

CANADA / JUDGMENT

G.B.I. v. British Columbia (Maintenance Enforcement, Director)

2005 BCSC 1145

COURT

Supreme Court of British Columbia

DECIDED

4 August 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

G.B.I. v. British Columbia (Maintenance Enforcement, Director),

2005 BCSC 1145

Date: 20050804

Docket: L050824

Registry: Vancouver

Between:

G.B.I.

Petitioner

And

The Director of Maintenance Enforcement

Respondent

Before: The Honourable Mr. Justice Ralph

Reasons for Judgment

(In Chambers)

Counsel for the petitioner

D.J. O'Donnell

Counsel for the respondent

A.M. Accettura

Date and Place of Hearing:

May 9, 2005

Vancouver, B.C.

- [1] The petitioner, Mr. G.B.I., applies for a declaration that he is not in persistent arrears of a child support order, for judicial review of the Director of Maintenance Enforcement's licence denial application that suspended his passport, and an order in the nature of mandamus directing the Director of Maintenance Enforcement (the "Director") to issue a request to the Federal Minister of Justice to terminate the licence denial application outstanding against the petitioner. The Director opposes all aspects of this petition.

Facts

- [2] On June 18, 1998, Mr. G.B.I. was ordered by the Superior Court of the State of Washington to pay \$400 USD per month for support of the child, R.M.S., born [], 1994. The order was registered with the Family Maintenance Enforcement Program ("FMEP") in British Columbia in August 2000. Mr. G.B.I. is 49 years old and has a Ph.D. in Environmental Planning from the U.[].
- [3] The original Washington State order was based on Mr. G.B.I.'s income from a temporary academic position at the time but income at a level that exceeds any income since earned. Mr. G.B.I. says that his employment since that time has been sporadic and temporary and most of the jobs that he has held have been international. Other than an \$800 payment received by the State of Washington and two recent payments of \$80 each received by the Director this year, the petitioner has not made any other payments toward his child support obligations. Mr. G.B.I. deposes that his work search has been extensive and ongoing, including applying for three permanent and four temporary positions per week ranging from academic to manual labour, but he has failed to make any payments from the sporadic work income that he has reported. The arrears of child support now amount to approximately \$75,000 CDN.
- [4] Under s. 67 of the Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985, c. 4 (2nd supp.) ("FOAEAA"), the Director may apply to the federal Minister of Justice to have the Minister take action to suspend a "licence" where a debtor is in "persistent arrears" under a support order. A "licence" includes a passport and the definition of "persistent arrears" includes a support order which has accumulated arrears of \$3,000 or more.
- [5] On September 16, 2004, the Director applied to the Minister of Justice for a denial of federal licences and pursuant to the application, Mr. G.B.I.'s passport was suspended.

- [6] Although Mr. G.B.I. deposes that he was not given any notice of FMEP's dissatisfaction with his compliance, an enforcement officer with FMEP has deposed that she discussed with Mr. G.B.I. the program's concern that he had made no attempt to vary the Washington State order and that he had informed her in the same conversation that he was planning on giving up his Canadian residency. In November 2004, Mr. G.B.I. applied to the Washington State Court to reduce support and cancel arrears, but that application has not yet been heard.
- [7] In July 2004, FMEP also commenced enforcement proceedings in Provincial Court. In February 2005, Mr. G.B.I. filed a Notice of Motion in the Provincial Court registry seeking an order that the Director instruct the Insurance Corporation of British Columbia (the "Insurance Corporation") to remove the driver's licence hold that it had imposed pursuant to other provisions in the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 ("FMEA"), that the passport restrictions be lifted and that these matters be heard along with the enforcement proceedings. On March 22, 2005, the hearing of this matter in Provincial Court was adjourned to August 2, 2005 by consent, but an interim order was agreed upon that reduced the monthly payments to \$80 per month with the balance going to arrears. FMEP also agreed to the return of Mr. G.B.I.'s driver's licence. Mr. G.B.I. has disclosed his tax returns and assessments and states that his average annual income over the last ten years has been \$8,391.
- [8] Mr. G.B.I.'s position is that he will not be able to pay his debt without access to his passport, since he believes that his best chances of employment are abroad. He deposes that "to deny me my passport would simply force me back on Social Assistance at a time when I am hoping to find a position and quickly pay down the outstanding child support". The Director's position as I understand it, beyond arguing that the decision is not subject to review by the courts, is that passport denial is a necessary enforcement tool against Mr. G.B.I., without which he has little power to keep Mr. G.B.I.'s residence within Canada. An enforcement manager in the office of FMEP has deposed that Mr. G.B.I. informed her on or about July 28, 2004 that in four days he was leaving for Pakistan and that in his anticipated new employment, he may be based out of Geneva with frequent flights to Pakistan. The enforcement manager deposed that Mr. G.B.I. informed her:

that he would not be in the country for any court proceedings so based on this new information we (the Program) should stop wasting his time and money.

The anticipated employment did not occur and Mr. G.B.I. returned to Canada.

Issues

- [9] There are three issues raised in considering the petition:
- (1) Does the court have jurisdiction to review the decisions of the Director to apply to the federal Minister of Justice for a licence denial under s. 67 of the FOAEAA?
 - (2) If so, what is the appropriate standard of review?

(3) If the court has jurisdiction, should it grant Mr. G.B.I. relief in the nature of mandamus?

Does the court have jurisdiction?

[10] I note at the outset that the FMEA contains a wide-ranging series of provisions which grant powers both to the director and the courts to accomplish the purpose of the legislation. In *British Columbia (Maintenance Enforcement, Director) v. I.W.A. Forest Industry Pension Plan (Trustees of)* (1991), 61 B.C.L.R. (2d) 264 at ¶ 20, 37 R.F.L. (3d) 266, Lambert J.A. for the court stated that the purpose of the act is:

to address the evil of widespread default in payments required to be made by family maintenance payment orders. In essence it makes available to persons entitled to maintenance payments the power and the resources of the state to enforce payment and thereby alleviate the distress which is the frequent consequence of non-payment.

[11] Among the powers of the Director is a power under s. 29.1 where a debtor is in default and the arrears total \$3,000 or more, to prepare and forward to the Insurance Corporation, a notice stating that the debtor is in default. On receipt of the notice, the Insurance Corporation must not issue or renew a driver's licence of the debtor until the Insurance Corporation is advised by the Director of circumstances set out in the FMEA which would end the continuation of the notice.

[12] Within s. 29.2, the Director is compelled to direct the Insurance Corporation to disregard a notice under s. 29.1 if the debtor satisfies the Director that the notice is based on a material error. If the Director refuses to do so, the court "may summarily determine whether the refusal was unreasonable" and, if the refusal is found to be unreasonable, may order the Director to issue the appropriate directions.

[13] By contrast, the FMEA is silent with respect to the powers of the Director in relation to the FOAEAA, which is understandable, given the fact that the FOAEAA is federal legislation.

[14] An appropriate question to be asked in the present petition, therefore, is whether the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 ("JRPA") is applicable where the power exercised by the Director is derived from the federal legislation. I have concluded that the decision of the Director to apply for a licence denial under s. 67 of the FOAEAA is subject to review under the JRPA.

[15] To be subject to judicial review, the Director must constitute a tribunal under the JRPA (see *Shannon Woods Development Ltd. v. British Columbia (Provincial Approving Officer)*, [1996] B.C.J. No. 2869 (S.C.) at ¶ 13). The JRPA defines a tribunal as follows: "one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred." A statutory power of decision is:

[A] power or right conferred by an enactment to make a decision deciding or prescribing

(a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or

- (b) the eligibility of a person to receive, or to continue to receive a benefit or licence, whether or not the person is legally entitled to it,

and includes the powers of the Provincial Court.

- [16] In this case, the FMEA and the FOAEAA confer a statutory power of decision on the Director. Section 4(a) of the FMEA authorizes the Director to take whatever steps considered advisable for the enforcement of a maintenance order filed with the Program. Section 5(4) further provides:

Nothing in this Act prohibits the director or, subject to subsection (1), a creditor from taking proceedings under another enactment of British Columbia or Canada to enforce a maintenance order.

- [17] The federal FOAEAA confers upon the Director the authority to apply to the Minister of Justice to take a number of actions against a debtor. The authority includes suspending all existing schedule licences and declining to renew any schedule licences (s. 67(1)). Under s. 69 of the FOAEAA, the Minister must act on the application of the Director. No appeal lies from any action taken (s. 71), and the application will only be terminated if the Director is satisfied that the debtor is no longer in arrears, is complying with all support orders according to a payment plan "that the provincial enforcement agency considers reasonable," or is unable to pay the amount in arrears such that it is not reasonable to make the application (s. 72(a)). These statutory powers, in my view, constitute a "statutory power of decision" and the Director is, therefore, a "tribunal" under the JRPA when acting to remove Mr. G.B.I.'s entitlement to continue to receive access to a benefit or licence (in this case, his passport).

What is the appropriate standard of review?

- [18] In order to decide the appropriate standard of review, the court should apply the pragmatic and functional approach, as revised in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19 at ¶ 22, McLachlin C.J. summed up this analysis as follows:

[T]he pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" [*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 57], or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness simpliciter, and patent unreasonableness.

The "series of factors" include the presence of a privative clause, the level of expertise of the administrative decision maker, the purpose of the statutory scheme in question and the nature of the problem at hand (see Pushpanathan).

[19] There is no privative clause in either piece of legislation, although s. 71 of the FOAEAA limits the right of appeal. While a strong privative clause indicates that the court should treat the administrative decision with a high degree of deference, the absence of a privative clause does not conversely indicate a high degree of scrutiny by the courts (Pushpanathan).

[20] The expertise of the decision maker is the most important factor in the pragmatic and functional approach (Southam). In this case, while the court also has some enforcement jurisdiction, the Director has specialized knowledge in the area of support enforcement and collection of arrears. As found by the Alberta Court of Queen's Bench in *Anderson v. Anderson* (2003), 12 Alta. L.R. (4th) 243 at ¶ 14, 2003 ABQB 54:

The Director of Maintenance Enforcement presumably has expertise and experience in the area of pursuing debtors who have avoided making their maintenance payments. The Director will have expertise in what constitutes "satisfactory arrangements" for paying arrears. The Director does not have expertise in the interpretation of legislation or general questions of law.

The problem in question is how best to collect on Mr. G.B.I.'s debt and his continued support obligations; the Director's expertise has direct application to this question.

[21] The Director obtains authority over enforcing support orders from the FMEA. The FOAEAA enhances the scope of the Director to pursue his mandate under the provincial legislation. As s. 64 notes, the purpose of the licence denial provisions is "to help provincial enforcement services enforce support orders." To that end, the Licence Denial provisions of the federal Act provide the Director with a specific tool, the use of which may further the purpose of the provincial legislation.

[22] As stated by McLachlin C.J. in *Dr. Q* (at ¶ 31):

A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court [references omitted]

[23] The parties' dispute centers on the most effective way to enforce Mr. G.B.I.'s debt repayment and payment on his continuing child support obligations. The nature of this dispute is factual.

[24] I conclude that the Director's decision is entitled to a high degree of deference. Because of the significance of the interest at stake, however, the balancing of interests necessitated in applying the legislation call for the Director's decision to be subject to reasonable scrutiny. I note that s. 29.2(2) of the FMEA prescribes a reasonableness standard of review by the Provincial Court to decisions by the Director to deny a debtor a driver's licence. I conclude

that the applicable standard of review in relation to the denial of a licence such as a passport under the FOAEAA should similarly be reasonableness simpliciter.

Should the court issue an order in the nature of mandamus directing the Director to cancel the licence denial application outstanding against the petitioner?

[25] In *Southam, Iacobucci J.* defined the reasonableness standard at ¶ 56 as follows:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

[26] In this case, Mr. G.B.I. suggests that the unreasonableness of the Director's decision lies in the Director's failing to accept that he is more likely to repay his debt and fulfill his continuing support obligations if he is permitted to apply for employment outside of Canada. He says that his most likely employment opportunities will arise outside of Canada where he has a reasonable opportunity to obtain contract and employment income and that this is demonstrated by interviews he has had outside Canada.

[27] In addition Mr. G.B.I. submits that by reason of the Provincial Court order of March 22, 2005, it can no longer be said that he is persistently in arrears of his support payments. As a result, he says that the pre-requisites to a passport denial are not present and the Director has no basis to seek a denial of his passport. He says that a further reason to remove the suspension is that he has filed an application seeking to have the Washington State court reduce his support payments and the arrears.

[28] An enforcement officer with FMEP has set out in her affidavit the steps taken by the program to enforce payment. With the exception of an \$800 payment prior to the enrolment of the support order with FMEP, the only voluntary payments made by Mr. G.B.I. have been two \$80 payments following the March 22, 2005 Provincial Court order. In February 2003, the Director lifted a passport restriction then in place on conditions including a condition that Mr. G.B.I. file a notice of motion to seek variation of the Washington State order. He did not do so until November 2004. Between February 2003 and the obtaining of the current passport restriction, Mr. G.B.I. made no payments despite having travelled outside the country on a number of occasions, nor did he provide documented confirmation of any amounts he earned while abroad.

[29] An enforcement manager in the Victoria office of the FMEP has also deposed that in July 2004 she had a telephone conversation with Mr. G.B.I. in which he stated that he was giving up his Canadian residency but that he would continue to use his Canadian passport. He also informed the enforcement manager that he would not be in the country for any court proceedings and that the program should stop wasting his time and money. In light of this information, and having made no progress in obtaining payments from Mr. G.B.I., on

September 16, 2004, the Director again made application for the denial of federal licences.

[30] The March 22, 2005 Provincial Court interim order that Mr. G.B.I. make payments of \$80 per month was made under s. 21(3) of the FMEA. It did not cancel or reduce arrears. I do not think that the order altered the fact that Mr. G.B.I. continued to be persistently in arrears and that the arrears were in excess of \$3,000. As a result, I conclude that the Director was under no obligation at that time to request the termination of the passport suspension.

[31] Although Mr. G.B.I. deposes that, "to deny me my passport would simply force me back on social assistance at a time when I am hoping to find a position and quickly pay down the outstanding child support", I am not satisfied that he has demonstrated that the Director has acted unreasonably. There was ample evidence before the Director to make the determinations and adopt the enforcement measures which were made in relation to Mr. G.B.I..

[32] In the result, Mr. G.B.I.'s petition must be denied.

"Bryan F. Ralph, J."

The Honourable Mr. Justice Bryan F. Ralph

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