

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111205

Docket: A-476-10

Citation: 2011 FCA 338

**CORAM: NADON J.A.
SHARLOW J.A.
MAINVILLE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JOHN FLUEVOG

Respondent

Heard at Vancouver, British Columbia, on November 28, 2011.

Judgment delivered at Ottawa, Ontario on December 5, 2011.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

**SHARLOW J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

NADON J.A.

[1] The Crown is appealing an order of the Tax Court of Canada allowing the respondent Mr. Fluevog to amend his pleadings in an appeal of an assessment under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The amendment is intended to support Mr. Fluevog's argument that his income tax assessment should be vacated because the Minister, acting through the Canada Revenue Agency, follows a certain assessing policy relating to gifts to charities that favours other taxpayers and not him, and that the assessing policy in question breaches Mr. Fluevog's right under section 15 of the *Canadian Charter of Rights and Freedoms* to the equal protection and benefit of the law without discrimination on the basis of religion.

[2] The main issue in the income tax appeal is whether certain payments made by Mr. Fluevog to Swim Canada, which is a “registered Canadian amateur athletic association” as defined in subsection 248(1) of the *Income Tax Act*, entitle Mr. Fluevog to a tax credit under section 118.1 of the *Income Tax Act*. The basis of the assessment under appeal is that the payment is not a gift because Mr. Fluevog received consideration for it in the form of swimming lessons for his children.

[3] The impugned assessing policy is that a payment made for students attending a religious school will be treated as a gift for income tax purposes if the school “teaches exclusively religion and thereby operates exclusively for the advancement of religion” (Information Circular IC 75-23, paragraph 3). The factual basis of Mr. Fluevog’s Charter argument, as set out in his Memorandum of Fact and Law, is that “his donations [to Swim Canada] were made to obtain training for his children (*i.e.*, swim training) that is not religious training, and it is for that reason that his donations were not treated as a gift”. Mr. Fluevog argues that the disallowance of his claim for a tax credit amounts to discrimination against him on the basis of religion in breach of subsection 15(1) of the *Charter*, and that this breach should be remedied by allowing him the tax credit he claimed. The Tax Court judge concluded that Mr. Fluevog has an arguable case and on that basis allowed the amendment.

[4] A decision to grant or deny an amendment to pleadings is discretionary, and this Court will not intervene in such a decision in the absence of an error of law or a failure to exercise the discretion judicially. In my respectful view, the decision to allow the amendment in this case is based on an error of law. Assuming, as alleged by Mr. Fluevog, that the Minister follows the

assessing policy described above, it cannot follow that this would entitle Mr. Fluevog to a tax credit for a payment to Swim Canada for which he received consideration.

[5] It is not open to the Minister to determine that a payment that is not a gift as a matter of law will nevertheless be treated as a gift for income tax purposes. If that is what the Minister has done by adopting the impugned assessing policy (and I express no opinion on that point), then the policy is wrong in law and cannot stand. But that is of no assistance to Mr. Fluevog. The remedy for adopting a policy that is wrong in law is to reject the policy, not extend it to everyone who pays for swimming lessons for their children.

[6] For these reasons, I would allow the Crown's appeal, set aside the order of the Tax Court judge and dismiss Mr. Fluevog's motion to amend the pleadings. The Crown is entitled to its costs in respect of its appeal and its motion.

“M. Nadon”

J.A.

“I agree.

K. Sharlow J.A.”

“I agree.

Robert M. Mainville J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-476-10

STYLE OF CAUSE: H.M.Q. v. JOHN FLUEVOG

PLACE OF HEARING: Vancouver, B.C.

DATE OF HEARING: November 28, 2011

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: SHARLOW J.A.
MAINVILLE J.A.

DATED: December 5, 2011

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