Docket: 2007-3097(IT)I

BETWEEN:

GEORGE P. CALOGERACOS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 19, 2008, at Ottawa, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Charles Camirand

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* with respect to the Appellant's 2006 taxation year is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 3rd day of July 2008.

"Wyman W. Webb"

Webb, J.

Citation:2008TCC389
Date: July 3, 2008
Docket: 2007-3097(IT)I

BETWEEN:

GEORGE P. CALOGERACOS,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant is appealing the assessment that denied his claim for a tax credit with respect to one of his children under paragraph 118(1)(*b*) of the *Income Tax Act* (the "*Act*") on the basis that subsection 118(5) of the *Act* is contrary to the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[2] There is no dispute with respect to the facts in this case. The Appellant and his former spouse are divorced. They have two children, and they have joint and shared custody of the two children. Since the Appellant's income exceeded his former spouse's income he was required to pay child support to his former spouse, as well as spousal support pursuant to an order issued by the Ontario Superior Court of Justice, Family Court. In filing his income tax return for 2006 he claimed a tax credit, pursuant to paragraph 118(1)(*b*) of the *Act* for one of the children. This claim was denied by the Respondent as a result of the provisions of subsection 118(5) of the *Act*. Subsection 118(5) of the *Act* provides as follows:

> 118(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4))

> to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual
>
> (a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or
>
> (b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

[3] It is clear that the conditions of this subsection are satisfied in this case, and the Appellant does not dispute that the conditions of this subsection are satisfied. However, the Appellant challenges this provision on the basis that it is contrary to the *Charter*.

[4] The Appellant based his submission on three different arguments. The Appellant argued that the provision should be struck because it is vague, because it contravenes section 7 of the *Charter*, or because it contravenes subsection 15(1) of the *Charter*.

[5] In my opinion, the provisions of subsection 118(5) of the *Act* are clear and are not vague and therefore, the Appellant cannot succeed on this basis.

[6] With respect to the Appellant's argument related to section 7 of the *Charter*, section 7 of the *Charter* provides as follows:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[7] Justice Rothstein, as he then was, made the following comments on section 7 of the *Charter* in relation to reassessments under the *Act* in the case of *Mathew* v. *R.* (2003 FCA 371):

> 29 I will accept that the power of reassessment of a taxpayer implicates the administration of justice. However, I do not accept that reassessments of taxpayers result in a deprivation of liberty or security of the person.
>
> 30 If there is a right at issue in the case of reassessments in income tax, it is an economic right. In *Gosselin*, McLachlin C.J.C., for the majority, observed that in *Irwin Toy Ltd. c Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at 1003, Dickson C.J.C., for the majority, left open the question of whether section 7 could

> operate to protect "economic rights fundamental to human ... survival". However, there is no suggestion in *Gosselin* that section 7 is broad enough to encompass economic rights generally or, in particular, in respect of reassessments of income tax. I am, therefore, of the view that the appellants have not demonstrated a deprivation of any right protected by section 7 of the Charter.

[8] The *Mathew* case was affirmed by the Supreme Court of Canada (2005 SCC 55) but the Supreme Court of Canada did not comment on the application of section 7 of the *Charter* to reassessments under the *Act.*

[9] As a result of the comments of Justice Rothstein, the Appellant cannot succeed on the basis that section 7 of the *Charter* applies to subsection 118(5) of the *Act*. The evidence was that the tax refund that the Appellant was expecting as a result of claiming the tax credit under paragraph 118(1)(*b*) of the *Act* was going to be used to fund a family vacation, not that the refund was necessary for human survival.

[10] The Appellant also argued that subsection 118(5) of the *Act* discriminates against males who are obligated to pay child support when they have shared custody of the children and therefore contravened subsection 15(1) of the *Charter*. This subsection of the *Charter* provides as follows:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit 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.

[11] In *Law v. Minister of Human Resources Development*, [1999] 1 S.C.R. 497 Justice Iacobucci of the Supreme Court of Canada made the following comments in relation to the approach to be followed in dealing with a claim of discrimination under subsection 15(1) of the *Charter:*

> 39 In my view, the proper approach to analyzing a claim of discrimination under s. 15(1) of the Charter involves a synthesis of these various articulations. Following upon the analysis in Andrews, supra, and the two-step framework set out in Egan, supra, and Miron, supra, among other cases, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?

> And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

[12] Justice Iacobucci also made the following comments in relation to the relevant comparator:

> 56 As discussed above, McIntyre J. emphasized in Andrews, supra, that the equality guarantee is a comparative concept. Ultimately, a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction. Identifying the appropriate comparator will be relevant when considering many of the contextual factors in the discrimination analysis.
>
> 57 To locate the appropriate comparator, we must consider a variety of factors, including the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive sense more generally: see Weatherall, supra, at pp. 877-78.
>
> 58 When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see Symes, supra, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.

[13] In *Granovsky v. Minister of Employment and Immigration* [2000] 1 S.C.R. 703, Justice Binnie made the following comments:

> 43 The first step is to determine whether the CPP disability provision draws a distinction, based on one or more personal characteristics, between the appellant and some other person or group to whom he may properly be compared, resulting in unequal treatment.

[14] In a subsequent decision of the Supreme Court of Canada in *Minister of Human Resources Development v. Hodge* [2004] 3 S.C.R. 357, Justice Binnie on behalf of the Supreme Court stated as follows:

> 23 The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*. An example of the former is the requirement that spouses be of the opposite sex; *M. v. H., supra*. An example of the latter is the omission of sexual orientation from the Alberta *Individual's Rights Protection Act*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
>
> 24 The usual starting point is an analysis of the legislation (or state conduct) that denied the benefit or imposed the unwanted burden. While we are dealing in this appeal with access to a government benefit, and the starting point is thus the *purpose* of the legislative provisions, a similar exercise is required where a claim is based on the *effect* of an impugned law or state action. Thus, in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, the terms of the powers given to customs officers to intercept incoming publications were neutral, but the appellant, a Vancouver bookstore, claimed that their shipments of books and magazines were targeted by customs officials in a discriminatory way because the store catered to gay and lesbian clients. It was clear that customs officials had systematically delayed and denied entry to lawful materials. Thus, the comparator group, defined by reference to the *effect* of the impugned conduct of customs officials, was "other individuals importing comparable publications of a heterosexual nature" (para. 120).
>
> 25 In either case, the universe of people potentially entitled to equal treatment in relation to the subject matter of the claim must be identified. I use the phrase "potentially entitled" because the legislative definition, being the subject matter of the equality rights challenge, is not the last word. Otherwise, a survivor's pension restricted to white protestant males could be defended on the ground that all surviving white protestant males were being treated equally. The objective of s. 15(1) is not just "formal" equality but *substantive* equality (*Andrews, supra*, at p. 166).

[15] Therefore, the first step will be to determine whether the provisions of subsection 118(5) of the *Act* draw “a distinction, based on one or more personal characteristics, between the appellant and some other person or group to whom he may properly be compared, resulting in unequal treatment”. It appears that the Appellant has suggested that his group is comprised of male parents who are separated or divorced, who have a shared custody arrangement for children and who are required to make support payments. The comparative group that he appears to be suggesting is one comprised of female parents who are separated or divorced, who have a shared custody arrangement for children and who receive support payments.

However, as noted by the Supreme Court of Canada the appropriate comparator group must be one that mirrors the characteristics of the claimant relative to the benefit or burden except for the personal characteristic that is enumerated in the *Charter* or is analogous to those characteristics that are enumerated in the *Charter*. This comparative group has two changes from the Appellant's group - one related to the gender and the other related to whether the person is paying or receiving a support amount.

[16] In *Giorno v. The Queen* [2005] 2 C.T.C. 2146, 2005 D.T.C. 441 Justice Rip, as he then was, stated that:

> 21 In Keller, I concluded that an obligation to pay child support is not an immutable, or constructively immutable, personal characteristic. The appellant argues that Keller is no longer good law in the wake of Mr. B. I cannot agree with this position. While Mr. B did clarify that an individual need not be a member of a group, historically disadvantaged or otherwise, to succeed in a claim for discrimination, the law with respect to analogous grounds of discrimination did not change. The obligation to pay child support is not immutable in the sense that it cannot be changed. Further, an obligation to pay child support may be based on the income of the payer. Far from being an immutable personal characteristic, income is a function of activity, merit and circumstance. As alluded to in Keller, parental status may be immutable, but an obligation to pay child support is not.
>
> 22 Even if an obligation to pay child support can sometimes be said to be an analogous ground in some circumstances insofar as it may be an obligation imposed by a court or by operation of law, that is not the case here. Mr. Giorno's own evidence shows that the Separation Agreement was just that -- an agreement. The obligation to pay child support does not arise out of a personal characteristic, but from an agreement between the appellant and his former spouse.

[17] Justice Rip, as he then was, noted that "even if an obligation to pay can sometimes be said to be analogous ground in some circumstances insofar as it may be an obligation imposed by a court" which might suggest that a court imposed obligation to pay child support might be an analogous ground in some circumstances. In this case, the obligation imposed on the Appellant to pay child support was imposed by an order issued by the Ontario Superior Court of Justice, Family Court. In my opinion, in this case, even though the obligation to make the support payments is imposed by a court order this is still not an analogous ground. In the case of *Stanwick v. Her Majesty the Queen,* [1999] 1 C.T.C. 143 the Federal Court of Appeal stated that:

> … Level of income is not a personal characteristic enumerated in section 15, nor is it a characteristic analogous to those which are enumerated.

[18] The reason that the obligation was imposed upon the Appellant by the court order is because his income was higher than that of his former spouse. Level of income is not a personal characteristic enumerated in section 15 of the *Charter* nor is it analogous. The obligation to pay child support (which is based on the relative level of income of the parents) is therefore not an analogous ground. Therefore, this factor cannot be changed for the comparator group.

[19] The comparator group would then be described as female parents who are separated or divorced, who have a shared custody arrangement for children and who are required to make support payments. However with this group as the comparator group there is no discrimination under subsection 118(5) of the *Act* as this subsection does not distinguish between male persons who are required to make support payments and female persons who are required to make support payments. Both are treated the same under subsection 118(5) of the *Act*. Therefore this cannot be the basis of a claim under subsection 15(1) of the *Charter*.

[20] The Appellant submitted some statistical data to establish his basis for claiming that in general it is males who are required to make support payments in shared custody situations. The data introduced by the Appellant only provides the statistical information for five of the 10 provinces and does not include data for provinces that represent more than fifty percent of the population of Canada. The provinces that are not included in the data provided by the Appellant are Ontario, Québec, Manitoba, New Brunswick and Newfoundland and Labrador. The data that was submitted did show that in joint custody situations it is generally, by a significant margin, the male who is paying child support.

[21] However it is subsection 118(5) of the *Act* that is to be analyzed to determine whether this subsection of the *Act* draws a distinction between males and females. It does not. Both men and women who pay child support are, as a result of the provisions of subsection 118(5) of the *Act*, denied the claim for a credit under paragraph 118(1)(*b*) of the *Act*. As noted above, Justice Iacobucci in *Law* stated that:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

[22] In this case the provision in question neither makes a formal distinction between males and females nor does it fail to take into account the Appellant's already disadvantaged position within Canadian society. It draws a distinction based on whether the individual is paying child support, which is based on the income levels of the parents since the obligation to pay child support is based on the relative income of the parents. The fact that in most joint or shared custody arrangements it is the male who is making child support payments cannot be grounds for a claim for discrimination by the Appellant as males who make more money than females are not in a disadvantaged position in Canadian society.

[23] There have been other cases that have dealt with the issue of whether the provisions of subsection 118(5) of the *Act* are contrary to the provisions of section 15 of the *Charter.* In *Keller v. The Queen* [2002] 3 C.T.C. 2499, *Nixon v. The Queen* [1999] T.C.J. No. 885, and *Werring v. The Queen* [1997] 3 C.T.C. 2876, 97 DTC 3290, this court held that the provisions of subsection 118(5) of the *Act* did not infringe section 15 of the *Charter* at a time when the amounts payable for child support were deductible by the payer and included in the income of the recipient. In *Nelson v. Attorney General of Canada* [2000] 4 C.T.C. 252, 2000 DTC 6556, the Federal Court of Appeal reached the same conclusion.

[24] In *Giorno, supra,* and *Frégeau v. The Queen* 2004 TCC 293, Justice Rip (as he then was) and Justice Bédard, respectively, both held that the provisions of subsection 118(5) of the *Act* did not infringe section 15 of the *Charter* at a time when the amounts payable for child support were not deductible by the payer and not included in the income of the recipient (which is the present situation).

[25] There is an additional matter in this case, that does not favour the Appellant. The Appellant was ordered to pay child support payments based on the Federal Child Support Guidelines. In *Frégeau* Justice Bédard made the following comments:

> 30 The Appellant's Agents also state that the distinction resulting from the application of subsection 118(5) of the Act is discriminatory because Quebec's Regulation respecting the determination of child support payments, like the Federal Child Support Guidelines, does not take the credit for a wholly dependent person into account.
>
> 31 In my opinion, that claim is also incorrect because the Federal Child Support Tables seem to have been designed with a number of elements in mind, including the credit for a wholly dependent person, as indicated in the Federal Child Support Guidelines:

> 6. The formula referred to in note 5 sets support amounts to reflect average expenditures on children by a spouse with a particular number of children and level of income. The calculation is based on the support payer's income. The formula uses the basic personal amount for non-refundable tax credits to recognize personal expenses, and takes other federal and provincial income taxes and credits into account. Federal Child Tax benefits and Goods and Services Tax credits for children are excluded from the calculation. At lower income levels, the formula sets the amounts to take into account the combined impact of taxes and child support payments on the support payer's limited disposable income.

(emphasis added by Justice Bédard)

32 Thus, in setting out the child support amounts, the Federal Guidelines assume that the support payer will not be entitled to the credit for a wholly dependent person. Consequently, although the taxpayer paying child support does not benefit from the credit for a wholly dependent person because he or she pays support, the support paid by that taxpayer was established based on the fact that he or she is not entitled to receive the personal tax credit in question.

33 Without evidence refuting the legislator's claim that the formula used to establish the Federal Guideline Tables takes into account the denial of the tax credit in subsection 118(1) of the Act for the taxpayer who pays child support, I cannot reach such a conclusion. The part of the 1996 budget entitled "The New Child Support Package" indicates, at page 12, that:

> The Schedule amounts are fixed by a formula that calculates the appropriate amount of support in light of economic data on average expenditures on children across different income levels. The formula reserves a basic amount of income for the payer's self-support, and adjusts for the impact of federal and provincial income taxes. There are separate tables for each province to take differences in provincial income tax rates into account. The Schedules for each province and territory are included in the Annex.

The Honourable Paul Martin made the following comments concerning the legislator's decision to change the tax treatment:

> The equivalent-to-married credit is provided to a single parent of a child under the age of 18. Currently, the Income Tax Act provides that the recipient of child support, not the payer, is eligible to claim the credit.
>
> This treatment will continue to apply under the new rules. This approach is consistent with the new federal child support guidelines, under which award levels are set based on the assumption that it is the recipient spouse who claims the equivalent-to-married credit.

And:

> Subsection 118(5) of the Act provides that an individual who is entitled to a deduction under paragraph 60(b), (c) or (c.1) of the Act in respect of a support payment for the maintenance of a spouse or child is not also entitled to claim a credit under section 118 in respect of that spouse or child.
>
> Subsection 118(5) is amended as a consequence of the changes to the treatment of child support. As amended, subsection 118(5) provides that an individual is not entitled to claim a credit under subsection 118(1) in respect of a person if the individual is required to pay a support amount to his or her spouse or former spouse for that person and the individual either is living separate and apart from the spouse or former spouse throughout the year because of marriage breakdown or is claiming a deduction for support payments.
>
> Under this new wording, where an individual is required to make child or spousal support payments in years following the year of marriage breakdown, no credits under subsection 118(1) will be available to the individual in respect of the spouse or child, even in cases where such support payments are not made or, if made, are not deductible. In the year in which a marriage breakdown occurs, an individual may be able to claim credits under subsection 118(1) if he or she does not claim a deduction for support payments.
>
> These amendments apply to the 1997 and subsequent taxation years.

> I must conclude that the Federal Child Support Guidelines do take the credit for a wholly dependent person into account. Therefore, the Appellant has not met the burden of proving the opposite effect and thus that argument must be dismissed.

[26] In this case as well the Appellant introduced into evidence a copy of the letter that he received from James Flaherty, the Minister of Finance dated November 21, 2007. In this letter the Minister of Finance states as follows:

> Under the federal child support guidelines, payments are determined in the context of a tax system in which only the recipient of the payments may claim the EDC. If the payer of child support could claim all or part of the EDC, this might lead to changes to the child support guidelines, resulting in payers of child-support receiving little or no net benefit.

[27] The EDC referred to in this letter is the eligible dependent tax credit, which is the credit that is in issue in this case.

[28] Therefore it would seem that the amount that the Appellant was required to pay as child support under the Federal Child Support Guidelines was based on the fact that he would not be receiving a tax credit under paragraph 118(1)(*b*) of the *Act* and that his former spouse would be receiving such a credit. Therefore it is difficult

to determine how he is prejudiced as a result of the provisions of subsection 118(5) of the *Act* since, presumably, as the Federal Child Support Guidelines are based on his ability to pay (taking into account the fact that as a payer he will not be entitled to claim a tax credit for his children) his child support payment is less than it would be if he were entitled to claim this credit.

[29] There is one final matter. In the Order issued by the Ontario Court of Justice, Family Court, there is a provision that the mother will be entitled to claim one of the children as equivalent to married for tax purposes and that the Appellant will be entitled to claim the other. However an Order of the Ontario Court of Justice, Family Court cannot amend the requirements of the *Act* and in particular cannot override the provisions of subsection 118(5) of the *Act.*

[30] As a result, the appeal is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 3rd day of July 2008.

"Wyman W. Webb"

Webb, J.

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APPEARANCES:

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