

Citation: 2010 TCC 364
Date: 20100702
Docket: 2002-3842(IT)G

BETWEEN:

JAMES GRENON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Miller J.

[1] The Appellant, Mr. Grenon, brings a motion for an Order:

- i) compelling the Crown to provide answers to objected undertakings;
- ii) requiring the Crown to present a knowledgeable officer for further examinations for discovery; and
- iii) advice and directions regarding the appropriate scope of discovery in this appeal.

[2] Mr. Grenon's appeal concerns the denial by the Minister of National Revenue ("Minister") of the deduction for significant legal expenses incurred by Mr. Grenon in litigation dealing with child support. The Minister's position is that such expenses are personal expenses of the Appellant and not incurred for the purpose of gaining or producing income; consequently, paragraph 18(1)(a) of the *Income Tax Act* ("Act") applies to deny the deduction. Mr. Grenon's primary argument is that if the legal fees

are not deductible under paragraph 18(1)(a) of the *Act* then paragraph 18(1)(a) infringes his right to equal protection and equal treatment under the law, pursuant to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[3] In support of his *Charter* argument, Mr. Grenon relies heavily on the *Federal Child Support Guidelines* (the "*Guidelines*"). Under the submissions section of Mr. Grenon's Third Amended Notice of Appeal, he states:¹

...
25. The *Guidelines* are a central contextual factor in the systemic discrimination against men in the field of family law. The *Guidelines* created an inherent inequality between women as support recipients and men as support paying parents, creating an unconstitutional discriminatory effect on men. That unconstitutional effect arises from a violation of the Appellant's (and all support paying parents, the vast majority of who are men), rights to equal protection and equal benefit under the law as required under s.15(1) and s.28 of the *Charter*. The particulars of the deficiencies in the *Guidelines* of the *Divorce Act* leading to this unequal treatment and unconstitutional discrimination include:

- (a) Failing to implement the principle under s.26.1 of the *Divorce Act* that spouses have a joint financial obligation to support their children by focusing only on a paying parent's income and not adequately, or at all, taking into account the financial circumstances of the recipient parent;
- (b) An arbitrary focus on the income of the paying parent in the assessment of child support without an actual or reasonable assessment of the needs or true costs of children and thereby failing to provide a *bona fide* economic foundation for the *Guidelines*;
- (c) Failing to account adequately, or at all, for the costs of having custody of children at any level less than 40% of the time thereby failing to require the recipient custodial spouse to share in any of those costs. Further unequal treatment includes applying onerous factual presumptions and financial disclosure requirements on paying parents only;
- (d) Applying an unfairly simplistic linear formula connected to the paying parents after-tax income and not recognizing that the actual costs of raising children does not rise proportionately as income increases;

¹ Tab C, Brief of the Appellant.

- (e) Causing an unwarranted transfer of wealth between paying and recipient parent aimed at an equalization of household income as opposed to the stated and legitimate aims of the joint financial support of children;
- (f) Arbitrarily dictating that the non-custodial parent (where custody is less than 40% of the time) is the paying parent, when financial circumstances may indicate that the opposite should be ordered;
- (g) Such further and other particulars as may be proven at the hearing of this appeal.

...

[4] Mr. Grenon goes on to suggest systemic discrimination in the Government of Canada as follows:

- 26. The Appellant submits that the discrimination described herein arising from the *Act* results from and reinforces other unequal, discriminatory treatment of men and fathers in the field of divorce law, including that:
 - a. the federal government has expressly adopted a policy of promoting the legal, social, economic and political interests of women, including informal and formal consultations between the federal Department of Justice and the federal Status of Women Canada agency, but has not adopted a similar policy with respect to men;
 - b. the federal government funds and participates in private *ex parte* briefings to judges, including judges in matters of divorce, that promote the legal, social, economic and political interest of women, but do not address in an equal manner the interests of men;
 - c. the federal government includes a Secretary of State cabinet position, together with a concomitant budget and bureaucracy with the mandate to promote the legal, social, economic and political interests of women, yet there is no cabinet member with the same mandate for men;
 - c.1 the federal government funds non-governmental organizations promoting the legal, social, economic and political interests of women, yet does not fund, or does not fund at an equal level, groups promoting those same interests of men;
 - d. according to a federal Department of Justice publication, women are awarded sole custody of children in divorce proceedings in 78.5% of cases. Fathers had sole custody in only 8.8% of cases and shared

custody (where a child spends at least 40% of the time with each parent) was only in 6.7% of cases;

- e. according to a federal Department of Justice publication, men are the payers of child support in 92.8% of cases before the court;
- e.1 The Minister has also interpreted that spousal support recipients are entitled to deduct legal fees incurred in relation to such support, but that the payers of such support are not entitled to deductibility. According to a federal Department of Justice publication, men are the payers of spousal support in 98.7% of cases where such support is ordered for couples that had children, and men are the payers in the vast majority of cases where spousal support is paid where the couple had no children;
- h. Numerous laws and enforcement programs have been participated in by the federal government for the enforcement of child support payments, but none for the enforcement of court ordered child access by a non-custodial parent.

[5] The Respondent states in the Reply to the Third Amended Notice of Appeal:²

- 13. He further submits that ss. 3, 6, 9, 18 and 248(1) do not draw a formal distinction between the Appellant and others on the basis of one or more personal characteristics and do not fail to take into account the Appellant's alleged disadvantaged position within Canadian society resulting in a substantively differential treatment between the Appellant and others on the basis of one or more personal characteristics. In the alternative, it is further submitted that there is no differential treatment of the Appellant for the purposes of s. 15(1) of the *Charter*.

[6] The Respondent presented an Appeals Officer, Mr. Peturson, for examination for discovery. The Appeals Officer who reviewed Mr. Grenon's objection and her team leader are both no longer employed with the Canada Revenue Agency ("CRA"). Mr. Peturson reviewed the pleadings, CRA's files and the production of documents of each Party. In an affidavit in support of the Respondent's response to the Appellant's Motion, Mr. Peturson stated that the Minister did not rely upon the *Guidelines* in denying Mr. Grenon the deduction of legal expenses.

² Tab D, Brief of the Appellant.

[7] At the examination for discovery, Mr. Peturson was asked several questions in connection with the *Guidelines*. These are the questions Mr. Grenon seeks to compel the Respondent to answer. They are attached as Appendix A hereto.

[8] Mr. Grenon, in his affidavit in support of the motion, identified Ms. Giliberti and Ms. Brazeau as the principal authors of the 1995 Federal/Provincial/Territorial Family Law Committee's Report and Recommendation on Child Support, which Mr. Grenon suggests forms the basis for the *Guidelines*. Mr. Grenon also identified Ms. McRae as a co-chair of the Federal Family Law Committee in 2001. All three individuals are employed by the Government of Canada. Mr. Grenon desires to have any one of them appear for examinations for discovery to answer the questions with respect to the *Guidelines*.

Motion to Compel

[9] From a review of the Undertakings, it is clear that they all relate to the development, comprehensiveness and adequacy of the *Guidelines*. Are such questions proper in accordance with *Rule 95 of the Tax Court of Canada Rules (General Procedure)*, which stipulates that a person "shall answer to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding"? The Appellant takes a broad and liberal interpretation to the scope of examination and answers this question affirmatively. The Respondent focuses on the requirement that the question must be relevant to a matter in issue based upon the pleadings and argues such questions do not so relate.

[10] The Respondent draws a distinction between material facts relied upon in the pleadings versus argument or submissions in the pleadings, concluding that the Appellant cannot allege facts in its own argument and then turn around to discover the Respondent on such facts. In this regard, the Appellant referred to the case of *Xu v. The Queen*³ where Justice Mogan stated:

13. I will strike out paragraph 17 of the Reply because, under the heading "Statutory Provisions and Grounds relied On", the Respondent should not allege a new fact or make a new argument based on a fact not previously alleged.

³ 2006 TCC 695.

[11] The Respondent argues this is especially so where the questions do not relate to the issue – the constitutionality of paragraph 18(1)(a) of the *Act*. Justice Beaubier, in his decision of June 9, 2006 on a motion by Mr. Grenon stated:

1. Advice and directions respecting the Court's jurisdiction of the constitutionality of the *Federal Child Support Guidelines*. This is answered by stating that in this Appeal of an assessment under the *Income Tax Act* (the "Act"), this Court may rule as to matters affected by that assessment under the *Act*. But in and of themselves, the *Federal Child Support Guidelines* (the "Guidelines") are outside of the jurisdiction of this Court as set forth in the *Tax Court of Canada Act*.

[12] The Respondent's position is summarized in paragraphs 18 and 19 of her written submission:

18. It is in this context the Appellant's 3rd Amended Notice of Appeal must be examined. Paragraphs 16 through 26 of the "Submissions of the Appellant" portion of the 3rd Amended Notice of Appeal, do not give rise to discoverable allegations of material facts. The content of these paragraphs has not been plead as material facts, and therefore they have not been responded to as facts in the Reply to the 3rd Amended Notice of Appeal. These paragraphs represent only the arguments the Applicant intends to make at the hearing of the appeal and they do not have the character of allegations of fact.
19. As is evident from the decision of the Tax Court and of the Federal Court of Appeal, the Federal Child Support Guidelines are not an issue before the Tax Court in this Appeal. The Appellant's opinion that his arguments regarding these Guidelines are relevant to an interpretation of paragraph 18(1)(a) of the *Act* and section 15 of the *Charter*, does not transform what are otherwise only arguments into material facts or issues to be decided by the Tax Court, not otherwise plead.

[13] Mr. Grenon's counsel places little importance on the placement of facts in the pleadings, suggesting that if I find he has incurred some technical breach in putting the facts in paragraph 26 of the Third Amended Notice of Appeal in the wrong section of the pleadings, he will simply seek leave to amend pleadings. With respect, counsel is making light of the framing of pleadings. And the Appellant, in his own submissions, acknowledged that where a party objects to a question on the basis of relevancy, the questioned party must satisfy the Court that the information it seeks may be relevant to a fact in issue. The deficiencies in the *Guidelines*, that the Appellant refers to in his submissions portion of the Third Amended Notice of Appeal, are simply not facts in issue. They are the Appellant's opinion of the

Guidelines raised in argument. The *Guidelines* themselves are a fact. The Appellant's view of them are not, and are not relevant to whether paragraph 18(1)(a) is discriminatory against men.

[14] The Appellant's counsel suggested that if I rule against him on this motion, I am effectively rendering his client's constitutional challenge impossible. I was disappointed to hear him take that tact. The issue of deductibility of legal expenses in support payment litigation is an important one. It is certainly easy to appreciate why a litigant may find it unequal or unfair that he or she, the payer of support, may not be allowed to deduct legal fees, while the other litigant is allowed to deduct legal fees. I have not been convinced, however, that the extent of examination the Appellant seeks is the kind of full canvassing contemplated by the *Rules*, nor frankly, necessary for a fulsome *Charter* argument on whether paragraph 18(1)(a) of the *Act* contravenes section 15 of the *Charter*.

[15] There have been several cases recently providing some guidance to litigants and to this Court as to the scope of examinations. Certainly, wide latitude is acceptable. But there are limits. I recognize that in the context of a *Charter* argument, the Courts are to make broad inquiries into the contextual factors: the Appellant suggests that in this case those factors include pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by men as child support payers. The Appellant attempts to draw a direct line between these factors and the role the *Guidelines* play in legal disputes over support, suggesting the need to delve into the very foundation of the *Guidelines*. I disagree. This approach goes beyond providing context in the paragraph 18(1)(a) dispute, and effectively, puts the constitutionality of the *Guidelines* in play, exactly what Justice Beaubier ruled against.

[16] The *Guidelines* are indeed a factor. Their creation and development are not. Put another way, it is important context in this case involving a challenge to paragraph 18(1)(a) of the *Act* to understand whether the effect of the *Guidelines* has been discriminatory in the application of that income tax provision. So, for example, undertaking number 16 which asks if the Crown accepts that in 92.8% of cases men are the payers of child support, is a proper question in this regard. Undertaking number 16 was taken under advisement by the Crown and is not in dispute.

[17] The Appellant appears to want to explore whether the *Guidelines* were created with an objective to be discriminatory against men or at the very least, that they were inadequately developed. That, however, is not the matter in issue. The Appellant, in providing context, may need to show a pre-existing disadvantage to men as a result

of the application of the *Guidelines*, not as a result of any inadequacy in their development.

[18] The Appellant, in paragraph 26 of his submissions in his Third Amended Notice of Appeal, argues that the discrimination in paragraph 18(1)(a) of the *Act* results from discriminatory treatment of men in the field of the divorce law generally and goes on to cite factors such as government policies promoting women and not men, judges' training promoting women's interest and not men's, and government funding women's organization. Given the Appellant's approach to examinations regarding paragraph 25 of his Third Amended Notice of Appeal, I have grave concerns as to where he might go with respect to paragraph 26. It is an exercise to prove systemic discrimination against men by the Government of Canada. From a common-sense point of view alone, I fail to see how opening the door so wide, even at the examination stage, will provide the necessary context for a *Charter* challenge to paragraph 18(1)(a) of the *Act*, as it pertains to the deduction of legal fees.

[19] It is important to bear in mind that paragraph 18(1)(a) of the *Act* is not a provision specific to legal fees, let alone legal fees in a family law dispute. It is an overriding restriction on the deduction of payments that are not incurred for the purpose of earning or producing income business or property. It is also important to note that it is the Court's interpretation of this provision (see the *Federal Court of Appeal* decision *Nadeau v. Canada*⁴) that has denied the deduction to a man in circumstances similar to the Appellant's.

[20] I interpret the Appellant's theory to be along the lines that the Court's interpretation of paragraph 18(1)(a) of the *Act* to date, to deny a deduction of legal fees to a male payer of support, is reinforcement of a government policy to discriminate against men. It is, therefore, according to the Appellant, necessary in this *Charter* challenge to provide the context of that overriding discriminatory policy to show the pre-existing disadvantage. I do not buy it. To be relevant to a challenge to paragraph 18(1)(a) of the *Act*, there must be some link between that alleged policy and that provision of the *Act*. This should be a matter of law, not politics, and should be about context surrounding the application of that particular law. An overall attack on government policy in the domain of family law is far beyond the scope of this challenge and, I find it would be an unnecessary fishing expedition to permit questioning regarding government policies with respect to funding, judicial training,

⁴ [2003] F.C.J. No. 1611.

etc. I trust these comments will serve as guidance to the parties for the completion of discoveries.

Motion to require knowledgeable officer

[21] I agree with the Respondent's submission that the parties' disagreement as to the discoverability of the *Guidelines* was really the dispute at the heart of this motion, not necessarily Mr. Peturson's competence as an appropriate officer from the Crown. Given my conclusion that the detailed discovery on the *Guidelines* sought by the Appellant is not proper, it follows that the Appellant's request to have officers of the Crown knowledgeable about the development of the *Guidelines* is to be denied. It is unnecessary for me, given that finding, to explore the reasons in the case of *Simser v. Canada*⁵ for ordering the attendance of a different officer of the Crown.

[22] The motion is denied. Costs will be in the cause.

Signed at Ottawa, Canada, this **2nd** day of **July**, 2010.

"Campbell J. Miller"

C. Miller J.

⁵ [2002] T.C.J. No. 432.

APPENDIX A

UNDERTAKING NUMBER 22:

Inquire of the Department of Justice and inquire into any records kept of the federal/provincial territorial family law committee regarding the development of the child support guidelines, to what extent that this concept was considered, in terms of Martin Browning's position that child support costs were not linear.

(Objected to).

UNDERTAKING NUMBER 23:

Produce the document or documents relating specifically to the delivery of this mandate to the family law committee or the FLC.

(Objected to).

UNDERTAKING NUMBER 24:

Advise why the assessment or inclusion of section "Subsequent Family Situations" was not included in the child support guidelines.

(Objected to).

UNDERTAKING NUMBER 25:

Advise why this consideration of subsequent spouses was not included in the eventual child support guidelines.

(Objected to).

UNDERTAKING NUMBER 26:

Advise why this particular issue of costs associated with the noncustodial parent was not addressed in the child support guidelines and if it is, to what extent it is.

(Objected to).

UNDERTAKING NUMBER 27:

Advise to what extent the child support guidelines take into consideration the nonmonetary costs of custodial parents.

(Objected to).

UNDERTAKING NUMBER 28:

Advise why the issue of the age of children in respect to child support orders was not addressed in the child support guidelines.

(Objected to).

UNDERTAKING NUMBER 29:

Advise as to why a national study to determine the cost of children was not undertaken by the federal government and to produce any documentation with respect to a decision not to proceed with any type of survey on what the actual cost of children are.

(Objected to).

UNDERTAKING NUMBER 30:

Produce the minutes that may exist with respect to the proceedings of the federal/provincial territorial family law committee on the development of the child support guidelines.

(Objected to).

UNDERTAKING NUMBER 31:

Provide the three proposals referenced on page 3 that were received by the economists who are identified in Footnote Number 1.

(Objected to).

UNDERTAKING NUMBER 32:

Advise what the Department of Justice document referred to is in this paragraph 4 in Document 38. Also, provide the documents which might have been received from these consultants that the Department of Justice sought opinions from and any additional analysis of those opinions by the Department of Justice.

(Objected to).

UNDERTAKING NUMBER 33:

Provided any documents related to the point you've referenced in the possession of the Crown and whether there was any related analysis by the family law committee.

(Objected to).

UNDERTAKING NUMBER 34:

Produce the background information documentation regarding the analysis of this and other models regarding the issue of linearity.

(Objected to).

UNDERTAKING NUMBER 35:

Advise what information the Crown had with respect to developing the child support guidelines that suggested that child costs remain constant over their lifetime or over their childhood.

(Objected to).

UNDERTAKING NUMBER 36:

Advise what information or analysis was done on that issue and a production of any written documentation with respect to that issue.

(Objected to).

UNDERTAKING NUMBER 37:

Advise whether or not the Crown conducted any analysis with respect to the proportionality of child costs in relation to income. And, if it did, produce any analyses or any associated documents with that, including any expert opinions provided to the Crown on that issue.

(Objected to).

CITATION: 2010 TCC 364

COURT FILE NO.: 2002-3842(IT)G

STYLE OF CAUSE: JAMES GRENON and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: June 18, 2010

REASONS FOR ORDER BY: The Honourable Justice Campbell J. Miller

DATE OF ORDER: June 28, 2010

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