Federal Court of Appeal  Cour d'appel fédérale

Date: 20130306

Docket: A-335-12

Citation: 2013 FCA 69

CORAM: **NOËL J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

MARC VERONES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on March 5, 2013.

Judgment delivered at Calgary, Alberta, on March 6, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

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REASONS FOR JUDGMENT

TRUDEL J.A.

BACKGROUND

[1] This is an appeal by Mr. Verones (the "appellant") from a decision of the Tax Court of Canada (the "Tax Court") (2012 TCC 291). The Tax Court concluded that the appellant was not entitled to claim non-refundable tax credits in respect of a wholly dependent person and child

pursuant to paragraphs 118(1)(*b*) and (*b.1*), and subsections 118(5) and (5.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") for the taxation years 2009 and 2010.

[2] Within the context of the present facts, subsection 118(5) of the Act provides that no amount may be claimed as a personal credit by the appellant since he is required, by Court order, to pay support for his children to a former spouse from whom he was living separate and apart through the taxation years in issue. For its part, subsection 118(5.1) provides a narrow exception to this rule where both parents are paying child support to each other for a given taxation year as, otherwise, subsection 118(5) would prevent both of them from claiming the tax credit. In his memorandum of fact and law, the appellant argues that his case falls within this exception. At the hearing of this appeal, the appellant also argued that his case falls within subsection 118(5) if properly construed. The interpretation that he proposes rests on his view that subsection 118(5.1) should be repealed as it undermines the general rule expressed in subsection 118(5), and that the introduction of this provision in 2007 constituted an error of law. For the reasons which follow, I propose to dismiss the appeal with costs.

THE RELEVANT FACTS

[3] The appellant and his former spouse have lived apart since 2008. They are the parents of two children under the age of 18. The children reside 50% of the time with each parent in a shared custody arrangement. Pursuant to an Order of the Court of Queen's Bench of Alberta, the appellant was ordered to pay both spousal support and child support. Only the child support is at issue in this appeal. The appellant pays monthly support for the children in the amount of $1,763. This amount

represents a set-off between the total amount the appellant is required to contribute to his children's needs ($2,202), and the amount his former spouse is required to contribute ($439), as set out in the *Federal Child Support Guidelines*, SOR/97-175 (the "Federal Guidelines").

[4] The appellant's original position is that pursuant to the Federal Guidelines, both he and his ex-spouse pay child support to each other. For the appellant, the set-off technique found in the Federal Guidelines is simply a means of avoiding the unnecessary exchange of cheques between the parents, as it would make no sense for him to write a cheque in the amount of $2,202 to his former spouse and for her to do the same to him in the amount of $439. As a result, the appellant argues that he is entitled to the tax credit for one of the two children pursuant to subsection 118(5.1) of the Act.

ANALYSIS

[5] I am of the view that the Tax Court correctly rejected the appellant's thesis. The Tax Court observed that the Order of the Court of Queen's Bench of Alberta directed only the appellant to make child support payments, notwithstanding that his former spouse's income was taken into consideration in determining the amount that he, as the higher income spouse, was directed to pay. It is clear that the child support payments made by the appellant constitute a "support amount" as contemplated by subsection 56.1(4) of the Act. The mother's contribution to the children's needs does not meet the requirement of that subsection as there is no order or written agreement requiring her to make child support payments to the appellant. As a result, subsection 118(5) is applicable and

the appellant is not entitled to the tax credits (see *Perrin v. Canada,* 2010 TCC 331; *Ladell v. Canada*, 2011 TCC 314, cited at paragraph 6 of the Tax Court's reasons).

[6] The whole discussion about the concept of set-off is a mere distraction from the real issue, *i.e.* whether or not the appellant is the only parent making a "child support payment" in virtue of "an order of a competent tribunal or an agreement", as defined under the Act.

[7] In *Contino v. Leonelli-Contino,* 2005 SCC 63; [2005] 3 S.C.R. 217 [*Contino*], Bastarache J. clearly articulated that the underlining principle relating to child support in the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (s. 26.1(2)), and the Federal Guidelines (s. 1), consists of the parents' "joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation" (at paragraph 32).

[8] Once each parent's obligation vis-à-vis the children is determined, the higher income parent may be obligated to make child support payments to the lower income parent as part of his or her performance of said obligation. However, in the end, the set-off concept does not translate the parents' respective obligation to contribute to child rearing into a "support payment" as defined in the Act.

[9] Thus, the appellant's argument as to the impact of the Federal Guidelines on child support payments cannot succeed. Moreover, subsection 118(5.1) of the Act does not apply to the present factual situation. As found by the Tax Court Judge, "(s)ubsection 118(5.1) was introduced in 2007 presumably to provide relief where both parents do, in fact, pay an amount of child support" which,

as mentioned above, is not the case here. As for the appellant's suggestion that subsection 118(5.1) of the Act should be repealed, it is a matter which only Parliament can address.

[10] Finally, the respondent has sought a modification to the style of cause to name Her Majesty the Queen as the proper respondent in this file and the judgment will so provide.

CONCLUSIONS

[11] As a result, I propose to dismiss the appeal with costs.

"Johanne Trudel"
J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-335-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE CAMPBELL OF THE TAX COURT OF CANADA DATED MARCH 21, 2012, DOCKET NUMBER 2011-2948(IT)I.	
STYLE OF CAUSE:	MARC VERONES and HER MAJESTY THE QUEEN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MARCH 05, 2013
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	NOËL J.A. GAUTHIER J.A.
DATED:	MARCH 06, 2013

APPEARANCES:

Mr. Marc Verones	FOR THE APPELLANT (self represented)
Mr. Robert Neilson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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