Federal Court of Appeal  Cour d'appel fédérale

Date: 20140205

Docket: A-199-13

Citation: 2014 FCA 33

CORAM: **BLAIS C.J.**
SHARLOW J.A.
GAUTHIER J.A.

Docket: A-199-13

BETWEEN:

ROBERT T. STRICKLAND, GEORGE CONNON, ROLAND AUER, IWONA AUER-GRZESIAK, MARK AUER, AND VLADIMIR AUER BY THIS LITIGATION REPRESENTATIVE ROLAND AUER

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on February 5, 2014.

Judgment delivered from the Bench at Calgary, Alberta, on February 5, 2014.

REASONS FOR JUDGMENT OF THE COURT BY: GAUTHIER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Calgary, Alberta, on February 5, 2014).

GAUTHIER J.A.

[1] This is an appeal from the order of Justice Gleason of the Federal Court dismissing the appellants' application for judicial review. In her reasons (2013 FC 475), the judge found i) that George Connon, Iwona Auer-Grzesiak, Mark Auer and Vladimir Auer lacked standing to bring the

application and did not meet the test for public interest standing, ii) that the application of Robert T. Strickland was an impermissible collateral attack and an abuse of process, and iii) that while Roland Auer had standing to bring the application, this was a case where the Court should decline to exercise its jurisdiction to hear the application mainly because the issues raised would be more appropriately determined by the provincial superior courts, which have virtually exclusive jurisdiction over divorce, corollary relief (including child support) and variation proceedings under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Suppl.) (*Divorce Act*).

[2] In their application, Robert T. Strickland, George Connon, Roland Auer, Iwona Auer-Grzesiak, Mark Auer and Vladimir Auer (the appellants) allege that the *Federal Child Support Guidelines,* SOR/97-175 (the Guidelines) contradict the provisions of the *Divorce Act*, under which they were enacted. They seek to have the Federal Court declare that the Guidelines are *ultra vires* the *Divorce Act*. The appellants claim that the Guidelines do not reflect the requirements set out in subsection 26.1(2) of the *Divorce Act* and over compensate former spouses where there is a joint custody arrangement and the children reside part time with the payor parent.

[3] The Attorney General of Canada (AGC) brought a motion seeking to have the application dismissed because of a lack of standing, because the application constituted an impermissible collateral attack on a child support agreement or otherwise an abuse of process, or in the alternative, because the Court should exercise its discretion to decline to hear the application.

[4] To understand the judge's conclusions and the arguments put forth before us, it is worth noting the following in respect of each individual appellant (see paragraphs 5 to 8 and 32 of the judge's reasons):

- Robert T. Strickland: At the time the application was filed, he was a party to a divorce action. In the context of this action, he entered into an interim child support agreement through court mandated mediation.
- George Connon: He was separated from his wife but had not yet started divorce proceedings. He voluntarily pays child support calculated in accordance with the Guidelines.
- Roland Auer: Three of Mr. Auer's marriages are implicated in this proceeding. He and his second wife (Aysel Auer) have one child for which Mr. Auer pays child support. The amount of such support was initially calculated with reference to the Guidelines but it has since been varied twice by the Alberta Court of Queen's Bench. The latest order is "made on a without prejudice basis so that if [Roland Auer] is successful with his federal challenge to the Federal Child Support Guidelines, then [the amount to be paid] shall be reviewable back to the date of this Order".
- Iwona Auer-Grzesiak: She is the former first wife of Roland Auer. They have two children. There is no evidence of any court order for child support for these children.
- Mark Auer: He is one of the children of Roland Auer and Iwona Auer-Grzesiack, two of the above-mentioned appellants. There is no evidence of any order for child support for this appellant.
- Vladimir Auer: A child of Roland Auer's third marriage. He lives with his parents, who are neither separated nor divorced.

[5] Robert T. Strickland, George Connon and Roland Auer – the payors – ultimately seek to have a downward variation of the child support they are paying. The other three appellants argue that they are directly affected by any obligation to pay support pursuant to the Guidelines.

[6] The appellants essentially contest all of the findings of the judge where she disagrees with their position.

[7] In our view, the judge did not err in law when she concluded that the provincial superior courts have jurisdiction to determine the *vires* of the Guidelines in the context of proceedings for which they have jurisdiction under the *Divorce Act* and to decline to apply them if found to be *ultra-vires*. We agree with her, essentially for the reasons she gave.

[8] We agree with the appellants that the judge erred in principle when she described and applied the third factor to be considered to determine public interest standing. As explained in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 (*Downtown Eastside*) at paragraph 44, the judge had to consider whether the application was in all of the circumstances, and in light of a number of considerations described in the said decision, "a reasonable and effective mean to bring the challenge to court".

[9] That is not to say that applying the appropriate flexible and purposive approach mandated in *Downtown Eastside* would have led to a different conclusion. In our view, it is not necessary to do this exercise for in the end, this appeal should be determined on the question of whether or not the

judge erred in declining to exercise her jurisdiction. For that purpose, we are prepared to assume that all appellants could have some standing, and we will not address the subsidiary issue regarding collateral attack and abuse of process. It is clear that even if all the appellants had been granted public interest standing, the judge would not have exercised her discretion differently.

[10] In reaching her conclusion, the judge was entitled to consider the fact that provincial superior courts clearly have more expertise than the Federal Court in child support matters. As a matter of fact, they deal extensively with such matters. Although the Federal Court technically also has a limited jurisdiction over these matters where both parties to a marriage commence an action on the same day in different provincial superior courts and neither is discontinued (see subsections 3(3), 4(3) of the *Divorce Act*), such jurisdiction has rarely been exercised and the Federal Court has no expertise in matters of family law.

[11] We do not read the judge's reasons as dependent on the existence of an actual parallel litigation as in the case of Roland Auer. The case law that she relies on at paragraphs 59 and 60 (*Reza v. Canada*, [1994] 2 S.C.R. 394 and *L'Action des nouvelles conjointes du Québec v. Canada*, 2004 FC 797) did not involve any such parallel litigation. Her conclusion would therefore apply to all the appellants regardless of whether or not they were engaged in other proceedings.

[12] In any event, we have reached the conclusion that the Federal Court's discretion to not hear this matter should indeed be exercised in respect of this application for a number of reasons.

[13] First, as noted by the judge, the *vires* of the Guidelines should be determined by a court that has developed the particular expertise to properly assess the arguments in their factual context. This is particularly important when one considers the nature of the arguments set out in paragraphs 14 and 15 of the application and the general allegation at paragraph 16 that the Guidelines are unreasonable and manifestly unjust, which involves looking at the impact of the Guidelines and the child support calculation formula on spouses and children in practice. Practical experience is relevant also when one considers that the Guidelines provide significant discretion to the provincial superior courts to depart from the statutory formula. According to the Appellants, such courts in fact rarely exercise that discretion. It would be difficult for the Federal Court to assess the validity of that contention.

[14] Second, it is acknowledged by the Appellants that the reach of the Guidelines extends to family law matters outside the *Divorce Act* by virtue of provincial legislation and practice. In respect of such matters, the consequences of invalidating the Guidelines would be uncertain.

[15] Third, it would be more appropriate to adjudicate these issues in the context of a divorce or corollary relief proceedings because it would ensure full and proper participation of the spouse seeking child support. Such parties are directly affected by the position taken by the appellants and are not present in the context of the application filed with the Federal Court.

[16] Fourth, the appellants emphasized the importance of the issue they raised. It is thus likely that any first instance decision would be brought to a provincial court of appeal and perhaps to the Supreme Court of Canada. These courts would significantly benefit from the practical expertise that

provincial superior courts have with such matters and from the additional arguments provided by the spouse seeking support as well as those of the AGC if he chose to intervene.

[17] We have been mindful of the appellants' argument that the remedy they seek – a declaration of invalidity and an order quashing the guidelines – could not be granted by a provincial superior court. However, as stated by Sharlow J.A. in *Froom v. Canada (Minister of Justice)*, 2004 FCA 352 at paragraph 12:

> It is well established that the Federal Court has the discretion to decline to exercise its judicial review jurisdiction if the applicant has available an adequate alternative remedy: *Fast v. Canada (Minister of Citizenship and Immigration)* (2001), 288 N.R. 8, (2001) 41 Admin. L.R. (3d) 200 (F.C.A.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3. In considering whether to decline jurisdiction, the test is whether the alternative remedy is adequate, not whether it is perfect.

[18] It is in fact difficult to see why the appellants would not be able to obtain the reduction of their child support obligations under the Guidelines if their argument were to succeed before a provincial superior court. Simply because the appellants cannot obtain a formal declaration of invalidity does not affect their ability to achieve their ultimate goal. In addition, in the event that a provincial court of appeal or the Supreme Court of Canada ruled in the appellants' favour, the appellants would in practice obtain, if they succeeded with their argument, the relief they are seeking without the need for a formal declaration. Thus, although the prospect of a single proceeding in the Federal Court may be a factor that weighs in favour of the Federal Court hearing this application, it is not enough to outweigh the question of expertise, the potential implication for provincial law and practice and the fact that a more complete adversarial debate would result from having this matter heard in the context of proceedings under the *Divorce Act*.

[19] Finally, regarding the appellants' argument that provincial superior courts have historically been reluctant to grant standing to litigants who wish to contest the *vires* of the Guidelines, it has not been established to our satisfaction that this was indeed so and in any event, even if this was so in the past, these courts would now have to address the issue of standing within the framework set out in *Downtown Eastside*.

[20] In light of the foregoing, the appeal will be dismissed with costs.

"Johanne Gauthier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-199-13

(APPEAL FROM A JUDGMENT OR ORDER OF THE DATED (DATE), DOCKET NO. (DOCKET NUMBER)) **(See comment in left margin) if applicable**

DOCKET: A-199-13

STYLE OF CAUSE: ROBERT T. STRICKLAND, GEORGE CONNON, ROLAND AUER, IWONA AUER-GRZESIAK, MARK AUER, AND VLADIMIR AUER BY THIS LITIGATION REPRESENTATIVE ROLAND AUER v. THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: FEBRUARY 5, 2014

REASONS FOR JUDGMENT OF THE COURT BY: BLAIS C.J.
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GAUTHIER J.A.

DELIVERED FROM THE BENCH BY: GAUTHIER J.A.

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