



March 8, 2018

Via email: Bill.Morneau@parl.gc.ca

The Honourable William Morneau, P.C., M.P.
Minister of Finance
House of Commons
Ottawa, ON K1A 0A6

Dear Minister:

Re: Eligible Dependent Tax Credit

I am writing on behalf of the Canadian Bar Association's National Family Law Section (CBA Section). The CBA is a national association of over 36,000 lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of family law specialists from all regions of Canada, with clients representing the full range of individuals impacted by family breakdown.

For several years, the CBA Section has been concerned about the application of sections 118(5) and (5.1) of the *Income Tax Act* (ITA) to separated and divorced parents who share day-to-day care of their children. The Tax Court of Canada's interpretation of those sections has led to uncertainty and inequity for those parents, creating financial risk and stress for many households. This has increased legal costs for some parents, and limited access to justice for others.

Section 118(5) of the ITA provides that a person paying child support cannot claim the eligible dependent tax credit for a child for whom support is being paid. Section 118(5.1) further provides that section 118(5) does not apply if that would mean that no one is entitled to the credit.

When a child lives mostly with one parent after separation, the Federal Child Support Guidelines (FCSG)¹ require only one payor of child support, and section 118(5) clearly allows only the recipient of child support to claim the eligible dependent tax credit for the child.

When a child lives with both parents in shared parenting (as defined in the legislation), the FCSG requires that both parents pay child support to each other. Almost all shared parenting families find it more convenient and easier to manage financially to adopt an informal set-off approach to child support, rather than each exchanging payments. Only the higher income parent pays support to the lower income parent, calculated by deducting the lesser amount of child support payable from the higher amount payable under the FCSG. Many parents in this situation also agree to share the eligible dependent credit for their children.

¹ See also provincial/territorial child support guidelines.

The Tax Court of Canada recognizes that the set-off amount of child support is calculated based on the child support obligations of *both* parents, but has held that where just one payment changes hands, only the recipient can claim the eligible dependent tax credit. The effect has been to ignore the nominal payment of the recipient parent and to frustrate the intentions of parents who have agreed to share the eligible dependent credit. While the Court has expressed some sympathy for applicants in those cases, it has not deviated from this interpretation of the ITA. This interpretation contradicts information on Revenue Canada's website, which practitioners and litigants have relied on as sound policy and safe practice.

In the recent *Harder* decision², despite a clearly worded separation agreement that acknowledged each parent would calculate their respective support obligations, adopt the set-off amount, and each claim the eligible dependent credit for one child, the Court interpreted section 118(5.1) to find "a mandatory requirement for each parent to pay an amount reflected in a court order or formal agreement marching along with conclusive evidence of actual payment being made".

At paragraph 11, it stated:

The practising family law Bar should take note. The engagement of the combined effect of subsections 118(5) and 118(5.1), at a minimum, requires a comprehensive documentary and evidentiary record. If separating spouses, seeking joint custody, wish to avail themselves of a dependent deduction for both spouses in such situations, surely family law lawyers can deploy their usual flexible skills to ignore the set off provisions within the paradoxically named "Divorce Mate" for a brief moment and mandate and effect actual periodic payments by both spouses to each other in cases of shared parenting of two or more children. Surely cheques, or even their more modern replacement of recurring e-transfers, may evidence a clearly enumerated, reciprocal and mandatory support amount paid by each spouse to the other.

This interpretation – that even an explicit separation agreement or court order is insufficient as a 'documentary and evidentiary record' – means that many families cannot follow the terms of existing agreements or orders, and run significant risk of financial consequences if they are audited.

Parents would instead need to actually exchange the full amount of their respective support payments and keep a record of each payment for both to claim the eligible dependent tax credit. While the Tax Court and the CRA have offered that as a solution, affected families are frustrated and financially challenged by that option. Higher income earners may try to protect themselves by renegotiating or re-litigating the terms of their separation, creating additional cost and stress on families.

These decisions have created arbitrary differences and unfairness between different kinds of separated families.³ For example, parents who share parenting of children on a generally equal basis bear similar costs of raising those children, yet not all can take advantage of the tax credit:

- Parents who have different incomes may find that only the lower income parent can claim the credit; and/or
- Parents with the same income can both claim the credit as neither is considered a 'payor of child support'

Requiring the actual exchange can also be problematic where child support is a controversial issue or in other high conflict situations. For example, if one parent is not paying child support voluntarily, or where there has been domestic violence, low income parents might dutifully pay

² See, *Harder v. Her Majesty the Queen* (2016) CarswellNAT 4358, which cites previous cases with similar results.

³ See *R. v. Lawson*, [online](http://bit.ly/2G37KMn) (<http://bit.ly/2G37KMn>) where the Court took note of the problems that arise and the resulting arbitrariness for some families.

their share but then find that they do not receive the reciprocal payment from the higher income parent. This is not a farfetched example, and could expose children to more conflict and impoverishment, as well as add strain on courts and enforcement agencies attempting to rectify this situation.

Shared parenting is increasingly prevalent across Canada. The CBA Section appreciates that the federal government is committed to supporting families,⁴ including separated and divorced families. We believe that amending the ITA and creating interim policies and directives to facilitate the continuation of the set-off approach and sharing the eligible dependent credit would be a significant step towards demonstrating that support. In our view, this is essential to ensure families avoid the need to renegotiate or re-litigate these issues, as well as the cost, stress and uncertainty inherent in those processes.

We are available to discuss this matter with you further at your convenience.

Yours truly,

(original letter signed by Gaylene Schellenberg for Lawrence Pinsky)

Lawrence Pinsky
Chair, National Family Section

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⁴ See recent announcement of extended parental leave in *Budget 2018*, [online](http://bit.ly/2lafg8F) (<http://bit.ly/2lafg8F>).