It's All In The Family: Child Support, Tax, and *Thibaudeau*

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The issue of whether the tax system discriminates against women in contravention of section 15(1) of the *Charter* has been the focus of much public attention recently. This question has arisen in the context of two recent *Charter* challenges heard by the Supreme Court of Canada, both of which have been to the *Income Tax Act*.[1] In *Symes* v. *Canada*[2] the Court held that it was not discriminatory on the basis of sex to deny the deduction of child care expenses as a business expense. In *Thibaudeau* v. *Canada*,[3] which is the focus of this comment, the issue was whether the requirement that Suzanne Thibaudeau include child support payments received from her ex-spouse in income discriminated against her as a divorced custodial parent in contravention of section 15(1) of the *Charter*. The Federal Court of Appeal[4] held that the requirement did discriminate on that basis, but the Supreme Court of Canada overturned this decision, holding that there was no discrimination. In so doing the Supreme Court split along gender lines. As was the case in *Symes*, the male judges made up the majority, which held that there had been no discrimination, and the only two women on the Court were in dissent. This point did not escape Suzanne Thibaudeau who commented after the decision that "laws are made by men for men."[5]

As background to my analysis of the decision of the Supreme Court in *Thibaudeau*, I review both the tax rules that prompted the litigation and the decision of the Federal Court of Appeal. My analysis will focus on four issues: the Court's attachment to the "post-divorce spousal unit" as the relevant group for the purposes of the application of section 15 of the *Charter*; the Court's view that if the tax rules create a problem for divorced or separated custodial parents that problem relates to family law, not tax law; the unfortunate absence from the decision of any discussion of the argument raised by the intervenors in the case that the tax rules discriminate against custodial parents on the basis of sex; and, finally, whether there is a future for successful *Charter* challenges to the *Act*.

Paragraphs 60(b) and (c) of the *Act* provide a deduction in the computation of income to those who pay child support. The deduction is available if the payment is made on a periodic basis, is for the maintenance of the child, and is made pursuant to court order or written agreement. If an amount is deductible by the payor, paragraphs 56(1)(b) and (c) of the *Act* require that the amount be included in the income of the recipient (whether or not the payor actually takes the deduction). This is known as the "inclusion/deduction" system. The gender dimensions of these rules are straightforward; 98 per cent of those paying child support, and thereby entitled to the deduction, are men and 98 per cent of those receiving child support payments which they must include in their income are women.[6] The primary justification for these rules put forward by the Department of Finance is that the inclusion/deduction system provides a subsidy which results in higher support payments, thereby benefiting children whose parents have separated or divorced.[7] The subsidy arises where the payor is in a higher tax bracket than the recipient because the monetary value of the deduction to the payor exceeds the amount of the tax payable by the recipient. In theory, this overall tax saving permits higher support awards. It has been estimated that the amount of the tax subsidy is approximately $300 million a year.[8]

In May 1995 the Federal Court of Appeal held in *Thibaudeau* (F.C.A.) that the requirement to include child support payments in income contravened section 15 of the *Charter* on the basis of family status. The court found that it discriminated against separated custodial parents because neither separated non-custodial parents nor separated custodial non-parents are required to include in income any amounts that they receive for the support of children.[9] This decision was heralded by many women's groups as a victory for women who receive child support from their ex-spouses.[10] The response of the federal government was threefold; it appealed the decision to the Supreme Court of Canada, it applied for and received a stay of the order of the Federal Court of Appeal, and it established the Task Force on Child Care headed by Sheila Finestone, Secretary of State (Status of Women) to "seek the views of Canadians ... on the tax treatment of child support."[11] As of the present time, the report of the Task Force has not been released to the public.

Thus the scene was set for the Supreme Court to rule on the matter, and this they did with remarkable speed, releasing their decision just one year after the ruling of the Federal Court of Appeal.[12] By a majority of 5-2, the Court held that the requirement to include child support payments in income did not contravene the *Charter*.[13] The decision is, however, a complex one. Two majority judges (Cory and Iacobucci JJ.) disassociated themselves from the decision of Gonthier J. with respect to his section 15 analysis, preferring to adopt the reasoning of McLachlin J. enunciated in *Miron* v. *Trudel*[14] and incorporated into her dissent in *Thibaudeau*. Despite using the same *Charter* analysis as McLachlin J., Cory and Iacobucci JJ. reach a different result with respect to its application to the facts of this case. The other judges in the majority (LaForest and Sopinka JJ.) agree with Cory J., Iacobucci J. and Gonthier J. that section 15 is not infringed, although they do not state which *Charter* analysis they apply to reach that conclusion. L'Heureux-Dubé J., in dissent, formulates her own *Charter* analysis and reaches the same conclusion as McLachlin J. on the facts of the case.

The test applied by Gonthier J. in determining whether section 56(1) of the *Act* contravenes section 15 of the *Charter* is "whether the impugned provision creates a prejudicial distinction affecting the complainant as a member of a group, based on an irrelevant personal characteristic shared by the group."[15] But Gonthier J. makes it clear that in applying this test he takes a "comparative" approach and this is the point of departure in the reasoning of Cory and Iacobucci JJ. In his section 15 analysis, Gonthier J. takes into account the objectives of the inclusion/deduction scheme. For him, they form part of the legal context for determining the section 15 issue. In so doing he acknowledges but dismisses the argument of the intervenor SCOPE that such an approach is more properly applied to a section 1 analysis. The issue of where this analysis of "functional values and relevance" (as it is described by Cory and Iacobucci JJ.)[16] belongs is critical because it relates directly to the issue of who bears the burden of proof. Section 1 makes *Charter* rights subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The onus to justify the discrimination is on the government and that is when, in the opinion of Cory and Iacobucci JJ., an analysis of functional values and relevance is to be undertaken, not when the onus is on the complainant to demonstrate discrimination under section 15. Furthermore, as Cory and Iacobucci JJ. point out, the approach of Gonthier J. focuses on the ground of distinction rather than the discriminatory impact of the distinction. As they state, this "permits proof of relevance, standing alone, to negate a finding of discrimination."[17]

A key to understanding the basis of the decision of the majority in *Thibaudeau* is that the relevant group for the purposes of their *Charter* analysis is separated or divorced couples or, as Cory and Iacobucci JJ. put it, the "post-divorce 'family unit'."[18] With this "unit" as the starting point for the section 15 analysis, it is easy for the majority to conclude that there is no discrimination because the inclusion/deduction system benefits the group of separated or divorced parents by generating "substantial savings."[19] Overall the tax burden of the *couple* is reduced. But what about the fact that the tax benefit is not shared equally by the individuals in the couple or that the support payments may not be increased to accurately reflect the impact of the inclusion/deduction system? For Gonthier J. this is a family law issue, not a tax issue.[20] I return to this point later.

In contrast to the majority, McLachlin and L'Heureux-Dubé JJ. focus on the inequality as between custodial and non-custodial parents. They do not view separated or divorced individuals as part of a couple with their ex-spouses. Rather they consider the impact of the requirement to include child support payments in income on separated or divorced custodial parents alone. With respect to this difference of

opinion about the unit of comparison for the purposes of a section 15 analysis, McLachlin J. states: "Where unequal treatment of one individual as compared with another is established, it is no answer to the inequality to say that a social unit of which the individual is a member has, viewed globally, been fairly treated."[21] Once the women on the court frame the issue as being whether custodial parents are discriminated against in comparison to non-custodial parents, it is as easy for them to conclude that the inclusion/deduction scheme is discriminatory as it was for the men on the Court to conclude that it was not discriminatory. Simply put, in comparison to non-custodial parents who receive a tax deduction, custodial parents incur a tax burden.

The majority's view that the divorced or separated couple should be viewed as a single unit is problematic for several reasons. First, it is at odds with one of the objectives of family law, which is to promote a "clean break" or self-sufficiency of spouses after separation or divorce. While the *Moge* v. *Moge*[22] decision of the Supreme Court of Canada clarified that this objective was only one among others, including compensation for the economic consequence of family breakdown, the promotion of self-sufficiency remains a key component of support law. Treating the divorced couple as a single unit flies in the face of this development. Second, if one takes the view of the majority to its logical conclusion, it appears that once a couple has a child, they remain a couple forever. Neither separation, divorce, or even remarriage by one or both of the parties, can dissolve the "family," at least insofar as the inclusion/deduction rules apply to them.

The role of family law in setting the amount of child support awards is central to the decision of the majority. For Gonthier J., if a support award does not take the tax consequences into account sufficiently, then the recipient may apply for a variation of the order in accordance with family law. Consequently, any unfairness can be redressed. As L'Heureux-Dubé J. points out, life is not so simple. She demonstrates that "important systemic factors preclude the family law system from properly filling the lacuna left by the deduction/inclusion provisions of the [*Act*]."[23] One of these factors is that family law discourages frequent applications for variation of support orders. This is a problem because, even if a court takes the inclusion/deduction rules into account when setting the amount of child support[24], the accuracy of that amount may be very short lived. If there is any change to the income of either party, the amount may be too low (or too high). Indeed it is quite possible that annual applications for variation of the amount would be necessary to redress any unfairness. Further, as L'Heureux-Dubé J. illustrates, the costs of such court actions and fears about antagonising the non-custodial parent also serve as effective deterrents to seeking variations of the amount of child support awards. Cory and Iacobucci JJ. also place importance on the role of family law. They conclude that the tax rules and family law operate in tandem and "if there is any disproportionate displacement of the tax liability between the former spouses (as appears to be the situation befalling Ms. Thibaudeau), the responsibility for this lies not in the *Income Tax Act*, but in the family law system and the procedures from which the support orders originally flow."[25] I find the approach of the majority somewhat perplexing. It reminds one of the "chicken and egg" analogy. Surely without the tax rules that require the inclusion of child support payments in income, there would be no need for family law to compensate with respect to the amount of these orders. The problem appears, therefore, to be rooted in the tax rules and not, as Gonthier J. would suggest, merely a family law problem exacerbated by the tax rules.

In their decision, the Supreme Court chose not to discuss one extremely important issue; that is whether section 56(1)(b) and (c) of the *Act* has an adverse impact on women, thereby discriminating against them on the basis of sex. Hugessen J. at the Federal Court of Appeal held that there was no sex discrimination. His reasoning was that a rule does not discriminate on the basis of sex simply because it affects more members of one sex than the other. If a rule which adversely affects women has the same adverse effect on men, then even though the number of women adversely affected (98 per cent in this case) is considerably greater than the number of men adversely affected (2 per cent), there is no sex discrimination. In other words, he invoked a qualitative aspect to the test of adverse impact discrimination. In order to succeed, women in the affected group (separated or divorced custodial parents) had to be affected differently than men.[26]As Ellen Zweibel has said, this interpretation "comes dangerously close to requiring a distinction based on a sex-linked physical characteristic to establish adverse effects discrimination based on sex. It virtually precludes linking gender-based discrimination to social or economic status."[27] At the Supreme Court, the Coalition of Intervenors argued that there was also discrimination on the basis of sex and in so doing challenged this narrow interpretation of adverse-

effects discrimination. It is regrettable that the Supreme Court did not take the opportunity to address the issue.

Thibaudeau is an important decision for many reasons, not the least of which is that it throws some light on the possible fate of future *Charter* challenges to the *Act*. While acknowledging that "the [*Act*] is subject to the application of the Charter just as any other legislation is" Gonthier J. also refers to the "special nature" of the *Act*. [28] The question then becomes, is there something so special or different about tax legislation that requires that it be treated differently than other legislation when the subject of a section 15 challenge? [29] It appears that for Gonthier J. the answer is yes. For him the special nature is connected to the fact that it is the "essence of the ITA to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests."[30] This special nature is a "significant factor that must be taken into account in defining the scope of the right relied on, which here as we know is the right to the 'equal benefit' of the law."[31] Gonthier J.'s analysis is not convincing and contradicts other Supreme Court pronouncements on the issue.[32] Attributing a special nature for section 15 purposes to legislation merely because it makes distinctions is highly problematic. Most legislation makes distinctions and indeed a distinction is the first step to establishing an infringement of section 15. I find Gonthier J.'s concern about revenue raising legislation somewhat of a red herring, as the purpose of the inclusion/deduction system is to generate a tax subsidy not revenue. L'Heureux-Dubé J., in dissent, is clearly not persuaded that such an approach is appropriate in a section 15 analysis. In a veiled criticism of Gonthier J.'s approach she states:[33]

> Inequality is inequality and discrimination is discrimination, whatever the legislative source. To water down one's analysis of a legislative distinction or burden merely because it arises in a statute which makes many other distinctions is antithetical to the broad and purposive approach to s. 15 of the Charter which this Court has repeatedly endorsed.

In conclusion, while Suzanne Thibaudeau lost in court, her litigation has clearly prompted the federal government to reconsider the current policy with respect to child support.[34] Immediately after the decision of the Federal Court of Appeal, the federal government announced the establishment of the Finestone Task Force, although, as mentioned, its report has not yet been released publicly. In January 1995 the Federal/Provincial/Territorial Family Law Committee issued its report and recommendations on child support.[35] It recommended child support guidelines which establish a formula by which the amount of child support would be set and made suggestions with respect to any further examination of the tax issues. Allan Rock, Minister of Justice also has acknowledged the role that Suzanne Thibaudeau has played in this process. In announcing that he hopes to introduce legislation to deal with this issue soon, he said "Suzanne Thibaudeau succeeded very well in bringing these issues to the attention of not only the courts, but to the Canadian public and the Parliament of Canada. Because of this judgment [*Thibaudeau*], the process has accelerated."[36] What remains to be seen is what this process will produce in terms of improvements to the system. ❑

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Endnotes

1. *Income Tax Act*, R.S.C. 1985, c. I-5 [hereinafter the *Act*].

2. (1993), 4 S.C.R. 695, 110 D.L.R. (4th.) 470 [hereinafter *Symes*].

3. [1995] S.C.J. No. 42 (QL) [hereinafter *Thibaudeau*]. Suzanne Thibaudeau argued that it was discriminatory on the basis of family status to require her to include child support payments in her income. The intervenors, SCOPE (Support and Custody Orders for Priority Enforcement) and the Coalition of Intervenors (consisting of the Charter Committee on Poverty Issues, the Federated Anti-Poverty Groups of British Columbia, the National Action Committee on the Status of Women and the Women's Legal Education and Action Fund) argued that it was also discriminatory on the basis of sex because the requirement had an adverse impact on women, compared to men.

4. (1994), D.L.R. (4th) 261; [1994] 2 C.T.C. 4 [hereinafter *Thibaudeau* (F.C.A.) cited to C.T.C.].

5. "A Deduction that is not Elementary" *The [Toronto] Globe and Mail* (31 May, 1995) A13.

6. See the evidence of Nathalie Martel, a federal government economist, on cross examination in *Thibaudeau* (F.C.A.) Supplementary Case on Appeal, Volume 2 at 185.

7. See Ellen Zweibel and Richard Shillington, *Child Support Policy: Income Tax Treatment and Child Support Guidelines* (Toronto: The Policy Research Centre on Children, Youth and Families, 1993) at 8.

8. *Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support* (Canada: Minister of Public Works and Government Services, 1995) at 49.

9. As I shall discuss later, the Federal Court of Appeal rejected the argument of the intervenor SCOPE that the requirement to include child support payments also discriminated on the basis of sex.

10. See e.g. "Mothers Stand to Gain Through Tax Ruling" *The [Toronto] Globe and Mail* (4 May, 1995) A2, where Ardyth Cooper, of the Canadian Advisory Council on the Status of Women said that, "[i]t sends out a clear message that the rights of these parents — most of them women and many of them among Canada's poorest — cannot be trampled by outdated tax law."

11. Introduction to Status of Women Canada, *Task Group on the Tax Treatment of Child Support: Discussion Points* (Ottawa: Status of Women Canada, 1994).

12. The Federal Court of Appeal released its decision on May 3, 1994, the Supreme Court of Canada heard the appeal on October 4, 1994 and released its decision on May 25, 1995.

13. The majority consisted of Justices LaForest, Sopinka, Gonthier, Cory and Iacobucci with L'Heureux-Dubé and McLachlin JJ. dissenting.

14. [1995] S.C.J. No. 44 (QL).

15. *Thibaudeau*, para. 103.

16. *Thibaudeau*, para. 154.

17. *Thibaudeau*, para. 156.

18. *Thibaudeau*, para. 158. This characterisation of separated or divorced parents can be contrasted to that of McLachlin J. who describes them as "the fractured family" (at para. 187).

19. *Thibaudeau*, para. 134.

20. *Thibaudeau*, para. 141.

21. *Thibaudeau*, para. 190.

22. (1992) 43 R.F.L. 3d. 345.

23. *Thibaudeau*, para. 23.

24. Evidence was presented in *Thibaudeau* that, in fact, judges do not always take the tax consequences into account when setting the amount of child support awards. See *Thibaudeau* F.C.A. at 14.

25. *Thibaudeau*, para. 160.

26. For an excellent discussion of this issue, see Lisa Philipps and Margot Young, "Sex, Tax and the Charter: A Review of *Thibaudeau v. Canada*, (1995) 2 Rev. Con. Studies 221 at 240-247.

27. Ellen Zweibel, "*Thibaudeau v. R.*: Constitutional Challenge to the Taxation of Child Support Payments" (1993/94) N.J.C.L. 305 at 317.

28. *Thibaudeau*, para. 90.

29. The Supreme Court has made it clear that the *Act* is subject to *Charter* scrutiny. In *Symes* Iacobucci said "[t]he Income Tax Act is certainly not insulated against all forms of Charter review" (at 67) and in *Thibaudeau* Cory and Iacobucci JJ. state that: "As must any other legislation, the Income Tax Act is subject to Charter scrutiny. The scope of the s. 15 right is not dependent upon the nature of the legislation which is being challenged" (at para. 159).

30. *Thibaudeau*, para. 91.

31. *Thibaudeau*, para. 90.

32. *Supra* note 29.

33. *Thibaudeau*, para. 6.

34. It should be noted that in May 1995 Allan Rock, Minister of Justice announced that Suzanne Thibaudeau's legal expenses with respect to the Supreme Court hearing would be paid by the federal government. See "Ottawa to Appeal Child Support Ruling" *The [Toronto] Globe and Mail* (19 May, 1995) A2.

35. *Supra* note 8.

36. "Feds Ponder Tax Changes for Child Support" *Law Times* (5-11 June, 1995) 4.

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