Federal Court  Cour fédérale

Date: 20170119

Docket: T-184-16

Citation: 2017 FC 58

Ottawa, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DAN FANNON

Applicant

and

REVENUE CANADA AGENCY

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought by Dan Fannon [the Applicant] pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision dated January 14, 2016, made by the Canadian Human Rights Commission [the Commission] determining not to deal with the Applicant's complaint pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*CHRA*] [the Decision].

II. Facts

[2] The Applicant is a non-custodial parent who alleges that section 63 (child care expenses deduction) and section 122.8 (child fitness tax credits) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [*ITA*] discriminate against him and other non-custodial parents in "split families." The Applicant had a child in 1998 and, pursuant to a court order made in 2001, the Applicant paid child support and special expenses for his child. These "special expenses" included child care expenses (day care costs) and child fitness expenses.

[3] The child did not reside with the Applicant during 2007 and 2008; the child resided with the mother during these years. This is not disputed.

[4] Under subsection 63(3) of the *ITA*, the Applicant is required to have resided with the child in the years concerned in order to claim child care expenses. The Applicant claimed child care expenses for the years 2007 and 2008. The Applicant's claims for child care expenses were denied by the Canada Revenue Agency [CRA] upon reassessment on the basis that the Applicant did not reside with the child in the years concerned and therefore did not satisfy the requirements of subsection 63(3).

[5] The Applicant appealed the reassessment to the Tax Court of Canada [Tax Court], in which appeal he also challenged section 63 of the *ITA* as being discriminatory on the grounds of family status and marital status, contrary to subsection 15(1) of the *Charter of Rights and Freedoms* [*Charter*] and the *CHRA*. His appeal was denied. The Tax Court determined that "…

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*": 2011 TCC 503. The Tax Court did not deal with whether subsection 63(3) of the *ITA* contravened the *CHRA*, finding that it lacked jurisdiction to do so.

[6] The Applicant sought judicial review of the Minister of National Revenue's decision denying the Applicant's claim for child care expense deductions under subsection 63(3) of the *ITA*: 2012 FC 876. In a decision dated July 11, 2012, Justice Near (as he then was) dismissed the Applicant's application, finding the Decision could not be unreasonable because the Minister had simply followed and applied the legislation. Regarding the claim of discrimination by section 63, Justice Near found the Applicant failed to meet the two-part test, set out by the Supreme Court of Canada for determining subsection 15(1) Charter claims, in *R v Kapp*, 2008 SCC 41 [*Kapp*]. Justice Near agreed with the Tax Court's analysis of the Applicant's subsection 15(1) *Charter* argument, per Webb TCCJ (as he then was):

> [18] …. Justice Webb concluded:
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> > [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*.
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> …
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> [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*.

[7] The Applicant appealed this decision to the Federal Court of Appeal: 2013 FCA 99, which dismissed his appeal due to the absence of a proper evidentiary foundation:

> [5] In order to succeed in his *Charter* claim, Mr. Fannon was required to submit evidence capable of proving that the statutory condition barring his claim for a deduction for child care expenses creates an adverse distinction based on an enumerated or analogous ground, and that the statutory distinction creates a disadvantage by perpetuating prejudice or stereotyping (*Quebec*

> *(Attorney General) v. A.*, 2013 SCC 5; *R. v. Kapp*, 2008 SCC 41). Mr. Fannon presented no evidence in the Federal Court that addresses those questions. The lack of an evidentiary foundation is fatal to his *Charter* claim (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357).
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> [6] Mr. Fannon also argues that section 63 should be interpreted more generously than the Minister has done in this case, because even though his son did not reside with him when the child care expenses were incurred, his claim for a deduction for those expenses is fair and reasonable in the circumstances, and meets the policy objectives of section 63. Unfortunately for Mr. Fannon, the Minister is not free to disregard statutory conditions to the deductibility of child care expenses. If section 63 is too restrictive to meet its policy objectives in the particular circumstances of this case, the remedy lies with Parliament, not with the Minister and not with this Court.

[8] Neither this Court nor the Federal Court of Appeal considered or were asked to consider section 122.8 of the *ITA* concerning the child fitness tax credits.

[9] On December 14, 2014, the Applicant filed a Complaint with the Commission alleging that section 63 (child care expenses) and section 122.8 (child fitness tax credit) of the *ITA* discriminate against parents of children in "split families" in favour of the parents of children in intact families, contrary to section 5 of the *CHRA*. He alleges the existence of a discriminatory policy or practice, based on discriminatory grounds of "marital status" and "family status". The Applicant alleged:

> 3) Under current Canadian Tax Law, non-custodial parents cannot claim any daycare expenses, or Fitness activity costs for their children on their tax return.
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> 4) Under certain conditions, as set out in Canadian Tax Law, the custodial parent is also denied the tax deductions for daycare expenses and fitness activities for their child. Under these certain conditions a non-parent who has not paid for the expenses is the only person eligible to claim for the said deductions.

> 5) I as a parent cannot receive the full benefit of the Canadian Tax laws.

[10] In his submissions, the Applicant listed comparator groups and scenarios, along with mathematical calculations to support his claim of discrimination.

[11] The Commission invited the parties to make submissions on whether paragraph 41(1)(d) of the *CHRA* may apply "because the human rights issues in this complaint may have already been dealt with through another process, namely the Federal Court and the Federal Court of Appeal", noting that "[s]uch a complaint may be 'vexatious' within the meaning of the Act".

[12] Thereafter, staff prepared a Section 40/41 Report [40/41 Report], dated October 15, 2015, which recommended that the Commission not deal with the Applicant's complaint because it was vexatious in that "the other procedures have addressed the allegation of discrimination overall." The other procedures said to have addressed the allegations were the Federal Court of Canada and Federal Court of Appeal proceedings just referred to.

[13] Commission staff sent the 40/41 Report to the parties, who were invited to provide their positions on the issues for decision under paragraph 41(1)(d) of the *CHRA*. Specifically, the issue for the parties was whether the complaint may be considered as vexatious because this Court and the Federal Court of Appeal had already dealt with the human rights issue.

[14] On November 9, 2015, the Applicant submitted a letter to the Commission in response to the 40/41 Report [Response Letter]. In it, he set out his claims of discrimination in respect of the child care expense credit and the child fitness tax credit provisions of the *ITA*.

[15] In his Response Letter, the Applicant stated his belief that his case has "merit". This argument was based on the Applicant's misunderstanding of a letter sent by the CRA to the Commission, which he had not seen, in which the CRA apparently differentiated between dealing with the complaint under paragraph 41(1)(d) versus dealing with its "merits". I must immediately reject this argument because the use of the term "merits" in this context by a lawyer does not involve any admission that the Applicant's complaint had "merits"; the word "merits" in this context by the lawyer could equally mean "lack of merits".

[16] Of particular importance, the Response Letter included the Applicant's correct statement that neither this Court nor the Federal Court of Appeal had dealt with the *child fitness tax credit* issue under section 122.8 of the *ITA*.

[17] After receiving these submissions, staff of the Commission sent the 40/41 Report to the Commission for determination, without revisions, and in particular, without any mention of the allegations of bias, together with the Response Letter filed by the Applicant. On January 4, 2016, the Commission decided not to deal with the complaint under paragraph 41(1)(d) of the *CHRA*. The Applicant seeks judicial review from this Decision.

III. Decision

[18] The 40/41 Report is considered to form part of the Commission's reasons in this case: *Zulkoskey v Canada (Employment and Social Development)*, 2016 FC 268 at para 16 [*Zulkoskey*].

[19] Paragraph 41(1)(d) of the *CHRA* provides that the Commission need not deal with a complaint where it is "(d) … trivial, frivolous, vexatious or made in bad faith;…." The Commission correctly noted that a complaint may be vexatious if it has already been decided in another process involving essentially the same issues, where the complainant had a chance to raise all relevant human rights issues and where the complainant has finished with all available reviews or appeals.

[20] In its analysis the Commission states:

> 34. The Federal Court of Appeal decision to dismiss the appeal was rooted in the fact that the complainant did not provide information to support his allegations of discrimination. It also considered whether the Minister's decision under section 63 of the *Income Tax Act* was reasonable. Even though the complainant disagrees with the Minister's decision and the Federal Court and Federal Court of Appeal decisions, the other processes have addressed the allegations of discrimination overall.
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> 35. It should also be noted that the grounds of discrimination in this complaint were specifically addressed by the Federal Court of Appeal. In paragraph 3 of its decision, the Court stated, "he [the complainant] alleges that section 63 discriminates against him on the basis of marital status, family status and an analogous ground, place of residence.
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> …

> 37. The complainant submits that the Federal Court and the Federal Court of Appeal cannot deal with his allegations of discrimination, as they do not have the authority to do so. However, the *Canadian Human Rights Act* is a federal law upon which the Federal Court and the Federal Court of Appeal both have jurisdiction. One function of the Federal Court and the Federal Court of Appeal is to review the decisions made by government departments, including decisions made by the Commission. Therefore the Federal Court and the Federal Court of Appeal had the authority to address the human rights issues in this complaint.
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> [emphasis added]

[21] In closing, the Commission cited *Canada (Attorney General) v Brown*, 2001 FCA 385 [Brown]:

> 39. In *Brown*, the Federal Court of Appeal set aside a finding by an Umpire that a provision of the *EI Act* violated the CHRA on the basis that in *Sollback*, the Federal Court of Appeal had already upheld the impugned provision in the context of a challenge under section 15(1) of the *Charter*. In this case, the Federal Court of Appeal stated that it would be unjustifiable to hold that a provision that was already found not to be discriminatory under the *Charter* could be found discriminatory under the CHRA. Therefore, considering the Federal Court found that the complainant's allegations in the present complaint were not discriminatory under the *Charter*, justice does not require that the Commission deal with the complaint.

[22] The Commission therefore decided not to deal with the Applicant's case because other procedures had addressed the allegation of discrimination "overall".

IV. Issues

[23] This case raises the following issues:

1. Whether portions of the Applicant's affidavit are improper and should be struck;

2. Whether the Commission's decisions concerning (a) the child fitness tax credit, and or (b) the child care expense deduction are reasonable;
3. Whether the Commission's decision is vitiated by procedural unfairness, namely bias on the part of the Commission's Early Resolution staff; and
4. What remedy should be given.

V. Standard of Review

[24] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The standard of review for a decision by the Commission is reasonableness: *Bergeron v Canada (Attorney General)*, 2013 FC 301 at para 27 [*Bergeron (FC)*], *Bergeron v Canada (Attorney General)*, 2015 FCA 160, leave to appeal to SCC refused, 36701 (14 April 2016). At paragraph 39 of *Bergeron (FC)*, citing *Sketchley v Canada*, 2005 FCA 404 at para 38, the Court stated: "[T]he jurisprudence is clear that the Commission is to be afforded great latitude in exercising its judgment and in assessing the appropriate factors when considering the application of paragraph 41(1)(d) of the *CHRA* and performing this 'screening function.'"

[25] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial

> review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] Questions of procedural fairness are reviewable on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[27] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc, 2012 SCC 65*; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Relevant Provisions

[28] Subsection 40(1) of the *CHRA* allows an individual to file a complaint with the Commission should a complainant have "reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice." Under section 41 of the *CHRA*, the Commission is required to deal with complaints it receives unless the complaint falls within one of the exceptions listed in paragraphs 41(1)(a) to (e), in which case it may decline to deal with the complaint. At issue in this case is paragraph 41(1)(d), under which the Commission may decline to deal with a matter on the grounds that it is "trivial, frivolous, vexatious or made in bad faith." Lying at the heart of this case is the Commission's finding the Applicant's complaint was vexatious.

[29] It is common ground that the Commission may decline to deal with a complaint "if another complaint or grievance process has already addressed the allegations of discrimination." Such complaints are considered "vexatious" within the scheme of paragraph 41(1)(d) of the *CHRA*.

[30] The allegedly discriminatory sections under the *ITA* dealing with child care expenses (subsection 63(3)), and the child fitness tax credit (section 122.8) provide as follows:

Child care expenses	**Frais de garde d'enfants**
63 …	**63 …**
Marginal note: Definitions	**Note marginale: Définitions**
(3) In this section,	**(3)** Les définitions qui suivent s'appliquent au présent article.
…	…
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	***frais de garde d'enfants*** Frais engagés au cours d'une année d'imposition dans le but de faire assurer au Canada la garde de tout enfant admissible du contribuable, en le confiant

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,

[emphasis added]

à des services de garde d'enfants, y compris des services de gardienne d'enfants ou de garderie ou des services assurés dans un pensionnat ou dans une colonie de vacances, si les services étaient assurés :

a) d'une part, pour permettre au contribuable, ou à la personne assumant les frais d'entretien de l'enfant pour l'année, qui résidait avec l'enfant au moment où les frais ont été engagés d'exercer l'une des activités suivantes :

[soulignements ajoutés]

Child Fitness Tax Credit

Marginal note: Definitions

122.8 (1) The following definitions apply in this section.

eligible fitness expense in respect of a qualifying child of an individual for a taxation year means the amount of a fee paid to a qualifying entity (other than an amount paid to a person that is, at the time the amount is paid, the individual's spouse or common-law partner or another individual who is under 18 years of age) to the extent that the fee is attributable to the cost of registration or membership of the qualifying child in a prescribed program of physical activity and, for the purposes of this section, that cost

(a) includes the cost to the qualifying entity of the program in respect of its

Crédit d'impôt pour la condition physique des enfants

Note marginale : Définitions

122.8 (1) Les définitions qui suivent s'appliquent au présent article.

dépense admissible pour activités physiques En ce qui concerne l'enfant admissible d'un particulier pour une année d'imposition, la somme versée à une entité admissible (sauf une somme versée à une personne qui, au moment du versement, est soit l'époux ou le conjoint de fait du particulier, soit un autre particulier âgé de moins de 18 ans), dans la mesure où elle est attribuable au coût d'inscription ou d'adhésion de l'enfant à un programme d'activités physiques visé par règlement. Pour l'application du présent article, ce coût :

a) comprend le coût du programme pour l'entité admissible, ayant trait à son

administration, instruction, rental of required facilities, and uniforms and equipment that are not available to be acquired by a participant in the program for an amount less than their fair market value at the time, if any, they are so acquired; and	administration, aux cours, à la location des installations nécessaires et aux uniformes et matériel que les participants au programme ne peuvent acquérir à un prix inférieur à leur juste valeur marchande au moment, s'il en est, où ils sont ainsi acquis;
(b) does not include	b) ne comprend pas les sommes suivantes :
(i) the cost of accommodation, travel, food or beverages, or	(i) le coût de l'hébergement, des déplacements, des aliments et des boissons,
(ii) any amount deductible under section 63 in computing any person's income for any taxation year. (dépense admissible pour activités physiques)	(ii) toute somme déductible en application de l'article 63 dans le calcul du revenu d'une personne pour une année d'imposition. (eligible fitness expense)

[31] The *CHRA* prohibits, and gives the Commission jurisdiction to inquire into "discriminatory practices." The Applicant's complaint was lodged pursuant to section 5 of the *CHRA* which provides

Denial of good service, facility or accommodation	**Refus de biens, de services, d'installations ou d'hébergement**
5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual, on a prohibited ground of	b) de le défavoriser à l'occasion de leur fourniture.

discrimination.

[32] The Applicant also argues that the above sections of the *ITA* contravene subsection 15(1) of the *Charter*, which provides:

Equality Rights **Marginal note: Equally before and under law and equal protection and benefit of law** **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**.**	**Droits à l'égalité** **Note marginale** : Égalité devant la loi, égalité de bénéfice et protection égale de la loi **15. (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[33] To establish a violation of equality rights under subsection 15(1) of the *Charter*, a complainant must satisfy the two-step test set out by the Supreme Court of Canada in *Kapp*:

1. Does the law create a distinction based on an enumerated or analogous ground? and
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

VII. Analysis

Issue 1: Whether portions of the Applicant's affidavit are improper and should be struck.

[34] The Applicant filed an affidavit in support of judicial review. However, affidavits containing new information that was not before the administrative decision-maker are not

generally allowed on judicial review. On a judicial review, the Court decides the matter based on the material that was before the decision-maker (referred to as the "record"), which in this case was the Commission. The Federal Court of Appeal laid out the following guidelines regarding new evidence on judicial review in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22:

> [18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.
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> [19] Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.
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> [20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
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> > (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it

> in understanding the issues relevant to the judicial review: see, *e.g., Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
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> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: *e.g, Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite, supra*.

[35] There is repetition of several paragraph numbers in the Applicant's affidavit. In my view, paragraphs 1 to 7 and the first set of paragraphs 8 and 9, as well as paragraphs 23 to 38, should be struck as containing argument because argument is not admissible as new evidence. However, the second set of paragraphs 8 and 9, as well as paragraphs 10 and 11, which raise the allegation of bias will remain.

Issue 2: Whether the Commission's decision was unreasonable concerning the child fitness tax credit or the child care expense issue.

Child fitness tax credit

[36] In my respectful view, the decision of the Commission concerning the child fitness tax credit is not reasonable. The Commission overlooked or failed to consider the fact that the Applicant had never previously litigated the issue of the child fitness tax credit. The Applicant has never before taken the issue of the child fitness tax credit under section 122.8 of the *ITA* to any court or tribunal for a determination of its *Charter* validity: not to the Tax Court, nor to this Court, nor to the Federal Court of Appeal. Likewise, the Applicant has never previously litigated his objection to the child fitness tax credit as discriminating against him and others in split families, contrary to section 5 of the *CHRA*, in terms of either family status or marital status. The Respondent admits this situation. As a consequence the decision is not defensible on the record before the Commission and is therefore to this extent unreasonable.

[37] I am not sure why the Commission overlooked this central fact, because the Applicant made this very point in his Response Letter.

[38] The Respondent argues that section 63 (child care expenses) and section 122.8 (child fitness tax credits) are similar and therefore, deciding the *Charter* validity of child care expenses also decides the *Charter* validity and *CHRA* issues concerning the child fitness tax credits "overall". I disagree. While both sections deal with tax relief for those with children, they are far from identical. In fact, and quite inconsistently, elsewhere the Respondent argues that the two

provisions are different: the Respondent alleges that, while child care expenses may only be claimed by persons who reside with the child, child fitness tax credits are not so restricted. There may be other differences as well. For example, the child care expense matter is a deduction while the child fitness relief is a tax credit. The suggestion that dealing with one deals with the other "overall" is in my view unreasonable as regards their validity under either the *CHRA* or for that matter, the *Charter*, because such a conclusion is not defensible on the law in this case.

[39] What is important is that the Applicant has never litigated or received a decision on the issue of whether or not the child fitness tax credit is discriminatory as contrary to the *CHRA* or *Charter*. Yet, that in effect is what the Commission found, unsupported by and contrary to the record.

[40] Approaching the Decision as an organic whole and, importantly, viewing it in the context of the record in this case, in my respectful view the Decision does not fall within the range of decisions that are defensible in terms of the facts or the law. Therefore, I am compelled to find that the Commission's Decision in respect of the complaint concerning the child tax fitness credit per section 122.8 of the *ITA* is unreasonable per *Dunsmuir*. Therefore it must be set aside.

Child care expenses

[41] However, I am not persuaded the Commission acted unreasonably in determining that the Applicant's claim re child care expenses, per section 63 of the *ITA*, was vexatious. That finding is supported by the record; the Applicant's claim had already been considered both by this Court and by the Federal Court of Appeal. I appreciate that the Federal Court of Appeal based its

finding on the absence of an evidentiary background, but the Applicant had a full and fair opportunity to make his claim of discrimination before both courts. In addition, notwithstanding the reasons of the Federal Court of Appeal pointing out the need for a proper evidentiary foundation to support a *Charter*-based claim of discrimination, the Applicant filed little or no additional evidence to that filed before.

[42] While the Federal Court and Federal Court of Appeal in the previous litigation considered *Charter* claims based on subsection 15(1), rather than complaints of discrimination under section 5 of the *CHRA*, the Federal Court of Appeal provides a bridge between the two in *Brown.* In *Brown*, the Federal Court of Appeal held it would not be justifiable to hold that a provision found not discriminatory under the *Charter* was nonetheless discriminatory under the *CHRA.* In my view, the same reasoning applies in this case. Therefore, considering the Federal Court found the complainant's allegations in the present complaint were not discriminatory under the *Charter*, justice does not require that the Commission deal with the complaint under the *CHRA.* I appreciate the Federal Court of Appeal chose to dismiss the Applicant's *Charter* appeal because it lacked an evidentiary basis, but the merits of the matter were dealt with by the Federal Court.

[43] Again viewing the Decision in respect of the child care expense claim as an organic whole, and based on the record before it, I have concluded that the Commission's decision falls within the permitted range of outcomes that are defensible on the facts and law per Dunsmuir. Judicial review must therefore be dismissed in respect of the child care expense claim.

[44] Therefore, I would set aside the decision of the Commission, but only to the extent of the Applicant's complaint concerning section 122.8 of the *ITA* regarding the child fitness tax credit.

Issue 3: Whether the Commission's decision is vitiated by procedural unfairness, namely bias on the part of the Commission's Early Resolution staff.

[45] The procedural fairness issue in this case arises in connection with an allegation of Commission staff bias against the Applicant. As noted above, procedural fairness issues are reviewed on the correctness standard.

[46] The uncontested evidence of the Applicant, as set out in his November 9, 2015 Response Letter to the Commission, is that the he had a telephone conversation with the Manager of the Early Resolution Services branch of the Commission [Manager]. This branch reviews and puts together material and recommendations which, after obtaining comments from the parties, it then forwards to the Commission for use in determining whether to dismiss a complaint under section 41 of the *CHRA*.

[47] According to the record, the Manager told the Applicant:

> I am done, finished, as far as I am concerned you are done, you will be found to be vexatious, you only get so many kicks at the can, and, your ability to appeal to the court decision is long gone, so, you are finished.

[48] This allegation appears twice in the record. First, it is contained in the Applicant's Response Letter to the Commission as quoted above. Second, it is repeated, with changes, in the

Applicant's affidavit filed on this application for judicial review, which states that the Manager told him:

> You are finished, you are done, you only get so many kicks at the can, and your ability to appeal to a higher court is long gone, you are finished.

[49] Both versions, though the unsworn version more so, are troubling accounts of what was said by a public servant occupying an important role at the Commission.

[50] I appreciate that the duty of fairness owed by those charged with preliminary investigations under section 41 of the *CHRA* is at the low end of the spectrum. As Evans J (as he then was) put it:

> [18] Just as the content of the participatory rights conferred by the duty of fairness vary according to the legal, administrative and factual contexts from which the dispute arises, so does the standard of impartiality required of an administrative agency. Thus, administrative agencies exercising adjudicative functions, including human rights tribunals, are held to a high standard of impartiality approaching that applicable to courts: see, for example, *Great Atlantic & Pacific Co. of Canada v. Ontario (Human Rights Commission)* (1993), 1993 CanLII 8616 (ON SC), 13 O.R. (3d) 824 (Div. Ct.). On the other hand, a much lower standard has been applied to municipal councillors voting on a zoning bylaw in the exercise of legislative powers: *Save Richmond Farmland Society v. Richmond (Township)*, 1990 CanLII 1132 (SCC), [1990] 3 S.C.R. 1213.
>
> [19] In my opinion the standard of impartiality required of investigators and members of the Commission is at the low end of the spectrum, at least when the basis of the allegation of bias is that they have expressed views that indicate a pre-judgment of the issues under consideration. In order to succeed in his challenge in this case the applicant must show that Ms. Falardeau-Ramsay had a closed mind when she participated in the Commission's decision to refer the complaint against Mr. Zündel to a Tribunal.

> *Zündel v Canada (Attorney General)*, [1999] 4 FCR 289, 1999 CanLII 9357 (FC) [*Zündel*]
>
> [emphasis added]

[51] However, the Applicant's allegation of bias was not contradicted in any way. No contrary evidence was filed, nor was the Applicant cross-examined. I note also that while the Applicant's Response Letter to the Commission included this allegation, for reasons which are not in the record, the drafters of the 40/41 Report chose not to refer to this allegation of bias. The bias issue was not addressed by either the 40/41 Report's summary of the complainant's position, or its analysis. No explanation is offered for these omissions.

[52] I note that the Applicant's actual Response Letter was sent to the Commission with the 40/41 Report. However, in my respectful view, an allegation of Commission staff bias should be brought to the Commission's attention directly where the alleged bias may implicate those individuals preparing material for the Commission's review, as here. If that is not done, the Commission itself must address a serious issue like this, or leave it open for this Court to conclude that the Commission simply failed to consider the Applicant's submissions at all:

> 26 …. Where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. Such was the situation in *Egan v. Canada (Attorney General)*, [2008] F.C.J. 816; 2008 FC 649.
>
> *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26.

[53] This is not a new situation either. A decade ago, Justice Mactavish found that a failure by both Commission staff and the Commission itself to address allegations of bias made it unsafe to allow the decision to stand:

> The Bias Allegation
>
> [73] I am very troubled by the apparent failure of the Commission to address Ms. Sanderson's allegation that the investigator assigned to her case lacked the requisite level of neutrality.
>
> [74] A review of the submissions prepared by Ms. Sanderson in response to the report of the Commission investigator discloses that Ms. Sanderson made very serious allegations with respect to possible bias on the part of the investigator.
>
> [75] In light of the non-adjudicative nature of the Commission's responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. That is, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a "closed mind": see *Zündel v. Canada (Attorney General) (1999)*, 175 D.L.R. 512, at ¶ 17-22.
>
> [76] With this in mind, it bears noting that the uncontroverted evidence before the Commission when it made its decision to dismiss Ms. Sanderson's complaint was that the investigator had a personal relationship with one of the key witnesses, and that this relationship had led the investigator to approach the investigation with a closed mind.
>
> [77] It may be that had the Commission looked into Ms. Sanderson's allegations, it might have determined that there is no substance to any of them. However, we have no way of knowing whether this was the case, as there is nothing in the record to suggest that any examination of Ms. Sanderson's allegations was ever carried out by the Commission prior to the decision being made to dismiss Ms. Sanderson's complaint.
>
> [78] The serious allegations made by Ms. Sanderson required consideration by the Commission. The failure of the Commission to address these concerns is a further reason why I am of the view that it would be unsafe to allow the decision of the Commission to stand.

Sanderson v. Canada (Attorney General), 2006 FC 447.

[54] In concluding on this point, I am not persuaded that the Applicant has met the relatively high test to establish bias set out in *Zündel*. While I find on the evidence before me that the Manager who spoke with the Applicant had a closed mind on the Applicant's complaint, I am unable to say what role that individual played in the preparation of the 40/41 Report submitted to the Commission. That said, given judicial review is ordered, it is appropriate to order that any future 40/41 Report(s) shall be prepared without the involvement of the Manager in question.

Issue 4: What remedy should the Court give?

[55] It is appropriate at this point to consider the Respondent's argument that the Applicant's complaint is a direct attack on portions of the *ITA* and as such does not come within the scope of the *CHRA*. I agree with the Respondent on this point. In my respectful view, the Applicant's complaint constitutes a direct attack on portions of the *ITA* and, as such, falls outside the scope of the *CHRA* because it is aimed at the legislation itself and nothing else. The *CHRA* does not provide for the filing of a complaint directed against Acts of Parliament: *Public Service Alliance of Canada v Canada Revenue Agency*, 2012 FCA 7 [*Murphy*] at paras 5- 6, leave to appeal to SCC refused, 34706 (8 November 2012). *Murphy* states:

> [6] This is a direct attack on sections 110.2 and 120.31 of the ITA, based on considerations that are wholly extrinsic to the ITA. As was held in *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5 at paragraphs 37 and 38 with respect to an identical challenge directed at specified provisions of the *Citizenship Act*, R.S.C. 1985, c. C-29, this type of attack falls outside the scope of the CHRA since it is aimed at the legislation per se, and nothing else. Along the same lines, the Federal Court in *Wignall v. Canada (Department of National Revenue (Taxation))*, 2003 FC 1280, observed in obiter that an attempt pursuant to the CHRA to counter

> the application of paragraph 56(1)(n) of the ITA based solely on its alleged discriminatory impact on the complainant, could not succeed; only a constitutional challenge could yield this result. In our view, the opinion expressed in these cases is the correct one since the CHRA does not provide for the filing of a complaint directed against an act of Parliament (see subsection 40(1) which authorizes the filing of complaints and sections 5 to 14.1 which sets out the "discriminatory practices" against which complaints may be directed).
>
> [emphasis added]

[56] The Federal Court of Appeal recently affirmed *Murphy*: see *Canadian Human Rights Commission v Attorney General of Canada*, 2016 FCA 200 [*Andrews*]. In *Andrews*, the Federal Court of Appeal concluded, per Gleason JA:

> [104] I therefore conclude… that the Tribunal's decisions in *Matson* and *Andrews* are reasonable and that there is no basis upon which to declare that *Murphy* is no longer good law.

[57] The *CHRA* creates a statutory scheme. Section 5 of the *CHRA* sets out "discriminatory practices" against which complaints may be directed:

Denial of good service, facility or accommodation	**Refus de biens, de services, d'installations ou d'hébergement**
5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	b) de le défavoriser à l'occasion de leur fourniture.

> on a prohibited ground of discrimination.

[58] As may be seen, a complaint directed at legislation enacted by the Parliament of Canada does not come within any of the "practices" that may form the object of a discriminatory practice complaint under the *CHRA*. That, in essence, is why a direct attack on portions of the *ITA* does not come within the scope of the *CHRA.*

[59] I note that *Murphy* was the subject of an unsuccessful application for leave to appeal to the Supreme Court of Canada. *Andrews*, just cited, is now the subject of an application for leave to appeal to the Supreme Court of Canada: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, SCC docket No 37208. That said, I must and do follow the law as it stands now.

[60] In this case, I have concluded that decision of the Commission is unreasonable in terms of the complaint concerning the validity of the child fitness tax credit provisions of section 122.8 of the *ITA*. However, I have also found that the Applicant's complaints do not come within the scope of the *CHRA* to begin with. I note that paragraph 41(1)(c) of the *CHRA* allows the Commission to dismiss a complaint that is beyond the jurisdiction of the Commission. In my view, it is for the Commission to decide what to do with the Applicant's child fitness tax credit complaint. Therefore, in my respectful view, the appropriate remedy is to grant judicial review and order the child fitness tax credit aspect of the Applicant's complaint be reconsidered on terms as set out in the Judgment.

VIII. Costs

[61] The Applicant did not seek costs and therefore no costs are awarded.

IX. Conclusions

[62] The application for judicial review is granted in part and the Applicant's complaint regarding the child fitness tax credit is remanded for redetermination by the Commission with the direction contained in the Judgment; otherwise, the application is dismissed. There is no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Paragraphs 1 to 7 and the first set of paragraphs 8 and 9, as well as paragraphs 23 to 38, of the Applicant's affidavit are struck.
2. Judicial review of the decision of the Commission dated January 14, 2016, is granted in part, insofar as the decision relates to the Applicant's complaint concerning the child fitness tax credit under section 122.8 of the *Income Tax Act*, but is dismissed insofar as the complaint concerned the child care expense deduction under subsection 63(3) of the *Income Tax Act*.
3. The said Decision is set aside insofar as the decision relates to the Applicant's complaint concerning the child fitness tax credit under section 122.8 of the *Income Tax Act*, but is not set aside insofar as the decision relates to the child care expense deduction under subsection 63(3) of the *Income Tax Act*.
4. The Applicant's complaint concerning section 122.8 of the *Income Tax Act* is remanded to the Commission for re-determination with the direction that no reliance may be placed on any section 40/41 Report prepared by or with the involvement of the Manager referred to in paragraphs 46 to 48 of the Reasons.
5. There is no order as to costs.

"Henry S. Brown"
Judge

Appendix

Canadian Human Rights Act, RSC, 1985, c H-6

Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
Discriminatory Practices **Marginal note: Denial of good service, facility or accommodation**	**Actes discriminatoires** **Note marginale : Refus de biens, de services, d'installations ou d'hébergement**
5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	b) de le défavoriser à l'occasion de leur fourniture.
Complaints	**Plaintes**
40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a	40 (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte

discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

Commission to deal with complaint

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

Irrecevabilité

41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

Child care expenses
63 …
Marginal note: Definitions
(3) In this section,

...
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,
(ii) to carry on a business either alone or as a partner actively engaged in the business,
(iii) [Repealed, 1996, c. 23, s. 173(1)]
(iv) to carry on research or any similar work in respect of which the taxpayer or supporting person received a grant, or
(v) to attend a designated educational institution or a secondary school, where the taxpayer is enrolled in a program of the institution or

Frais de garde d'enfants
63 …
Note marginale : Définitions
(3) Les définitions qui suivent s'appliquent au présent article.
…
frais de garde d'enfants Frais engagés au cours d'une année d'imposition dans le but de faire assurer au Canada la garde de tout enfant admissible du contribuable, en le confiant à des services de garde d'enfants, y compris des services de gardienne d'enfants ou de garderie ou des services assurés dans un pensionnat ou dans une colonie de vacances, si les services étaient assurés :
a) d'une part, pour permettre au contribuable, ou à la personne assumant les frais d'entretien de l'enfant pour l'année, qui résidait avec l'enfant au moment où les frais ont été engagés d'exercer l'une des activités suivantes :
(i) remplir les fonctions d'une charge ou d'un emploi,
(ii) exploiter une entreprise, soit seul, soit comme associé participant activement à l'exploitation de l'entreprise,
(iii) [Abrogé, 1996, ch. 23, art. 173(1)]
(iv) mener des recherches ou des travaux similaires relativement auxquels il a reçu une subvention;

(v) fréquenter un établissement d'enseignement agréé ou une école secondaire où il est inscrit à un programme d'une durée d'au moins trois

school of not less than three consecutive weeks duration that provides that each student in the program spend not less than

(A) 10 hours per week on courses or work in the program, or

(B) 12 hours per month on courses in the program, and

(b) by a resident of Canada other than a person

(i) who is the father or the mother of the child,

(ii) who is a supporting person of the child or is under 18 years of age and related to the taxpayer, or

(iii) in respect of whom an amount is deducted under section 118 in computing the tax payable under this Part for the year by the taxpayer or by a supporting person of the child,

except that

(c) any such expenses paid in the year for a child's attendance at a boarding school or camp to the extent that the total of those expenses exceeds the product obtained when the periodic child care expense amount in respect of the child for the year is multiplied by the number of weeks in the year during which the child attended the school or camp, and

semaines consécutives, selon le cas :

(A) aux cours ou aux travaux duquel chaque étudiant doit consacrer au moins dix heures par semaine,

(B) aux cours duquel chaque étudiant doit consacrer au moins douze heures par mois;

b) d'autre part, par une personne résidant au Canada autre qu'une personne :

(i) soit qui est le père ou la mère de l'enfant,

(ii) soit qui est la personne assumant les frais d'entretien de l'enfant ou était âgée de moins de 18 ans et liée au contribuable,

(iii) soit pour laquelle un montant est déduit en application de l'article 118 dans le calcul de l'impôt payable en vertu de la présente partie pour l'année par le contribuable ou par la personne assumant les frais d'entretien de l'enfant;

toutefois ne constituent pas des frais de garde d'enfants

c) tous frais de cette nature payés au cours de l'année pour un enfant qui fréquente un pensionnat ou une colonie de vacances, dans la mesure où leur total dépasse le produit de la multiplication du montant périodique de frais de garde d'enfants pour l'enfant pour l'année par le nombre de semaines de l'année pendant lesquelles l'enfant a fréquenté le pensionnat ou la colonie de

(d) for greater certainty, any expenses described in subsection 118.2(2) and any other expenses that are paid for medical or hospital care, clothing, transportation or education or for board and lodging, except as otherwise expressly provided in this definition,

are not child care expenses; (frais de garde d'enfants)

vacances :
d) pour plus de précision, les frais médicaux visés au paragraphe 118.2(2) et les autres frais payés au titre des soins médicaux ou hospitaliers, de l'habillement, du transport, de l'éducation et de la pension et du logement, sauf dispositions contraires à la présente définition. (child care expense)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-184-16
STYLE OF CAUSE:	DAN FANNON v REVENUE CANADA AGENCY
PLACE OF HEARING:	LONDON, ONTARIO
DATE OF HEARING:	NOVEMBER 8, 2016
JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 19, 2017

APPEARANCES:

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