Docket: 2011-810(IT)I

BETWEEN:

DAN FANNON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 24, 2011, at London, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Tamara Watters

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* with respect to the Appellant's 2007 and 2008 taxation years are dismissed, without costs.

Signed at Halifax, Nova Scotia, this 3rd day of November 2011.

"Wyman W. Webb"

Webb, J.

Citation:2011TCC503
Date: 20111103
Docket: 2011-810(IT)I

BETWEEN:

DAN FANNON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant is appealing the reassessments that denied his claim for child care expenses with respect to his child, who did not reside with the Appellant, on the basis that the provisions of subsection 63(3) of the *Income Tax Act* (the "*Act*") are contrary to the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). It appears that the Appellant had also been reassessed to deny a claim for a tax credit that the Appellant had made based on the child being a dependent. However, the only matter addressed by the Appellant in his Notice of Appeal and during the hearing was the denial of the amounts claimed for child care expenses.

[2] There is no dispute with respect to the facts in this case. The Appellant and Lisa Spooner had a child together in 1998. The child resided with Lisa Spooner throughout 2007 and 2008 and did not reside with the Appellant. The Appellant was required by a Court Order dated April 22, 2001 to pay child support and special expenses (daycare) and the Appellant paid child support and an additional amount as special expenses (daycare) in 2007 and 2008. The Appellant claimed child care expenses of $3,013 in 2007 and $3,014 in 2008.

[3] Subsection 63(1) of the *Act* provides for a deduction for child care expenses. Subsection 63(3) of the *Act* provides, in part, that:

> "child care expense" means an expense incurred in a taxation year for the purpose of providing in Canada, for an eligible child of a taxpayer, child care services including baby sitting services, day nursery services or services provided at a boarding school or camp if the services were provided
>
> > (*a*) to enable the taxpayer, or the supporting person of the child for the year, who resided with the child at the time the expense was incurred,
> >
> > > (i) to perform the duties of an office or employment,
> > >
> > > …

[4] It is clear that the amounts paid by the Appellant to Lisa Spooner as special expenses (daycare) were not child care expenses as defined in subsection 63(3) of the *Act* as the child did not reside with the Appellant. The Appellant did not argue that the amounts that he paid were child care expenses as defined in the *Act*, but based his argument, in his Notice of Appeal, on the *Canadian Human Rights Act* and the *Charter*.

[5] In *Christoffersen* v. *Minister of National Revenue*, [1993] 2 C.T.C. 2054, 93 D.T.C. 727, Justice Brulé noted that:

> … I agree that the Court is without jurisdiction to consider any allegation of a violation of the Canadian Human Rights Act.

[6] This Court does not have the jurisdiction to consider whether the provisions of the *Act* violate any provisions of the *Canadian Human Rights Act*. At the hearing the Appellant only pursued his argument based on subsection 15(1) of the *Charter*.

[7] The Appellant argued that the definition of child care expenses in subsection 63(3) of the *Act* discriminates against individuals who do not have custody of children but who are still required to pay an amount for daycare expenses 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.

[8] 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).

[9] 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.

[10] 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.

[11] 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).

[12] In *Withler* v. *Canada (Attorney General)*, 2011 SCC 12, Chief Justice McLachlin and Justice Abella writing on behalf of the Supreme Court of Canada stated that:

> 30 The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) does the law create a distinction that is based on an enumerated or analogous ground? and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.)
>
> 31 The two steps reflect the fact that not all distinctions are, in and of themselves, contrary to s. 15(1) of the *Charter* (*Andrews*; *Law*; *Ermineskin Indian Band*, at para. 188). Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s. 15(1), a person "must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (*Andrews*, at p. 182; *Ermineskin Indian Band*, at para. 188; *Kapp*, at para. 28).

[13] Therefore, the first step will be to determine whether the provisions of subsection 63(3) of the *Act* “create a distinction that is based on an enumerated or analogous ground”. It appears that the Appellant has suggested that his group is comprised of parents who do not have custody but who are paying for daycare expenses and who were required to do so as a result of a Court Order (or an agreement). The comparative group that he appears to be suggesting is one comprised of parents who have custody and who are paying for daycare expenses as a result of an agreement with the daycare facility. However, the provisions of the *Act*

related to child care expenses are not based on who has custody of the child but rather on the person with whom the child resides. While as a result of the definition of “eligible child” in subsection 63(3) of the *Act*, it is also possible that someone who is not a parent may be able to claim child care expenses, it is not entirely clear whether a person who is not a parent could be ordered to pay daycare expenses. Therefore based on the provisions of the *Act* which the Appellant is challenging and the groups as proposed by the Appellant, the Appellant’s group would be parents who pay for daycare expenses as a result of a Court Order (or an agreement) but with whom a child does not reside and the appropriate comparator group must be parents who pay child care expenses (as a result of an agreement with the daycare facility) and with whom the child does reside. The relevant distinction created by the *Act* is based on whether the child resides with the person or not. Clearly this is not one of the enumerated grounds in subsection 15(1) of the *Charter*.

[14] In *Withler* v. *Canada (Attorney General)*, above, Chief Justice McLachlin and Justice Abella stated that:

> 33 The first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews*, it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them. An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity": *Corbiere v. Canada* (*Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203, at para. 13. Grounds including sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination.

[15] Whether a child is residing with one person or another is not a characteristic that is immutable or changeable only at an unacceptable cost to personal identity. A child who is residing with one parent could start to reside with the other parent. If a child should commence to reside with the other parent, this would not be at an unacceptable cost to personal identity of either the first parent or the second parent. As a result it seems to me that it is not an analogous ground and the provisions of subsection 15(1) of the *Charter* are not applicable to the provisions of the definition of child care expenses in subsection 63(3) of the *Act*.

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

Signed at Halifax, Nova Scotia, this 3rd day of November 2011.

"Wyman W. Webb"

Webb, J.

CITATION:	2011TCC503
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APPEARANCES:

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