

# SUPPORT THE CHALLENGE

## Challenging Canada's Child Support Guidelines

This bulletin is the second of a series leading up to the upcoming court challenge to Canada's *Child Support Guidelines* (the Guidelines) scheduled on December 2 to 4, 2020 in Edmonton, Alberta (the Action).

As discussed in the first bulletin, the mathematical formula in the Guidelines is rigged in favour of the custodial parent (the CP), and is misrepresented as being the result of a careful balanced analysis. In the aggregate, the consequences are sufficiently enormous to be another landmark Canadian social injustice. While statistically, more men are the non-custodial parent (the NCP), both sexes can be winners or losers depending on whether they are part of or related to a family unit involving a NCP. As such, we do not consider this to be a battle of the sexes even though some may jump to that conclusion. A copy of the first bulletin can be found at the following link – [First Bulletin Letter](#).

In addition to the skewed math, unless the NCP has at least 40% custody, they are treated much differently than the CP. Specifically, the NCP must endure the yearly cost and subservience of disclosing their financial information to the CP, with no information supplied by the CP. And, the NCP must pay their child support. In sharp contrast, there is no requirement that the CP spend the child support received from the NCP on the children, let alone contribute anything from their own resources.

The exaggerated amount of child support awards is only one part of the problem. The enforcement of such awards by provincial agencies is the second act. Does it sound right that an amount of child support that is too high, because the Guidelines don't follow the law, should have a specific arm of government to enforce payment? Although the enforcement process is not one of the grounds for the Action, it should be considered as part of the matrix.

Since the introduction of the Guidelines in 1997, provincial governments have moved towards imposing more severe penalties against NCPs who have defaulted on their child support obligations. Maintenance enforcement agencies have wide-ranging powers to investigate the NCP's finances and impose penalties against the NCP in order to collect payment. These powers include garnishing wages and bank accounts, imposing liens against property, suspending drivers and professional licenses and passports, and even imprisonment.

The effect of these enforcement measures can be life-altering. They can also be counterproductive. For example, suspending the NCP's driver's license or professional license can seriously impede their ability to earn a livelihood. In turn, the NCP's child support arrears grow.

The constitutionality of these enforcement measures is open for debate as well. For instance, the suspension of the NCP's passport arguably breaches their rights under Section 6(1) of the *Charter of Rights and Freedoms* (the Charter) which provides that every Canadian has the right to enter, remain and leave Canada. Additionally, suspension of the NCP's driver's license potentially violates Section 6(2)(b) of the Charter pursuant to which every Canadian has the right to pursue the gaining of a livelihood.

The prosecution of NCPs in default proceedings raises numerous constitutional issues as well. As previously mentioned, NCPs may be imprisoned for willfully refusing to make support payments or not cooperating with their maintenance enforcement agent. In default proceedings, NCPs are not advised of

their right to retain counsel.<sup>i</sup> The provision of legal assistance through duty counsel is not made available to NCPs either. In addition, NCPs have the burden of proving that they have been cooperative with their maintenance enforcement agent, to the best of their abilities.<sup>ii</sup> How does this accord with the NCP's right to be presumed innocent until proven guilty under Section 11 of the Charter? NCPs in default proceedings are not afforded the procedural protections given to real criminals.

Beyond the Guidelines and the enforcement of child support awards under provincial regulations, NCPs also face prejudice under Canada's *Income Tax Act* (the ITA). The ITA allows child support recipients to deduct their legal fees to establish, negotiate or challenge the amount of child support payments. But, you guessed it, even a NCP who is successful in defending against unreasonable demands in a child support dispute cannot deduct any legal expenses. The implication is that through the taxation system, the law penalizes NCPs who seek vindication of their legal rights, and offers a public subsidy to the CP side of a private dispute.

While court challenges to this asymmetric tax treatment have been unsuccessful, numerous judges of the Tax Court of Canada have expressed concern about this policy. Specifically, judges have acknowledged there is no current logical basis for such policy and that it is unjust, unfair and inequitable. Nonetheless the courts have resisted deviating from longstanding case law in support of this unequal treatment. As noted by Justice Rommel Masse, "The principle of law that a payer cannot deduct legal fees incurred to prevent child support from being established or increased, or to have child support decreased or terminated, is so well entrenched that only Parliament can bring about legislative changes to the law. The fact that Parliament has not done so speaks to the will of our law-makers."<sup>iii</sup>

It is hoped the Action will serve as a catalyst for change in not only the Guidelines, but also, other laws in Canada which are prejudicial to NCPs.

For more information about the Action and the Guidelines please visit our website at [www.supportthechallenge.ca](http://www.supportthechallenge.ca). If you are interested in receiving more information on this issue, including receiving updates on the Action, you can register for future email notifications there.

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<sup>i</sup> Millar, Paul (2010). "Punishing our way out of poverty: The prosecution of child-support debt in Alberta, Canada," *Canadian Journal of Law and Society*, vol. 25, no. 2, pp. 145-169.

<sup>ii</sup> *Ibid.*

<sup>iii</sup> *Mills v. The Queen*, 2014 TCC 153.