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# CHILD SUPPORT: QUANTUM, ENFORCEMENT AND TAXATION

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## INTRODUCTION

In outlining the new federal child support strategy announced in the 6 March 1996 Federal Budget,(1) Minister of Justice Allan Rock stressed the importance of meeting the needs of children. The four-pronged strategy announced included long-awaited changes to the tax treatment of child support and the introduction of child support guidelines, as well as new enforcement measures and an enhancement of the Child Tax Benefit available to the children of the working poor. These measures are scheduled to take effect over the next two years, and have stirred an immediate response from lawyers, parents, anti-poverty activists, academics and other commentators. This paper reviews the law of child support in the three areas that affect its adequacy to meet children's needs, quantum, enforcement and taxation. It also discusses the changes announced in the latest Budget, and suggests a number of outstanding problems that will be highlighted during the transition period when the 1996 Budget measures are being debated and adopted.

Family law, of which the law of child support is an important part, is a rapidly changing area of Canadian law. Its history has reflected the legal system's efforts to keep pace with equally dramatic changes in Canadian society, particularly in families. The law of child support governs the amounts that parents are required to contribute to the financial support of their children after separation and divorce. These payments are subject to taxation under the federal income tax system, and any obligation that is not honoured may be enforced pursuant to provincial legislation.

Constitutional jurisdiction to legislate in these areas is divided between the federal and provincial governments. Divorce, and corollary relief flowing from divorce – custody and support – are governed by the federal *Divorce Act, 1985*. Provincial statutes govern matrimonial

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(1) Government of Canada, "Government Announces New Child Support Strategy," *News Release*, Ottawa, 6 March 1996.

property rights, as well as support and custody in cases where a divorce is not sought. The enforcement of support obligations is the subject of provincial jurisdiction, as are issues like adoption, child protection, and change of name. Many of the common law rules that influence outcomes in family law cases have, however, evolved in a judicial system where these areas of federal and provincial authority are mixed.

In the last two decades, most governments in Canada have re-examined and amended their family law legislation significantly. There has been a serious effort to reflect and accommodate areas of change in a society in which variations of the nuclear family unit have become more commonplace, the participation of women in the paid labour force has increased, and the long-lasting consequences of divorce for parents and children are being recognized. Canadian legislative bodies have attempted to alter family law legislation so that it provides for families in the

Constitutional jurisdiction to legislate in these areas is divided between the federal and provincial governments. Divorce, and corollary relief flowing from divorce – custody and support – are governed by the federal *Divorce Act, 1985*. Provincial statutes govern matrimonial property rights, as well as support and custody in cases where a divorce is not sought. The enforcement of support obligations is the subject of provincial jurisdiction, as are issues like adoption, child protection, and change of name. Many of the common law rules that influence outcomes in family law cases have, however, evolved in a judicial system where these areas of federal and provincial authority are mixed.

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## REVIEW OF CURRENT CHILD SUPPORT LAW

Until the latter half of this century, child support law in Canada was based on the desire of the state to provide for needy women and children abandoned by husbands or fathers. Since the 1970s, new family law legislation at both the federal and provincial levels has begun to focus on a gender-neutral parental obligation to provide for the needs of children. However, as most children reside with their mothers after their parents separate, most payers of child support ("payors") are fathers. Many observers have concluded that inadequate levels of child support and ineffective enforcement of child support obligations have contributed significantly to child poverty in Canada.

There are as many different economic situations facing families after separation as there are couples who have separated. Very wealthy couples may separate, leaving both parents well off, and the outstanding financial issues may include the division of responsibility for payment for what some might consider luxuries, such as private school tuition and exclusive summer camps. In these families, both parents may have the ability to earn significant income, leaving neither dependent on the other for spousal support, and with plenty of money available to meet the needs of the children. These are the exceptions, however, and even in these cases the family law system may fail to distribute responsibility for the children fairly.

Some major trends in the economic realities facing separated families can be identified. There are a significant number of Canadian children living in poverty – one in five in 1985[(2)] – and the causes of child poverty have been linked to marriage breakdown. Single-parent families headed by women are the most poverty-prone of all groups in Canada: 59% of them live below the poverty line.[(3)] Studies of child support levels in Canada have indicated that the average child support order is for considerably less than one-half the actual expenses incurred in relation to

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(2) "Income Distribution by Size in Canada," *Statistics Canada Publications Catalogue 13-207*, Supply and Services Canada, Ottawa, 1985, p. 16. The percentage of Canadian children who are poor increased from 14.5% in 1989 to 18.9% in 1992, representing 331,000 additional poor children, according to Statistics Canada figures reported in the November 1994 report of the Centre for International Statistics on Economics and Social Welfare at the Canadian Council on Social Development, entitled *Countdown 94: Campaign 2000 Child Poverty Indicator Report*.

(3) Philippe Dubuissons, "Hausse de 66 p.c. des mères seules avec des enfants à charge en 15 ans," *La Presse*, 9 March 1993. This figure represents an increase from 57% in 1990, as set out in the National Council of Welfare report *Women and Poverty Revisited*, Supply and Services Canada, Ottawa, 1990, at p. 2.

that child, so that the custodial parent in the average case is required to absorb the difference.(4) Since the overwhelming majority of custodial parents are women, and women's incomes average about two-thirds those of men, clearly an inequitable burden is placed on female single parents.

As Lenore Weitzman documented in the United States, divorce is economically "unfair to women and children ... The data reveal a dramatic contrast in financial status of divorced men and divorced women at every income level and every level of marital duration. Women of all ages and at all socioeconomic levels experience a precipitous decline in standard of living ... while their former husbands' standard of living improves ... These economic changes have drastic psychosocial effects on the children of divorce."(5) This dynamic is equally observable in Canada, and for many of the same reasons.

A number of commentators have cautioned that neither child poverty, nor the "feminization of poverty," as the disproportionate presence of women among the ranks of the poor has been called, can be explained by reference purely to family law. As Professor E. Diane Pask has argued, despite remarkable changes in family law in the past 15 years, there has been little or no change in the social and economic inequality between men, women and children in Canada.(6) In a review of two recent American books dealing with child poverty and the family law system, U.S. law professor Marsha Garrison cautioned that child poverty cannot be dramatically relieved by improved child support laws because too many parents have inadequate salaries, and because operating two households will always cost much more than the one required by an intact family.(7) Improving child support laws cannot be expected to lift significant numbers of children out of poverty because it offers the most help to the least needy children. However, child support policy is of continued importance because it may be able to ensure that the economic hardship that results from separation or divorce is distributed equitably

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(4) E. Diane Pask and M.L. McCall, "How Much and Why? An Overview," *Challenging Our Assumptions*, The Association of Family and Conciliation Courts, Winnipeg, 1990, p. 142.

(5) Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences* for Women *and Children in America*, The Free Press, New York, 1985, p. 400.

(6) E. Diane Pask, "Gender Bias and Child Support: Sharing the Poverty?", *Canadian Family Law Quarterly,* Vol. 10, 1994, p. 33-121 at p. 36.

(7) Marsha Garrison, "Child Support and Children's Poverty – A Review of *Small Change: The Economics of Child Support* and *America's Children: Resources from Family, Government, and the Economy*," Fall 1994, *Family Law Quarterly*, Vol. 28, No. 3, p.475-507, at p.502.

among the members of a family, and that children are not disproportionately impoverished as a result of family breakdown.(8)

## A. Quantum of Support

### 1. Current Practice

Child support levels are determined in a number of ways: voluntarily by parties who have agreed to settle their affairs in a separation agreement or consent court order, or by the decision of a judge applying either provincial family law or the provisions of the *Divorce Act*. Where the parties are unable to settle the child support issue, then, like most contested family law decisions, it is decided at the discretion of the judge. Given the complexity of the issues posed by any family breakdown, judicial discretion is needed to consider and adjust for all the aspects of a particular family's situation. The judge must be flexible enough to account for all of the potential variables, but the unfortunate by-product of discretionary decision-making is that judges may also be inconsistent. If levels of child support were more consistent, as is hoped will be the case under the system proposed in the 1996 Budget, outcomes would be more predictable, allowing parties to settle their affairs outside of court.

Judge James Williams of the Family Court in Dartmouth, Nova Scotia, found in a 1989 survey that the most common words used by writers, lawyers or judges to describe child support levels were *inadequate*, *inconsistent* and *arbitrary*.(9) Child support awards are inadequate at the time they are made, and become progressively more so over time, with inflation and the maturation and growing financial needs of children. Professor Pask has found that both judicial comment and survey data support the proposition that childraising costs increase with children's age.(10) Child support orders are arbitrary in the sense that the amounts are not related to any cost guidelines, nor are they based on any judicially articulated principles, in most cases. There is also tremendous inconsistency between judges and jurisdictions.

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(8) *Ibid*., p.503.

(9) R. James Williams, "Quantification of Child Support," (1989) 18 R.F.L. (3d) 234.

(10) Pask (1994), p. 81.

Across Canada, this inconsistency is magnified many times by the number of levels of courts making child support decisions, by the number of provincial and federal statutes pursuant to which decisions are made, by the regional differences in cost of living, and so on.

The unsatisfactory state of the law under which quantum of child support is established by judges was examined in great detail by Madame Justice L'Heureux-Dubé in her 1994 concurring judgement in *Willick* v. *Willick*.(11) In her reasons, she argued that the reality that many women suffer financial hardship following divorce should not be ignored when courts are dealing with child support. She cited a Justice Department study evaluating the *Divorce Act* which found that child support levels had deteriorated between 1985 and 1988, thereby increasing the burden on custodial parents.(12) Other authorities cited also dealt with the inadequacy of child support across Canada and the attempted solutions, such as the attempts in various jurisdictions to quantify the actual costs of raising children,(13) the identification of a "glass ceiling" or invisible barrier that acts to prevent more than minimal levels of child support from being ordered,(14) and judges' general lack of awareness of what should be included in calculating the costs of childrearing. Madam Justice L'Heureux-Dubé strenuously objected to children living at or near the poverty level while non-custodial parents have the means by which to meet their needs, and stated that "the financial burden of divorce should not be borne primarily by children and their custodial parents."(15)

Judges deciding child support applications under the *Divorce Act* are governed by subsections (5) and (8) of section 15.

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(11) (1994), 6 R.F.L. 4th 161 (S.C.C.). Professor Julien Payne, in an article entitled "Support After *Moge*, *Willick* and *Levesque*" (1995), 12 C.F.L.Q. 261, noted that Madam Justice L'Heureux-Dubé's reasons received the support of only three of seven judges of the Supreme Court of Canada, but suggested that they would likely be cited with approval in Canadian courts (p. 287).

(12) Department of Justice, "Evaluation of the *Divorce Act* – Phase II: Monitoring and Evaluation," Department of Justice, Ottawa, 1990, cited at para. 66 of *Willick*.

(13) Edmonton Social Planning Council, *Family Budgeting* Guide, Edmonton, March 1992 and a similar project in Metropolitan Toronto were cited as having been discussed in Ellen B. Zweibel, "Child Support Guidelines: An Ineffective and Potentially Gender-Biased Response to Child Support Issues," in *Family Law Voodoo: Economics for Women – Feminist Analysis Conference*, Canadian Bar Association, Ontario, 1993.

(14) Myriam Grassby, "Women in Their Forties: The Extent of Their Rights to Alimentary Support," (1991), 30 R.F.L. (3d) 369, and Rosalie S. Abella, "Economic Adjustment on Marriage Breakdown: Support," 4 *Fam. L. Rev*. 1, 1981.

(15) *Willick*, para.71.

> (5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including
> (a) the length of time the spouses cohabited;
> (b) the functions performed by the spouse during cohabitation; and
> (c) any order, agreement or arrangement relating to support of the spouse or child.
>
> (8) An order made under this section that provides for the support of a child of the marriage should
> (a) recognize that the spouses have a joint financial obligation to maintain the child; and
> (b) apportion the obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

The first step in determining the appropriate level of child support to be paid is to assess the child's needs. This in itself involves questions of considerable complexity. A child's needs will be determined to some extent by reference to the parents' circumstances. The cases in this area have devoted a great deal of time to questions such as: What proportion of the custodial parent's fixed costs, such as rent and utilities, relate to the support of the child? To what extent should the award exceed subsistence level expenses? Which expenses, such as music lessons or orthodontic expenses, are legitimate?

Family lawyers often comment that judges fail to appreciate the costs of raising children. The judiciary in Canada is "largely uneducated about the cost of raising children, and as many are male, and from intact families, [they] have little or no personal experience in the raising of children."(16) As a result, many observers have advocated judicial education in this area, or the establishment of child support guidelines that would remove judicial discretion from the process. On the other hand, while stressing the importance of judicial discretion in *Willick,*(17) Mme. Justice L'Heureux-Dubé discussed at length the sources of information about childrearing costs

(16) Carole Curtis, "Workshop on Limits of the System: Women in Family Law," Paper delivered at the Conference of the National Association of Women and the Law, Toronto, February 1991, p. 2.

(17) *Willick*, para. 60.

to which judges should be referred by counsel, including various types of statistics and commentary about the inadequacy of child support orders and the costs of raising children.

In practice, each parent's counsel is required to file a statement of the parent's financial circumstances, detailing his or her budget as well as property holdings and debts. Most custodial parents' counsel would also produce a statement of the child's expenses, listing things like food, shelter and clothing, along with others such as hockey lessons and entertainment expenses. Because these matters are decided in the context of the adversarial litigation process, it is the opposing counsel's job to attempt to reduce or eliminate these expenses, resulting in a lower overall assessment of the child's needs.

The courts have established very few general rules. It is not clear whether all non-custodial parents are required to contribute to child support regardless of their means, or only those who have reached at least a certain minimum level of self-sufficiency. In many cases, the non-custodial parent will arrange his or her affairs so as to appear unable to contribute to child support. As Judge Williams noted, to compensate for such attempts, courts have attributed income to parties who have deliberately reduced their ability to pay (for example, by quitting jobs or returning to school), forced the sale of property, awarded lump sum payments set off against matrimonial property where there was resistance to paying support, and made orders for support based on the expected rearrangement of the payor's debt load.[18]

Additional complexity is added to this calculation when there is a new partner for one or both spouses. To what extent are a newly formed household's joint means and needs to be considered? Certainly new obligations and sources of income are relevant to an assessment of the lifestyle of either party. The objective of the quantum decision is to maintain the standard of living of the children at a level as close as possible to the one that existed before separation. Also, children may have independent sources of income, such as child tax credit payments or part-time jobs. There may be a "settled intention" parent – one who is not the child's biological parent, but who is under a legal obligation to support the child because he or she "stand[s] in the place of parents."[19] Many child support awards are made on variation applications. In these cases, the parties may add complexity to the determination with the existence of previous orders or agreements that must be considered in setting a new level of child support.

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(18) Williams (1989), p. 246.

(19) *Divorce Act, 1985*, R.S.C. 1985, c. 27 (2d Supp.), s. 2(2).

Some judicial attempts were made earlier to develop a formula for the establishment of child support levels. Most notably, in the *Paras* case,[20] a formula was established whereby the sum required to meet the children's needs is to be apportioned between the parents according to their respective incomes. Though this formula is widely applied, and has an appealing fairness, it does not take into account high-income situations, third parties, inflation or the problem of assessing the costs of raising children. Since there is no limit to the number of formulas that may be used by judges, the choice of a formula itself is the subject of judicial discretion and may lead to inconsistency in results.

Carol Rogerson, in an extensive study of judicial interpretation of the child support provisions in the *Divorce Act, 1985*, found that most awards are not set at levels that would provide an equalizing of standard of living between the child's household and that of the non-custodial parent, or even at levels meeting the *Paras* standard. "Typically the household of the custodial parent (usually the mother) and children is left with an income between 40% and 80% of that enjoyed by the non-custodial parent."[21] As Rogerson points out, this usually means that the mother's two-or-more-person household must survive on less income than the father's one-person household (though he may, of course, remarry).

Two other findings about the courts' application of the *Paras* formula, whereby a strictly proportionate share of child care costs is allocated to each parent, led Rogerson to the conclusion that it was leading to unfair results: (1) the relatively low incomes earned by custodial mothers were not usually recognized by the courts, with the result that a disproportionate financial burden is placed upon mothers; and (2) except in rare cases where the non-custodial parent is exercising no access, no credit is given to the custodial parent for her non-financial contributions to the care of the child.

Carol Rogerson's study was based on a review of reported family law cases. As a result, she noted that her sample probably involved higher than usual levels of support, because generally only the well-off can afford litigation. Nonetheless, Rogerson concluded that the stated objectives for child support, set out in the *Divorce Act*, were rarely met. Indeed, they were most closely approached only in cases where there was also generous spousal support or the custodial

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(20) *Paras* v. Paras, [1971] 1 O.R. 130, 2 R.F.L. 328 (C.A.)

(21) Carol Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985*," (Part II), 7 C. Fam. Law Q. 271, 1991, p. 274.

parent earned a relatively high income. "Children are rarely being maintained at the marital standard of living or even at a standard equivalent to that of the non-custodial parent."(22)

Judge Williams set out a comprehensive checklist of items to be considered in establishing child support levels in *Syvitski* v. *Syvitski*, which was cited with approval in the *Willick* case.(23) The items included on the *Syvitski* list covered assessing children's needs, including lifestyle; the self-sufficiency of each of the custodial and non-custodial parents; income tax implications of support; access expenses; responsibility for the support of others; and non-financial contributions to child care.

A complicating factor for the quantum decision in many cases is the impact of income taxation on both parents, which is discussed in more detail below. The tax consequences are intended to be considered by lawyers and judges in setting child support levels, but the complexity of the income tax rules, which interact with GST and child tax credits, as well as the many future developments in the lives of the parties that may intervene to reduce the accuracy of the tax assessment, such as more children, new partners, new sources of income, and so on, may prevent the tax consequences from being properly taken into account. When the child support level is set by a court, or indeed by parties to a settlement, it is taken to incorporate all reasonably foreseeable future developments.

Other problems, in addition to the uncertainty of the judicial process, contribute to the inadequacy of child support awards. In practice, the reasonable needs of a child may far exceed the combined ability of the child's parents to contribute. When the non-custodial parent's means are inadequate, the court's analysis often shifts to a consideration of his or her ability to pay. The administrative procedures employed by the courts, including the financial statements that must be filed by each party, emphasize the parents' financial circumstances. The courts tend to focus on the non-custodial parent's disposable income, and the custodial parent may be left to pay the proportion of the child's expenses that cannot be met out of the payor spouse's disposable income, regardless of the custodial parent's ability to pay.

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(22) *Ibid*., p. 304.

(23) (1988), 86 N.S.R. (2d) 248 (Fam. Ct.)

## 2. Child Support Guidelines

To correct the arbitrariness of the quantum decision as it is currently made, the federal government announced, as part of the 6 March 1996 Budget, that it will introduce Child Support Guidelines in the *Divorce Act*. The Guidelines, set out as the Annex to the Budget document entitled "Budget 1996: The New Child Support Package," would enable a divorcing couple to determine immediately the appropriate level of child support to be paid, based on the payor spouse's income. This would replace the system by which judges, using discretion, determine the **specific** costs of raising a child, with one in which parties would be guided by tables setting out numbers based on **average** costs of raising a child; this would be only for cases decided under the *Divorce Act*, however. The Budget documents indicate that the government is working with the provinces and territories to encourage them to adopt guidelines as well. The government claims that the guidelines will result in more consistent payment levels across similar income levels, and ensure that more children will receive adequate amounts of child support.(24)

Child support guidelines had been recommended for adoption in Canada by the Federal/Provincial/Territorial Family Law Committee. The Committee began to study child support guidelines in June 1990, and its final report was released in January 1995.(25) Guidelines were seen as the best means for achieving consistency in child support awards, as well as a means of increasing awards overall. The Committee hoped that, with the provision of consistency, individuals would be able to settle their affairs without resort to litigation in a higher proportion of cases. The expectation that the presence of guidelines would facilitate settlement, and decrease legal costs, was also cited in the recent Budget documents as one of the benefits of the new system.[26]

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(24) Government of Canada, "Budget 1996: The New Child Support Package," Ottawa, 6 March 1996, p. 13.

(25) *Federal/*Provincial*/Territorial Family Law Committee's Report and Recommendations on Child Support*, Ottawa: Department of Justice, 1995. The *Report* points out that the recommended method of apportioning costs of children between parents, which had been referred to throughout the Committee's previous work as "guidelines," would be more appropriately called a "formula," as the Committee was recommending the adoption of a mathematical formula for the calculation of the costs of children as well as an apportioning principle (*Report*, p. 1).

(26) "Budget 1996: The New Child Support Package," p. 11.

Guidelines have been in place in the United States, where each state was required to adopt child support guidelines, since 1987. Judge Williams reviewed two articles by American jurists,(27) and outlined the following types of guidelines models set up in the U.S.:

- Flat percentage guidelines:

  The non-custodial parent is required to pay a flat percentage of either gross or net income, without regard to the income of the custodial parent.

- Income shares model:

  The parents' incomes are added together, and a basic joint child cost is estimated based on the amount that would have been spent in an intact household, which obligation is then divided between the parents according to their respective shares of the joint income.

- Delaware (Melson) formula:

  After deducting the amount required by the parents to provide their bare necessities from their incomes, the primary support needs of the children are established (there is a minimum); the children receive a percentage of the non-custodial parent's income after the first two amounts have been deducted.

- Income equalization (Cassetty) model:

  The net income of each parent's household is to be equalized with that of the other parent, with a poverty level reserve for each member of each household.

In the United States, as would be the case in Canada under the 1996 proposal, the guidelines are not binding on the courts, but are rebuttable presumptions. Thus, in the context of the adversarial system, the parties may work to avoid their impact by leading evidence that the result of the application of the guidelines is in some way unfair. Their desirability, however, seems to stem from their impact in steering the focus of support proceedings from expenses to income, with courts dividing income instead of arbitrarily evaluating the legitimacy of expenses.(28)

The Federal/Provincial/Territorial Family Law Committee has studied these and other child support guidelines and their application in various economic models. The guidelines meet the objective of simplifying the child support system to varying degrees. One of the major problems of applying this solution in the Canadian context was emphasized in the Committee's

(27) Elrod, "Kansas Child Support Guidelines: An Elusive Search for Fairness in Support Orders," (1987) 27 Washburn Law J. 104 and Williams, "Guidelines for Setting Levels of Child Support Orders" (1987), 21 Fam. Law Q. 281, cited in Williams (1989), p. 267.

(28) Williams (1989), p. 271.

research report *The Financial Implications of Child Support Guidelines*: "although child support guidelines seek to simplify and provide fairness in determining child support awards, under the present tax system the exercise will remain somewhat complex."(29) The tax problem was not entirely solved by the Committee in its final report, and is discussed more fully in the next section of this paper. The federal government, in its March 1996 package of child support reforms, has sought to correct the quantum-taxation overlap by simultaneously adopting guidelines and removing the requirement that child support payments be taxed as income of the recipient and deducted by the payor.

The guidelines announced in the 1996 Budget are similar to those recommended by the Federal/Provincial/Territorial Family Law Committee, with some significant changes. As the Committee recommended, the guidelines contain tables of numbers based on a mathematical formula that "calculates the appropriate amount of support in light of economic data on average expenditures on children across different income levels."(30) The formula saves the payor spouse a basic amount of income as a personal reserve, and adjusts for federal and provincial income taxes. Separate tables for each province take into account provincial income tax rates; however, apparently no additional calculations have been made to take into account regional differences in the cost of living. The figure dictated by the guidelines would not be binding on a couple who negotiated a settlement out of court, but would guide a judge deciding an application under the *Divorce Act*. Also, in some specific circumstances, the judge could adjust the guidelines amount.

There are four proposed types of special child-related expenses that could be added to the amount set out in the tables (called the "Child Support Payment Schedules").(31) The four types of expenses that will be considered are child care expenses for children not in full-time school, or with special needs; medical expenses over $200 per year that are not covered by government health insurance plans; education expenses; and "extraordinary expenses for extracurricular activities that allow a child to pursue a special interest or talent."(32) The last will likely provide room for significant numbers of court applications, given the numbers of children enrolled in lessons and courses of every kind. If the judge considers it appropriate, then the

(29) Federal/Provincial/Territorial Family Law Committee, *The Financial Implications of Child Support Guidelines:* Research *Report*, May, 1992.

(30) "Budget 1996: The New Child Support Package," p. 12.

(31) *Ibid.,* p. 15.

(32) *Ibid.*

support payor's contribution to any of these four expenses will be added to the Schedule amount of support. On the other hand, a payor might plead undue hardship based on three or more types of circumstances in order to have the Schedule amount reduced. The Budget materials indicate that situations that might justify a finding of undue hardship are not limited, but could include unusually high debt levels; access expenses; or obligations to support other children or a spouse.(33)

Academics, lawyers and other commentators have published articles discussing the guideline options available in Canada and the recommendations of the Federal/Provincial/ Territorial Family Law Committee.(34)

Some warned against rigid rules that might prevent the anticipation of or proper reaction to economic change;(35) others expressed the fear that in some cases the guidelines might result in lower awards;(36) and one commentator cautioned that the tables released by the Committee did not take into account the custodial parent's income, and would therefore produce an unfair result in any case where the parents' incomes were not similar.(37) In the days immediately following the 1996 Budget announcement of their proposed adoption, the guidelines have not attracted as much attention as the other aspects of the Budget's child support measures; however, the two major criticisms have been the absence of retroactivity (so that in order to benefit from the new system, custodial parents will have to seek to vary existing agreements and awards) and uncertainty about the amounts (said to be insufficient or excessive, depending on who commented) dictated by the guidelines.

Professor Ross Finnie, in an evaluation of the Committee's recommendations, suggested that, while the basic formula proposed was sound, problems with the recommendations could worsen, rather than improve, the child support situation in Canada.(38)

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(33) *Ibid.*

(34) For example, Ross Finnie *et al*., *Child Support: The Guideline Options*, The Institute for Research on Public Policy, Montreal, 1994.

(35) Gordon Jarenko, "Child Support Plan Details Questioned," *Calgary Herald*, 28 January 1995, p .B6.

(36) Anita Elash, "Legal Update: Family Law," *Canadian Lawyer*, Vol. 18, No. 8, October 1994, p. 36; Catherine Aitken, "Will Federal Child Support Guidelines Lead to Pandemonium?", *The Lawyers Weekly*, 23 February 1996, p. 22.

(37) Stephen L.P. Sanderson, "Proposed Support Guidelines Don't Jibe with Current Law," *Law Times*, 26 June - 2 July 1995, p. 8.

(38) Ross Finnie, "Child Support Guidelines: An Evaluation of Recent Government Proposals," (1995), 11 *Reports of Family Law* (4th) 317, at p. 318.

Finnie's concerns were these: (1) that the recommendations do not adequately consider expenses borne by non-custodial parents who spend significant amounts of time with the child (or children), but less than the 40% of the child's time for which an adjustment would be provided (the adjustment is made only in cases where the non-custodial parent spends more than 40% of the time with the child); (2) that it is inappropriate to raise awards, as the *Report* recommends, for low-income non-custodial parents above the basic formula levels; (3) the inclusion of a new spouse's income in calculation of household income is unfair and could be a disincentive to remarriage; (4) the hardship conditions are applicable only to low-income non-custodial parents, but should apply to all non-custodial parents; and finally, (5) the Committee failed to resolve how the tax treatment of child support should interact with guidelines. These problems, and particularly the last three, appear to have been resolved to some extent by the 1996 Budget proposals.

The Federal/Provincial/Territorial Family Law Committee, in recommending the adoption of child support guidelines, or a child support formula as they referred to it, predicted that fairer and more consistent child support awards will be the result. This rationale is also relied upon by the federal government. By removing child support negotiations as a source of conflict at the time of separation, the formula will enhance family relations and lower legal costs, including those borne by the state through legal aid and the administration of the courts.(39) However, Professor Finnie reports that while guidelines have been introduced in some countries with positive effect, in others "the results appear to be fairly disastrous."(40)

Professor Garrison reviewed a number of negative consequences that have resulted from the imposition of guidelines in some American jurisdictions. She examined the current picture of child support and child poverty, concluding that although the majority of poor children live in households that would be eligible for child support, most are not receiving adequate support and many are receiving nothing at all.(41) She also noted that the mean child support award in 1989, while higher in guideline states, still fell short of its 1978 value in

(39) *Summary: Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support*, Department of Justice, Ottawa, 1995, p. 3.

(40) Finnie *et al*. (1994), p. 13.

(41) Garrison (1994), p. 480.

inflation-adjusted dollars.(42) In guideline states, the mean child support award was $228 per year higher, and the proportion of women receiving some support was somewhat higher; however, a drop in compliance with child support orders was noted. Also, for black and never-married mothers, guidelines meant lower award rates.(43) These results highlight the importance of careful examination of the ways different families will be affected by any child support formula adopted.

A different model for a child support guideline was put forward in 1992 by the Canadian Bar Association's National Family Law Section.(44) The C.B.A. proposed guidelines based on an equalization of the living standards of the two units of the divided family. The calculations used combine the gross incomes of the parents, and allocate it as follows: 3 parts to the father, 3 parts to the mother, and 1 part to each child. The underlying premise of this proposal is that children of separated parents should suffer the least economic hardship possible, and maintain a standard of living as close as possible to that enjoyed by the family before separation. It is not clear how this proposal would deal with multiple family situations, interaction with spousal support, or the tax treatment of child support. An element of the principle that household standards of living should be equalized has been incorporated into the 1996 Budget proposals. When a payor pleads undue hardship, seeking a variation of the amount payable under the Schedule, he or she will have to give evidence of having a lower standard of living than the custodial parent.(45)

The federal government announced in the 1996 Budget that a $50-million fund will be established for the purpose of developing, together with provincial and territorial governments, new administrative mechanisms at the provincial level to facilitate the up-dating and variation of existing child support orders and agreements, which would otherwise not be affected by the adoption of child support guidelines. It is hoped that such a system will enable all children and custodial parents to benefit from the improved system, but it remains to be seen to what extent that will happen. The government has also indicated that Justice Canada will

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(42) *Ibid*., p.489, citing Andrea H. Beller and John W. Graham, *Small Change: The Economics of Child Support*, Yale University Press, 1993.

(43) *Ibid*., p.485.

(44) Canadian Bar Association, Submission of the National Family Law Section of the C.B.A. on *Child Maintenance* Guidelines, Toronto, December 1992, cited in Pask (1994), p. 114.

(45) "Budget 1996: The New Child Support Package," p. 15.

monitor and evaluate the operation of the guidelines, once they are in place, that research will be conducted on their impact, and that parents, mediators, lawyers and judges will be asked for their input. The results of the evaluation will be submitted to Parliament, so that they will be available to legislators as well as members of the public. Justice Canada will establish an Advisory Committee to help in the implementation of the guidelines.

The joint introduction of guidelines, as a rebuttable presumption of the appropriate quantum of support, and a new tax system removing the tax obligation that currently falls on custodial parents who receive support may not be sufficient to overcome the inadequacy of child support. There may continue to be enforcement problems, although the Budget included enhancements in that area as well (as is discussed in the next section of the paper), and there will continue to be difficulties surrounding the interaction between spousal and child support levels, the establishment of parental income, and other factual determinations, such as how much time each parent spends with the child(ren). One result of the Committee's study and the resulting policy debate will benefit litigants and their children: Canadians, including lawyers, judges and parents, are becoming better educated about the costs of raising children and the devastating consequences of inadequate support.

Judge Williams, after finding that the frustration experienced in Nova Scotia with the inconsistency, arbitrariness and complexity of quantum of child support decisions was common to all North American jurisdictions, concluded that there is no *answer* to the problem.(46) However, he did suggest a number of measures that would incrementally assist, including the reduction of the number of levels of court dealing with child support matters in each jurisdiction, the development of child support guidelines within each province, as well as a variety of efforts that may be made by individual lawyers and judges to improve the delivery of this service to clients and their children. For example, judges should specialize in family law matters, as lawyers do, so that they will become more educated about family law and the social and economic realities facing families after separation and divorce.

(46) Williams (1989), p. 271.

## B. Enforcement of Child Support Obligations

The enforcement of child support orders is primarily a matter under provincial jurisdiction, whether the orders arise under provincial legislation or the federal *Divorce Act*. The federal role in this area has been to facilitate provincial efforts by providing provincial enforcement agencies with access to federal sources of information about defaulting spouses, and by ensuring that federal payments to individuals are subject to garnishment and attachment proceedings.

Most provinces have moved in recent years to establish automatic, government-run systems for the enforcement of child and spousal support orders and agreements. Before these new programs were developed, support orders, like all court orders in civil proceedings, were enforced only at the will and expense of the creditor. In other words, the collection of moneys owed under any such order depended upon the success of the creditor's efforts to enforce payment. Methods of enforcement available to a judgement creditor, all of which continue to be available to those who opt out of the state-operated enforcement programs, include: the judgement-debtor examination, where information about assets and income is solicited from the debtor under oath; seizure and sale of assets, including bank accounts, by the Sheriff's office; garnishment or attachment of wages or other moneys owed to the debtor; and default hearings, where the debtor is called before the court to explain the default.

Most provincial legislatures, starting with Manitoba in 1985, have taken the significant step of creating a state-operated enforcement system for family support because there was a serious problem of non-payment of support orders across the country. In 1974, the Law Reform Commission of Canada estimated that some degree of default with respect to support orders occurred in as many as 75% of all cases.(47) This trend has been confirmed in a number of other studies, although the exact rate of non-compliance has been found at various times to be somewhere between 50 and 85%.(48) This failure weakened the entire family law system, and legislators recognized the difficulty faced by custodial parents whose support was unpaid in pursuing costly and ineffective private enforcement means.

Possibly the fact that so many of such custodial parents turned to public assistance for financial relief persuaded the provincial governments that the enforcement of support orders

(47) Law Reform Commission of Canada, *The Family Court, Working Paper 1*, Law Reform Commission, Ottawa, 1974, p. 51.

could no longer be treated as a private matter. Certainly the cost being borne by society was becoming less and less tolerable as more couples separated without there being any increase in the effectiveness of the family law system to ensure that both parents continued to contribute to the adequate support of their children. Several studies reported the onerous cost of the traditional system of enforcing support obligations.(49)

The new provincial enforcement systems had some common basic components, reflecting the earlier work done by the Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders in Canada from 1981 to 1983. All separation agreements could be filed with the enforcement agencies, and court orders were automatically filed. The creditor assigned her (or his) right to enforce to the agency, which then took steps to enforce the obligation in the most effective manner. The money collected was forwarded to the creditor. The agency would deal with any necessary court proceedings, unless the debtor applied to vary the support order or agreement itself. This meant that support creditors did not have to hire their own lawyers, and were not required to initiate the enforcement procedure.

The enforcement agencies were expected to produce dramatic results. It was known that the high default rates that had been documented were not the result of debtors' inability to pay. The Institute for Law Research and Reform, in an empirical study of the private law enforcement system in Alberta, found that 80% of separated or divorced spouses had a disposable income sufficient to discharge their spousal and child support obligations.(50) Because the reasons for non-payment had so little to do with ability to pay, it was hoped that effective enforcement would put sufficient funds in the hands of custodial parents and children.

On the federal level, legislative action has also been taken, and additional measures were announced. The *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2, allows for the garnishment of federal employees' salaries and federal pension benefits. The *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. F-1.4, enables provincial enforcement agencies access to federal information sources to assist in locating defaulting spouses. It also allows the garnishment of "garnishable moneys," which have been defined in the Regulations

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(48) F.M. Steel, "An Overview of Provincial and Federal Maintenance Enforcement Legislation," *Challenging Our Assumptions,* The Association of Family and Conciliation Courts, Winnipeg, 1990, p. 262.

(49) F.M. Steel, "Maintenance Enforcement in Canada," *Ottawa Law Review*, Vol. 17, 1985, p. 504.

(50) The Institute of Law Research and Reform, *Matrimonial Support Failures: Reasons, Profiles and Perceptions of* Individuals *Involved*, Vol. 1, Edmonton, 1981, cited in F.M. Steel (1990), p. 264.

under the Act since 1988 to include income tax refunds, unemployment insurance benefits, old age security payments and training allowances. Since January 1991, GST credits have been included, and, since June 1991, the garnishment powers have been extended to include Canada Pension Plan payments. A unit was established in the Department of Justice to provide locating information and operate the garnishment of federal funds provided for under the legislation. The unit now processes 10,000 locating requests per year and garnishes about $37 million annually, according to the Federal/Provincial/Territorial Family Law Committee's *Report*.(51)

The new federal enforcement measures, part of the 1996 Budget, include the Federal Licence Suspension Initiative; extended means of tracing defaulting payors; and the expansion of powers for the diversion of federal pensions. The licence suspension initiative will allow the federal government, at the request of a provincial or territorial enforcement agency, to suspend licences, privileges or certificates issued to a payor who has failed to pay support for three consecutive months, or who has accumulated arrears of $3,000.(52) Payors who are in default will be notified by the appropriate enforcement agency that it intends to invoke this remedy, and the defaulting individual will be able to avoid licence suspension by making payment arrangements. This measure will initially apply to passports and specific federal aviation and marine licences and certificates, but others may be included later.

In addition to debtor-tracing assistance already provided to enforcement agencies by the federal government, the measures announced in March 1996 mean that Revenue Canada will be added to the list of federal departments whose data banks can be searched at the request of a provincial enforcement agency. The information that may be obtained, such as address and name of employer, is kept confidential, and used only for the purposes of locating the debtors, and securing support payments. The new pension diversion measures announced will require the amendment of existing pension legislation in order to allow pension diversion in a wider range of cases and to "maximize" the pension benefits that can be applied toward support obligations.(53)

Several other enforcement-related measures were announced, including a feasibility study on the potential for incorporating an American enforcement mechanism, whereby all government agencies must report all their new hiring and re-hiring information to a

(51) *Federal/Provincial/Territorial Family Law Committee's Report and Recommendations*, p. D-2.

(52) "Budget 1996: The New Child Support Package," p. 20.

(53) *Ibid*., p. 21.

national registry. The federal government will also fund a national public awareness campaign, developed in cooperation with the provinces and territories, aimed at changing societal attitudes toward support obligations. It will also contribute up to $13.7 million to joint federal-provincial-territorial projects that encourage innovative or more rigorous support enforcement, or streamlining the collection of out-of-province support orders. A new position, the Federal Support Enforcement Director, will be established in the Department of Justice, to coordinate enforcement efforts and services at the federal level, and to work with the provinces and territories as well. A number of technical and research improvements are also to take place.

The provincial enforcement agencies have not significantly improved the overall rate of compliance with support orders. The tremendous volume of cases they handle is likely part of the reason for their disappointing results so far. All orders filed are monitored by a computer system, with payments made to the agency and then forwarded to the creditor. Because of the thousands and thousands of payments being processed, the systems are not very good at dealing with such occurrences as agreements between debtors and creditors, changes in either party's financial circumstances, or death. Other explanations offered in the report of the Federal/ Provincial/Territorial Family Law Committee include debtors' inability to pay, including inability to pay the necessary legal costs of seeking to vary a child support order, the difficulty of locating debtor spouses, and the difficulty of garnishment of self-employed payors, attitudes of payor spouses who do not attach sufficient importance to child support, and finally, difficulties in inter-provincial and international cooperation.(54)

Some of the provinces have made fairly dramatic changes to their enforcement systems even more recently. Ontario has passed the *Family Support Plan Act*, S.O. 1991, c. 5, in effect since 1 March 1992, which aims to streamline enforcement to improve service to support creditors. This controversial new system provides for automatic support deductions, whereby all support orders must contain provisions requiring a portion of the debtor's income to be diverted at source to the Family Support Plan Office, to be directed from there to the creditor. This is similar to garnishment, except that every debtor's income is affected, without waiting for a default. Stiffer penalties for contravention of the provision of the Act apply, with fines up to $10,000 or imprisonment available. There is also a new provision making it very difficult for a couple to withdraw from the system: specific grounds must be met to satisfy a judge that the parties should

(54) *Federal/Provincial/Territorial Family* Law *Committee's Report and Recommendations*, p. D-3.

be allowed to withdraw, and the support debtor must post security in an amount equal to four months of support.

Saskatchewan, on the other hand, has made less drastic changes to its *Enforcement of Maintenance Orders Act*, S.S. 1984-85-86, c. E-9.2, the latest changes having been in effect since November 1992. The enforcement powers of the Maintenance Enforcement Office and its Director have been increased. The Director can now fix an amount of up to 15% of the payor's gross income, to a maximum of $500 a month, which may be garnisheed along with any ongoing maintenance obligation. This continuing garnishment may be issued and served by the Director without being issued by the court. Also, the Director's powers to demand information in default hearings have been expanded. Saskatchewan's Department of Justice officials report that the enforcement system is working very well: since 1986, the default rate has fallen from an estimated 80% to 32%.(55) Saskatchewan is now looking at proposed legislative amendments including withholding motor vehicle licences for payors in default.(56)

Nova Scotia, New Brunswick, Alberta, and British Columbia have also recently proposed or enacted strengthening measures for the enforcement of child support, and both Yukon and Northwest Territories are reviewing their maintenance enforcement legislation and establishing public awareness campaigns.(57) The federal government continues to provide funding to the provinces and territories, which are the primary collectors of support, to help them improve their support enforcement systems. Other research, statistics-gathering and cooperative commitments have been made by the federal government, as set out in an Appendix to the Federal/Provincial/Territorial Family Law Committee's *Report* dealing with enforcement issues.(58)

None of these initiatives has been in place long enough for researchers to draw any conclusions about which models will produce the highest levels of compliance. Generally speaking, improvements have been noted across Canada, and most lawyers and custodial parents at least have the impression that major efforts are being made to solve the problem of defaulting support debtors. A great deal of public attention has been brought to bear on the issue, with the result that support

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(55) Susan Amrud, Department of Justice, Legislative Services Branch, Saskatchewan, personal communication, 2 November 1992.

(56) *Federal/Provincial/Territorial Family Law Committee's Report and Recommendations*, p. D5

(57) *Ibid.*

(58) *Ibid*., Appendix D.

obligations are taken more seriously, both while they are being established and thereafter. Perhaps it is because these obligations are now so much more enforceable that attention has also been given to their adequacy, and the newest federal measures indicate that this trend is continuing.

The books reviewed by Professor Garrison and dealing with American experiences with child support policy and child poverty in the last decade and a half, looked at the failure of enhanced enforcement measures, among other things, in improving the situation of poor children. Some new enforcement techniques were found to be effective in improving compliance, but others were not. Automatic or mandatory wage withholding, which has been widely implemented in Canada, and automatic liens against property, were found to have been effective in improving compliance with child support orders and agreements.(59) Criminal penalties seemed to lose effectiveness as states acquired other means by which to enforce support obligations. Voluntary wage assignments, and securities, bonds or other guarantees of payment seemed indirectly to encourage higher rates of support.(60) In Canada, there will have to be careful monitoring of the results of new enforcement tools as they are developed, with specific attention to the differential impact of various reforms.

### C. Taxation of Child Support

Of all the child support measures announced in the 1996 Budget, the most dramatic is the change to the tax treatment of child support. This measure will affect all new final child support orders and agreements, whether made under provincial or federal legislation, or in a court order or separation agreement, made after 1 May 1997. By virtue of its far-reaching effect, and the public attention that was garnered by the lead-up to it, including the *Thibaudeau* case, this change has been met with intense reaction, both positive and negative.

Until May 1997, the inclusion/deduction mechanism will remain in place, so that support payments will continue to be generally deductible from the taxable income of the payor, but included in calculating the income of the recipient. This arrangement has been controversial because it increases the tax liability of support recipients, who are by definition financially dependent, and may reduce their ability to meet their own or their children's expenses. On the other

(59) Garrison (1994), p. 484.

(60) *Ibid*.

hand, the arrangement can have an income-splitting effect, and had been justified on the basis that it reduced the overall tax liability of the now-separated family.

The Federal/Provincial/Territorial Family Law Committee's Research Report on the *Financial Implications of Child Support Guidelines* explored the treatment of child support payments in the Canadian tax system. The policy of inclusion and deduction of child support payments was developed in 1942, the report states, when personal income tax rates were increasing due to the war. Various criteria have been added to the *Income Tax Act* since then, but the inclusion/deduction policy remained in place until the 1996 Budget announcements.

The rationale for the inclusion/deduction policy, as articulated by the Department of Finance, included four tenets.(61) The first is that it is a principle of taxation that, where a payor claims a deduction in respect of an expense, the recipient of the payment should pay the tax on it. Also, it means that support recipients will pay amounts of income tax similar to those of other taxpayers receiving the same amount from other sources.

Two other explanations for the policy were offered by the Finance Department. One is the theory that the tax deduction allowed to the payor will make the payment of child support more attractive; however, the overwhelming levels of non-compliance with these obligations should surely lay this idea to rest. The other explanation of the policy is that the tax treatment provides a subsidy for children since it encourages larger payments. This last is also illusory: as explained above, any increase in the quantum of support resulting from the consideration of the tax consequences of child support will be devoted to the payment of income tax, not to the child's expenses.

When the inclusion/deduction policy was developed, virtually all support payors were in a higher tax bracket than support recipients. When child support was paid, the money resulted in a larger deduction for the payor than tax liability for the recipient, resulting in lower taxes paid by the couple overall, with potentially some or most of this "extra" money available for the children. Canadian society has changed tremendously since 1942, as have other provisions of the *Income Tax Act*, making this rationale for the inclusion/deduction policy less supportable than it may once have been.

The number of tax brackets has been significantly reduced, so that support creditors and debtors may be in the same tax bracket even though one earns more than the other. When the

(61) Federal/Provincial/Territorial Family Law Committee (1992), p. 84.

Federal/Provincial/Territorial Family Law Committee examined 1988 taxation statistics to determine to what extent the policy was benefiting children, they found that, in spite of these changes in tax brackets, 60% of support payors were in the two top tax brackets prior to the deduction of support payments, and almost 90% of recipients were either non-taxable or in the lowest bracket. After the deduction/inclusion of support payments, 50% of the payors remained in the top two brackets, and 80% of recipients remained non-taxable or in the lowest tax bracket. Thus, even though a clear majority of cases *could* have benefited from the income-splitting effect of the policy, little or no benefit was being passed on to the children through the support recipient.

The requirement that support recipients include child support payments in income is governed by sections 56 and 56.1 of the *Income Tax Act*, S.C. 1970-71-72, c. 63, as amended. Section 56 (1)(b), (c) and (c.1) determines what payments will be considered alimony or maintenance within the meaning of the Act, and therefore included in income. Sections 60 and 60.1 provide that payments that meet the same requirements will be deductible by the payor. These provisions of the *Income Tax Act* were tested and upheld by the Supreme Court of Canada in its 1995 decision in *Thibaudeau* v. *R.*[(62)]

In 1991, Suzanne Thibaudeau appealed the Minister of Revenue's assessment of her tax obligation for the 1989 tax year, whereby the income she received as child support for her two children had been added to her taxable income. She took the position that the income was actually that of her children, and had even maintained a separate bank account and filed separate income tax returns for her children. The Tax Court of Canada dismissed Suzanne Thibaudeau's appeal, upholding the inclusion/deduction system, but suggesting that if the tax consequences of the child support award had not been considered, she should appeal the child support decision and not look to Revenue Canada for relief.[(63)] The Federal Court of Canada reversed the decision, holding that section 56(1)(b) of the *Income Tax Act* infringed section 15(1) of the *Canadian Charter of Rights and Freedoms* and could not be justified under section 1 of the Charter.[(64)] The federal government appealed the Federal Court decision to the Supreme Court of Canada, whose decision reversing the result was released on 25 May 1995.

(62) (1995), 12 R.F.L. (4th) 1.

(63) *Thibaudeau* v. *R.*, 92 D.T.C. 2111.

(64) 94 D.T.C. 6230.

The majority of the Supreme Court justices upheld the inclusion/deduction provisions, finding that there was no violation of the Charter's equality guarantee. The judgements noted that if there is any disproportionate impact of the tax liability on mothers, who form the majority of the custodial parent population, the responsibility lies not in the income tax system but in the family law system. Professor James McLeod, in his Annotation in the *Reports of Family Law,* suggested that family law is not to blame either, because information about tax consequences is readily available, so that if tax consequences are not properly figured into support awards, it is lawyers and judges who are at fault.(65) Allocating responsibility in this fashion, too, may under-emphasize the complexity of family law negotiations, which are affected by power imbalances among the parties, as well as competing emotional and personal struggles. Professor McLeod predicted that the tax treatment of child support would be altered by Parliament, and expressed the hope that the income-splitting benefit derived by most families would be recognized and retained. He also cautioned that if the tax treatment was changed without child support guidelines being in place, the courts would be flooded with applications to vary support, because most support orders include a tax gross-up.(66)

Justices L'Heureux-Dubé and McLachlin dissented from the majority decision in *Thibaudeau*. Both held that by imposing a tax burden uniquely on one spouse, section 56(1)(b) infringes section 15(1) of the Charter, and it is not saved by section 1. Madam Justice McLachlin would have read down section 56(1)(b) to exclude child support payments from its operation, and Madam Justice L'Heureux-Dubé would have struck the provision down, but suspended the declaration of invalidity for 12 months to allow Parliament to implement a less discriminatory alternative. The dissenting judges recognized that the income-splitting feature of the inclusion/deduction system creates a benefit for most separated families; however, the benefit is unequally distributed between the spouses, and it is primarily payors who benefit. Both dissenting judges accepted a great deal of external evidence about the impact of the inclusion/deduction system on divorced or separated mothers and their children.

When the courts refused to alter the tax treatment of periodic child support payments in Canada, women's advocates and other interested parties continued to press for change on a political level. The National Association of Women and the Law and the Canadian

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(65) James G. McLeod, "Annotation," *Thibaudeau* v. *R.* (1995), 12 R.F.L. (4th) 1, at p.12.

(66) *Ibid*., p.13.

Advisory Council on the Status of Women have lobbied Parliament since the late 1970s, seeking an amendment of the *Income Tax Act* to ensure that child support payments are no longer considered taxable income in the hands of the recipient.(67) Members of Parliament, including Dawn Black and Beryl Gaffney, sponsored motions in the House of Commons calling for the necessary amendment to the *Income Tax Act* to render child support payments non-taxable in the hands of custodial parents. Beryl Gaffney's motion to that effect was passed, on division, on 30 May 1994 in the House of Commons.

Much of the advocacy of change to the tax treatment of child support in recent years, including Ms. Gaffney's Private Member's Motion, has been informed by the research of Ellen Zweibel and Richard Shillington, who released in 1993 a study of the financial impact of the inclusion/deduction system on divorced couples and their families. Zweibel and Shillington found that the combined impact of income tax and child support policies has to be considered in the "real light of their impact on the standard of living produced in actual family law cases."(68) They critically analyzed the policy rationales upon which the Finance Department bases its continued support for the deduction/inclusion mechanism for taxation of child support payments. Confirming what had often been observed and reported by women and their advocates, the research found that there was a potential subsidy to divorcing couples in only 51% of the cases studied – in 49% of cases, the current mechanism could not have produced a subsidy for the family.

The inclusion/deduction treatment of child support has made an overall tax savings available only where the payor is in a higher tax bracket than the support recipient after child support is paid. Therefore, in these situations, where financial resources have been available but shared in a way that resulted in inequity between the two after-divorce households (i.e., the father by himself has significantly more resources available to him than the household comprising the mother with children), there has been a tax saving. No tax relief has been provided where both

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(67) See Ellen B. Zweibel, "Child Support Policy and Child Support Guidelines: Broadening the Agenda," *Canadian Journal of Women* and *the Law,* Vol. 6, No. 2, 1993, p. 371, note 9; Canadian Advisory Council on the Status of Women, "Comments on the Federal/ Provincial/Territorial Family Law Committee's *Report and Recommendations on Child Support,*" March 1995, p.12; and National Association of Women and the Law, "Summary of Resolutions," Tenth Biennial Conference – "Healing the Past, Forming the Future," 19-21 February 1993.

(68) Ellen B. Zweibel and Richard Shillington, "Child Support Policy: Income Tax Treatment and Child Support Guidelines," Paper supported by the Policy Research Centre on Children, Youth and Families, 1993, p. 2.

parents are in the same tax bracket after support is paid, and there has been a tax penalty where the custodial household is in a higher tax bracket than the payor.

Tax policies should not produce or support results that conflict with other aspects of federal policy, as Zweibel and Shillington discuss. It is a clear objective of family law policy that, as much as possible, the standards of living of the two households after divorce should be equal. Therefore, in most cases, the custodial household should have more resources available to it than the one-member household of the non-custodial parent. If this objective were more commonly achieved, even fewer families would benefit from any tax savings.

Zweibel and Shillington also identify some glaring errors in the policy basis for the deduction/inclusion mechanism.

> The current policy also ignores the reality that child support is a contentious issue and that non-custodial fathers seeking to minimize their payments may not readily agree to either a gross-up or to a further sharing of any tax savings above the gross-up. The Finance Department's rationale also ignores the number of persons who settle their child support arrangements on their own, without the assistance of lawyers or accountants, the number of lawyers and judges who rely on rough estimates and the number of cases where, despite the custodial mother's lawyer's careful tax calculation, the "glass ceiling" moves in to reduce the award.(69)

The Finance Department's contention that the current mechanism is an incentive for non-custodial parents to pay higher amounts, or to pay at all, is simply unsupported by experience. As the National Association of Women and the Law's recent brief to the House of Commons Legislative Committee on Bill C-79 (amendments to the *Divorce Act*) points out: "The myth that an income tax deduction is an incentive to payors to pay support has been laid to rest with the knowledge that 85% of payors prefer not to pay, rather than avail themselves of the tax advantage."(70)

A number of potential income tax reforms, combined with several anti-poverty proposals, were tested by Zweibel and Shillington against their data to determine which

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(69) *Ibid*., p. 17.

(70) The National Association of Women and the Law, Brief Submitted on Bill C-79, An Act to amend the Divorce Act and the Family Orders and Agreements Enforcement Assistance Act, February 1993, p. 5.

combination had the best potential to improve the economic position of custodial mothers and their dependent children, while not adversely affecting the equity with which the system treats non-custodial fathers. The paper also tests a number of child support guidelines models, concluding that guidelines have the potential to increase the adequacy of quantum of child support and equity between families only if they are based on realistic estimates of the cost of raising children.

Zweibel and Shillington identified some crucial areas for further research, including the tax treatment of spousal support. If spousal support continued to be subjected to the inclusion/deduction mechanism once child support was not, then anti-tax avoidance mechanisms might have to be developed to prevent child support from being improperly characterized as spousal support. Also, other models for tax reform could be considered, such as the system in France whereby child support payments are deducted by the payor, but only partially included in the recipient's income.

Although their research left a number of important areas to be studied elsewhere, the Zweibel and Shillington paper came to an important conclusion:

> The good news from this research is that something can be done. Combining income tax reforms which address both the inequities of the deduction/inclusion provisions and contain anti-poverty elements, with child support guidelines supported by reasonable estimates on the costs of raising children can improve both the adequacy and equity of the private child support system.(71)

A study of the tax treatment of periodic child support payments by the Federal/Provincial/Territorial Family Law Committee resulted in a "Working Paper on the Tax Implications of Child Support," released as an Appendix to the Committee's 1995 *Report*.(72) The Working Paper reviewed the advantages and disadvantages of the then current tax treatment of child support, and explored a number of options for reform. The Committee found a fundamental conflict between the tax treatment of child support and the family law principle that obligations should be imposed on both divorcing parents to support their children financially following family breakdown. The obligation is divided, and the non-custodial parent receives a

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(71) Zweibel and Shillington (1993), p. 50.

(72) Federal/Provincial/Territorial Family Law Committee, "Working Paper on the Tax Treatment of Child Support Payments," *Report and Recommendations on Child Support*, January 1995, Appendix E. Note that the Working Paper was prepared before the Supreme Court of Canada rendered its decision in the *Thibaudeau* case.

tax break on his (or her) share while the custodial parent does not. Family law, as the Committee notes, is a discretionary system while tax law is not, and there will always be difficulties in trying to deliver precise results in a system based on discretion.

The committee recommended the elimination of the inclusion/deduction provisions of the *Income Tax Act*, along with the maintenance of the value of the current subsidy to families who benefit from it, and passing it along to children who need it. The Committee felt it important that the value of the subsidy not be lost, and that it be directed more effectively to children. The Committee identified three possible ways to pass the subsidy on to children, including the enhancement of the basic Child Tax Benefit to all low income families, an increase in the Equivalent to Married Credit, or the creation of a new benefit for children of separated and divorced families, and recommended that they be explored further.

Citing the consultations held by the Federal/Provincial/Territorial Family Law Committee and the Task Group on the Taxation of Child Support, the federal government in the 1996 Budget documents recognizes that most Canadians no longer support the application of the inclusion/deduction mechanism with respect to child support. Child support paid pursuant to a written order or agreement made after 1 May 1997, will be neither deductible by the payor nor included in the income of the recipient. The time lag is intended to provide time for the enactment of child support guidelines and to prepare for an anticipated increase in court applications to vary existing orders and agreements.

Orders or agreements made before 1 May 1997 can be varied to take into account the tax changes after that date, or can indicate that the parties wish the new tax rules to apply as of that date. Also, the parties to a support order or agreement can sign and file a form with Revenue Canada indicating that the new tax rules will apply to their payments as of a specific date (no earlier than 30 April 1997). Parties will not be allowed to return to the old rules once this change has been effected.

The change does not apply to spousal support, and courts will be required to distinguish clearly between child and spousal support in all orders made after 1 May 1997. At present, in some jurisdictions, support orders are sometimes made for the support of both spouse and children in one global sum. After 1 May 1997, any support payment that does not indicate that it is solely for the support of a spouse will be treated as child support for income tax purposes. Third party support payments will be treated as child support as well, unless they are

clearly identified as being solely for the benefit of the spouse. Wherever an agreement or order provides for the payment of both child and spousal support, and there is any default in a tax year, the payments made will first be considered child support for income tax purposes.

"Budget 1996: The New Child Support Package" indicates that the inclusion/ deduction mechanism for the tax treatment of child support costs the federal and provincial governments about $410 million per year in lost tax revenues, of which the federal component is $240 million.(73) These costs are expected to decrease gradually, as the new tax treatment of child support becomes effective. The government indicates that the funds will be used to implement the guidelines and the new enforcement measures, as well as to double the Working Income Supplement (WIS) of the Federal Child Tax Benefit.

The Federal Child Tax Benefit was established pursuant to the 1992 Budget, and has been delivered monthly since January 1993. Maximum payments go to families with net incomes under $25,921; the WIS is an additional payment available to low-income working families. The WIS represents a payment of up to $500, tax-free, per month, subject to a reduction formula based on household income. Under the changes announced in March 1996, the maximum WIS will be doubled. The Budget documents indicate that this change recognizes the difficulties faced by low-income working parents, and reflects the importance of living standards in low-income homes. It is intended to help low-income parents off-set the higher costs of working outside the home. The government anticipates that over 700,000 families will benefit from the increased WIS, which will cost the government $250 million a year once it is fully implemented in July 1998.

The doubling of the WIS was welcomed by the Canadian Council on Social Development in its report called "Child Poverty: What Are the Consequences?", released 12 March 1996; however, the fact that the additional funds were made available only to children whose parents worked was seen as an unfair reward to working parents, at the expense of poor children whose parents do not work.(74) The new measure would provide no assistance to children whose parents depend on social assistance. Certainly, this mechanism falls short of what was recommended by the Federal/Provincial/Territorial Family Law Committee as an appropriate way to pass on to children the subsidy lost when the tax treatment of child support

(73) Estimated, 1996-97, "Budget 1996: The New Child Support Package," p. 9.

(74) Derek Ferguson, "Budget No Help to Many Kids, Report Says," *Toronto Star*, 12 March 1996.

was changed. The Committee had proposed that the Child Tax Benefit be enhanced for all low income families, or that there be an increase in the Equivalent to Married Credit, or that a new benefit be created specifically for the children of divorced or separated families.

## CONCLUSION

Of the three areas of child support policy discussed in this paper, only quantum and taxation are areas where federal legislative change may have a significant impact. The writers referred to throughout this paper consistently pointed out that changes to child support legislation, however appropriate and well-intentioned, will have limited success in improving the economic well-being of children because so many causes of child poverty lie outside the family law system. Family law is important to many Canadians, however, and equally undeniable is the proposition that the equal distribution of the financial hardship resulting from family breakdown is a compelling legal and policy goal.

The harmful consequences of divorce and child poverty are well documented. In the United States, exposure to a single-parent family has been correlated with poor health, childhood behaviour problems, delinquency, reduced educational attainment, lower income, and higher rates of poverty, early childbearing, and divorce.(75) Similar patterns are observable in Canada. The economic difficulties facing even intact young families have been particularly pronounced in the 1990s.(76) There is a clear onus on legislators and policy-makers to improve the family law system's capacity to fairly distribute the consequences of marital breakdown.

Several commentators cautioned against simultaneous reforms of the various areas of child support law. Based on the American research that indicated the differential impact of different reform measures, where the beneficial effects of one sometimes were negated by the impact of another, Professor Garrison suggested the need for caution in adopting many reforms at once, without careful monitoring of the impacts of each measure.(77) Professor Zweibel pointed out that some reforms may benefit particular subgroups of custodial mothers without affecting others, or even leaving them worse off.(78) She gave the example of Ontario women

(75) Garrison (1994), p. 503.

(76) Susan McGrath *et al.*, "The Prospects of Young Families," *Transition*, Vol. 25, December 1995, p. 12

(77) Garrison (1994), p. 487.

(78) Zweibel, "Child Support Policy..." (1993), p. 374.

receiving full or partial social assistance, who would not benefit from higher support awards because their assistance payments are reduced dollar for dollar by any child support they receive.(79) Ottawa family lawyer Catherine Aitken has predicted that if the government chooses to change the tax treatment of child support payments at the same time as it introduces child support guidelines, as it indeed has done, and to allow variation applications for existing support agreements and orders, "lawyers will have no shortage of work and there will be pandemonium in the courts."(80)

At least one Canadian academic has questioned the appropriateness of looking to the family law system to improve the economic situation of single mothers and their children. Professor Jane Pulkingham points out that, while the number of women who are poor has increased, women have always been poorer than men, and in fact the proportion of women who are poor has decreased.(81) She suggests that treating the problem that causes female and child poverty as a failure of the family law system, reflects the mistaken assumption that it is the individual male breadwinner's job to provide for women and children, and not society's. Professor Pulkingham asserts that there needs to be a recognition of collective responsibility and a broader program of social and economic change. Her 1994 paper also points out that the inclusion/deduction treatment of child support costs the federal government approximately $250 million per year, which is almost as much as it spent in 1992-93 on transfers to the provinces through the Canada Assistance Plan for child care. In addition, governments are paying significant amounts of money for the enforcement of child support obligations, money that might be more appropriately spent, in her view, on measures more likely to alleviate child poverty.

If the goal of reform in this area of law is to improve the financial situation of children whose parents have separated or divorced, there is clear recognition that family law and tax law amendments will not be sufficient. As Professor Zweibel has emphasized, "in the majority of cases, children's 'need for systematic and stable family income' cannot be met through the combined financial resources of their custodial and non-custodial parent."(82) Some have suggested that a system of advanced payment, like that in place in Sweden, would be more

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(79) Of course, these women would benefit if higher awards exceeded the total amounts of their assistance payments.

(80) Aitken (1996), p. 21.

(81) Jane Pulkingham, "Private Troubles, Private Solutions: Poverty Among Divorced Women and the Politics of Support Enforcement and Child Custody Determination," *Canadian Journal of Law and Society*, Vol. 9, No. 2, Fall 1994, 73, at p. 80.

(82) Zweibel, "Child Support Policy..." (1993), p. 401.

helpful to low income recipients because it would protect them from the insecurities of payment and enforcement that have not been entirely removed.(83)

The Federal/Provincial/Territorial Family Law Committee's original mandate included the requirement that child support be considered within a broader context of family breakdown, because of a recognition that child support alone cannot resolve the problem of inadequate private resources.(84) These issues were not covered in the Committee's study, but were directed to the federal government's Social Security Review. There continues, however, to be overlap between these policy areas. If the goal of child support reform is to better distribute the financial consequences of marital breakdown among the family, rather than the alleviation of child poverty, as must be the case, understanding this should better inform the work of those developing reform alternatives.

There may be risks involved in the adoption of any particular law reform alternative for correcting the continuing problems that have been identified in the area of child support law. In some cases, new measures may produce results that are no better, or indeed even worse, than what the current law would produce. However, with care to avoid such negative outcomes, a major improvement can be selected from the schemes that have been developed in recent years, building on the changes to be made as a result of the 1996 Budget. Any measure leading to greater consistency and predictability of outcomes will reduce the costs, emotional and financial, that parties to litigation must bear. In order to avoid litigation, however, it is essential that the impact on existing as well as future arrangements be considered and provided for. Whatever new measures are adopted, their effectiveness will be enhanced as a result of ongoing consultation between the federal and provincial governments, parents, lawyers, judges and children, which will allow for monitoring their impact, as well as any fine-tuning that may become necessary in the future.

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(83) Pask (1994), p. 118.

(84) Canadian Advisory Council on the Status of Women (1995), p. 13.