Citation: 2004TCC460
20041104
Docket: 2002-4718(IT)I

BETWEEN:

WILLIAM S. CAMPBELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

CORRECTED REASONS FOR JUDGMENT

(Replaces Reasons for Judgment dated October 7, 2004. Correction at paragraph 71.)

Hershfield J.

Introduction

[1] This case concerns a father's claim that he was the primary caregiver to his son for periods affecting his 1995, 1996 and 1997 taxation years and that he thereby meets the requirements of the *Income Tax Act* ("*ITA*") to receive the Canada Child Tax Benefit ("CCTB"). The case concerns as well the treatment of male versus female parents under the provisions of the CCTB in the context of the equality guarantees found in the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The impugned provisions under the *ITA* and *Income Tax Regulations* ("*Regulations*") contain a presumption that where a child resides with both parents, the female parent is the primary caregiver and thus the parent eligible to receive the CCTB. The impact of this presumption in light of sections 15 and 28 of the *Charter* and subsection 52(1) of the *Constitution Act* is dealt with in these Reasons as well as Appellant's claim that he was, in fact, the primary caregiver to his son during the period under review. The Respondent acknowledged that the required notices under section 19.2 of the *Tax Court of Canada Act* ("*TCCA*") have been sent in respect of the Appellant's *Charter* challenge.

[2] The Minister initially accepted the Appellant's claim on the basis that the Appellant had care of his son and did not have a spouse during the relevant periods. The Minister later learned that the Appellant was in fact married during

the relevant periods and that he resided with his spouse and their son in the same home throughout such periods. Relying on the presumption that the female parent is the primary caregiver in these circumstances, the Minister re-determined that the Appellant was not entitled to the benefits initially allowed. The Appellant appeals that re-determination.[1]

[3] At this point it would be helpful to note that the relevant periods in this appeal do not correspond with the taxation years appealed. This results from the way in which the CCTB is calculated. Simply, the CCTB is a non-taxable amount paid monthly to an eligible individual to assist in the raising of a child. The amount is calculated by looking at the eligible individual's "base year" as defined in the *ITA*. In the present case, the Appellant was in receipt of the CCTB for the months April 1997 through April 1999. The base years for these months are as follows:

April 1997 to June 1997: base year 1995
July 1997 to June 1998: base year 1996
July 1998 to April 1999: base year 1997

[4] Accordingly, although the taxation years under appeal are 1995, 1996 and 1997, the Appellant's entitlement to the CCTB requires his being the "eligible individual" (as defined in the *ITA*) for the relevant periods April 1997 through April 1999. Subject to addressing the impact of the presumption in favour of the female parent, the Appellant will be considered the eligible individual if he was the parent during the relevant periods who primarily fulfilled the responsibility for the care and upbringing of his son.[2]

[5] The presumption in favour of the female parent is contained in paragraph (*f*) of the definition of "eligible individual" which reads as follows:

> 122.6 In this subdivision,

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[1] In more technical terms, this is an appeal from a consequential assessment made pursuant to subsection 152(4.3) of the *Act* following a re-determination by the Minister of the amount deemed by paragraph 122.6(1)(*i*) to be an overpayment of tax. The re-determination resulted in an excess amount being identified as having been paid or credited to the Appellant as a CCTB. Subject to this appeal such excess is repayable by the Appellant on the terms set out in section 160.1.

[2] See (*b*) of the definition of "eligible individual" in section 122.6.

> . . .
>
> (*f*) where a qualified dependant resides with the qualified dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent, . . .

[6] Paragraph (*f*) speaks to the case, as in the case at bar, where there are two persons, both parents of the qualified dependant, who claim to be the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant. As will be noted later in these Reasons, the presumption does not apply if both parents have filed a notice claiming the CCTB *provided* the two claimants live at different locations. Since that is not the case in this appeal, the presumption applies.

[7] The Appellant testified at the hearing that he, not his wife, was the primary caregiver during the relevant periods. If that is the case, the presumption in paragraph (*f*) has been held not to apply. That is, the presumption in paragraph (*f*) has been found to be rebuttable.[3] It is rebuttable because it is only a "presumption" not a deemed fact. Ignoring the *Charter* issue then, the Appellant can succeed on his claim to receive the CCTB if he can establish, on a balance of probability, that he was his son's primary caregiver during the relevant periods.

[8] To oppose the Appellant's testimony that he was his son's primary caregiver, the Respondent called the child's mother who separated from the Appellant at the end of March 1999. The child's aunt (the mother's sister) was called to corroborate the mother's testimony.

Was the Appellant the Primary Caregiver

[9] This is a case of considerable hostility between the Appellant and his former wife. Each has recast history to best reflect on their own conduct in relation to their son and to shed the worst possible light on their partner's conduct in relation to their son. While it is not particularly helpful in my view to review the testimony of the Appellant and his wife in any detail, an overview of the evidence is required.

[10] The Appellant was jobless when his son was born in March 1997. He had lost his job 12 days earlier. He was jobless until sometime after he completed a

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[3] *Cabot v. M.N.R.*, [1998] 4 C.T.C. 2893 (T.C.C.); and *Pollak v. R.*, [1999] 2 C.T.C. 2225.

four to six month retraining program that ended in or about June 1998. His testimony was that he looked diligently for work and cared for his son while his wife was off attending to her business. His wife was a neglectful mother who had no real relationship with the son. The Appellant tendered evidence as to his wife's business routine away from home and considerable hearsay evidence was advanced (letters and affidavits) which taken together describe him as a loving, caring, attentive father who drove his son to and from daycare and who had been seen giving lunch to his son, taking him for walks in a stroller and watching over him. He said he fed, changed and shopped for his son. He said he attended with his son at doctor's appointments and otherwise took the role of the parent performing the primary role in the care and upbringing of his son. He said he cashed in over $30,000.00 of savings to support the family during his unemployment and used employment insurance benefits for the same purpose.

[11] On cross-examination, however, he was not very convincing as to his role as a primary caregiver. He admitted his wife breast fed for three to four months. He stumbled over meal schedules and baby products and did not know where his son's health card was kept. He acknowledged that although his wife was away a lot in the course of her business, both he and his son travelled with her regularly, at least until the summer of 1998 at about which time the Appellant's wife began taking some trips without the son. By February 1999 the son was enrolled in a daycare three times a week and, it would seem was travelling less with his mother. However, even with the son in daycare, weekends were available for the child to travel with the mother and much of her travel was on weekends.

[12] While I am satisfied that the Appellant may have been required to spend more time with his son from the summer of 1998 through to his separation from his wife in March 1999, I am not satisfied that the increase in his role would have constituted him the primary caregiver during this period.

[13] The Appellant's wife was a professional dog handler. She showed dogs. Before shows she would spend all night grooming her dogs. Showing her dogs required travel and at shows she spent several hours a day handling her dogs during the course of their being judged. She started back to work only nine days after her son was born. She testified that until the summer of 1998 the son travelled with her *on all* trips. She described the Appellant as a lazy, cheating, lying, good-for-nothing who never once changed a diaper or fed their son a meal. She said she paid for all the household expenditures with the exception of some 10 mortgage payments which she acknowledged her husband made during the relevant period. The animosity between the Appellant and his former wife is best demonstrated by

an exchange between them on the Appellant's cross-examination of his former wife wherein they accused each other of tax evasion. Notwithstanding such hostility, her testimony in respect of the day-to-day care of her son clearly reflected that she had a much greater role than the Appellant in this regard.

[14] At the end of the day I would suggest that neither the Appellant nor his former wife are quite as bad as they would each have me believe. The Appellant was not as lazy as portrayed by his wife and I accept that he did help with their son's care and upbringing. The Appellant's sister-in-law who testified, confirmed this to some extent at least. Although I would not say that this witness was entirely disinterested, her testimony was clearly more balanced and she acknowledged that the Appellant did, at least on occasion, assist in feeding, changing and attending to his son.

[15] On balance, the testimony of the Appellant that he was the primary caregiver was simply not credible which is to say that he has not brought forward sufficient evidence to rebut the presumption in favour of the mother. To the contrary, the evidence brought forward by the Respondent is sufficient to establish, on a balance of probability, that the mother was in this case the primary caregiver of the qualified dependant during the relevant periods.

[16] It is important to underline this finding in the context of the analysis of the *Charter* issue raised by the Appellant. The *Charter* challenge, as I will elaborate on momentarily, is based on the discriminatory impact of the presumption in terms of the process that he has been subjected to by reason only of his gender. The Appellant has been put in the position of being an appellant for no other reason than he is a male parent. He has been required to file an Objection and Notice of Appeal to a reassessment. He has been subject to time limitations, filing fees and other costs. He has been pre-judged and bears a burden of proof to rebut the presumption in favour of his former wife – a presumption she enjoys for no other reason than she is a female. Procedurally, he asserts that the presumption operates or operated in his case in a discriminatory manner. While the remedy for such discrimination, if proven, might include or require the striking of the impugned provisions, such remedy in itself would be of no assistance to the Appellant since, by virtue of my findings of fact as to which parent was the primary caregiver, he would still not be entitled to receive the CCTB. Regardless, the Appellant seeks recognition and redress of the discriminatory aspects and impact of the impugned provisions.

[17] This raises a question of the jurisdiction of this Court to go beyond a determination of the correctness of a liability determined on a reassessment. I have determined the correctness of the liability. Can I do more? The answer to this question requires an analysis of section 24 of the *Charter* which reads as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Jurisdiction under Section 24 of the Charter

[18] Before considering the question of the scope of this Court's jurisdiction under section 24 it is necessary to consider the interrelationship between section 24 of the *Charter* and section 171 of the *ITA* as well as the interrelationship between section 24 of the *Charter* and subsection 52(1) of the *Constitution Act*.

[19] Subsection 52(1) of the *Constitution Act* provides that the Constitution "is the supreme law of Canada, and any other law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect". The invalidity of a provision that violates rights guaranteed under the *Charter* then does not arise from a declaration of a court but from the operation of subsection 52(1). As stated by Gonthier J. in *Nova Scotia (Workers' Compensation Board) v. Martin*[4] at para. 28 "In principle such provision is invalid from the moment it is enacted" and every level of government including administrative organs of state may not apply invalid laws. In *Schachter v. Canada*[5] Lamare J. wrote at para. 87, page 719, that where section 52 of the *Constitution Act* is not engaged, a remedy under section 24 of the *Charter* may still be available: "This will be the case where the statute or provision in question is not in and of itself unconstitutional but some action taken under it infringes a person's *Charter* rights." Bringing these principles together it seems clear that even if the impugned provisions in the case at bar do not necessarily violate the *Charter*, it is open for the Appellant to seek recognition and redress under section 24 if the *application* of the impugned provision in his case infringed his *Charter* rights.

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[4] [2003] 2 S.C.R. 504.

[5] [1992] 2 S.C.R. 679.

[20] The Respondent does not admit to this position and relies on *Keyes v. Canada (M.N.R.)*[6] as authority for limiting the jurisdiction of this Court not to do more than it is empowered to do under section 171 of the *ITA*. Subsection 171(1) of the *ITA* provides as follows:

> 171. (1) The Tax Court of Canada may dispose of an appeal by
>
> (*a*) dismissing it; or
>
> (*b*) allowing it and
>
> (i) vacating the assessment,
>
> (ii) varying the assessment, or
>
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.

In general terms this limits the jurisdiction of this Court to a determination of the correctness of an assessment.

[21] *Keyes* dealt with a husband's family allowance claim and the preference given to females under similar provisions as now contained in the CCTB provisions. Bonner J. of this Court found authority in *Mills v. R.*[7] to say that although this Court has jurisdiction to hear *Charter* challenges it is limited in the disposition of them by section 171 of the *ITA*. The task of the Court is to fit the remedy allowed under section 24 into the statutory scheme of the *ITA*. Otherwise, it is suggested in *Mills* that the legal system would be turned "upside down".

[22] With respect to the Respondent's position and reliance on *Mills*, as applied in *Keyes*, I do not agree that this Court's recourse under section 24 is so limited. This is broadly confirmed in *Canada v. O'Neill Motors Ltd.*[8] where at paragraph 10 Linden J. confirmed this Court's jurisdiction under section 24 to grant a remedy as is appropriate and just.

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[6] 89 DTC 91.

[7] [1986] 1 S.C.R. 863.

[8] [1998] 4 F.C.R. 180 (F.C.A.).

[23] In *O'Neill Motors*, Bowman A.C.J. vacated an assessment in respect of which an illegal search had been conducted. The illegal search violated the appellant's rights under the *Charter* and although the evidence so obtained could, under the *Charter*, be excluded, Bowman A.C.J. exercised his authority to invoke subsection 24(1) of the *Charter* which allows for any appropriate and just remedy. Arguably, using subsection 24(1) to vacate the assessment offers no precedent for this Court to apply a remedy beyond one statutorily provided for in section 171 of the *ITA* since the remedy actually invoked in that case was one within the scope of that section. However, in my view, the Federal Court of Appeal's affirmation of A.C.J. Bowman's decision goes further. It clearly acknowledges "the *general authority* given to the Court in subsection 24(1) to grant a remedy as is appropriate and just" (emphasis added).

[24] Further, I note that the jurisdiction of a statutory court to grant a remedy under section 24 of the *Charter* has been more recently dealt with in *R. v. 974649 Ontario Inc.*[9] In that case McLachlin C.J. confirmed the three requirements for a statutory court to have jurisdiction to grant *Charter* remedies under section 24 of the *Charter*. They are: (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy.[10] The jurisdiction issue in that case, as in the case at bar, concerned the third requirement, namely jurisdiction to grant the remedy.

[25] McLachlin C.J. adopted a "functional and structural" approach to implying legislative jurisdiction to grant *Charter* relief under section 24.[11] Under this approach the relevant factors and their relative weight will vary with the circumstances at hand. A necessary factor to consider in regard to the function of the Court is any expression of its mandate.[12] A further but different factor to consider in regard to function is any expression of the type of remedy that it is authorized to grant.[13] This Court's mandate is set out in section 12 of the *TCCA*. This section grants this Court exclusive original jurisdiction to hear and determine references and appeals "on matters arising under ... the *Income Tax Act*". There is

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[9] (2001) 206 D.L.R. (4th) 444.

[10] At para. 15.

[11] At para. 42.

[12] At para. 44.

[13] At para. 66.

no question that this statement of the Court's mandate is broader than suggested by section 171. Indeed it supports this Court's general authority to consider appropriate remedies on a *Charter* challenge. Further, section 19.2 of the *TCCA* makes specific reference to constitutional questions where the validity, applicability or operability of an Act of Parliament or its regulations is before this Court. As in the case of other superior courts mandated to hear constitutional questions there is a requirement that the Attorney Generals be notified. This section of the *TCCA* clearly underlines Parliament's intention to embrace this Court as one whose function is to deal with constitutional issues arising under the *ITA* including questions regarding the operation of a provision of the *ITA* or its *Regulations*.

[26] The next question then is whether section 171 of the *ITA* which limits remedies available in respect of appeals before this Court, can reasonably be taken as an expression of Parliament to limit the remedies otherwise available under section 24 of the *Charter* when a *Charter* challenge is before it. While section 171 may appear to be a telling indicator of this Court's limited function, such appearance, in my view, is misleading for several reasons. Firstly, it ignores the Court's wider mandate. As well, the court has express jurisdiction to do more than set out in section 171. Section 173 affords this Court jurisdiction to hear on joint application "a question of law, fact or mixed law and fact arising under this Act, in respect of any assessment, proposed assessment, determination or a proposed determination". While this appeal is not a section 173 reference on a question of law, that seems entirely beside the point. The point is that this Court has on references before it, express statutory jurisdiction to make a finding of law which would surely include a *Charter* violation under the *ITA* in respect of a determination such as the one being appealed at the case at bar. To say that such jurisdiction exists without access, as a matter of its general authority, to a remedy under section 24 of the *Charter* would be self-contradictory. Further, I would suggest that the statutory authority in section 171 is there to recognize a level of expertise and experience with a subject matter over which it is given *exclusive* jurisdiction. This limits the jurisdiction of other Courts. However, to say other courts do not have authority to consider remedies under section 171 of the *ITA* is not to suggest that the Judges of this Court lack the training or experience to consider appropriate and just remedies under section 24 of the *Charter*, when it considers *Charter* challenges consistent with its mandate. Further still, statutory authority to grant particular remedies is just one factor to consider in the overall assessment of the function and structure of the Court. I would hope that there is little question that this Court having the tools, facilities, resources and personnel of a superior court of record is sufficiently equipped functionally and structurally to

be recognized as having jurisdiction under section 24 of the *Charter* without encumbrance by virtue of section 171 of the *ITA*.[14] It is wholly consistent with this Court's function and processes to recognize its jurisdiction to employ just and appropriate remedies pursuant to section 24 of the *Charter* where applying the principles in *Schachter* as described above it determines that such remedies are available to an Appellant. Importantly as well, I note the remarks of Gonthier J. in *Nova Scotia (Workers' Compensation Board) v. Martin:*[15] "... Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts" (i.e. in the context of this case - "without the need for parallel proceedings before another court"). The Appellant in the case at bar should not be required to conduct this appeal in two forums: one in the Tax Court of Canada (as to his eligibility status) and one in the Federal Court of Canada (as to his entitlement to a section 24 remedy).

[27] In my view it is clear that this Court has jurisdiction to hear *Charter* questions respecting impugned provisions of the *ITA* or *Regulations* or the manner in which an impugned provision has been applied even under the informal procedure and the remedy available is that governed by the *Charter*.[16] Indeed, not only do section 24 of the *Charter* and subsection 52(1) of the *Constitution Act* trump section 171 of the *ITA*, they impose an obligation on this Court to consider

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[14] Wilson J. in writing for the majority in *R. v. Gamble* held that superior courts are to have a constant, complete and concurrent jurisdiction to grant section 24 remedies. However such case did not consider the jurisdiction of this Court specifically as it was not then a superior court. Accordingly, it did not consider the case of a superior statutory court with express and limited legislative authority.

[15] [2003] 2 S.C.R. 504 at para. 29.

[16] Informal Procedure cases do not enjoy the benefits of pre-trial discoveries and are not subject to the rigorous application of rules of evidence. Section 18.28 of the *TCCA* prescribes that judgments under the Informal Procedure are of no precedential value. Frequently appellants under the Informal Procedure are self-represented or are represented by non-lawyers, the latter not being permitted in cases brought under the General Procedure where appeals are governed by rules substantially similar to rules of other superior courts of record. This case was brought under the Informal Procedure by the Appellant due to the limited dollar value of the CCTB at issue, however, the Respondent was prepared to bring evidence and deal with the *Charter* challenge without assertions that this Court's jurisdiction was more limited under the Informal Procedure than it might be under the General Procedure. More importantly, I have determined that the role of this Court as a tribunal competent to exercise general authority under section 24 of the *Charter* has not, in this case, been compromised in any material way by virtue of having been brought under the Informal Procedure.

the constitutional validity of provisions applied and relied on in an assessment, reassessment or determination and to either strike an invalid provision or invoke an appropriate and just remedy under section 24 of the *Charter* where impugned provisions are not in and by themselves unconstitutional but where some action taken under them has infringed on a person's *Charter* rights.[17]

[28] Accepting jurisdiction, I reiterate that in considering the *Charter* challenge in the context of the case at bar, there are two determinations required: firstly, whether the impugned provisions of the *ITA* and *Regulations* are invalid pursuant to subsection 52(1) of the *Constitution Act* which requires a determination as to whether such provisions in and by themselves violate the Appellant's rights under the *Charter*; and, secondly if the impugned provisions do not in and by themselves violate the Appellant's rights under the *Charter*, whether the provisions of the *ITA* and *Regulations* as applied have in an administrative or procedural way violated the Appellant's rights under the *Charter*. The *Charter* question so framed takes on a life of its own and must be dealt with irrespective of the possibility or even inevitability that the remedy may not include a favourable judgment for the Appellant on the tax liability issue before this Court. That I have found that the Appellant in the case at bar cannot, on the merits of his appeal, receive the CCTB claimed, does not prevent my addressing the procedural discrimination complained of. Otherwise such discrimination would always be ignored in this Court. That the impugned presumption has been found to correctly reflect the facts of this case, cannot be a bar to examining the *Charter* complaint.

[29] Before considering the impugned provisions of the *ITA* and *Regulations* in light of sections 15 and 28 of the *Charter* and addressing the two questions raised above, I note as another preliminary point that the enquiry into the discrimination claim in the case at bar is not foreclosed by the findings of this Court that the impugned presumption is rebuttable. That the presumption in favour of the female parent is rebuttable, is *not* sufficient to obviate concern over an infringement of a

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[17] One aspect of the jurisdiction of this Court that is well accepted is that this Court has no jurisdiction to grant a remedy for abuse of process. Actions of the Minister are under the judicial review of the Federal Court. Asserting jurisdiction to just and appropriate remedies under section 24 in the case at bar is not in my view an invitation for this Court to extend its jurisdiction to abuse of process cases. What I am dealing with in the case at bar is not an abuse of process; it concerns the application and operation of a specific provision of the *ITA* and its *Regulations*. The question it deals with is whether the distinction in *Schachter* is engaged. If it is, then subsection 52(1) of the *Constitution Act* or section 24 of the *Charter* is thereby engaged. In the latter case consideration of actions of the Minister are invited regardless that such invitation may be seen as tantamount to a judicial review of the Minister's action.

right guaranteed under the *Charter*. To suggest otherwise either precludes a determination of whether there is a procedural problem in this case in the administration of the subject provisions that infringes on the *Charter* as alleged by the Appellant or implicitly accepts that any such apparent infringement does not ultimately infringe on the *Charter*. Neither of these results can be defended.

[30] Support for this position can also be found in the analysis of the majority decision of the Supreme Court of Canada in *R. v. Downey*[18] delivered by Cory J. Although a case dealing with a presumption in the *Criminal Code*, impugned as violating paragraph 11(*g*) of the *Charter*, the analysis confirms that presumptions that affect burdens of proof, can violate a right guaranteed under the *Charter*. At page 29, summarizing seven principles dealing with presumptions, Cory J. wrote as principle III: "Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence."

[31] This principle applies in my view to the impugned provisions in the case at bar which require the Appellant, by virtue of his gender, to disprove or rebut a presumed fact even if there is a rational connection between the established facts and the presumed fact. While the burden of proof and presumption of innocence in criminal cases can be said to be of greater importance and more worthy of protection, surely presumptions based on stereotypes affecting civil rights require similar consideration subject to a possible lowering of the justification bar as circumstances may dictate. Even more to the point, stereotypical presumptions are surely not less offensive simply because the person offended can disprove the presumption. The existence of the presumption is the evil that the *Charter* seeks to address if, based on a stereotype, it has given effect to discriminatory treatment. The question remains one of determining whether the Appellant's *Charter* rights have been violated by reason of gender discrimination.

The Charter Challenge – the Statutory Framework

[32] Preliminary issues aside then, it is necessary in considering the *Charter* challenge to first cite two further paragraphs of the *ITA*, namely, paragraphs (*g*) and (*h*), of the definition of "eligible individual" contained in section 122.6 of the *ITA* and sections 6301 and 6302 of the *Regulations*:

> "eligible individual" in respect of a qualified dependant at any time means a person who at that time

[18] [1992] 2 S.C.R. 10.

. . .

and for the purposes of this definition,

. . .

(*g*) the presumption referred to in paragraph (f) does not apply in prescribed circumstances,

(*h*) prescribed factors shall be considered in determining what constitutes care and upbringing.

6301. (1) For the purposes of paragraph (*g*) of the definition of "eligible individual" in section 122.6 of the Act, the presumption referred to in paragraph (*f*) of that definition does not apply in the circumstances where

(*a*) the female parent of the qualified dependant declares in writing to the Minister that the male parent, with whom she resides, is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of each of the qualified dependants who reside with both parents;

(*b*) the female parent is a qualified dependant of an eligible individual and each of them files a notice with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant;

(*c*) there is more than one female parent of the qualified dependant who resides with the qualified dependant and each female parent files a notice with the Minister under subsection 122.62(1) of the Act in respect of the qualified dependant; or

(*d*) more than one notice is filed with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant who resides with each of the persons filing the notices if such persons live at different locations.

6302. For the purposes of paragraph (*h*) of the definition of "eligible individual" in section 122.6 of the Act, the following factors are to be considered in determining what constitutes care and upbringing of a qualified dependant:

(*a*) the supervision of the daily activities and needs of the qualified dependant;

(*b*) the maintenance of a secure environment in which the qualified dependant resides;

(*c*) the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;

(*d*) the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;

(*e*) the attendance to the needs of the qualified dependant when the qualified dependant is ill or otherwise in need of the attendance of another person;

(*f*) the attendance to the hygienic needs of the qualified dependant on a regular basis;

(*g*) the provision, generally, of guidance and companionship to the qualified dependant; and

(*h*) the existence of a court order in respect of the qualified dependant that is valid in the jurisdiction in which the qualified dependant resides.

[33] The sections of the *Charter* upon which the Appellant relies is as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of

race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

. . .

28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The Issue Reframed in Light of the Charter Challenge

[34] It is helpful at this point to review the assessment, objection and confirmation process that faced the Appellant prior to filing his Notice of Appeal.

[35] The Appellant first applied for the CCTB in April 2000. The application shows his status as single which was the case by then. It is not clear from the application what period or base taxation year was covered but in August 2000 he requested in writing that his CCTB claim be processed retroactively to March 1997. No elaboration as to his marital status between March 1997 and March 1999 was provided. The Respondent suggested at the hearing that it was misled by the Appellant not having acknowledged that he was married and living with his wife during that period, the relevant period. The Appellant denies that the misrepresentation was intentional however I have little hesitation in suggesting that he would have known or ought to have known that in refraining from making the distinction clear, he was misrepresenting facts that bore to his entitlement. He knew his wife had not filed tax returns or made CCTB claims for the relevant periods when they separated in March 1999. Given my impression of the Appellant and his former wife, I can readily see how hostilities between them might have contributed to an attitude that could result in either of them misleading the CCRA. However, while I make these observations in deference to the Respondent's position, I find them of no relevance. They have no bearing on the question of which parent actually was the primary caregiver and in respect of the *Charter* challenge, they have no bearing on the principle question that I will ultimately have to consider which is whether the CCRA relied on any factors that bore to the best interests of the qualified dependant in invoking the presumption in favour of the female parent in this case.

[36] In January 2001, presumably after having allowed the Appellant's claim, the CCRA questioned the Appellant's claim and sent him a questionnaire. The response to the questionnaire accurately described the Appellant's marital status during the relevant periods and that he was living in the same house with his then spouse and their son. Although not in evidence, it seems safe to assume that the CCRA was, after initially allowing the Appellant's claim for the CCTB for the relevant periods, facing a competing claim by the Appellant's former spouse by January 2001. As well the CCRA was aware that the Appellant's former wife had not declared in writing that the male parent (the Appellant) was the parent who primarily fulfilled the responsibility for the care and upbringing of their son as required under paragraph (*a*) of *Regulation* 6301 to negate the presumption, in favour of the female parent, in paragraph (*f*) of the definition of "eligible

individual". Accordingly, the Respondent relied on the presumption and made its re-determination against the Appellant. The Appellant admitted he made no attempt to seek his former wife's consent to his receiving the CCTB but asserts that his having to ask for his wife's declaration is an affront to his dignity as a person guaranteed equal rights under the *Charter*.

[37] I note that one might assume that the CCRA sent the Appellant the questionnaire to help make an assessment, under section 6302 of the *Regulations*, of the Appellant's claim to have been the primary caregiver to his son during the relevant periods. However the Respondent has placed no reliance on the questionnaire. Indeed, the Respondent placed no reliance on any factual findings it may have made in respect of the Appellant's spouse being the primary caregiver of the couple's son. This is made abundantly clear in the Notice of Confirmation, which only referred to the presumption in favour of the female parent making no reference to *Regulation* 6302,[19] and in the Reply, which repeatedly refers to the initial determination being based on incorrect information (that the Appellant was not during the relevant periods married and living with his spouse) omitting any assumptions or assertions that the female parent was *in fact* the primary caregiver during the relevant periods. But for sending a questionnaire which was seemingly ignored, all I can see is that the re-determination, Confirmation and Reply are a lazy reliance on the presumption in favour of the female. The Reply does cite *Regulation* 6302 but offers no hint as to its relevance in the pre-hearing context. Certainly the Respondent's counsel was aware of its relevance and brought witnesses to support its application but that does not address the problem of the use of the impugned presumption before the hearing that made the Appellant the appellant. It seems clear, based on the Notice of Confirmation and the Reply, that the presumption in favour of the female parent alone has resulted in the denial of the CCTB and in the Appellant having to launch this appeal.

[38] It is in this context that I will now consider the Appellant's *Charter* challenge.

Charter Analysis

[19] Exhibit A-10. "It is hereby confirmed that the assessments have been made in accordance with the provisions of Section 122.6 and regulation 6301 of the Income Tax Act on the basis that: you are not the eligible individual to receive the Canada Child Tax Benefit for the period April, 1997 to April, 1999." No mention is made of *Regulation* 6302.

[39] In *Law v. Canada*,[20] three broad enquiries are to be considered in section 15 *Charter* cases. Summarily they are:

1. Has a distinction been drawn between the Appellant and others on the basis of a personal characteristic (or fail to take into account an existing disadvantaged position resulting in substantial differential treatment on the basis of a personal characteristic)?

2. If there is different or distinctive treatment, is the ground for that distinction enumerated, or analogous to a ground enumerated, in subsection 15(1) of the *Charter*?

3. If so, does the treatment discriminate by imposing a burden upon or withholding a benefit from the Appellant in a manner reflective of stereotypical applications of presumed personal characteristics or in a manner which has the effect of perpetrating or promoting the view that the Appellant is less capable or less worthy of recognition or value or not equally deserving of concern, respect and consideration?

[40] There can be no question that the Appellant is treated differently under the impugned provisions of the *ITA* and *Regulations*. Further, there can be no question that the basis for the distinction is a personal characteristic: he is the male parent of the qualified dependant as opposed to the female parent and is treated differently for that reason alone. The Notice of Confirmation and Reply relied entirely on the presumption under review. There is differential treatment by imposing the burden of an appeal process on the Appellant simply on the basis of gender. Further, the female parent is empowered to declare the male parent as the primary caregiver and to effectively make the initial determination of the male parent's entitlement to receive the CCTB.

[41] Having determined that the differential treatment suffered/experienced by the Appellant is based solely on his sex, which is one of the grounds enumerated in subsection 15(1) of the *Charter*, it is necessary to go on to the third enquiry.

[42] The third enquiry under the *Law* test asks whether the differential treatment was discriminatory. In the present case, the question may be stated as follows:

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[20] [1999] 1 S.C.R. 497 at 548-49.

> Did the differential treatment discriminate by imposing a burden upon or withholding a benefit from the Appellant in a manner that,
>
> (a) is reflective of stereotypical applications of presumed personal characteristics of male and female parents, or
>
> (b) has the effect of perpetrating the view that the Appellant as a male is less capable or less worthy of recognition or value as a parent, or promoting the view that he is not deserving of equal respect and consideration in the determination of his role as a parent?

[43] The analysis of such question must consider whether the purpose of the *Charter* is served by finding that the differential treatment in this case is a violation of the Appellant's rights or whether there is a contextual justification for the existence of the impugned provisions. "Equality analysis under the *Charter* must be purposive and contextual".[21] Differential treatment "may be found not to engage the purpose of the *Charter* guarantee" or it may "not have the effect of imposing a real disadvantage in the social and political context of the claim".[22]

[44] An example, in the context of the case at bar, of differential treatment not "engaging" the *Charter* is found in the case of *Weatherall v. Canada.*[23] La Forrest J. at page 877 remarked that "Given the historical, biological and sociological differences between men and women, equality does not demand" equal search practices of male and female prison inmates. He found that there was a reality to the historical trend of violence by men against women not matched by any comparable trend of women as violent aggressors against men. Cross-gender searches were more threatening to historically disadvantaged women so the different treatment did not offend the *Charter* and was in any event saved by section 1.

[45] This argument may seem appropriate for the present case. Undoubtedly there is an historical concordance, based on sociological patterns, between the presumption of the female's parenting role and the role actually played by females. However unlike matters involving sexual aggression as considered in *Weatherall,*

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[21] *Law* at page 509 para 6.

[22] Per McLachlin J. *Miron v. Trudel,* [1995] 2 S.C.R. 418 at para. 132 as cited in *Law* at para. 38.

[23] [1993] 2 S.C.R 872.

there is little or no biological basis for the impugned provision in the case at bar. For example the presumption favouring females in the parenting role is not based on biological traits attributable to birth mothers. This is evident in paragraph (*c*) of section 6301 of the *Regulations* which contemplates a situation where there are two female parents caring for a child. Even though one of the female parents may be the birth mother, *facts* not presumptions will determine the entitlement to the CCTB. This suggests that the concordance between the presumption of the female's parenting role and the role actually played by females may be based solely on historical sociological patterns or custom.[24] Such concordance is a factor in determining whether the impugned provisions are substantively discriminatory although it might also be the very evil the *Charter* is meant to combat. A purposive and contextual analysis will assist in the consideration of this question.

[46] The purpose of the *Charter* has been described in several cases in several different ways.[25] The protection of human dignity however seems to be the most common theme of purposive statements. Indeed in *Miron*, the overarching purpose of section 15 is stated as being "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance".[26] Finding, in conflict, with such purpose, that legislative provisions reflect and reinforce existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within Canadian society, resulting in further stigmatization of that person or the members of the group or otherwise in their unfair treatment, was highlighted in *Law* as the most prevalent reason that a given legislative provision may be found to infringe subsection 15(1).[27]

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[24] In *Symes v. The Queen*, [1993] 4 S.C.R. 695 at page 828, the report of the Commission on Equality in Employment, by Rosalie Abella (now of the Supreme Court of Canada), is quoted in the dissenting opinion of L'Heureux-Dubé J. concurred with by Justice McLachlin (as she then was): "By Canadian law both parents have a duty to care for their children, but by custom this responsibility has consistently fallen to the mother". I accept that "custom" not emotional or other influences on a person's "nature" is the basis for the concordance of the presumption of the female's parenting role and the role actually played by females in Canadian families.

[25] A review of purposive statements is set out in *Law* from pages 524 to 531.

[26] See *Law* at page 528 paragraph 48.

[27] See *Law* at page 535 paragraph 64.

[47] The Appellant asserts his human dignity is harmed by the lack of equal consideration he is exposed to as a male parent under the impugned provisions and that his capabilities as a parent in Canadian society are prejudged on the basis of presumed characteristics, not merit. As stated in *Law*:

> Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[28]

[48] Both subjectively and objectively, the assertion that the Appellant has been unfairly treated and as a result has been marginalized and devalued, is self-evident. In respect of the appeal process, he has had to appeal a determination of his eligible status which was made without regard to personal merit. Legislatively his role as a parent has been stereotypically marginalized.

[49] I note here that I agree with the Appellant that his human dignity has been harmed in spite of arguments to the contrary made by Respondent's counsel. The Respondent argues that because the primary caregiver presumption is rebuttable, it does not constitute a complete exclusion of fathers from the benefit at issue. It does not have the hallmarks of arbitrariness and complete exclusion that was found to offend the *Charter* in *Trociuk v. B.C. (A.G.)*.[29] The Respondent then says that the government can therefore suggest that unlike the situation in *Trociuk*, the measure in question does not send the message that a father's relationship with his children is less worthy of respect than that between a mother and her children. Indeed, the Respondent says this should be the central message of its argument.

[50] I am not persuaded by this message. In my view, a reasonable person in the Appellant's circumstances would perceive that his dignity has been infringed by the presumption even though it is rebuttable. The Court in *Trociuk* was faced with impugned legislative provisions that afforded fathers no recourse to a mother's right to refuse to acknowledge a father for the purposes of naming a baby and the absence

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[28] See *Law* at page 530 paragraph 53.

[29] [2003] 1 S.C.R. 835.

of recourse was a factor considered. However, I cannot find or accept that the decision in *Trociuk* is authority to say that recourse, such as afforded by a rebuttable presumption, is always a sufficient answer to a discrimination claim.[30] Of more importance is that the Court in *Trociuk* recognized that both parents have a deep personal interest in fostering the growth of their children and acknowledged the centrality of parent/child relationships to an individual's identity.[31] To perceive the mother as having a greater role in fostering the growth of children reflects stereotypical thinking both as to male and female parental roles. As noted earlier in these Reasons, a presumption based on a stereotype that violates a right under the *Charter* cannot be saved on the basis that it is rebuttable. Being called upon to seek a direction from the female parent or to rebut the presumption in favour of the female parent reflects an attitude that fathers are less worthy of consideration in respect of their parenting role than females. *This* is demeaning to male parents and in a backhanded way supports the stereotypical view that women by their nature are better suited to be at home with the children. In a society that promotes paternity leave to enable mothers to go back to work, the impugned provisions are not only non-progressive, but are sufficiently out of sync as to support the finding that a reasonable person would find them demeaning regardless of the rebuttal recourse afforded a complainant. A purposive analysis does not save the impugned provisions in my view.

[51] This takes me to a contextual or circumstantial justification analysis upon which the Respondent also places reliance in defending the impugned provisions. *Law* identifies four contextual factors that assist in determining whether a legislative provision violates subsection 15(1) in a substantive sense. The four factors are: a) whether the group at issue experienced a pre-existing disadvantage; b) the relationship between the grounds and the claimant's characteristics; c) the ameliorative purpose or effects of the impugned law upon a more disadvantaged group; and d) the nature and scope of the interest affected by the impugned law.[32]

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[30] The Court in *Trociuk* in finding that the impugned provision in that case violated the *Charter*, considered amending legislation that allowed recourse to unacknowledged fathers. A mother or father could seek a paternity order and require acknowledgement of a child's father in respect of procedures for naming of that child. While arguably the practical effect of such amended provision might be to require fathers to go through a significant extra procedural step to overcome a mother's refusal to acknowledge a father, that was not considered as the amended legislation was not under review in *Trociuk* .

[31] At paragraphs 15 and 21.

[32] See *Law* at para 88.

[52] In a broad sense these factors are aimed at determining whether the impugned provisions "... have the effect of imposing a real disadvantage in the social and political context of the claim".[33]

[53] The first factor is a non-factor in this case. That persons seeking protection of their rights under the *Charter* are not a disadvantaged group is not a relevant factor. That a provision may be saved by affording protection to a disadvantaged group does not deny advantaged persons protection under the *Charter*. This was clearly enunciated in *Trociuk.*[34]

[54] The second factor is the concordance between the grounds and the claimant's characteristics. From the Appellant's perspective, the impugned presumption does not concord with the growing realities of our society which recognize and embrace stay-at-home dads. There can be no doubt that times are changing and that more men are taking on the responsibility of being the caregivers for children. The statistics still show, however, that overwhelmingly, women are in fact the caregivers.[35] Arguably

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[33] See footnote 16.

[34] At para. 20.

[35] The Appellant submitted an article entitled "Stay-at-home dads" by Katherine Marshall found at Statistics Canada – Catalogue no. 75-0001-XPE, Spring 1998 Perspectives page 9. Drawn from a Labour force survey, in single earner husband-wife families only 1% of families had stay at-home fathers in 1976 compared to 6% in 1997. The 1997 statistics showed that stay-at-home dads were less likely to have pre-school aged children at home (40%) than stay-at-home moms (59%). Regional and occupational data offered more refinements. Other reports provided by the Appellant also tended to show increasing trends in fathers taking more responsibility for child-care. For example, an article in *The Daily*, March 21, 2003, published on-line by Statistics Canada noted that in 2000 only 3% of fathers claimed paid parental benefits. By 2001, this proportion had more than tripled to 10%. Respondent's exhibits included a number of Statistics Canada Reports as well. None were as narrow in their focus on stay-at-home dads as were the Appellant's exhibits but support for the reality of women being the primary support givers is clearly there. For example in the August 2001 Target Groups Project Report Women in Canada: Work Chapter Updates Catalogue no. 89 F0133XIE it was reported that in the year 2000, 15% of women part-time workers said they did not work full time because they were caring for children in contrast to only 2% of male part-time workers reporting a similar reason. The contract was seven times greater favouring females for part-time workers over 45. However, the variables here are too many to draw reliable inferences: age, marital status, income status to name a few. Accordingly, while I accept the general picture described in the Appellant's exhibits, I have no reliable evidence upon which to evaluate the concordance of the impugned presumption with the realities of low-income families and more importantly the impact of striking such presumption on either mothers or their children. While discriminatory impact can be assessed by the judiciary without exacting statistics or expert

then the presumption accords with societal realities. Would this, in the perception of a reasonable person in the claimant's circumstances, save an otherwise discriminatory provision? Given that it promotes a stereotype of women that is out of sync with growing societal trends, there is clearly reason to suggest that the answer should be "no". However, that is before considering any ameliorative aspects of the impugned provision, which taken together with concordance may suggest that the interests of the subject social program for children (the CCTB) warrant greater protection.

[55] The Respondent, viewing the concordance factor from the female's perspective, argues that the impugned provisions accommodate the needs, capacities and circumstances of women who are by and large the primary caregivers in society. As noted, statistics tendered at trial support this assertion as to "circumstances". As to the "needs" and "capacities" of women, no evidence was tendered in respect of these elusive concepts.[36] Needs and capacities have clear relevance in the context of the handicapped or other groups having physical, emotional or mental needs or incapacities but in the context of gender, surely a line must be drawn between concordance as a justification for gender distinctions and stereotypical role-casting. The manner in which statistical realities are brought to bare in this case is respectful of neither a man's value as a human being performing a most basic role in our society nor of a women's capacity outside the home. There is little diminishment of these slights in the recognition of the concordance of females and persons acting as primary caregivers of children in Canadian homes. In any event, to the extent that needs and capacities are relevant in a contextual or circumstantial analysis, they are better considered under the analysis of the third factor dealing with ameliorative purpose.

[56] The third factor is where there is an ameliorative purpose or effect in respect of a more disadvantaged person or group. An ameliorative purpose or effect will have impact in determining whether the impugned provisions are discriminatory in the social and political context of the *Charter*. That is, an ameliorative purpose is less likely to violate the dignity of a more advantaged person or group. The focus here is to protect the vulnerable and in particular the historically vulnerable. Such focus directs the Court to take into account whether the impugned provisions have a

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evidence, in this case more evidence material to redressing the discrimination complained and to the remedy that might be afforded the Appellant would have been helpful.

[36] As noted, I have accepted that the concordance between the impugned presumption and females as caregivers is attributable to custom not capacity.

broadly ameliorative purpose that is consistent with the equality values enshrined in subsection 15(1) of the *Charter*.[37] That the ameliorative purpose must be consistent with enshrined equality values suggests that there is a difference between legislation that takes into account the actual needs and circumstances of one group in a manner that respects their value so as to diminish the discriminatory effect on another group and legislation that simply reflects and encourages stereotypical thinking. Such difference must be kept in mind in this part of the analysis.

[57] While the purpose of the CCTB is to benefit the child, it does favour the mother, so it seems necessary that an ameliorative purpose of the impugned provisions be considered from both the perspective of the mother and the child as done in *Trociuk*. I will deal firstly with considering mothers or females as the historically disadvantaged group who are assisted by the impugned provisions.

[58] While little evidence has been tendered at the hearing to support or challenge a finding in respect of an ameliorative purpose or effect in respect of this group, I accept the likelihood of both such purpose and effect. Doubtless, women have suffered historical hardships in the workplace and societal pressure to stay at home and as a result have less financial means to support their children. Doubtless, women have suffered historical hardships as dependants of their male partners. A government support payment such as the CCTB being directed to the female parent in low-income families can be seen as ameliorating these historical hardships. Presumably there is some reality to the notion that where the parents and child live under one roof as a family (which is the limited case to which impugned provisions apply), paying the female will ameliorate her dependence in a great number of cases and perhaps, in some regrettable circumstances, may actually be the only way to ensure that the payments will be applied to the benefit of the child. If the impugned provisions are attempting to recognize and ameliorate, in a non-pejorative or non-stigmatizing way, such reality in Canadian families, arguably at least, they should not reasonably be seen as attacking the dignity of men or women. That is, it may not be reasonable to find that the impugned provisions are substantively discriminatory.

[59] However, to find justification for the impugned provisions in such realities which reflect pre-existing stereotypes of parenting roles in low-income families does not sit easily. Moreover, if the disadvantage sought to be relieved is the economic dependency of female parents in low-income families, the rebuttable presumption might be that the primary caregiver is the parent with the least earned income. Indeed

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[37] *Canada (A.G.) v. Lesiuk*, [2003] F.C.J. No. 1 (F.C.A.) at para. 49; *Gosselin, supra*, at para. 62.

this is suggested by comments in one of the Respondent's exhibits, a publication of Status of Women Canada, The Dynamics of Women's Poverty in Canada, March 2000, Clarence Lochhead and Katherine Scott. In the concluding chapter under the heading "Strategies" it is recognized that women are penalized by means of test programs that assume that resources are shared within the family. Giving the CCTB directly to women where they are the low-income earner resolves this problem. While a presumption favouring the low-income earner would be defeated on the facts in the Appellant's case, it would seem to work well in respect of more genuine stay-at-home dads who comprise the group assertedly discriminated against by the impugned provisions.[38]

[60] At this point I note that an analysis of the ameliorative aspects of the impugned provisions in respect of disadvantaged women might be considered under subsection 15(2) of the *Charter*. A broad ameliorative purpose in a subsection 15(1) analysis can defuse an apparently discriminatory provision so as to permit a finding that there is no substantive or real discrimination in a political and social context. Subsection 15(2), on the other hand, appears to save a substantively discriminatory provision if its express object is to ameliorate conditions of a disadvantaged group.[39] The case at bar might serve as a good example of the distinction. That I might find that there is substantive discrimination in this case in spite of its broad ameliorative purposes,

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[38] It is ironic that even though stay-at-home dads as a group could contribute to remedying the historical disadvantages suffered by females, it is argued that they can be discriminated against so as to ameliorate disadvantages suffered by females with less liberated partners. This irony is complimented by another which is the argument that suggests that a female's pre-existing disadvantaged position in our society should be used as a justification for the perpetration of parenting stereotypes of women.

[39] There is little if any authority for this statement. Typically discriminatory provisions saved by "justification" are saved under section 1 of the *Charter* which provides that rights set out in the *Charter* "are subject only to such reasonable limits prescribed by law as can be justified in a free and democratic society". For example in *R. v. Nguyen,* [1990] 2 S.C.R. 906 where subsection 15(2) was argued, the Court relied on section 1. The dissenting opinion of McLachlin J. expresses the view that subsection 15(2) is there to silence the debate over affirmative action. The presumption in favour of females to expedite funding for childcare cannot be seen as grounded in an affirmative action. In any event, no evidence was introduced or argument made with respect to either section 1 or subsection 15(2) of the *Charter* in respect of which the burden of proof lies with the Crown. The Reply cites reliance on section 1 of the *Charter*, but that is not sufficient. I could invite or require the Respondent to better defend the integrity of the CCTB program as written and make submissions on impact and on the application of subsection 15(2) and section 1 of the *Charter*. However to do so is neither necessary nor appropriate. Crafting a suitable remedy for a violation of the Appellant's *Charter* rights in the case at bar seems possible without finding a justification for the impugned provisions under these provisions.

does not mean that subsection 15(2) cannot save the impugned provisions if a specific ameliorative purpose such as an affirmative action purpose is clearly articulated by the legislation. While it is easy to speculate on ameliorative purposes from different perspectives, no clear, specific ameliorative purpose stands out in respect of the impugned legislation; nor has the Respondent suggested that an express purpose exists so as to engage subsection 15(2). This leads me to consider the ameliorative aspects of the impugned provisions from the perspective of the child since the most readily discernible general objective of the CCTB is to benefit the child.

[61] The Respondent acknowledges that in fact the CCTB exists for the benefit of the child – not for the parents. In *Cabot* Rip T.C.J. provided the following useful statement of the objectives underlying the CCTB at page 2900:

> The child tax benefit was introduced in 1993 to replace the family allowances, the tax credit for dependants under 18 years of age and the refundable child tax credit with a single non-taxable monthly payment made to the custodial parent of the child. *The child tax benefit is to benefit the child.* The child tax benefit provides the parent who primarily fulfils the responsibility for the care and upbringing of the child with funds to bring up the children. [emphasis added]

[62] If the focus of the CCTB provisions is to benefit the child by giving the tax refund credit to the parent who is actually spending the money for the benefit of the child, the presumption in favour of the female might simply serve to expedite the issuance of funds to the parent who statistically plays that role in the large majority of Canadian families. Litigating over which parent gets the CCTB might mean that neither parent would get it without substantial delay – to the detriment of the child. Any presumption that expedites the issuance of a cheque might be said to be justified and not demeaning. That is, expediting CCTB payments for the benefit of the child is a worthy objective and, if the purpose of the impugned provisions is to ameliorate the plight of disadvantaged children in lower income families, then a presumption made to expedite the payments and enhance the efficiency of the provision of childcare benefits should not be reasonably seen as pejorative or stigmatizing or demeaning to the human dignity of male parents.

[63] However, once again, while an ameliorative purpose might reasonably be expected to diminish the discriminatory aspect of impugned legislation, such diminishment should not be the basis or justification for legislation that advances stereotypical thinking particularly where non-discriminatory options might be available. Revised CCTB provisions might leave the decision as to who is entitled to payments to the agreement of the parties or to a family court or where there is no

timely agreement or court order, payments to parents living together might be made, as noted above, to the parent with the lower earned income on the basis of a rebuttable presumption that that parent is engaging in more "caring labour".

[64] While such revisions to the CCTB regime would be Parliament's role, not that of the judiciary, recognition of non-discriminatory alternatives is a factor in considering justification for a discriminatory provision.

[65] The fourth factor to be considered is the nature and scope of the interest affected. In general, the more severe and localized the consequences of the legislation for the affected group, the more likely that the allegations of discrimination are well-founded.[40]

[66] Admittedly the scope of the discriminatory aspects of the impugned provisions is limited. Families eligible for the CCTB living under one roof who would fight over the eligibility as between mother and father might, practically speaking, be a very limited group. That is, while there is an element of this case that suggests that the actual substantive discrimination imposed by the impugned provisions is so *de minimis* in both scope and nature as not to warrant judicial interference, I have a contrary view. The statistics tendered at trial show that there are a material number of stay-at-home dads in Canadian society and that the trend for men to stay at home and care for the children is growing. In this context the Appellant properly points out that even the most reasonable stay-at-home dad with a most reasonable female partner would be justified in finding it offensive that the presumption operates against him unless the female directs the CCTB payment to him. There is no equal footing in the operation of the presumption.

CONCLUSIONS

[67] Having considered the factors in *Law*, I must now determine as stated earlier in these reasons under the heading "Jurisdiction Under Section 24 of the Charter", whether the impugned provisions of the *ITA* and *Regulations* are invalid pursuant to subsection 52(1) of the *Constitution Act.* This requires a determination as to whether such provisions in and by themselves violate the Appellant's rights under the *Charter.*

[40] *Law v. Canada, supra* at para. 74.

[68] I am unconvinced that the impugned provision of the *ITA*, namely paragraph (*f*) of the definition of "eligible individual" in section 122.6, is, in and by itself, unconstitutional. Simply put, I am unconvinced that there may never be circumstances where it will be in the best interests of a child to invoke the presumption in favour of the female contained in that paragraph. I have genuine concerns that to ignore statistical realities and the possible need in low-income families to recognize the female parent as being the parent who should be the recipient of the CCTB, may in some cases adversely affect children. That is, while I am uncomfortable with accepting that each of concordance and ameliorative impact are alone compelling reasons to tolerate the discriminatory impact of the impugned provisions, when taken together I am compelled to say that a balance in favour of the best interests of children must be given effect to. A small risk that children will be adversely affected is justification enough not to strike the impugned provisions. Under the doctrine of proportionality the interests of children prevail. Accordingly, while I am not swayed from my finding that there has been substantive discrimination *in the employment of the impugned provisions* in the case at bar, I do not find them in and of themselves unconstitutional or invalid under subsection 52(1) of the *Constitution Act*. It is the action taken under them that has in this case infringed on the Appellant's *Charter* rights, namely, the employment of the presumption without having considered whether the employment was in the best interests of the child.

[69] Put another way, being unconvinced that safeguarding the needs of children might, in some cases, leave the Minister and the CRA no choice but to invoke the presumption in favour of a female parent, I am unable to accept that striking the impugned provision of the *ITA* effects a proper balance of competing interests. That being the case, I cannot punish the Minister for not meeting a burden of proof as to a justification for this impugned provision of the *ITA* by invoking judicial authority to strike it. It is enough that I am satisfied that he and the officials of the CRA may in some circumstances reasonably see that the best interests of a child are best served by application of the presumption in favour of the female. The problem in the case at bar is that the best interests of the child was not a factor in relying on the presumption. Indeed, not only do I have no evidence that the best interests of the child were ever considered in this case but the record is clear that the interests of the child were not a factor in such reliance. It is this unjustified, blind reliance on the presumption that has violated the section 15 *Charter* rights of the Appellant. Such violation does not engage subsection 52(1) of the *Constitution Act* but under the principles set out in *Schachter*, engages the *Charter* remedies set out in section 24 – remedies consistent with this Court's mandate but beyond the narrow limits of section 171 of the *ITA*.

[70] I would note as well, although it does not seem necessary to do so, that I believe it may be appropriate in cases such as these to go directly to *Charter* remedies under section 24 without striking an impugned provision even if such provision in and by itself violates rights guaranteed under section 15 of the *Charter*. This, perhaps, is a bold statement in light of high court findings that provisions that violate *Charter* rights are invalid from the moment that they are enacted. However, this is a statement of law "in principle" as formulated by Gonthier J. in *Nova Scotia (Workers' Compensation Board).* Some circumstances might demand that acknowledgement of an invalidity must be dealt with differently. A declaration of invalidity might be suspended to avoid chaos or excessive judicial intervention or to afford Parliament an opportunity to revisit an impugned provision. "Suspension" is itself an exception to finding that an invalid law is invalid from the moment it is passed. Similarly, constitutional exceptions have been created which would find an impugned provision invalid but only in their application to certain groups so as not to declare such provision unconstitutional or invalid for all purposes.[41] In the case at bar I might have tried to justify a decision not to strike the impugned paragraph of the *ITA* using the theory of the constitutional exception doctrine while addressing the discrimination under section 24 of the *Charter*. I might have said I will read down the impugned provision or read in a requirement to ensure that it would apply only in limited circumstances – justifiable circumstances such as are in the best interests of the child. Failure to apply the impugned provision in the appropriate circumstances could then be addressed under section 24 of the *Charter*. However, regardless how I frame my finding, it is sufficient to say that the impugned provision of the *ITA* is not invalid if applied reasonably in the best interests of a child.

[71] The Appellant's rights then under section 15 of the *Charter* have been violated in the case at bar in that the presumption in favour of the female parent was not **invoked,** overtly or otherwise, on the basis that it was reasonable to invoke it in the best interests of the child. The remedy for such violation lies in section 24 of the *Charter*.

[72] I note that the foregoing remarks are limited to paragraph (*f*) of the definition of "eligible individual" in section 122.6 of the *ITA* which is the paragraph that provides for the presumption in favour of the female parent. While the need for section 6301 of the *Regulations*, which under the authority of paragraph (*g*) of the

[41] A discussion of constitutional exceptions is contained in "The Charter of Rights in Litigation", Jamal and Taylor, Canada Law Book at para. 47:15 (5).

definition of "eligible individual" prescribes circumstances when the presumption is not to apply, seems doubtful if the only non-offensive use of the presumption is when there are reasonable grounds to believe its use is in the best interests of the child, I will not strike either paragraph (*g*) or section 6301 of the *Regulations*. I have had no submissions on the point in terms of the possible legislative gaps and associated problems that would be created by striking them. While I see no gaps or such problems, striking these impugned provisions or even suspending a declaration of their invalidity pending further submissions or Parliamentary review does not seem necessary at this time. The Appellant's complaint can be addressed more simply by fashioning a remedy under section 24 of the *Charter* for the violation to his rights as described above.

[73] Remedies under section 24 of the *Charter* can be fashioned to meet the circumstances of the complaint. That is, Parliament has invited the Courts to impose appropriate and just remedies as the circumstances require. Justice McIntyre in *Mills* stated at pp. 965-6:

> It is difficult to imagine language which could give the court a wider and less fettered discretion — the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.

[74] At paragraph 47:02 of Jamal and Taylor "The Charter of Rights in Litigation", the authors comment that there are remedies yet to be considered such as compensatory damages for a rights violation and remedies seldom considered such as mandatory orders against government. While the Appellant's human dignity, offended by the impugned provisions as applied in the case at bar, cannot be bought with compensatory damages, some financial redress for such damage in recognition of the violation seems both appropriate and just. As well, the process to which the Appellant was subjected as a result of the discriminatory action against him caused him real damage in terms of time, energy and monies spent. The Appellant has been required to object to and appeal an assessment based solely on his gender. He has as well, but for a remedy dictating otherwise, been saddled with the burden of proof to rebut the presumption contained in the impugned provisions.

[75] Accordingly, in broad terms, the remedial action I would embrace at this time on the facts and submissions before me is as follows: On an appeal of a determination or re-determination of "eligible individual" which has been made solely in reliance on the presumption in favour of the female parent without reasonable grounds to believe its use is in the best interests of the child, the qualified dependant, the Court shall determine on a balance of probability which parent has

primarily fulfilled the responsibility for the care and upbringing of the qualified dependant and it is open to the Court in such case to award compensatory damages to the male parent as appropriate in the circumstances. Where the presumption in favour of the female parent has been employed based on facts or assumed facts reasonably asserted that the female is the parent who has primarily fulfilled the responsibility for the care and upbringing of the qualified dependant or where it has been employed on the basis of there being reasonable grounds to believe its use is in the best interests of the qualified dependant, then the presumption remains rebuttable.

[76] I stress that I have not embraced a remedy that would impose a burden of proof on either the male or female except in the circumstances where the presumption remains rebuttable as described above. In other cases, like the one at bar, the proceedings before this Court must be along the lines of a request for a factual determination as provided in section 174 of the *ITA*. That section allows for this Court to determine a question of fact on a binding basis in respect of all taxpayers concerned. The proceedings should be uncluttered by burden of proof issues. Putting the burden of proof on the Respondent may have the affect of putting it effectively on the female parent. Indeed, the Respondent argued that without the presumption, women, who in the majority of cases are the primary caregivers to children in two-parent families, would face a disproportionate burden in having to prove, in situations where there may or may not be significant evidence of this fact, that they carry out this role within the family in order to receive the CCTB. I agree that any remedy addressing the impugned provisions cannot transfer the procedural discrimination complained of in this case from males to females. This is not my intent. I note here as well that while I intend the direction in this paragraph to be mandatory in respect of an appeal before this Court, there is nothing to prevent the CCRA from seeking on its own initiative, an Order under section 174 of the *ITA* *prior* to an appeal being launched. Of course, the problem disappears if the determination or re-determination of an "eligible individual" is made on the basis of facts discovered on inquiry or reasonably assumed after consideration of relevant factors such as those set out in section 6302 of the *Regulation*s.

[77] I acknowledge that reliance on section 6302 of the *Regulations* or on the Court for a determination of an "eligible individual" might slow down the CCTB payments in some cases. While this is a problem it is not likely one that will arise frequently. It seems better to put emphasis on the infrequency in terms of the CRA having to do some expedient work than putting emphasis on it to justify the discriminatory application of the subject provisions.

[78] Further, to avert assertions of discrimination in the course of making an eligible status determination, it seems essential that the CRA adopt practices that are more gender-neutral than (but within the scope of) those contemplated by the existing provisions. For example, the use of a CCTB application directing the recipient of the CCTB signed by both parents would be within the scope of the existing *Regulations* and would obviate concerns that it is demeaning to seek the females' direction. While I choose not to impose such administrative practice on the CRA under the authority of section 24 of the *Charter*, I note that if the CRA cannot embrace gender-neutral practices such as this, it seems inevitable that further complaints will be forthcoming. Short of legislative reform or an appellant Court's direction, I dare say this Court may yet strike the impugned provisions if they cannot be saved under subsection 15(2) or section 1 of the *Charter* on more convincing submissions. Otherwise, the remedy granted in this case will presumably stand for future cases. As to legislative reform, I am hopeful that Parliament will revisit the impugned provisions to obviate the need for any further judicial consideration of them. If the judiciary is to defer to Parliament, as I am doing, Parliament should give every sign to the judiciary that it will put its mind to reacting to the concerns of the judiciary.

[79] At this point I note that it is not necessary to consider the Appellant's *Charter* challenge under section 28 which reads as follows:

> 28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[80] I do note however that I agree with the submissions of counsel for the Respondent on section 28. It is not intended to create a separate equality rights regime with respect to discrimination on the basis of sex. Rather, it is intended to ensure that all *Charter* provisions are applied without discrimination between the sexes in accordance with section 15 of the *Charter*.[42]

[81] To conclude, I have determined that the Appellant was not an eligible individual for the purposes of the CCTB provisions under the *ITA* during the relevant periods but that contrary to his rights guaranteed under the *Charter*, the Appellant has on the basis of his gender alone been put to time and expense and

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[42] *Re Blainey and Ontario Hockey Association* (1985), 21 D.L.R. (4th) 599 (O.H.C.J.) at 610-11, rev'd. (not specifically re: s. 28) (1986), 26 D.L.R. (4th) 728 (C.A.), lv. to app'l refused, [1996] 1 S.C.R. xii. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

the indignity of an appeal by the employment of the presumption in favour of the female parent contained in the CCTB provisions of the *ITA* without consideration of the best interests of the qualified dependant. Accordingly, the Appellant is not entitled to the CCTB for the relevant periods but is awarded the amount of $1,000.00 as compensatory damages, including costs, in respect of the violation of his *Charter* rights, such amount to be paid by the Respondent forthwith. In awarding such amount I have taken into consideration all the factual circumstances of the case as generally set out in these Reasons.

Signed at Ottawa, Canada, this 4th day of November 2004.

"J.E. Hershfield"

Hershfield J.

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