Federal Court of Appeal | Cour d'appel fédérale

Date: 20160111

Docket: A-473-14

Citation: 2016 FCA 4

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

JAMES T. GRENON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on November 5, 2015.

Judgment delivered at Ottawa, Ontario, on January 11, 2016.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Background

[1] The appellant incurred legal fees and costs in contested proceedings to determine the amount of child support payments to be paid by him to his ex-wife. He then sought to deduct those expenses from his 1999 and 2000 income. The Minister denied the deduction and assessed accordingly. The appellant appealed the assessments to the Tax Court of Canada.

[2] In a decision (2014 TCC 265) per Justice Graham, the Tax Court dismissed the appellant's challenge. The appellant appeals from that decision and, for the reasons that follow, I would dismiss the appeal.

[3] There are three legislative provisions in issue. Paragraph 18(1)(a) of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (*ITA*) allows a taxpayer to deduct an expense if it "was made or incurred for the purpose of gaining or producing income from the business or property." Subsection 248(1) defines property as including "a right of any kind whatever, a share or a chose in action." To round out the legislation in issue, section 60 prescribes certain expenses which, in addition to those that fall within the ambit of paragraph 18(1)(a), are also permissible deductions.

[4] The combined effect of subsections 18(1) and 248(1) of the *ITA*, judicially interpreted, is to allow the deduction of legal fees and costs incurred by a taxpayer in obtaining, enforcing or varying child support payments, but to deny the deduction of the expenses incurred by taxpayers who pay child support payments.

II. The Tax Court decision

[5] The appellant advanced two arguments before the Tax Court.

[6] The first was predicated on what the appellant contended was the correct interpretation of paragraph 18(1)(a) of the *ITA*. The second was predicated on the *Canadian Charter of Rights and Freedoms* (*Constitution Acts*, 1867 to 1982, Part I) (*Charter*), specifically, that a tax regime which allows recipients of child support payments, but not payors of child support payments, to

deduct their legal fees violates subsection 15(1) of the *Charter* on the basis of sex and family status.

[7] The judge rejected the statutory interpretation argument. He found that the decision of this Court in *Nadeau v. M.N.R.*, 2003 FCA 400 was dispositive of that issue. In *Nadeau*, Noël J.A. (now Chief Justice), speaking for the Court, concluded at paragraph 14 that "…the cases have consistently held for more than forty years that the right to support, once established by a court, is 'property' within the meaning of subsection 248(1) of the Act, and that the income from such support constitutes, in the hands of the person receiving it, income from property." Graham J. also rejected the argument that it was a necessary corollary to the ruling in *Nadeau* that legal expenses incurred by the appellant which, by reducing the scope of his obligation to pay support, preserved or maintained his income, were also incurred "to gain or produce income from property" and should be deductible.

[8] Further, after reviewing the legislative history with respect to the tax treatment of child support payments, the judge concluded that Parliament did not intend to alter the longstanding interpretation of paragraph 18(1)(a) to include child support payments as property. For over 40 years, payors have been precluded from deducting their legal expenses, and Parliament did nothing to intervene. He noted, as did this Court in *Nadeau*, that the amendments to the *ITA* in 1996 which eliminated the inclusion of child support payments as income, were drafted so as to preserve the deduction of legal expenses under paragraph 18(1)(a).

[9] The judge also dismissed the appellant's *Charter* argument on the basis that it did not meet the criteria necessary to establish a section 15 violation most recently articulated in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396. In that decision, the Supreme Court of Canada instructed a two stage inquiry. The first stage of the section 15 analysis requires a court to determine whether the law creates a distinction based on a ground that is enumerated in section 15 or which is analogous to an enumerated ground. The second step is to determine whether the distinction creates a disadvantage by perpetuating prejudice or stereotype.

[10] The judge found that the first branch of the *Withler* test was not met as paragraph 18(1)(a) and subsection 248(1) did not, on their face, create a distinction on an enumerated or analogous ground. Tracing the reasoning of *Nadeau*, he noted that the rationale for the difference in treatment between recipients of child support payments and payors was predicated on the fact that child support payments were a pre-existing right, and as such they were "property", in the hands of the recipient. In consequence, expenses incurred to maintain or vary that right were deductible.

[11] He noted that while expenses incurred to establish a right or property interest would, under established tax principles, be considered to be on account of capital, they had nevertheless also been considered to be on account of income. While this point is neither integral to the judge's reasoning nor to the disposition of this appeal, a point arises with respect to the characterization (at para. 15) of expenditures incurred to "establish" child support.

[12] *Nadeau* is clear that the reason why the tax treatment is on account of income is because there is a pre-existing right to support. The expenditures are not, therefore, incurred to establish the right. It already exists, by operation of the common and civil law and their provincial codification.

[13] The judge concluded that the difference in treatment between payors and payees lay "solely in the fact that recipients of child support have a source of property income in the form of their right to child support payments and payors do not", and that the gender of the payor and recipient had no bearing on whether the legal costs were deductible.

[14] The judge then turned to the question whether the distinction was based on an analogous ground. Applying the test established in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 13, he concluded that having or not having a source of property income was not an analogous ground, as it was not based on a personal characteristic that was immutable or changeable only at an unacceptable cost to personal identity. The section 15 argument therefore failed. He did not consider the second prong of the *Withler* test as he did not find it necessary to do so.

[15] The judge expressed sympathy for the appellant's argument, noting that there was no "current logical basis" for the situation. He noted that "what has happened over the course of many years is that the tax system has effectively read into section 60 of the *ITA* a paragraph that permits recipients of child support to deduct their legal fees irrespective of whether those fees are

actually laid out to earn income from property." However, he considered himself bound by *Nadeau* and confirmed the assessment.

[16] Given the likelihood of an appeal, the judge reviewed the evidence of two expert witnesses called on behalf of the appellant. While he discounted much of the expert evidence on the basis of relevance and admissibility, he did accept evidence establishing that 92.8% of all payors were men. He concluded that substantially all payors of child support are men.

III. Denial of the request to re-open

[17] I will, at this point, open a parenthesis in respect of a matter of evidence. I do so given the importance of the issue in all cases where declarations under section 52 of the *Constitution Act* are sought.

[18] At trial, the Minister did not lead any evidence to support a subsection 15(2) justification or to the justification of an infringement under section 1 of the *Charter*. Nor did the Minister lead any evidence to respond to the appellant's evidence to the effect that virtually all payors were men.

[19] After the case had been closed and at the conclusion of oral submissions, the Minister's counsel sought to re-open her case to lead evidence on the subsection 15(2) and section 1 issues. The judge did not grant leave. This decision was manifestly correct.

[20] In her submissions for leave to re-open, counsel for the respondent conceded that the government knew that section 15 was a live issue and that evidence as to the underlying policy rationale for the distinction in tax treatment should be lead. Counsel indicated that the government declined to produce witnesses to give testimony with respect to the rationale underlying the different treatment between payors and payees. Counsel advised that she personally considered this course of action unwise. She would be correct. The incompleteness of the record falls squarely at the Crown's feet.

[21] In dismissing the motion for leave to re-open, the judge noted that this proceeding had a long antecedence, having been to the Court of Appeal twice on interlocutory matters and leave having been sought to the Supreme Court of Canada in respect of one of those decisions. The judge observed that the Minister expected to win the case based on reliance on *Nadeau* alone, and did not "appear to have been concerned about introducing evidence to deal with the second part of the test or to deal with a section 1 defence." He observed that the appellant was no doubt aware that the Tax Court would consider itself bound by *Nadeau*, but nonetheless introduced the required expert evidence needed to establish a record and to pursue an appeal. He concluded, correctly in my view, that "the Respondent should have known that it needed to lay the evidentiary groundwork at trial to defend a section 15 challenge on appeal."

[22] Given the disposition of this appeal, the failure to lead evidence is of no consequence. The point remains, however, that the Court was asked to grant a declaration with respect to the constitutionality of key provisions of the ITA, and to do so in the absence of relevant considerations. It is well established that questions of constitutionality should only be determined

with a full appreciation of the relevant legislative, legal, social, economic and policy context; *Mackay v. Manitoba*, [1989] 2 S.C.R. 357.

IV. Analysis

A. *The statutory interpretation argument - does paragraph 18(1)(a) of the ITA allow deduction of a payor's legal fees?*

[23] There is no provision in the *ITA* which specifically allows the deduction of legal expenses incurred to determine child support obligations. Such expenses can only be deducted if it can be established that they were incurred for the purpose of gaining or producing income from a business or property. However, as found by this Court in *Nadeau* at paragraph 18, "…the expenses incurred by the payer of support (either to prevent it from being established or increased, or to decrease or terminate it) cannot be considered to have been incurred for the purpose of earning income, and the courts have never recognized any right to the deduction of these expenditures."

[24] In light of the controlling jurisprudence, the judge correctly dismissed the appellant's argument that as his ex-wife was obligated under the terms of their separation and parenting agreement, to reimburse him for funds he expended on behalf of the children, he too had a right to income from which legal expenses could be deducted. The appellant, unlike his ex-wife, had no pre-existing right to reimbursement. As Noël J.A. noted in *Nadeau*, at paragraph 28, "it still remains that the right to support is 'property' under the Act. If the right to support is 'property', it is hard to dissociate this 'property' from the income which flows from the exercise of this right." This rationale does not apply in respect of the payor, who has no underlying right to be reimbursed.

[25] The appellant contends that the *Nadeau* interpretation of paragraph 18(1)(a) should be reconsidered. He argues that *stare decisis* alone is not a good enough reason to continue that interpretation. In support, he urges that legal expenses incurred to resist a demand for child support, serve to increase or preserve his income.

[26] In my view, this argument does not acknowledge the language in paragraph 18(1)(a) which requires that the expenses be incurred to "gain or produce" income from business or property. If there was a pre-existing source or right, there would be no issue that amounts expended to increase the income from that source are deductible. In this context however, the payor has neither a right to child support nor a stream of income stemming from a property interest.

[27] Finally, the appellant submits that the *ITA* should be interpreted in light of *Charter* values. This effectively amounts to a duplication of the appellant's *Charter* challenge to the provisions. In any event, *Charter* values can only be used as an interpretive aid where the statute is ambiguous which paragraph 18(1)(a) is not: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para 62; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, at para. 67.

[28] As the judge noted in his reasons, various judges of the Tax Court of Canada have expressed concern about the underlying tax policy with respect to child support payments. In his reasons, the judge set forth various scenarios which illustrated the absence of a logical basis for the current regime. Under the current law, even a payor who is successful in fending off

unreasonable demands in a child support dispute cannot deduct any legal expenses that are not recovered through cost awards. The implication is that through the taxation system, Parliament penalizes payors who seek vindication of their legal rights, and offers a public subsidy to one side of a private dispute. Further, the notion that the child support payment is "property" in the hands of the recipient is arguably an artifice. It is the child that has the right to be supported. The child support is money paid to the parent for the benefit of the child. These concerns are policy matters for Parliament, and do not bear on the legal question of what is "property" and whether child support is a "right of any kind" under the *ITA*.

[29] The appellant urges that Nadeau be reconsidered. In support the appellant referred us to decisions which expressed concern regarding the deductibility of legal expenses to only one side: see *Loewig v. Canada*, 2006 TCC 476; *Rabb v. Canada*, 2006 TCC 140; *McLaren v. Canada*, 2009 TCC 514; *Trignani v. Canada*, 2010 TCC 209.

[30] This Court will only depart from a previous decision where it is manifestly incorrect or where subsequent decisions require that it be reconsidered; *Miller v. Canada (Attorney General)*, 2002 FCA 370. Neither of these criteria apply to the interpretation accorded paragraph 18(1)(a) by this Court in *Nadeau* and, accordingly, this ground of appeal fails.

B. *The second issue - does subsection 18(1) of the ITA violate subsection 15(1) of the Charter?*

(1) Direct discrimination

[31] Prior to considering the reasons of the judge below, I note that in *Nadeau*, this Court, at paragraph 37, expressly declined to opine on whether the restriction on deductibility offended section 15. The *Charter* question is thus a matter of first impression in this Court.

[32] The examination of whether a law violates subsection 15(1) proceeds in two steps. At the first step, the claimant must demonstrate that the law grants an unequal benefit or imposes an unequal burden on the basis of a ground that is either enumerated in the text of subsection 15(1) or analogous thereto. At the second step, the claimant must demonstrate that the unequal treatment amounts to discrimination. This step inquires into whether the unequal treatment perpetuates stereotypes and prejudices, or whether it suggests that certain members of society are less worthy of consideration. If these steps are satisfied a breach of subsection 15(1) results, and the burden shifts to the Crown to justify the breach under either subsection 15(2) (the affirmative action provision) or section 1.

[33] The *ITA* provisions in question are, on their face, neutral and make no distinction based on an enumerated or analogous ground in section 248. Parliament defined property to include a right of any kind, and paragraph 18(1)(a) allowed deductions of expenses incurred for the purposes of gaining or producing income. Paragraph 18(1)(a) makes a distinction only insofar as it bars deductions unless the expense was incurred "for the purpose of producing or gaining

income from property." Parliament left the precise contours of that definition for the judiciary to determine.

[34] In the result, the *ITA* discriminates between those who have income from property and those who do not. The *ITA* is replete with such distinctions – between capital and income, loss and profit. The foundations of these distinctions are not the gender of the taxpayer, but the nature and source of income and the means of which it is produced. The fact that deductions may be available to limited segments of Canadian society, which may, in fact, be largely men, or largely women, does not constitute either an enumerated or analogous ground. In sum, having income from property is not an inherent or personal characteristic and to characterize this as a *Charter* violation conflates unfairness about income distribution with *Charter* rights.

[35] There is, therefore, no direct distinction based on an enumerated or analogous ground.

[36] This however, does not dispose of the *Charter* argument. A law which is neutral on its face may, unintentionally, have a disproportionate or adverse effect on a group or individual, and if so, satisfy the first step of the *Withler* analysis. The trial judge, while correct in the result, omitted this element of the section 15 analysis. He did not consider whether the provisions of the *ITA*, while not directly discriminating on the basis of gender and family status, did so indirectly and unintentionally.

(2) Adverse effect discrimination

[37] Adverse effect discrimination has been recognized as an integral part of the section 15 inquiry; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at para. 41. The question becomes whether paragraph 18(1)(a) and the definition of property in subsection 248(1), by indirectly limiting the deductibility of payors' legal expenses, intentionally or otherwise, does so on the basis of a personal characteristic. If the answer to that question is affirmative, the question becomes whether it is a discriminatory distinction.

[38] The evidence before the judge was that 92.8% of payors are men. I note, parenthetically, that while this statistic was the best evidence available to the judge, it was derived from a 2004 Department of Justice report and may not be reflective of the situation in 2014. In any event, on the evidence before the judge, the facially-neutral provisions of the *ITA* affect men far more than they do women. But this does not necessarily translate into a finding that the effect is "adverse" as contemplated by section 15.

[39] This is the false syllogism that underlies the appellant's case. The appellant confounds the fact that virtually all payors are men with the proof of adverse effect. While it is true that virtually all payors are men, and that it is mostly men that are denied the deduction, it is not a consequence of the legislation. There is no nexus between what the *ITA* requires and the consequence.

[40] Men are denied the deduction not because they are men, but because they are not, in the majority of cases, the custodial parent. Under the Child Support Guidelines, whether a person is

a payor depends either on whether they have more than 60% custody, a determination made by agreement or a court. In the case of joint custody, whether a person is a payor depends on the respective income levels of the parents. The trigger as to whether they pay or receive support payments is entirely unconnected to the *ITA*.

[41] When the Supreme Court of Canada used the language of legislation having an adverse or disproportionate impact, it did so in the context of the over-arching construct of the section 15 analysis, which is a search for substantive discrimination. To establish a section 15 violation, the appellant must establish that the law, objectively applied, has an adverse effect on men. The law, when applied to men as opposed to women, must have a qualitatively different impact on men. A mere numerical imbalance will not suffice. Just as the inquiry as to whether an impugned provision is "discriminatory" is directed to the identification of substantive inequality, adverse effect is equally infused with the requirement of substantive discriminatory impact.

[42] Paragraph 18(1)(a), as interpreted, does not affect men differently than women. Women payees are affected in the same manner and to the same extent as male payees. The impact of the law is, in terms of its effect, neutral.

[43] The *Charter* argument fails because it confounds the underlying social circumstances with the consequences of the law. Assume, for example, a special tax on the highest earning 1% of income earners in Canadian society. Such a tax may fall disproportionately on men, but that does not mean that men are subject to differential treatment within the meaning of section 15. Similarly, the fact that more women may receive the Guaranteed Income Supplement because of

age and income levels than men does not mean that women are given a benefit that men are not. Special taxes and withholding provisions in respect of foreign nationals may affect people of one ethnicity or country of origin than another.

[44] In each case, it must be established that the tax measure affects them because of or by reason of, a prohibited ground, their gender, age or ethnicity, and not as a consequential effect.

[45] Put otherwise, the section 15 analysis requires that there be a qualitative nexus between the law and the group. As noted by Iacobucci in *Symes v. Canada*, [1993] 4 SCR 695, at p. 764 "If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved." The fact that men are denied the deduction is a consequence of custody determinations made by agreement or by provincial courts, and, in the case of joint custody, income levels of the respective parents. The *Charter* analysis thus fails at the first stage.

[46] I would dismiss the appeal with costs.

"Donald J. Rennie"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED OCTOBER 3, 2014, NO. 2002-3842(IT)G

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DATED:	JANUARY 11, 2016

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