Docket: 2013-1924(IT)I

BETWEEN:

GERALD G. BLEILER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 13, 2014, at Kelowna, British Columbia.

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Devi Ramachandran

JUDGMENT

The Appeal of the Appellant's 2012 taxation year is dismissed without costs.

Signed at Toronto, Ontario, this 6th day of October 2014.

"David E. Graham"

Graham J.

Citation: 2014 TCC 296
Date: 20141006
Docket: 2013-1924(IT)I

BETWEEN:

GERALD G. BLEILER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Gerald Bleiler had his left eye removed in 1938 when he was 4 years old. He now wears a prosthesis in that eye. His vision in his right eye is above average. Mr. Bleiler claimed a disability tax credit in respect of his 2012 tax year. The Minister of National Revenue denied the claim on the basis that Mr. Bleiler was not "blind" within the parameters that have been applied to that term by the Courts in interpreting its use in paragraph 118.4(1)(*b*) of the *Income Tax Act* (the "*Act*")[1]. Mr. Bleiler has appealed that decision.

[2] Mr. Bleiler accepts that he is not "blind" and therefore does not qualify for the disability tax credit set out in the test currently set out in the *Act*. He also accepts that he does not otherwise meet the tests set out for claiming a disability tax credit under sections 118.3 and 118.4 of the *Act*, despite some difficulties that he has in walking and some mental anguish that he suffers as a result of his visual impairment. However, Mr. Bleiler submits that the narrow manner in which those sections have been drafted is a breach of his equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*. Mr. Bleiler says that sections 118.3 and 118.4 breach section 15 of the *Charter* because those sections define the

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[1] See, for example, *Blondin v. Canada*, [1994] TCJ No. 987; *Islam v. Canada*, 2013 TCC 175; *Hoben v. Canada*, 2003 TCC 658; *Riley v. Canada*, 2003 TCC 916; and *Ewen v. Canada*, [2000] TCJ No. 845.

attributes of a person with a disability so narrowly as to exclude others, like himself, who have a disability that places fewer limitations on them.

[3] Mr. Bleiler has given the appropriate *Charter* notice to the Attorney General of Canada and the Attorneys General of each of the Provinces and Territories.

Issue

[4] The issue in this Appeal is whether the narrow manner in which sections 118.3 and 118.4 prescribe the attributes necessary to qualify for a disability tax credit breaches section 15(1) of the *Charter*.

[5] The two-part test to be applied on a section 15 analysis was confirmed by the Supreme Court of Canada in *Withler v. Canada (Attorney General)*[2]. The first part of the test requires me to determine whether the law creates a distinction based on a ground that is enumerated in section 15 or on an analogous ground. The second part of the test asks whether that distinction creates a disadvantage by perpetuating prejudice or stereotyping.

Does the law create a distinction based on an enumerated or analogous ground?

[6] Mental and physical disabilities are an enumerated ground under section 15 of the *Charter*. Mr. Bleiler argues that sections 118.3 and 118.4 create a distinction between people with less severe disabilities and people with no disabilities. However, people with less severe disabilities and people with no disabilities are treated the same under those sections; both are denied disability tax credits.

[7] The more appropriate way of characterizing the distinction for the purposes of the two-part test in *Withler* is as a distinction between people with less severe disabilities and people with more severe disabilities as these two groups are treated differently under the *Act*. The Respondent concedes that sections 118.3 and 118.4 create a distinction between those two groups of people and therefore that this first step of the *Withler* test is met. The Respondent's concession is based on the reasoning of the Supreme Court of Canada in *Granovsky v. Canada (Minister of Employment and Immigration)*[3].

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2 2011 SCC 12.

3 2000 SCC 28.

Does the Distinction Create a Disadvantage by Perpetuating Prejudice or Stereotyping?

[8] The second step of the *Withler* test involves an examination of various contextual factors with the goal of determining whether the distinction in the legislation creates a disadvantage by perpetuating prejudice or stereotyping. At paragraph 38, *Withler* identifies a non-exhaustive list of contextual factors that can be considered:

> Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. … Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.

[9] There is no question that Mr. Bleiler's visual impairment causes him some personal difficulties. Mr. Bleiler described various challenges that he has avoiding people and objects when walking due to his reduced range of vision and lack of depth perception. He also explained that, while he can read, reading for extended periods of time causes eye strain that he believes is not shared by people with binocular vision. He also stated that he has additional expenses related to the purchase of his prosthetic eye and to the maintenance of both that prosthetic and his eye socket. Finally, Mr. Bleiler testified that his visual impairment has caused him mental anguish for a number of reasons. The first reason is what I will informally describe as survivor's guilt related to his being discharged from the army prior to the deployment of his army unit to the Korean War. The second reason for his anguish is his increased fear of losing his eyesight completely if anything were to happen to his right eye. The final reason for his anguish is the way that he perceives that others view him as a result of his impairment[4].

[10] All that said, the question is not whether Mr. Bleiler personally has difficulties as a result of his visual impairment but rather whether, in general, people with less severe disabilities are subject to prejudice or stereotyping. Mr. Bleiler introduced very little evidence on this point. However, given that the

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[4] I assume that Mr. Bleiler's prosthetic eye must be detectable to others at close range since I could not detect any difference between his eyes from my position on the bench.

existence of such prejudice or stereotyping in respect of people with disabilities is hardly controversial and given that acknowledging such prejudice and stereotyping without direct evidence thereof will not affect the outcome of this case, I am prepared to take judicial notice of the existence of such prejudice and stereotyping for the purposes of this case. The standards established by sections 118.3 and 118.4 are sufficiently high that at least some people who would commonly be acknowledged as having a physical or mental disability and who may suffer prejudice and stereotyping as a result of that disability would not qualify for the disability tax credit.

[11] However, it is not enough for Mr. Bleiler to demonstrate that people with less severe disabilities suffer prejudice or stereotyping. Mr. Bleiler must also show that the denial of the disability tax credit to those people has the effect of perpetuating that prejudice or disadvantage. The only effect of being denied the disability tax credit that Mr. Bleiler described was the fact that he had to pay more tax than he would have paid if he had received the credit. In *Granovsky*, the Supreme Court of Canada stated at paragraph 58 that:

> The question therefore is not just whether the appellant has suffered the deprivation of a financial benefit, which he has, but whether the deprivation promotes the view that persons with temporary disabilities are "less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.
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> [emphasis in original]

[12] I struggle to see how not receiving the disability tax credit perpetuates the prejudice or stereotyping suffered by less severely disabled people. Mr. Bleiler did not introduce any evidence that denying a disability tax credit to a person with a less severe disability in any way promotes the view that such people are less capable or less worthy of recognition or value as human beings or members of Canadian society.

[13] Since the purpose of the disability tax credit is to provide financial relief, Mr. Bleiler would have to have shown that the relief provided did not take into account the actual needs or circumstances of people with less severe disabilities. Mr. Bleiler did not provide any evidence of the financial needs of this group. The only financial circumstances that he described were his own. The fact that a person has a disability does not mean that he or she earns less income. Mr. Bleiler's case is a good example. While his visual impairment resulted in some limitations on the

employment opportunities available to him[5], it did not prevent him from earning what I must presume would have been at least a solid middle class living as a personnel director at a major medical institution for 17 years and, following his retirement from that job, as a part-time professor.

[14] Even if Mr. Bleiler had provided evidence that the disability tax credit did not take into account the financial needs of people with less severe disabilities, he would still have needed to show that, looking at the scheme of the *Act* as a whole, the line that Parliament has chosen to draw between people with more severe disabilities and people with less severe disabilities was not generally appropriate. The Supreme Court of Canada explained this aspect of the test at paragraph 67 of *Withler*:

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

[15] Mr. Bleiler did not introduce any evidence that would show that the line drawn by Parliament between people with more severe disabilities and people with less severe disabilities was not generally appropriate.

[16] In light of all of the foregoing, I find that Mr. Bleiler has not shown that sections 118.3 and 118.4 breach section 15 of the *Charter*.

Section 1 Analysis

[17] Since I have concluded that sections 118.3 and 118.4 do not breach section 15 of the *Charter*, there is no need for me to conduct an analysis under section 1 of the *Charter*.

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5 Mr. Bleiler testified that he was unable to serve in the army or become a pilot.

Conclusion

[18] Based on all of the foregoing, the appeal is dismissed without costs.

Signed at Toronto, Ontario, this 6th day of October 2014.

"David E. Graham"

Graham J.

CITATION:	2014 TCC 296
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APPEARANCES:

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COUNSEL OF RECORD:

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