Federal Court  Cour fédérale

Date: 20130506

Docket: T-2064-12

Citation: 2013 FC 475

Edmonton, Alberta, May 6, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

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

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicants allege that the Federal Child Support Guidelines, SOR/97-175 [the Guidelines] contradict the statutory provisions under which they were enacted and have brought an application for judicial review in which they seek to have this Court declare that the Guidelines are *ultra vires* the *Divorce Act*, RSC 1985, c 3 (2nd Supp) [the *Divorce Act* or Act] due to their alleged inconsistency with section 26.1 of the Act, the section pursuant to which the Guidelines were promulgated.

[2] The Respondent, the Attorney General for Canada [AGC] has brought a motion under Rule 369 of the *Federal Courts Rules*, SOR/98-106 seeking to have the application dismissed for the following reasons:

1. the applicants, Robert Strickland, George Connon, Iwona Auer-Grezesiak, Mark Auer and Vladamir Auer lack direct standing to commence the application and do not meet the test for public interest standing;
2. in the cases of Robert Strickland and Roland Auer, the application is an impermissible collateral attack on a child support agreement and order made in family law proceedings before the provincial superior courts or is otherwise an abuse of process; or
3. in the alternative, this Court should exercise its discretion and decline to hear the application.

The AGC argues in the further alternative that if the application is not dismissed, interested third parties (i.e. the recipients of the support payments made by certain of the applicants) should be joined as respondents to the application and the application should be brought under case management.

[3] As is more fully detailed below, I have determined that this application should be dismissed for the following three reasons. First, George Connon, Iwona Auer-Grezesiak, Mark Auer and Vladamir Auer lack direct standing to commence the application and do not meet the test for public interest standing. Second, the application is both an impermissible collateral attack and abuse of process in the case of Robert Strickland. Finally, while Roland Auer does not lack standing nor does

his bringing of this application amount to an impermissible collateral attack or abuse of process given the wording of his support order, it is nonetheless inappropriate that his challenge to the Guidelines proceed before this Court. In reaching this conclusion, I have determined that there is concurrent jurisdiction between this Court and the provincial superior courts to hear applications of this nature. However, in my view, this Court is not the appropriate forum in which to address the issues raised in Mr. Auer's application given the very minor role this Court plays in issues under the *Divorce Act* and the breadth of the jurisdiction and expertise of the provincial superior courts in matters related to divorce and child support. I have therefore granted the AGC's motion, with costs. My reasons for these determinations appear below.

Background

[4] To understand this Order, factual background is necessary. At the time the application was filed, Robert Strickland was party to a divorce action. The evidence before the Court does not indicate in which court the action was commenced, but it was doubtless a provincial superior court in light of the provisions of section 3 of the *Divorce Act*, which provide that, subject to a very narrow exception, the provincial courts have exclusive jurisdiction over divorce and child and spousal support collateral to divorce. The exception to this requirement is contained in subsection 3(3) of the *Divorce Act*, which provides that where both parties to a marriage commence a divorce action on the same day in different provincial superior courts, this Court has jurisdiction over the divorce and corollary relief arising in respect of the divorce. Needless to say, a divorce action is virtually never commenced in this Court.

[5] In the context of his divorce action, Mr. Strickland entered into an interim child support agreement through a court-mandated mediation. His interest, like that of all the payor applicants in this application, is to seek a downward variation of the amount of child support he is paying. He argues that the Guidelines do not appropriately reflect the requirements of the *Divorce Act*, which mandate that support is a joint spousal obligation and is to be based on the relative ability of the spouses to contribute to the support of the children of the marriage. He (and the other applicants) argue that the Guidelines overcompensate the former spouses where there is a joint custody arrangement and the children reside part of the time with the payor parent.

[6] George Connon and his wife were separated at the time the application was commenced, but had not yet started divorce proceedings. He voluntarily pays child support to his wife, and calculated the amount payable with reference to the Guidelines.

[7] Three of Robert Auer's marriages are implicated in this application. He and his former second wife, Aysel Auer, have one child. In 2008, the Alberta Court of Queen's Bench granted the Auers a divorce. Mr. Auer pays Ms. Auer child and spousal support. The amount of the support payments were initially set through an arbitration that the Auers voluntarily participated in after Ms. Auer brought an application for child and spousal support in the context of the divorce proceedings. The amount of child support payable was calculated with reference to the Guidelines. Thereafter, the amount of child support payable by Mr. Auer was twice varied by the Alberta Court of Queen's Bench. The second variance order, issued on December 13, 2010, provides that the child support the Court ordered paid was "made on a without prejudice basis so that if [Mr. Auer] is successful with his federal challenge to the Federal Child Support Guidelines, then [the amount of the required

support payment] shall be reviewable back to the date of this Order". In its Order, the Alberta Court of Queen's Bench also provided that matters arising from the Order were to be brought before one of the judges of that Court "for either interpretation or implementation".

[8] Iwona Auer-Gzesiak is the former first wife of Roland Auer, with whom she had two children. It is unclear from the materials before the Court whether or not Mr. Auer pays child support for these children. Mark Auer is a child of Mr. Auer's first marriage. Vladimir Auer is a child of Mr. Auer's third marriage, which was still subsisting at the time the application was filed. These three individuals (Ms. Auer-Gzesiak, Mark Auer and Vladimir Auer) all support Mr. Auer's claim to vary downwards the amount of support Mr. Auer is paying on account of the child of his second marriage.

[9] As is apparent from the foregoing, the following issues arise in this motion:

1. Do Robert Strickland, George Connon, Iwona Auer-Grezesiak, Mark Auer and Vladamir Auer have standing to bring the application?
2. Is the application an impermissible collateral attack on the Order of the Alberta Court of Queen's Bench, made in Robert Auer's case, or on the agreement made via court-mandated mediation, in Robert Strickland's case, or otherwise an abuse of process?
3. Should this Court decline jurisdiction over this application?

[10] Prior to addressing these issues, it is necessary to first examine the jurisdiction of this Court and of the provincial superior courts to hear applications like the present because the issue of the respective jurisdiction of each court is intertwined with the other issues that arise in this application.

Jurisdiction over an application for a declaration that the Guidelines are *ultra vires* the *Divorce Act*

[11] As noted, it is my view that there is concurrent jurisdiction between this Court and the provincial superior courts over applications such as the present, which involve a challenge to the *vires* of the Guidelines as a matter of administrative as opposed to constitutional law. In this regard, the applicants accept that the federal Governor in Council possesses constitutional authority to issue the Guidelines. Their argument, rather, is that the Guidelines do not conform to the statutory authority pursuant to which they were made; they argue that as subordinate legislation (i.e. either a regulation or an instrument akin to a regulation), the Guidelines must conform to the terms of the legislation pursuant to which they were enacted.

Jurisdiction of the Federal Court

[12] Dealing, first, with the Federal Court's jurisdiction, sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [FCA] have been interpreted broadly to include jurisdiction over the review of subordinate legislation in cases such as the present. Subsection 18(1) and 18.1(3) of the FCA are particularly relevant in the present circumstances. They provide:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of	a) décerner une injonction, un bref de certiorari, de

quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[…]

18.1 […]

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[…]

18.1 […]

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[13] In *Markevich v Canada*, [1999] 3 FC 28, 163 FTR 209 at para 11 (TD) (reversed on other grounds by 2001 FCA 144 and 2003 SCC 9) [*Markevich*], Justice Evans determined that the scope of judicial review is governed by subsection 18.1(3) and that a "decision, order, act or proceeding" includes a challenge to subordinate legislation or regulations. His decision was followed by Justice O'Reilly in *Nunavut Tunngavik Inc v Canada (Attorney General)*, 2004 FC 85 at paras 8-9, who confirmed that judicial review under sections 18 and 18.1 is not limited to decisions, but noted that the challenged administrative action must flow from a statutory power for it to be susceptible to judicial review.

[14] In *Saskatchewan Wheat Pool v Canada (Attorney General)*, [1993] FCJ No 902, 67 FTR 98 (TD), Justice Rothstein (then of this Court) held that the Governor in Council, when enacting a regulation, was to be considered a federal board pursuant to the FCA. Similarly, in *Canadian Council for Refugees v Canada*, 2008 FCA 229, the Federal Court of Appeal confirmed that the *vires* of regulations may be challenged by way of judicial review and that in such cases the standard of review is that of correctness.

[15] Thus, it is clear that this Court possesses jurisdiction over this application.

Jurisdiction of the Provincial Superior Courts

[16] Turning, then, to the issue of the provincial superior courts' jurisdiction, it is the applicants' position that because the judicial review of the *vires* of regulations is governed by subsection 18(1) of the FCA, the Federal Court's jurisdiction is exclusive due to the wording of the subsection which uses the term "exclusive jurisdiction." The applicants thus argue that their challenge to the *vires* of

the Guidelines on an administrative law basis cannot be brought before a superior court either as a stand-alone proceeding or in the context of divorce proceedings where the Guidelines are being applied.

[17] The AGC, on the other hand, takes the position that jurisdiction over challenges to the *vires* of the Guidelines is shared between the Federal Court and superior courts. I agree with the AGC's position and believe that provincial superior courts do possess jurisdiction to hear challenges like the present in the context of divorce proceedings, which, indeed, are the only circumstances in which someone seeking to challenge the Guidelines would possess standing to do so, as is discussed below.

[18] The starting point for the discussion of the jurisdiction of the provincial superior courts is the *Divorce Act*, which, as noted, provides that the superior courts have virtually exclusive jurisdiction over the subject matter of the Act, subject to the very narrow role afforded to this Court (see ss 3-5). Section 4 is particularly relevant and provides that the provincial superior courts have exclusive jurisdiction over child support corollary to divorce, except in the near hypothetical case where the divorce proceeding takes place before the Federal Court (i.e. where both spouses started divorce proceedings on the same day in front of the courts in different provinces). The Guidelines are mandated by the *Divorce Act* and, subject to the exceptions provided in that Act, must be applied by judges making support orders. Section 15.1 of the *Divorce Act* provides in relevant part in this regard:

CHILD SUPPORT ORDERS	ORDONNANCES ALIMENTIARES AU PROFIT D'UN ENFANT
Child support order 15.1 (1) A court of competent	

jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

[…]

Guidelines apply
(3) A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.

[…]

Court may take agreement, etc., into account
(5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

(a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Reasons
(6) Where the court awards,

Ordonnance alimentaire au profit d'un enfant
15.1 (1) Sur demande des époux ou de l'un d'eux, le tribunal compétent peut rendre une ordonnance enjoignant à un époux de verser une prestation pour les aliments des enfants à charge ou de l'un d'eux.

[…]

Application des lignes directrices applicables
(3) Le tribunal qui rend une ordonnance ou une ordonnance provisoire la rend conformément aux lignes directrices applicables.

[…]

Ententes, ordonnances, jugements, etc.
(5) Par dérogation au paragraphe (3), le tribunal peut fixer un montant différent de celui qui serait déterminé conformément aux lignes directrices applicables s'il est convaincu, à la fois :

a) que des dispositions spéciales d'un jugement, d'une ordonnance ou d'une entente écrite relatif aux obligations financières des époux ou au partage ou au transfert de leurs biens accordent directement ou indirectement un avantage à un enfant pour qui les aliments sont demandés, ou que des dispositions spéciales ont été prises pour lui accorder autrement un avantage;

pursuant to subsection (5), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

Consent orders
(7) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

Reasonable arrangements
(8) For the purposes of subsection (7), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

b) que le montant déterminé conformément aux lignes directrices applicables serait inéquitable eu égard à ces dispositions.

Motifs
(6) S'il fixe, au titre du paragraphe (5), un montant qui est différent de celui qui serait déterminé conformément aux lignes directrices applicables, le tribunal enregistre les motifs de sa décision.

Consentement des époux
(7) Par dérogation au paragraphe (3), le tribunal peut, avec le consentement des époux, fixer un montant qui est différent de celui qui serait déterminé conformément aux lignes directrices applicables s'il est convaincu que des arrangements raisonnables ont été conclus pour les aliments de l'enfant visé par l'ordonnance.

Arrangements raisonnables
(8) Pour l'application du paragraphe (7), le tribunal tient compte des lignes directrices applicables pour déterminer si les arrangements sont raisonnables. Toutefois, les arrangements ne sont pas déraisonnables du seul fait que le montant sur lequel les conjoints s'entendent est différent de celui qui serait déterminé conformément aux lignes directrices applicables.

Thus, those to whom the Guidelines will be applied will virtually invariably be before a provincial superior court.

[19] The next point which must be considered is the jurisdiction to declare subordinate legislation, like the Guidelines, *ultra vires*. In light of section 96 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, provincial superior courts possess jurisdiction to hear challenges to the *vires* of subordinate federal legislation on constitutional grounds. The Supreme Court of Canada confirmed this in *Canada (Attorney General) v Law Society of British Columbia*, [1982] 2 SCR 307, [1982] SCJ No 70 [*LSBC*], where it held that Parliament cannot oust the inherent jurisdiction of superior courts to rule on the constitutionality of federal legislation, which includes subordinate legislation.

[20] The case law, however, is divided on whether jurisdiction also extends to review of the *vires* of subordinate legislation before the provincial superior courts where the challenge is based on administrative law as opposed to constitutional grounds.

[21] In *Williams v Canada (Auditor General)* (1983), 45 OR (2d) 291, 6 DLR (4^{th}) 329 (Ont Div Ct) [*Williams*], Justice Osler held, on the basis of *LSBC*, that the *vires* of federal regulations could be challenged directly before a superior court, even if constitutionality is not the basis of the challenge. In *Groupe des éleveurs de volailles de l'est de l'Ontario v Canadian Chicken Marketing Agency* (1984), 14 DLR (4th) 151, [1985] 1 FC 280 (TD) [*Canadian Chicken*], on the other hand, Justice Strayer refused to follow *Williams* and questioned whether federal regulations could ever be challenged in provincial superior courts. He wrote as follows (at para 23):

> Even assuming, however, that the principle of the Law Soc. of B.C. case applies so as to ensure the Supreme Court of Ontario the power to make a declaration as to conflicts between regulations made by federal boards and the Charter, it is doubtful that the principle can be carried beyond that so as to authorize such judicial review of the acts of a federal agency in the form of a declaration that its regulations, though within federal jurisdiction, were not authorized by Parliament. I can see no reason for an implied guaranteed right of the provincial superior Courts to issue such a declaration, as the situation does not menace the federal system or constitutional safeguards of individual rights and freedoms.

[22] Justice Strayer's comments were followed by the Saskatchewan Court of Appeal in *Saskatchewan Wheat Pool v Canada (Attorney General)*, [1993] SJ No 436 at para 13, 107 DLR (4th) 63 (Sask CA) [*Wheat Pool*]:

> In this action we are not asked to rule on the constitutional validity of the *Canadian Wheat Board Act*, nor has any *Charter* issue been raised. The issue here is purely and simply a request for a declaration that the Governor in Council has acted in excess of the authority it was granted by a federal statute when it issued the order in council in question. In our view, this case comes as close as it can come to being a situation which was intended to be within the exclusive jurisdiction of the federal court. All of the attributes of what might be termed a federal case are firmly in place and the exception identified by Strayer J. has no application.

[23] In *Messageries Publi-maison Ltée v Société canadienne des postes*, [1996] RJQ 547, EYB 1996-71771, JE 96-575 (Qc CA), Justice Fish, then of the Québec Court of Appeal, noted the conflicting case law on whether a non-constitutional challenge of the *vires* of federal regulation can be heard by superior courts and that the Supreme Court had not yet decided the issue. Justice Fish followed the decision in *Wheat Pool*.

[24] The bulk of the case law, therefore, recognizes that the provincial superior courts do not possess jurisdiction to hear applications that seek to challenge the *vires* of federal subordinate legislation on an administrative law basis, where the challenge proceeds as a stand-alone claim for a declaration and is not an integral part of another claim that is otherwise within the jurisdiction of the court.

[25] Where, however, the challenge to the *vires* of the federal subordinate legislation on an administrative law basis is an integral part of another claim over which the superior courts possess jurisdiction, it is my view that the superior courts do possess jurisdiction to hear the *vires* claim because jurisdiction over a subject-matter must include every legal and factual element necessary to deal with the subject matter.

[26] In *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585, the Supreme Court of Canada was faced with a somewhat similar situation where TeleZone had commenced an action against the Crown in Right of Canada for damages when TeleZone was not awarded a tender. As part of its claim, TeleZone argued that the decision made by Industry Canada breached the policy statements the department had issued regarding the tendering process and was therefore improper and in effect illegal. The Supreme Court dismissed the respondent's claim that the action was an attack on the decision made by Industry Canada that needed to proceed before the Federal Court by way of judicial review due to sections 18 and 18.1 of the FCA. Writing for the Court, Justice Binnie stated at para 6:

> In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the

> remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. That being the case, the Superior Court has jurisdiction to proceed.

[27] In the companion judgments issued in *Canada (Attorney General) v McArthur*, 2010 SCC 63, [2010] 3 SCR 626, *Nu-Pharm v Canada (Attorney General)*, 2010 SCC 65, [2010] 3 SCR 648, *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 SCR 657 and *Manuge v Canada*, 2010 SCC 67, [2010] 3 SCR 672, the Supreme Court applied the same principles and held that plaintiffs could challenge the legality of decisions made by federal decision-makers in the context of actions in tort, contract or under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, in which the plaintiffs sought relief from the decision-makers or against the federal Crown.

[28] In my view, the reasoning in these cases should be extended to situations where a party seeks to challenge the *vires* of federal subordinate legislation in the context of another claim over which the superior court has jurisdiction. Support for this proposition is found in Denys C. Holland and John P. McGowan's *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 247:

> In the context of a collateral challenge to the validity of a particular regulation, the provincial courts must retain jurisdiction to entertain arguments and to rule upon the validity of the regulation in question. On our reading of the Federal Court[s] Act, all that statute does is limit the opportunities for direct challenge of the regulation. This is quite a different thing from requiring a court to enforce a regulation without regard to its legality.

[29] In addition, in *Premi v Khodeir*, [2009] OJ No 3365, 179 ACWS (3d) 880 (Sup Ct) [*Premi*], a case involving a claim for child support, Justice Turnbull ruled, albeit in *obiter*, on the *vires* of the Guidelines in the context of a challenge similar to that which the applicants seek to make in this application. In so doing, however, Justice Turnbull did not expressly address the issue of the Ontario Superior Court's jurisdiction to rule on the *vires* argument, but, rather, merely exercised his jurisdiction and dealt with the argument.

[30] To somewhat similar effect, in *Authorson (Litigation Administrator of) v Canada (Attorney General)* (2004), 238 DLR (4th) 517, [2004] OJ No 1201 (Ont CA), a class action involving benefits for veterans, the Ontario Court of Appeal considered the *vires* of the *Veterans Treatment Regulations*, CRC 1978, c 1585 in the context of a damages claim and held that the regulations were consistent with the *Pension Act*, RSC 1985, c P-6. This case and *Premi* provide two examples of situations where courts other than this one have taken jurisdiction over a *vires* claim like that the applicants seek to make.

[31] In light of the foregoing, it is my view that the provincial superior courts do possess jurisdiction over a claim that the Guidelines are *ultra vires* due to their alleged conflict with section 26.1 of the *Divorce Act*, if such claim is made in the context of a proceeding where the superior court is called upon to apply the Guidelines. There is thus concurrent jurisdiction over these issues between this Court and the provincial superior courts.

Standing

[32] Turning, next, to the issue of the applicants' standing, as noted, the AGC argues that all the applicants except Robert Auer lack standing because none of them is party to an order in which the

Guidelines were applied. The applicants, on the other hand, argue that they are all impacted by the Guidelines as they determine the amount of support payable, which has a detrimental effect on them. Such effect, however, is insufficient to afford them standing.

[33] Standing may arise either directly due to a party's interest in the subject matter of the action or as a matter of public interest.

i) Private standing

[34] Insofar as concerns private or direct standing, generally speaking, to possess such standing an applicant or plaintiff must have a personal interest in the proceeding such that there is some direct causal relationship between the alleged wrongs set out in the pleadings and a prejudice suffered by the party or some advantage the party will directly gain if the proceeding succeeds (*Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 622-624).

[35] The Saskatchewan Court of Appeal has applied these principles in *Zeyha v Canada (Attorney General)*, 2004 SKCA 157 [*Zeyha*], a case identical to the present. There, the Court of Appeal held that only a person who is subject to a child support order made in the context of a divorce proceeding has private standing to challenge the Guidelines. In other words, merely being impacted by such an order – as in the case of a subsequent spouse or another child – does not afford an individual standing to challenge the Guidelines as any order quashing or upholding them will not directly impact such an individual.

[36] In light of the foregoing, it is clear that Vladimir Auer, Mark Auer, Iwona Auer-Grzesiak and George Connon have no private standing. None of them is engaged in divorce proceedings or pays child support pursuant to a court order. In the case of George Connon, I agree with the AGC that the fact that he pays child support on a voluntary basis in not sufficient to grant him private standing as he is not impacted by an order applying the Guidelines.

[37] It is equally clear that Roland Auer does have private standing, as he is subject to a child support court order. (Indeed, the AGC does not challenge his standing.)

[38] The standing of Robert Strickland is more ambiguous. In his affidavit, he explains that he is engaged in a divorce proceeding and pays child support pursuant to an interim agreement reached in a court-mandated mediation session. He intimates that the Guidelines were applied to arrive at the amount payable. I am inclined to accept that he does have private standing, but this issue is not determinative because, as is discussed below, his claim must be dismissed as an impermissible collateral attack.

ii) Public interest standing

[39] Insofar as concerns public interest standing, the Supreme Court of Canada set out the requirements for being granted public interest standing in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 253-254. To be granted public standing, a party must demonstrate that:

1) a serious justiciable issue is raised;
2) the party has a real stake or genuine interest in the resolution of the legal issue; and

3) there is no other reasonable and effective way to bring the issue before the courts.

[40] The first two prongs of the test are met by all applicants. However, I agree with the AGC that the third prong is not met. The applicants' argument that the present application is the only possible way to bring the issue before a court must fail, as superior courts may rule on the *vires* of the Guidelines in family law proceedings, as discussed above. The applicants alternatively argue that this application is a reasonable and effective way to bring the issue of the *vires* of the Guidelines before the courts, as opposed to addressing the issue in the context of family proceedings before a superior court. With respect, this argument misses the point; the issue is not whether this application is reasonable and effective. The issue is rather whether there is no other reasonable and effective way to bring the challenge before the courts. As noted, the *vires* claim can be made in the context of a divorce proceeding before a superior court as occurred in *Premi*. Such a proceeding is, in my view, "another effective and reasonable way to bring the issue before the court".

[41] Thus, none of the applicants possesses public interest standing in respect of this application and only Robert Strickland and Roland Auer possess private standing to make the *vires* challenge to the Guidelines.

Collateral Attack and Abuse of Process

[42] I now turn to the issue of whether Robert Strickland and Roland Auer's challenge of the *vires* of the Guidelines amounts to an impermissible collateral attack of a court order in the case of Mr. Auer and a court mandated agreement in the case of Mr. Strickland or are otherwise an abuse of process.

[43] Both the applicants and the respondent refer to *R v Wilson*, [1983] 2 SCR 594, [1983] SCJ No 88 [*Wilson*], as setting out the test for collateral attack. There, the Supreme Court of Canada held that "a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (at 599). The rule against collateral attack prevents parties from questioning an order made by a court of competent jurisdiction in any other proceeding except through the appeal process applicable to the order (*Wilson* at 599; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 20 [*Danyluk*]; *British Colombia Workers' Compensation Board v British Colombia (Human Rights Tribunal)*, 2011 SCC 52 at para 28 [*Figliola*]).

[44] The doctrine of collateral attack has been applied to prevent parties from challenging support orders or support agreements, arrived at through a court-sponsored mediation process. In *Cunningham v Moran*, 2011 ONCA 476 [*Cunningham*], the Ontario Court of Appeal upheld the motion judges' decision, dismissing an action brought by the payor spouse against his former spouse and her counsel, seeking damages for their allegedly having misrepresented the former spouse's ability to pay. The parties had reached a negotiated agreement, providing for child support, following a mediation-arbitration. The plaintiff and his ex-spouse had voluntarily agreed to participate in the mediation-arbitration to resolve the ex-spouse's family law action, in which she sought child support, a division of property and spousal support. Their agreements and settlement were incorporated into court orders and an order from the mediator/arbitrator. The Court of Appeal upheld the dismissal of the subsequent action for damages as being an impermissible collateral attack on the agreements, arbitral awards and court orders issued in the earlier proceedings. The

Court of Appeal ruled that agreements made in family law actions cannot be collaterally attacked in separate proceedings.

[45] A similar conclusion was reached in *Zeyha*. In addition to determining that the appellants lacked standing to bring the challenge to the Guidelines as discussed above, the Saskatchewan Court of Appeal also indicated that if the appellant had possessed standing to attack the Guidelines, their action would be an impermissible collateral attack on the support orders applicable to them (see also *Premi; Grenon v Canada (Attorney General)*, 2007 ABQB 403 [*Grenon*]; *Khodeir v Canada (Attorney General)*, 2009 CarswellOnt 4483 (Sup Ct)).

[46] In many of these cases, the doctrine of abuse of process was applied as an additional basis for dismissal of the collateral action. The Courts reasoned that it is an abuse of process for a party to seek to collaterally attack an order rather than appealing it through the appropriate appeal route (see *Cunningham* at para 36; *Grenon* at paras 32-33; *Premi* at paras 22-24; *Figliola* at paras 31-33, considering *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77; *Danyluk*).

[47] What these various decisions teach is that the place and time to raise a challenge to the *vires* of the Guidelines is before the provincial superior court in the context of the claim for child support, where the court will be called upon to apply the Guidelines or to explain why they should not apply. It is too late and inappropriate to challenge the Guidelines in a collateral proceeding, commenced after the support order is made (unless the order contemplates the challenge).

[48] Application of the foregoing principles leads to the conclusion that Mr. Strickland's application is an impermissible collateral attack on the agreement reached in the context of his family proceedings and an abuse of process. His claim is indistinguishable from that dismissed by the Ontario Court of Appeal in *Cunningham*.

[49] The same result, however, does not pertain in Mr. Auer's case. There, as noted, the most recent Order of the Alberta Court of Queen's Bench specifically provides that it may be varied, depending on the outcome of the present application. The Order stipulates that it "is made on a without prejudice basis so that if [Mr. Auer] is successful with his federal challenge to the *Federal Child Support Guidelines*, then [the amount of the required support payment] shall be reviewable back to the date of this Order". Contrary to what the AGC asserts, I do not believe that this possibility for amendment of the Order depending on the outcome of the present application is negated by the subsequent provision in that Order requiring that matters arising from it are to be brought before one of the judges of the Alberta Court of Queen's Bench "for either interpretation or implementation". The two are different issues.

[50] Thus, the issue becomes whether in the face of such an express provision in the Order, providing for variation depending on the outcome of the present application, the doctrine of abuse of process and the rule against collateral attack prevent Mr. Strickland from bringing this application. Such an issue does not appear to have been previously squarely considered in the case law. That said, it is my view that the policy objectives for both doctrines and the case law on "without prejudice" orders leads to the conclusion that the doctrine of abuse of process and the rule against collateral attack do not prevent Mr. Auer from instituting this application.

[51] The Supreme Court of Canada has identified the policy objectives of the doctrine of collateral attack as being to "[prevent] a party from undermining previous orders issued by a court or administrative tribunal" (*Garland v Consumer' Gas Co*, 2004 SCC 25 at para 71) and to "protect the fairness and integrity of the justice system by preventing duplicative proceedings" (*Figliola* at para 28). In *Figliola* (at para 31), Justice Abella noted that the same policy objectives underlie the doctrine of abuse of process.

[52] However, neither collateral attack nor abuse of process is categorical in its application. Where "the interests underlying the rule are not served by adherence to it" (*R v Domm* (1996), 31 OR (3d) 540 (CA)) or whether the fair administration of justice will not be harmed by the arguably duplicative proceeding, an exception to the doctrines may be appropriate (*Shams v MacDonald (2008)*, 174 ACWS (3d) 1026, [2009] OJ No 226 at para 26 (Sup Ct)).

[53] With regard to "without prejudice orders", judges often dismiss an action at a preliminary stage "without prejudice" to further proceedings on the substance of the issue. This prohibits defendants from relying on the defences of *res judicata*, issue estoppel or collateral attack. Such indications are generally respected by other judges and other courts (See e.g. *Wilson (Re)*, [1937] OJ No 314 at para 9 (CA); *Jagtoo v 407 ETR Concession Co*, [2001] OJ No 2789 at para 5; 106 ACWS (3d) 450 (Sup Ct); *Porter v Anytime Custom Mechanical Ltd*, 2007 ABCA 208 at para 13; *Carleton University v Geonetix Technologies Inc*, [2001] OJ No 2780 at para 7, 106 ACWS (3d) 585 (Sp Ct); *Mahmood (Re)*, 2011 ONSC 625 at para 19; *Logan v Harper*, 72 OR (3d) 706, [2004] OJ No 4132 (Sp Ct)).

[54] In *Goulding v Ternoey*, 35 OR (2d) 29 [1982] OJ No 3109 at para 27 (CA), Justice Houlden elaborated on the meaning of "without prejudice" in a court order and quoted the Supreme Court of Alabama's decision in *Palmer et al v Rucker et al*, 268 So 2d 773 (1972):

> [7] The words "without prejudice" in their general adaptation, when used in a decree, mean that there is no decision of the controversy on its merits, and leaves the whole subject in litigation as much open to another suit as if no suit had ever been brought. […] When the words "without prejudice" appear in an order or decree, it shows that the judicial act done is not intended to be *res judicata* of the merits of the controversy. […]
>
> [Citations omitted]

[55] In my view, the policy objectives of the doctrines of collateral attack and abuse of process as stated by the Supreme Court are consistent with Mr. Auer's application proceeding. Because the Alberta Court of Queen's Bench Order was specifically "without prejudice to a federal challenge of the Guidelines", it cannot be said that Mr. Auer seeks to "undermine a previous order" through this application.

[56] Thus, only Mr. Auer has the standing to advance the application and is not barred by the doctrine of abuse of process or the rule against collateral attack from doing so.

Deferral to the Alberta Court of Queen's Bench

[57] The final issue that I must determine involves consideration of whether I should exercise my discretion to hear Mr. Auer's application or should return it to the Alberta Court of Queen's Bench for decision.

[58] As the AGC correctly notes, judicial review is a discretionary remedy. This Court accordingly possesses jurisdiction to decline to hear a judicial review application where the issues raised in it are more appropriately considered by another court or tribunal or where an applicant has unduly delayed in bringing the proceeding. I need not consider the AGC's claim of undue delay as, in my view, the Alberta Court of Queen's Bench is the more appropriate forum to hear Mr. Auer's challenge to the *vires* of the Guidelines, given the fact that it applies the *Divorce Act* and the Guidelines on a daily basis and this Court is virtually never called upon to do so.

[59] In *Reza v Canada*, [1994] 2 SCR 394, 116 DLR (4th) 61 [*Reza*], cited by the respondent, the applicant challenged the constitutionality of provisions of the *Immigration Act*, RSC 1985, c I-2 on *Charter* grounds before the Ontario Court (General Division). Although the superior court has concurrent jurisdiction with the Federal Court to hear constitutional challenges of legislation, the Supreme Court of Canada held that the Federal Court was the proper forum because of its expertise in immigration law and because Parliament granted exclusive jurisdiction to the Federal Court over the *Immigration Act*.

[60] Likewise, in *Action des nouvelles conjointes du Québec v Canada*, 2004 FC 797, this Court declined to exercise its jurisdiction to hear a constitutional challenge to the constitutionality of certain provisions of the *Divorce Act* and the Guidelines. Applying Reza, Justice Blais (as he then was) determined that the proper forum for this challenge was the superior court, which has expertise and near exclusive jurisdiction over the legislative and regulatory scheme:

> 46 The Federal Court is not the appropriate forum to challenge provisions of the *Divorce Act*, for two main reasons: First, Parliament has granted jurisdiction on divorce to provincial superior courts, which therefore have a great deal more experience than the

> Federal Court in hearing cases under the Act and applying the law. Secondly, according to *Reza v. Canada*, [1994] 2 S.C.R. 394, even if there is concurrent jurisdiction in a matter, it is preferable for the Court mandated by the regulatory scheme of the Act to hear matters under that Act. It could be argued that the "court of competent jurisdiction", terminology used in both the Charter section 24 and the *Divorce Act* section 16, is more likely the superior court of a province rather than the Federal Court.
>
> 47 The Federal Court is given a very narrow mandate by the *Divorce Act*. In the unlikely event that a divorce action would be started on the same day in two different provinces, and if after thirty days one or the other party has not withdrawn his or her action, the Federal Court has jurisdiction to hear the divorce case. This occurrence is extremely rare (one case found in Quick Law, *Williamson v. Williamson*, [1977] 1 F.C. 38). The plaintiffs argue that the Federal Court has jurisdiction to hear challenges of federal legislation. This is undoubtedly the case, but a court challenge cannot be severed of its subject matter.

[61] In my view, identical reasoning should be applied in the present case. Parliament granted exclusive jurisdiction over the *Divorce Act*, except in exceptional circumstances, to the superior courts. Superior courts have developed expertise in family law in general, and in child support matters in particular. The Alberta Court of Queen's Bench is therefore better placed than this Court to hear Mr. Auer's application.

[62] This application will therefore be dismissed, without leave to amend.

Costs

[63] The AGC, as the successful party, is entitled to its costs of this application, inclusive of the costs of this motion. If the parties are not able to settle the quantum of costs, they shall file

submissions of no more the 5 pages each, outlining their positions on the quantum of costs to be awarded. Such submissions shall be served and filed by June 28, 2013.

ORDER

THIS COURT ORDERS that:

1. This motion is granted and the applicants' application for judicial review is dismissed with costs; and
2. In the event the parties cannot agree as to the quantum of the costs, they may file written submissions of no more than 5 pages in length by June 28, 2013.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2064-12
STYLE OF CAUSE:	*Robert T. Strickland et al v The Attorney General of Canada*
PLACE OF HEARING:	Motion R369
DATE OF HEARING:	Motion filed December 14, 2012
REASONS FOR ORDER AND ORDER:	GLEASON J.
DATED:	May 6, 2013

APPEARANCES:

No appearance	FOR THE APPLICANTS
No appearance	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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