an equal or near equal basis” for the purposes of the Act is to be determined without reference to the Guidelines.

[29] As noted above, the definition of "shared-custody parent" was added by the 2010 Amendments. The 2010 federal budget included a reference to this change and the 2010 Budget Supplementary Information stated that:

> **2010 BSI: Benefits Entitlement — Shared Custody**
>
> Under existing rules, only one eligible individual can receive the Canada Child Tax Benefit and Universal Child Care Benefit in respect of a qualified dependant each month. Similarly, the child component of the Goods and Services Tax/Harmonized Sales Tax Credit (GST/HST credit) is payable in respect of a qualified dependant to only one eligible individual each quarter.
>
> To improve the allocation of child benefits between parents who share custody of a child, Budget 2010 proposes to allow two eligible individuals to receive Canada Child Tax Benefit and Universal Child Care Benefit amounts in a particular month, and two eligible individuals to receive GST/HST credit amounts in respect of a particular quarter, in respect of a child if the recipients would be eligible to receive amounts under the Canada Revenue Agency's existing shared eligibility policy. This policy applies when a child lives more or less equally with two individuals who live separately. The Canada Child Tax Benefit and Universal Child Care Benefit payments will be equivalent to each eligible individual receiving one-half of the annual entitlement that they would receive if they were the sole eligible individual, paid in monthly instalments over the year. The child component of the GST/HST credit will similarly be equivalent to each eligible individual receiving one-half of the annual entitlement that they would receive if they were the sole eligible individual, paid in quarterly instalments over the year.
>
> Corresponding amendments will be made to the *Universal Child Care Benefit Act*.
>
> This measure will apply to benefits payable commencing July 2011.
>
> (emphasis added)

[30] This document indicates that the purpose of the amendments was to reflect the existing policy of the CRA. As noted above, this policy provided that:

> Shared eligibility exists where a child lives more or less equally with two separate individuals (whether 4 days with one, and 3 days with the other, on a one week on, one week off basis or some other similar rotation), and each individual is primarily responsible for the child's care and upbringing when the child resides with them.

[31] The only example given is one where a child resides with one parent for 4 days in one week and with the other parent for the other 3 days of that week, on a one week on, one week off basis. This alternating basis between the first week and the second week would mean that for a full two-week cycle, the child would live with each parent for 7 days, which would be on an equal basis. This policy did not provide for any significant deviation from an equal basis. Since the Budget Supplementary Information stated that the amendments to the CCTB provisions were intended to implement CRA's "existing shared eligibility policy", this would indicate that "near equal" was only intended to support minor deviations from sharing custody on an equal basis.

[32] In *Brady*, Justice Campbell referred to the Child Benefits Guide, T4114(E) (the Guide), which was revised by the CRA after the amendments were made to the CCTB provisions in 2010. In this Guide, the CRA indicates that:

> You share custody of a child if the child lives with two different individuals in separate residences on a more or less equal basis, such as:
>
> - the child lives with one parent four days a week and the other parent three days a week
> - the child lives with one parent one week and the other parent the following week
> - any other regular cycle of alternation

[33] Since the Guide is published by the CRA, it is not binding on this Court. It is, however, noteworthy to compare the first example in this Guide to the example provided by the CRA in its "shared eligibility policy" that existed prior to the amendments made in 2010. These two examples are:

Example in the "shared eligibility policy"	**Example in the Guide**
[child lives] 4 days with one [parent], and 3 days with the other [parent], on a one week on, one week off basis	the child lives with one parent four days a week and the other parent three days a week

[34] In the "shared eligibility policy", the only example provided was one that would result in the child living on an equal basis with each parent since the child would be living with each parent for 7 days over the full 2 week cycle. However, in the example provided in the Guide, the second part of the example from the "shared eligibility policy" (which stipulates that the shared custody arrangement would operate "on a one week on, one week off basis") is omitted. By omitting the alternating part of the arrangement, the example in the Guide suggests that the four days per week with one parent will continue throughout the year. This would reduce the time that a parent would be required to reside with his or her child to around 43%. There is no explanation for why the example was changed from the one cited in the "shared eligibility policy" to the one listed in the Guide. Since, based on the Budget Supplementary Information, the amendments made to the CCTB provisions in 2010 were intended to implement the existing policy, the example provided in the Guide should have been the same as the one set out in the shared eligibility policy.

[35] I also agree with the comments of Justice Campbell in *Brady* that the third situation identified in the Guide (any other regular cycle of alternation) is too broad.

[36] The purpose of the CCTB is to provide a payment to qualifying parents. The CCTB is either paid entirely to one parent or is shared equally between two parents. It is not allocated between the parents based on the percentage of time that each parent resides with the child. Since the amount of the benefit paid to each shared-custody parent will be one-half of the CCTB, this would also support a finding that any deviation from residing on an equal basis must be a minor deviation in order to qualify as "near equal". This is also consistent with the stated intention in the 2010 Budget Supplementary Information that the amendments would implement the "shared eligibility policy" of the CRA, which, based on the example provided, did not indicate that any significant deviation from sharing custody on an equal basis would result in a sharing of the CCTB.

F. *Conclusion on the Interpretation of "near equal"*

[37] In my view, based on the text, context and purpose, Parliament intended that "near equal" be interpreted as essentially or almost equal. Parents should be considered to reside with their child on an equal or near equal basis if the Tax Court is satisfied, when comparing the amount of time that a child resides with each parent, that each parent resides 50% (or almost 50%) of the time with the child.

[38] In determining whether a child is residing with a parent on a near equal basis, it is important to remember what is being measured. In my view, Parliament did not intend for the parties to maintain detailed records of every hour that a child resides with each parent. In several of the decisions of the Tax Court, the percentage of time that each parent resides with the child is calculated to the nearest hundredth of a percentage point. For example in Morrissey, the finding was that the proportion of time was "somewhere between a 59.38%/40.62% split and a 57.14%/42.86% split". Mr. Lavrinenko, in his submissions, stated that the percentage of time that he resided with his son was 40.87%.

[39] It does not seem to me that Parliament, in addressing whether the parents reside with the child on an equal or near equal basis, had intended that the parents or the Tax Court measure the actual amount of time so precisely and calculate it to the nearest hundredth of a percentage point. This could also lead to a situation where one parent could intentionally delay taking the child to the other parent to attempt to reduce the time that the child is with the other parent to produce a precisely calculated amount of time that would result in the other parent not being a shared-custody parent. This could not have been the intent of this provision.

[40] It is not always possible to accurately quantify the number of hours that the child resides with each parent and therefore arrive at a precise determination of the percentage of time that the child resides with each parent accurate to the nearest hundredth of a percentage point. The accuracy of the result of any mathematical computation is entirely dependent on the accuracy of the numbers used to produce that result. Parents who are sharing the custody of a child should be focused on the best interests of the child and not in documenting each hour that

the child is residing with them. This condition for the CCTB should not add any additional stress by requiring parents to maintain detailed records of the exact time that the child spends with each parent. As well, there are a number of issues that could contribute to the imprecise calculation such as whether the time that a child spends in school or at summer camp should be allocated to one or both parents, and if so, how it should be allocated.

[41] Parliament chose to not fix the range that would qualify as “near equal”. However, in my view, any percentage of time that cannot be rounded off to 50% would not qualify as near equal. In deciding how to round off an amount of time, it is important to consider the accuracy of the amounts used to determine the percentage of time that a child resides with each parent.

[42] As noted above, it is not always possible to accurately quantify the number of hours that the child resides with each parent and, therefore, arrive at a precise determination of the percentage of time that the child resides with each parent. As a result, any rounding of percentages should not be restricted to rounding to the nearest percentage point but rather to the nearest whole number that is a multiple of 10 and another whole number. For example, 48% would be rounded to 50% and 44% would be rounded to 40%. This would allow some flexibility for the imprecise data that may be available and still reflect the intention of Parliament that the child reside on an equal or near equal basis with each parent.

[43] On this basis, even accepting Mr. Lavrinenko's submission that he resided with his child 41% of the time (which would be rounded to 40%), he does not satisfy the requirement that he resided on an equal or near equal basis with his son. Therefore, it is not necessary to resolve the issue of whether the actual percentage of time that Mr. Lavrinenko resided with his son was less than 40% or approximately 41%.

[44] As a result, I would dismiss the appeal. Although the Crown has requested costs, in my view, costs should not be awarded in this case.

"Wyman W. Webb"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED NOVEMBER 20, 2017, CITATION NO. 2017 TCC 230 (DOCKET NUMBER 2016-4766 (IT)I)

DOCKET:	A-410-17
STYLE OF CAUSE:	ALEXEY LAVRINENKO v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 4, 2018
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A. LASKIN J.A.
DATED:	MARCH 27, 2019

APPEARANCES:

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