Docket: 2012-2713(IT)I

BETWEEN:

JEAN-CLAUDE DUBUC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 22, 2013, at Montréal, Quebec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agents for the appellant:	**Yuval Levy, student-at-law**
	Dorothy Laverdière, student-at-law
Counsel for the respondent:	**Amelia Fink**
	Dany Leduc

AMENDED JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2010 taxation year is dismissed, in accordance with the attached Reasons for Judgment.

This Amended Judgment is issued in substitution for the Judgment dated April 28, 2014.

Signed at Ottawa, Canada, this 5th day of June 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 18th day of July 2014
Daniela Guglietta, Translator

Citation: 2014 TCC 115
Date: 20140703
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AMENDED REASONS FOR JUDGMENT

Masse D.J.

[1] This case involves the constitutional validity of subsection 118(5) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the ITA). The appellant submits that subsection 118(5) of the ITA is discriminatory and infringes his constitutional right to equality protected by subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, constituting Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the Charter).

Factual background

[2] There is no dispute concerning the factual background of this case. The appellant and Johanne Martineau were married on September 10, 1994, and had three children. The marriage ended and the two parents stopped living together on June 19, 2005. Their divorce was obtained on February 17, 2010. They have shared custody of their three minor children since their separation. Both parents support the children's standard of living when they are with him or with her and share specific expenses 50/50. The appellant pays his former spouse child support. For the 2010 taxation year, the appellant entered an agreement with his former spouse. Said agreement (see Exhibit A-1, tab 4) provided that the appellant file a claim for a dependent tax credit for one of their three children, which the appellant did.

[3] On December 19, 2011, the Minister of National Revenue (the Minister) in applying the provisions of subsection 118(5) of the ITA, issued a Notice of Reassessment in respect of the taxation year stating that the Minister was disallowing the amount of $10,382 for wholly dependent persons as well as the child amount of $2,101 used to compute the non-refundable tax credit that he had claimed for one of his children. The Minister stated that the appellant could not file a claim for tax credit for a child when he made or was required to make support payments for the child.

[4] Paragraph 118(1)(*b*.1) of the ITA provides a tax credit for a taxpayer's dependents, who are under the age of 18 years. Subsection 118(5) of the ITA provides that this credit is not available for a child in respect of whom the taxpayer has paid child support amounts to his spouse or former spouse. The appellant appeals the Notice of Reassessment by challenging the constitutionality of subsection 118(5) of the ITA.

The appellant's position

[5] The appellant submits that the Act is discriminatory, unjust and unfair in this case. He supports his children when they are with him, which means 50% of the time. He is a single parent living alone with his children and also pays child support to his former spouse. Subsection 118(5) of the ITA precludes the appellant from claiming tax credits in respect of his children. While parents in a partnership are free to agree on which of the two parents will claim the tax credit, separated parents are denied this freedom by a statutory provision applied blindly.

[6] The appellant submits that subsection 118(5) of the ITA is unconstitutional, because it infringes his right to contractual agreement solely on the basis of his marital status, ground of discrimination analogous to the grounds of discrimination prohibited by subsection 15(1) of the Charter. The appellant states that this discrimination is unjustifiable in a free and democratic society.

[7] The appellant requests that subsection 118(5) of the ITA be invalidated under section 52 of the Charter, or alternatively, the appellant asks for a broad interpretation of subsection 118(5.1) of the ITA to include respect for the contractual freedom between former spouses, thus restoring equality between the appellant, a divorced father paying child support and, and his counterparts in a partnership, to freely enter into an agreement with the mother of their children on tax credits for the children.

The respondent's position

[8] The respondent submits that subsection 118(5) of the ITA provides that the wholly dependent person credit or the amount for a child under the age of 18 may not be deducted under paragraphs 118(1)(*b*) and 118(1)(*b.1*) of the ITA by a taxpayer required to pay a support amount (within the meaning assigned by subsection 56.1(4) of the ITA. The respondent submits that subsection 118(5) of the ITA does not violate the right to equality protected by subsection 15(1) of the Charter. Therefore, the appeal must be dismissed.

Statutory provisions

[9] Subsection 15(1) of the Charter reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[10] The relevant provisions of the ITA are as follows:

> 56.1(4) "support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and
>
> > (*a*) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or
> >
> > (*b*) the payer is a legal parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.
>
> . . .
>
> 118(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4))

> to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual
>
> > (*a*) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or
> >
> > (*b*) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.
>
> 118(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a deduction under paragraph (*b*) or (*b.1*) of the description of B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.

Analysis

[11] Paragraph 118(1)(*b*) of the ITA provides a personal credit for the taxpayer who supports the wholly dependent person. Paragraph 118(1)(*b*.1) of the ITA provides a personal credit for the taxpayer who supports a child. However, based on subsection 118(5) of the ITA, no amount may be deducted under subsection 118(1) of the ITA by the taxpayer in respect of a person where the taxpayer is required to pay a support amount (as defined in subsection 56.1(4) of the ITA) in respect of the person.

[12] In the case at bar, the appellant and his former spouse agreed that the appellant would be entitled to claim the tax credits for dependent persons and children.

[13] However, it is clear that the agreement of the parties cannot change the requirements of the Act and, further, cannot bind the tax authorities. In *Ross J. Cunningham v. The Queen*, 2012 TCC 279 (CanLII), the taxpayer and his former spouse agreed that the taxpayer was entitled to the tax credit for a dependent person. Justice Boyle of the Tax Court of Canada held as follows at paragraph 16:

> [16] I am not unsympathetic to the fact that the Appellant is not receiving the benefit of the child credit in 2009 even though he and his ex-wife agreed he would be the one entitled to claim it during that year of shared custody. Instead, I am told that she claimed the deduction in 2009. However, the agreement of the parties cannot change the requirements of the *Act*. I am also not unsympathetic to the fact that the Appellant, a tax professional, cannot discern a policy basis or other reason

> for such differing tax results in the cases of shared custody and split custody. Nonetheless, it is clear that the provisions of the Guidelines and of the child tax credit, as they are worded and as they have been interpreted by the Courts, do not allow Mr. Cunningham's appeal to succeed.

[14] In *Daniel Beaudoin v. The Queen*, 2010 TCC 600 (CanLII), the father of a child had to pay the mother child support according to the terms of a divorce judgment. The parents were granted shared custody of their child with alternating weeks of custody. The Superior Court amended the divorce judgment by allocating to the father all child amounts for taxation years 2007 and following. The Minister disallowed the father's claim for the wholly dependent person credit under paragraph 118(1)(*b*) of the ITA and the child amount under paragraph 118(1)(*b.1*) of the ITA. The father appealed to the Tax Court of Canada. Justice Favreau dismissed the appeal finding that a Superior Court judgment in which all child amounts are allocated to one parent cannot derogate from the requirements of the ITA and particularly those of subsection 118(5) of the ITA. A judge who does so exceeds the jurisdiction of his or her court.

[15] In the case at bar, the appellant submits that subsection 118(5) of the ITA is discriminatory and infringes the right to equality protected by subsection 15(1) of the Charter. One must therefore ask, what is discrimination? Justice McIntyre of the Supreme Court defined discrimination as follows in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pages 174-175:

> . . . discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those [page175] based on an individual's merits and capacities will rarely be so classed.

[16] The test to be applied when determining whether an Act infringes subsection 15(1) of the Charter was set out by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CanLII 675:

> 1. whether a law imposes differential treatment between the claimant and others, in purpose or effect;

2. whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

3. whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

[17] Chief Justice McLachlin and Justice Abella of the Supreme Court of Canada restated the test in *Kapp v. Canada*, 2008 SCC 41. They established a two-part test for assessing a s. 15(2) claim at paragraph 17:

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

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

These were divided, in *Law*, *supra*, into three steps, but in the Court's view the criteria set out in *Kapp*, *supra*, are, in substance, the same as in *Law*, *supra*. Thus, in my view, case law centred on the application of the analysis based on *Law*, *supra*, remains authoritative.

[18] It is settled law that subsection 118(5) of the ITA does not infringe the equality guarantee in subsection 15(1) of the Charter: see *Nixon v. The Queen*, [1999] T.C.J. No. 885 (QL); *Nelson v. Canada (AG)*, 2000 CanLII 16332 (FCA); *Keller v. The Queen*, [2002] 3 C.T.C. 2499; *Werring v. The Queen*, [2002] 3 C.T.C. 2876; *Frégeau v. R.*, 2004 TCC 293 (CanLII); *Giorno v. R.*, 2005 TCC 175 (CanLII); *Donovan v. R.*, 2005 TCC 667 (CanLII); *Calogeracos v. R.*, 2008 TCC 389 (CanLII); and *Sears v. R.*, 2009 TCC 22 (CanLII).

[19] *Nelson v. Canada*, [2000] 4 CTC 252, is a case where the facts are analogous to those of the case at bar. Mr. Nelson and his former spouse had joint custody of their children. He paid child support to his former spouse for the children. He claimed a tax credit in respect of one of his children under paragraph 118(1)(*b*) of the ITA which was disallowed under subsection 118(5) of the ITA. Mr. Nelson appealed to the Tax Court of Canada arguing that his equality rights protected by subsection 15(1) of the Charter were breached under subsection 118(5) of the ITA. The Tax Court Judge dismissed his appeal. In the Federal Court of Appeal, Justice Sharlow dismissed the application for judicial review because Mr. Nelson did not comply with the requirements of subsection 57(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which requires that notice of the constitutional question be served on the Attorney General of Canada and the attorney general of each province. As for the constitutionality of subsection 118(5) of the ITA, Justice Sharlow rules as follows:

> [10] Mr. Nelson's argument is that subsection 118(5), in denying him the equivalent to married tax credit for his son, resulted in a disadvantage to him that amounts to a breach of his rights under subsection 15(1) of the Charter. . . .
>
> [11] As explained above, the critical fact that led to the application of subsection 118(5) is Mr. Nelson's obligation to pay child support to his former spouse in respect of his son even though he lives with and supports his son and has joint custody. I would identify the relevant comparator group in Mr. Nelson's case as a single parent who lives with and supports a child in a shared custody arrangement with the child's other parent but who has no legal obligation to pay child support to the other parent.
>
> [12] In my view, the differential treatment created by subsection 118(5) of the *Income Tax Act* is not based on one of the grounds enumerated in subsection 15(1) of the Charter or an analogous ground. Subsection 118(5) does not draw a distinction between Mr. Nelson and the comparator group based on personal characteristics, or the stereotypical application of presumed group or personal characteristics, and does not bring into play the purpose of subsection 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage. Nor does the operation of subsection 118(5) of the *Income Tax Act* offend Mr. Nelson's dignity, intrinsic worthiness or self-respect. Therefore, the differential treatment resulting from subsection 118(5) is not discriminatory in the Charter sense.
>
> [13] The premise underlying Mr. Nelson's argument is that Parliament should provide equal tax relief to all single parents who support their children in a shared custody arrangement. While that may be a laudable public policy objective, it is not one that can be advanced through a claim under subsection 15(1) of the Charter. Mr. Nelson's remedy lies with Parliament alone.

[20] This decision is still authoritative on this issue and can in itself warrant the dismissal of the appeal. However, I will perform an analysis under the criteria set out in *Kapp*, *supra*.

[21] In *Withler v. Canada (Attorney General)*, 2011 SCC 12, Chief Justice McLachlin and Justice Abella of the Supreme Court of Canada established that the analysis under the two steps in *Kapp*, *supra*, reflect the fact that not all distinctions are, in and of themselves, contrary to s. 15(1) of the Charter. Equality is not about sameness and s. 15(1) of the Charter does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s. 15(1), a person must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by

law but, in addition, must show that the legislative impact of the law is discriminatory: (see *Withler*, *supra*, paragraph 31).

The first stage—does the law create a distinction based on an enumerated or analogous ground?

[22] The appellant submits that the obligation to pay child support applies primarily to men and therefore subsection 118(5) of the ITA amounts to indirect or adverse effect discrimination against men which is based on an enumerated ground, sex. I disagree.

[23] Support amounts are determined on the basis of each parent's income and not on the basis of the sex of the parent. Although historically, fathers' income have been higher than the income of their children's mother, in cases where the mother's income is higher than that of the father, which is becoming more and more frequent, the father would not have to pay support and would be entitled to claim tax credits. Thus, paying support and entitlement to claim a tax credit have nothing to do with the sex of the payer or of the beneficiary.

[24] In *Calogeracos v. R.*, 2008 TCC 389, the Tax Court of Canada concluded that the legislation here under review does not draw a distinction between males and females. Justice Webb, now of the Federal Court of Appeal, stated as follows from paragraph 20 to paragraph 22:

> [20] The Appellant submitted some statistical data to establish his basis for claiming that in general it is males who are required to make support payments in shared custody situations. . . . The data that was submitted did show that in joint custody situations it is generally, by a significant margin, the male who is paying child support.
>
> [21] However it is subsection 118(5) of the Act that is to be analyzed to determine whether this subsection of the Act draws a distinction between males and females. . . .
>
> [22] In this case the provision in question neither makes a formal distinction between males and females nor does it fail to take into account the Appellant's already disadvantaged position within Canadian society. It draws a distinction based on whether the individual is paying child support, which is based on the income levels of the parents since the obligation to pay child support is based on the relative income of the parents. The fact that in most joint or shared custody arrangements it is the male who is making child support payments cannot be grounds for a claim for

> discrimination by the Appellant as males who make more money than females are not in a disadvantaged position in Canadian society.

I am in complete agreement with Justice Webb.

[25] The appellant also alleges that the obligation to pay support disproportionately impacts divorced custodial parents, as they do not have the right to decide who can claim the tax credits as is the case with parents who are not separated. Thus, subsection 118(5) of the ITA denies the appellant the right to enter into a contractual agreement, thereby adversely affecting divorced custodial parents based on their marital status, an analogous ground. Again, I disagree.

[26] At paragraph 206 of *Thibaudeau v. Canada*, 1995 CanLII 99, [1995] 2 SCR 627 (SCC), Justice McLachlin (as she then was) made it clear that the status of separated or divorced custodial parent is an analogous ground within the meaning of s. 15 of the Charter. However, with respect to subsection 118(5) of the ITA, Justice Bédard in *Frégeau v. R.*, 2004 TCC 293, unequivocally stated that the fact of being a separated or divorced parent is not the reason why the appellant is not entitled to the credit in paragraph 118(1)(*b*) of the ITA. The distinction is not the marital status or the family status of the divorced custodial parent, but rather the fact that he pays child support to his former spouse. Justice Bédard stated as follows at paragraph 20:

> [20] Is the Appellant, because of subsection 118(5) of the Act, being treated differently based on a personal characteristic? I must respond to that question in the negative. Although the Appellant's Agents maintain that the differential treatment endured by the Appellant results from his family status, the differential treatment is, in my opinion, caused by his obligation to pay child support. Therefore, it is not a personal characteristic analogous to those listed in section 15 of the Charter. The obligation results from family status, whether it is a personal characteristic or not. However, the fact of being a separated or divorced parent is not the reason why the Appellant is not entitled to the credit in paragraph 118(1)(*b*) of the Act. The Appellant was denied the credit in paragraph 118(1)(*b*) of the Act because he pays child support to his former spouse. Thus, the Appellant was treated differently than other separated or divorced parents who do not pay child support. The distinction depends on the pecuniary obligation resulting from an obligation to pay child support. Section 15 of the Charter seeks to prohibit differential treatment based on personal characteristics, i.e. characteristics tied to the dignity of a person such as race, national or ethnic origin, colour, religion, sex, age, physical or mental disability and all analogous grounds. Since a pecuniary obligation is not a personal characteristic analogous to those set out in section 15 of the Charter, the Appellant is not, in my opinion, being treated differently under that section of the Charter.

[27] In *Calogeracos v. R.*, *supra*, Justice Webb, observed at paragraph 18:

> [18] The reason that the obligation was imposed upon the Appellant by the court order is because his income was higher than that of his former spouse. Level of income is not a personal characteristic enumerated in section 15 of the Charter nor is it analogous. The obligation to pay child support (which is based on the relative level of income of the parents) is therefore not an analogous ground. Therefore, this factor cannot be changed for the comparator group.

[28] To constitute an analogous ground a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity must exist: *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, paragraph 13. The obligation to pay child support, which is based, *inter alia*, on income levels, cannot constitute an immutable personal characteristic: see *Donovan v. R.*, 2005 TCC 667, at paragraph 18; *Sears v. R.*, *supra*, at paragraphs 30 and 44; *Calogeracos v. R.*, *supra*, at paragraph 18; and *Giorno v. R.*, 2005 TCC 175, at paragraph 21.

[29] All parents, whether divorced or not, separated or not, have an obligation to provide for their children, whether the parent is married or not; whether the parent is separated or not. The obligation imposed by a court or by an agreement to pay support is merely a means to ensure that a separated and/or divorced parent is carrying out his or her legal and moral duties of providing for his or her children. To require a parent to provide for his or her children is not discriminatory and does not disproportionately impact separated or divorced parents.

[30] I find that subsection 118(5) of the ITA does not infringe subsection 15(1) of the Charter, as it does not create a distinction based on an enumerated or analogous ground within the meaning of subsection 15(1) of the Charter.

<u>The second stage—does the distinction create a disadvantage by perpetuating prejudice or stereotyping?</u>

[31] Having found following the analysis of the first stage that subsection 118(5) of the ITA does not infringe subsection 15(1) of the Charter, it is not necessary to continue the analysis. However, I must comment on the second stage.

[32] A distinction based on an enumerated or analogous ground is not in itself a justification to establish that there is a violation of subsection 15(1) of the Charter. At the second stage of the analysis, the Court must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction

discriminates by perpetuating the group's disadvantage or by stereotyping the claimant's group; see *Withler v. Canada (Attorney General)*, *supra*, at paragraph 71. In my view, the legislation does not have a discriminatory effect, taking account of the tax purpose of the law and the appellant's situation. The legislation neither stigmatizes men nor separated custodial parents and does not stereotype them.

[33] In *Donovan v. The Queen*, *supra*, Justice Hershfield of the Tax Court of Canada had to consider whether the impugned law perpetuated disadvantage or stereotyping. While Justice Hershfield discussed the third branch of the test in *Law*, *supra*, his words are applicable to the second branch of the test in *Kapp*, *supra*:

> [19] As to the third inquiry, to find that an impugned provision violates section 15 rights under the *Charter*, the burden imposed on the Appellant or the benefit denied, must be reflective of a stereotypical application of a presumed personal characteristic or have the effect of perpetrating the view that the Appellant, as a custodial supporting parent, is less worthy of recognition as a parent or less deserving of equal respect.
>
> [20] Being denied personal tax credits is not demeaning, in my view. A reasonable person would not, in my view, suggest that one's personal dignity or self-worth as a supporting custodial parent has been attacked by the denial of a personal tax credit. Fiscal inequalities in these circumstances are not based on some pejorative stereotype of joint custodial parents who are required by their economic circumstances to contribute to the support of a child while in the custody of the other parent. That the tax policy behind the impugned provision may be difficult to defend, does not reflect or perpetrate a negative stereotype in these circumstances. The *Charter* cannot be employed simply because an identifiable group is treated fiscally unfairly. The purpose of the *Charter* is not to protect against bad tax policy which at best this appeal is all about. This is not about human dignity. This is not about a provision that reflects a misunderstanding of the Appellant's merit as a parent. This is not a provision that stigmatises supporting custodial parents. The Appellant's place within Canadian society has not been marginalized by the denial of a tax credit.
>
> [21] Accordingly, even allowing, and I do not, that the second enquiry has met (i.e. that the impugned provision results in differential treatment based on an analogous ground), these findings in respect of the third enquiry fall short of engaging the *Charter* in this case.

I could not have stated it better.

[34] In *Sears v. The Queen*, *supra*, Mr. Sears argued that he was in an "analogous group" on the basis that he is a parent who pays child support. He stated that discrimination on that basis touches the essential dignity and worth of an individual

in the same way as other recognized grounds of discrimination which violate fundamental human rights or norms. These contentions were rejected by Justice Margeson of the Tax Court of Canada.

[35] Justice Gonthier of the Supreme Court of Canada, in discussing the nature and the operation of the ITA in *Thibodeau v. Canada*, *supra*, stated at paragraph 91:

> It is of the very essence of the ITA to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests. In view of this, the right to the equal benefit of the law cannot mean that each taxpayer has an equal right to receive the same amounts, deductions or benefits, but merely a right to be equally governed by the law. The basic purpose of s. 15 of the Charter was explained by McIntyre J. in Andrews, supra, at p. 171:
>
> > It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.
>
> That being the case, one should not confuse the concept of fiscal equity, which is concerned with the best distribution of the tax burden in light of the need for revenue, the taxpayers' ability to pay and the economic and social policies of the government, with the concept of the right to equality, which as I shall explain in detail later means that a member of a group shall not be disadvantaged on account of an irrelevant personal characteristic shared by that group.

[36] In my view, the tax credits in this case were not created in favour of the parents, but rather in favour of children or dependents. It is clear that the purpose of the impugned legislation is the distribution of the financial resources between separated parents for the benefit of their children.

[37] Furthermore, there is another very important fact that weighs against the appellant's position. The support payable by the appellant was determined based on his income as well as the income of his former spouse in accordance with the *Federal Child Support Guidelines*. The Guidelines were designed taking into account the various federal and provincial income taxes and credits. Thus, tax credits have already been accounted for even before a court may establish the support amount in under the Guidelines. Therefore, the fact that only the beneficiary of support may claim tax credits does not create a disadvantage or prejudice to the payer of said support. Justice Bédard, in *Frégeau*, *supra*, further explains this and I repeat his dictum:

[30] The Appellant's Agents also state that the distinction resulting from the application of subsection 118(5) of the Act is discriminatory because Quebec's Regulation respecting the determination of child support payments, like the Federal Child Support Guidelines, does not take the credit for a wholly dependent person into account.

[31] In my opinion, that claim is also incorrect because the Federal Child Support Tables seem to have been designed with a number of elements in mind, including the credit for a wholly dependent person, as indicated in the Federal Child Support Guidelines (emphasis added):

> 6. The formula referred to in note 5 sets support amounts to reflect average expenditures on children by a spouse with a particular number of children and level of income. The calculation is based on the support payer's income. The formula uses the basic personal amount for non-refundable tax credits to recognize personal expenses, and takes other federal and provincial income taxes and credits into account. Federal Child Tax benefits and Goods and Services Tax credits for children are excluded from the calculation. At lower income levels, the formula sets the amounts to take into account the combined impact of taxes and child support payments on the support payer's limited disposable income.

[32] Thus, in setting out the child support amounts, the Federal Guidelines assume that the support payer will not be entitled to the credit for a wholly dependent person. Consequently, although the taxpayer paying child support does not benefit from the credit for a wholly dependent person because he or she pays support, the support paid by that taxpayer was established based on the fact that he or she is not entitled to receive the personal tax credit in question.

[Emphasis added.]

[33] Without evidence refuting the legislator's claim that the formula used to establish the Federal Guideline Tables takes into account the denial of the tax credit in subsection 118(1) of the Act for the taxpayer who pays child support, I cannot reach such a conclusion. The part of the 1996 budget entitled "The New Child Support Package" indicates, at page 12, that:

> The Schedule amounts are fixed by a formula that calculates the appropriate amount of support in light of economic data on average expenditures on children across different income levels. The formula reserves a basic amount of income for the payer's self-support, and adjusts for the impact of federal and provincial income taxes. There are separate tables for each province to take differences in provincial

> income tax rates into account. The Schedules for each province and territory are included in the Annex.

The Honourable Paul Martin made the following comments concerning the legislator's decision to change the tax treatment:

> The equivalent-to-married credit is provided to a single parent of a child under the age of 18. Currently, the *Income Tax Act* provides that the recipient of child support, not the payer, is eligible to claim the credit.
>
> This treatment will continue to apply under the new rules. This approach is consistent with the new federal child support guidelines, under which award levels are set based on the assumption that it is the recipient spouse who claims the equivalent-to-married credit.

And:

> Subsection 118(5) of the Act provides that an individual who is entitled to a deduction under paragraph 60(*b*), (*c*) or (*c*.1) of the Act in respect of a support payment for the maintenance of a spouse or child is not also entitled to claim a credit under section 118 in respect of that spouse or child.
>
> Subsection 118(5) is amended as a consequence of the changes to the treatment of child support. As amended, subsection 118(5) provides that an individual is not entitled to claim a credit under subsection 118(1) in respect of a person if the individual is required to pay a support amount to his or her spouse or former spouse for that person and the individual either is living separate and apart from the spouse or former spouse throughout the year because of marriage breakdown or is claiming a deduction for support payments.
>
> Under this new wording, where an individual is required to make child or spousal support payments in years following the year of marriage breakdown, no credits under subsection 118(1) will be available to the individual in respect of the spouse or child, even in cases where such support payments are not made or, if made, are not deductible. In the year in which a marriage breakdown occurs, an individual may be able to claim credits under subsection 118(1) if he or she does not claim a deduction for support payments.
>
> These amendments apply to the 1997 and subsequent taxation years.

> I must conclude that the Federal Child Support Guidelines do take the credit for a wholly dependent person into account. Therefore, the Appellant has not met the burden of proving the opposite effect and thus that argument must be dismissed.

[38] Having found that subsection 118(5) of the ITA does not infringe section 15 of the Charter, it is not necessary to determine whether subsection 118(5) of the ITA constitutes a law, within reasonable limits, as can be demonstrably justified in a free and democratic society under section 1 of the Charter.

Conclusion

[39] In conclusion, I am of the view that subsection 118(5) of the ITA does not create a distinction that is based on an enumerated ground, that is, sex, or an analogous ground, that is, marital status. If such a distinction exists, the distinction does not create a disadvantage by perpetuating prejudice or stereotyping.

[40] I therefore conclude that subsection 118(5) of the ITA does not infringe the right to equality protected by subsection 15(1) of the Charter.

[41] Since the constitutional issue was the sole ground of appeal, the appeal is dismissed.

These Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment dated April 28, 2014.

Signed at Kingston, Ontario, this 3rd day of July 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 18th day of July 2014
Daniela Guglietta, Translator

CITATION:	2014 TCC 115
COURT FILE NO.:	2012-2713(IT)I
STYLE OF CAUSE:	JEAN-CLAUDE DUBUC v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 22, 2013
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF AMENDED JUDGMENT:	June 5, 2014
DATE OF AMENDED REASONS FOR JUDGMENT:	July 3, 2014

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