

REPORT OF THE FOLLOW-UP COMMITTEE ON THE QUEBEC MODEL FOR THE DETERMINATION OF CHILD SUPPORT PAYMENTS

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July 2004

Report of the Follow-Up Committee on the Quebec Model for the Determination of Child Support Payments

Prepared by:
Ministère de la Justice du Québec

Presented to:
Family, Children and Youth Section
Department of Justice Canada

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March 22, 2000

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Minister of Justice,
Attorney General, Minister responsible
for the status of women
and for the application of
professional laws
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Dear Madam Minister:

On behalf of the members of the Follow-Up Committee on the Quebec Model for the Determination of Child Support Payments, I am delighted to submit this report detailing our proceedings and recommendations.

From the outset, Committee members agreed to operate on the basis of consensus. Thus I would hasten to inform you that the recommendations submitted here have, for all intents and purposes, received unanimous approval. With respect to recommendations around which no such consensus was reached, Committee members unanimously agreed upon the studies to be undertaken or the consultation process to be initiated.

The word "family" has a wide range of definitions; it includes social, religious, economic and legal concepts that are interpreted differently by different people, depending on the concept in question, one's age and gender, and, as regards our study, the general situation of the family's child members. The social consensus around legal guidelines and the ensuing economic consequences change over time.

I myself have witnessed such changes, having been a member since 1986 of all the Barreau du Québec Committees that have reviewed, analyzed, commented upon and made recommendations about the body of legislation affecting the family, its components and its economic and fiscal elements, as well as the exercising of familial rights. Since you yourself sat, as a family law expert, on the Barreau du Québec's Comité de la famille, focussing in particular on the legislation that concerns us here, as well as on many other legal issues, you are well aware of the scope and depth of the deliberations.

A similar approach has characterized each meeting of the follow-up Committee, due to the judicious choice of organizations that were invited to participate in the process and to the highly able representatives actually delegated by these agencies to attend. The same holds true for the representatives of the various government departments; in their role as support organizations, they never failed to provide precise and relevant information, all of which was necessary for our understanding of the model and for determining the feasibility of the proposals under variation.

The follow-up Committee well deserves its name, for it has indeed monitored successive changes to the new Quebec model for the determination of child support payments since it came into force on May 1, 1997. The Committee reviewed a wide variety of matters in the course of its deliberations, including studies of case law, surveys involving practitioners in the field (lawyers, mediators, special clerks and judges) and voluminous records of court cases dating from September 1, 1997, to December 31, 1998.

The first conclusion we have drawn from our deliberations is that with its new method of determining child support payments, Quebec has reached the objectives set in the original legislation. In my view, this success is due, in large measure, to the fact that sufficient time was devoted to examining the overall situation (the Quebec government began its work in 1989) and to the consultation process that the government carried out during this period, before it enacted legislation of such vital importance.

No model can solve all problems, especially when it is designed for such a vast target group, namely all those undergoing a separation or divorce. Nonetheless, the Quebec method can be applied successfully, with all the necessary rigour, to the situations that arise most frequently, and it still leaves sufficient latitude for the requisite adjustments to be made in exceptional circumstances, with judicial discretion once again providing the most effective means of handling these special cases.

Since any system should be open to improvement, the Committee has formulated certain recommendations that seem necessary to us and that require your immediate, and sometimes urgent, attention.

We would suggest that changes of a technical nature be made as quickly as possible. You may judge that other proposed changes should be subject to further study. Given the tight deadline that it faced in tabling its report, the Committee was unable to vary and analyze all subjects as fully as possible; in such instances, it has recommended that additional studies and consultations be carried out. These issues, such as whether priority should be given to support obligations arising from other unions, give rise to opinions which, while not necessarily conflicting, are at times expressed clearly and precisely in the on-going debates.

The Committee has therefore highlighted the various opinions expressed, based on the firm conviction that the Quebec model can be improved if such views are in fact more fully analyzed. Particularly at issue here are subjects about which the Committee was unable to come to a consensus.

We would also like to underline the excellent work and professionalism of Pierre Tanguay from the Ministère de la Justice, as well as every single member of his team. Because of their commitment, devotion and consistent good humour, the work of the Committee, as well as its proceedings, unfolded in a smooth and effective manner.

I am well aware of your commitment to the family, so I am convinced that after reading our report you will hasten to make the necessary improvements to the Quebec model for the determination of child support payments. In so doing, you will help bring positive change to a system whose overall objective is to make it easier to settle family conflicts, in which the interests of the children, who are often silent witnesses to the conflict, are given the highest priority in our legislation. By promoting such changes, you will make Committee members all the more proud to have participated, so enthusiastically and with so much devotion, in the complex process of deciding just how to improve the Quebec model for the determination of child support payments.

Yours sincerely,

Jean-Marie Fortin, M. Fisc.
Chair of the Follow-Up Committee
on the Quebec Model for the
Determination of Child Support Payments

CHAPTER 1: SUMMARY OF THE QUEBEC MODEL FOR THE DETERMINATION OF CHILD SUPPORT PAYMENTS

In June 1996, the Minister for Income Security and the Minister responsible for the Status of Women tabled a consultation paper distributed to groups and organizations affected by the system of determining child support payments. On August 28 and 29, and September 30, 1996, public hearings were held on the subject. As a result, on October 25, 1996, a joint brief was submitted to Cabinet by the Minister for Income Security and the Minister of Justice reviewing the main recommendations made during the hearing process.

The ensuing reform was essentially due to the inadequate amount of support sometimes awarded by the courts and the unpredictable nature of the support payment decisions handed down. The brief of October 25, 1996, makes the following point:

Current legislation respecting the determination of support provides only limited guidelines that leave a great deal of discretion to the courts. In exercising this discretion, judges may end up establishing very different support payments for very similar situations. Moreover, the need to fully assess the tax consequences of paying support adds to the unpredictable nature of support awards: the problem of calculating tax consequences when determining child support payments will, however, be solved by removing child support from the tax system.

Nonetheless, even with such changes to tax treatment procedures, current methods for determining support do not guarantee that families in similar circumstances will be awarded similar amounts of support.

An Act to amend the Civil Code of Québec and the Code of Civil Procedure as regards the determination of child support payments (1996, c. 68) was approved on December 23, 1996 (Bill 68). The Act and its regulations, including a form and a table, came into force on May 1, 1997 (Appendix 1).

The legal framework for determining child support payments was thus substantially modified, the result of various findings pertaining to the rules in place up until that point.

Here we must stop for a few moments to variation the reasoning behind the reform of the system for determining child support payments. Before the reform, the criteria for determining support were very simple (some would say too simple). If the parents were unable to agree upon an amount—and based on the principle that even though they have separated, parents still had a shared responsibility with respect to their child or children—the courts considered, on a case by case basis, both the needs of each child and the financial situation of each parent. In the more typical case of the mother being awarded custody, the financial situations of the parents were compared in order to determine the amount of child support to be provided by the non-custodial parent:

The problem with this way of proceeding is that the courts enjoyed a vast latitude in assessing levels of support. A number of studies conducted in the 1980s reveal that this system often resulted in child support awards which were insufficient, and that major

discrepancies in similar situations were apparent in the decisions of various judges. In order to address these problems, the government decided to implement a system for determining support payments based, in part, on pre-established tables.¹

Furthermore, it is important to emphasize that the Federal Child Support Guidelines also came into force on May 1, 1997, at the same time as *An Act to Amend the Divorce Act*. At this point, Quebec was empowered by order in council to apply what it defines as the “applicable guidelines” in accordance with the *Divorce Act* (SOR/97-237, (1997) 131 *Canada Gazette*, Part II, 1415) (Appendix 2). As a result, when both parties reside in Quebec, the Quebec model applies, even in matters of divorce. Thus the vast majority of Quebec’s child support orders are handed down in accordance with the Quebec model.

It should be pointed out that the model comprises all the various elements appearing in the order in council. The model includes not only the Regulation and its schedules 1 and 2 (form and table), but also the rules outlined in the *Civil Code of Québec* and the *Code of Civil Procedure*, which are listed in the order in council as well.

On May 1, 1997, new tax rules respecting child support payments also came into force. Since that time, for all intents and purposes, payers of support have no longer been entitled to deduct support payments from their income, and support is no longer included in the taxable income of the recipient, but instead is considered as net. These new tax rules resulted from the proceedings initiated by Suzanne Thibaudeau who took her case to the Supreme Court of Canada in order to argue that child support payments should not be taxed as income. Even though the Supreme Court did not rule in her favour, the governments of Canada and Quebec subsequently followed up on her request.

The new Quebec model for the determination of child support payments pertains to applications for child support filed on or after May 1, 1997. As opposed to the federal guidelines that apply to matters pending as of May 1, 1997, Quebec’s legislation specifically stipulates that the model does not apply to matters pending as of this date, since the new procedure requires that an application be accompanied by the appropriate form and the prescribed documents in order to be heard. Quebec’s lawmakers clearly did not deem it appropriate to require such documentation for applications filed before May 1, 1997.

The Quebec Court of Appeal has ruled that the federal guidelines are immediately applicable and accordingly are applicable to matters pending.² In another decision, the same court ruled that the Quebec model was not applicable to matters pending and that the federal guidelines were thus in force with respect to matters of divorce.³

Furthermore, the legislation stipulates that as of May 1, 1997, judgments awarding both child and spousal support must explicitly state the amount allocated to each party. This is certainly the best approach to take given that the model applies only to matters of child support and that the

¹ D. Goubau, J.-M. Fortin, and M. Grassby, “Un système de fixation des pensions alimentaires,” *Le Journal du Barreau* 29.5 (March 15, 1997): 20. Cited in *Droit de la famille—2702*, (1997), R.J.Q. 1960. (This and all subsequent quotations from French texts have been translated for the current report.)

² *Droit de la famille—2789*, J.E. 97-1922, C.A. 500-09-004518-973.

³ *Droit de la famille—3034*, (1998) R.J.Q. 1706, C.A. 500-09-004962-973.

support payments thus determined are not subject to taxation, whereas spousal support payments continue to be treated as taxable income.

The model applies to any application for variation of a support order filed as of May 1, 1997; it does not automatically apply to support payment settlements established prior to that date. If one of the parents wishes to see changes made to the support agreement in force, he or she must file an application for variation of a support order by using the form stipulated in the Regulation. In addition, the Court of Appeal has ruled that the coming into force of the new rules constituted a significant change that justifies an application for variation of a child support order.⁴

THE BASIC PRINCIPLES OF THE MODEL

The principles are stated in the joint brief of October 25, 1996, and constitute the basis for the Quebec model for the determination of child support payments. They are as follows:

- to affirm the joint responsibility of both parents for their children pursuant to the provisions of the *Civil Code of Québec*, in particular articles 585, 587 and 599
- to ensure that the needs of the children are met to the extent of the parents' ability to pay (support determined in light of the child's needs and the parents' respective incomes)
- to divide responsibility for providing financial support for the children between both parents (not only the non-custodial parent), in proportion to their respective incomes
- to give priority to the paying parent's support obligation with respect to expenditures exceeding his or her own essential needs
- to provide, as far as possible, equal treatment for all children from various unions with respect to their right to support
- to maintain as far as possible the incentive for low-income parents to meet their support obligations to their children.

THE MODEL MAKES IT EASIER TO DETERMINE CHILD SUPPORT PAYMENTS

Support payments are calculated based on the following information:

- the income of both parents;
- the number of children;
- the nature of the custodial arrangement; and
- certain additional expenses relating to the children's needs, if applicable.

⁴ Droit de la famille—2569, J.E. 98-1753, C.A. 200-09-001881-983.

The model was designed in such a way as to ensure that the children's needs are met and that support payments are adequate and predictable, while taking in account the incomes of both parents. It was also designed to make determining child support payments easier, quicker and less expensive.

The amount of support may be determined by applying the various rules provided both in the Act and the Regulation; the guidelines are made complete by the addition of certain practical and user-friendly tools, namely the form and the table. By applying these specific standards, the basic parental contribution can be established, based on the income of both parents and the number of children involved. Calculated according to the model, this contribution is considered to correspond to the needs of the children and the parents' ability to pay. A proof of need is no longer required in order to establish a child's basic needs.

If necessary, this contribution may be increased so as to take certain child-related expenses into account. Such expenses must either be agreed upon or proven. They include child care expenses, post-secondary education expenses and special expenses, and may be added to support payments, if they meet the definitions provided in the Regulation and insofar as they are reasonable in light of the needs and abilities of each party.

These standards have been introduced in order to reduce the number of confrontations between parents, as well as the delays and costs that arise during the process of determining child support payments. The model provides parents with the necessary tools to determine, on their own, the amount of support to be paid for their children.

The model is flexible enough to enable parents to agree upon an amount that differs from that provided by applying the *Regulation respecting the determination of child support payments*. They must, however, clearly state the reasons for this variance in their agreement, and it is the court's duty to ensure that the amount agreed upon is sufficient to meet the needs of the child.

If no agreement exists between the parties, it must be demonstrated, before the model can be bypassed, that the amount of support as determined would cause undue hardship for one or the other parent. Furthermore, the court can increase or decrease the support payments to take into account the value of a parent's assets or the resources available to the child.

HOW THE AMOUNTS LISTED IN THE TABLE TO DETERMINE THE BASIC PARENTAL CONTRIBUTION HAVE BEEN DERIVED

The table is based on estimates of child-related expenses in relation to family income, estimates determined by using data concerning consumer spending on goods and services by Canadian households.

As a rule, it is considered that the expenditures of families with the same income will be the same regardless of whether or not they have children. Families without children simply spend their incomes differently. Thus, in order to determine the cost of children for a family, an indirect method must be applied. Expenses for children as a proportion of necessary family expenditures is used as an indicator of child-related expenses, given that having a child inevitably leads to additional expenditures. The basic parental contribution covers the nine recognized essential

needs: food, lodging, communications, housekeeping, personal care, clothing, furniture, transportation and recreation.

The expenditures for essential needs have been compared for each family income bracket and according to the number of children in the household (0, 1, 2 or 3 children). These comparisons help determine the additional expenses for these needs incurred with the arrival of a child in the family, as well as the relative weight of child-related expenses. Next, the relative weight of the children with respect to various budgetary items is applied to the entire family budget for goods and services. **Hence this technique takes into account both so-called essential needs and all other child-related needs that lead to expenditures other than for the basics, such as savings, travel, etc.**

To summarize, by applying the above method, the average expenditures incurred for children in our society can be determined for each family income bracket.

Thus the basic parental support contribution as outlined in the table takes into account the real cost of the child's essential and non-essential needs, and not any sort of fictitious costs. In other words, all of the children's needs have been taken into consideration in establishing the table. Nevertheless, in order to allow for the specific needs of certain children, the model is flexible enough to include the possibility of adding other child-related expenses to the amounts established in the table.

CHAPTER 2: SUMMARY OF THE IMPLEMENTATION PROCESS

A number of measures were put in place by various practitioners and government departments affected by the new model in order to coordinate the implementation process.

First of all, the Ministère de la Justice, which is in charge of applying the model, implemented an administrative support procedure for the new system in all 43 courthouses where the Quebec Superior Court holds its sessions. The procedure was developed in conjunction with the judiciary and was designed to handle all applications related to child support obligations from the time they are filed with the clerk of the court until a final decision is actually rendered.

The administrative procedure is based on the use of software adapted to the needs of the judiciary and employees of the office of the court. Although the form and table are quite user friendly, it is still advisable to use such software in order to process a significant volume of applications as efficiently as possible. The software that was placed at the disposal of the judiciary and its personnel carries out the requisite calculations precisely and very rapidly. Offices of the court are also equipped with it, to provide support for the activities of the court and of the special clerks. In order to avoid any error in calculation which might appear in the forms presented to the court, employees of the office of the court verify all calculations not carried out by the software. Manufactured by a private company, the software can also be purchased by professionals in the field, such as lawyers, mediators and accountants.

Training sessions on the model for determining child support were provided for all interested parties, and the Ministère de la Solidarité sociale and the Ministère de la Justice offered information sessions for a number of stakeholder groups in 1997 and 1998. Those who work for various judicial service departments in Quebec's courthouses also received training: special clerks (who are in charge of applying the model), administrators, judicial coordinators and employees of offices of the court.

The Barreau du Québec, as part of its continuing education program, provided training sessions in a number of judicial districts, concerning both the determination and tax treatment of support payments and the federal guidelines. The Chambre des notaires du Québec also offered courses on the determination of child support payments during training programs pertaining to family mediation.

With respect to communications, the Regulation, form, table, and brochure published by the Ministère de la Justice on the subject of support are available at all courthouses, Communication-Québec offices and regional offices of Quebec's Ministère du Revenu, as well as at the Direction des communications and on the Web site of the Ministère de la Justice:
<http://www.justice.gouv.qc.ca>.

Beginning on April 21, 1997, the Ministère de la Justice and the Ministère du Revenu jointly carried out a massive mailing of folders concerning the determination of child support payments and tax rules to roughly 185,000 payers and recipients of support.

Furthermore, in accordance with Section 12 of the *Regulation respecting the determination of child support payments*, the Justice Minister has, since its coming into force, indexed the Table

to Determine the Basic Parental Contribution as of January 1 of each year. In addition, notices of indexation of the table were published in Part 1 of the *Gazette officielle du Québec*. The adjustment rates of 1.9% for 1998, 0.9% for 1999 and 1.6% for 2000 come from the pension indexes established by applying section 119 of *An Act respecting the Quebec Pension Plan*. This is the same rate as the one outlined in article 590 of the *Civil Code of Québec* to index support payments. On each occasion, a press release was issued in the month of December in order to keep the general public abreast of these adjustments. Moreover, the new figures are made available to practitioners and to the general public in all courthouses, Communication-Québec offices, at the Direction des communications of the Ministère de la Justice and on the department's Web site.

CHAPTER 3: INTRODUCTION TO THE FOLLOW-UP COMMITTEE ON THE QUEBEC MODEL FOR THE DETERMINATION OF CHILD SUPPORT PAYMENTS

Section 4 of the *Act to amend the Civil Code of Québec and the Code of Civil Procedure as regards the determination of child support payments* (1996, c. 68) stipulates that:

4. The Minister of Justice shall, on or before May 1, 2000, report to the Government on the implementation of, and advisability of amending, the provisions of this Act.

The report shall be tabled by the Minister in the National Assembly within the ensuing 15 days or, if the Assembly is not in session, within 15 days of resumption.

In light of these provisions, Serge Ménard, then Minister of Justice, decided to form a Committee to follow up on the Act.

It should be mentioned that the federal Justice Minister must also table a report respecting the federal guidelines no later than May 2002, in accordance with section 28 of the *Divorce Act*.⁵

THE COMMITTEE'S MANDATE

The Committee has basically been given the responsibility of assessing the degree to which the objectives of the legislation have been attained and the principles enunciated in the model respected. Two aspects have been taken into account: how the legislation has been implemented (assessment and analysis of results), and whether the Act should be amended (recommendations).

Length of the Committee's Mandate

As stated in section 4 of the Act, the government must receive the report no later than May 1, 2000.

In order that the Minister might complete her report to the government within the time frame established in the legislation, the Committee presented her with its final report in March 2000.

THE COMMITTEE MEMBERS

The Committee is made up of eight members from the main groups and organizations representing those directly affected by the way child support payments are determined, as well as representatives from the government departments concerned. Each group or organization designated one person as their representative on the Committee, and one alternate. However, those who actually participated in Committee deliberations are as follows:

⁵ “28. The Minister of Justice shall undertake a comprehensive variation of the provisions and operation of the Federal Child Support Guidelines and the determination of child support under this Act and shall cause a report on the variation to be laid before each House of Parliament within five years after the coming into force of this section.”

The Association masculine irénique

Roger Fatta (until January 13, 1999)

Alain Lesage (February 17, 1999 to May 26, 1999)

Henri Lafrance (from June 22, 1999)

Alternates: Henri Lafrance (November 11, 1998 to December 9, 1998)

Pierre Grimbert (June 22, 1999 to February 16, 2000)

The Barreau du Québec

Jean-Marie Fortin, Committee Chair

Alternates: Dominique Goubeau (June 16, 1998)

Roger Garneau (June 22, 1999)

The Comité des Organismes accréditeurs en médiation familiale (C.O.A.M.F.)

François Crête

The Federation of Co-operative Family Economics Associations of Quebec (F.A.C.E.F.)

Monique Emond

The Fédération des Associations de familles monoparentales et recomposées du Québec (F.A.F.M.R.Q.)

Claudette Mainguy

The Ministère de la Solidarité sociale

Gaétan Lemay

Francine Gauvin

The Ministère de la Famille et de l'Enfance

Andrée Morin

Geneviève Leblanc (June 16, 1998 to September 16, 1998)

Guylaine St-Pierre (from October 21, 1998 to January 2000)

The Ministère de la Justice

Pierre Tanguay, Committee Secretary

Support team involved in the work of the Committee:

Lucie Ouellet, analyst

Annie Perron, student analyst (from November 11, 1998)

Marie-Hélène Filteau, analyst (from December 9, 1998)

Louis Tremblay, articling student (from June 22, 1999 to December 28, 1999)

Anne Richard, lawyer (from September 8, 1999)

Vicky Langevin, lawyer (January and February 2000)

Lucie Blanchette, secretary

The Committee retained the professional services of Jocelyn Verdon, from the firm of Garneau, Verdon, Michaud for the meetings of November 11, 1998, and November 10, 1999. He was

asked to inform the Committee about developments in the case law pertaining to the determination of child support payments.

THE NUMBER OF MEETINGS AND HOW THEY WERE CONDUCTED

The Committee held seventeen meetings over a period of eighteen and a half days. Aside from the opening meeting on June 16, 1998 (which lasted half a day), the sessions began at 9:00 a.m. and finished at 4:30 p.m. All meetings were held at the Ministère de la Justice building in Quebec City.

While carrying out its mandate, the Committee reviewed a number of documents, articles and studies related to the determination of child support payments. A list of these documents can be found at the conclusion of the report.

In the course of its deliberations, the Committee analyzed the way in which the new judicial framework governing the determination of child support payments was being applied. For instance, Committee members observed how the new standards were being interpreted and noted the various problems raised in the principal courtrooms with respect to the judicial framework in question. Summaries of certain key legal decisions studied by the Committee are included in Appendix 16 of the report.

As a means of supporting its deliberations and facilitating its assessment of the model, the Committee put together a database drawn from support orders handed down in 1997 and 1998. It also distributed questionnaires to people working directly in the child support field in order to carry out a general appraisal of the model. A statistical summary and analysis of the data gathered by way of these initiatives can be found in Chapter 4.

In addition, the Committee had the opportunity, while carrying out its mandate, to study criticisms and commentaries relevant to its work, this data having been taken from letters addressed to the Minister or to department officials, either by payers or recipients of support or by practitioners. The observations thus tabled with the Committee were duly analyzed and helped members focus upon problems, sometimes by reinforcing conclusions already drawn concerning the model and at other times by directing the Committee toward as yet unexplored issues by highlighting relevant difficulties or shortcomings.

These documents contain personal information about the individuals who forwarded them, information that could lead to disclosure of their identities. Such information is confidential under the *Act respecting Access to documents held by public bodies and the protection of personal information* (R.S.Q., c. A-2.1, ss. 53 and 54).

The concerned parties did, however, give Quebec's Ministère de la Justice permission to reveal such personal information to the follow-up Committee for the exclusive purposes of its work. In other cases, this information was simply crossed out in order to protect the identity of the individual in question.

Furthermore, as a means of providing the best possible guarantee of confidentiality for all concerned, Committee members (and their alternates) read and signed a confidentiality agreement.

The Committee received seventeen letters from practitioners and parties before the court; of the latter group thirteen came from men and two from women, including one spouse of a debtor father. There were also two letters from interveners, one of them from a lawyer and one from a group representing separated and divorced fathers. If applicable, the essential message of these letters has been provided in the various sections of Chapter 5 or directly listed in the set of recommendations found at the end of this report.

It should be noted that the observations provided by the above parties do not necessarily reflect the opinion of the Committee.

The remarks in question pertain to the following aspects of the model:

- Statement of parents' income—Part 2
- Calculation of parents' disposable income—Part 3
- Calculation of annual parental contribution—Part 4
- Calculation of annual support according to custody time—Part 5
- Capacity to pay of debtor—Part 6
- Agreement between parents—Part 7
- Special problems related to indexation of the model
- Specific questions related to children from another union
- General remarks about how the model works

A synthesis of the observations referred to above can be found in Appendix 3 of the report.

OBJECTIVES, BASIC PRINCIPLES AND CRITERIA FOR ASSESSMENT

Committee members carried out their deliberations in such a way as to ensure that shared objectives were reached in the course of their mandate, in a context within which the differing interests represented by the members served a complementary purpose. The members were able to develop a consensus on the different problems dealt with as well as on the recommendations.

This section contains the observations made and the criteria established during Committee meetings for each objective of the legislation, reflecting the members' attempt to carry out the Committee mandate.

Objectives of the Quebec Model for the Determination of Child Support Payments

1. Predictability of support payments: to guarantee similar support payments for families in similar situations.

Remarks:

- Before the legislation was enacted, the amount awarded for support payments was revealed when the court decision was handed down. Now the guidelines for determining support enable the parties to predict what these payments will be. Thus, if properly applied, the model ensures predictability. The basic parental support contribution outlined in the table serves as a norm and covers the needs of a child between the ages of 0 and 18.
- The model is designed in such a way as to take into account child care, post-secondary education and special expenses, but the amount in question must be outlined in an agreement between the parties or entered as evidence before the court. These expenditures represent the limits of support-payment predictability.
- Statistics concerning the number of cases contested before and after May 1997 may serve as an indicator of the reduction of contested cases, a reduction anticipated with the legislation's enactment. However, given that the model for family mediation came into force in September 1997, it will be difficult to isolate the contribution of the model for the determination of child support payments as concerns conflict reduction.
- The very fact of being able to count on a predictable amount of child support facilitates the reorganization of the family.
- As a rule, one is left with a certain impression of equality when the model is properly applied since the amount of the basic child support contribution will be the same for two households with equal incomes and similar custody arrangements.

2. Adequacy of the support payments: to ensure that the needs of the children are met to the extent of the parents' ability to pay.

Remarks:

- Evaluate the table according to the various income categories by comparing the amounts actually awarded (statistics).
- Update the Table to Determine the Basic Parental Contribution using data from the 1996 survey on family consumer spending and compare the new table to the current one.
- Adjust the calculation of the basic parental support contribution in light of additional costs (child care, post-secondary education and special expenses), using available statistics.
- Interpret the child care, post-secondary education and special expenses, as well as the concept of undue hardship (variation of the case law).

- Document the number of applications for variation as an indicator.
- For low-income cases, consider the relative importance of family government transfers as a means of compensating for the inadequacy of support payments to cover the needs of the child.

3. Establish precise and objective standards to facilitate the determination of child support payments and standardize a method of calculation that takes into account the real costs of providing for children's needs.

Remarks:

- The Act, the Regulation and especially the form and table facilitate the determination of child support payments.
- An examination of the case law has made it possible to verify the interpretation of child care, post-secondary education and special expenses, as well as the concept of undue hardship.

Basic Principles of the Model⁶

Like the objectives, the basic principles can be found in the legislative and regulatory provisions that make up the model.

Several aspects of the basic principles were assessed using both the available case law and information gathered during the course of the Committee's mandate (collection of data, questionnaires, etc.).

⁶ A list of the basic principles may be found on page 3.

CHAPTER 4: STATISTICAL SUMMARY AND ANALYSIS OF DATA CONCERNING THE APPLICATION OF THE MODEL

INTRODUCTION

Chapter 4 is divided into two parts. The first focuses on the database of child support orders. It includes an introduction, the methodology used both to put together the database and analyze them, and the results of that analysis. The second part deals with surveys providing a general appraisal of the model, comprising an introduction that states the goal survey, followed by the survey methodology, the results, and a brief conclusion.

WARNING

There were three broad stages involved in putting together the database: developing a methodology, collecting data and validating what had been collected. The three stages stretched over a period of 14 months, with the methodology developed from November 1998 to March 1999, the data-gathering period extending from April 1999 to August 1999, and the data-validation phase, from September 1999 to December 1999. As a result, the data-analysis process did not actually begin until January 2000. It is therefore important to note that the current study has focused upon the essential aspects of the model and that other relevant analyses could have been carried out if more time had been available for this phase of our work.

Furthermore, considering the deadlines and the rates of response actually obtained, surveys focusing upon a general appraisal of the model have not proven to be a precise evaluation tool, but rather a means of assessing trends and opinions of the interested parties at the point when child support payments were actually determined.

DATABASE OF CHILD SUPPORT ORDERS (1997-1998)

INTRODUCTION

“The Committee is instructed to verify the degree to which the objectives of the legislation have been reached and the basic principles of the model, respected. Members will carry out their study from two perspectives: how the provisions of the legislation were implemented (results assessment and analysis) and whether to amend the legislation itself (recommendations).” The data-collection process presented here was developed with the above-stated objectives in mind.

This part of the report will include a summary of the data analysis carried out as part of the data-collection plan.

METHODOLOGY

Research Protocol

The study examined a specific sample drawn from a total of 45,858 *support orders*, the sample cases having been taken from court files 04 and 12. Court-file 12 cases involve divorce proceedings, while court-file 04 cases include legal separation proceedings, cases involving common-law partners and marriage annulments. The entire collection of support orders comprised child support orders, orders involving both children and spouses, orders involving children of full age, and spousal support orders, whereas the sample included only child support orders and orders involving both children and spouses. The orders may have been the result of a first application for support or of a motion for variation.

The entire collection includes all child support orders issued between September 1, 1997 and December 31, 1998. Orders issued between May 1, 1997 and September 1, 1997 were removed from the collection since these orders do not accurately reflect how the model was applied. In fact, orders from this period came from files for which proceedings had already been initiated prior to the application of the model, and the latter was not meant to apply to matters pending (see Bill 68, s. 3, Schedule 1).

The data-collection plan (Appendix 4) was developed by a team from Quebec’s Ministère de la Justice (MJQ) in conjunction with the Montreal firm Neurofinance Inc. and members of the research unit of the federal Justice Department’s Child Support Team. As part of its mandate, the federal team is currently carrying out an evaluation of the Federal Child Support Guidelines, in conjunction with the provinces and territories. Since the Quebec model differs from the federal guidelines and deals both with applications for divorce (which fall under federal jurisdiction) and with applications for legal separation, as well as with all applications filed by common-law partners (the latter two categories being subject to provincial jurisdiction), a special questionnaire had to be drawn up for our model. Neurofinance Inc. was commissioned to produce the software required for data gathering for the provinces, including for the Quebec model. The federal Justice Department also commissioned the company to gather data and put together a database for purposes of analysis. The content of the questionnaire comprises information found in the Child Support Determination Form, with additional questions included in order to provide data that

might be useful to the Committee in carrying out its mandate. The Follow-up Committee examined the questionnaire in order to validate the final version before the data-collection process actually began.

Data was collected directly on computer using data-input software. This direct-input procedure reduces the likelihood of double errors, namely those arising from a manual transcription on a paper questionnaire and secretarial errors resulting from transferring input from written questionnaires onto data-input software. Furthermore, an approach involving data collection followed by data input would have taken twice as long as the procedure finally adopted.

In order to obtain the sample files from each courthouse, we requested the list of numbers for files containing support orders for each selected courthouse. A sampling interval often was chosen so that 10% of all orders were selected to form the sample.

Choice of Location

Forty-two Quebec courthouses offer Superior Court services on a permanent basis. These courthouses were ranked according to the total number of orders issued during the period in question (Appendix 5). The Committee then established categories of courthouses (small, medium-sized and large) based on the volume of support orders issued by them. Since we did not have the resources necessary to compile a register for all 42 courthouses, we instead put together a representative sample on a provincial scale. In the process, the 15 smaller courthouses were eliminated, given that they issued a mere 6% of all support orders. With respect to the remaining 28 courthouses (94% of all support orders issued), we adopted a compromise position between collecting orders issued by the 5 largest courthouses representing 52% of the province and choosing a larger number of courthouses to attain an equivalent percentage. We opted for the second method, while also including the Montreal and Quebec City courthouses, which alone issued 30% of all orders for the entire province. In order to guarantee a more representative geographic distribution with respect to the origin of the data, courthouses located in Amos, Arthabaska, Rimouski, Chicoutimi, Hull, Sherbrooke and Joliette were chosen along with those in Quebec City and Montreal. In all, the 9 courthouses selected issued 51% of all support orders for the province during the period in question.

Sample Size

A total of 45,858 child support orders were issued between September 1997 and December 1998. The aforementioned nine courthouses issued 22,945 such orders. We put together a sample which would allow us to work with a 10% margin of error. The result was a sample group of 2,783 support orders, including spousal orders, support orders for children at or above the age of majority, cases involving transitional provisions and others not subject to the application of the model for the determination of child support payments. Accordingly, 753 orders were removed from the total sample, which finally included 2,030 support orders. The number of orders in the sample and the number analyzed for each judicial district are presented in Diagram 1.

Diagram 1: The Number of Support Orders in the Sample and Those Analyzed for Each Judicial District



Table 1 presents the number of cases excluded from the analysis along with the reasons for their exclusion.

Table 1: Cases Excluded from the Analysis and Reasons for Their Exclusion

Cases Excluded and Reasons for Their Exclusion	Number	%
No children	12	2
Children of full age and spousal support payments	14	2
Children of full age requesting support from their parents	18	2
No support determined	20	3
Support cancelled	20	3
Non-custodial parent without income	29	4
Cancellation of support since debtor of support without income	45	6
Arrears only; no support	54	7
Children of full age; support cancelled	78	10
File missing from the file room	82	11
Transitional provisions (Bill 68, s. 3, Schedule 1)	94	12
Other	99	13
Spousal support	168	22
Total	753	100%

Targeted Results

Through the collection of data, we wished to assess the degree to which certain objectives of the model for the determination of child support payments had been attained since its coming into force and to verify whether the model was indeed being applied in an effective manner. We also wanted to track changes in the amounts of support awarded to see whether support payments corresponded to amounts produced by the Quebec table or whether, on occasion, the federal guidelines were being applied. And we endeavoured to discover the reasons for discrepancies between payments indicated in the table and amounts actually awarded. Lastly, we wished to develop a portrait of the model's users by obtaining information with respect to the number and age of their children, the parents' income, whether the parties filed an application for separation, divorce or termination of a common-law relationship, and/or whether the parties reached an agreement or left the decision as regards support to the discretion of the court.

Data-Collection Schedule

Districts/Courthouses Visited	Dates	Number of Sample Files	Number of People Collecting Data ⁷
Montreal	April 12 to 16 April 28	399	4
Hull	May 3 to 7 May 10 and 11	327	3
Joliette	May 12 to 14 May 17 to 20	366	3
Sherbrooke	May 31 to June 4	331	3
Arthabaska	June 7 to 9	214	3
Rimouski	June 14 to 17	247	3
Chicoutimi	July 5 to 9	306	3
Amos	July 12 to 16	215	2
Quebec City	March 9 to 11 March 22, 29, 31 until July 22	378	2
		2,783	

Questions Concerning the Data Quality and the Limits of the Study

The initial database was validated by the MJQ support team, as well as by Neurofinance Inc. Roughly 40 validation guidelines, designed to identify discrepancies between the various areas, were developed. In general, the number of exceptions or errors of logic, revealed in a comparison of the fields, was actually rather small. Consequently, since only a few exceptional cases needed to be corrected, it can be affirmed that a solid correlation was established among the fields. Furthermore, given the homogeneous nature of the data collected, the margin of error actually turned out to be below 10%, the figure agreed upon when the sample size was determined, and thus the data are, in fact, reliable.

⁷ It should be noted that three people carried out the collection of data for all courthouses except the ones in Quebec City (five people, including the three regulars), Montreal (four, excluding two regulars) and Amos (two of the three regulars).

Given the large number of sample cases and courthouses selected, the study can be said to provide an accurate representation of the Quebec situation, and thus to serve as a useful point of reference for discussing results province wide.

The Data-Analysis Strategy

The research provides a summary of the quantitative data obtained from answers to the questionnaire with respect to how frequently certain information recurs. As concerns descriptive statistics, both the median (i.e. the number above and below which half of all cases can be located) and the average are indicated since the median is less likely to be affected by extremes. The results are presented by following in sequence the different parts of the data-collection questionnaire.

RESULTS OF THE DATA ANALYSIS

Note 1: In all tables and diagrams, results are rounded off to the nearest whole number. Thus it may happen that the sum of the results does not come to 100%, with the difference being in the order of plus or minus one percent.

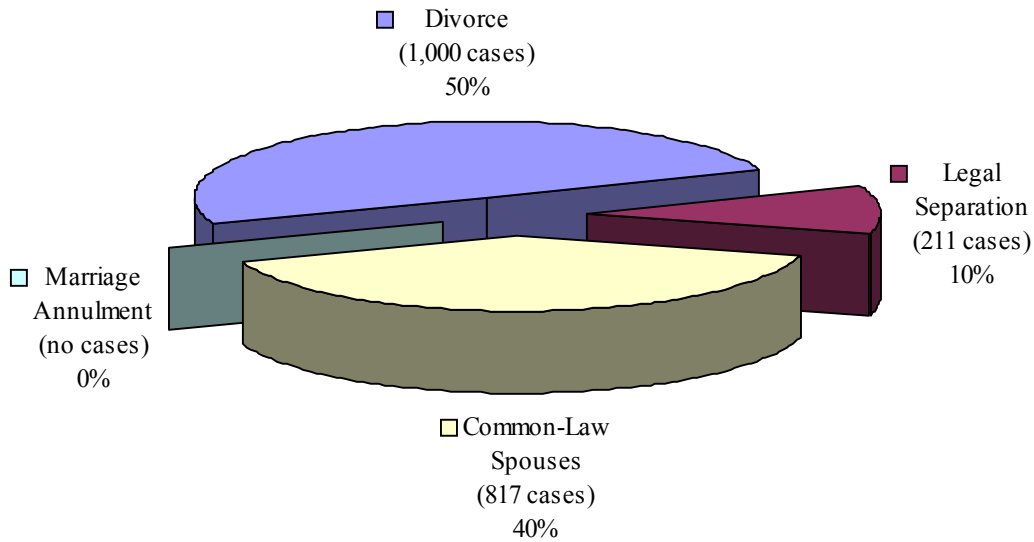
Note 2: In Section 3.1, the results pertain to a total of **2,030 support orders**, including all cases where the Quebec model and the federal guidelines were applied. However, in Section 3.2, all cases where the federal guidelines were applied have been removed, and one case had to be rejected because it did not contain the information necessary for a follow-up analysis. As a result, the analysis of Section 3.2 has been carried out using **2,004 support orders**.

Characteristics of the Support Orders

Sources of Information Concerning Child Support Orders

Diagram 2 illustrates that of the 2,030 orders analyzed, 50% were issued in cases of divorce, 10% in cases of legal separation and 40% for common-law spouses; none were issued pursuant to an application for marriage annulment. Thus 60% of the sample is made up of people who were married and 40% involves common-law partners. It should be noted that in 1997, according to calculations using data provided in Appendix 5, fully 50% of all files opened in family-related matters pertained to cases of divorce, while the other half involved legal separations and common-law partnerships. We can therefore safely say that the sample analyzed provides an accurate reflection of the reality.

Diagram 2: Percentage of Each Type of Case (on a Province-Wide Basis)



Total Number=2,028, Missing Cases=2

Diagram 3(a) identifies, within the sample, the percentage of decisions pertaining to initial applications (65%) as opposed to variation decisions (35%).

Among the decisions pertaining to initial applications (a first application), Diagram 3(b) shows that 9% are interim (or safeguard) decisions, 14% are decisions respecting transitional provisions (interim relief), 70% are judgments on the merits⁸ and 7% are of other types. Eighty-six percent (59) of the latter group involve decisions determining support payments (in cases for which recourse was reserved), in other words, an application to determine support payments was part of the file, whereas 10% (7) represent changes in corollary relief as well as the determination of support payments, and 4% (3), changes in custody along with the determination of support payments.

Among the variation decisions, Diagram 3(c) shows that 5% are decisions revising an interim ruling, 8% are decisions revising a ruling respecting interim relief, 85% are decisions revising a judgment on the merits and 2% are of other types. Forty-one percent (7) of the latter group involve decisions determining support payments and the others represent cancellations of support payments, corrected judgments, or other non-representative decisions pertaining to unique cases.

⁸ The term “on the merits” is used in Chapter 4 to apply to decisions respecting divorce, legal separation and the termination of common-law partnerships. Accordingly, the term does not apply to decisions under variation.

Diagram 3(a) Percentage of Decisions Pertaining to an Initial Application and Those Pertaining to an Application for Variation

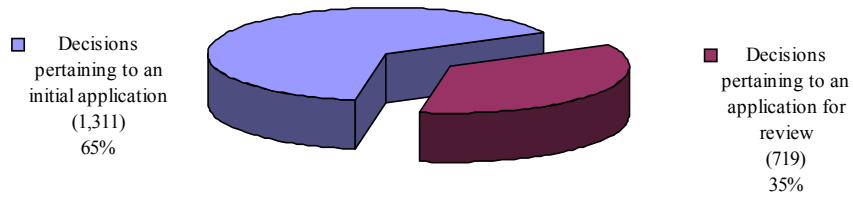


Diagram 3(b) Percentage of Each Type of Decision Pertaining to an Initial Application

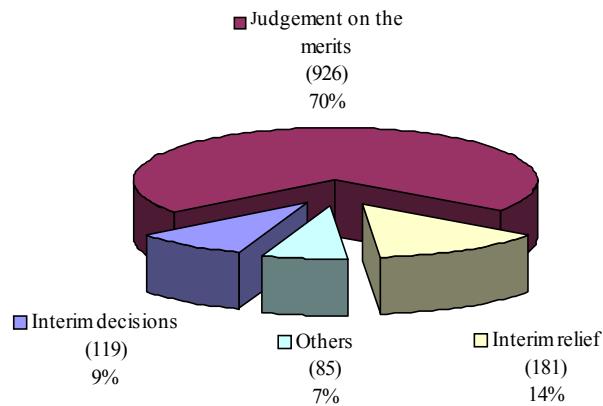
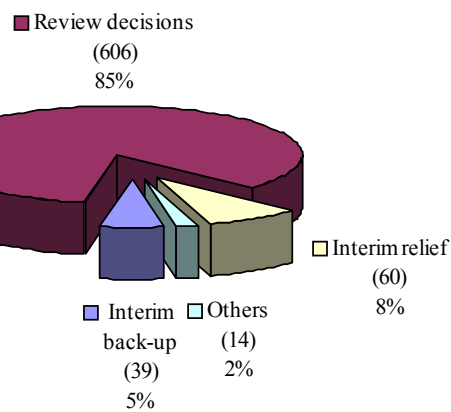


Diagram 3(c) Percentage of Each Type of Decision Pertaining to an Application for Variation



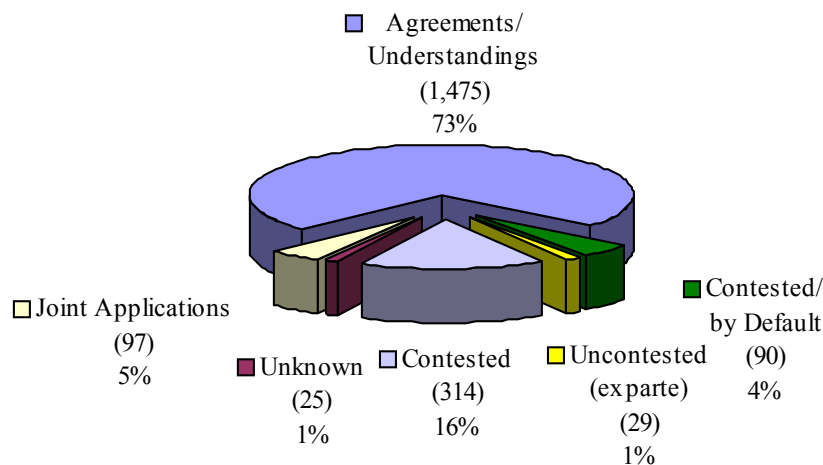
Type of Court

Fifty-five percent of the sample decisions were rendered by a judge and 45% by a special clerk. It should be noted that the powers of special clerks are restricted to confirming all agreements, except for those decisions concerning divorce, legal separation or marriage annulment.

Types of Decisions

Diagram 4 shows the percentage of decisions pertaining to joint applications, those pertaining to agreements, as well as both contested and uncontested decisions. The majority of decisions (73%) pertain to agreements, 16% to contested decisions, 4% involve decisions rendered by default and 1% are ex parte decisions. Five percent of decisions involve cases initiated as joint applications. It was impossible to determine the types of decisions rendered for 1% of all cases.

Diagram 4: Types of Decisions in Percentage Terms (Joint Applications, Agreements, Uncontested and Contested Decisions)



It is interesting to note that the percentage of contested decisions varies according to whether the decisions pertained to an initial application or to a variation decision. The respective percentages are as follows: 10% for the 1,311 decisions pertaining to initial applications and 25% for the 719 variation decisions.

Legal Representation

Table 2 indicates the number of cases concerning which the mother, father or child was represented by a lawyer, whenever such information appears in case files. The mother was represented in 93% of all cases (59% of the time by a lawyer working for or retained by legal aid and 34% of the time by an attorney from private practice), whereas the father received legal counsel in 65% of all cases (9% of the time from a lawyer working for or retained by legal aid and 56% of the time by an attorney from private practice). Both parents were represented by a lawyer in 1,190 cases, i.e. 59% of the sample cases. The child very rarely received legal counsel (1% of the time).

Table 2: Legal Representation

	Mother		Father		Child	
	Number	%	Number	%	Number	%
Private Practice	687	34	1,117	56	2	0
Legal Aid	1,195	59	182	9	23	1
None	123	6	677	34	2,005	99
Unknown	11	1	35	2	-	-
Total	2,016	100	2,011	101	2,030	100

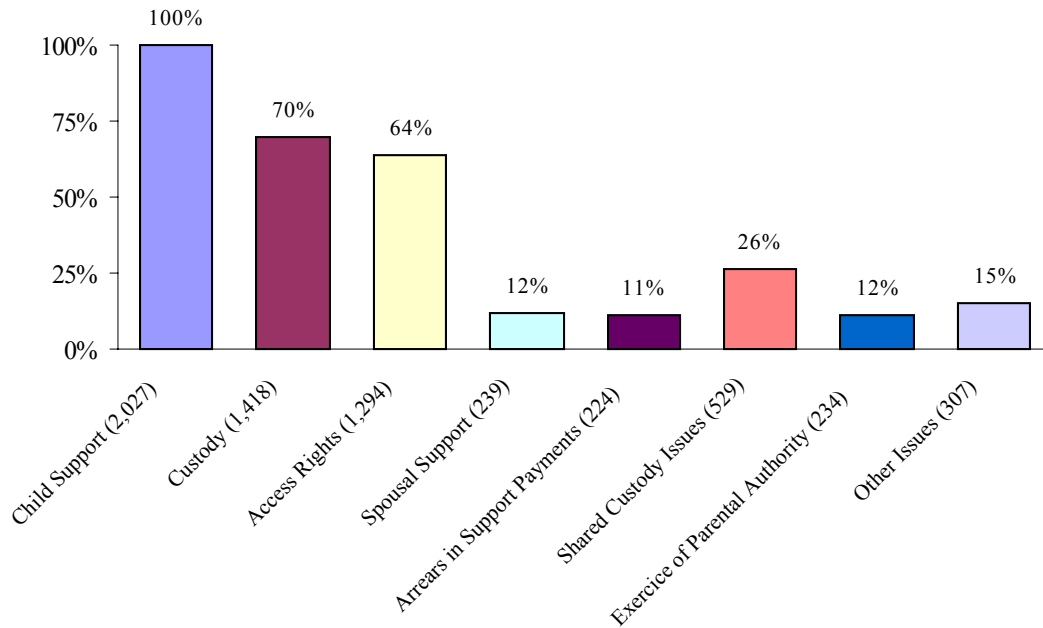
Missing cases involving mothers=14; Missing cases involving fathers=19
Total number=2,030.

Issues Addressed in the Decision

The issues addressed in each decision are shown in Diagram 5. The most frequent include child support (100%), custody (70%) and access rights (64%). Property sharing is addressed in 26% of all cases, 12% deal with spousal support, 12% with the exercise of parental authority and 11% with arrears in support payments.

Among the 307 cases in which the decision dealt with other issues, the most frequently addressed were: life insurance and medication (60 cases, or 20% of all such cases), use of the family residence or household effects from the residence (40 cases, or 13%), specific indexation clauses or indexation exclusion clauses (32 cases, or 11%) and revision clauses (26 cases, or 8%). Each of the other 149 cases in this category was unique and non-representative, and thus not subject to categorization.

Diagram 5 Issues Addressed in Court Decisions (%)

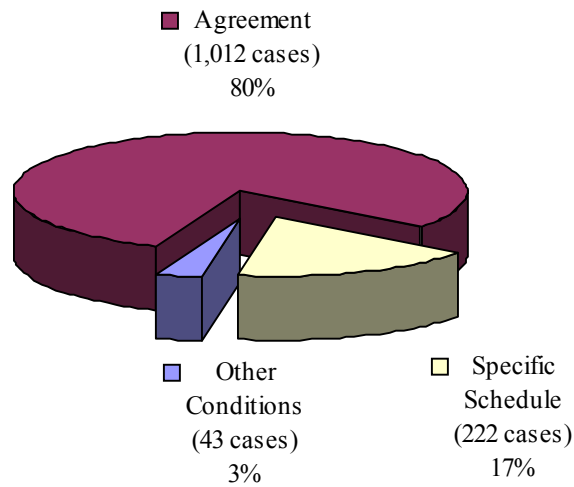


Conditions Governing Access Rights

Among the 1,294 cases involving access, the conditions governing access rights are as follows:

- according to an agreement between the parties (1,012 cases, or 80%);
- according to a specified schedule (222 cases, or 17%); and
- according to other conditions (43 cases, or 3%).

Diagram 6: Categories of Conditions Governing Sole custody with access rights and extended visitation Rights (%)



Missing cases: 17

The 1,012 cases of agreement between the parties on access rights can be subdivided according to different types of conditions governing access rights:

- agreement between the parties and, failing respect of the agreement, a schedule to be imposed, in 452 cases (45%);
- agreement between the parties only, in 325 cases (32%);
- agreement between the parties (parents) in accordance with the wishes of the child, in 126 cases (12%); and
- agreement between the parties in accordance with the wishes of the child, and failing respect of the agreement, a schedule to be imposed, in 109 cases (11%).

The 43 so-called “other” cases involve cases of a special nature with respect to access rights, namely 5 cases of shared custody (12%), 8 cases involving supervised visits and a specific schedule (19%), 7 cases with no access rights indicated (16%), and 4 cases of supervised visits only (9%). The rest of the cases in the “other” category can be classified as unique, and for these, the conditions governing access rights vary.

The Amounts of Spousal Support Payments

The sample includes 239 decisions (or 12%) involving spousal support; 141 of them deal with spousal support payments of over \$0. It should be noted that, given the nature of the survey itself, this number only includes cases involving dependent children.

The median monthly spousal support payment is \$433 (the average payment being \$622), with payments varying between \$36 and \$4,167. Monthly payments are below \$750 in 75% of all

cases. It should be mentioned that, as opposed to child support payments, these support contributions remain taxable.

In 137 of the cases involving spousal support payments, the support payer is clearly specified, with the woman deemed the recipient in 136 cases.

Application of the Model for the Determination of Child Support Payments

The Quebec model for the determination of support payments was followed in 99% of the sample cases (2,005), whereas the federal guidelines were applied to 24 cases, or 1% of the total sample. It should be noted that the database includes 39 cases (7 involving the mother and 32 involving the father) concerning which the province of residence is other than Quebec. The parties chose to follow the federal guidelines in only 24 of the 39 cases where these guidelines could have been applied.

The Level of Child Support Payments (Application of the Model)

Total Income of the Parents (Line 209)

The total parental income is listed at Line 209 of the Child Support Determination Form. It includes:

- gross salary
- commissions/tips
- net income from a business or self-employment
- employment insurance benefits
- support paid by a third party and received for one's own needs
- retirement, disability or other benefits
- interest and dividends and other investment income
- net rents
- other income except government family transfers, income security benefits and APPORT (parental wage assistance) benefits

The income of each parent is indicated in the majority of cases. In addition, there is information missing in certain cases (roughly 5%) since the support order was either not accompanied by a Child Support Determination Form or parental income was not indicated in the decision or agreement, as the case may be. Table 3 shows the total average and median income of the father, the mother and both parents.

Table 3: Total Average and Median Income of the Father, the Mother and Both Parents (Line 209)

Total Income	Number	Average	Median
Father	1,931	\$31,216	\$27,040
Mother	1,915	\$12,640	\$9,490
Both Parents	1,890	\$44,208	\$39,690

Missing cases involving the father’s total income: 73; involving the mother’s total income: 89; and involving the total income of both parents: 114.

Diagram 7(a) shows the total income of both parents by income bracket in percentage terms. The total parental income is below \$15,000 in 10% of all cases, under \$45,000 in 59% of cases and lower than \$75,000 in 89% of all cases. It should be noted that the total income is above \$100,000 in 4% of all cases.

Diagram 7(a): Total Income of Both Parents by Income Bracket (%)

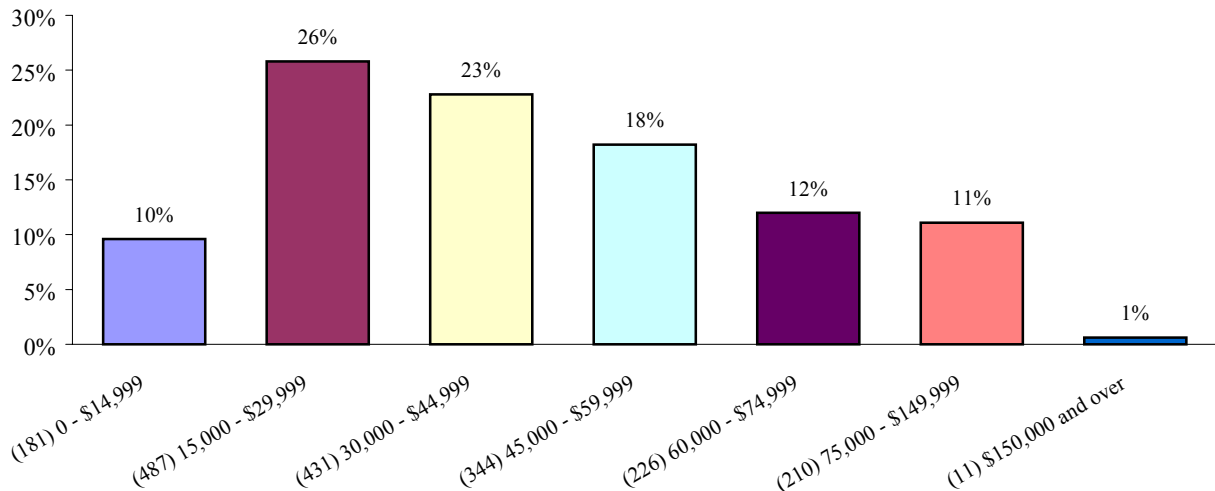


Diagram 7(b) shows the total income of each parent by income bracket in percentage terms. It should be noted that in most cases the mother’s income is to be found in the \$0 to \$14,999 bracket, and that it is generally much lower than the income of the father.

Diagram 7(b): Total Income of the Father and Mother by Income Bracket (%)

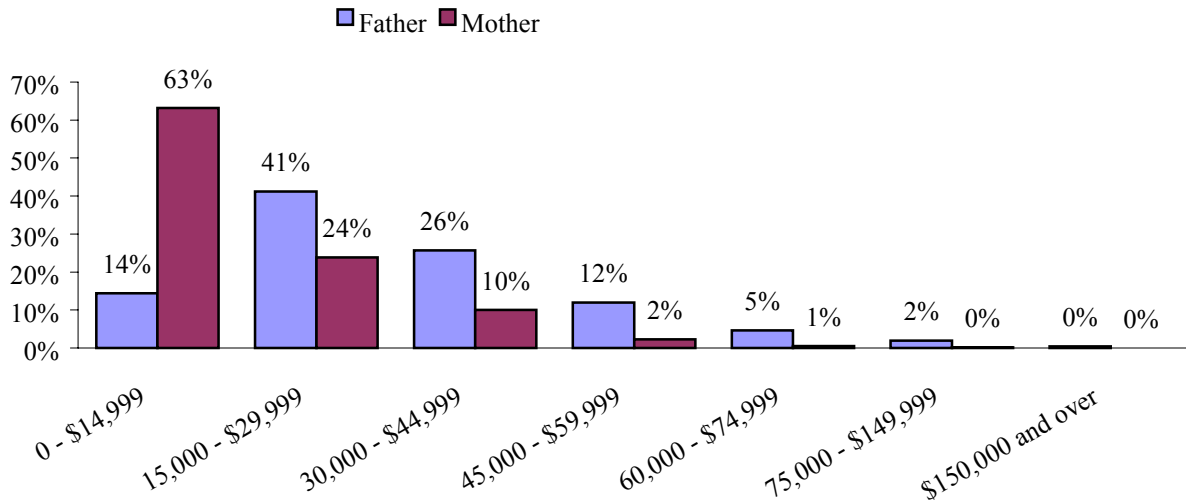


Table 4 presents the total average and median income of the two parents by type of custody arrangement. It is interesting to note that in cases where parents share custody or when sole custody is exercised by the father, the parents' income is higher than in the sample cases as a whole. In fact, it becomes apparent from the sample that the income of the parties is lowest when sole custody is exercised by the mother.

Table 4: Total Average and Median Income of Both Parents by Type of Custody (Line 209)

Type of Custody	Number	Average	Median
Sole Custody—Mother	1,336	\$41,698	\$37,050
Sole Custody—Father	83	\$52,295	\$49,400
Sole custody with access rights and extended visitation	173	\$48,549	\$42,117
Split custody	134	\$45,854	\$41,263
Shared Custody	140	\$55,805	\$48,076
Simultaneous Sole and Shared Custody	15	\$59,386	\$60,000

Comparing the Average Income of Both Parents in the Sample with the Average Income of all Families as Provided by Statistics Canada

As already noted, according to the *Regulation respecting the determination of child support payments*, certain types of income are not to be considered when calculating the parents' income. These include government family transfers, in particular federal and provincial family allowance benefits, income security benefits and APPORT program benefits. The average transfer payment for a Canadian family was \$6,748 in 1996. By adding this sum to the average income of the two parents (\$44,208), we arrive at an average income of \$50,956, which is slightly below the average income of a Quebec family, established at \$53,500 in 1996 (sources: Statistics Canada, catalogues 13-208 and 13-210).

Basic Deduction and Deductions for Union and Professional Dues

The questionnaire used for data collection did not take into account the three deductions included in the model, namely the basic deduction of \$9,000, the deduction for union dues, and the deduction for professional dues. However, the respondent was able to enter total income (Line 209), as well as disposable income (Line 305). Accordingly, it is possible, whenever the total income exceeds \$9,000, to establish the difference between the two sets of data and thus to obtain the total deductions (Line 304). For cases where the total income is lower than or equal to \$9,000, the difference is zero or less than zero; thus it is not possible to identify cases where deductions other than the \$9,000 basic deduction may have been taken in account.

Table 5, pertaining to fathers and mothers whose respective total incomes exceed \$9,000, shows the percentage of cases where the basic deduction of \$9,000 was the sole deduction and the percentage of cases where there was at least one other deduction in addition to the basic \$9,000 deduction. For both mothers and fathers, nearly 20% of all cases include a deduction for union dues and/or a deduction for professional dues, as well as the \$9,000 basic deduction.

Table 5: Number of Cases With Only the \$9,000 Deduction and With More than One Deduction

	Number of Cases Where Total Income > \$9,000	Only \$9,000		\$9,000 and Other Deductions	
		Number	%	Number	%
Father	1,833	1,477	81	356	19
Mother	976	785	80	191	20

Disposable Income of Each Parent (Line 305)

Disposable income, as used for purposes of calculation in the model, refers to the total income (as listed at Line 209) less the basic deduction (Line 301), the deduction for union dues (Line 302) and the deduction for professional dues (Line 303). Table 6 shows the average and median disposable income for the father, mother and both parents.

Table 6: Average and Median Disposable Income of the Father, the Mother and Both Parents (Line 305)

Disposable Income	Number	Average	Median
Father	1,931	\$22,313	\$18,000
Mother	1,915	\$ 7,347	\$ 318
Both Parents	1,890	\$29,953	\$24,443

Missing cases involving the father’s total income: 73; involving the mother’s total income: 89; and involving the total income of both parents: 114.

Diagram 8(a) categorizes on a percentage basis both parents’ disposable income by income bracket. The disposable income of both parents is less than \$15,000 in 31% of cases, less than \$45,000 in 79% of cases, and less than \$75,000 in 96% of cases. It is above \$100,000 in slightly over 1% of all cases.

Diagram 8(a): Percentage of Both Parents’ Disposable Income by Income Bracket

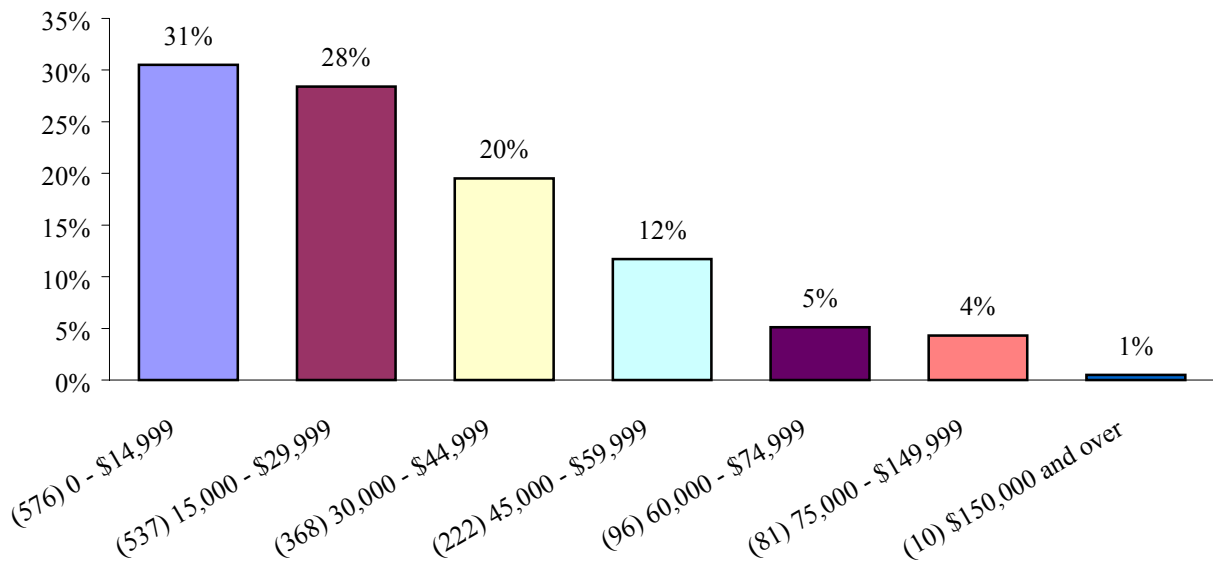
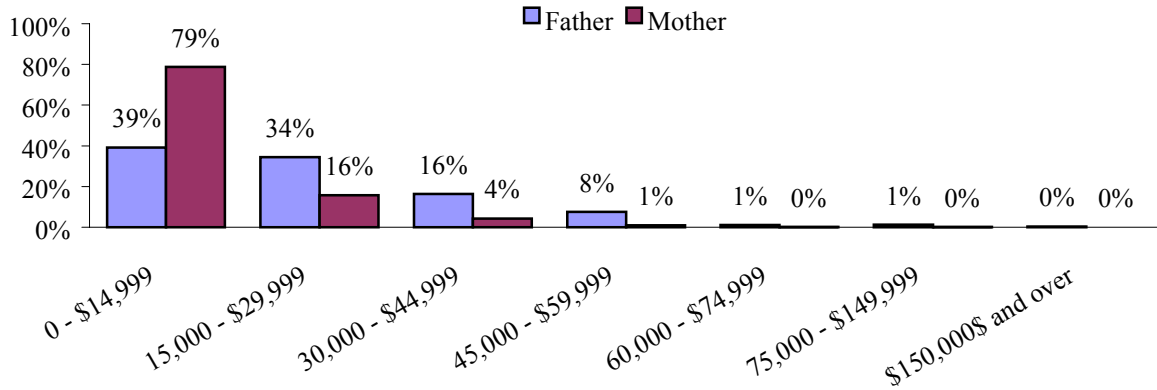


Diagram 8(b) categorizes on a percentage basis disposable income for fathers and mothers by income bracket.

Diagram 8(b) Percentage of Disposable Income for Fathers and Mothers by Income Bracket



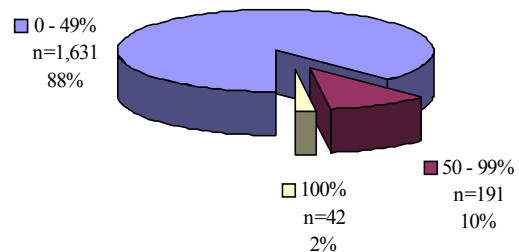
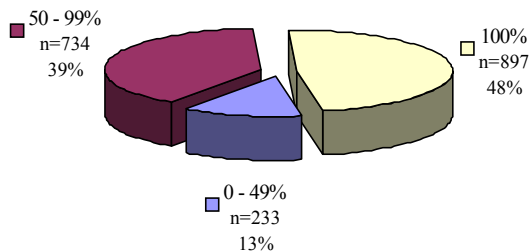
Distribution Factor of Income (Line 307)

The distribution factor of income reflects the disposable income of each parent as a percentage of the disposable income of both parents. Using the distribution factor, the basic support contribution as well as all expenses related to child care are divided between the parents. Diagram 9 shows the percentage of cases for each category of distribution factor for fathers and mothers. It is clear that 48% of fathers and 2% of mothers contribute the child support payments in their entirety. Furthermore, the father contributes between 50% and 99% of the payments (in terms of their dollar value) in 39% of cases and less than 50% in 13% of cases.

Diagram 9

Percentage of Cases for Each Category of Distribution Factor with Respect to Fathers

Percentage of Cases for Each Category of Distribution Factor with Respect to Mothers

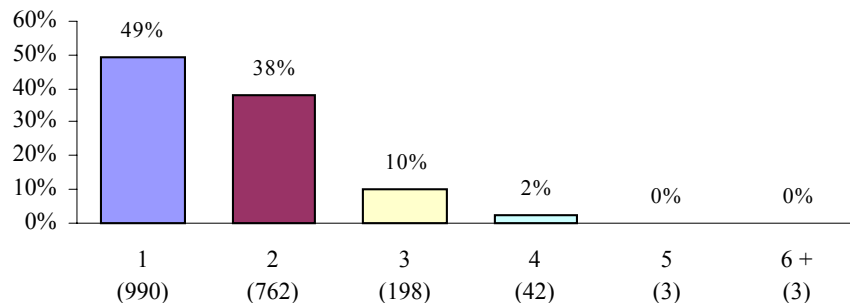


(140 cases where the disposable income of the two parents is either zero or not available were excluded from the analysis.)

Number of Children Covered by the Application (Line 400)

The model applies to all minor children of the two parents and can also apply to children at or above the age of majority in matters of divorce. Diagram 10 shows the percentage of cases as a function of the number of children in the case that figured in the calculation of support contribution based on the model (including both minors and those having attained the age of majority). Most of these cases involve one (49%) or two (38%) children. The average number of children per case was established at 1.65 children per family.

Diagram 10: Number of Children Covered Per Case



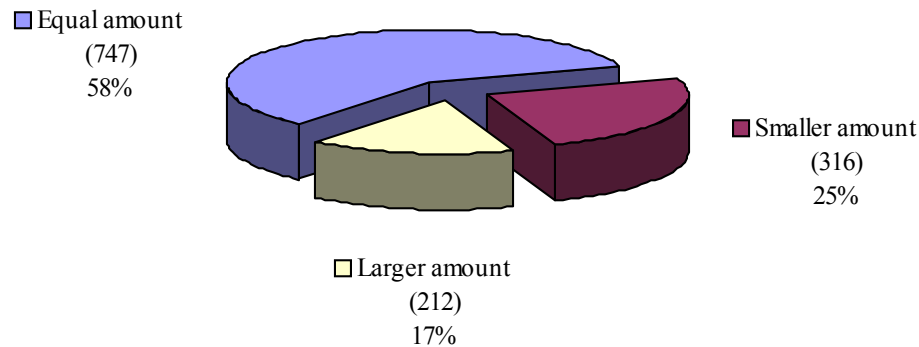
Basic Parental Contribution (Line 401)

One of the objectives of the model for the determination of child support payments is to make these payments predictable, i.e. to guarantee that families in similar situations will receive similar amounts of support. This is a reflection of the model's basic principles (see Chapter 3). Furthermore, article 587.1 of the *Civil Code of Québec* stipulates that this contribution "is presumed to meet the needs of the child and to be in proportion to the means of the parents." The following analysis pertains to all cases not involving additional child care expenses and was carried out in order to ascertain how often the amount of support awarded in the court decision was equal to, less than or greater than the support payments established by applying Part 5 of the model. For cases not involving additional child care expenses, the latter amount corresponds to the basic parental support contribution of the paying parent (the amount indicated in the table based on the custody arrangement involved).

The database contains 1,400 cases not involving additional child care expenses; information concerning the amounts established by applying the model and those awarded by the court is available for 1,275 of these files.

Diagram 11 shows the number of cases for which the amount of support awarded by the court was equal to (58%), greater than (17%) or less than (25%) the payments established by applying Part 5 of the model.

Diagram 11: Percentage of Cases for Which the Support Awarded by the Court Was Less Than, Equal to or Greater Than the Payments Established by Applying Part 5 of the Model



Of the 316 cases for which the amount of support awarded by the court was lower than the payments established by applying Part 5 of the model (the amount indicated in the table to be contributed by the paying parent based on the custody arrangement involved):

- 198 are cases involving the application of Part 7: Agreement between parents (63%)
- 47 involve the application of Part 6: Capacity to pay of debtor (15%)
- 26 involve cases of undue hardship as accepted by the court (8%)
- 24 involve cases where the amount to be paid was established by a judge whose reasons cannot be traced (8%)
- 21 involve cases for which no information is available (7%)

In order to provide a more accurate way of measuring the discrepancies among the 316 cases for which the amount of support awarded by the court was lower than the payments established by applying Part 5 of the model, Diagram 12 shows the distribution of the percentage reduction in the support payments awarded. For example, in 52% of the cases, the amount is reduced by less than 25%.

Diagram 12: Reduction in Support Payment Awards (%)

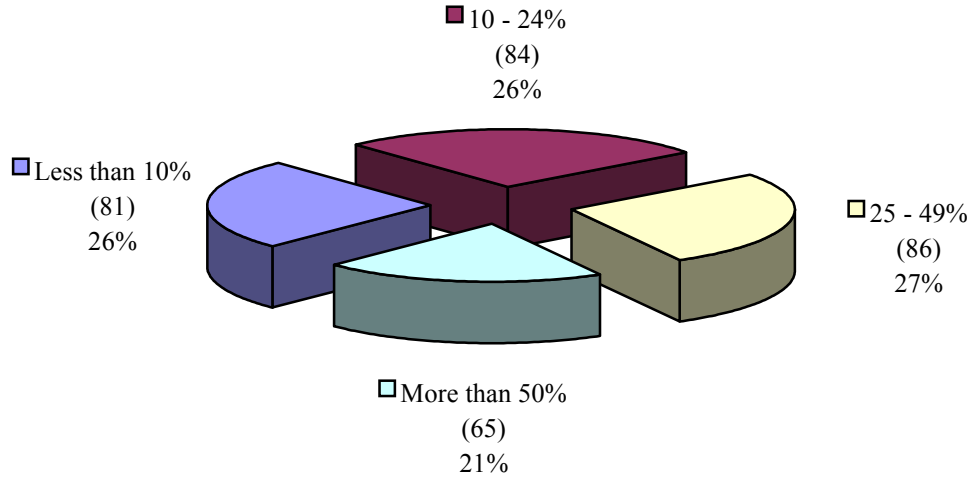


Table 7 focuses upon the 198 cases involving an agreement between the parties (Part 7), illustrating the number of cases ratified by a judge or confirmed by a clerk of the court for which no explanations were provided (181), and the number of cases for which explanations were provided (117), including the most frequent explanations for the discrepancies.

Table 7: Number of Unexplained Cases (Ratified by a Judge or Confirmed by a Special Clerk) and the Most Frequent Explanations Provided in Explained Cases

Cases for Which the Discrepancy is not Explained (Judge or Special Clerk)		
	Number	%
Ratified by a judge	34	42
Confirmed by a special clerk	47	58
Sub-total	81	100
The most frequent explanations provided in 117 explained cases		
	Number	%
Expenses related to the exercise of sole custody with access rights and extended visitation rights	17	15
The paying parent has children from an earlier union	13	11
Certain expenses are not included in the support payments	11	9
Extra income contributed by the children	7	6
Equal sharing of all expenses	7	6
Other dependent children from a new union	6	5
Other explanations (none of which cover over 3% of all explanations)	56	48
Sub-total	117	100

Child-Related Expenses (Lines 403, 404 and 405)

The questionnaire enabled us to collate all cases involving child-related expenses. There were 604 such cases, i.e. 30% of the sample. Information concerning the type and amount of these expenses was available for most cases, whereas for others these data were unknown. Three-hundred and sixty of the 604 cases (i.e. 18% of the entire sample) involved basic child care expenses, 77 (4% of the sample), post-secondary education expenses and 119 (6% of the sample), special expenses. The amount of each expenditure could be noted in the spaces provided in the questionnaire. However, in some cases, only information concerning total expenses was actually available. Table 8 illustrates the annual average and median amount for each of the three types of expenses, concerning all cases for which the amount of the expenditures is provided.

Table 8: Average and Median Amount for the Three Types of Expenses

Type of Expense	Number	Average	Median
Child care expenses	349	\$2,251	\$1,820
Post-secondary education expenses	66	\$2,309	\$1,550
Special expenses	114	\$1,478	\$ 980
Total expenses	480	\$2,369	\$1,930

Missing cases involving child care expenses: 11; post-secondary education expenses: 11; special expenses: 5; and total expenses: 1.

Tables 9, 10 and 11 show the average age of each of the children in the same family for the 360 cases involving child care expenses, the 77 cases involving post-secondary education expenses and the 119 cases involving special expenses. Families with four or more children (a limited number of the families in question) were removed from the sample.

Table 9: Average Age of Each Child in the Same Family for the 360 Families with Child Care Expenses

	Average Age
Families with ONE child (n=184)	5.4 years old
Families with TWO children (n=133)	Child #1 8.7 years old Child #2 6.1 years old
Families with THREE children (n=36)	Child #1 12.0 years old Child #2 9.2 years old Child #3 5.8 years old

Table 10: Average Age of Each Child in the Same Family for the 77 Families with Post-Secondary Education Expenses

		Average Age
Families with ONE child (n=26)		17.5 years old
Families with TWO children (n=35)	Child #1	17.7 years old
	Child #2	15.0 years old
Families with THREE children (n=15)	Child #1	17.9 years old
	Child #2	15.1 years old
	Child #3	11.2 years old

Table 11: Average Age of Each Child in the Same Family for the 119 Families with Special Expenses

		Average Age
Families with ONE child (n=46)		11.5 years old
Families with TWO children (n=53)	Child #1	13.6 years old
	Child #2	10.8 years old
Families with THREE children (n=16)	Child #1	16.9 years old
	Child #2	14.1 years old
	Child #3	10.0 years old

Table 12 shows the total average and median income of the father, mother and both parents in 159 cases involving post-secondary education expenses and special expenses. It is interesting to note that parental incomes in these cases are much higher than those included in the sample as a whole (see Table 3).

Table 12: Total Average and Median Income of the Father, Mother and Both Parents for Families with Post-Secondary Education and Special Expenses (Line 209)

Total Income	Number	Average	Median
Father	156	\$43,062	\$37,151
Mother	155	\$26,075	\$24,700
Both Parents	155	\$69,241	\$63,144

Missing cases involving the father's total income: 3; involving the mother's total income: 4; and involving the total income of both parents: 4.

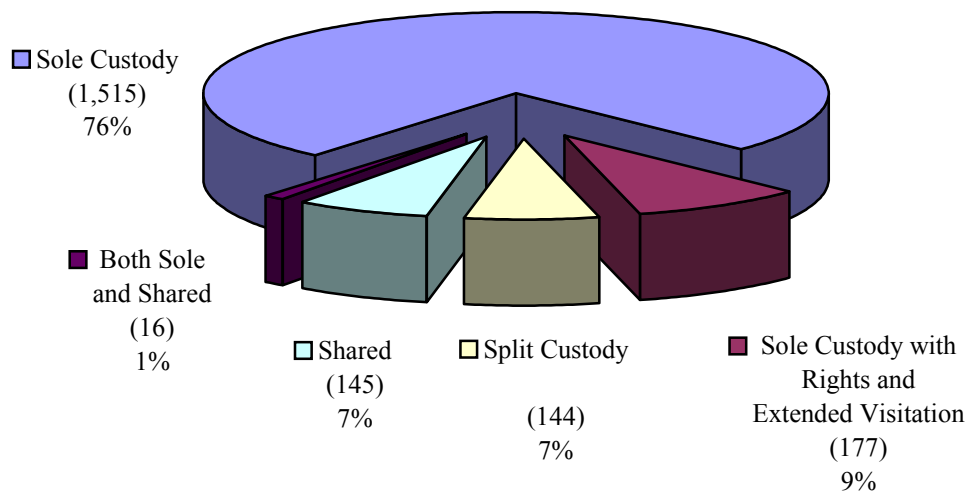
Percentage of Contested Decisions

For all cases, including those involving child-related expenses, such as basic child care expenses, post-secondary education expenses and special expenses, the Committee took a close look at the percentage of contested decisions. As a rule, a higher percentage of decisions are contested in cases involving child-related expenses (21%) than for the sample cases as a whole (16%). The difference is still greater with respect to post-secondary education expenses (25%) and special expenses (26%).

Types of Custody Arrangements

Diagram 13 shows the percentage of each type of custody arrangements, for the entire sample. In most cases (71%), the mother has sole custody of the children, with the father exercising sole custody in 5% of all cases. Sole custody with access rights and extended visitation for the non-custodial parent, shared custody, and sole custody of at least one child granted to each parent occur, respectively, in 9%, 7% and 7% of the sample cases. Simultaneous sole and shared custody occurs in only 1% of cases.

Diagram 13: Percentage of Each Type of Custody Arrangement



If we combine cases of sole custody and sole custody with access rights and extended visitation, we discover that cases where the mother has been granted custody represent 79% of all sample cases, whereas the father has been granted custody in 6% of the cases.

Table 13 illustrates the percentage distribution of custody time as concerns the exercising of access rights in cases where the father (and, in rare instances, the mother) is the non-custodial parent. As indicated, the father's custody time in percentage terms varies between 26% and 34% in the majority of cases (59%). There are not enough cases where the mother is the non-custodial parent for a trend to be detected.

Table 13: Percentage Distribution of Sole custody with extended visitation

Percentage of Custody Time	Non-Custodial Parent			
	Father		Mother	
	N	%	N	%
20-25%	40	25	6	55
26-34%	93	59	3	27
35-39%	25	16	2	18
Total	158	100	11	100

Missing cases: 8.

Table 14 shows the distribution ratio for situations of shared custody (7% of the sample). It should be noted that in the majority (78%) of cases, each parent has equal custody time (50%).

Table 14: Distribution Ratio for Situations of Shared Custody

Percentage of Custody Time	Parent with Custody			
	Father		Mother	
	N	%	N	%
40-49%	24	17	7	5
50%	113	78	113	78
51-60%	7	5	24	17
Total	144	100	144	100

Missing cases: 1.

Level of Child Support Payments

Table 15 shows the average and median monthly child support payments, according to the number of children in question. Information concerning families with five or more children does not appear in the table since there was insufficient data available with respect to this category of family. The last line of the table (Total) indicates the annual average and median amount for all cases for which complete data was available. It should be noted that these sums represent net income; in other words, they are not subject to taxation.

Table 15: Average and Median Monthly Child Support Payments According to the Number of Children

	Number	Average	Median
One Child	909	\$249	\$217
Two Children	716	\$384	\$351
Three Children	184	\$486	\$434
Four Children	38	\$547	\$499
Total	1,853	\$332	\$282

The 151 cases where the support payment is zero are not included in this table.

The average and median monthly child support payments by type of custody arrangement and number of children appear in Appendix 6. Information concerning families with four or more children is not provided due to a lack of relevant data. Furthermore, in certain cases, the data is not meaningful given the limited number of cases available and is provided for information purposes only (i.e. for cases where the father has sole custody of one, two or three children).

There are 151 cases involving support payments of zero. It is difficult to determine, given the available information, how many cases actually involve support payments of zero and how many are merely unknown. It is important to include these zero support payments in the following analysis, carried out using the medians that are less affected by extreme results than are averages.

Diagrams 14 and 15 show the median monthly child support payments for each total income bracket of the paying parent when the custodial parent has sole custody of one and two children respectively. Given the small number of cases involving three or more children in each income bracket, graphs pertaining to these cases have not been included in our report.

It will be noted that for cases involving one or two children, support payments become larger as parental income increases. For one child, the median monthly support payment rises from \$97, for the lowest income bracket, to \$702 for parents earning between \$75,000 and \$149,999. There are no cases where total income is \$150,000 and above. For cases involving two children, payments climb from \$106 to \$1,088, according to the above-mentioned income brackets. We were unable to examine enough cases involving three children for each income bracket; nonetheless, it can be asserted that the trend is the same in this category as it is for one or two children and that, on average, the payments awarded are slightly higher than for cases involving two children.

Diagram 14: Median Monthly Support Payments by Income Bracket of the Paying Parent for Cases of Sole Custody Involving ONE Child

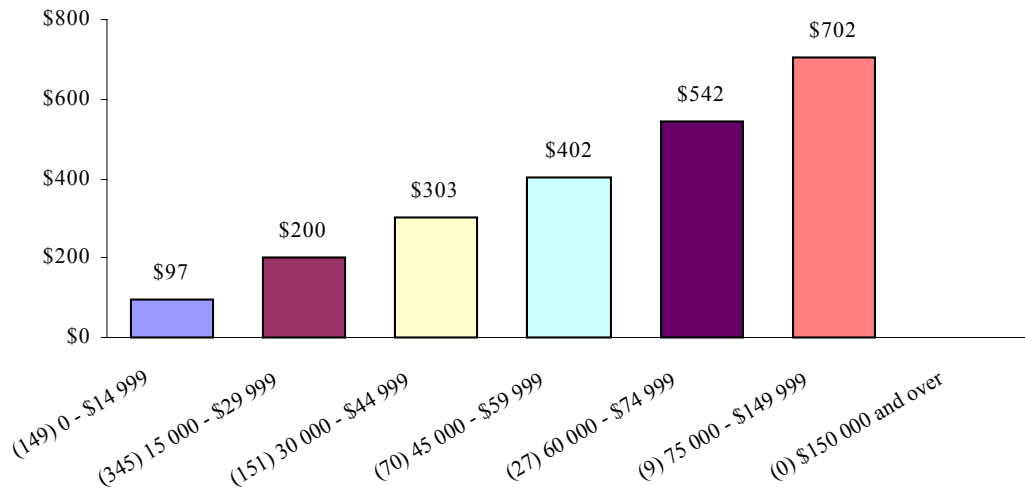
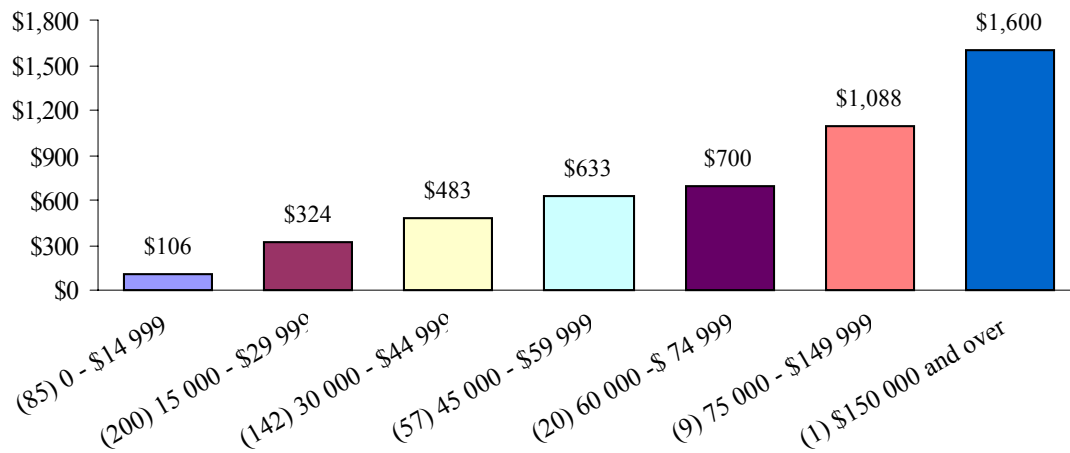


Diagram 15: Median Monthly Support Payments by Income Bracket of the Paying Parent for Cases of Sole Custody Involving TWO Children



Married and Common-Law Partners

This analysis represents an attempt to ascertain whether there are differences between former married and unmarried people with respect to income, number of children and levels of child support payments.

Table 16 shows the median total income of the father, the mother and both parents according to their previous marital status (married or common-law partners). It will be noted that the income of former married partners is significantly higher than that of their common-law counterparts, a phenomenon that might be explained, at least in part, by the relative ages of the two types of spouses in question. We could hypothesize that common-law spouses are, on average, younger than married couples, a hypothesis reinforced by the fact that former common-law partners have fewer children, again on average, than do former married couples. In fact, the median number of children for former married couples is two (the average is 1.9 children), whereas the median number for former common-law partners is only one (the average is 1.3). Since the parents' ages are not available, this hypothesis cannot be verified using our data.

Table 16: Total Median Income of the Father, the Mother and Both Parents (Line 209) Married and Unmarried

	Former Married		Former Unmarried	
	Number	Median	Number	Median
Father	1,144	\$31,200	785	\$22,530
Mother	1,139	\$12,421	774	\$0
Both Parents	1,125	\$45,906	763	\$29,461

Missing cases involving former married fathers: 46; missing cases involving their common-law counterparts: 27.
 Missing cases involving former married mothers: 51; missing cases involving their common-law counterparts: 38.
 Missing cases involving former married parents: 65; missing cases involving their common-law counterparts: 49.

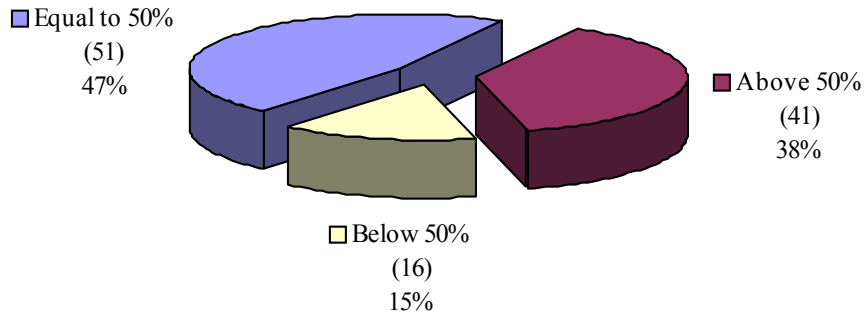
The fact that, overall, both income and number of children are higher for parents who were married is reflected in median monthly levels of support, which are 50% higher for them (\$332) than for their common-law counterparts (\$223).

Part 6—Capacity to Pay of Debtor

A parent cannot be required to pay support in excess of 50% of his or her disposable income, unless otherwise decided by the court. When this rule is applied to all sample cases, we discover 108 instances (5% of the sample) where Part 5 of the model establishes payments exceeding 50% of the paying parent's disposable income.

A variation of court decisions pertaining to the same 108 cases reveals that support payments equal to 50% of the paying parent's disposable income were awarded in 51 cases (47%), awards over 50% were granted in 41 cases (38%) and awards under 50%, in 16 cases (15%).

Diagram 16: Percentage of Cases Where the Court Awarded Support Below, Above or Equal to 50% of the Paying Parent’s Disposable Income (Part 6)



Among the 41 cases where the award exceeds 50% of the paying parent’s disposable income, there are 21 cases involving agreements between the parties, while the others are either the result of a court decision or non-respect of Part 6. As for the 16 cases where the support awarded is less than 50% of the paying parent’s disposable income, there are 10 cases involving agreements between the parties, 4 cases of undue hardship and 2 cases for which the reasons are unknown.

Undue Hardship

Only 46 cases (i.e. 2% of the total sample) involve applications claiming undue hardship, the paying parent having made this claim 42 times (91%), the receiving parent, 3 times (7%), and both parents only once (2%). The income of the other members of the household was taken into account in 22 (48%) of the 46 undue hardship cases; it was not considered at all in 20 cases (43%), while there was no answer to this question in 4 cases (9%).

The application was turned down 7 times (15%), while it was accepted, leading to an increase in support payments, in 4 cases (9%). In 35 of the 46 cases (76%), the application was accepted and support payments were decreased.

The reason put forward in 14 (46%) of the 35 cases where the level of support was reduced from that established by applying the model was “other dependent children,” either from a new union or a previous one. Other reasons include “costs related to exercising access” “debts held by the paying parent,” “the court finds the evidence sufficient” (no reason provided in the judge’s decision) and other reasons arising from unique cases.

NB: These results are provided for information purposes only. The 46 cases in the database involving undue hardship are probably not the only ones for which this claim was made. We are well aware of the fact that undue hardship can be claimed in court and rejected there without being mentioned in the judicial decision. Our results do not in themselves represent the actual situation.

Conclusion

As mentioned in Section 2.4 (“*Desired Outcome*”), one of our objectives is to provide a portrait of people using the model. Accordingly, the following summary delineates the main characteristics of this group:

General Characteristics

Sixty percent of the sample is made up of people who were married partners and 40% came from common-law relationships. Sixteen percent of all the court decisions included in the sample involved contested cases, with the percentage of such cases rising from 10% for initial applications to 25% for applications for revision. All the decisions (100%) deal with the issue of child support payments, 70% involve custody issues and 64% pertain to access rights.

Income

The average total income for the father is \$31,216; it is \$12,640 for the mother and \$44,208 for both parents. In fact, the total income for both parents is between \$15,000 and \$60,000 for slightly above 66% of sample cases, and it exceeds \$100,000 for 4% of the sample group. It should be noted that this is the income provided at Line 209 of the Child Support Determination Form and does not include government family transfers, income security benefits and/or APPORT benefits.

Number of Children

The average child support application covers 1.65 children. The majority of cases found in the sample deal with one child (49%) or two children (38%).

Child-Related Expenses

Six hundred and four cases (30%) from the sample involve child-related expenses. For cases where the types of expenses are identified, 18% involve basic child care expenses, 6%, special expenses, and 4%, post-secondary education expenses.

Distribution Factor

In 50% of the cases included in the sample, the father (48%) or the mother (2%) contributed 100% of the child support; in 39% of cases, the father contributed between 50% and 99% of all support, while contributing less than 50% in fewer than 13% of all cases.

Types of Custody Arrangements

The mother has sole custody of the children in the majority of cases included in the sample (79%), with the father having sole custody in 6% of all cases. Shared custody arrangements have been established in 7% of cases; another 7% involve arrangements where each parent has sole custody of at least one child. Simultaneous sole and shared custody is the operative arrangement for only 1% of cases included in the sample.

Level of Child Support Payments

The median monthly child support payment is \$282, compared to an average payment of \$332 for the sample group as a whole. It is \$217 for cases involving one child, \$351 for two children and \$434 for three children.

Lastly, the main objective of the data-collection project was to see whether the model was indeed being applied, in particular with respect to the amounts established in the Table to Determine the Basic Parental Contribution. For all cases not involving additional expenses, namely cases where the child support awarded should normally correspond to the sum listed in the table (i.e. support to be provided by the paying parent given the established custody arrangement), the results show that support payments are:

- equal to those established in the model for the type of custody arrangement in 58% of cases
- lower, in 25% of cases
- higher, in 17% of cases

With regard to cases where the support payments assumed by the paying parent are lower than those indicated in the table, the majority (63%) involve agreements between the parties. No justification for the lower figure was provided for 41% of these cases, whereas reasons were explicitly stated for the rest of the agreements. Examples of justifications for discrepancies between the model and the actual support awarded include costs relating to access, obligations to support children from an earlier union, and other expenses not included in the support award.

QUESTIONNAIRES PROVIDING A GENERAL APPRAISAL OF THE MODEL

INTRODUCTION

The previous section included certain conclusions drawn from the quantitative data pertaining to the model for the determination of child support payments. In order to complete the analysis, four surveys were conducted among practitioners working directly in the field as a means of ascertaining their assessment of the model and of the Child Support Determination Form. The interested parties surveyed included, from the private sector, lawyers specializing in family law and family mediators, and from the judicial system, special clerks and Quebec Superior Court.

The parents who actually used the support determination model were not in fact surveyed since few of them had experience with the former method of determining support payments and were thus unable to compare the previous and new approaches. Furthermore, given the limited amount of time at our disposal, it would have been difficult to target those parents whose support payments had been altered and to carry out all the steps required to survey them.

The present section provides a synthesis of the most significant results pertaining to the objectives and basic principles of the model for the determination of child support payments. Given the prevailing time constraints and the limited number of replies obtained, this survey can in no way claim to be scientific; rather, it should serve as a means of assessing trends with respect to the determination of child support payments.

METHODOLOGY

Target Groups

Target groups included lawyers specializing in family law, family mediators, special clerks and Quebec Superior Court judges.

Lawyers Specializing in Family Law

Since it was not possible to obtain a list of all lawyers specializing in family law, a sample grouping of 745 lawyers from across the province was put together, made up of practitioners having dealt with at least one family-related case during September 1999. Using this approach, we have been able to look at each administrative region with respect to the volume of activity that it handles.

Family Mediators

The list of certified family mediators is available from the Ministère de la Justice (it was established under section 6 of the *Regulation respecting family mediation*). We sent a questionnaire to all mediators who were duly certified as of November 1, 1999, with the exception of the 606 mediators who are members of the Barreau du Québec. The 679 mediators in our sample belong to the following accrediting bodies:

- 193 from the Chambre des notaires du Québec;
- 202 from the Ordre des psychologues du Québec;
- 46 from the Ordre professionnel des conseillères et conseillers d'orientation du Québec;
- 223 from the Ordre professionnel des travailleurs sociaux du Québec; and
- 15 from child and youth protection centres.

Mediators who are members of the Barreau du Québec were excluded given that a questionnaire had already been sent to a certain number of lawyers having argued at least one family-related case.

Special clerks

A questionnaire was sent to all 46 special clerks.

Quebec Superior Court Judges

A questionnaire was sent to all 179 Quebec Superior Court judges.

Questionnaires

The four questionnaires were drawn up by the Follow-up Committee and can be found in Appendix 7 of the report. The Ministère de la Justice's Committee for the protection of personal information gave the entire process official approval (questionnaire, target groups, etc.), to ensure respect for minimum requirements governing the protection of personal information during the conducting of surveys.

Limits of the Survey

Survey of Lawyers Specializing in Family Law

Table 1 shows the number of lawyers by administrative region that replied to the questionnaire in relation to the number of lawyers surveyed. It will be noted that, in general, all administrative regions are reasonably well represented. In all, 268 replies were received, representing a 36% response rate. As a rule, a response rate of under 50% undermines the representative nature of a survey with respect to the its target group. Given our deadlines, we were simply unable to send out reminders in order to raise the response rate to above 50%. Accordingly, it is once again important to note that the results obtained merely indicate trends and are provided for information purposes only.

Table 1: Number of Lawyers in the Sample Group and Number of Replies By Administrative Region

Number	Name of the Region	Sample Group	%	Number of Replies	%
1	Bas St-Laurent	22	3	14	5
2	Saguenay Lac St-Jean	28	4	17	6
3	Québec	69	9	21	8
4	Mauricie Bois-Francs	36	5	7	3
5	Estrie	41	6	18	7
6	Montréal-Centre	179	24	73	27
7	Outaouais	38	5	12	5
8	Abitibi-Témiscamingue	12	2	4	2
9	Côte-Nord	17	2	7	3
11	Gaspésie—Îles-de-la-Madeleine	12	2	4	2
12	Chaudières Appalaches	23	3	6	2
13	Laval	44	6	11	4
14	Lanaudière	23	3	11	4
15	Laurentides	44	6	16	6
16	Montérégie	135	18	40	15
17	Centre du Québec	22	3	7	3
	Total	745	100	268	102*

* Since percentage figures are rounded off to the nearest unit, the total is not equal to 100%.

Survey of Mediators

Table 2 shows the number of mediators that replied to the questionnaire in relation to the number of mediators surveyed, by accrediting body. It will be noted that notaries and employees of child and youth protection centres are slightly over-represented as compared to members of other professions. In all, 146 replies were received, representing a 22% response rate. As is the case for the survey of lawyers, the results thus obtained are indicative of certain trends only.

Table 2: Number of Mediators in the Sample Group and Number of Replies By Accrediting Body

Accrediting Body	Sample Group	%	Number of Replies	%
Chambre des notaires du Québec	193	28	55	38
Ordre des psychologues du Québec	202	30	35	24
Ordre professionnel des conseillères et conseillers d'orientation du Québec	46	7	8	5
Ordre professionnel des travailleurs sociaux du Québec	223	33	43	29
Child and youth protection centres	15	2	5	3
Total	679	100	146	99*

* Since percentage figures are rounded off to the nearest unit, the total is not equal to 100%.

Survey of Special Clerks

A total of 29 out of 46 special clerks filled in the questionnaire, representing a response rate of 63%.

Survey of Quebec Superior Court Judges

A total of 61 out of 179 judges completed the questionnaire, representing a response rate of 34%.

Even though the response rate for special clerks was higher than for other groups surveyed, the aforementioned warning still applies to the latter two surveys, namely that the results obtained are indicative of certain trends only.

THE SURVEY RESULTS

Given the similarity in results obtained from lawyers, mediators and special clerks and the difficulty of ascertaining major differences among the three target groups, the results of the three surveys will be presented together. The survey of judges will be the focus of a separate section.

Survey of Lawyers (Question 13), Mediators (Question 11) and Special Clerks (Question 7)

The results of the three surveys will be summarized in this section. Each group was asked to respond to a similar list of statements on the model's implementation. We have chosen to present these responses in the light of the basic objectives and fundamental principles of the model. Differences among the results obtained from the three groups will be specifically highlighted.

Objective

“Predictability of support: to guarantee families in similar situations a similar level of support.”

A majority of the respondent lawyers, mediators and special clerks believe that this objective has been reached (namely that families in similar situations receive a similar level of support) and that, as a result, support payment awards are now more predictable. Also, most members of the three groups consider that cases are closed more quickly and more easily and that fewer cases are actually contested.

Objective

“Adequate support payment awards: to ensure that the payments are sufficient to provide for the needs of the child to the extent of the parents’ ability to pay.”

Principle

“Guarantee children that their needs will be met to the extent of the parents’ ability to pay (support determined by considering the needs of the child and the means of the parents).”

More than 50% of the respondent lawyers disagree with the following two statements: “Support payments awarded meet the needs of children to the extent of the parents’ ability to pay” and “the model ensures that the parents’ basic needs will be met (deduction of \$9,000, maximum of 50% of disposable income and undue hardship).”

Fewer than 33% of respondent mediators disagree with the two statements, but this level of disagreement is nonetheless relatively high as compared to reactions to other statements in the questionnaire.

The aforementioned principle includes two policy statements: “Guarantee children that their needs will be met” and “support payments are to be determined to the extent of the parents’ ability to pay.” The disagreement, it could be argued, is more with the second statement, as reflected in a number of comments made in this regard by the lawyers and mediators surveyed. These may be summarized as follows:

- the basic \$9,000 deduction is too low;
- support payment awards are too high for low-income support payers; and it is very difficult to persuade the courts to reduce support payments by arguing on the basis of undue hardship.

These problem areas are addressed in Chapter 5 of the report, and the Committee has made certain recommendations in this regard.

Principle

“To give priority to the paying parent’s support obligation with respect to expenditures exceeding his or her own essential needs.”

A vast majority of the lawyers, mediators and special clerks agree with this basic principle.

Objective

“To establish clear standards and objectives in order to facilitate the determination of support payments and standardize the methods by which they are calculated, a procedure that should take into account the real costs related to meeting the needs of children.”

A majority of the lawyers and mediators agree with the following statement: *“[Since the model was implemented] it is easier to identify and resolve contentious issues in contested cases.”* This statement was not part of the questionnaire completed by the special clerks given that they are only permitted to confirm agreements.

A large majority of the lawyers, mediators and special clerks agree with the following statement: *“The model has helped make the judicial process more effective by providing guidelines for lawyers, spouses and the courts on how to determine child support payments.”*

A large majority of the lawyers and mediators, as well as a majority of special clerks, agree with the following statement: *“The form is user-friendly.”*

Principle

“To affirm the joint responsibility of both parents for their children pursuant to the Civil Code of Québec, in particular, articles 585, 587 and 599 C.C.Q.”

A great majority of lawyers, mediators and special clerks believe that this principle has been respected.

Principle

“To divide responsibility for providing financial support for the children between both parents (the obligation being not only that of the non-custodial parent), in proportion to their respective incomes.”

A majority of the lawyers and a large majority of the mediators and special clerks believe that this principle has been respected.

Principle

“To provide, as far as possible, equal treatment for all children from various unions with respect to their right to support.”

Fewer than half of the lawyers believe that this principle has been respected, as opposed to over 75% of the mediators and special clerks. (However, the level of disagreement for the latter group is relatively high compared to that elicited by other statements in the questionnaire.)

Furthermore, in their written observations, several lawyers and some mediators observe that the model should take into account children from other unions in the calculation of child support payments.

This problem area is addressed in Chapter 5 of the report, and the Committee has made certain recommendations in this regard.

Principle

“To maintain as far as possible the incentive for disadvantaged parents to meet their support obligations to their children.”

A majority of the lawyers and special clerks and a great majority of the mediators believe that this principle has been respected.

Lastly, a majority of the lawyers and a great majority of the mediators and special clerks believe that, on the whole, the model is a better system than its predecessor for determining child support payments.

The questionnaires for lawyers and mediators include a specific question concerning the workings of the model’s various components. Their replies indicate that the most problematic elements of the model are linked to some aspects that need further appraisal:

- the “undue hardship” principle
- the handling of children of full age
- the determination of special expenses

Furthermore, a number of the lawyers and mediators observe that the principle of undue hardship should be defined more clearly and that this principle has rarely provided a successful basis for convincing the court to reduce the level of support payments. Several respondents also add that the term special expenses should be more clearly defined. Lastly, certain respondents express a desire to see clearer guidelines with respect to the handling of children of full age.

These aspects are addressed in Chapter 5 of the report, and the Committee has made certain recommendations in this regard.

Results of the Questionnaire Addressed to Quebec Superior Court Judges

Given the duty to maintain confidentiality included in the responsibilities of Quebec Superior Court judges, the questions designed for them were of a more objective nature and focussed more precisely on the factual aspects of the model rather than requiring a subjective appraisal.

This section will provide a summary of their responses to the questionnaire.

Nearly a third of the judges who filled in the questionnaire indicate that “*child-related expenses*” (Lines 403, 404 and 405 of the form), as well as “*calculation of custody time*” are the two aspects that could and should be more clearly defined in order to foster a better understanding of the model.

Slightly under 25% of the judges singled out “*determination of income,*” “*children of full age*” and “*undue hardship*” as aspects that could be improved. It remains difficult to determine income from sources other than salary. In general, it would be useful to specify more clearly how to handle cases of children of full age. And with respect to the principle of undue hardship,

certain judges observe that parties forwarding this argument tend not to provide evidence to support their claim.

In general, it may be observed that documents which must be submitted in accordance with the *Regulation respecting the determination of child support payments* are not always provided as required in spite of their utility for a majority of cases. As for the Child Support Determination Form, the sections which are often completed incorrectly are *Part 4—Calculation of annual parental contribution*, *Part 7—Agreement between the parents* and *Part 8—Statement of each parent’s assets and liabilities*.

CONCLUSION

As a rule, the lawyers, mediators and special clerks who completed the questionnaire seem satisfied with the model for the determination of child support payments. Furthermore, in general, the model is seen as providing a better system than its predecessor for determining child support payments. However, the survey results also indicate that the following aspects of the model remain problematic;

- The amounts established in the support determination table are too high for low income earners
- The \$9,000 basic deduction is too low
- The principle of undue hardship is interpreted in too narrow a fashion
- Children from other unions are not taken into account when calculating support contributions (except with respect to undue hardship)
- The determination of special expenses
- The handling of children of full age
- The determination of income for self-employed workers

These problem areas are addressed in the next chapter of the report, and recommendations on how to solve some of them have been provided.

CHAPTER 5: SPECIFIC PROBLEM AREAS STUDIED BY THE FOLLOW-UP COMMITTEE

INTRODUCTION

Excluding issues which have been the focus of recommendations made during the Committee's mandate, we propose, in the upcoming chapter, to provide a succinct summary, under various subsections, of the Committee's deliberations concerning various aspects of the Quebec model for the determination of child support payments.

In each of the subsections, we describe the problems raised by certain concepts underlying the model, as well as by some parts and even certain lines of the Child Support Determination Form. We look at how each specific problem case fits into the model; we also point out the corresponding legislation, the perplexing issues that are raised and, if applicable, the relevant case law (Appendix 16). Lastly, we include the Committee's observations concerning the issues it has confronted and the recommendations that it has put forward for each case.

A number of the model's underlying concepts, along with many aspects of the form, are problem free, or are of such a technical nature that they provide no theoretical content which the Committee could discuss. These components are simply not addressed in the report.

RECOMMENDATIONS MADE DURING THE COURSE OF THE MANDATE

Before tabling its final report, the Follow-up Committee took the opportunity to change a few aspects of the Regulation, thus addressing some of the isolated problem areas identified during its deliberations. Then, during its sessions of June 22, September 8 and October 6, 1999, the Committee adopted certain recommendations that it in turn submitted to the Minister.

Since the Committee had not yet tabled its final report when it submitted these recommendations, it follows that their submission did not affect fundamental aspects of the model. In fact, the recommendations basically target the Child Support Determination Form found in Schedule 1 of the Regulation; these proposals are included in appendices 8 to 10 of the report.

1. In the first place, the Committee recommends that three more categories of custody be added to Division 4 of Part 5 of the form. The Committee has observed that their absence causes problems for users of the model, who are unable to find their own specific situation outlined in the form. The proposed new Division 4 would establish the following four types of custody (see Appendix 10):

1. both “sole custody” and “shared custody”;
2. both “sole custody” and “sole custody with visiting and prolonged outing rights”;
3. both “sole custody with visiting and prolonged outing rights” and “shared custody”; and
4. simultaneous “sole custody,” “sole custody with visiting and prolonged outing rights” and “shared custody.”

The latter three types of custody arrangements have been added to the first category, which was already outlined in the form. A minimum of two children is required for the first three types of custody arrangements to apply, whereas the fourth category pertains to a minimum of three children. These additions would serve to cover a wider range of situations and make the model easier to apply while reducing the risk of error for users.

2. The Committee recommends that an error of logic found in Division 4 of Part 5 of the form be corrected. It would appear that the calculation procedure does not take into account certain sums listed by one or another of the parents when determining annual support payments. Thus, in certain circumstances, parents may not be properly compensated. The Committee proposes that a new Division 4 be incorporated to take into account all sums listed by both parents. For instance, Appendix 8 clearly shows that the current form does not properly calculate support payments for a certain specific situation, one involving three children where the father has sole custody of one child and custody is shared in the case of the other two (cf. lines 545 and 551 of the form). The father’s annual support payments (\$976.67) are not reduced by the amount of support that the mother pays him for the child of whom he has sole custody (\$488.33). The same example is presented at Line 563 of the revised form as it appears in Appendix 9. It will be

noticed that the father is now meant to pay \$488.34 in annual support payments, rather than \$976.67 as previously established.

3. The Committee recommends that the form be modified so that annual support payment contributions appear under one of the available payment-period plans. The recommended changes can be found in the proposed new Part 8 of the form. The Committee noted during its deliberations that sometimes the sums attributed are listed on an annual basis (amount indicated in the table), the parties having neglected to divide this amount into instalments and to indicate the due date of the first payment. These changes will make the model more complete, as well as more user friendly.

4. The Committee recommends that the form clearly indicate that expenses listed at lines 403 to 405 (child care expenses, post-secondary education expenses and special expenses) are net expenses, as outlined in section 9 of the Regulation. This involves reminding the user of an important component of the model, and the reminder would appear in the form with the additions, at the end of lines 403, 404 and 405, of the word “net.” The Committee has concluded that it is important to underscore this fact for users by making direct mention of it in the Child Support Determination Form, thus reducing the risk of ambiguity.

5. The Committee recommends that a concrete change be made to the table (Schedule II of the Regulation) so as to correct a small mistake appearing in the initial calculation of a certain particular sum. The error has appeared ever since the table was first published, and has persisted even as the amounts were indexed in January 1998 and 1999. Hence, in the 1997 table, for a person with a disposable income of between \$66,001 and \$68,000 and one child, the amount should read \$7,190 instead of \$7,090. Indexed in accordance with the Regulation, this amount should now have reached \$7,520 (as of January 1, 2000) and not \$7,400 as currently indicated.

6. Part 5 of the new form proposed by the Committee would include a second explanatory note with respect to shared custody outlining the possibility of an adjustment if the basic parental contribution payments are not met by each of the parents based on the custody distribution factor. For instance, parents could reach an agreement stipulating that the mother alone will purchase all the children’s clothing. Such a situation would call for an adjustment of the annual support payments. The proposed explanation would be included in the form itself in order to make the latter clearer and more user friendly.

7. It is recommended that a question be added in order to identify the person who actually completed the form, i.e. to show whether it was filled in by the father, the mother, by both parties or as established by a judge. With this information, it will be easier to process the forms pertaining to each case by clearly identifying their origin. The proposed change should also reduce the risk of confusion and make the model that much more effective.

8. The Committee also believes that the form should be changed from a legal to a letter format in order, once again, to make it more user friendly. Parties before the court are likely to be more familiar with the letter format, and this change would reflect the Committee’s concern with ensuring that users’ needs be met. In addition, this format would make it easier to use the tools required for applying the model, such as calculation software, and also make the form easier to print.

9. The Committee recommends that a box in which both parents can include their share of the total amount recorded at lines 403 to 405 be added to Part 4 of the form, placed outside of the calculation area. This proposed change arises out of the Follow-up Committee's desire to make this information stand out visually, i.e. to highlight data which one cannot easily identify in the form as it currently stands. Established rules for determining child support payments will nevertheless remain intact, the additional data being provided for information purposes only. In fact, only the total amount for both parents listed in the aforementioned lines will be used to determine support payments, in accordance with current practice.

10. The Committee also believes that it would be useful to change Line 702 of Part 7, a part of the form reserved for calculating the difference between the level of support as established in the form and that determined by an agreement between the parents. As opposed to the method of calculation provided in the current form, the approach proposed in the new Line 702 would allow for a negative difference when the agreement reached by the parties establishes a level of support below the sum obtained after the method of calculation outlined in Part 5 has been applied.

11. The Committee recommends a few changes in terminology, to make certain terms more appropriate or their use more grammatical, or to bring the language of the form in line with changes made by other government departments.

12. The new version of the form appears in Appendix 10 of the report as part of the Committee's recommendations. Included are certain proposed changes in format and layout to make it easier to use and understand and thus to reduce the risk of user error.

13. Lastly, the Committee believes that it would also be appropriate to include a transitional provision stating that the proposed changes do not apply to pending applications. Other applications that could also be exempted from the new procedure might include joint applications filed after its coming into force if the parties based their agreement on the method of calculation provided in the previous form, and if they submit a formal exemption request. The courts could also be empowered to override the provisions of the new form.

PART 2—STATEMENT OF PARENTS’ INCOME

CONTEXT

The Concept of Annual Income

Annual income, as defined in section 9 of the Regulation, represents one of the fundamental parameters of the Quebec model for the determination of child support payments.

The annual income of each parent is determined by applying the method of calculation found in Part 2 of the form; the parents’ disposable income can then be worked out and recorded in Part 3.

From the outset, it is important to underscore the fact that this concept of annual income is nearly identical to the one applied before the model came into force. If we leave aside the specific exceptions found at Line 208 of the form (government family transfers, income security benefits and APPORT benefits), the concept is essentially the same as the one included in Form II: “Statement of Income and Expenditures and Balance Sheet,” as provided in what was once Rule 21 of the *Rules of practice of the Superior Court of Quebec in family matters* (now Form III, rules 26 to 30 of these rules of practice; see Appendix 11).

Furthermore, unless otherwise stated in the Regulation, the calculations carried out in Part 2 involve gross rather than net income. Since the support payments listed in the table are based on gross income, it is only logical that the same procedure should hold for the calculation of the amounts actually applicable:

Income is considered gross income, unless otherwise indicated in the Regulation. In fact, the amounts listed in the table were determined according to family expenditures by gross income bracket (while the expenditures in question were, of course, made using the family’s disposable, i.e. after-tax, income).⁹

The Regulation also stipulates that the income considered is that of the current year, unless the use of that reference period is not advisable given the circumstances. In the latter case, the Regulation states that the income is the income foreseeable for 12 months following the filing of the application.¹⁰

The Regulation does not create an airtight concept of income, one that is to be interpreted in a restrictive manner. In fact, the use of the expression “in particular” has meant, from the outset, that all sources of income should normally be taken into account and used in determining the basic support contribution:

Given the open-ended scope of this definition, along with the very use of the words “in particular,” all sources of income must be taken into account in order to determine basic support contributions. Thus, as soon as one of the parents receives any income from any

⁹ Gauvin, Francine, “Le modèle québécois de fixation des pensions alimentaires pour enfants,” in *Développements récents en droit familial (1997)*, (Cowansville, Les Éditions Yvon Blais inc., 1997), p. 153.

¹⁰ *Regulation respecting the determination of child support payments*, section 9.

source whatsoever, this amount must be included, unless subject to a clearly defined exemption.¹¹

Sources Not Included When Calculating Income

Even though the new guidelines for determining support have not changed the concept of income in any major way, they do nonetheless clearly indicate that certain sources of income are not to be included in the calculation of both parents' income.¹² These include government family transfers (for example, federal and provincial family allowance benefits), financial assistance benefits of last resort and APPORT program benefits. As a rule, beneficiaries of these programs (with the exception of federal family allowance recipients) earn less than Quebec's minimum taxable income.

In contrast to the aforementioned concept of open-ended income, this list of exemptions is very clearly defined and circumscribed. A careful reading of section 9 suggests that the courts have no discretionary power to add other sources of income to the list.¹³

Judicial Discretion with Respect to Determining Income

As a means of ensuring that all child support orders are issued in accordance with the model for the determination of child support payments, article 825.9, *C.C.P.*, stipulates that parents have a duty to complete the Child Support Determination Form, in particular by declaring their respective incomes and assets, and to include the prescribed documents, as listed in Part 2 of the form.

In addition, the courts retain broad discretionary powers to compensate for any missing elements in cases where the information appearing in the form or the prescribed documents is incomplete or contested. This judicial discretion is applied, for instance, in order to establish the respective incomes of the parties.¹⁴

LAW, REGULATION AND FORM

Code of Civil Procedure

825.8 The Government, by regulation, shall establish standards for the determination of the child support payments to be made by a parent, on the basis of the basic parental contribution determined in respect of the child, of the child care expenses, post-secondary education expenses and special expenses relating to the child and of the parents' custodial arrangement in respect of the child. The Government shall prescribe the use of a form and of a related table determining, on the basis of the parents' disposable income and the number of children, the basic parental contribution, as well as the production of evidentiary documents.

¹¹ Gauvin, "*Le modèle québécois*," p. 153.

¹² *Regulation respecting the determination of child support payments*, Section 9.

¹³ Goubau, Dominique, "Sécurité juridique et discrétion judiciaire : un difficile équilibre dans la fixation des pensions alimentaires pour enfants," in *Développements récents en droit familial (1999)*, (Cowansville: Les Éditions Yvon Blais, 1999), p. 23.

¹⁴ 825.12 *Code of Civil Procedure*.

825.9 No application relating to child support may be heard unless it is accompanied by the form prescribed for the determination of child support payments, duly completed by the plaintiff, and by the prescribed documents.

Likewise, no contestation of the application may be heard unless the prescribed form has been produced with the prescribed documents by the defendant. The court may, however, relieve the defendant from his default on the conditions it determines.

The rules provided in this article do not apply to a plaintiff or defendant who is not a parent of the child.

825.12 If the information stated in the prescribed form or prescribed documents is contested or incomplete or if the court considers it necessary, it may make good the deficiency and, for instance, establish the income of a parent. In establishing the income of a parent, the court may have regard, among other things, to the assets held by the parent and attribute to those assets the production of such income as it sees fit.

Regulation respecting the determination of child support payments

9. For the purposes of these Rules, including the related form and table, “annual income” means income from any source, in particular wages, salaries and other remuneration, support paid by a third party and received for one’s own needs, employment insurance benefits and other benefits granted under a statutory pension or compensation plan, dividends, interest and other investment income, net income from rental activities and net income from the operation of a business; notwithstanding the foregoing, this definition excludes government family transfers, benefits granted under the parental wage assistance program and income security benefits;

...The income considered is that of the current year, unless the use of that reference period is not advisable given the circumstances, in which case the income is the income foreseeable for 12 months following the filing of the application.

The Determination of Child Support Payments Form, Lines 200 to 207

- 200—Gross salary (attach pay slip)
- 201—Commissions/tips
- 202—Net income from a business or self-employment (attach financial statements)
- 203—Employment insurance benefits
- 204—Support paid by a third party and received for one’s own needs
- 205—Retirement, disability benefits or others
- 206—Interest and dividends and other investment income
- 207—Net rents (attach a statement of income and expenses respecting the immovable)
- 208—Other income (except family government transfers, income security benefits and APPORT benefits)
- 209—TOTAL (add lines 200 to 208)

PROBLEM AREAS

The Concept of Gross Income

1. A first problem area concerns what sources of income should be listed in the form. Some parties before the court have, in fact, asked us why gross rather than net (after-tax) income is used to determine support payments, pointing out, in particular, that they themselves have to “live on their net rather than their gross income.”

2. Another problem arising from this concept of income concerns just what to include in the annual income to be listed in the form. Case law has, as a rule, interpreted this concept very broadly, apparently in accordance with the will of Quebec’s lawmakers. However, the question that arises is whether or not the prevailing interpretation is actually too broad, and, if so, what other restrictions or exemptions should be added in order to meet the objectives of the model with respect to the concept of income. Suggestions for exemption, and other contentious issues, include:

- business income, rental income and depreciation allowances
- income from loans and bursaries
- other non-taxable income, such as CSST (Commission de la santé et de la sécurité de travail) [workers’ compensation] benefits
- the handling of family allowance benefits, which are listed as exceptions at Line 208

3. In addition to underlining the aforementioned problems, some parties before the court have criticized the method of determining income in cases involving:

- the addition of a second income to improve the financial situation of the of support payer and his or her second family;
- the taking into account of overtime earnings;
- a new relationship established by the parent receiving support; and
- the calculation of income for self-employed, part-time or seasonal workers.

4. Lastly, one party complained about the fact that family allowance payments are not included in the income of the custodial parent.

VARIATION OF THE CASE LAW

As indicated above, the concept of income is currently interpreted in a very broad manner. As a rule, the court will hold that the sources of income listed in section 9 of the Regulation are to be considered as a list of suggestions, not as exhaustive:

The Court notes that the terms used suggest that the provisions are not exhaustive, instead that an enumeration or description is contained therein, as opposed to an exhaustive definition. This listing of sources of income does however limit judicial discretion to assess each case based on the evidence at hand.¹⁵

Furthermore, generally speaking, the case law upholds the principle that the list of exemptions with respect to sources of income is exhaustive, and, consequently, that it is not possible to add other sources of income to this list.

The following decisions deal with the adding of certain sources of income to the annual income of the parties in question:

Droit de la famille—3026, J.E. 98-1340 (C.A.)	(Retirement income)
Droit de la famille—2873, J.E. 98-207 (C.A.)	(Compensation for sick leave)
Droit de la famille—2849, J.E. 98-92	(Use of automobile)
Droit de la famille—3309, J.E. 99-1117	(Use of automobile and performance bonus)
Droit de la famille—2931, J.E. 98-680	(Financial assistance from a relative and capital gain)
Droit de la famille—3051, 98 B.E.-785	(Business-related tax benefits)
Droit de la famille—2776, J.E. 97-1874	(Job-related benefits)
Droit de la famille—3069, J.E. 98-2130	(Earnings from the debtor's business)
Droit de la famille—3135, J.E. 98-2183	(Disability benefits)

Some decisions clarify the way certain sources of income should be considered when determining the parties' total income.

Droit de la famille—2797, J.E. 97-2047	(With respect to stock market investments, only dividend income is included)
Droit de la famille—3017, J.E. 98-1399	(Determination of gross annual income based on net profits)
Droit de la famille—3344, J.E. 99-1358	(Determination of gross annual income based on net profits of the debtor's company)
Droit de la famille—2827, [1997] R.D.F. 826	(Determination of gross income of an Aboriginal person paying no income tax)
Droit de la famille—2910 98, B.E.-212	(Determination of foreseeable income)

¹⁵ Droit de la famille—2178. K/E/97-1523.

Droit de la famille—2883, J.E. 98-378	(Determination of gross income based on health insurance benefits considered as a source of net income)
Droit de la famille—2962, J.E. 98-907	(Given the debtor's assets, income upon which to base calculations of support payments is established as being income for the current year, in spite of loss of job)
Droit de la famille—3038 98, B.E.-725	(The court cannot determine support to be paid in advance in case of future job loss)
Droit de la famille—3390, J.E. 99-1760	(Disability benefits are included without their gross value being determined)

In the following decisions, some sources of income have been exempted, or certain benefits, not taken into account.

Droit de la famille—2718, J.E. 97-1523	(Reimbursement of contributions to a pension plan)
Droit de la famille—2520, J.E. 99-1023	(Depreciation allowance)
Droit de la famille—2827, [1997] RDF 826	(G.S.T. and Q.S.T.)
Droit de la famille—2905, J.E. 98-571	(Allowance for entertainment expenses in a foreign country)
Droit de la famille—3135, J.E. 98-2183	(Night-time premiums and overtime earnings having become very unlikely)

In a number of cases, judges have decided not to reduce or cancel support payments when the loss of income clearly resulted from a conscious decision made by the parent paying support. On the other hand, in another decision, the court ruled that the support payer had a legitimate right to keep one job only.

Droit de la famille—3140, J.E. 98-2131 (C.A.)	(Sabbatical leave)
Droit de la famille—3289, J.E. 99-916	(Reduced workload)
Droit de la famille—3359, J.E. 99-1407	(Reduced workload)
Droit de la famille—3210, J.E. 99-274	(Sabbatical leave)
Droit de la famille—3278, 99 B.E.-449	(Sabbatical leave)
Droit de la famille—2968, J.E. 98-908	(Retirement)

Droit de la famille—2841, J.E. 98-1589 (Retirement)

Droit de la famille—3383, J.E. 99-1666 (Retirement)

OBSERVATIONS

Table 3 in Chapter 4 shows that the total average income for both parents is \$44,208, whereas the median income (i.e. in 50% of cases the income is lower and in 50%, higher) is \$39,690. The father's median income is \$27,040, as opposed to \$9,490 for the mother. Total income is below \$45,000 in 59% of all cases, and is above \$100,000 in only 4% of cases. As previously mentioned, gross income does not include government family transfers, income security benefits and APPORT benefits.

The majority of practitioners who having completed the survey consider that the model works well with respect to “determining income.” Moreover, it should be noted, and has already been indicated, that this concept of income remains virtually the same as the one in force before the model was adopted. In addition, certain respondents point out that problems still arise concerning how to determine the income of self-employed workers.

Thus the problem areas that need to be examined are linked to other aspects of Part 2.

The Concept of Gross Income

The Table to Determine the Basic Parental Contribution is based on a survey of household expenses. From the survey, it is possible to obtain various sources of income (transfer payments, work income and other sources of income) as well as the types of expenses incurred, by household and by income bracket (goods and services, income taxes, various mandatory deductions, RRSPs, etc.). The table has been developed on the basis of gross income and in taking only expenditures for goods and services into account.

It definitely seems simpler for the user, especially a party before the court, to determine gross income based on figures currently provided in the model. This way of proceeding makes using the model simpler given that the table already takes matters of taxation into account. The model could, of course, have been developed in such a way as to take the particular tax situation of each party into consideration, using a form not unlike the Ministère de Revenu's tax return, but the results would have been similar and the calculation process, more complicated.

However, it is not unreasonable to suggest that certain mechanisms for revising the model be put in place in order to take into account any significant changes in a person's tax load. The Committee notes that, as things currently stand (and with the exception of the legal duty to evaluate the model within three years of its coming into force), the lawmakers have established no mandatory procedure leading to the development of a mechanism for revising the model, so that it might take significant tax load changes into consideration.

Business Earnings, Rental Income and Depreciation Allowances

It may happen that net income from a business (Line 202) and net rents (Line 207) are listed as negative income. There are good reasons to continue to allow the filing of negative net company earnings and negative rental income given that a parent's ability to pay is linked to real losses

incurred during the year. Furthermore, article 825.12, *C.C.P.*, provides for this very eventuality by allowing the court to include in its assessment, among other elements, assets held by the parent relative to the total income listed at Line 209 of the form.

With respect to the question of depreciation allowances, it is difficult to adopt a firm position considering all the various possibilities the issue opens up, for instance, whether or not depreciation allowances should be taken into account, given that each situation is likely to be different and that, in the absence of an agreement between the parties, the courts have been empowered to analyse the situation and to reach a decision on a case-by-case basis.

A depreciation allowance is an accounting concept, while a capital cost allowance is its fiscal corollary. Calculating both for the same situation often leads to the same result, but in cases where the result is different, it is essential to know the reasons why. For example, according to generally accepted accounting procedures, a certain type of equipment will often be amortized on a linear basis given its lifespan in the company. In this instance, from the taxation standpoint, the company's capital cost allowance will either be larger or smaller, depending upon the tax provisions applicable to the equipment in question.

As it happens, lawmakers justify any discrepancy between the two on the basis of economic criteria pertaining to this particular type of equipment or to the sort of company to which it belongs. Thus at issue here are tax incentives designed to promote (or not to promote) a type of company or category of equipment; the tax advantage either granted or reduced has absolutely no bearing on lifespan, that is, on book depreciation.

With respect to calculating income, section 11 of Schedule III of the federal guidelines stipulates that the capital cost allowance for real property claimed by a spouse must be added to his or her income as stated in Line 150 of the federal income tax return form. The Quebec model, for its part, does not address this issue. Now, it is clear that neither a depreciation allowance nor a capital cost allowance actually represents an expense; each is, in fact, only a tax deduction. According to a number of practitioners, this deduction should not be included in the calculation of a parent's income, whereas others argue that the deduction cannot be dissociated from business income.

The Committee was unable to delve more deeply into this aspect of the debate. Nevertheless, given the significant number of self-employed workers in question, the impact of the issue should be studied further.

Loans and Grants

The basic underlying principle of the Quebec government's student loans and grants program is that all students must provide for their own schooling in proportion to the means at their disposal. Thus the loans and grants awarded to a given individual are determined according to the person's financial resources and the school-related expenses incurred. Financial assistance is provided, in the first place, in the form of a loan to be repaid after the recipient's studies have been completed. A grant may also be included, if the loan proves inadequate to cover eligible expenditures.

Eligible expenditures for the purposes of determining student loans and grants mainly include school-related expenses, living expenses and transportation costs, as well as additional living

expenses for single-parent families. Living expenses have been pegged at a maximum of \$158 per week, for an annual total of \$8,216, while the supplement for single-parent families is \$1,995, leading to a grand total of \$10,211, an amount slightly higher than the basic exemption of \$9,000.

The Committee believes that such government financial assistance should not be included in the calculation of parental income. In fact, student loans and grants merely serve to supplement the recipient's resources and, for all intents and purposes, represent a form of last-resort financial assistance. Accordingly, specific loans and grants provided by Quebec's Ministère de l'Éducation as part of its student assistance program should be included in the list of exempted sources of income, along with last-resort financial assistance benefits, government family transfers and APPORT program benefits.

Family Allowance Benefits

As already noted, the model stipulates that government family transfers are not to be included in parental income for the purposes of determining child support payments. In fact, these transfer payments are used especially to meet the needs of children, as are support payments, and, for low-income families, they represent an important form of compensation for the relatively low support contributions listed in the table, amounts that take both parental resources and the number of children into account. Basic parental support contributions are directly based on the income of both parents so it follows that the lower their respective incomes, the lower the contributions as established in the table. Family allowance and child tax benefits serve to supplement the relatively low incomes of these parents.

Incidentally, calculations of family allowance benefits take into account taxable support payments, but not those exempted from tax treatment, as has been the case for child support payments determined since May 1, 1997.

If government family transfers (such as family allowance and child tax benefits) were to be included in the model for calculating child support payments, support contributions would obviously decrease.

Family allowances and other family-related transfers are distributed according to the type of custody arrangement that has been established. These benefits are not subject to a prescribed sharing plan, but in cases where federal benefits are sent to recipients on an alternating basis, the provincial government follows the same distribution pattern.

During the family mediation process, some couples draw up a series of scenarios that take into account net family income and various types of custody arrangements. After reviewing the range of possibilities, former spouses then decide on the arrangement that best suits their situation.

With respect to the management of social transfer programs, some people suggest that the interested parties themselves should have the right to manage the sums that they receive. If this were the case, the Régie des rentes and Quebec's Ministère du Revenu would be in a position to respect the court-approved decision of the parties.

A majority of Committee members believe that family allowance and other family-related benefits should not be included when calculating support payments. For cases of shared custody, the Committee considers that the lower-income parent should receive child-related transfer benefits (the Canadian child tax benefit and Quebec family allowance), unless the interested parties or the presiding judge decide otherwise, in which case government officials would automatically be required to comply.

Other Taxable Income

The model is applied to the gross income of the parties in question. As already mentioned, the Committee does not feel that changes are needed in this regard. In reaching their decisions, the courts have in fact taken non-taxable income into account. They have, quite rightly, argued that a larger gross income should be recorded for recipients of non-taxable income and that the appropriate amount should be listed in the form, along with an indication that this income has not been subject to federal or provincial taxation.

THE COMMITTEE RECOMMENDS THAT:

- The current concept of gross income be maintained in calculating child support payments.
- The information brochure for the model be re-designed in order to add, to the general information already provided, a section explaining each line of the form, such as is found in the income tax return guide.
- The information brochure include an explanation of how gross income has been taken into account in relation to the actual design of the table.
- The Regulation, and not merely the form, stipulate that the pertinent documents must be provided.
- The Minister of Justice develop mechanisms to provide for an on-going assessment of the model, in particular as a means of taking into account any major changes in individual tax loads.
- Lines 202 and 207 of the form accompanying the Regulation be changed as follows:
 - 202—Net income from a business or self-employment (gross income less expenses related to the business or to self-employment)
 - 207—Net rents
(gross income from rental activities less expenses related to the rental of an immovable)
- The Ministère de la Justice pursue the variation initiated by the Committee concerning how to deal with depreciation allowances.
- The definition of “annual income” as provided in section 9 of the Regulation be changed so that loans and grants awarded under the Quebec Ministère de l’Éducation’s student financial assistance program be excluded when calculating parental income.

- The rule applying to shared custody cases stipulate that the lower-income parent should receive child-related transfer payments (the Canadian child tax benefit and Quebec family allowance), unless the interested parties or presiding judge decide otherwise, in which case government officials would automatically be required to comply.

PART 3—CALCULATION OF PARENTS’ DISPOSABLE INCOME

CONTEXT

The parents’ disposable income is established in this part of the form, based on the annual income determined in the previous section.

In calculating disposable income, all deductions outlined in the Regulation should be subtracted from the parents’ total income. These deductions include the basic deduction, as well as deductions for union and professional dues.

Once the disposable income of each parent has been determined, the disposable income of both parents is established simply by adding together the disposable incomes of each.

Using these two amounts, it is now possible to determine the distribution factor (%) of income. This involves establishing the annual disposable income of each parent as a percentage of the total annual disposable income. The distribution factor thus calculated will henceforth be used throughout the entire child support determination process in order to ensure that the obligation to provide support will be assumed by both parents according to the actual distribution of their respective incomes.

At this point, it is important to recall the objective of the basic \$9,000 deduction, which is to allow parents to meet their own essential needs. Because of this deduction, a worker with an income equivalent to last-resort financial assistance benefits is not required to provide support.

The basic deduction—as well as those for union and professional dues, combined with the “capacity-to-pay-of-debtor” stipulation appearing in Part 6—serves to illustrate two basic principles underlying the model, that of “giving priority to the paying parent’s support obligation with respect to expenditures exceeding his or her own essential needs” and of “maintaining as far as possible the incentive for disadvantaged parents to meet their support obligations to their children.”

In 1997, the basic amount needed to meet a parent’s essential needs was calculated as accurately as possible, by including the following elements:

1. The basic income-security benefit (\$6,480)
2. The deduction for a person living alone (\$1,200)
3. Contributions to the federal employment insurance program and Quebec’s Régie des rentes (\$419)
4. The deduction for job-related expenses (\$300)
5. The federal income tax to be paid (\$227)¹⁶

¹⁶ Gauvin, “Le modèle québécois”, p. 26.

LAW, REGULATION AND FORM

Regulation respecting the determination of child support payments

9. For the purposes of these Rules, including the related form and table,...

“disposable income” means the annual income, less the amount mentioned in Part 3 of the form as the basic deduction and deductions for union and professional dues.

Child Support Determination Form, lines 300 to 307

300	Annual income (line 209)
301	Basic deduction
302	Deduction for union dues
303	Deduction for professional dues
304	Total of deductions (add lines 301 to 303)
305	Disposable income of each parent (line 300—line 304) Enter 0 if negative
306	Disposable income of both parents (add the amount of line 305)
307	Distribution factor (%) of income
	Disposable income of father (line 305 ÷ line 306 X 100)
	Disposable income of mother (line 305 ÷ line 306 X 100)

PROBLEM AREAS

One party before the court suggested to the Committee that the parents’ disposable income should be determined after all mandatory contributions have been deducted (income tax, Régie des rentes, employment insurance, pension fund, etc.). This issue is addressed in the section of the report pertaining to Part 2 of the Form.

A practitioner pointed out to the Committee that the basic \$9,000 deduction is insufficient since a homeowner, in his view, spends approximately \$15,000 to \$18,000 per year for house-related expenses, food, clothing, taxes, insurance, loans, etc.

The particular problem area with respect to the basic deduction revolves around whether or not this deduction should be increased, i.e. is the deduction realistic given the current economic situation? By the same token, the issue of whether and how to index the basic deduction must be examined, i.e. is it appropriate for the deduction to be adjusted on an on-going basis? (See the section of the report dealing with indexation.)

OBSERVATIONS

The data-collection process described in Section 3.2.3 of Chapter 4 of the report has shown that union or professional dues are recorded along with the basic deduction in only 20% of all forms submitted, with no significant percentage difference between mothers and fathers noted in this regard. In the eyes of Committee members, this figure logically, seems relatively low, and neither the data nor the surveys provide a satisfactory explanation for the phenomenon.

As the data in Section 3.2.4, show, the average disposable income of both parents is \$29,953. With respect to the median income of both parents, it is below \$24,443 in 50% of all cases (\$18,000 for the father and \$318 for the mother). In fact, the disposable income of both parents is lower than \$45,000 in 79% of all cases, and this income is used to determine the basic parental support contribution, as provided in the table and recorded at Line 401 of the form. Data on the distribution factor of the parents' disposable income, as recorded at Line 307, show that in 48% of cases the father is the sole provider of support and that in 39% of cases he pays between 50% and 99% of all support.

These results are hardly surprising given that the father's income is, as a rule, higher than the mother's. Nevertheless, it should be pointed out that the income used in determining the basic parental support contribution to meet the children's needs is not very high to begin with. In order to obtain the parents' disposable income, certain deductions have been provided for (in Part 3 of the form), as a means of taking into account the essential needs of each parent and the loss of economies of scale resulting from the break-up of the couple. It should be recalled that the model provides parents with a basic \$18,000 deduction to be applied to their combined total income (at Line 209), so long as both parties have an income equal to or above \$9,000, obviously. Where applicable, union or professional dues are also deducted from the parents' disposable income.

It is important to clarify that these data are obtained by applying the specific guidelines included in the model. The information thus derived serves to illustrate a number of principles that underlie and are indeed an integral part of the model itself (in particular the various sections of the Child Support Determination Form), as our report has carefully pointed out. Moreover, the great majority of lawyers, mediators and special clerks agree with the principle that the paying parent's support obligation should be given priority in the model as opposed to expenditures exceeding his or her own essential needs.

When surveyed, a number of lawyers and mediators pointed out that the basic deduction was insufficient. This issue will be addressed in the section dealing with indexation.

Furthermore, the concept of disposable income has been poorly understood by a certain number of people, who wrongly equate the term with net income, even though a simple variation of Part 3 reveals that disposable income is not net income, but rather the basic income used to calculate support payments when the model is applied. Thus the concept of disposable income should definitely be clarified both in the model's information brochure and in the Child Support Determination Form.

THE COMMITTEE RECOMMENDS THAT:

- The Regulation be amended to include the following phrase in the title of Part 3 of the form: Calculation of the parents' disposable income for purposes of calculating support contributions.
- The concept of disposable income be more clearly explained in the model's information brochure.

PART 4—CALCULATION OF ANNUAL PARENTAL CONTRIBUTION

CONTEXT

The disposable income of both parents (i.e. the sum recorded at Line 306) is matched with the corresponding figure in the *Table to Determine the Basic Parental Contribution*, based on the number of children concerned, to establish the basic parental contribution (Line 401).

The basic parental contribution is “presumed to meet the needs of the child and to be in proportion to the means of the parents” (article 587.1, para. 1, C.C.Q.). Given the presumptive value of this legal provision, it is not necessary to provide proof with regard to the basic needs to be covered by the child support payments.

At Line 400, respondents are asked to indicate the number of children covered by the application, namely those whose birth dates are recorded in Part 1—Identification (Lines 102-107) of the Child Support Determination Form. These are the children for whom support payments must be determined (i.e. those from the union of the two parties in question) since the calculation procedures provided in the form cannot be applied to situations involving children from other unions. The latter situations may, however, be addressed in an agreement between the parents (Part 7) or in a claim based on the concept of undue hardship.

In accordance with article 587.1, para. 2, C.C.Q., the basic parental contribution may be increased in cases where expenditures related to child care are incurred; these include basic child care expenses (Line 403), post-secondary education expenses (Line 404) and special expenses (Line 405). As opposed to the sum obtained from the table to cover basic needs, which is awarded automatically, proof of such child-related expenses must be provided before they are added to support payments, unless otherwise stipulated in an agreement between the parents.

LAW, REGULATION AND FORM

Civil Code of Québec

33. Every decision concerning a child shall be taken in light of the child’s interests and the respect of his rights.

Consideration is given, in addition to the moral, intellectual, emotional and material needs of the child, to the child’s age, health, personality and family environment, and to the other aspects of his situation.

587.1 As regards the support owed to a child by his parents, the basic parental contribution, as determined pursuant to the rules for the determination of child support payments adopted under the *Code of Civil Procedure*, is presumed to meet the needs of the child and to be in proportion to the means of the parents.

The basic parental contribution may be increased having regard to certain expenses relating to the child which are specified in the rules, to the extent that such expenses are reasonable considering the needs and means of the parents and child.

587.2 The support to be provided by a parent for his child is equal to that parent's share of the basic parental contribution, increased, where applicable, having regard to specified expenses relating to the child.

The court may, however, increase or reduce the level of support if it is of the opinion that, in the special circumstances of the case, not doing so would entail undue hardship for one of the parents. Such hardship may be caused by, among other things, the costs involved in exercising visiting rights in respect of the child, obligations of support toward persons other than the child or reasonable debts incurred to meet family needs. The court may also increase or reduce the level of support if it is warranted by the value of either parent's assets or the extent of the resources available to the child.

Regulation respecting the determination of child support payments

1. These Rules, including the form and the table to which they refer, apply to any application concerning the parents' obligation of support toward their minor child.

They also apply to an application filed by a parent in respect of a child of full age who is not able to support himself, particularly because he is pursuing full-time studies. In that case, the applicant parent is presumed to hold a mandate from the child of full age to represent him in the exercise of his rights to support.

2. The Court may fix the support payable for a child of full age at a level that departs from the level of support which would be provided under these Rules, if it deems it appropriate, taking into account all the circumstances in which the child finds himself, particularly his age, health condition, level of education or nature of his studies, civil status, place of residence, as well as his level of autonomy and, where applicable, the time needed by the child to acquire sufficient autonomy.

9. For the purposes of these Rules, including the related form and table,

“annual income” means income from any source, in particular wages, salaries and other remuneration, support paid by a third party and received for one's own needs, employment insurance benefits and other benefits granted under a statutory pension or compensation plan, dividends, interest and other investment income, net income from rental activities and net income from the operation of a business; notwithstanding the foregoing, this definition excludes government family transfers, benefits granted under the parental wage assistance program and income security benefits;

“disposable income” means the annual income, less the amounts mentioned in Part 3 of the form as the basic deduction and deductions for union and professional dues;

“child care expenses” means, in addition to the annual child care expenses required to fulfil the child's needs, the child care expenses that the custodial parent must incur in particular to hold employment or to receive training or by reason of his health condition;

“post-secondary education expenses” means the annual expenses incurred so that a child may pursue post-secondary studies, including in particular, in addition to tuition fees and

expenses for required pedagogical materials, transportation or accommodation expenses incurred for the purpose;

“special expenses” means annual expenses other than child care expenses and post-secondary education expenses, such as medical expenses, expenses for primary or secondary studies or for any other educational program and expenses related to extracurricular activities, where those expenses are linked to the needs required by the particular situation experienced by the child;

The expenses described above shall be understood as expenses less any related advantage, subsidy, deduction or tax credit....

12. The amounts in the table in Schedule II shall be indexed by operation of law as of 1 January of each year, following the annual Pension Index established in accordance with section 119 of the Act respecting the Québec pension plan (R.S.Q., c. R-9), unless such indexing would result in bringing the annual basic parental contribution to more than half of the parent’s disposable income.

Where an indexed amount is not a multiple of \$10, the closest multiple of \$10 shall be substituted therefor.

The Minister of Justice shall publish yearly in the Gazette officielle du Québec a child support determination table indicating the amounts indexed pursuant to this section.

Child Support Determination Form (Schedule 1), Part 4, Lines 400 to 407

Part 4—Calculation of annual parental contribution

- 400 Number of children covered by the application
- 401 Basic parental contribution according to disposable income of both parents (line 306) and the number of children (line 400)
See table in Schedule II
- 402 Basic parental contribution of each parent (line 401 X line 307)
- 403 Child care expenses
- 404 Post-secondary education expenses
- 405 Special expenses
(specify)
- 406 Total expenses
(add lines 403 to 405)
- 407 Contribution of each parent to expenses
(line 406 X line 307)

PROBLEM AREAS

A number of problem areas related to Part 4 of the form are considered in subsequent sections, concerning:

- children covered by the application and support obligations applying to other unions (see the section of the report pertaining to Line 400);
- the erroneous interpretation made by many to the effect that the needs covered by the table are limited to the nine recognized essential needs (see the section pertaining to Line 401); and
- the interpretation of the term child care expenses (see the section pertaining to Lines 403, 404 and 405).

PART 4—LINE 400—NUMBER OF CHILDREN COVERED BY THE APPLICATION

CONTEXT

The number of children is one of the essential parameters used to determine the basic parental contribution. By applying this criterion in particular, the parent will be able to pinpoint the amount applicable to his or her situation in the table:

Using the “disposable income of both parents” (Line 306), it is possible, based on the number of children, to determine “the basic parental contribution” outlined in the provincial table, in Schedule 2 of the *Regulation respecting the determination of child support payments*.¹⁷

The rules currently provided in the model do not make it possible for a parent to deduct from his or her annual income other support obligations than the amounts pertaining to the case before the court.

Under the law as it stands, without an agreement between the parties, the only alternative offered by the Quebec model for the determination of child support payments as a means of overcoming the problem caused by various support obligations is to appeal in accordance with article 587.2 of the *Civil Code of Québec* and show that the level of support established for the child or children in question entails undue hardship for the plaintiff parent.

As a matter of fact, “obligations of support toward persons other than the child [in question]” appears in article 587.2, C.C.Q., as a grounds for appeal on the basis of undue hardship.

LAW, REGULATION AND FORM

Civil Code of Québec, articles 33, 587.1 and 587.2

Regulation respecting the determination of child support payments, section 1

Child Support Determination Form (Schedule 1), Part 4, Line 400

PROBLEM AREAS

One of the main problems encountered when dealing with Line 400 involves defining which children are to be considered, especially if children from a union other than the one addressed in the case at hand are meant to be taken into account.

¹⁷ Jocelyn Verdon, “Les nouveaux barèmes québécois de fixation des pensions alimentaires; les 100 premiers jours... (vers une stabilité qui déstabilise!)” in *Développements récents en droit familial (1997)*, (Cowansville: Les Éditions Yvon Blais, 1997).

In this regard, it is worth noting that both article 587.1 of the *Civil Code of Québec* and the *Regulation respecting the determination of child support payments* seem to apply only to the children of the parents before the court and not to those of one of the parents and another party not involved in the proceedings. Accordingly, children from another union cannot be taken into consideration when calculating support payments. On the other hand, the latter children could provide grounds for a court intervention under article 587.2, para. 2, of the *Civil Code of Québec*, based on undue hardship caused by obligations of support toward persons other than the child. However, a variation of the case law would suggest that the restrictive interpretation by the courts both of this justification and of all other possible reasons for reducing the level of support because of undue hardship makes it relatively difficult to have support payments reduced for this reason, unless otherwise stipulated in an agreement between the two parties. The problems in this regard are exacerbated by the legal fees and other expenses incurred by the contending parties in order to be heard by the court.

It should be noted, however, that article 587.1, C.C.Q., and the Regulation, taken together, cover only the children of the parents before the court and not the children that one of the parents may have had outside of the family unit involved in the dispute. Accordingly, in *Droit de la famille—2717*, 1997 R.D.F. 542 (C.S.), Justice Lesage points out, quite rightly, that the calculation of support, using the table, must be carried out for the three children of the parties before the court and not for the four children, as sought by the debtor, who considered that his being the father of a child with his new spouse should be taken into account. The court ruled that “the respondent’s fourth child cannot serve in the present case as a justification for reducing the obligation of support toward the three children of the parties before the court” (p. 543). In other words, “outside” children cannot be taken into consideration when applying the table. On the other hand, the existence of such children may influence the final ruling from the point of view of “undue hardship” (article 587.2, C.C.Q.).¹⁸

The challenge here is to make sure that applying the model does not result in an unjust situation for support payers, i.e. that excessive obligations not be imposed upon them in light of their resources.

Certain observations made to the Committee by practitioners and parties before the court address this thorny issue:

I am including for your information a copy of the forms that must be completed, as well as the accompanying tables. You will note that no provisions are made for cases where the parties have other children from earlier or subsequent unions.

I am currently dealing with three cases for which this is creating difficulty and all family-law lawyers must have one or several cases of the same nature, given that approximately 50% of all unions eventually break up....

¹⁸ Dominique Goubau, “La pension alimentaire pour enfants,” in *Droit de la famille québécois*, (Farham: Publications CCH Ltée), p. 5350, 60-890.

This flaw in the law should be remedied quickly, if we are serious about reducing separation costs for the parties before the court.¹⁹

VARIATION OF THE CASE LAW

Droit de la famille—2717 [1997] R.D.F. 542 (C.S.), J.E. 97-1521

The court ruled in this case that the respondent, the father of a fourth child from a new union, may not base the calculation of his support contribution on his having four children. The court deemed that articles 587.1 to 587.3 of the *Civil Code of Québec* must be applied only to the children of the parties before the court. Accordingly, the respondent's fourth child cannot be considered as a factor allowing him to reduce his obligation of support toward his other three children.

The case law indicates that priority must not be given to children from one union over those from another and that it is important to ensure that children from various unions receive equal treatment. On the other hand, the model does not clearly outline how to take into account support paid for a spouse or children from an earlier union, nor support obligations pertaining to a new union. The courts have addressed this problem on a case-by-case basis from the perspective of undue hardship. Parties making this claim must prove that paying the level of support determined by the model does indeed entail undue hardship for them.

Droit de la famille—3026, J.E. 98-1340 (C.A.)	(Undue hardship dismissed)
Droit de la famille—2784, J.E. 97-1964	(Undue hardship upheld)
Droit de la famille—2753, J.E. 97-1682	(Undue hardship dismissed)
Droit de la famille—2792, J.E. 97-1834	(Undue hardship dismissed)

OBSERVATIONS

On average, the number of children covered by the application for support is 1.65, with the majority of cases involving one child (49%) or two children (38%). (See Section 3.2.6 of Chapter 4.)

We have no clear data concerning the number of cases involving children from other unions. The only data we do have in this regard can be found in Section 3.2.7 (explained and unexplained agreements) and Section 3.3 (undue hardship) of Chapter 4. These data are incomplete, making it impossible for us to be more precise about the issue.

In their responses to the survey, several lawyers and a certain number of mediators have pointed out that the model should take children from another union into account in the calculation of child support payments. Moreover, with respect to the principle that the model should, as far as possible, ensure equal treatment for all children from various unions regarding their right to support, it would appear that fewer than 50% of the responding lawyers consider that this objective has been reached, whereas over 75% of the mediators and special clerks do believe that the principle has in fact been respected.

¹⁹ Letter from a practitioner tabled with the Committee, dated July 21, 1997.

In addition, the Committee is in agreement with trends in the case law indicating that children from other unions are not meant to be covered by the support application since the table is based on children from the same union. Hence it follows that Line 400 is meant to include only the children of the two parents covered by the form.

The Committee is also of the opinion that the obligation of support arising from earlier unions is not covered by the calculation procedure established in the Child Support Determination Form; rather, as the case law confirms, it is included under the concept of undue hardship that can be argued under article 587.2, para. 2, of the *Civil Code of Québec*.

On the other hand, the number of contributions and letters that the Committee received on this issue proves that it deserves special attention: Should the model, and especially the Child Support Determination Form, in a simple and fair manner, take into account other obligations of support?

To ask this question is, in fact, to raise doubts about one of the basic principles of the model, namely that of ensuring, as far as possible, equal treatment for all children from various unions with respect to their right to support.

The following economic argument seems irrefutable: from the beginning of the relationship, the disposable income available to a second union is always reduced by the support paid to the first spouse. Hence, how can it be claimed that each union must benefit from the same disposable income? Doesn't it only stand to reason that calculations of disposable income at the time of the second union's break-up should automatically take into account any previous obligation(s) of support since the sums paid for support have never actually been available to members of the second union?

One of the reasons why it has been difficult to adopt simple remedial measures in this regard lies in the fact that earlier support payments may or may not have been deductible, or even that some have been and others have not, depending upon the case at hand. Disposable income is, for all intents and purposes, gross income and thus is subject to taxation, and the table does in fact take tax consequences into account in determining the basic parental contribution.

For some practitioners, the concept of *disposable income* used in the Child Support Determination Form (Line 306) does not entirely reflect a certain economic reality; for them, true "disposable income" should be net after-tax income, i.e. excluding social security and income tax deductions, as well as—in the present discussion—earlier obligations of support.

Before examining this argument more thoroughly, it is important to keep in mind a few of the basic concepts found in the model. We have already addressed the concept of income and the way it is handled in the table, where the table provides a list of gross incomes that only take expenditures for goods and services into account. It should also be recalled that even though the disposable income appearing at Line 306 represents, for all intents and purposes, gross income (at least from an income tax standpoint), the sum has already been reduced by a basic total deduction of up to \$18,000, not to mention deductions for union and professional dues, if applicable. Hence this sum does accurately reflect, for purposes of the model, the parents' disposable income.

The Committee carried out certain simulations as a means of clarifying its views concerning other obligations of support.

One very simple solution would be to add a line to Part 3, between lines 303 and 304, where the user could record earlier obligations of support. Accordingly, the figure appearing at Line 304 would include these obligations of support, and a lower disposable income would thus be used in calculating the basic parental contribution to be provided by the second union.

This seems like a simple solution, but certain problems do nonetheless arise.

First of all, questions might be raised concerning the fact that certain earlier obligations are deductible (usually those pertaining to former spouses), while others are not (usually child support payments), and that the two types of obligations may also be assumed simultaneously (child support payments and support for a former spouse, or obligations of support still subject to tax treatment).

In cases such as these, should a distinction in fact be made between the two? If so, should the non-deductible support contribution now become subject to tax treatment, in keeping with Part 3 (that deals with before-tax amounts), or should deductible obligations of support be made non-taxable, on an equal footing with sums appearing in the table that are determined using non-taxable amounts? The first solution seems to be the logical one. It does, however, include calculations that can perhaps only be carried out by those having access to special software. Also, it goes against the current principle according to which child support payments should be removed from the tax system.

The second problem may be stated as follows: Should all obligations of support arising from other unions be taken into account, or only those pertaining to child support?

In this regard, it is the view of the Committee that all earlier obligations of support must be considered, not just child support obligations. In fact, given that calculations of parental income must include “support paid by a third party and received for one’s own needs” (Line 204), on the basis of what principle could support paid to a third party and received for personal needs in fact be excluded?

Another consideration should be added here. If a parent is required, when calculating obligations of support toward children from a second union, to include in his or her income at Line 204 support received for personal needs from a support payer from an earlier union, what reason could there possibly be to deny the payer the possibility of deducting both child and spousal support payments?

In order to promote the objective of equal treatment of children, the courts have ruled that children from all unions should be treated the same way, determining at the same time that the same income of the parent common to both (or several) unions should be used for purposes of calculating support.

The following question must be addressed: Why did the lawmakers include Line 204 when indicating how to calculate parental income? As things currently stand, the parent covered by Line 204 is no longer on an equal economic footing. This parent’s income, for purposes of determining his or her obligation of support toward children from the first union, does not include any personal spousal support received, whereas when calculating the income of the second union, the latter support payments must be taken into account. Some would argue that if such support is

awarded to cover personal needs, it should not be included when calculating the needs of children from the second union.

The Committee considers that by including Line 204 in the Child Support Determination Form, the lawmakers basically established an order of priorities pertaining to various unions over time.

This line may also have been included to reflect the description of income found in what was once Form II of the Quebec Superior Court (now Form III), which was used to determine the support needs of both parties, the spouse and the children, and which is still used to establish the spouse's needs only.

The fundamental concept of personal responsibility includes accepting responsibility for the consequences of one's actions, and these consequences do not, as it were, disappear over time. Thus, the very act of choosing a spouse has definite consequences which, if the relationship should collapse, lead to certain obligations. The same holds true when a couple chooses to have children: obligations remain in the wake of any break-up.

In time, these obligations will be set down in an agreement or a support order. If one of the parties subsequently chooses to form a new union, he or she must continue to assume the consequences of the earlier break-up. Hence, the latter will enter into any new relationship with a disposable income lessened by this obligation of support.

The new responsibilities entailed by a second union may only be taken on while respecting, and within the limits imposed by, the obligations arising from the first. The new partners, and any children they may have, will have to depend on a disposable income reduced accordingly.

Over the course of its mandate, the Follow-up Committee debated whether it would be appropriate to add new rules to the model so that parents might deduct amounts or a percentage of amounts paid in order to fulfil other obligations of support besides those covered by the application in question.

This may be the opportune moment to try to discern the scope the lawmakers intended to give one particular objective of the model, namely that of providing, as far as possible, equal treatment for all children from various unions with respect to their right to support.

Does respecting the latter principle mean that the monetary value of each support obligation must be equal? It may be argued that whereas everyone has the same right to apply for support, the level of support actually awarded may nevertheless depend upon the parents' ability to pay and their obligations with respect to other unions.

The Committee has therefore studied the possibility of introducing specific rules and thus limiting the discretionary power of the court, as it is currently outlined in article 587.2 of the *Civil Code of Québec* with reference to undue hardship. Committee members believe that it is important, in order to guarantee the on-going fairness of the model, to ensure that all the children's needs are met, while considering the possible difficulties the support payer may face in fulfilling all of his or her obligations.

A variation of the case law reveals a certain trend whereby judges, in the current legal context, are reluctant to give more importance to one union over another. Thus a number of judges refuse to establish a scale of priorities as concerns various unions and the children from these unions.

It may nevertheless be advisable to leave a certain discretionary power in the hands of the court, other than that based on the concept of undue hardship, in order to allow judges to reduce support contributions in light of support obligations linked to other unions. In any case, studies looking at various solutions to the problem raised by such support obligations should definitely be pursued.

THE COMMITTEE'S RECOMMENDATIONS

In order to reduce any ambiguity created by the phrase “Number of children covered by the application,” the Committee recommends that:

The phrase “Number of children covered by the application” found in Part 1, Line 400, of the Child Support Determination Form be changed to “Children of the two parties covered by the application.”

With respect to obligations of support linked to other unions, the Committee recommends that:

- The Ministère de la Justice pursue the study initiated by the Committee of different solutions concerning support obligations arising from other unions.

PART 4—LINE 401—BASIC PARENTAL CONTRIBUTION ACCORDING TO DISPOSABLE INCOME OF BOTH PARENTS (LINE 306) AND NUMBER OF CHILDREN (LINE 400)

CONTEXT

The Table to Determine the Basic Parental Contribution

In order to determine the basic parental contribution to be recorded at Line 401 of the Child Support Determination Form, parties must consult the *Table to Determine the Basic Parental Contribution* which makes up Schedule II of the *Regulation respecting the determination of child support payments*.

This table contains, for each disposable income bracket and according to the number of children covered by the application, the sum corresponding to the basic parental support contribution that applies to each individual case.

The table is of predominant importance to the model for determining support; in fact, it is arguably the key to the entire support calculation process.²⁰

The *Table to Determine the Basic Parental Contribution* was drawn up by taking into account the financial burden that a child represents for the average Quebec family budget. Thus it is not the product of a theoretical calculation process but rather of an analysis of typical family habits:

The Table to Determine the Basic Parental Contribution of the model for the determination of child support payments was based on data concerning Quebec found in the Survey of Household Expenditures carried out by Statistics Canada in 1986. Both expenses and income were indexed according to the Statistics Canada consumer price index and the average weekly wage of salaried workers. Households were then classified on the basis of their income bracket.

The total expenses incurred by families with children were then compared to those incurred by couples without children of the same income bracket. In most cases, it was discovered that practically the entire family income is allocated to cover total household expenses, no matter whether the family has children or not. For instance, a comparison of the total expenses of a couple without children earning \$20,000 with those of a couple with a child and earning the same salary could lead us to believe that no additional costs arise from having a child since both households spend all their income in any case. What this actually means is that when a couple has a child or children, a reallocation process takes place at the level of the family budget.

Hence, in order to get around the problem of income reallocation, total child-related expenses have to be estimated in an indirect manner. Nine basic needs have thus been identified as essential: food, lodging, communications, housekeeping, personal care, clothing, furniture, transportation and recreation. However, identifying these so-called

²⁰ Gauvin, "Le modèle québécois," p. 150.

essential needs only serves to determine the percentage of expenses for essential needs incurred according to the number of family members.

More concretely, in the first place, expenses incurred to cover these nine essential needs were compiled by type of family (with child or children and without children); in the second place, the model compares, for each income bracket, expenses for essential needs incurred by families without children with those of families with one, two or three children. In this way, it is possible to determine the percentage of essential expenditures allocated to child-related spending.

For example, if a family without children spends \$17,000 to cover essential needs and a family with one child spends \$20,000 for these same needs, total expenditures for essential needs allocated to child-related expenses can be pegged at 15% ($\$3,000/\$20,000$).

In the third place, the percentage of total family expenditures covering children's essential needs is then applied to family expenses as a whole. This is how the percentage of total family expenditures allocated to child-related expenses has been determined.

For instance, if 15% of total family expenditures earmarked to cover essential needs is allocated to child-related expenses and if total family expenditures are \$30,000 (\$20,000 for essential needs and \$10,000 for other needs), the amount established for child-related expenses is thus \$4,500 (i.e. 15% of \$30,000).

Using this method of calculating basic support contributions, it is possible to include expenses incurred in order to cover all the needs of the child or children, above and beyond such essential needs as education, transportation and savings.

Lastly, the basic parental support contributions thus established correspond to the average expenses incurred by families to cover all of their children's needs, according to the family income bracket and the number of children in question.²¹

This basic parental contribution becomes the first element in the process of determining support payments, a "basis for discussion"²² that, it should be recalled, represents a step toward ensuring that the needs of the children are met to the extent of the parents' ability to pay, as stipulated in article 587.1 of the *Civil Code of Québec*.

The "binding force" of the basic parental support contribution obtained by referring to the table is, however, not as restrictive as it would seem given the other provisions within the model that authorize the presiding judge to rectify a situation based on the evidence at hand. In such cases, the support contribution may be increased by taking into account special expenses (Line 405), undue hardship (the judge has certain discretionary powers in this regard) or the parties' respective assets. We should also recall that parents are always free to agree upon a different

²¹ Gaétan Lemay, Direction du développement des politiques et des programmes de sécurité du revenu, Ministère de la Sécurité du revenu, quoted in Gauvin, "Le modèle québécois," p. 150-152.

²² Gauvin, "Le modèle québécois", p. 152.

level of support from that determined by applying the model, in accordance with article 587.3 of the *Civil Code of Québec*.

Article 587 states the following general rule: “In awarding support, account is taken of the needs and means of the parties....” This fundamental principle represents absolutely nothing new.

However, as of May 1, 1997, article 587.1 establishes a second general rule applicable to children, a rule with a presumptive value: the basic support contribution determined by applying the model “is presumed to meet the needs of the child and to be in proportion to the means of the parents.”

However, the presumption is not irrefutable and can be reversed, since under articles 587.1, 587.2 and 587.3 the presiding judge has certain limited discretionary powers to alter the level of support established in the table.

Article 587.1, para. 2, empowers the judge to change the basic support contribution in light of certain special expenses as outlined in the Regulation.

Article 587.2, para. 1, states a third general rule: the parent’s support obligation corresponds to his or her share of the basic parental contribution, increased, where applicable, in light of special expenses. This represents the second phase of the process: the basic support contribution plus special expenses, where applicable....

Thus, when all is said and done, support is determined by way of a four-stage procedure under the following headings:

1. Basic support contribution
2. Special needs
3. Undue hardship
4. The parents’ assets and the resources available to the child.²³

The Process of Indexing the Table to Determine the Basic Parental Contribution

In order to maintain the presumption that the support contributions established in the table continue to correspond over time to the ongoing needs of the child and are in proportion to the means of the parents, a mechanism was needed to ensure that the provisions remained realistic on a long-term basis. The mechanism ultimately chosen involved the annual indexation of the table, a procedure which has also made it possible to reduce the number of support variation applications since the level of support (with some exceptions) is automatically subject to indexation.

Section 12 of the Regulation stipulates that the amounts listed in the *Table to Determine the Basic Parental Contribution* are to be indexed, “by operation of law, on January 1 of each year, in accordance with the annual Pension Index established pursuant to section 119 of the Act respecting the Québec Pension Plan.” This guideline is based on article 590, C.C.Q.

²³ *Droit de la famille—3151 (C.A.)*, October, 1, 1998, justices Brossard, Robert and Letarte, p. 7-9.

Up until now, the table has been indexed on three separate occasions, namely on January 1, 1998 (1.9%), January 1, 1999 (0.9%), and January 1, 2000 (1.6%).

Section 12 of the Regulation also includes a mechanism to correct the possible impact of indexation upon debtor parents, stipulating that the table is indexed annually “unless such indexing would result in bringing the annual basic parental contribution to more than half of the parents’ disposable income.”

LAW, REGULATION AND FORM

The Regulation respecting the determination of child support payments, section 12 and Schedule II, Table to Determine the Basic Parental Contribution.

PROBLEM AREAS

The Follow-up Committee needs to examine the problem raised by the fact that the support contributions established in the table are subject to indexation while the basic deduction is not. Indeed, according to the feedback received by the Committee, the system of indexation has certain defects which may, in the future, make the Quebec model for the determination of child support payments completely unrealistic.

Furthermore, one party before the court detected an error of logic in Division 4 of Part 5, which neglects to take into account compensation for support payments in cases where a parent is granted sole custody of one or several children. The Committee has already pointed out the problem to the Minister of Justice and suggested a minor change to the form (see recommendation 2 of the recommendations made during the Committee’s mandate).

VARIATION OF THE CASE LAW

The reader is invited to consult the decision of the Quebec Court of Appeal related to this problem area (Droit de la Famille—3151 (C.A.)). The Court summarizes the model and refers particularly to the presumptive value of the basic parental contribution, as well as to the discretionary powers contained therein.

OBSERVATIONS

As already mentioned, the objectives of the model include ensuring that support payments are both adequate and predictable and that standards are established to facilitate and standardize the way support payments are calculated. The calculations used to determine the basic parental contribution contribute to the attaining of these objectives.

The data concerning support orders appearing in Chapter 4, Section 3.2.7, of the present report demonstrate that in 58% of cases the level of child support actually established is the same as the support payments provided in Part 5; it is higher in 17% of cases and lower 25% of the time. These data obviously exclude cases involving child-related expenses.

Although in 75% of cases, the level of support actually obtained is the same as or higher than that established in Part 5; it is important to take a closer look at the 316 cases (25%) where the level of support is lower than that determined by using one of the calculations in Part 5 of the form (custody time).

Sixty-three percent of the 316 cases involve an agreement reached between the parties in accordance with Part 7 of the form. In addition, Diagram 12 reveals that in 52% of cases, the level of support is reduced by less than 25%. The reasons for this discrepancy are clearly stated in 59% of all cases involving an agreement, and a number of the explanations provided correspond to the definition of undue hardship.

As has already been shown in tables 3 and 6 of Section 4, the combined incomes of separated or divorced parents with an average of 1.65 children are not that high, given that the median income has been established at \$39,690 and the disposable median income at \$24,443. A family break-up entails additional difficulties for both the parents and their children, particularly on a financial level. It certainly doesn't lead to an increase in parental income: while expenditures increase, their respective incomes stay the same.

While the loss of the economies of scale that characterize the life of a couple is offset by the basic deduction, such is not the case for the additional expenses caused by the break-up (two rents, related expenses, etc.).

The combined gross income of both parents is under \$45,000 in 59% of cases, and their disposable income is less than \$45,000 in 79% of cases.

Nobody anticipates any problems in meeting the needs of the children of those rare parents who have a combined income of \$100,000 or more.

Instead, the major challenge for the model, and especially for the table with its presumptive value, is situated at the level of that vast category of combined disposable incomes totalling \$45,000 or less, representing 79% of all situations. It is obviously much more difficult for parents in this income bracket to meet their children's needs than for those with a higher income. This being the case, it would seem that the table targets income brackets in an appropriate manner and awards levels of support in accordance with the basic principles of the model. The parental contributions established in the table optimize support for the needs of the children with due regard for the parents' ability to pay.

Furthermore, the specific content of the table has been mentioned at a number of points in this report. The Committee has come to realize that many people mistakenly believe that only the nine essential needs are covered by the amounts provided in table, whereas the sums listed therein actually correspond to the average expenditures incurred by families to cover all the needs of their children, based on the parents' income bracket and the number of children involved.

Hence, as has already been indicated, the table takes into account all the children's needs. Nonetheless, there is still room to make allowances for the special needs of certain children by adding child-related expenses, where applicable.

Under the circumstances, the Regulation should perhaps be amended to include the above clarifications, although article 587.1, C.C.Q., does seem clear enough as it now stands:

The basic parental contribution...is presumed to meet the needs of the child and to be in proportion to the means of the parents ... [The level of support] may be increased having regard to certain expenses relating to the child... (Emphasis added)

Concerning the question of indexation, the Follow-up Committee decided to study a number of possible approaches in order to recommend the best possible solution to a problem that is addressed in a specific section of this chapter.

THE COMMITTEE RECOMMENDS THAT:

- The Minister of Justice make it clear, in any manner she deems appropriate, perhaps including an amendment to the Regulation, that the basic parental contribution is meant to cover all the needs of the children (essential and non-essential), with the exception of child-related expenses as outlined in section 9 of the Regulation.

PART 4—LINE 403—CHILD CARE EXPENSES

CONTEXT

Section 9 of the Regulation outlines the child care expenses that may be recorded in the form.

Two types of child care expenses are covered by section 9:

A distinction must be made between two types of child care expenses: those incurred to meet the children's needs and those covering the needs of the custodial parent. The first category may include expenditures for specific child-care services necessary to the child's socialization (for instance, going to a daycare centre several days per week) or for certain special services (for example, those helping a handicapped child master certain skills).

The second category encompasses the most commonly encountered child care expenses, including those the custodial parent must incur in order to hold a job or receive training, or that arise from the state of his or her health.

In both cases, expenses thus incurred were not considered when the support determination table was established and as such should be added to the basic parental contribution, if a need is clearly demonstrated in this respect.²⁴

Similarly:

The term child care expenses includes not only particular expenses dictated by the child's special needs, but also expenses incurred by the custodial parent in order to maintain his or her job, undergo training or look after personal health problems.²⁵

LAW, REGULATION AND FORM

The *Civil Code of Québec*, article 587.1, para. 1, and article 587.2

The *Regulation respecting the determination of child support payments*, section 9

Child Support Determination Form, Line 403

²⁴ Gauvin, "Le modèle québécois", p. 156.

²⁵ Goubau, "La pension alimentaire," p. 5374, 60-980.

PROBLEM AREAS

The Committee's attention was drawn to certain problematic aspects of the form.

The first concerns the difficulty of determining the net expenses that result in certain tax benefits. Furthermore, a number of couples do not seem to understand that only net child care expenses should be recorded in the form. In spite of this difficulty, the feedback received by the Committee does not seem to suggest that this procedure should be scrapped. (It should be noted, moreover, that this way of proceeding is still required by the Quebec Superior Court, in Form III, Statement of Income and Expenditures and Balance Sheet.)

The second difficulty arises from the impossibility of clearly distinguishing between expenses of the same nature incurred by each individual parent when they fill in the same lines (403, 404 and 405). (Consider, for example, the case of parents who share the cost of child care.) Simple changes to the form will remove these irritants rather easily. (See recommendation 9 of the recommendations made during the Committee's mandate.)

A private citizen also suggested that a fixed amount be established for child care and post-secondary education expenses

VARIATION OF THE CASE LAW

The following court rulings address the issue of whether and how child care expenses should be included in the calculation of child support payments.

Droit de la famille—2911, J.E. 98-906 (C.A.)	(Indicating net child care expenses on the form)
Droit de la famille—2717, J.E. 97-1521	(Lodging expenses in a foster family)
Droit de la famille—2881, 98 B.E.-117	(Expenses for a day camp)
Droit de la famille—2935, 98 B.E.-257	(Child care expenses to allow a mother to have a break)

GENERAL OBSERVATIONS

General Observations Concerning Child-related Expenses

Thirty percent of the sample cases involve child-related expenses. As a rule, there are more contested decisions in this area (21%), as compared to the sample as a whole (16%). (See Chapter 4, Section 3.2.8, of this report.)

Furthermore, the expenses covered by lines 403, 404 and 405 are net expenses, in other words, related tax benefits have already been taken into account.²⁶ By establishing the distinct categories of child care, post-secondary education and special expenses, the lawmakers have made it

²⁶ Section 9 of the Regulation.

possible for such expenses (which are above and beyond the expenditures for basic needs covered by the basic parental contribution) to be considered in light of the socio-economic benefits that they provide.

Of course, these benefits are determined not only by the specific situations but also by outside criteria that impose various choices and constraints upon the parents in question.

Let us examine, for instance, child care expenses that may only be claimed by the parent with the lower income. In one particularly bizarre scenario, a mother with a new spouse, even a common-law spouse (from the taxation standpoint) with a lower income than her own, will not herself be entitled to claim the tax benefits linked to child care expenses incurred for the children of whom she has custody. Instead, these benefits are attributed to her common-law spouse.

Such tax benefits may not be calculated using the disposable income of both parents, nor their gross income, given that they no longer form a couple; therefore only their new personal situation can actually be taken into account.

By choosing to make the above-mentioned stipulation, the lawmakers also recognized that all benefits arising from a specific deduction should serve to fully cover expenses related to child care, with any additional amounts to be shared by the parents.

The Committee endorses this approach.

Observations Concerning Child Care Expenses

Eighteen percent of all sample cases involve child care expenses averaging \$2,251, with the median amount totalling \$1,820. The average age of the children in question is 5.4 years old for families with one child, while for families with two children, the average age is 8.7 for the first child and 6.1 for the second.

A major problem with respect to child care expenses arises when the parties neglect to treat these costs as net expenses. It would therefore be useful to issue a reminder and provide more information in this regard.

THE COMMITTEE RECOMMENDS THAT:

- All recommendations made during their mandate be duly considered, especially recommendations 4 and 9.
- The user be given more information in the brochure accompanying the model about all child-related expenses and how to calculate net expenses.

PART 4—LINE 404—POST-SECONDARY EDUCATION EXPENSES

CONTEXT

All post-secondary education expenses are recorded at Line 404 of the form. This sum is then added to the basic annual contribution calculated according to the procedure also outlined in the form.

Post-secondary education expenses are defined in section 9 of the Regulation. The wording of this section is generally viewed as allowing for a broad interpretation of the expenses to be included at Line 404: “The wording of these provisions makes it possible, generally speaking, to cover expenses related to such studies.”²⁷

In the same vein, Professor Goubau mentions that “...the definition covers expenses in the broadest sense of the term, including, ‘in particular,’ tuition fees, instructional material, transportation and even accommodation expenses, where applicable.”²⁸

One of the fundamental criteria for determining the admissibility of post-secondary education expenses is, obviously, whether or not the child in question is in fact pursuing his or her studies. For instance, in a case cited in *Droit de la Famille—3002*, the judge refused to include the amount requested under post-secondary education expenses since the child was not pursuing such studies at that time. In the judge’s view, no party may be reimbursed for expenses incurred at an earlier date but never actually claimed:

With respect to the post-secondary education expenses totalling \$4,016.92 claimed by the applicant in her Child Support Determination Form, these expenses are inadmissible since C. is no longer pursuing post-secondary studies. At issue here, in the main, are earlier expenses already covered by the applicant, for which she never made any previous claim.

Lastly, and still with respect to admissible expenses, the specific question of children of full age must be addressed. Since post-secondary education expenses generally affect children of full age, the model includes a few additional requirements in this regard:

However, since these costs usually concern children of at or over the age of majority, it will first be necessary to ensure that the aforementioned criteria for considering them as dependent upon their parents or upon a person designated *in loco parentis* are met and also to take into account the discretionary powers of the court to consider various factors before determining the level of support for these children.²⁹

As a rule, the case law does indeed impose stricter requirements for children who have attained the age of majority, whereas minor children are usually treated in a more generous manner:

²⁷ Gauvin, “Le modèle québécois,” p. 157.

²⁸ Goubau, “La pension alimentaire”, p. 5375, 60-980.

²⁹ Gauvin, “Le modèle québécois,” p. 157.

In light of the Regulation, in particular sections 1 and 2, it may be asserted that post-secondary education expenses involving a minor child will automatically be taken into account (provided, of course, that these expenditures are deemed reasonable, pursuant to article 587.1, para. 1, C.C.Q.). On the other hand, the requirements are stricter whenever a child at or above the age of majority is involved ...³⁰

LAW, REGULATION AND FORM

Civil Code of Québec, article 587.1, para. 1 and para. 2, and article 587.2

587.2 The support to be provided by a parent for his child is equal to that parent's share of the basic parental contribution, increased, where applicable, having regard to specified expenses relating to the child.

The court may, however, increase or reduce the level of support if it is of the opinion that, in the special circumstances of the case, not doing so would entail undue hardship for one of the parents. Such hardship may be caused by, among other things, the costs involved in exercising visiting rights in respect of the child, obligations of support toward persons other than the child or reasonable debts incurred to meet family needs. The court may also increase or reduce the level of support if it is warranted by the value of either parent's assets or the extent of the resources available to the child. (emphasis ours)

Regulation respecting the determination of child support payments, sections 1, 2 and 9.

Child Support Determination Form, Line 404.

PROBLEM AREAS

- See the problems raised by child care expenses in the section that addresses Line 403.
- The impact of loans and bursaries in determining post-secondary education expenses.

VARIATION OF THE CASE LAW

With respect to determining the level of support to be awarded to a child at or above the age of majority, the case law has, for a long period of time, taken into consideration a number of circumstances, including those outlined in section 2 of the Regulation.

A variation of the case law pertaining to post-secondary education expenses demonstrates that these applications for support continue to be assessed on a case-by-case basis:

- (1) The income of the children who have attained the age of majority is to be taken into account when calculating levels of support, since these children must contribute to meeting their own needs by working or by way of loans and bursaries:

³⁰ Goubau, "La pension alimentaire," p. 5375, 60-980.

Droit de la famille—2775, J.E. 987-1872

Droit de la famille—2859, 98 B.E.-12

Droit de la famille—2870, J.E. 98-265

Droit de la famille—2942, J.E. 98-750

(2) The expenses claimed must take parental resources into account:

Droit de la famille—2850, J.E. 98-158

(3) The student must be pursuing his or her post-secondary education when the level of support is determined, since previously incurred expenses may not be claimed:

Droit de la famille—3002, J.E. 98-1230

Furthermore, under the circumstances, not every expenditure related to post-secondary studies may necessarily be added to the basic needs of the child. In fact, in a case cited in *Droit de la Famille—2899* (J.E. 98-443), it was ruled that a percentage of the accommodation expenses were already included in the basic parental contribution, and thus that tuition fees and the cost of books would remain the only expenses to be fully covered.

OBSERVATIONS

Please refer to the general observations found in the section dealing with Line 403 with respect to child care expenses.

Post-secondary education expenses are included in only 4% of all sample cases. The average amount of such expenses is \$2,309, while the median is \$1,550; the average age of children from the same family is 17.5 years old for families with one child and 17.7 and 15 years old for two-child families. A higher percentage (25%) of decisions concerning post-secondary education expenses are contested than those in the sample as a whole (16%). Parents incurring post-secondary education and special expenses earn a much higher income than all other parents surveyed, as is demonstrated by the median income of \$63,144 earned by this particular parent group.

Thus, in cases of divorce, the model can be applied to children at or above the age of majority who are pursuing full-time studies and are therefore unable to cover their own basic needs.

Nevertheless, given that these dependent children are at or above the age of majority, the model provides the court with the discretionary power to either fix the support payable at a different level (section 2 of the Regulation) or to increase or decrease the level of support based on the value of the parents' assets and the resources available to the child.

The impact of loans and bursaries on the process of determining post-secondary education expenses needs to be examined, much as the determining of parental income was the focus of an earlier section of the report (dealing with Part 2 of the form). Should these loans and bursaries be

deducted in their entirety from the amount claimed for post-secondary education expenses? The Committee considers that there is every reason to answer in the affirmative.

It is well known that the expenses taken into account when determining loans and bursaries include, in particular, tuition fees, transportation costs and living expenses. Thus it stands to reason that any loans and bursaries received must be deducted from the total amount required to cover basic needs so that these needs are not covered twice (once by the model and a second time by the loans and bursaries). Nevertheless, it should be emphasized that in situations where the child's needs are covered by the level of support provided in the table, along with a supplement for post-secondary education expenses, the amount represented by loans and bursaries must only be deducted from total expenses incurred and not from the total amount required to cover basic needs. Thus it would seem necessary to specify that any related subsidy, benefit, deduction or tax credit must be deducted from the level of support needed to cover post-secondary education expenses. The term "benefit" is a broad one, taking into account an entire range of resources. The Committee considers that loans and bursaries are, in fact, "benefits" and that this should be clearly stated in the Regulation.

THE COMMITTEE RECOMMENDS THAT:

- The recommendations made in the course of the mandate, in particular recommendations 4 and 9, be duly considered.
- Section 9 of the Regulation be amended so that the definition of post-secondary education expenses clearly indicates that such expenses are over and above those covered by any loans and bursaries for which the child might be eligible.

PART 4—LINE 405—SPECIAL EXPENSES

CONTEXT

As stipulated at Line 405 of the Child Support Determination Form, it is possible to include, when calculating the level of support, all special expenses incurred by each parent.

Section 9 of the Regulation defines these expenses as follows:

... annual expenses other than child care expenses and post-secondary education expenses, such as medical expenses, expenses for primary or secondary studies or for any other educational program and expenses related to extracurricular activities, where those expenses are linked to the needs required by the particular situation experienced by the child.

It would seem that the lawmakers, from the outset, intended “special expenses” to apply to exceptional cases, thus favouring a relatively restrictive approach with respect to including such expenses in the calculation of support payments. In other words, the term “special expenses” is used when referring to exceptional measures involving expenditures that would appear to exceed those already covered by the basic needs as established in the table.

The expression “particular situation,” as used here, reflects the intention that this concept be interpreted in a restrictive manner so as not to lead to an increase in the basic parental contribution, which takes into account expenses that might be qualified as “normal,” i.e. expenses already covered by the basic support contribution.

In fact, since the basic parental contribution already covers expenses related to education, extracurricular activities and recreation (expenses that vary according to parental income), it is incumbent upon the courts to assess the eligibility of the child’s need in light of his or her “particular situation,” i.e. circumstances that could justify the awarding of an additional sum.

Special expenses may include, in particular, registration fees for a costly private institution that the child was already attending when the parents separated or the concept may apply to cases where the necessity of attending such an institution was demonstrated when the application for support was filed. On the other hand, in my opinion, it would be difficult to justify increasing the basic parental contribution to cover, for example, the annual \$200 fees related to attending a public institution, given that these expenses are already covered in the table since they are necessarily assumed by all parents with dependent children of school age.³¹

In the case law, as it currently stands, there seems to be at the very least a certain tendency to adopt this concept of special expenses. Thus, when referring to special expenses related to

³¹ Gauvin, “Le modèle québécois,” p. 159.

recreation, Justice Thibault, speaking for the Quebec Court of Appeal, made the following remarks:

As noted, the basic support contribution established in the *Regulation respecting the determination of child support payments* is meant to meet the following basic needs: food, lodging, communications, housekeeping, personal care, clothing, furniture, transportation and recreation. Thus, in principle, recreation activities are covered by the basic support contribution. Nevertheless, to the extent that expenses exceed those normally incurred for such activities, they constitute special expenses in accordance with the Regulation and may be added to the basic parental contribution.

In the case in point, the amount reserved for recreation exceeds the sum normally set aside for such purposes. In this regard, the data compiled by Statistics Canada concerning “Average Household Expenditures” are likely to guide the court in the exercise of its discretionary power. These data are “generally known”² and serve to highlight “the social situation in which decisions to award support are made.”³ According to Statistics Canada, approximately 5% of the average household budget is set aside for expenses related to recreation. If this average amount is applied to the needs of the children covered by the application for support, as stipulated in the *Regulation*, i.e. needs normally covered by the support contribution of both parties, and considering that recreation as an item includes all recreational activities (vacations, cinema, sports and entertainment, etc.), one can only conclude, as I have already noted, that the expenses claimed do in fact exceed the amount normally set aside for recreation.

Given the level of parental income and the fact that the parents will cover these expenses in proportion to their respective incomes, I am of the opinion that these expenses may reasonable be claimed.³²

² Article 2808, C.C.Q.

³ *Moge v. Moge*, [1992] 3 S.C.R. 813 at 874. See also *L. (L.) v. F. (D.)*, REJB 99-10690.

Justice Goodwin, as cited in *Droit de la Famille—2781*, underlines the “special” nature of special expenses:

Justice Goodwin mentions in this regard that section 9 of the Regulation uses restrictive terminology “and that the phrase ‘needs required by the particular situation’ paves the way for dealing with ‘exceptional’ needs exceeding so-called normal expenses, since basic needs are already covered by the basic parental contribution.”

This decision underscores the fact that the new system for determining child support payments appreciably reduces the discretionary powers of the court in such matters. However, the court does agree, and quite rightly so, to include under special expenses a series of expenditures related to the participation of children in sports activities of a certain level, as well as serious training and education programs. One can only urge that such activities continue to be included in the court’s understanding of the expression “where those expenses are linked to the needs required by the particular situation

³² *Droit de la famille—3228*, J.E. 99-1169 C.A. 200-09-002402-995, pp. 3-5.

experienced by the child,” as stated in section 9 of the Regulation. The evidence no doubt made it easier to reach such a conclusion in the case at hand, since the parties agreed to recognize the talents and excellent sports and academic achievements of their children, as well as to acknowledge that the children should continue to be encouraged in this direction.³³

Method of Analyzing Special Expenses: A Two-Step Process

One of the key elements as concerns the concept of special expenses involves determining their eligibility. In this regard, the Quebec Court of Appeal has pointed out that there is a double limit to the eligibility of special expenses:

Article 587.1, para. 2, C.C.Q., and section 9 of the *Regulation respecting the determination of child support payments* impose a double limit upon the eligibility of special expenses: in the first place, they must be reasonable in light of the needs and means of the parents and, secondly, they must be linked to the needs of the child, given his or her particular situation.³⁴

It should be noted that article 587.1, para. 2, of the *Civil Code of Québec* basically provides guidelines for the court responsible for assessing whether or not the expenses claimed are, in fact, reasonable:

The reasonable nature of the expenses being claimed must be assessed by the court. Thus, even in cases where the child’s need is demonstrated as being essential, the court may nevertheless decide that the expenses claimed are, in fact, excessive in light of the nature of the need and the parents’ ability to pay.

Let us look once again at the aforementioned example, that of a child who is attending a very costly private institution when the separation occurs. Now then, one could very well imagine situations arising where the parents are no longer able to cover these expenses, either due to the very fact of their being separated or for other reasons such as a decrease in their income. In such cases, a refusal to increase the basic parental contribution in light of the child’s special need may well be totally justified.

On the other hand, expenses related to the specific medical care required because of the state of the child’s health or those incurred to overcome a handicap or disability could serve to justify an increase in the basic parental contribution, even if such an increase may entail a certain degree of financial hardship for debtor parents. It should be recalled that one of the objectives of the Quebec model for the determination of child support payments is to ensure that the child’s needs are covered, especially those considered essential, before the non-essential needs of the parents are taken into account.³⁵

The second guideline to be followed by the courts, i.e. that special expenses must be “linked to the needs required by the particular situation experienced by the child,” seems to impose an

³³ Goubau, “La pension alimentaire,” 65-000.

³⁴ Droit de la famille—3228, J.E. 99-1169, p. 3.

³⁵ Gauvin, “Le modèle québécois,” p. 158.

additional requirement, namely that of confirming the exceptional nature of the special expenses under variation:

A double limitation is in force when these expenses are being variationed. Firstly, like all additional expenses, they are evaluated to determine whether they are “reasonable considering the needs and means of the parents and children,” as outlined in article 587.1, para. 2, C.C.Q., and explained above. Secondly, according to section 9 *in fine* of the Regulation, such special expenses must be “linked to the needs required by the particular situation experienced by the child.” The latter stipulation clearly represents an additional requirement, in other words, a stricter condition than the simple reasonable needs test outlined in article 587.1, C.C.Q. Thus, “special expenses” cannot be invoked as a pretext for arguing that the basic contribution, as established by the table, is insufficient to cover ordinary needs. In our view, that would run counter to the procedure established in the rules for determining child support payments.³⁶

Nevertheless, this stipulation only comes into play when the Regulation itself is being applied; it may no longer apply in cases where a judge exercises the discretionary power granted under article 587.2 *in fine*:

However, in our view, this stricter requirement, resulting from the fact that the Regulation insists upon “needs required by the particular situation experienced by the child,” only applies within the framework of the Regulation itself, i.e. with respect to establishing child support payments using the Child Support Determination Form. In other words, this restriction is in force when assessing expenses that might be taken into account in order to determine support payments based on annual disposable income. On the other hand, this limitation should not normally come into play in cases where article 587.2, C.C.Q., *in fine* is being applied, namely in situations where the court has concluded that the value of the assets of the debtor of support justifies an increase in the support contribution. Under such circumstances, the Civil Code, in fact, sets down no particular limitations, and the court must therefore refer to the concept of the child’s interests (article 33, C.C.Q.) and needs and means (article 587.1, C.C.Q.).³⁷

With respect to the court’s decision to award a certain specific amount for extracurricular activities (Droit de la famille—2718), a jurist writes:

In our view, the term “special expenses,” as defined in section 9 of the Regulation, provides the court with the latitude to take into account, for instance, needs that are not covered by the basic support contribution or to consider the children’s standard of living whenever it awards levels of support that differ from the amounts established in the table. It will be interesting to see whether the courts interpret this concept in a liberal or a restrictive manner.³⁸

³⁶ Goubau, “La pension alimentaire,” 65-000.

³⁷ Goubau, “La pension alimentaire,” 65-040.

³⁸ Verdon, “Les nouveaux barèmes,” p. 234.

LAW, REGULATION AND FORM

Civil Code of Québec, article 587.1, para. 2, and article 587.2

Regulation respecting the determination of child support payments, section 9

Line 405 of the Child Support Determination Form

PROBLEM AREAS

- See the general problem outlined in the section pertaining to Line 403.
- One party before the court has proposed that additional expenses, such as those incurred for sports activities, not be considered when calculating basic support needs and that such costs be covered on a voluntary basis only. This person is of the opinion that these expenses could be used in an attempt to receive an excessively high level of support.
- One of the important problems raised by the concept of special expenses concerns how the term itself should actually be interpreted. Professor Goubau provides an excellent summary of the problem.³⁹

The question becomes even more problematic in cases involving extracurricular activities, sports or cultural activities, enrolment in a private school, or specific training programs. Two distinct trends may be noted with respect to such expenses: the first is to be rather “generous,” i.e. disposed to increasing the level of support; the second, on the contrary, involves emphasizing the exceptional or special nature of such expenses, reflecting a reluctance to deviate too quickly from the levels of support as established in the table. In the Quebec system, the problem arises from the fact that “special expenses,” as defined in section 9 of the Regulation, may only be taken into account if they “are linked to the needs required by the particular situation experienced by the child.” Is it enough, under such circumstances, to demonstrate, with respect to extracurricular activities for example, that any given aspect of the child’s situation in itself creates a need? Could an argument be made based on the fact that a first draft of the Regulation states that such expenses, in order to be considered, had to be “exceptional” as the Federal Child Support Guidelines stipulate? As concerns the Quebec system, it is in fact possible to conclude that “special expenses” are not necessarily “exceptional expenses.” Nevertheless, Quebec’s standards are not so watered down that the only criterion to be applied is simply the child’s interests or the test of means and needs. For the Regulation does indeed stipulate that these expenses must arise from a “particular situation.” This expression necessarily refers to a situation that “deviates from the norm,” with the norm in this case represented by the amounts established in the table. And this is precisely where part of the problem lies: insofar, for example, as many extracurricular activities may also be recreational activities, they are already included in the basic needs covered by the support contributions provided in the table. The validity of this argument is reinforced by the fact that these contributions increase along with parental income. Thus the amounts established in the table do

³⁹ Goubau, “Sécurité juridique.”

necessarily cover more than essential needs. The higher the parental income, the more likely it is that the support contribution provided by the table will cover basic needs such as recreation, transportation, etc.

VARIATION OF THE CASE LAW

As we have seen at the beginning of this section, the Quebec Court of Appeal in *Droit de la famille—3228* has outlined the general criteria respecting special expenses by emphasizing that article 587.1, para. 2, C.C.Q., and section 9 of the Regulation impose a double restriction with respect to the eligibility of special expenses. On the one hand, these expenses must be reasonable in light of the parents' means and needs and, on the other, they must be linked to the needs required by the particular situation of the child. (*Droit de la famille—3228*).

In a ruling that appears in *Droit de la famille—3038*, Justice Allard defines the special expenses referred to in section 9 of the Regulation as expenses incurred in order to cover needs not already covered by the basic parental contribution, i.e. those resulting from a particular situation. This seems to be the definition that is generally applied by the courts.

Expenses usually claimed under section 9 include orthodontic, dental, optometrist and medication costs, private school expenses, and costs related to extracurricular activities (music lessons, ballet lessons, etc.) and to sports. As a rule, dental and orthodontic costs have been deemed ineligible, since they are already covered by the basic parental contribution, whereas the opposite has been determined with respect to medical expenses.

Some rulings have stipulated that only private school tuition fees constitute special expenses, with other costs being covered by the basic parental contribution, whereas other court decisions have taken into account all expenses related to attending a private school, i.e. the cost of instructional material, books, uniforms, etc. Furthermore, in all decisions upholding the right to include such expenses in calculations of support contributions, the court has looked at both the parents' resources and whether or not it was in fact necessary for the child to attend a private school. In one case, these expenses were ruled inadmissible because one of the parents had not been consulted.

With respect to extracurricular and sports activities, some judges have ruled that expenses related to these activities are already included in the basic parental contribution, whereas others have found that they indeed constituted special expenses. In the majority of decisions allowing such costs to be claimed as special expenses, the aptitudes, talents and/or interests of the child were examined in order to determine whether this child was in a particular situation as compared to other children. Such cases include, for example, a child who participates in major competitions or who wishes to pursue a career in a special field. Lastly, even arguments based on the fact that the parents initiated the activity or that the child has been doing it for a long time have been accepted.

<i>Droit de la famille—2873</i> , J.E. 98-207 (C.A.)	(Orthodontic expenses)
<i>Droit de la famille—3297</i> , J.E. 99-972	(Dental expenses)
<i>Droit de la famille—3143</i> , J.E. 98-2184	(Optometrist expenses)

Droit de la famille—3199, J.E. 99-160 (C.A.)	(Private school and parental resources)
Droit de la famille—2826, [1997] R.D.F. 823	(Private school and one parent having been consulted)
Droit de la famille—2848, J.E. 98-159	(Private school: tuition fees only)
Droit de la famille—2900, J.E. 98-444	(Private school: all related costs)
Droit de la famille—2772, J.E. 97-1834	(Piano lessons excluded)
Droit de la famille—3297, J.E. 99-972	(Piano lessons and art courses, as well as the special aptitudes of the child)
Droit de la famille—3032, J.E. 98-1489	(Figure skating: parental encouragement of the pursuit and the child’s desire to teach the discipline)
Droit de la famille—3092, 98 B.E.-999	(Exclusion of general skiing expenses; costs related to competitive skiing accepted)
Droit de la famille—3155, J.E. 98-2289	(Horseback riding and parental resources)
Droit de la famille—2830, J.E. 97-2180	(Asthma medication)
Droit de la famille—2951, J.E. 98-804	(Medical expenses not included in the basic parental contribution)

OBSERVATIONS

See the general observations respecting child care expenses in the section pertaining to Line 403.

Only 6% of sample cases involve special expenses, representing an average amount of \$1,478 and a median of \$980. In such cases, the average age of children from the same family is 11.5 years old for one-child families and 13.6 and 10.8 years old respectively, for families with two children. As is the case for post-secondary education expenses, the percentage of contested decisions involving special expenses is higher (26%) than for all sample cases (16%). The income of parents in cases involving post-secondary education expenses and special expenses (a median income of \$63,144) is much higher than for the sample as a whole.

The lawyers and mediators surveyed indicate that determining special expenses represents one of the most problematic aspects of the model. A number of these respondents point out that the term “special expenses” should be more clearly defined.

It would seem that the concept is being clarified within the case law and among legal authorities:

By what criterion might one conclude, on the one hand, that a need is not already covered in the table, and, on the other, that the level of support should be increased in light of this need?

- the extraordinary nature of the activity?
- the special or exceptional aptitudes of the child?¹¹
- the financial resources of the parents?
- the choices regarding schooling made by the parents before the break-up?¹²
- the exorbitant cost of the activity?
- the prior living standards of the child?
- the fact that this specific expense exceeds “what parents of the same income would normally spend for the purpose in question?”¹³

¹¹ Example: *Droit de la famille*—3155, J.E. 98-2289 (C.S.).

¹² Example: *Droit de la famille*—3210, J.E. 99-274 (C.S.).

¹³ This is the solution recently proposed by the Standing Senate Committee on Social Affairs, Science and Technology in its report *Federal Child Support Guidelines*.

No matter how this question is ultimately answered, it should, in our view, at the very least take the following elements into account:

- The presumptive nature of the system for determining support payments (the amounts provided in the table are presumed to cover basic needs and to take parental income into account);
- Even if special expenses need not be “exceptional,” they must necessarily cover costs other than those included in the table;
- “Special expenses” cannot be determined by using the criterion of parental income since the latter is taken into account in the *second* stage, during verification of the reasonable nature of the special expenses, under article 587.1 of the *Civil Code of Québec. Consequently a child’s need does not become “special” simply as a result of parental income.*

These various findings lead to the following conclusion: First of all, it must be demonstrated that a child has a special need that is clearly different from the needs that parents of the same socio-economic bracket usually have to cover. Then, it remains to be seen whether or not there are sufficient “resources” at hand (including all assets) to cover this sort of expenditure. The more this expenditure serves to meet one of the child’s essential needs, the more the aforementioned resources should be used to cover it.⁴⁰ (Emphasis added)

In the Committee’s view, the elements highlighted in the above text serve to clearly define the concept of “special expenses” as it should be understood within the framework of the model.

⁴⁰ Goubau, “Sécurité juridique.”

It is obvious that the term “special expenses,” like most of the concepts in the model that are open to judicial appraisal and discretion, gives rise to a great many questions. Does the body of case law on the subject suggest a rather restrictive or a more liberal interpretation of the concept? When considering the statistics, in particular the fact that these expenses have been applied in only 6% of all cases, one can only conclude that, as a general rule, the concept has been judiciously applied. Would it be preferable to tighten the definition still further and in so doing reduce the latitude exercised by the courts, a discretionary power that, we feel, must be maintained in order to ensure that adjustments, which are both necessary and rather difficult to frame, can be made? Such an operation involves risks that must be examined very carefully indeed. It should be recalled that an earlier draft of the Regulation defined special expenses as being of an exceptional nature. However, the term “exceptional nature” began to seem much too restrictive under civil law; thus, after feedback from interested parties was taken into account, the lawmakers decided to introduce the current concept of special expenses. Although the wording of this concept does not lend itself to a broad interpretation, it is certainly less restrictive than it was during its draft stages. Which wording should be used to reclarify the concept? In the current context, we feel that yet another change may very well lead to new interpretations that would take several years to stabilize. The model is still in its fledgling phase, having been in place for only three years, and in the eyes of the Committee, the process is unfolding as it should, with the concept of special expenses becoming more and more precise. It is our view that nothing in the legal doctrine, the case law or the latest statistical data can justify a change in wording, nor help in determining the nature of the change or how it is to be applied. On the other hand, judicial tendencies are taking shape and beginning to stabilize, revealing that the model is now much more clearly understood than it was at the outset and that concepts such as the basic contribution, as established in the table and applied in conjunction with the two-step process for determining special expenses, have been mastered.

Developments regarding these expenses should, however, be closely monitored in order to determine whether or how to clarify the concept of special expenses.

THE COMMITTEE RECOMMENDS THAT:

- Careful consideration be given to recommendations made during the course of its mandate, especially recommendations 4 and 9.
- The current wording of the guidelines pertaining to special expenses be maintained.
- The Ministère de la Justice continue to examine developments related to special expenses, especially current case law, in order to determine whether or how to further clarify this concept.

PART 5—CALCULATION OF ANNUAL SUPPORT ACCORDING TO CUSTODY TIME

CONTEXT

In addressing Part 5 of the form, it is important to recall a few basic principles established under civil law with respect to parental authority.

Article 32 of the *Civil Code of Québec* stipulates that “Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are able to give to him.” In addition, article 33 states that “Every decision concerning a child shall be taken in light of the child’s interests and the respect of his rights.” Article 599 of the Code later provides that “The father and mother have the rights and duties of custody, supervision and education of their children.” In other words, parents are responsible for feeding and caring for their children, and article 600 provides that “the father and mother exercise parental authority together.” This responsibility lies with both parents, whether or not they are in fact married. Furthermore, in case of break-up, article 605 clearly states that parents maintain their parental authority no matter what the circumstances: “Whether custody is entrusted to one of the parents or to a third person, and whatever the reasons may be, the father and mother retain the right to supervise the maintenance and education of the children, and are bound to contribute thereto in proportion to their means.”

It is clear that the Civil Code respects the principle of parental equality and that it promotes, even after a break-up, the maintaining of both parents’ responsibilities with respect to their children.

The Quebec model for the determination of child support payments also respects the aforementioned principles and, especially in Part 5 of the form, promotes the children’s right to have access to both their parents.

Percentage of Custody Time

The model establishes that the percentage of custody time may influence the level of support actually awarded: “One of the most important components of the Quebec model for the determination of child support payments is that it takes into account the custody time of both parents in determining child support contributions.”⁴¹

Part 5 of the Child Support Determination Form allows for an adjustment of the level of support in proportion to the amount of time that the child spends with each respective parent. It follows that, after custody and access rights have been established, the parents must complete the section of the form corresponding to their own particular situation in order to determine the level of child support payments:

The system for determining support contributions established in the Regulation and the form designed for its application distinguish among three types of situations based on the access time of the non-custodial parent, i.e. whether this time falls below 20%, is between 20% and 40%, or has reached 40%. The longer the non-custodial parent’s access time, the

⁴¹ Gauvin, “Le modèle québécois,” p. 150.

more he or she is considered as having made a contribution that must be factored in when reducing the level of support to be paid using the Table to Determine the Basic Parental Contribution.

Given this regulatory framework, it is crucial that access time be calculated as accurately and realistically as possible. Both judges and practitioners do, however, run the risk of distorting the procedure for determining access time by reducing or increasing access time artificially, in order to change how support payments are calculated. The fundamental principle regarding the child's interests imposes an obligation to determine access based on a system that will guarantee the child's optimum development and as far as possible, ensure that both parents have appropriate access so that they might contribute, to their child's growth and education, while determining, as a next step, the level of child support to be paid.

Assessing custody time often proves to be a very difficult task....⁴²

Accordingly, for parents with sole custody of their children, i.e. in cases where a child spends more than 60% of his or her time with the custodial parent, the latter must complete Division 1 of the form concerning sole custody.

Division 2 ("Split custody") is used to calculate support contributions if each parent has sole exclusive custody of at least one child.

Division 3 ("Shared custody") is used for calculating support contributions if each parent assumes at least 40% of custody time in respect of all children.

Lastly, Division 4 ("Both sole and shared custody") has been designed for cases where at least one parent has sole custody of at least one child and where both parents have joint custody of at least one more child.

LAW, REGULATION AND FORM

Regulation respecting the determination of child support payments

3. The support payable by a parent for his child shall be established, on an annual basis, taking into account the basic parental contribution to which the parents should be bound jointly in respect of the child, the child care expenses, post-secondary education expenses and special expenses relating to the child, the disposable income of that parent in relation to that of both parents and the custody time he assumes in respect of the child, in accordance with the following Rules and the form in Schedule I. (emphasis ours)

4. A parent who assumes more than 60% of the custody time of a child shall be considered to have sole custody for the purposes of these Rules.

Where only one parent has sole custody of all children, the support payable by the other parent shall be calculated following Division I of Part 5 of the form; notwithstanding the

⁴² E.P v. S.P., Quebec Court of Appeal, November 1, 1999, 500-09-007691-991, LeBel, Nuss and Thibault JJ.

foregoing, if the non-custodial parent has visiting and prolonged outing rights, that is, if he assumes between 20% and 40% of the custody time in respect of the children, the support payable by that parent shall be calculated following Division 1.1 of that part of the form.

5. Custody is also considered to be sole custody where each parent has sole custody of at least one child. In that case, the support payable by a parent shall be calculated following Division 2 of Part 5 of the form.

6. Where each parent assumes at least 40% of the custody time in respect of a child, custody of that child is considered shared custody for the purposes of these Rules.

Where both parents have shared custody of all children, the support payable by a parent shall be calculated following Division 3 of Part 5 of the form.

7. In situations involving both sole custody and shared custody, that is, where at least one parent has sole custody of at least one child and where both parents have shared custody of at least another child, the support payable by a parent shall be calculated following Division 4 of Part 5 of the form.

Child Support Determination Form, lines 510 to 552.1

Division 1 Sole custody
Lines 510 to 512.1

Division 1.1 Adjustment for visiting and prolonged outing rights
Lines 513 to 518.1

Lines 515 - Percentage of custody time for exercising visiting and prolonged outing rights
(number of days _____ ÷ 365 X 100)

Division 2 Split custody
Lines 520 to 526.1

Division 3 Shared custody
Lines 530 to 534.1
Lines 530—Distribution factor (%) of custody
(father: number of days of custody _____ ÷ 365 X 100)
(mother: number of days of custody _____ ÷ 365 X 100)

Division 4 Both sole and shared custody
Lines 540 to 552.1

Lines 548—Distribution factor (%) of shared custody
(father: number of days of custody _____ ÷ 365 X 100)
(mother: number of days of custody _____ ÷ 365 X 100)

PROBLEM AREAS

One party before the court asked the Committee to explain why the non-custodial parent cannot deduct the first 20% of custody time from the basic support contribution. He argues that the non-custodial parent is penalized twice: first by losing custody of the child and then by being penalized financially.

Another party wonders why the adjustment for access rights applies only to the basic parental contribution (Line 401) and not to the annual contribution of both parents (Line 514).

- A number of problem areas related to Part 5 have been reviewed in the section on recommendations made during the Committee's mandate and will not be reconsidered here.
- The entire issue of calculating custody time is an area of concern.
- The problem of how to apply the concept of shared custody has also been raised.

The Basis of the Principle of Custody Time

When the model was initially implemented, a first problem concerned the principle itself. Some observers feared that parents might begin to use their children as bargaining chips:

Another crucial point may very well cause problems: custody time is now considered as a criterion when assessing annual levels of support. According to the new system, the parent with access rights constituting between 20% and 40% of custody time is considered to be a non-custodial parent with prolonged visiting rights. Shared custody is deemed to apply to cases where each parent assumes at least 40% of custody time in respect of all children. Support contributions will vary according to custody time, and it is easy to imagine all the problems that this assessment criterion will create, since custody and access rights now become a fundamental issue, and so much is at stake.

Another problem related to this entire issue arises from the fact that the new system provides for a reduction in levels of support proportionate to the access time awarded to the non-custodial parent. A non-custodial parent whose children spend 30% of all custody time with him or her may reduce support contributions proportionately. And yet it is a well known fact that, notwithstanding the "prolonged" access rights exercised by the non-custodial parent, the custodial parent always pays the lion's share of child care expenses, in spite of the temporary absence of the children. Here is one example among so many others: the housing costs of the custodial parent remain the same whether the child is at home or not! Food bills are probably the only ones to actually drop.

On the other hand, expenses incurred by the non-custodial parent during periods spent with the children do not warrant a reduction in the level of support equivalent to access time. Serious consideration should be given to removing this automatic reduction based on the exercise of access rights.

The new concept is to be feared because it may very well cause a flood of new court cases. Children could literally be held hostage since custody time will directly influence

the levels of support awarded. Furthermore, since it is stipulated in the Child Support Determination Form that the terms and conditions for custody and access rights must also be specified, a serious problem may arise when the form is being completed. Custody and access rights very often become contentious issues when parties first file for support.⁴³

HOW THE PRINCIPLE OF CUSTODY TIME IS APPLIED

Problems also arise when the principle is actually applied. The question has thus been debated at length before the courts, especially in order to define a system for calculating custody time.

One party before the court sent a letter to the Ministère which was, in turn, forwarded to the Follow-up Committee. The letter outlines the correspondent's concerns:

... [According] to current case law, time spent at the day care centre or at school belongs, as it were, to the custodial parent.

Thus, the case law establishes that a parent who has a child every other week may not actually meet the 40% criterion.

In my opinion, there is not difference; a week is a week. I too have to take my little girl to the pediatrician or the dentist and stay home from work when she's sick in bed.⁴⁴

VARIATION OF THE CASE LAW

The Regulation does not specifically indicate how custody time should be calculated. There are several Superior Court rulings on the issue, some suggesting that the percentage of custody time should be based on the number of nights the child expects to spend with each parent, while others imply that the calculation should take into account the number of days that the child is cared for by each parent, without considering short periods of time or the exact number of hours. The Quebec Court of Appeal finally settled the issue (as can be seen in *Droit de la famille*—3165, [1998] R.J.Q. 2050) by ruling that all periods of time spent with one or the other parent must be included when calculating custody time and that there is nothing in the Regulation that would exclude periods when a child spends fewer than twelve hours with a given parent.

OBSERVATIONS

A study of the data reveals that the mother is granted sole custody in 71% of cases, while the father has sole custody in 5% of cases. Thus it will be noted that sole exclusive custody is granted in 76% of all cases. However, if all cases of sole custody with access rights and extended visitation for the non-custodial parent are combined with cases of sole exclusive custody, it will be noted that the mother has custody in 79% of all sample cases while the father has custody in only 6% (see Chapter 4, Section 3.2.9). Leaving aside cases of both sole and shared custody, representing only 1% of the sample, other types of custody occur in a very similar percentage of

⁴³ Bourgault, Richard, "Pensions alimentaires : le travail n'est pas terminé," in *La Presse*, June 10, 1997, p. B3.

⁴⁴ E-mail from Mr. A.D., June 25, 1999.

cases: 9% (sole custody with visiting and prolonged outing rights for the non-custodial parent), 7% (shared custody) and 7% (split custody).

Table 13 shows how custody time is allocated on a percentage basis with respect to the exercise of access rights. The father is the non-custodial parent in 93% of all cases. In 59% of cases, the percentage of the non-custodial parent's prolonged custody time varies from 26% to 34%. In comparing median monthly support payments according to the type of custody (see Appendix 6), it will be noted that the median amount is \$303 for cases where the mother has been granted sole custody and \$279 for cases of sole custody with access rights and extended visitation. The compensation for this kind of custody is not large. It should be recalled that no compensation whatsoever is received in cases where the non-custodial parent has custody for fewer than 73 days per year (under 20%), whereas a certain compensation is provided whenever the non-custodial parent has been granted access rights totalling between 20% and 40% of custody time in order to encourage the child's access to both parents. It would appear that the fears expressed by certain practitioners when the model was first implemented concerning the new concept of custody time have not in fact been borne out. With respect to shared custody, parents have shown a preference for an equal sharing of custody time in 78% of all cases, while 22% have preferred to allocate custody time in an unequal manner (between 40% and 60%). For this type of arrangement, custody time is compensated once the 40% level is reached. As indicated in the above example, the model is flexible enough to take into account the needs of both parents and their children.

Furthermore, it is interesting to compare these data with statistics concerning the median total income of both parents by type of custody (Table 4 of Chapter 4). On the one hand, incomes are higher across the sample for parents with both sole custody and shared custody, i.e. \$60,000 (1% of all cases), \$49,400 for cases where the father has sole custody (5% of all cases) and \$48,076 for cases of shared custody (7% of cases). On the other hand, income is lowest when the mother has sole custody, i.e. \$37,050 (71%).

The model tends to facilitate the children's access to both of their parents by stipulating the levels of compensation that correspond to different types of custody arrangements (except for cases of sole custody). Nonetheless, having a relatively low income is probably one of the problems preventing parents from choosing an arrangement other than sole custody even if they would prefer to do so.

Lastly, it will be noted that the highest median level of monthly support, as established in the model, is awarded in cases where the mother has been granted sole custody (cf. Appendix 6), on the understanding that the latter's income is significantly lower than the father's (see Chapter 4, Tables 3 and 6 and Diagram 9).

Calculating Custody Time

Following several divergent rulings handed down by the Quebec Superior Court, the Quebec Court of Appeal finally settled the question of how to calculate custody time in a unanimous decision, with reasons for the judgment provided by Justice Chamberland (*Droit de la famille—3165*⁴⁵). This ruling has, moreover, been upheld in another Court of Appeal decision.⁴⁶

Even though jurists are now aware of these rulings, it is still important to ensure that the procedure for calculating custody time is clearly stated in the Regulation and explained in the information brochure pertaining to the model so that parties before the court can use the model more easily. Custody time should include the whole length of time that the child is in the parent's care; in other words, the entire period during which the parent is responsible for the child must be taken into account, including, for instance, time spent at day care or at school. These clarifications would represent a pro-active approach to problem solving and would help prevent sterile quarrels erupting between parties before the court.

The Impact of Shared Custody on the Division of Shared Expenses

While the mechanism established in the form does not in itself cause any problems, the story is very different with respect to how it is applied by parents once the decision to adopt this type of custody arrangement has been made. In this regard, it is important to mention a few concepts that might better explain the impact of shared custody on the division of shared expenses.

In sole custody cases, support contributions cover all expenses related to child care (housing, food, clothing, education, health, recreation, etc.). It follows that the non-custodial parent is only responsible for expenses that directly result from the exercise of his or her access rights. Furthermore, child care expenses, post-secondary education expenses and special expenses, as recorded at Line 406 of the Child Support Determination Form, are not open to interpretation since they are added to the level of support to be paid based on the disposable income of each parent (Line 407). Thus, in all cases, the parent receiving support must also cover these expenses, regardless of the custody arrangement, unless arranged otherwise in a specific agreement between the parties. For instance, it could be arranged that the non-custodial parent pay certain fees directly to a third party, such as a private school, a day care, etc.

On the other hand, in shared custody cases, the question of who should defray certain expenses is often open to interpretation. At issue here are shared costs linked to the purchase of certain goods and services, i.e. expenses which are incurred on a recurring basis (the purchase of clothing, health-care expenses, registration costs for a sporting activity, etc.) and are shared by the two households. Some contend that these expenses, like special expenses, should be covered by the parent receiving support, whereas others would argue that these costs should be divided according to the income of each parent.

The mechanism for dealing with cases of shared custody, found in Part 3 of the form, is based on the principle that support is paid to the lower-income parent. Support payments serve to make up for the gap between custody expenses and the basic parental support contribution so that each parent has the necessary resources to cover expenses related to child care. It follows that, once

⁴⁵ J.E. 98-2287 (C.A.). 500-09-006378-988, October 29, 1998.

⁴⁶ *E.P. v. S.P.*, QCA, November 1, 1999.

the level of support is determined at Line 534 (“Annual support payable”), **shared expenses, as defined above, should be covered by both parents according to the custody time of each one.** These expenses are independent of the parents’ income. Support payments serve to balance out the cost of child care according to custody time so that each parent may then cover his or her share of expenses related to child care.

Thus the Regulation stipulates that each parent must cover these expenditures when they arise in proportion to custody time (40% to 60% as the case may be); one party is then reimbursed by the other for these expenses according to a pre-determined arrangement. In practice, some people find this way of proceeding cumbersome and inappropriate. They are, however, free to establish their own payment system so long as it remains within the framework of the Regulation. For instance, the parents might together estimate the annual cost of clothing, after which one party would give the other a lump sum covering his or her share of these expenses (40% to 60%, as the case may be). The parent having received this payment would subsequently be responsible for all clothing purchases.

Both Sole and Shared Custody Involving Two or More Children

According to the statistics, parents with two or more children having chosen an arrangement whereby at least one parent has sole custody of at least one child and both parents have joint custody of at least another child represent 10% of all sample cases. In 7% of all cases, the parents have opted for sole exclusive custody of at least one child each, while 3% of parents share custody of two or more children.

Now, the table was designed, and quite rightly so, to reflect the assumption that the cost of having two or more children is not twice or three times, etc. the cost of caring for an only child, obviously provided that the children in question live in the same home. The table takes into account economies of scale and the relative weight in terms of expenditures for each member of the family unit.

This reasoning cannot be applied in cases where at least one parent has sole custody of at least one child or both parents have shared custody of two or more children since each child is living in a different place. In all such cases, shouldn’t calculations of support be based on the amount listed in the table corresponding to the real situation of each parent, i.e. the actual number of children living with each one?

Here is an example of what this might mean: if the family income for purposes of calculation is \$40,000, and each parent has sole custody of one child, the annual level of support would currently be pegged at \$3,855 per child, for a total of \$7,710. However, since each party must maintain a residence equipped to receive a child on a full-time basis, it cannot be claimed that either of them is benefiting from economies of scale. Thus it only stands to reason that the amount provided by the table for a first child should be applied in the case of each party, i.e. \$5,150 each, for a grand total of \$10,300.

The Follow-up Committee did not have enough time to examine this question fully. A variation of the entire issue should be included in any future studies.

THE COMMITTEE RECOMMENDS THAT:

- Careful consideration be given to recommendations made during its mandate, especially recommendations 6 and 12. The proposed new form (see Appendix 10) includes a revised version of Part 5.
- The Regulation be amended to include a method of calculating custody time that takes into account the entire period during which the child is entrusted to each parent and the whole length of time during which the child is the sole responsibility of the custodial parent.
- The information brochure explaining the model be redesigned to provide more information concerning how to calculate custody time and the impacts of shared custody upon shared expenses.
- The Ministère de la Justice thoroughly examine the cost of looking after one child in relation to the amounts provided in the table and calculations made in cases of shared custody or where each parent has sole custody, when there are two or more children.

PART 6—CAPACITY TO PAY OF DEBTOR

CONTEXT

Section 8 of the *Regulation respecting the determination of child support payments* stipulates that “Unless the Court decides otherwise considering, in particular, the parent’s assets, the support payable by a parent in respect of his child may not exceed half his disposable income...”

The provision is applied to Part 6 of the Child Support Determination Form, which enables the support payer to verify whether or not prescribed support payments exceed 50% of his or her disposable income.

This rule serves to illustrate one of the basic principles underlying the model, namely that low-income parents should be given incentives to fulfil their support obligations with respect to their children.

LAW, REGULATION AND FORM

Regulation respecting the determination of child support payments

8. Unless the Court decides otherwise considering, in particular, the parent’s assets, the support payable by a parent in respect of his child may not exceed half his disposable income. Part 6 of the form shows how to calculate the support payable pursuant to this Rule.

12. The amounts in the table in Schedule II shall be indexed by operation of law as of 1 January of each year, following the annual Pension Index established in accordance with section 119 of the Act respecting the Québec pension plan (R.S.Q., c. R-9), unless such indexing would result in bringing the annual basic parental contribution to more than half of the parents’ disposable income.

Where an indexed amount is not a multiple of \$10, the closest multiple of \$10 shall be substituted therefor.

The Minister of Justice shall publish yearly in the *Gazette officielle du Québec* a child support determination table indicating the amounts indexed pursuant to this section. (emphasis ours)

Child Support Determination Form, Part 6

- 600 Disposable income of parent required to pay support (line 305)
- 601 Multiply line 600 by 50%
- 602 Annual support payable according to calculations under a division of Part 5
- 603 Annual support payable
(enter the lesser amount between lines 601 and 602)

PROBLEM AREAS

One practitioner pointed out to the Committee that the new calculation system does not take debts into account. More specifically, a party before the court asked the Committee why debts incurred for university studies are not factored in when calculating support payments, especially since, in his view, these financial obligations represent a heavy financial burden, particularly given the current, “increasingly precarious,” job market.

Other parties also find the provisions of section 8 of the Regulation to be excessive, insofar as they stipulate that support contributions may not exceed half the parent’s disposable income. More specifically, one party mentioned that in his view child support payments should never exceed one third of disposable income.

Limit of 50% of Disposable Income (Line 601)

Line 601 does not represent any problem in terms of calculation, but some observers wonder whether the assumptions that underlie it are reasonable. At first glance, a limit of 50% of disposable income for child support payments does seem rather high. It should be recalled, however, that before the model came into force, the case law had established a certain “glass ceiling” constituting the limit for all types of support payments (including for the spouse or former spouse and children). The ceiling, as it happened, was pegged at 50% of the gross income earned by the support payer.

This same ceiling was established by the lawmakers in article 553, para. 2, of the *Code of Civil Procedure* with respect to an exemption from seizure of property. In essence, the C.C.P. stipulates that certain types of income and benefits may be seized up to a limit of 50%, particularly in cases involving support payments. Furthermore, article 15 of *An Act to facilitate the payment of support* (c. 18, 1995) states that, for cases involving sums paid to the debtor on a periodic basis, the Minister of Revenue is to determine the amount that may be deducted at source up to the percentage of income seizable for support payments as established by applying article 553, para. 2, C.C.P.

Thus the only difference between disposable income as defined by the model and the gross income used before the model’s coming into force lies in the basic deduction of \$9,000, along with the deduction for union or professional dues. It also follows that the difference between these two categories of income decreases as a person’s income increases.

Problems arise at both ends of the income scale, i.e. for high-income parties before the court who have several children, as well as for those with low incomes. Let us look at two such problematic situations.

Low-Income Parties Before the Court

A significant number of observations concerning the support payments established in the table are to the effect that these contributions are too high for low-income earners.

The limit of 50% of disposable income, as stipulated at Line 601 of the form, comes into play automatically and serves to limit the basic parental contribution for those with low incomes.

For instance, in cases where there is only one child, the automatic 50% ceiling ceases to apply only when income exceeds \$3,000, whereas in cases where six (6) children are involved, it no longer applies once the annual disposable income of both parents exceeds \$14,000.

Even in light of this automatic limit, the levels of support listed in the table for these income brackets are often seen as being too high.

Given that for low-income parties before the court, each dollar has a high marginal importance (both for parents and their children), the model does not seem in this instance to strengthen the desire to keep a job or even return to work. This is a situation that cries out for a solution.

Parties with Other Financial Obligations

Some parties find themselves in situations involving unavoidable economic constraints that others do not face; this is the case, for instance, for those who must make mandatory contributions to a pension fund due to the terms and conditions of their employment and not to their own professional status.

The rationale for only allowing deductions for union or professional dues is that these costs cannot be avoided when earning an income, and this is in fact the case for all professionals or unionized workers: such dues are part and parcel of the right to work. On the other hand, it is contended that mandatory pension fund contributions deducted by a company or organization are among the salary conditions of the company or organization and are not an inherent element of the employment or work status of the party before the court.

The calculations that have yielded the amounts listed in the table take into account a percentage of savings and the capitalization of income for the future (i.e. pension funds, RRSP contributions and other tools for establishing a deferred retirement income).

It is likely that, in certain cases, the support payer's net residual income (after income tax, various types of social security and other tax payments, child support payments, and in some cases support payments to a spouse or former spouse) is insufficient to cover his or her needs, assuming that the \$9,000 figure to cover personal needs is maintained.

This sort of situation arises in particular for workers with several children making certain types of mandatory contributions, for instance, for government employees who must pay into the RREGOP [Quebec's government and public employees retirement plan] pension fund or workers making mandatory payments into their company's pension fund.

In order to carry out an accurate analysis of the situation, the Committee undertook to determine the net income of a person who is alone (the usual income tax situation of a support payer after a separation or divorce). For more information, please see the table in Appendix 12 of the report.

Parties Before the Court With Several Children

An unusual economic situation is faced by parties with a large family.

The analysis of figures provided by the table for each income bracket and number of children yields some rather interesting results. Indeed, it should be noted that the amounts listed in the

table under the “Number of children” column almost always correspond to the same percentage of net income for cases where one parent alone is earning employment income. For instance, a gross income of \$20,000 yields a net income of \$15,795, an amount that, in turn, corresponds to a disposable income of \$11,000. The level of support established in the table for one child is \$2,520, i.e. 16% of net income (see Appendix 12).

1 child	16% - 17%
2 children	23% - 26%
3 children	29% - 32%
4 children	34% - 38%
5 children	38% - 45%
6 children	38% - 51%

As Appendix 12 reveals, in cases involving six children, the percentage of the basic parental support contribution is, in the majority of cases, approximately 50% of net income.

A comparison of the total income of both parents in all situations with the total income of parents with between one and four children yields the following results:

Total income of both parents:

		Average	Median
All cases	1,890	\$44,208	\$39,690
1 child	917	\$41,060	\$36,130
2 children	733	\$47,153	\$43,169
3 children	189	\$48,390	\$40,684
4 children	43	\$45,112	\$41,587

These data tend to demonstrate that combined parental income increases with the number of children. The slight drop in combined income for couples with four children does not, in our view, seem significant enough (given the small number of such cases included in the sample) to support the argument that this rule no longer applies to cases of couples with four or more children. The Committee considers that there is a proven link between income level and the number of children. It could happen, however, that after a couple has had a certain number of children, one of the partners might leave the job market in order to remove an important set of expenditures, i.e. those directly or indirectly related to a second job. The family income will, of course, drop in such circumstances, but so will child care expenses, such as day care costs. Additional transportation expenditures and the cost of restaurant meals will also decrease, to name only a few other types of expenses.

Thus the rule holds true for each disposable income bracket: a larger number of children means a higher basic parental support contribution and less room for child care expenses. Although the Committee does not have statistical evidence to support the following hypothesis, it only stands to reason that as a couple has more children in the course of a relationship, there is less income available for such expenditures.

As discussed earlier, the model stipulates that the support payable by a parent in respect of his or her child may not exceed half the parent's disposable income. On the other hand, as we have also seen, the basic parental support contribution can currently exceed 50% of net income in cases where there are several children and only one income. If one applies the percentage to disposable income as proposed in the table, this works out to approximately 40% of disposable income.

In other words, support payments representing 50% of disposable income (as recorded at Line 601 of the form) exceed, in certain cases, 50% of the net income of the party before the court.

After having reviewed some borderline cases (an average income, six children, RREGOP and other contributions), we have concluded that parents before the court whose parental contribution has reached 50% of net income are in a situation whereby any contribution exceeding this percentage of net income may lead to "undue hardship."

For couples with a single income (50% of all cases), the 50% ceiling for disposable income represents 63% of net income, thus resulting in obvious undue hardship for the debtor of support.

The Committee contends that the lawmakers did not intend to introduce measures that put parties before the court in a situation which seems, a priori, to be extremely difficult. The current ceiling causes such hardship, in the Committee's view, in cases where there are five or six children and the support payer is the only income provider.

VARIATION OF THE CASE LAW

The debtor's ability to pay is examined by the court in cases where it must decide whether or not to include certain expenses related to child care, in cases involving children at or above the age of majority and in the aforementioned cases where the concept of undue hardship might be applied. The case law concerning these subjects may be found in the various sections concerning the problem areas studied by the Committee during its mandate.

OBSERVATIONS

Limit of 50% of Disposable Income (Line 601)

While searching for possible answers to the problems raised, the Committee discovered a very simple solution: reduce the limit appearing at Line 601 to 40% of disposable income.

In the first place, the automatic application of a maximum of 40% of disposable income to the various income brackets listed in the table serves to reduce the parental contributions of low-income parties before the court.

This automatic reduction represents a response to the many observations in the Committee's surveys, namely that the amounts listed in the table are too high for low-income parties.

The table in Appendix 13 compares the results of applying this measure with the amounts provided in the current table (January 2000).

The scale produced by the new rate includes a lower basic parental support contribution for the income brackets targeted by the current 50% limit. The new rate also leads to a decrease in basic parental support for certain higher income brackets, raising the maximum income for an automatic application of the ceiling to \$4,000 in cases where there is only one child and \$30,000 in cases where there are six.

For parties before the court with large families and high incomes, a reduction in the 50% ceiling would serve to increase the amount of money available to the support payer for meeting his or her other support obligations.

Appendices 14A, B, and C demonstrate the differences resulting from a reduction in the 50% limit. The table below contains only the most extreme cases of divergence.

Maximum Differences							
Period	Limit	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
Weekly	Minimum	\$1.92	\$1.92	\$1.92	\$1.92	\$1.92	\$1.92
	Maximum	\$6.54	\$10.77	\$15.38	\$19.23	\$23.08	\$28.65
Monthly	Minimum	\$8.33	\$8.33	\$8.33	\$8.33	\$8.33	\$8.33
	Maximum	\$28.33	\$46.66	\$66.66	\$83.33	\$100.00	\$124.16
Yearly	Minimum	\$100.00	\$100.00	\$100.00	\$100.00	\$100.00	\$100.00
	Maximum	\$340.00	\$560.00	\$800.00	\$1,000.00	\$1,200.00	\$1,490.00

THE COMMITTEE RECOMMENDS THAT:

- The Regulation be amended in order to replace the current limit of 50% of disposable income with a rate of 40%.

PART 7—AGREEMENT BETWEEN PARENTS

CONTEXT

The parents' right to agree upon different ways of implementing their support obligations has in no way been compromised by the setting up of the model. In fact, parental leeway has been preserved in the Quebec model and it may even be seen as a means of reaching settlements:

In accordance with the rules of civil law, in spite of their separation, parents retain the right to supervise the maintenance and education of their children (article 605, C.C.Q.). The adoption of the model was in no way intended as a means of eliminating this right and preventing the parents from reaching an agreement concerning the expenses they would normally cover in relation to certain needs of the child, just as they did when they were together, based on personal criteria, and in light of their own priorities, way of life, culture, etc.

Bill 68 preserves the parents' freedom to reach a private agreement providing for a level of child support that departs from the amounts calculated by applying the guidelines of the Regulation so long as they clearly state in their agreement the reasons for such a departure (article 825.14, C.C.P., and Part 7 of the form). However, the court has the obligation to ensure that the amounts thus agreed upon adequately provide for the needs of the child (article 587.3, C.C.Q.).

The adoption of the model for the determination of child support payments should encourage parents to reach agreements, not only by bringing to their attention a set of objective rules for agreeing upon a level of support, but also by making available to them the tools needed to reach this goal, namely the Child Support Determination Form and the Table to Determine the Basic Parental Contribution.⁴⁷

LAW, REGULATION AND FORM

Civil Code of Québec

587.3 Parents may make a private agreement stipulating a level of child support that departs from the level which would be required to be provided under the rules for the determination of child support payments, subject to the court being satisfied that the needs of the child are adequately provided for.

Civil Code of Québec

605. Whether custody is entrusted to one of the parents or to a third person, and whatever the reasons may be, the father and mother retain the right to supervise the maintenance and education of the children, and are bound to contribute thereto in proportion to their means.

⁴⁷ Gauvin, "Le modèle québécois," p. 166.

Code of Civil Procedure

825.14 Parents who make a private agreement stipulating a level of child support that departs from the level of support which would be required to be provided under the rules for the determination of child support payments must state precisely, in their agreement, the reasons for such departure.

Likewise, any judgment granting a level of child support which is at variance with a private agreement between the parents or, in the case of a contested application, with the information stated in a form filed by the parents, must state precisely the reasons for such variance and include references to the relevant items of the prescribed form.

Child Support Determination Form, Part 7

Part 7—Agreement between parents

- 700 Annual support payable
- 701 Annual support payable according to agreement between parents
- 702 Difference between the 2 amounts
(line 700—line 701)
- 703 State precisely the reasons for that difference

PROBLEM AREAS

According to the data gathered for this report, the courts have ruled on a certain number of cases involving agreements where the level of support departs from the amount established by applying the model and where the reasons for such a departure appear neither in the agreement nor in Part 7 of the form.

VARIATION OF THE CASE LAW

Droit de la famille—2975, J.E. 98-955

In its decision, the court mentions that the obligation to provide support is part of public policy and cannot be renounced: “Neither parent may limit or renounce child support rights, which are based on public policy.”

Droit de la famille—3112 [1998] R.D.F. 675 (C.S.), J.E. 98-1994

In this case, the judge ruled that, notwithstanding an agreement between the parties, the court may not, without a valid reason, establish child support payments that depart from the amount provided in the Table to Determine the Basic Parental Contribution, the latter amount being mandatory under the *Regulation respecting the determination of child support payments*.

In the judge’s view, the explanation provided was not sufficient, in light of article 825.14 of the *Code of Civil Procedure*, which stipulates that the parties must state precisely, in their agreement, the reasons for any departure.

Support payments of \$300 per month depart from the norms established under article 825.8, C.C.P. According to the Court's calculations, the father should provide the mother with support payments of \$335.30 per month for N. ($64.27\% \times \$6,260 \div 12$). When the parties' lawyer was asked to explain the discrepancy between the level of support established by her clients and that determined in the table, she replied that "the parties jointly decided that support payments of \$300 would be sufficient since the father had covered the lion's share of expenses related to the family home during the entire period of their separation."

The Court does not believe that this explanation provides sufficient grounds for establishing support payments that depart from the mandatory level of support provided by the table in accordance with the *Regulation respecting the determination of child support payments*. In fact, article 825.14, C.C.P. stipulates that the Court may not, without a valid reason, grant a level of child support which is at variance with the amount provided in the table, notwithstanding a private agreement between the parents.

OBSERVATIONS

The brief presented to Cabinet on October 25, 1996, contains the following observations:

2.8 Assessment of the Model

The model itself stipulates that the Minister of Justice must table a report on the implementation of the model within a period of three years.

To be in a position to begin the required assessment, the model also stipulates that a decision ordering a parent to provide support that differs from his or her share of the basic support contribution must clearly state the reasons for such a difference.

Articles 587.3, C.C.Q., and 825.14, C.C.P., give parents a certain flexibility within a judicial framework defined by the court's obligation to ensure that the agreed-upon level of support is sufficient to meet the needs of the child or children in question. It is therefore necessary to clearly state the reasons for any departure from the model, and this obligation, as stipulated in article 825.14, C.C.P., applies to both increases and decreases in the basic parental contribution. The reasons have to be specified so that both parties might understand why they have departed from the model and so that the court might verify the agreement in accordance with article 825.14, C.C.P. A clear understanding of these reasons will also prove useful if the level of support should ever need to be revised. Lastly, an analysis of these departures contributes to the assessment of the model itself. In this regard, Chapter 4, Section 3.2.7, of this report points out that in 316 cases in the sample (25%), support payments are lower than the amounts determined in Part 5 of the form when there are no child-related expenses. Sixty-three percent (198) of these cases involve agreements reached by applying Part 7 of the form. However, even though the law is categorical in this regard, the Committee has observed that 41% of the most recent orders establishing a lower level of support were submitted without reasons for the departure being recorded (it sometimes happens that the reasons are stated during the hearing). Based on these results, we are unable to carry out as thorough an assessment as we would like concerning whether or not the amounts provided in the table are in fact appropriate.

THE COMMITTEE RECOMMENDS THAT:

- A thorough examination be made of recommendation 10, proposed during the Committee's mandate.
- The Ministère de la Justice remind judges and special clerks, who respectively ratify and confirm agreements, that they must ensure in **all cases** that the reasons for any departure are clearly stated in the agreement or in Part 7 of the form.
- Article 825.14, C.C.P., be amended so as to clearly stipulate that the reasons for any departure must be recorded either in the agreement or in the form.

PART 8—STATEMENT OF EACH PARENT’S ASSETS AND LIABILITIES

CONTEXT

Part 8 of the form stipulates that each party must list his or her assets and liabilities. This section of the form borrows, nearly verbatim, the information provided in Form III of the Rules of practice of the Superior Court of Quebec in family matters.

A consideration of the parties’ assets and liabilities has always been part of the process of determining support payments. The new rules outlined in the model recognize the importance of this information, which is, moreover, an integral part of the Child Support Determination Form.

Above and beyond the concept of undue hardship (concerning which the burden of proof is upon the parent who wishes to invoke it), Bill 68 also gives judges the power to increase or reduce the level of support pursuant to the Regulation by taking into account the value of a given parent’s assets.

This measure is very important since the model stipulates that the level of support must be based on the incomes of both parents and not the total value of their resources. Of course, it could very well happen that one parent has very little income (or assets that generate income from income, i.e. rental or investment income), but nonetheless has substantial assets (real property, works of art, a significant amount of capital, various luxury items, etc.). Once the existence of these assets has been established, the court could then take them into account when determining support contributions. In this regard, the Child Support Determination Form stipulates that both parents must provide a statement of their assets and liabilities.⁴⁸

LAW, REGULATION AND FORM

Civil Code of Québec

587.2 The support to be provided by a parent for his child is equal to that parent’s share of the basic parental contribution, increased, where applicable, having regard to specified expenses relating to the child.

The court may, however, increase or reduce the level of support if it is of the opinion that, in the special circumstances of the case, not doing so would entail undue hardship for one of the parents. Such hardship may be caused by, among other things, the costs involved in exercising visiting rights in respect of the child, obligations of support toward persons other than the child or reasonable debts incurred to meet family needs. The court may also increase or reduce the level of support if it is warranted by the value of either parent’s assets or the extent of the resources available to the child. (Emphasis added)

⁴⁸ Gauvin, “Le modèle québécois,” p. 165.

Code of Civil Procedure, articles 825.9 to 825.12

825.12 If the information stated in the prescribed form or prescribed documents is contested or incomplete or if the court considers it necessary, it may make good the deficiency and, for instance, establish the income of a parent. In establishing the income of a parent, the court may have regard, among other things, to the assets held by the parent and attribute to those assets the production of such income as it sees fit.

Child Support Determination Form, Part 8.

PROBLEM AREAS

Does Part 8 of the form always have to be completed? Some interveners have asked whether it is appropriate for everyone in every case to fill in Part 8. Nevertheless, before the model was established, Form 2 of the Rules of practice of the Superior Court of Quebec in family matters (the current Form III), always had to be completed. Why should things be different today?

VARIATION OF THE CASE LAW

In the following cases, the court departed from the general rules for determining support payments by taking into account the value of the parties' assets.

Droit de la famille—3139, J.E. 98-2132 (C.A.)

Droit de la famille—3397, J.E. 99-1811

Droit de la famille—3171, J.E. 98-2379

OBSERVATIONS

Parties before the court have an obligation to complete Part 8 of the form even though there is no clear indication therein as to whether or not this information may be used to increase or decrease the level of support. The form contains information declared under oath, and this information is part of the evidence provided. Article 825.9, *C.C.P.*, clearly states that “No application relating to child support may be heard unless it is accompanied by the form ... duly completed ... and by the prescribed documents.”

Part 8 must also be completed in order that both parties might be apprised of all the elements likely to influence the determination of child support payments. It is as important for everyone concerned to be informed about the assets and liabilities of each party as it is to provide the documents required to establish the parents' income under Part 2 of the form. How can a judge or any other interested party possibly know whether or not to apply article 825.12, *C.C.P.*, in order to establish the income of a parent based on the value of his or her assets if Part 8 is not duly completed? The same question arises in light of the last sentence of article 587.2, *C.C.Q.*, which reads as follows: “The court may also increase or reduce the level of support if it is warranted by the value of either parent's assets....”

Under the rules, applicants are required to state their assets and liabilities in Part 8 of the form. If no such information is provided, one or the other party, or the court, is entitled to demand that

this part of the form be duly completed. Committee members feel that Part 8 of the form must be retained and that interested parties and practitioners should be reminded of the obligation to complete it. The Committee has recommended during its mandate that changes be made to the design of Part 8 in order to make it more user friendly.

THE COMMITTEE RECOMMENDS THAT:

- Careful attention be paid to changes proposed during its mandate with respect to Part 9 of the draft form as it appears in Appendix 10.
- The Ministère de la Justice remind all parties and interveners of the obligation to complete all sections of the Child Support Determination Form.

PROBLEMS RAISED BY INDEXATION

CONTEXT

Indexation is one of the problem areas that have generated the most discussion among members of the Follow-up Committee. At issue here, in the main, are two basic components of the model, namely the *Table to Determine the Basic Parental Contribution* (Schedule II of the Regulation) and the \$9,000 basic deduction established at Line 301 of the Child Support Determination Form.

In addition, the Committee looked at the possibility of indexing the income brackets listed in the table.

It is important to specify from the outset that the entire indexation problem exists because only the support contributions provided in the table are actually indexed and not the other parameters associated with these levels of support.

The Quebec model for the determination of child support payments in fact establishes a procedure whereby the amounts listed in the table are indexed on an annual basis, all within the framework of the *Regulation respecting the determination of child support payments*.

Section 12 of the Regulation states that the “amounts in the table in Schedule II shall be indexed by operation of law as of January 1 of each year.”

This process was implemented, among other reasons, in order to bring the table in line with the automatic indexing of support payments as outlined in article 590, *C.C.Q.* The amounts in the table are indexed at the same rate. Since support payments are themselves indexed, it must be understood that indexing the sums listed in the table necessarily leads to a reduction in requests for revision, because otherwise, at a certain point, support payments would have exceeded the amounts provided in the table.

To date, the table has been indexed three times, on January 1, 1998 (1.9%), January 1, 1999 (0.9%) and January 1, 2000 (1.6%).

It should be emphasized, moreover, that the Table to Determine the Basic Parental Contribution is divided not only according to the number of children included in the support application, but also according to the parents' disposable income brackets, which vary from a minimum of \$1 to a maximum of \$200,000, with cases exceeding the latter amount being addressed in section 10 of the Regulation.

Section 12 of the Regulation also provides a mechanism to compensate for any impact indexation may have upon the parents, since it stipulates that the table will be indexed annually “unless such indexing would result in bringing the annual basic parental contribution to more than half of the parents' disposable income.”

Indexation has also caused problems related to the basic deduction (Line 301). This deduction has been set at \$9,000, based on certain guidelines already mentioned in the section pertaining to Part 3. Nonetheless, as concerns whether or how to index the basic deduction, it should be emphasized

that, as opposed to the table, the model provides no mechanism to ensure an on-going indexation of this amount. Hence the basic deduction remains unchanged, whereas the sums listed in the table are indexed on an annual basis.

LAW, REGULATION AND FORM

Regulation respecting the determination of child support payments

10. The percentage in the table in Schedule II for the part of the parents' disposable income exceeding \$200,000 is given for information purposes only; therefore, the Court may, if it deems it appropriate, fix for that part of the disposable income an amount different from the amount that would be obtained using that percentage.

12. The amounts in the table in Schedule II shall be indexed by operation of law as of 1 January of each year, following the annual Pension Index established in accordance with section 119 of the *Act respecting the Québec pension plan* (R.S.Q., c. R-9), unless such indexing would result in bringing the annual basic parental contribution to more than half of the parents' disposable income.

Where an indexed amount is not a multiple of \$10, the closest multiple of \$10 shall be substituted therefor.

The Minister of Justice shall publish yearly in the *Gazette officielle du Québec* a child support determination table indicating the amounts indexed pursuant to this section.

PROBLEM AREAS

As already indicated in the discussion of Line 401, the Committee realized, in the course of its deliberations, that indexation has caused problems when the model is applied, in particular with respect to the model's fairness, notwithstanding the fact that the levels of support provided in the table have been indexed on an on-going basis.

The second part of the problem is centred around the basic deduction itself. Here once again, the main difficulty lies in ensuring that the model is applied on a fair and equal basis over time. In this regard, a number of groups and individuals have raised questions as to whether the basic deduction should in fact remain unchanged. It seems illogical to maintain the same basic deduction while the cost of living tends to increase from one year to the next.

According to one party before the court, the fact that the table is indexed on an annual basis means that support payments increase every year in conjunction with the cost of living, even if the debtor's salary remains the same. Furthermore, this same person points out that due to the indexation of the table, the level of support increases twofold whenever one of the parents obtains a raise in salary: once due to the raise itself and a second time in accordance with the rising cost of living. He therefore argues that the table should not be indexed, but that support payments should instead be adjusted annually in light of any changes in the parties' salaries.

Out of a concern for consistency, the Committee chose to study, at one and the same time, all issues involving the indexation of elements of the model.

VARIATION OF THE CASE LAW

The Committee did not variation any decisions pertaining to this issue.

OBSERVATIONS

Predictable Child support payments should have the effect of ensuring that families in similar circumstances receive a similar level of support. This is the objective both when support contributions are first determined and for a number of years thereafter. The indexation problem is directly linked to the difficulty of maintaining this objective over time. In this context, the provision in the law stipulating that the model must be evaluated within three years of its enactment, with respect to whether or not it has reached its objectives, takes on its full meaning.

General Observations

Committee members believe that problems created by the indexation of the *Table to Determine the Basic Parental Contribution* may, even on a medium-term basis, serve to discredit the model for the determination of child support payments by undermining its credibility and by creating a gap between the reality experienced by families undergoing a break-up and the level of support determined by applying the model.

Professor Dominique Goubau observes, with respect to the system of indexing the table, that:

It is nonetheless anticipated that the cumulative effect of successive indexations can only result in the level of support exceeding 50% of disposable income. In reality, this represents a somewhat awkward consequence of a difficulty inherent in the automatic indexation of the table, i.e. that such a system is destined, one day or another, to become totally inoperative, since the amounts as indexed will tend to diverge, gradually, over time, from the reality of family expenditures ... In the long run, such a divergence would make the system inequitable.⁴⁹

The relevant guidelines in this regard are provided in article 587.1, para. 1, of the *Civil Code of Québec*:

As regards the support owed to a child by his parents, the basic parental contribution, as determined pursuant to the rules for the determination of child support payments adopted under the *Code of Civil Procedure*, is presumed to meet the needs of the child and to be in proportion to the means of the parents.

If the argument noted above should be confirmed, there is every reason to fear that the presumption established in article 587.1, *C.C.Q.* (one of the centrepieces of the Quebec model for determination of child support payments) is increasingly unlikely to correspond to reality and that the model, as it is applied, will no longer meet the needs of children. Instead these needs will be substantially exceeded by the sums provided. If the problem is not addressed, it will also affect the fundamental purpose of the model as stated in article 587.1, *C.C.Q.*, namely to “meet the needs of the child and to be in proportion to the means of the parents ...,” with support payments

⁴⁹ Goubau, “La pension alimentaire,” p. 5345, 60-840.

determined according to the needs of the child and the income of the parents. Generally speaking, the objectives and basic principles of the model indicate that all available resources should be taken into account in order to meet the needs of the child effectively, not excessively.

A similar problem arises with respect to the basic deduction. There is a real risk that the model, as it is applied, will lead to a situation of inequity on a medium-term basis (or at least appear to do so) since this amount remains the same whereas the payer's support obligations are increasing every year. It should also be considered that the overall cost of living continues to rise and that, on a more or less long-term basis, a basic deduction that remains unchanged might become less and less relevant to the everyday reality of Quebec families. One must not forget that this deduction reflects a basic principle of the model, namely to give priority to the paying parent's support obligation with respect to expenditures exceeding his or her own essential needs. In the case of low-income parents, the problem also affects another basic principle, i.e. to maintain as far as possible the incentive for low-income parents to meet their support obligations to their children.

Various Scenarios Considered

Over the course of its deliberations, the Follow-up Committee developed a number of scenarios, subjected them to further study and then, where applicable, formulated appropriate recommendations, adopting a position on the indexation of various elements of the model.

The Committee decided to study the question of whether to index the table and the basic deduction together at the same time, in order to address as many situations as possible and to develop a more comprehensive perspective. The Committee also took the ancillary step of looking at the possibility of indexing the income brackets appearing in the *Table to Determine the Basic Parental Contribution*. The following scenarios were considered:

1. Indexation of the table but not the basic deduction (*status quo*)
2. Non-indexation of the table and non-indexation of the basic deduction
3. Non-indexation of the table but indexation of the basic deduction
4. Indexation of the table and of the basic deduction
5. Indexation of the table, the basic deduction and the parents' disposable income brackets

These scenarios are described in more detail in Appendix 15.

Analysis of the Scenarios

All the scenarios studied by the Committee projected results for a period of 10 years, that is, the average period during which support is provided in the province of Quebec. Each scenario included a comparison of its support figures with the amounts indexed according to article 590, C.C.Q., with future indexation levels obviously pegged at a rate of two percent per year.

The first four scenarios clearly revealed a discrepancy—one that was at times very pronounced—between the support contributions appearing in the scenarios and those that are first awarded and are then subject to indexation.

The ideal objective to be pursued is a formula to ensure, on an on-going basis, that the amount appearing in the table for a given situation is the same as the level of support awarded in previous years and then indexed in accordance with the Civil Code. Practically speaking, only Scenario 5 (indexation of the table, the basic deduction and the parents' disposable income brackets) yields mathematically identical results. An analysis of its components has led to the following observations:

1. Maintaining the indexation of the table, i.e. indexing each basic parental contribution appearing therein, respects one fundamental objective, namely establishing as a general principle that the cost of meeting needs increases on an on-going basis. As already mentioned, this indexation brings the basic parental contribution in line with the mandatory indexation of the support obligation pursuant to article 590, C.C.Q.
2. The indexation of the basic \$9,000 deduction would reflect a recognition of the following economic principle: if the cost of meeting the children's needs constantly increases, so too does the cost of meeting the parents'. The Committee endorses the principle that underlies the basic deduction, namely that parents should be granted a minimum income to cover their own essential needs before they are required to provide support for their children. With this approach, economic equity is ensured.
3. Mathematical equality cannot be reached without indexing disposable income brackets (see Appendix 15, Scenario 5). The reasoning behind this assertion is as follows: In a situation where income only increases in step with inflation, disposable income will not necessarily increase at all since basic costs are also subject to the same pattern of inflation. Disposable income begins to increase only when absolute growth in income exceeds the rate of inflation. The indexing of disposable income brackets is another tool for ensuring this economic reality.

No problems arise from choosing to maintain the rate of indexation provided by the Regulation: doing so has been common practice since the coming into force of article 590, C.C.Q. The Committee therefore recommends that this practice be continued.

As a consequence, the Follow-up Committee recommends that the Regulation be amended to incorporate Scenario 5, and thus to provide for the indexation of the amounts listed in the table, the basic deduction appearing at Line 301 of the form, and the parents' disposable income brackets included in the table.

Moreover, we should recall the importance of the recommendation appearing in Part 2 of this chapter: “that the Ministère de la Justice develop mechanisms to provide for an on-going variation of the model.” The whole problem area of indexation should be covered by this variation procedure.

THE COMMITTEE RECOMMENDS THAT:

- The Regulation be amended to provide for the indexation of the basic deduction appearing at Line 301 of the form and the parents' disposable income brackets included in the table, as well as the support contributions listed in the table.

THE CONCEPT OF “UNDUE HARDSHIP”

CONTEXT

The Quebec model for the determination of child support payments includes various means by which the result obtained through applying the method of calculation provided in the form may be altered. The model establishes exception mechanisms so it can be adapted to specific situations. One of these important mechanisms, representing an exception to strictly applying the results generated by the form, is the concept of “undue hardship.”

In fact, notwithstanding the support contributions generated by applying the rules in the Child Support Determination Form to the letter, it is still possible for the court to depart from these levels of support in light of undue hardship experienced by either of the parents.

In this regard, the court has been granted discretionary power under article 587.2, para. 2, of the *Civil Code of Québec*. The latitude described therein constitutes, as it were, the final step in adjusting support contributions:

By using the information provided in the form and the table, the judge obtains the amount normally owed by each parent. Undue hardship must be clearly demonstrated before the court will depart from the amount of support obtained by using the form. Article 587.2, para. 2, *C.C.Q.*, contains a non-exhaustive list of factors that might cause undue hardship: “the costs involved in exercising visiting rights in respect of the child, obligations of support toward persons other than the child or reasonable debts incurred to meet family needs.” It may be noted that family needs are the root cause of each of these difficulties, and that an *ejusdem generis* interpretation would suggest that the lawmakers intended undue hardship to apply only in areas related to the family context.

This concept of undue hardship represents an exception with respect to the model’s guidelines. Given the objectives of the legislation, we believe that the concept will be interpreted in a restrictive manner, especially in cases where it will serve to reduce the level of child support.⁵⁰

This same point is made by the Quebec Court of Appeal in *Droit de la famille—3151*:

The third phase of the process begins with the application of article 587.2, para. 2, *C.C.Q.* The judge of the first instance is granted additional latitude to raise or lower the result obtained, according to whether he or she deems that maintaining this result will, under the circumstances, entail undue hardship for either the payer or the recipient.⁵¹

With respect to the discretionary nature of this provision, it should be added that the court will examine the entire set of circumstances before departing from the amount of support obtained by using the form. Consequently, the sole fact of a plaintiff’s being in a situation described in article 587.2, para. 2, does not, objectively speaking, provide sufficient grounds to convince a

⁵⁰ Verdon, “Les nouveaux barèmes,” p. 238-239.

⁵¹ *Droit de la famille—3151*, J.E.-2234, p. 8.

judge that the parent in question is in a situation of undue hardship.⁵² Rather, the presiding judge is meant to assess, on a subjective basis, each situation submitted, in order to determine whether or not the parent is indeed experiencing undue hardship.

It must be added that the list of situations that are potentially open to the application of undue hardship, as outlined in article 587, is not exhaustive. Here, once again, the court has the discretionary power to decide, based on the entire set of circumstances, whether a parent is in fact facing undue hardship.

With respect to the assessment that the court must make of the circumstances that may cause undue hardship, it should also be noted that the Quebec model for the determination of child support payments does not provide for an objective test, such as the standard of living comparison test included in the federal guidelines:

When applying the provincial rules for determining child support, the court may, under article 587.2, *C.C.Q.*, increase or reduce the basic support contribution if it deems that maintaining the current level of support would entail undue hardship for either parent, resulting from, for example:

- costs involved in exercising visiting rights in respect of the child;
- obligations of support toward persons other than the child; and/or
- reasonable debts incurred to meet family needs.

The above-mentioned examples of undue hardship may also be invoked under the *Federal Child Support Guidelines*, thus enabling the court to alter the obligation of support already established, but only in favour of the parent whose household has a lower standard of living. In order to compare the living standards of the respective households, the *Federal Child Support Guidelines* (section 10(4) and Schedule II) provide a “Method to Compare Household Standards of Living.”

Even though a test for comparing household living standards does not exist within the framework of the provincial Regulation, we believe that the latter method, which makes it possible to compare the income ratio of each household and thus to take into account the new reality of blended families, is purely objective and could serve as another source of inspiration when it comes time to evaluate claims of undue hardship made by one of the parties when both reside in the province of Quebec.⁵³

⁵² Dominique Goubau, “Les règles québécoises de fixation des pensions,” in *Droit de la famille québécois*, (Farhan: Publications CCH Ltée, 1998), p. 5382.

⁵³ Nicole Parent, “L’application des nouvelles règles de fixation des pensions alimentaires depuis le 1^{er} mai 1997,” in *Développements récents en droit familial (1998)*, (Cowansville: Les Éditions Yvon Blais, 1998), pp. 27, 46.

LAW, REGULATION AND FORM

Civil Code of Québec, article 587.2, para. 2

The court may, however, increase or reduce the level of support if it is of the opinion that, in the special circumstances of the case, not doing so would entail undue hardship for one of the parents. Such hardship may be caused by, among other things, the costs involved in exercising visiting rights in respect of the child, obligations of support toward persons other than the child or reasonable debts incurred to meet family needs.

PROBLEM AREAS

The key to this concept resides in the court's appraisal of the facts presented in each case. Generally speaking, as can be seen from the voluminous rulings dealing with the issue, it would appear that judges are indeed inclined to use the discretionary power granted under article 587.2, para. 2, of the *Civil Code of Québec*.

It is nevertheless interesting to note that some writers suggest that this discretionary power should be framed by certain regulatory guidelines; in particular, they propose an objective test along the lines of the household living standards test provided in the federal guidelines.

Lastly, let us note for the record an intervention made by a party before the court who wrote to the Ministère in order to point out, among other things, that a judge had applied the concept of undue hardship to his case even though the concept had never been invoked before the court. (Letter of May 12, 1999. Also see *Droit de la famille*—3238, J.E. 99-1169).

VARIATION OF THE CASE LAW

According to the case law, failure of the non-custodial parent to exercise his or her access right, an obligation to support a new spouse, debts, and the need to maintain the children's previous living standards may, in certain circumstances, constitute undue hardship for both payers and receivers of support. These grounds are not, however, automatically upheld by the court. It is incumbent upon the party claiming undue hardship to overturn the presumption that the amount of support provided in the table meets the children's needs to the extent of the parents' ability to pay.

Droit de la famille—3228, J.E. 99-1169 (C.A.)	(Access rights not exercised can constitute undue hardship)
Droit de la famille—3006, J.E. 98-1173 (C.A.)	(Access rights not exercised do not constitute undue hardship)
Droit de la famille—3010, J.E. 98-1229 (C.A.)	(Support for a new spouse does not automatically entail undue hardship)
Droit de la famille—2784, J.E. 97-1964	(New family obligations constitute undue hardship)

Droit de la famille—2943, J.E. 98-747	(Support for a new spouse does not constitute undue hardship)
Droit de la famille 3026, J.E. 98-1340 (C.A.)	(Paying support for other children does not constitute undue hardship)
Droit de la famille—3006, J.E. 98-2273 (C.A.)	(Support for a new spouse and a handicapped child constitutes undue hardship)
Droit de la famille—2820, (1997) R.D.F. 820	(Support payments totalling over 50% of disposable income constitute undue hardship)
Droit de la famille—2849, J.E. 98-92	(Debt does not constitute undue hardship)
Droit de la famille—2879, J.E. 98-318	(Difficulty of maintaining the previous living standards of the children constitutes undue hardship for the receiver of support)

OBSERVATIONS

In examining the case law as well as the reasons why certain parties have settled upon a level of support that differs from the amount calculated using the form, we have observed that a number of parents adopt the grounds provided in article 587.2, C.C.Q. In cases where an agreement has been reached, it is understandable that the parties are able, of their own accord, to apply the concept of undue hardship. Thus, they make the necessary adjustments in light of their own situation, in keeping with the provisions of the model. The court will, however, serve as a watchdog, making sure that the agreed-upon level of support is sufficient to meet the needs of the child or children in question.

However, in situations that are less than ideal, i.e. when the parties do not reach an agreement, it is incumbent upon the court to determine whether maintaining the level of support will result in undue hardship. With regard to an exception to the result of a strict application of the model in a way, the relatively restrictive interpretation of the majority of the rulings examined seems normal and in accordance with the overall thrust of the model.

The current interpretation provided by the courts also seems desirable insofar as the lawmakers intended the model to be applied as uniformly as possible.

It goes without saying that, like special expenses and the calculation of custody time, the concept of undue hardship has been the subject of considerable debate among jurists who have asked the courts to clarify, even verify, the scope of these new concepts. Since these concepts call for a good deal of discretion, it is therefore not surprising that a substantial body of case law has been generated since the model came into force. Over time, and given the trends established in the case law, these concepts have inevitably become more integrated into general practice. Under the circumstances, should the discretionary powers outlined in the model be restricted by a more rigid framework? By adopting such an approach, we would run the risk of reducing the current

flexibility of the model, and yet the process needs to be flexible in order to take into account the various situations of the families involved.

Furthermore, it is rather unrealistic to claim that any table or excessively rigid mechanism can include provisions for all the specific circumstances faced by parties before the court. Thus it is preferable that the current practice of examining each case on its own merits be maintained.

In addition, some writers have suggested that the Quebec model should incorporate the method of comparing household living standards outlined in section 10 of the federal guidelines. Under this provision, the court must dismiss a claim based on undue hardship, even though it has ruled that the claim is founded, if it believes that, following the determination of the support order, the household of the claimant spouse would benefit from a higher standard of living than the household of the respondent. In this regard, the court may also apply the method outlined in Schedule II of the federal guidelines. This method takes into account, in particular, the annual income of all members of the household, including the new spouse and the children. Had such an approach been incorporated into the Quebec model, it may be assumed that our courts would have heard fewer appeals based on undue hardship, given that lawyers would first have carried out the calculations that are prescribed in the method. This being the case, it follows that our courts would not have been able to assess the particular circumstances of these cases, as has been the practice up until now. And given that the concept of undue hardship is already being interpreted in a restrictive manner, isn't it reasonable to conclude that fewer claims would actually have been received? In fact, whether the party before the court was a payer or receiver of support, he or she would not have been able to count on the legal system for a definitive ruling. The discretionary power currently held by Quebec's judges would have been circumscribed if the federal method had been incorporated into our model, and so would any possibility for recourse on the part of the party before the court.

Up until now, it has not been shown that incorporating the federal method would have a positive impact on the model.

Given current case law as it pertains to undue hardship, and in light of the potential effects of the aforementioned method on the model, it does not appear desirable, as things stand, to provide an additional framework for the concept of undue hardship as it is currently outlined in article 587.2, C.C.Q.

THE COMMITTEE RECOMMENDS THAT:

- The current wording of article 587.2, para. 2, with respect to undue hardship, be maintained.

THE DETERMINATION OF SUPPORT FOR A CHILD AT OR ABOVE THE AGE OF MAJORITY

CONTEXT

The *Regulation respecting the determination of child support payments* stipulates that its guidelines “apply to any application filed by a parent in respect of a child at or above the age of majority who is not able to support himself, particularly because he is pursuing full-time studies. In that case, the applicant parent is presumed to hold a mandate from the child at or above the age of majority to represent him in the exercise of his rights to support” (section 1 of the Regulation).

This provision, as it stands in the Regulation, does not create any new rights, and therefore it is still not possible for Quebec parents to file for support in respect of a child at or above the age of majority under the provisions of the *Civil Code of Québec*. On the other hand, under the *Divorce Act*, a parent may legitimately file for support in respect of such a dependent child, as established in section 2(1) of the Act. Thus it is only in these cases that the Regulation will apply to a child who has attained the age of majority, and the court will, accordingly, determine the level of support payable for the child in question by using the Child Support Determination Form and the table. However, under section 2 of the Regulation,

The court may fix the support payable for a child of full age at a level that departs from the level of support which would be provided under these Rules, if it deems it appropriate, taking into account all the circumstances in which the child finds himself, particularly his age, health condition, level of education or nature of his studies, civil status, place of residence, as well as his level of autonomy and, where applicable, the time needed by the child to acquire sufficient autonomy.

Moreover, in accordance with article 587.2, C.C.Q., “The court may also increase or reduce the level of support if it is warranted by ... the extent of the resources available to the child.”

As a result, the guidelines provided in the Regulation apply to any application for support filed by the parent of a dependent child at or above the age of majority within the framework of the *Divorce Act*. However, when one of these children files on his or her own behalf for parental support under articles 585 and 587, C.C.Q., the Child Support Determination Form and table no longer apply, and the child must submit a statement of income and expenditures in the manner prescribed by the Rules of practice of the Superior Court of Quebec in family matters. The level of support will then be determined on the basis of the child’s needs and resources, as well as the financial capacity of both parents.

LAW, REGULATION AND FORM

Civil Code of Québec

585. Spouses, and relatives in the direct line in the first degree, owe each other support.

586. Proceedings for the support of a minor child may be instituted by the holder of parental authority, his tutor, or any person who has custody of him, according to the circumstances.

The court may order the support payable to the person who has custody of the child.

587.2, para. 2

The court may, however, increase or reduce the level of support if it is of the opinion that, in the special circumstances of the case, not doing so would entail undue hardship for one of the parents. Such hardship may be caused by, among other things, the costs involved in exercising visiting rights in respect of the child, obligations of support toward persons other than the child or reasonable debts incurred to meet family needs. The court may also increase or reduce the level of support if it is warranted by the value of either parent's assets or the extent of the resources available to the child. (Emphasis added)

Regulation respecting the determination of child support payments

1. These Rules, including the form and the table to which they refer, apply to any application concerning the parents' obligation of support toward their minor child.

They also apply to an application filed by a parent in respect of a child of full age who is not able to support himself, particularly because he is pursuing full-time studies. In that case, the applicant parent is presumed to hold a mandate from the child of full age to represent him in the exercise of his rights to support.

2. The Court may fix the support payable for a child of full age at a level that departs from the level of support which would be provided under these Rules, if it deems it appropriate, taking into account all the circumstances in which the child finds himself, particularly his age, health condition, level of education or nature of his studies, civil status, place of residence, as well as his level of autonomy and, where applicable, the time needed by the child to acquire sufficient autonomy.

PROBLEM AREAS

The Committee was apprised of a letter in which a party before the court complained about the fact that his children who had attained the age of majority were eligible under the law to receive child support. In this regard, the father asked the Ministère to ensure that

students of 18 and over make every effort to become as autonomous as possible by working in the summer and on weekends to pay for their studies... [and] that students who have begun undergraduate studies, in light of their autonomy, be deemed ineligible to receive support. Providing child support for such young people represents a burdensome obligation for a couple just beginning a new married life or a common-law relationship.

The obligation to provide support also affects the financial situation of the support payer's spouse or common-law partner....

However, certain Committee members have wondered whether it is advisable to maintain current differences in treatment depending on whether civil law rules or the *Divorce Act* are actually applied in cases involving children at or above the age of majority.

VARIATION OF THE CASE LAW

The model is only applicable to children who have attained the age of majority in matters of divorce, which is under federal jurisdiction. The case law confirms that only parents who have already been married and whose divorces are pending or who are in fact divorced may apply for support on behalf of their children at or above the age of majority. Thus, common-law spouses or parents who are legally separated may not invoke section I of the Regulation under which the applicant parent is presumed to hold a mandate for the child of full age, and, given that the provisions of article 586, C.C.Q., apply only to proceedings for the support of a minor child, the Regulation cannot have a broader application than what is indicated in the law. Furthermore, the provisions of the Regulation may only be applied when a parent files an application for support on behalf of his or her child at or above the age of majority. Children at or above the age of majority who petition the court for support on their own behalf are not subject to the terms of the Regulation.

Droit de la famille—2864, J.E. 98-204	(Child at or above the age of majority of common-law spouses)
Droit de la famille—2899, J.E. 98-448	(Child at or above the age of majority filing for support on his own behalf)
Droit de la famille—2942, J.E. 98-750	(Application of the Regulation to a child at or above the age of majority)

OBSERVATIONS

In spite of the fact that the case law tends to suggest that the model does not apply in cases filed under civil law or when children at or above the age of majority file for support on their own behalf, the Committee has observed that the court will, in such cases, nevertheless apply the provisions of section 2 of the *Regulation respecting the determination of child support payments*. Thus the legal system does take into account all the circumstances of the children covered by this provision.

This being said, not all “dependent” children who have attained the age of majority actually benefit from the presumption established in article 587.1, C.C.Q., whereby “the basic parental contribution... is presumed to meet the needs of the child and to be in proportion to the means of the parents.” As has already been noted, under current law, the Quebec model applies to a child at or above the age of majority only insofar as the *Divorce Act* is applicable and the request for support is filed by one of the parents. Hence, it would appear that the Quebec model, which is part of civil law, is not applicable with respect to children who have attained the age of majority

in situations covered by civil law, namely those involving common-law spouses, legal separations and annulments. In these same situations, neither parent may be presumed to hold a mandate for the child at or above the age of majority.

It is pertinent to note that 50% of support orders now pertain to family matters covered by civil law, i.e. 10% for legal separations and 40% for common-law spouses.

In 1989, out of 37,612 new files pertaining to family matters, 62% involved divorce and 38%, legal separations, marriage annulments and common-law spouses. Ten years later, 1999 figures indicate that out of 37,075 new files in the same area, the percentage of divorce cases dropped to 50%, to be replaced primarily by cases involving common-law spouses.

A number of practitioners who completed the questionnaire mentioned that problems have arisen with the way the rules respecting children who have attained the age of majority have been applied and that such rules should be more clearly delineated. Some Committee members would also like to see the model applied to children at or above the age of majority in order that one of the parents might be mandated to act on their behalf in matters covered by civil law.

It is important to continue to vary the situation to determine whether or not the model should apply to dependent children who have attained the age of majority with respect to cases in civil law.

THE COMMITTEE RECOMMENDS THAT:

- The Ministère de la Justice continue to look at whether or not the model should apply to all children who have attained the age of majority whenever an application is filed on their behalf by one of the parents.

CONCLUSION

When the Federal Child Support Guidelines were introduced on May 1, 1997, Quebec chose a different path by adopting its own model for Quebec residents. The distinction between the two models was accentuated by the fact that Quebec enacted legislation to cover issues concerning which clear solutions were provided, i.e. all types of custodial arrangements, particularly custody with access rights, and arrangements involving shared custody.

In this regard, the most important difference between the two involves the calculation of the basic parental contribution which, in Quebec, factors in both parents' income, not just the income of the non-custodial parent. In this way, Quebec has been able to protect and maintain the basic principle underlying its model, namely that the level of support should be determined by taking into account both parents' ability to pay, as well as the needs of their children.

Since procedural matters fall under provincial jurisdiction, Quebec decided to include a form as part of its Regulation in order to make it easier for users of the model to calculate levels of support. This distinct feature of the Quebec model has led to its being applied much more effectively, with results that are a great deal more predictable. The Child Support Determination Form now constitutes an indispensable tool for mediators, lawyers, judges and parties before the court alike.

It would seem, on the whole, that the Quebec model has attained its objectives, and it is important to point out that the long variation and consultation process that preceded its coming into force contributed to this successful outcome. Lawmakers should indeed be aware of and well informed about the repercussions of any reform that is as important as that of the determination of child support payments.

This preliminary procedure thus contributed to achieving the anticipated results. Unfortunately, it is not always possible to devote so much time to analyzing the need for change and finding pertinent solutions; yet here we have a clear example of a successful outcome when such efforts are in fact made.

Several of the statistics taken from the data provided in Chapter 4 speak volumes concerning how the model has actually been applied.

It may be concluded that, as a rule, the support awards obtained by using the Quebec model meet the needs of most parties before the court, and that if not, the model is flexible enough to accommodate and facilitate the implementation of the necessary adjustments.

The fact that these objectives have been reached does not preclude other improvements. In this regard, our attention has been focused on certain specific areas.

The Child Support Determination Form was the first topic of discussion among Committee members. Some technical anomalies had already been reported, and the mandatory use of the form in court proceedings quickly revealed other flaws. While suggesting changes in areas other than those already identified, the Committee, in the course of its mandate, also recommended certain immediate technical alterations. Once these recommendations are in fact applied, the

model will be better understood and a handful of anomalies will be corrected, problems involving, for example, the mechanics of calculating various types of custody arrangements, compensation in cases where both parents have custody of one or more children, the special situation of the parent who defrays a variety of expenses in addition to providing the basic parental contribution, and clarifications with respect to the legal implications of certain calculations.

Aside from the debate concerning transitional provisions (involving questions ultimately settled by a ruling of the Court of Appeal), the most controversial subjects have to do with fundamental problems rather than with how the model is actually applied. The most delicate of all concerns how to handle support obligations associated with other unions. This issue in itself gave rise to a variety of contending and fundamentally worthwhile opinions. A more in-depth study is needed here, because it is a question, in a way, of analyzing the evolving change in the way we think about family values with regard to subsequent unions and their economic consequences.

Most other subjects, such as indexation, additional income to be included or excluded, depreciation allowances, the calculation of custody time, and additional costs associated with certain types of custody arrangements, to name only a few, have not led to such widely divergent fundamental positions. Instead, these subjects involve various ways of assessing the scope of the problem, as well as which mechanism to use so that a given solution does not make the model any less easy to use and apply.

The prescribed form has proven to be the veritable cornerstone of the Quebec model, an indispensable tool in its application. As well as making support payments more predictable and easier to calculate (a major objective of the legislation), the form is flexible enough to incorporate the changes proposed by the Committee. Even the most difficult or complex problem to be addressed as a result of the Committee's recommendations should normally be solved by a simple change to the form.

During its mandate, Committee members made every effort to reach a consensus with respect to their recommendations. The present report represents the nearly unanimous agreement of members about the recommendations they have made. The Committee recommends additional research, studies or consultations in cases where time constraints and the feedback it has received have led to the conclusion that these important matters should be explored in more depth before being subject to a government decision.

Other recommendations that do not require study or more research should be implemented as quickly as possible. As a rule, they are the result of a general consensus noted by the Committee among parties before the court, practitioners and judges, as well as officers of the court.

The establishment of a Follow-up Committee to evaluate the implementation and development of new legislation is an initiative that has proven to be worthwhile and important. For instance, new work and research tools have been designed to meet the Committee's requirements, and these tools will be of long-term use for the Ministère de la Justice, not only for subsequent monitoring of the Quebec model for the determination of child support payments, but also for dealing with the constant change in the social norm of parties before the court in family and support matters.

The Committee met on a regular basis, which, in turn, meant that its members remained highly attentive throughout the process. Thus the latest feedback it received was subject to very rapid analysis.

The help of external consultants also enabled deeper and more objective studies of the ever-changing case law in the area, as well as the creation of an important database. Such assistance was an indispensable tool for the Follow-up Committee, as it would be for any such Committee under similar circumstances.

The Quebec model for the determination of child support payments has passed the test with flying colours. Nevertheless, we suggest that certain improvements are called for in light of three years of experience with the model, with special care being taken to ensure that all proposed solutions lead to a greater degree of efficiency and a higher level of user satisfaction.

Committee members are proud to have participated in this stage of the process and firmly believe that their recommendations will help improve the model. The entire procedure pertaining to this important reform, from its design to its implementation to its assessment, provides a model to be emulated. We can only hope that it will serve as a guarantee of success for the future.

FINAL RECOMMENDATIONS

RENEWAL OF THE COMMITTEE'S MANDATE AND DISTRIBUTION OF THE REPORT

As has already been mentioned, the creation of the Follow-up Committee has served as an indispensable tool in analyzing how the Quebec model for the determination of child support payments was established and developed.

Given that formulating survey questionnaires and creating a database were both time-consuming activities, Committee members were unable to complete their variation of certain specific points, most of which are the focus of recommendations for additional study or consultation.

In order to maintain continuity and to accelerate the recommended additional study process, the Committee should be empowered to pursue its examinations.

Moreover, given the scope of the reform with respect to the determination of child support payments, this report will likely be of interest to all practitioners in the field. Since it clarifies certain aspects of the model and provides a glimpse of current case law in matters of family law, the report may serve as an additional source of reflection for various practitioners as they address the issues that require further study.

- The Committee recommends that its mandate be renewed so that it might complete the suggested studies, as well as any other mandate with which it is entrusted by the Minister.
- The Committee recommends that the present report be released to the public and that the Minister of Justice take the appropriate measures to have it distributed to all interested parties and practitioners.

LIST OF RECOMMENDATIONS

RECOMMENDATIONS MADE DURING THE COMMITTEE'S MANDATE

1. First of all, it is recommended that three other types of custody arrangements be added to Division 4 of Part 5, of the form. The Committee has concluded that their absence causes problems for users whose particular situation is not described in the form. The proposed new Division 4 would include the following four types of custody arrangements:

1. Both “sole” and “shared custody;”
2. Both “sole custody” and “sole custody with visiting and prolonged outing rights;”
3. Both “sole custody with visiting and prolonged outing rights” and “shared custody;” and
4. Simultaneous “sole custody,” “sole custody with visiting and prolonged outing rights” and “shared custody.”

The latter three types of custody arrangements would be added to the first category already included in the form. A minimum of two children would be required before the first three types would apply, whereas the fourth necessitates a minimum of three children. With these additions, the range of possible situations would be broadened, thus making the model easier to apply while reducing the risk of error on the part of users.

2. The Committee recommends that an error in logic contained in Division 4 of Part 5, of the form be corrected. It would seem that the current method of calculating annual support contributions does not take into account certain amounts listed by one or the other parent. Thus, in certain circumstances, the compensations provided in the model may not in fact be correct. The Committee therefore proposes a new Division 4, one that will factor in all amounts listed by one or the other parent. According to the analysis included in Appendix 8 of this report, for instance the form as it stands does not provide for the proper calculation of support payable at lines 545 and 551 in a situation where there are three children, with the father having sole custody of one child and shared custody of the other two. The annual support payable by the father (\$976.67) is not reduced by the amount the mother owes him for the child of whom he has sole custody (\$488.33). Line 563 of the proposed new form (see Appendix 9 of the report) includes the same example, to which the recommended changes have been applied. It will be noted that in this case the annual support payable by the father is \$488.34, instead of \$976.67.

3. The Committee recommends that the form be changed so that the annual amount of support payments may be recorded in terms of one of various types of instalment plans. (These proposed changes may be found in Part 8 of the new form.) In the course of its deliberations, the Committee noted that, upon occasion, support awards are listed on an annual basis only (the amount listed in the table), the parties having neglected to calculate monthly instalments and to indicate the due date of the first payment. The proposed changes would make the model more complete and its use more practical.

4. The Committee also recommends that the form clearly indicate that the expenses to be listed at lines 403 to 405 of the form (child care expenses, post-secondary education expenses and special expenses) are net expenses, in accordance with section 9 of the Regulation. This involves reminding users of an already existing provision of the model and may be accomplished by adding the word “net” to the end of each of the aforementioned lines. The Committee believes that it is important to emphasize this point for users by directly mentioning it in the form. In this way, fewer problems will arise due to ambiguity.

5. The Committee recommends that the table (Schedule II of the Regulation) be changed in order to rectify a misprint with respect to the initial calculation of one specific amount. The error has been present since the table was first published, even as the amounts listed therein were indexed in January 1998 and January 1999. Accordingly, the entry in the 1997 table for parties with one child and a disposable income of between \$66,001 and \$68,000 should read \$7,190, not \$7,090. Indexed in accordance with the terms of the Regulation, this amount should have reached \$7,520 as of January 2000, and not \$7,400 as it currently stands.

6. In the proposed new form, a second explanatory note would appear in Part 5 with respect to shared custody. It would clearly indicate the possibility of an adjustment if the basic parental contribution is not assumed by each parent in proportion to the custody distribution factor. For instance, parents could reach an agreement stipulating that the mother will be responsible for the purchase of all children’s clothing. This would necessarily entail an adjustment in the annual support payments. These explanations would appear in the form itself in order to make it easier to use and understand.

7. It is recommended that a question be added making it possible to identify the person or persons having filled in the form, i.e. whether it was the father, the mother or both parents, or whether it was produced by the presiding judge. With this information, it would be easier to process the forms in the file since their origin would be clearly indicated. Moreover, such an approach should normally reduce the risk of confusion and improve the model’s effectiveness.

8. The Committee also considers that it would be wise to change the form from legal to letter format, in order to make the form more user friendly. Parties before the court are more familiar with the letter format, and such a change would reflect the Committee’s concern with meeting users’ needs. Moreover, the new format would make it easier to use the tools necessary for applying the model, including calculation software, and make the form simpler to print.

9. The Committee recommends that a framed insert be added to Part 4, set apart from the calculation section, so that both parents can record the amounts corresponding to their respective percentages of the total listed at lines 403 to 405. This change reflects the Follow-up Committee’s desire to make this data stand out more clearly, since in the present form this information does not stand out at all. However, this change would in no way affect the standard rules for determining child support and would be included simply to provide the user with more information. In fact, only the total for both parents recorded at these lines would be applied for determining child support, as is currently the case.

10. The Committee also believes that it would be useful to change Line 702 in Part 7, of the form, which makes it possible to calculate the difference between annual support payable and

support payable based on an agreement between the parents. As opposed to the method of calculation now in place, the proposed new procedure at Line 702 would allow for the possibility of a negative difference when the agreement between the parties involves an amount lower than that established through the calculations carried out in Part 5 of the form.

11. The Committee recommends a few terminology changes in order to make certain terms more stylistically and grammatically appropriate and to bring the language of the form in line with changes in terminology adopted by other government departments.

12. The modified version of the form is included in the present recommendations and may be found in Appendix 10 of the report. The proposed new form features certain changes in formatting and layout that make it easier to use and understand, thus reducing the risk of user error.

13. Lastly, the Committee believes that it is advisable to set down a transitional provision stipulating that the proposed changes do not apply to pending support proceedings. Joint applications filed after the coming into force of this new form may also be excluded from its terms and conditions if the parties based their agreement on calculations carried out using the old form, so long as they request such an exemption. The application of the new form may also be delayed if so decided by the courts.

PART 2—STATEMENT OF PARENTS' INCOME

The Committee recommends that:

14. The current concept of gross income be retained for purposes of calculating child support.

15. The information brochure for the model be redesigned to include, along with the general information currently provided, an explanatory note for each line of the form, following the example of the income tax return guide.

16. The information brochure include explanations about the use of gross income in relation to the way the table was designed.

17. The obligation to provide the prescribed documents be clearly stated in the Regulation itself, and not just in the form.

18. The Minister of Justice establish mechanisms for revising the model on an on-going basis and that these mechanisms be designed to take into account, in particular, any major changes in the individual tax burden.

19. The Regulation and form be changed so that lines 202 and 207 read as follows:

202—Net income from a business or self-employment
(gross income less expenses related to the business or self-employment)

207—Net rents
(gross income from rental activities less expenses related to rental of the property)

20. The Ministère de la Justice pursue the examination begun by the Committee about how to deal with depreciation allowances.

21. The definition of “annual income” provided in section 9 of the Regulation be changed in order to stipulate that loans and bursaries awarded as part of the Quebec Ministère de l’Éducation’s student financial assistance program not be included when calculating parental income.

22. In cases of shared custody, the rule should be that the parent with the lower income is the one entitled to receive child-related government transfers (the Canadian child tax benefit and the Quebec family allowance), unless the parties or a judge decide otherwise, in which case the officials concerned would be bound by the terms of this decision.

PART 3—CALCULATION OF PARENTS’ DISPOSABLE INCOME

The Committee recommends that:

23. The Regulation be amended so that the title of Part 3 of the form would read as follows: Calculation of parents’ disposable income for purposes of determining support payments.

24. The concept of disposable income be explained more clearly in the model’s information brochure.

PART 4—LINE 400—NUMBER OF CHILDREN COVERED BY THE APPLICATION

In order to avoid the ambiguity created by the expression “children covered by the application,” the Committee recommends that:

25. The aforementioned expression, appearing in Part 1 at Line 400 of the form, be replaced by “Children of the two parties covered by the application.”

Regarding obligations of support to other unions, the Committee recommends that:

26. The Department of Justice pursue the Committee’s investigation of various solutions with respect to support obligations arising from other unions.

PART 4—LINE 401—BASIC PARENTAL CONTRIBUTION ACCORDING TO DISPOSABLE INCOME OF BOTH PARENTS

The Committee recommends that:

27. The Minister of Justice clearly indicate, in any way she deems appropriate, including by means of an amendment to the Regulation, that the basic parental contribution is meant to cover all the needs of the children (both essential and non essential), except the child-care related expenses outlined in section 9 of the Regulation.

PART 4—LINE 403—CHILD CARE EXPENSES

The Committee recommends that:

28. The model's information brochure provide the user with more information concerning all expenses covered by the concept, as well as the method of calculating net expenses.

PART 4—LINE 404—POST-SECONDARY EDUCATION EXPENSES

The Committee recommends that:

29. Section 9 of the Regulation be amended to specify that post-secondary education expenses are by definition expenses exceeding the amounts of loans and grants in cases where the child is eligible to receive them.

PART 4—LINE 405—SPECIAL EXPENSES

The Committee recommends that:

30. The rules respecting special expenses be maintained in their current form.

31. The Ministère de la Justice pursue the examination of developments related to special expenses, in particular the relevant case law, in order to determine the utility of providing a more precise definition of the concept.

PART 5—CALCULATION OF ANNUAL SUPPORT ACCORDING TO CUSTODY TIME

The Committee recommends that:

32. The Regulation be amended to include a provision that custody time be calculated by taking into account the entire period of time that the child is under a given parent's care and the entire period during which the child is the responsibility of the custodial parent.

33. The model's information brochure provide a more thorough explanation of how custody time is to be calculated and of the impact of shared custody with respect to the division of shared expenses.

34. The Ministère de la Justice undertake a thorough examination of the cost of child care in relation to the amount provided in the table and the method of calculation in cases where at least one parent has sole custody of at least one child and both parents have joint custody of at least another child.

PART 6—CAPACITY TO PAY OF DEBTOR

The Committee recommends that:

35. The Regulation be amended so that the current rate of 50% of disposable income be replaced by 40% of disposable income.

PART 7—AGREEMENT BETWEEN PARENTS

The Committee recommends that:

36. The Ministère de la Justice remind all judges and special clerks that when they, respectively, ratify and confirm an agreement, they must **in all cases** ensure that the reasons for the difference between the terms of the agreement and the levels of support in the table be clearly stated in the agreement or in Part 7 of the form.

37. Article 825.14, C.C.P., be amended to stipulate that the reasons for any difference be provided in the agreement or in the form.

PART 8—STATEMENT OF EACH PARENT’S ASSETS AND LIABILITIES

The Committee recommends that:

38. The Ministère de la Justice remind the parties and all practitioners of the obligation to complete all sections of the form.

Problems Related to Indexation

The Committee recommends that:

39. The Regulation be amended so as to provide for the indexation of the basic deduction found at Line 301 and of the parents’ disposable income brackets appearing in the table, in addition to the support contributions listed in the table.

The Concept of “Undue Hardship”

The Committee recommends that:

40. The current wording of article 587.2, ss. 2, C.C.Q., with respect to undue hardship be maintained.

Determining Levels of Support For Children at or Above the Age of Majority

The Committee recommends that:

41. The Ministère de la Justice continue to investigate the advisability of making the model applicable for all children who have attained the age of majority if the application for support is filed by one of the parents.

CONCLUSION—RENEWAL OF THE COMMITTEE’S MANDATE AND DISTRIBUTION OF THE REPORT

The Committee recommends that:

42. Its mandate be renewed in order that it might complete the recommended studies, as well as any other mandate with which it is entrusted by the Minister.
43. The present report be released to the public and that the Minister of Justice take the appropriate measures to have it distributed to all interested parties and practitioners.

LIST OF TABLED DOCUMENTS

1. LEGISLATION

Brief to Cabinet

Subject: *An Act to amend the Civil Code of Québec and the Code of Civil Procedure as regards the determination of child support payments* (tabled June 16, 1998)

Bill 68 “*An Act to amend the Civil Code of Québec and the Code of Civil Procedure as regards the determination of child support payments*” (tabled June 16, 1998)

Regulation respecting the determination of child support payments (tabled June 16, 1998)

Form “Sworn Statement Under Article 827.5 of the Code of Civil Procedure” (tabled December 9, 1998)

2. DOCUMENTS CONNECTED WITH THE COMMITTEE

Press release “Justice Minister Ménard sets up two Follow-up Committees for family matters” (tabled June 16, 1998)

List of members of the Follow-up Committee on the Quebec Model for the Determination of Child Support Payments (tabled June 16, 1998)

Proposal concerning the setting up of a follow-up committee on the Quebec model for the determination of child support payments (tabled June 16, 1998)

S.O.Q.U.I.J.—Letter dated September 11, 1998, from Micheline Montpetit, Director of Legal Information, entitled “Autorisation à reproduire des résumés tirés de Jurisprudence Express” [authorization to reproduce summaries taken from Jurisprudence Express] (dated September 16, 1998)

Commitment to maintaining confidentiality (tabled September 16, 1998)

Mandate, objectives and basic principles—Version of January 13, 1999

Letter dated February 2, 1999 from Mathieu Boutin, Director of Development, Legal Publications, for Publications Carswell—Permission to reproduce issues of “Repères” (tabled February 17, 1999)

Form “Application for Reimbursement of Travel Expenses for Members of the Follow-up Committee on Quebec Model for the Determination of Child Support Payments” (corrected version tabled September 16, 1998)

Letter dated April 23, 1999, from Lyse Savard, Publishing Director for Publications CCH Ltée, authorizing the reproduction of articles and summaries of judicial decisions taken from their publications (tabled May 26, 1999)

3. INFORMATION DOCUMENTS (BROCHURES—FOLDERS)

Folder entitled “Information Concerning Support Payments” (tabled June 16, 1998)

Folder entitled “A New Way to Determine Child Support Payments” (tabled June 16, 1998)

Brochure entitled “New Tax Measures Related to Child Support Payments” (tabled June 16, 1998)

Brochure entitled “The Quebec Model for the Determination of Child Support Payments—Answers to Your Questions” (tabled June 16, 1998)

Draft brochure entitled “Presentation of a joint application to determine custody and access rights and child support payments for common-law spouses, of a joint application for transitional provisions or for revision of accessory measures concerning a case of divorce or legal separation, and of a joint application for exemption under section 3 of *An Act to facilitate the payment of support*” (tabled September 16, 1998)

4. OTHER DOCUMENTS

Comparison of Household Standards of Living Test (Federal Child Support Guidelines) (tabled September 16, 1998)

Bulletin de liaison, Vol. 23 No. 2—“Ménager le chou,” by Claudette Mainguy, Development Officer (tabled November 11, 1998)

Note from the Secretary of the Régie des rentes du Québec—Rate of adjustments for contributions to the Régime de rentes du Québec (tabled December 9, 1998)

Brief presented to the Quebec government’s parliamentary Committee examining the determination of child support payments, by the Association Masculine d’Entraide pour la Famille [men’s mutual assistance association for family matters]—August 20, 1996 (tabled December 9, 1998)

Letter from J. Wilson, Revenue Canada—Questions from the Child Support Team, Department of Justice (tabled December 9, 1998)

“Shared Custody: The American Experience,” by Laura W. Morgan, Esquire (tabled December 9, 1998)

Report of the Special Joint Committee of the Senate and of the House of Commons on Child Custody and Visiting Rights—Declaration of the federal Justice Minister (tabled January 13, 1999)

Report of the Special Joint Committee on Child Custody and Visiting Rights—December 1998 (tabled January 13, 1999)

“Droit et enfant”—Continuing education for the Quebec Barreau (tabled February 17, 1999)

“Child Support Processes: Options for Canada,” Child Support Team—March 1997—Research Report CSR-1997-3E (tabled February 17, 1999)

“Expedited Child Support: An Overview of the Commonwealth Countries’ and United States’ Procedures for Establishing and Modifying Child Support,” Child Support Team—Research Report CSR-1997-4E (tabled February 17, 1999)

Child support guidelines: The next generation—Chapter 5 “Child support, visitation, shared custody and split custody” (tabled March 24, 1999)

“The Daily”—Statistics Canada—Major Press Releases: 1997 Survey on Household Spending (tabled March 24, 1999)

Table to Determine the Basic Child Support Contribution (Indexed on January 1, 1999) (tabled April 21, 1999)

Questionnaires from the federal Department of Justice (tabled April 21, 1999):

- Lawyers: Survey on experiences and issues related to the child support guidelines, conducted among continuing legal education participants—Halifax—December 4, 1998
- Lawyers: Survey on experiences and issues related to the child support guidelines, conducted among continuing legal education participants
- Judges: Survey on experiences and issues related to the child support guidelines

Interim report on the implementation of family mediation in accordance with Bill 65 - December 1998 (tabled May 26, 1999)

Bulletin de liaison, Vol. 24, No. 1, “Suivi sur les pensions alimentaires,” by Claudette Mainguy, Development Officer (tabled May 26, 1999)

Research Report (CSR-1999-3E) “Custody, Access and Child Support: Findings from the National Longitudinal Survey of Children and Youth”—June 1999—Department of Justice Canada (tabled September 8, 1999)

Mini-conference held by the Barreau du Québec / April 1999 “Les récents développements en droit familial”—Speakers: Dominique Goubau, Faculty of Law—Université Laval—“Sécurité juridique et discrétion judiciaire : un difficile équilibre dans la fixation des pensions alimentaires pour enfants,” and Jean-Marie Fortin—“Les aspects fiscaux et financiers des pensions alimentaires” (tabled September 8, 1999)

Research Report CSR-1999-2E—July 1999—“The Survey of Child Support Awards: Final Analysis of Pilot Data and Recommendations for Continued Data Collection” (tabled October 6, 1999)

“Les pères devenus des guichets automatiques?”—Le Droit, Ottawa-Hull, Wednesday, September 29, 1999 (tabled October 6, 1999)

Table to Determine the Basic Parental Contribution (Indexed on January 1, 2000) (tabled on January 18, 2000)

Publication in the *Gazette officielle du Québec* (January 29, 2000) of the “Table to Determine the Basic Parental Contribution” (tabled February 2, 2000)

5. CRITICAL ANALYSIS AND OBSERVATIONS PROVIDED BY PRACTITIONERS AND PARTIES BEFORE THE COURT

A synthesis of the observations made by certain practitioners and parties before the court is included in the Appendix of the present report.

Observations of the F.A.F.M.R.Q. with respect to the draft brochure on joint applications (tabled October 21, 1998)

6. CASE LAW

Case law summaries were tabled at each meeting. These summaries are included in the Appendix of the present report.

Three decisions of the Quebec Superior Court that exempt parties from paying support or establish support payments below those provided in the Quebec model due to the low income of the debtor of support:

Decision of June 10, 1997, Justice Clément Trudel, 705-04-000803-953

Decision of November 4, 1997, Justice Ross Goodwin, JSC, 200-12-039847-893

Decision of November 12 1997, Justice Jean-Pierre Sénécal, JSC, 500-04-002188-969 (tabled November 11, 1998)

Document provided by Jocelyn Verdon, of the law firm Garneau, Verdon, Michaud, entitled “Les barèmes québécois de fixation des pensions alimentaires : jurisprudence choisie” (tabled November 11, 1998)

Decision of the Quebec Court of Appeal dated October 29, 1998, Justices Gendreau and Chamberland, associate chief justices, and Justice Denis, associate chief justice, 500-09-006378-988 (tabled December 9, 1998)

Decision of November 19, 1997, Justice John H. Gomery, JSC, 500-2-194835-18 (tabled December 9, 1998)

Decision of July 17, 1997, Justice Léo Daigle, JSC, 450-04-001990-976 (tabled December 9, 1998)

Summary of “Jurisprudence Express” cited in the document presented by Jocelyn Verdon at the meeting of November 11, 1998, concerning case law on determining support payments (tabled December 9, 1998)

Decision of August 1, 1997, Justice Jean Lemelin, JSC, 200-12-042882-903 (tabled January 13, 1999)

Decision of October 1, 1998, Justices Brossard and Robert, associate chief justices, and Justice Letarte, associate chief justice, 200-09-001623-971 (tabled January 13, 1999)

Decision of July 18, 1997, Justice Louis Rochette, JSC, 200-12-057961-972 (tabled April 21, 1999)

Decision of August 4, 1997, Justice Hubert Walters, JSC, 200-12-046619-913 (tabled April 21, 1999)

Decision of January 5, 1998, Justices Mailhot, Robert and Philippon, associate chief justice, 200-09-001578-977 (tabled April 21, 1999)

Decision of December 22, 1998, Justice G. B. Maughan, JSC, 500-04-013411-989 (tabled May 26, 1999)

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