

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20120124

Docket: A-494-10

Citation: 2012 FCA 27

**CORAM: EVANS J.A.
SHARLOW J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

WILLIAM SHAWN DAVITT

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on January 24, 2012.

Judgment delivered from the Bench at Toronto, Ontario, on January 24, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 24, 2012)

LAYDEN-STEVENSON J.A.

[1] The appellant appealed to the Tax Court of Canada (Tax Court) from rulings under the *Employment Insurance Act*, S.C. 1996, c. 23 (EI Act) and the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). His appeals related to EI and CPP premiums he paid in 2007, which he argued should not have been payable because the regimes of both statutes, by which the rates are determined, discriminate on the basis of age, contrary to *Canadian Charter of Rights and Freedoms* (the

Charter). Specifically, he maintained: (a) since younger Canadians have lower incomes, the contributions required by the EI Act adversely affect them; and (b) the CPP obliges Canadians born after 1960 to contribute higher premiums and is therefore discriminatory. He further alleged that the CPP is a Ponzi scheme, illegal under the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] Justice Boyle of the Tax Court (the judge) allowed the respondent's motion to quash the appellant's notices of appeal. He also prohibited the appellant from filing further EI Act and CPP appeals without leave of the court. The judge's reasons are reported as 2010 TCC 555.

[3] The appellant appeals to this Court only with respect to the quashing of his notices of appeal. He asserts that the judge erred in so doing. He further contends that the judgment should be set aside on the basis that it gives rise to a reasonable apprehension of bias. We are of the view that the appeal must be dismissed.

[4] The appellant has been challenging the EI Act and CPP premium rates in the Tax Court since 2001. According to his memorandum of fact and law, appeals regarding future years are currently in progress (para. 19). The judge, before concluding that the notices of appeal should be quashed, summarized prior Tax Court decisions striking the appellant's appeals as well as a decision of this Court reported as *Davitt v. Canada*, 2009 FCA 362 (*Davitt I*), leave to appeal refused, [2010] SCCA No. 38. In addressing the appeals before him, the judge made a factual determination that there was "little new in his current appeals beyond additional evidence being pleaded at considerable length."

[5] In our view, there is no basis upon which to distinguish *Davitt 1* from the circumstances of this case. In *Davitt 1*, Justice Sharlow, writing for a unanimous court, explained that the section of the EI Act permitting appeals to the Tax Court (s. 103) is limited to issues falling within paragraphs 90(1)(a)-(i). Challenging the statutory obligation to pay EI or the premium rates themselves are neither expressly nor implicitly within the appeal provisions. More specifically, paragraph 90(1)(f) is limited to challenging calculations or the amount of insurable earnings that were used. The same can be said for the CPP. An appeal of the Minister's decision may be taken to the Tax Court (s. 28). However, the appeal to the Minister (s. 27) is from a ruling under paragraphs 26.1(1)(a)-(f), which do not relate to the contribution rate (*Davitt 1*, paras. 5-9).

[6] Although the appellant strenuously argues that his dispute relates to amounts payable rather than the applicable rates, in our view, this is a distinction without a difference. The word "rates" is simply a convenient shorthand way to describe the formula that determines the amounts payable. It is the determination of the rates that the appellant claims are unconstitutional.

[7] Contrary to the appellant's submission, *Davitt 1* does not limit "jurisdiction related to constitutionality depending on whether the appeal relates to income taxes." The Tax Court's jurisdiction is constrained by the express wording of section 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, which allows for EI Act and CPP appeals only to the extent that they are permitted by the EI Act and the CPP. Further, *Davitt 1* does not state that the Tax Court should disregard the Charter in the course of hearing appeals within its exclusive jurisdiction, as argued by

the appellant. Rather, the Court determined that the appellant's dispute was not within the Tax Court's jurisdiction.

[8] Absent jurisdiction over the dispute, it necessarily follows that a court will lack jurisdiction over any constitutional arguments in relation to such dispute. The EI Act and CPP premium rates are beyond the Tax Court's jurisdiction. Since jurisdiction is not engaged, the constitutional arguments cannot be considered. As was the situation in *Davitt I*, the appellant "has chosen the wrong procedure and the wrong court" (*Davitt I*, para. 10). In sum, *Davitt I* is dispositive. This Court only departs from its previous decisions in exceptional circumstances (*Miller v. Canada (Attorney General)*, 2002 FCA 370). No such circumstances are present here.

[9] The appellant also alleges a reasonable apprehension of bias. Again, he reiterates the arguments advanced in *Davitt I*. That is, the Tax Court has almost never upheld a Charter challenge and the judge's reasoning and conclusions do not accord with the appellant's view. As held in *Davitt I*, these are not valid foundations for an allegation of a reasonable apprehension of bias. The appellant takes no issue with the judge's conduct or comments, other than to disagree with the latter.

[10] For these reasons, the appeal will be dismissed with costs to the respondent in the fixed amount of \$1500, inclusive of disbursements and taxes.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-494-10

(APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE BOYLE, OF THE TAX COURT, DATED DECEMBER 7, 2010, DOCKET NOS. 2010-1146(EI), 2010-1147 CPP)).

STYLE OF CAUSE: WILLIAM SHAWN DAVITT v.
THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 24, 2012

**REASONS FOR JUDGMENT
OF THE COURT BY:** EVANS, SHARLOW & LAYDEN-
STEVENSON JJ.A.

DELIVERED FROM THE BENCH BY: LAYDEN-STEVENSON J.A.

APPEARANCES:

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Annie Paré FOR THE RESPONDENT

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