

Date: 20080422

Docket: T-1337-07

Citation: 2008 FC 524

Ottawa, Ontario, April 22, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

RICHARD JOSEPH DONOVAN

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER AND ORDER

[1] Death and taxes are certain. Allowable deductions from income are not. This judicial review of a decision of the Canadian Human Rights Commission not to investigate Mr. Donovan's plight is grounded in the *Income Tax Act*.

[2] Mr. Donovan and his wife separated in 1990 and later divorced. They had joint custody of their son with equal time sharing arrangements. At first he was able to claim child support payments and what was then known as the equivalent-to-spouse tax credit. However, these credits were

disallowed for the 1998, 1999 and 2000 tax years. Mr. Donovan objected. The matter worked its way to the Tax Court.

[3] In dismissing his appeal from the assessments in question, Mr. Justice Hershfield accepted that Mr. Donovan had a double obligation to support his son both when he was with him and when he was with his former wife. The child support obligation was covered by a judgment of the Manitoba Court of Queen's Bench. However, since April 2007 neither obligation gave rise to tax relief. He held that section 118(5) of the *Income Tax Act*, appended hereto, governed. On its face, the section is clear and unambiguous in stating that no amount may be deducted in Mr. Donovan's circumstances.

[4] However, Mr. Donovan argued that section 118(5) violated his Charter rights, more particularly section 15 (1) which provides:

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.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[5] After a full review of the case law, Mr. Justice Hershfield opined that although some might think section 118(5) of the *Income Tax Act* is socially misguided, it did not violate the Charter.

Essentially, the policy of Parliament, as expressed in the legislation, discriminated against Mr. Donovan's on his ability to pay. Such discrimination is not prohibited. His reasons are reported at *Donovan v. Canada*, 2005 TCC 667, [2006] 1 C.T.C. 2041, [2006] T.C.J. No. 494.

[6] Mr. Donovan did not appeal that decision. Rather, he filed a complaint with the Canadian Human Rights Commission because he was denied a tax credit for the years 1998 to 2004. The basis of the complaint was that the Canada Revenue Agency adversely discriminated against him based on sex, family or marital status. The investigator informed Mr. Donovan that she would recommend that the Commission not investigate as the alleged discrimination was not covered by the *Canadian Human Rights Act*. The disadvantageous tax treatment he received was based on his ability to pay, not on family or marital status.

[7] The Commission duly refused to investigate. It relied upon section 41 (1)(c) of the Act which provides:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

[...]

(c) the complaint is beyond the jurisdiction of the Commission;

41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

[...]

c) la plainte n'est pas de sa compétence;

and said "the alleged discrimination is not linked to a prohibited ground of discrimination as stipulated under the *Canadian Human Rights Act*"

ISSUES

[8] The only issue is to determine the degree of deference owed to the Commission in light of its refusal to investigate Mr. Donovan's complaint on the ground that it was without jurisdiction. Mr. Justice Hershfield's decision, upholding the assessments made under the *Income Tax Act* for the 1998, 1999 and 2000 taxation years, is not in issue. It is final and binding. Likewise, the Charter is not before me, at least not directly.

DISCUSSION

[9] Following the decision of the Supreme Court last month in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No.9, there are now two basic standards of judicial review; correctness and reasonableness *simpliciter*. Much depends on whether the issue is one of law, mixed fact and law, or pure fact. Generally speaking, but not always, questions of law are reviewed on a correctness standard. Indeed, section 18.1(4) (c) of the *Federal Courts Act* provides that this Court may grant relief if satisfied that the federal board or commission in question "...erred in law in making a decision or an order, whether or not the error appears on the face of the record."

[10] As noted in Madam Justice Deschamps' concurring reasons in *Dunsmuir*, above, there certainly are instances in which the Federal Board or Tribunal has greater expertise than the Court in interpreting its own legislation. One guideline to Parliament's intention is whether there is a privative clause in the legislation. There is no such clause in the *Canadian Human Rights Act*.

[11] At issue in this case is the jurisdiction of the Canadian Human Rights Commission and statutory interpretation. These are legal issues and should be reviewed on the correctness standard as stated by Mr. Justice Russell in *Canadian Museum of Civilization Corporation v. Public Service Alliance of Canada, Local 70396*, 2006 FC 703, 294 F.T.R. 163.

CANADIAN HUMAN RIGHTS ACT

[12] The purpose of the Act as set out in section 2 is to give effect, with respect to matters within Parliament's legislative authority, to the principle that all individuals should have equal opportunity with others to make the lives they are able and wish to have, and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered or prevented from so doing by discriminatory practices based on, among other things, sex, marital status and family status. The Act established both the Canadian Human Rights Commission and the Canadian Human Rights Tribunal. Although the Commission has a multi-faceted jurisdiction, the aspect thereof at issue here is its right to investigate, or vet complaints, and if appropriate refer them to the Tribunal.

[13] Sections 27 and 49 (5), read together, provide that if a matter is referred to the Tribunal, it may consider the underlying statute. This is consistent with the many decisions which have given human rights legislation quasi-constitutional status, decisions which have assumed that Parliament and provincial legislatures intend that such legislation supersede other laws when conflict arises.

[14] The Commission may encourage settlements, and the Tribunal may award damages.

[15] Three elements must be in place in order for the Commission to have jurisdiction to investigate a complaint: 1) there must be a practice; 2) the practice must be discriminatory; and 3) the discrimination must be prohibited under the *Canadian Human Rights Act*.

[16] A “practice” within the meaning of the Act is not defined. However discriminatory practices identified in the Act relate to the denial of goods, services, facilities or accommodation, employment, or communication likely to expose a person to hatred or contempt by reason of identification with a prohibited ground of discrimination.

[17] What is at issue here is the enforcement of a statute. Parliament cannot have intended to have equated “practice” and “enforcement”. I cannot possibly imagine the Canada Revenue Agency being condemned to damages because it enforced a law enacted by Parliament. It was not its practice to disallow the credits claimed by Mr. Donovan; it was its duty.

[18] Section 118(5) of the *Income Tax Act* may well be discriminatory. The graduated income tax scale is discriminatory. However, the discrimination is based upon Mr. Donovan’s ability to pay. This is a matter of legislative policy, not a prohibited ground of discrimination.

[19] There is certainly nothing ambiguous about section 118(5) of the *Income Tax Act*. I agree with the Commission. Mr. Donovan’s recourse was to challenge section 118(5) on the grounds it violated the Charter. He did so, but was not successful, and did not appeal

[20] The Federal Court of Appeal has already expressed the view that section 118(5) of the *Income Tax Act* does not violate the Charter (*Nelson v. Canada*, 2000 D.T.C. 6556, [2000] F.C.J. No. 1613). A decision I consider completely persuasive is that of the Federal Court of Appeal in *Canada (Attorney General) v. Brown*, 2001 FCA 385, [2001] F.C.J. No. 1882. In that case, the Court had already determined that the inclusion of maternity benefits in the determination of the weeks of employment benefits was not contrary to section 15 of the Charter, and that it would be unjustifiable to hold that the same provision was discriminatory for the purposes of the *Canadian Human Rights Act*. Mr. Justice Evans stated at paragraph 6:

6 Since the Court has found that the statutory cap on the weeks of regular benefits payable to a claimant who has received maternity benefits in the same benefit period is not discriminatory for the purpose of section 15 of the Charter, it would be unjustifiable to hold that the same provision is discriminatory for the purpose of the Canadian Human Rights Act. Further, counsel was unable to refer us to any authority for the proposition that, on an appeal from a Board of Referees, it is open to an Umpire to read out of the Employment Insurance Act a clear and otherwise valid provision on the ground that it is contrary to the Canadian Human Rights Act.

Likewise, an allegation that section 118(5) of the *Income Tax Act* runs afoul of the *Canadian Human Rights Act* cannot be justified.

[21] In any event, the Charter was before Mr. Justice Hershfield, not before me. Mr. Donovan had a right to appeal to the Federal Court of Appeal; he did not. His complaint to the Commission smacks of a collateral attack or abuse of process. (*Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77).

[22] For these reasons, the application shall be dismissed with costs.

ORDER

UPON judicial review of the refusal of the Canadian Human Rights Commission to investigate a complaint against Canada Revenue Agency for adverse differential treatment based on marital status, family status, and sex;

THIS COURT ORDERS that the application is dismissed with costs.

“Sean Harrington”

Judge

APPENDIX

Section 118(5) of the *Income Tax Act*:

Article 118 (5) de la *Loi de l'impôt sur le revenu* :

(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

(5) Aucun montant n'est déductible en application du paragraphe (1) relativement à une personne dans le calcul de l'impôt payable par un particulier en vertu de la présente partie pour une année d'imposition si le particulier, d'une part, est tenu de payer une pension alimentaire au sens du paragraphe 56.1(4) à son conjoint ou ancien conjoint pour la personne et, d'autre part, selon le cas :

(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

a) vit séparé de son époux ou conjoint de fait ou ex-époux ou ancien conjoint de fait tout au long de l'année pour cause d'échec de leur mariage ou union de fait;

(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.

b) demande une déduction pour l'année par l'effet de l'article 60 au titre de la pension alimentaire versée à son conjoint ou ancien conjoint.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1337-07

STYLE OF CAUSE: Richard Joseph Donovan v.
Her Majesty the Queen

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369**

**REASONS FOR ORDER
AND ORDER:** Harrington J.

DATED: April 22, 2008

WRITTEN REPRESENTATIONS BY:

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BEHALF

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