



Novembre 15, 2021

Via email: chrystia.freeland@parl.gc.ca

The Honourable Chrystia Freeland, P.C., M.P.
Deputy Prime Minister and Minister of Finance
90 Elgin Street
Ottawa, ON K1A 0G5

Dear Minister Freeland:

Re: Tax Issues for Separated Families

I am writing on behalf of the Canadian Bar Association's Family Law Section (CBA Section) to reiterate our concerns about the inequality of tax law for families who enjoy a shared time arrangement with their children (a child's time is nearly equal between their parents) when compared to a primary parent situation, and deductibility of legal fees incurred for some but not all family law matters. We request an update to language in Canada Revenue Agency (CRA) materials to be consistent with recent amendments to the language found in the Divorce Act.

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.

We appreciate recent changes to the proof required by the CRA for applying primary caregivers as well as the evidence of primary residence required to establish eligibility for the Canada Child Benefit.

Eligible Dependent Credit in Shared Parenting

CBA Section members continue to have concerns about the application of subsections 118(5) and (5.1) of the *Income Tax Act* (ITA) to shared parenting arrangements between separated parents. In primary parenting situations the parent is eligible to claim the dependent tax credit.

The Tax Court of Canada's interpretation of these subsections has led to uncertainty and financial hardship for parents and their children who enjoy shared time arrangements. For example, subsection 118(5) states that a person paying child support cannot claim the eligible dependent tax credit for a child for whom support is being paid.

In shared parenting arrangements, the *Federal Child Support Guidelines* require that the court consider the incomes of both parties in setting the child support that may be payable from one to the other. When child support is payable by each parent to the other it is instinctive to have the monthly child support payments offset each other with a net amount paid by one parent to the other.

To date, the Tax Court of Canada recognizes that the set-off amount of child support is calculated based on the *Federal Child Support Guidelines*. However, it held that there is no discretion for parents who share a child's time to equally enjoy the benefit of the eligible dependent tax credit. Instead, where just one child support payment is made (like in a set-off arrangement), only the recipient may make this claim.¹ This does not reflect the financial impact of equally raising a child between two households.² It does not permit each parent to apply for this credit, or alternatively to share or alternate sharing the tax credit. This results in a differential tax treatment for the parent(s) of children who are in primary care and shared time situations. Further, this interpretation contradicts information that had previously been on the CRA website, which practitioners and litigants relied on as sound policy and safe practice.³

We urge the federal government to demonstrate its commitment to supporting Canadian families by amending the ITA and creating policies to facilitate sharing the eligible dependent credit in shared time arrangements. It will ensure an equal application of tax law for parents and children.

Deductibility of Legal Fees

CBA Section members continue to have concerns about the unequal application of the ITA for those who seek to deduct legal fees relating to spousal and/or child support claims.

Paragraph 21 of the interpretation bulletin IT-99R5⁴ confirms CRA's position that legal fees are not deductible by a payor spouse under any circumstances. Further, CRA Income Tax Folio S1-F3-C3⁵ states that only a recipient spouse may claim deductions for legal fees, to:

- 1) Obtain an order for child or spousal support
- 2) Enforce an existing order for child or spousal support
- 3) Vary an existing order for child or spousal support
- 4) Defend a reduction for child or spousal support.

A recipient of support (spousal and/or child) may claim a tax deduction for fees paid to seek or obtain support payments. There is no reciprocal provision for a payor of support who incurs legal fees to obtain a determination of an appropriate support amount, a reduction of support or termination of support. Currently, the recipient can always deduct legal fees, whether they were the one to advance or respond to a claim for support. The reverse is not possible even though both types of claims are consistent with family law legislation. Neither party should be denied eligibility to deduct legal fees incurred for support claims and we seek equal treatment for parties in either situation.

New Divorce Act and CRA Website

Significant amendments to the *Divorce Act* came into force on March 1, 2021. There were various social policy and practical reasons for updating the language in the federal legislation. Among the key changes is new language to describe parenting arrangements. For example, "custody" and "access" were replaced with "decision-making", "parenting time" and "contact". Concurrently, the *Federal Child Support Guidelines* were updated to reflect this new language.

¹ *Harder v. Her Majesty the Queen* (2016) CarswellNAT 4358

² See [Lawson v. R. 2017 TCC 131, where the Court took note of the problems that arise and the resulting arbitrariness for some families](#)

³ See [Tax Matters Toolkit for Lawyers](#)

⁴ See [IT-99R5, Legal and Accounting Fees](#)

⁵ See [Income Tax Folio S1-F3-C3, Support Payments](#)

However, the CRA website and materials have not been updated and continue to refer to “custody” and “access”. To avoid confusion, and to promote consistency, it is essential that the same language be used in all government department websites and materials, including that of the CRA.

Thank you for taking the time to review our concerns. We are available to discuss these matters with you or your staff and look forward to hearing back from your office to discuss how we can improve equality of tax treatment for families and their children.

Yours truly,

(original letter signed by Véronique Morissette for Erin Brook)

Erin L. Brook
Chair, Family Law Section