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Via email: Lesley.taylor@canada.ca

Lesley Taylor, Director, Social Tax Policy
Finance Canada
99 Elgin St.
Ottawa, ON K1A 0G5

Dear Ms. Taylor:

Re: Tax Issues for Family Lawyers

I am writing to follow up on some taxation issues raised when the Canadian Bar Association Family Law Section (CBA Section) last met with you and members of your team in November 2018. The CBA Section represents lawyers who practice in the area of family law from every part of Canada, serving clients that include all parties to family law disputes. We value our meetings with Canada Revenue Agency representatives, as they permit an ongoing exchange on important issues for family lawyers and an opportunity to find potential solutions for Canadian families as they navigate through divorce and separation. We appreciate that the timing of the federal election made a meeting this year difficult but hope that we can resume meeting in fall 2020.

We have some continued areas of concern, which we outlined at previous meetings and in correspondence in March 2018 to the Minister of Finance. The first pertains to problems with claiming the Eligible Dependent Tax Credit in shared parenting cases when a set-off amount of child support is paid. Related to that is the requirement for proof of shared parenting arrangements for receipt of the Canada Child Benefit. Another persistent problem for our clients is the lack of deductibility of legal fees for payors of spousal and child support.

Almost 3 in 10 Canadian children live in a household that does not have both of their parents under the same roof. According to Statistics Canada in 2016, 28.9% of the 5.8 million children in Canada up to age 14 are not growing up in a two-parent household with biological or adoptive parents.¹ Of these approximately 1.7 million children, 19.2% are in a household with just one parent, 6.1% of these households include a parent and a stepparent, and 3.6% include a parent living with another adult.

1 Data from the 2016 Census. This is a national average and does not include those above age 14. Provincial and territorial numbers range between 27.1% to 38.7%.

Current sources suggest that about 38% of all marriages end in divorce. Further, over one-fifth of all couples (21.3%) live common law and we expect that rates of separation for those people would resemble current rates of divorce.²

The proportion of cases where there is shared custody has increased sharply over the past three decades, and at least two thirds of cases in the Canadian court system now involve some form of joint legal custody or shared parental responsibility for decision-making.³ A recent article, *Shared Parenting in Canada: Increasing Use but Continued Controversy*,⁴ notes that approximately 1 in 5 cases involve shared parenting and at least 2/3 of cases in Canada's courts involve some form of joint legal custody or shared parental responsibility for decision-making. A survey of lawyers at the 2016 National Family Law Program indicated that 42% of their cases involved shared parenting.⁵

In summary, an increasing number of children in Canada are part of families who have experienced separation and divorce. In these families, shared parenting of children on a more-or-less equal basis is also growing. As a result, tax issues arising from shared parenting arrangements can only be expected to increase as the dynamics of families and household composition evolve over time.

Issue 1: Claiming the Eligible Dependent Credit in Shared Parenting Situations

As family lawyers, we find that this remains the most difficult and intractable tax issue facing families going through a separation. Differing communications from CRA and logistically impractical decisions from the Tax Court make this an issue consistently raised as problematic by lawyers and clients across Canada.

Current position

Generally, a party can claim the Eligible Dependent Credit if the party was not living with, supporting, or being supported by a spouse or common-law partner, and the party resided with and supported a dependent in the year.

Under the *Income Tax Act*, child support payors cannot claim as an eligible dependent a child for whom that person pays support. However, section 118(5.1) provides that section 118(5) does *not* apply if the result would be that neither party qualifies for the credit. Section 118(5.1) seems intended to ensure that in shared parenting situations where each party contributes to the support of children, the eligible dependent credit will not be lost.

Child Support Guidelines

In assessing child support in shared care situations pursuant to section 9 of the Guidelines, the table amounts for each parent are considered, as well as the increased costs of maintaining the child(ren) in shared care, and any conditions, means, needs and other circumstances of the parents and the child(ren). In practical terms, the court orders support having considered the factors in section 9 and each parent's income, often offsetting those sums. CRA allows the eligible dependent claim to be made only by the "recipient parent" even though each parent is notionally paying support, both of their table amounts having been considered in the assessment of support.

2 www150.statcan.gc.ca/n1/daily-quotidien/170802/dq170802a-eng.htm

3 Nick Bala, Rachel Birnbaum, Karine Poitras, Michael Saini, Francine Cyr and Shawna LeClair published October 2017 in *Family Court Review* 55(4):513-530.

4 *Ibid.*

5 *Ibid.*, at 521.

CRA's website previously said that where the court order or written agreement included a clause to the effect of, "for convenience, the amounts will be offset, which will satisfy both parents' obligations", CRA would permit the deduction for both parents. This has now been removed from the website and that protocol is no longer accepted by CRA.

Further, a recent Tax Court of Canada decision (*Harder v. Canada*)⁶ required parents to physically exchange funds for each to make an eligible dependent claim. As the net amount of support paid remains the same, all that is accomplished is unduly complicating payments, whether direct or through Maintenance Enforcement Programs. It can also result in inequities when a Maintenance Enforcement Program may enforce against one parent but not the other.

We look forward to discussing possible solutions, including reverting back to accepting a "for convenience" paragraph in orders or agreements.

Issue 2: Canada Child Benefit for Primary Care Parents

Our clients often encounter problems with the proof required by CRA from primary caregiving parents for the purposes of the Canada Child Benefit (CCB). According to *Guide T4114(E) Rev. 19*, the primary caregiver must live with the child and be the person primarily responsible for the care and upbringing of the child. The application form lists documents that might show in which parent's primary care the child resides. The documents include letters from individuals such as daycare providers, school authorities, social workers or resettlement officers who claim to have personal knowledge of the children's residence, other than as reported by the parent. In our view, a court order or written separation agreement should be ample proof of the current parenting situation, without requiring parents to supply further documents of limited evidentiary value. In shared parenting situations, it is even more complex as there may be two approximately equal caregivers with neither being appropriately designated as "primary".

Issue 3: Deductibility of Legal Fees for Payors of Support

Currently, only the recipient of support can claim a tax deduction for legal fees paid to seek or obtain support. A payor of support may also incur legal fees to seek a determination of the amount of support to be paid or to seek a reduction or termination of support. In every circumstance, the recipient can deduct legal fees, while the payor cannot. In both cases, payors and recipients are seeking a support order that will affect their incomes. We see a fundamental unfairness in not allowing the payor of support to similarly deduct legal fees, regardless of the situation.

We look forward to discussing these issues and others at your convenience.

Yours truly,

(original letter signed by Gaylene Schellenberg for Jeffrey D. Wise, Q.C.)

Jeffrey D. Wise, Q.C.
Chair, Family Law Section

cc. Claire Farid
Nicole Jones