

## Child Support & Set-off in Guidelines - Sas Ansari

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### Child Support Payments - Is Set-Off in Child Support Guidelines Tantamount to Each Parent Paying the Other Child Support?

*Verones v The Queen*, [2013 FCA 69](#)

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The Appellant argued **two issues**:

1) That because both parents were making child support payments to each other (evinced by set-off in the child support guidelines), the exception to the prohibition in 118(5) against claiming the non-refundable credit in respect of a wholly dependent person and child, didn't apply pursuant to 118(5.1); or

2) That subsection 118(5.1) should be repealed as it undermines the general expression in subsection 118(5).

**The Appellant argued** that the set-off provided for in the child support guidelines was tantamount to each parent making a support payment to the other, and the netting of the amounts was to avoid the unnecessary exchange of cheques.

**The court held** that a set-off in the child support guidelines only took into account the other parent's income in determining the child support payable by the higher income parent. This set-off is not indicative of both parents making child support payments to each other.

While the payments by the Appellant met the definition of "support payment" in 56.1(4), that of his spouse did not as there was "no order or written agreement requiring her to make support payments to the appellant" (para 5). The only issue is whether both parents are making "support payments" because of "an order of a competent tribunal or an agreement".

**There is a problem with the FCA's reasoning** - or at least an apparent problem. If, as the court described, in making an order for child support payments, the incomes of both parents are taken into account, and the support payment is ordered to be made by the higher income parent on a net or set-off basis (pursuant to the child support guidelines), THEN one is left with the impression that there would never be a requirement for both parents to make child support payments to each other as required by 118(5.1).

It may be that this section is only meant to apply where, in a tax year, there is a change in the

direction of flow of child support payments. In that case, there is no real issue, and subsection 118(5.1) would be there to prevent the circumstance where neither parent could claim the credits in the year of change. An alternative would be where the court order or written agreement imposed an obligation on both parents to make payments to each other, with or without the option to set-off or net the amounts. It is likely that these are the circumstances at which this exception was aimed at.

It appears that the CRA is in agreement with the decision of the FCA in this case. In Income Tax Ruling 2011-0396611E5 (E), the CRA opined that:

New subsection 118(5.1) of the Act was introduced, effective with the 2007 taxation year, to eliminate that restriction when both parents are required to pay child support in respect of the same child. The amendment ensures that in cases where both parents had an obligation to pay a child support amount in respect of the same child, one parent could claim the EDC in respect of that child, providing all other conditions were met.

It is a question of fact as to whether the agreement or court order imposes a legally enforceable obligation on both parents to pay child support. Where a written agreement or court order requires both parents to make child support payments and both parents make actual payments (e.g. cheque, bank or maintenance enforcement programs), then supporting documents are generally available to substantiate the individual's eligibility for the exception provided under subsection 118(5.1) of the Act.

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The Department of Finance explanatory notes don't shed much light on the issue. They read:

**EN November 2007 [S.C. 2007, c. 35 (Bill C-28)]** — Presently, subsection 118(5) precludes a person from claiming a credit in respect of a child under paragraph (b) or (b.1) of the description of B in subsection 118(1) if that person also pays child support in

respect of the child. Where, in the same taxation year, two persons pay child support in respect of a child, neither person is eligible for the credit.

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