Docket: 2004-2179(IT)G

BETWEEN:

MICHEL PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 24, 2006, at Montreal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Yanick Houle

JUDGMENT

The appeal under the informal procedure from the assessment made under the *Income Tax Act* for the 2002 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of May 2006.

"Paul Bédard"

Bédard J.

Translation certified true
on this 31st day of July 2008.

Erich Klein, Revisor

Citation: 2006TCC260
Date: 20060523
Docket: 2004-2179(IT)G

BETWEEN:

MICHEL PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal under the informal procedure from an assessment made against the appellant by the Minister of National Revenue (the "Minister") under the *Income Tax Act* (the "Act") for 2002 taxation year.

[2] In his income tax return for the 2002 taxation year, the appellant claimed a credit for a wholly dependent person of $1,037.12 ($6,492 x 16%) with respect to his daughter Merlyne. In making the assessment dated June 12, 2003, the Minister denied the appellant the credit for a wholly dependent person.

[3] The evidence showed the following:

(i) the appellant and Manon Gravel were married in 1988;

(ii) the appellant and Ms. Gravel have lived separate and apart since 1999;

(iii) from the appellant and Ms. Gravel's union four children were born: Manuel, Mélodie, Monika and Merlyne;

(iv) during the year in question, the appellant lived separate and apart from Ms. Gravel;

(v) a judgment by the Superior Court of Quebec dated June 4, 2002 (Exhibit I-1, Tab 10) ordered the appellant and Ms. Gravel to adhere to an agreement on interim relief concluded that day between the parties (Exhibit I-1, Tab 9) in which they agreed they would have joint custody of the four children, [TRANSLATION] "from week to week with the exchange taking place every Friday after school starting with the mother on Friday, June 7, 2002." The judgment also ordered the appellant to pay Ms. Gravel support for the four children in the amount of $2,600 per year starting June 21, 2002.

[4] Only the appellant testified in support of his position. During his testimony, he essentially restated the arguments raised in his notice of appeal, which states:

> [TRANSLATION]
> (c) The appellant submits that section 118 of the Act is being interpreted in a simplistic and biased fashion by the Canada Customs and Revenue Agency, which is denying him the right to claim amounts for a dependent person of whom the appellant had custody from January 1, 2002, to June 4, 2002, in the dwelling declared as the main family residence, and for whom the custody terms have been amended and changed to joint custody from week to week as of that date, and of whom the appellant had custody on December 31, 2002, as will be more fully demonstrated at the hearing.
>
> (d) The CCRA maintains that, under subsections 118(1) and (5), by virtue of the fact that the appellant is required as of June 4, 2002, to pay support within the meaning of subsection 56.1(4) of the Act, even though he has shared custody of his four children, no amount in respect of a dependent person (equivalent to married) can be claimed, as stated in a letter from the CCRA dated February 18, 2004, in response to the appellant's notice of objection of June 27, 2003, which position was confirmed on August 4, 2003, by the Appeals Division of the CCRA.
>
> (e) The appellant is of the opinion that paying support under subsection 56.1(4) of the Act does not deprive him of his single-parent-family status, he being the main custodial parent for the period from January 1, 2002, to June 4, 2002, and having shared custody from week to week at the declared main family dwelling for the period from June 4, 2002, to December 31, 2002, and that the two elements of support and custody should be considered separately. The appellant affirms that he is the main supporting person given that he maintains the safe residence

declared as the main family residence and attends to his children's various needs, in particular regarding medical services, and that the other parent has neglected to provide medical assistance to the children on several occasions. Moreover, the appellant is of the opinion that the administrative principle whereby the situation that is more advantageous to the client must be favoured in cases where there are two situations is applicable in the present case.

(f) The appellant intends to rely on the principles stated above in paragraphs c, d, and e of this document, and to show that the presumption that eligible dependents are the mother's responsibility, as set out in the Income Tax Act, constitutes unlawful discrimination, in particular, discrimination based on sex under the Canadian Charter of Rights (s. 15).

[5] The relevant provisions for the purposes of the present case are as follows:

118. (1) Personal credits – 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 x B
where
A is the appropriate percentage for the year, and
B is the total of,
. . .

(b) **Wholly dependent person**—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,

. . .
an amount equal to the total of
(iii) $7,131, and
(iv) the amount determined by the formula
$6,055 - (D - $606)
where
D is the greater of $606 and the dependent person's income for the year,

(5) Support -- No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual

(*a*) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or
(*b*) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

56.1 (1) Support—For the purposes of paragraph 56(1)(*b*) and subsection 118(5), where an order or agreement, or any variation thereof, provides for the payment of an amount to a taxpayer or for the benefit of the taxpayer, children in the taxpayer's custody or both the taxpayer and those children, the amount or any part thereof

(*a*) when payable, is deemed to be payable to and receivable by the taxpayer; and
(*b*) when paid, is deemed to have been paid to and received by the taxpayer.

. . .

(4) Definitions—The definitions in this subsection apply in this section and section 56.

> **"child support amount"** means any support amount that is not identified in the agreement or order under which it is receivable as being solely for the support of a recipient who is a spouse or common-law partner or former spouse or common-law partner of the payer or who is a parent of a child of whom the payer is a natural parent.
> . . .
>
> **"support amount"** means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and
>
> > (*a*) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or
> > (*b*) the payer is a natural parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[6] Subsection 118(5) of the Act states that an individual cannot claim an amount under subsection 118(1) of the Act in respect of a person where the individual is required to pay a support amount to the individual's spouse or former spouse in respect of that person and where the individual lives separate and apart from the spouse throughout the year because of the breakdown of their marriage, or claims a deduction in respect of support. Thus, an individual who is required to pay a support amount for a taxation year following the year of the breakdown of the marriage is not entitled to a tax credit under subsection 118(1) of the Act in respect of his spouse or child, even in cases where no payment of this type is made or is deductible.

[7] The sole issue is whether the appellant is entitled to claim a tax credit for a wholly dependent person in respect of his daughter Merlyne. It should first be noted that, although he was advised to do so by the Court during the status hearing held by conference call on February 9, 2006, the appellant did not serve on the attorneys general of Canada, the provinces and the territories a notice of a constitutional question challenging the constitutionality of subsection 118(5) of the Act in light of section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). I point out that, at the hearing, the appellant definitively abandoned his section 15 constitutional challenge of subsection 118(5) of the Act. In this case, the

appellant was required to pay in 2002 a support amount within the meaning of subsection 56.1(4) of the Act and he lived separate and apart from his spouse throughout that year because of the breakdown of their marriage. As a result, the appellant could not deduct an amount under subsection 118(1) of the Act with regard to his daughter Merlyne.

[8] It is clear that, as the appellant mentioned, the application of subsection 118(5) of the Act results in differential treatment: a taxpayer who is separated and has joint custody of his children, but who does not pay any child support, is entitled to the credit for a wholly dependent person, while such is not the case for a taxpayer in the same situation who does not pay child support. However, before determining whether on that basis subsection 118(5) of the Act violates section 15 of the Charter, the Court must answer these two questions:

(i) Is the differential treatment based on one or more of the enumerated grounds or on similar grounds?

(ii) Does subsection 118(5) of the Act have a purpose or effect that is discriminatory as contemplated by the equality guarantee?

[9] Although I do not need to address these questions because the appellant did not serve a notice of a constitutional question and furthermore, at the hearing, he abandoned his constitutional challenge of subsection 118(5) of the Act under section 15 of the Charter, I note that in *Frégeau*, where the facts were similar to those of the present case, I answered both these questions in the negative and I held that subsection 118(5) of the Act did not violate section 15 of the Charter.

[10] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 23rd day of May 2006.

"Paul Bédard"

Bédard J.

Translation certified true
on this 31st day of July 2008.

Erich Klein, Revisor

CITATION:	2006TCC260
COURT FILE NO.:	2004-2179(IT)G
STYLE OF CAUSE:	Michel Pelletier v. Her Majesty the Queen
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	April 24, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	May 23, 2006
APPEARANCES:	
For the Appellant:	The Appellant himself
Counsel for the Respondent:	Yanick Houle
COUNSEL OF RECORD:	
For the Appellant:	
Name:	The Appellant himself
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada