Docket: 2002-3842(IT)G

BETWEEN:

JAMES T. GRENON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on May 27, 28 and 29, 2014, at Calgary, Alberta.

Before: The Honourable Justice David E. Graham

Appearances:

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| Counsel for the Appellant: | Ronald J. Robinson |
| Counsel for the Respondent: | Wendy Bridges |

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**JUDGMENT**

The Appeal is dismissed with costs to the Respondent.

The Respondent's request to re-open the Respondent's case to introduce additional evidence is denied.

Signed at Toronto, Ontario, this 3rd day of October 2014.

"David E. Graham"

Graham J.

Citation: 2014 TCC 265
Date: 20141003
Docket: 2002-3842(IT)G

BETWEEN:

JAMES R. GRENON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Graham J.

[1] James Grenon separated from his former spouse in 1998. There are two children of the marriage, both of whom were minors at the time of the separation. In 1999, Ms. Grenon commenced family law proceedings in the Court of Queen's Bench of Alberta concerning custody, child support, spousal support and the division of property. Mr. Grenon retained counsel to represent him in the family law proceedings and incurred legal fees to pay such counsel. The family law proceedings were ultimately resolved in 2001 in a manner that, among other things, resulted in Mr. Grenon paying child support payments to his former spouse.

[2] In 2001, Mr. Grenon asked the Minister of National Revenue to adjust his 1999 income tax return to allow a deduction of $11,816.21 in legal expenses with respect to the family law proceedings. The Minister issued a notice of reassessment denying Mr. Grenon's request. When Mr. Grenon filed his 2000 income tax return, he deducted $165,187.70 for legal expenses incurred with respect to the family law proceedings. The Minister also denied that deduction. Mr. Grenon has appealed the denial of his deductions and, as part of that appeal, is challenging the denial of the deductions under section 15 of the *Canadian Charter of Rights and Freedoms*.

## Issues

[3] There are three issues in this Appeal.

(a) What legal fees did Mr. Grenon incur in the family law proceedings in relation to his child support obligations?

(b) To the extent that Mr. Grenon incurred legal fees in the family law proceedings, is Mr. Grenon entitled to deduct those legal fees from his income in 1999 and 2000?

(c) If Mr. Grenon is not entitled to deduct his legal fees, does the denial of that deduction result in a breach of his equality rights under section 15 of the *Charter*?

[4] In addition to the foregoing issues, I will also have to review the evidence of Mr. Grenon's expert witnesses and address a request from the Respondent to re-open its case to introduce additional evidence.

## Amount of Legal Fees

[5] The Minister did not make any assumptions of fact regarding either the quantum of legal fees incurred by Mr. Grenon in the family law proceedings or the amount of such fees that related specifically to the determination of Mr. Grenon's child support obligations. Mr. Grenon testified on his own behalf. I found him to be a credible witness. He explained that he was represented by three different law firms over the course of the family law proceedings, described the roles those firms played and explained how he determined the percentage of their fees that related to the determination of his child support obligations.

[6] While Mr. Grenon's testimony and the supporting documents that were filed as exhibits were by no means as complete or clear as I would have preferred, this evidence was not seriously challenged on cross-examination and no evidence to the contrary was introduced by the Respondent. I therefore accept that Mr. Grenon incurred legal fees relating to the determination of his child support obligations of $10,265.82[1] in 1999 and $116,360.65[2] in 2000 (together, the "Fees").

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1 Joint Book of Documents, Tabs 10 and 11.

2 Joint Book of Documents, Tab 12.

**Is Mr. Grenon entitled to deduct the Fees?**

[7] There is no provision in the *Income Tax Act* that would specifically permit Mr. Grenon to deduct the Fees the way that, for example, paragraph 60(*o*) of the *Act* specifically permits the deduction of legal fees incurred disputing an income tax assessment in court. For Mr. Grenon to be able to deduct the Fees, they would have to be an expense that he had incurred for the purpose of gaining or producing income from a business or property.

[8] Mr. Grenon is the payor of child support, not the recipient. The leading case on the deductibility of legal fees relating to child support payments is the Federal Court of Appeal decision in *Nadeau v. The Queen*[3]. The Court made it clear at paragraph 18 of that decision that "expenses incurred by the payor of support (either to prevent it from being established or increased, or to decrease or terminate it) cannot be considered to have been incurred for the purpose of earning income, and the courts have never recognized any right to the deduction of these expenditures".

[9] Mr. Grenon submits that, despite the general prohibition in *Nadeau* on the deduction of legal fees by the payors of support, he is still entitled to deduct the 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 between Mr. Grenon and Ms. Grenon, 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 *Act*. I accept that this right is property but I struggle to see how it would give rise to income. At best it could be characterized as giving rise to a reimbursement.

[10] Based on all of the foregoing, I find that Mr. Grenon was not entitled to deduct the Fees when computing his income in his 1999 and 2000 tax years.

**Does the denial of the deduction of the Fees breach Mr. Grenon's equality rights under section 15 of the *Charter*?**

[11] Mr. Grenon submits that payors and recipients of child support payments are treated differently under the *Act* and that that differential treatment is the result of

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[3] 2003 FCA 400.

discrimination on the basis of sex in breach of his rights under section 15 of the *Charter*.

[12] The two-part test to be applied on a section 15 analysis was confirmed by the Supreme Court of Canada in *Withler v. Canada (Attorney General)*[4]. The first part of the test requires me to determine whether the law creates a distinction based on a ground that is enumerated in section 15 or on an analogous ground. The second part of the test asks whether that distinction creates a disadvantage by perpetuating prejudice or stereotyping.

*Does the law create a distinction?*

[13] As set out above, payors of child support are not permitted to deduct legal fees incurred to establish their support obligations, to resist the increase of existing support obligations, to resist the payment of existing support obligations, to cause the decrease of existing support obligations or to cause the elimination of existing support obligations. Both the Minister and the Courts have been consistent in applying this principle. By contrast, the Minister permits recipients to deduct legal fees incurred to establish, increase or enforce child support payments and to resist actions by the payor to reduce or eliminate such payments[5]. In order to determine the basis of this differential treatment, I need to examine why recipients of child support payments are permitted to deduct their legal fees.

[14] There is no provision in the *Act* that specifically permits the deduction of legal fees by recipients of child support. The justification for the deduction of these fees is based on the idea that such fees are amounts laid out to earn income from property. In *Nadeau*, the Federal Court of Appeal observed that "[t]he cases have consistently held for more than forty years that the right to support, once established by a court, is 'property' within the meaning of subsection 248(1) of the *Act*, and that the income from such support constitutes, in the hands of the person receiving it, income from property"[6]. The Court went on to conclude that the Court had "little difficulty in finding that income from a support payment is income from property and that as such the expenses incurred in obtaining the payment thereof may be deducted"[7]. The Court stated that "… this is the treatment that the Minster

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4 2011 SCC 12.

5 See IT-99R5 as amended by Technical News No. 24, October 10, 2002.

6 See *Nadeau* at paragraph 14.

7 *Nadeau* at paragraph 29.

has advocated and applied for more than 40 years. It is logical to assume that if this treatment was in some way contrary to Parliament's wishes, an amendment would have been brought"[8]. In reaching these conclusions, the Court noted that the 1996 amendments to the *Act* to eliminate the taxation of child support payments had been drafted in such a way as to continue to allow the deduction of expenses under paragraph 18(1)(*a*) and concluded from this that Parliament was of the view that child support payments were income from property[9]. I am bound by this reasoning.

[15] *Nadeau* did not address the question of whether legal fees expended to establish child support payments were deductible. While one might normally expect that amounts laid out to create a right to income would be treated as being on capital account, it has been broadly accepted by this Court for almost 20 years that legal fees incurred by a recipient of child support payments in order to establish that support are deductible[10]. The reason for this is that the right to child support has been found to be a pre-existing right. Thus, legal fees paid to establish the amount of child support have been considered to have been spent to enforce the right to the income rather than to create it and thus have been found to be on income account rather than capital account.

[16] Based on the foregoing, the difference in the treatment of payors and recipients of child support payments in respect of the deduction of legal fees relating to establishing child support payments lies solely in the fact that recipients of child support have a source of property income in the form of their right to child support payments and payors do not. The gender of the payor and the recipient have nothing to do with the determination of deductibility. The distinction between people who do and do not earn income from property is commonplace under the *Act*. For example, a residential landlord may deduct the property taxes, mortgage interest and utilities that she pays in respect of her rental property, but a simple homeowner who resides in his own property may not.

[17] Having or not having a source of property income is certainly not an enumerated ground under section 15 nor could it be said to be an analogous ground. An analogous ground is one based on "a personal characteristic that is

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8 *Nadeau* at paragraph 30.

9 *Nadeau* at paragraphs 32 – 34.

10 *Wakeman v. The Queen*, 1996 CarswellNat 1514; *McColl v. The Queen*, 2000 CarswellNat 1006; *Sol v. The Queen*, 2000 CarswellNat 2120; *Sabour v. The Queen*, 2001 CarswellNat 2691 (in obiter at paragraph 9); *Rabb v. The Queen*, 2006 TCC 140; *Trignani v. The Queen*, 2010 TCC 209; and *Mercier v. The Queen*, 2011 TCC 427.

immutable or changeable only at unacceptable cost to personal identity"[11]. It is difficult to see how whether one is earning income from property, or not, could be considered to be such a ground. Accordingly, Mr. Grenon's *Charter* challenge fails to pass the first part of the *Withler* test. Having reached that conclusion, it is not necessary for me to consider the second part of the test.

[18] In reaching this conclusion, I am mindful of an argument raised by Mr. Grenon. His 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. I am sympathetic to this characterization of *Nadeau*. It appears to me that what has happened over the course of many years is that 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. That said, I am bound by the reasoning in *Nadeau*. Mr. Grenon will no doubt appeal my decision. He may be able to convince the Federal Court of Appeal to revisit *Nadeau* or that recipients of child support payments are currently permitted a deduction, not because they expend legal fees to earn income from property, but rather simply on the basis that they are recipients of child support payments. Since the vast majority of recipients of child support payments are women and the vast majority of payors are men, Mr. Grenon may then be in a better position to pursue his belief that allowing recipients a deduction but denying the deduction to payors effectively discriminates on the basis of sex.

## **Expert Witnesses**

[19] Two expert witnesses testified at trial on behalf of Mr. Grenon. The purpose of those witnesses was to provide evidence in support of the second part of the *Withler* test. Given my conclusion on the first part of the test, it would normally not be necessary for me to consider their evidence. However, since I am almost certain that Mr. Grenon will appeal my decision to the Federal Court of Appeal, I need to review the expert evidence in case it is required on appeal. I will look at the evidence of each witness separately.

### *Professor Paul Millar*

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11 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paragraph 13.

[20] Professor Paul Millar is an assistant professor in the School of Criminology and Criminal Justice at Nipissing University. He has a doctorate in sociology and specializes in the areas of law and society, criminology, sociology and statistical quantitative methods. I accept Professor Millar as an expert in these areas. He prepared an expert report entitled "Gender Bias and Disadvantage in the Family Law System".

[21] I take Professor Millar's report with a significant grain of salt. He demonstrated a bias towards Mr. Grenon's position that was not in keeping with the impartiality expected of expert witnesses. He 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 without clarifying that difference and was evasive when asked about his personal experience bringing a *Charter* challenge to the Alberta Court of Appeal in respect of the Maintenance Enforcement Program[12].

[22] In paragraph 15 of his report, Professor Millar states that "A survey conducted by the Canadian Research Institute for Law and the Family in 2007 found a strong perception that the justice system is biased in favour of mothers, and that it penalizes fathers, regardless of either parent's conduct." A review of the report setting out the results of that survey shows that the authors had considerable concerns about making generalizations from the results given the very low sample size and response rate.[13] They were also concerned about the respondent's understanding of the survey questions. I am troubled both by the fact that Professor Millar would rely on such a survey in his report despite its flaws and that he did not draw those flaws to my attention. Accordingly, I would give no weight to paragraph 15 of Professor Millar's report.

[23] In his report, Professor Millar concludes that there is a historical and ongoing bias in the Canadian court system in favour of awarding custody to women. It appears to me that the facts that Professor Millar relies upon in coming to this conclusion are open to alternative interpretations. Professor Millar did little to convince me that he had valid reasons for considering and discarding those alternatives. For example, Professor Millar finds that gender is not a good indicator of parenting ability. He also finds that courts award custody to women

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12 *Millar v. Millar*, 2000 ABCA 100.

13 Exhibit R-1, pages 5 to 7.

substantially all of the time. My understanding is that from this information he concludes that the courts must be biased against fathers. I struggle with the leap of logic that he appears to have made. I am not satisfied that he has given adequate or even any consideration to other variables such as whether the selection of cases that actually go to trial are representative of the population of parents as a whole and whether the father was even actively seeking custody in the cases that went to trial or was simply seeking a determination of the amount of support. When I combine this concern with my overall concern about Professor Millar's bias, I am unable to give weight to his finding that the court system is biased against men.

[24] Professor Millar used the term "custody" in different ways in different parts of his report. It appears that in some circumstances he used the term to describe legal custody (i.e. the right to make decisions about the child's education, health care, religion, etc. regardless of where the child resides) and that in other cases he used the term to describe where the child resided. To the extent that the term related to where the child resided, it was unclear whether the use of the term referred to residing with the given parent 100% of the time or simply the majority of the time. The fact that Professor Millar did not clarify these terms either in his report or in his direct examination and the fact that he seemed somewhat uncertain on cross-examination exactly how the term was used throughout his report, has left me unable to accept the statistics contained at paragraphs 8, 11, 12 and 14 of his report as I am unsure exactly what they mean. I do, however, accept the figures set out in paragraphs 13(b) and (c) of the report as Professor Millar clearly stated on cross-examination that the term "custody" as used in paragraphs 13(b) and (c) refers to where the child lives, not legal custody.

[25] Notwithstanding my concerns about Professor Millar's bias, I am prepared to accept what I think is the key piece of evidence that Mr. Grenon wanted to rely on from Professor Millar's report. That is the statistic, found in paragraph 13(a) of the report, that fathers are child support payors in 92.8% of cases. Professor Millar draws this statistic from a report from the Department of Justice entitled "Phase 2 of the Survey of Child Support Awards: Final Report"[14]. The Respondent drew my attention to a number of issues that may affect the reliability of the report. While I acknowledge those issues, I note that they were not of sufficient concern to prevent the government from issuing the report in the first place. Professor Millar stated that he had done similar research using a different source of data and had arrived at a comparable figure. Ultimately, the exact percentage of child support payors who

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[14] Joint Book of Documents, Tab 22.

are men is not important. It is sufficient for the purposes of this Appeal that I accept that substantially all of the payors of child support are men.

*Professor Douglas W. Allen*

[26] Professor Douglas W. Allen is the Burnaby Mountain Professor of Economics at Simon Fraser University. He has a doctorate in economics and specializes in the area of law and economics. The economics of the family is one of his areas of research. He has published four papers on the Federal Child Support Guidelines. I accept Professor Allen as an expert in these areas. Professor Allen's expert report was filed with the Court.

[27] I found Professor Allen's report and testimony to be essentially free from bias. While it is clear that he has a strong opinion on the issues upon which he was opining, I do not feel that he slipped into the role of advocating for Mr. Grenon. The only concern that I had with Professor Allen's report is that he relies to an extent on the work of Professor Christopher Sarlo. In a pre-trial conference the Respondent objected to the introduction of a previous version of Professor Allen's report on a number of different grounds. One of those grounds was that it relied too heavily on the work of Professor Sarlo. Mr. Grenon was permitted to file an amended version of the expert report on the condition that, to the extent the report continued to rely on Professor Sarlo's work, Professor Sarlo would be made available for cross-examination at the trial. I have not read the previous report so I do not know exactly to what extent it relied upon Professor Sarlo's work. There are three remaining references to Professor Sarlo's work in Professor Allen's report. Professor Sarlo was not made available for cross-examination at trial. Accordingly, I must exclude paragraphs 38 and 51 of the report and any conclusions that rely on those paragraphs from evidence along with the reference to Professor Sarlo's work in footnote 1 of the report.

**Can the Respondent have leave to re-open the Respondent's case?**

[28] The Respondent did not lead any evidence that would support a defence under section 1 of the *Charter* if Mr. Grenon were able to prove that there was a breach of his section 15 rights. At the end of oral submissions, counsel for the Respondent requested leave to re-open the Respondent's case in order to introduce evidence in support of defences under section 1. It was not entirely clear, but I believe the request was also intended to cover possible evidence under section 15(2) of the *Charter*.

[29] I am not willing to grant such leave. The Respondent appears to have expected to win this Appeal on the first part of the *Withler* test based on the fact that I would be bound by the decision in *Nadeau* and thus does not appear to have been concerned about introducing evidence to deal with the second part of the test or to deal with a section 1 defence. This Appeal has been going on for more than a decade. The Respondent knew that Mr. Grenon was not just a taxpayer with a chip on his shoulder and a belief that the *Charter* gave him a general right to be treated "fairly". He was represented by counsel, had a clear idea of the basis upon which he believed discrimination was occurring and obviously intended to introduce the factual evidence that he believed he needed to support a section 15 challenge. Given the history of this appeal, it should have been obvious to the Respondent that, if Mr. Grenon lost, he would almost certainly appeal to the Federal Court of Appeal[15]. Even though the Respondent knew that I would most likely find myself to be bound by *Nadeau*, the Federal Court of Appeal would clearly not have been so bound. Thus the Respondent should have known that it needed to lay the evidentiary groundwork at trial to defend a section 15 challenge on appeal. Mr. Grenon was also no doubt aware that I would most likely find myself to be bound by *Nadeau* yet he introduced the expert evidence that he needed to pursue his appeal to the Federal Court of Appeal.

[30] Based on the foregoing, the Respondent's request to re-open its case to introduce additional evidence is denied.

[31] I want to make it clear that the foregoing comments are in no way intended to reflect on the judgment of counsel for the Respondent. I am well aware that decisions on the conduct of this Appeal will most likely have involved a wide variety of different individuals at the Department of Justice, the Canada Revenue Agency and, possibly, the Department of Finance and may not, in fact, reflect the manner in which counsel may have chosen to conduct the litigation if it had been her decision alone.

## **Conclusion**

[32] Based on all of the foregoing, the appeal is dismissed with costs to the Respondent.

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15 Mr. Grenon has already been to the Federal Court of Appeal twice on interlocutory matters on this appeal (2007 FCA 239 and 2011 FCA 147) and has sought and been refused leave to appeal the first such decision to the Supreme Court of Canada (2007 CarswellNat 4174).

**Concerns about the state of the law**

[33] I have spent a great deal of time considering the issues raised in this Appeal. I would like to take this opportunity to express some concerns that I have about the current state of the law. In my 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. I feel that those inequities are aching to be addressed by Parliament. Please note that the following comments relate only to legal fees laid out to establish child support, not those laid out to enforce arrears of child support.

[34] For example, take a divorced couple who are both fully employed and assume that the mother earns $1,000 per year more than the father. If they both go to court seeking 75% custodial access to their children there are four possible outcomes:

(a) Example "A": The mother will be successful in getting 75% custodial access. As the mother will have more than 60% custodial access, support will be determined based on the father's income without taking the mother's income into account. The mother will therefore become the recipient of child support and will be able to deduct her legal fees and the father, as the payor, will not.

(b) Example "B": The father will be successful in getting 75% custodial access. As the father will have more than 60% custodial access, support will be determined based on the mother's income without taking the father's income into account. The father will therefore become the recipient of child support and will be able to deduct his legal fees and the mother, as the payor, will not.

(c) Example "C": The court will award custodial access somewhere between the two levels requested by the parents. For simplicity assume that custodial access is divided 50/50. In that case, support will be determined based on a comparison of the income levels of both parents. Since the mother's income is slightly higher than the father's, the father will become the recipient of child support (albeit a very relatively small amount of support). Thus the father will be able to deduct his legal fees and the mother, as the payor, will not.

(d) Example "D": The court will award 75% custodial access to one child to the father and 75% custodial access to the other child to the mother. Support for the first child will be determined based on the mother's income and support for the second child will be determined based on the father's income and the resulting amounts will be set-off against one another. Since the mother has the higher income, she will end up being the payor after the set-off so the father will be able to deduct his legal fees but the mother will not.

[35] Regardless of whether the recipient has income from property or not, I struggle to see how, in the foregoing examples, it is acceptable from a public policy point of view to allow the recipient to deduct his or her legal fees while denying that deduction to the payor. Both parties are in court fighting about the exact same issues. What policy objective could possibly justify this outcome? The objective cannot be to give a financial break to the party with the greater financial need because in Example "A" the parent with the higher income receives the deduction. The objective cannot be to ensure the financial security of the children because the children in each example would benefit more from having both parents receive the deduction. The objective cannot be to reward the party who is successful in court because in Example "C" both parents have succeeded in increasing their custodial access from the 25% offered by the other parent to the 50% they received in court yet the mother is not permitted to deduct her legal fees. The objective cannot 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 (e.g. in Example "C" above, the father receives the subsidy whether his income is $4,000, $49,000 or $499,000 and the mother is denied it whether her income is $5,000, $50,000 or $500,000).

[36] In my view, the problem with the current system arises, to a large extent, because there is an unfortunate tendency to examine this issue using the classic "deadbeat dad" stereotype[16]. If that stereotype is used, then there does not appear to be a problem with the system. The stereotypical "deadbeat dad" is considerably financially better off than the mother, wants little or no custodial access and is seeking to keep his child support payments as low as possible. In this situation, it is easy to argue that giving the deduction to the mother achieves the above policy goals: the mother is the party with the greater need; the children are better off if the mother is subsidized in her fight to establish a high level of child support and

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16 I note that this is one of the stereotypes that Mr. Grenon relied upon in his submissions on the second part of the *Withler* test.

the father is not subsidized in his fight to keep his child support payments low; the mother is the successful party in court; and, without the deduction, the mother may not be able to afford access to justice.

[37] However, tax policy should not be driven by stereotypes. The modern reality is that more and more parents fall into Example "C". The tax system should, in my view, do a better job of reflecting that reality.

[38] Justice Woods' decision in *Trignani v. The Queen*[17] and Justice Angers' decision in *Mercier v. The Queen*[18] show that it may be possible for a payor in the above examples to obtain a deduction if he or she has a claim for child support that is "*bona fide*, not frivolous, and [has] a reasonable prospect of success"[19]. I applaud the ingenuity of Justices Woods and Angers in addressing the inequality in the system but I feel that payors of child support should not have to wait for a patchwork of relief to emerge from this Court one decision at a time. Taxpayers would be far better served by a well thought out global system that balances the various fiscal and social issues and addresses both the needs of the parents in my examples and the needs of the parents in the "deadbeat dad" scenario. This Court cannot possibly achieve such a global system on a case by case basis. It is my hope that Parliament will give serious consideration to establishing such a system.

Signed at Toronto, Ontario, this 3rd day of October 2014.

"David E. Graham"

Graham J.

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17 2010 TCC 209.

18 2011 TCC 427.

19 *Trignani* at paragraph 28.

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| COURT FILE NO.: | 2002-3842(IT)G |
| STYLE OF CAUSE: | JAMES T. GRENON AND HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Calgary, Alberta |
| DATE OF HEARING: | May 27, 28 and 29, 2014 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice David E. Graham |
| DATE OF JUDGMENT: | October 3, 2014 |

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| Counsel for the Respondent: | Wendy Bridges |

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