Explanatory Notes Relating to the Legislative Proposal Relating to the Income Tax Act (Shared-Custody Parent)

Clause 1

Income Tax Act
122.6 "shared-custody parent"

The definition "shared-custody parent" in section 122.6 of the *Income Tax Act* is amended in response to the Federal Court of Appeal decisions in *Lavrinenko v. Canada* (2019 FCA 51) and *Morrissey v. Canada* (2019 FCA 56). Paragraph (b) of the definition currently provides that, for an individual to qualify as a shared-custody parent in respect of a qualified dependant, the individual must be one of the two parents of the qualified dependant who reside with the qualified dependant on an equal or near equal basis. These decisions interpreted "near equal basis" as essentially meaning between 45% and 55% of the time.

The amendment replaces the "equal or near equal" test in paragraph (b) of the definition with two tests, set out in subparagraphs (i) and (ii). A taxpayer will only have to meet one of the two tests to satisfy paragraph (b), although in most cases a taxpayer meeting the condition in one subparagraph will meet the condition in the other.

The test in subparagraph (i) is intended to provide certainty for taxpayers. It provides that where each parent resides with the qualified dependant at least 40% of the time (*i.e.*, they both reside between 40% and 60% of the time), they may qualify as "shared-custody parents" for the purposes of section 122.6 of the *Income Tax Act* (provided the other conditions in the definition are met). This test is intended to be consistent with the concept of shared custody in the *Federal Child Support Guidelines*.

The test in subparagraph (ii) is intended to provide additional flexibility in the determination of who qualifies as a shared-custody parent. It borrows from the previous "equal or near equal" test, but changes "equal or near equal basis" to "approximately equal basis". As a result, parents who reside with the qualified dependent less than 40% of the time but still on an "approximately equal basis" may also qualify as shared-custody parents. This would be the case where the proportion of time each parent spends residing with the qualified dependant represents a genuine approximation of equal time, given the particular circumstances of the parents.

While it is expected that the test in subparagraph (i) will apply in almost all cases where paragraph (b) is satisfied, the amendments allow for the possibility that, in certain circumstances, parents could be outside the 40% to 60% range (reflected in the *Federal Child Support Guidelines*) and still appropriately be considered to reside with the qualified dependant on an approximately equal basis. For example, the test in subparagraph (ii) may be met where the qualified dependant generally resides with each parent in the 40% to 60% range and the parents try to reside with the qualified dependant on as near an equal basis as possible but, due to illness or summer vacation schedules, the split is 38% to 62% in a particular month.

This amendment is intended to reflect the Canada Revenue Agency's administrative practice relating to the definition "shared-custody parent" prior to the recent decisions noted above.

This amendment applies to overpayments that are deemed to arise after June 2011, which is the date that the original shared-custody parent provision came into effect.