

Federal Court of Appeal



Cour d'appel fédérale

Date: 20211122

Docket: A-291-20

Citation: 2021 FCA 225

[ENGLISH TRANSLATION]

**CORAM: NOËL C.J.
DE MONTIGNY J.A.
LEBLANC J.A.**

BETWEEN:

M.S.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montreal, Quebec, on November 18, 2021.

Judgment delivered at Ottawa, Ontario, on November 22, 2021.

REASONS FOR JUDGMENT BY:

NOËL C.J.

CONCURRED IN BY:

**DE MONTIGNY J.A.
LEBLANC J.A.**

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REASONS FOR JUDGMENT

NOËL C.J.

[1] The appellant is appealing a decision of the Federal Court (2020 FC 982) in which Mr. Justice Grammond denied her authorization to institute a class action on behalf of parents who were allegedly illegally deprived of the Canada Child Benefit, the GST/HST credit and other similar benefits. According to the appellant, the Canada Revenue Agency (the CRA) does

not have the authority to terminate these benefits when a child is the subject of a placement under child protection legislation but is still staying with his or her parents on occasion.

[2] This appeal is part of the Federal Courts' procedural bijuralism pilot project. As a result, the provisions of the Quebec *Code of Civil Procedure*, C.Q.L.R. c. C-25.01 (CCP) apply in this case. Pursuant to article 575(2) of the CCP, the appellant had to demonstrate, in particular, that the facts alleged in her application "appear to justify the conclusions sought".

[3] Justice Grammond found that the appellant had failed to demonstrate that this was the case, citing the fact that the intended action essentially sought to obtain payment of the benefits at issue and holding that only the Tax Court of Canada (TCC) had jurisdiction in this regard.

[4] Given that this is an appeal from a judgment dismissing an application for authorization to institute a class action, this Court must defer to the trial judgment unless there is an error of law or the assessment with respect to the criteria of article 575 of the CCP is "clearly wrong" (*L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, 434 D.L.R. (4th) 1, at para. 10; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 34).

[5] In support of her appeal, the appellant claimed that she had demonstrated an arguable case under article 575(2) of the CCP (appellant's memorandum, at paras. 17–71) and that Justice Grammond had erred in law by applying too high a threshold for the criterion of this article (appellant's memorandum, at paras. 72–96). Furthermore, he allegedly misunderstood the object of the appellant's application (appellant's memorandum, at paras. 97–105); refused to

interpret the *Children's Special Allowances Act*, S.C. 1992, c. 48; provided a poor description of the interaction between the different statutory schemes involved; disregarded the fact that there was no assessment appealable to the TCC for certain members of the group; and failed to explain why the Federal Court could not grant declaratory relief or issue an injunction against the CRA in connection with the class action in the event that the Court was satisfied that the CRA was acting illegally, as the appellant claimed (appellant's memorandum, at paras. 106–141).

[6] The stumbling block with respect to all these arguments is the fact that only the TCC has jurisdiction to rule on the alleged illegality that underlies the class action, in all its aspects. The appellant took issue with the CRA's interpretation of section 9 of the *Children's Special Allowance Regulations*, SOR/93-12 (Regulations), part of which reads as follows:

9 For the purposes of the Act, a child is considered to be maintained by an applicant in a month if:

(a) the applicant, at the end of the month, provides for the child's care, maintenance, education, training and advancement to a greater extent than any other department, agency or institution or any person; or

...

[Emphasis added by the appellant.]

9 Pour l'application de la Loi, un enfant est considéré comme étant à la charge du demandeur pour un mois donné si :

a) soit le demandeur est à la fin de ce mois celui qui assure le soin, la subsistance, l'éducation, la formation et le perfectionnement de l'enfant dans une plus large mesure que tout autre ministère, organisme ou établissement, ou toute personne;

[...]

[Soulignement de l'appelante.]

[7] According to the CRA, when a child is entrusted to a youth protection agency, that agency is responsible for the child's maintenance. The fact that the agency allows the child to stay temporarily with his or her parents does not change this. According to the appellant, a child who is the subject of a child protection measure could be considered as being maintained by his

or her parents for the purposes of section 9 of the Regulations if he or she is staying with them on a part-time basis. This is the issue that the Federal Court would have to dispose of based on her interpretation of section 9 of the Regulations and its enabling statute if the class action were to proceed. This is also the specific issue that the TCC would have had to rule on if the appellant had exercised her right to challenge the assessment made against her.

[8] The appellant claimed that some individuals who are in the same situation as she is and whom she seeks to represent would not be in a position to invoke the jurisdiction of the TCC to rule on this issue in their particular cases. This argument does not hold water.

[9] Eligibility for benefits arises from a deemed overpayment amount, which is computed under subsection 122.5(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA) with respect to the child portion of the GST/HST credit, or under subsection 122.61(1) with respect to the Canada Child Benefit. The deemed overpayment amount is established by a notice of determination issued after a return of income is filed pursuant to paragraph 152(1)(b) or following a request for a notice of determination under paragraph 152(1.2)(d) of the ITA (in the case of the child portion of the GST/HST credit) and under subsections 152(3.2) and 152(3.3) (in the case of the Canada Child Benefit).

[10] Contrary to what the appellant states (appellant's memorandum, at paras. 125–132), a person who has not received Canada Child Benefit benefits and who claims to be entitled to them may bring an appeal to the TCC even if no assessment has been made, by requesting that a notice of determination be issued in accordance with the provisions conferring that entitlement. It

follows that the appellant, as well as anyone in the same situation, may have the issue underlying the class action decided by the TCC if they take the necessary steps.

[11] It is settled law that an action before the Federal Court where damages or any kind of relief are sought on the basis of an invalid assessment cannot succeed unless the TCC has previously overturned the assessment (*Canada v. Roitman*, 2006 FCA 266, 353 N.R. 75, at para. 20).

[12] Given that all the remedies sought by the appellant as part of the proposed class action require that the Federal Court invalidate the interpretation given by the CRA to section 9 of the Regulations and its enabling statute, and given that the TCC has exclusive jurisdiction in the matter, Justice Grammond was correct in dismissing the application for authorization.

[13] Despite this outcome, Justice Grammond exercised his discretion and did not award costs against the appellant because of her modest income, and I am of the opinion that we should do the same.

[14] I would therefore dismiss the appeal, with each party bearing its own costs.

“Marc Noël”
Chief Justice

“I agree.
Yves de Montigny, J.A.”

“I agree.
René LeBlanc, J.A.”

Certified true translation
Melissa Paquette, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-291-20

**APPEAL FROM AN ORDER OF THE HONOURABLE SÉBASTIEN GRAMMOND
DATED OCTOBER 21, 2020, DOCKET NO. T-1914-19.**

STYLE OF CAUSE: M.S. v. HER MAJESTY THE
QUEEN

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: NOVEMBER 18, 2021

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

DATED: November 22, 2021

APPEARANCES:

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Joanie Lévesque

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(VIA VIDEOCONFERENCE)

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(IN PERSON)

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