Federal Court  Cour fédérale

Date: 20120711

Docket: T-586-11

Citation: 2012 FC 876

Ottawa, Ontario, July 11, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

DAN FANNON

Applicant

and

REVENUE CANADA AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Daniel Lawrence Fannon, seeks judicial review of a decision by the Minister of National Revenue (Minister) that he was unable to deduct child care expenses under subsection 63(3) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the Act) because his son did not reside with him during the relevant taxation years.

[2] For the reasons set out below, I am dismissing his application.

I. Background

[3] The Applicant made various requests to the Canada Revenue Agency (CRA) to allow the deduction of his child care expenses under the Act in the interests of fairness.

[4] In a letter dated June 23, 2010, the CRA advised him that he was not entitled to claim child care expenses because his son did not reside with him from 2001 to 2008 as required by subsection 63(3). His 2007 and 2008 years would be readjusted to disallow child care expenses; however, the CRA was statute barred from reassessing the 2006 income tax year.

[5] Shortly thereafter, the Applicant requested a response to a previous request. The CRA sent another letter dated July 7, 2010 reiterating its position by stating:

> As you were advised in our letter dated June 23, 2010 your claim for child care expenses is not allowable as your son did not reside with you. Therefore, your request for child care expenses for the 2001-2005 taxation years cannot [*sic*] accepted under the taxpayer relief provisions.

[6] The Applicant applied to this Court for judicial review of the CRA's decisions. On consent, the Minister reconsidered the decisions not to allow the deduction of child care expenses.

[7] On March 14, 2011, the Applicant was informed of the subsequent denial of his request. The letter confirmed the following:

> To qualify for the child care expense deduction, the child must have resided with you at the time the expenses were incurred.
>
> Our review indicates that your son did not reside with you during the 2001 to 2008 tax years. Furthermore, you do not have a shared custody agreement in place. Consequently, are not entitled to claim the deduction for child care expenses at this time.
>
> […]
>
> When we initially assessed your 2007 and 2008 tax returns you received a refund. Subsequently, your returns were reassessed to correct the child care deductions claim, resulting in a balance owing. When we issue a refund that is more than the amount you are entitled to receive, you have to repay the extra amount, plus any credit interest that we allowed on it.

[8] The Applicant now challenges this decision seeking taxpayer relief for child care expenses in the years 2001 to 2005.

II. Issues

[9] The issues raised by this application include:

(a) Is the Minister's decision to deny the deduction of child care expenses reasonable?

(b) Does the definition of child care expense in subsection 63(3) of the Act violate section 15(1) of the *Canadian Charter of Rights and Freedoms*?

III. Analysis

A. *Is the Minister's Decision to Deny the Deduction of Child Care Expenses Reasonable?*

[10] Discretionary decisions of the Minister under the Act are afforded deference based on the reasonableness standard of review (see *Barron v Canada (Minister of National Revenue – MNR)* (1997), 209 NR 392, [1997] FCJ no 175 at para 5; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 51).

[11] Applying this standard, I consider the Minister's decision not to allow the Applicant to deduct child care expenses since his son did not reside with him an acceptable outcome (see *Dunsmuir*, above at para 47).

[12] The definition of child care expense under subsection 63(3) clearly relates to a taxpayer, or supporting person, "who resided with the child at the time the expense was incurred." More generally, the provision reads:

"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	« 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) 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,

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) to perform the duties of an office or employment,

(i) remplir les fonctions d'une charge ou d'un emploi,

(ii) to carry on a business either alone or as a partner actively engaged in the business,

(ii) exploiter une entreprise, soit seul, soit comme associé participant activement à l'exploitation de l'entreprise,

(iii) [Repealed, 1996, c. 23, s. 173(1)]

(iii) [Abrogé, 1996, ch. 23, art. 173(1)]

(iv) to carry on research or any similar work in respect of which the taxpayer or supporting person received a grant, or

(iv) mener des recherches ou des travaux similaires relativement auxquels il a reçu une subvention;

(v) to attend a designated educational institution or a secondary school, where the taxpayer is enrolled in a program of the institution or school of not less than three consecutive weeks duration that provides that each student in the program spend not less than

(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 semaines consécutives, selon le cas:

(A) 10 hours per week on courses or

(A) aux cours ou aux travaux duquel chaque

work in the program, or	étudiant doit consacrer au moins dix heures par semaine,
(B) 12 hours per month on courses in the program, and	(B) aux cours duquel chaque étudiant doit consacrer au moins douze heures par mois;
(b) by a resident of Canada other than a person	*b)* d'autre part, par une personne résidant au Canada autre qu'une personne :
(i) who is the father or the mother of the child,	(i) soit qui est le père ou la mère de l'enfant,
(ii) who is a supporting person of the child or is under 18 years of age and related to the taxpayer, or	(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) 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,	(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;
[…]	[…]

[13] There is no dispute that the Applicant's son did not reside with him at the time child care expenses were incurred. As a consequence, he cannot be granted taxpayer relief for the daycare payments under the circumstances. The Applicant refers to a court order that he was to pay a

portion of his son's daycare costs, but this does not address the relevant issue of the child's residency in subsection 63(3).

[14] Having found that the Minister applied the law as it stands to the Applicant's circumstances in a reasonable manner, I am left with his contention that subsection 63(3) discriminates against non-custodial parents by disallowing the deduction of daycare expenses.

B. *Does the Definition of Child Care Expense in Subsection 63(3) of the Act Violate Section 15(1) of the Canadian Charter of Rights and Freedoms?*

[15] The Applicant argues that subsection 63(3) denies him equal benefit of the law as guaranteed by the Charter. As a non-custodial parent, he remains financially responsible for paying a portion of his son's daycare costs, but unlike a custodial parent, he is precluded from the benefit of a tax deduction.

[16] The Supreme Court identified the two-step test that the Applicant would have to satisfy in establishing a violation of his equality rights under section 15(1). It consists of two questions: (1) does the law (in this instance subsection 63(3) of the Act) create a distinction based on an enumerated or analogous ground? (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 17).

[17] I am not convinced that the Applicant's critique of the legislation would meet this test. To do so, he would first have to present evidence, or a proper factual foundation as it is referred to in the relevant jurisprudence, in support of his claim (see *Williams v Canada (Minister of National*

Revenue – MNR), 2011 FC 766, [2011] FCJ no 959; *MacKay v Manitoba*, [1989] 2 SCR 357, [1989] SCJ no 88). His affidavit does not address whether subsection 63(3) creates a disadvantage by perpetuating prejudice or stereotypes. He merely asserts that he is denied a tax benefit given to custodial parents.

[18] In addition, while on its face the provision creates a distinction between those parents who have a child living with them and those who live apart but otherwise incur child care expenses; it is not clear that this would relate to an enumerated or analogous ground. In this regard, I see no reason to depart from the decision of Justice Webb of the Tax Court as it addressed the issue at the urging of the Applicant in the context of an appeal of his reassessments (*Fannon v Canada*, 2011 TCC 503, [2011] TCJ no 408). Justice Webb concluded:

> 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*.
>
> […]
>
> 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*.

[19] In addition, the Applicant cannot demonstrate that this distinction is discriminatory in accordance with the second step of the test. Relevant factors in that step of the analysis include a pre-existing disadvantage, correspondence with actual characteristics and the nature of the interest affected (see *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCJ no 12 at para 66; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, [1999] SCJ no 12).

[20] There is no pre-existing disadvantage for those non-custodial parents paying child care expenses. They are not "disadvantaged" in the sense of being vulnerable, prejudiced or facing a negative social characterization (*Kapp*, above at para 55).

[21] Similarly, any correspondence between the distinction made in the provision and the Applicant's actual characteristics or circumstances is not established in this case. From *Withler*, above at para 67 it is clear:

> […] 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.

[22] The purpose of subsection 63(3) of the Act is to allow a tax deduction for those incurring child care expenses to carry on employment, a business, research or attend an educational institution. The Applicant did not directly incur expenses to engage in these activities as his son was not residing with him during the relevant period. I accept the position of the Respondent that the Applicant's situation is not reflective of the purpose for which the provision was intended. As in *Withler*, above at para 38, "the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis."

[23] The nature of the Applicant's interest in this matter is financial as he is unable to deduct child care expenses. The Supreme Court made clear in, for example, *Granovsky v Canada (Minister of Employment)*, 2000 SCC 28, [2000] 1 SCR 703 at para 58 that "it is not just whether the appellant has suffered the deprivation of a financial benefit" and that something more is required to establish a violation of section 15(1) of the Charter.

IV. Conclusion

[24] It was reasonable for the Minister to deny the Applicant child care expense deductions based on the requirements of subsection 63(3) of the Act. His section 15(1) Charter claim must also fail. The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-586-11**
STYLE OF CAUSE:	**FANNON v REVENUE CANADA AGENCY**
PLACE OF HEARING:	**LONDON**
DATE OF HEARING:	**APRIL 18, 2012**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**JULY 11, 2012**

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