Docket: 2013-528(IT)I

BETWEEN:

PETER D'AMBROSIO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 28, 2014, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Alisa Apostle

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the Appellant's 2009, 2010 and 2011 taxation years is dismissed

Signed at Ottawa, Canada, this 5th day of March 2014.

"V.A. Miller"

V.A. Miller J.

Citation: 2014TCC70
Date: 20140305
Docket: 2013-528(IT)I

BETWEEN:

PETER D'AMBROSIO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] This appeal relates to the Appellant's 2009, 2010 and 2011 taxation years in which he was denied tax credits in respect of his son on the basis that subsection 118(5) of the *Income Tax Act* (*"ITA"*) applied. It is the Appellant's position that both the Interim Order made by the Ontario Superior Court of Justice and the application of subsection 118(5) are infringements of his rights under section 15 of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*).

[2] Subsection 15(1) of the *Charter* reads:

> 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.

The Order

[3] The Appellant and his Former Spouse separated on March 1, 2008. On September 18, 2009, an Interim Order from the Ontario Superior Court of Justice (the "Order") awarded them joint custody of their son. According to this Order, their son's primary residence was with the Former Spouse and the Appellant was to have

"generous access" to his son. The Appellant was ordered to pay child support of $630 monthly and spousal support of $850 monthly.

[4] In the Order, Belleghem J wrote; "I cannot be sure of Mother's Income" and the Former Spouse was not required to pay child support but she was required to pay the costs for the upkeep of the household pending the sale of the home.

[5] It is the Appellant's position that Bellegham J made a distinction between him and his Former Spouse by presuming that he, the Appellant, earned more income than she did. This he argued infringed his section 15 *Charter* rights and he asks this Court to alter or to ignore the Order.

[6] As I explained to the Appellant at the hearing of this appeal, this Court does not have the jurisdiction to alter or interfere with an Order made by another court. This Court's jurisdiction is limited by section 12 of the *Tax Court of Canada Act* and by subsection 171(1) of the *ITA*. In an appeal against an assessment under the *ITA*, this Court's jurisdiction is limited to (a) dismissing the appeal or (b) allowing the appeal and (i) vacating the assessment, (ii) varying the assessment or (iii) referring the assessment back to the Minister for reconsideration and reassessment.

[7] I have not been given any evidence which would allow me to ignore the Order. The Appellant and his Former Spouse were each represented by counsel at the hearing before the Ontario Superior Court of Justice. They were able to each put forth their relevant information and arguments. It is clear from the Order that Belleghem J considered the income earning capacity of the Former Spouse when he ordered the Appellant to make support payments. It does not appear to me that he "presumed" that the Appellant earned more income than his Former Spouse. His Order was based on the evidence presented to him by the parties. He wrote:

> The extreme degree to which the Affidavits are in conflict render it difficult to assess the veracity of either Parties' version of the situation in which the Parties' only child, 3 year old _____, finds himself. This is also a short marriage. However, as Mother's counsel points out, if the situation was as bad as Father makes it out to be I would have expected him to have claimed custody when the parties separated March 1, 2008, 18 months ago, instead of waiting until Mother brought her action. Both parties are always at liberty to have CAS check out the health + safety concerns raised, even now. At the end of the day I am satisfied that maintaining the Status Quo, at least for the foreseeable future is the most appropriate outcome for today. Father is content to move out in any event so the first term of my interim order effective September 21, 2009 will be interim exclusive possession of the matrimonial home to Mother. Father's request to add the step daughters is denied. He can sue in Small Claims Court if he wishes. It is not proper to combine the type of debt claims he wishes to pursue in the context of a family law action. To give

> effect to the Status Quo there will be a Joint Custody order, primary residence of child with Mother. Generous access in accord with the existing work schedules of the parties, i.e. Status Quo remains.
> Father will pay child support of $630.00 per month per Guidelines on a $68,000.00/yr income. Rather than have Father pay both spousal support AND maintain his share of the Matrimonial Home he will pay $850.00 per month spousal support and Mother will bear household upkeep costs Pending sale. I cannot be sure of Mother's Income But she shouldn't need more support than this to keep up the house from her own earning capacity and the help of her daughters living with her.

[8] The Appellant has argued that the Order is in violation of the *Charter*. This argument should have been made before the court that made the Order. I note that the Appellant did not appeal the Order and in November 2009, he and his Former Spouse entered into Minutes of Settlement where they agreed to clarify the Order as it pertained to access to their son.

Tax Credits

[9] In his 2009, 2010 and 2011 taxation years, the Appellant claimed tax credits in the amount of $10,320, $10,382 and $10,527 respectively in respect of an eligible dependant under paragraph 118(1)(*b*) of the *ITA*. He also claimed tax credits of $2,089, $2,101 and $2,131 respectively in respect of child amounts under subparagraph 118(1)(*b*.1)(ii) of the *ITA*. As stated earlier, his claims for the tax credits were denied but his 2009 taxation year was reassessed to allow a deduction for spousal support payments of $619.

[10] His Former Spouse claimed and was allowed the tax credits for an eligible dependant and child amounts in 2009, 2010 and 2011.

[11] Subsection 118(5) of the *ITA* provides:

> 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.

[12] It is clear that subsection 118(5) applies in the circumstances of this case. The Appellant was required to pay child support amounts to his spouse in respect of his son; and, he and his spouse lived separate and apart during 2009, 2010 and 2011 because of a breakdown of their marriage. Consequently, subsection 118(5) instructs that the Appellant is not entitled to a deduction under subsection 118(1).

[13] It is the Appellant's position that this provision of the *ITA* violates his rights under section 15 of the *Charter* by allowing his Former Spouse to claim the tax credits under subsection 118(1) while denying him the right to make the same claim. He stated that this is "effective discrimination". The tax credits are intended to assist in offsetting the costs of parental care and he provides the same or more parental care to his son as his Former Spouse.

[14] In *R v Kapp*, 2008 SCC 41, the Supreme Court of Canada gave a two-part test for analysing whether there has been discrimination under subsection 15(1) of the *Charter*: The questions to be answered are: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? If the first question is answered in the negative, there is no need to proceed to the second step of the analysis: *Withler v Canada (Attorney General)*, 2011 SCC 12 at paragraph 63.

[15] Subsection 118(5) does create a distinction but that distinction is not based on a personal characteristic which is enumerated in section 15 of the *Charter*. Nor is the distinction based on a characteristic which is analogous to those enumerated in the *Charter*. The distinction is based on whether the individual is required to pay a support amount in respect of the person for whom the individual seeks to claim a tax credit. The obligation to pay child support is not an immutable, or constructively immutable, personal characteristic: *Giorno v The Queen*, 2005 TCC 175. In this case, the obligation to pay child support arose out of the Order which, in my view, was based on the Appellant's level of income. This is not a personal characteristic enumerated in section 15; nor is it analogous to a ground enumerated in section 15: *Stanwick v Her Majesty the Queen*, [1999] 1 CTC 143 (FCA).

[16] Several judges of this Court have also considered whether subsection 118(5) was contrary to section 15 of the *Charter*. They all concluded that the application of subsection 118(5) did not infringe an individual's section 15 *Charter* rights. See *Keller v The Queen*, [2002] 3 CTC 2499; *Giorno v The Queen* (*supra*); *Frégeau v*

The Queen, 2004 TCC 293; *Calogeracos v The Queen*, 2008 TCC 389; *Sears v The Queen*, 2009 TCC 22; *Krashinsky v Canada*, 2010 TCC 78. In *Nelson v Canada*, [2000] 4 CTC 252, the Federal Court of Appeal also agreed that subsection 118(5) was not contrary to the Charter. Sharlow JA stated:

> 12 In my view, the differential treatment created by subsection 118(5) of the Income Tax Act is not based on one of the grounds enumerated in subsection 15(1) of the Charter or an analogous ground. Subsection 118(5) does not draw a distinction between Mr. Nelson and the comparator group based on personal characteristics, or the stereotypical application of presumed group or personal characteristics, and does not bring into play the purpose of subsection 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage. Nor does the operation of subsection 118(5) of the Income Tax Act offend Mr. Nelson's dignity, intrinsic worthiness or self-respect. Therefore, the differential treatment resulting from subsection 118(5) is not discriminatory in the Charter sense.

[17] It is my view that the above is sufficient to dismiss this appeal. However, I would like to address other arguments made by the Appellant.

[18] He relied on statistics published by the Department of Justice to argue that when there are court-ordered custody arrangements, mothers are "unjustly favoured" in receiving custody of the children. The result he states is that males are predominantly the support payers.

[19] The statistics he referred to were the Selected Statistics on Canadian Families and Family Law with respect to Child Custody for 1994-1995. There was nothing in these statistics that disclosed a factual basis to allege that mothers were "unjustly favoured" in receiving custody of children.

[20] In custody cases, it is usually the person who earns the most income who must pay support. If this happens to be the male, it cannot be a ground for discrimination. As stated by Webb J, as he then was, in *Calogeracos:*

> 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.

[21] The Appellant also argued that the tax credits are intended to assist in offsetting his costs of parental care. However, his child support payments were based on the Federal Guidelines and it appears that one of the considerations in the Guidelines was that the supporting parent would not be receiving the tax credits. In *Frégeau*, Bédard J wrote:

> 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)
>
> 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.

[22] In conclusion, I have no jurisdiction to alter or interfere with the Order issued by the Ontario Superior Court of Justice and there was no evidence given to me that would allow me to ignore it. The Appellant's section 15 *Charter* rights have not been infringed by the application of subsection 118(5) of the *ITA*. The appeal is dismissed.

Signed at Ottawa, Canada, this 5th day of March 2014.

"V.A. Miller"

V.A. Miller J.

CITATION:	2014TCC70
COURT FILE NO.:	2013-528(IT)I
STYLE OF CAUSE:	PETER D'AMBROSIO AND HER MAJESTY THE QUEEN
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REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
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APPEARANCES:

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Counsel for the Respondent:	Alisa Apostle

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