

Docket: 2007-861(IT)I

BETWEEN:

MARIE AUKSTINAITIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on December 13, 2007, at Ottawa, Ontario.  
Before: The Honourable Associate Chief Justice Gerald J. Rip

Appearances:

Appellant: The Appellant herself  
Counsel for the Respondent: Marie-Claude Boisvert

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**JUDGMENT**

The appeal from the assessment dated June 20, 2006, by which the Minister of National Revenue ("the Minister") disallowed the Canada Child Tax Benefit attributable to the Appellant for the 2002, 2003 and 2004 base years for the period from July 2005 to June 2006, and from the assessment dated May 26, 2006, by which the Minister disallowed the Goods and Services Tax Credit attributable to the Appellant for the 2002, 2003 and 2004 taxation years for the period from July 2003 to June 2006, are allowed, with costs, if any, and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant was an eligible individual within the meaning of the *Income Tax Act*.

Signed at Ottawa, Canada, this 19th day of February 2008.

"Gerald J. Rip"

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Rip A.C.J.

Translation certified true  
on this 11th day of April 2008.  
Susan Deichert, Reviser

Citation: 2008TCC104  
Date: 20080219  
Docket: 2007-861(IT)I

BETWEEN:

MARIE AUKSTINAITIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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### **REASONS FOR JUDGMENT**

**Rip A.C.J.**

#### **I. INTRODUCTION**

[1] These appeals, heard under the informal procedure, pertain to the 2002, 2003 and 2004 base years. The Minister of National Revenue ("the Minister") assessed the Appellant for the periods under appeal, and, based on the assumption that Marc Mongeon was her common-law partner, disallowed the Goods and Services Tax Credit ("GSTC") and the Canada Child Tax Benefit ("CCTB"). Consequently, the Minister assessed the Appellant for the periods from July 2005 to June 2006 and July 2003 to June 2006 for the deemed CCTB and GSTC overpayments.

[2] The Minister based his assessments on the following facts:

[TRANSLATION]

- (a) The Appellant and Marc Mongeon have a child. (confirmed by the Appellant)
- (b) The child was born on September 30, 2000. (confirmed by the Appellant)
- (c) The Appellant and Marc Mongeon lived together throughout the relevant period.
- (d) The Appellant and Marc Mongeon shared certain financial responsibilities throughout the relevant period.
- (e) The Appellant and Marc Mongeon jointly assumed responsibility for the care and upbringing of the child throughout the relevant period.

[3] Thus, the issue for determination in the instant case is whether Marc Mongeon was the Appellant's common-law partner during the periods under appeal.

## **II. FACTS**

[4] It should be noted that Marc Mongeon did not appear at the hearing of this appeal, even though he was served with a notice of appearance.

[5] The Appellant and Marc Mongeon lived together as common-law partners from 1999 to March 17, 2001. Their child was born during this period.

[6] On September 27, 2001, following the breakdown of their relationship, the Quebec Superior Court issued an agreement concerning the child's shared custody. Marc Mongeon subsequently had another common-law partner, and a second child was born from that relationship. In 2003, Marc Mongeon separated from this second common-law partner. He declared personal bankruptcy in November 2003.

[7] Mr. Mongeon then went to live with the Appellant from the beginning of 2004 to July 2006. It is this period of cohabitation that gave rise to the instant appeal.

### III. THE PARTIES' POSITIONS

[8] The Appellant clearly did not consider herself to be Mr. Mongeon's common-law partner during the periods in issue. In her submission, they were merely cohabiting and sharing the custody of their child in accordance with a Superior Court order, and nothing more. Hence, she claims to be entitled to the credits that were disallowed.

[9] By contrast, the Respondent submits that the Appellant and Mr. Mongeon were common-law partners during the periods in issue. Based on this determination, the Respondent submits that the Appellant is not entitled to the credits in issue.

### V. ANALYSIS

[10] The income of the common-law partner must be taken into account in computing the GSTC and CCTB.

[11] Subsection 248(1) of the *Income Tax Act* defines "common-law partner" for the purposes of the Act as follows:

"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;

[12] For the purposes of the GSTC and CCTB, section 122.6 of the Act defines "cohabiting 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;

[13] The former subsection 252(4) defined the terms "spouse" and "marriage". In *Milot v. The Queen*,<sup>1</sup> my colleague Lamarre Proulx J. wrote the following:

11 This definition [the former subsection 252(4)] leads us to consider the notion of conjugal relationship. When can two persons be considered as living in a conjugal relationship? This notion has often been studied for the purposes of various statutes. In Quebec, for example, this notion was studied in particular for the application of the *Automobile Insurance Act*, R.S.Q., c. A-25, s. 2, para. 2, and the *Act respecting the Québec Pension Plan*, R.S.Q., c. R-9, s. 91. See *Les personnes et les familles*, Knoppers, Bernard et Shelton, Tome 2, Les éditions Adage, the first chapter of which is entitled "Les familles de fait". It states that cohabitation is fundamental in a conjugal relationship and in conjugal conduct. That conduct may be determined through sexual relations, emotional and intellectual exchange, financial support and common knowledge.

[14] Lamarre Proulx J. went on to apply the factors developed by Kurisko D.C.J. in *Molodowich v. Penttinen*<sup>2</sup> to determine what a conjugal relationship is. The judgment of the Ontario District Court provides more precisely what constitutes cohabitation or a conjugal or marriage-like relationship. Specifically, Kurisko D.C.J. provides the following list of relevant points:

**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?

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<sup>1</sup> 1995 CarswellNat 1987, [1996] 1 C.T.C. 2247, at page 2250.

<sup>2</sup> (1980), 17 R.F.L. (2d) 376 (Ont Dist. Ct.).

**2. Sexual and personal behaviour:**

- (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,
- (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 towards 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 towards 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 towards 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 children?

As Kurisko D.C.J. further observed, the extent to which each of the aforementioned seven different components will be taken into account must vary with the circumstances of each particular case.

[15] The approach laid down in *Molodowich* was later approved by the Supreme Court of Canada in *M v. H.*<sup>3</sup> As stated there, it should be borne in mind that these factors must not be followed blindly but rather applied based on the specific facts of each case:

**59** *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

**60** Certainly an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true of same-sex couples. Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely. In these circumstances, the Court of Appeal correctly concluded that there is nothing to suggest that same-sex couples do not meet the legal definition of "conjugal".

[16] In *Rangwala v. Canada*,<sup>4</sup> Campbell J. also emphasized the importance of applying the test flexibly in order to take the facts of each case into consideration, by adopting the remarks made by Wilson J. in *Macmillan-Dekker v. Dekker*:<sup>5</sup>

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<sup>3</sup> [1999] 2 S.C.R. 3. See also *Lavoie v. Canada*, 2001 DTC 5083 (F.C.A.), which followed *Milot*.

<sup>4</sup> [2000] T.C.J. No. 624 (QL).

<sup>5</sup> [2000] O.J. No. 2957 (QL).

23 He also states that:

...

I conclude that there is no single, static model of a conjugal relationship, nor of marriage. Rather, there are a cluster of factors which reflect the diversity of conjugal and marriage relationships that exist in modern Canadian society. Each case must be examined in light of its own unique objective facts.<sup>6</sup>

[17] In *Sanford v. Canada*,<sup>7</sup> affirmed by the Federal Court of Appeal,<sup>8</sup> Morgan J. noted that a taxpayer's civil status should be determined by objective standards, not by subjective attitudes.<sup>9</sup>

[18] All of this must be taken into consideration in applying *Milot* to the specific facts of the instant case.

[19] In fact, the Appellant responded to each factor of this test.

**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?

[20] Clearly, the Appellant and Marc Mongeon lived under the same roof with their son, and Mr. Mongeon's other son sometimes lived with them. Nonetheless, the Appellant testified that they each had their own bed and their own room.

[21] It is settled law that the mere fact that two people live together is not sufficient to conclude that they are common-law partners.<sup>10</sup> In fact, in *Kelner v. Canada*,<sup>11</sup> Bowman J. (as he then was) stated as follows:

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<sup>6</sup> *Dekker*, at paragraph 68.

<sup>7</sup> [2000] T.C.J. No. 801.

<sup>8</sup> 2002 DTC 7442.

<sup>9</sup> "[18] In deciding whether the Appellant and Markus Buchart cohabit in a conjugal relationship within the meaning of paragraph 252(4)(a), their status must be determined by objective standards and not by subjective attitudes. . . ."

<sup>10</sup> For example, see *Rangwala v. The Queen*, [2000] 4 C.T.C. 2430; *Sigouin v. The Queen*, [2002] 1 C.T.C. 2596; *Uwasomba v. The Queen*, [2003] 2 C.T.C. 2295 and *Bellavance v. The Queen*, [2004] 4 C.T.C. 2179.



**17** 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.

**18** In *Murphy v. Murphy* [1962] NSW 417 Nield J. said at p. 424:

There is the old story of "absence making the heart grow fonder"; but when people have an inability to accommodate themselves to one another, and are forced to occupy the same dwelling, to live under the same roof, with that difference in feeling; then the antagonisms build up and build up, as they see one another day after day; and the possibility of their ever coming together again becomes more and more remote and they tend to be more and more separated, by their hostility to one another, and apart from one another, in that they have nothing in common at all. I can see no reason in logic why one cannot say of people living under the same roof that they are living separate and apart; just as if they were living in different home.

**19** I tend to think that Nield J. may have gone a little further than our courts would have. Courts in Canada have however recognized that parties may live separate and apart even though they are under one roof. *Rushton v. Rushton* [1969] 66 W.W.R. 764; *Tuomi v. Ungarian* [1991] 5 W.W.R. 424.

[22] To hold otherwise could result in absurd consequences in a modern context where former common-law partners, who have no chance of reconciliation, sometimes decide to continue to live together for the welfare of their child or simply because they cannot financially afford not to.

[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.

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<sup>11</sup> [1996] 1 C.T.C. 2687, [1995] T.C.J. No. 1130 (QL).

**2. Sexual and personal behaviour:**

- (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?

[24] The Appellant stated that she had no sexual relations with Mr. Mongeon, and had no other partners during the periods in issue. Apart from trying to maintain good communications with Mr. Mongeon for the welfare of their child, and having eaten at the same time as him in rare instances, nothing suggests to me that this second factor militates against the Appellant. On the contrary, it seems that the contacts and exchanges between the Appellant and Mr. Mongeon 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.

**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,
- (e) Any other domestic services?

[25] It appears that household maintenance and dishwashing were the only things that were essentially done by the Appellant. All other duties were apparently shared.

I do not see how this factor could either favour or oppose the existence of a conjugal relationship in the case at bar. In my opinion, it is not a decisive factor here.

**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 towards 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 towards each of them and as a couple?

[26] Based on the Appellant's testimony, these criteria weigh heavily against a finding that there was a common-law partnership, because the Appellant and Mr. Mongeon did no social activities together, did not visit each other's families, did not introduce themselves as partners, and were not considered partners.

**6. Support (Economic):**

- (a) What were the financial arrangements between the parties regarding the provision of or contribution towards 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?

[27] The extent of Mr. Mongeon's financial contribution to this cohabitation is unclear, but it appears that he covered at least the excess costs that his presence generated. It is true that such an arrangement could, at first sight, appear "abusive" for people who are not living in a common-law partnership. But one must bear in mind that Mr. Mongeon went to live with the Appellant after going bankrupt, and that she wanted him to be in a position to leave her residence as quickly as possible.

(7) **Children:**

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

[28] With respect to the last factor, there is a judgment of the Quebec Superior Court under which the Appellant and Mr. Mongeon have shared custody of their son. There is nothing in the evidence submitted before me that causes me to doubt that they were complying with this order even though they lived under the same roof. As the Appellant admitted, they did sometimes exchange custody-related duties, such as where the parent who did not have custody during a certain week would go to pick up the child at school because the other parent had to work late.

### **Conclusion**

[29] A few factors favour the existence of a common-law relationship, but the majority do not.

[30] Despite the Appellant's submissions, it is clear that, during the period in issue, she and Marc Mongeon lived together, shared certain financial responsibilities and were jointly responsible for the care and upbringing of their child.

[31] Marc Mongeon and their son nonetheless each had a separate room. Mr. Mongeon also had his own fridge, and each person looked after his or her own grocery shopping. Mr. Mongeon stored the rest of his personal belongings at the Appellant's house, but used only what was necessary to furnish his room. The Appellant wanted Mr. Mongeon to be able to leave as easily and quickly as possible when the time came, and she wanted to avoid arguments concerning what belonged to him upon his departure.

[32] The Respondent presented Marc Mongeon's income for the years in issue with a view to showing that he did not in any way depend on the Appellant's financial assistance during that period. Perhaps so, but everything suggests that the Appellant was unaware of this, and that she merely wanted to ensure her child's welfare pending Mr. Mongeon's discharge from bankruptcy.

[33] The Appellant's testimony ranked very high in terms of its credibility, and aside from the fact that I disagree with the terms that she uses to describe certain facts, I have to believe her. In addition, the fact that Mr. Mongeon did not testify benefited the Appellant. Thus, I accept the Appellant's testimony. Consequently, the burden was on the Respondent to overturn this finding, but since the Respondent did not adduce anything more than Mr. Mongeon's income during the periods in issue, I have no choice but to find for the Appellant.

[34] When the Appellant decided to house her ex-partner temporarily, she was merely trying to be a responsible parent, and she should not be penalized for that.

[35] Based on all of the foregoing, I find, on a balance of probabilities, that the Appellant and Mr. Mongeon were not common-law partners during the periods in issue.

[36] I therefore allow the appeal, with costs, if any, and refer the assessments back to the Minister for reconsideration on the basis that Ms. Aukstinaitis's CCTB and GSTC are to be remitted to her.

Signed at Ottawa, Canada, this 19th day of February 2008.

"Gerald J. Rip"

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Rip A.C.J.

Translation certified true  
on this 11th day of April 2008.  
Susan Deichert, Reviser

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DATE OF HEARING: December 13, 2007

REASONS FOR JUDGMENT BY: The Honourable  
Associate Chief Justice Gerald J. Rip

DATE OF JUDGMENT: February 19, 2008

APPEARANCES:

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