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The Deductibility of Legal Fees Incurred in Child Support Proceedings and Section 15 of the Charter

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Case Commented On: *Grenon v. Canada*, 2016 FCA 4 (CanLII), leave to appeal dismissed, 2016 CanLII 41074 (SCC)

On June 30th, 2016, the Supreme Court of Canada denied leave to appeal in the case of *Grenon v. Canada*, 2016 FCA 4 (CanLII), which was heard in Calgary at both trial and on appeal. The Appellant Grenon was seeking to challenge certain aspects of tax law and policy under section 15 of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada has only heard two previous challenges to tax law based on the equality rights guarantee in section 15 of the *Charter*. In *Symes v. Canada*, [1993] 4 SCR 695, 1993 CanLII 55, a challenge based on the inability to deduct childcare expenses as business expenses was unsuccessful. In *Thibaudeau v. Canada*, [1995] 2 SCR 627, 1995 CanLII 99, a provision requiring custodial parents to include child support payments in their income was also found not to violate section 15. It has been 21 years since the Supreme Court of Canada last heard an equality challenge to tax law. This post will focus on the missed opportunities resulting from the Supreme Court's refusal to hear the Grenon appeal and some of the issues that have arisen in the past 20 years which it could have confronted.

After receiving a Shea Nerland Calnan LLP Research Fellowship in Tax Law, my research this summer for Professors Jennifer Koshan, Jonnette Watson Hamilton, and Saul Templeton involves analysis of the nearly 250 cases where section 15 *Charter* challenges have been brought to various aspects of tax law and policy since October of 1995. As mentioned, none of these challenges have succeeded in reaching the Supreme Court, now including *Grenon v. Canada*. Since *Thibaudeau*, the analytical approach to section 15 claims has been "continually reinvented" by the Court as Jennifer Koshan and Jonnette Watson Hamilton point out here. The section 15 framework's ambiguities that have manifested since *Thibaudeau* are in need of clarification by the Supreme Court.

Facts

Mr. Grenon and his former spouse separated in 1998. They had two children who were minors at the time of separation. Mr. Grenon incurred legal expenses in proceedings contesting the amount of child support to be paid to his ex-wife. Mr. Grenon asked the Minister of National Revenue to adjust his 1999 income tax return to allow for a deduction of $11,816.21. This request was denied. When Mr. Grenon filed his 2000 income tax return, he deducted $165,187.70 for legal expenses incurred with respect to the child support proceedings. After the Minister denied this deduction as well, Mr. Grenon appealed the denial of those deductions to the Tax Court of Canada (2014 TCC 265 (CanLII)) and then to the Federal Court of Appeal (2016 FCA 4 (CanLII)).

Law

There are three legislative provisions that have the combined effect of allowing the deduction of legal fees and costs incurred by a taxpayer (Ms. Grenon in this case) in obtaining, enforcing or varying child support payments, and simultaneously denying the deduction of the expenses incurred by taxpayers who pay child support (Mr. Grenon in this case).

Rennie J.A. summarized these provisions in the Federal Court of Appeal decision (at para 3):

> Paragraph 18(1)(a) of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp)) (*ITA*) allows a taxpayer to deduct an expense if it "was made or incurred for the purpose of gaining or producing income from the business or property." Subsection 248(1) defines property as including "a right of any kind whatever, a share or a chose in action." To round out the legislation in issue, section 60 prescribes certain expenses which, in addition to those that fall within the ambit of paragraph 18(1)(a), are also permissible deductions.

"Property" in section 248(1) has been interpreted to include the right to receive child support. In *Nadeau v. M.N.R.*, 2003 FCA 400 (CanLII), Noël J.A. noted (at para 28) that "the right to support is 'property' under the *Act*…and it is hard to dissociate this 'property' from the income which flows from the exercise of this right."

The Statutory Interpretation Argument

Mr. Grenon made two arguments. Prior to making his *Charter* argument, he advanced a statutory interpretation argument submitting that he was entitled to deduct his legal fees because they were incurred for the purpose of gaining or producing income from property. As part of the settlement of the family law proceedings, Ms. Grenon agreed that she would reimburse Mr. Grenon when he spent money for the benefit of the children that she was otherwise required to spend under the terms of their agreement. Mr. Grenon submitted that this right to reimbursement was "property" within the meaning of section 248(1) of the *ITA* (at para 9, TCC). If this argument that "legal expenses incurred to resist a demand for child support…serve to increase or preserve his income" (at para 25) had been accepted, Grenon would have been able to deduct his legal expenses because those expenses would have then been incurred to gain or produce income, as required by paragraph 18(1)(a) of the *Income Tax Act*.

At the Federal Court of Appeal (at para 24), Rennie J.A. relied on *Nadeau*. Because Mr. Grenon had neither a right to child support nor a stream of income stemming from a property interest, and because his legal expenses were not incurred to "gain or produce" income from business or property, his argument was rejected (at para 26).

This result of allowing a child support recipient to deduct legal expenses and not permitting a payor to do so for the same proceeding is based on an odd and antiquated characterization of child support payments (as income from property in the hands of the recipient) that can have the effect of being unfair to payors. Mr. Grenon's counsel characterized *Nadeau* as standing for the proposition that "child support payments are income from property, not because of any current logical basis for reaching that conclusion, but rather because the system has treated them as being income from property for so long that it is no longer feasible to treat them in any other manner" (at para 18, TCC). In the Tax Court of Canada decision, Graham J. stated that he was "sympathetic to this characterization of *Nadeau*," and perhaps would have reconsidered that case if he were not bound by its reasoning (at para 18).

In my view, if the tax system has "effectively read in to section 60 of the *Act* a paragraph that permits recipients of child support to deduct their legal fees irrespective of whether those fees are actually laid out to earn income from property," as Graham J. suggests it has (at para 18 TCC), the Supreme Court could have considered overruling *Nadeau* on this basis. Updating what seems to be outdated jurisprudence with no logical foundation could have lent some much needed clarification to the issue of whether or not child support recipients should be entitled to the deduction. This potential for clarification is one of the opportunities missed by the Supreme Court of Canada in their denial of Grenon's leave to appeal.

The Section 15 *Charter* Argument

Turning to Mr. Grenon's section 15 argument, he laid the evidentiary groundwork for this claim at the Tax Court of Canada level. At trial he made substantially the same *Charter* argument as was made at the Federal Court of Appeal. Graham J. had reviewed the expert evidence submitted by Mr. Grenon with a likely appeal in mind (at para 18 TCC). Unfortunately for Mr. Grenon though, the expert evidence was largely found to be less than robust and in some instances, biased. The most troublesome testimony came from Professor Paul Millar, an assistant professor of Criminology and Criminal Justice at Nipissing University. Taking Professor Millar's report "with a significant grain of salt" (at para 21 TCC), Graham J. found that Professor Millar "cited studies performed by others without drawing my attention to various weaknesses of those studies, made significant logical leaps in his own report without clearly highlighting them for me, used the term "custody" to mean different things in different parts of his report" (at para 21 TCC).

While Graham J. was unable to give weight to much of the evidence introduced by Mr. Grenon, he did accept (at para 25 TCC) what would become a crucial piece of evidence on appeal, a Department of Justice statistic that 92.8% of child support payors are men.

Mr. Grenon argued that child support payors and payees are treated differently under the *Income Tax Act*, and that this distinction results in discrimination on the basis of sex and family status in violation of his section 15 *Charter* rights. For this argument to succeed, Mr. Grenon was required to show, as articulated by the Supreme Court in *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII), first, that the law in question created a distinction based on a ground enumerated in section 15 (i.e. sex), or a ground analogous thereto (i.e. family status). Second, Mr. Grenon was also required to show that this distinction created a disadvantage by perpetuating prejudice or stereotyping (*Withler* at para 54*). Withler*, the leading Supreme Court of Canada case on section 15 at the time, provided the framework for analysis used by the trial judge (at para 12, TCC) and the Federal Court of Appeal (at para 32).

The Federal Court of Appeal considered Mr. Grenon's claim both as a claim of direct discrimination and adverse effects discrimination. Dealing first with the direct discrimination claim, the Federal Court of Appeal did not apply the *Withler* test for discrimination upon the ground of family status, as was advanced by Mr. Grenon (at para 6). Instead, the analysis proceeded on the basis of "those who have income from property", the distinction drawn in the challenged provisions (at para 34). Because the foundation of this distinction was "the nature and source of income and the means of which it is produced" (at para 34) the distinction was not based on an enumerated or analogous ground. Mr. Grenon's direct discrimination argument therefore failed.

The *ITA* provisions at issue were also characterized by the Federal Court of Appeal as "neutral on their face" (at para 33). Because laws which are facially neutral may "unintentionally have a disproportionate or adverse effect on a group or individual" (at para 36), the Federal Court of Appeal proceeded, where the trial judge did not, to consider "whether the provisions of the *ITA*, while not directly discriminating on the basis of gender and family status, did so indirectly and unintentionally" (at para 36).

For the adverse effects discrimination argument, the grounds of discrimination the Court used for analysis were sex and family status. For Mr. Grenon to have succeeded here, he was required to show that the cumulative effect of paragraph 18(1)(a) and the definition of property in subsection 248(1) limited his ability to deduct legal expenses on the basis of a personal characteristic, albeit indirectly. Rennie J.A. found that the provisions of the *ITA* at issue "affect men far more than they do women" (at para 38). Nevertheless, Grenon's *Charter* argument failed "because it confound[ed] the underlying social circumstances with the consequences of the law" (at para 43).

I would suggest that Rennie J.A.'s assertion (at para 42) that paragraph 18(1)(a) of the *ITA* "does not affect men differently than women" illustrates the failure of the court to apply the concept of adverse effects discrimination. He writes, in the next two sentences, that "[w]omen payees are affected in the same manner and to the same extent as male payees. The impact of the law is, in terms of its effect, neutral" (at para 42). By switching focus to women *payees* and male *payees*, the Court is no longer proceeding with an analysis of adverse effects discrimination, the appropriate ground for which would be sex. Instead of focusing on substantive equality, which ought to be the goal of section 15 (see *Withler*, at para 2), a formal equality analysis is what results. Any chance of adverse effects discrimination being found is effectively derailed when the analysis switches (at para 42) to those who are similarly situated, as male and female payees purportedly are.

Consequently, *Grenon v Canada* becomes yet another case in which a claim for adverse effects discrimination was unsuccessful. For a thorough discussion of the Supreme Court's approach to adverse effects discrimination under section 15 of the *Charter*, see Jonnette Watson Hamilton and Jennifer Koshan's paper on the topic here. The adverse effects analysis in *Grenon* purportedly failed for causal-connection reasons, with Rennie J.A. stating that "while it is true that virtually all payors are men, and that it is mostly men that are denied the deduction, it is not a consequence of the legislation. There is no nexus between what the *ITA* requires and the consequence" (at para 39, FCA).

Beth Symes faced a similar challenge in *Symes v Canada*, where she was unable to prove a causal connection between the effect of section 63 of the *ITA* and the costs of childcare that women incur. Her challenge was similarly dismissed, Iacobucci J. stating that "[i]n order to demonstrate a distinction between the sexes within an adverse effects analysis, one therefore needs to prove that section 63 disproportionately limits the deduction with respect to actual expenses incurred by women" (at para 142). Like Grenon, she was unable to demonstrate a nexus between the legislation and the consequence. If an admissible finding that 92.8% of payors are men is not enough to support a successful finding of adverse effects discrimination, what would be? A useful clarification that the Supreme Court could have made if it had granted leave is the extent of the causal connection required between provisions of the *ITA* and the adverse impact it has on a particular group in order to make out an adverse effects discrimination claim.

Furthermore, the test for discrimination has been repeatedly modified since *Symes* and *Thibaudeau*, as alluded to earlier in this post. The framework was recently changed again with

the decisions of *Quebec (Attorney General) v. A*, 2013 SCC 5 (CanLII) and *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII). In these cases, it appears that the Supreme Court has shifted its definition of discrimination from the perpetuation of *prejudice and stereotyping* (see *Withler* at para 37) to the perpetuation of *disadvantage.* As Abella J. wrote in *Quebec v A* (at para 325), prejudice and stereotyping should be seen simply as "two of the indicia" relevant to whether there is a violation of substantive equality. The focus now appears to be on disadvantage. In *Taypotat*, the Court also seemed to suggest that the claimant must belong to a historically disadvantaged group in order to mount a successful discrimination claim (*Taypotat* at para 21). That is, a finding of discrimination seems to require proof of the law's *perpetuation* of that historic disadvantage for the group in question.

If proof of historical disadvantage is required for a finding of discrimination, one must ask if men could ever mount a successful claim. Because it seems unlikely that men, as a group, would ever be convincingly characterized as historically disadvantaged in a general way, *Grenon* is a case where the Supreme Court could have clarified if the test has in fact changed to require proof of historical disadvantage or not. Limiting section 15 claimants to those who are historically disadvantaged would also raise questions about previous cases such as *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34 (CanLII). In that case, a male complainant successfully argued that sections of the British Columbia *Vital Statistics Act* that allowed for the permanent exclusion of his particulars from his child's birth certificate violated his section 15 equality rights, *without* a need to prove that he was a member of a historically disadvantaged group.

Graham J. did discuss, to a limited extent, one stereotype that may be active in the tax provisions challenged by Grenon: "the classic "deadbeat dad" stereotype" (at para 36, TCC). The context in which this stereotype was mentioned involved a discussion of the tax system, not the section 15 test for discrimination. Section 15's analytical framework still includes stereotyping as one way to prove discrimination, but the "deadbeat-dad" stereotype is unique because it pertains to a non-disadvantaged group, namely men. The *Grenon* case would have been an ideal opportunity for the Supreme Court to clarify if use of such a stereotype, applied to a non-historically disadvantaged group, would have been enough to satisfy the test for discrimination under section 15.

Concerns About the State of the Law

It is worth pointing out that in addition to the *Charter* issues I have discussed here, Graham J. discussed some of his concerns about the current state of the law (para 33 TCC). In his view, "there are serious inequities that can arise when child support recipients are permitted to deduct the legal fees that they have laid out to establish child support payments and child support payors are not permitted the same deduction" (at para 33, TCC).

Whatever policy objective may exist to justify this outcome, it would not be, as Graham J. lamented (at para 33, TCC) "to give a financial break to the party with the greater financial need," because a child support recipient with greater than 60% access will still receive the deduction even if she earns substantially more income than the payor. The objective could not be to "ensure the financial security of the children" because children in any case would benefit more from having both parents receive the deduction. The objective could also not be to "ensure access to justice because the subsidy is given to one parent and denied to the other regardless of their individual financial resources." These are but some of the inequities that Graham J. indicated are "aching to be addressed by Parliament" (at para 33, TCC).

The Supreme Court's refusal to hear Grenon's appeal means that a number of issues will continue to need clarification. I confined my discussion here almost exclusively to *Charter* issues, but there are many others raised by the facts of this case that the Supreme Court could have addressed. Until such time, a great number of individuals will continue to be affected by them.

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