Fannon v Revenue Canada Agency, 2012 FC 876

Reasonableness of the Minister's Denial of Child Care Expense Deductions Pursuant to Subsection 63(3) in the Interest of Fairness AND Constitutionality of the Definition of Child Care Expenses in that Subsection

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There were two issues before the Court here:

- the reasonableness of the minister's discretionary decision under the fairness provision.
- whether the definition of child care expenses in subsection 63(3) violates section 15(1) of the *Charter*. [I use the term section and not subsection in reference to 15(1) as this is the term the court uses].

The Father of a child ("taxpayer") wanted to deduct day care expenses he was ordered to pay for a child who did not reside with him. The taxpayer requested to be allowed to deduct child care expenses pursuant to subsection 63(3) of the ITA in the interest of fairness. The CRA did not allow the deduction on the basis that the child did not live with the taxpayer in the years in question, and that they could not be accepted under the taxpayer relief provisions. The taxpayer applied for judicial review to the Federal Court.

The Court held that that the Minister's denial of the deduction for a child who did not reside with him was an acceptable [and reasonable] outcome, and that the definition of "child care expenses" in subsection 63(3) did not violate section 15(1) of the *Charter*. Something more than merely the denial of financial benefit is required to make out a section 15(1) violation.

The Court identified the standard of review for discretionary decisions of the Minister under the ITA as reasonableness.

The court reviewed the definition of child care expenses in subsection 63(3), which clearly relates to the supporting person who resided with the child at the time the expense was incurred. Based on this, the court found that the Minister's denial of the deduction for a child who did not reside with him was an acceptable outcome.

The Court then addressed the question of subsection 63(3) discriminating against non-custodial parents by disallowing the deduction of daycare expenses. The taxpayer argued that he was denied equal benefit of the law, since as a non-custodial parent he remained liable to pay a portion of the daycare costs, but is denied the benefit of the tax deduction.

After identifying the two part rests for section 15(1) as identified by the Supreme Court of Canada in *R v Kapp*, 2008 SCC 41, the court expressed doubt as to the taxpayers ability to satisfy the test on two grounds:

- There was no evidence or proper factual foundation to address the question of whether

subsection 63(3) creates a disadvantage by perpetuating prejudice of stereotyping; and
- It was unclear whether non-custodial parents were an analogous group to those enumerated in section 15(1).

The FC saw no reason to depart from Justice Webb's decision in Fannon v Canada, 2011 TCC 503, where the *Charter* argument was addressed, and quoted:

> [B]ased 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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> 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.

The Court also noted that the taxpayer was unable to demonstrate that the distinction is discriminatory because the relevant factors of pre-existing disadvantage, correspondence with actual characteristics and the nature of the interest affected were not present. " There is no pre-existing disadvantage for those non-custodial parents paying child care expenses [, and T]hey are not “disadvantaged” in the sense of being vulnerable, prejudiced or facing a negative social characterization".

Finally, the court considered whether there is a correspondence between the distinction made in the provision, and the characteristics or circumstances of the individual. The Court accepted the Crown's position that the taxpayer's circumstances did not match the purpose of the provision. The purpose of subsection 63(3) of the ITA is to allow a tax deduction those incurring child care expenses to carry on employment, business, research, or educational pursuits. The taxpayer did not directly incur child care expenses to engage in these activities because the child was not residing with him. Justice Near also referred to the SCC decision in Granovsky v Canada (Minister of Employment), 2000 SCC 28, where it was said that something more than a deprivation of a financial benefit is required to establish a violation of section 15(1) of the *Charter*.